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# **TREACHERY IN TRADE: ANALYZING AMERICAN CRITICISMS AGAINST THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION**

AUTHORED BY - RYAN GAURAV

## **INTRODUCTION**

For nearly twenty-eight years the World Trade Organization has been the cornerstone for creating international trade standards by upkeeping transactional protocols and helping member countries build up their trade capacities. The ‘Crown-Jewel’ of the World Trade Organization, however, is the Dispute Settlement System (DSS), a process that is ideally supposed to adjudicate disputes related to international trade and commerce between member states. However, recent criticisms by the United States of America and other member states have effectively paralyzed the functioning of the entire system by creating an impasse related to the appointment of members to the Appellate Body, the highest adjudicating body in the international world of business and trade. American concerns primarily revolve around objections regarding inconsistencies in procedural matters, disagreements with allegedly flawed and overwhelmingly ‘liberal’ judgements passed by the Appellate Body combined with an overall lack of trust in what current United States Trade Representative (USTR) Katherine Tai calls a “flawed process that we don’t believe in”. But is the Dispute Settlement System truly a flawed process? The paper opens up avenues of investigation, questioning the true motives of the United States in meting out criticism and their subsequent actions of blocking appointments to the Appellate Body. Could this shadow be disquieting motives to implement government policies that restrict the free flow of trade and promote national industrial businesses? Is their ultimate goal to destabilize the judicial authority of the Dispute Settlement System, thus allowing them to effectively skirt around unfavorable decisions that hamper their own economic interests?

It thus becomes crucial to thoroughly evaluate the credibility of the assertions and criticisms brought forward by the United States to accurately identify issues and devise a suitable and appropriate solution. The malfunctioning of the World Trade Organization signifies a flawed global trade structure requiring urgent rectification to restore the smooth flow of trade and prompt resolution of trade disputes between nations.

### **A HISTORY OF AMERICAN PROTECTIONISM**

History serves as a remarkable background for current events, and thus no understanding of current affairs will ever be complete unless one has some knowledge of the past that evolved into today's world. Thus, to accurately analyze and assess the American dilemma, the authors find it necessary to brief the reader and give them a quick understanding of the evolution of American trade policies, significantly those that highlight its tendency towards a protectionist attitude towards economic affairs<sup>1</sup>.

Firstly – we must primarily define what ‘protectionism’ in this context is - Protectionism is a political ideology that entails an economic policy of ‘protecting’ domestic and national industries from foreign competition by involving various barriers to trade, including tariffs, subsidies, import quotas and boycotts. Indeed, any strategy that successfully hinders the role of foreign traders and global markets and promotes business and trade within the country can be considered a ‘protectionist’ trade policy. Protectionism is in stark opposition to free trade. Despite economists largely agreeing that free trade is mutually beneficial and leads to a better socio-economic society, some countries may still choose to implement protectionist trade policies for various reasons<sup>2</sup>.

Throughout the course of modern history, America infamously has held these protectionist attitudes close to heart. Economic historian Paul Bairoch once termed it as “the homeland and bastion of modern protectionism”. Great Britain had implemented extremely repressive economic policies in America, policies that ensured America would have an extremely insignificant role in the emerging western economy. Britain wanted to ensure the safety of their economically elite and keep their position as the dominant nation in global affairs. The American revolution was, in a sense, a war against these repressive policies – an attempt to finally industrialize the colonies and improve the newly independent nation's economic standing.

It was after the war of independence was won that we see the beginnings of trade protectionism in the United States. American elites, including politicians, lawyers and other intellectuals decided that by allowing America to be isolated from the outside world and implementing protectionist ideals in their policies, they would be able to build up their industries and economy

<sup>1</sup> Feenstra, R.C., 1992. How costly is protectionism? *Journal of Economic Perspectives*, 6(3), pp.159-178.

<sup>2</sup> Bhagwati, J.N., 1988. *Protectionism*. MIT press.

without the threat of foreign interference that would ensure the industrial system they were building would remain self-reliant.

