From the Board

The GATTification of the WTO – Regime Change and Thinning Legality in International Trade Relations

1 FROM CRISIS TO REGIME CHANGE: FIVE YEARS WITHOUT THE APPELLATE BODY

The publication of this issue coincides with a grim anniversary for the World Trade Organization (WTO). Together with the thirty-year anniversary of the WTO Agreements entering into force, at the end of 2024 it will have been five years since the organization's 'jewel of the crown', the Appellate Body, became non-operational on 11 December 2019, after the first Trump administration decided to block appointments indefinitely. This block persisted through the Biden administration and has few prospects of change under Trump 2.0. The alternative found by some other WTO Members to maintain compulsory dispute settlement alive – the 2020 *Multiparty Interim Appeal Arbitration Arrangement* (MPIA) – attracted solid participation, but has led to a single appeal arbitration award in four years.[1] Besides a second appeal award, issued under an *ad hoc* agreement to appeal arbitration,[2] the Appellate Body issued three 'post-demise' reports in 2020.[3] This total of five rulings, the last of which is over two years old, contrasts starkly with an average of six Appellate Body reports issued per year in the period 2015–2019.[4]

1 WTO, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU* (30 Apr. 2020), JOB/DSB/1/Add.12. Award of the Arbitrators, *Colombia – Frozen Fries*, 21 Dec. 2022 (WT/DS591/ARB25). Parties are Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Hong Kong (China), Iceland, Japan, Macao (China), Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, the Philippines, Singapore, Switzerland, Ukraine, and Uruguay.

2 Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, 25 Jul. 2022 (WT/DS583/ARB25).

3 Appellate Body Report, *Australia – Tobacco Plain Packaging* (WT/DS435/AB/R, WT/DS311/AB/R), adopted 29 Jun. 2020; Appellate Body Report, *US – Supercalendered Paper* (WT/DS435/AB/R, WT/DS311/AB/R), adopted 25 Mar. 2020; and Appellate Body Report, *Russia – Railway Equipment* (WT/DS499/AB/R), adopted 8 Jan. 2020.

4 www.WorldTradeLaw.net (accessed 23 Oct. 2024).

'From the Board The GATTification of the WTO – Regime Change and Thinning Legality in International Trade Relations'. *Legal Issues of Economic Integration* 51, no. 4 (2024): 305–316.

On the surface, WTO panels continue to function. Indeed, eight new requests for consultations were filed in 2024, which will possibly add to the thirty-eight panel reports issued since 2020. However, of these 38, only eight reports were adopted by the Dispute Settlement Body (DSB).[5] Four other reports enshrined mutually agreed solutions, an outcome only seen seven times between 1995 and 2019.[6] The vast majority of panel reports issued post-demise – 24 of the 38 – were 'appealed into the void'.[7] This means that one of the parties, using its prerogative under the Dispute Settlement Understanding (DSU), appealed from the panel report, putting it 'in limbo', with no finality or legal effects, until the non-operational Appellate Body reviews it one day. In the foreseeable future, appealing panel reports 'into limbo' will remain an option. And, while complainants may still bring disputes before WTO panels, any party dissatisfied with the outcome of the panel process can derail it by appealing it to the non-operational Appellate Body.

Five years later and given the announced priorities of the incoming second Trump presidency, it may be the time to acknowledge that there is no longer a 'crisis' but a regime change at the WTO. The demise of the Appellate Body has coincided with a fundamental change in the role of WTO rules in global trade relations. The 'legalistic' revolution that reshaped the conduct of global trade relations in 1995, when the WTO replaced the 1947 General Agreement on Tariffs and Trade (GATT), has been de facto reversed. It may be going too far to speak of a complete 'de-legalization' of trade relations, since agreements, protocols, procedures and dispute settlement remain available and are regularly used by WTO Members to express, renegotiate, and stabilize new realities in their relations. However, both at the level of dispute resolution and at the level of the renegotiation of relations, the 'thick' legal limitations to self-interested conduct provided by WTO rules in the twenty-five years between 1995 and 2020 have been replaced with a 'thin' role for WTO legality. Indeed, to explain why these developments amount to 'regime change', it is useful to revive the metaphors of 'thick' and 'thin' legality, employed in the initial years of the organization to convey the extent of the changes that the transition from the GATT to the WTO system produced over the conduct of global trade relations.

