

A Unilateral President vs. A Multilateral Trade Organization: Ethical Implications In The Ongoing Trade War

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INTRODUCTION

The World Trade Organization (WTO) was established on January 1, 1995, with three primary goals: to create a forum for international trade negotiation, facilitate the resolution of trade disputes, and provide support for developing countries.¹ Throughout its history, the WTO and its predecessor organization, the General Agreement on Tariffs and Trade (GATT), were widely viewed as successes.² Indeed, the GATT was instrumental in reducing tariffs,³ and the WTO developed the GATT's initial groundwork of trade rules into a comprehensive set of agreements governing trade in goods, services, and even intellectual property.⁴ Furthermore, the WTO's Dispute Settlement Body (DSB) has presided over hundreds of cases between member countries, and earned itself the nickname the "crown jewel" of the WTO for its ability to impartially resolve disputes.⁵

However, in recent years—and most dramatically, since 2016—the WTO has faced a steady barrage of criticism from the U.S. and other major trading nations. This censure relates primarily to the WTO's treatment of China—a recent member of the organization—and the WTO's not fully developed body of law. While most countries have contained their frustration by merely expressing their criticism at annual DSB meetings, the Trump administration has gone one step further by launching a number of high-profile unilateral actions that undermine the WTO's legitimacy.

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1. Renae Reints, *Trump Said to Seek U.S. Withdrawal From the World Trade Organization*, FORTUNE, (June 29, 2018), <http://fortune.com/2018/06/29/trump-wto-withdrawal/> [<https://perma.cc/KHD2-9SYE>].

2. See generally Chad Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 REV. ECON. & STAT. 811 (2004); Brendan Ruddy, *The Critical Success of the WTO: Trade Policies of the Current Economic Crisis*, 13 J. INT'L ECON. L. 475 (2010).

3. Douglas A. Irwin, *The GATT in Historical Perspective*, 85 THE AM. ECON. REV. 323, 325 (1995).

4. S.P. Shukla, *From GATT to WTO and Beyond 25* (United Nations University, World Institute for Development Economics Research, Working Paper No. 195, 2000), <https://www.wider.unu.edu/sites/default/files/wp195.pdf> [<https://perma.cc/DKJ6-8XMZ>].

5. Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* (European Univ. Inst. Department of Law, Working Paper No. 2017/11), <https://ssrn.com/abstract=2997094> [<https://perma.cc/59NM-RU38>].

The first significant action that the U.S. has taken in response to the WTO's "deficiencies" is refusing to appoint nominees to the WTO's Appellate Body (AB).⁶ The AB, which is the highest court within the WTO, normally consists of seven permanent sitting members, but functionally requires only three judges to hear a dispute.⁷ Because the U.S. has blocked all potential nominees since summer 2017, the WTO's Appellate Body has been reduced to three members, and will be completely halted by September 2019. This would, in effect, ensure that all Dispute Settlement Body (DSB) determinations are unenforceable and render one of the WTO's most important functions inoperative.⁸ The second action the U.S. has taken is imposing tariffs on \$250 billion worth of goods coming from China under Section 301 of the Trade Act of 1974.⁹ The 301 tariffs are a direct response to China's allegedly "unfair trade practices," specifically those related to intellectual property.¹⁰ The third and final action the U.S. has taken is imposing 10% and 25% tariffs on aluminum and steel, respectively, under Section 232 of the Trade Expansion Act of 1962.¹¹ The 232 tariffs are based on a "national security" rationale—the theory being that imports of aluminum and steel threaten the U.S.'s national security—but the tariffs have been widely criticized as a disguised form of protectionism.¹²

While the Trump administration has attempted to support these actions with valid policy reasons, there is no question that the measures undermine the WTO in three existential ways. First, the unilateral 301 tariffs represent an outright ignorance of established WTO law and thereby de-legitimizes the authority of the WTO to regulate trade. Second, the imposition of 232 tariffs potentially represents a bad faith application of WTO provisions and rips a gaping hole in a national security provision that was historically used with caution. Finally, the U.S.'s refusal to appoint Appellate Body members directly contravenes the spirit and objectives of the WTO, which are to reduce trade barriers and ensure the

6. Tetyana Payosova et al., *18-5 The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, Mar. 2018, at 2, <https://piee.com/system/files/documents/pb18-5.pdf> [<https://perma.cc/FD8M-ES9B>].

7. See Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (providing that the Appellate Body shall be "comprised of [seven] persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally").

8. Under Article 16.4 of the DSU, WTO members cannot adopt a panel decision until the subsequent appeal is completed. Thus, if the Appellate Body lacks sufficient members to hear an appeal, all DSB decisions will be rendered unenforceable once they are appealed.

9. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 27,710 (June 20, 2018).

10. WAYNE M. MORRISON, CONG. RESEARCH SERV., IF10708, ENFORCING U.S. TRADE LAWS: SECTION 301 AND CHINA 1 (2019).

11. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

12. Brandon J. Murrill et al., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 6 (2018).

neutral settlement of disputes. As a result of these unprecedented actions, the WTO's role as the legitimate authority charged with regulating trade has been undermined, and countries are now faced with the highly controversial¹³ decision of taking similar unilateral trade action or being subjugated by the U.S.

In light of this unparalleled predicament, the purpose of this note is fourfold: Part I summarizes the purported deficiencies that the United States has identified within the WTO. These issues include the WTO's allowing China to violate its Accession Protocol, lacking general substantive rules to deal with China, and ignoring simple procedural rules. Part II outlines the actions that the Trump administration has taken to address these concerns, including blocking the appointment of Appellate Body Members, tariffs under Section 301 of the Trade Act of 1974, and tariffs under Section 232 of the Trade Expansion Act of 1962. Finally, Part III summarizes the ramifications of the U.S.'s unprecedented unilateral actions. For example, it discusses the incentivization of other countries to bypass the WTO, the deteriorating legitimacy of the WTO, and the potential precedent that WTO rules can be applied in bad faith.

I. A NEW ERA: THE EVER-GROWING LIST OF THE U.S.'S GRIEVANCES CONCERNING THE WTO

The US and other major trading nations have lambasted the role of the WTO with unparalleled vigor in recent years. The U.S.'s criticism largely pertains to three divisive problems which underlie the WTO's "rules-based system."¹⁴ First, the U.S. alleges that the WTO has allowed China to circumvent the broad economic reforms provided within its Accession Protocol. Second, the U.S. charges that the WTO lacks a sufficiently stringent rulebook to constrain many of the pernicious trade practices that China engages in, such as intellectual property theft and state subsidization. Third, the U.S. claims that the WTO's procedural rules are outdated, ambiguous, and are often ignored without just cause.

