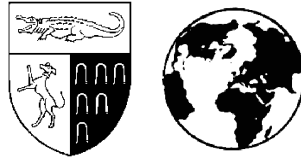


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A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations

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I. RIGHT VERSUS MIGHT IN INTERNATIONAL TRADE DISPUTE SETTLEMENT

The relation of international law and legal institutions to power is asymmetrical. Power can create law and legal institutions to legitimate, stabilize, and institutionalize policy. Over time, legal institutions can develop a trajectory of their own and, in the process, constrain power. Yet, power eventually can respond and curb international legal institutions' independence and authority. In return, these institutions hold few tools to counter it. The crisis besetting the dispute settlement system of the World Trade Organization (WTO) illustrates this fundamental asymmetry of international law and power. The United States created the WTO and its dispute settlement system. Now the United States is undoing it. The result could be a long-term decline of multilateralism, coupled with a new—potentially more devastating—form of cold war conflict. This will undermine cooperation to address urgent transnational problems. But it is not determined. Some reform of the WTO that accommodates U.S. demands may still be possible. Thus, countries scramble to reexamine the role and institutionalization of WTO dispute settlement in the current political context.

The eminent trade law scholar John Jackson described the creation of the WTO's dispute settlement system in 1995 as a move from a "power-oriented technique" to a "rule-oriented" one, which, in the words of other commentators, could lead to the triumph of "right over might."¹ The year 1995 marked the 50th

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1. JOHN JACKSON, *THE WORLD TRADING SYSTEM* 111 (2d ed. 1997) ("One way to explore the questions raised above is to compare two techniques of modern diplomacy: a 'rule-oriented' technique and a 'power-oriented technique.'"); see also James Bacchus, *Might Unmakes Right: The American Assault on the Role of Law in World Trade*, CIGI Papers No. 173 (May 2018); J. Lacarte-Muró & P. Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the*

anniversary of the United Nations Charter and the 200th anniversary of the publication of Immanuel Kant's *Toward Perpetual Peace*, where Kant advocated the creation of a league of nations grounded in law.² For the first time in 1995, trade law panels formed automatically following the filing of a WTO complaint.³ For the first time, these panels' decisions were binding, although subject to appeal before a new Appellate Body (AB), whose decisions, in turn, were binding.⁴ The AB, touted as the WTO's "crown jewel," established a coherent and sophisticated jurisprudence.⁵ New casebooks and journals specialized in WTO law. A plethora of articles and books circulated. WTO moot court competitions emerged. Countries hired and worked with law firms, which were often paid by businesses and trade associations. The press reported AB decisions on their front pages. Politicians referenced them in their campaigns. In short, the trading system became judicialized under the rule of lawyers.⁶ At the multilateral level, the AB became the world's most authoritative court.⁷

In response to Jackson, many trade scholars argued that law is always mixed with politics, so power would simply manifest itself in new ways. Realists, for example, stressed that the United States should have little to fear. Politics would constrain WTO judicial interpretation so that it would heed the interests

Bench, 3 J. INT'L ECON. L. 395, 401 (2000) (arguing that "right perseveres over might").

2. See James Bohman and Matthias Lutz-Bachmann, *Introduction*, in *PERPETUAL PEACE: ESSAYS ON KANT'S COSMOPOLITAN IDEAL* (James Bohman and Matthias Lutz-Bachmann eds., 1997), at 2. According to Kant, "[t]he spirit of commerce, which is incompatible with war, sooner or later gains the upper hand in every state." IMMANUEL KANT, *PERPETUAL PEACE* 32 (Lewis White Beck ed., 1957).

3. Formally, the panel is formed upon a party's second request, which can be a month after the first request. At that time, its formation is automatic. See Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 6, 16, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

4. In each case, they could be blocked by consensus of the entire membership, but that would never occur in practice since there would always be a winning party. See DSU, *supra* note 3, art. 14.

5. Commentators critique particular decisions and argue that there are inconsistencies among them. Yet, because the AB is a single body acting collegially, there is much greater coherence and consistency across decisions than if there were ad hoc decision-making by individual panels. The jurisprudence of international investment arbitration panels illustrates this point. See Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018). Similarly, the inconsistencies in WTO panel reports regarding the interpretation of the Agreement on Technical Barriers to Trade from 2011-2013 show the risks of ad hoc decision-making for coherence and consistency. See Gabrielle Marceau, *The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US - Cool*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 40 (2013).

6. See, e.g., J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 201 ("[T]he Appellate Body is a court in all but name.").

7. Some commentators may argue that the AB became "too" judicialized and thus "too" authoritative, but that is a normative evaluation that makes the same analytic point. See Gregory Shaffer et al., *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237 (2016) [hereinafter Shaffer et al., *The Extensive (but Fragile)*] (documenting these developments); see also Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9 (2016); H el ene Ruiz Fabri, *The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story*, 27 EUR. J. INT'L L. 1075, 1080 (2017) (celebrating the "rise of a fully-fledged judicial power"); Andrew L. Stoler, *The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?*, 3 WORLD TRADE REV. 99, 114 (2004) [hereinafter Stoler, *The WTO Dispute Settlement Process*] ("In terms of dealing effectively with important state-to-state disputes, it has no equal in the modern world."). By international courts at the multilateral level, I distinguish courts such as the International Court of Justice, International Criminal Court, and the AB from regional courts such as the European Court of Human Rights and the Court of Justice of the European Union.

of powerful states.⁸ In any case, the United States had dominated the negotiations leading to the WTO's establishment and thus determined the substance of WTO rules.⁹ Institutionalist-oriented scholars further emphasized that the United States and European Union wielded vast legal resources, combining experienced government attorneys with private lawyers hired by U.S. and European companies for WTO dispute settlement. As a result, the United States and E.U. were in the best position to shape WTO jurisprudence.¹⁰ In addition, the enforcement of AB decisions depended on WTO-authorized retaliation of an equivalent amount of trade concessions, pursuant to the WTO dispute settlement understanding (the DSU). This favored members with large markets.¹¹ For developing countries and development activists, not only were the substantive rules rigged;¹² they feared that the costly dispute settlement system's procedures and remedies were structurally biased against them.¹³

Over time, however, emerging economies invested in building legal capacity and learned how to work the WTO system, including against the United States. China, in particular, became a major player in the trading system, surpassing the United States as the world's largest trading nation. Although the United States has the highest win rate among major users of the WTO dispute settlement system, and China the lowest,¹⁴ China won important cases against

8. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT'L L. 247 (2004) ("Politics, however, constrains both discursive and constitutional latitude, which should alleviate concerns that WTO judicial lawmaking is so expansive as to undermine the sovereignty of powerful states, create a serious democratic deficit for their citizens, or catalyze withdrawal of their support for the organization.").

