

## Dismantling the WTO: The United States' Battle Against World Trade

Aaron Seals

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# Dismantling the WTO: The United States’ Battle Against World Trade

Aaron Seals\*

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## I. INTRODUCTION

The World Trade Organization (“WTO”), founded in 1995,<sup>1</sup> has been crucial to the expansion of the world’s economy. States’ markets and economies would not be as intertwined today without the WTO’s existence. Although scholars can point out its flaws, economists consider membership in the WTO, and the liberalization of trade in general, as a positive.<sup>2</sup> The United States, one of the original members of the WTO,<sup>3</sup> has been one of the largest beneficiaries of the WTO’s efforts to unite the global economy. Specifically, American companies and producers have

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<sup>1</sup> Kathleen Claussen, *The Other Trade War*, 103 MINN. L. REV. HEADNOTES 1, 3 (2018).

<sup>2</sup> *See id.* at 4-5.

<sup>3</sup> *See id.* at 3.

been able to export their goods around the world without the fear of high tariffs.<sup>4</sup>

However, despite the WTO's success, the United States is attempting to cripple the organization by targeting its dispute resolution system. Specifically, the United States is preventing the Appellate Body, the final authority of the WTO's dispute resolution system, from remaining fully staffed. The United States is entitled to block appointments of panelists to the Appellate Body, and is doing so with each opportunity it gets.<sup>5</sup> The result of the United States' obstinance is that the Appellate Body is at risk of becoming impotent because term limits cause it to shrink as judicial appointments remain vacant. This article argues that the United States' attack on the Appellate Body is a breach of its obligation to the WTO and places the future of the global economy in jeopardy.

Part I of this comment will provide a general history of the WTO and explain its dispute resolution system, which is its largest tool in controlling global trade. Part II will explain why the Marrakesh Agreement<sup>6</sup>—and international treaties in general—bind states to obligations that they may not legally violate. Part III will outline the United States' attack on the WTO's dispute resolution system and the global response to its behavior. Part IV contemplates what a global economy would look like without the WTO, or without the United States in the WTO. Finally, Part V analyzes WTO members' potential recourse to prevent the United States from dismantling the WTO's dispute resolution system.

## II. THE DEVELOPMENT OF THE WTO AND ITS DISPUTE RESOLUTION SYSTEM

### A. *The Origin of the WTO*

The idea to interweave the economies of different states to form a united global economy did not originate with the World Trade Organization. Prior to 1995, the General Agreement on Tariffs and Trade ("GATT") had been attempting the same project for decades.<sup>7</sup> The

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<sup>4</sup> See *id.*

<sup>5</sup> See Simon Lester, Comment to *Blocking WTO appointment hurts US goal of resolving unfair trade, holds system hostage*, CHANNEL NEWS ASIA (Jun. 22, 2018, 6:38 AM), <https://www.channelnewsasia.com/news/commentary/trump-block-wto-appointment-hurts-unfair-trade-case-10449820>.

<sup>6</sup> See *infra* note 41.

<sup>7</sup> See Claussen, *supra* note 1, at 3.

GATT was formed in 1947 in response to the havoc of World War II.<sup>8</sup> As the predecessor to the WTO, the GATT experimented with liberalized trade and set the stage for the WTO to thrive. Members of the GATT hoped to create an organization called the International Trade Organization (“ITO”) to work with the World Bank and the International Monetary Fund in furthering global economic goals.<sup>9</sup> The GATT was not meant to be long-lasting, and states expected the ITO to subsume it in due time.<sup>10</sup> Ironically, this never occurred because the United States (who had pushed for the ITO’s existence) failed to ratify the ITO’s charter, which effectively killed it.<sup>11</sup>

Even without the ITO, the GATT was integral to setting the stage for the WTO. GATT members would routinely get together to discuss tariffs and protectionist trade barriers.<sup>12</sup> These talks not only helped states begin to trade more freely with one another, but also fostered trust and confidence among them.<sup>13</sup> The average tariff faced by importers in 1947 was around 40%. Throughout the GATT-era, tariffs steadily declined such that today’s importers typically face 5% tariffs.<sup>14</sup> The trust and confidence that resulted from this economic and political warmth was welcomed considering the fact that the GATT was formed directly after world powers terrorized each other twice in two world wars within a half-century of each other.

The GATT’s successes were applaudable, but the organization had several flaws which enabled the WTO to emerge as its replacement.<sup>15</sup> The largest of its flaws involved its ineffective dispute resolution system.<sup>16</sup> Because unanimity was required in approving resolutions to disputes, the losing party of a dispute was able to block the enforcement of a decision against it.<sup>17</sup> Among other flawed functions, GATT members were ready to form an improved organization to govern their

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<sup>8</sup> See DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *THE GENESIS OF THE GATT* 2 (2008); see also Claussen, *supra* note 1, at 3.

<sup>9</sup> See *id.* at 98-99.

<sup>10</sup> See Claussen, *supra* note 1, at 3; *From the GATT to the WTO: A Brief Overview*, GEORGETOWN LAW, <https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235> (last visited Sept. 27, 2019).

<sup>11</sup> See IRWIN, MAVROIDIS & SYKES, *supra* note 8, at 122.

<sup>12</sup> See *id.* at 117-18.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 30; Chad P. Bown & Douglas A. Irwin, *The GATT’s Starting Point: Tariff Levels Circa 1947* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 21782, 2015).

<sup>15</sup> See SARAH LOUISE JOSEPH, *BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE* 9 (2011).

<sup>16</sup> See *id.* at 8.

