

LETTING TIME SERVE YOU: BOOT CAMPS AND ALTERNATIVE SENTENCING FOR FEMALE OFFENDERS

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Abstract

Across multiple American presidential administrations, the United States has made its discontent with the dispute resolution bodies of the World Trade Organization known. The actions of the United States initiated a crisis of confidence in the World Trade Organization. This Note examines that crisis and posits what comes next for the World Trade Organization and the resolution of international trade disputes in general.

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I.	INTRODUCTION: WHAT IS THE WTO? HOW DOES IT FUNCTION AND WHY IS IT IMPORTANT?	

The World Trade Organization (WTO) is an international organization that seeks to promote free trade and eliminate trade barriers across the world.¹ The organization was created in 1994 by the Marrakesh Agreement, and it has been one of the most influential and powerful international organizations in the past three decades.² As of today, the WTO has 164 members, representing over 98% of global trade.³

The WTO's power mainly comes from three relatively unique designs of its structure: First, the WTO uses a single-undertaking approach. Members cannot agree to just part of the agreement, they must agree to the agreement or annex entirely for the agreement and annex to take effect.⁴ Second, the establishment of the Dispute Settlement Body (DSB) with a permanent Appellate Body brought consistency and expertise to the interpretation of the General Agreement on Tariffs and Trade (GATT), the governing law of the WTO.⁵ Third, the WTO adopted a reverse-consensus rule on the decision issued by the DSB, this means unless all WTO members choose to *reject* the report (including the winning party), the report by either the Panel or the Appellate Body would be adopted, thus becoming binding.⁶ The design gave the DSB and the Appellate Body a considerable amount of authority, and the Appellate Body is consistently referred to as the “jewel in the crown” for its importance in the DSB.⁷

The Appellate Body consists of seven members, and each member serves a four-year term, with the possibility of reappointment for another term. Each member must be a “person[] of recognized authority, with

1. Overview, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm [https://perma.cc/KB4M-A953]

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Cosette D. Creamer, *From the WTO's Crown Jewel To Its Crown Of Thorns*, 113 AM. J. INT'L L. UNBOUND 51, 51 (2019); Imogen Saunders, *Populism, Backlash and the Ongoing Use of the World Trade Organization Dispute Settlement System: State Responses to the Appellate Body Crisis*, 35 MD. J. INT'L L. 172, 172 (2020).

demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally.”⁸

II. THE DISPUTE SETTLEMENT PROCESS

The Dispute Settlement Process can be summarized into three steps, starting with formal consultation requested by any member against another member.

1. Consultation

The Party requesting consultation is labeled as the complaining party or the complainer, and the party responding is labeled as the respondent. Any member of WTO can bring a case against another party, even if the complainer’s interest was not harmed. The consultation period lasts sixty days, and in this period, parties would try to negotiate to reach a positive resolution.⁹

2. Panel

If the dispute cannot be resolved over the consultation period, the complaining party can submit a request in writing for a dispute Panel, the Panel, normally composed of three people, will effectively act as the judge of this dispute. (WTO dispute Panel is not a standing body; it would only be created when needed)¹⁰

- a. Written Submission and Oral Arguments by parties.
- b. Issuance of an interim report.
- c. Parties can submit written comments on the interim report.
- d. Issuance of the final report

3. Appellate Body

After the Panel issued its final report, the parties may choose to appeal. The WTO Appellate Body will hear the appeal. The Appellate Body is a standing body with seven members, serving four-year terms with the option to be reappointed one time. The Appellate Body’s decision is final, but it lacks remand authority, so if it decides it lacks the necessary fact to conclude, it will simply state it is “unable to complete legal analysis”, and the case ends there.¹¹

8. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 17, 1867 U.N.T.S. 3 (1995).

9. *Id.* at 17.2.

10. *Id.* at 17.3.