A significant shift occurred during the American Civil War (1861-1865). While the primary reason for the secession of the southern states was over the issue of slavery, the south also reasoned that a protectionist ideology was against their local, agrarian interests (The south also was a major exporter of cotton to Great Britain, who strongly believed in free trade). In stark opposition, the northern states led by Abraham Lincoln strongly opposed the idea of free trade to benefit their more industry and factory leaning interests. Under Lincoln, tariffs had increased to nearly 44%, and continued to rise to fund the war against the secession of the south. In 1847, Lincoln declared “Give us a (protective) tariff, and we shall have the greatest nation on earth”. Even after the civil war had ended, tariffs never really fell below 38%, and by the start of the twentieth century, in 1896, the republican government pledged to “create a platform that emphasizes and renews our allegiance to the policy of protectionism, as it remains the bulwark of American industrial independence and the foundation of the nations development and prosperity.”

### **THE SHIFT DURING THE 20<sup>TH</sup> CENTURY**

Despite American economists continuing to criticize protectionist policies, political powers continued to support these legislations well into the twentieth century. The trend appears to culminate in the Smoot-Hawley Tariff act of 1930, imposing restrictive trade practices and tariffs of up to 30%. The restrictions of the Smoot Hawley Tariffs were so immense that it completely collapsed global trade, as other countries also began to impose trade restrictions causing a complete plummet in economic activity. The Smoot Hawley Act is infamously credited with bringing about the Wall Street Crash of 1929. Which brought about the Great American Depression, which lasted for nearly ten years. A radical shift occurred when Franklin D. Roosevelt was elected President in 1933. His cabinet, especially the Secretary of State, Cordell Hull were more inclined toward free trade policies, reflecting his southern heritage. Determined to reverse the restrictive trade policies, the Congress passed the Reciprocal Tariff Act in 1934. The act provided for a massive reduction in tariffs and allowed for the negotiation of tariff agreements between the United States and other countries, with an emphasis on Latin American States. The bill also gave the power to the President of the United States to negotiate new, bilateral and reciprocal trade agreements with other countries across the globe. With this act, Roosevelt had ushered in a new era of liberalized American trade policy that persisted



through much of the twentieth century. The rise of fascism and the subsequent Second World War brought bilateral trade negotiations largely to an end. Strict limitations in inter-state trade were a natural consequence of a global war. The United States at this point had accumulated a large amount of wealth, primarily from holding gold bullion that most European countries (including the United Kingdom) had invested in to safeguard their own economy in case of an invasion. Despite significant spending during the war, the United States had emerged as the wealthiest country in the post-war period. Bilateral negotiations however, had not resumed even after the war. Post-war economic policy was still largely restrictive, primarily to ensure that no country would feel 'beggared' by the United States, allowing them to instead grow and rebuild their economies together and trade once they had the capacity too. As already enunciated above, the United Nations emerged, and subsequently the World Trade Organization. Policies continued to grow in favor of free trade, most notably with the 1962 Trade Expansion Act. This gave then President John F. Kennedy had the authority to negotiate tariffs for foreign trade up to 80%, and allowed for the signing and implementation of new negotiations between countries during the sixth round of the General Agreement on Tariffs and Trade (GATT) rounds in the United Nations<sup>3</sup>.

And so, the new world had entered into a glorious era of free trade. America, rich with natural resources and highly developed industries now engaged with other states in robust external trade. Reduction of tariffs aside, the American economy saw immense growth during this period. In the background, however, backing for re-imposing restrictive trade policies continued to grow. The late 60's and 70's saw the re-emergence of European and Asian economic activity; just as post-war rebuilding efforts had concluded. Additionally, during this period, American industries were disrupted by the oil crises of 1973, high inflation and the termination of fixed exchange rates in global markets. As a result, American producers in certain labor-intensive industries demanded more protectionist-oriented policies. These industries were competing against foreign manufacturers who were able to supply goods faster, cheaper and more efficiently. Thus, members from these industries began to lobby for government action against imported goods. Japan, for example, was able to supply cotton and cotton related goods at a much faster and more efficient pace compared to the American manufacturers. Hence, the government would often engage in talks with the other country (By means of the provisions of the GATT) and came to a Voluntary Export Restraint (VER), that

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<sup>3</sup> Wraight, T., 2019. From Reagan to Trump: The origins of US neoliberal protectionism. *The Political Quarterly*, 90(4), pp.735-742.

