A GLOBAL CONSTITUTIONAL CRISIS

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ABSTRACT

Justice, justice thou shalt pursue.[1]

The Trump administration has recently pushed the World Trade Organization (WTO) into a crisis by gutting its court and waging trade wars. Conventional narratives on this crisis have been state-centered as they ascribe origins of the crisis to domestic politics in key WTO members, especially the United States. This Article divulges both analytical and normative blind spots left by these narratives. This Article, in a Copernican turn, submits a system-driven alternative, in terms of the "World Trade Constitution" (WTC), which generates rich insights in both diagnosing and prescribing the crisis. The WTC, for the purpose of the Article, does not denote a formal document; rather, it signifies a broad sense of "constitutionalism" consonant with a total set of fundamental normative products, such as practice and precedent, which have historically emerged in the world trading community. This Article tests the resiliency of the WTC by demonstrating various system-maintaining behaviors of WTO members in the face of the crisis. This Article posits that the WTC is culturally stickier than many would believe in that its stakeholders incorporate, by reference, the WTC into the domestic legal and political discourse, even without a formal transposition mechanism. The very fact that the Biden administration was pressured to return to the WTO normalcy is emblematic of the WTC's resiliency. The legal gravitational force of the WTC can also shape daily operations of private businesses at a granular level, even if such force may remain unrecognizable on a surficial level. This Article finally argues that political constitutionalism, through a collective decision-making mechanism (voting), must complement the WTC for the latter's lasting sustainability.

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Introduction: A Copernican Turn in Understanding Global Governance

Ever since his inauguration, President Trump and his administration have been accused of being disdainful of rules and threatening the U.S. constitutional order.[2] A long list of his executive orders, ranging from healthcare to immigration, have been constitutionally suspect to many.[3] The Trump administration's alleged menace to the U.S. Constitution finds its unlikely parallel in the international sphere. Its recent decision to unpack the World Trade Court and wage trade wars has pushed the World Trade Organization (WTO) into a crisis by jeopardizing the WTO's fundamental, "constitutional" norms. The aforementioned hazard notwithstanding, most observers believe that the

2. Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE 1, 3 (2019) (observing the Trump administrations "three-prong strategy" attack on the WTO: "(1) an offensive against the WTO's Appellate Body; (2) a return to unilateral adjudication and remediation of trade disputes; and (3) an interpretation of the WTO's national security exception that would permit economic concerns to qualify.").

3. *Id.*

battered U.S. constitutional system would survive the Trump administration.[4] In tandem, this Article argues that the WTO's own constitutional order has passed the stress test and remained largely resilient, if not entirely unscathed. Such resiliency is testimonial to a deep-rooted cultural base of the WTO's legitimacy shared by the world trading community's stakeholders.

At broad brush, the WTO is analogous to the United Nations (UN). Similar to why the UN was created to prevent the Third World War, the General Agreement on Tariffs and Trade (GATT), the WTO's old self, was also established to avert another *trade* war, which contributed to the outbreak of the Second World War.[5] The UN system prohibits any country from dropping a bomb in another country's territory without cause.[6] The World Court (International Court of Justice) will eventually adjudicate the existence of any justifiable cause for the bombing. Likewise, the WTO system legally prohibits any country from dropping a *tariff* bomb[7] on an imported product from another country.[8] The World Trade Court (Appellate Body) determines whether members of the WTO have imposed tariffs in a manner consistent with WTO norms.[9] Importantly, neither the UN nor the WTO is a World Government that can mobilize centralized enforcement powers against a renegade member.[10] Voluntary cooperation based on consensus is the main operational logic to both organizations.

The engine of the WTO worked smoothly until the Trump administration singlehandedly threw a giant monkey wrench into it. A series

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4. *See* Noah Feldman, *Will U.S. Democracy Survive? Here's How to Figure That Out.*, BLOOMBERG (Dec. 28, 2021), https://www.bloomberg.com/opinion/articles/2021-12-28/u-s-democracy-will-survive-this-is-not-the-civil-war [https://perma.cc/L3XU-TW56]; *See also* Elain Kamarck, Did Trump Damage American Democracy, BROOKINGS (July 9, 2021), https://www.brookings.edu/blog/fixgov/2021/07/09/did-trump-damage-american-democracy/ [https://perma.cc/3PZX-SUQ6].

5. *See* Patrica Clavin, *The Triumph of Regionalism over Globalism: Patterns of Trade in the Interwar Period, in* REGIONAL TRADE BLOCS, MULTILATERALISM, AND THE GATT: COMPLEMENTARY PATHS TO FREE TRADE 31-33 (Till Geiger & Dennis Kennedy eds., 1996).

6. *See* U.N. Charter art. 2(4); *see also* Mary E. O'Connell, *The Ban on the Bomb – and Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497, 498 (2007).

7. A "tariff bomb" is a retaliatory or punitive measure intended to exert political pressure on other countries in the form of heavy taxes on imported goods. *See* CHRISTOPHER A. CASEY, CONG. RSCH. SERV., U.S. TARIFF POLICY: OVERVIEW (2022); *see also Trump hurls US$50 billion tariff bomb at China*, ASIATIMES (Mar. 23, 2018), https://asiatimes.com/2018/03/trump-launches-us50-billion-tariff-bomb-china/ [https://perma.cc/CN6Z-JRHB].

8. NINA M. HART & BRANDON J. MURRILL, CONG. RSCH. SERV., R46852, THE WORLD TRADE ORGANIZATION'S (WTO'S) APPELLATE BODY: KEY DISPUTES AND CONTROVERSIES 4-5 (2021).

9. *Id.* at 4.

10. Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 148 (observing that "international law is law 'quite simply, because states and individuals regard it as such.'").

of the U.S. blocking of new appointments at the Appellate Body has paralyzed its operation.[11] As of December 2019, the WTO's high court contains only a single judge. Due to the lack of a quorum, three Appellate Body members, an appellate review is no longer available.[12] This creates a fatal legal limbo: a losing party in a panel stage may be incentivized to immediately appeal to a now-defunct Appellate Body, expecting the panel decision never to be adopted and thus remain nonbinding permanently.[13] With the World Trade Court disarmed, the Trump administration launched unilateral trade wars against its major trading partners, based on exceedingly controversial grounds, such as national security.[14] In particular, the U.S.' trade war against China has been massive and wreaked havoc on the global economy as well as the U.S. economy. The International Monetary Fund warned that the trade war would cut the global growth by one-half percent, greater than the size of the South African economy,[15] risking a global recession.[16]

In expounding on this crisis, conventional narratives focus predominantly on WTO members, particularly the United States, and their various accusations against the WTO, whether justified or not. The U.S. self-righteous position shifts all the blame to the WTO itself, which finds sympathizers among conventional narratives of a realist bent. Dominant domestic special interests in powerful countries always seek to weaken an international tribunal's power that rules against their interest.[17] For the past decade, the Appellate Body's effective discipline of the U.S. antidumping measures on steel imports

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11. Hart & Murrill, *supra* note 8.

12. *Id.*

13. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 16.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] ("If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal."). *See also* Alex Lawson, *Fatalism Sets In As WTO Appeals System Circles The Drain*, LAW360 (May 29, 2019), https://www.law360.com/articles/1164052/fatalism-sets-in-as-wto-appeals-system-circles-the-drain [https://perma.cc/T4AD-VC79] (citing a former AB Member Peter Van den Bossche). Subsequently, this is exactly what happened. *See e.g.*, *U.S. Appeals Panel Report Regarding U.S. Duties on Canadian Softwood Lumber, WTO News,* WORLD TRADE ORGANIZATION (Sep. 28, 2020), https://www.wto.org/english/news_e/news20_e/ds533apl_28sep20_e.htm [https://perma.cc/XG7H-9QLE]. The WTO acknowledges that "[g]iven the ongoing lack of agreement among WTO members regarding the filling of Appellate Body vacancies, there is no Appellate Body Division available at the current time to deal with the appeal."

14. *See infra* sec. III:0.

15. Mathew Rocco et al., *Lagarde Warns of Trade War's 'Self-Inflicted Wounds'*, FIN. TIMES (Jun. 5, 2019), https://www.ft.com/content/72541d70-87a2-11e9-97ea-05ac2431f453 [https://perma.cc/6DZE-DZEG].

16. Colby Smith, *The True Cost of Trade Wars*, FIN. TIMES (Jun. 3, 2019), https://www.ft.com/content/7acf01ff-de1e-330b-b755-3875237ca09f [https://perma.cc/LFK3-XU6N].

17. John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out,"* 98 AM. J. INT'L L. 109, 121 (2004). In this regard,

have invited vexed reactions from the steel industry, and its trade attorneys.[18] Captured by this group of special interest, the United States Trade Representative (USTR) criticized the Appellate Body's fundamental jurisprudence on antidumping as "judicial overreach" that the U.S. government had not originally consented to.[19] More recently, the titular "China question" has been singled out as a main justifying ground for the U.S. trade war. The Trump administration has argued that the current WTO rules could not effectively discipline China's ever-intensifying state capitalism.[20]

Indeed, many scholars, mostly those in the United States, have warned that a frustrated superpower would cease to tolerate a normative shackle from the WTO, which the former believes no longer serves its interest.[21] According to those scholars, there exists a neat causality between irritations from the USTR, U.S. politicians and special interests (such as the steel industry), and the U.S.'s anti-WTO behaviors. Such a solipsistic position, often translated into the self-justification under the cloak of sovereignty, appears to be aligned with a classical state-centered nature of public international law.[22] In apparent anarchy, which entity holds a final say other than a sovereign state itself, especially a hegemonic one? As long as the United States treats the WTO as a mere contractual *tool*, the United States may break the WTO if the United States believes that the WTO ceases to work for their interest.[23]

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former chairman of the AB, James Bacchus, lambasted the U.S.' "political intimidation … sought to use to pressure WTO jurists to abandon their legal task of upholding the rule of law and instead make political decisions approving flawed positions favoured by the United States." Alan Beattie, *Why Self-Sufficiency in Trade Is Not the Answer to Coronavirus*, FIN. TIMES (Mar. 10, 2020), https://www.ft.com/content/c9bb04b6-6186-11ea-a6cd-df28cc3c6a68 (quoting James Bacchus). Likewise, John McGinnis views that the WTO can in fact foster its members' sovereignty by preventing them from falling into Madisonian constitutional failures precipitated by rent-seekers or "factions." John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381, 383 (2000). *See also* Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, UCLA SCH. OF LAW, LAW & ECON. RESEARCH PAPER SERIES, No. 07-15, at 3 (arguing that the WTO system "free[s] member states from the capture by entrenched domestic interests.").

18. Joel Trachtman, *What Aspects of the WTO is the Trump Administration Targeting for Reform?*, ECONOFACT (Jan. 28, 2020), https://econofact.org/what-aspects-of-the-wto-is-the-trump-administration-targeting-for-reform [https://perma.cc/WM5Y-9DN9].

19. *See e.g.*, Tetyana Payosova et al., *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PIIE Policy Brief, No. 18-5, 1 (Mar. 2018) (observing the Trump administrations frustration with the WTO and potential proposals to "move forward.")

20. *Id.* at 9.

21. *Id.* at 8.

22. *Id.* at 9.

23. *Id.* at 11.

Unfortunately, however, this conventional "member-driven" view leaves serious questions, both descriptive and normative, under-analyzed. First, descriptively, without appreciating the WTO's normative structure and its influence, the U.S.'s behavior could not be fully explained and evaluated. While the typical realist narrative might demonstrate a simple causal link between the unique U.S. domestic political situation and its particular anti-WTO behaviors, the narrative still lacks a critical context or background that situates, and gives meanings to, those behaviors. To analogize, a simple causal explanation of how a certain patient contracted the COVID-19 virus might not be enough to understand what the COVID-19 virus truly *is* without knowing its structure (such as the fact that it is an RNA, not a DNA, virus).[24] New insights can emerge from the "concept formation through 'multiple description' of the same phenomenon in various settings."[25] To understand why and how the WTO itself responds to the U.S.'s behavior sheds critical light on what led to the WTO crisis.

More seriously, the crisis signifies a normative battle between the WTO system (disciplining structure) and a protectionist member (defying agent). The conventional view is mostly silent on normative consequences of the crisis. Granted, nations violate a variety of international obligations often. The U.S.'s transgression may be just another addition to such an inglorious list. Yet this Article argues that the Trump administration's sabotaging of the WTO system goes beyond a mere bout of a violation. While one may cheat a couple of times in a chess game, one is not supposed to refuse a checkmate.[26] The Trump administration refuses to accept the very foundation of the WTO system by waging trade wars and dismantling a court that would declare its actions illegal. It is a total negation, or "nihilation,"[27] of the multilateral trading system, threatening global prosperity by raising uncertainty and discouraging economic activities.[28] From the WTO's perspective, it is a "constitutional" crisis.

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24. Carl Zimmer, *The Coronavirus Unveiled*, NY TIMES (Oct. 9, 2020), https://www.nytimes.com/interactive/2020/health/coronavirus-unveiled.htm0 [https://perma.cc/9P54-XKZ9]l.

25. Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT'L J. CONST. L. 1, 10 (2013).

26. *See* Oran R. Young, *International Regimes: Toward a New Theory of Institutions* 39 WORLD POL. 104, 120 (1986).

27. PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 114 (1966).

28. Laurence Boone, *A Fragile Global Economy Needs Urgent Cooperative Action*, OECD ECOSCOPE (May 21, 2019), https://oecdecoscope.blog/2019/05/21/a-fragile-global-economy-needs-urgent-cooperative-action/?mc_cid=33681444f1&mc_eid=ef2b880169 [https://perma.cc/MX2M-N3JQ] (observing that "challenges to existing trade relationships and the multilateral rules-based trade system have now derailed global growth by raising uncertainty that is depressing investment and trade").

The conventional member-driven perspective is hardly capable of articulating this normative vacuum. On the contrary, it tends to naturalize big powers' unilateralism and licenses them to negotiate away their transgression in a private (bilateral) setting.[29] If a powerful member is allowed to put its thumb on the scale of law and justice, a troubling premise that "might makes right" will deprive the WTO law of its transformative power.[30] Insert a "natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them."[31] For example, to many Americans, *Bush v. Gore*, 531 U.S. 98 (2000)[32] may be one of the most bitter decisions delivered by the U.S. Supreme Court. Although they believed that the decision was wrongly decided, they still accepted its legitimacy.[33] They would never propose to vacate the Supreme Court for the alleged wrong decision. Yet in the World Trade Court, this is exactly what the U.S. government has done. The United States, the erstwhile architect of the multilateral trading system, singlehandedly blocked new appointments of members of the WTO's High Court, the Appellate Body, because it believed that the Appellate Body issued a series of flawed decisions.[34]

In an attempt to overcome the aforementioned analytical and normative blind spots, this Article offers a "system-driven" account of the WTO crisis from the WTO's *own* perspective as an autonomous legal community.[35] Rather than treating WTO rules as revocable constraints

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29. Ernst-Ulrich Petersmann, *WTO Adjudication@me.too: Are Global Public Goods Like the World Trade Organization Owned by Governments or By Peoples and Citizens?*, 13 J. E. ASIA & INT'L L. 27, 30-31 (2020).

30. Jackson, *supra* note 17, at 120-21. *See generally* BRIAN FAY, SOCIAL THEORY AND POLITICAL PRACTICE (1975); Robert Cox, *Social Forces, States and World Orders: Beyond International Relations Theory,* 10 J. INT'L STUD. 126, 126 (1981).

31. JOHN RAWLS, A THEORY OF JUSTICE 355 (1971).

32. *See* Stephen Breyer, *America's Courts Can't Ignore the World*, THE ATLANTIC, Oct. 2018, at 109.

33. *Id.*

34. Annenberg Public Policy Center, *1 in 3 Americans Say They Might Consider Abolishing or Limiting Supreme Court* (Oct. 4, 2021); Annenberg Public Policy Center, *2021 Civic Knowledge Survey* (2021); Annenberg Public Policy Center, *Most Americans Trust the Supreme Court, But Think It Is 'Too Mixed Up in Politics'*, (Oct. 16, 2019); Sean Illing, *The case for ctripping the Supreme Court of its power*, VOX (Oct. 27, 2020); Russell Wheeler, *Should we restructure the Supreme Court?*, BROOKINGS INSTITUTE (Mar. 2, 2020).

35. A legal community can be broadly defined as an entity or society in which members share the common goals, culture, values and interest in a particular area of law. *See e.g.*, THOMAS WEATHERALL, *JUS COGENS*: INTERNATIONAL LAW AND SOCIAL CONTRACT 25 (2015); *see generally* HEDLEY BULL, THE ANARCHICAL SOCIETY (2d ed. 1995). Admittedly, convergence of culture and values in a given community does not necessarily translate into cooperation. *See* Monica Hakimi, *Constructing an International Community*, 111 AM. J. INT'L L. 317 (2017) (arguing that conflict is often a "unifying force" behind the constitution of a community). Deborah Z. Cass, *The 'Constitutionalisation' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, Eur. J. Int'l L. (2001) 12 (1): 39 (observing that "the Appellate Body's interpretations of the instruments of international trade law emphasize the existence of an international trade legal

on members, this Article reformulates the WTO as a social fact that can be labeled as a world trading community whose members have constructed an intersubjective meaning-complex (norm) based on their subjectively developed reliable expectations of reasonably unobstructed trade.[36] As such a cultural norm, the "World Trade Constitution" (WTC) constitutes members' identities and interests in a systemic and structural sense.[37] For the purpose of this Article, the WTC does not denote a formal document, such as a domestic, *Large C* Constitution, legislated by a particular set of consents in a particular moment of time; rather, it signifies a broad sense of constitutionalism consonant with a total set of fundamental normative products, such as custom, practice and precedent,[38] which have historically emerged in the world trading community during an extended period of time.[39]

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community in a manner which is absent when, for example, the International Court of Justice interprets a treaty on non-proliferation."); Phoenix X.F. Cai, *Aid for Trade: A Roadmap for Success*, 36 DENV. J. INT'L L. & POL'Y 283, 318-319 (2008) (arguing that "[t]he legal community must also play a role in making aid for trade a success."). *But see* Bruno Simma & Andreas L. Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 EUR. J. INT'L L. 266, 267 (1998) (warning against any wholesale adoption of "international *legal* community," which views a community of states exclusively as a community of international law).

36. *Cf.* Vincent Pouliot, *"Sobjectivism": Toward a Constructivist Methodology*, 51 INT'L STUD. Q. 359, 375 (2007).

37. *See* PHILLIP ALLOT, EUNOMIA: NEW ORDER FOR A NEW WORLD 167 (1990) (viewing a constitution as a "structure-system which is shared by all societies"). There may be "two stories to tell" in understanding the U.S. sabotaging of the WTO system and its consequences: *why* did it happen and *what* is this?; more of "constitutive" theorizing than of "causal" theorizing. ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 79-88 (1999).

38. Parallel ideas also emerged in the U.S. constitutional scholarship. *See e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1738 (2007) (viewing that popular sovereignty has driven "constitutional conversation" mediated by the Supreme Court); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. L. REV. 549 (2009) (observing that "constitutional change occurs through interactions between the political branches and the courts."); Ernest A. Young, *The Constitution Outside of the Constitution*, 117 YALE L. J. 408 (2007) (discussing functional and "extracanonical" constitutional norms that actually constitute public legal order.). Regarding a similar idea applying to international organizations, see Julian Arato, *Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT'L J. CONST. L. 627 (2012) (discussing juridical (legal) and political dimensions of the United Nation's fundamental legal order.).

39. Regarding an "emergent" nature of WTO norms, *see* SUNGJOON CHO, THE SOCIAL FOUNDATIONS OF WORLD TRADE: NORMS, COMMUNITY AND CONSTITUTION (2015). Regarding the "contents" of the WTC, I draw mainly on the late John Jackson's characterization of trade constitution, which he defines as an "intricate set of constraints imposed by a variety of rules or legal norms in a particular institutional setting." JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 339 (2d. 1997); JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 101-4 (1998); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 25-28 (1996); John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL'Y INT'L BUS. 873, 873 (1996). *See also* Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 316-24 (1998) (discussing Professor Jackson's constitutional premise of international trade law).

Ironically, the current WTO crisis throws the WTO's constitutional dimension into sharp relief. Would the WTO "collapse or become irrelevant"[40] under political pressure from a powerful member? Or would the WTO overcome such pressure and actualize its ultimate goal of "an integrated, more viable and durable multilateral trading system"?[41] The WTO is well-situated to "frame and articulate [its] own positions on a given constitutional question."[42] This is a "cultural" dimension in that the crisis tests the stickiness of the WTO habit of its members: whether its members would, or could, shake loose its symbolic universe in the face of the crisis.

Admittedly, realists might dismiss the notion of the WTC as a "hypothetical global polity"[43] or a "fantasyland" built by global governance advocates.[44] Yet the WTC countenances profound normative insights beyond positivistic accounts of technical legal rights and obligations. As a structural character of civilized global governance, the WTC can be understood as the "fundamental legal order of a public community"[45] or a "command without being the command of an organized political authority."[46] The WTC inevitably evokes an ideal of "justice" in that it is to "redress asymmetries of power" and to "provide opportunities for small or relatively powerless entities (such as small countries, nonindustrial countries, and individuals) to gain access to a system that will protect their interests (stakes promised by the system) in a way that they can depend upon."[47] Likewise, the WTC summons a rule of law without self-legislation.[48] in that "only through final ascertainment by agencies other than the parties to the dispute can the law be

40. Richard H. Steinberg, J*udicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 Am. J. Int'l L. 247, 257 (2004); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables, in* INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

41. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1876 U.N.T.S. 154, at pmbl. [hereinafter WTO Agreement].

42. Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT'L J. CONST. L. 1, 1 (2013).

43. Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 115 (2009).

44. John R. Bolon, *U.S. Isn't Legally Obligated to Pay the U.N.*, WALL ST. J. (Nov. 17, 1997).

45. Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 556 (1998) (citing KONRAD HESSE, GRUNDZOGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 10 (19th ed. 1993)).

