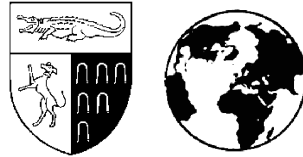


# The Yale Journal of International Law Online



## The Trump Administration and the Future of the WTO

By Rachel Brewster<sup>†</sup>

International trade law is making headlines in the United States and around the world in a manner unprecedented in the last two decades. The United States' escalating trade war with China, its combative relationship with European trading partners, its forced renegotiation of the North American Free Trade Agreement (NAFTA), and its block on the appointment and re-appointment of Appellate Body members at the World Trade Organization (WTO) have all vaulted trade politics into the spotlight from its once quiet existence.

The crisis in trade law may be thought to be yet another example of the Trump administration's iconoclastic approach to foreign relations that will fade as Trump's tenure in power ends. But the damage done by the Trump administration's actions in international trade will be long-lasting and, even if repairable, costly to unwind. Although many observers are heartened by the conclusion of a new NAFTA agreement with only minor changes—buoyed both by the idea that international economic order is resilient to the Trump administration's tactics and the possibility that the administration may settle its aggressive demands for relatively small modifications<sup>1</sup>—this essay argues that such optimism is misplaced. In all likelihood, the Trump administration's trade policies will not be a passing concern.

The Trump administration's attacks on the WTO, in particular, represent a shock to the norms and understandings essential to the agreement, not just a strike against certain trading partners or discrete policies. This shock has weakened the foundations of the multilateral trading system and will impose significant costs on the United States for decades to come. Specifically, the

---

<sup>†</sup> Jeffrey and Bettysue Hughes Professor of Law and Co-Director of the Center for International and Comparative Law at Duke University. Thanks to Sophia Durand for excellent research assistance. Please send comments to [brewster@law.duke.edu](mailto:brewster@law.duke.edu).

1. See, e.g., Greg Ip, *New NAFTA Shows Limits of 'America First'*, WALL ST. J. (Oct. 3, 2018), <http://www.wsj.com/articles/new-nafta-shows-limits-of-america-first-1538568001> (describing the changes to NAFTA as minor and noting that “[t]he new deal shows . . . an underlying resilience to the existing order”).

Trump administration's trade policies give China a path to rewrite global trade rules. China is and will be increasingly important to the future of global trade because of its expanding market size, but the Trump administration's actions have weakened international institutions that would have provided a globally-supported set of constraints to channel this increased power.

This essay considers whether we may be entering a post-WTO era for international trade law. The WTO may continue to exist, but it will cease to provide a meaningful check on State action. Over the last two decades, WTO law and dispute settlement have been powerful forces in international economic relations. This may no longer be the case. Such a transformation will be costly to the United States in both the short and long-term if WTO rules, which generally benefit the American economic model, are no longer dominant and enforceable.

An alternative outcome is possible. If countries respond to the present moment by returning to and reinforcing multilateral norms and negotiations, then the present shock could be a spur to reignite commitments to a rule-based multilateral system. This would require a turn away from bilateral negotiations and the present American insistence on power-based dispute resolution.

This essay begins by reviewing the Trump administration's strategy attacking the WTO. The essay goes on to explain why this strategy undermines the institution's core norms and principles; it is not simply a continuation of existing disagreements within the WTO's membership. The essay next turns to the consequences of a weakened WTO, particularly the precedent this sets for emerging powers to simply disregard the institution's rules in their efforts to reshape trade relations. The essay concludes by very briefly considering what would be necessary to restore faith in the WTO and reinvigorate its relevance going forward.

## I. THE WTO AND THE TRUMP ADMINISTRATION'S TRADE POLICY

Until recently, trade law was a very stable—perhaps even boring—area of international law. The WTO was the preeminent international trade regime for over two decades with its near-global membership. In addition, the WTO's dispute settlement system was one of the most widely respected international legal systems in existence due to its large caseload, compulsory jurisdiction, high levels of compliance, and authoritative seven-member Appellate Body.<sup>2</sup> The organization was not without problems—most notably its inability to conclude a new round of trade negotiations—but, on the whole, observers considered the WTO to be a model of global governance and a well-functioning institution.<sup>3</sup> Indeed, many commentators had marveled that the WTO had managed to withstand the global economic shocks of the Great Recession without member

---

2. For an overview of the Appellate Body's structure and functions, see Gregory Shaffer et al., *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 237 (2016).

