

RETHINKING THE WTO – A TRIBUTE TO BOB LUTZ

Paul B. Stephan*

<i>The GATT and the WTO</i>	717
<i>The Challenges</i>	720
<i>The WTO's Appellate Body</i>	721
<i>National Security</i>	721
<i>The Fate of the WTO</i>	727
<i>The Virtues of Smallball in International Law</i>	729

Over the last thirty years, almost every time I stepped out of my narrow academic path to do something that, I hoped, was for the greater public good, I encountered Bob Lutz. When I worked with the American Bar Association (ABA) to encourage the engagement of its members with first the Soviet Union, and then Russia, Bob was there as a leader in its Section on International Law. A few years later, when I served in the State Department's Office of the Legal Adviser, Bob came to Foggy Bottom to represent the interests of the ABA. A decade after that, when I worked on the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States, Bob served as liaison to the ABA as well as a member of the project's Members Consultative Group. At each stage, he acted as a bridge between the academic community, government, and bar associations by devoting time, energy, and mind space to involve all sides of the legal profession and striving to improve international law.

Having devoted his career to this field, Bob must have some concerns about the direction the world seems to be heading today. At the beginning of this century, the commitment to the international rule of law seemed widespread and deep. Since then, national populists have upended politics in the rich world, including the United States. Revisionist states

* John C. Jeffries, Jr., Distinguished Professor of Law and David H. Ibbeken '71 Research Professor of Law, University of Virginia.

elsewhere—China and Russia in particular, Argentina, Brazil, India, South Africa, and Turkey—have used their growing influence to challenge the existing order. Today, defenders of international law seem to find themselves back on their heels in the face of onslaughts from all directions.

This essay focuses on one area where Bob has worked for much of his career. As a scholar and practitioner, Bob was a fixture in international economic law, particularly in the law of the World Trade Organization (WTO). Today, that legal regime faces great challenges. Within the United States, a rising tide of anti-globalization in both political parties has sidelined the liberal internationalist policies that motivated the United States from the end of World War II until the Great Recession of 2007-09. Other countries, with less of a commitment to the WTO, have resisted its rules with creative legal theories, a strategy that the U.S. has also adopted. Today, we face a world where the WTO has been robbed of much of its legal bite.

These challenges rest on long-term economic and political trends and must be taken seriously. Supporters of the status quo mostly struggle to grapple with the critiques. Many others, however, have come to believe that the existing system, even if it is good in theory, fails to meet the needs of significant portions of the world's population.

I argue that the WTO still has an important role to play in guiding the world economy, but less as a law enforcer. Without an international consensus about the WTO's purposes and methods, we should not expect it to do much as a third-party arbiter of disputes. Instead, it can function as a symposium, where states with divergent economic interests can educate themselves and others about potential conflicts and solutions. It can support the elaboration and refinement of international economic law without serving as the world's sheriff.¹

The GATT and the WTO

Liberalizing international trade had been a core project for the rich world since the end of World War II. The General Agreement on Tariffs and Trade (GATT) began as a road map for reducing state-imposed barriers to international trade in goods. States originally conceived the GATT as part of a full-blown international organization like the International Monetary Fund (IMF) and the World Bank. The 1948 Havana Charter sought to establish the International Trade Organization (ITO) which would

1. Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49 (2000).

have had the same structural form as the United Nations, the IMF, and the World Bank.²

Instead, the United States pivoted toward hegemonic leadership of its bloc at the outset of the Cold War. The Marshall and Dodge Plans largely supplanted the World Bank, although the World Bank stayed in business. The ITO, on the other hand, never got off the ground. Instead, the GATT became a treaty (only provisionally applicable, not ratified) with substantive rather than institutional commitments.³ The project relied on a tiny staff borrowed from the United Nations' Geneva resources and initially had no grandiose stand-alone headquarters.