13. This decision is controversial because retaliation is permitted under Article 3.7 of the DSU only if a country receives prior approval by the DSB. Thus, countries must decide to either bring a case at the WTO and wait roughly a year until that case has been decided – assuming that they are victorious – or on the other hand, take immediate retaliatory action and strengthen the precedent that WTO rules can be flouted – albeit this action would be only slightly stronger moral grounds. See DSU art. 3.7; see also Chad Bown, *Trump's Steel and Aluminum Tariffs: How WTO Retaliation Typically Works*, PETERSON INST. FOR INT'L ECON., (Mar. 5, 2018), <https://piie.com/blogs/trade-investment-policy-watch/trumps-steel-and-aluminum-tariffs-how-wto-retaliation-typically> [<https://perma.cc/DMW4-24GD>] (discussing the WTO procedure concerning retaliation and the above-described predicament of whether to wait for a DSB ruling or take immediate retaliation without the DSB's authorization).

14. The WTO operates under a "rules-based system" where the rules are laid out through various topic-specific agreements. The most fundamental agreements, which provide the broad rules that WTO members must abide by include the General Agreement on Tariffs and Trade (GATT); the General Agreement on Trade in Services (GATS); and the Trade-Related Aspects of Intellectual Property Rights (TRIPS). See *Overview: a navigational guide*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm [<https://perma.cc/HZ63-R2XQ>].

A. THE WTO HAS ALLOWED CHINA TO CIRCUMVENT ITS ACCESSION
PROTOCOL OBLIGATIONS WITHOUT ANY REPERCUSSIONS

In December 2001, after a lengthy fifteen years of negotiations with free-market powers such as the United States and Europe, China finally plunged into the international rules-based trade system by formally joining the WTO.¹⁵ As part of its entrance, China was required to comply with a lengthy list of conditions formally known as the Protocol of Accession (China's "accession protocol").¹⁶ While all WTO members are required to comply with an individualized accession protocol when joining the WTO, China was dealt an extensive list of commitments "that substantially exceed[ed] those made by any other member of the World Trade Organization."¹⁷ The stringent nature of the Chinese commitments¹⁸ were prompted by China's contentious history of using "unfair trade practices" such as forced technology transfer, foreign investment restrictions, state subsidies, and export restraints.¹⁹ Thus, to join the historically free-trade-oriented WTO, China was required to "take concrete steps to remove trade barriers and open its markets to foreign companies . . . eliminate or significantly reduce restrictions on the rights of foreign companies . . . [and] rectify numerous trade-distortive industrial and agricultural policies."²⁰ Specifically, China agreed *inter alia* to:

- undertake that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced²¹
- progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China²²

15. See World Trade Organization, Ministerial Declaration of 23 November 2001, WTO Doc. WT(01)/L/432 (2001) [hereinafter "China's Accession Protocol"].

16. *Id.* at 2-11.

17. Nicholas R. Lardy, *Issues in China's WTO Accession*, BROOKINGS INSTITUTION, (May 9, 2001) <https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/> [<https://perma.cc/5NU4-HTCN>].

18. See S. M. Shafaeddin, *Some implications of accession to WTO for China's economy*, 1 INT'L J. OF DEV. ISSUES 93, 100 (2002) ("Upon the accession China becomes subject to all WTO rules and obligations as though it signed the UR agreements at the time they came into force i.e. 1995. The main channel of the impact, however, would be through reduction of tariff and non-tariff barriers, the lack of discrimination between domestic and foreign firms, including removal of restrictions on local contents, and removal of subsidies paid to loss making State Owned Enterprise (SOEs) contingent to export performance.").

19. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2018 REPORT TO CONGRESS ON CHINA'S COMPLIANCE 29-33 (2019).

20. Background Information on China's Accession to the World Trade Organization, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Dec. 11, 2001), https://ustr.gov/archive/Document_Library/Fact_Sheets/2001/Background_Information_on_China's_Accession_to_the_World_Trade_Organization.html [<https://perma.cc/P5XL-DDN4>].

21. China's Accession Protocol at 4.

22. *Id.* at 5.

- ensure that import purchasing procedures of state trading enterprises are fully transparent, and in compliance with the WTO Agreement, and shall refrain from taking any measure to influence or direct state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with the WTO Agreement²³
- allow prices for traded goods and services in every sector to be determined by market forces²⁴
- notify the WTO of any subsidy within the meaning of Article 1 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), granted or maintained in its territory²⁵
- not maintain or introduce any export subsidies on agricultural products²⁶
- bring into conformity with the TBT [Technical Barriers to Trade] Agreement all technical regulations, standards and conformity assessment procedures²⁷

While China has consistently asserted that it has satisfied the conditions listed in its 2001 accession protocol,²⁸ the U.S. has accused China of falling short on a number of critical commitments. For example, in the 2018 report to Congress on China’s WTO compliance, the United States Trade Representative (“USTR”) stated “[t]oday, almost two decades after China pledged to support the WTO’s multilateral trading system, China has not embraced open, market-oriented policies. The state remains in control of China’s economy, and it heavily intervenes in the market to achieve industrial policy objectives.”²⁹ These practices directly contravene several of China’s commitments outlined above. Furthermore, China’s state-led policies have proven devastating for a host of countries, including the U.S., that have a significant trade relationship with China. For example, the U.S. has been most significantly impacted through its loss of valuable IP, which some estimates value at \$600 billion a year.³⁰ Additionally, the U.S.’s inability to sell certain commodities due to excess capacity being produced in China and the resulting distorted markets, have further injured U.S. manufacturers.³¹ The Trump administration—as well as previous administrations—has

23. *Id.*

24. *Id.*

25. *Id.* at 7.

26. China’s Accession Protocol at 7.

27. *Id.* at 8.

28. See generally Charlotte Gao, *China, US Fight Over China’s Market Economy Status*, THE DIPLOMAT, (Dec. 2, 2017) <https://thediplomat.com/2017/12/china-us-fight-over-chinas-market-economy-status/> [<https://perma.cc/AYW9-C3CV>].

29. 2018 Report On China’s Compliance, *supra* note 19, at 11.

30. Sherisse Pham, *How much has the US lost from China’s IP theft?*, CNN BUSINESS (Mar. 23, 2018), <https://money.cnn.com/2018/03/23/technology/china-us-trump-tariffs-ip-theft/index.html> [<https://perma.cc/A8TV-WUSK>].