3. See, e.g., DANIEL W. DREZNER, *THE SYSTEM WORKED: HOW THE WORLD STOPPED ANOTHER GREAT DEPRESSION* 1-56 (2014) (describing the WTO as a functional and effective system of international governance even during the Great Recession).

countries breaching their commitments and imposing new barriers to trade.<sup>4</sup>

The election of Donald Trump called into question this confidence in the robustness of the WTO. Trump had campaigned on an anti-international trade platform and was skeptical of American international commitments more generally. The shock that has subsequently come from the Trump administration has overcome traditional Republican support for freer trade policies as well as the popular wisdom that the economic costs of upending the WTO system were too great for any government to consider seriously.

The Trump administration's attack on the WTO has been a three-pronged strategy: (1) an offensive against the WTO's Appellate Body; (2) a return to unilateral adjudication and remediation of trade disputes; and (3) an interpretation of the WTO's national security exception that would permit economic concerns to qualify. Each part of the attack on the WTO is worthy of its own essay, but this section will only provide a brief summary. In the following section, I analyze the impact of these policies on the future of the WTO.

The first part of the Trump administration's strategy to undermine the WTO began with its block on confirming Appellate Body members. In these matters, the WTO membership acts by consensus, which is defined as no WTO member formally objecting.<sup>5</sup> Now, the United States' policy is to object formally to all motions to nominate or renew the term of Appellate Body members. This block will close down the body by December 2019 (and with it, the entire dispute settlement system) by depriving it of the necessary personnel to adjudicate cases.<sup>6</sup> A former Appellate Body member, Ricardo Ramírez-Hernández, has termed this the Appellate Body's "[death] through asphyxiation."<sup>7</sup> Although previous U.S. administrations had refused to re-nominate some American Appellate Body members and even blocked the reappointment of a South Korean Appellate Body member,<sup>8</sup> the Trump administration's policy of blocking *all Appellate Body nominees*, regardless of judicial philosophy, is a categorical

4. See, e.g., Chad P. Bown & Meredith A. Crowley, *Import Protection, Business Cycles, and Exchange Rates: Evidence from the Great Recession*, 90 J. INT'L ECON. 50 (2013); see also DREZNER, *supra* note 3, at 24-56; Christina L. Davis & Krzysztof J. Pelc, *Cooperation in Hard Times: Self-Restraint of Trade Protection*, 61 J. CONFLICT RESOL. 398 (2017).

5. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2(4) n.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] ("The 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.").

6. As of October 1, 2018, there are only three remaining Appellate Body Members and two of the Members' terms expire in December 2019. See *Dispute Settlement – Appellate Body Members*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (last visited Oct. 27, 2018). For more on the Appellate Body crisis, see Bryce Baschuk, *WTO Appellate Body Crisis Reaches New Phase*, 35 Int'l Trade Rep. (BNA) No. 25 (June 21, 2018). Shutting down the Appellate Body could end any effective dispute settlement within the WTO because members have the right to an appeal to the Appellate Body. See DSU art. 16(4). Thus, the WTO's Dispute Settlement Body cannot adopt the panel decision, when one party appeals, if the Appellate Body has not ruled on the case.

7. See Ricardo Ramírez-Hernández, Appellate Body Member, World Trade Org., Farewell Speech (May 28, 2018) (transcript available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/ricardoramirezfarwellspeech\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm)).

8. For a discussion, see Jeffrey L. Dunoff and Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225 (2017).

change. The policy seeks to end the dispute resolution process altogether, rather than addressing more narrow objections to the trajectory of WTO jurisprudence.

The United States' block on Appellate Body nominations is a direct assault on the idea that disputes should be resolved through a neutral interpretation of trade law rather than more negotiated, economic-power-based solution.<sup>9</sup> Without a dispute settlement system, international trade law would return to a GATT-era type system where panels would issue legal opinions but most significant trade disputes were resolved through negotiations, and where the meaning and operation of the law were largely determined through power politics.