46. HERSCH LAUTERPACHT, FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, 419-20 (1933).

47. Jackson, *supra* note 17, at 118.

48. Hauke Brunkhorst, *Globalizing Democracy without a State*, 31 MILLENNIUM J. OF INT'L STUD. 675 (2002). *Cf.* Ernst-Ulrich Petersmann, WTO Adjudication@Me.Too: Hidden in Plain Sight, Int'l Econ. L. & Pol'y Blog (Mar. 17, 2020), https://ielp.worldtradelaw.net/2020/03/guest-post-wto-adjudicationmetoo-hidden-in-plain-sight.html

rendered certain; it is not rendered so by the *ipse dixit* [dogmatic statement] of an interested party."[49]

Markedly, the very fact that the Biden administration was pressured to return to the WTO order tends to corroborate the resiliency of the WTC.[50] While the Biden administration inherited the WTO crisis initiated by the Trump administration, the former's multilateralist pledge based on global decency corresponds to the moral foundation of the WTC.[51] Now, more than ever, the United States has been placed in a critical situation in which both its trade leadership and time-honored commitments to the world trading system are being tested.

The systemic, constitutional approach this Article adopts signifies momentous repercussions beyond the WTO. It ushers in a critical paradigm shift in broader disciplines of international law (IL) and international relations (IR). The conventional IL/IR theory may be portrayed as a "geocentric" view in that its characteristic state (sovereignty)-centered position is prone to hegemonic solipsism. The U.S. government, and those who sympathize with its position, tend to project the U.S.'s own legal image into IL and self-justify its validity, as if Claudius Ptolemy rationalized the Aristotelian geocentrism through a

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[https://perma.cc/B7GW-3E22] (observing that politicization of the U.S. Supreme Court tends to undermine social justice by protecting interest of powerful groups).

49. Lauterpacht, *supra* note 46 at 425. There is nothing radical in this view. In fact, this is what Hersch Lauterpacht envisioned nearly a century ago when he emphasized the "specific" character of international law within the context of the international community. *Id.* at 405. *See* Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004) (attempting to predicate legitimacy of international law on foundations other than specific state consents).

50. *See* Office of the United States Trade Representative (USTR), *Office of the United States Trade Representative Statement on the Director General of the World Trade Organization* (Feb. 5, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/february/office-united-states-trade-representative-statement-director-general-world-trade-organization [https://perma.cc/D8YM-76SA] (reversing the Trump administration's blocking of the candidacy of Dr. Ngozi Okonjo-Iweala as the next WTO Director-General of the WTO and committing itself to "working with a new WTO Director General to find paths forward to achieve necessary substantive and procedural reform of the WTO"). *See also* Matt Thompson, *Biden May Face Hurdles in Normalizing US – EU Trade Relations*, LAW360 (Nov. 13, 2020) (citing the former Democratic U.S. Senate majority leader Tom Daschle who opines that the Biden administration would attempt to restore the Appellate Body that the Trump administration paralyzed). The USTR has recently organized a webinar in an effort to expedite the implementation of the WTO Trade Facilitation Agreement (TFA). *See* USTR, *A Conversation with the U.S. Private Sector on Why Accelerating Implementation of the WTO Trade Facilitation Agreement is a Game Changer* (May 26, 2021), https://ustr.gov/sites/default/files/IssueAreas/Trade%20Organizations/WTO/USTR%20WTO%20TFA%20Webinar%20Invite%5B6%5D.pdf [https://perma.cc/FF6U-B93P]. *But see* Bryce Baschuk & Enda Curran, *'China Shock' Still Shakes World Grappling With Trade's Future*, BLOOMBERG LAW NEWS (Dec. 4, 2021) (reporting that the Biden administration has continued Trump's previous "hardline" approach, despite some positive changes "in tone" toward the WTO).

51. Alexander Kentikelenis & Erik Voeten, *Biden promises to embrace multilateralism again. World leaders agree.*, WASH. POST (Dec. 16, 2020), https://www.washingtonpost.com/politics/2020/12/16/biden-promises-embrace-multilateralism-again-world-leaders-agree/ [https://perma.cc/AFB3-FW73].

complicated mathematic concept, such as "equant."[52] This geocentric view of IL/IR leaves behind an ill-conceived analogy with a contract,[53] lacking broader societal imagination. As Jon Elster trenchantly observes, "the transfer of concepts used to study individuals to the behavior of collectives, as if these were individuals writ large, can be very misleading."[54] Only when we realize that domestic law is no more than a "historical category," can we embrace a more "elastic," constitutional, dimension of international law.[55]

Therefore, we need to embrace a "heliocentric" viewpoint of an international organization, such as the WTO, itself. This is a long-overdue paradigm shift from the law of sovereignty to the sovereignty of law: "a beneficent transition from a doctrine of international law based on the will of sovereign States to a doctrine of the law of nations based on the law's impersonal sovereignty."[56] The recent COVID-19 pandemic only emphasizes this paradigm shift. Driven by fear with little to no insight, individual states' knee-jerk reactions to the pandemic have failed to consider negative impacts onto others.[57] This lack of coordination has made a truly effective global response impossible. Many have found the WTO missing when its members competitively erected export controls on essential medical supplies.[58] Should the supranational authority borne by the WTC fully materialize, the WTO could have provided better and more timely disciplines on those trade restrictions.

Finally, a disclaimer is in order. Although this Article critiques an agency, member-driven model of the WTO and advances a structure, system-driven model as an alternative, it does not negate the possibility of agential construction. True, it is still member states that *can* change the fate of the organization. What this Article does censure is an uncritical manner in which a member-driven approach dictates in the conventional narratives on the WTO crisis. This Article recognizes that WTO members and the WTC are mutually constitutive, to wit,

52. Dana Zartner Falstrom, *Thought versus Action: The Influence of Legal Tradition on French and American Approaches to International Law*, 58 ME. L. REV. 338, 366-367 (2006) (observing that "[w]hen surveyed about the most pressing concerns on which the United States needs to be focused, Americans consistently aver that domestic concerns trump foreign policy issues.").

53. Lauterpacht, *supra* note 46 at 407.

54. JON ELSTER, ULYSSES UNBOUND 92 (2000).

55. *Cf.* Lauterpacht, *supra* note 46 at 414.

56. *Id.*, at 430.

57. *See* WTO News, *DDG Wolff: This Is the Time to Consider the Future of the Multilateral Trading System* (May 27, 2020). In particular, "policy space invoked by large trading countries has more of an impact globally than it being claimed by smaller countries." *Id.*

58. *Id.*

WTO members' self-understanding of their behaviors as inextricably linked to the WTC as a social structure.[59]

Against this background, this Article unfolds in the following sequence. Part I first juxtaposes two contrasting frameworks on the WTO, one *member*-driven (the "Original Contract" thesis[60]) and the other *system*-driven (the "Living Organization" thesis)[61]. This Part then highlights how the "Living Organization" thesis can brighten up analytical and normative blind spots left by the "Original Contract" thesis. Part II conceptualizes the WTO through a "constitutional" lens in the form of the WTC, which denotes a social structure providing a symbolic gravitational force field that shapes WTO members' anti-protectionist behaviors. This Part also outlines the bi-dimensional fabric of the WTC: the procedural WTC, such as principles of compulsory-exclusive jurisdiction and automatic adoption (no veto) of tribunal decisions, and the substantive WTC, such as a set of fundamental norms (precedent) that allocate power between the WTO and its members.

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59. *See* Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 27 (2000). *See also* ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION 281–84 (1984).

60. In the political science discipline of international relations (IR), the Original Contract thesis can be best captured by "rationalism," such as neorealism and rational choice theory, that prioritizes state power and interests over international law or international organizations. *See* Richard H. Steinberg, *Wanted – Dead or Alive: Realism in International Law*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 150 (Jeffrey Dunoff & Mark Pollack eds., 2013) (viewing that power occupies the analytical center of neorealism); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005) (arguing that international law "emerges from states acting rationally to maximize their interests"); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 7 (1995) (contending that international organizations do not exert autonomous impacts on state behaviors); Harlan Grant Cohen, *Can International Law Work?: A Constructivist Expansion*, 27 BERKELEY J. INT'L L. 636, 637 (2009) (observing that rational choice scholars view states as rational actors who condition their compliance with international law on their interests).

61. Within the context of IR theories, the Living Organization thesis tends to represent "constructivism" in that its holistic ontology emphasizes collective identities and community norms that constitute, if not determine, state behaviors. *See* Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385 (1994) (emphasizing that state interests are not exogenously given, but defined by collective identity among states); *See* Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385 (1994) (emphasizing that state interests are not exogenously given, but defined by collective identity among states); FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICES AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 43 (1991) (arguing that rules and norm guide choices via deliberation and discourse on the merits and "cast in terms of universalizable rules"); MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATION IN GLOBAL POLITICS 6–7 (2004) (observing that an international organization can create its own "social reality" based on norms); Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT'L ORG. 555, 564 (1997) (quoting JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 136 (1991)) (arguing that habituated patterns of collective interpretation determines members' "lifeworld").

This Part finally highlights a *moral* foundation of the WTC, which manifests the ideal of justice and rule of law.

Part III analyses the current WTO crisis by applying the WTC framework defined in the previous Part. It first demonstrates why the WTO crisis is a "constitutional" crisis by highlighting the system-undermining nature of the U.S.' twin threats of sabotaging the WTO appellate mechanism and launching trade wars. This Part then analyzes the origins of such constitutional threats by employing Kenneth Waltz's concept of "Three Images" (Individual, State, and International System) of international conflict. Part III views individuals (such as Trump and his cabinet members), state (the United States), international system (the lack of a collective decision-making system within the WTO) as co-contributors to the WTO's constitutional crisis. While not subscribing to a Waltz's neorealist paradigm of IR itself, this Article does benchmark Waltz's three images of IR to illustrate different yet interrelated causes and contexts of the current WTO crisis. Unearthing the origins of the crisis helps identify the "constitutional" nature of the crisis and therefore substantiates a paradigm shift toward a system-driven viewpoint on the WTO.

Part IV then spotlights the WTC's systemic resiliency that was manifested amid the constitutional crisis. As a "cultural," rather than material, phenomenon, the systemic resiliency warrants the WTC's potential of shaping a new global order. This Part begins with delineating various system-maintaining behaviors of WTO members in the face of the crisis. In particular, this Part spotlights WTO members' (minus the United States) collective efforts to replicate the now-defunct Appellate Body expeditiously. It then discusses the "indirect effect" of the WTC on individual economic players. The WTC's legal gravitational force can shape daily operations of private businesses at a granular level, even if such force may remain unrecognizable on a surficial level. Relatedly, private actors can also sponsor the WTC in the domestic arena through lobbying and litigation. Finally, this Part views the WTC's normative force cannot but remain limited unless the WTC's main engine, judicial constitutionalism, is complemented by "political" constitutionalism that involves voting.

This Article concludes that the WTC, as a symbolic-normative control tower over world trade, can inoculate against future trade wars if accompanied by a didactic effort among the WTO membership. Such a collective effort can cultivate a "constitutional culture,"[62] within and

62. *Cf.* Allan Ides, *The Emerging Transnational Constitution: Introduction*, 37 LOY. L.A. L. REV. 187, 188 (2003) (defining "constitutional culture" as "cultural cohesion that habitually accepts the propriety and necessity of constitutional compliance").

outside of the WTO, to help individual countries make better-informed political decisions on trade matters.[63]

I. TWO OPPOSING FRAMEWORKS ON THE WORLD TRADE ORGANIZATION

Narratives on the WTO crisis vary and do not necessarily cohere among themselves. Some accuse President Trump of his characteristic hostility against multilateralism,[64] in tandem with a broader theme of American Exceptionalism.[65] Others point to the political "capture" of the U.S. government by special interests, such as the steel industry.[66] Some others attribute the current crisis to the WTO's own making, in particular the Appellate Body's alleged judicial activism.[67] Still some others blame China.[68] While those narratives may offer particular snapshots of the WTO crisis, they fail to expose the deeper, philosophical, chasm between two meta-narratives underlying the surficial rhetoric: the "Original Contract" thesis and the "Living Organization" thesis.

A. The "Original Contract" Thesis

The Original Contract thesis represents an agency, state-oriented view in understanding international relations.[69] This thesis is symbolized by two historical international law canons: the *Lotus* principle (a state in general enjoys a "wide measure of discretion" without manifestly prohibitive rules[70]) and *in dubio mitius* (an international law obligation must be given the "less onerous meaning" to a state).[71] This

63. *See* Steve Charnovitz, *The WTO and Cosmopolitics*, 7 J. INT'L ECON. L. 675 (2004) (urging that the WTO should endeavor to facilitate public participation).

64. Brewster, *supra* note 2, at 8.

65. *See* James Bacchus, *Might Unmakes Right: The American Assault on the Rule of Law in World Trade*, Center for Int'l Governance Innovation (CICG) Paper No. 173 (May 2018); Steve Charnovitz, *How American Rejectionism Undermines International Economic Law*, 10 TRADE L. & DEV. 226 (2018) [hereinafter *American Rejectionism*].

66. Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 Eur. J. Int'l. L. 9, 58 (2016).

67. Steinberg, *supra* note 40, at 247-48. (observing that a wide range of commentators, such as scholars, practitioners, politicians and NGOs have recently accused the WTO Appellate Body of judicial activism); Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 J. WORLD TRADE 867 (2018) (criticizing the Appellate Body's judicial activism and proposing to restore the original political check established in the Uruguay Round negotiation).

68. Brewster, *supra* note 2, at 6-9.

69. *See* J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS 354, 363 (1996–97) (observing that the "continued centrality of the national and the state is ontologically necessary" to conventional IR scholars).

70. SS Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7).

71. OPPENHEIM'S INTERNATIONAL LAW 1278-9 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

thesis highlights members' control on the WTO affairs.[72] The U.S. government and some sympathetic observers subscribe to the thesis.[73] In what could be described as a "buyer's remorse,"[74] the U.S. government believes that the current developments under the WTO deviate from the original bargain struck at the Uruguay Round negotiation.[75] In particular, the U.S. government believes that it had secured a wide room for domestic deference within the WTO Antidumping Code. Article 17.6 (ii) of the Code provides that: "Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."[76]

Contrary to the U.S.'s wishful thinking, however, the WTO AB interpreted the provision strictly and struck down a manipulative methodology (zeroing) that had long been favored in calculating dumping margins for foreign imports. The zeroing methodology inflates a final dumping margin, which leads to higher antidumping duties, because it omits ("zeroes") any negative individual dumping margins when aggregating them to produce a total dumping margin of a given foreign product.[77] This legal defeat in the WTO frustrated the U.S. government as it was deprived of a main protectionist device. A torrent of criticisms flowed from the U.S. government, domestic industries competing with foreign producers, especially the steel industry, and trade attorneys representing those domestic industries.[78] In unison, they blamed the WTO Appellate Body for its lack of deference, or judicial activism, which they believe betrayed their expectation at the time of signing the WTO treaty.[79]

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72. *See e.g.*, Joost Pauwelyn, *The WTO 20 Years On: Global Governance by Judiciary or, Rather, Member-driven Settlement of (Some) Trade Disputes between (Some) WTO Members?*, 27 EUR. J. INT'L L. 1119, 1124 (2016) (emphasizing the "member-driven mandate" of the Appellate Body and the member control of its operation).

73. *See* USTR, *Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization* (Oct. 2021), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tais-remarks-prepared-delivery-world-trade-organization [https://perma.cc/MH4A-ANS9] (arguing that reforming the WTO dispute settlement mechanism is about "revitalizing the agency of Members to secure acceptable resolutions").

74. McDougall, *supra* note 67, at 872.

75. *See infra* sec. III. 0

76. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17.6 (ii).

77. *See* Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT'L L. 621, 633-41 (2010) (contrasting the US' sovereignty-maximizing interpretation of its zeroing practice with the majority of WTO members' institution-preserving construction of the same practice).

78. *See infra* Section III.B.

79. Chad P. Bown & Soumaya Keynes, *Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0*, 2, 6-7, 17 (Peterson Institute for Int'l Econs., Working Paper, 2020),

It is an official position of the current U.S. administration that the AB's approach "fails to apply the WTO rules as written and agreed to by the United States and other WTO Members" and that the "WTO Appellate Body has repeatedly sought to create new obligations not covered in WTO agreements."[80] Former USTR Robert Lighthizer argues that "the [WTO] dispute-settlement process over the years has really diminished what we bargained for or imposed obligations that we do not believe we agreed to."[81] Stephen Vaughn, former General Council for the USTR, also views that "the U.S. went into the dispute settlement system thinking that it was going to be an arbitration process that would be limited in its ability to force members to do things that they had not agreed to."[82] In the same vein, some scholars submit that the Appellate Body should adhere to a rather modest mandate originally established in 1995 when the WTO was created.[83] To them, the empowered Appellate Body is an "unintended consequence."[84] Thus, advocates for the thesis prefer *re*-negotiation to such judicial activism by the Appellate Body.[85] In this position, the U.S. government

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https://www.piie.com/publications/working-papers/why-trump-shot-sheriffs-end-wto-dispute-settlement-10 [https://perma.cc/89LR-92E8]; Jeffrey J. Schott & Euijin Jung, *The WTO's Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes*, PIIE (Dec. 2019), https://www.piie.com/publications/policy-briefs/wtos-existential-crisis-how-salvage-its-ability-settle-trade-disputes#:~:text=Trade%20Disputes%20%7C%20PIIE-,The%20WTO's%20Existential%20Crisis%3A%20How%20to%20Salvage,Ability%20to%20Settle%20Trade%20Disputes&text=It%20will%20weaken%20enforcement%20of,on%20US%20law%20and%20practice [https://perma.cc/4XEL-JVW6]; Chad P. Bown, *Can We Save the WTO Appellate Body?*, PIIE (Dec. 3, 2019), https://www.piie.com/commentary/testimonies/can-we-save-wto-appellate-body [https://perma.cc/EM9H-7XB3].

80. USTR, *2019 Trade Policy Agenda and 2018 Annual Report* (Mar. 2019), p. 26.

81. Center for Strategic and International Studies (CSIS), Interview of Ambassador Robert Lighthizer on the U.S. Trade Policy Priorities, (Sep. 18, 2017), https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative [https://perma.cc/MW4F-V5S8][hereinafter Lighthizer, Interview]. *Cf.* JUDITH L. GOLDSTEIN & RICHARD H. STEINBERG, REGULATORY SHIFT: THE RISE OF JUDICIAL LIBERALIZATION AT THE WTO, IN THE POLITICS OF GLOBAL REGULATION 223-26 (Walter Mattli & Ngaire Woods eds., 2009) (bringing in the theory of "incomplete contract" in interpreting WTO provisions); Steinberg, *supra* note 40, at 257 (viewing that "highly expansive lawmaking [by the Appellate Body] that changes the fundamental balance of rights and responsibilities established in the WTO negotiations" would irritate powerful members, such as the United States).

82. Shawn Donnan & Bryce Baschuk, *Trump's Bid to Dismantle Global Trading System Poised for a Win*, BLOOMBERG LAW (Jul. 30, 2019).

83. *See generally* Bernard Hoekman & Petros C. Mavroidis, *Burning Down the House?: The Appellate Body in the Centre of the WTO Crisis* (European Univ. Inst. Robert Schuman Centre for Advanced Studies, Working Paper No. 2019/56).

84. Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RES. 3, 8 (1998) (arguing that international organizations could exert non-material influences upon states, which are "unintended consequences" to powerful states, such as the United States).

85. *See e.g.*, Jeffrey J. Schott & Euijin Jung, *The WTO's Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes*, Peterson Institute for Int'l Econ. Policy Brief, No. 19-19, 6 (Dec. 2019), https://www.piie.com/sites/default/files/documents/pb19-19.pdf

might be tempted to buy back the Appellate Body only in return for new commercial gains, such as those incurring from the withdrawal of a developing country status by China, Brazil, and India.[86]

In sum, the Original Contract thesis analogizes the principle of party autonomy in a domestic contract and fuses it with the sovereignty principle under international law: the WTO is a sovereign contract. The thesis also betrays a hidden premise that a WTO member must be able to "self-judge" a particular meaning of a treaty provision. The gist of the U.S. position is that the country's *own* interpretation is the one that matters. This position effectively obliterates the very rationale of the WTO system of impartial, third-party adjudication. Thus, according to the Original Contract thesis, a powerful nation is inclined to stick to whatever *version* of the original terms that best suits its interest and desire to enforce it unilaterally without legal constraints – both procedural and substantive – from the international rule of law. This is exactly what the United States has practiced under the Trump administration.

B. The "Living Organization" Thesis

The most fatal aspect of the Original Contract thesis is that it turns a blind eye to its systemic impact to the world trading community. By the time that the United States claimed a restoration of the alleged original contractual terms through a trade war, the trade war had already wreaked havoc on economies, *both* globally and domestically. The recent "Phase One" deal between the United States and China would hardly bring any tangible net economic benefits to the U.S. economy, given the tremendous costs that the trade war incurred to the business sector.[87] Tariffs have taxed the U.S. firms doing business with the world's second largest economy, forcing many of them to reconfigure their supply chains at prohibitive costs. Worse, sheer uncertainty, which is a natural consequence of any trade war, has prevented the businesses from making necessary investments and hiring new workers.[88] These totally unnecessary self-inflicted wounds have taken place

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[https://perma.cc/9KMS-ZCF5](proposing a permanent moratorium on appeals for cases involving antidumping and countervailing measures and a subsequent negotiation on those issues).

86. *See* Anabel González & Euijin Jung, *Developing Countries Can Help Restore the WTO's Dispute Settlement System*, Peterson Institute for Int'l Econ. Policy Brief, No. 20-1 (Jan. 2020), https://www.piie.com/publications/policy-briefs/developing-countries-can-help-restore-wtos-dispute-settlement-system [https://perma.cc/W6GR-C9K8].

87. *See generally* Ana Swanson & Keith Bradsher, *Trump Officials Praise Gains from China Deal, but They Come at a Cost*, NY TIMES (Dec. 15, 2019), https://www.nytimes.com/2019/12/15/business/economy/us-china-trade-deal.html.