31. 2018 Report On China’s Compliance, *supra* note 19, at 17–19.

consequently criticized the WTO for allowing China to ignore several of its most important commitments without any retribution.³²

B. THE WTO HAS FAILED TO IMPLEMENT A BROADER SET OF RULES THAT CURB CHINA'S UNFAIR TRADE PRACTICES

While the United States has expressed frustration with the WTO specifically for allowing China to violate its accession protocol without any repercussions, the U.S. has also rebuked the WTO for lacking a broader set of rules that would circumscribe unfair trade practices generally. For example, in the 2017 Report on China's WTO Compliance, the USTR discussed the ineffectiveness of rules currently in place, saying "it is now clear that the WTO rules are not sufficient to constrain China's market-distorting behavior."³³ Peter Navarro, a key member of Trump's trade cabinet, also remarked that "[t]he WTO's abject failure to address emerging problems caused by unfair practices from countries like China has put the U.S. at a great disadvantage."³⁴

One specific area that the Trump administration believes needs improvement is the WTO's Dispute-Settlement Body (DSB). While the WTO has often been lauded for its comprehensive DSB—what many trade experts consider the "crown jewel" of the WTO—the Trump administration has repeatedly derided the DSB for lacking the ability to address China's broad state-led policies. Again, in the 2017 Compliance Report, the USTR stated:

The WTO's dispute settlement mechanism is narrowly targeted at good faith disputes where one member believes that another member has adopted a measure or taken an action that violates a WTO obligation. It can address this type of discrete problem, *but it is not effective in addressing a trade regime that broadly conflicts with the fundamental underpinnings of the WTO system . . . Indeed, many of the most harmful policies and practices being pursued by China are not even directly disciplined by WTO rules.*³⁵

Unfortunately, when the WTO rules were initially formulated, the drafters did not anticipate the mercurial nature of China's state intervention. For instance, China consistently seeks to "limit market access for imported goods, foreign manufacturers and foreign services suppliers, while offering substantial government guidance, resources and regulatory support to Chinese industries."³⁶ While

32. See Stephen Ezzel, *Top 9 False Promises That China Made in Joining the World Trade Organization*, INNOVATION FILES (Sept. 22, 2015), <https://www.innovationfiles.org/top-9-false-promises-that-china-made-in-joining-the-world-trade-organization/> [<https://perma.cc/8YZH-CEHM>] (explaining how China has failed to abide by its accession protocol commitments).

33. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 2 (2018).

34. Jacob M. Schlesinger, *How China Swallowed the WTO*, WALL ST. J. (Nov. 1, 2017), <https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308> [<https://perma.cc/Z3PP-ATBG>].

35. 2017 Report On China's WTO Compliance, *supra* note 33, at 5 (emphasis supplied).

36. 2018 Report On China's Compliance, *supra* note 19, at 29.

the U.S. has pressed ahead by launching 23 cases against China,³⁷ the DSB has been rather ineffective at addressing the U.S.'s complaints as China will routinely replace its violative policies with more "sophisticated—and still very troubling—policies and practices."³⁸ In this sense, the U.S.'s criticism of the WTO relates not only to ineffective policies but also the mercurial nature of the Chinese government to disguise its subsidies and export programs as legitimate activities of state-owned-enterprises.³⁹ Nevertheless, the Trump administration believes the WTO does not contain a precise-enough rulebook to fully constrain China's state-led policies, and for this reason, is calling for a refreshed rulebook.⁴⁰

C. THE WTO LACKS A CLEARLY DEFINED BODY OF LAW, IS CREATING
SUBSTANTIVE RIGHTS IN VIOLATION OF ARTICLES 3.2 AND 19.2 OF THE
DISPUTE SETTLEMENT UNDERSTANDING, AND FAILS TO CONSISTENTLY
ENFORCE PROCEDURAL RULES

In addition to the broad issues related to China, the U.S. has also criticized the WTO for a host of more narrow issues, one being that the WTO lacks a clearly defined body of law—both procedurally and substantively—that the DSB and Appellate Body can uniformly apply. This, the U.S. argues, has led to various inconsistent determinations and contravenes the WTO's strict procedures for rule-making.⁴¹ To the first point, the US has argued that because "WTO members have failed to negotiate updates to the rulebook, including rules on dispute settlement itself . . . the WTO Appellate Body increasingly is asked to render decisions on ambiguous or incomplete WTO rules."⁴² By allowing the DSB and AB to render decisions in spite of constructive ambiguities in the law, the WTO is essentially providing the judicial panels the ability to "manufacture new rights and obligations of WTO members."⁴³ This practice constitutes a clear violation of Articles 3.2 and 19.2 of the Dispute Settlement Understanding (DSU), which provide that neither the DSB nor AB can "add to or diminish the rights and obligations" provided in the covered agreements.⁴⁴

Numerous policymakers and commentators alike have called attention to the fact that WTO panels are reaching conclusions despite there being no bona fide consensus on an issue—what some describe as overreach and activism.⁴⁵ Even the USTR within the Obama administration took note of this issue, when it stated at a DSB meeting that:

37. *Id.* at 23.

38. 2017 Report On China's WTO Compliance, *supra* note 33, at 2.

39. *Id.*

40. Payosova, *supra* note 6, at 3.

41. *Id.* at 1.

42. *Id.*

43. *Id.* at 2.

44. *Id.*

45. Payosova, *supra* note 6, at 2 (identifying the WTO's practice of "overreaching" as a "systemic issue at the core of the current crisis").

The role of the Appellate Body as part of the WTO's dispute settlement system is to decide appeals of panel reports to help achieve "[t]he aim of the dispute settlement mechanism [. . .] to secure a positive solution to a dispute," as set out in DSU Article 3.7. And the DSU reminds panels and the Appellate Body not once, but twice [arts. 3.4 and 19.2], that "*in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.*"⁴⁶

While the effect of this practice might seem narrowly applicable to the parties involved, the actual effect of this overreach is that the WTO's dispute settlement system is serving as both arbiter and rule maker. Peter Van den Bossche, a former Belgian judge on the Appellate Body, keenly recognized the hazards associated with this trend, saying the "dangerous institutional imbalance in the WTO between its 'judicial' branch and its political 'rule-making' branch may drastically weaken" the system.⁴⁷

Similarly, another way in which the U.S. alleges the WTO's DSB is creating rights is through *obiter dicta*⁴⁸ within Appellate Body reports. In several DSB meetings and policy memorandums, the U.S. and several other countries have charged the Appellate Body of the WTO with ruling on issues that are superfluous to the issues on appeal.⁴⁹ The non-binding *dictum* that ensues is not only irrelevant to the issues at hand, but oftentimes functions to create new rules and rights that WTO members may rely on in future cases. As an illustration, the USTR, in a May 2016 DSB meeting, cited a 2016 case between Panama and Argentina where forty-six pages of the DSB report was *dicta*.⁵⁰ The Trump administration raised these same objections again at a DSB meeting on September 29, 2017, citing the AB report from US—Certain EC Products, where several of the rulings contained within the report were unnecessary and only served to deplete the DSB of essential resources, which could be used in other pending cases.⁵¹ The U.S.'s stance on this issue was crystallized when the USTR stated in the 2018 Trade Policy Agenda that the:

[P]urpose of the dispute settlement system is not to produce reports or to "make law," but rather to help Members resolve trade disputes among them.

46. Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, May 23, 2016, at 2, https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf [<https://perma.cc/B493-3BKS>] (emphasis supplied).

47. PETER VAN DEN BOSSCHE, THE CONTRIBUTION OF INTERNATIONAL AND SUPRANATIONAL COURTS TO THE RULE OF LAW 176 (De Baere, Wouters eds., 2015).

48. See *Obiter Dicta*, 12 FORDHAM L. REV. 202, 202 (1943) ("An obiter dictum, in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it.").

49. Payosova, *supra* note 6, at 4.

50. See David A. Gantz, *An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States* 6 (Univ. of Ariz. James E. Rogers College of Law, Discussion Paper No. 18-26, 2018).

51. *Id.*

WTO Members have not given panels or the Appellate Body the power to give “advisory opinions” as some national or international tribunals have.⁵²

While there are certain instances when dicta might be necessary to articulate proper interpretation of a rule, there is a common notion that “the WTO is increasingly becoming a dispute resolution forum where activist members of an international institution are creating new, non-negotiated, obligations for member states.”⁵³

Lastly, a more menial complaint—albeit one that relates to the WTO’s inconsistent application of the DSU—is that the WTO’s procedural rules are both unclear and being violated.⁵⁴ For example, one oft-repeated complaint from the U.S. is that AB members continue to serve on cases after their terms have expired.⁵⁵ While Article 15 of the Working Procedures for Appellate Review provides that “[a] person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member,”⁵⁶ the DSB has never outrightly approved this measure.⁵⁷ Thus, there is a clear violation, since under Article 17.2, the DSB has the right to decide the appointment or reappointment of AB members.⁵⁸ Additionally, the U.S. has criticized the Appellate Body for repeatedly failing to issue its reports within the allotted 90-day deadline.⁵⁹ While the time restrictions are unequivocal—the maximum time that is allowed to complete an AB report is 90 days⁶⁰—the AB has only respected this 90-day deadline “once since 2013, and the current average duration [for a report to be issued] is almost one year.”⁶¹ The motive for the U.S.’s complaint here is to “encourage the AB to restrict its examination to questions of

52. OFFICE OF THE UNITED STATES TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT at 26 (Mar. 2018).

53. *The WTO Is Inappropriately Usurping American Sovereignty*, WILEY REIN (July 14, 2017), <https://www.wileyrein.com/newsroom-articles-The-WTO-Is-Inappropriately-Usurping-American-Sovereignty.html> [<https://perma.cc/PU7T-G73R>].

54. Payosova, *supra* note 6, at 3.

55. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Aug. 27, 2018, at 37, https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_public.pdf [<https://perma.cc/9EBR-9BDY>].

56. WTO Doc WT/AB/WP/6 (2010), r. 15.

57. See Elvire Fabry & Erik Tate, *Saving the WTO Appellate Body or Returning to the Wild West of Trade?* 9 (Notre Europe Jacques Delors Inst., Policy Paper No. 225, 2018) (“On February 28, 2018, the United States again challenged the notion that this authorisation lies with the AB and that the DSB is only subject to notification, arguing that *Rule 15 has not been approved by the DSB.*”) (emphasis supplied).

58. See Payosova, *supra* note 6, at 3.

59. OFFICE OF THE UNITED STATES TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT 24 (Mar. 2018); see also Statements by the United States at the Meeting of the WTO Dispute Settlement Body, June 22, 2018, at 11, https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_public.rev_.pdf [<https://perma.cc/PAX3-6QP7>].

60. DSU art. 17.5.

61. Fabry & Tate, *supra* note 57, at 8.

law rather than to re-examine the whole procedure.”⁶² Strictly enforcing the 90-day restriction would also likely prevent the AB from ruling on unsettled areas of law as well as issues that are moot.

While the foregoing complaints are the most significant quarrels that the U.S. administrations has raised within the WTO, it should be noted that this list is not exhaustive and there are several other sources of U.S. frustration that are beyond the scope of this note.⁶³

II. AN UNPRECEDENTED RESPONSE: THE U.S.’S UNILATERAL APPLICATION OF 301 TARIFFS, 232 TARIFFS, AND ITS REFUSAL TO APPOINT APPELLATE BODY MEMBERS

As a means of addressing the widespread issues the Trump administration has identified within the WTO, the U.S. has taken an array of actions that deviate from its normal trade playbook. The first response to be analyzed is the U.S.’s imposition of unilateral tariffs under Section 301-310 of the Trade Act of 1974 (“Section 301”).

Under Section 301, the President may authorize the USTR to investigate unfair trade practices stemming from another country’s exports.⁶⁴ If the USTR discovers acts, policies, or practices that violate or are inconsistent with a trade agreement, or constitute an unjustifiable burden on U.S. commerce, the statute permits the President to undertake unilateral actions to eliminate or otherwise resolve such unfair trade practices.⁶⁵ On August 15, 2017, President Trump used Section 301 to request that the USTR probe China’s intellectual property practices.⁶⁶ On March 22, 2018, the USTR issued a report finding that China’s trade practices unduly burdened U.S. commerce.⁶⁷ Shortly thereafter, on May 29, 2018, President Trump proceeded to impose 25% tariffs on \$50 billion worth of goods from China;⁶⁸ in addition, on September 19, 2018, President Trump imposed another 10% (which was supposed to rise to 25% on March 2, 2019, but has been

62. *Id.*

63. See generally OFFICE OF THE UNITED STATES TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT (Mar. 2018); 2017 Report On China’s WTO Compliance, *supra* note 33; Fabry & Tate, *supra* note 57, at 9 (discussing the U.S.’s contention with the WTO’s bias against trade defense).

64. Morrison, *supra* note 10, at 1.

65. 19 U.S.C. § 2411 (2019); § 301 Trade Act of 1974 (Under 19 U.S.C. § 2411, where Section 301 is codified in U.S. law, the President must also first seek a negotiated settlement with foreign country. Such settlement may entail an agreement for elimination of the unfair trade practice or compensation).

66. Presidential Memorandum for the United States Trade Representative, 82 Fed. Reg. 39,007 (Aug. 17, 2017).

67. OFFICE OF THE UNITED STATES TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 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 at 45, 60, 150, 173 (2018).