Second, the Trump administration began unilaterally imposing trade sanctions against China for its intellectual property policies, which it has deemed to be unfair trade practices.<sup>10</sup> These so-called Section 301 sanctions have escalated over the last several months as China has responded by imposing its own sanctions on American imports.<sup>11</sup> The use of Section 301 sanctions represents a rejection of one of the WTO's fundamental due process principles—the commitment to the multilateral resolution of disputes through neutral adjudication. The core of the WTO law is not just a system of trade rules but a commitment to refrain from retaliating against other WTO countries' perceived trade law breaches until the alleged breaches have been adjudicated, and then retaliating only to the extent allowed by WTO arbitration.<sup>12</sup> The resort to unilateral trade measures is a dramatic departure from past American administrations, who have carefully followed WTO due process rules to maintain the power and legitimacy of the system.<sup>13</sup> It also represents a full-throated

---

9. See Tom Miles, *Isolate Trump at WTO, says Former Top Trade Judge Bacchus*, REUTERS (Oct. 3, 2018), <http://www.reuters.com/article/us-usa-trade-wto/isolate-trump-at-wto-says-former-top-trade-judge-bacchus-idUSKCN1MD2AL> (“What the United States really wants is to be judge and jury in all its disputes in the WTO involving the U.S. They want judges to rule in favor of the United States under threat of not being reappointed if they do not,” [former American Appellate Body member James] Bacchus said.); Tom Miles, *Trump's Bonfire of the Treaties Sweeps Towards the WTO*, REUTERS (May 18, 2018), <http://www.reuters.com/article/us-usa-trade-wto-analysis/trumps-bonfire-of-the-treaties-sweeps-towards-the-wto-idUSKCN1J1K9> (some observers “see [the United States’ block as] a systemic threat and a desire to return to pre-WTO days when countries settled disputes by negotiation—with the more powerful party usually winning, regardless of the merits of the case—rather than under internationally-agreed rules”).

10. See Chad P. Bown et al., *Trump and China Formalize Tariffs on \$260 Billion of Imports and Look Ahead to Next Phase*, PETERSON INST. FOR INT’L ECON. (Sept. 20, 2018, 10:00 AM), <http://piie.com/blogs/trade-investment-policy-watch/trump-and-china-formalize-tariffs-260-billion-imports-and-look>.

11. Lingling Wei and Jacob M. Schlesinger, *China Retaliates with Tariffs on \$60 Billion of U.S. Goods*, WALL ST. J. (Sept. 19, 2018), <http://www.wsj.com/articles/chinese-officials-scramble-to-respond-to-trumps-new-tariffs-1537275015>.

12. See Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶¶ 7.71–7.92, WTO Doc. WT/DS152/R (Dec. 22, 1999) (describing how Art. 23 of the Dispute Settlement Understanding furthers commitment to multilateral dispute settlement and the core principles of WTO dispute settlement system); see also Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 256–59 (2006) (describing how the WTO dispute settlement structure represents a rejection of unilateral interpretation and enforcement of international trade law).

13. The United States has not applied trade sanctions to WTO members for alleged breaches of WTO law without WTO authorization. For instance, in the United States dispute with the European Union on the European ban on beef from hormone-treated cattle, the United States waited for WTO authorization to raise tariffs on European goods and only applied sanctions to the level authorized. See 2 CHARAN DEVEREAUX ET AL., CASE STUDIES IN U.S. TRADE NEGOTIATION: RESOLVING DISPUTES 72–73 (2006). This is particularly notable given that the United States had unilaterally retaliated against the EU’s

rejection of the WTO's rule of law norms and a forceful return to the unilateralism that WTO structures were designed to prevent.