9. See, e.g., HUGO PAEMAN & ALEXANDRA BENSCH, FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND (1995). In particular, the United States successfully introduced strong intellectual property protection rights, backed by binding dispute settlement. In addition, it advanced the liberalization of trade in services, where the United States held a comparative advantage, particularly regarding the right to establish services industries abroad, receive visas to provide services, and to provide services online. It also successfully pressed for limitations on countries' ability to use industrial policy, including through investment approval measures to favor domestic industry. Some critics argued that, through the WTO, developed countries had kicked away the ladder for developing countries after having used it to become industrial powers. See HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT POLICY IN HISTORICAL PERSPECTIVE (2002).

10. See GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003); see also Marc L. Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559 (2009).

11. As Robert Hudec wrote, "Larger and more powerful countries—those accustomed to living by rules slanted in their favor—are likely to aim for a somewhat less balanced result. For them, the optimal remedy package will be one that works well against others but not so well against themselves. This tendency also has to be considered in explaining why WTO remedies are as they are." Robert Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS (Friedl Weiss ed., 2000).

12. See, e.g., KEVIN WATKINS & PENNY FOWLER, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALIZATION AND THE FIGHT AGAINST POVERTY (2002).

13. See, e.g., Hakan Nordstrom & Gregory Shaffer, *Access to Justice in the World Trade Organization: The Case for a Small Claims Tribunal?*, 7 WORLD TRADE REV. 587 (2008).

14. Louise Johannesson & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995-2016: A Data Set and Its Descriptive Statistics* (Eur. Univ. Inst., RSCAS Working Paper No. 2016/72, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888358. This point was confirmed by email from Louise Johannesson to the author on November 5, 2018.

the United States that could constrain U.S. policy toward China.¹⁵ In parallel, a number of countries subsidized a new organization, the Advisory Centre on WTO Law (ACWL), to provide low-cost legal assistance for developing countries. The ACWL became a repeat player in WTO litigation, and the third most active litigant after the United States and the European Union.¹⁶ Its success helped to legitimize the system for a greater number of developing countries.

Already under the Bush and Obama administrations, the United States became circumspect as it lost cases at the WTO regarding antidumping, countervailing duty, and safeguard measures.¹⁷ With China's rise, especially following the 2008 financial crisis, the United States felt that WTO rules, as interpreted and enforced by the AB, constrained its ability to protect U.S. industries from "unfair competition" from Chinese imports.¹⁸ The Office of the United States Trade Representative (USTR) increasingly challenged AB decisions against it and expressed its discontent by taking more aggressive positions in the AB selection process.¹⁹

The AB consists of seven members who decide cases in panels of three.²⁰ These AB members hold four-year terms, which are renewable once. Appointing them requires consensus of all WTO members so that any member can veto a candidate's selection.²¹ Under the Bush and Obama administrations, the USTR twice refused to renominate the current U.S. member to the AB for a second term as a signal of U.S. dissatisfaction (replacing each with a new U.S. member). The Obama administration then blocked consensus over the appointment of a Kenyan law professor based in the United States for an African regional slot, as well as the reappointment for a second term of a South Korean law professor.²² The Obama administration, nonetheless, eventually agreed to the filling of AB vacancies with individuals who had less of an academic and more of a diplomatic background. The administration appeared to believe that an appointee with a diplomatic background would be more politically astute, more deferential to state import relief law, and less likely to take an expansive view of the AB as an independent, quasi-constitutional judicial body.

In contrast, the Trump administration strategically blocked the launching

15. Gregory Shaffer & Henry S. Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115 (2018). The AB decided cases against the United States that were politically sensitive. This situation differs from investment law where ad hoc arbitral tribunals have yet to award damages against the United States.

16. Gregory Shaffer, *Assessing the Advisory Centre on WTO Law from a Broader Governance Perspective*, (Univ. Minn. L. Sch., Legal Studies Research Paper No.11-46, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966251.

17. See, e.g., Stoler, *The WTO Dispute Settlement Process*, *supra* note 7.

18. Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261 (2016) [hereinafter Wu, *China Inc.*]; Paul Blustein, *China Inc. in the WTO Dock: Tales from a System Under Fire*, CIGI Papers No. 157 (Dec. 2017).

19. See Gregory Shaffer, Manfred Elsig, & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, in *THE POLITICS OF INTERNATIONAL LAW* (Wayne Sandholtz & Christopher Whytock eds., 2016).

20. See DSU, *supra* note 3, art. 17.1.

21. See DSU, *supra* note 3, art. 2.4 (decisions "by consensus").

22. Formally there are no regional slots, but they have existed in practice to ensure representativeness of the WTO membership.

of the formal process for selecting any new AB members; it thus appears determined to let the AB and its authority wither away.²³ Stated simply, if no one is selected to replace departing AB members whose terms expire, then there will be no one on the AB to hear an appeal. If the AB has no members and the losing party exercises its right to appeal an adverse panel decision, then the panel decision cannot be adopted either.²⁴ In effect, any party to a case can then effectively block the adoption of a panel report by appealing it to an AB without members.

As of October 1, 2018, only three AB members remained, respectively from China, India, and the United States. With only three members, the AB is no longer representative of the WTO membership, as required under Article 17 of the DSU.²⁵ Moreover, there can be no “exchange of views” among seven members, as required under the AB’s Working Procedures.²⁶ Unless the United States stops blocking the launching of the AB selection process, only one AB member will remain as of December 11, 2019. Thus, the AB’s end effectively approaches.²⁷

With law’s decline, “power-oriented techniques” reappear with a vengeance. The United States has blatantly ignored WTO law by raising tariffs to pressure other countries to negotiate new rules.²⁸ When the United States raised tariffs on steel and aluminum products by 25% and 10%, respectively, in March 2018,²⁹ it at least defended the measures under the WTO’s national security exception,³⁰ even though its NATO allies naturally protested a lack of good faith. Then, piqued by Turkey’s failure to release an American evangelical preacher under house arrest, the Trump administration doubled steel and aluminum tariffs against Turkey. The Trump administration next threatened to

23. Manfred Elsig, Mark Pollack, and Gregory Shaffer, *Trump Is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important*, WASH. POST. (Sept. 27, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?utm_term=.6b40a7038536. Tactically, the European Union temporarily blocked the appointment process for a successor for Ricardo Ramirez (the AB member from Mexico) so that the selection processes for the Latin American slot and the European slot would be launched together. The European Union’s move appears to have been a serious miscalculation in hindsight, because if the European Union had not acted the way it did, there might be a Latin American AB member now. I thank Nicolas Lamp for this point.

