COMMENT ON SHAFFER/GAO

*William J. Davey**

Professors Shaffer and Gao have written a fascinating article about the way in which China has become an effective user of the World Trade Organization ("WTO") dispute settlement system, especially in attacking the United States and the European Union trade remedy regulations and practices. Despite a general antipathy toward international judicial processes,[1] in the realm of international trade law China has made considerable efforts to create WTO expertise in government, academia, private law firms, and businesses. As a consequence, it has become an active player in WTO dispute settlement, having initiated fifteen cases and been a respondent in thirty-nine cases as of December 2017, which makes China the third most active participant in WTO dispute settlement after the United States and the European Union.[2] This article is particularly noteworthy and useful because of the extensive field research done by Shaffer and Gao through their many interviews with those instrumental in China's development of WTO expertise. Too often, academic writing is far removed from actual reality, but that is not the case here, and the authors are to be congratulated for grounding their article in the real world.

Although China may have undertaken the most extensive action by a developing country to become expert in WTO dispute settlement procedures, it is worth noting that China is not unique amongst developing countries in undertaking efforts to learn how to effectively use the WTO dispute settlement system. For example, very early on in the history of the WTO, Thailand made a considerable investment in dispute settlement training for its trade diplomats. It not only sent them to basic WTO dispute settlement training courses but also requested that the WTO design an advanced dispute settlement course for its diplomats. One result was that Thailand was a relatively active user, especially for a litigation-adverse Asian country, of the WTO dispute settlement system in its early

* Guy Raymond Jones Chair in Law Emeritus, University of Illinois College of Law. Professor Davey is a former Director of the Legal Affairs Division of the World Trade Organization.

1. Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 118 n. 14 (referring to PCIA decision as "waste paper").

2. The various country statistics are available at the WTO dispute settlement webpage. *Disputes by Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Jan. 6, 2017). In some instances where China was a respondent, there were multiple complainants.

years.[3] Indeed, even now, Thailand ranks as the twelfth most frequent complainant in WTO dispute settlement, despite not having initiated a consultation request in the last decade or so.

Brazil is the other prime example of a developing country devoting significant resources to WTO dispute settlement. It has been the most active developing country in WTO dispute settlement in terms of initiating disputes.[4] Brazil prioritized government foreign policy related to WTO dispute settlements and organized a special office to handle WTO dispute settlement. Interestingly, the head of the office, who had first served at the Brazilian embassy in Geneva in the early years of the WTO, was Roberto Azevedo, now the Director-General of the WTO. Brazil also worked to reach out to industry groups to make them aware of WTO dispute settlement possibilities, something that many developing countries have found difficult to do. This is a key component in making effective use of WTO dispute settlement, as can be seen in the cases of the United States and European Union.[5]

Thus, while China's development of WTO expertise is not unique, it is of utmost importance in the evolution of WTO dispute settlement. China has been able to use its skills, as Shaffer and Gao recite, to achieve significant victories in cases against the United States and the European Union. These cases have considerable importance to China and its export trade because they limit the ability of the United States and the European Union to use their trade remedy laws to restrict Chinese exports. Unfortunately, as the authors conclude, China may have been too successful: "China's successful adaptation to WTO law, in other words, paradoxically has called into question U.S. commitments to the trade legal order itself."[6] Recent events, discussed below, indicate that there has been a backlash in the United States, which views the WTO dispute settlement system and the Appellate Body as having gone too far in curtailing the use of trade remedies.

In the remainder of this comment, I will offer some thoughts on what the United States concerns seem to be and how the United States has acted as a result. In this regard, I will recall how the WTO dispute settlement system came into being and explore the importance of the United States concerns with respect to trade remedies in some detail. After that, I will explore what the United States wants to change and conclude with some thoughts on the future.

As to what these concerns pertain to, during his November 2017 trip to Asia, President Trump complained:

> When the United States enters into a trading relationship with other countries or other peoples, we will, from now on, expect that our partners will faithfully follow the rules just like we do. . . . Unfortunately, for too long

3. *Id.* Only Brazil, India, and Mexico were as active as complaining developing countries.