Third, the Trump administration has used national security to justify a series of tariff measures on steel and aluminum imports.<sup>14</sup> It is currently considering similar actions on automobiles.<sup>15</sup> The General Agreement on Tariffs and Trade contains a narrow exception to protect "essential security interests taken in time of war or other emergency in international relations."<sup>16</sup> WTO members have historically been quite restrained in claiming national security concerns, recognizing that broad national security claims could be misused to provide economic protection to industries.<sup>17</sup> For instance, when the George W. Bush administration imposed tariffs to protect the American steel industry, that administration did not claim a national security justification but applied the tariff as a safeguard.<sup>18</sup> In fact, the United States has not used a national security justification for tariffs in the entire history of the WTO.<sup>19</sup>

By claiming national security as a justification for these trade measures, the Trump administration is maintaining that its measures are beyond the jurisdiction of the WTO to judge. Commerce Secretary Wilbur Ross has argued that national security concerns are justified to keep an important industry healthy, stating, "National security is broadly defined to include the economy, to include the impact on employment, to include a very big variety of things . . . . Economic security is military security. And without economic security, you can't have military security."<sup>20</sup> This claim is very broad and would mean that large sections of a nation's economy could be considered within the exception's scope

---

hormone beef ban before the creation of the WTO's dispute settlement system. *Id.* at 51.

14. Proclamation No. 9,704, 83 Fed. Reg. 11,619 (Mar. 8, 2018); Proclamation No. 9,705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

15. Office of Pub. Affairs, *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, U.S. DEP'T OF COMMERCE (May 23, 2018, 8:20 PM), <http://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>.

16. General Agreement on Tariffs and Trade, art. XXI(b)(iii), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

17. Chad P. Bown, *Trump Has Announced Massive Aluminum and Steel Tariffs. Here Are 5 Things You Need to Know*, WASH. POST: MONKEY CAGE (Mar. 1, 2018), <http://www.washingtonpost.com/news/monkey-cage/wp/2018/03/01/trump-has-announced-massive-aluminum-and-steel-tariffs-here-are-5-things-you-need-to-know> (explaining why claiming national security justifications for trade measures can unravel trade rules and thus countries act with great restraint in this area).

18. The Bush administration lifted these tariffs after the WTO dispute resolution system ruled that the tariffs were not legal, although it did not cite the WTO ruling in its public statements about why the tariffs were lifted. Richard W. Stevenson & Elizabeth Becker, *After 21 Months, Bush Lifts Tariffs on Steel Imports*, N.Y. TIMES (Dec. 5, 2003), <http://www.nytimes.com/2003/12/05/us/after-21-months-bush-lifts-tariff-on-steel-imports.html>.

19. Bown, *supra* note 17 (noting that the United States has not claimed a national security justification for trade measures in over 30 years).

20. Berkeley Lovelace Jr., *Commerce Secretary Wilbur Ross on Auto Import Probe: 'Economic security is military security'*, CNBC (May 24, 2018, 7:21 AM), <http://www.cnbc.com/2018/05/24/wilbur-ross-on-auto-import-probe-economic-security-is-military-security.html>; *see also* John Brinkley, *Trump's National Security Tariffs Have Nothing To Do With National Security*, FORBES (Mar. 12, 2018, 11:41 AM), <http://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security> (citing a U.S. Department of Defense memorandum that it disagreed with the Commerce Department's assessment of the need to protect steel and aluminum industries to meet military needs).

and thus freed from WTO rules.<sup>21</sup> Again, this political move—asserting that large swaths of the national economic policy are exempt from the WTO—is another rejection of multilateral authority over trade policy.<sup>22</sup>

Together, these three policies represent a U.S. strategy of rejecting the WTO's bindings as legitimate, attempting to undermine the WTO's rule of law system, and embracing a return to unilateralism and power-based bargaining. This is a categorical departure from past trade disputes among WTO members, where countries engaged in many protracted battles over the meaning and application of WTO rules but reliably stayed within the institution's framework for resolving disputes.<sup>23</sup> By rejecting the WTO's mandate to constrain a State's trade policy, and actively attempting to shut down the dispute settlement system, the Trump administration has undermined the WTO's authority as a legitimate constraint on member countries and weakened its influence in transnational relations.