would make Japan voluntarily agree to restrict its cotton exports, at the risk of being held accountable for charges of unfair trade practices or to avoid punitive trade practices/restrictions against them. The imposition of VER led to a drop in Japanese cotton exports amounting to \$84 million in 1956 and \$69 million in 1961. US textile producers persisted in advocating for more VERs and import limitations against unchecked competition from Hong Kong and India, which had taken over the US market due to decreased Japanese imports. Consequently, the bilateral voluntary export restraint and the ensuing decline in the US market for Japanese textile goods strained trade relations between Japan and the United States. The extremely apparent hypocrisy in the United State's action of using restrictive, pro-protectionist practices while publicly claiming to be for free trade showcases that despite implementing legislations, the egoistic American spirit's desire is to retain economic power and maximize its monetary influence in the world. This fact will become more and more apparent, especially as we evolve our findings into the present-day scenario.

In the realm of global trade, few issues are as scrutinized as the balance between principles of free trade and self-serving protectionist trade practices. The United States, at this point in history, was at a careful interplay between the two ideologies. Despite public proclamations in favor of free trade in global markets, the actual actions of the state shed light on a stark contradiction between rhetoric and reality. The implementation of these non-tariff barriers reveals a deep truth about the American economic mentality – the influence of industrial actors on state policymaking through lobbying efforts, governmental campaigns and fiduciary contributions that push for protectionist measures to safeguard their own interests at the expense of broader economic principles. Moreover, the embrace of protectionism reflects a broader trend towards economic nationalism—a sentiment that resonates with segments of the population concerned about job security and the erosion of domestic industries. However, the pursuit of protectionist policies can have far-reaching consequences, both domestically and internationally. Domestically, protectionism risks stifling competitive markets and innovation, despite some short-term goals and reliefs for the industries being met. Ultimately this leads to a detriment in consumer interests by reduced choice and increased price. On an international level, the adoption of protectionist measures can ignite trade conflicts and strain diplomatic relations with trading partners, ultimately harming global economic growth and stability. Moreover, they undermine the rules-based international trading system that has underpinned economic prosperity for decades, jeopardizing the very principles that both the GATT and the world trade organization are founded on.

### **PROTECTIONISM IN AMERICA TODAY**

As the 21<sup>st</sup> century came about, protectionist policies in America still existed in some aspects. However general legislation and public policy leaned toward free trade, especially as the Republican party gained more prominence. The administration under George W Bush mostly abandoned protectionist policies and, in accordance with the terms of the GATT and discussions in the World Trade Organization, came out against protectionist policies including VER's and quotas. Bilateral 'free-trade' agreements were signed with Canada and that eventually evolved into the North American Free Trade Agreement that involved Canada, the United States and Mexico. The act brought the immediate elimination of tariffs on a large percentage of exports and imports, while also culling a significant number of barriers to trade that existed between both countries.

The history of trade policy expounded upon in the preceding pages is critical to understand, especially if we want to give rationale to the United States' seemingly sudden and arbitrary disavowing of the World Trade Organization and the neutering of its Appellate Body. It reveals the existence of a political advocacy for protectionist ideals that lies simmering in the heart of American industry<sup>4</sup>. This delicate balance remained relatively stable, and support for free trade and anti-protectionist practices reached an ultimate peak during President Barack Obama's administration (2009-2017). During his tenure as president, Obama would represent the peak of the United States and the World Trade Organization concordance on the same issues. Policies enacted significantly reduced trade barriers, even expanding focus to the east, with increased exports and imports being distributed across the Asian continent, particularly China and India. Even most dispute cases brought about in the Dispute Settlement System involving the United States more often than not represented them bringing action to reduce international trade barriers that were set up by other states. Of particular interest are actions against China in 2017, who had set up Tariff-Quotas that restricted wheat and corn imports from the United States. The United States also won action against India in 2015, when the subcontinent had banned American agricultural exports including meat, eggs and livestock, claiming these products were not up to food safety regulation and of a lower quality. The United States challenged this claim, saying that India was using "unscientific and discriminatory" claims that were "simply a disguise for protectionism"

Thus, at this point, there was a complete turn from previous policy. During the Obama

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<sup>4</sup> Takacs, W.E., 1981. Pressures for protectionism: An empirical analysis. *Economic Inquiry*, 19(4), p.687.

administration, harmony between the principles and ideals of the World Trade Organization and American economical and industrial interests reached its highest point. A strong record of trade enforcement that focused and promoted developing countries and involving them in global trade systems were also noted by analysts. The Doha rounds of discussions (2001-ongoing) also saw the United States taking an active effort to expand international trade technologies and relationships, concluding multiple parts and discussions of the round.