As conceived, the GATT was meant to ward off the kind of retaliatory tariff hikes that had fed the Great Depression, the global economic crisis of the early 1930s that aided Hitler's rise to power and greased the path to World War II. The GATT served as a site for multilateral negotiations on lowering tariffs, battled against workarounds that could substitute for protective tariffs, and offered dispute settlement services through ad hoc arbitration to the parties to the Agreement. This exclusive focus on tariff reduction meant lower barriers for physical goods, the only commodities subject to this form of border taxation. Other projects for liberalizing the world economy came later.

By the 1980s, the GATT had become a flourishing international institution, astride a crucial and burgeoning economic sector that it managed with a soft touch and increasingly legalized pronouncements. Even a few "socialist" countries—Hungary, Poland, Romania, and Yugoslavia—joined during the 1960s and 1970s. It achieved its narrow but critical purpose: keeping trade barriers down on a wide range of goods, mostly those made in the developed world.

When the world changed with the collapse of the Soviet Union and the end of the Cold War, the GATT remade itself as the WTO, the kind of full-blown international institution that the postwar visionaries had hoped for in the ITO. The 1994 Uruguay Round Agreements created an organization, founded a permanent appellate court to ride herd over its dispute resolution business, and added new economic sectors to its jurisdiction.⁴ By first

2. Here and in the remainder of this article, I reference Chapters 3 and 11 of my forthcoming book. A reader wishing more detailed discussion of these events and appropriate references should look there. See PAUL B. STEPHAN, *THE WORLD CRISIS AND INTERNATIONAL LAW – THE KNOWLEDGE ECONOMY, SYSTEM SHOCKS, NATIONAL POPULISM, AND THE BATTLE FOR THE FUTURE* (Cambridge Univ. Press 2023) (forthcoming Mar. 2023).

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIII, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

4. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

terminating the GATT, the rich countries that dominated these negotiations made an offer that the rest of the world could not refuse: join the new regime or live with legal anarchy in international economic relations. The formerly socialist countries queued up for membership. By the end of 2000, the WTO had 140 members, up from 84 in 1989. Today 160 of the 193 states that belong to the United Nations are members of the WTO.

The Uruguay Round Agreements, each bundled into the new WTO regime, reflected the Washington consensus of the day.⁵ Recognizing that tariff reduction had gone about as far as it could, the framers of these agreements promoted the freeing up of cross-border trade in services, unifying health and safety standards through committees of international experts, and strengthening the legal protection of intellectual property and, to a lesser extent, of capital mobility.⁶ As services had assumed a larger role in the world economy, promoting international competition in these sectors became more important to those who thought more competition meant greater prosperity. Making intellectual property mandatory, rather than a local option for states, would, in theory, bolster innovation everywhere. In the short term, however, it would increase royalty payments from poor countries to rich ones, where most intellectual property then originated. Likewise, insisting that health and safety standards conform to international scientific standards (a measure intended to suppress covert trade barriers) helped rich world producers who had the greatest knowledge about and influence over those standards.

Not only did the WTO expand in size and scope, but it upgraded its institutional bite. In its early days, the GATT relied on diplomats to mediate trade disputes, employing pragmatic bargaining more than legal formalism. During the 1950s and 1960s, trade lawyers, especially veterans of government ministries, took over dispute resolution. The GATT sponsored arbitration panels, formed from a list of state-nominated trade law specialists. These panels would offer their views, often in elaborate legal opinions. The disputants, however, had no formal obligation to comply. A panel opinion took effect only if a consensus of the GATT parties adopted

5. See John G. Williamson, *Lowest Common Denominator or Neoliberal Manifesto? The Polemics of the Washington Consensus* in CHALLENGING THE ORTHODOXIES 13 (Richard M. Auty & John Toye eds., 1996) (discussing the history and meaning of the Washington consensus).

6. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement, Annex 1B, 1869 U.N.T.S. 183; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1867 U.N.T.S. 493; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 186.

it. This meant that a dissatisfied state could veto any and all panel decisions that did not go its way. The panel opinions instead served as a focal point for settlements.⁷

Under the WTO, the arbitral panels remained in place, but dissatisfied states could appeal to the WTO Appellate Body, a permanent working court. The seven members of the court, chosen by the members and acting through three-person tribunals, could affirm, reject, or revise panel decisions. States that disagreed with an Appellate-Body decision could appeal to the membership as a whole, but unless a consensus of the members (including the state that had prevailed in the appeal) held otherwise, the appellate decision would stand.⁸ The Appellate Body soon developed an extensive body of case law, on which a growing industry of civil society and academic specialists fed.⁹

The WTO Appellate Body represented a distillation of the ideas that flourished after the end of the Cold War. The existing consensus held that promoting competition and markets was the desired end and that legal commitments enforced by expert and disinterested third parties were the preferred instrument. Accordingly, trade law specialists, not economists or diplomats, should have the last say on what an increasingly ambitious international regulatory regime means.

The Challenges

Two developments challenged the resilience of WTO law. First, the last three U.S. administrations opposed the Appellate Body and ultimately neutralized it. As a result, the WTO now lacks an independent judicial body and can adopt legal decisions only by consent of the entire membership. Second, several states, including the United States, have seized on the national-security exception found in all the Uruguay Round agreements as a tool for negating legal commitments at will. The issue, put baldly, is whether these developments have robbed WTO law of any force. Can we imagine a future where the WTO, lacking an independent court and avoiding almost all obligations by way of an exception that creates an all-encompassing loophole, continues to carry out useful work?

7. *Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance*, L/4907 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 210 (1989).

8. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401.

9. *Dispute Settlement*, WTO (Mar. 28, 2022), https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

The WTO's Appellate Body

Under the Uruguay Round Agreements, the Appellate Body has the final say in resolving legal disputes among the members. Only a consensus of the membership, including the state that prevailed in its decision, can reverse it. However, for the Appellate Body to function, people must have valid appointments to it. When fully staffed, it has up to seven members who serve staggered four-year terms and sit in three-person panels.

Beginning with the Obama administration, the United States blocked the replacement of any new member of the Appellate Body as terms expired. The Body lost a quorum to convene a panel in 2019 and has had no members since the end of 2020. For Obama's team, this was a warning signal indicating dissatisfaction with how the Body had performed and it intended to provoke reform. For the Trump administration, blocking new appointments was a means to another end, the undoing of international supervision of trade law. The Biden administration, as of this writing, has remained on this course.

Once the Appellate Body lost its quorum, China and the European Union established an alternative appellate body to function as long as the official one remained out of commission.¹⁰ This mechanism has no bearing on the United States or the other states that did not join their agreement. It has heard one case, a dispute between Turkey and the EU, but its decision was not made on behalf of the WTO.¹¹ For the indefinite future, then, we no longer have a multilateral dispute settlement process for trade issues just at a time when the government of the world's largest economy wields a legal theory allowing it to disregard any WTO obligation it chooses.

National Security

In recent years, states, including the United States, have weaponized the national security exception to negate their GATT obligations. The

10. Request for Circulation of Interim Appeal Arbitration Arrangement by the Panel, *Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020).

11. See Award of the Arbitrators, Arbitration under article 25 of the DSU, *Turkey – Certain Measures Concern the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/ARB25 (Jul. 25, 2022); see also Communication from Türkiye, *Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/15 (Aug. 22, 2022). According to press accounts, the European Union is about to commence a proceeding challenging China's retaliation against Lithuania for its recognition of the Republic of China. If it gets under way, that matter might eventually wind up in the new appellate mechanism. See Request for Consultations by the European Union, *China – Measures Concerning Trade in Goods and Services*, WTO Doc. WT/DS610/1 (Jan. 31, 2022).

GATT's Article XXI(b) suspends a state's obligations under the GATT system when:

taking any action *which it considers* necessary for the protection of its essential security interests . . . (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 . . .¹²

The important legal question is the scope of the "it considers" modifier. Does this language leave any room for WTO adjudication of disputes once the exception is invoked?¹³

At least three plausible interpretations present themselves. First, the WTO, acting through its dispute-resolution organs, might address only the question of whether a state does "consider" the otherwise unlawful measure necessary for its national security interests. Second, the WTO might decide whether it believes that, as an objective matter, the measure is connected in some way to military procurement or is taken in the context of an emergency in international relations. Third, the WTO might consider whether a state's claim as to the measures the state considers necessary is made in good faith, allowing the WTO to make an independent assessment of necessity with respect to either procurement or a crisis.¹⁴

These three approaches represent points along a continuum running from easy invocation, meaning effortless unilateral avoidance of WTO obligations, to rigorous scrutiny of a state's motivations and the real basis of its concerns, meaning third-party oversight playing a dominant role in a wide range of trade disputes. A prior issue, however, is whether the "it considers" language permits any third-party review.