4. *Id.*

5. *See generally* Gregory Shaffer, Michelle Ratton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 *(2008)*. On the importance of public-private partnerships to the effective use of WTO dispute settlement in the United States and the European Union, see GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

6. Shaffer & Gao, *supra* note 1, at 178 (following note 514).

> and in too many places, the opposite has happened. . . . Simply put, we have not been treated fairly by the World Trade Organization.[7]

The clear statement here is that the United States plays by the rules and other countries do not and that WTO rules are being broken. The subtext is that the WTO dispute settlement system is not appropriately responding and that, as a consequence, the United States is not being treated fairly. In particular, President Trump noted the problems of "product dumping, subsidized goods, currency manipulation, and predatory industrial policies," with particular concern about "the massive subsidizing of industries through colossal state-owned enterprises that put private competitors out of business."[8] More particularly, with respect to WTO dispute settlement, President Trump said in an interview in October 2017 that the WTO system was "set up for the benefit of taking advantage of the United States."[9] His comment was foreshadowed by United States Trade Representative Robert Lighthizer in a September 18 panel discussion in Washington, where he was quoted as saying that many Appellate Body decisions have been "indefensible" and that there are "numerous examples" of WTO cases that have "diminished what we bargained for or imposed obligations that we do not believe that we agreed to." In his view, the Appellate Body failed to stick to the terms of the agreement and "took the position that they were going to strike down something they thought shouldn't happen."[10]

As this is written in mid-December 2017, the principal manifestation of the concerns expressed by Trump and Lighthizer has been the United States' decision to block the process for replacing three members of the Appellate Body whose terms have expired. Although the stated reason for the refusal is that there is a need to clarify under what circumstances an Appellate Body member whose term has expired may continue to sit on cases to which he or she was assigned prior to the expiration of his or her term, the United States in its statements to the WTO Dispute Settlement Body has more generally referred to other concerns it has with the dispute settlement system.[11] This action by the United States has caused considerable concern in Geneva. As reported by the *Financial Times*:

7. *Remarks by President Trump at APEC CEO Summit, Da Nang, Vietnam*, WHITEHOUSE.GOV (Nov. 10, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/.

8. *Id.*

9. Bryce Baschuk, *U.S. Keeps WTO Members Guessing on Participation in Buenos Aires*, BLOOMBERG BNA: INT'L TRADE DAILY (Dec. 8, 2017), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=124667308&vname=itdbulallissues&wsn=499884500&searchid=30985302&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0.

10. Bryce Baschuk, *U.S. Trade Official Slams WTO's 'Indefensible' Dispute Rulings*, BLOOMBERG BNA: INT'L TRADE DAILY (Sept. 19, 2017), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=120867923&vname=itdbulallissues&wsn=500948000&searchid=30985305&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0.

11. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, August, 31, 2017, MISSION U.S. GENEVA SWITZ., https://geneva.usmission.gov/wp-content/uploads/2017/08/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf (last visited Jan. 6, 2018).

> The head of the World Trade Organization has warned that the Trump administration's blocking of the appointment of new judges to hear international disputes risks undermining a system that has kept trade wars at bay for more than two decades. In an interview with the Financial Times, Roberto Azevêdo, WTO director-general, said the US move to block the filling of two [three as of December 11, 2017] vacancies on the seven-member appellate body was causing a crisis for the body's most important function.[12]

From the foregoing, it is clear that the United States is quite dissatisfied with certain decisions of the Appellate Body. This dissatisfaction mainly concerns decisions that restrict the ability of the United States to impose trade remedies and in particular antidumping and countervailing duties. The dissatisfaction is not new, although prior administrations did not express it so vehemently. Nonetheless, prior administrations did manifest dissatisfaction with the Appellate Body. For example, in 2011, it appeared that the United States decided not to re-nominate an American, who had been nominated by the United States four years earlier, for a second four-year term on the Appellate Body in part because of dissatisfaction with the Appellate Body. No reason for declining to re-nominate was given, and since the position has been viewed as the United States seat, criticism was muted.[13] In 2016, the United States opposed the re-nomination of an Appellate Body member from South Korea. The United States explained its refusal to agree to the four-year extension as arising from its concerns that the individual in question had not performed the role intended for Appellate Body members by acting to add obligations and diminish the rights of WTO members.[14] This action was severely criticized by other WTO members.[15] Korea argued, for example, that the United States action would undermine the independence and integrity of the Appellate Body.[16] A compromise was ultimately reached that resulted in the appointment of another Korean.[17] At the time of this writing, it is not clear how the current stalemate over filling the three vacancies will be resolved, although, in concluding, I consider what the United States may hope to achieve.