11. Saunders, *supra* note 7, at 172; Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 17, 1867 U.N.T.S. 3 (1995).

III. CURRENT CRISIS

A. *Historical Problem with the DSB and the Appellate Body*

Over the past two decades, members have had problems and complaints about the DSB and the Appellate Body, for example, the Panel and the Appellate Body's significant delay in the delivery of the rulings,¹² and disagreement with the legal reasoning of individual rulings.¹³ However, the DSB and the Appellate Body have been fairly successful in adjudicating disputes between members, the compliance rate of the DSB ruling has been high at about 90% as of 2017,¹⁴ and countries have rarely challenged the overall authority and legitimacy of the DSB.¹⁵

B. *The Unprecedented Challenge*

The real challenge and crisis started in 2016 with the Obama Administration blocking two appointments of Appellate Body judges,¹⁶ and this marked the first time the United States blocked the appointment of a *foreign* Appellate Body judge.¹⁷ The Trump Administration pushed this to an extreme. Starting in June 2017, the United States has adopted a policy to deliberately block the appointment and reappointment of Appellate Body judges.¹⁸ At midnight of December 10, 2019, the Appellate Body was completely paralyzed as it finally fell below the mandatory number of judges to adjudicate any appeal,¹⁹ and the fall of the Appellate Body marked the incapacitation of the entire DSB,²⁰ as the DSB lost the ability to issue binding rulings and reports that were almost impossible to reject due to the reverse-consensus model. A member can simply appeal an unfavorable Panel ruling into "limbo," as the paralyzed Appellate Body cannot hear the case.²¹ Members could of course agree with each other to not appeal the ruling of a panel, however, neither the WTO nor any member could compel others to act this way.²² Indeed, as multiple commentators pointed out, the DSB and the Appellate Body are facing "unprecedented challenges."²³

12. Saunders, *supra* note 7, at 173.

13. Creamer, *supra* note 7, at 52–53.

14. *Dispute settlement*, WORLD TRADE ORG., https://www.Wto.Org/English/TheWto_E/Minist_E/Mc11_E/Briefing_Notes_E/Bfdispu_E.Htm [<https://perma.cc/645G-TSNQ>].

15. See Creamer, *supra* note 7, at 52–53.

16. Saunders, *supra* note 7, at 175.

17. *Id.*

18. *Id.*

19. *Id.* at 176.

20. *Id.* at 174.

21. *Id.* at 182.

22. *Id.* at 174.

23. Creamer, *supra* note 7, at 51; Saunders, *supra* note 7, at 174.

IV. U.S. ALLEGATION

Starting in the Obama Administration, the United States showed its impatience and disapproval of the DSB and the Appellate Body by blocking the appointment of two Appellate Body judges.²⁴ After the Appellate Body ruled against the United States regarding its interpretation of “zeroing” in its antidumping duty and subsidies to State-Owned Enterprise in a countervailing duty,²⁵ the United States decided to attack the system by issuing a series of statements accusing the Appellate Body of engaging in inappropriate behavior.²⁶ In February 2020, the United States Trade Representative (USTR) issued a lengthy report on the issue and the accusation can be summarized into three major ones:

The *Report* levels three major charges: (1) the Appellate Body ignores or violates numerous procedural rules and deadlines in dispute settlement; (2) the Appellate Body engages in “making law,” issuing rulings that are not to be found in the body of WTO agreements; and (3) the Appellate Body has issued numerous rulings invalidating U.S. domestic trade remedy laws that are essential to U.S. interests. The *Report* contends that the Appellate Body was never intended to serve as a supreme court of international trade, and that, under the Agreement Establishing the WTO, Article IX.2, only the Ministerial Conference and the General Council may adopt interpretations of WTO agreements.²⁷

This allegation has received bipartisan support,²⁸ and the United States has generally taken a negative view of the entire WTO DSB over the past few years.²⁹ In a joint letter to Katherine Tai, the USTR of the Biden Administration, three Senators, Marco Rubio, Tom Cotton, and Chuck Grassley stated that:

The United States has blocked new members to the appellate body since 2011, when the Obama Administration blocked an appointment, citing the WTO’s failure to protect American interests. The Trump Administration followed this tradition. This rare bipartisan agreement was the result of a clear and consistent pattern of the WTO intentionally undermining American sovereignty while enriching the

24. See Saunders, *supra* note 7, at 175.

25. Thomas J. Schoenbaum, *The Biden Administration’s Trade Policy: Promise and Reality*, 24 GER. L.J. 102, 115 (2023).

26. *Id.*

27. *Id.*

28. See *id.* at 115; Saunders, *supra* note 7, at 186; José E. Alvarez, *Biden’s International Law Restoration*, 53 N.Y.U. J. INT’L L. & POL. 523, 542 (2021).

