

VETOING WTO APPELLATE BODY JUDGES’ REAPPOINTMENTS: ANALYZING THE UNITED STATES’ ACTIONS THROUGH NEO-REALIST LENSES

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INTRODUCTION

The World Trade Organization's ("WTO") dispute settlement system has often been labeled the "crown jewel"¹ of the WTO. A vital feature of this system is its Appellate Body, which hears trade and tariff controversies that have been appealed from its panel stage.² The WTO's dispute settlement system has helped resolve more than five hundred trade disputes over a period of twenty years.³ Because it efficiently resolves a vast array of cases through binding rulings, the system's legitimacy depends on the well-perceived appearances of its Appellate Body justices as neutral decision makers. This legitimacy is also derived from the ability of its justices to interpret and provide rulings according to the WTO's ethos.

Much controversy has arisen over the United States' decisions to block the reappointments of well-respected Appellate Body judges. First, in 2016, the United States blocked

1. YANG GUOHUA, BRYAN MERCURIO & LI YONGJIE, *WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION*, at xi (2005).

2. *Dispute Settlement: Appellate Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Sept. 8, 2019).

3. *Dispute Settlement Activity — Some Figures*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm (last visited Sept. 8, 2019).

the reappointment of Seung Chang, a South Korean Appellate Body judge, due to concerns of judicial activism.⁴ Over fifty countries, through their respective WTO delegates, condemned the United States' actions as being politically motivated.⁵ Specifically, they contended that vetoing a judge because of unfavorable rulings creates a dangerous precedent that would corrode the legitimacy of the WTO.⁶ The United States faced backlash again from the world community in August of 2018 when it blocked the reappointment of Shree Baboo Chekitan Servansing, a Mauritian Appellate Body judge.⁷ The United States Trade Representative, Dennis Shea, explained that the veto was necessary in light of many procedural and substantive shortcomings of the Appellate Body.⁸ Conversely, many WTO members saw the vetoing act as a crippling move that threatened the future of the Appellate Body because there would only be three justices left to adjudicate—the minimum amount required.⁹ The impact of the United States' vetoing acts was

4. *Statement by the United States at the Meeting of the WTO Dispute Settlement Body*, WORLD TRADE ORG. 5 (May 23, 2016), https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf. [hereinafter *Statement by the United States*]; *Dispute Settlement: WTO Members Debate Appointment/Reappointment of Appellate Body Members*, WORLD TRADE ORG. (May 23, 2016), https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm [hereinafter *WTO Members Debate Appointment*].

5. *WTO Members Debate Appointment*, *supra* note 4; see Victoria Guida, *U.S. Stands Alone Against WTO Appellate Body Member*, POLITICO (May 24, 2016, 10:00 AM), <http://www.politico.com/tipsheets/morning-trade/2016/05/us-stands-alone-against-wto-appellate-body-member-catfish-drug-snap-with-obama-in-vietnam-dueling-tpp-letters-214457>.

6. *WTO Members Debate Appointment*, *supra* note 4.

7. Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Aug. 27, 2018, 7:54 AM), <https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O>.

8. *Statement of the United States by Ambassador Dennis Shea at the 14th WTO Trade Policy Review of the United States of America*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Dec. 17, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/december/statement-united-states-ambassador>.

9. Miles, *supra* note 7; *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Feb. 13, 2020); see also *WTO Members Debate Appointment*, *supra* note 4; Marina Foltea, *Options for Breaking the WTO Appellate Deadlock*, INT'L CTR. FOR TRADE & SUSTAINABLE

greatly felt in December of 2019 when two justices' term limits expired, effectively paralyzing the WTO's ability to hear new cases and resolve trade disputes.¹⁰

At first glance, the United States' vetoing acts may seem perplexing and contrary to its strong history as an advocator for free trade and liberalization. However, analyzing these actions through neo-realist lenses provides considerable clarity. Specifically, the neo-realist methodology, influenced in part by political theorist John Mearsheimer and other scholars, establishes a neo-realist framework for evaluating controversies. The core neo-realist tenets include: (1) there is an *anarchical international system* where states have no central authority above them; (2) states are *rational actors* who make cost benefit analyses critical for their survival; (3) states are constantly concerned about their *military power and abilities* relative to other states; (4) states' *national interests and security* are placed at its forefront, above foreign interests; and (5) the need for *survival* dominates other motives because once a state is conquered, it cannot pursue other interests.¹¹ In addition, offensive neo-realists believe that good strategic decisions require gaining as much power as possible because power-balancing is inefficient as countries are constantly trying to take advantage of each other.¹²

DEV. (Jan. 19, 2018), <https://www.icts.org/opinion/options-for-breaking-the-wto-appellate-body-deadlock> (discussing various ways in the which the WTO could appoint more Appellate Body judges if the United States keeps vetoing appointments; this includes moving to a majority vote, creating a negotiating group, modifying appellate body rules, or appeal arbitration).

10. *Members Urge Continued Engagement on Resolving Appellate Body Issues*, WORLD TRADE ORG. (Dec. 18, 2019), https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm [hereinafter *Members Urged Continued Engagement*].

11. JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 29–37 (updated ed. 2014); *see also*, John J. Mearsheimer, *Structural Realism*, in INTERNATIONAL RELATIONS THEORIES: DISCIPLINE AND DIVERSITY 77, 79–80 (Tim Dunne et al. eds., 3rd ed. 2013).

12. Mearsheimer, *Structural Realism*, *supra* note 11, at 78; *see also*, Steven E. Lobell, *Structural Realism/Offensive and Defensive*, OXFORD RESEARCH ENCYCLOPEDIA (2010), <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-304?print=pdf>. Generally, offensive realists seek “power and influence to achieve security through domination and hegemony,” whereas,

Part I provides a brief history of the WTO's Appellate Body and its judicial appointment and reappointment process. In particular, it discusses the binding applicable rules for Appellate Body justices under the Dispute Settlement Understanding and the most recent Appellate Body justices' term limits. After this foundation has been established, Part II examines the United States' history of blocking the appointments and reappointments of Appellate Body justices. Specifically, it evaluates the United States' decision to block both the reappointment of its own nominee, Jennifer Hillman (2011) and the appointment of a qualified Kenyan scholar, James Gathii (2013). In addition, a detailed analysis of the controversial blockings of Seung Chang (2016) and Shree Baboo Chekitan Servansing (2018) is provided. Finally, Part III analyzes through neo-realist lenses the rationale behind the United States' vetoing acts. Factors such as the anarchical international trade system, cost-benefits as a rational actor, the increase in protectionist policies, and safeguarding national interests are examined.

I. THE APPOINTMENT AND REAPPOINTMENT PROCESS OF THE WORLD TRADE ORGANIZATION'S APPELLATE BODY

The WTO's Appellate Body is comprised of seven justices who are governed by the "Rules of Conduct for the Understanding of Rules and Procedures Governing the Settlement of Disputes" ("DSU").¹³ Under DSU Article 17.3, Appellate Body justices must be members of recognized authority who demonstrate expertise in international trade and are unaffiliated with any government.¹⁴ In addition, each Appellate Body member must be independent, impartial, and

defensive realists do "not deny the reality of interstate conflict, nor that incentives for state expansion do exist, [they] contend[] that these incentives are sporadic rather than endemic." Lobell, *supra*.

13. Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 2.1, 17.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *see also*, Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court,"* 36 J. WORLD TRADE 605, 607-08 (2002).

14. DSU, *supra* note 13, art. 17.3.

maintain confidentiality.¹⁵ Appellate Body judges are required to preserve the rights of WTO members under the covered agreements.¹⁶ Specifically, the recommendations and rulings provided by the Appellate Body can neither add to nor diminish any rights provided in covered agreements.¹⁷ For example, Appellate Body judges must refrain from engaging in judicial activism, such as considering issues that have not previously been raised in the dispute settlement proceedings.¹⁸

With each appeal, only three judges are selected to hear and decide the case.¹⁹ Rule 6(2) of the Working Procedures for Appellate Review ensures that judges are selected through a random and unpredictable process that enables each justice the opportunity to serve regardless of national origin.²⁰ WTO members appoint Appellate Body judges by a consensus vote to serve a four-year term.²¹ Additionally, each justice may be reappointed once for an additional four-year period.²² The term dates for each justice are staggered to ensure that each judge's respective term is not beginning and ending at the same time.²³ Granting a sitting Appellate Body judge a second term has been considered a customary practice of the WTO.²⁴ Consequently, a formal rejection by any WTO member, preventing a consensus,

15. *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 3.2, WTO Doc. WT/DSB/RC/1 (Dec. 11, 1996) [hereinafter *Rules of Conduct*], https://www.wto.org/english/Tratop_e/dispu_e/rc_e.htm.

16. Appellate Body Secretariat, *Annual Report for 2008*, at 1, WTO Doc. WT/AB/11 (Feb. 2009), https://www.wto.org/english/tratop_e/dispu_e/ab_anrep_2008_e.pdf.

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

18. DSU, *supra* note 13, arts. 3.2, 17.12.

19. *Appellate Body Members*, *supra* note 9.

20. *Id.* Panel members however cannot be assigned to a case of their national origin. U.N. Conference on Trade and Development, *Dispute Settlement: World Trade Organization 3.3 Appellate Review*, at 6, U.N. Doc. UNCTAD/EDM/Misc.232/Add.17 (2003), https://unctad.org/en/Docs/edmmisc232add17_en.pdf.

21. DSU, *supra* note 13, arts. 17.1–17.2.

22. *Id.* art. 17.2.

23. Appellate Body Secretariat, *supra* note 16, at 2.

24. Arman Sarvarian & Filippo Fontanelli, *The USA and Re-Appointment at the WTO: A 'Legitimacy Crisis'?*, BLOG OF THE EUR. J. OF INT'L L. (May 27, 2016), <https://www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/>. The customary exceptions were cases of misconduct or infirmity. *Id.*

can block the appointment or reappointment of a judge.²⁵

The table below presents recent data of the Appellate Body justices' terms. Seung Chang of South Korea and Shree Baboo Servansing of Mauritius were each denied a second term because the United States blocked their reappointments. In December of 2019, Ujal Singh Bhatia and Thomas R Graham's respective judicial terms expired.²⁶ As there were no successive appointments, Hong Zhaho remains the only justice on the WTO's Appellate Body.²⁷ Consequently, the WTO's Appellate Body is currently unable to adjudicate until at least two vacancies are filled.²⁸

Table 1-1: WTO Appellate Body Justices Terms *as of February 1, 2020*²⁹

<u>Appellate Body Judges</u>	<u>First Term Start Date:</u>	<u>First Term End Date:</u>	<u>Second Term Start Date:</u>	<u>Second Term End Date:</u>
1. Ujal Singh Bhatia (India)	December 11, 2011	December 10, 2015	December 11, 2015	December 10, 2019
2. Peter Van den Bossche (Belgium)	December 12, 2009	December 11, 2013	December 12, 2013	December 11, 2017
3. Seung Wha	June 1,	May 31,	X	X

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

26. *Appellate Body Members*, *supra* note 9. Miles, *supra* note 7; Foltea, *supra* note 9.

27. *Appellate Body Members*, *supra* note 9; *Members Urge Continued Engagement*, *supra* note 10.

28. *Members Urge Continued Engagement*, *supra* note 10.

29. *Appellate Body Members*, *supra* note 9; *Appellate Body Member Re-appointed and Chair Re-elected*, WORLD TRADE ORG. (Dec. 12, 2013), https://www.wto.org/english/news_e/news13_e/disp_12dec13_e.htm; WORLD TRADE ORG., ANNUAL REPORT 2013, 92 (2013), https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_chap5_e.pdf; WORLD TRADE ORG., ANNUAL REPORT 2014, 95 (2014), https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep14_e.pdf; *WTO Appoints New Appellate Body Member*, WORLD TRADE ORG. (Sept. 30, 2014), https://www.wto.org/english/news_e/pres14_e/pr723_e.htm.

Chang (Korea)	2012	2016		
4. Thomas R. Graham (US)	December 11, 2011	December 10, 2015	December 11, 2015	December 10, 2019
5. Ricardo Ramírez-Hernández (Mexico)	July 1, 2009	June 30, 2013	July 1, 2013	June 20, 2017
6. Shree Baboo Chekitan Servansing (Mauritius)	October 1, 2014	September 30, 2018	X	X
7. Hong Zhao (China)	December 1, 2016	November 30, 2020	—	—

II. THE UNITED STATES' HISTORY OF BLOCKING JUDICIAL APPOINTMENTS AND REAPPOINTMENTS

A. *Jennifer Hillman (2011) and James Gathii (2013)*

The United States has exercised its power as a WTO member multiple times to block the appointment or reappointment of an Appellate Body judge. First, in 2011, the United States' Trade Representative ("USTR") blocked the reappointment of Jennifer Hillman, its own nominee.³⁰ Hillman was previously appointed to the Appellate Body in 2007.³¹ Although the United States' reasons were not made public, some believed that the USTR vetoed her reappointment because she did not uphold U.S. protectionist measures that were challenged

30. Manfred Elsig et al., *The U.S. Is Causing a Major Controversy in the World Trade Organization*, WASH. POST (June 6, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/>.

31. *Appellate Body Members*, *supra* note 9.

in the dispute settlement.³²

Hillman responded to the United States' actions, stating:

By blocking a member based on decisions that were not his alone, the *U.S. risks undermining the confidence* that members have in the dispute settlement system and risks suggesting that appointments should be made on the basis of support for a given country's national agenda rather than legal skills, fairness, and impartiality.³³

Additionally, in her farewell speech to the WTO's dispute settlement body, she maintained that she was willing to accept the decisions of the system because she believed that the conclusions had been made by "adjudicators who [were] truly impartial and independent."³⁴ She further noted that "[i]ndependence and impartiality stem from . . . the individual qualities of the people who are appointed[,] the process by which they reach their decisions[,] . . . [and] from an institutional guarantee of independence."³⁵ It is clear from Jennifer Hillman's remarks that she felt that the blocking of an Appellate Body judge's reappointment on political grounds could weaken the legitimacy of the WTO.