### **MAKE AMERICA GREAT AGAIN?**

Donald Trump was elected into the Presidential office on the 20<sup>th</sup> of January, 2017 in an election with a campaign that ‘defied public norms’ and commanded the attention of the American people. Trump perhaps represents one of the most controversial Presidents in the history of America since the end of the Cold War. Representing the Republican party, his cabinets’ policies were a remarkable turn from the democratic and progressive ideals of the previous administration. His campaign, as evident by its name. “Make America Great Again”, was built around the idea of regress – a return to those ideals that the nation was founded upon – to go back to the principles of their ancestors, that placed the American nation in the politically and economically position it is today.

Trump’s approach to policy, both foreign and at home, involved making major changes to the systems of democracy set in place (In a poll conducted after his tenure as President, more than half of American voters said Trump had little to no respect for democratic values and institutions). He achieved a huge number of long sought conservative victories, including major tax-cuts for corporate firms, tough immigration restrictions and the elimination of a significant number of environmentally beneficial restrictions.

Unsurprisingly, his policy toward global trade was not too different. A businessman at heart, he focused on promoting policies that would maximize profit while reducing economic costs associated with making such decisions. He radically overhauled Obama’s policy, promoting an ‘America First’ ideology – placing the interests of the United States over all else, even to the detriment of a functional global trade system. We will focus on two critical, and interconnected policies that he set in place – the imposition of protectionist-oriented tariffs and, of course, his assault on the World Trade Organization.<sup>5</sup>

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<sup>5</sup> Irwin, D.A., 2017. The false promise of protectionism: Why Trump's trade policy could backfire. *Foreign Aff.*, 96, p.45.

### **TRUMP TARIFFS**

As part of his 'America First' policy, Donald Trump imposed a series of trade tariffs dubbed the "Trump Tariffs" during his presidency. The idea was to change America's economic policy to reduce trade deficits – situations where the nation's imports exceeded the value of its exports. By placing tariffs on goods being brought into the American nation, Trump promised the growth of the American economy – more jobs, better housing, greater standards of living, etc. He saw this as a chance to boost American industry and cull foreign competition, taking inspiration from historical precedent. In January of 2018, he began following through on his policy, setting up tariffs on electronic systems and appliances including solar panels and washing machines ranging from 30% to 50%. A month later, in March, he imposed global tariffs on steel and aluminum (25% and 10% respectively), which makes up approximately 4.2% of U.S imports. The tariffs were imposed upon trading partners in Asia, the European Union as well as in North America. China was the worst affected, with Trump imposing various trade barriers and tariffs of up to 3.4 billion dollars. Additionally, during his election campaign, Trump claimed that China was 'costing the American economy billions of dollars' by using unfair trade practices. China was the second largest economy, closely catching up to America. Trump believed that China's economic power was having a detrimental effect on local industries within the United States, as China, with its huge population, was able to manufacture and produce and export goods at a much faster, and more efficient rate. The imposition of these tariffs led to a de-facto trade war with China, with them increasing tariff rates on US imports to an equivalent amount (In one of his speeches, Donald Trump claimed that trade wars are 'good' and easy-to-win').

However, it wasn't just China. Most trading partners during this time were enraged, and imposed their own retaliatory tariffs. India imposed retaliatory tariffs of up to 250 million USD, with Canada and countries in the European Union matching that number. Trump's tariffs on trade from Mexico are of some particular interest, as he decided to increase the tariff rates on Mexican goods by five percent every three months, until illegal immigration from Mexico came to a complete end. Trump even claimed issues of national security a justification for imposing steel and aluminum tariffs on Canada. Canadian Prime Minister Justin Trudeau said the idea "that Canada could be considered a national security risk to the United States" was "nonsensical" and "inconceivable" and called the tariffs "totally unacceptable."

So, did the tariffs work? Did these pro-protectionist policies grow the economy of the United



States, and bring back industry and jobs to American shores, just like Trump promised they would?