29. *Id.*

Chinese Communist Party (CCP). Restoring the Appellate Body would only harm the United States and give international bureaucrats and members of the CCP more influence over U.S. trade policy.”³⁰

V. U.S. MOTIVE

A. *Concerns of Judicial Activism by an Overpowered Appellate Body*

So exactly how did the United States get to such an extreme and unprecedented position on the organization that it once created and led? The concerns and objections leading to the final outbreak have long been identified by members: due to the complexity of the GATT and WTO, members often found themselves failing to collectively govern the organization,³¹ Under the traditional separation of power setting, the judiciary is subject to the constraint of legislative veto and overriding. The legislature could use legislation to fix any judicial interpretation with unintended or undesired consequences.³² This safety net not only constrains the judiciary from judicial activism but also increases the legitimacy and members’ trust in the judiciary.

Even though the WTO does have such mechanisms, due to the single-undertaking approach discussed above, it is extremely difficult to pass any amendments and new agreements to correct unintended judicial interpretation.³³ Ever since the 1994 Uruguay Round, which established the WTO, there has been no successful negotiation for the past three decades. The last attempt was the Doha Round, which started in 2001 and lasted an incredible fourteen years, yet no consensus was reached, and the negotiation essentially failed.³⁴ This reality gave the Appellate Body tremendous, even concerning power to interpret and apply the governing law. Even though previous interpretations are not binding precedents in DSB, both the Panel and the Appellate Body would usually follow their previous reasoning.³⁵

This setting, while concerning, is a “necessary evil,” given the difficulty to pass new amendments and agreements, the Appellate Body must fill the gap, clear any ambiguity, and accommodate unforeseen

30. Letter from Tom Cotton, U.S. Senator; Charles Grassley, U.S. Senator; and Marco Rubio, U.S. Senator; to Katherine Tai, United States Trade Representative (Aug. 29, 2022), https://www.grassley.senate.gov/imo/media/doc/grassley_cotton_rubio_to_ustr_-_wto.pdf [<https://perma.cc/V2PT-VT5U>].

31. Creamer, *supra* note 7, at 52.

32. *Id.* at 53.

33. *Id.*

34. Michael Forman, *We Are at the End of the Line on the Doha Round of Trade Talks*, FIN. TIMES (Dec. 13, 2015), <http://www.ft.com/cms/s/0/4ccf5356-9eaa-11e5-8ce1-f6219b685d74.html> [<https://perma.cc/9SR4-W3SG>]; Schoenbaum, *supra* note 25, at 115.

35. Saunders, *supra* note 7, at 173.

developments of the modern world.³⁶ WTO members also recognized both sides of the controversy, and as discussed above, they rarely challenge the overall legitimacy of the system.³⁷

B. *Reform or Destruction?*

Then why, suddenly, did the United States take such an extreme approach when the problems with the Appellate Body have long been identified and debated? One explanation, as some commentators argued, could be the frustration has built up to the point where the United States just cannot stand it anymore, and decided to take this extreme approach to force some changes in the system,³⁸ however, this explanation is not convincing, a more convincing argument would be the Trump Administration acted in a such extreme way to achieve its political agenda for the following reasons:

First, the Trump Administration's attacks were not limited to the DSB and the Appellate Body, even though the Trade War with China caught the most attention internationally, the Trump Administration launched an unprecedented attack on international trade by imposing a tariff on not just China but a lot of its allies including EC, South Korea, Japan, and Canada under The Trade Expansion Act Section 232.³⁹ The "America First" and Protectionism policy is exactly contrary to the very fundamental objective of WTO.

Second, instead of reforming the system, the Trump Administration simply killed it.⁴⁰ The Trump Administration never presented the DSB with any conditions for removing its block of Appellate Body appointment, nor did it cooperate with any of the members to change the system.⁴¹ A lot of scholars and commentators argued that the United States is simply not interested in reforming the system, but in completely incapacitating it.⁴²

Indeed, Skepticism of the true U.S. motive was very common, scholars and commentators repetitively argued that the unprecedented challenge upon DSB and the Appellate Body was caused by the political motive to strengthen the Protectionism policy rather than reforming the Appellate Body and strengthening globalization and international trade.⁴³

36. Creamer, *supra* note 7, at 53.

37. *Id.*

38. *Id.* at 55.

39. Kristen Hopewell, *Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 AM. J. INT'L L. UNBOUND 58, 60 (2022).

40. Rachel Brewster, *Analyzing the Trump Administration's International Trade Strategy*, 42 FORDHAM INT'L L.J. 1419, 1426 (2019).

41. *Id.*

42. Saunders, *supra* note 7, at 181; Brewster, *supra* note 40, at 1426; Creamer, *supra* note 7, at 55; Alvarez, *supra* note 28, at 544.