Similarly, in 2013, the United States blocked a consensus vote for the appointment of James Gathii, a Kenyan citizen, to the Appellate Body.³⁶ Kenya's Foreign Affairs Cabinet Secretary, Amb

32. Gary Clyde Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, PETERSON INST. FOR INT'L ECON. (June 13, 2011, 5:00 PM), <https://piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system>. This was the first time the United States has ever blocked its own judicial appointment. The USTR did not give reasons publicly for blocking Hillman. *Id.*

33. Alex Lawson, *US Playing with Fire in WTO Appellate Body Spat*, LAW360 (May 24, 2016, 7:36 PM) (emphasis added), <http://www.law360.com/articles/799678/us-playing-with-fire-in-wto-appellate-body-spat>.

34. Jennifer A. Hillman, *Informal Remarks upon Departure from the Appellate Body*, WORLD TRADE ORG. (Dec. 8, 2011), https://www.wto.org/english/news_e/news11_e/farewell_com_jenniferh.doc.

35. *Id.*

36. Elsig et al., *supra* note 30; *see also* RAJ BHALA, CHAOS: RECENT DEVELOPMENTS

Amina Mohamed, nominated Gathii, stating:

Gathii is among the most influential and well-recognized international trade scholar [sic] from Africa. His distinguished record of scholarship, teaching, and practice in the fields of international law, international trade, human rights, and other subjects has made a lasting impact on law and policy not only in Kenya, but across Africa and the globe.³⁷

Under DSU Article 17.3, James Gathii appeared to have the education and expertise to be considered well-qualified³⁸ and was unaffiliated with any government.³⁹ However, the United States objected to Gathii's appointment based on his writings in legal journals. Specifically, the United States took issue with his legal writings that claimed the WTO's dispute settlement system was biased in favor of rich countries.⁴⁰ The United States may have feared that those sentiments and potential biases would not make Gathii a neutral arbiter. Other domestic political reasons may also have influenced the United States' actions. For example, in 2013, the relationship between the United States and Kenya declined after the election of Uhuru Kenyatta because under his rule, the Kenyan government forged a new foreign policy looking east, away from Kenya's traditional

IN INTERNATIONAL TRADE LAW AT THE MULTILATERAL, REGIONAL, AND U.S. LEVELS, 3 (2018), <https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2018/bhala-materials.pdf>.

37. *Gathii Nominated for WTO Job*, DAILY NATION (June 15, 2013), <https://www.nation.co.ke/news/Gathii-nominated-to-WTO-Appellate-Body/1056-1883786-d8y3bo/index.html>.

38. DSU, *supra* note 13, art. 17.3. *See generally Law Faculty and Administration Profile: James Thuo Gathii*, LOYOLA U. CHI., <https://www.luc.edu/law/faculty/facultyandadministrationprofiles/gathii-james.shtml> (last visited Nov. 17, 2019) (highlighting Gathii's accomplishments as a professor, founding member of the Third World Approaches to International Law Network, and author to a vast amount of publications in the area of international human rights and international trade work).

39. DSU, *supra* note 13, art. 17.3.

40. BHALA, *supra* note 36, at 3.

western allies.⁴¹

B. *Seung Wha Chang (2016)*

In May of 2016, the United States blocked the reappointment of South Korean Appellate Body judge, Seung Wha Chang.⁴² The USTR deputy, Michael Punke, released a formal statement claiming that Chang breached Article 3.2 of the DSU by exercising judicial activism (i.e. adding to or diminishing the rights and obligations covered in the agreements).⁴³ Specifically, the United States stated:

[W]e do not consider that [Chang's] service reflects the role assigned to the Appellate Body by WTO Members in the WTO agreements. Any failure to follow scrupulously the role we Members have assigned through these agreements undermines the integrity of, and support for, the WTO dispute settlement system.⁴⁴

In its formal rejection, the United States claimed Chang had exercised improper judicial interpretations in four specific cases over which he presided.⁴⁵ The United States argued that the

41. See generally Robyn Dixon, *Fixing U.S. Ties with Kenya: Kerry Meets Leader Ahead of Obama Visit*, L.A. TIMES (May 4, 2015), <http://www.latimes.com/world/africa/la-fg-kenya-kerry-20150504-story.html> (discussing the decline of U.S. relations with Kenya due to Kenya's corruption and human rights abuses after President Kenyatta was elected in 2013); Patrick Nzioka, *The Well-heeled Look to the East as an Ideal Destination to Invest their Wealth*, DAILY NATION (Feb. 19, 2014), <http://www.nation.co.ke/news/The-rich-look-to-the-East-as-an-ideal-INVESTMENT-destination/1056-2213896-u9u3ug/index.html> (discussing the way Kenya's millionaires began to abandon their European and North American ties for investment in Eastern countries such as Singapore and China).

42. Sarvarian & Fontanelli, *supra* note 24.

43. *Statement by the United States*, *supra* note 4, at 2.

44. *Id.* at 1.

45. See *id.* at 3–5. The first ruling (DS453) regarded a financial services controversy between Panama and Argentina, where the United States claimed that most of the arguments in the AB ruling were not related to arguments being considered. *Id.* at 3–4; see also *Statement by the United States at the Meeting of the WTO Dispute Settlement Body*,

integrity of the WTO depended upon justices who fairly applied international trade rules *strictly*.⁴⁶ The U.S. government maintained that the Appellate Body should not write new rules that are “inconsistent with the trade obligations that were carefully negotiated by the United States and other WTO members.”⁴⁷

The South Korean government rebuked the United States’ actions of vetoing Chang and urged the United States to withdraw its opposition. The Korean government noted the widely held view that Chang served the Appellate Body honorably during his term and that oppositions to reappointments should only be for “compelling and legitimate” reasons.⁴⁸ The Korean government expressed several “systemic” concerns with the United States’ position, including the

U.S. MISSION TO INT’L ORG. IN GENEVA 4–5 (May 9, 2016), <https://geneva.usmission.gov/wp-content/uploads/sites/290/May-9-DSB.pdf>. The second ruling (DS430) regarded a dispute between the United States and India over India’s import ban on U.S. poultry products. *Statement by the United States at the Meeting of the WTO Dispute Settlement Body*, U.S. MISSION TO INT’L ORG. IN GENEVA 9 (June 19, 2015), https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun19.DSB_Stmt_as-delivered.Public.pdf. The United States claimed, “[T]he Appellate Body devoted considerable time to an issue that the parties and the third parties agreed had not been raised on appeal, involving an item that was not on the record, that had not been raised by either party in its arguments, and had not been examined by the panel and was not the subject of any panel findings.” *Statement by the United States*, *supra* note 4, at 4. The third case (DS437) contested an Appellate Body ruling concerning a dispute between the United States and China over duties imposed by the United States on Chinese imports. Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, ¶¶ 1.1–1.2, 1.13, WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014), https://www.wto.org/english/tratop_e/dispu_e/437abr_e.pdf. The United States argued that the views of the Appellate Body “[departed] markedly from that set out in the DSU and reflected in numerous prior reports.” *Statement by the United States*, *supra* note 4, at 4. The fourth ruling (DS449) dealt with another controversy between the United States and China regarding anti-dumping measures, in which the United States claimed the “Appellate Body report took a very problematic and erroneous approach to reviewing a Member’s domestic law.” *Id.* at 5; *see also* Sarvarian & Fontanelli, *supra* note 24 (listing the four cases that Chang presided over where the United States questioned improper judicial interpretation).