No. Economic analyses conducted by various groups, including the United States' National Economic Council have ultimately come to a consensual conclusion that Trump's economic policy had little to no significant impact to the growth of the American economy, If anything, most believe that the United States' economy was ultimately harmed by Trump's policies, increasing taxes on the American people and reducing their income. Prices for tariffed goods had increased dramatically, and a study conducted by Forbes ultimately determined that America's real GDP growth had reduced by one percentage. Trump's tariffs were also ultimately a failure in reducing the trade deficit between imported and exported goods, which was Trump's primary argument for imposing the tariffs. Ironically, the U.S. trade deficit grew by nearly 119 billion dollars, reaching the highest it had ever been since 2008.

### **TRUMP AND THE WORLD TRADE ORGANIZATION**

The crux of the issue lies in ascertaining the rationale behind America's assault against the World Trade Organization. While it is natural to reason that Trump's conservative ethos in the realm of international trade was the cause for the repeated blocking of judicial reappointments to the world trade organization, the actual beginnings of this practice began in the latter days of the Obama administration. In 2016, Barack Obama's cabinet committed a unilateral attack against Appellate Body Member Seung Wha Chang, an acclaimed South Korean jurist. The alleged rationale behind this decision according to the Cabinet was because of her rulings in favor of China in nearly four recent Appellate Body cases, against the economic interests of the United States. At the DSB Meeting, the Administration stated clearly that Appellate Body jurists needed to be "held responsible" and "accountable for the views they have endorsed".

This action against Justice Chang marked the beginning of the end of a proper-functioning Dispute Resolution System. The World Trade Organization was already facing some doubts on its credibility due to its inability to efficiently conclude various issues in the Doha Round trade talks. The last bulwark of respect was held in its dispute resolution system, and the United States had just delivered its first blow to its functioning. The Obama administration created a situation that endangered the future of the Dispute Resolution System by creating a vacancy in the Appellate Body, and politicizing the re-appoint process to ensure a favorable outcome for the United States.

The danger to the WTO dispute system was immediately grasped by the WTO community. The other six judges on the Appellate Body sent a joint letter to the DSB Chair in May 2016 observing that "The dispute settlement system depends on WTO Members trusting the independence and impartiality of Appellate Body Members. Linking the reappointment of a member to a specific case could affect that trust." In addition, the body of retired WTO appellate judges voiced sharp criticism. In another letter written in May 2016, all 13 former Appellate Body members wrote to the DSB chair to criticize the blocked reappointment. The letter stated that "all of the accomplishments of the past generation in establishing the credibility of the WTO dispute system can be put in jeopardy" by "inappropriate pressures by participants in the WTO system."

It appears that Donald Trump and his cabinet immediately perceived the World Trade Organization as a threat to American economic growth. Trump hysterically claimed numerous times during his election campaigns and during the tenure of his presidency that the World Trade Organization had an alleged secret agenda against the United States and the American people. He claimed that in the past years, the WTO's Dispute Resolution System had worked outside its mandate, and consistently ensured that the United States lost or received unfavorable judgments. These statements were completely untrue, as even a surface level analysis of past dispute cases would reveal that the United States had, in reality, won a majority of the dispute cases prior to 2019. It appears that this fear-mongering campaign (which appears to be a common strategy Trump used toward various electoral policy) to demonize the World Trade Organization was the first step in creating Americas justifications for their assault on the World Trade Organization.

It wasn't long before Trump's government found a way to effectively curb the judicial authority of the World Trade Organization. They targeted the appointment of judges to the Appellate Body. Why the AB? Primarily the United States had the vested power to veto the election of members and also perhaps, because It would be easier to give reason for their actions, as opposed to any strategy that directly targeted the World Trade Organization. Toward the latter end of 2019. The United States was successful in its endeavors and had created a complete impasse with the election of judges to the appellate body, and ultimately crippled its ability to adjudicate on any matter brought up before it due to a lack of quorum.

And the rationale given for such a decision? Trump's cabinet claimed that the Dispute

Settlement System was an ultimately flawed process, and cited concerns of overwhelmingly ‘liberal’ and ‘biased’ judgements that targeted the United States, perhaps even implying a conspiracy of sorts. Officially however, answers came on February 11, 2020 when the Office of the United States Trade Representative (at the time under Robert Lighthizer) published the ‘*Report on the Appellate Body of the World Trade Organization*’ which accused the Appellate Body of creating an irrational system, and thus giving justification for the actions taken by the government to block the appointment of new members until their alleged concerns were addressed.