68. Morrison, *supra* note 10, at 2.

suspended pending ongoing bilateral negotiations with China)⁶⁹ on an additional \$200 billion worth of goods from China.⁷⁰ In response, China has requested consultations at the WTO and retaliated with its own 5-10% tariffs on \$60 billion worth of goods from the U.S.⁷¹ Various commentators agree that this tit-for-tat trade war has had widespread detrimental effects on both countries' economies.⁷²

The second action the US has taken in response to the WTO's ineffectiveness—albeit, the connection is slightly more attenuated—are Section 232 tariffs. Under 19 U.S.C. § 1862(c)(1)(ii)—where Section 232 of the Trade Expansion Act of 1962 is codified—the president is authorized to “adjust imports of an article” so that “such imports will not threaten to impair the [U.S.’s] national security.”⁷³ On April 19, 2017, the President requested the Department of Commerce investigate the effects of aluminum and steel imports on U.S. national security—the first procedural hurdle that the President must clear before imposing tariffs.⁷⁴ On March 8, 2018, President Trump, after receiving the Department of Commerce's report, declared that there was a national security crisis with regards to steel and aluminum and announced that as a result, he would be imposing tariffs of 25% and 10% respectively on U.S. steel and aluminum imports.⁷⁵ While the President has the ultimate discretion to determine what constitutes a national security threat, two cases have already been brought challenging the executive's national security rationale.⁷⁶ Further, to put the Trump administration's actions in context, Section 232 has only been invoked twice in the last 25 years—in 1999 for crude oil and in 2001 for iron and steel—and on both occasions no action was recommended.⁷⁷ Nevertheless, President Trump has also initiated 232 investigations into imports of automobiles and automobile parts, but to date, has not yet

69. David Lawder, *U.S. sets new March 2 date for China tariff increases amid talks*, REUTERS (Dec. 14, 2018), <https://www.reuters.com/article/us-usa-trade-china-tariffs/u-s-sets-new-march-2-date-for-china-tariff-increases-amid-talks-idUSKBN1OD2QL> [https://perma.cc/MAC2-GCVB].

70. Morrison, *supra* note 10, at 2.

71. *Id.*

72. See Nariman Behraves, et al., *Impact of a Global Trade War on the Economy*, IHS MARKIT, <https://ihsmarkit.com/solutions/us-china-trade-war-impacts.html> [https://perma.cc/J4MP-NAVK] (last visited Mar. 27, 2019).

73. 19 U.S.C. § 1862(c)(1)(ii) further requires that the President receive a report compiled by the USTR prior to pursuing any action.

74. Peter Koenig, Frank R. Samolis & Ludmilla Savelieff, *For National Security, Trump Administration Initiates Rarely Used Section 232 Statute to Probe Into Steel Imports*, LEXOLOGY (May 28, 2017), <https://www.lexology.com/library/detail.aspx?g=251aa13a-eb34-4a10-95ae-91ace7a07b99> [https://perma.cc/4AT8-89QQ].

75. Spencer Toubia et al., *President Imposes Section 232 Steel and Aluminum Duties on Imports from the European Union, Canada, and Mexico*, CROWELL MORING (June 4, 2018), <https://www.cmtradelaw.com/2018/06/president-imposes-section-232-steel-and-aluminum-duties-on-imports-from-the-european-union-canada-and-mexico/> [https://perma.cc/6DAY-2GHE].

76. See *Severstal Exp. GMBH v. United States*, 2018 Ct. Intl. Trade LEXIS 38 at *19 (Ct. Int'l Trade 2018) (discussing the justiciability of the President's decision under 19 U.S.C. § 1862: “this court lacks the power to review the President's lawful exercise of discretion”).

77. Koenig, *supra* note 74.

taken action with regards to these goods.⁷⁸

While facially the Section 232 statute violates both the Most-Favored-Nation clause and National Treatment clause of the WTO, under Article XXI of the GATT (the agreement underlying and incorporated within the WTO Agreement), member countries are permitted to take actions which otherwise violate WTO law if such action is “necessary for the protection of its essential security interest.”⁷⁹ Given the vague language of the statute, there is wide discretion for members to implement this statute; on that same token, however, many countries view this exception as merely a last resort option which should rarely be invoked.⁸⁰

The third response the U.S. has taken—and one that has admittedly been ongoing for more than a year—is the U.S.’s stalwart refusal to appoint Appellate Body members. As part of its protest against the WTO, the U.S. has consistently, since summer 2017, blocked all potential nominees from being appointed to the WTO’s AB.⁸¹ While the AB normally consists of seven permanent sitting members, it functionally only requires three judges to hear any dispute.⁸² As a result of the U.S.’s blockade, the AB has been recently reduced to three members, and in December 2019 the AB will be further reduced to one member when Ujal Singh Bhatia and Thomas Graham’s terms expire.⁸³ Even still, due to the potential of an AB member being conflicted, there are likely to be numerous cases that cannot proceed with the requisite three judges.⁸⁴ The effect of the U.S.’s inaction is that virtually all DSB decisions will be unenforceable since any party could technically appeal the DSB’s findings, but no AB panel could be formed to resolve such an appeal. In short, the WTO’s supreme judicial body is on the precipice of collapse, assuming the U.S. will continue its holdout through September 2019.

78. Frances Hadfield & Yun Gao, *Section 232 Investigation on Imports of Autos and Auto Parts—Comment Period Extended*, CROWELL MORING (June 22, 2018), <https://www.cmtradelaw.com/2018/06/section-232-investigation-on-imports-of-autos-and-auto-parts-comment-period-extended/> [<https://perma.cc/UUV6-AZY6>].

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

80. Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 698–99 (2011).

81. Payosova, *supra* note 6, at 3; Manfred Elsig, et al., *Trump is fighting an open war on trade. His stealth war on trade may be even more important*, WASHINGTON 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=.3dba04d7b24d [<https://perma.cc/9BC3-U9V8>].

82. See DSU art. 17.1 (providing that the Appellate Body shall be “comprised of [seven] persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally”).

83. The World Trade Organization, *Appellate Body Members*, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [<https://perma.cc/DP7N-3P24>] (last visited Feb. 16, 2019).

84. See Jennifer Hillman, *Three Approaches To Fixing The World Trade Organization’s Appellate Body: The Good, The Bad And The Ugly?*, GEORGETOWN INSTITUTE OF INTERNATIONAL ECONOMIC LAW 2, n. 2.

III. UNCHARTERED TERRITORY: THE ETHICAL IMPLICATIONS OF THE U.S.'S UNILATERAL MEASURES, AND HOW THEY THREATEN THE MULTILATERAL RULES-BASED SYSTEM

While many concur, at least to some degree, with the substance President Trump's complaints, the executive's choice of response thus far—imposing unilateral trade measures and refusing to appoint Appellate Body members—has had substantial deleterious effects on the WTO. First, the imposition of 301 tariffs in the face of the WTO's previous 2001 ruling on Section 301 sets the precedent that member countries can ignore WTO law altogether and act in their own best interest. Secondly, the imposition of 232 tariffs on steel and aluminum despite there being no credible national security threat promotes bad faith applications of the historically well-respected national security provision—Article XXIII. Lastly, the U.S.'s sweeping refusal to appoint AB members represents a staggering punch to one of the WTO's most effective bodies, and flies in the face of the WTO's coveted principles of cooperation, negotiation, and multilateralism. In short, the U.S.'s unilateral actions represent the most serious threat to the WTO's legitimacy since its inception.