<sup>17</sup> *Id.*

trade agreements.<sup>18</sup> At the GATT's final set of talks in the late 20th century, known as the Uruguay Rounds, the WTO was created.<sup>19</sup>

The WTO, like the GATT before it, attempts to enhance and unite the global economy.<sup>20</sup> Members of the WTO are equal with one another when it comes to trade. This egalitarianism is manifested in the WTO by way of the most-favored-nation principle, which holds that states are forbidden from treating some nations better than others by giving allies more attractive tariffs.<sup>21</sup> Although there is an exception for states joining in a trade agreement, such as the North American Free Trade Agreement ("NAFTA"), states generally cannot apply different measures to different states' products.<sup>22</sup> Furthermore, WTO members cannot engage in a variety of activities that would create unfair trade advantages, including subsidizing domestic producers so they can undercut foreign producers.<sup>23</sup>

The WTO relies on one key organ to retain credibility among its members: the dispute resolution system's Appellate Body.<sup>24</sup> The Appellate Body issues rulings like any judicial body in response to potential violations of WTO rules.<sup>25</sup> It has become a centerpiece of the WTO and exists to self-regulate WTO members with consistency and coherency.<sup>26</sup> However, if the Appellate Body is understaffed to the point that it cannot form a panel to hear a dispute, members could simply appeal the lower panel's ruling, aware that the appeal will never be heard by the Appellate Body. By doing so, members could effectively violate WTO rules without punishment.

When the Appellate Body is staffed, it improves upon the GATT's dispute resolution system in a few ways. Member states can bring claims against violating members and feel confident that a just outcome will result. These outcomes come in multiple forms: cessation of the prohibited activity, payment of a fine to the victimized member(s), and

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<sup>18</sup> *See id.*

<sup>19</sup> *See* IRWIN, MAVROIDIS & SYKES, *supra* note 8, at 121.

<sup>20</sup> *See* Bown & Irwin, *supra* note 14, at 1

<sup>21</sup> *See* IRWIN, MAVROIDIS & SYKES, *supra* note 8, at 38-40.

<sup>22</sup> *See id.* at 263 (explaining that states engaged in bilateral agreements "grant reductions or bindings of its import tariffs of which the other was an important supplier," which are "generalized to third countries either by virtue of most-favored-nation obligations or as a matter of policy.").

<sup>23</sup> *See Subsidies and countervailing measures*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/scm\\_e/scm\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/scm_e.htm) (last visited Sept. 15, 2019).

<sup>24</sup> *See* Hélène Ruiz Fabri, *The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story*, 27(4) *European Journal of International Law (EJIL)* (2016) 1076.

<sup>25</sup> *See id.*

<sup>26</sup> *Id.* at 1078.

retaliatory measures against the offending member.<sup>27</sup> First, an offending state is asked to stop violating a WTO rule, such as an illegal tariff rate. If it fails to comply, it is asked to pay money to the victim member in the amount equal to the damage caused by the violation.<sup>28</sup> Finally, after continued noncompliance, the WTO allows the victim to issue retaliatory measures against the offender to recover its losses.<sup>29</sup> An example of this final stage was demonstrated by China and the European Union when they placed otherwise illegal tariffs on American products, such as Harley-Davidson motorcycles and Kentucky bourbon, after the United States placed tariffs on Chinese steel and EU aluminum.<sup>30</sup>

Without a robust dispute resolution system, the WTO would have a difficult time promoting free trade or enforcing its rules. In fact, it is likely that the WTO as a whole would fail if its dispute resolution system fails. Unfortunately for the WTO's proponents, one of its founding members, the United States, is attempting to paralyze the Appellate Body. Due to this attempted paralysis, the near future looks bleak because the Appellate Body requires at least three panelists to operate, and terms are expiring.<sup>31</sup>

### *B. The United States' Role in the Dispute Resolution System*

The Appellate Body is made up of seven judges but only requires a minimum of three to function, as only three serve on each panel.<sup>32</sup> Appointments, which are made by the Dispute Settlement Body ("DSB") to the Appellate Body, require consensus among WTO members.<sup>33</sup> Approval of an appointment is inferred; therefore, a member must formally object to an appointee if it wishes to veto the appointment.<sup>34</sup> The United States, like any member, has a right to veto appointments to

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<sup>27</sup> William J. Davey, *The WTO Dispute Settlement Mechanism* 25, (Illinois Public Law Research Working Paper No. 03-08, 2003).

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*; *Chinese retaliatory tariffs aim to hit Trump in his electoral base*, THE GUARDIAN, <https://www.theguardian.com/business/2018/jun/24/tariffs-trump-china-red-states-retaliation> (last updated Jun. 24, 2018).

<sup>31</sup> *See Davey, supra* note 27, at 14.

<sup>32</sup> *Appellate Body Members*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (last visited Sept. 16, 2019).

<sup>33</sup> *WTO Members Intensify Debate Over Resolving Appellate Body Impasse*, International Centre for Trade and Sustainable Development (Jun. 28, 2018), <https://www.ictsd.org/bridges-news/bridges/news/wto-members-intensify-debate-over-resolving-appellate-body-impasse>.

<sup>34</sup> *Id.*

break the consensus. Feeling as though it has been treated unfairly by the Appellate Body, the United States has exercised its veto consistently since President Donald Trump began his administration in 2017.<sup>35</sup> As a result, only three panelists remain on the Appellate Body. The move by the United States to cripple the Appellate Body has widely been met with disapproval; specifically, the chief of the Appellate Body, Chair Ujal Singh Bhatia, has said that the United States is going to “warp [the WTO] back to the GATT era” concerning dispute resolution.<sup>36</sup>

One of the reasons for opposing the WTO, according to the United States, is its unfair treatment of the United States when it is involved in trade disputes.<sup>37</sup> The Trump Administration has stated that the United States is treated unfairly,<sup>38</sup> signaling that it believes the United States does not prevail in front of the Appellate Body often enough for it to be considered a just process. The United States, however, wins eighty-seven percent of the claims it brings to the WTO.<sup>39</sup> Additionally, its loss rate when a claim is brought against it is lower than that of the average WTO state.<sup>40</sup> Therefore, the United States’ opposition to the WTO does not have a basis for a claim of unfair treatment, unless the current administration feels that complete American domination is the only fair outcome in trade disputes. The United States phenomenal win record in trade disputes illustrates its dominant presence in the WTO, which begs the question: why would the United States wish to harm the organization?