### **ANALYZING THE ACCUSATIONS**

A deeper dive into the criticisms made by the United States can only shed light on the nature and validity of their reasons, and it thus becomes important to do so, to ultimately assess the rationale of their action against the Appellate Body. As mentioned above, the most comprehensive publicly released statements are expounded in the “*Report...*” by the office of the United States Trade Representative.

The criticisms begin with the United States claiming that the Appellate Body in the course of its actions have acted Ultra Vires, that is, beyond the scope of legal authority that they were vested with, and along with that, have consistently breached the foundational principles on which the World Trade Organization was created. In particular, accusations include –

1. Consistently breaching the mandatory deadline for the completion of deadlines
2. Allowing Appellate Body and its Members to continue to participate in and decide on appeals after their terms have ended
3. Exceeded its limited authority to review legal issues by reviewing factual findings of domestic law
4. Overstepped in its role by rendering ‘unnecessary opinions’ on unrelated issues in a Dispute Settlement Process
5. That the AB has asserted that it can give recommendations that are not explicitly mandated in the Dispute Settlement Understanding, and,
6. Overstepped its authority by opining on matters that are the authority of other WTO bodies thus, concluding their first set of allegations against the Appellate Body.

It becomes almost comically obvious that these criticisms lack any kind of justification. Almost every single one of the points put forward by the United States Trade Representative are extremely shallow criticisms, something that will be pointed out by various responses to the

allegations that we will analyze later. But even without expert opinion, the weak accusations limply thrown struggle to stand on their own feet. Most of them do not even constitute a breach in regulations, but rather are actions conducted out of necessity. The first point, for example. Claiming disputes are not resolved in time is hardly fair criticism. Certain cases may take longer than the mandated period, especially considering the complicated field of international relations as a background for these disputes. The AB obviously holds no maleficent intent to delay the process as the United States would have one believe, if anything, jurists would probably benefit by quickly (and, of course haphazardly) resolving cases as soon as possible.

It appears that the United States will remain unsatisfied with any kind of Dispute Resolution System until it reaches utopian ideals and ultimate, exemplary practices. It's nonsensical to expect anything like that, and all things considered, the valid parts of their criticisms hardly necessitate a complete paralysis of the World Trade Organization. Minor problems could have easily been fixed, and nothing the United States put forward as justification necessitated such immediate and obliterative action against the World Trade Organization.

### **DISAGREEMENTS WITH APPELLATE BODY RULINGS**

Robert E. Lighthizer, the United States Trade Representative under Trump's administration claimed that "The Dispute Settlement Process has, over the years, diminished from what we bargained for, and imposed obligations we do not believe we agree to". The United States has continuously expressed displeasure with AB rulings, especially as with Trump's revert to protectionist ideals caused obvious distress to the free-trade oriented World Trade Organization, leaving them little choice but to intervene and rule against America in disputes brought up as a consequence of their policy. The US has indicated that the AB was responsible for judicial activism, meaning that the tribunal had indulged in rule-making beyond what the members negotiated and signed up for at the WTO. It's made clear that the US is of the view that the AB says more than it has to. The US feels that the AB needs to be more conservative in its interpretation and interfere in domestic affairs than what it currently is doing.

World Trade Organizations dispute settlement panels had ruled against the United States on four separate cases involving the US imposition of tariffs on steel imports and duties on imports of aluminum. China, Turkey, Norway and Switzerland and even India had brought the cases against the United States. These cases are interesting because the United States claimed that these imports constituted a threat to the national security of the United States.

This too, is hardly a satisfactory reason. If anything, it puts forward a clear clash in ideology that would better explain why the United States has such a harsh outlook on the World Trade Organization. Trade officials note that, not unlike a few members, the EU and other countries have also made their displeasure known when they do lose dispute cases, but they do not “kick up a fuss” nor try to take the system hostage and crumble it. This was echoed by a developing country trade official in Geneva, “We are not happy with some of the rulings of the Appellate Body, but that does not mean we will call for an abolition of the court” – a far more rational and ultimately, justifiable response than the apparent overreaction of the United States.