A state might plausibly argue that all WTO supervisory jurisdiction disappears when it invokes its essential security interests. Efforts by the WTO to argue otherwise must then be considered illegitimate. In technical language, the "it considers" language denies the WTO the capacity,

12. GATT, *supra* note 3, art. XXI(b); TRIPS Agreement, *supra* note 6, art. 73(b). GATT's article XXI(b) is identical to the TRIPS Agreement's Article 73(b) where both address disputes over the enforcement of intellectual property rights.

13. Paul B. Stephan, *Sovereignty and the World Economy*, 17 U. ST. THOMAS L.J. 649, 666 (2021).

14. On reading a good faith requirement into essential security provisions in treaties generally, see William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 376-81 (2008) (arguing for implicit good faith limitation on self-judging national security clauses in investment treaties).

definitively and authoritatively, to determine its jurisdiction—what in Europe is known as *kompetenz kompetenz*.¹⁵

If this argument has any bite, the WTO has a problem. Without third-party enforcement, the WTO rules do not function as law so much as desiderata. As such, rule compliance drops out of the system. Instead, more general and hard-to-pin-down qualities such as a state's tendency toward cooperativeness or disruption do all the work. Robustly resorting to a national security exception, when this choice easily and perhaps automatically ousts formal dispute settlement, prevents states from pursuing a greater good and undermines the WTO as a rules-based system.¹⁶

For the first twenty years of the WTO, no one sought to test the dispute settlement system by invoking Article XXI(b). Commentators suggested that the logic of mutually assured destruction applied. The risk of creating an easy out from formal dispute settlement, and thus undermining the WTO agreements as a legal system, was thought to deter states from opening up the national security Pandora's box. Even before the Trump administration, however, other WTO states went down this path. In 2014, Russia imposed trade sanctions on Ukraine to discourage it from upgrading its economic ties with the European Union. In 2017, Saudi Arabia formed a coalition to boycott Qatar for its supposed support of revisionist populist movements inspired by the Arab Spring. In both cases, the parties targeted by the sanctions sought a ruling from the WTO that the measures violate the Uruguay Round Agreements. Russia and Saudi Arabia both invoked Article XXI as a defense.¹⁷

In the Russian case, an arbitral panel formed by the WTO ruled that it had jurisdiction to decide whether the elements of a national security defense exist—whether the measures advance a national security interest arising out of a crisis in international relations—and thus rejected self-judging by the respondent state. It explained that an implied

obligation of good faith . . . applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their

15. See, e.g., RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 2.8 cmt. a (AM. L. INST., Proposed Final Draft 2019) (*kompetenz kompetenz* in arbitration); J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L. J. 411, 413 (1996) (judicial *kompetenz kompetenz*).

16. Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era*, 113 AM. J. INT'L L. UNBOUND 45, 47–48 (2019).

17. Tania Voon, *World Trade Organization — General Agreement on Tariffs and Trade 1994 — Security Exception — Freedom of Transit — Russia's Accession Protocol*, 114 AM. J. INT'L L. 96, 102 (2020).

connection with the measures at issue. Thus, . . . this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests . . .¹⁸

The panel, having asserted its right to review the factual basis of Russia's national security claim, then found Russia's account satisfactory.¹⁹

A later panel went further. It rejected Saudi Arabia's claim that a measure was necessary to meet a conceded national security interest. As part of its boycott of Qatar, the Saudi government refused to take action against a private broadcaster operating in its territory whose programming included copyrighted programs belonging to a Qatari firm. The panel concluded that the enforcement of copyright laws against a pirate within Saudi territory would not require the Saudi authorities to interact with Qatari nationals in any way that might create a risk of subversion. Thus, although the government's inaction arose out of an "emergency in international relations" within the terms of Article XXI(b)(iii), it was not necessary within the terms of that article, even if Saudi Arabia asserted otherwise. Notwithstanding the "which it considers" language of Article XXI(b)(iii), this judgment, the panel asserted, was for the panel to make, not the Saudi government.²⁰