Simply put, the United States newfound desire to frustrate the WTO’s ambition of liberalized trade stems from the current administration’s desire for protectionist policies. The WTO’s purpose is to remove trade barriers, which is necessarily incompatible with a state’s objective of instituting protectionist policies. The WTO’s charter explains that the parties to the agreement are “desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other

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<sup>35</sup> Ana Swanson, *Trump Cripples W.T.O. as Trade War Rages*, N.Y. TIMES (Dec. 8, 2019), <https://www.nytimes.com/2019/12/08/business/trump-trade-war-wto.html>.

<sup>36</sup> See International Centre for Trade and Sustainable Development, *supra* note 33.

<sup>37</sup> See Swanson, *supra* note 35.

<sup>38</sup> See *id.*

<sup>39</sup> Henrietta Reily, *By the numbers: Here’s how “badly” the WTO treats the U.S.*, AXIOS (Jul. 07, 2018), <https://www.axios.com/by-the-numbers-wtos-treated-the-united-states-very-badly-1530622593-14ba45da-e0da-462f-974e-f8792a086177.html>.

<sup>40</sup> *Id.*

barriers to trade and to the elimination of discriminatory treatment in international trade relations.”<sup>41</sup> These objectives are in opposition of the current American administration’s normative view of the American economy, and who it should reward.

Another possible motivation for paralyzing the Appellate Body is to prevent the WTO from forcing the United States to reel back on its steel and aluminum tariffs it has imposed on China. The United States has used the GATT Article XXI “National Security” exception to impose those tariffs, which many consider in violation of WTO rules against unfair border measures.<sup>42</sup> This exception is “self-judging” however, leading to potential for abuse.<sup>43</sup> The text of Article XXI is as follows:

Nothing in this Agreement shall be construed

...

(b) to prevent any [member country] from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any [member country] from taking any action in pursuance of its obligations under the United

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<sup>41</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

<sup>42</sup> Scott Miller, *National Security Exception: When Trade Rules Don’t Apply*, TRADE VISTAS (Jun. 1, 2017), <https://tradevistas.org/national-security-exception-trade-rules-dont-apply/>.

<sup>43</sup> *Id.* at 3.



Nations Charter for the maintenance of international peace and security.<sup>44</sup>

The exception leaves room for the United States—which believes that stunting China’s ability to undercut American steel producers is essential to national security—to impose harmful tariffs under the guise of national security.<sup>45</sup> Therefore, perhaps the United States has sought to dismantle the Appellate Body in preparation for claiming this exemption.

The “National Security” exception within Article XXI provides members with almost unchecked power to ignore WTO rules. The only check is an eventual Appellate Body ruling. If the Appellate Body is unable to function, however, then the power of the member state exercising the exemption becomes *completely* unchecked.

The United States could argue that it is simply exercising its right as a member of the WTO; however, attempting to destroy the organization is not permitted under its obligations to the WTO. The founding document of the WTO, the Marrakesh Agreement, as well as principles of international law provide ammunition for those who oppose the United States’ behavior.

### III. THE MARRAKESH AGREEMENT AND INTERNATIONAL TREATIES

The Marrakesh Agreement, signed in Morocco in 1994, serves as the charter for the WTO.<sup>46</sup> The twenty-three founding members of the GATT were the original parties of the Marrakesh Agreement.<sup>47</sup> Throughout the past decades, from the GATT to the present WTO, WTO membership has increased to 128 total members.<sup>48</sup> The United States was both a founding member of the GATT and a party to the Marrakesh Agreement, meaning that it willingly subjected itself to the treaty and all its corresponding legal obligations.<sup>49</sup>

<sup>44</sup> Brandon J. Murrill, *The “National Security Exception” and the World Trade Organization*, CONGRESSIONAL RESEARCH SERVICE 2 (Nov. 28, 2018), <https://fas.org/sgp/crs/row/LSB10223.pdf>.

<sup>45</sup> Todd Tucker, *The WTO just blew up Trump’s argument for steel tariffs*, WASH. POST (Apr. 5, 2019), <https://www.washingtonpost.com/politics/2019/04/05/wto-just-blew-up-trumps-argument-steel-tariffs/>.

<sup>46</sup> See Marrakesh Agreement, *supra* note 41.

<sup>47</sup> See Press Release, World Trade Org., Fifteenth Anniversary of the Multilateral Trading Sys., 2, 4, (2009), [https://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/chrono.htm](https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm).

<sup>48</sup> *Id.* at 1.

<sup>49</sup> See Marrakesh Agreement, *supra* note 41 (demonstrating that the United States is a signatory); See Claussen, *supra* note 1, at 3 (showing that the United States was a leading party in the founding of the GATT).

The United States' zealous advocacy of the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement is evidence of its belief that the Marrakesh Agreement has legal obligations. The TRIPS Agreement was intensely advocated by the United States because it helped protect American companies.<sup>50</sup> The United States believed this agreement to be binding and instructed other states that they were bound by WTO obligations.<sup>51</sup> Currently, however, the United States has seemingly forgotten its stance on the Marrakesh Agreement's binding authority, as it is breaching its obligation to adhere to the WTO's dispute resolution process.