24. A party has the right to appeal a panel decision under Article 16 of the DSU. DSU, *supra* note 3.

25. DSU, *supra* note 3, art. 17.

26. The Working Procedures provide for an exchange of views to provide greater coherence and consistency in AB decision-making and greater collegiality in the AB as a body. *See* Dispute Settlement: Appeals Procedures, *Working Procedures for Appellate Review*, art. 4, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010); *see also* Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT’L L. J. 469, 470 (2003).

27. Optically, an AB of three members has already lost its legitimacy. Practically, its workload is overburdening it. Formally, AB panels can no longer be formed when less than three members remain.

28. *See* Chad P. Bown & Melina Kolb, *Trump’s Trade War Timeline: An Up-to-Date Guide* (Sept. 24, 2018), <https://piiie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide> (regarding the actions described in this paragraph).

29. *Id.*

30. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XXI (Security Exceptions) [hereinafter GATT].

use the same national security exception to justify tariffs on automobiles and other products. Going further, the United States raised tariffs on \$50 billion of Chinese imports in two tranches in July and August 2018, then another \$200 billion in September, and threatened to cover all Chinese imports. By acting unilaterally against China outside of WTO procedures, the United States ignored WTO law.³¹ In response, WTO members retaliated by raising tariffs on U.S. products, again flouting WTO constraints. The rule-based system of the WTO still exists in name, but, for relations with the United States, it is largely irrelevant in practice.

II. EXPLANATIONS FOR THE U.S. CHALLENGE TO THE WTO'S JUDICIARY

The U.S. attack on the AB can be viewed historically as symptomatic of the traditional swings in U.S. politics between international engagement and disengagement. It is not the first time that the United States has abandoned a multilateral dispute settlement process. The Reagan administration withdrew the United States from the Optional Protocol to the International Court of Justice (ICJ) in 1985 because of the ICJ's decision against the U.S. arming of Contra guerillas and mining of Nicaragua's harbor to overthrow Nicaragua's government. The Bush administration did the same under the Optional Protocol to the Vienna Convention on Consular Relations (VCCR) in 2005 following another ICJ decision against the United States, this time concerning its violation of the VCCR in relation to U.S. federal and state policies on the death penalty.³² The Trump administration, in turn, withdrew in 2018 from the Optional Protocol to the Vienna Convention on Diplomatic Relations to deny ICJ jurisdiction.³³ Indeed, the Trump administration's attack on the AB, combined with U.S. withdrawal from other treaties, suggests a larger U.S. challenge to multilateralism and the liberal world order that the United States created.³⁴ For better or worse, it reflects a longstanding strand in U.S. politics.

The greatest challenge for the maintenance of the WTO dispute settlement system is the growing political and economic competition between the United States and China.³⁵ This competition takes place in the context of rising

31. Article 23.2 of the DSU provides, "Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding."

32. U.S. states prosecuted, convicted, and, in a number of cases, executed foreigners who were never advised of the consular rights, and whose consuls were never notified of their arrest, in violation of the convention. *See Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. 12 (Mar. 31).

33. It also withdrew from the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran for this same reason. *See Carol Morello, U.S. Terminates 1955 Treaty with Iran*, WASH. POST (Oct. 3, 2018), https://www.washingtonpost.com/world/national-security/us-terminates-1955-treaty-with-iran-calling-it-an-absolute-absurdity/2018/10/03/839b39a6-3bcf-42b1-a2d5-04bfe1c5f660_story.html?utm_term=.d5ee9be4a268.

34. *See, e.g., John Bolton, Trump, Trade and American Sovereignty*, WALL ST. J., Mar. 8, 2017, at A21.

35. *See, e.g., Ambassador Dennis Shea, The WTO: Looking Forward*, CTR. FOR STRATEGIC &

nationalism and inequality in the United States that sharpened after the global financial crisis of 2008.³⁶ There is a new narrative in U.S. politics that depicts China as a predator to be countered.³⁷ Commentators mocked U.S. trade czar Peter Navarro's *Death by China*,³⁸ but the narrative has been successful politically. A new geo-economic cold war could be forming, in part through the reality of China's rise and the relative decline in U.S. power, and in part because of the Trump administration's rhetoric. But whether the rhetoric is following reality, or reality following the rhetoric, the new narrative is becoming dominant in the United States. Eyeing China, the Trump administration attacks its economic model of state capitalism and the lack of reciprocity of tariffs among WTO members. The administration trumpets economic security as part of national security.³⁹ It aims to halt China's rise.⁴⁰ And it appears to find the AB's independence too costly. The United States will only compromise if it is convinced that it will be worse off without the AB, and so far, the United States does not appear convinced.

The core U.S. complaint is the *judicialization* of WTO dispute settlement, where the AB has been operating as if it is an international court building a jurisprudence, rather than a modest body that issues ad hoc decisions to help WTO members resolve discrete disputes.⁴¹ In the U.S. view, the AB has either

INT'L STUD. (Oct. 12, 2018), <https://www.csis.org/events/wto-looking-forward> [hereinafter Shea, *Looking Forward*] ("We need to recognize that the economic system of China is not compatible with the WTO norms;" and "the WTO as currently constituted is not equipped to deal with China."); Wu, *China, Inc.*, *supra* note 18.

36. As I have written elsewhere, an alternative way to sustain the WTO with its multilateral dispute settlement system is to redo the rules in ways that support greater social inclusion. See Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 ILL. LAW REV. 1 (forthcoming 2019) [hereinafter Shaffer, *Retooling*]. Economic globalization has benefitted capital in relation to workers and States, and this imbalance needs to be addressed in WTO law. Until members do so, there will be social disintegration within states that will contribute to the disintegration of law in international economic relations. Given the U.S. political context, the prospect for such change also seems unlikely. See also Gregory Shaffer, *How Do We Get Along: International Economic Law and the Nation-State*, MICH. LAW REV. (forthcoming 2019).

37. Vice President Michael Pence, Remarks by Vice President Pence on the Administration's Policy Toward China, HUDSON INST. (Oct. 4, 2018), <https://www.hudson.org/events/1610-vice-president-mike-pence-s-remarks-on-the-administration-s-policy-towards-china102018>; Adam Beshudi, *Lighthizer: 'Made in China 2025' a Threat to Global System*, POLITICO (Nov. 6, 2017), <https://www.politico.com/tipsheets/morning-trade/2017/11/06/lighthizer-made-in-china-2025-a-threat-to-global-system-223188>; Hal Brand, Opinion, *How China Went From a Business Opportunity to Enemy No. 1*, BLOOMBERG (Sep. 6, 2018), <https://www.bloomberg.com/opinion/articles/2018-09-06/how-china-went-from-a-business-opportunity-to-enemy-no-1>.