88. Ryan Hass & Abraham Denmark, *More Pain than Gain: How the US-China Trade War Hurt America*, BROOKINGS (Aug. 20, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/.

in the name of sovereignty, as they used to in the interwar period leading to the ultimate outbreak of the Second World War.[89]

The philosophical foundation of the sovereignty thesis lies on an atomistic, state-centered understanding of trade relations.[90] It enshrines a mechanistic order based on territorial sovereignty, presupposing disconnected and separable trading units. Therefore, the thesis pays short shrift to the new economic reality of Global Value Chains (GVCs), which manifests an "implicate order"[91] of interconnection and interdependency. GVCs are structured in an organic way as a living whole. Its multi-location production and trade pattern represents self *with* other, rather than self *versus* other. For example, the logic of wind turbines global value chains requires European manufactures of wind turbines to import Chinese raw materials (rare earths) and other components for wind turbines to compete with Chinese manufacturers of wind turbines.[92] The new economic reality calls for an open and deterritorialized framework, which is attainable only through the systemic approach discussed below.

The Living Organization thesis is a structure-driven framework in understanding trade relations. This thesis highlights the WTO's supranationality[93] in that the "common" intentions of WTO members must prevail over the "subjective and unilaterally determined expectation" of an individual member.[94] It also advances the international

89. *See* Douglas A. Irwin, *The GATT in Historical Perspective*, 85 AM. ECON. REV. 323, 323-24 (1995); *see also* John Steel Gordon, The United States of Free Trade, Wall St. J. (Sept, 21, 2018), https://www.wsj.com/articles/the-united-states-of-free-trade-1537566912 [https://perma.cc/Q9F4-RD3K].

90. *See* Oliver Kessler, *Toward a Sociology of the International?: International Relations between Anarchy and World Society*, 3 INT'L POL. SOC. 87, 101 (2009) (arguing that approaching international law from the state-based perspective fails to capture the transformation of sovereignty through the process of constitutionalization).

91. *Cf.* DAVID BOHM, WHOLENESS AND THE IMPLICATE ORDER (1980); *cf.*David Peat, David Bohm, Implicate Order and Holomovement, SAND, https://www.scienceandnonduality.com/article/david-bohm-implicate-order-and-holomovement [https://perma.cc/4Z6K-57CY] ("In principle, any individual element could reveal 'detailed information about every other element in the universe.'").

92. Leslie Hook, *Wind Power Industry Warns of Global Trade War Threat*, FIN. TIMES (Oct. 21, 2019), https://www.ft.com/content/1fb3a25c-f3f4-11e9-b018-3ef8794b17c6 [https://perma.cc/98V2-ZNBX].

93. *See e.g.*, Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621, 631 (2009) (stating that mainstream IR theorists have often refused to recognize an international organization's capacity to "develop autonomous capacities to produce, monitor, and enforce legal norms").

94. *See* Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶ 84, WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (Jun. 5, 1998).

rule of law[95] with an independent world trade tribunal.[96] According to this thesis, precedent is a *sine qua non* of rule of law as it denotes stability and predictability of the WTO system.[97] The WTO community is a "compliance community"[98] in which rule-following is internalized as a "default pattern" of members' behaviors.[99] Such precedent "cannot be disinvented," even though its positivistic contract (treaty) is dismantled.[100] While the Original Contract thesis is nostalgic about the old GATT dispute resolution mechanism under which a losing party could "veto" the panel decision, the Living Organization thesis claims that it is the wayward member, not the WTO itself, that must be tamed.[101] The Living Organization thesis mandates that the attitude and identity of such renegade members must be reconstituted.[102]

In sum, the Original Contract thesis informs the recent U.S. destructive unilateral moves, such as the Appellate Body un-packing,

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95. Dispute Settlement Body, *Minutes of the Meeting*, WTO Doc. WT/DSB/M/379 (Aug. 29, 2016). *See also* Alan Wm. Wolff, *It Would Be a Mistake to Underestimate Strength of Multilateral Trading System* (Dec. 4, 2019), https://www.wto.org/english/news_e/news19_e/ddgaw_04dec19_e.htm#fnt-1 [https://perma.cc/4C2Z-VPSN] (quoting Edward Alden from Council on Foreign Relations).

96. JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 278-79 (2000) (observing the evolution in the GATT/WTO from the *power*-oriented system to the *rule*-oriented system); Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM (G. Sacerdoti et al. eds, 2006); Hélène Ruiz Fabri, *The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story*, 27 EUR. J. INT'L L. 1075, 1077 (2016); Debra Steger, *The founding of the Appellate Body*, *in* A HISTORY OF LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 448-49 (Gabrielle Marceau ed., 2015); SUNGJOON CHO, THE SOCIAL FOUNDATIONS OF WORLD TRADE: NORMS, COMMUNITY AND CONSTITUTION 28-30 (2015) [hereinafter, The SOCIAL FOUNDATIONS] (arguing that the world trading system has evolved from the original "contract" model to the "trade constitution" model).

97. DSU, *supra* note 13, art. 3.2 ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."). *See* Philip Selznick, Book Review, 30 AM. SOC. REV. 947, 947-98 (1965) (reviewing LON L. FULLER, THE MORALITY OF LAW (1964)) (observing that "a legal order is not a brute datum of social power but a mode of decision-making guided by distinctive standards and ideals.").

98. *See* KAREN ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 92-94 (2009); BETH A. SIMMONS, MOBILIZING HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 78-79 (2014).

99. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2655 (1997) (discussing how institutional habits lead nations to compliance).

100. Steve Charnovitz, *A WTO If You Can Keep It*, 63 QUESTIONS OF INT'L L., Zoom-Out 5, 35 (2019).

101. *See* WTO, Appellate Body, "Unprecedented Challenges" Confront Appellate Body, Chair Warns (Jun. 22, 2018) https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm [https://perma.cc/DR3H-DMZL]. ("The current events are a sobering reminder of what is at stake and how the erosion of the WTO dispute settlement system could lead to the re-emergence of power orientation in international trade policy.").

102. *See* Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INT'L ORG. 887 (1998).

trade wars and the blocking of the WTO budget.[103] Accommodating the U.S. request[104] would mean rewarding a system-destructive behavior. Faced with such an existential threat,[105] the WTO is left with no other option but to preserve its legal and institutional integrity, which lends credence to the Living Organization thesis. This explains why the U.S. anomic behaviors paradoxically elevate the prominence of the WTC, which will be discussed below.

II. MAPPING THE WORLD TRADE CONSTITUTION

Guided by the "Living Organization" thesis, this Part begins with conceptualizing the WTO through a "constitutional" lens in the form of the WTC. The WTC represents a social structure that nurtures an anti-protectionist culture and provides a symbolic gravitational force field that shapes WTO members' behaviors. This Part also outlines the procedure and substantive bi-dimensional fabric of the WTC. The procedural WTC concerns principles of compulsory-exclusive jurisdiction and automatic adoption, without the veto possibility, under the WTO's dispute settlement system. The substantive WTC connotes a set of fundamental norms that allocate power between the WTO and its members and discipline protectionist abuses of trade remedies, such as antidumping measures. Finally, this Part highlights a moral foundation of the WTC, which manifests the ideal of justice and rule of law in the global trade sphere.

A. Constitutional Case for the World Trade Organization

The Original Contract thesis envisions a positivist version of the WTO, faithful to the traditional state-centered model of international law based on sovereignty, and therefore rejects a constitutional order within the WTO. Admittedly, "[t]here is no constitutional court, no constitutional convention, no constitutional drafting process, and no readily identifiable constitutional moment"[106] within the WTO. Yet a strictly positivist view on the WTO risks countenancing "obdurately

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103. Bryce Baschuk, *U.S. Is Said to Raise Prospect of Blocking Passage of WTO Budget*, BLOOMBERG LAW (Nov. 12, 2019).

104. *See* Tetyana Payosova et al., *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures,* Peterson Institute for International Economics Policy Brief, No. 18-5 (Mar. 2018), at 11, https://www.piie.com/system/files/documents/pb18-5.pdf [https://perma.cc/K842-WCMA] (arguing that "WTO members should engage more with the United States, not less").

105. *See* Steve Charnovitz, *Solving the Challenges to World Trade*, GW LEGAL STUDIES RESEARCH PAPER No. 2020-78, at 16 (warning that the U.S. trade unilateralism, if left unchecked, might create a situation in which "the game of WTO rules is rendered unworth the candle").

106. Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 650-51 (2006). *See also* Cass, *supra* note 28, at 40 (observing that a constitutional dialogue on the WTO often causes "consternation and criticism" among trade law scholars and trade policy officials alike).

defensive internationalism" that could not fully capture the rich dynamic at a "systemic" level.[107] Namely, how the WTO, as an autonomous legal subject, governs and disciplines its constituent units (members), which may translate into "self-affirming constitutional discourse."[108] Under this defensive internationalism, an evolutionary nature of the WTO case law might be debunked as "judicial overreach," with its even "persuasive," not mandatory, authority being questioned.[109]

Importantly, however, conceptualizing the WTO as a constitutional system does not denote a *large C* Constitution.[110] What it does embrace is the undeniable presence of a functional constitutional dimension of the WTO as a supranational system. As a matter of sustainability, the WTO needs to manage organizational problems, such as anomic behaviors and other kinds of system-undermining uncertainty. For example, even the bilateral trade war between the United States and China holds a multilateral dimension as both made-in-China and made-in-USA products contain varying degrees of parts and components added from numerous trading partners in the contemporary setting of GVCs.[111] Sustaining a multilateral trading system is essentially a complicated governance issue. It inevitably involves a task of allocation of power between the WTO and its member(s).

While trade law and trade politics always remain intertwined in such power allocation, trade constitution symbolizes a historical evolution from a power-oriented arrangement to a *rule*-oriented system.[112] While the GATT was launched as a desperate collective effort to disci-

107. Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 332 (2002).

108. *Id.*

109. *See, e.g.*, WTO, Draft Decision, *Functioning of the Appellate Body*, WT/GC/W/791 (Nov. 28, 2019), ¶ 15 [hereinafter Functioning of the Appellate Body] ("Precedent is not created through WTO dispute settlement proceedings."). Regarding an excellent critique on this position, *see notably* Steve Charnovitz, *The Myth of No WTO Precedent*, INT'L ECON. L. & POL'Y BLOG (Dec. 9, 2019), https://ielp.worldtradelaw.net/2019/12/the-myth-of-no-wto-precedent.html [https://perma.cc/NN2M-3MYR](surveying an ubiquitous use of precedent in both domestic and international judicial systems). *See also* Simon Lester & James Bacchus, *Of Precedent and Persuasion: The Crucial Role of an Appeals Court in WTO Disputes*, Free Trade Bulletin (Cato Institute), No. 74 (Sep. 12, 2019), https://www.cato.org/publications/free-trade-bulletin/precedent-persuasion-crucial-role-appeals-court-wto-disputes [https://perma.cc/QAK7-39XF] (highlighting the fundamental value of precedent, beyond differing semantics, in terms of securing stability and predictability of the world trading system).

110. Dunoff, *supra* note 95, at 647-49 (arguing that "neither WTO texts nor practices suggest that the WTO is a constitutional entity").

111. World Bank, *World Dev. Report 2020: Trading for Development in the Age of Global Value* Chains, ch. 4, at 114.

112. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 85 (1989).

pline protectionist politics, its early operation was at the mercy of diplomacy and politics.[113] The launch of the WTO has "enable[d] its members to pursue common goals without being defeated by competing antisocial conduct of members of the group."[114] Without such disciplining, or constitutional, mechanism, the global trading community would regress to an interwar "law of the jungle"[115] that would make trade wars a perennial phenomenon.[116] As Hersch Lauterpacht aptly observed, "it is the *refusal* of the State to submit the dispute to judicial settlement, and not the intrinsic nature of the controversy, which makes it political."[117] If WTO members are all "civilized" nations and adhere to some form of rule of law,[118] none of them would claim that a WTO matter basically reduces down to politics.[119] Otherwise, the WTO law might descend to a mere "apology" for unbridled superpowers.[120] Such an apology would even license a state to self-identify *lacuna* and self-declare a *non liquet* situation to justify unilateralism. For example, the United States has attempted to justify its trade war against China based on its allegation that the current WTO norms fail to cover matters at hand, such as issues related to China's state capitalism.[121]

The WTO can be postulated as a constitutional system, under the WTC, in two ways.[122] First, the WTO *qua* social structure can be explained by "system-level properties," such as a culture of anti-protectionism and anti-unilateralism, prevailing in the WTO community. The WTO community exists in terms of subjective meanings, such as reliable expectations of free trade, and intersubjective relations, such as a collective identity.[123] It is this fidelity to this "multilateral rules-

113. *See* The Social Foundations, *supra* note 85, ch.3.

114. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 788 (1969).

115. *See* Lionel Laurent, *WTO Paralysis Means Law of the Jungle*, WASH. POST (Dec. 12, 2019).

116. *See* Simon Lester, *Unilateral Enforcement in the US-China "Phase One" Trade Agreement*, INT'L ECON. L. & POL'Y BLOG (Dec. 14, 2019), https://ielp.worldtradelaw.net/2019/12/unilateral-enforcement-in-the-us-china-phase-1-trade-agreement.html [https://perma.cc/825T-ALQE] (observing that the unilateralist enforcement mechanism in the preliminary U.S. – China trade agreement tends to invite trade wars).

117. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 164 (1933) (emphasis added).

118. Alan Wm. Wolff, *The Rule of Law in an Age of Conflict*, Keynote Address at the Closing Ceremony of the World Trade Institute Master Programs, University of Bern (Jun. 29, 2018), https://www.wto.org/english/news_e/news18_e/ddgra_02jul18_e.htm [https://perma.cc/4SHD-K4PA].

119. Martti Koskenniemi, *The Function of Law in the International Community: 75 Years After*, 79 BRIT. Y.B. INT'L L. 353, 358 (2008) [hereinafter, Koskenniemi, *The Function of Law*].

120. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2009).

121. *See* Bryce Baschuk, *Shea Says China's Trade Regime `Not Compatible' with WTO Rules*, (Dec. 17, 2018) BLOOMBERG LAW (Dec. 17, 2018).

122. Here, I draw mainly on Wendt, *supra* note 37, at 11-12.

123. Pouliot, *supra* note 36, at 375.

based"[124] culture that prompted key WTO members, such as the EU, China, Brazil, and Canada to devise an interim appeal arbitration mechanism ("Multi-Party Interim Appeal Arbitration Arrangement" (MPIA)) replicating the now paralyzed AB.[125] In this sense, those WTO members can be said to have reproduced the WTO's symbolic universe through the MPIA. Likewise, WTO members are inclined to evoke, nearly reflexively, such culture of the multilateral trading system at every crisis moment, as seen in an emergency statement amid the COVID-19 pandemic.[126]

Second, the WTO shapes and explains particular state behaviors, ranging from compliance to violations. The WTC's "juridical field," [127] as a symbolic gravitational force field, denotes an "extensive" legal authority that the WTC exerts over a wide array of stakeholders, including not only WTO member governments but also practitioners, businesses, NGOs, and academia.[128] The quantum of such force may be measured by the consistent increase in the number of relevant publications and the size of participation in the WTO Public Forum.[129] The WTC can also transcend down *below* the state level. In many issue areas, quotidian yet conscious interactions among various norm-sponsors, such as policymakers, practitioners, scholars, and think tanks, are capable of mainstreaming WTC into domestic discourse. This neomonistic transnationality can secure a habituated enclave of WTC within a domestic legal system, which renders departing from the WTC aberrant rather than normal.[130]

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124. Bryce Baschuk, *EU Joins 15 Nations to Forge End-Run Around Trump's WTO Block*, BLOOMBERG LAW (Mar. 27, 2020).

125. Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (Apr. 30, 2020), pmbl. ("*Re-affirming* their commitment to a multilateral rules-based trading system") (emphasis original); Alex Lawson, *WTO Legal Veterans Named To Interim Appeals Panel*, LAW360 (Aug. 3, 2020) https://www.law360.com/articles/1297754/wto-legal-veterans-named-to-interim-appeals-panel [https://perma.cc/MYQ4-7SH7] (reporting ten trade law experts appointed to the MPIA panel). *See also* Murilo Lubambo de Melo, *International Trade Dispute Settlement: Ready to Blossom Again?*, ASIL INSIGHTS, Jul. 21, 2020, (observing that "the MPIA is a well-thought-out and promising mechanism that stems from public international law roots").

126. APEC, *Statement on COVID-19 by APEC Ministers Responsible for Trade* (May 5, 2020) (declaring that "[emergency] measures should be targeted, proportionate, transparent, temporary and should not create unnecessary barriers to trade, and are consistent with WTO rules").

127. *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805 (1987).

128. *See* Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS. 1 (2016).

129. Gregory Shaffer et al., *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237, 239-240, 267 (2016).

130. *Cf.* BERGER & LUCKMAN, *supra* note 27, at 66 (observing, from a sociological standpoint, that a drastic departure from the objectified social knowledge is tantamount to a deviation from reality and thus deems inacceptable).

An interesting manifestation of this neo-monistic transnationality is the convergence between the WTC and a domestic free trade constitution. As widely documented, the current trade wars have left enormous self-inflicted wounds to the U.S. economic players, such as importers and consumers.[131] They have recently challenged the Trump administration's retaliatory tariffs in the U.S. domestic court, highlighting the flawed grounds for those tariffs, including bilateral trade deficits between the United States and China,[132] as well as the arbitrary and capricious nature of their administration.[133] The sheer size of those lawsuits, launched by more than 3,500 companies, vividly describes economic pains that trade wars inflict on their own citizens.[134] Here, even though the U.S. importers have not relied directly on particular WTO provisions in disputing the trade war in the domestic court, both goals and consequences of their domestic lawsuits can be said to correspond with the broad ideal of the free trade (Foreign Commerce) stipulated in the U.S. Constitution.[135] To that extent, the WTC's

131. Jiana Smialek & Ana Swanson, American Consumers, Not China, Are Paying for Trump's Tariffs, N.Y TIMES (Jan 6. 2020), https://www.nytimes.com/2020/01/06/business/economy/trade-war-tariffs.html [https://perma.cc/MK3X-MLES]; Mary Amiti et al., *The Impact of the 2018 Tariffs on Prices and Welfare*, 33 J. ECON. PERSPECTIVES, Fall 2019, at 187, 188-89; Mary Amiti et al., *The Impact of the 2018 Trade War on U.S. Prices and Welfare* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25672, 2019).

132. *See* Brian Flood, *Trump's Escalation of China Trade War Draws Wave of Lawsuits*, BLOOMBERG L. (Sep. 18, 2020), https://news.bloomberglaw.com/ip-law/trumps-escalation-of-china-trade-war-draws-wave-of-lawsuits?context=article-related [https://perma.cc/9QG4-N29Y].

133. *See Tesla, Volvo, Ford and Mercedes Sue US over 'Unlawful' Tariffs on Chinese Parts*, THE GUARDIAN (Sep. 23, 2020, 8:26 PM), https://www.theguardian.com/technology/2020/sep/24/tesla-sues-trump-administration-over-unlawful-tariffs-on-chinese-parts [https://perma.cc/D2LS-L322]; Alex Lawson, *More Than 3,300 Importers Energized to Erase China Tariffs*, LAW360 (Sep. 22, 2020, 7:13 PM), https://www.law360.com/articles/1312509/print?section=construction [https://perma.cc/2SQ2-5QKK] (reporting that a myriad of importers, including Home Depot, Target and Ford, filed lawsuits against Trump's tariffs on Chinese goods based on procedural grounds). Notably, some federal court judges appear to sympathize with importers' positions. *See* Alex Lawson, *Trade Judges Press Government on Harm of China Tariffs*, LAW360 (Jun. 17, 2021, 2:50 PM), https://www.law360.com/articles/1393670/print?section=construction [https://perma.cc/QV6F-SD4Z] (reporting a U.S. Court of International Trade judge who questioned described the U.S. government's refusal to pay refunds on liquidated entries as she described it as "irreparable harm" to importers).

134. Aime Williams, *Thousands of Companies Sue US over China Tariffs*, FIN. TIMES (Oct. 5, 2020), https://www.ft.com/content/2b85124a-2196-42ec-96bb-4e9a3cb962dd; Alex Lawson, *The Most Pressing Trade Policy Questions Looming in 2021*, LAW360 [https://perma.cc/AC7E-MYL3] (Jan. 3, 2021, 12:02 PM), https://www.law360.com/articles/1332890/print?section=aerospace [https://perma.cc/8NLK-ENXL] (reporting on a "massive mobilization of attorneys representing importers" in these domestic lawsuits against trade war measures).

135. Bradley Jones, *Americans are generally positive about free trade agreements, more critical of tariff increases*, PEW RESEARCH CENTER., (May 10, 2018); Andrew Chatzky and Anshu Siripurapu, *The Truth About Tariffs,* COUNCIL ON FOREIGN RELATIONS (Oct. 8, 2021); Lawrence Hurley, *U.S. Supreme Court rejects challenge to Trump's steel tariffs*, REUTERS (Jun. 22, 2020); David Shepardson, *Some 3,500 U.S. Companies sue over Trump-imposed Chinese Tariffs*, REUTERS (Sep. 25, 2020).

gravitational force can be said to be in sync with that of the U.S. Constitution's conception of free trade. The only difference is that domestic lawsuits, if successful, can bestow upon them retrospective remedies (tariff returns), which the WTO is not equipped with.

B. The Fabric of the World Trade Constitution: Procedural and Substantive

The WTC, as *corpus juris*, is a total sum of decades-long institutional custom (*acquis*), which has emerged within the WTO and its predecessor GATT.[136] This rich normative product is instantiated by a variety of formal and informal documents, including agreements, decisions, declarations, working procedures, minutes of various committee meetings, panels and the Appellate Body reports, and press releases.[137] The WTC holds both procedural and substantive dimensions.

The procedural WTC is comprised of the WTO Dispute Settlement Understanding (DSU) and its derivative "procedural self-regulation," such as working procedures for appellate review, which buttresses the WTO's "procedural independence" from its members.[138] As a "central element in providing security and predictability to the multilateral trading system,"[139] the WTC's procedural features include compulsory jurisdiction (no WTO member could escape its jurisdiction),[140] exclusive jurisdiction (the WTO provides an exclusive forum for resolving trade disputes)[141] and the automaticity principle (no WTO member could veto a panel or the Appellate Body decision once it is issued).[142] WTO members "shall have recourse to, and abide by, the rules and procedures

136. WTO Agreement, *supra* note 41, art. XVI ("[T]he WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947").

137. THE SOCIAL FOUNDATIONS, *supra* note 96, at 130.

138. Fabri, *supra* note 96, at 1077.

139. DSU *supra* note 13, art. 3.2.

140. In the GATT era, a contracting party could block the establishment of a dispute settlement panel. The United States government was often frustrated by the European Communities' refusal to launch a panel on certain politically sensitive disputes, such as the Hormones case. This frustration led to the compulsory jurisdiction rule, i.e., the automatic establishment of a panel, under the new WTO dispute settlement system. JENNIFER HILLMAN, THREE APPROACHES TO FIXING THE WORLD TRADE ORGANIZATION'S APPELLATE BODY: THE GOOD, THE BAD AND THE UGLY? (Inst. Int'l Econ. L., Geo. U. L. Ctr.).

141. "Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding." DSU, *supra* note 13, art. 23.2(a).

142. "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members." DSU, *supra* note 13, art. 17.14.

of" the DSU, and the DSU *only*, when it comes to dispute resolution.[143] A rule-based, binding dispute settlement system, which the procedural WTC denotes, is critical in effectively operating the WTO system because WTO members would otherwise have no incentive to engage in a serious negotiation.[144]

While the WTC's procedural features constitute the hardware of the WTO system, the substantive dimension concerns its software. In particular, certain WTO norms, mostly in the form of precedent, offer an operative language in governing fundamental, constitutional issues. These constitutional issues include reconciliation between free trade values and societal values.[145] The reconciliation between free trade values and societal values is seen in the jurisprudence of GATT Article XX and two side agreements (the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS)),[146] and various disciplines in the antidumping area, in particular the anti-zeroing precedent.[147]

For example, the WTO has developed a sophisticated set of "constitutional common law" which effectively allocates regulatory power between the WTO and its members regarding various societal policy areas, such as environment and public health.[148] Under the old GATT norm, a sharp dichotomy existed between free trade values, such as the treatment obligation (GATT Article III) and societal values (GATT Article XX). A structural pro-trade bias prioritized the former as general obligations vis-à-vis the latter as general "exceptions."[149] Thus, a regulating state had to bear the burden of proving that its measure was "necessary" to achieve certain policy objectives (such as protecting

143. DSU, *supra* note 13, art. 23.

144. Ana Swanson, *Trump Cripples W.T.O. as Trade War Rages*, N.Y. TIMES (Dec. 8, 2019) https://www.nytimes.com/2019/12/08/business/trump-trade-war-wto.html [https://perma.cc/56GV-6FGJ] (quoting a former Appellate Body member Ujal Singh Bhatia who cast a poignant question: "why would people come to the W.T.O. to negotiate rules if they are not sure the rules can be enforced?").

145. *See* Jeffrey L. Dunoff, *"Trade and": Recent Developments in Trade Policy and Scholarship–And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1996-1997) (viewing that the trade regime's expansion into the social policy realm, in terms of "trade and" issues, may jeopardize the trade regime's continued political viability).

146. THE SOCIAL FOUNDATIONS, *supra* note 96, ch. 4 (discussing the concept of the "Basic Law" in international trade). *Cf.* Andrew Lang, *The Judicial Sensibility of the WTO Appellate Body*, 27 EUR. J. INT'L L. 1095, 1099-1100 (2016) (observing that the TBT/SPS jurisprudence focuses on regulatory disciplines akin to due process, rather than on narrow protectionism).

147. *See* Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT'L L. 621 (2010) (viewing that the WTO was able to reconstruct trade norms regarding antidumping practices despite the United States' sovereignty-maximizing interpretation of its zeroing practice).

148. THE SOCIAL FOUNDATIONS, *supra* note 96, at 154.

149. Sungjoon Cho & Jurgen Jurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT'L L., no. 1, 2018, at 169, 183.

human health).[150] Here, being "necessary" was interpreted as being "least trade-restrictive," namely having no other alternatives than the measure itself. Such a draconian test signifies that not a single measure was justified under Article XX in the whole GATT history.[151] For example, in *Thai Cigarettes* (1990), a GATT panel refused to validate a Thai moratorium on harmful foreign cigarettes. The panel viewed that such measures were not "necessary" to protect human health—the Thai government could have adopted less trade-restrictive measures, such as disclosure regulation.[152] This decision faced severe criticism of unduly interfering with the regulatory autonomy of domestic governments.[153]

In response, the newly minted WTO Appellate Body developed a new test that overcame the chronic pro-trade bias and accord domestic governments broader regulatory space. This test, coined the "chapeau test," breathed a new life into a seldom-used introductory language (chapeau) of GATT Article XX, which reads that exceptions "are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or a *disguised restriction* on international trade."[154] In *Gasoline* (1996), the Appellate Body, applying the chapeau test, upheld the substantive merits of the U.S.'s clean fuel standard as a legitimate environmental measure but eventually struck it down because the measure was applied in a way which failed to take into account its negative impacts on the U.S.'s trading partners (Brazil and Venezuela).[155] The Appellate Body viewed that such failure constituted arbitrary or unjustifiable discrimination or a disguised restriction and therefore violated GATT Article XX.[156]

The chapeau test heralded an ingenious hermeneutical tool in balancing between free trade goals and regulatory autonomy. In *Gasoline*, while the U.S. government technically lost the dispute, it could still claim a partial victory in that the Appellate Body reversed the original panel report, which had invalidated the U.S. gasoline standard as

150. *See* GATT, art. XX; Justifiable Reasons, Chapter 4, https://www.meti.go.jp/english/report/data/2018WTO/gct18_1coe.html [https://perma.cc/W3BW-UERS].

151. *See* Robert Howse, *Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, *in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 142 (Thomas Cottier & Petros C. Mavroidis eds., 2000) [hereinafter Howse, *Managing the Interface*].

152. Panel Report, *Thailand Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 77, WTO Doc. DS10/R/37S/200 (adopted Nov. 7, 1990).

153. Howse, *Managing the Interface, supra* note 151, at 142.

154. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX [hereinafter GATT] (emphasis added).

155. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (May 20, 1996), 25-27 [hereinafter *Gasoline*].

156. *Id.*

simply protectionist and reinstated the U.S. measure as legitimate environmental policy.[157] Moreover, the remedy that the U.S. government had to implement was not too burdensome to the U.S. government.[158] Instead of repealing a federal statute, which would have involved the Congress and therefore would have been daunting, the U.S. government only had to revise its internal guidelines to establish cooperative arrangements with foreign trading partners. Hence, a better constitutional balance between the WTO and its member states is necessary in allocating regulatory power.

The chapeau test invented in *Gasoline* re-emerged in *Shrimp-Turtle*.[159] In the Nineties, the U.S. government, based on Section 609, banned shrimp imports from Malaysia on the grounds that the Malaysian fishing industry, while catching shrimp, killed sea turtles, which are endangered species.[160] The United States justified its ban as an environmental measure, as permitted under GATT Article XX (g) ("relating to the conservation of exhaustible natural resources").[161] However, the Appellate Body ruled that the U.S. ban constituted "arbitrary" discrimination under the chapeau test of Art. XX.[162] In particular, the Appellate Body viewed that the U.S. *application* of Section 609 in that dispute was "arbitrary" discrimination because of the "rigidity and inflexibility in its application, and the lack of transparency and procedural fairness in the administration of trade regulations."[163]

In its compliance with the Appellate Body report, the U.S. government had made "serious, good faith efforts" to work out a new international agreement that aims to protect sea turtles.[164] The U.S. government forsook the previous requirement that a foreign sea turtle protection program be "essentially the same" as that of the United States.[165] Instead, it adopted a more flexible policy stance requiring

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157. *Id.* at 19.

158. *See* Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, at 29, WTO DOC. WT/DS2/AB/R (adopted Apr. 29, 1996) [hereinafter Gasoline Appellate Body Report].

159. Robert Howse, *The Appellate Body Rulings in the Shrimp / Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENV'T. L. 491, 498-99 (2002).

160. Panel Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶¶ 147-146, WTO DOC. WT/DS58/R (adopted May 5, 1998) [hereinafter Shrimp/Turtle Panel Report].

161. *Id.*

162. Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 184, WTO DOC. WT/DS58/AB/R (adopted Oct. 12, 1998).

163. US – Shrimp (DS 58), WTO Dispute Settlement: One-Page Summaries (2019), at 29, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds58sum_e.pdf [https://perma.cc/H4GV-GGU8].

164. US – Shrimp (Article 21.5 – Malaysia) (DS 58), WTO Dispute Settlement: One-Page Summaries (2019), at 30, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds58sum_e.pdf.

165. US – Shrimp (DS 58), WTO Dispute Settlement: One-Page Summaries (2019), at 30, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds58sum_e.pdf.

foreign protection programs to simply be "comparable in effectiveness" to the U.S. program.[166] To Malaysia, this type of revision was hardly a satisfying remedy since the U.S. new guideline would still ban its shrimp export. Nonetheless, the Appellate Body ruled that:

> [T]he United States had only an obligation to make best efforts to negotiate an international agreement regarding the protection of sea turtles, not an obligation to actually conclude such an agreement because all that was required of the United States to avoid "arbitrary or unjustifiable discrimination" under the chapeau was to provide all exporting countries "similar opportunities to negotiate" an international agreement.[167]

The Appellate Body also noted that "so long as such comparable efforts are made, it is more likely that 'arbitrary or unjustifiable discrimination' will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries."[168] The Appellate Body's constitutional adjudication strikes a subtle balance between free trade (such as free movement of shrimp products) and regulatory autonomy (such as protection of sea turtles) in a procedural, not substantive, fashion.

The WTO's balancing of free trade and regulatory autonomy culminated with the Appellate Body engaging in the TBT/SPS Agreements. As an articulation of non-discrimination principles under GATT Articles III and XX in the areas of technical regulations (TBT) and public health measures (SPS), these twin side agreements purport to eliminate the chronic GATT dichotomy between free trade obligations and regulatory exceptions. Instead, the Appellate Body has assumed a role similar to a domestic court of constitutional review—which has been seen in the European Court of Justice on the principle of Free Movement of Goods and the U.S. Supreme Court on the Dormant Commerce Clause.[169] The Appellate Body has recently ruled that negative trade impacts on foreign products caused by a technical regulation may be deemed legitimate. Thus, the regulation would remain consistent with the TBT Agreement, only if the regulation was applied in an "even-handed" manner, which parallels administrative law principles such as consistency and due process.[170]

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166. *Id.*

167. *Id.*

168. *Id.*

169. *See generally* SUNGJOON CHO, FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM, ch. 5 (2003).

170. Appellate Body Report, *United States—Certain Country of Origin Labelling Requirements*, ¶ 30, WTO Doc. WT/DS386/AB/R (adopted June 29, 2012); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, ¶ 225, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter *Tuna II*]; Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 215, WTO Doc. WT/DS406/AB/R (adopted on Apr. 4, 2012).

In *Tuna II* (2012), the Appellate Body identified the detrimental impact on Mexican tuna producers from the U.S. measure prohibiting most Mexican tuna products from being eligible for the "dolphin-safe" label while allowing most U.S. and other foreign tuna products to use the label.[171] It was not that the Appellate Body found the Mexican fishing technique (purse-seining) safe or unsafe to dolphins in the Eastern Tropical Pacific Ocean. Rather, the Appellate Body questioned the way in which the U.S. government calibrated risks of dolphin fatality.[172] The U.S. government granted non-Mexican tuna products access to the dolphin-safe label even though their tuna products were harvested with non-trivial dolphin fatalities in different parts of the ocean, using different fishing methods, such as trawling.[173] As a result, the Appellate Body found that the U.S. did not implement their measures in an "even-handed" manner.[174]

The SPS Agreement and its derivative jurisprudence also displays this proceduralist focus of constitutional balancing. Indeed, the chapeau language ("avoid arbitrary or unjustifiable distinctions") was directly incorporated into the text of the SPS Agreement.[175] Moreover, other important obligations under the SPS Agreement, such as "scientific justification" and "risk assessment," can be said to mirror the chapeau test since the former concerns key administrative law principles that govern *how* a sanitary measure is adopted or enforced, rather than the content of the measure itself.[176] These obligations are premised on a "convergence in *procedures* that countries follow when setting SPS policies but not necessarily convergence in particular regulatory *outcomes*."[177] In the same vein, in *Hormones* (1998), the Appellate Body refused to censure the E.U. ban on the U.S. hormone-treated beef as "arbitrary" discrimination simply because the E.U. allowed the marketing of other agricultural products containing the same hormones in them.[178] The Appellate Body upheld the E.U.'s regulatory autonomy

171. *Tuna II*, *supra* note 168, ¶ 284.

172. *Id.* ¶¶ 285-296.

173. *Id.*

174. *Tuna II*, *supra* note 170, ¶¶ 284, 297.

175. Agreement on the Application of Sanitary and Phytosanitary Measures art. 5.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1876 U.N.T.S. 154 [hereinafter SPS Agreement].

176. David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years*, 32 N.Y.U. J. INT'l L. & POL. 865, 913-14 (2000).

177. David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years,* 32 N.Y.U. J. INT'L L. & POL. 865, 872 (2000).

178. Appellate Body Report, EG Measures Concerning Meat and Meat Products, ¶¶ 223-225, WTO DOCS. WT/DS26/AB/R & WT/DS48/AB/R (adopted Jan. 16, 1998).

(hormones ban), despite its detrimental impact on the U.S. beef producers, by finding two regulatory situations (artificially injected hormones and naturally occurring hormones) incomparable.[179]

Markedly, these rich sets of constitutional precedent are a product of "constitutional adjudication"[180] in that independent judges, as "ideal observer[s],"[181] are capable of advancing a *jus gentium* without domestic political constraints.[182] The Appellate Body's "enhanced role for a self-confident judiciary . . . fill[s] in the gaps which states in their legislative capacity have been unwilling—or unable—to fill."[183] Once we view the WTO through a constitutional lens, the Appellate Body's constitutional norm-making becomes inevitable. "[E]volve[d] according to a legal genetic code towards greater judicialization,"[184] the Appellate Body's ultimate hermeneutical mission is not to unearth the original intent of treaty makers over a certain treaty provision. Instead, it should make sense of that provision in terms of its object and purpose as the adjudicator applies that provision to a particular set of facts comprising a dispute at hand.[185] One could even postulate that it was

179. Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), ¶ 221, WTO Doc. WT/DS26 (adopted Feb. 13, 1998) [hereinafter *Hormones*].

180. *See* Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT'L L. 621, 623-24 (2010) (portraying the Appellate Body's anti-zeroing jurisprudence as a deliberate outcome of constitutional adjudication); *see generally*, Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System*, *in* INTERNATIONAL ECONOMIC LAW SERIES (John H. Jackson ed., 2005) (discussing judicial constitutionalization by the Appellate Body); *see also* Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L. L. 9, 75-76 (2016) (highlighting the unique normative influence that the Appellate Body has exerted on WTO members through its decisions); Hélène Ruiz Fabri, *The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story*, 27 EUR. J. INT'L L. 1075, 1076 (2016) (arguing that the Appellate Body's "procedural sensibility" has made its decisions sustainable).

181. *See* Roderick Firth, *Ethical Absolutism and the Ideal Observer*, 12 PHIL. & PHENOMENOLOGICAL RESEARCH 317, 335-36 (1952).

182. *See* RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE 3 (1985).

183. Philippe Sands, *'Unilateralism,' Values, and International Law*, 11 EUR. J. INT'L L. 291, 301 (2000); *see also* Donald M. McRae, *The WTO in International Law: Traditional Continued or New Frontier?*, 3 J. INT'L ECON. L. 27, 40 (2000) (claiming that the WTO dispute settlement system nurtures the "development of principles of international law through judicial decisions at a much faster pace than has occurred under existing international legal institutions."); José E. Alvarez, *The Internationalization of the U.S. Law*, 47 COLUM. J. TRANSNAT'L L. 537, 555-56 (2009) ("The general disinclination to issue a finding of non-liquet fuels the reach for non-WTO principles to fill in the interpretative and other inevitable gaps in WTO law. It remains anathema for judges (or international law scholars) to proclaim that there is no law. A declaration of non-liquet would be in the views of most a defeat for the dispute settlement system as well as for the general hopes of constructing a rule-oriented regime not dependent on power.").

184. Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 456 (Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes eds., 2006).

185. *See* Panos Merkouris, (Inter) *Temporal Considerations in the Interpretive Process of the VCLT: Do Treaties Endure, Perdure or Exdure?*, 45 NETH. Y.B. INT'L L 121, 131 (2014).

indeed the WTO members' original intent that would permit the inevitable evolutionary, teleological interpretation.[186] After all, "a juridical fact must be appreciated in the light of the law *contemporary* with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[187]

C. The Moral Foundation of the World Trade Constitution

The core values of the WTC, including justice, reveal its moral foundation.[188] The outcome of a dispute must be determined in a fair, *legal* way, not at the mercy of bullying politics.[189] Even Antigua and Barbuda, a small Caribbean nation, may prevail over the United States in the WTO based purely on the merits of the case.[190] This "emotional appeal"[191] is the fundamental source of the WTO's legitimacy as all members, big or small, believe that they are equally positioned before the scale of justice. Here, the WTC can nurture a "global empathy"[192] as enduring adherence to multilateralism "embodies some set of values

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186. Gabrielle Marceau, *Evolutive Interpretation by the WTO Adjudicator*, 21 J. INT'L ECON. L. 791, 810 (2018) (emphasis added); *cf.* Aegean Sea Continental Shelf Case Greece v. Turk.), Judgement, 1978 I.C.J. 30, ¶ 77 (Dec. 19) (attributing parties' use of a "generic term" to its implicit intention to "follow the evolution of the law"). The European Court of Human Rights also expressed a similar position on the evolutionary interpretation. "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions." Tyrer v United Kingdom, App. No. 5856/72, Eur. Ct. H.R. ¶ 31 (April 25, 1978).

187. Island of Palmas Case (Neth. v U.S.), 2 R.I.A.A. 831, 845 (Perm. Ct. Arb. 1928) (emphasis added); *see also* Marceau, *supra* note 155, at 793 (observing that "*physical or technical transformations*" tend to warrant evolutive interpretation). *But see* Petros C. Mavroidis, *The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body*, 27 Eur. J. Int'l L. 1107, 1114 (2016) (criticizing the Appellate Body's activist interpretation); Richard H. Steinberg, *The Impending Dejudicialization of the WTO Dispute Settlement System?*, 112 AM. SOC'Y INT'L L. PROC. 316, 317 (2018) ("This judicial lawmaking is particularly problematic in so far as the AB has systematically privileged liberalization over interpretations that accept the political and social importance of WTO exceptions and trade remedies.").

188. *See* FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE (2003); *cf.* Paul J. Zak, *Moral Markets*, 77 J. ECON. BEHAVIOR & ORG. 212, 217 (2011) (arguing that morality is a necessary condition for any commercial exchange in the market).

189. Steinberg, *supra* note 40, at 247; Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39, 52 (2001) (locating a deep-rooted aspiration of constitutional adjudication, which is to "design a *fair* system of law") (emphasis added).

190. *See* Sungjoon Cho & Simon Lester, *The WTO and Copyright Piracy*, THE HUFFINGTON POST (Feb. 12, 2013), https://www.huffpost.com/entry/wto-copyright-piracy_b_2621985 []https://perma.cc/GT6A-VQR2].

191. EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 89, 97 (2d ed. 1946).

192. *See generally* Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483 (2004); *see also* Catherine Lu, *Cosmopolitan Justice, Democracy, and the World State*, *in* INSTITUTIONAL COSMOPOLITANISM 232, 242 (Luis Cabrera ed., 2018).

central to the larger world culture," even if it contradicts immediate national interests.[193] Without this minimum level of moral expectation and imagination among WTO members, the WTO's legitimacy would be jeopardized.[194] It is a reaffirmation of the *social* dimension of the global trading community.

Such a moral foundation offers a litmus test for global governance defined by an antinomian struggle between (global) law and (local) politics. This is a battle between a general, collective value and a special, parochial interest. A solipsistic obsession with sovereignty, or the externalization of domestic politics into the international sphere, fails the moral foundation litmus test. Outcomes, even those resulting from a valid treaty, could hardly factor in the "equally weighted interests of all persons,"[195] including those living in "unfavorable conditions" in the Rawlsian sense.[196] While a certain form of protectionism may be justified as a legitimate government intervention program domestically, its global effect can be pernicious as it entails a disproportionate shift of adjustment burdens from "regime-makers" to "regime-takers."[197] "[D]emocracy may better achieve justice for its own citizens, but not necessarily for those outside the polity."[198]

For example, developed countries' chronic agricultural protectionism threatens the sustainability of less-developed countries' commodities, such as African cotton,[199] Moldovan fruits,[200] and Cambodian garments.[201] Indeed, free trade principles mandate rich countries to import poor countries' agricultural products without undue restrictions.[202] However, as painfully witnessed in the recent deadlock of the Doha "Development" Round, developed countries have continuously refused to open their agricultural markets based on the vexing mercantilist logic of reciprocity: developed countries link their protectionism to the relative dearth of developing countries' concessions in

193. Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 339 (1996).

194. *Cf.* CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 23 (2003).

195. Luis Cabrera, *Introduction: Institutions as a Cosmopolitan Concern*, *in* INSTITUTIONAL COSMOPOLITANISM 1, 4 (Luis Cabrera ed., 2018).

196. *See generally* JOHN RAWLS, THE LAW OF PEOPLES 105-06 (1999).

197. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 413 (1982).

198. James Bohman, *The Democratic Millennium: Is Democracy a Means to Global Justice?*, 19 ETHICS & INT'L AFF. 101, 102 (2005). *See also* JAMES BOHMAN, DEMOCRACY ACROSS BORDERS: FROM DEMOS TO DĒMOI 175, 189-90 (MIT Press 2007).

199. *See Stitched Up: African Irritation at Rich Countries' Cotton Subsidies*, ECONOMIST, (Jul. 26, 2003).

200. *See Moldova's Poverty: Outsiders Aren't Helping*, ECONOMIST (Feb. 15, 2003).

201. *See* David Woods, *Two Queries – and Same Answer – for U.S. Textile Lobbyists*, FIN. TIMES (Dec. 22, 2005), at 12.

202. Sixth WTO Ministerial Conference, *Day 1: Conference Opens Formally and Ministers Consult on Industrial Goods*, (Dec. 13, 2005) http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_13dec_e.htm [https://perma.cc/W562-NCZQ].

return.[203] The notion of reciprocity can be distorted, and therefore unjust, between parties of unequal positions. Developing countries are often subject to special exemptions from WTO obligations under the "special and different treatment" (SDT) provisions. In return, however, developed countries exclude developing countries' major exports from trade preferences.[204] However, this ostensibly reciprocal deal proves to be a Faustian bargain as it eventually harms developing countries' long-term economic development by depriving them of an opportunity to step up an industrial ladder.[205]

The WTC's moral foundation provides a therapeutic response to those unfair circumstances and, therefore, encourages developing countries to remain within the WTC's normative orbit.[206] First, the procedural WTC empowers developing countries to challenge agricultural protectionism in the WTO dispute settlement mechanism. Brazil successfully sued the United States for their cotton subsidies before the WTO tribunal.[207] Second, the substantive WTC furnishes many development-friendly norms that mandate effective access to developed countries' markets. Examples of this include case law that invalidates new quotas stealthily injected in a regional trading bloc signed by developed countries[208] and another that prohibits developed countries' abuse of a temporary trade remedy, such as the "transitional safeguard mechanism" under the Agreement on Textiles and Clothing.[209] Admittedly, developing countries' relatively low environmental and public health standards may force developed countries to discriminate

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203. *See* Oxfam Press Release, *Responsibility on EU and US to Deliver Fair Trade Rules for 2006*, (Dec. 20, 2005), http://www.oxfam.org/en/news/pressreleases2005/pr051220_hongkong [https://perma.cc/SUH3-GJMY].

204. MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 368 (2d ed. 1999).

205. Ablasse Ouedraogo, Deputy Director-General at the Seminar on Special and Different Treatment, *Seminar on Special and Differential Treatment for Developing Countries, Closing Remarks*, WTO (Mar. 7, 2000), http://www.wto.org/english/tratop_e/devel_e/sem01_e/sdtrem_e.htm [https://perma.cc/U6H2-UJC2]; *cf.* Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold*, 23 WORLD ECON. 437, 437-38 (2000) (criticizing the developed countries' "hypocrisy" when they continuously exhort developing countries towards further market openings, while they still maintain trade barriers in sectors of natural comparative advantage for developing countries).

206. *See generally*, Sungjoon Cho, *Reinventing the Development Wheel of the World Trading System*, 16 J. INT'L ECON. L. 481 (2013) (reviewing SONIA E. ROLLAND, DEVELOPMENT AT THE WORLD TRADE ORGANIZATION (2012)).

207. Appellate Body Report, *United States – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (Mar. 3, 2005).

208. *See* Appellate Body Report, *Turkey- Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (*adopted* Nov. 19, 1999).

209. *See* Appellate Body Report, *United States--Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WTO Doc. WT/DS192/AB/R (Oct. 8, 2001).

products from the former.[210] Yet even in this situation, a well-established tenet of the substantive WTC requires the former to establish a cooperative arrangement with the latter, which may include some form of technical and financial assistance programs.[211]

The moral thesis embedded in the WTC eventually corresponds to what Jürgen Habermas views a "transitional stage en route to a world republic."[212] Emmanuel Kant attempted to depart from the Westphalian boundary of world order through his avant-garde concept of "cosmopolitan condition (*weltbürgerlichen Zustand*)."[213] Jürgen Habermas has recently translated Kant's cosmopolitanism into the "postnational constellation" as he observes that nation-states "become increasingly enmeshed in the horizontal networks of a global society."[214] In tandem with this new trend, Habermas witnesses an institutional evolution from the "non-hierarchical association of collective actors to the supra- and transnational organizations of a cosmopolitan order."[215]

As an illustrative case, Habermas refers to the WTO and endorses its status as a "constitution" focusing on its strong supranational mandate for global governance.[216] Concomitantly, Habermas rightly warns against any wrong analogy of such supranational order to a domestic constitution. True, "the WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas."[217] Habermas underscores a "thematic" limit of a supranational organization ("restricted to a few, carefully circumscribed functions").[218] Ironically, however, such a functional limit actually lowers the constitutive threshold of a supranational organization since it does not require "thick political value-orientations" necessary for a domestic constitution.[219] This is why *trade* constitution can speak to a cosmopolitan, and egalitarian, morality.

While the WTC connotes a moral foundation, its potential does not necessarily materialize without the right cultural conditions shared by WTO members. A Hobbesian culture tends to frame one's trading partner as an adversary to defeat in a zero-sum game of trade. Under such

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210. *See generally* STANDARDS AND GLOBAL TRADE: A VOICE FOR AFRICA (John S. Wilson & Victor O. Abiola eds., 2003) [hereinafter A VOICE FOR AFRICA].

211. THE SOCIAL FOUNDATIONS, *supra* note 96, ch. 4.

212. Jürgen Habermas, *A Political Constitution for the Pluralist World Society?*, THE COSMOPOLITANISM READER 267, 268 (Garrett W. Brown & David Held eds. 2010).

213. JÜRGEN HABERMAS, THE DIVIDED WEST 115 (Ciaran Cronin ed. & trans. 2006). *See also* David Palmeter, *A Note on the Ethics of Free Trade*, 4 WORLD TRADE REV. 449, 458 (2005) (observing that "[Immanuel] Kant was one of the first to observe that when goods do not cross borders, armies do").

214. HABERMAS, *supra* note 213, at 115.

215. *Id.* at 133.

216. *Id.* at 134.

217. Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416, 416-17 (1996).

218. HABERMAS, *supra* note 213 at 134.

219. *Id.* at 143.

a cultural condition, a cosmopolitan morality can hardly actualize.[220] Only in a Kantian culture of amity and rapport, one "would no longer understand its interests as the unilateral exploitation of the other state" and instead "might see itself as a partner in pursuit of some value other than narrow strategic interest."[221] In the same vein, John Rawls also emphasized a moral foundation of world trade in his magnum opus, *A Theory of Justice*:

> [I]f free trade is desirable from the point of view of equal citizens or of the least advantaged, it is justified even though more specific interests suffer. For we are to agree in advance to the principles of justice and their consistent application from the standpoint of certain positions.[222]

III. THE CONSTITUTIONAL CONFIGURATION OF THE WORLD TRADE CRISIS

This Part analyzes the current WTO crisis by applying the WTC framework defined in the previous Part. It first demonstrates why the WTO crisis is a "constitutional" crisis by highlighting the system-undermining nature of the U.S.'s twin threats of sabotaging the WTO appellate mechanism and launching trade wars. This Part then analyzes the origins of such constitutional threats by employing Kenneth Waltz's concept of "Three Images" (Individual, State, and International System) of an international conflict. Part III views that individuals (such as Trump and his cabinet members), state (the United States), and the international system (the lack of a collective decision-making system within the WTO) jointly contribute to the WTO's constitutional crisis.

A. The WTO Crisis as a Constitutional Crisis

The WTO has suffered from many challenges to its normative integrity since its creation, including the Helms-Burton Act dispute (concerning the U.S. extraterritorial secondary embargo related to the Cuban sanction),[223] the Banana saga (concerning the EU's vast preferential treatments for bananas imported from its former colonies)[224] and the Hormones dispute (concerning the EU's ban on the hormone-

220. Wendt, *supra* note 37; *see* Sungjoon Cho & Jürgen Kurtz, *International Cooperation and Organizational Identities: The Evolution of the ASEAN Investment Regime*, 36 NW. J. INT'L & BUS. 173, 176-77 (2017) (observing that international cooperation is deemed infeasible under the Hobbesian culture shared among nations).

221. Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23 INT'L SECURITY, 171, 189. (1998).

222. JOHN RAWLS, A THEORY OF JUSTICE 99-100 (Harv. University Press 1971).

223. United States — The Cuban Liberty and Democratic Solidarity Act, WTO Doc. WT/DS38 (panel authority lapsed on Apr. 22, 1998).

224. European Communities — Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/R (Appellate Body Report adopted on Sep. 25, 1997).

treated beef from the United States).[225] These cases differed from ordinary trade disputes, given the vast magnitude of their impacts on world trade, the number of countries involved, and their politically combustible nature. Nonetheless, the WTO managed to process them *within* its constitutional system, in a prudential combination of diplomacy and adjudication. The current WTO crisis, provoked by a *single* member, the United States,[226] marks a radical departure from the past pattern in that it directly defies the procedural WTC. Importantly, the U.S. defiance of the procedural WTC is closely linked to its long-standing tension with one of main tenets of the substantive WTC, the anti-dumping discipline.

First of all, the United States transgressed the procedural WTC. By *de facto* dismantling the WTO appellate mechanism and then waging trade wars outside of the DSU, the United States "violates the constitutional rule in DSU Article 23"[227] that forbids WTO Members' unilateral and perfunctory enforcement of trade sanctions. While the *Section 301* (1999) panel report provisionally upheld the U.S. internal trade grievance mechanism (Section 301), it only did so based on the U.S.'s good faith commitment that it would not invoke Section 301 in a way inconsistent with the WTO rules.[228] The panel solemnly declared that any future deviation from this commitment would make Section 301 invalid.[229] The U.S. unilateralism exceeds merely a violation of the WTO norm: it is a form of "nihilation"[230] in that it rejects the entire

225. *Hormones*, *supra* note 179.

226. Permanent Mission of the European Union to the World Trade Organization, EU Statement by Ambassador João Aguiar Machado at the General Council Meeting (Dec. 9, 2019), https://eeas.europa.eu/delegations/world-trade-organization-wto/71695/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-general-council-meeting-9-december-2019_en [https://perma.cc/M3LY-VAX8] ("The actions of *one Member* will deprive other Members of their right to a binding and 2-step dispute settlement system even though this right is specifically envisaged in the WTO contract. The actions of *one Member* will have that result for the rights of all other Members.") (emphasis added).

227. Charnovitz, *supra* note 65, at 237.

228. The Section 301 panel viewed that the U.S. statements made before the panel could "curtail the discretionary element" embedded in Section 304 and therefore rendered it consistent with the DSU. Panel Report, *United States-Sections 301-310 of the Trade Act of 1974*, ¶ 7.134, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000), [hereinafter *Section 301*].

229. *Id.* at ¶ 7.136 ("Should the undertakings articulated in the SAA and confirmed and amplified by the US to this Panel be repudiated or in any other way removed by the US Administration or another branch of the US Government, this finding of conformity would no longer be warranted."). In a subsequent dispute, which did not directly involve Section 301, the United States unilaterally increased bonding requirements on certain imported goods from the EU to retaliate against the EU's failure to implement the *EC – Bananas* decision. The Appellate Body ruled that the U.S. measure violated the DSU provisions that prohibit WTO members' unilateral "suspension of concessions or other obligations" without prior authorization of the WTO Dispute Settlement Body (DSB). United States – Import Measures on Certain Products from the European Communities, WT/DS165/AB/R, Appellate Report adopted on Jan. 10, 2001.

230. BERGER & LUCKMANN, *supra* note 27, at 130, 132-33.

WTO DSU as if a chess player refuses to accept a checkmate.[231] The United States renounces a legal "enclave" in the domestic system to adapt to the WTO's official legal reality.[232] It negates the WTO's monopoly, its "symbolic power,"[233] in establishing an official symbolic universe and instead attempts to create its own legal reality by bypassing the DSU.

The U.S.'s initiation of trade wars was in sync with its halting of the Appellate Body by blocking new appointments of members of the Appellate Body. The U.S.'s troubled relationship with the WTO's anti-dumping discipline highlights the U.S.'s sabotaging of the Appellate Body. It is no secret that the U.S. departure from the DSU has been motivated by its long-held resentment of the Appellate Body's anti-dumping jurisprudence. As widely known, antidumping measures, in essence, are a protectionist device in law's disguise.[234] They simply denounce low-priced imports as "dumping" and justify extra (anti-dumping) duties imposed to neutralize any price advantages to foreign producers. Former Federal Reserve Bank Chairman Alan Greenspan condemned antidumping remedies as "simple guises for inhibiting competition" imposed in the name of "fair trade."[235] Anti-dumping measures are also anti-development, as they disproportionately hurt developing countries. Rich countries' anti-dumping investigations often target poor countries whose main exports are primary commodities or labor-intensive manufacturing products.[236] Anti-dumping measures wipe out poor countries' comparative advantages and deprive them of their critical development opportunities. Such measures also nullify any beneficial effects of the meager preferential treatments poor countries may receive, which is even more outrageous within the context of the deadlocked Doha "Development" Round.[237] It is against this background that the Appellate Body has recently developed a sophisticated set of

231. Oran R. Young, *International Regimes: Toward a New Theory of Institution*, 39 WORLD POL., 104, 120 (1986).

232. BERGER & LUCKMANN, *supra* note 27, at 39-40, 54-55, 104, 115.

233. PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 165 (1977).

234. *See generally* Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N. C. L. REV. 357 (2009) (criticizing an inherently protectionist nature of antidumping measures).

235. Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 ANTITRUST L.J. 725, 725 (2000) (quoting Alan Greenspan, former Federal Reserve Board Chairman, Remarks Before the Dallas Ambassadors Forum (Apr. 16, 1999)).

236. WTO, ANTI-DUMPING, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [https://perma.cc/53VL-GYJZ].

237. *See* Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. 395, 400 (2007) ("Even if rich countries grant poor countries duty and quota-free market access in the Doha negotiation, the former can always impose prohibitively high tariffs on the latter's clothing or shoes on the ground that the latter *dump* these products in the former's markets.").

jurisprudence to prevent abuse of anti-dumping remedies, such as "zeroing." This peculiar calculative methodology[238] unduly inflates dumping margins up to 90 percent by omitting ("zeroing") negative individual dumping margins before aggregating them into a total dumping margin.[239] As discussed below, the Appellate Body struck down, repeatedly, the U.S.'s zeroing practices in various occasions, which led eventually to the U.S.'s vengeful action against the Appellate Body.

B. Three Images of the WTO Crisis

With the WTO crisis now characterized as a constitutional crisis, the next stage of inquiry centers on its origins. Why did the United States abandon the WTC? Why did its "logic of interest" become detached from the "logic of appropriateness"?[240] Uncovering the origins of the crisis highlight the unique, constitutional, challenges faced by the WTO and therefore substantiates a paradigm shift toward a system-driven approach adopted by this Article. In structuring its inquiry into the origins of the crisis, this Article draws on Kenneth Waltz's "Three Images" (Individual, State and International System).[241] Kenneth Waltz, the father of neorealist political theory, presented Three Images of war in his 1959 classic "Man, the State and War."[242] In a stylized account, Waltz describes how these three different factors contribute to the outbreak of war.[243] First, a political leader's ambitious agenda may precipitate a war.[244] Examples are legion in history, ranging from Genghis Khan to Napoleon.[245] Second, a state's political and economic condition is said to be responsible for war.[246] After all, going to war is a decision made *within* a state. Finally, international anarchy

238. It signifies an obvious selection bias. It is analogous to a situation in which a study on wage discrimination between men and women omitted all instances where a female employee is paid higher than a male counterpart before concluding that female employees are paid less in a systematic manner. *See generally* Thomas J. Prusa, & Edwin Vermulst, *A One-Two Punch on Zeroing: US-Zeroing (EC) and US-Zeroing (Japan)*, 8 WORLD TRADE REV. 187, 187-242 (2009).

239. Daniel Ikenson, *Antidumping Reformers Rejoice*, Cato At Liberty, Dec. 18, 2006, https://www.cato.org/blog/antidumping-reformers-rejoice[https://perma.cc/BK4U-M3MM].

240. I owe this insight to Joseph Conti. Regarding the discussion on the "logic of interest" and the "logic of appropriateness," *see* JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATION BASIS OF POLITICS (1989).

241. KENNETH N. WALTZ, MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS (1959).

242. *See generally id*.

243. *See generally id.*

244. *Id.* at 61-63.

245. *Id.*; *see* Nathaniel Scharping, *The Life of Genghis Khan, the Ruthless Warlord Who Created the World's Largest Empire*, DISCOVER (Oct. 17, 2020, 8:00 AM), https://www.discovermagazine.com/planet-earth/the-life-of-genghis-khan-the-ruthless-warlord-who-created-the-worlds-largest [https://perma.cc/L69X-WCSJ].

246. Waltz, *supra* note 239, at 81-83.

is also to blame: a war between nations would have been inconceivable under the World Government.[247]

While this Article does not subscribe to Waltz's neorealist view on international relations, it still finds the "Three Images" useful in illustrating varying yet interrelated causes, and contexts, of the current WTO crisis.

1. The First Image (Individual)

President Trump's hostility toward the WTO has been well documented. In his campaign trail, he declared that the WTO had been a "disaster" to the United States.[248] Under his watch, the United States had become a "rogue superpower" that disdains the WTC, which is to say the United States disdains "fundamental norms of a trading system based on multilateral agreement and binding rules."[249] The "America First" doctrine pitched by President Trump has been a political engine that powers his administration's paralyzing tactics toward the Appellate Body as well as its trade war against China.[250] The Trump administration refused to formulate its trade policy in terms of preexisting normative language provided by the WTO and its jurisprudence. Trump de-legitimized the WTO's constitutional values defined by its unique procedural mechanism, such as the Appellate Body, and thus refused to abide by the WTO system.

Trump's cabinet members and advisors also shared his ego-centric worldview and belligerent negotiation tactics. As "carriers" of the collective memory of American Exceptionalism from the past, their policy views are regressively nostalgic.[251] For example, the USTR Robert Lighthizer desires to abrogate the procedural WTC and revert to the old GATT dispute settlement system that licensed a "veto" power by a

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247. *Id*. at 228.

248. Russell Berman, *Trump's Shockingly Specific Speech on Trade*, THE ATLANTIC MONTHLY (June 28, 2016), https://www.theatlantic.com/politics/archive/2016/06/donald-trumps-shockingly-specific-speech-on-trade/489194/ [https://perma.cc/SFM3-3ZBA]. Trump's paranoiac attacks to the WTO are often without a sound basis. Although he claims that "we lose the lawsuits, almost all of the lawsuits in the WTO," the United States has actually won more than 75 percent of WTO cases it had filed. *See* Ernst Ulrich-Petersmann, *How Should WTO Members React to Their WTO Crises?*, 18 WORLD TRADE REV. 503, 506 (2019) [hereinafter *WTO Crises*]; Gregory Shaffer et al., *The Slow Killing of the WTO*, HUFFINGTON POST (Nov. 17, 2017) [hereinafter *The Slow Killing*].

249. Martin Wolf, *The US – China Conflict Challenges the World*, FIN. TIMES (May 21, 2019).

250. "Our trade policy is steadfastly focused on the national interest, including retaining and using U.S. sovereign power to act in defense of that interest." Bryce Baschuk, *U.S. Defends 'America First' Approach at WTO Trade Policy Review*, BLOOMBERG LAW (Dec. 17, 2018) (quoting the U.S. statement submitted to the WTO).

251. *See* Sungjoon Cho, *The Undead Past: How Collective Memory Configures Trade Wars*, 95 TUL. L. REV. 487 (2021).

losing party.[252] Likewise, former National Security Advisor John Bolton compared the Trump administration's disdain of the WTO dispute settlement mechanism with the U.S. rejectionism of the Reagan administration regarding the International Court of Justice in the Eighties.[253] In sum, their "personal inertia" tends to negate the constitutional transformation of dispute resolution mechanism from diplomacy under the old GATT system to the juridification under the new WTO system.[254]

2. The Second Image (State)

The WTO crisis represents an externalization of the U.S. political economy to the extent that the WTO crisis has been provoked by the United States. Obviously, the United States is no ordinary WTO member. Its superpower status, together with the fact that it was a main architect and sponsor of the current WTO system, paints a complex picture of the WTO's constitutional crisis. Both endogenous factors, such as the U.S.'s unique political culture, and exogenous factors, such as the post-Cold War developments, tend to configure the WTO's constitutional crisis.

Contemporary U.S. trade politics embodies a classical "public choice" model according to which a handful of policy elites captured by special interest go against *vox populi*.[255] A recent opinion poll has revealed that most Americans support free trade despite the trade war. Americans overwhelmingly believe that free trade is good for the U.S. economy (Gallup: 70%; WSJ/ NBC News: 66%), rather than a threat to it (Gallup: 25%; WSJ/ NBC News: 20%).[256] Nonetheless, it is powerful rent-seekers that exert disproportionate influences on the U.S. trade policy.[257]

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252. *See* Lighthizer Interview, *supra* note 81(expressing a nostalgic view on the veto-prone (non-binding) dispute settlement system in the GATT era).

253. *See* John Bolton, Trump, *Trade and American Sovereignty*, WALL ST. J. (Mar. 7, 2017).

254. Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 193 (2001).

255. *See* James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, THE THEORY OF PUBLIC CHOICE-II at 11 (warning against a romanticized view of public policymaking for the sake of general public interest); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 476-77 (1988) (observing that legislators are not "public-regarding guardian angels" and that a political marketplace "reflect[s] a political equilibrium that in turn reflects the relative strengths of rival groups"). *See also* Scott Lincicome, *The "Protectionist Moment" That Wasn't: American Views on Trade and Globalization*, Free Trade Bulletin (Cato Institute), No. 72 (Nov. 2, 2018).

256. Lincicome, *supra* note 255.

257. *See* James Bacchus, *America's Abusive Trade Practices*, WALL ST. J. (May 12, 2019).

Once the WTC's disciplinary power deprived powerful domestic lobbies, such as the steel industry, of their protectionist space that they used to enjoy, the United States has increasingly turned sore losers.[258] The recent "zeroing" saga is a case in point.[259] The Appellate Body's unequivocal and all-inclusive rejection of the U.S. Commerce Department's zeroing practice, which would dramatically increase dumping margins, infuriated the U.S. steel industry and the U.S. trade bar representing the steel industry in domestic antidumping suits.[260] Accusing the Appellate Body of committing "judicial overreach,"[261] the U.S. government and sympathetic critics argue that "we lose cases and claims we shouldn't lose,"[262] despite the U.S.'s outstanding overall winning ratio, approximately 75 percent, in the WTO litigation.[263] Even long before the current WTO crisis, some scholars feared that powerful members, such as the United States, could rein in the alleged "expansive judicial lawmaking" by the WTO tribunal.[264] Daniel Tarullo warned that "political fallout" from adverse WTO tribunal decisions, especially those on trade remedies, might deprive the U.S. government of its support for future multilateral agendas.[265]

Tarullo's warning proved to be prescient. The U.S. government decided to demolish the procedural WTC. Robert Howse trenchantly observes that:

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258. *See* Cosette Creamer & Zuzanna Godzimirska, *(De)Legitimation at the WTO Dispute Settlement Mechanism*, 49 VAND. J. TRANSNAT'L L. 275, 304 (2016) (contending that the "Appellate Body does not have a legal duty to accept or consider unsolicited briefs" from nonmember interest groups) (emphasis omitted).