46. *US Body Blow to DSU, Creating Systemic Crisis*, THIRD WORLD NETWORK (May 17, 2016), <http://www.twm.my/title2/wto.info/2016/ti160514.htm>.

47. *Id.*

48. *WTO Members Debate Appointment*, *supra* note 4.

confidentiality of Appellate Body proceedings.⁴⁹ Because decisions are rendered anonymously, the Korean government advocated that no single Appellate Body judge should be singled out for any criticism directed at the Appellate Body report.⁵⁰ Furthermore, the Korean government expressed their concern that the United States' opposition was an attempt to "rein in Appellate Body members for decisions they make on the bench."⁵¹ The Korean government was concerned that the United States' actions would set a dangerous precedent, tempting other countries to follow.

Chang rebuked the United States' claims, asserting that the United States' actions were unprecedented and did not make sense, echoing a statement made by Sri Lanka.⁵² Chang relied on the fact that more than fifty countries spoke up at the DSB meeting denouncing the United States' position.⁵³ Chang was skeptical of the United States' rationale because an Indian judge, Ujal Singh Bhatia, who participated in the same cases as Chang and reached the same judgments was reappointed the previous year.⁵⁴ Furthermore, Chang suggested that the United States' actions may have been rooted in its desire to prevent a South Korean judge from sitting on three upcoming cases between the United States and South Korea.⁵⁵ Chang stressed the

49. *Dispute Settlement Body Minutes of Meeting on 23 May 2016*, WTO Doc. WT/DSB/M/379, at 18 (May 23, 2016), https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/230808/q/WT/DSB/M379.pdf.

50. *Id.* ("Its message was loud and clear: 'If Appellate Body Members made decisions that did not conform to US perspectives, they were not going to be reappointed.' Needless to say, if the US position was allowed to prevail, it would seriously undermine the independence and integrity of the Appellate Body").

51. *Id.*; Victoria Guida, *U.S. Stands Alone Against WTO Appellate Body Member*, POLITICO (May 24, 2016, 10:00 AM), <http://www.politico.com/tipsheets/morning-trade/2016/05/us-stands-alone-against-wto-appellate-body-member-catfish-drug-snag-with-obama-in-vietnam-dueling-tpp-letters-214457>.

52. Nam Jeong-Ho & Sarah Kim, *Korean Squeezed out of WTO Judgeship Speaks His Mind*, KOREA JOONGANG DAILY (July 30, 2016), <http://koreajoongang-daily.joins.com/news/article/Article.aspx?aid=3021963>.

53. *Id.*

54. *Id.*

55. *Id.*; Scott Flaherty, *S. Korea Brings WTO Case Over US Washing Machine Duties*, LAW360 (Aug. 29, 2013, 3:31 PM), <http://www.law360.com/articles/468769/s-korea->

importance of removing political interference from the Appellate Body system and consistently maintained that he had faithfully executed his duties as an Appellate Body judge.⁵⁶

C. *Shree Baboo Chekitan Servansing (2018)*

In August of 2018, the United States opposed the reappointment of Shree Baboo Chekitan Servansing, causing his term to expire on September 30, 2018.⁵⁷ Differing from previous vetoing actions, the United States' rationale for blocking Servansing was geared towards the defects of the Appellate Body *as a whole* rather than Servansing's individual performance. Emphasizing this point, USTR Dennis Shea stated that the United States' objection "was not a reflection of any one individual but reflects our principled concern."⁵⁸

The United States took issue with what it perceived as critical substantive and procedural defects of the Appellate Body. Procedurally, the United States rebuked the Appellate Body for allowing justices to work on appeals after their

brings-wto-case-over-us-washing-machine-duties (discussing in one case Korea has challenged the US's approaches of imposing anti-dumping tariffs of 9–13% on South Korean-made washing machines and zeroing policies (DS464)); Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, ¶¶ 6.6–6.11, 6.17, WTO Doc. WT/DS464/AB/R (adopted Sept. 7, 2016), https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/231027/q/WT/DS/464ABR.pdf (finding that the zeroing method was in violation of the anti-dumping agreement and that the United States targeting products sold on specific dates violated several agreements).

56. See, e.g., *Farewell Speech of Seung Wha Chang at the DSB on 26 September 2016*, WORLD TRADE ORG. 4 (Sept. 26, 2016), https://www.wto.org/english/news_e/news16_e/changfarwellspeech_e.pdf ("In my recollection, for the last four years, in the Appellate Body hearings, my questioning has failed to evenly please both parties, but at every single one of them, I have tried my best to displease them in an evenhanded manner, whether they are claimants or respondents, large advanced countries or small less-developed countries. Yes, this is my 'judicial style'").

57. *US Blocks AB member Servansing's Reappointment*, THIRD WORLD NETWORK (Sept. 3, 2018), <https://www.twn.my/title2/wto.info/2018/ti180901.htm>.

58. Jan Dahinten, *U.S. Blocks WTO Judge Reappointment Amid Looming Trade Crisis*, BLOOMBERG (Aug. 27, 2018, 11:25 AM), <https://www.bloomberg.com/news/articles/2018-08-27/u-s-blocks-wto-judge-reappointment-amid-looming-trade-crisis>.

respective terms had expired.⁵⁹ For example, after his term had lapsed, Appellate Body judge Ricardo Ramirez continued to sit on a case in which he was involved.⁶⁰ The United States affirmed “that there needs to be a legal basis to show that a person who has ceased to be a member of the [Appellate Body] should continue serving on an appeal.”⁶¹ In addition, the United States found fault with the Appellate Body consistently disregarding the mandatory ninety-day deadline for providing appeal reports to WTO members.⁶² Under DSU Article 17.5, the Appellate Body should circulate a report within sixty days to WTO members, in no case exceeding ninety days of the date when the notice of appeal was filed.⁶³

In regard to its substantive concerns, the United States critiqued the Appellate Body for failing to limit their discussions in reports to the legal issues necessary to resolve the matter.⁶⁴ For example, in a case between Panama and Argentina, “forty-six pages of the report was dicta, setting out interpretations of the General Agreement on Trade in Services.”⁶⁵ Moreover, the United States admonished the Appellate Body for issuing advisory opinions of legal issues for which they had not been given authority by the WTO to do.⁶⁶ The United States

59. *WTO Members Intensify Debate Over Resolving Appellate Body Impasse*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV., (June 28, 2018), <https://www.ictsd.org/bridges-news/bridges/news/wto-members-intensify-debate-over-resolving-appellate-body-im-passe>.

60. LOUISE JOHANNESSEN, *SETTLING DISPUTES AT THE WORLD TRADE ORGANIZATION* 13, 32 (2018), <http://oru.diva-portal.org/smash/get/diva2:1178890/FULLTEXT01.pdf>.