38. Cf. *Trade: Last Week Tonight with John Oliver* (HBO television broadcast Aug. 19, 2018), available at <https://www.youtube.com/watch?v=etkd57IPfPU>; *Death by China: How America Lost its Manufacturing Base* (Apr. 10, 2016), available at <https://www.youtube.com/watch?v=mMlmjXtnLXI>. Navarro is Director of the White House National Trade Council.

39. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 19 (Dec. 2017), available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>. China's average tariff bindings are 9.1 percent compared to U.S. average tariff bindings of 3.9 percent.

40. Erica Berenstein, *Why is the US Afraid of China's Rise?*, N.Y. TIMES, (May 15, 2018), <https://www.nytimes.com/2018/05/15/business/china-growth-fears.html>.

41. The United States would like to see the AB operate not as a court that develops a body of jurisprudence but as a facilitator for states to resolve disputes. The European Union, in contrast, supports the AB's operation as an autonomous court. See Shea, *Looking Forward*, *supra* note 35.

decided cases in ways contrary to what the United States negotiated or has been activist in filling gaps in WTO rules where there were ambiguities, many of which were intentional.⁴² Specifically, the United States is concerned with how this judicialized process has been used against U.S. import relief laws.⁴³ The AB has overruled panel decisions in favor of the United States regarding Chinese and other countries' challenges to U.S. measures under antidumping and countervailing duty laws, and thus constrained the United States' ability to raise tariffs against their imports.⁴⁴

Although mainstream economists have long criticized U.S. import relief rules for being protectionist, these rules provide a political safeguard for the government to respond to protectionist industries.⁴⁵ In the context of a relatively weak U.S. social safety net, import relief laws also provide a means to protect U.S. workers from competition from foreign low-wage producers.⁴⁶ The 2007-08 financial crisis and the surge of imports from China raised these issues' saliency.⁴⁷ Because AB interpretations of WTO law constrained U.S. policy, and

42. *Id.* For example, the United States negotiated what it thought was a more deferential standard of review for antidumping matters in Article 17.6 of the Anti-Dumping Agreement, which reads in part: "Where the panel finds that a relevant provision of the [Anti-Dumping] Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." *Anti-Dumping Agreement*, WTO ANALYTICAL INDEX, art. 17 (Feb. 2018), https://www.wto.org/english/res_e/publications_e/ai17_e/anti_dumping_art17_oth.pdf. The AB in practice has applied a less deferential standard of review for import relief matters than for health-related regulations. See Petros C. Mavroidis, *The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body*, 27 EUR. J. INT'L L. 1107 (2016). USTR Lighthizer repeatedly has stressed that "a lot" of AB decisions coming out of trade remedies cases are "indefensible." See *U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative*, CTR. STRATEGIC & INT'L STUD. (Sept. 18, 2017), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170918_U.S._Trade_Policy_Priorities_Robert_Lighthizer_transcript.pdf?kYkVT9pyKE.PK.utw_u0QVoewnVi2j5L.

43. Richard Steinberg, *The Impending Crisis of the WTO Dispute Settlement System*, 112 AM. SOC'Y INT'L L. PROC. (forthcoming 2018) [hereinafter, Steinberg, *The Impending Crisis*].

44. Two sets of AB decisions stand out—those finding against the U.S. practice of "zeroing" in calculating antidumping duties, and those finding that Chinese state-owned enterprises are not "public bodies" unless they exercise "government functions" and thus may not be subject to the WTO Agreement on Subsidies and Countervailing Measures. "Zeroing" refers to the U.S. practice of setting at zero the negative differences between the foreign domestic prices of a product when compared to its U.S. import prices. Because negative amounts are excluded, this practice often results in the finding of dumping when otherwise there would be none, as well as the calculation of a higher dumping margin and thus the imposition of a higher antidumping duty. See Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391 (2014). On the issue of "public body," see Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (Mar. 11, 2011); and *USTR Statement Regarding WTO Appellate Body Report in Countervailing Duty Dispute with China*, OFF. U.S. TRADE REPRESENTATIVE (Mar. 17, 2011) ("I am deeply troubled by this report," said United States Trade Representative Ron Kirk. "It appears to be a clear case of overreaching by the Appellate Body. We are reviewing the findings closely in order to understand fully their implications."), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/march/ustr-statement-regarding-wto-appellate-body-report-c>.

45. See DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 162 (3d ed. 2009); John J. Barceló III, *Antidumping Laws As Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 502-13 (1972); see also J. Michael Finger, *Dumping and Antidumping: The Rhetoric and the Reality of Protection in Industrial Countries*, 7 WORLD BANK RES. OBSERVER 121-44 (1992); Wentong Zheng, *Reforming Trade Remedies*, 34 MICH. J. INT'L L. 151, 155-56 (2012).

46. Cf. Shaffer, *Retooling*, *supra* note 36.

47. See David Autor, David Dorn & Gordon Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121 (2013).

because the United States was unable to check the AB politically given the positive consensus requirement to block adoption of an AB decision, the Trump administration felt that its only option was to neuter the AB by preventing its vacancies from being filled.⁴⁸

A principled, or at least pragmatic, argument is that judicial processes need to be balanced by political ones, just as domestic courts by legislatures. Insiders have long recognized the imbalance between judicial and political processes at the WTO.⁴⁹ Given the stalemate of WTO negotiating processes,⁵⁰ the AB became more authoritative than WTO members in determining the meaning of global trade rules, because its decisions are automatically adopted (unlike political decisions that require consensus).⁵¹ This imbalance has raised legitimacy concerns.⁵² Given the unlikelihood that countries will agree to be bound by more robust political processes involving voting, a call for strengthening WTO political processes will fail. The only alternative for rebalancing is thus some retrenchment of judicial authority.

In addition, WTO rules arguably do not cover many Chinese practices that were not contemplated at the time the WTO was created in 1995. In March 2018, the USTR issued a 182-page Section 301 report that raised pointed accusations against Chinese practices appropriating U.S. technology and intellectual property.⁵³ They include Chinese cyber theft and Chinese use of administrative and joint venture approvals to pressure U.S. companies to transfer intellectual

48. Article 17 of the DSU provides, “Vacancies shall be filled as they arise.” Thus, the U.S. actions also violate this provision.

49. Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article XI:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT’L ECON. L. 803 (2005) [hereinafter Ehlermann & Ehring, *Authoritative Interpretation*].