259. Trachtman, *supra* note 18.

260. *Id.* at 311-14. *See* Brendan Murray & Shawn Donnan, *China wins WTO case to sanction $3.6 billion in US trade*, The Econ. Times (Nov. 2, 2019), https://economictimes.indiatimes.com/markets/stocks/news/china-wins-wto-case-to-sanction-3-6-billion-in-us-trade/articleshow/71864908.cms?from=mdr [https://perma.cc/NGV8-7ZGD]. (reporting that the WTO repeatedly rejected the U.S. government's use of zeroing methodologies in antidumping investigation on imported products from China).

261. Regarding a well-documented chronology of the U.S. sabotaging of the Appellate Body system, *see* Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?*, *in* 6 SUI GENERIS (Daniel Hürlimann & Marc Thommen eds., 2019) (arguing that while the U.S. accusation of the Appellate Body's judicial overreach is *legally* without merits, WTO members still need to engage with the United States *politically* to resolve the current Appellate Body crisis). *See also* Henry S. Gao, *Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis*, *in* THE APPELLATE BODY OF THE WTO AND ITS REFORM, 215-38 (Chang-fa Lo et al. eds., 2019) (arguing that the U.S. criticisms on the Appellate Body are "deeply flawed").

262. Colloquium, *Disputed Court: A Look at the Challenges to (and from) the WTO Dispute Settlement System,* GLOB. BUS. DIALOGUE (2017), http://www.gbdinc.org/wp-content/uploads/2018/02/C245-Dispute-Settlement-Transcript-of-Remarks-by-John-Magnus-12-20-2017.pdf [https://perma.cc/MY3Q-FKQ5].

263. *The Slow Killing*, *supra* note 248.

264. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 249 (2004).

265. Daniel K. Tarullo, *Paved with Good Intentions: The Dynamic Effects of WTO Review of Anti-Dumping Action*, 2 WORLD TRADE REV. 373, 385 (2003).

> Relentless pressure was being applied to the Appellate Body from the US trade representative (USTR) to give zeroing a green light. While the USA did implement gradually the Appellate Body's rulings in some fashion, it sent a note of criticism to the Appellate Body itself in two cases. In other cases, panels of first instance refused to follow the Appellate Body's approach to the zeroing issue (at the time, the head of the legal secretariat serving the panels of first instance was an American, Bruce Wilson, with a Washington, DC, insider background). The departure of US Appellate Body Member Merit Janow from the Appellate Body without seeking renewal for a second term and the USA's failure to allow her successor Jennifer Hillman to serve a second term may well be related to the zeroing controversy. Finally, the USTR apparently resolved to block any appointment of a new Appellate Body Member who is likely to be independent of trade insider circles, especially any academic.[266]

Admittedly, mere domestic political economy could not fully explain the recent U.S. destructive behaviors on the WTC. During the Cold War, the U.S. leadership had restrained the extent of externalization of U.S. trade politics.[267] In what Jagdish Bhagwati coined the "Diminished Giant Syndrome," the U.S. government had increasingly succumbed to the parochial trade politics since the Eighties.[268] Congress removed, albeit indirectly, the Foreign Commerce Power from the Executive and began interfering with trade policies by various means.[269] For example, due to its congressional heritage the USTR reports directly to the Congress.[270] Congress transferred the jurisdiction for dumping determination from the Department of Treasury to the De-

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266. Howse, *supra* note 66, at 71. *See also* Robert Howse, *Appointment with Destiny: Selecting WTO Judges in the Future*, 12 GLOBAL POL'Y 71, 72 (Supp. 3 2021) (critically observing that "the trade remedies bar and its clientele of industries demanding contingent protection" led to the current Appellate Body crisis). Regarding a similar position that attributes the U.S. grievances on the Appellate Body to the zeroing practice, *see* Petros C. Mavroidis & Thomas J. Prusa, *Die Another Day: Zeroing in on Targeted Dumping – Did the AB Hit the Mark in US-Washing Machines?*, 17 WORLD TRADE REV. 239 (2018). *See also American Rejectionism*, *supra* note 65, at 231 ("Distressed at losing so many WTO cases, the Obama Administration struck back against the WTO Appellate Body in 2016 by blocking the reappointment of the distinguished Korean jurist, Seung Wha Chang"); Steve Charnovitz, *A WTO If You Can Keep It*, 6 QIL, ZOOM-OUT 5, 11 (2019) (observing that the United States has been blocking appointments, and reappointments, of the Appellate Body members since 2016); Simon Lester, *Can Interim Appeal Arbitration Preserve the WTO Dispute System?*, FREE TRADE BULL. (Cato Institute, D.C.), Sept. 2020 (linking the U.S. resentment from losing trade remedy, in particular "zeroing" cases, to the demise of the Appellate Body).

267. Jussi M. Hanhimaki, *Global Visions and Parochial Politics: The Persistent Dilemma of the "American Century,"* DIPLOMATIC HISTORY, Sept. 2003, at 423, 432.

268. Jagdish Bhagwati & Douglas A. Irwin, *The Return of the Reciprocitarians: US Trade Policy Today*, 10 WORLD ECON. 109, 109 (1987).

269. Paula Stern, *Reaping the Wind and Sowing the Whirlwind: Section 301 as a Metaphor for Congressional Assertiveness in U.S. Trade Policy*, 12. 8 B.U. INT'L L.J. 1, 6-17 (1990).

270. STEPHEN D. COHEN ET AL., FUNDAMENTALS OF US FOREIGN TRADE POLICY: ECONOMICS, POLITICS, LAWS AND ISSUES 192 (1996).

partment of Commerce, making antidumping policy extremely vulnerable to industry capture.[271] It also influenced the International Trade Commission business through budget and composition.[272] The Congress even passed the Super 301 that stipulated unilateral pressuring and retaliation to open up foreign markets.[273]

The increasingly hegemonic turn in U.S. trade policy motivated the U.S. trading partners to launch the WTO system through the Uruguay Round negotiations.[274] The U.S.'s overall stance on the WTO has been ambivalent from the inception.[275] The U.S. tolerated the widening of the WTO's constitutional space as long as the WTC suited its interest. For example, the U.S. supported the Appellate Body's judicial activism in some interpretations that the U.S. found favorable, including the Appellate Body's acceptance of amicus briefs as well as its evolutionary interpretation that identified endangered species, such as sea turtles, as the "exhaustible natural resources" under GATT Article XX (g).[276] The U.S. government expressed little concern for the Appellate Body's interpretation of trade remedy cases until recently.[277] Originally, the U.S. mostly "viewed itself as entirely the plaintiff, not really the defendant in any case."[278]

This ambivalence is informed, to a large extent, by an extremely robust dualist legal tradition within the United States, which believes that the domestic legal system and international law, such as the WTO law, are qualitatively different from each other.[279] Under this tradi-

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271. ANNE O. KRUEGER, AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING 11-12 (1995).

272. Stern, *supra* note 269, at 16.

273. Ronald Cass, *Velvet Fist in an Iron Glove: The Omnibus Trade and Competitiveness Act of 1988*, 14 REG. 50 (1991).

274. Corrado Pirzio-Biroli, *A European View of the 1988 U.S. Trade Act and Section 301*, *in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 261 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (depicting the U.S. enation of a highly unilateralist trade act (Super 301) as a "mépris" of the GATT).

275. *See* John Redwood, Why the WTO Fails the World's Poor, WALL. ST. J. (Sept. 4, 2003), https://www.wsj.com/articles/SB106262504682449800 [https://perma.cc/434Y-K7MN]; *see also* Ana Swanson & Jack Ewing, *Trump's National Security Claim for Tariffs Sets Off Crisis at W.T.O*, N.Y. TIMES (Aug. 12, 2018).

276. J. Patrick Kelly, *The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance*, 38 CORNELL INT'L L. J. 459, 460 (2005).

277. UNITED STATES GENERAL ACCOUNTING OFFICE (GAO), WORLD TRADE ORGANIZATION: STANDARD OF REVIEW AND IMPACT OF TRADE REMEDY RULINGS (2003) (observing that "[o]f the legal experts GAO consulted, a majority concluded that the WTO has properly applied standards of review and correctly ruled on major trade remedy issues").

278. Lighthizer, Robert E. (2000), Remarks at the "America's Trade Agenda after the Battle in Seattle: A Forum on WTO and U.S. Trade Law Reform" (Jul. 20, 2000), http://libertyparkusafd.org/Hamilton/conferences/Remarks%20by%20the%20Honorable%20Robert%20Lighthizer.htm [https://perma.cc/9R7C-NEMM].

279. Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 186 (1993).

tion, which may be attributable to a quasi-religion of popular sovereignty and the totem of the Constitution,[280] domestic law always prevails over the WTO law. The Uruguay Round Agreements Act (URAA), enacted in 1994 as an implementation act of the WTO Agreements, eloquently demonstrates a strong dualist legal culture that attempts to secure, *ex ante*, a sanctified legal space unaffected by the WTO's legal system.

> SEC. 102. RELATIONSHIP OF THE AGREEMENTS TO UNITED STATES LAW AND STATE LAW. (a) RELATIONSHIP OF AGREEMENTS TO UNITED STATES LAW.— (1) UNITED STATES LAW TO PREVAIL IN CONFLICT.—No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. (2) CONSTRUCTION.—Nothing in this Act shall be construed— (A) to amend or modify any law of the United States, including any law relating to— (i) the protection of human, animal, or plant life or health, (ii) the protection of the environment, or (iii) worker safety, or (B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974, unless specifically provided for in this Act.[281]

Therefore, in times of disagreement, domestic politicians are "deeply troubled about what has been going on in the WTO dispute-settlement process" and criticize the Appellate Body as a "kangaroo court."[282] They believe, in a solipsistic manner, that "it's absolutely critical that the United States has the ability to make its own trade policy."[283] At the same token, the U.S. government has increasingly been frustrated since its unsuccessful bid to complete the Doha Round on its own terms at the Cancun Ministerial Conference in 2003.[284] The U.S. government was not simply ready to live up to the spirit of the Doha Development Round. Restricting farm support, through the reduction of either tariffs or subsidies, was politically infeasible. Instead, the U.S. government condemned big developing countries, such as India, China and Brazil, for their lack of market opening concessions, despite that they

280. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

281. 19 U.S.C.A. Relationship of agreements to United States law and State law.

282. Senator Max Baucas, U.S. Trade Laws and the WTO, Speech to the Global Business Dialogue (Sept. 26, 2002), http://tokyo.usembassy.gov/e/p/tp-ec0014.html.

283. Ana Swanson, *Trump Cripples WTO as Trade War Rages*, N.Y. TIMES (Dec. 8, 2019), https://www.nytimes.com/2019/12/08/business/trump-trade-war-wto.html [https://perma.cc/LH3X-7WSU] (quoting Stephen P. Vaughn, a former high-ranking USTR official).

284. *See* Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219 (2004).

deserved a "special treatment" status as developing countries in none but a *development* round.[285]

More recently, the financial crisis and its bitter legacies within the United States, such as a class warfare and de-globalization drive, has fueled a populist culture.[286] Economic nativism scapegoats "outsiders," including foreign trading partners, and antagonizes multilateral institutions, such as the WTO.[287] Politicians even call for the U.S.' withdrawal from the WTO.[288] In particular, the U.S. government has begun to view China as a "strategic competitor"[289] and become increasingly frustrated as it failed to win key cases, including those related to Chinese state-owned enterprises (SOEs), in the WTO dispute settlement system.[290] Note that the WTO tribunal is capable of adjudicating major U.S. claims against China. The claims include forced technology transfer, under the current WTO norms, including China's accession protocol.[291] Nonetheless, the U.S. government elects not to have full recourse to the WTO tribunal for the alleged violations committed by China.[292] The Trump administration has filed only three WTO cases against

285. Roula Khalaf & Alan Beattie, *Introducing Trade Secrets: New Expert Analysis on the Twists and Turns in Global Trade*, FIN. TIMES (Oct. 21, 2019), https://www.ft.com/content/7eb81854-f3dc-11e9-b018-3ef8794b17c6 (quoting the former USTR Robert Zoellick).

286. Philip Stephens, *Populism is the true legacy of the global financial crisis*, FIN. TIMES (Aug. 29, 2018), https://www.ft.com/content/687c0184-aaa6-11e8-94bd-cba20d67390c [https://perma.cc/X4CN-KNG6].

287. *See* Eirikur Bergmann, Understanding Nativist Populism *in* NEO-NATIONALISM.

288. *See* John Micklethwait et al., *Trump Threatens to Pull U.S. Out of WTO If It Doesn't 'Shape Up,'* BLOOMBERG, https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up [https://perma.cc/6S5C-D6MA] (last updated Aug. 31, 2018, 3:52 AM); Keith Johnson, *U.S. Effort to Depart WTO Gathers Momentum*, FOREIGN POL'Y (May 27, 2020, 2:31 PM), https://foreignpolicy.com/2020/05/27/world-trade-organization-united-states-departure-china/ [https://perma.cc/XP3Z-7JGE]. *But see* Riley Walters, *The U.S. Should Make Greater Use of the WTO, Not Withdraw*, THE HERITAGE FOUND. (May 13, 2020) (arguing against the U.S. withdrawal from the WTO due to devastative economic damages to the U.S. economy).

289. Anthea Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT'L ECON. L. 655, 664 (2019) (observing that "[t]he 2017 US National Security Strategy deemed China a 'revisionist power' and a 'strategic competitor' that uses 'predatory economics' to intimidate its neighbours."). *See also* Shaffer et al., *supra* note 129, at 267-73 (observing that geopolitical shifts involving China and the United States tend to threaten the Appellate Body's authority).

290. *See* Chad Bown, *The 2018 Trade War and the End of Dispute Settlement as We Knew It*, VOX EU (Jun. 13, 2019), https://voxeu.org/article/2018-trade-war-and-end-dispute-settlement-we-knew-it [https://perma.cc/M6TW-JHJV].

291. *See, e.g.*, James Bacchus et al., *Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented*, CATO INSTITUTE Policy Analysis, No. 856 (Nov. 15, 2018).

292. The Trump administration did file a formal complaint against China on the latter's alleged violations in the area of intellectual property rights, but only *after* it completed its Section 301 investigations. China—Certain Measures Concerning the Protection of Intellectual Property Rights, WT/DS 542, Consultations requested on Mar. 23, 2008.

China, despite China having the "most extensive legal obligations" resulting from the "numerous unique commitments" that China had to concede as a steep price of its membership when it joined the WTO..[293]

In sum, the United States has increasingly viewed the WTO and other members as working against U.S. interests, be they mercantilist (in case of trade remedies) or geopolitical (in case of China).[294] In the post-Cold War era, the U.S. hegemonic power has lost its past incentive of aligning itself with multilateral institutions, such as the WTO. The United States, the erstwhile architect of the WTO, is now threatening the its very existence.

3. The Third Image (International System)

The fact that the WTO and its members failed to prevent the U.S.'s anomic behaviors eloquently demonstrates the WTC's structural fragility. It lays bare the old problem of the WTO's decision-making process, in particular the "consensus" rule. The United States obviously took advantage of the consensus rule when it single-handedly disbanded the Appellate Body by blocking re-appointments and new appointments of its members. Admittedly, such veto was not entirely unprecedented. At the eleventh hour of the Bali Ministerial Conference in 2013, Cuba threatened to veto the adoption of the ministerial declaration.[295] Cuba's confrontation was temporary and soon politically resolved under peer pressure.[296] In the face of the U.S.'s system-destroying actions, the WTO membership never activated the collective decision-making (voting) mechanism stipulated in the WTO Charter. Adopting a voting mechanism could have countervailed the U.S. veto in the appointment process.[297]

Overall, the WTO's legislative process remains dormant. The legislative mechanism must be distinguished from the negotiation process. In fact, the WTO Charter provides a sophisticated set of voting structure with a simple or supermajority rule.[298] Alas, such a voting mechanism has never been invoked. In particular, the "authoritative interpretation" mechanism, in which the WTO membership can render an

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293. Steve Charnovitz, *U.S.-China Talks Ignore Global Trade Rules*, WALL ST. J. (May 17, 2019).

294. *See* Graham Allison, *American is Hunkering Down for a New Cold War*, FIN. TIMES (Oct. 13, 2018).

295. *Cuba drops veto at WTO meet, enabling global trade deal sources*, REUTERS (Dec. 6, 2013), https://www.reuters.com/article/uk-trade-wto/cuba-drops-veto-at-wto-meet-enabling-global-trade-deal-sources-idUKBRE9B504Y20131207 [https://perma.cc/3D2L-9HDH].

296. *Id.*

297. *See infra* Section IV:0.

298. CRAIG VANGRASSTEK, THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION 211 (2013).

official interpretation of controversial provisions of any WTO agreements, has never been activated.[299] As the U.S. government observes, "a review process could be established for *extraordinary* cases where a panel report contains legal interpretations that are questioned formally by one of the parties."[300] This process could have effectively addressed the widely circulated concern for judicial activism by the Appellate Body.

The chronic torpor of the WTO's collective decision-making process eventually undermines the WTO's legitimacy. It tends to throw the WTC into an anarchical trap, as painfully witnessed in the current WTO crisis. The entire WTO membership has been collectively impotent in generating a "community sanction"[301] against system-destroying behaviors by a single member. This power vacuum within the WTO may be symptomatic of a broader systemic flaw, which is the absence of the "cultural and economic dynamics of the world society itself."[302]

IV. THE WORLD TRADE CONSTITUTION AND A NEW GLOBAL ORDER

This Part spotlights the WTC's systemic resiliency manifested amid the constitutional crisis as discussed in the previous Part. As a cultural, rather than material, phenomenon, the systemic resiliency warrants the WTC's potential of shaping a new global order. This Part begins with delineating various system-maintaining behaviors of WTO members in the face of the crisis. It then discusses the "indirect effect" of the WTC on individual economic players. Private businesses can indirectly benefit from the WTC as the WTC offers a normative background for their daily operations. Private actors can also sponsor the WTC in the domestic arena through lobbying and litigation. Finally, this Part views that the WTC's normative force can only remain limited unless the WTC's main engine, judicial constitutionalism, is not complemented by "political" constitutionalism that involves voting by WTO members.

A. The Resiliency of the World Trade Constitution

From a realist standpoint, the WTO is simply a tool for sovereign states, particularly powerful ones, and therefore, could be abandoned if it stops working for them. The U.S. political mechanism failed to

299. *WTO Appellate Body Roundtable*, AM. SOC'Y INT'L L. PROC. 177 (2005).

300. Communication from the United States of 6 April 1990 (MTN.GNG/NG13/W/40), p. 5 (emphasis added).

301. *See* Charnovitz, Steve, *Rethinking WTO Trade Sanctions* (January 1, 2001). Available at SSRN: https://ssrn.com/abstract=256952 [https://perma.cc/4423-9VB6]; Ingrid Scheibler, *Gadamer, Heidegger, and the Social Dimensions of Language: Reflections on the Critical Potential of Hermeneutical Philosophy*, 76 CHI.-KENT L. REV. 853, 893 (2000).

302. HABERMAS, *supra* note 213, at 161.

channel and represent its systematic economic interest, which does align with the WTO norms. Instead, the political mechanism was captured by narrow factions or special interests defined by biases and swing votes. While a parochial interest, such as that of the steel industry, has skewed the U.S. national interest, the former has increasingly been denied under the WTO norms. Thus, the United States came to believe that the WTO ceased to function for its national interest. The U.S.'s radical attempt to fix, or break, the WTO tool toward its own interest precipitated the current crisis.

However, the reality of the WTO envisioned in Washington is radically different from what has been constructed in Geneva. The WTC, as a cultural product, cannot be broken or disposed of. As a socio-legal reality, the WTC has already been established, and the United States simply cannot just wish it away.[303] The U.S. sovereign space is not unlimited. Even as a superpower, its political maneuvering failed to bar other WTO members from engaging in system-preserving collective behaviors.[304] Indeed, the resiliency of the WTC has been displayed even before the WTO crisis. For example, the U.S. singlehanded resistance to zeroing immediately invited a collective response from the WTO membership. The "Friends of Antidumping," a large group of major WTO members, including Brazil, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland and Thailand, pushed the legislative prohibition on the zeroing practice on all occasions.[305] This group strived to protect a fundamental value of the WTO, trade liberalization, from a protectionist calculative methodology, such as zeroing.[306]

Even facing the current crisis, the WTC remains hardly scathed. After the United States refused to re-appoint one Appellate Body member from Korea (Seung-Hwa Chang) in 2016, other WTO members

303. *Cf.* Berger & Luckmann, *supra* note 27 , at 19-28 (regarding the "reality of everyday life").

304. For example, a group of WTO members, at the behest of the European Union, established a replica of the Appellate Body (MPIA) that the United States torpedoed. *See supra*, accompanying note 125.

305. Proposal on Prohibition of Zeroing, *Paper from Brazil; Chile; Columbia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland and Thailand*, TN/RL/W/113, (Jun. 6, 2003) [hereinafter The Anti-Zeroing Proposal] ("Amend Article 2.4.2 to explicitly provide that regardless of the basis of the comparison of export prices to normal value (i.e. weighted average-to-weighted average or transaction-to-transaction, or weighted average-to-transaction), all positive margins of dumping and negative margins of dumping found on imports from an exporter or producer of the product subject to investigation or review must be added up.").