2 THE CREATION OF THE WTO AS A 'THICKENING OF LEGALITY'

The image of a 'thick' legality to explain the WTO was first used by Celso Lafer, then DSB Chairman, at a lecture given in 1996, at the forty-eighth Session of the

5 *Ibid.*

6 *Ibid.* In 2019, four disputes were settled in this way, all concerning United States steel and aluminium tariffs and the responses thereto, already at a time when the Appellate Body would predictably stop operating.

7 *Ibid.*

International Law Commission in Geneva. Lafer's central argument was that the transition from the GATT to the WTO had resulted in a 'thickening of legality' in international trade relations. Trade negotiators had gone beyond making adjustments to the substantive rules of conduct in the GATT and established a 'rule-oriented mechanism … aimed at "taming" unilateral trends of the "reasons of State", which are power-oriented'. The new WTO dispute settlement system, codified in the DSU, enshrined an agreement by negotiators 'to avoid unilateralism of interpretations and to contain "self-help"'.[8]

In the GATT 1947 era, dispute settlement had a predominantly 'diplomatic dimension', where 'the objective of the dispute settlement mechanism was less to arrive to a legal judgment than to take advantage of the law to overcome diplomatically a trade problem'.[9] At the GATT, parties could request reports on disputes from independent panels. The Contracting Parties, acting by consensus, could adopt these reports as their own. But this required the consent of both disputing parties. Thus, reports were considered not a legal judgment but 'a legal opinion … an advice'.[10] Solutions had to be achieved by decisions arrived at diplomatically, including whether or not to adopt a panel report.

The Uruguay Round Agreements reversed this setting. The GATT was replaced with a fully-fledged international organization, with diplomatic missions, specialized organs, and distinct decision-making procedures. The DSU established compulsory dispute settlement by independent bodies – panels, the Appellate Body, and arbitrators – with delimitated powers, setting out a clear procedure for the settlement of disputes, including disputes over compliance with previous rulings and permissible responses to non-compliance. Most importantly perhaps, the decision-making procedure of the DSB prevented individual WTO Members from blocking the use of dispute settlement and the advance of procedures. The addition of an Appellate Body was part of, and reinforced, a broader movement towards a 'thickened' role for law in the administration of trade relations.

The timing of Lafer's lecture was particularly interesting. The previous month, the DSB had adopted its first dispute settlement report, in *United States – Gasoline*. In a thirty-page report, the Appellate Body had agreed with the complainants that the United States was in violation of its commitments towards Venezuela and Brazil. While recognizing that new US laws fulfilled a legitimate objective (requiring gasoline to be less polluting), the Appellate Body concluded that the regulation implementing this objective unjustifiably discriminated against foreign refineries.[11] On this report,

8 Celso Lafer, *The World Trade Organization Dispute Settlement System*, in *Gilberto Amado Memorial Lectures – Revised and Expanded Second Edition* 241–265, 247 (FUNAG 2012).
9 *Ibid.*, at 254.
10 *Ibid.*, at 252.
11 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996 (WT/DS2/AB/R), at 28–29.

Lafer remarked that 'when compared to reports of panels [it was] clearly a text of a more legal nature and, without leaving the persuasiveness aside, it is closer to the language of a prescriptive document, that is, to the style of a legal judgment'.[12]

During the Uruguay Round that led to the establishment of the WTO, the United States had been the key proponent of making WTO rules enforceable. Politically and economically, it was perhaps at the peak of its global hegemony – its 'unipolar moment'.[13] There was therefore great anticipation surrounding the US reaction to this first report, in which it was the condemned party. At the DSB meeting where the report was considered, the US representative seemed buoyant:

> This first appeal had vindicated the decision of the negotiators to establish an Appellate Body composed of eminent persons who were experts in GATT and international law. The panel's findings and conclusions had a number of significant flaws. The Appellate Body had demonstrated its willingness to thoroughly review and correct panel reports, and ensure that mistakes in legal reasoning were not perpetuated. This could only strengthen the WTO system and reinforce confidence in the quality of its dispute settlement mechanism.[14]

While, under the new regime, the parties were no longer required to accept a report for it to be adopted, opposition by the United States at this crucial stage might have significantly hampered the authority of the new dispute settlement system and its ability to turn the 'thick' legality enshrined in the DSU into an actual preeminence in the interpretation of WTO rules. The US representative was reassuring: '[t]he sophistication of the Appellate Body's approach to treaty interpretation was an example of the high quality of its analysis and drafting. This was how dispute settlement should work'.[15]

3 A THINNING LEGALITY 1: THE END OF COMPULSORY DISPUTE SETTLEMENT

As is now well known, the US's positive attitude towards adjudication and the Appellate Body would soon wane. There were always US critics of the very idea of addressing trade disputes through adjudication. But criticisms started to mount when, in the early 2000s, the Appellate Body issued findings on trade remedies – safeguards and anti-dumping – that made these remedies far more difficult to apply lawfully.[16] A group of US practitioners, writing in 2003, enjoined the United States government 'to ensure strong trade [remedy] laws remain available for domestic

12 Lafer, *supra* n. 8, at 258.
13 Charles Krauthammer, 'The Unipolar Moment' (1990) 70 Foreign Affairs 23.
14 *Ibid*.
15 WTO, *Minutes of the DSB Meeting of 20 May 1996* (WT/DSB/M/17), at 2.
16 *See* e.g., Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 World Trade Rev. 261 (2003); Roger P. Alford, *Reflections on US – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 Columbia J. Transn'l L. 196 (2006).

industries' and predicted, ominously, that '[f]ailure in this area will undermine the ability to move an aggressive agenda in other areas'.[17]

Over the years, not only did the WTO fail to produce any new grand bargain on trade liberalization, but certain points of Appellate Body jurisprudence created a growing list of US grievances towards the institution. This was not helped by a perceived increasing assertiveness of the Appellate Body, which became particularly acute, again, in the field of trade remedies.

In the 'zeroing' saga, the Appellate Body disagreed with a number of panels and found that the practice of 'zeroing' in anti-dumping calculations, used by the United States and the European Union, was WTO-inconsistent.[18] Then, the panel in *US – Stainless Steel (Mexico)* 'felt compelled to depart from the Appellate Body's approach' on zeroing.[19] On appeal, the Appellate Body went beyond reversing this panel's findings. It concluded that the DSU established a 'hierarchical structure', according special status to 'well-established Appellate Body jurisprudence' – a term carrying precisely the judicial undertones that the DSU goes to great lengths to avoid – and stating that panels must provide 'cogent reasons' to depart from interpretations issued by the Appellate Body.[20] In a subsequent dispute on the same matter, *US – Continued Zeroing*, one Appellate Body member stated in an individual opinion that, once the Appellate Body had 'spoken definitively' on an issue matter, its conclusions 'must prevail'.[21]

The growing US dissatisfaction with the Appellate Body''s interpretations and perception of its role eventually resulted in the unprecedented decision, by the Obama administration, to block the re-appointment of an Appellate Body member in 2016, on grounds that 'WTO Members could not have confidence in a system where WTO adjudicators overstepped the boundaries agreed by WTO Members in the DSU and the WTO Agreement' and that this particular member 'had not been willing to adhere to the proper role of the Appellate Body'.[22] Once Donald Trump was in office, the US resorted to an all-out blocking of appointments – until, on 11 December 2019, the Appellate Body became non-operational, reduced to a single member, and then, on 20 November 2020, to none.