43. See sources cited *supra* note 42.

C. *The Disappointment of the Biden Administration*

After President Biden assumed office in 2021, the hope was that the Biden Administration would quickly reverse the Trump Administration's Protectionism and restore international trade, and propose a solution to the current Appellate Body Crisis,⁴⁴ as Biden committed to multilateralism and international cooperation during his campaign.⁴⁵

However, people with this hope were quickly disappointed by the Biden Administration. Even though the Biden Administration reversed some of the Trump Administration's foreign policy like its position on climate change, the Trump Administration's trade policy, tariff, and position on WTO DSB and Appellate Body were almost untouched by the Biden Administration.⁴⁶

Instead, the Biden Administration implicitly approved the Trump Administration's trade policy. The Biden Administration "lavishly appraised USMCA,"⁴⁷ Kathrine Tai, The Biden Administration's USTR, called USMCA a "premier bipartisan accomplishment."⁴⁸ The USMCA is the replacement for NAFTA, and it was negotiated by the Trump Administration to help American businesses and to achieve the "America First" agenda.⁴⁹ The Biden Administration is also not interested in Free Trade Agreement negotiation, as Biden announced in one of the interviews after he was elected as president, he is "not going to enter any new trade agreement until we have made major investments here at home and in our workers."⁵⁰

Furthermore, the Biden Administration's "Buy American" policy is simply a more emphasized "America First" on trade and protectionism.⁵¹ "Buy American" starts with the order that federal government entities purchase American products.⁵² The Buy American Act (BAA) generally requires federal entities to purchase articles manufactured in the United States unless the head of the department determines that their cost is unreasonable. The BAA outlined various tests to determine the origin of a product. One of the most important tests applied to manufactured

44. Alvarez, *supra* note 28, at 544; Hopewell, *supra* note 39, at 60.

45. Alvarez, *supra* note 28, at 544; Hopewell, *supra* note 39, at 60.

46. Schoenbaum, *supra* note 25, at 104.

47. *Id.* at 116.

48. *Remarks of Ambassador Katherine Tai Opening the First USMCA Free Trade Commission*, OFF. OF THE U.S. TRADE REPRESENTATIVE (May 18, 2021), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/may/remarks-ambassador-katherine-tai-opening-first-usmca-free-trade-commission> [<https://perma.cc/ZG32-UMYJ>].

49. Schoenbaum, *supra* note 25, at 116.

50. Thomas J. Schoenbaum, *Bidenomics Versus Maganomics on Trade Law: Pick Your Poison*, WASH. INT'L TRADE J. (Mar. 31, 2024), <https://www.wita.org/atp-research/bidenomics-maganomics/> [<https://perma.cc/T976-V38A>].

51. Schoenbaum, *supra* note 25, at 107, 124.

52. *See* Exec. Order No. 14005, 86 Fed. Reg. 7475 (Jan. 25, 2021).

products is the domestic content test. The domestic content test states that for a manufactured product to be considered of American origin, the product must be manufactured in the U.S. and the cost of its components mined, produced, or manufactured in the U.S. must exceed 50% of the cost of all its components.⁵³ Biden issued an executive order increasing the domestic content requirement from 50% to 75% , and still higher minimums are applied to iron and steel end products. The executive order also increases the price preferences for domestic end products and construction materials. If a domestic end-product is not the lowest price for a government contract, a factor of 20 to 30% must be added to the price of the foreign low offer to evaluate the relative competitiveness of the offers.⁵⁴

The Biden Administration's "Buy American" policy is a key aspect of a new American industrial policy enacted by Congress in the form of four laws that subsidize key sectors of the U.S. economy. The American Rescue Plan Act (2021), the Infrastructure and Jobs Act (2021), the Inflation Reduction Act (2022), and the Chips Act (2022) provided a total of about \$1.87 trillion in subsidies to various sectors. These laws coupled with new "Buy American" standards constitute a venture into protectionism and away from free trade ideals.

The failure to restore international trade order by the Biden Administration is certainly contrary to a lot of people's anticipation.⁵⁵ This somewhat surprising outcome can be understood by the Biden Administration's political priority during this unique time. So far, COVID-19 pandemic covered the entire term of the Biden Administration, the economic crisis caused by the pandemic is disastrous, to say the least. Under a difficult economic environment, countries tend to shrink into protectionism to appease worried and angry voters. Free trade promotes overall economic efficiency with dispersed benefits to the public, making it hardly noticeable. In contrast, protectionism concentrates the benefit on specific groups at the cost of all consumers, giving the political leader a strong incentive to utilize it to appease a group of beneficiaries.