The Marrakesh Agreement imposes specific obligations that prohibit the United States' present activity. Article II of the Marrakesh Agreement declares that Annexes 1, 2, and 3 (each an "Annex") are integral parts of the Agreement, and are binding on all of the WTO's members.<sup>52</sup> Annex 2 outlines binding principles and obligations concerning the dispute resolution system.<sup>53</sup> Article III of Annex 2 outlines general principles agreed to by the members as to the purpose of the WTO's dispute resolution system.<sup>54</sup> Included in this section is the principle that the dispute resolution system's goal is to find mutually beneficial results,<sup>55</sup> not domination by one member. Furthermore, members agreed to the declaration that the dispute resolution system is essential to the WTO's security and effectiveness.<sup>56</sup> Therefore, members agree that *without* the dispute resolution system, the WTO cannot be secure or effective. The Annex also obliges that all solutions, including arbitration awards, made "under the consultation and dispute settlement provisions . . . shall not . . . impede the attainment of any objective" of agreements made pertaining to the organization, operation, and effectiveness of the dispute resolution system.<sup>57</sup>

Other provisions in Annex 2 all present clear objectives, including timeliness and fairness requirements, which cannot be impeded without

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<sup>50</sup> See Linda Lourie, US position on TRIPS, in GRAIN 77-83 (Steve Eberhart ed., 1998), <https://www.grain.org/article/entries/2105-us-position-on-trips>.

<sup>51</sup> *See id.*

<sup>52</sup> Marrakesh Agreement, *supra* note 41, at 155 (Article II is titled "Scope of the WTO").

<sup>53</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>54</sup> *Id.* art. 3, ¶ 1.

<sup>55</sup> *See id.* art. 3, ¶ 3-4.

<sup>56</sup> *Id.* art. 21, ¶ 1.

<sup>57</sup> *See id.* art. 3, ¶ 5.

directly violating the Marrakesh Agreement.<sup>58</sup> Article 17 of Annex 2, titled “Appellate Review,” outlines numerous objectives. Section 1 states the following:

A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.<sup>59</sup>

Despite these objectives, appellate panels cannot be established because the United States is blocking their formation, and a rotation cannot occur if the Appellate Body has fewer than four members. Thus, virtually every objective envisioned by this section is impeded by the United States’ behavior.

Section 2 of Article 17 discusses how often members of the Appellate Body should be appointed.<sup>60</sup> The key phrase within this section is that “[v]acancies *shall* be filled as they arise.”<sup>61</sup> The United States’ public stonewalling of the filling of vacancies impedes the mandate that the vacancies be filled as they arise. The wording of the section, that vacancies *shall* be filled, leaves no room to contend that states have discretion about whether the Appellate Body should be fully staffed or not. Despite this directive, the United States has made it no secret that it wishes for the vacancies to remain.<sup>62</sup>

Section 5 of Article 17 establishes a general rule that proceedings should be resolved within 60 days.<sup>63</sup> If the United States continues on its path of purposefully depriving the Appellate Body of its staff, there will not be an Appellate Body to resolve disputes within 60 days. Thus, the United States’ behavior likely impedes the timeliness objective in Section 5, even if the imposition is indirect.

Article 17, which contains various Appellate Body procedural requirements, is being impeded by the United States. Moreover, impeding objectives laid out by the Marrakesh Agreement is a violation of a party’s legally binding obligations under that agreement. Therefore, the United States is in breach of the Marrakesh Agreement.

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<sup>58</sup> DSU, *supra* note 53, art. 3, ¶ 5.

<sup>59</sup> *Id.* art. 17, ¶ 1.

<sup>60</sup> *Id.* art. 17, ¶ 2.

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> See Swanson, *supra* note 35.

<sup>63</sup> *Id.* art. 17, ¶ 5.

The Trump Administration treats international treaties as nonbinding, so it is likely that the Administration finds a breach of the Marrakesh Agreement to be of no legal consequence.<sup>64</sup> However, centuries of international law and scholarly support demonstrate that this is not the case. The head of the American Society of International Law, Law Professor Frederic Kirgis, has addressed the question of international treaties' binding authority on the United States, such as the Marrakesh Agreement.<sup>65</sup> Importantly, academics believe that international treaties are treated as binding because of the concept of comity, which influences a nation to respect an agreement so other nations also respect it.<sup>66</sup> Additionally, Kirgis argues that the United States has historically considered treaties binding because it has treated them like disputes arising under domestic contract law.<sup>67</sup>

Support for the United States' position that treaties are binding is also found in the Constitution, which prescribes treaties as "supreme law of the land[.]"<sup>68</sup> Although supporters of the Trump Administration may argue that international law is too murky to consider international treaties binding, scholars disagree. Kirgis argues that the United States has always held the belief that international treaties should be binding on those who sign them: "The United States government has frequently demonstrated that it regards treaties (including treaties for U.S. constitutional purposes as well as other international agreements) as binding instruments under international law."<sup>69</sup> It appears that the Trump Administration's argument is not supported by scholarship or historical practice.

Nevertheless, the Trump Administration will likely continue arguing that the United States can breach its international obligations, despite historical practice. As a result, other states may try to force the United States to respect a treaty it has signed, but their efforts would not likely

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<sup>64</sup> See David Roberts, *The Paris climate agreement is at risk of falling apart in the 2020s*, Vox (Nov. 5, 2019), <https://www.vox.com/energy-and-environment/2019/11/5/20947289/paris-climate-agreement-2020s-breakdown-trump> (demonstrating how the Trump Administration disregards its international obligations of other treaties, such as the Paris Climate Accords).

<sup>65</sup> Frederic L. Kirgis, *Treaties as Binding International Obligation*, AMERICAN SOCIETY INT'L L. (May 14, 1997), <https://www.asil.org/insights/volume/2/issue/4/treaties-binding-international-obligation>.