306. Negotiating Group on Rules, *Statement on "Zeroing" in the Anti-Dumping Negotiations, Statement of Brazil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India; Indonesia; Israel; Japan; Korea, Rep. of; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Vietnam*, TN/RL/W/214/Rev.3 (Jan. 25, 2008).

rushed to preserve the Appellate Body's independence through a systemic solution.[307] The EU warned that:

> [T]he non-reappointment of an Appellate Body member for reasons related to the content of particular rulings has created a situation in which there may be doubts as to whether decisions of particular Appellate Body members are influenced by such threat of non-reappointment. This situation is not tenable and needs to be addressed systemically.[308]

Collective efforts to salvage the WTC began with collectively censuring the U.S. unilateralism.[309] Only the United States argues that the Appellate Body "adds or diminishes" members' rights and obligations, violating DSU Article 3.2.[310] The rest of the WTO members firmly expressed their disagreements with the United States from the *systemic* perspective, as seen in various statements: "[p]reserving the system and improving the rules in order to make the work of the Appellate Body more effective was therefore of high importance for the international trade community";[311] "a well-functioning dispute settlement system in the WTO was essential";[312] "[a]n independent dispute settlement system was imperative for the fair enforcement of the rules of international trade";[313] "[m]embers had a responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system";[314] "[a]s a small, vulnerable economy, Antigua and Barbuda considered that respect for those rules provided the best insurance policy against the arbitrariness and unpredictability of a power-based system that failed to comport with the principle of fairness."[315]

Some even proposed to disengage the United States to save the DSU ("n minus 1"), no matter how provocative it might be to the United States.[316] Former WTO Director General Pascal Lamy argues that:

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307. European Commission, EU's Proposals on WTO Modernization (Jul. 5, 2018).

308. *Id.*

309. *See e.g.*, Jonathan Stearns, *EU's Malmstrom Warns U.S. Against `Pulling the Plug' on WTO*, BLOOMBERG LAW (Mar. 21, 2019).

310. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, at 22 (2018) (emphasis added).

311. WTO, General Council, Minutes of Meeting on 12 December 2018, WT/GC/M/175 [hereinafter WT/GC/M/175], ¶ 6.37 (Feb. 20, 2019) (statement by the delegation of Montenegro) (emphasis added).

312. WT/GC/M/175, ¶ 6.40 (statement by the delegation of Norway) (emphasis added).

313. WT/GC/M/175, ¶ 6.57 (statement by the delegation of India) (emphasis added).

314. WT/GC/M/175, ¶ 6.88 (statement by the delegation of Iceland) (emphasis added).

315. WT/GC/M/175, ¶ 6.107 (statement by the delegation of Antigua and Barbuda) (emphasis added).

316. Alan Beattie, *Fixing the WTO Judges Crisis*, FIN. TIMES (Jul. 18, 2019).

> [I]t would be prudent for other members to start thinking about devising a new international trade organization minus the United States in order to avoid the 'my way or the highway' blackmail that has become the American president's signature negotiating style.[317]

Consequently, the WTO crisis has produced what might be dubbed the "WTO minus one" phenomenon.[318] A recent survey of WTO members has revealed the fact that a vast majority of the WTO membership, obviously except for the United States, is quite satisfied with the basic structure of the current WTO dispute settlement system and have no major complaints.[319] In particular, no other WTO member supports the U.S. strategy of sabotaging the WTO Appellate Body mechanism.[320] This overwhelming support for the WTC from the WTO membership was reaffirmed when 117 members of the WTO urged to fill the Appellate Body's current vacancies at the Dispute Settlement Body (DSB) meeting on November 22, 2019.[321]

In a culmination of those collective efforts to safeguard the WTC, the EU, with an endorsement from Canada, spearheaded the establishment of the "Multi-Party Interim Appeal Arrangement" (MPIA) under DSU Article 25,[322] in an effort to "replicate as much as they can what the [A]ppellate [B]ody offers."[323] Consisting of ten permanent arbitrators, the MPIA is open to all WTO members. Three arbitrators hear a particular appeal, with full collegiality parallel to the original Appellate Body.[324] Importantly, even a decision by such an arbitration

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317. Pascal Lamy, *Trump's Protectionism Might Just Save the WTO*, WASH. POST (Nov. 12, 2018).

318. *See e.g.*, McDougall, *supra* note 67, at 882 (observing that the U.S. proposal to bolster member control of the Appellate Body has received "very little support" from other WTO members).

319. Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, BERTELSMANN STIFTUNG (2019); *see also Leading Question*, THE ECONOMIST (Jul. 11, 2020) (reporting that "Geneva-based national representatives want a new chief to prioritise restoring the Appellate Body"); Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences*, CEPR DISCUSSION PAPER, No. DPI 4834 (May 2020) (discussing a survey data that demonstrates a "strong support for the basic design of the dispute settlement system").

320. Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences,* BERTELSMANN STIFTUNG (2019).

321. WTO (Dispute Settlement), *Members Reiterate Joint Call to Launch Selection Process for Appellate Body Members* (Nov. 22, 2019).

322. *See* Dani Kass, *EU Mobilizes To Replace Embattled WTO Appellate Body*, LAW360 (Jun. 6, 2019).

323. Bryce Baschuk, *Canada, EU Agree to Plan that Sidesteps Trump's Impasse on World Trade Organization Disputes*, BLOOMBERG LAW (Jul. 25, 2019) (quoting the WTO spokesman Keith Rockwell).

324. "The arbitrators may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators, without prejudice to the exclusive responsibility and freedom of the arbitrators with respect to such decisions and their quality." WTO, *Multiparty Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, Addendum

panel may be referenced by other panels as precedent, although it is not technically binding, just as the International Court of Justice's (ICJ) Advisory Opinions are treated as non-binding precedent. After all, the WTC is a "social" phenomenon, rather than a strict doctrinal entity. A creative use of DSU Article 25 is capable of expanding the gravitational force of the WTC.

Even the United States is not completely off the hook of the WTC, although the United States sabotaged the latter. Interestingly, the way in which American Exceptionalism plays out is different within the context of the WTO from other areas of international law. Obviously, the U.S.'s recent willful deviation from international law is not confined to international trade law. Indeed, the Bush administration's departure from the Kyoto Protocol and the Trump administration's withdrawal from the Paris Climate Agreement appear to be as telling as the WTO crisis that the United States precipitated. Nonetheless, what distinguishes the U.S. behavioral pattern within the WTO from those in other areas of international law is the U.S. ambivalence over the WTO system. Despite all the criticisms against the WTO, the United States has never withdrawn from the organization.[325] Most U.S. politicians, while criticizing China's trade practices, still appear to prefer working *through* the WTO in addressing those concerns.[326]

Indeed, the United States has continued to engage in the WTO as it routinely sues other members and responds to other members' complaints against it within the WTO dispute settlement mechanism.[327] From a purely strategic standpoint, the United States would have been in a more advantageous position if it had completely abandoned the WTO and instead pursued bilateral or regional trade agreements with those handpicked members it favors. For example, when the United States withdrew from the Rome Statute that established the International Criminal Court, it signed a series of bilateral immunity agreements with multiple individual contracting parties to the Rome Statute.[328] In other words, as far as the WTO is concerned, the United

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to *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, JOB/DSB/1/Add.12, April 30, 2020, Annex I, ¶ 8.

325. *See* Doug Palmer, *New Ruling Quashes Hawley's Hope for Senate WTO Withdrawal Vote*, POLITICO (July 1, 2020, 9:40 AM), https://www.politico.com/news/2020/07/01/ruling-quashes-hawley-hope-senate-wto-withdrawal-347732 [https://perma.cc/S9EE-47D5].

326. Alex Lawson, *GOP China Hawks Want Trump To Repair Ties With WTO*, LAW360 (Sept. 30, 2020, 5:42 PM), https://www.law360.com/articles/1315329/gop-china-hawks-want-trump-to-repair-ties-with-wto [https://perma.cc/2VH2-7TMH] (quoting House Foreign Affairs Committee ranking member Michael McCaul (R-Texas) who stated that the U.S. government should work "through the WTO … on developing reforms and new rules and disciplines to address the threats the [Chinese Communist Party] poses.").

327. *See* Swanson & Ewing, *supra* note 272.

328. Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19, 51 (2003).

States is still situated in the WTO's legal gravitational field.[329] Even a strategic decision that led to a trade war could not completely sever an underlying normative, and cultural, connection between the WTO and the United States. After all, the United States is still speaking a WTO language.

Even in the middle of a trade war, both the United States and China have not completely bypassed the WTO DSU. In fact, both countries have invoked the WTO dispute settlement mechanism in tandem with their unilateral and bilateral engagements outside of the WTO. For example, China sued the United States for their punitive tariffs.[330] The United States also filed a complaint against China regarding China's alleged violation of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS), in addition to its unilateral execution of the Section 301 procedure on the same complaint.[331] While negotiating with the United States outside of the WTO, China also requested a consultation with the United States under the WTO dispute settlement system regarding the latter's Section 301 investigation and determination on certain Chinese IP practices, such as technology transfer.[332] Even an interim agreement between the United States and China (the "Phase One" Agreement) failed to prevent a WTO panel from finding that the U.S.'s punitive tariffs violated the WTO rules.[333]

Moreover, the United States cannot escape the WTC's gravitational force field in that it is still prone to the WTO-sanctioned retaliatory measures. At the same time, the United States can also benefit from

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329. When the United States appealed a panel report "into the void" for the first time, it still expressed its willingness to consider "alternatives to the appellate process." *See* Notification of an Appeal by the United States under Article 16 of the DSU, *United States–Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶3, WTO Doc. WT/DS436/21 (Dec. 19, 2019). However, in a subsequent appeal of a panel decision on Canadian softwood lumber, the United States dropped such an accommodating language. *See* Statement, Global Affairs Canada, Meeting of the WTO Dispute Settlement Body: Statement by Canada (Sept. 28, 2020), https://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/other-autres/2020-09-28-WTO-statement-declaration-OMC.aspx?lang=eng [https://perma.cc/J3QC-UJZJ] (criticizing the Unites States for its appeal "into the void" after refusing to bring the original panel report to an interim appeal arrangement).

330. *See* Constitution of the Panel Established at the Request of China, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/8 (Jun. 4, 2019); *see also* Panel Requested, *United States—Tariff Measures on Certain Goods from China II*, WT/DS 565 (Oct. 18, 2018).

331. *See* Constitution of the Panel Established at the Request of the United States, *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS 542/9, (Jan. 17, 2019).

332. *See* Request for Consultations by China, *United States–Tariff Measures on Certain Goods from China III*, 17, 65, WTO Doc. WT/DS587/1, G/L/1322 (Sept. 4, 2019).

333. *See* Panel Report, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020) [hereinafter *United States–Tariff Measures*]. *See also* Jingyuan Zhou, *No Unilateral Action—WTO Panel Ruled U.S. Section 301 Tariffs on Chinese Imports Inconsistent with WTO Obligations*, ASIL INSIGHTS, (Oct. 5, 2020).

the WTC's enforcement mechanism when it retaliates against another WTO member that refuses to comply with a WTO tribunal decision won by the United States.[334] The recent *Boeing-Airbus* dispute between the United States and the EU is a case in point. In this epic transatlantic legal battle which has run for more than a decade, both parties have managed to score legal victories against each other and have been known to employ retaliatory measures.[335] First of all, the United States is subject to the EU's retaliatory tariffs up to $4 billion authorized by the WTO.[336] Second, the United States may only avoid the EU's retaliation if the former complies with the original ruling against it. It is against this background that the U.S. government has recently notified the WTO of its compliance with an earlier WTO tribunal decision that invalidated the State of Washington's tax break scheme as an illegal subsidy.[337]

The recent U.S. appeals "into the void" are an ironic testament to the U.S.'s recognition, of the WTC's gravitational force.[338] As the Appellate Body has been paralyzed, it cannot undertake any appellate review. Nonetheless, a losing party at a panel stage may prevent the panel report from being adopted, and therefore having a formal legal effect simply by appealing it to the now defunct Appellate Body.[339] Had the United States been nonchalant about the WTC's legal force, it would not have needed to launch an appeal; it could have just ignored the panel report. Yet, the very fact that it attempted to halt the WTC's

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334. Ana Swanson & Milan Schreuer, *Trump Cleared to Put More Tariffs on Europe in Airbus Case*, N.Y. TIMES (Sept. 16, 2019), https://www.nytimes.com/2019/09/16/business/economy/wto-airbus-tariffs.html [https://perma.cc/WU6U-XNQ4] (observing that a recent U.S. victory in the WTO on the European Union's illegal subsidies to Airbus may provide the Trump administration "fodder" for its ongoing trade war with the EU).

335. Ana Swanson & Niraj Chokshi, *Europe Can Impose Tariffs on U.S. in Long-Running Aircraft Battle*, NY TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/business/economy/boeing-europe-tariffs-trade.html [https://perma.cc/WU6U-XNQ4].

336. Bryce Baschuk, *WTO Awards EU $4 Billion Sanctions for Boeing-U.S., Reuters Says*, BLOOMBERG LAW (Sept. 29, 2020, 3:45 AM), https://www.bloomberg.com/news/articles/2020-09-30/wto-rules-eu-can-target-4-billion-in-u-s-goods-in-boeing-case [https://perma.cc/2YT2-C2GZ].

337. Press Release, U.S. Trade Representative, U.S. Notifies Full Compliance in WTO Aircraft Dispute (May 6, 2020) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/may/us-notifies-full-compliance-wto-aircraft-dispute [https://perma.cc/6PCE-4MN3].

338. *See, e.g.*, Finbarr Bermingham, *US Lodges Appeal against WTO Ruling in China's Favour ver Trade War Tariffs*, S. CHINA MORNING POST (Oct. 26, 2020, 8:37 PM), https://www.scmp.com/economy/china-economy/article/3107147/us-lodges-appeal-against-wto-ruling-chinas-favour-over-trade [https://perma.cc/P2B2-CJUW]; *see also* Alex Lawson, *US Sends Indian Steel Dispute Into WTO's Legal Void*, LAW360 (Dec. 18, 2019, 11:55 AM), https://www.law360.com/articles/1229407/print?section=internationalarbitration [https://perma.cc/P7VF-SCHN].

339. *The process — Stages in a typical WTO dispute settlement case*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm [https://perma.cc/AWG3-3XNK].

legal force through the aforementioned technical gambit is an eloquent demonstration that the United States does recognize the WTC.

Finally, the recent ruling by a WTO panel (*Russia–Transit*)[340] on the national security exception under GATT Article XXI has further solidified the WTC.[341] Article XXI permits a WTO member to "tak[e] any action which it considers necessary for the protection of its essential security interests."[342] Some members, in particular the United States that has justified its trade wars based on the same exception, have argued that the provision is of a "self-judging" nature. According to their interpretation, a WTO member invoking the provision enjoys a blanket freedom in interpreting the provision, including issues, such as what constitutes "national security" and which action is necessary to protect its "essential" interests.[343] However, the WTO panel in *Russia–Transit* rejected the U.S. position that Russia's invocation of the national security exception is "non-justiciable."[344] Instead, the panel emphasized that the exception must not be abused based on the good faith principle.[345] According to the panel, the good faith principle requires a country invoking the national security exception to demonstrate the following two facts: first, there was an actual emergency akin to a war; second, there existed a substantial, plausible relationship (nexus) between the emergency situation and the measure in question.[346]

This landmark decision is characteristic of a "constitutional" moment for the WTO. Note that GATT Article XXI is not just a mundane, technical interpretive issue to the WTO. The national security exception concerns a critical matter of allocating power between the WTO as an autonomous institution and its individual members. On the one hand, the *Russia–Transit* panel firmly established a doctrinal device to prevent an abuse of the national security exception by providing the aforementioned two-tier test. On the other hand, the panel also secured a zone of deference for a country invoking the exception by refraining from second-guessing what would be truly "necessary" to protect its essential security interests.[347] Suppose that the panel had ac-

340. Panel Report, *Russia–Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter Russia–Transit].

341. *See* Sungjoon Cho, *A WTO's "Kompetenz-Kompetenz" Moment*, INT'L ECON. L. & POL'Y BLOG (Apr. 5, 2019), https://worldtradelaw.typepad.com/ielpblog/2019/04/a-wtos-kompetenz-kompetenz-moment.html [https://perma.cc/X5V7-KRYP].

342. GATT, *supra* note 154, art. XXI.

343. In a third-party submission, the United States argued that the panel "lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute." *Russia – Transit*, *supra* note 290, ¶ 7.51.

344. *Id.* ¶ 7.103.

345. *Id.* ¶¶ 7.132-33.

346. *Id.* ¶¶ 7.134-39.

347. *Id.* ¶ 7.146.

cepted Russia's original claim and declared Article XXI as a self-judging provision. The WTO would have opened a jurisdictional Pandora's Box, inviting massive abuses by domestic politicians. Another constitutional crisis would have been very likely.[348]

The anti-unilateralist constitutional discipline established in *Russia – Transit* reverberates in a subsequent case. In *United States–Tariff Measures*, the United States attempted to justify its trade war tariffs against Chinese products based on the "public morals" exception under GATT Article XX (a).[349] According to the United States, China's alleged intellectual property theft violated public morals, which would justify United States' imposition of punitive tariffs based on Section 301.[350] However, the panel rejected the United States' argument by ruling that the United States failed to demonstrate that "there is a *genuine relationship of ends and means* between the measures at issue and the public morals objective pursued by the United States."[351] This is another "nexus" test reminiscent of a similar test under *Russia – Transit*. Importantly, the public morals exception resembles the national security exception due to its innately deferential nature. The panel considered public morals as the "standards of right and wrong" and concluded that intellectual property theft, albeit an economic matter, could be covered by the public morals exception under GATT Article XX (a).[352] Nonetheless, the public morals exception, just like the national security exception, shall not be abused by a WTO member. In *United States–Tariff Measures*, the U.S. government incoherently narrowed the range of certain Chinese products covered by punitive tariffs[353] as well as excluded particular products from such tariffs on a selective basis.[354] It is against the background of such an arbitrary nature of the U.S. Section 301 procedure that the panel refused to find a plausible relationship between the U.S.'s alleged goal of protecting public morals (ends) and its Section 301 tariffs (means).

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348. *See* James Bacchus, *WTO Signals National Security No Longer Trump Card in Trade Disputes*, NEWSWEEK (Jul. 7, 2020, 2:21 PM), https://www.newsweek.com/wto-qatar-saudi-national-security-trade-trump-card-1516027 [https://perma.cc/3N9U-49DK] (viewing that the recent WTO panel decisions on the national security exception "remove the foundations for the U.S. argument that it can do whatever it wishes in trade if it does so in the name of national security").

349. *United States – Tariff Measures*, *supra* note 333, ¶ 6.6.

350. *See id.* ¶¶ 7.113, 7.127.

351. *Id.* ¶ 7.229 (emphasis added).

352. *See id.* ¶ 7.140.

353. *See id.* ¶ 7.199.

354. *See id.* ¶ 7.213.

B. The "Indirect Effect" of the World Trade Constitution

While system-maintaining behaviors of WTO members demonstrate the resiliency of the WTC, its true potential as a system of constitutional governance must be also identified *within* members' territories. The gravitational force of the WTC pierces the conventional veil of state sovereignty under public international law. It penetrates the border and reaches out to *private* economic players. The *Section 301* panel aptly held that:

> The security and predictability in question are of "the multilateral trading system." The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of *individual* economic operators. The lack of security and predictability affects mostly these *individual* operators.[355]

> Trade is conducted most often and increasingly by *private* operators. It is through improved conditions for these *private* operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of *individuals* within it.[356]

Granted, the way in which the WTC affects private economic players is more nuanced than a domestic or regional constitutional regime. For example, as a non-self-executing treaty, the URAA, the U.S. implementation act of the WTO treaty, does not permit individuals to directly invoke any WTO provision as a cause of action or an affirmative defense in domestic litigation.[357] Instead, the WTC's normative connection with private actors, such as businesspeople, think-tanks, policymakers and even politicians, is "indirect," as the *Section 301* panel characterized. Harold Koh's "transnational legal process"[358] is useful in illustrating this indirect effect of the WTC. The WTC becomes "sticky" as "maintenance of an international commitment become[s] entrenched in domestic legal and political processes."[359] Domestic actors, both public and private, which may be broadly dubbed "norm-sponsors"[360] of the WTC, can continuously enhance domestic susceptibility to the WTC by internalizing it through various channels. Examples are widespread:

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355. *Section 301*, *supra* note 228, ¶ 7.76 (emphasis added).

356. *Id.* at ¶ 7.77 (emphasis added).

357. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 § 4809, 4818 (1994).

358. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2658 (1997). *See also* Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231 (2016) (discussing the dynamic and multi-faceted public-private governance nexus under the label of "transnational legal ordering").

359. *Id.* at 2654–55.

360. Allan Rosas, *The European Court of Justice and Public International Law*, A Speech at the Meeting of the Council of Europe Committee of Legal Advisers on Public International

The European Court of Justice (ECJ) regularly refers to decisions of WTO panels and the Appellate Body in its own decisions. Allan Rosas, a judge of the ECJ, views that:

> While the WTO rules are not deemed to have direct effect in Union law contexts, the principle of consistent interpretation and the risk that violations of WTO law incur the international responsibility of the Union have in some instances prompted the ECJ to look at WTO case law, as interpreted by the dispute settlement bodies, for guidance.[361]

In a similar manner, the European Commission has recently relied, heavily on the WTO case law on trade remedies when it imposed new antidumping and countervailing duties against China. Usually, countervailing duties are imposed when both a subsidizing country and a recipient company belong to the same territory. However, in a stark departure from this territoriality principle, the Commission treated a Chinese subsidiary located in Egypt as a recipient of subsidies (loans and credit insurance) from a Chinses state-owned bank.[362] In doing so, the Commission referred to the Appellate Body's report in *EC – Fasteners*, which allowed an investigating authority to treat multiple exporters as a *single* entity based on the "existence of corporate and structural links between the exporters."[363] This incorporation, by reference, of the WTO case law into domestic policymaking seems to have settled into a pattern, beyond a mere dimension of isolated anecdotes.[364]

Likewise, some U.S. government agencies, which, unlike the USTR and the Department of Commerce, are not positioned in the frontline of trade wars, are still mindful of WTO obligations in their quotidian policymaking process. For example, the Trump administration has recently increased federal subsidies to farmers negatively affected by its trade dispute with China.[365] When the Department of Agriculture de-

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Law (CAHDI) (Mar. 23, 2018), at 10, https://rm.coe.int/statement-delivered-by-judge-allan-rosas-at-the-55th-cahdi-meeting-55t/16807b3b04 [https://perma.cc/N7Q2-WYGP].