VI. OTHER COUNTRIES' RESPONSE

A. *Objection and Disapproval of the United States Approach*

As discussed above, a lot of WTO members shared the same concerns for a long time,⁵⁶ and a lot of them have issued public statements to

53. 48 C.F.R. § 25.101(a) (2023).

54. Federal Acquisition Regulation, 87 Fed. Reg. 12780, 12791 (Mar. 4, 2022) (to be codified at 48 C.F.R. pt. 1).

55. See generally Alvarez, *supra* note 28, at 523.

56. See Saunders, *supra* note 7, at 175.

express their dissatisfaction with the DSB and Appellate Body,⁵⁷ however, members rarely challenge and backlash against the system's overall legitimacy, and certainly no member has ever tried to incapacitate the system completely.⁵⁸ Most of the members are rather reform-minded than destruction-minded as evidenced by their response to the current crisis.

No countries have voiced support publicly for the United States,⁵⁹ to the contrary, most members directly expressed their disapproval and objection to the U.S. blockade. In June 2019, a proposal supported by ninety-one WTO members including major players like China, EU, Russia, and South Korea was presented the proposal called for reviving the selection and appointment of Appellate Body judges.⁶⁰ In the WTO Dispute Settlement Body meeting on October 2019, a similar report with 115 sponsors was circulated and discussed.⁶¹ During the meeting, the Representative of Qatar iterated that the status quo is "deeply concerning,"⁶² and a functioning Appellate Body is essential to the WTO.⁶³ Numerous other countries delivered statements to support Qatar's contention and invited members that have not sponsored the proposal to endorse the proposal.⁶⁴

B. *The MPIA and the Lonely United States*

Despite the malfunctioning of the Appellate Body, members still utilize the DSB to resolve disputes.⁶⁵ A dozen of countries have brought forty-one cases since 2019 (ironically, the United States is one of them).⁶⁶ In 2019, the EU, Canada, and Norway agreed to an alternative appeal process,⁶⁷ under the agreement, members would still use the DSB at the consultation and panel stage. In a joint statement made by Canada and the EU, parties identified their intention to preserve the functionality of the DSB.

57. Creamer, *supra* note 7, at 52.

58. *Id.*

59. Saunders, *supra* note 7, at 180.

60. *Id.*; Dispute Settlement Body, *Appellate Body Appointments*, WTO Doc. WT/DSB/W/609/Rev.15 (adopted Dec. 6, 2019).

61. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 15 August 2019*, WTO Doc. WT/DSB/M/433 (adopted Oct. 29, 2019).

62. *Id.* at 10.3.

63. *Id.* at 10.3, 10.10.

64. *Id.* at 10.11, 10.16–10.30.

65. Saunders, *supra* note 7, at 181–82.

66. Chronological list of disputes cases, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm [<https://perma.cc/4X46-F7E2>]

67. Imogen Saunders, *Populism, Backlash and the Ongoing Use of the World Trade Organization Dispute Settlement System: State Responses to the Appellate Body Crisis*, 35 MD. J. INT'L L. 172, 185–86 (2020).

Following the successful EU-Canada Summit on July 17–18, 2019, leaders from the EU and Canada reaffirmed a shared commitment to the rules-based international order and to preserve and safeguard a functioning World Trade Organization (WTO) dispute settlement system.⁶⁸

To further expand the three-country agreement, the EU coordinated with fifteen other countries and started the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).⁶⁹ In the joint statements of all participants, the arrangement was intended to:

[I]n the interim, to put in place contingency measures based on Article 25 of the DSU to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports, and thereby to preserve their rights and obligations under the WTO Agreement.⁷⁰

The number of participants in the MPIA keep increasing since its establishment. As of March 2023, with the addition of Japan,⁷¹ 53 out of 164 WTO members are part of the MPIA, including major players like the EU, China, Canada, Australia, and Japan.⁷² To the United States' disappointment, after receiving negative feedback from the initial attempts to resolve the problem, the rest of the world is open to alternative solutions and it seems to not feel the urgency to bring the United States back into the conversation.

The United States currently found itself in an awkward situation, as the global leader in international order and trade, it found itself in a position with no ally probably for the first time in many years, with the growing influence and participants of the MIPA, it could well be the case in near future that the United States is completely isolated.

68. Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement (July 25, 2019), https://policy.trade.ec.europa.eu/news/joint-statement-eu-and-canada-interim-appeal-arbitration-arrangement-2019-07-25_en [<https://perma.cc/B5ZR-4MN8>].

69. WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020).

70. *Id.*

71. Cabinet Understanding regarding Participation in the MPIA (Multi-Party Interim Appeal Arbitration Arrangement) (Mar. 10, 2023), https://www.mofa.go.jp/press/release/press6e_000447.html [<https://perma.cc/8JN3-37CL>].

72. Multi-Party Interim Appeal Arbitration Arrangement (MPIA), https://wtotplurilaterals.info/plural_initiative/the-mpia/ [<https://perma.cc/26ED-ALFP>].

VII. FUTURE OF THE DSB AND THE APPELLATE BODY

A. *Lack of Motive and Interest to Restore the Functionality of the DSB by the U.S.*

As argued above, the United States' decision to block and paralyze the DSB and the Appellate Body was driven by political motivation rather than the intention to reform the system.⁷³ The United States would have no interest in lifting its blockage any time soon due to a few reasons.

First, currently, there are dozens of WTO complaints against the United States since the Trump Administration's international trade policy was implemented,⁷⁴ some of them already resulted in unfavorable rulings to the United States,⁷⁵ while others are highly suspicious in terms of compliance with WTO obligations. Reviving the Appellate Body means the United States would be forced to face those unfavorable rulings and extended challenges to the United States' international trade policy.

Second, the United States has very little use of the WTO at this stage as the free trade negotiations are very low on the priority list for the Biden Administration.⁷⁶ Under the current Protectionism trade policy, the United States would hardly have any use of a platform that promotes something completely contrary.⁷⁷ WTO established the rule of law principle of international trade in the past three decades,⁷⁸ however, the United States has abandoned this principle that was established once by itself.⁷⁹ The Trump Administration returned to an anarchical practice of international trade order by using coercive power in trade.⁸⁰ In other words, the United States retracted from the governance of rule of law and chose to do whatever would please the voters in the short run. Trade policy was weaponized by the Trump Administration to achieve its desired diplomatic outcome and appease the sectors that receive the concentrated benefit of Protectionism at the cost of the general public. This is evident using Section 301—which enables it to unilaterally take retaliatory action against any country deemed to “unjustifiably” restrict or burden U.S. commerce—as a cornerstone of its trade strategy.⁸¹ As discussed above, this policy spreads far beyond just China; China simply

73. See discussion in Section V(B) *supra*.

74. Follow disputes and create alerts, https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm [https://perma.cc/G4WR-8VNQ].

75. *Id.*

76. Schoenbaum, *supra* note 25, at 116.

77. *Id.* at 123.

78. Kristen Hopewell, *Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 AM. J. INT'L. L. UNBOUND 58, 59 (2022).

79. *Id.*

80. *Id.*

81. *Id.*

happens to be one of the countries that runs afoul of the United States' political agenda.⁸²

Third, the United States has taken a more hostile view toward China⁸³ and Russia⁸⁴ by banning the former and sanctioning the latter.⁸⁵ The Trump Administration mainly used tariffs in its trade war against China, and a lot of those tariffs are still in place.⁸⁶ In the meanwhile, the Biden Administration mainly countered by matching the subsidy⁸⁷ and prohibiting the exportation of certain productions to China. All policies mentioned above would raise some serious WTO obligation compliance questions. Therefore, it is in the United States' best interest to keep the Appellate Body in its current paralyzed state.⁸⁸ China also adopted a similar viewpoint and approach on international trade.⁸⁹ Even though President Xi does not have to think about reelection, over the past few years, China has exercised coercive economic power on trade to "punish" other countries for actions that China is not a fan of. For example, China blocked imports of Canadian pork, beef, soybeans, and canola—and arbitrarily imprisoned two Canadian citizens—in retaliation for the country's participation in the extradition of a Huawei executive to face fraud charges in the United States. Beijing's trade restrictions cost Canada \$4 billion in lost exports.⁹⁰ China has similarly blocked imports from Australia in retaliation for its calls for an independent inquiry into the origins of the COVID-19 pandemic as well as Canberra's complaints about Chinese Communist Party interference in Australia's domestic politics.⁹¹ As Australia's largest trading partner, and the destination for nearly 40% of its exports, China's import curbs—which target an extraordinarily broad list of agricultural and mining products—are intended to inflict maximum economic pain on Australia's core export sectors.⁹² Against the Chinese practice of weaponizing trade, the United States found itself in a difficult spot to untie its hands even if it wants to do so.