<sup>66</sup> *Id.*

<sup>67</sup> For example, the United States accused France of breach of contract following a failure to live up to obligations laid out in the 1946 Air Service Agreement. *Id.*

<sup>68</sup> U.S. Const. art. VI, cl. 2.

<sup>69</sup> Kirgis, *supra* note 65 (explaining how the United States historically viewed treaties, like domestic contract law, as binding).

be successful. If the United States derogates from its international obligations with a treaties-mean-nothing attitude, what would come of the United States' place in the world? The United States may soon find itself on the outside looking in on the global policy discussion, especially as other states' power increases, such as Brazil.<sup>70</sup> Moreover, other states may view United States policy towards international treaties as contingent upon the election for president every four years. Inevitably, states may choose to simply leave the United States out of the global policy conversation.

#### IV. RESPONSES TO THE UNITED STATES' BEHAVIOR

The United States' belief that the WTO's dispute resolution system needs reform is not unique. At least 18 other members have shared similar concerns.<sup>71</sup> However, none of those members planned to unilaterally halt the Appellate Body's operations. The United States' attempt at doing so has provoked international condemnation and opposition.

France has cautioned the United States against its current course. President Emmanuel Macron has stated that the United States' trade war with China, and broader disrespect of the WTO rules, presents a prospect where "everyone loses."<sup>72</sup> Further, he stated that "[t]he strong nation is the one following the law," signaling the French belief that the United States is breaking the law by stalling the WTO's dispute resolution system.<sup>73</sup> Other French officials have echoed President Macron's statements, warning that unilateral trade actions cannot replace the WTO's multilateral system, and arguing that actions taken for the purpose of paralyzing the organization must cease.<sup>74</sup>

Germany has also responded to both the United States' use of the national security exception and its eagerness to dismantle the Appellate Body. In response to threats made by President Trump concerning the

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<sup>70</sup> As of January 2019, Brazil's stock market is performing better than the United States' market. Kenneth Rapoza, *Brazil is the Best Stock Market in the World Right Now*, FORBES (Jan. 8, 2019 12:34 PM), <https://www.forbes.com/sites/kenrapoza/2019/01/08/brazil-is-the-best-stock-market-in-the-world-right-now/#2d3d672771d5>.

<sup>71</sup> Claussen, *supra* note 1, at 21 (citing Terence P. Stewart, *Can the WTO be Saved from Itself?* (2018)).

<sup>72</sup> See *Macron urges WTO 'reform' as US metal tariffs expected to hit early*, EURACTIV 2 (May 31, 2018), <https://www.euractiv.com/section/economy-jobs/news/macron-urges-wto-reform-as-us-metal-tariffs-expected-to-hit-early/>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 3.

imposition of steep tariffs on the EU, Chancellor Angela Merkel stated that the dispute between the United States and the EU has the hallmarks of a trade conflict, and that it is “worth every effort to try to defuse this conflict[.]”<sup>75</sup> Furthermore, Chancellor Merkel mentioned that it “takes two” to prevent a trade war, indicating that the EU cannot avoid a trade war without American cooperation.<sup>76</sup> Additionally, Chancellor Merkel warned that the United States’ attempt to take down the WTO is unwise because global problems require multilateral answers.<sup>77</sup> Accordingly, she warned President Trump that “protectionism is not the proper answer.”<sup>78</sup>

Canadian officials strongly back the WTO and resent the United States’ behavior.<sup>79</sup> Canada proposed changes to the WTO’s dispute resolution system in an attempt to discourage protectionist measures like those that have been implemented in the United States.<sup>80</sup> Canada is a strong proponent of the WTO and of multilateral trading systems in general.<sup>81</sup> For example, in 2014, Canada led the charge in launching negotiations that expanded environmental protections in the WTO.<sup>82</sup> Thus, Canada opposes the United States’ goal to inhibit the WTO’s efficacy.

Yet the strongest opposition to the United States’ attempt at impeding the Appellate Body has come from India, China, and the European Union. In December 2018, these member states united to do more than simply state their dissatisfaction with the United States: they offered a solution.<sup>83</sup> The Marrakesh Agreement did not contemplate an

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<sup>75</sup> See Max Greenwood, *Merkel on Trump tariffs: ‘It takes two’ to prevent a trade war*, THE HILL 1 (Jul. 4, 2018, 1:21 PM), <https://thehill.com/policy/finance/395514-merkel-on-trump-tariffs-it-takes-two-sides-to-prevent-a-trade-war>.

<sup>76</sup> See *id.*

<sup>77</sup> See Larry Elliott, *Protectionism is Not the Answer, Angela Merkel Warns US*, THE GUARDIAN 1 (Jan. 24, 2018, 12:21 PM), <https://www.theguardian.com/business/2018/jan/24/wto-head-rejects-talk-global-trade-war-us-more-tariffs>.

<sup>78</sup> *Id.*

<sup>79</sup> Bryce Baschuk, *Canada Unveils Plan to Bolster WTO in Face of U.S. Protectionism*, BLOOMBERG 1 (Sep. 25, 2018, 7:14 AM), <https://www.bloomberg.com/news/articles/2018-09-25/canada-unveils-plan-to-bolster-wto-in-face-of-u-s-protectionism>.

<sup>80</sup> *Id.*

<sup>81</sup> *Canada and the World Trade Organization (WTO)*, GOVERNMENT OF CANADA, [https://international.gc.ca/world-monde/international\\_relations-relations\\_internationales/wto-omc/index.aspx?lang=eng](https://international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/index.aspx?lang=eng).

<sup>82</sup> *Id.* at 5.