Eventually the Trump administration will end. But even if many of the policies of the current administration end with it, the effects of the current administration's actions in the trade realm will be hard to unwind. The next section addresses whether and how these policies will affect the future of global trade law and norms in the long term. It focuses on future leverage that the Trump administration's policies provide toward China's effort to rewrite trade law and trade institutions.

## II. THE CONSEQUENCES OF UNDERMINING WTO NORMS

One of the primary effects of the current attack on the WTO will be to increase China's bargaining power in the near future. China was already bound to have more negotiating power in international economic law as the size of its internal market continues to grow dramatically.<sup>24</sup> This is a natural and probably inevitable result of China's economic development. Nonetheless, China's growing economic power had been cabined into a solid institutional structure of

---

21. Jennifer A. Hillman, Opinion, *Trump Tariffs Threaten National Security*, N.Y. TIMES (June 1, 2018), <http://www.nytimes.com/2018/06/01/opinion/trump-national-security-tariffs.html>.

22. Our WTO trading partners have disagreed that the steel and aluminum tariffs are covered by the national security exemption. In particular, the European Union has argued that the national security claim is a pretext and the action is actually an illegal safeguard. Emre Peker, *EU Looks to Familiar Playbook to Hit Back at Trump Plan*, WALL ST. J. (Mar. 5, 2018), <http://www.wsj.com/articles/eu-may-use-familiar-playbook-to-hit-back-at-trump-tariff-plan-1520265992>. The EU has applied retaliatory tariffs as allowed by international trade law in the case of illegal safeguards. European Commission Press Release IP/18/4083, EU–U.S. Trade: European Commission Endorses Rebalancing Duties on U.S. Products, (June 6, 2018), [http://europa.eu/rapid/press-release\\_IP-18-4083\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4083_en.htm).

23. The WTO's success was in large part found in the fact that member countries abided by the process norms of the system—not acting unilaterally and accepting multilateral legal decisions—even if they did not always abide by all of the WTO's substantive rules. See Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 300-01 (2013) (discussing how WTO members may have breached trade rules but did not violate the WTO framework for resolving allegations of breach).

24. Bargaining power in trade negotiations is linked to market size because countries offer greater access to their market as leverage for getting greater access to other countries' markets. The greater a country's internal market, the greater its bargaining power all else being equal. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 347-48 (2002).

longstanding and well-respected trade rules and institutions. China's decision to enter the WTO in 2001 under the WTO's most complex and demanding accession agreement reflects the importance of the WTO to accessing global markets.<sup>25</sup> China understood that fuller inclusion within the global economic system demanded acceptance of key institutional structures and rules.<sup>26</sup> WTO law and processes were not ideal for China's model of development,<sup>27</sup> but China could not start negotiations from a blank slate. The United States, the European Union, Japan, and other developed economies had a first mover advantage in setting up their preferred substantive rules (including rules on intellectual property and state subsidies) and institutionalizing these principles into a strong rule-of-law dispute settlement system.<sup>28</sup> These structures—both the laws and process norms of the WTO—established an economic order that would channel and constrain China's increasing economic power.

The current shock has ruptured the existing economic order and has provided the Chinese government with numerous means to challenge the WTO system and demand greater policy accommodations going forward. A post-WTO era may be beginning. At the most obvious level, the Chinese government can simply copy the Trump administration's precedent to disregard trade rules that it does not like. In trade disputes with regional partners, it can impose unilateral sanctions and demand bilateral negotiations to resolve its concerns. Similarly, the Chinese government could forbid entry into whole sectors of its economy by claiming broad national security rationales and rejecting WTO jurisdiction over these claims. It too can block Appellate Body members whose interpretations of trade law do not match Chinese interests, and it can threaten to shut the system down if its preferred substantive interpretations are not met.

At a broader level, the current shock has undone the binding of the international economic law system. The pre-2016 WTO was multilateral and consensus-oriented (to its detriment in new negotiations).<sup>29</sup> The substantive rules and process norms were "sticky" because they were long-standing, widely observed, and generally respected.<sup>30</sup> The system demanded that countries address their concerns with trade partners' policies and challenges to other

---

25. Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 323-332 (2004).

26. *See id.* at 333-39.

27. For instance, China's model of development has focused on interconnected state-owned enterprises, making the WTO's anti-subsidy rules and domestic trade remedy laws are far from optimal for China. *See* Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 269-84 (2016) (examining how state-owned enterprises are part of China's economic model).

28. Trade agreements often begin with a smaller, more homogenous group of countries that can agree to deeper substantive rules and then offer membership to other States. For a general theory of this effect, *see* George W. Downs et al., *Managing the Evolution of Multilateralism*, 52 INT'L ORG. 397 (1998). The Trans-Pacific Partnership was often described as a similar sequential agreement structure: Pacific countries (except China) would negotiate deeper free trade rules in the first stage with the expectation that China would need to accede to the agreement at a later stage. *See* Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHI. J. INT'L L. 370 (2016).

29. *See* Jeffrey J. Schott & Jayashree Watal, *Decision-Making in the WTO*, PETERSON INST. FOR INT'L ECON. (Mar. 2000), <http://piie.com/publications/policy-briefs/decision-making-wto>.

30. *See* Shaffer et al., *supra* note 2, at 256-67.

members' compliance with trade law in a multilateral forum that emphasized the power of law and minimized power considerations, even if it did not eliminate power imbalances.<sup>31</sup> The Trump administration's rejection of these multilateral norms in favor of bilateral, power-based bargaining has minimized the WTO's influence over China as it becomes a major economic power.

As its market power increases, the Chinese government can demand that trade negotiations and dispute resolution proceed outside of the WTO framework. The norms against such a blatantly WTO-illegal move were previously strong enough that it would have been costly for China and engendered significant pushback from other WTO members. Now, however, the clear American precedent for such actions lowers the costs to China of adopting such a policy and may increase the expected benefits by adopting such a strategy. It may even enable China to push the world towards a post-WTO order with less formal institutions that might better serve China's economic interests. Instead of facing a stable and united international order, China enters the global economy as a full economic power with the global system in disarray. Opportunities now abound for China to reshape global trade rules and processes.

Thus far, the Chinese government has indicated willingness to support the WTO's substantive rules and institutional structure. It has criticized the United States for its intransigence on Appellate Body member confirmations and has argued that the United States' return to unilateralism is illegitimate.<sup>32</sup> However, it is unclear how extensive the Chinese government's commitment to the WTO is, given the economic advantages to alternative systems. For instance, for China, a post-WTO world that includes more flexibility on intellectual property and subsidies may be preferable to the current WTO regime. This is particularly true if the plans to "save the WTO" from the United States involve more onerous economic demands on China. For instance, the EU's proposal to revitalize the WTO includes greater intellectual property restrictions, which would distribute more of the gains from trade away from China and developing countries.<sup>33</sup> Japan and the EU are also trying to engage the United States by pushing forward a joint proposal targeting Chinese state-owned enterprises and threatening WTO-

---

31. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 109-12, 133-37 (2d ed. 1997). Market size, and thus economic power, still is relevant at the WTO. For instance, the United States has been able to resist complying with some Appellate Body decisions because it has a greater ability to bear economic retaliation than smaller States do. Nonetheless, compared to the pre-WTO GATT system, the dispute settlement system is more rule-based and minimizes power imbalances in adjudication. *See* Brewster, *supra* note 12, at 257-60.

32. *See U.S. Could 'Fatally Undermine' the WTO: China's Ambassador*, BLOOMBERG NEWS (May 16, 2018, 2:00 AM), <http://www.bloomberg.com/news/articles/2018-05-16/u-s-could-fatally-undermine-the-wto-china-s-ambassador-says>; Bryce Baschuk, *Chinese Vice Minister Says U.S. Trade Moves Could Unravel WTO*, WTO Reporter (BNA) No. 134 (July 12, 2018).