Fourth, the bipartisan consensus further entrenches the United States' position. As discussed above, in the U.S., there is bipartisan support for

82. See discussion in Section V(B) *supra*.

83. José E. Alvarez, *Biden's International Law Restoration*, 53 N.Y.U. J. INT'L L. & POL. 523, 538–39 (2021).

84. Schoenbaum, *supra* note 25, at 123.

85. *Id.* at 119–23.

86. *Id.* at 104; Kristen Hopewell, *Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 AM. J. INT'L L. UNBOUND 58, 59 (2022).

87. Schoenbaum, *supra* note 25, at 119–21.

88. *Id.* at 104.

89. Hopewell, *supra* note 39, at 61.

90. *Id.*

91. *Id.*

92. *Id.*

the blockage against the DSB and the Appellate Body,⁹³ and this makes it very hard for the U.S. to abandon its current position, even if a new president is elected in 2024. Both parties now are leaning more and more toward populist practice, and reverting Protectionism would require a lot of political capital and run the risk of popular backlash. The Biden Administration demonstrated this perfectly by keeping the Trump Administration’s trade policy in place and adding its own to gain further popular support.

Figure 1: Poll of What Americans Believe is the Most Important Problem for the U.S. Today⁹⁴

What do you think is the most important problem facing the country today?							
Recent trend							
	Feb-2023	Jan-2023	Nov/Dec-2022	Oct-2022	Sep-2022	Aug-2022	Jul-2022
	%	%	%	%	%	%	%
ECONOMIC PROBLEMS (NET)	35	34	40	46	38	37	35
High cost of living/inflation	13	15	16	20	17	18	17
Economy in general	13	10	16	18	12	14	12
Federal budget deficit/Federal debt	3	3	2	2	1	1	1
Gap between rich and poor	2	2	2	2	2	1	1
Unemployment/Jobs	1	2	1	2	2	2	1
Wage issues	1	1	*	1	1	*	1
Lack of money	1	1	2	1	2	1	1
Taxes	1	1	1	1	1	1	*
Fuel/Oil prices	*	1	2	2	3	3	5
Foreign Trade/Trade deficit	*	*	--	--	*	--	*
Recession	*	*	1	*	*	1	*
Corporate corruption	--	*	--	*	*	*	1

Finally, the matter lacks popular support or even awareness. As we can see from Figure 1, Americans are more caught up in domestic affairs rather than foreign trade, “Foreign Trade/Trade Deficit” received an insignificant number of votes in the past six months.

Overall, the hope that the United States would lift the block on its own would be misplaced,⁹⁵ the status quo fits the United States’ current interest in foreign policy,⁹⁶ and any change would only result in an additional burden with no benefit to the United States. Any move to revert to the current approach would be unpopular to both parties, and there won’t be any popular support from the public.

93. See Schoenbaum, *supra* note 25, at 123.
94. *Most Important Problem*, GALLUP, <https://news.gallup.com/poll/1675/most-important-problem.aspx> [<https://perma.cc/AJ4P-JV22>].
95. See Schoenbaum, *supra* note 25, at 123.
96. *Id.* at 123–24.

VIII. POSSIBLE EFFECT ON THE UNITED STATES AND FUTURE GLOBAL TRADE ORDER

A. *The Continuation of Protectionism and Blockage Could Isolate the United States from its Allies and the Rest of the World*

The adoption of Protectionism makes WTO relatively useless for the United States contemporarily, however, this would not be the long-term solution for economic prosperity. As proven by history and economists, free trade fosters efficiency and economic improvement. Once the pandemic cleared and the economy is back on track, it would likely be in the U.S.'s best interest to reopen its border, but the world might not wait for that.