<sup>83</sup> Kirtika Suneja, *India, EU, China Push New Hiring Norms for WTO Appellate Body*, THE ECONOMIC TIMES (Dec. 12, 2018, 12:17 AM), <https://economictimes.indiatimes.com/news/economy/foreign-trade/india-eu-china-push-new-hiring-norms-for-wto-appellate-body/articleshow/67051059.cms>.

instance where a founding member, or any member for that matter, would deliberately attack the organization to which it was bound. As a result, no safeguards to this situation were originally put in place. However, India, China, and the EU have proposed a response to the United States' actions,<sup>84</sup> which seeks to accomplish two key objectives. First, the proposal would increase the number of panelists in the Appellate Body from seven to nine total panelists and extend their term duration by two years.<sup>85</sup> Second, outgoing Appellate Body panelists would remain in their positions in order to fulfil the panel's duties until their positions have been filled.<sup>86</sup> The proposal appears to allow the WTO to operate as planned without fear that a member could effectively stall operations. In practice, the proposed changes would ensure that the Appellate Body could continue operation despite protectionist regimes sprouting up in a member's government.

Aside from its support for the proposal, India has consistently criticized the United States' behavior. Perhaps India's strong opposition stems from the fact that it has a particular interest in the WTO's dispute resolution system's vitality: India is a claimant against the United States in a dispute over steel tariffs.<sup>87</sup> India successfully established a panel to hear the claim in December 2018; however, India would require a functioning Appellate Body if it wanted to bring an eventual appeal.<sup>88</sup> This fact is not lost on India, and may explain why it vigorously supports repairing the Appellate Body. Overall, India has made it clear that it disagrees with American tactics and hopes to see the Appellate Body recover from its current position.

China, in addition to its proposal with India and the European Union, has publicly admonished the United States.<sup>89</sup> Regarding the United States' behavior, a Chinese official stated the following in December 2018: "A top dog should act like a top dog. It cannot only see a narrow spectrum of its own self-interest, and it certainly should not do whatever it wishes at the sacrifice of others."<sup>90</sup> This comment was met with support from Canada and Japan, who both disapprove of the steel and

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> D. Ravi Kanth, *India Gets WTO Nod to Establish Dispute Panel*, LIVE MINT (Dec. 5, 2018, 1:33 AM), <https://www.livemint.com/Politics/qtBTrIN8teWyZ0kcsqhBeN/India-gets-WTO-nod-to-establish-dispute-panel.html>.

<sup>88</sup> *Id.*

<sup>89</sup> *Major economic powers take aim at U.S. during WTO policy forum*, JAPAN TIMES (Dec. 18, 2018), <https://www.japantimes.co.jp/news/2018/12/18/asia-pacific/major-economic-powers-take-aim-u-s-wto-policy-forum/#.XDjW0i2ZNsM>.

<sup>90</sup> *Id.*

aluminum tariffs the United States has imposed on China. However, China's comments should be taken with a grain of salt since it has long been seen as the United States' primary challenger for possession of the world's most dominant economy.<sup>91</sup> Therefore, China's opposition to the United States' current disapproval of liberalized trade could simply be China trying to seize an opportunity.

China has taken such opportunities before. In 2016, when the United States ceased negotiations on the Trans-Pacific Partnership, one scholar commented that China had been left to "dominate Asia."<sup>92</sup> China took the opportunity to fill the void left by the United States, by assuring its Asian neighbors that investment and trade should go through Chinese led coalitions.<sup>93</sup> Perhaps China currently sees a similar opportunity to fill the void in the WTO that may be left by the United States.

Around the world, WTO members consistently disagree with the United States' current tactics. Specifically, traditional allies like France, Japan, Germany, and Canada have provided vocal, public opposition to the Trump Administration's actions in international trade. Other countries, such as India and China have gone beyond voicing opposition to propose changes that would protect the WTO. Whether the motivations behind that proposal are genuine or not, the United States' behavior has certainly caused international upheaval.

## V. A GLOBAL ECONOMY WITHOUT THE WTO

The global economy would look much different if the WTO ceased to exist. The benefit of the WTO to the global economy can be seen by viewing reports about annual trade performance. Those reports reveal a key aspect of the WTO as it concerns global growth; the WTO's goal is to increase *all* global trade rather than just trade involving its largest members.<sup>94</sup> For example, under the WTO, developing nations have seen growth in trade volume across all kinds of products, including

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<sup>91</sup> Wendell Cox, *500 Years of GDP: A Tale of Two Countries*, NEW GEOGRAPHY (Nov. 21, 2015), <https://www.newgeography.com/content/005050-500-years-gdp-a-tale-two-countries>.

<sup>92</sup> Anthony Rowley, *US Walks Away from TPP, Leaving China Free to Dominate Asia*, YALE GLOBAL (Nov. 22, 2016), <https://yaleglobal.yale.edu/content/us-walks-away-tpp-leaving-china-free-dominate-asia>.

<sup>93</sup> *Id.*

<sup>94</sup> *The WTO can ... stimulate economic growth and employment*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/10thi\\_e/10thi03\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi03_e.htm) (last visited Oct. 10, 2019).



agricultural products, oil and mining products, and merchandise.<sup>95</sup> At least a portion of this growth can likely be attributed to the WTO's use of the most-favored-nation principle, allowing for developing nations to participate in the global economy on equal footing.<sup>96</sup>

For manufacturers of goods from large states, the WTO offers the opportunity to spread their products around the world. Consider the WTO's significant function of regulating border measures, such as heightened tariffs. Who pays for tariffs? States do not pay for them. Companies do.<sup>97</sup> Restricting China from imposing an inconsistent tariff on televisions enables foreign manufacturers of televisions to more easily enter China's 1.5-billion-person market.<sup>98</sup> Thus, when China is restricted from imposing that tariff, foreign manufacturers evade paying the tariff rather than the states themselves. For this reason, the presence of the WTO is important. Without it, foreign manufacturers and exporters would foot the bill for heightened tariffs, which could harm existing industries, raise the prices of goods, and stifle trade all together.<sup>99</sup>

Open economies grow faster and more steadily than their closed counterparts.<sup>100</sup> The WTO forces all of its members to have open economies. Economies which grow rapidly require new jobs to meet the increased output requirements.<sup>101</sup> Departing the WTO for protectionist policies results in the loss of jobs.<sup>102</sup> Prior to the WTO, when the international system was dominated by protectionist policies, unemployment rates and import rates of goods were linked.<sup>103</sup> After the WTO emerged, however, imports rose dramatically while unemployment dropped or remained steady.<sup>104</sup> It can be inferred from this data that open trade enables employers from all states to expand and begin exporting all over the world. Although imports dramatically increased with the introduction of the WTO, each state dramatically increased its exports as

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<sup>95</sup> *Participation of developing countries. . . Overview of major trends and underlying factors*, WORLD TRADE ORG. (Aug. 16, 1996), [https://www.wto.org/english/tratop\\_e/devel\\_e/w15.htm](https://www.wto.org/english/tratop_e/devel_e/w15.htm).

<sup>96</sup> See discussion *supra* Part I, Section A.

<sup>97</sup> Kumar Singh & Andrea Shalal, *Who pays trump's tariffs, China or U.S. customers and companies?*, REUTERS (May 21, 2019), <https://www.reuters.com/article/us-usa-trade-china-tariffs-explainer/who-pays-trumps-tariffs-china-or-u-s-customers-and-companies-idUSKCN1SR1UI>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *WORLD TRADE ORG.*, *supra* note 93.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

well.<sup>105</sup> This data demonstrates that high import rates do not lead to high unemployment, and that free trade among open economies can lead to job growth. A world without the WTO could revert back to an environment where manufacturers find it more difficult to profit abroad and unemployment rises.<sup>106</sup>

Another implication of a world without the WTO is that member states would be forced to negotiate independent trade agreements with each other. This may prove challenging. For example, only forty-seven percent of the United States' trade is covered by independent free trade agreements,<sup>107</sup> while the standard WTO rules cover the remaining fifty-three percent of its trade. For large states like the United States, perhaps negotiating independent free trade agreements would not be a significant issue because larger states may be able to strongarm smaller states into favorable trade agreements. However, smaller states' negotiation power, such as in Southeast Asia, would not likely be able to produce independent trade agreements that offer such states protection equal to that currently offered by the WTO. Furthermore, independent free trade agreements may not be able to be enforced against large states without accountability protections built into international organizations like the WTO.

Alternatively, problems will result if the WTO does not dissolve but continues to be denied an effective dispute resolution system. At best, WTO members would be expected to follow WTO rules out of honor with no real recourse for disputes. For example, the EU has suspicions that the current iteration of NAFTA, following the Trump Administrations reworking of it, violates WTO rules.<sup>108</sup> However, assuming the Appellate Body is not repaired, the EU has no real recourse to attempt to vindicate its claim against the United States, Canada, or Mexico if NAFTA does violate WTO rules. The EU's only recourse would be to impose countermeasures against those states, without an official WTO order. Perhaps some do not fear a world where the EU or the United States can impose retributive measures for WTO violations. However, such a system would open the door to abuse of smaller, poorer members by larger members. The WTO expressly sought to prevent this from happening.

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<sup>105</sup> WORLD TRADE ORG., *supra* note 93.

<sup>106</sup> See Pierre Lemieux, *Free Trade Isn't Killing Jobs*, FOUNDATION FOR ECONOMIC EDUC. (Oct. 16, 2017), <https://fee.org/articles/free-trade-isnt-killing-jobs/>.

<sup>107</sup> *Free Trade Agreements*, INTERNATIONAL TRADE ORGANIZATION, <https://www.trade.gov/fta/>.

<sup>108</sup> Megan Cassella, *U.S. faces a grilling at the WTO*, POLITICO (Dec. 17, 2018), <https://www.politico.com/newsletters/morning-trade/2018/12/17/us-faces-a-grilling-at-the-wto-457562>.

Furthermore, a future in which the United States is not a party to the WTO can be imagined. In that potential reality, the loser might be the United States if the WTO thrived without its membership. WTO members may perceive the United States as an unpredictable trade partner, not only because of its behavior when it was a member of the WTO, but also because the United States would not have to follow a set of international trade rules. The United States' social and political capital, as well as the respect that the United States possesses because of its status as a founding member of the international economic system, may be lost upon its theoretical departure from the WTO. In fact, American business would likely see less growth in a world where the United States is not a member of the WTO,<sup>109</sup> considering the fact that American companies will likely see a reduction in economic growth due to the tariffs implemented on Chinese exports.<sup>110</sup> Without the WTO, tariffs like these could be implemented at the United States' discretion and completely unrestricted by WTO Rules, resulting in stymied economic growth.

The United States believes that it is being treated unfairly by the Appellate Body and has attempted to take the whole system hostage as a solution. If one of the remaining three Appellate Body panelists departs, it would be impossible for the Appellate Body to function. How can WTO members stop the United States from successfully destroying the Appellate Body?

## VI. RECOURSE FOR WTO MEMBERS

The Marrakesh Agreement has a section dedicated to a withdrawal process for states that choose to remove themselves from the agreement's obligations. The withdrawal process, defined in Article XV, enables a party to unilaterally decide to exit the WTO six months after requesting to do so.<sup>111</sup> Withdrawing from the WTO also extinguishes all legal obligations stemming from the WTO's multilateral trade agreements.<sup>112</sup> The United States, unhappy with the WTO, could exercise its right to withdrawal.