Meanwhile Turkey, joined with a number of other WTO members, has a case pending against the United States. It challenges special duties on imports of aluminum and steel products levied by the Trump administration on national security grounds. Given the role of the United States in the world economy, the case has profound significance for the meaning of Article XXI and, consequently, of GATT commitments themselves.

Under U.S. trade law, the president may restrict imports of particular goods through higher duties or other barriers, such as a quota or ban, if the imports present a threat to the country's national security. The provision bestowing this authority, Section 232, was a central part of the Kennedy administration's principal legislative initiative, the Trade Expansion Act of 1962.²¹ President Ford invoked it in 1975 to impose licensing fees on oil imports, a measure that won the Supreme Court's blessing after an importer's legal challenge. The Court took a generous view of the president's discretion to determine what constitutes a national security

18. Panel Report, *Russia – Measures Concerning Traffic in Transit*, ¶ 7.138, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

19. *Id.*

20. Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (adopted Jun. 16, 2020).

21. Trade Expansion Act of 1962, Pub. L. No. 87-794, Title II, § 232, 1962, 76 Stat. 877 (codified at 19 U.S.C. § 1862).

threat and what measures will suffice to abate it. The case serves as a classic example of the reluctance of the U.S. judiciary to constrain a president's intervention in international trade, no matter how amorphous the national security claim, on the basis of an open-ended legislative delegation.²²

No president took greater advantage of this authority than Donald Trump. His administration launched eight investigations by the Department of Commerce, six of which resulted in positive findings of a national security threat and five of which he accepted. His approach was transactional rather than interventionist. He used the positive findings as starting points for negotiations with other countries. These sought to induce exporting states to reduce what they sold into the U.S. market, rather than putting the burden on the United States to impose trade barriers.²³

In the case of steel and aluminum, Trump imposed special duties, with certain exceptions for countries in preexisting trade agreements with the United States. When negotiations failed, as they did with Turkey, the administration increased duties above the baseline in the original notice. Importers litigated whether the increased duties fit within the statute's time limits. The one federal court with appellate jurisdiction over these duties upheld them.²⁴

Since coming to office, the Biden administration has left these measures in place and launched new Section 232 investigations of other imports. It did negotiate a special deal with the European Union, adhering to Trump's transactional model, that substitutes export-state-imposed controls for U.S. import barriers.²⁵ It later replaced the tariffs on Japanese steel with a quota on imports.²⁶ It otherwise remains committed to the same basic strategy of unilateral trade measures resting on dubious national security claims that Trump pioneered.

Section 232 measures, however lawful under domestic law, call the U.S. relationship with the WTO into question. Under WTO rules, a state "binds" itself to a schedule of duties (tariff) from which it can deviate

22. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-70 (1976).

23. RACHEL F. FEFER, CONG. RESEARCH SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2021).

24. *Transpacific Steel L.L.C. v. United States*, 4 F.4th 1306, 1310 (Fed. Cir. 2021).

25. *See Announcement of Actions on EU Imports Under Sections 232*, Oct. 31, 2021, <https://www.commerce.gov/sites/default/files/2021-10/US%20232%20EU%20Statement.pdf>; *see generally* Steel and Aluminum U.S.-EU Joint Statement, U.S.-E.U., Oct. 31, 2021, <https://www.commerce.gov/sites/default/files/2021-10/US%20232%20EU%20Statement.pdf>.

26. *See Announcement of Actions on Japanese Imports of Steels under Section 232*, U.S. DEP'T OF COM. (Feb. 7, 2022), <https://www.commerce.gov/sites/default/files/2022-02/US-Statement-on-Japan-232.pdf>.

downwards but not exceed.²⁷ The WTO also provides for exceptions to this rule. It permits a state to impose temporary trade barriers called “safeguards” to address sudden surges of imports to the detriment of its domestic producers.²⁸ Safeguards must comply with other WTO rules, in particular a requirement of equal application of the measure to all members (most-favored-nation treatment), and other states may retaliate with proportional increases in their duties on the goods exported by the safeguard imposer. States can also impose extra duties, called anti-dumping duties and countervailing duties, that negate benefits that the exporter derives from specified anticompetitive practices or proscribed state subsidies. Elaborate rules apply to the imposition of both these kinds of fairness-based penalties.²⁹

The United States does not rely on any of these exceptions for its new measures. Instead, it relies on the most problematic of WTO exceptions, that for the protection of national security. This particular exception is not problematic because it allows states to take their national security into account; such rules are pervasive in trade and investment agreements and seem unavoidable in a world where states must attend to their security. Rather, the provision sets up a conundrum because it allows a state to decide for itself what it can do under the national security umbrella.

At Turkey’s request, the WTO convened an arbitration panel to address the dispute. The United States informed the WTO that, because it regards the dispute as a political matter not subject to WTO review, it would not participate in the proceedings. The panel has postponed releasing its report multiple times, citing the COVID quarantine as the reason.³⁰

The U.S. case tests the meaning of Article XXI to a much greater extent than the Russian or Saudi disputes. Russia was not merely worried about Ukraine, but at the time it imposed its sanctions it was effectively at war. Similarly, the members of the Saudi-led coalition faced what they

27. GATT, *supra* note 3, art. II, ¶1.

28. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 154.

29. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 14; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 201.

30. Request for Consultations by Turkey, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/1 (Aug. 20, 2018); Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/9 to WT/DS564/11 (Oct. 15, 2018). The most recent postponement stated that no report could be expected sooner than the last quarter of 2022. Communication from the Panel, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/20 (Jun. 30, 2022).

viewed as serious and violent domestic opposition to which, they believed, Qatar gave aid and comfort. In both situations, people died and more casualties were expected. By contrast, the U.S. measures invoke no specific threat from any adversary, but rather a general sense that existing trade patterns weaken the country.

Shoe-horning the U.S. argument into the language of Article XXI is a reach. If anything less than unrestrained self-judging applies, the claim should fail. Indeed, a bloody-minded observer could interpret the U.S. position as a deliberate provocation, meant to expose the disconnect between the formal rules that the WTO applies and the actual balance of interests that sustains the multilateral trade regime.

From the WTO's perspective, the absence of a functional Appellate Body means that it lacks a way to reach a definitive legal resolution of these questions. A plausible interpretation of the WTO rules gives no legal effect to a panel's decision when a dissatisfied state has a right of appeal, even though that right is meaningless because of the absence of a working appellate mechanism.³¹ As a result, current panel decisions, including those on Article XXI, live in a kind of limbo. Every state that has invoked the national-security exception to call off its WTO obligations can fairly argue that the WTO has yet to decide against it authoritatively. Panels may disagree, but without the Appellate Body in place, none of their decisions will bind any member, including the United States.

The Fate of the WTO

Unwinding the free trade commitments that the Uruguay Round agreements meant to entrench remains high on the agenda of populist movements throughout the West. While deploring the style of its predecessor's approach to diplomacy and international law, the Biden administration has done very little to undo Trump's most consequential attacks on the WTO regime. It also has given at least soft support to supply chain onshoring as a means of reducing its dependency on China. Implementing this policy cannot be done consistently with WTO obligations, unless the United States chooses to invoke the national security exception repeatedly.

As of this writing, the Biden administration has neither indicated a pathway toward restoring the WTO's Appellate Body nor backed away from a theory of the national security exception that provides a blanket loophole for nearly every WTO obligation. Reshoring supply chains will

31. Communication from the United States, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/12 (Apr. 22, 2020).

make the United States even more dependent on that exception. At least for the near term, we must expect the United States, and probably other economically significant states, to make decisions about trade in the absence of any compulsion to comply with WTO law.

However, eviscerating the WTO as a formal legal system does not have to mean throwing out the organization and its values altogether. Imagine what might happen as long as no Appellate Body exists and states increasingly invoke national security to suspend their WTO obligations. In this world, the WTO functions not as a lawmaker, but as a proposer of compromises and a venue for negotiations. States will remain free to reject its interventions. A strong and consistent pattern of such rejections would indicate that it no longer serves much purpose. But its fate need not be irrelevance.

The GATT system that preceded the WTO had no permanent court and yet seemed to do important work. It offered *ad hoc* arbitration to states with trade disputes, but the resulting arbitral awards bound no one until adopted by consensus to become law. It also had a national security exception that seemed to rely on self-judging, or at least the United States so asserted.³² Yet ultimately, no state relied solely on that exception to defend a trade measure.

The pre-1994 system had its shortcomings: it did little for the global South and excluded China and Russia. Nonetheless, it kept trade disputes from going off the rails and contributed to the West's economic ascendancy. That system may persist, rather than collapse into deadlock and impotence.

A recent action by the Biden administration, while not reversing any of the significant steps undertaken by the Trump administration, represents a small gesture that might point the way. In late 2021, the Biden team allowed a case, *Antidumping and Countervailing Duties on Ripe Olives from Spain*, to take effect even though it did not agree with the outcome.³³ The dispute involved retaliatory duties imposed by the United States on imported olives to offset advantages that the producers enjoyed from unfair conditions in their home market. The panel ruled that the United States had failed to prove that one particular benefit that the European Union provided to olive producers affected the export product. As a result, this one countervailing duty imposed by the United States failed to comply with WTO law.

32. Report of the Panel, *United States – Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986).

33. Panel Report, *United States – Anti Dumping and Countervailing Duties on Ripe Olives From Spain*, WT Doc. WT/DS577/R (Nov. 19, 2021).

The United States provided an explanation for its decision not to block the panel decision from taking effect. The panel had rejected most of the European Union's arguments and thus had preserved U.S. authority to retaliate against what it regarded as unfair support for exports. The United States objected to one of the panel's conclusions. It interpreted that particular part of the decision, however, to be specific to the facts of the case and therefore not an obstacle to undertaking similar trade measures in the future. As the United States could live with the decision, it would do nothing to obstruct it.³⁴

No one should make too much out of a single incident. The dispute involved an industry—large-scale agriculture—that represents the past more than the future, and the protection of which has, in the view of many observers, held back the European Union from becoming a platform for economic dynamism. We need to see a lot more before proclaiming a hopeful trend toward international cooperation.

Rather, the case provides an example of how important states can accommodate themselves to the technocratic and legalistic advice of the WTO without surrendering control over trade issues. It works if the participants find accommodation preferable to blowing up the system. This preference can survive as long as the pretensions of the system do not become intolerable.

The Virtues of Smallball in International Law

This meditation on the WTO suggests a larger point about the international legal system that Bob has worked in throughout his career. People sometimes used the metaphor of a shark to describe international trade law. Sharks, folk wisdom maintains, must keep moving forward to survive. So, pundits explained, the legal regime for the world trading system had to keep making progress, or it would die. If true, this perspective implies that the WTO is now in a death spiral, and it can be saved only by reversing the trends of the last few years.

However, the WTO regime is in fact capable of pragmatic adaption based on reduced ambition. My larger point is that people who work in international law generally, not just trade lawyers, need to meet the mounting challenges around the world not by doubling down and treating

34. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives From Spain*, at 9-10, (Dec. 20, 2021), https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2021/12/Dec20.DSB_.Stmt_.as_.deliv_.fin_.pdf.

any backtracking as an existential threat. Rather, they need to play smallball. They must find areas where international cooperation makes sense and where expressing that cooperation with legal formality can clarify expectations. Repeated often enough, these episodes of cooperation framed by legal arguments can bolster international law despite seemingly overwhelming threats.

Approaching international law through a smallball approach, rather than grand theory, captures what Bob's vocation has been all about. He represents a style of lawyering that the contemporary academy does not celebrate often enough. Practical reasoning in search of workable solutions can do much good in this world. Bob's career proves that.