61. Priti Patnaik, *Why Has the US Launched an Offensive Against WTO’s Dispute Settlement System?* THE WIRE (Oct. 27, 2017), <https://thewire.in/external-affairs/us-launched-offensive-wtos-dispute-settlement-system>.

62. *WTO Members Intensify Debate Over Resolving Appellate Body Impasse*, *supra* note 59.

63. DSU, *supra* note 13, art. 17.5.

64. *WTO Members Intensify Debate Over Resolving Appellate Body Impasse*, *supra* note 59.

65. David Gantz, *An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States*, ARIZ. LEGAL STUD., July 2018, at 6.

66. *Id.* For example, in regards to a dispute concerning the Sanitary and

emphasized that the purpose of the dispute settlement system “[was] not to produce reports or to make law, but rather to help Members resolve trade disputes among them[selves].”⁶⁷ The United States maintains that the Appellate Body should not use an appeal as an occasion to write a treatise or WTO agreement; likewise, Appellate Body adjudicators should not exceed their mandates.⁶⁸ These concerns reveal a disagreement about the nature of the dispute settlement system.

After this vetoing act, many WTO members voiced their concerns, especially regarding the United States’ “impasse” over the appointment of new Appellate Body members.⁶⁹ Flexibility was urged of all WTO members to resolve this situation.⁷⁰ In response to the United States’ failure to act, Mexico’s representative stated, “By failing to act today, ‘we will maintain the current situation which is seriously affecting the workings of the Appellate Body against the best interests of its Members.’”⁷¹ Additionally, some countries, including Russia, Switzerland, Brazil, Korea, and China, critiqued the United States for (1) not providing any proposal or recommendations over the past years to resolve this issue and for (2) failing to engage in meaningful discussions about the United States’ concerns.⁷² Colombia, speaking for the Group of Latin American and Caribbean countries, furthered these sentiments. They stated that if the problems continued without resolution, it would lead to the paralysis of the Appellate Body and put the entire dispute

Phytosanitary Measures Agreement, the United States asserted that the Appellate Body “report engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal.” *Id.* (quoting *Statement by the United States*, *supra* note 4, at 4).

67. Gantz, *supra* note 65.

68. Patnaik, *supra* note 61.

69. Kanaga Raja, *US Again Blocks Consensus Over AB Appointments*, THIRD WORLD NETWORK (May 31, 2018), <https://www.twn.my/title2/wto.info/2018/ti180602.htm>.

70. *Id.*

71. Kanaga Raja, *U.S. Continues to Block Appointment of New AB Members*, THIRD WORLD NETWORK (Apr. 3, 2018), <https://www.twn.my/title2/wto.info/2018/ti180401.htm>.

72. Raja, *supra* note 69.

settlement system in dire risk.⁷³ These fears proved to be true in December of 2019 when the Appellate Body was forced to halt due to the lack of justices. The world communities' response to the United States' actions highlights the growing tension concerning the Appellate Body.

III. EXAMINING THE UNITED STATES' VETOING ACTS THROUGH NEO-REALIST LENSES

A. Methodology: Neo-Realist Paradigm

The neo-realism methodology for this analysis will in part be derived from the works of the well-renowned political theorist, Joseph Mearsheimer. The neo-realism paradigm embodies the following core principles: (1) anarchic international system, (2) rational action, (3) military power, (4) national interests and security, and (5) survival.⁷⁴ Mearsheimer's view of neo-realism distinguishes between offensive and defensive neo-realism.⁷⁵ Generally, defensive realists, such as Kenneth Waltz, argue that certain structural factors limit how states are able to gain power, which lessens the effects of security competition.⁷⁶ For example, under this defensive view, states should not try to maximize their share of world power because the system punishes states that gain too much power.⁷⁷ Specifically, through power-balancing, other great authorities will simply build up their militaries to balance their powers (i.e. Nazi Germany).⁷⁸ Conversely, Mearsheimer maintains that offensive realists believe "that the system's structure encourages states to maximize their share of world power, pursuing hegemony, which

73. *Id.*

74. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 30–31. See generally Mearsheimer, *Structural Realism*, *supra* note 11 (discussing how different realists view power).

75. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 21.

76. *Id.* at 166.

77. *Id.* at 22.

78. *Id.* at 307; see also Glenn H. Snyder, *Mearsheimer's World—Offensive Realism and the Struggle for Security: A Review Essay*, INT'L SEC., Summer 2002, at 149, 159–160.

intends to intensify security competition.”⁷⁹ They believe that strategic decisions require gaining as much control as possible and that balancing is inefficient as great powers constantly look for opportunities to take advantage over each other.⁸⁰

First, according to the neo-realist ideology, the great power nations are the main actors in the world of politics, operating in an anarchic system.⁸¹ There is “no centralized authority or ultimate arbiter that stands above states.”⁸² Thus, its anarchic nature does not connote the existence of chaos; rather, it refers to *the absence* of a world government.⁸³ Additionally, Kenneth Waltz maintains that war occurs because there is nothing to prevent them as a state; it can only depend upon itself.⁸⁴

The second neo-realist assumption is that states are rational actors. Mearsheimer notes, “[states] are aware of their external environment and they think strategically about how to survive in it.”⁸⁵ States must look at both the long-term and the immediate consequences of their actions through cost-benefit analyses.⁸⁶ Realist scholar, Hans Morgenthau, describes the international political sphere as a constant struggle for power where the context and structure of the international system dictate how states gain power and make their decisions.⁸⁷ Emphasizing this point, he states “governments acting rationally in this sense means that they have consistent, ordered preferences, and that they calculate the costs and benefits of all alternative policies in order to maximize their utility.”⁸⁸

The third essential tenet of neo-realism is a state’s military

79. Mearsheimer, *Structural Realism*, *supra* note 11, at 77.

80. *See id.* at 78.

81. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 19.

82. Mearsheimer, *Structural Realism*, *supra* note 11, at 79.

83. *Id.* at 30.

84. KENNETH N. WALTZ, MAN, THE STATE AND WAR 188 (1959).

85. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 31.

86. *See id.*

87. *Political Realism in International Relations*, STAN. ENCYCLOPEDIA OF PHIL. (May 24, 2017), <http://plato.stanford.edu/entries/realism-intl-relations/>.

88. Robert O. Keohane, *Realism, Neorealism and the Study of World Politics*, in NEOREALISM AND ITS CRITICS 1, 11 (1986).

power. Military power includes the capabilities and capacity of a state to wage war.⁸⁹ Power may be displayed through the state's material capabilities relative to other states (i.e. advancement of weapons) and the state's political power to coerce and control states within the system.⁹⁰ Hans Morgenthau conceptualizes power as something innately rooted in human nature where individuals are inherently aggressive and seek power.⁹¹ Under this neo-realist view, great powers inherently possess offensive military capability, making them potentially dangerous to other nations.⁹²

In addition, protecting a state's national interest and security are fundamental principles of neo-realism.⁹³ The sovereign's national and domestic interests are placed at the forefront; neo-realists believe that "national interests ought always to take precedence over all other values in the decisions of statesmen."⁹⁴ Kenneth Waltz refers to the state in his "second image" paradigm, arguing that on the state level, the "pursuit of national interest[s] inevitably leads to nationalistic clashes with other states."⁹⁵ Under this view, states can never be sure about the other state's intention. Thus, even though one can evaluate foreign policy-makers' intentions through speeches or policy documents, one can never be sure if they are lying or concealing their true intentions.⁹⁶ In regard to security, John Herz, an international relations scholar, contends that states are driven to secure more capabilities in order to escape the capabilities of other states; moreover, "since none can ever feel entirely secure in such a world of competing units, power competition ensues and

89. Mearsheimer, *Structural Realism*, *supra* note 11, at 77.

90. *Id.*

91. *Political Realism in International Relations*, *supra* note 87.