33. *See* European Commission Directorate-General for Trade, *WTO – EU's Proposal for Modernization*, at 6, WK 8329/2018 INIT (July 5, 2018) (discussing expanding rules regarding investment and intellectual property). Intellectual property rules distribute more of the gains from trade for IP-heavy goods to more developed States and away from consumers of these goods. *See, e.g.*, Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 127 (2002) (stating that high intellectual property rules incorporated into international trade rules "facilitate[], even enforce[] with the aid of trade sanctions, what is in the main a payment by the poor countries (which consume intellectual property) to the rich countries (which produce it)").



imposed fines for subsidies.<sup>34</sup> These new proposals are being offered while the Chinese government continues the battle to be recognized as a market-economy, a status that China believes it is entitled to under its accession agreement.<sup>35</sup>

The future relevance of the WTO may very well lie with the Chinese government's assessment of whether the WTO is a useful structure to legitimize China's economic rise to an economic superpower, or whether the WTO is a hurdle to China's growth and strategic economic interests.<sup>36</sup> China would not have to exit the WTO to create a post-WTO economic order. Rather, China could remain formally a member, but follow the Trump administration's lead by acting outside of WTO rules and demanding bilateral negotiations to resolve disputes when it suits China's interests.

### III. CONCLUSION

The current crisis in international trade law is unlikely to dissipate with the end of the Trump administration's tenure in power. The attack on the legitimacy and authority of the WTO has shaken the institution's ability to be relevant in international economic relations. The world's twenty-year experience with a multilateral and rule-based international trade system may well be at a close.

The sunset of the WTO's relevance is not inevitable. The shock of the Trump administration's unilateralist policies may lead to backlash. Such a backlash could make member countries—including the next American administration—willing to recommit to multilateralism in a manner that they were previously reluctant to consider. Crisis can result in political support for institutional reform and revitalization as well as decay. Much of the work needed to restore faith in multilateralism involves State restraint—not making unilateral threats, not demanding bilateral negotiations, and not refusing to engage multilateral processes. But the exercise of State restraint will not be enough. Rather, a public, positive, and credible demonstration of support for the WTO would be necessary to rebuild the confidence in the organization.

One action that would be credible and public would be a change to the selection of Appellate Body members that gives them more independence. The European Commission has already suggested expanding Appellate Body member terms to 6-8 years without renewal (instead of 4 years, renewable once).<sup>37</sup> In addition, WTO member countries could prevent one or two powerful

---

34. See Takashi Tsuji, *Proposed WTO Reforms Would Target Chinese Subsidies*, NIKKEI ASIAN REV. (Sept. 27, 2018), <http://asia.nikkei.com/Politics/International-Relations/Proposed-WTO-reforms-would-target-Chinese-subsidies>.

35. The Chinese government already claims that other WTO members are not fully recognizing China's rights under the WTO agreement by denying them market economy status. This status would lessen China's vulnerability to domestic trade remedies for alleged dumping. See Chad P. Bown, *Trump Says China Is Not a Market Economy. That's a Big Deal.*, WASH. POST: MONKEY CAGE (Dec. 12, 2016), <http://www.washingtonpost.com/news/monkey-cage/wp/2016/12/12/trump-says-china-is-not-a-market-economy-heres-why-this-is-a-big-deal>.

36. The European Commissioner for Trade Cecilia Malmström has similarly cautioned that the United States' attack on China through WTO illegal measures may "end up breaking the multilateral system." Bengt Ljung and Bryce Baschuk, *Help Reform WTO, Don't Break It Up, EU's Malmstrom Urges U.S.*, 35 Int'l Trade Rep. (BNA) No. 30 (July 26, 2018).

37. European Commission Directorate-General for Trade, *supra* note 33, at 18; see also Bryce

States from blocking Appellate Body members by basing the selection of new judges on a consensus-minus-one or consensus-minus-two model, such that no individual member (or its close ally) could shut down the dispute resolution system again. Such an institutional innovation would strengthen WTO processes as well as provide a credible demonstration of member countries' recommitment to multilateralism going forward.

---

Baschuk, *European Plan for Extending WTO Appellate Terms Panned by U.S.*, Int'l Trade Daily (BNA) No. 194 (Oct. 5, 2018). The European Commission also calls for increasing the number of Appellate Body members from seven to nine. European Commission Directorate-General for Trade, *supra* note 33, at 18, at 17. This would further insulate the Appellate Body from attempts to limit its power by blocking reappointments.