As the Biden administration draws to a close and the prospect of a second Trump presidency materializes, the United States' opposition to recomposing the Appellate Body remains unabated. At the June 2024 meeting of the DSB, the US representative stated that the 'longstanding concerns' expressed by the US Trade Representative when

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17 Terrence P. Stewart, Amy S. Dwyer & Marta M. Prado, *Antidumping, Countervailing Duties and Trade Remedies: Let's Make a Deal – Views from a Domestic Practitioner*, 37(3) Int'l Law. (ABA) 761, 770 (2003).

18 Thomas J. Prusa & Edwin Vermulst, *United States – Continued Existence and Application of Zeroing Methodology: the end of Zeroing?*, 10 World Trade Rev. 45, 55 (2011).

19 Panel Report, *US – Stainless Steel (Mexico)* (WT/DS344/R), para. 7.106.

20 Appellate Body Report, *US – Stainless Steel (Mexico)* (WT/DS344/AB/R), paras 304–313.

21 *Ibid.,* paras 304–313.

22 Minutes of DSB Meeting, 23 May 2016 (WT/DSB/M/379), para. 6.7.

it announced it would not agree to recompose the Appellate Body 'remained unaddressed', adding that 'calls for the restoration of the Appellate Body undermined … collective efforts for reform'.[23] The US representative recalled a report issued by the United States Trade Representative (USTR) in 2020, under USTR Robert Lighthizer, laying down reasons for the US decision no longer to support appointments and concluding: '[t]he conduct of the Appellate Body has converted the WTO from a forum for discussion and negotiation into a forum for litigation'.[24] Although Members can still bring complaints before WTO panels, without the Appellate Body a complainant can no longer unilaterally obtain a WTO ruling supporting its claims: as in the GATT era, a multilateral interpretation that diverges from a respondent's own view of its obligations now depends on the respondent consenting to such a solution.

4 A THINNING LEGALITY 2: TRADE WARS AND TRADE DEALS

The thinning role played by WTO law in global trade relations can be traced back to the year before the Appellate Body became non-operational. In 2018, the United States initiated two parallel 'trade wars', one affecting all US trade partners, the other targeted at China. First, the US Secretary of Commerce declared that importing steel and aluminium was 'threaten[ing] to impair' US national security.[25] On this basis, President Trump ordered the imposition of additional tariffs of 25% on all steel imports and 10% on all aluminium imports – unless exporting countries agreed to limit their exports of these products to the United States.[26] Second, the US imposed 25% tariffs on Chinese products across a variety of sectors, with an annual value of thirty-four billion US dollars, alleging that these tariffs were a response to Chinese 'acts, policies, and practices … related to technology transfer, intellectual property, and innovation'.[27]

When questioned about these measures at the WTO, the United States declared that they were not subject to WTO law constraints. As regards the tariffs on steel and aluminium, the US asserted that '[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement'.[28] With

23 Minutes of DSB Meeting, 24 Jun. 2024 (WT/DSB/M/491), para. 5.3.
24 Office of the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* i (Feb. 2020) ('Introduction').
25 US Department of Commerce, *The Effects of Imports of Steel on the National Security* 55 (11 Jan. 2018); US Department of Commerce, *The Effects of Imports of Aluminum on the National Security* 104 (17 Jan. 2018).
26 US Customs and Border Control, *Section 232 Tariffs on Aluminum and Steel, U.S Customs and Border Protection* (21 Sep. 2018).
27 USTR, *Notice of Determination 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(67) Fed. Reg. 14906 (6 Apr. 2018); USTR, *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(119) Fed. Reg. 28711 (30 Jun. 2018).
28 Communication from the United States, *US – Steel and Aluminium Products (China)* (WT/DS544/2).

regard to the China-specific tariffs, the US representative declared before the DSB that they were 'steps to address harmful, trade distorting policies not directly covered by WTO rules'.[29] Before the General Council, the US ambassador argued that WTO law could not be 'a shield protecting those Members that choose to adopt policies that can be shown to undermine the fairness and balance of the international trading system'.[30]

With regards to the tariffs on steel and aluminium, other Members found a way to respond allegedly within the bounds of WTO law. Nine Members challenged US tariffs through formal disputes: Canada, China, India, the European Union, Mexico, Norway, Russia, Switzerland and Turkey.[31] Besides bringing WTO disputes, six complainants (China, Canada, the European Union, Mexico, Turkey, and Russia) responded with tariff of their own. Some resorted to a provision in the Agreement on Safeguards that allows the adoption of 'rebalancing' measures, imposing their own extra-schedule tariffs on United States products.[32] To do this, these Members disregarded the US's stated justification for its tariffs (protecting essential security interests under GATT Article XXI) and treated these tariffs as atypical safeguards.[33] This allowed them to respond to US tariffs with counter-tariffs of their own, while claiming to remain within the bounds of WTO law. Panel reports, issued in 2020, found both the US tariffs and the unilateral responses to these measures to be violations of WTO law.[34] All were appealed into the void. The tariffs remain in force for those Members that did not get into deals with the United States to limit exports.

China also challenged the China-specific tariffs through WTO dispute settlement. The panel report in *US – Tariff Measures (China)*, finding the tariffs unwarranted in late 2020, was equally appealed into the void.[35] At the same time, China did not wait for this panel report. Mirroring the United States' disregard for WTO procedures, China retaliated immediately, imposing 25% tariffs on imports from the US, in an equivalent value as the one affected by the US's tariffs.[36] This was done in violation of

29 Statements by the United States at the Meeting of the WTO Dispute Settlement Body (27 Apr. 2018).

30 US Ambassador Dennis Shea, *Statement at the WTO General Council* (8 May 2018), https://geneva.usmission.gov/2018/05/16/ambassador-dennis-sheas-statement-at-the-wto-general-council/.

31 Request for Consultations, *US – Tariff Measures (China)*, 5 Apr. 2018 (WT/DS543/1).

32 Agreement on Safeguards, Art. 8(2). *See* the requests for consultations in *Canada/China/European Union/Mexico/Turkey/Russia – Additional Duties on Certain Products from the United States* (WT/DS557; WT/DS558; WT/DS559; WT/DS/560; WT/DS561; DS566).

33 Article 8(2) of the Agreement on Safeguards permits Members affected by safeguards to suspend 'the application of substantially equivalent concessions' towards the Member applying the safeguards.

34 Panel Report, *US – Steel and Aluminium Products (China)* (WT/DS544/R), issued 9 Dec. 2022 (under appeal); Panel Report, *US – Steel and Aluminium Products (Norway)* (WT/DS552/R), issued 9 Dec. 2022 (under appeal); Panel Report, *US – Steel and Aluminium Products (Switzerland)* (WT/DS556/R), issued 9 Dec. 2022 (under appeal); Panel Report, *US – Steel and Aluminium Products (Turkey)* (WT/DS564/R), issued 9 Dec. 2022 (under appeal). Two panels on the purported trade retaliations issued reports: Panel Report, *Turkey – Additional Duties (US)* (WT/DS561/R), 19 Dec. 2023 (under appeal); Panel Report, *China – Additional Duties (US)* (WT/DS558/R), 16 Aug. 2023 (under appeal).

35 Panel Report, *US – Tariff Measures (China)* (DS543), issued 15 Sep. 2020 (under appeal).

36 Chad P. Bown, *The US–China Trade War and Phase One Agreement*, 43 J. Pol'y Modeling 805, 814 (2021).

the WTO duty not to retaliate unilaterally.[37] China's statement announcing the imposition of these tariffs referred to a 'trade war'.[38] To counter China's response, the United States applied new tariffs, to which China again responded, leading to escalation of the dispute over the subsequent month.[39] This eventually led to a bilateral 'Phase One' agreement, in which China agreed to specific purchases of US products – which apparently did not materialize.[40] The extra-WTO bilateral tariffs remain in force and have, in fact, been somewhat increased during the Biden administration – including, in 2024, an 100% tariff increase on Chinese electric vehicles.[41]

Significantly, Biden's announcement of new tariffs coincided with Canada's imposition of its own tariffs on Chinese products: 100% on electric vehicles and 25% on steel and aluminium, essentially copying those imposed by the United States.[42] Canada's position in the trade wars thus shifted in 2024, from taking part in the coalition seeking to preserve the relevance of WTO law and counter the United States' unilateral moves to taking the US's side. Its actions were particularly significant due to the absence of legal justification: no attempt was made to couch the extra-WTO tariffs in the language of trade remedies or national security measures.

In addition to tariff increases, WTO Members – again, led by the United States – increasingly resort to bilateral 'deals' to govern trade relations, sometimes without even the attempt to classify these deals under WTO rules. Examples include, besides the US-China 'Phase One' agreement, the 2019 'Trade Agreement' between the United States and Japan, featuring reciprocal preferential access almost exclusively for agricultural trade.[43] In both cases, the process for settling disputes does not involve an adjudicator at all, but merely reciprocal non-performance – i.e., retaliation – on the basis of unilateral assessments of breach. The resolution of the US-EU dispute on steel and aluminium was similarly *ad hoc*. It foresaw the creation of a multilateral gathering to 'address … global non-market excess capacity as well as the carbon intensity of the industries',[44] while providing the EU with quotas to export steel to the US without incurring the US tariffs.[45]

37 *See* DSU, Art. 23(2)(c).

38 Request for Consultations by China, *United States – Tariff Measures on Certain Goods from China*, 5 Apr. 2018 (WT/DS543/1).

39 *See* Bown, *supra* n. 36, at 815–816.

40 Chad P. Bown, *China Bought None of the Extra $200billion of US Exports in Trump's Trade Deal*, PIIE Educational Resources (19 Jul. 2022).

41 Ana Swanson & Jordyn Holman, *Biden Administration Ratchets Up Tariffs on Chinese Goods*, New York Times (13 Sep. 2024).

42 Canada, Customs Notice 24–32: China Surtax Order (2024), 3 Oct. 2024; Customs Notice 24–36: China Surtax Order (2024) – Steel and Aluminium (18 Oct. 2024).

43 *Trade Agreement Between the United States of America and Japan* (7 Oct. 2019).

44 US-EU Joint Statement, *Steel & Aluminum* (31 Oct. 2021).

45 US International Trade Commission, *U.S.-EU Joint Statement Modifies U.S. Section 232 Steel and Aluminum Tariffs, Lifts EU Retaliatory Tariffs, and Announces Negotiations of a First-ever Carbon-based Sectoral Arrangement*, Executive Briefings on Trade (Jan. 2022).

These developments suggest a *de facto* regime change affecting global trade relations. Though it may be going too far to say that the trade regime has been wholly de-legalized, the role of WTO rules has been significantly downgraded. Every indication given by Donald Trump in his campaign for a new presidency suggests an intensification and expansion of the United States' current policies. WTO Members may continue to resort to WTO dispute settlement to challenge the lawfulness of other Members' measures, and negotiations may continue to take place at the WTO, in attempts to settle disputes and agree to new rules. Regional trade agreements may continue to be signed and ratified. Indeed, many new agreements are establishing innovative rules, in areas such as digital trade and labour and environmental standards, in which WTO rules historically provide little detail.

At the same time, the former pronounced role of WTO law in constraining state conduct has shrunk significantly – certainly as far as relations with the United States are concerned – and legal consideratons are increasingly largely replaced with pure strategic, power-based considerations. Referring issues to dispute settlement in the absence of an assured final ruling is not the same as doing so with the certainty that a WTO dispute settlement report will be issued, which can be followed by WTO-authorized retaliation in case of non-compliance. Finally, the multiplication of' deals' that are ostensibly at odds with WTO commitments, and sometimes entirely unburdened by them, indicates that the purchase of WTO rules will remain reduced, at least in relations between the largest economies, as long as the new, *de facto* WTO regime remains in place.

5 A GATTIFIED WTO: WHERE DO WE GO FROM HERE?

In 1996, Lafer recalled that 'the asset of the WTO is not its resources – as is the case of the World Bank and, to a certain extent, of the IMF. The asset of the WTO is its credibility, and the acceptance and the observance of its rules'.[46] The original WTO regime was based on the understanding that multilateral trade relations would be grounded in WTO rules, bilateral relations would be limited by these rules, and disputes would be addressed following the procedures provided by these same rules. And, in fact, for over twenty years, bilateral agreements and understandings were largely grounded in WTO rules; and retaliation (or at least trade retaliation among key Members) was limited by, and conditional upon, following the WTO process.

These commitments aimed at changing the increasingly conflictive trade regime of the late 1980s. In the later years of the GATT 1947, GATT rules

[46] Lafer, *supra* n. 1, at 247 (attributing the remark to Peter Sutherland, the first WTO Director-General).

were stretched significantly. Many GATT panel reports were blocked by dissatisfied respondents, and *ad hoc* political instruments and solutions were the crucial elements in settling disputes. GATT parties (in particular, the United States) would deploy trade retaliation unilaterally, without going through a legal assessment by GATT panels. And disputes were often resolved through so-called 'grey area' measures, such as voluntary export restraints, which contradicted the objectives of the regime but were grounded in the consent of states or their companies. As Lafer noted in 1996, the GATT system relied on a 'blend of legal and diplomatic strategies', with 'power-oriented' results often prevailing over 'rule-oriented' outcomes.[47]

It was perhaps predictable that dismantling the Appellate Body would, to a significant extent, result in a return to this power-oriented regime. In a 2017 interview, USTR Robert Lighthizer stated that the administration 'prefer[red] bilateral trade agreements to the plurilateral and multilateral trade agreements. The working assumption is that if you have an $18 trillion economy, you can do better negotiating individually'. He also outlined US grievances regarding the Appellate Body and the significance acquired by WTO dispute settlement more broadly, longing for the time 'before 1995, before the WTO, under the GATT, [when] there was a system where you would bring panels and then you would have a negotiation'.[48]

This appears to be the case once more. Unlike the WTO of the late 1990s to mid-2010s – when its rules significantly constrained state conduct – WTO law now seems to have reverted to the more limited role that GATT law played in the 1980s. The rules continue to offer guidelines to reduce friction, provide a framework for negotiations of new agreements and renegotiations of unsatisfactory ones, and permit consensual settlement of disputes. At the same time, when politically salient disputes arise or particularly important sectors and issues are involved, the legal constraints posed by the WTO Agreements seem, at best, of secondary importance. Members are increasingly willing to disregard the multilateral legal framework and adopt power-oriented *ad hoc* responses, addressing matters through retaliation, bilateral negotiations, and 'deals' that may or may not conform to WTO rules. Without any formal amendments to the WTO Agreements, the organization has, in effect, been GATTified.

Is there a silver lining to this downgrading of the Uruguay Round's legalization of trade relations? One key feature of trade relations—perhaps more so than any other area of international relations—is the permanent prospect of reciprocity.

[47] Robert Hudec, *The GATT Legal System And World Trade Diplomacy* vi (Butterworth 1990).
[48] Robert Lighthizer, *U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative*, Center for Strategic & International Studies (18 Sep. 2017), https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative (accessed 28 Oct. 2024).

Legalized interaction, through established rules and procedures, offers an alternative to disorderly trade wars, where parties pursue their interests through disruptive measures, hoping to inflict more harm on their opponents than they suffer themselves. The turbulent disputes and renegotiations of the 1980s, marked by mutually harmful policies and low predictability, eventually led to the creation of the WTO. The WTO Agreements did not merely codify long-standing demands by GATT parties for new substantive rules, on textile protection, agricultural subsidies, trade remedies, and intellectual property. They also introduced a fundamental shift: an agreement to renounce unilateral actions and self-help measures in pursuit of economic interests, in favour of a legally structured framework for interaction. The shift away from legalization is a step back from this renunciation. But experiencing prolonged trade wars in practice may ultimately bring WTO members back to where they were at the end of the 1980s: searching for a way to avoid escalating trade conflicts and commit once again to a legally ordered, rules-based regime.

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