92. Snyder, *supra* note 78, at 149, 156, n. 16.

93. *Political Realism in International Relations*, *supra* note 87.

94. Jack Donnelly, *The Ethics of Realism*, in THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 150, 155 (Christian Reus-Smit & Duncan Snidal, eds., 2008).

95. JILL STEANS ET. AL, INTRODUCTION TO INTERNATIONAL RELATIONS THEORY: PERSPECTIVES AND THEMES 64 (3rd ed. 2010).

96. Mearsheimer, *Structural Realism*, *supra* note 11, at 79.

a vicious circle of security and power accumul[ates].”⁹⁷ Ultimately, Kenneth Waltz affirms that security is the *sine qua non* for all other pursuits.⁹⁸

Finally, the fifth principle of neo-realism is the survival of the nation. States are concerned with maintaining both their “territorial integrity” and “domestic political autonomy.” Mearsheimer summarizes, “Survival dominates all other motives because once a state is conquered, it is unlikely to be in a position to pursue other aims.”⁹⁹ Political theorist Nicholas Spykman also defends this neo-realist belief by elaborating that the struggle for power is not always identical to the struggle for survival.¹⁰⁰ Overall, these principles and tenets work together and must be evaluated in unison to provide a complete analysis of the neo-realist ideology.

B. *Seung Wha Chang’s Blocked Reappointment (2016)*

1. *The United States’ Role in the “Anarchical International System.”* First, under the neo-realist tenet concerning the anarchical nature of the international system, there is no higher governing power that controls or exceeds the United States’ sovereign interests.¹⁰¹ Thus, the United States supports and legitimizes the Appellate Body rulings only to the extent that the rulings advance the United States’ well-defined state interests. Following this rationale, it seems plausible for the United States, whose sovereign ideals are its primary interest, to reject the appointment of an Appellate Body judge if they feel that he or she is rendering rulings contrary to those key national interests—minimizing its power. This was likely the USTR’s mindset when they attacked Chang’s interpretation method in many Appellate Body cases. For example, the USTR stated,

97. Snyder, *supra* note 78, at 155.

98. Randall L. Schweller, *Neorealism’s Status-Quo Bias: What Security Dilemma?* 5 SECURITY STUD., no. 3, 1996, at 90, 91.

99. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 31.

100. Donnelly, *supra* note 94, at 155.

101. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 19.

[T]he Appellate Body report rejected a party's appeal, but then went on to reverse the Panel Report and to find a breach on the basis of an argument and approach entirely of the Appellate Body's creation. This approach suggested that panels and the Appellate Body are to conduct independent investigations and apply new legal standards, regardless of what either party actually argues to the panel or Appellate Body. But that is not right.¹⁰²

The United States maintained that Chang had certain written portions of Appellate Body reports because of the questions he asked during oral arguments.¹⁰³ However under the neo-realist ideology, the United States' actions, as a rational actor, are proven to be a conscious decision to support only those Appellate Body justices whose judicial interpretation styles and rulings align with its national interests. At the time of Chang's reappointment, South Korea had challenged the United States' approach of imposing anti-dumping tariffs of 9-13% on Korean-made washing machines and other zeroing policies.¹⁰⁴ If the United States questioned Chang's ability to be a neutral arbiter and judicially adjudicate according to the WTO's mandate, having Chang preside over a case where his home country was the opposing party would be against the United States' national interests.¹⁰⁵

The United States legitimizes Appellate Body rulings only to the extent that they advance its well-defined state interests. This fact is evidenced by its record of not implementing the

102. *Statement by the United States*, *supra* note 4, at 4.

103. *Id.* at 5.

104. Jeong-Ho & Kim, *supra* note 52.

105. Interestingly, if this was the US's objective, the vetoing action was not successful because the Appellate Body ruled on September 8 in South Korea's favor. The Appellate Body found that the zeroing method was in violation of the anti-dumping agreement and that the US targeting products sold on specific dates (i.e. black Friday) violated the WTO agreement. See Scott Flaherty, *South Korea Brings WTO Case over Washing Machine Duties*, LAW360 (August 29, 2013, 3:31 PM), <http://www.law360.com/articles/468769/s-korea-brings-wto-case-over-us-washing-machine-duties>.

largest number of WTO rulings (from both the Panel and the Appellate Body).¹⁰⁶ Most of these non-implemented rulings and recommendations are those dealing with anti-dumping and countervailing duty investigations and measures.¹⁰⁷ From this anarchical perspective of the international system, at times, the United States prefers to take the chance of retaliation by an injured nation than to adopt a policy that would negatively affect the United States' national interests. Under a neo-realist lens, the United States turns to the WTO's Appellate Body to solve the United States' trade disputes because it is a rational actor and the dispute settlement system generates better outcomes—maximizing the United States' power. For example, “the choice of adjudication represents a shift in process- not an abdication of sovereignty.”¹⁰⁸ The state ultimately retains the power to negotiate international rules, to decide when and how to enforce them, and to determine which rulings it is going to comply with.¹⁰⁹ Hence, from the neo-realist perspective, the United States views the Appellate Body decision as a more cost-efficient way (and a less-threatening alternative than war) to advance its domestic interests while solving trade issues with other countries.

2. *The United States' Key National Trade Interests and Goals Prior to Vetoing Chang's Reappointment.*

a. Rigorous Trade Enforcement. In order to make sense of the United States' actions under a neo-realist view, it is necessary to first establish the United States' distinct national trade interests prior to blocking Chang. This is best accomplished by examining 1) speeches from President Obama, the President of the United States at the time, and 2) other reports promulgated by the White House. The first key national trade interest is rigorous trade enforcement. Throughout his presidency, President Obama stated that he not only “made rigorous trade

106. *US Body Blow to DSU, Creating Systemic Crisis*, *supra* note 46.