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<sup>109</sup> See Nicholas Sakelaris, *WTO scales back economic forecast, pointing to U.S.-China conflict*, UPI (Sept. 27, 2018), [https://www.upi.com/Top\\_News/World-News/2018/09/27/WTO-scales-back-economic-forecast-pointing-to-US-China-conflict/9451538056359/](https://www.upi.com/Top_News/World-News/2018/09/27/WTO-scales-back-economic-forecast-pointing-to-US-China-conflict/9451538056359/) (explaining that United States' tariffs implemented against China, which would have been prohibited under WTO rules, will lead to less economic growth than predicted prior to their implementation).

<sup>110</sup> *Id.*

<sup>111</sup> Marrakesh Agreement, *supra* note 41, at 163.

<sup>112</sup> *Id.* at 163.

However, the treaty does *not* contemplate an instance where a member remains in the WTO with the intention of pursuing the organization's demise. As a result, there is no mechanism to vote to expel a member state.

In the absence of a vote to expel the United States, other WTO members could involve the United Nations' International Court of Justice ("ICJ"). Although this is not necessarily the United Nation's concern, the ICJ's Statute provides:

The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.<sup>113</sup>

As stated in the statute, the ICJ's jurisdiction is compulsory upon parties who consented to the ICJ statute when a dispute falls under the scope of that consent.<sup>114</sup> Article 36 of the ICJ Statute states that the ICJ has compulsory jurisdiction concerning the interpretation of a treaty or determining if a state has breached an international obligation.<sup>115</sup>

The United States' behavior in the WTO poses issues that fall into both categories for establishing the ICJ's compulsory jurisdiction: whether the Marrakesh Agreement allows for the United States' interpretation resulting in deliberate paralysis of the Appellate Body and whether the United States is in breach of an international obligation for doing so. However, the United States does not accept the ICJ's compulsory jurisdiction, so hailing them to court would prove difficult.

Even assuming the United States accepts its jurisdiction, the ICJ cannot enforce its decision.<sup>116</sup> Without enforcement authority, it follows

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<sup>113</sup> Statute of the International Court of Justice, art. 36, ¶ 2.

<sup>114</sup> Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?*, 5 CHINESE J. INT'L L. 29, 29 (2006).

<sup>115</sup> Statute of the International Court of Justice, art. 36, ¶ 2.

<sup>116</sup> *How the Court Works*, INTERNATIONAL COURT OF JUSTICE, (2019), <https://www.icj-cij.org/en/how-the-court-works>.

that a potential ICJ declaration would not likely change the United States tactics. At best, the ICJ would simply be another voice discouraging the United States' behavior.

However, there is some utility in getting the ICJ involved, despite a lack of enforcement authority. An ICJ ruling against the United States may be a catalyst for WTO members to initiate the United States to cease its stalling efforts. Currently, the WTO's limited scope prevents it from ruling on the question of whether the United States' behavior constitutes a breach of its obligations. The WTO's tribunals only determine whether its members are abiding by regulations about tariffs, bilateral treaties, or other trade related issues.<sup>117</sup> An ICJ opinion condemning the United States' behavior as a breach of its international obligations would be the first authoritative declaration of its kind.

Another possible solution is to appease the United States. According to former WTO director-general Pascal Lamy, President Trump's protectionism has offered an opportunity to make reforms to the WTO rules.<sup>118</sup> Lamy believes that the United States 2018 steel and aluminum tariffs violate WTO rules, whereas Chinese subsidies that damage American companies are permissible because of the vagueness of the current WTO rules.<sup>119</sup> Lamy argues that there is a need to change WTO rules to account for China's rapid growth since the last round of rule changes.<sup>120</sup> A call to change the WTO rules would likely please the Trump Administration, and the prospect of the United States' departure from the WTO might spark long overdue amendments to WTO rules.<sup>121</sup> Thus, the United States' tactics may spark important change which would benefit large members like the United States, which in turn may convince the United States to cease its attack on the Appellate Body.

Another option for WTO members remains: they can wait. It may not be as palatable a route in light of the other options previously described but waiting until the United States transitions to an administration that is potentially friendlier to free trade may be the best solution. Under this option, the WTO could continue to create rules in preparation for a rejuvenated Appellate Body. Considering the United States' historical commitment to free trade, as well as the fact that it was a founding member of the GATT and the WTO, it is not unfounded to

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<sup>117</sup> *Id.*

<sup>118</sup> Pascal Lamy, *Trump's protectionism might just save the WTO*, WASH. POST (Nov. 12, 2018, 11:54 AM), [https://www.washingtonpost.com/news/theworldpost/wp/2018/11/12/wto-2/?noredirect=on&utm\\_term=.c828fbc835f0](https://www.washingtonpost.com/news/theworldpost/wp/2018/11/12/wto-2/?noredirect=on&utm_term=.c828fbc835f0).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

suggest that the next American President would recommit America to the WTO.

## VII. CONCLUSION

The United States reaps benefits from the WTO. However, it seems that any advantages the WTO provides to the United States are not sufficient to retain its allegiance. The United States' deliberate attempt to render the Appellate Body impotent has caused its allies and rivals to voice concern. In turn, the United States' behavior has diminished its credibility on the global stage and cost American exporters large sums of money. Ultimately, however, its actions are in violation of a binding international agreement.

If the world hopes to prevent the WTO from becoming ineffective, it must step up and convince the United States to alter its course. States must not forget the benefit of supranational organizations, such as the WTO, which seek to unite the many great nations of this world. The devastation caused by the two World Wars serves as a stark reminder of the importance of global unity. The WTO promotes that unity.