12. Shawn Donnan, *WTO Chief Warns of Risks to Trade Peace: US Blocking of Court Appointments Threatens Dispute-Settlement System*, FIN. TIMES (Oct. 1, 2017), https://www.ft.com/content/3459f930-a532-11e7-9e4f-7f5e6a7c98a2.

13. Daniel Pruzin, *U.S. to Put Forward Candidate For WTO Appellate Body Vacancies*, BLOOMBERG BNA: INT'L TRADE DAILY (Aug. 10, 2011), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=21765654&vname=itdbulallissues&wsn=538814000&searchid=30985309&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0. There was no comment in the WTO Dispute Settlement Body on this issue.

14. Dispute Settlement Body, *Minutes of Meeting*, WTO.ORG (May 23, 2016), https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/230808/q/WT/DSB/M379.pdf.

15. *Id.* at 18–31.

16. *Id.* at 18.

17. The Korean in question, Kim Hyun-chong, resigned only a year later to become the Korean negotiator for the expected renegotiation of the Korean-United States Free Trade Agreement. Bryce Baschuk, *Boeing, Airbus Appeals May Face Delays After WTO Panelist Resigns*, BLOOMBERG BNA: INT'L TRADE DAILY (Aug. 1, 2017), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=117992072&vname=itdbulallissues&wsn=501676000&searchid=30985314&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0.

To understand this current crisis in WTO dispute settlement, it is necessary to go back in time. Although the specific threat facing the system today is unique, similar issues have arisen in the past. The creation of the WTO system in 1995 was intended to be an improvement to the General Agreement on Tariffs and Trade ("GATT") dispute settlement system. The GATT system was like the WTO system in its application in specific cases, but differed in several key aspects.[18] To commence a dispute and obtain the establishment of a panel to rule on it, it was necessary to have a consensus decision of the GATT Council, a body consisting of all GATT parties. Thus, a proposed respondent could prevent the commencement of an action against it. While such action was rare, it was possible. Moreover, after the panel considering the case had issued its report, the report had to be adopted by a consensus decision of the GATT Council for it to have any effect. Finally, for the prevailing complainant to take retaliatory action against a nonconforming respondent, another consensus decision in the GATT Council was necessary.

In his comprehensive analysis of the GATT dispute settlement system through 1989, the leading authority on GATT dispute settlement—Professor Robert C. Hudec of Minnesota—concluded that a GATT party with a legitimate complaint received full redress from the system in 60% of the cases and partial redress in 29%.[19] This is an impressive record, but there were problems. Due to the need for consensus and the possibility of a respondent blocking the adoption of an adverse decision, which began to happen more frequently after 1989, it was thought that difficult cases were not brought to the GATT dispute settlement system because it was anticipated that there would be no satisfactory result. Thus, in the trade negotiations launched in 1986—the so-called Uruguay Round—one issue was improving the dispute settlement system.[20]

Initially, the debate in the Uruguay Round was between the United States, which wanted a more judicial-like, rules-based dispute settlement system, and others, such as the European Union and Japan, who preferred a system emphasizing negotiation. Ultimately, the latter group agreed to a more rules-based system, mainly in return for an agreement by the United States to cease acting unilaterally under United States law to impose trade sanctions on other countries because of trade practices of which the United States disapproved and instead bring such matters to the new dispute settlement system that came into being with the WTO.[21] Thus, the WTO system was given exclusive and compulsory jurisdiction over disputes related to the WTO. The possibility of blockage at the stages noted above was eliminated by rules that provided for the automatic es-

18. For a description of the GATT system and the controversy over whether rules-based or power-based dispute settlement is preferable, see William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987).

19. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 285 (1993).

20. William J. Davey, *The WTO Dispute Settlement Mechanism*, ILL. PUB. L. RES. PAPER, June 25, 2003, at 8–9, http://papers.ssrn.com/abstract=419943.