361. *Id.*

362. *EU imposes tariffs on Chinese makers of glass fibre fabric in China and Egypt*, REUTERS (June 15, 2020), https://www.reuters.com/article/us-eu-china-egypt-trade/eu-imposes-tariffs-on-chinese-makers-of-glass-fibre-fabric-in-china-and-egypt-idUSKBN23M27J [https://perma.cc/2499-9PSD].

363. Implementing Regulation 2020/776 of 12 June 2020 Imposing Definitive Countervailing Duties on Imports of Certain Woven and/or Stitched Glass Fibre Fabrics Originating in the People's Republic of China and Egypt, 63 O. J. (L 189) 1, 13-14 (2020).

364. "If WTO dispute settlement becomes more difficult to use, you could see more of what the EU is doing at the moment against what it perceives as Chinese subsidies in Egypt — using WTO subsidies rules in EU anti-subsidy investigations, leading to EU tariffs, rather than filing a WTO complaint." Alan Beattie, *WTO Still Has Ability to Affect Rulings and Regulation Elsewhere*, FIN TIMES (Jun. 18, 2020) (quoting Joost Pauwelyn).

365. Alan Rappeport, *Trump Funnels Record Subsidies to Farmers Ahead of Election Day*, N.Y. TIMES (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/us/politics/trump-farmers-subsidies.html [https://perma.cc/4WMC-UES9].

vised the direct payment scheme under the Market Facilitation Program, it made a conscious effort not to run afoul of the WTO commitment by ensuring that such payment would not incentivize overproduction of particular crops.[366]

Even the U.S. Congress has increasingly seemed to acknowledge "*de facto* delegation" of trade authority to the Appellate Body, attesting to demonstrating domestic political tolerance to WTC.[367] The House Ways and Means Committee has recently passed a resolution highlighting the congressional support for the WTO system. In the congressional debate leading up to the passing of the resolution, Rep. Don Beyer (D-VA) criticized the USTR's decision to block appointments of the Appellate Body members, describing it as a "terrible decision" to "pick up our toys and go home."[368] Critical of the Trump administration's sabotaging of the WTO dispute settlement system, Rep. Stephanie Murphy (D-FL), a member of the Ways & Means trade subcommittee, warned that paralyzing the Appellate Body means going "back to the wild" and "could turn every trade dispute between nations into a mini trade war with countries unilaterally imposing tariffs and counter tariffs on each other," eventually harming interests of American businesses and consumers.[369] Even Senator Chuck Grassley, historically a trade hawk, praised the value of the WTC by stating that "the WTO's expansion of global trade has actually enabled the U.S. to respond to the pandemic" as "global supply chains, facilitated by WTO rules" empowered the U.S. automakers to globally source components necessary to manufacture ventilators.[370]

Some U.S. politicians even take advantage of WTO decisions affecting domestic politics amid controversial legislative debates, such as the debate involving farm subsidies. U.S. Senator Pat Roberts was opposed to the "Adverse Market Payments (AMP)" included in a farm bill on the grounds that it would violate the WTO norms.[371] Indeed, projecting WTO disciplines onto domestic legislation offers an effective

366. Gregory Meyer, *US Increases Federal Aid for Farmers Hit by China Trade War*, FIN. TIMES (Jul. 26, 2019), https://www.ft.com/content/fcf5f5c8-aee6-11e9-8030-530adfa879c2 [https://perma.cc/LA43-M8XR].

367. *See* Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate?: Effects of WTO Judicial Delegation on U.S. Trade Politics*, UCLA SCH. OF LAW, LAW & ECON. RESEARCH PAPER SERIES, No. 07-14, at 36–37 (discussing how the Appellate Body may successfully push for trade openness in the U.S. and the E.U.).

368. Hannah Monicken, *Ways and Means Members Affirm Support for the WTO, U.S. Critiques*, WORLD TRADE ONLINE (Dec. 17, 2019), https://insidetrade.com/daily-news/ways-means-members-affirm-support-wto-us-critiques [https://perma.cc/H4H4-FK5R].

369. Brett Fortnam, *Without an Appellate Body, What's Next for the WTO?*, WORLD TRADE ONLINE (Dec. 11, 2019), https://insidetrade.com/daily-news/without-appellate-body-what%E2%80%99s-next-wto [https://perma.cc/KV34-HZEB].

370. Chuck Grassley, *WTO Needs Reform to Be a Nimble Trade Referee*, BLOOMBERG LAW (Jun. 16, 2020).

371. *See e.g.*, *US Senate Debates Potential for WTO Challenge to 2013 Farm Bill*, 17 BRIDGES WKLY. TRADE NEWS DIGEST, May 23, 2013.

remedy for the Madisonian failures regarding special interests seeking trade protection.[372] The U.S. government can "avail itself of the advantages offered by international organization" to "expan[d] the sphere of the national government . . . for the purpose of securing the greatest possible advantages for the individual citizen."[373]

The WTC's gravitational force can also shape daily operations of "private" businesses at a granular level, even if such force may remain unrecognizable on a surficial level. The epic *Airbus-Boeing* saga lasting for sixteen years powerfully demonstrates this proposition. The rich set of case law emanating from the WTO tribunal in this long and winding litigation forced transatlantic aerospace industries to innovate to remain competitive, instead of perennially relying on subsidy money.[374] The anti-protectionist tenet of the WTC empowered government officials to remove big companies from lavish public bounties.[375] Even frustrated rent-seekers could not deprive the WTC of support from the whole business sector. Business leaders have appealed directly to the White House, urging the U.S. government to unblock the appointment of the Appellate Body members.[376] In particular, confronted by unparalleled economic pains inflicted by the coronavirus pandemic, the U.S. business community has realized that a well-functioning dispute settlement mechanism is essential to reduce trade barriers and regain business confidence.[377]

Business and industrial organizations have also acknowledged that they have "under-invested" in the multilateral trading system, as they

372. *See* Sungjoon Cho, *Toward a New Economic Constitution: Judicial Disciplines on Trade Politics*, 42 WAKE FOREST L. REV. 167, 184–86 (2007) (discussing how protectionist trade practice can be detrimental to U.S. economics).

373. Steve Charnovitz, A WTO If You Can Keep It, 6 QIL, Zoom-Out 5, 35 (2019). (quoting Paul S. Reinsch, *International Administrative Law and National Sovereignty*, 3 AM. J. INT'l L. 12, 15 (1909)).

374. *See* Alan Beattie, *Airbus-Boeing and the Bright Side of Endless Litigation*, TRADE SECRETS, FIN. TIMES (Oct. 12, 2020), https://www.ft.com/content/d770001a-3da1-4860-baf8-65669ab7fe53) [https://perma.cc/R9T9-XYA6]; *see also* Sungjoon Cho, *Aerospace Saga Has Far-Reaching Repercussions*, FIN. TIMES (Oct. 15, 2020), https://www.ft.com/content/e2aab969-1b0b-4045-9299-4bc6aa1fe660 [https://perma.cc/KV34-HZEB].

375. Beattie, *supra* note 374. (quoting David O'Sullivan, a former EU Director-General of Trade, who stated that European bureaucrats had warned Airbus of the latter's need to comply with WTO rulings).

376. Americans for Prosperity et al., *A Letter to the White House* (Dec. 6, 2019), https://mk0xituxemauaaa56cm7.kinstacdn.com/wp-content/uploads/2019/12/WTO-AB-coalition-letter-to-president-2019-12-10.pdf [https://perma.cc/6MVM-T6WP]. *See also* Stuart Anderson, *New Proposal Seeks To Save World Trade Organization*, FORBES (Dec. 9, 2019), https://www.forbes.com/sites/stuartanderson/2019/12/09/new-proposal-seeks-to-save-world-trade-organization/?sh=7215f08b61db [https://perma.cc/29FV-4LWE].

377. *See* Yuka Hayashi, *Countries Seek New Fix for Dormant International Trade Court*, WALL ST. J. (Feb. 24, 2021).

have emphasized the fundamental value of the WTC.[378] For example, Rufus Yerxa, head of the National Foreign Trade Council, views that:

> "The current environment surrounding international trade and trade policy makes it more important than ever that we work to strengthen and update multilateral institutions such as the WTO that support the rules-based trading system and discourage economic nationalism and mercantilist policies around the world"[379]

Other private actors, such as NGOs and think-tanks, have also expressed their strong support for the WTC. The "Americans for Prosperity" harshly rebuked the Trump administration's strategy of blocking new appointments of the Appellate Body members, warning that such a strategy would "create a frontier approach to trade that will [leave] . . . countries adopting a go-it-alone, eye-for-an-eye approach even less likely to resolve disagreements."[380]

Concededly, one should not take the existence of norm-sponsors for granted. In a domestic arena of political economy, perennial battles are waged between carriers of the Kantian culture (norm-sponsors) and carriers of the Hobbesian culture (mercantilists). For example, trade attorneys who represent domestic producers in trade remedy disputes belong to the latter camp.[381] To them, the WTC is an anathema. Moreover, recent populist sentiments portray norm-sponsors of the WTC as "globalists" or "establishment" that are responsible for domestic economic maladies.[382] In this context, trade wars provide a teachable moment. Relevant agencies, such as the Department of Commerce and the Department of Treasury, and stakeholders, such as consumers, should develop a better understanding of the cost of trade protectionism. While nurturing norm-sponsors require a change of culture, once a pro-WTO culture emerges, there are ample legal devices that help implement the WTC by aligning interstate commerce with foreign commerce, such as the *Charming Betsy* doctrine.[383] WTO members

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378. *NFTC Head: Businesses Paying More Attention to the WTO*, WORLD TRADE ONLINE (Oct. 8, 2019), https://insidetrade.com/trade/nftc-head-businesses-paying-more-attention-wto [https://perma.cc/K6P3-KFFH](quoting Rufus Yerxa, head of the National Foreign Trade Council).

379. Veronica Berkshire, *NFTC Releases Policy Brief on Strengthening the WTO*, National Foreign Trade Council Press Releases (Oct. 8, 2019), http://nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=4203&category=All [https://perma.cc/BP2F-DWSN].

380. Bryce Baschuk, *Koch Group Blasts U.S. Clash With WTO Body in Break With Trump*, BLOOMBERG LAW (July 24, 2019).

381. *See* Donnan & Baschuk, *supra* note 82.

382. Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, 30 EUR. J. INT'L L. 1359 (2019) (contending that the "Trump Narrative" views trade as a "zero-sum competition over wealth - as measured by the trade balance - and jobs.").

383. *See e.g.*, Hyundai Elec. Co. v. U.S., 53 F. Supp. 2d 1334 at 1343-45 (Ct. Int'l Trade 1999) (holding that the Department of Commerce's administration of antidumping measures

must be reminded that they hold ample "wiggle room" to bring their measures in conformity with the WTC.[384]

C. The Limits of the World Trade Constitution: A Case for Political Constitutionalism

The Trump administration's trade wars and the sabotaging of the Appellate Body have broken an unspoken political consensus among WTO members and permanently altered the political dynamic within the WTO. Before the current crisis, the WTC had been preserved based on such political consensus that no WTO member could halt the engine of the WTC itself. Now, the WTC is prone to a possibility of a repeating crisis. What if China, India or Russia mimics the United States in the future?[385] Moreover, those who sympathize with the U.S. justification —judicial overreach—for its destructive behaviors advocate political settlement, rather than adjudication, on controversial issues, such as zeroing.[386] Other observers, although they do not necessarily support the U.S.'s radical tactics, also lament the lack of a political filter[387] and over-litigation trends in the WTO.[388]

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should be consistent with the WTO Antidumping Agreement in accordance with the *Charming Betsy* doctrine).

384. James Thuo Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions*, 34 GA. J. INT'L & COMP. L. 1, 35-36 (2005); John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out,"* 98 AM. J. INT'L L. 109, 122 (2004).

385. *See* Jamil Anderlini, *China Is Escalating Its Punishment Diplomacy*, FIN. TIMES (Sep. 23, 2020) (warning that China has recently been "wielding trade and market access as a political weapon" against its trading partners, such as South Korea, Japan and Taiwan); Like Patey, *China Is an Economic Bully – and Weaker Than It Looks*, FOREIGN POL'Y (Jan. 4, 2021), https://foreignpolicy.com/2021/01/04/china-is-an-economic-bully-and-weaker-than-it-looks [https://perma.cc/MJ6T-8YUB] (documenting China's recent economic coercion against trading partners that "cross its political redlines").

386. *See* Communication from the United States, *Offsets for Non-Dumped Comparisons*, TN/RL/W/208, Jun. 5, 2007, at 2.

387. Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9 (2016). *See also* Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far, in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM 227 (Roger B. Porter et al eds. 2001) (warning that the WTO constitution would "take politics out of the global equation when on the contrary it needs to be brought back in").

388. The former WTO Director-General Pascal Lamy warned that "shifting priority away from negotiations and to litigation... could damage the fragile balance that exists between interpreting existing rules and creating new and more relevant WTO agreements." *Governments Exploring How to Restart Doha Round Talks*, BRIDGES WKLY TRADE NEWS DIG., - vol. 10, no. 28, Aug. 2, 2006. *See also* Alan Beattie, *Washington Takes EU to WTO*, FIN. TIMES, Jan. 16, 2009 (observing that the Doha failure has generated "a wave of legal action as aggrieved governments try to settle trade disputes by litigation rather than negotiation"). *But see* Philippe Sands, *'Unilateralism,' Values, and International Law*, 11 EUR. J. INT'L L. 291, 301 (2000) (advocating the Appellate Body's "enhanced role for a self-confident judiciary, filling in the gaps which states in their legislative capacity have been unwilling—or unable—to fill").

WTO critics call for comprehensive negotiations on the WTO's structural issues and seek to create a new institution, such as the WTO 2.0, as a *deux ex machine* to salvage the WTO from the current existential crisis.[389] Yet, as seen in the recent deadlock in the Doha round negotiations, a political breakthrough via negotiation is dubious, at least in the short or mid-term, given the current populist climate within major WTO members, including the United States.[390] Rather, individualized political support from powerful countries[391] must be replaced with *collective* decision-making from the entire WTO membership through "voting."[392] Voting is a bold governance move that can bolster the WTC in that voting can generate "constitutional discourse"[393] among WTO members. The conventional consensus rule, albeit ideal, has become increasingly inept given the large number of WTO members.[394]

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389. *See, e.g.*, Karen Alter, Opinion, *Time for a World Trade Organization 2.0*, WALL ST. J. (Sep. 15, 2019), https://www.wsj.com/articles/time-for-a-world-trade-organization-2-0-11568577021 [https://perma.cc/G3LN-PQ6K] (arguing that the United States should lead to update the current WTO and threaten to exclude China for the latter's compliance).

390. *See* Adom Getachew, *Reclaiming Populism*, BOS. REV. (Apr. 29, 2020), https://bostonreview.net/forum/adom-getachew-reclaiming-populism [https://perma.cc/VR2F-H8SX] (arguing against critics of populism who merely see "exclusionary anti-pluralism, an unstable anti-institutionalism, and a dictatorial style of political leadership" because of populists' "appeal to 'the people' . . . a central element of democratic societies").

391. *Cf.* Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000) (observing that judicial activism of the Appellate Body would undermine political support for the WTO from powerful members).

392. A number of trade law scholars advocate the use of collective political decision-making to resolve the Appellate Body crisis. *See* Ernst Ulrich-Petersmann, *How Should WTO Members React to Their WTO Crises?*, 18 WORLD TRADE REV. 503 (2019); Peter Jan Kuijper, *Guest Post from Peter Jan Kuijper on the US Attack on the Appellate Body*, INT'L ECON. L. & POL'Y BLOG (Nov. 15, 2017), https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html [https://perma.cc/6P9A-2FHG]; Jennifer Hillman, *Moving Towards an International Rule of Law*, *in* A HISTORY OF LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 60 (Gabrielle Marceau ed., 2015); Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, 24 J. INT'L ECON. L. 534 (2021) (arguing that the WTO General Council should appoint the Appellate Body members based on majority voting).

393. *See* Walker, *supra* note 108, at 341 (defining "constitutional discourse" as "some functionally equivalent discourse, as necessary to and constitutive of the legal normative order of contemporary non-state and post-state polities just as it is necessary to and constitutive of the legal normative order of state polities").

394. John H. Jackson, *Appraising the Launch and Functioning of the WTO*, 39 GERMAN Y. B. INT'L L. 20, 39 (1996) ("The decision-making and voting procedures of the WTO, although much improved over the GATT, still leave much to be desired. It is not clear how the consensus practice will proceed, particularly given the large number of countries now or soon involved.").

Indeed, the WTO crisis offers a perfect constitutional moment[395] in which WTO members can activate the long-dormant voting process under the WTO Charter. Article IX:1 of the WTO Charter provides that:

> The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting … Decisions of the Ministerial Conference and the General Council shall be taken by a *majority* of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[396]

One might reasonably argue that the intentional blocking of the appointment of the Appellate Body members, and the subsequent paralyzing of the WTO dispute settlement system, is a situation "where a decision cannot be arrived at by consensus" under Article IX:1, which justifies an invocation of a majority voting among WTO members.[397] Such interpretation appears to be legitimate, especially considering the WTO members' collective duty to fill vacancies of the Appellate Body "as they arise" under Article 17 of DSU.[398] Therefore, a simple majority of WTO members may unblock the current Appellate Body by appointing its members via voting.

Finally, WTO members may inoculate the abovementioned interpretation that permits voting from a possible counter-interpretation or any other objections.[399] A super-majority (three quarters) of the WTO membership "shall have the exclusive authority to adopt interpretations" on WTO legal issues under Article IX:2.[400] Even if Article 2.4 of DSU stipulates the consensus rule over matters relating to dispute settlement,[401] this rigid procedural hurdle can still be overridden by a simple-majority rule under Article IX:1 of the WTO Agreement, as the conflict rule under Article XVI:3 of the WTO Agreement applies.[402]

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395. Regarding bold yet innovative proposals along the similar line of political constitutionalism, see Julia Ya Qin, *WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons from the US-China Trade War*, Wayne State University Law School Legal Studies Research Paper, No. 2020-73,

http://www.ssrn.com/link/Wayne-State-U-LEG.html [https://perma.cc/6G62-BTKC] (proposing a variety of collective measures to prevent unilateralism retaliation, including "forced withdrawal," "suspension of trade relations with the WTO," and "amendment to DSU Article 23").

396. WTO Agreement, *supra* note 41, art. IX:1 (emphasis added).

397. *WTO Crises*, *supra* note 248, at 514, n. 27.

398. DSU, *supra* note 13, art. 17.

399. *WTO Crises*, *supra* note 248, at 514-15, n. 29.

400. WTO Agreement, *supra* note 41, art. IX:2.

401. DSU, *supra* note 13, art. 2.4.

402. "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict." WTO Agreement, *supra* note 41, art. XVI:3. *See WTO Crises*, *supra* note 211, at 514, n. 29.

CONCLUSION: THE FUTURE OF THE WORLD TRADE CONSTITUTION

The impact wrought by the current WTO crisis is unique and serious enough to justify a fresh framework for understanding the WTO itself, different from the conventional member-driven model. This Article argues that the current crisis is best analyzed as a "constitutional" crisis that calls for a system-driven framework on the WTO, symbolized by the WTC. The Article then, based on the new approach, delineates system-maintaining behaviors of WTO members, emblematic of the WTC's resiliency. It also evokes political constitutionalism via voting in an attempt to solidify the WTC.

Will the current WTO crisis prove to be a *good* crisis? Will the rest of WTO members cooperate and hang together, with or without the U.S.'s support? As a cultural product, the WTC is a self-fulfilling prophesy.[403] Answers to those questions depend eventually on the extent to which the entire WTO membership internalizes the notion of the WTC. In this regard, a post-COVID-19 world demonstrates a strong normative case for the WTC. As economic recoveries from the pandemic are uneven among nations, politicians will be tempted to rely increasingly on populist de-globalizing tactics, which tends to weaken the case for the WTC. If the WTC loses its relevancy, regional mega-trading blocs will compartmentalize global trade, such as the European Fortress (represented by the European Union); the North American Fortress (represented by the United States-Mexico-Canada Free Trade Agreement); and the Asia-Pacific Fortress (represented by the Comprehensive and Progressive Trans-Pacific Partnership or the Regional Comprehensive Economic Partnership). Such a world will perilously resemble an interwar economic balkanization. With this dark forecast ahead, the global trading community is faced with an existential choice between prosperous commerce and the agonies of war, as engraved in the Shield of Achilles.[404]

The WTC, as a symbolic, and normative, control tower over world trade, can inoculate the global trading community against such a devastating scenario. This inoculation, in turn, requires a didactic effort among the WTO membership. WTO stakeholders must be disabused from a long-standing "positivist nostrum" based on an anachronistic belief that "multilateral mechanisms for making global law, binding on the international community as a whole, do not exist."[405] They must

403. *See* Andre Kukla, *The Structure of Self-Fulfilling and Self-Negating Prophecies*, 4 THEO. & PSY. 5 (1994).

404. Oliver Taplin, "The Shield of Achilles within the *Iliad*," 27 G & R 1, 15 (1980).

405. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 586–87 (2005).

nurture "constitutional culture,"[406] within and outside of the WTO, to help the public make better-informed political decisions on trade matters.[407]

In closing, it is the WTO members that created the WTO. Yet, they created the WTO to be bound by its norms, which this Article symbolizes as the WTC. The collective Odysseus chose, out of self-enlightenment, to lash its treacherous hands against the mast of a living trade constitution.[408] Now, it is a "civic duty" of WTO members and their representatives to "make the system work."[409]

406. *Cf.* Allan Ides, *The Emerging Transnational Constitution: Introduction*, 37 LOY. L.A. L. REV. 187, 188 (2003) (defining "constitutional culture" as "cultural cohesion that habitually accepts the propriety and necessity of constitutional compliance").

407. *See* Steve Charnovitz, *The WTO and Cosmopolitics*, 7 J. INT'L ECON. L. 675 (2004) (urging that the WTO should endeavor to facilitate public participation). *See also* WTO, *Trade Dialogues, Consumer Groups Express Support for Multilateral Trade, Stress Priorities for E-Commerce* (May 6, 2019), https://www.wto.org/english/news_e/news19_e/trdia_06may19_e.htm [https://perma.cc/9NMN-DTK8].

408. *See notably* Robert E. Hudec, *GATT or GABB?: The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1309-36 (1971) (discussing the policy of "lashing oneself to the mast").

409. Wolff, *supra* note 57.