



## Appeals to the abyss are letting China off the hook on trade violations

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Australian Prime Minister Scott Morrison has drilled right to the heart of the matter in urging the G7 to lead the way in restoring the appellate tribunal of the World Trade Organization — the WTO cannot be effective without enforcement of trade rules by its binding dispute settlement system, and that system cannot be effective without the appointment of seven new judges to sit on the now vacant bench of the WTO appellate body.

In the runup to this weekend's G7 summit in Cornwall, Morrison did not mention China by name. His remarks, however, were clearly centered on China, with which Australia is engaged in an increasing number of trade disputes. He denounced "economic coercion," which Australians see in China's recent impositions of restrictions on billions of dollars of imports of Australian barley and wine following Australia's denunciations of Chinese actions that undermine democracy and violate human rights.

Australia has already filed a WTO case against China challenging Chinese duties on Australian barley, which China says is dumped on the Chinese market. Australia is also on the verge of filing a WTO case challenging Chinese tariffs of up to 220 percent on Australian wine, which China alleges is heavily subsidized by Australia and then dumped on the Chinese market. These cases may well have legal merit, but, even if Australia wins before the ad hoc panels that serve as WTO trial courts, it will not be able to get those judgments enforced.

WTO members have an automatic right under the WTO treaty to appeal panel verdicts to the appellate body before they are enforced. While there are no judges on the appellate body, that right will be denied. Thus, if Australia prevails before the panels, China will be able to appeal into the abyss, and, with the cases in limbo without final judgments, the members of the WTO will be unable to adopt and enforce the panel rulings.

Of course, this is not only the case in trade disputes between Australia and China. It is the case in trade disputes among all 164 WTO members. A binding trade dispute settlement system built up

over a quarter of a century through the accumulation of hundreds of cases and thousands of legal rulings has now been largely undone; for any country that loses a case can — by filing an appeal to a court that is no longer there — block the enforcement of the ruling in that case.

As Morrison sees it, and as the leaders of all countries that are WTO members should see it, the only way to restore the effectiveness of the WTO as an upholder of the agreed trade rules in the WTO treaty and “the most practical way to address economic coercion is the restoration of the global trading body’s binding dispute settlement system. Where there are no consequences for coercive behavior, there is little incentive for restraint.”

If the G7 countries do not act together in the WTO to reconstitute the appellate body, and if nothing changes, China and other large trading countries will simply employ the heft of their economic leverage to do as they wish in their trade dealings with other countries — and especially those that are smaller and less powerful. We will be back to where we were before we created the WTO, which was designed to end trade lawlessness by upholding the international rule of law through the enforcement of binding rules for trade.

Of course, this dire situation in WTO dispute settlement is not the fault of either China or Australia. It is almost entirely the fault of the United States of America. Little is accomplished nowadays in the United States on a bipartisan basis. Yet a bipartisan effort — one that began in the second Bush administration, intensified throughout the Obama and Trump administrations, and persists, at least for now, under President Joe Biden — has gradually succeeded in undermining what has been until now the most successful international system for settling disputes in the history of the world.

The sad historical irony is that it was the United States that most insisted on creating a binding dispute settlement system when the WTO was established. We Americans knew then — on a bipartisan basis — that, as the leading trading nation in the world, we benefit more than any other single country from having a global underpinning of agreed and binding rules of trade to ease and enhance the flow of trade worldwide. Somehow, we have forgotten this.

Successive administrations have refused to agree to appoint new WTO appellate jurists when sitting jurists completed their terms and departed. They have done so based on excuses that are mostly bogus and that are merely smoke screens for the real reason there is such bipartisan support for this myopic intransigence — the appellate body has consistently upheld the WTO rules on anti-dumping and other trade restrictions, which constrain the ability of the United States government to apply such trade remedies when and as it chooses. And both American political parties have their reasons for wanting as much legal latitude as possible to apply such remedies, which are of special importance to the voters and trade-challenged smokestack industries in the pivotal “swing states” in the industrial Midwest.

The United States has repeatedly accused the judges on the appellate body of “overreaching” when clarifying WTO rules on trade remedies. In fact, the judges have simply been upholding the rules. What is really motivating the United States is that it does not want to have to comply with those rules. Yet, not having the time or the inclination to read all the voluminous WTO rules and rulings — replete with esoteric footnotes — politicians and journalists in the United

States have largely believed this “big lie.” It is now widely considered conventional wisdom within the Washington Beltway.

The real issue is not “overreaching” by WTO judges. The real issue is “underreaching” by the United States and many other members of the WTO who are hesitating to build on the core legal foundation of all they have created through the WTO. As Morrison implied, all the members of the WTO must remember why they created a binding trade dispute settlement system in the first place, and after remembering, they must restore it, starting with the appellate body. If they do not, the security of the rule of law in international trade will give way once more to the chaos of the rule of power.

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