A. THE IMPOSITION OF SECTION 301 TARIFFS DE-LEGITIMIZES THE DSB AND SETS THE PRECEDENT THAT WTO LAW CAN BE IGNORED

One significant effect that the Trump administration's actions will have on the WTO is to set a precedent that the global trading system can be bypassed altogether. As mentioned previously, one of the primary purposes of the WTO is to resolve trade disputes, and a large part of the WTO's success is due to countries resorting to the DSB rather than settling disputes unilaterally.⁸⁵ While the U.S. finds itself squarely in the type of trade dispute that the DSB was designed to resolve, the U.S. has chosen to utilize its domestic Section 301 legislation rather than bring a case at the WTO.⁸⁶ Further, by imposing unilateral tariffs under Section 301, President Trump is undermining the spirit of the WTO and its various agreements by creating the precedent that disputes may be settled through internal domestic investigations and actions, rather than resort to the DSB. This presents a dangerous situation and threatens to undo over two decades of progress where the DSB served as the go-to neutral venue for settling complex disputes. The 12th Annual Report by the Subcommittee on Unfair Trade Policies and Measures of the WTO summarized this danger, saying “[t]he multilateral trading

85. Reints, *supra* note 1.

86. While the U.S. requested that a panel be established at the DSB on October 18, 2018, President Trump had already imposed 25% tariffs on \$50 billion worth of goods and an additional 10% tariff on \$200 billion worth of goods from China by September 17, 2018. Thus, its unilateral actions clearly preceded its resort to the DSB. See Request for the Establishment of a Panel by United States, *China—Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/8 (Oct. 19, 2018); see also Morrison, *supra* note 10, at 1.

system is marked by countries observing international rules, including those provided by the WTO Agreement and its dispute settlement procedures. Disputes occurring within the system should be resolved by the available dispute settlement procedures, not through resort to unilateral measures.”⁸⁷

Furthermore, by invoking Section 301, the Trump administration is acting in a manner that had already been strictly prescribed by the WTO. Specifically, the Trump administration’s use of Section 301 constitutes a violation of Article 23 of the DSU, which “explicitly prohibits Members from invoking unilateral measures that are not based on the WTO dispute settlement procedures.”⁸⁸ President Trump imposed the Section 301 tariffs on China on July 6, 2018, before the U.S. had even requested the establishment of a panel at the WTO, which it did later on October 29, 2018. Because the U.S. had not received a panel report from the DSB authorizing unilateral action, the U.S. violated Article 23 of the DSU by imposing tariffs without the proper DSB authorization.

Additionally, this application of the Section 301 legislation, which ostensibly authorizes Trump’s tariffs on China, has already been found violative by the WTO. In 2000, in the landmark case *United States—Sections 301–310 of the Trade Act 1974*,⁸⁹ the DSB performed a textual analysis of the 301 legislation and tentatively concluded that Section 301 was inconsistent with Article 23 of the DSU because it enabled the U.S. to take unilateral action before a DSB report was issued.⁹⁰ This type of action would be a violation of Article 23, mentioned above. During the pendency of the case, however, the U.S. implemented a Statement of Administrative Action (SAA)⁹¹ stating that the U.S. would refrain from implementing Section 301 in this manner—meaning it would not take unilateral action before receiving a WTO panel report authorizing such action. As a result of the hastily-drafted SAA, the DSB Panel ruled that Section 301 was not inconsistent with WTO law, so long as it was applied consistent with the SAA.⁹² The U.S.’s recent utilization of Section 301 to implement tariffs on China, however, constitutes a clear backtracking on its commitment in the SAA, and consequently a violation of Article 23 since it had not received any authorization from the DSB to impose tariffs.⁹³ This intentional violation of the DSU framework by

87. 12th Annual Report by Subcommittee on Unfair Trade Policies and Measures of WTO at 378-79 (2003), <http://www.meti.go.jp/english/report/downloadfiles/gCT0334e.pdf> [https://perma.cc/CR4T-96K5] (last visited Mar. 27, 2019).

88. *Id.*

89. See Dispute Settlement Body Report, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (adopted Dec. 22, 1999) [hereinafter Section 301 Report].

90. See Caitlain Devereaux Lewis, CONG. RESEARCH SERV., LSB10108, TRICKS OF THE TRADE: SECTION 301 INVESTIGATION OF CHINESE INTELLECTUAL PROPERTY PRACTICES CONCLUDES (PART I) 3-4 (2018).

91. *Id.*

92. See Section 301 Report, *supra* note 89, at 350-51.

93. DSU art. 23.2(a) (“[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements . . . 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

the U.S. represents a sweeping change from the U.S.'s otherwise compliant behavior historically.

The resulting climate, where countries will feel they can ignore the WTO framework, not only has near-term implications, it also threatens to destroy the long-term economic integration that followed the creation of WTO post-World War II.⁹⁴ Joshua Meltzer astutely recognized this danger, saying “there are other reasons for complying with WTO rules, such as the economic benefits of liberalized trade, or to point to the role of the WTO in avoiding the beggar-thy-neighbor protectionism that helped create the environment which made World War Two possible.”⁹⁵ Unlike the 232 tariffs, which represent an objectionable interpretation of WTO law,⁹⁶ the imposition of tariffs under Section 301 represents an outright ignorance of past WTO precedent. This type of circumvention threatens the precedential value of WTO decisions and makes other members increasingly likely to ignore WTO rules as well.

B. THE U.S.'S APPLICATION OF SECTION 232 TARIFFS UNDERMINES THE DUTY TO PERFORM WTO OBLIGATIONS IN GOOD FAITH

The U.S.'s 232 tariff actions on steel and aluminum (and also potentially on automobiles and uranium) also represent a stark change in U.S. behavior, and perhaps a bad faith application of key WTO provisions. While none of the WTO's various agreements specifically prescribe an ethical duty, per se, many scholars believe that a duty of good faith underlies all international treaties—through the foundation of *pacta sunt servanda* in Article 26 of the Vienna Convention on Laws and Treaties.⁹⁷ Thus, the argument goes, the obligation to perform treaty obligations in good faith applies to the WTO agreements indirectly.⁹⁸ Marion Panizzon points to several DSB and AB reports, which support this quasi-ethical

has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding”).

94. See Douglas A. Irwin *The GATT's Contribution to Economic Recovery in Post-War Western Europe*, 28-29 (Nat'l Bureau of Econ. Research, Working Paper No. 4944, 1994) (discussing how the GATT contributed, in part, to the economic stability that followed World-War II).

95. Joshua Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26 U. PA. J. INT'L ECON. L. 693, 710 (2005).

96. See *infra* Section III.C.

97. The good faith obligation that arises under public international law is derived primarily from the term *pacta sunt servanda* in Article 26 of the Vienna Convention on Laws and Treaties, which means “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Several other sources of law also prescribe a “duty of good faith”: Article 2(2) of the Charter of the United Nations states “[a]ll Members . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter”. See United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations; see also U.N. Charter art. 2, 2.

98. Marion Panizzon, *GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT* 86 (2006) (“WTO agreements are themselves creatures of international law; they are treaties binding only because of the underlying norm of international law *pacta sunt servanda*. This suggests that good faith may underlie the WTO agreements as a whole.”).

duty of members in her book, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*.⁹⁹ In perhaps her strongest example, she quotes the Appellate Body Report in *United States—Section 211 Omnibus Appropriations Act of 1998*, which says “the AB has introduced a self-standing obligation to implement all WTO Agreements in good faith, based upon a Panel decision that had applied such a duty to the TRIPS Agreement.”¹⁰⁰ This case, as well as several others that are mentioned in her book, suggest that there is an affirmative duty of Members to perform their obligations under the WTO in good faith, despite such duty not being expressly codified within the DSU or GATT Articles.

Given this quasi-ethical duty of WTO members, one could argue—and it likely will be argued during the cases currently pending at the WTO—that the U.S.’s application of Section 232 on aluminum and steel constitutes a bad faith application of Article XXI(b) of the GATT. As a reminder, GATT Article XXI(b) is a broad exception to the Most-Favored-Nation clause, National Treatment clause, and Article 23 of the DSU; it specifically provides that member countries can take unilateral action so long as it is “necessary for the protection of its essential security interests.”¹⁰¹ Given that the term “essential security interests” is not defined specifically within the GATT, much like the national security interest in the U.S.’s domestic Section 232 legislation, member countries have wide discretion to determine what circumstances satisfy the “essential security interests” standard.¹⁰² In essence, Article XXI(b) allows countries to self-judge when the criteria is met,¹⁰³ and if a country determines that the criteria is met, it may impose any amount of tariffs that the country finds necessary to remedy the issue.

When implementing the Section 232 tariffs on steel and aluminum, President Trump relied on the Department of Commerce report, which determined that “imports of certain steel mill products and . . . aluminum ‘threaten to impair the national security’ of the United States.”¹⁰⁴ Peter Navarro further defended the U.S.’s national security rationale, saying “[t]his particular action on steel and aluminum is . . . about national security . . . without an aluminum steel industry, we don’t have a country.”¹⁰⁵ Despite this rhetoric, many have questioned the rationale that steel and aluminum imports threaten the U.S.’s national security and

99. *Id.*

100. *Id.* (citing Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (adopted Feb. 1, 2002)).

101. GATT, art. XXI(b).

102. Alford, *supra* note 81, at 698–99.

103. *Id.*

104. Murrill, *supra* note 12, at 6.

105. Henry Fernandez, *Trump tariffs are about national security: Peter Navarro*, FOX BUSINESS (May 31, 2018), <https://www.foxbusiness.com/politics/trump-tariffs-are-about-national-security-peter-navarro> [https://perma.cc/LKE7-QZ8D].

instead have ascribed the motive as being “explicitly political.”¹⁰⁶ In support of this theory, Adam Taylor noted that “amid a diplomatic spat with Turkey, Trump unexpectedly announced he would be doubling tariffs on metal imports from Turkey, an apparent retaliation for Turkey’s detention of an American pastor rather than any trade actions.”¹⁰⁷

Furthermore, in *Severstal Exp. GMBH v. United States*, a Swiss steel exporting company and its U.S. affiliate sued the U.S. government, alleging that “the trade actions taken by the administration were not motivated by national security concerns (their ostensible purpose), but instead were taken for the purpose of balancing the U.S. trade deficit and increasing economic competitiveness.”¹⁰⁸ While the Court of International Trade upheld the President’s “national security” determination—primarily because the President is given tremendous leeway in determining when the criteria is met¹⁰⁹—the opinion is devoid of any analysis regarding whether the “national security” basis was asserted in good faith. Because the affirmative duty of good faith stems from international law, the Court of International Trade (a domestic Article III court) was under no obligation to apply this duty to the President. However, when this issue plays out at the WTO, a venue that has in the past recognized the “duty of good faith” derived from the Vienna Convention, the President’s determination may not pass muster.

It is also worth noting that there has long been a mutual understanding that member countries will not invoke the national security exception unless there is a genuine issue of national security.¹¹⁰ As Taylor points out, “Section 232 was rarely used, and investigations were often requested by aggrieved companies rather than initiated by the government itself. Until Trump took office, no president had acted under Section 232 since 1982—and there had been no investigations whatsoever since 2001.”¹¹¹ Furthermore, “[d]espite the risks associated with a self-judging exception, Member States have exercised good faith in complying

106. Adam Taylor, *No president has used sanctions and tariffs quite like Trump*, WASHINGTON POST (Aug. 29, 2018), https://www.washingtonpost.com/world/2018/08/29/no-president-has-used-sanctions-tariffs-quite-like-trump/?noredirect=on&utm_term=.97029a70392f [https://perma.cc/EG9E-2NJJ].

107. *Id.*

108. Todd N. Tucker, *First Case Filed Against Administration’s National Security Motivated Tariffs*, LAWFARE (Apr. 6, 2018), <https://www.lawfareblog.com/first-case-filed-against-administrations-national-security-motivated-tariffs> [https://perma.cc/Y7AE-HQ5R].

109. *See* *Severstal Exp. GMBH v. United States*, 2018 Ct. Intl. Trade LEXIS 38 at *27 (Ct. Int’l Trade 2018) (“Plaintiffs have pointed to neither statutory authority nor legislative history which suggest that Section 1862(d) clearly forecloses the President from finding a threat to national security due to the overall economic situation of the steel industry. Where, as here, an industry is found to produce goods vital to U.S. national security . . . the court finds it highly unlikely that Presidential statements indicating an overarching economic rationale for Section 1862 tariffs are clearly inconsistent with that statute’s grant of authority.”).

110. In fact, the WTO has never had to rule on a dispute involving trade restrictions based on national security grounds. Thomas Biesheuvel et al., *Trade as National Security Issue? Here’s What the U.S. Law Says*, BLOOMBERG (July 10, 2018), https://www.washingtonpost.com/business/trade-as-national-security-issue-heres-what-the-us-law-says/2018/07/10/5b814332-8467-11e8-9e06-4db52ac42e05_story.html?utm_term=.4d4d2a24bb8e [https://perma.cc/YE4V-ERS6].