21. *Id.* at 5.

tablishment of panels and adoption of reports and authorization of retaliation absent a consensus to the contrary, which has never occurred.[22] Having obtained its goal, the United States had second thoughts, and, to obtain the necessary Senate votes to adopt the WTO implementing legislation, President Clinton promised Senator Dole that he would sign legislation requiring the appointment of a commission of federal judges to review WTO decisions adverse to the United States to ensure that they were appropriate.[23] In fact, such legislation was never adopted and the issue faded away at the time. Interestingly, around this time Professor Hudec expressed concerns that the new dispute settlement system might be too rigorous and could collapse if a major player refused to accept losing cases.[24] In the first years of dispute settlement, however, his concerns were allayed as the system successfully dealt with the controversial cases and issues that had led to blocked panel reports under the GATT system.[25] Indeed, the WTO dispute settlement system began to be referred to as the "crown jewel" of the WTO system.[26]

Some years later, however, after a number of losses by the United States, there was renewed concern in the United States over whether it should have agreed to the WTO system. In some quarters, WTO dispute settlement was seen as a threat to United States sovereignty;[27] in others, the very idea of judicial-like international dispute settlement was questioned.[28] In analyzing these concerns and considering whether the WTO system "was doomed to fail," I concluded that the system was not so doomed.[29] In particular, as to the sovereignty concerns, I argued that the cases lost by the United States were not examples of judicial overreaching but were within the realm of reasonable interpretations of the WTO agreements and that they had not presented implementation problems for the United States.[30] Moreover, the United States had greatly benefitted from its ability to use the WTO dispute settlement system as a complainant.[31] My conclusions were reached as of the end of 2005. How much has changed since then?

The principal development of the last decade or so in the WTO dispute settlement system has been the large number of cases brought against the United States with respect to trade remedies.[32] Generally, the United States has lost these

22. For a general description of the system, see *id*.

23. Gary N. Horlick, *WTO Dispute Settlement and the Dole Commission*, 29 J. WORLD TRADE 45 (1995).

24. Hudec, *supra* note 19, at 364; Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 10–15 (1999).

25. William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 17–21 (2005).

26. An oft-quoted phrase of uncertain origin.

27. CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION (2001).

28. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

29. William J. Davey, *The WTO: Looking Forwards*, 9 J. INT'L ECON. L. 1, 14–20 (2006).

30. *Id.* at 15–17.

31. *Id.* at 17.

32. William J. Davey, *The WTO Dispute Settlement System at 18: Effective at Controlling the Major Players?* 5–7 (European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme, Working Paper RSCAS 2013/29, 2013), http://cadmus.eui.eu/handle/1814/26794.

cases. While implementation was delayed, the United States arguably did bring its practices in the trade-remedies area into compliance over time with WTO rules as interpreted by the Appellate Body.[33] This was done begrudgingly and the United States losses were extremely controversial in Washington, where many believed that Appellate Body rulings had effectively rewritten key parts of the Uruguay Round agreements on trade remedies.[34] These concerns have increased over time, in large part because of the belief that these rulings have significantly curtailed the ability of the United States to use trade remedies against China, which, as noted above, is viewed by many in Washington as the main trade rival of the United States and as an unfair trader. In the first instance, it is useful to consider the major United States complaints and then consider what can be done about them.

There are essentially three types of trade remedies that might be used against injurious imports: safeguards, antidumping measures, and countervailing duties against subsidies. In the case of safeguards, it is necessary to show that increased imports have caused serious injury to domestic industry.[35] I think it is fair to say that the Appellate Body has interpreted the Uruguay Round Safeguards Agreement so as to lessen its utility. In particular, it resurrected a requirement that the increased imports be a result of "unforeseen developments," a phrase that appeared in GATT Article XIX but not in the Safeguards Agreement. Fifteen years after this requirement was established, it remains unclear as to how it can be met.[36] In addition, the Appellate Body's interpretation of the requirement that injury from other sources not be attributed to increased imports has also made it difficult to use the Safeguards Agreement.[37] The Appellate Body's general approach to safeguards seems inconsistent with the supposed Uruguay Round goal of increasing the use of safeguards in preference to informal voluntary export restraints.[38]

In the case of dumping, the Uruguay Round Antidumping Agreement allows the imposition of duties to offset the amount (or margin) of dumping, which is defined as the difference between the export price of a good (*i.e.*, the price in the United States market of the exported good) and its normal value, the latter being calculated on the basis of home market prices or costs of producing the good (or in the case of nonmarket economy countries, surrogate prices or costs).[39] In a series of decisions, the Appellate Body has found that a commonly used practice called "zeroing," which is a calculation method for determining the

33. *Id.* at 9–12.