50. In 2001, WTO members launched a new round of negotiations at the WTO ministerial meeting in Doha. However, those negotiations collapsed in 2008 and the United States and other members have lost faith in the ability of the WTO to serve as a meaningful negotiating forum. Some members continue to advance the option of negotiating plurilateral agreements in the WTO, but WTO rules require consensus for them to go into effect and many developing countries have stressed their opposition to plurilateral agreements. See Marrakesh Agreement Establishing the World Trade Organization art. X.9, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement]; Bernard Hoekman & Petros Mavroidis, *WTO ‘a la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements*, 26 EUR. J. INT’L L. 319 (2015) [hereinafter Hoekman & Mavroidis, *WTO ‘a la carte’*]; D. Ravi Kanth, *India Protests Move to Launch Plurilateral Negotiations at Global Trade Body*, MINT (Oct. 22, 2018), <https://www.livemint.com/Politics/idlPcz8Bw9yvhr5P4h3yGM/India-protests-move-to-launch-plurilateral-negotiations-at-g.html>.

51. That is, positive consensus is required for political decisions in practice, but negative consensus applies to the adoption of AB reports. Put otherwise, in the words of USTR Lighthizer, the WTO has become “a litigation-centered organization,” one in which the AB makes the final decision. Lighthizer, *WTO Becoming Too Focused on Litigation, Must Concentrate More on Negotiations*, WORLD TRADE ONLINE (Dec. 11, 2017), <https://insidetrade.com/daily-news/lighthizer-wto-becoming-too-focused-litigation-must-concentrate-more-negotiations>.

52. Ehlermann & Ehring, *Authoritative Interpretation*, *supra* note 49, at 813 (“[I]f the legislative response . . . is not available or not working, the independent (quasi-) judiciary becomes an uncontrolled decision-maker and is weakened in its legitimacy.”).

53. See *Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974*, OFF. U.S. TRADE REPRESENTATIVE (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

property and technology to Chinese companies. The report notes that China's ambitious "Made in China 2025" project aims to make China a global leader in strategic advanced technology industries, including robotics and artificial intelligence; information technology; clean energy vehicles; aircraft; maritime vessels; rail; advanced electrical equipment; new materials; and advanced pharmaceutical and medical devices.⁵⁴ Some of these technologies have military uses and could threaten U.S. supremacy. In its challenges to Chinese practices and ambitions, the Trump administration wants to enhance its room for maneuvering, and not submit to normative constraints set by binding WTO panel and AB judicial decisions.⁵⁵

Because the United States has declined in relative economic power, it is more difficult for the United States to dictate new WTO rules in multilateral negotiations. Collectively, the share of global GDP of China, India, and Brazil approached that of the United States in nominal terms in 2017 (the United States at 24.35% compared to theirs of 20.82%) and leapt past it in terms of purchasing power parity (the United States at 15.28% compared to theirs of 28.18%).⁵⁶ Due to the size of the U.S. market, the United States nonetheless wields considerable leverage in bilateral bargaining with most states, which allows the United States to obtain new rules and favorably settle outstanding disputes.⁵⁷ The United States thus may prefer a neutralized WTO dispute settlement system while it negotiates new rules subject to bilateral dispute settlement. The United States is already using its market clout to negotiate (or arguably extract) new concessions from countries, such as under the United States-Mexico-Canada (USMCA) trade agreement that is to replace NAFTA,⁵⁸ and the revised trade agreement with South Korea.⁵⁹ The administration's tactics recall those of the late 1980s and

54. *Id.* at 14.

55. *See, e.g.*, Interview with Ambassador Robert Lighthizer, *U.S. Trade Policy Priorities* (Sept. 18, 2017), <https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative>; *see also* Steinberg, *The Impending Crisis*, *supra* note 43.

56. The combined GDP of China, India, and Brazil in 2017 was 85.53% of U.S. GDP in nominal terms, and 184.42% of U.S. GDP measured by purchasing power parity. The author's calculations are based on IMF Data Mapper, World Economic Outlook (Oct. 2018), http://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEO_WORLD, and IMF, World Economic Outlook Database (Oct. 2018). Purchasing power parity (PPP) sets a hypothetical exchange rate based on a basket of consumables to equalize the purchasing power of different currencies, such that a person could buy the same amount of goods and services at the PPP exchange rate; it differs from the market (or nominal) exchange rate used in foreign exchange markets.

57. *See, e.g.*, Megan Cassella, 'Buy American' Makes its Way Into USMCA, *POLITICO* (Oct. 29, 2018), <https://www.politico.com/newsletters/morning-trade/2018/10/29/buy-american-makes-its-way-into-usmca-392939> ("'I'm not making you fair trade deals,' Trump said in Murphysboro, Ill. 'I'm making you unfair trade deals in our favor.'").

58. For example, Canada capitulated in separate disputes with the United States on dairy and on wine, which were settled in the new NAFTA rather than through formal dispute settlement. *See United States-Canada Side Letter on Wine*, OFF. U.S. TRADE REPRESENTATIVE (2018), <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/US%20CA%20Side%20Letter%20-BC%20Wine%20Letter%20.pdf>; *UNITED STATES-MEXICO-CANADA TRADE FACT SHEET Agriculture: Market Access and Dairy Outcomes of the USMC Agreement*, OFF. U.S. TRADE REPRESENTATIVE (Oct. 2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/october/united-states%E2%80%93mexico%E2%80%93canada-trade-fact>.

59. *See* Alexia Fernández Campbell, *Trump's New Trade Deal with South Korea, Explained*, *VOX* (Sept. 25, 2018), <https://www.vox.com/2018/9/24/17883506/trump-korea-trade-deal-korus> ("[R]emoves a few regulatory burdens for US automakers to export cars, extends a 25 percent US tariff

early 1990s, when the United States took aggressive unilateral measures to obtain substantive concessions from other countries.⁶⁰ These tactics are now on steroids.

Although there is a sound principle behind the call to rebalance WTO political and judicial processes, such rebalancing also means a greater role for power. The United States is now shaping the terms of global debates. There is a danger of appeasement, but there is also the reality of power, which constrains choices. To respond to the United States' concerns, the European Union and Canada advance options for new rules that align with U.S. demands.⁶¹ In parallel, some commentators have adopted the U.S. framing of AB "activism" and "overreach" in their attacks on the AB. Just like the USTR, they castigate the AB for judicial "lawmaking," "gap-filling," and a "lack of circumspection."⁶² On the one hand, parties often advance the charge of "activism" and "overreach" when courts render decisions against them to de-legitimize the judicial body. For some, this U.S. charge against the AB should not be given much credence, since the United States earlier backed what were arguably the AB's most activist legal interpretations,⁶³ as well as the only two AB decisions—both in the United States' favor—where the AB deployed the term "evolutionary" interpretation.⁶⁴

on imported Korean trucks, and lifts a cap on US car exports to South Korea that don't need to meet Korean safety standards.").