As discussed above, WTO members are open to and have acted to circumvent the United States to preserve the DSB.⁹⁷ The United States has effectively abandoned its leadership in international trade,⁹⁸ a position that it has held ever since WWII by hurting its major trade partners and long-term allies.⁹⁹

The ignorance of the WTO and the lack of a Free Trade Agreement means the United States is offered no preference or protection in international trade. Currently, U.S. exporters presently have preferential access only to markets that constitute 9% of global GDP. By comparison, Canada maintains preferential access to 57% of global export markets; Mexico has access to 56%; Japan has access to 31%; and the EU has access to 20%.¹⁰⁰

Additionally, the withdrawal from Free Trade Agreements like Trans-Pacific Partnership (TPP), which is now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) hurt the United States as it gave its allies no incentives to address American interests internationally.¹⁰¹ The support from these countries is important for the United States to achieve its foreign policy objective, namely promoting Chinese reform in areas like IP and SOEs.¹⁰² Ironically, while the United States wages its trade war with China, it has abandoned its closest allies.¹⁰³ Despite the U.S. preoccupation with China's industrial policy and its interventionist state, it has largely turned a blind eye to its

97. See sources cited *supra* notes 58–64 and accompanying text.

98. See Schoenbaum, *supra* note 25, at 103.

99. Hopewell, *supra* note 39, at 61.

100. Guy Erb & Scott Sommers, *Biden's Trade Policy and Free Trade Areas*, WASH. INT'L TRADE ASS'N BLOG (June 5, 2021), <https://www.wita.org/blogs/bidens-trade-policy/> [<https://perma.cc/XZ6C-SV4U>].

101. Brewster, *supra* note 40, at 1428–29.

102. *Id.*

103. Hopewell, *supra* note 39, at 61.

economic coercion and the effects on U.S. allies.¹⁰⁴ And, indeed, rather than helping to defend its allies from Chinese trade aggression, the United States has done just the opposite: America's closest allies—including the European Union, Japan, South Korea, Canada, and Australia—have been among the primary targets of its own trade aggression.¹⁰⁵

Of course, the United States can utilize its superior economic power to coerce countries into favorable deals, as it did with USMCA,¹⁰⁶ but this would just further decrease the leadership and legitimacy of the United States and encourage countries to seek other options.

B. *The United States Have Opened Pandora's Box*

The United States is setting a terrible precedent by blocking the appointment of Appellate Body judges. Any member can block the consensus for appointing or re-appointing an Appellate Body member.¹⁰⁷ If the precedent set here is followed, the damage could be tremendous,¹⁰⁸ even possibly forcing members to modify the rules, which is something that has never happened.¹⁰⁹

The arbitrary application of Section 232 and Section 301 to impose tariffs is also concerning,¹¹⁰ the broad national security claim would raise a serious question about the legitimacy of the claims and deter foreign investment.¹¹¹

Additionally, the practice of Protectionism and arbitrary tariff won't benefit the United States all that much even in a short year, it is a double-edged sword. Paralyzing the WTO and imposing arbitrary tariffs expose the United States from retaliation by the rest of the world, without the rule of law protection, countries can freely retaliate against the United States. For example, Canada implemented retaliatory tariffs on U.S. imports. The value of the Canadian tariffs was set to match the value of the U.S. tariffs dollar-for-dollar and cover 299 U.S. goods, including steel, aluminum, and a variety of other products, including inflatable boats, yogurt, whiskies, candles, and sleeping bags before the tariffs were lifted on May 20, 2019.¹¹² The Trump Administration eventually lifted the tariff in 2019, not only did this round of tariffs fail to achieve its purpose, it injured the relationship between the United States and one of

104. *Id.*

105. *Id.*

106. *See* Schoenbaum, *supra* note 25.

107. Brewster, *supra* note 40, at 1427.

108. *Id.*

109. *Id.* at 1428.

110. *See* Schoenbaum, *supra* note 25.

111. *Id.*

112. Ana Swanson, *Trump Lifts Metal Tariffs and Delays Auto Levies, Limiting Global Trade Fight*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/us/politics/china-auto-tariffs-donald-trump.html> [<https://perma.cc/PPL5-BL5M>].

its neighbors and long-term ally. The disturbance of rule of law international trade and arbitrary imposing tariff is needlessly weakening support for the United States push against its rival like China and Russia by outraging trading allies who could provide useful support for United States pressure.¹¹³

IX. CONCLUSION

The crisis caused by the United States on the DSB and the Appellate Body is nowhere near a clear solution; however, we are getting some clues out of the change of administrations and the response by other members. The historical record suggests that crises can operate as a turning point, opening up possibilities for dramatic reforms and changes.¹¹⁴ Despite being motivated by political agenda, the crisis perhaps could lead to significant reform of the WTO DSB, which has been proven less effective than anticipated.

113. Brewster, *supra* note 40, at 1426.

114. Hopewell, *supra* note 39, at 62.