34. *See* Baschuk, *supra* note 10.

35. Agreement on Safeguards, at 273–74, https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf.

36. For a discussion of the issue, see JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 775–76 (6th ed. 2013).

37. *Id.* at 803–11.

38. *Id.* at 761–62.

39. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, at art. 2, https://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter *The Antidumping Agreement*.

dumping margin, is incompatible with the Antidumping Agreement.[40] These decisions have enraged the United States, in large part because they are based on the Appellate Body's interpretation of the definitions of "dumping" and "margins of dumping" and largely ignore a specific provision of the agreement that arguably allows "zeroing" in certain circumstances.[41] In the view of the United States, its ability to use zeroing in those circumstances was a fundamental part of the basic deal in the Uruguay Round.[42] The result of these decisions has been to reduce the level of antidumping duties imposable under WTO rules. Additionally, of great concern at the moment to the United States and the European Union is the possibility that the Appellate Body will rule that the United States and European Union practice of treating China as a nonmarket economy for purposes of antidumping duty calculations is WTO-inconsistent. Under Article 15 of its accession protocol, China had agreed not to challenge that practice for fifteen years after its accession. That time period has elapsed and it is uncertain what happens now, although there is more than a little indication that the Appellate Body will not permit the United States and the European Union to treat China differently than market economies.[43] The United States and the European Union have made extensive use of antidumping measures against Chinese exports and fear they will be limited in their ability to do so in the future.[44]

In the case of countervailing duties, the Uruguay Round Agreement on Subsidies and Countervailing Measures allows the imposition of duties to offset the amount of subsidization, as defined in the agreement.[45] In the case of China, the United States believes that significant subsidization occurs through state-owned enterprises. It believes that, for example, a government-owned energy company or materials producer sells its product to Chinese companies at below-market prices at the behest of its owner—the Chinese government. While the Subsidies Agreement covers the grant of subsidies by "public bodies," the Appellate Body, in the view of the United States, has unduly limited the scope of the Subsidies Agreement by narrowly defining that term in a clear break with the negotiators' intentions.[46]

40. Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WTO Doc. WT/DS322/AB/R (Jan. 23, 2007).

41. The provision in question is article 2.4.2 of the Antidumping Agreement.

42. *See* JACKSON ET AL., *supra* note 36, at 885.

43. *Id.* at 895.

44. To get a sense of that use, WTO reports indicate that the United States has imposed antidumping duties on 110 Chinese products as of June 30, 2017, with the next most frequent United States target of such duties being Taiwan, 23 of whose products are subject to such duties. Committee on Anti-Dumping Practices, *Semi-Annual Report Under Article 16.5 of the Agreement—United States*, WTO Doc. G/ADP/N/300/USA, at 50–55 (Sept. 6, 2017). In the case of the European Union, it has imposed antidumping duties on 56 Chinese products, with Russia being its next most frequent target with only eight products subject to duties. Committee on Anti-Dumping Practices, *Semi-Annual Report Under Article 16.5 of the Agreement—European Union*, WTO Doc. G/ADP/N/300/EU, at 12–15 (Oct. 19, 2017).

45. Agreement on Subsidies and Countervailing Measures, art. 2, art. 19, https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

46. For a detailed criticism of the Appellate Body's "public body" decision, see Michel Cartland, Gérard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. WORLD TRADE 979 (2012). The authors were, respectively, the chair of the negotiating group on subsidies in the Uruguay Round,