60. JAGDISH N. BHAGWATI, *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (1991).

61. See *infra* notes 73-78 and accompanying text.

62. See, e.g., Robert McDougall, *The Search for Solutions to Save the WTO Appellate Body*, *European Centre for International Political Economy* (Eur. Ctr. for Int'l Pol. Econ. Bull. No. 3/2017, 2017), <http://ecipe.org/app/uploads/2017/12/Bulletin-03.17.pdf> ("Freedom from the risk of collective correction and oversight has served to erode slowly the degree of circumspection the Appellate Body demonstrated in its early years and has forced the United States increasingly to take unilateral action to achieve such a rebalancing."); Steinberg, *The Impending Crisis*, *supra* note 43 (critiquing the AB for being too "legalistic" and for not paying "more attention to politics"). Steinberg also writes:

The first challenge arises from the legal culture of the AB, which seems to have viewed its role expansively, as bearing a responsibility to complete international trade law by clarifying ambiguities and filling gaps in WTO agreements. The AB views itself as having a duty to make law. This is problematic because, in doing so, the AB is substituting its judgement for rules that otherwise would be a product of sensitive political negotiations. This judicial law-making is particularly problematic in so far as the AB has systematically privileged liberalization over interpretations that accept the political and social importance of WTO exceptions and trade remedies.

Id. I agree with the commentators' analysis that the AB is a judicialized system that the United States finds too constraining, so the United States presses for the system to be reformed to better balance political processes and become less judicialized. In my view, whether the AB is "activist" and "overreaches" depends on the beholder, and these terms are not necessary for objectively analyzing the situation regarding the relation of international trade law, power, and politics.

63. The United States supported what are arguably the most activist AB decisions regarding the acceptance of amicus briefs and the opening of AB proceedings to the public. See ANDREW GUZMAN & JOOST PAUWELYN, *INTERNATIONAL TRADE LAW* 168-77 (2d ed. 2012) (noting only the United States supported the AB ruling on amicus briefs); Communications from the United States, *Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency*, TN/DS/W/13 (Aug. 22, 2002), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=97540,47468,10776,101447&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

64. See Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 47, WTO Doc.

On the other hand, the core U.S. complaint is the *judicialization* of WTO dispute settlement itself. What might be done?

III. ALTERNATIVE FUTURES FOR WTO DISPUTE SETTLEMENT

A. *Alternative Proposals*

Soon, the WTO's dispute settlement system could effectively revert to the pre-1995 regime of the General Agreement on Tariffs and Trade (GATT). Under the GATT, parties could bring claims before ad hoc panels of three persons, who were usually diplomats.⁶⁵ Since GATT practice required positive consensus for a panel's formation, the respondent could thwart it. Even if the panel was formed, the GATT required consensus for adoption of the panel's report, so that the losing party could veto the report's adoption. Parties often did not exercise this right because of their concern that others might abuse it, but they did so in politically sensitive cases.⁶⁶ If the United States continues to block the AB selection process, the situation will be slightly different since parties would still be able to bring cases automatically under WTO rules. However, the resulting panel decisions would not be binding if the losing party appeals to an AB that does not have at least three members. Parties thus effectively would hold a veto right over the panel report's adoption.⁶⁷

WTO members retain some options to salvage binding WTO dispute settlement, including with an appellate mechanism. Most ambitiously, WTO members could defy the United States and launch the AB selection process by voting, ending the tradition of WTO political decision-making by consensus.⁶⁸ Formally, the DSU requires consensus in the AB selection process,⁶⁹ but some contend that in an emergency situation implicating the very existence of the dispute settlement system, voting could be used.⁷⁰ Alternatively, WTO members could sign a side agreement to maintain the AB without U.S. participation.⁷¹ In

WT/DS/363/AB/R (Dec. 21, 2009) ("The Panel, however, followed an 'evolutionary' approach to treaty interpretation, insofar as it interpreted China's GATS commitments based on their contemporary meaning."); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (US – Shrimp), ¶ 130, WTO Doc. WT/DS58/AB/R (Oct. 22, 2001) ("From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary.'"). The United States might also like to be able to use ambiguous WTO rules (i.e. gaps) to address Chinese practices that do not clearly fall within them.

65. See ROBERT HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVIDENCE OF THE MODERN GATT LEGAL SYSTEM* (1993).

66. *Id.* Because there was no appeal mechanism, there also was no means to ensure consistency among panel interpretations and applications of GATT law.

67. See *supra* notes 25-28.

68. See Peter Jan Kuijper, *Guest Post from Peter Jan Kuijper on the US Attack on the Appellate Body*, INT'L ECON. L. & POL'Y BLOG (Nov. 15, 2017, 7:22 AM), <http://worldtradelaw.typepad.com/ielblog/2017/11/guest-post-from-pieter-jan-kuijper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html> [hereinafter, Kuijper, *Guest Post*].

69. Article 2.4 of the DSU provides for decision-making by consensus for all decisions made under the DSU (unless provided otherwise).

70. See Kuijper, *Guest Post*, *supra* note 68. Parties might, for example, revert to voting under Article IX of the Agreement Establishing the WTO.

71. *Id.*; see also Pascale Lamy, *Trump's Protectionism Might Just Save the WTO*, WASH. POST

that way, the United States would incapacitate the WTO and its dispute settlement system only for trade relations with the United States, but not for trade relations of other WTO members among themselves.

WTO members, however, fear that the United States, under its mercurial President, then might leave the WTO altogether. They do not welcome a situation, reminiscent of the League of Nations, in which the world's largest economic power is not a member. Moreover, the United States can threaten individual countries with tariffs and other retaliation to undermine their collective action. Some states may hope to wait out the Trump administration, after which the WTO dispute settlement system can return to normal. Or perhaps, they surmise that the Trump administration will agree to relatively modest changes, as it did under the USMCA.

To that end, some countries and commentators have advanced proposals that respond to U.S. concerns without the United States itself even making a formal proposal. For example, the European Union prepared a detailed concept paper in which it listed U.S. concerns over WTO dispute settlement and responded to them.⁷² Some of the proposals are technical—such as a requirement that the AB complete proceedings within ninety days “unless the parties agree otherwise,” combined with transitional rules for outgoing AB members.⁷³ Others are largely hortatory, such as a provision instructing the AB to address issues only “to the extent . . . necessary for the resolution of the dispute” (although it could in theory reduce the AB’s use of dicta in constructing jurisprudence).⁷⁴ One proposal provides greater deference for panel findings on domestic law, which is to be considered a factual issue outside of the AB’s competence. Another is procedural, providing for an annual exchange between WTO members and the AB. The European Union’s proposals, in turn, however, would also bolster the AB’s independence by providing that AB members hold a single, non-renewable term of six to eight years, work only for the AB, and be supported by a secretariat with more resources.⁷⁵ The United States thus quickly panned the EU proposal for supporting WTO judicialization rather than curtailing it.⁷⁶

(Nov. 12, 2018) (“[I]t would be prudent for other members to start thinking about devising a new international trade organization minus the United States in order to avoid the ‘my way or the highway’ blackmail that has become the American president’s signature negotiating style.”). To add a WTO agreement, WTO members must act “exclusively by consensus.” See Marrakesh Agreement, art. X.9, *supra* note 50. Thus, a side agreement outside of the WTO would be necessary.

72. EUROPEAN UNION, WTO MODERNIZATION: INTRODUCTION TO FUTURE EU PROPOSALS (2018) [hereinafter EU CONCEPT PAPER], available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf. This was followed by Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico to the General Council, WTO Doc. WT/GC/W/752 (Nov. 26, 2018); and Communication from the European Union, China, and India to the General Council, WTO Doc. WT/CG/W/753 (Nov. 26, 2018).

73. *Id.* at 15.

74. *Id.* at 16; cf. Henry Gao, *Dictum on Dicta: Obiter Dicta in WTO Disputes*, 17 WORLD TRADE REV. 509 (2018) [hereinafter Gao, *Dictum*].

75. EU CONCEPT PAPER, *supra* note 72, at 16-17.

76. Bryce Baschuk, *European Plan for Extending WTO Appellate Body Panned by U.S.*, BNA WTO REPORTER (Oct. 5, 2018).

Canada, in parallel, issued a discussion paper that went further in advancing options that might satisfy the United States by clipping the AB's jurisdiction and authority.⁷⁷ The paper opened the possibility of "formal exclusion of certain types of disputes or certain issues from the jurisdiction of adjudication" (possibly including those involving national security) and "alternative procedures tailored to certain kinds of disputes" such as "short-term trade-distorting measures" (possibly involving import relief measures). Canada also included means to limit AB dicta and constrain the AB through a more deferential standard of review, again potentially enhancing discretion for import relief measures. A former Canadian official, now a consultant, separately listed further options for curtailing AB authority, including partial adoption of AB reports⁷⁸ and adoption of only their result and not their reasoning.⁷⁹ The paper also noted ways that the AB could exercise greater constraint, such as declining certiorari when a panel's report adequately resolves a matter, or finding *non liquet* when an issue is not clear, thus effectively deciding in favor of the respondent.⁸⁰

Despite these efforts, it appears increasingly unlikely that the United States will agree to an enforceable WTO dispute settlement system, at least in its relations with China, unless China limits its economic model's reliance on industrial policy, state-owned enterprises, and indigenous intellectual property development.⁸¹ At a minimum, the United States will require substantive rule changes that permit it to apply import relief laws with greater discretion, especially against products from non-market and mixed economies. China, in turn, will not easily back down, and hardliners in China have gained authority. Nonetheless, China benefits from the WTO and will weigh its options. From a pragmatic perspective, it may be better for China to concede more flexibility on the use of import relief while maintaining the AB, possibly with some checks, than take the risk of foregoing WTO dispute settlement altogether. In theory, the U.S. challenge to Chinese practices could embolden and empower Chinese reformers who do not support the statist turn in Chinese policy since President

77. CANADA, STRENGTHENING AND MODERNIZING THE WTO: DISCUSSION PAPER, JOB/GC/201 (Sept. 24, 2018) [hereinafter CANADA DISCUSSION PAPER].

78. ROBERT MCDUGALL, CRISIS IN THE WTO: RESTORING THE WTO DISPUTE SETTLEMENT FUNCTION 20 (2018) [hereinafter MCDUGALL, CRISIS]; cf. *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement*, TN/DS/W/82 (Oct. 24, 2005), https://ustr.gov/sites/default/files/asset_upload_file737_10409.pdf; CLAUDE BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION (2001).

79. MCDUGALL, CRISIS, *supra* note 78, at 23 ("[A]dopt only the findings and recommendations, relegating the entirety of the reasoning to background."); see also Gao, *Dictum*, *supra* note 74, at 533.

80. MCDUGALL, CRISIS, *supra* note 78, at 21; see also Steinberg, *The Impending Crisis*, *supra* note 43 (advocating use of "*in dubio mitius*," a canon of treaty interpretation such that if a term is ambiguous, the AB would defer to sovereignty and the preferred meaning that is least onerous to the party assuming an obligation; in cases of gaps, declaring the case *non liquet* ('It is not clear'), in recognition that it is not the place of courts to fill gaps as they are not legislative organs; declaring some cases nonjusticiable, such as when GATT's Article XXI national security exception is invoked).

81. For a list of U.S. demands, see *The President's 2018 Trade Policy Agenda 22–28*, OFF. U.S. TRADE REPRESENTATIVE (2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>.

Xi assumed power,⁸² but it also could backfire and embolden authoritarian nationalists. In the meantime, the WTO dispute settlement system is held hostage.⁸³

B. *Most Likely Outcome*

Unless there is a significant shift in U.S. policy, one can envision two alternative outcomes, both of which result in less judicialization of trade relations. The first is that the United States will not completely abandon the WTO and multilateralism. Rather, it will force the trade dispute settlement system to revert to its less judicialized roots in the GATT, with members committing to the use of third-party dispute settlement while retaining a veto over the launching of cases and, if initiated, the adoption of panel reports that a party believes to be legally wrong or politically problematic. It will do so by continuing to block the replacement of AB members, which, in turn, could force the disbandment of the AB secretariat, a division that the United States finds too independent of member control.⁸⁴ There is some indication that this is what officials in the Trump administration want. U.S. Trade Representative Robert Lighthizer said in late September 2018 that the WTO is “an important body and . . . if we didn’t have it we’d have to invent it.”⁸⁵ At the same time, he also has noted the superiority of GATT dispute settlement.⁸⁶

Under this alternative, other countries could still salvage some form of binding WTO dispute settlement with appellate review, although likely with constrained normative authority. First, WTO members could commit ex ante to recognize panel reports as binding, subject to the other member’s reciprocal commitment.⁸⁷ They thereby would check unilateralism, including unilateral retaliation after a panel finds that a respondent has violated WTO rules.⁸⁸

82. See, e.g., Chris Buckley, *As China’s Woes Mount, Xi Jinping Faces Rare Rebuke at Home*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/world/asia/xi-jinping-internal-dissent.html>.

83. *America Holds the World Trade Organisation Hostage*, THE ECONOMIST (Sept. 23, 2017), <https://www.economist.com/finance-and-economics/2017/09/23/america-holds-the-world-trade-organisation-hostage>.

84. The United States views the AB secretariat, and in particular its director, as being too powerful, too judicialized, and too intrusive in its decisions against U.S. import relief laws. Some U.S. officials go so far as to call it “anti-American,” though (for this article) the real problem for the United States is the secretariat’s independence and authority as part of a judicialized, court-like dispute settlement process. Author discussion with official at the WTO, March 2018.

85. Isabelle Hoagland, *Eyeing October Summit in Ottawa, Canada Prepares WTO Reform Pitch*, INSIDE U.S. TRADE (Sept. 25, 2018), <https://insidetrade.com/daily-news/eyeing-october-summit-ottawa-canada-prepares-wto-reform-pitch>.

86. See *U.S. Trade Policy Priorities*, supra note 42 (“[T]here was a system, it was before 1995, before the WTO, under the GATT, and there was a system where you would bring panels and then you would have a negotiation. And, you know, trade grew and we resolved issues eventually. And, you know, it’s a system that, you know, was successful for a long period of time. Now, under this binding dispute-settlement process, we have to figure out a way to have – from our point of view, to have it work.”).

87. Steve Charnovitz, *How to Save WTO Dispute Settlement from the Trump Administration*, INT’L ECON. L. & POL’Y BLOG (Nov. 3, 2017, 12:01 PM), <http://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>.

88. Under the WTO system, where there is disagreement over the amount of WTO concessions

Second, members could commit to a binding ad hoc system of appeals by using arbitration under Article 25 of the DSU.⁸⁹ In that case, members could appeal panel decisions before current and former AB members for a period of time, which the AB division of the secretariat would service. Third, this mechanism could be used until a permanent AB is recreated (if ever), following negotiations over new substantive and procedural rules. Fourth, if the WTO embraces plurilateral rule-making, the dispute settlement system could enforce new plurilateral agreements as well, subject to the parties covering the costs.⁹⁰

The Trump administration will unlikely agree to binding panel or arbitral decisions in disputes that it considers sensitive, particularly disputes brought by China. Nonetheless, the United States could make reciprocal commitments to all WTO members except China, or it could refuse to bind itself until its preferred reforms are agreed upon and implemented. In either case, while China and the United States fight and bargain over the resolution of their disputes, the WTO dispute settlement system would continue to operate for everyone else. There may even be incentives for the United States to later rejoin the system. If investors invest outside the United States to obtain greater certainty and predictability (analogous to the effect of Brexit on investments in the United Kingdom), then WTO members could possibly gain greater bargaining leverage and entice the United States to rejoin a binding WTO dispute settlement system.⁹¹ The system nonetheless would be less judicialized because its use would be subject to a less predictable reciprocity requirement and it would lack a permanent AB, establishing a more coherent and consistent jurisprudence.

This outcome is not necessarily bad, at least when compared to the alternative. It would provide a different balance between law and politics. For some, it would be a better balance than the current system, where AB interpretations are automatically adopted and WTO members cannot change them because of the consensus requirement.⁹² Even though this system would be more favorable to powerful countries, it also could be more stable in the current geopolitical context.⁹³ Moreover, compared to the alternative, it could still provide a system of impartial, compulsory, and binding dispute settlement, one

that a respondent's measures have nullified, the amount of corresponding retaliation is determined by arbitration under DSU Articles 21 and 22. There is thus a greater incentive under WTO rules than under the GATT for the losing party not to veto the panel report, because in the GATT there was no defined, orderly legal process constraining the amount of retaliation. I thank Nicolas Lamp for this point.

89. Scott Andersen et al., *Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals* (Ctr. for Trade & Econ. Integration Working Papers 2017-17, 2017).

90. Hoekman & Mavroidies, *WTO 'a la carte,' supra* note 50.

91. Countries would have an incentive to sign reciprocal commitments to binding WTO dispute settlement in order to attract investment through providing greater certainty regarding the company's exports and imports. For example, were Canada to sign a commitment, but not the United States, some investors may prefer to invest in Canada. This, in turn, could create lobbying pressure in the United States to commit to binding dispute settlement.

92. See e.g., Steinberg, *The Impending Crisis*, *supra* note 43.

93. Cf. Erik Voeten, *International Judicial Independence*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 421* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012) (describing a "politically optimal level of judicial independence"). In any case, a multilateral dispute settlement system is better for smaller and poorer countries than the alternative of bilateral relations with powerful countries.

that likely would be more deferential to national sovereignty concerns.

The second alternative is more draconian, involving the de facto abandonment of multilateralism and its institutionalization in the WTO. Great power politics and geo-economic conflict would return. When the next global financial crisis strikes, it would be much more challenging to manage. The result would be potentially catastrophic, heightening geopolitical tension and the risk of war.⁹⁴

IV. CONCLUSION

It is the end of an era—potentially the close of at least the semblance of the rule of law in international trade relations.⁹⁵ Not only does the end bode ill for the ability of the United States and China to benefit mutually from their exchange relations, but it will also raise tensions that undercut countries' ability to cooperate in other important areas, most notably climate change. When the next global financial crisis strikes, there is a greater risk of tit-for-tat retaliatory sanctions spiraling out of control. That could lead to widespread economic immiseration and spur authoritarian responses, increasing the prospects of violence within and between states.

Whatever the outcome, the vision of an authoritative, quasi-constitutional, international court to resolve conflicts and develop jurisprudence is in retreat. In retrospect, the AB was a remarkable experiment in international relations. For scholars who are skeptical of the law/politics dichotomy, such as those of a realist and critical bent, there was something to Professor Jackson's claim that the WTO indeed represented a turn to a rule-oriented system. If China's rise is inexorable and the WTO legal order implodes, the United States too will regret—someday—the system's demise.

94. See GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES TRAP?* (2018).

95. From a formalist perspective, "rule of law" refers to such aspects as the law's generality, equality of application, and certainty, together with a third-party institution to enforce it in an impartial, consistent, and reasoned manner. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214–19 (1979) (listing eight principles). A socio-legal perspective defines the "rule of law" in terms of its goal (to create restraints on government to provide security and predictability) and its actual practice (constituting a culture of appropriate conduct). See Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 45, 60 (Gianluigi Palombella & Neil Walker eds., 2009). To put these conceptions together, one can conceive of the rule of law in the WTO context in terms of a rule-based system with impartial dispute settlement that gives rise to a culture of abiding by those rules.