111. Taylor, *supra* note 107.

with their trade obligations.”¹¹² Given the rarity with which the Section 232 is invoked,¹¹³ there is widespread concern that President Trump is merely disguising a protectionist regime under the national security basis.¹¹⁴

Lastly, the substantial ripple effects that are likely to result from the U.S.’s behavior threatens the stability of the WTO.¹¹⁵ For example, several countries have taken unilateral retaliation against the U.S. in response to the 232 tariffs levied on imports of steel and aluminum.¹¹⁶ While these retaliatory responses are technically in violation of the Article 3.7 of the DSU,¹¹⁷ the U.S. has created the precedent through its knowing violation of Article 23, that such rules can be ignored. The U.S.’s precedent for raising tariffs on the basis of Section 232 thus presents a slippery slope and makes flouting rules and protectionist behavior the customary norm.

C. THE U.S.’S REFUSAL TO APPOINT APPELLATE BODY MEMBERS DIRECTLY CONTRAVENES THE SPIRIT OF THE WTO

Finally, the U.S.’s stalwart refusal to appoint judges to the Appellate Body represents one of the most direct affronts on the WTO to date. As mentioned above, the U.S.’s blockade threatens to freeze the entire DSB system—one of the cornerstones of the WTO—because without a functional AB, all Panel decisions would be unenforceable upon a losing country’s appeal. While this action has obvious immediate consequences, it is also paramount to contextualize the effects of the U.S.’s actions within the history of the WTO and the purposes for which it was created.

Since the WTO both arose from and incorporates GATT provisions, it is important to note the foundational principles that presupposed the GATT. The GATT was created out of the ashes of World War II, specifically to discourage trade protectionism and diffuse economic hostilities between countries:

The goal was to create an agreement that would ensure postwar stability and avoid a repeat of the mistakes of the recent past, including the Smoot-Hawley tariffs and retaliatory responses, which had been a contributor to the

112. Alford, *supra* note 81, at 699 (2011).

113. Taylor, *supra* note 107.

114. See Brandon J. Murrill, CONG. RESEARCH SERV., LSB10223, THE “NATIONAL SECURITY EXCEPTION” AND THE WORLD TRADE ORGANIZATION 4 (discussing the potential for countries to enact protectionist measures under the guise of national security).

115. Alford, *supra* note 81, at 699 (Alford discussed the potential instability that can result from a bad faith use of the national security exception, saying “a self-judging security exception poses grave risks. If abused, it could undermine the entire WTO regime. But the practice of WTO Member States is to invoke the security exception in good faith, with a margin of discretion.”).

116. See Coalition of American Metal Manufacturers and Users, *A Comprehensive List of Retaliatory Tariffs* (June 18, 2018), http://www.aiis.org/wp-content/uploads/2018/06/Retaliatory-Tariffs-by-Country-6.18_0.pdf [<https://perma.cc/SL7Q-DCZ8>].

117. DSU art. 22.2.

devastating economic climate that culminated in the death and destruction of the Second World War.¹¹⁸

After successful negotiation by twenty-three countries, the 1947 GATT provided a rudimentary rule-based framework on trade and lowered tariff rates between the “contracting parties” as they were called.¹¹⁹ In the decades after GATT was created, countries continued to join by the dozen, and additional agreements were reached during negotiating rounds, which further reduced trade barriers.¹²⁰ The WTO was later established in 1994 to provide “a more enduring institutional framework for implementing and extending” the GATT’s principles.¹²¹ While the WTO has adopted several major trade agreements since its inception (i.e. the Agreement on Agriculture, the General Agreement on Trade in Services (GATS), and the Trade-Related Aspects of Intellectual Property Rights (TRIPS)), arguably its biggest feat was the creation of the first *effective* dispute-settlement body.¹²² The WTO’s DSB embodies the original GATT principles as it “aims to provide a fast, efficient, dependable and rule-oriented system to resolve disputes about the application of the provisions of the WTO Agreement. By reinforcing the rule of law, the dispute settlement system makes the trading system more secure and predictable.”¹²³

Given the underlying purposes of the DSB—to further stabilize trade relations between countries and ensure predictability through quasi-stare decisis case law—the U.S.’s decision to block appointment of the DSB’s highest body represents a dagger into what has become the WTO’s most important body. Indeed, the DSB has helped resolve over 350 disputes to date and has led to a drastic decrease in the number of unilateral actions taken by member countries.¹²⁴ Thus, by attacking the DSB, the U.S. is undermining the core principles on which the WTO stands; namely, it is marginalizing the principles of cooperation, negotiation, and economic integration, as all countries consented to creating the DSB and consequently committed to be bound by it. Furthermore, if the U.S. continues its holdout, member countries will be increasingly likely to take unilateral actions,

118. CHAD BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 11 (2009).

119. *Id.*

120. *The GATT years: from Havana to Marrakesh*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm [https://perma.cc/5RUZ-LADR] (last visited Mar. 27, 2019).

121. *From the GATT to the WTO: A Brief Overview*, GEORGETOWN LAW LIBRARY, <https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235> [https://perma.cc/UR8K-BEPK] (last visited Mar. 28, 2019).

122. The GATT dispute settlement system that preceded the WTO was largely ineffective because all “contracting parties” had the ability to veto a decision – even if they weren’t a party to the dispute itself. BOWN, *supra* note 2, at 821.

123. *Introduction to the WTO dispute settlement system*, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s3p1_e.htm [https://perma.cc/R3LL-S4J9] (last visited Mar. 27, 2019).

124. *Dispute Settlement*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [https://perma.cc/93FK-C9CL] (last visited Mar. 27, 2019).

just as the U.S. has done, since the WTO would be unable to authorize retaliation without a functional DSB. This scenario, which is likely to result from the U.S.'s inaction, harkens to "globalization's last dark episode of protectionism" before the creation of the GATT, where "[t]he U.S. imposition of the Smoot-Hawley tariffs and the international retaliatory response in the 1930s led to the virtual halting of international commerce."¹²⁵

In sum, the U.S.'s direct attack on the WTO's "crown-jewel" represents its decommitment to the central tenets the WTO stands for. Given that the U.S. has consistently adhered to nearly all of the DSB decisions its been a party to, this break from past precedent is all but certain to usher in a new era of disobedience and ignorance of WTO principles.

CONCLUSION

The United States, with President Trump at the helm, has levied a hefty amount of criticism at the WTO, largely pertaining to China's unfair trading practices and the WTO's not fully developed legal framework. While the U.S. has *some* reason to be concerned—nearly all WTO members agree that China has not met the expectations set forth under its accession protocol and that the WTO rulebook should be updated—President Trump has undertaken numerous actions that severely undermine the WTO's legitimacy. These pernicious unilateral actions represent a broad departure from its historical position as a generally compliant WTO member and threaten to undermine the core principles on which the WTO stands – principles which have for decades guaranteed economic stability and a predictability in trade. While there are undoubtedly policy reasons that the U.S. will offer to substantiate its position, the decision to go the unilateral route has broken the WTO and arguably constitutes bad faith behavior.

125. BOWN, *supra* note 118, at 11.