Given the Trump Administration's concerns about Chinese exports to the United States, the way in which the Appellate Body has limited the use of trade remedies has undoubtedly contributed to its current attitude toward the WTO. While one can still argue, as I did in 2006, that these decisions are within the realm of reasonable interpretations,[47] there is no doubt that many of those involved in the Uruguay Round negotiations believe that the more recent Appellate Body decisions mentioned above are not consistent with the intentions of the negotiators. While it can be suggested that those negotiators should have expressed themselves more clearly, such a suggestion will only inflame the current controversy. In this regard, it is worth noting that trade remedies have always been subject to great criticism by those espousing a more open trading system. For example, many economists would argue that dumping and subsidization are not problems absent some sort of predation, which is unlikely to occur or succeed.[48] Nonetheless, in negotiations, the permission to use trade remedies can be viewed as an important price that must be paid for more open markets since they are useful in ensuring that expanding international trade is fair. If they are unduly restricted, the argument will be made that the negotiated balance has been skewed, which is essentially the United States' position at present.

So, how can this impasse be resolved? The Appellate Body now has only four members and the term of one of them will expire at the end of September 2018, while that of two others will expire in December 2019. So, what does the United States want in return for unblocking the Appellate Body appointment process? I see three possible outcomes.

First, the United States may be trying to send a message to the Appellate Body that it must change its approach on trade remedies. It seems impossible that the Appellate Body will reverse itself, at least not explicitly, but it is conceivable that in the future it could take a more permissive attitude toward the use of trade remedies, if only to preserve the dispute settlement system from United States actions to undermine it. Thus, at some point the United States may stop blocking reappointments on some sort of tacit understanding that its message has been sent and received and some indication given that it will be acted upon. This result, of course, could never be officially admitted by the Appellate Body, or anyone else for that matter.

Second, it is possible that the United States wants a clear statement that judicial overreach and gap-filling by the WTO dispute settlement system is not permitted. The problem for the United States is that the WTO Dispute Settlement Understanding already contains such language. For example, the Dispute Settlement Understanding ("DSU") specifies that the system "serves to preserve the rights and obligations of Members" and that dispute settlement rulings "cannot

the chief European Union negotiator on subsidies in the Uruguay Round and the senior GATT/WTO secretariat official advising the Uruguay Round negotiations on subsidies.

47. Davey, *supra* note 29, at 15–17.

48. *See* JACKSON ET AL., *supra* note 36, at 838–43, 946–52.

add to or diminish the rights and obligations provided in the covered agreements."[49] However, it is also provided that the dispute settlement system serves "to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law."[50] Those rules of interpretation, which are embodied in the Vienna Convention on the Law of Treaties, in fact give considerable leeway to treaty interpreters, who are almost always able to justify their interpretations by reference to plausible dictionary definitions of the words contained in the treaty. Thus, it is not clear what the United States can achieve by adding additional language to the DSU on judicial overreach and gap-filling beyond a sort of warning to the Appellate Body that it should err on the side of approving WTO member actions—something the United States will not like when it is a complainant. Nonetheless, this outcome may be the best offer at this point. Whether the rest of the WTO membership would accept something like this is not clear, especially since the United States blockage of Appellate Body appointments is viewed as simply unacceptable. Under these circumstances, "giving in" to the United States might be difficult for the WTO membership to accept. Even if the WTO membership did do this, the bad feelings engendered by the United States' actions may well mean that the Appellate Body will be loath to bend as far as the United States would like.

Finally, it is possible that the current United States administration is going to implement President Trump's view that the United States should deal with other countries on a bilateral basis, where it has the greatest leverage in negotiations.[51] If there are disputes, the power of the United States would count as much (or more) than the rules. As noted above, this position arguably is more akin to GATT dispute settlement and is certainly more akin to state-to-state dispute settlement in other realms of international law. If this is the United States' position, then WTO dispute settlement is doomed, at least for the near term. Under this scenario, whether the Appellate Body inappropriately restricted the use of trade remedies is irrelevant; the United States has simply changed its view on the desirability of international cooperation in bodies such as the WTO.

Only time will tell, but it is possible that the Chinese achievement of attaining excellence in its ability to use the WTO dispute settlement system will ultimately be worth little, at least *vis a vis* the United States.

49. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, art. 3.2. It reiterates that point later in article 19.2.

50. *Id.* art. 3.2.

51. OFFICE OF THE U.S. TRADE REP., THE PRESIDENT'S 2017 TRADE POLICY AGENDA 1 ("As a general matter, we believe that [U.S.] goals can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations . . . .").