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Echoing Trump, Biden Embraces International Trade Lawlessness

By **James Bacchus**

The prolonged charade of the United States is over in its disingenuous opposition to the reconstitution of the Appellate Body of the World Trade Organization. It is clear now that the Biden administration—like the **Trump administration** before it—has no desire to restore the highest court of appeal in world trade as an independent and impartial tribunal. One now glaring reason is the absence of an Appellate Body will enable the United States to escape the imposition of what would likely have been billions of dollars in annual trade sanctions because of its continued imposition of illegal tariffs on imports of **steel** and **aluminum**.

This clarity is provided by the negative U.S. reaction to the long-awaited **decision** of WTO jurists in disputes brought by China, Norway, Switzerland, and Turkey challenging the 25 percent tariffs on steel imports and the 10 percent tariffs on aluminum imports that former President Donald Trump imposed in 2018, on supposed national security grounds, under **Section 232** of the Trade Expansion Act of 1962. The national security motivation cited by the Trump administration was the need to protect domestic manufacturers from market distortions caused by the global overproduction of the two metals.

The WTO panelists **ruled** that these tariffs discriminating in favor of domestic steel and aluminum products over like foreign products, and in favor of some foreign producers of those products over others, are in violation of basic WTO rules requiring national treatment and most-favored-nation treatment and prohibiting quantitative restrictions on imports. They ruled also that these measures are not entitled to the benefit of the national-security exception in the WTO treaty because—contrary to what the United States argued in the case—the WTO *does* have jurisdiction to decide such disputes, and these measures were not—as the exception requires—"taken in time of war or other emergency in international relations," per Article XXI(b)(iii) of the General Agreement on Tariffs and Trade (GATT).

Much of the **immediate reaction** to this ruling in the United States—particularly from the less-competitive parts of the U.S. steel and aluminum industries and others who favor these illegal trade restrictions—has centered on the perceived audacity of WTO jurists in telling the U.S. what to do. This concern is misplaced. The WTO cannot make the United States do anything. Nor should it have that right. Despite the domestic uproar, the fact is, none of the 164 member countries of the WTO is in favor of giving the international trade institution such a right. This is not an instance of some faceless foreign judges telling Americans what they must do in making decisions about their own country.

Under the WTO treaty, the decision about what to do about the ruling is quite rightly left entirely to the United States. The U.S. can choose either to remove the tariffs or—if it chooses not to do so—face significant economic sanctions from the four complaining countries in the form of the removal of previously granted trade benefits in other areas of international trade. Significantly, though, what seems to be a decision by the Biden administration mostly to retain these steel and aluminum tariffs despite this WTO ruling could have been expensive economically for the United States—if there were a sitting Appellate Body.

But there is not. Because of the continuing opposition of the United States to filling the seven vacant seats on the highest tribunal of appeal in world trade, the Appellate Body currently exists only on paper. Even so, the United States has a right of appeal under the WTO treaty, and, in an act of rank hypocrisy, appeal it surely will. Then, because the Appellate Body exists only on paper, the United States will be denied its right to an appeal, the members of the WTO will therefore be unable to adopt the panel ruling against the U.S., and the complaining countries will not have legal authorization to apply economic sanctions.

In response to the ruling, a spokesman for the Office of the U.S. Trade Representative predictably **reiterated** that the WTO "has no authority" to review national security issues and announced: "We do not intend to remove the Section 232 duties as a result of these disputes." The spokesman also hinted the United States will appeal the ruling into the **legal abyss** of the absence of a sitting Appellate Body—which would have the effect of denying to the prevailing countries their treaty right of lawfully applying economic sanctions against the United States, should the U.S. choose not to comply with the panel rulings and recommendations.

The U.S. view that the WTO has no legal authority to judge whether an action purportedly taken for national security reasons is truly a national security action, is, as the WTO panel ruled, patently incorrect under international trade law. If the United States were correct about this, then why are specific circumstances set out in the WTO treaty that spell out when measures that would otherwise be inconsistent with WTO obligations can be excused for national security reasons? The United States agreed to the limits set out in the exception in 1947, and these limits have been in the trade rules—to which the United States agreed—ever since. Twice in recent years WTO panels **have affirmed** these limits when the national security exception has been invoked.

As I have explained and explored at length in a new Cato Institute **policy analysis**, acceptance by WTO jurists of the contemporary and bipartisan U.S. view that the WTO has no jurisdiction on such matters would open up a black hole of national security, in which professed national security measures of all kinds could swallow up the entirety of all WTO obligations—something the United States itself warned against when the national security exception was written at the creation of the multilateral trading system in the immediate aftermath of the Second World War. This would be the end of the multilateral trading system. The Biden administration, however, seems not to be interested in this possible disastrous outcome of its intransigent position.

Instead, the President and his trade team are, in this as in most other aspects of their trade policymaking, looking only to the near political term in the run-up to the next presidential election in

2024. Hypocritically, the Biden administration has pretended for nearly two years that, unlike the Trump administration, it wishes to restore the full functioning of the WTO dispute settlement system. U.S. Trade Representative Katherine Tai has **whispered** sweet trade nothings into the ears of WTO members and WTO supporters in Geneva and elsewhere, and, as people sometimes tend to do, they have heard what they wanted to hear.

Earlier this year, her assistants even began to sit down individually and privately with some other members of the WTO to discuss the ongoing impasse over the fate of the Appellate Body and the future of the dispute settlement system (although, per private conversations I have sustained with various WTO members, they seem to have revealed little about their own position in the process). This latest action by the United States in rejecting this WTO ruling shows just how insincere these actions have been. It is evident now that the Biden administration, in part, has simply been buying time by procrastinating on the question of dispute settlement reform in anticipation that this adverse ruling would be forthcoming.

The United States **still has not told** the other members of the WTO what it is seeking in dispute settlement reform—primarily because it is understandably reluctant to be fully candid with the other WTO members about what it wants. What the United States is really seeking is the right to wield the WTO as a legal sword when it wins, shield itself from WTO rulings by ignoring them when it loses, and, if it gets its fondest wish, undermine the independence of the Appellate Body and the impartiality of its rulings by acquiring the right to redline or otherwise veto Appellate Body rulings before they are issued to the members of the WTO and then to the public.

The President's trade team has fully embraced the Trump administration's full panoply of fabrications and exaggerations about the alleged "**overreaching**" and other sins and shortcomings of the Appellate Body. In truth, the opposition of both the Trump and Biden administrations to the consistent efforts of the Appellate Body to uphold the rule of law in trade can be summed up in three words: "Pennsylvania", "Michigan", and "Wisconsin". Pivotal and protectionist-minded labor and business interests in these three swing states want the U.S. to have the maximum of elbow room in applying anti-dumping and other import restrictions as trade "remedies"—which the Appellate Body, by upholding WTO rules, has refused to provide. They also want to keep in place these steel and aluminum tariffs—which a WTO panel has now pointed out are inconsistent with U.S. treaty obligations.

For this reason, so do the President, those who serve him, and those in both parties who support him on this issue in the Congress. Apparently, they think risking the loss of the rule of law in international trade and all the bountiful benefits of a rule-based multilateral trading system to the United States is a small price to pay for keeping these tariffs. As its statements in reaction to the WTO ruling on the steel and aluminum tariffs demonstrate, the Biden administration seems perfectly content to rely instead on the rule of power.

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