107. *Id.*

108. CHRISTINA L. DAVIS, WHY ADJUDICATE? ENFORCING TRADE RULES IN THE WTO 1 (2012).

109. *Id.*

enforcement a central pillar of U.S. trade policy, [but also] moved aggressively to protect American workers and to improve labor and working conditions with trading partners across the globe.”¹¹⁰ His beliefs were reflected in the United States’ actions. For example, since 2009, the Obama Administration brought twenty enforcement cases to the WTO, more than any other WTO member.¹¹¹ Additionally, President Obama made trade enforcement his top priority by taking executive action to create the Interagency Trade Enforcement Center (IETC).¹¹² This center enhanced the United States’ capability “to investigate foreign trade practices that [were] potentially unfair to American industry and American workers.”¹¹³ Finally, President Obama safeguarded this national interest by requesting \$606 million dollars for trade administrative activities in 2017.¹¹⁴

Under the neo-realist methodology, the United States’ actions of blocking Chang may be viewed as a decision to protect its overarching state interest of trade enforcement. It makes sense for the United States to be concerned with the WTO’s enforcement body, specifically an Appellate Body judge who it feels is not properly adjudicating trade controversies. In addition, the United States felt that the Appellate Body rulings diminished what it had bargained for by imposing obligations with which the United States did not agree.¹¹⁵ Under this paradigm, the United States views the international system’s structure as one where it must continue to maximize its share of world power before others do. In order to accomplish this, the United States can only be a part of an international organization if it advances its key national interests. Thus, the United States

110. THE WHITE HOUSE, *STANDING UP FOR AMERICAN WORKERS AND BUSINESSES: THE OBAMA’S ADMINISTRATION’S TRADE ENFORCEMENT RECORD 1* (Feb. 2016) (emphasis added), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/The-Obama-Administration-Trade-Enforcement-Record-2016-FINAL.pdf>.

111. *Id.* at 6.

112. *Id.* at 2.

113. *Id.*

114. *Id.* at 3.

115. Kanaga Raja, *US Told to De-Link its AB Concerns from Selection Process*, THIRD WORLD NETWORK, (Sept. 25, 2017), <https://www.twn.my/title2/wto.info/2017/ti170914.htm>.

viewed Chang's actions as threatening the legitimacy of the WTO's dispute settlement body, and consequently the United States' ability to have its trade cases adequately enforced to protect its interests.

The national interest of trade enforcement can also be evaluated through the neo-realist principle of state security. The White House's National Security Strategy Report specified that "[t]he United States government has no greater responsibility than protecting the American people."¹¹⁶ Under this neo-realist tenet, a nation can never be completely sure about another nation's true intentions because it can often be concealed or contrived to protect one's true ideals. This helps explain the United States' skepticism regarding the Appellate Body rulings over which Chang presided. If the United States was skeptical of Chang (a representative of South Korea) and his true intentions, the United States would always question whether Chang was impartial or secretly advancing his own domestic agenda. While the United States' public rationale relies on Chang's overreaching judicial tendencies, under the neo-realist paradigm, its true concerns of advancing rigorous trade enforcement may have been tied to the three upcoming cases between the United States and South Korea.

According to the 2016 National Trade Estimate Report on Foreign Trade Barriers, at the time of Chang's blocking there were still some areas of controversy between the United States and South Korea in the international trade realm.¹¹⁷ For example in the Telecommunications Sector, South Korea prohibited foreign satellite service providers "from selling services (e.g. transmission capacity) directly to end-users without going through a company established in Korea."¹¹⁸ The United States argued that given the current investment restrictions and the fact that having a local presence might not be economically efficient, the

116. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 7 (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf.

117. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2016 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2016) 272–74, <https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf>.

118. *Id.* at 280.

prohibition greatly restricted the ability of foreign actors to participate in the Korean market.¹¹⁹ Another example could be seen in the credit and debit card payment services sector.¹²⁰ There, United States stakeholders were concerned that the Financial Services Commission was exerting pressure on Korean financial institutions to steer customers toward domestic brands, rather than international ones.¹²¹ The United States believed that South Korea was pursuing policies that discriminated against American branded credit/debit cards.¹²²

From the neo-realist methodology, the United States pursued trade enforcement to maximize its power and protect its national interests. Ultimately, the United States was likely concerned that Chang's relationship with South Korea would bring negative Appellate Body rulings that would be contrary to the United States' welfare. Even if Chang's intentions were pure, from the neo-realist methodology, the United States is an actor who will always be skeptical of the intentions of other states (including its representatives). The United States sought to capitalize its power by vetoing Chang in order to make the WTO's dispute settlement body a legitimate entity again, protecting its ultimate interest of rigorous trade enforcement. Because the United States could never be sure of Chang's (South Korea's) intentions, it felt that blocking Chang's reappointment was the best option for securing the United States' future.

b. Protecting American Jobs and Domestic Industries. Another critical national trade interest to the United States at the time of Chang's blocking was making sure that American jobs and domestic industries were protected. Highlighting this point, the USTR reported, "[t]he Obama Administration's unprecedented enforcement efforts . . . benefit American workers and businesses by leveling the playing field and by demonstrating [the United States'] commitment to upholding trade rules to

119. *Id.*

120. *Id.*

121. *Id.* at 279–80.

122. *Id.* at 280.

support future American economic growth and jobs.”¹²³ There were many domestic industries including the steel, auto, agricultural, and aircraft sectors whose interests the United States prioritized to protect.¹²⁴ Pointedly, the United States’ mission was to safeguard domestic manufacturers, especially the steel and iron industries.¹²⁵ Before the blocking of Chang in 2016, the United States’ government felt extreme pressures from senators and supporters of the steel and mining industries to take action.¹²⁶ These pressures and the neo-realist desire to maintain domestic political autonomy and national interests may have influenced the United States’ decision to block Chang. In particular, U.S. senators stated:

Our steel industries are facing billions in losses. Thousands of miners and steelworkers have been laid off, and have been left wondering how they are going to be able to make ends meet. When foreign producers dump steel into our countries, they deprive our own domestic steel industries of the benefit of both current and future growth. Unfairly priced foreign steel displaces steel from domestic producers that employ Canadian and American workers.¹²⁷

123. *Fact Sheet: The Obama Administration’s Unprecedented Enforcement Record*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Jan. 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/january/fact-sheet-obama-administration%E2%80%99s> (emphasis added).

124. *Id.*

125. *Id.*

126. *US-Canada Steel Letter North American Leaders Summit*, STEEL (June 29, 2016), <https://www.steel.org/~media/Files/AISI/Public%20Policy/Letters/US%20Canada%20Steel%20Letter%20North%20American%20Leaders%20Summit-signed.pdf>.

127. *Id.* United Steelworkers International’s president Leo Gerard, also shared similar views. He stated,

China has targeted industry after industry with unfair and often secret subsidies. America’s aerospace industry, one that widely supports manufacturing jobs all across the country, is yet another example. Tens of thousands of USW members working in the aluminum, steel, glass and tire sectors produce and supply materials and parts used in the domestic aerospace industry. The USTR’s actions are a critical part

The United States government was implored to take aggressive measures in order to counter the adverse effects of foreign trade-distorting policies and practices.¹²⁸

Also in February of 2016, three months before the vetoing, the American Iron and Steel Institute (“AISI”) published its 2016 Policy Agenda calling upon the United States to take action.¹²⁹ In particular, the AISI suggested that the influx of trade-distorting foreign government policies (e.g. subsidies, raw material exports restrictions, and import barriers) had resulted in massive global steel overcapacity—leading high levels of steel imports to enter the United States.¹³⁰ The AISI report explicitly targeted the Chinese government’s actions.¹³¹ Regarding Chinese export restrictions, the AISI argued that China had enacted substantial barriers to raw material exports “in order to ensure an abundant domestic supply, at low prices, for their manufacturers.”¹³² Those barriers included export quotas, taxes, and licensing requirements; AISI alleged that many of the barriers violated WTO agreements.¹³³

of a strategy to maintain U.S. leadership in this vital sector.

USW Commends USTR Filing Action Against China for Its Illegal Aerospace Support Measures, UNITED STEELWORKERS (December 8, 2015), <https://www.usw.org/news/media-center/releases/2015/usw-commends-ustr-filing-action-against-china-for-its-illegal-aerospace-support-measures>.

128. *Id.*

129. AM. IRON & STEEL INST., 2016 PUBLIC POLICY AGENDA 3 (Feb. 4, 2016), <https://www.steel.org/~media/Files/AISI/Public%20Policy/2016/AISI%202016%20Public%20Policy%20Agenda.pdf?la=en>.

130. *Id.*

131. AM. IRON & STEEL INST., COMMENTS REGARDING FOREIGN TRADE BARRIERS TO U.S. EXPORTS FOR 2017 REPORTING, DOCKET NO. USTR-2016-0007 58 (Oct. 27, 2016), <https://www.steel.org/~media/Files/AISI/Public%20Policy/Letters/AISI%202016%20NTE%20Comments%20-%20Final.pdf?la=en>.

132. *Id.* at 2.

133. *Id.* The AISI also discussed the *China-Rare Earths* dispute where the Appellate Body found that the Chinese restrictions on certain rare raw materials violated China’s WTO obligations. *Id.* at 2–4. However, this Appellate Body win was not enough for the U.S. domestic steel industry. *See Id.* at 3–4. AISI stated, “*China has moved to strengthen state control over the rare earths industry in a manner that may result in de facto restraints on exports of these raw materials.*” *Id.* at 3 (emphasis added).

Another problem for the United States' domestic manufacturers and industries, especially within the steel industry, was foreign governments' usage of subsidies. For example, AISI points out that many subsidies had the effect of protecting domestic products from foreign competition or "artificially stimulating exports of a particular domestic product, thereby displacing U.S. exports in global markets."¹³⁴ The increased usage of subsidies by the South Korean government may have contributed to the United States' imminent need to protect its national interest (preservation of American industries) through the vetoing of Chang. For example, Korea Electric Power Corporation, a state-owned corporation, controlled "all aspects of electricity generation, transmission, distribution and retail."¹³⁵ The Korean government provides subsidies to many domestic sectors including its steel industry.¹³⁶ The Korean government purchased electricity from steel producers and sold it back to them for subsidized prices.¹³⁷ Specifically, the AISI report revealed that "[b]y 2021, the Korean government is expected to have provided Korean steel producers with over 112 billion won in subsidies through this program."¹³⁸ Additionally, South Korea's government-controlled and government-owned banks provided various subsidies "contingent upon export performance that is often utilized by the steel industry."¹³⁹

Under the neo-realist methodology, the sovereign's domestic interests are placed at the forefront over any other foreign interests.¹⁴⁰ According to Kenneth Waltz's "second-image" paradigm, "the nature of a state's political institutions, its modes of production and distribution, the quality and origins of its elites, and (sometimes) the characteristics of its people

134. *Id.* at 28.

135. *Id.*

136. *Id.*

137. *Id.* at 44–45.

138. *Id.* at 45.

139. *Id.*

140. *See Political Realism in International Relations, supra* note 87.

determine whether that state will be peaceful or belligerent.”¹⁴¹ Here, the United States was most concerned about its domestic sectors, including its steel industry. Furthermore, if the United States viewed the WTO Appellate Body’s decisions as infective (as the AISI and U.S. senators did) or as corroding its domestic interests, the United States would act swiftly to remedy and maximize its power. This is due to the unique political economy of the United States that externalizes itself in the international sphere.¹⁴² Under the neo-realist view, the United States could never be sure of South Korea’s intentions; it likely determined that it was in its best interest to veto Chang at the last minute rather than to try to negotiate a resolution. Nothing would quash the United States’ fears that Chang could be advancing South Korea’s national interests other than his removal from the Appellate Body. Consequently, the United States’ decision to block the reappointment of Chang may be seen as an effort to protect the United States’ national trade interest of maintaining American jobs and domestic industries.

i. *The Protectionist Effects of the 2016 Presidential Election.* It is likely that the wave of protectionism in the United States caused by the 2016 presidential election influenced the United States’ decision to veto Chang’s reappointment. Under neorealist principles, the “national interests ought always to take precedence over all other values in the decisions of statesmen.”¹⁴³ During the time leading up to the blocking, the United States was very concerned with its national interests of protecting its economy and increasing jobs for its citizens.¹⁴⁴ The

141. J. David Singer, *International Conflict: Three Levels of Analysis*, 12 WORLD POL. 453, 457 (Apr. 1960), <http://www.jstor.org/stable/2009401>.

142. See generally Ralf J. Leiteritz, *International Political Economy: The State of Art*, COLOMBIA INTERNACIONAL, JULY 2005, at 50, 50–60 (2005), http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-56122005000200004 (discussing that human actors are driven by material interests, not norms). Actors pursue goals with a material substance. *Id.* at 55. Material interests of aggregate social groups are derived and affect economic policy. See *Id.* at 55–56.

143. Donnelly, *supra* note 94, at 155.

144. See MIRIAM SAPIRO, US ELECTION NOTE: TRADE POLICY AFTER 2016 1–2 (2016), <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-08->

U.S. government was likely inclined to take more protectionist measures because the presidential nominees were propagating those views. The public sentiment blamed trade for many of the economic woes, including slow job growth and stagnant wages.¹⁴⁵ Under the neo-realist ideology, these national interests took precedent, and vetoing Chang was seen as the tool to appease the public interests—especially the interests of the steel and iron industries in key battleground states. The United States’ shift to more nationalist views has historically occurred during presidential campaign seasons.¹⁴⁶ For example, in the 2008 election season, President Obama campaigned very hard against the North American Free Trade Agreement (“NAFTA”).¹⁴⁷

Yet, in order to best understand the United States’ mindset during the vetoing of Chang, it is important to examine some of the protectionist policies advocated by the presidential nominees. Both President Donald Trump and Hillary Clinton took strict stances on trade issues, including opposing the Trans-Pacific Partnership (“TPP”) and strengthening enforcement of trade obligations, especially with China.¹⁴⁸ President Trump maintained that he would tear up existing trade agreements, withdraw from the WTO, and impose tariffs as high as 45 percent on imports from China and Mexico.¹⁴⁹ President Trump additionally wanted to withdraw from free trade agreements like the U.S.-Korea Free Trade Agreement, which absent an agreement, would cause U.S. and South Korean tariffs to return to the previously negotiated levels under the most favored nation principle.¹⁵⁰ In short, the South Korean

31-us-election-note-trade-sapiro.pdf.

145. *The Consequences: How Trade Became a Major Issue in 2016*, FIFTYTHREE (June 13, 2016, 12:57 PM) <http://fivethirtyeight.com/features/the-consequences-how-trade-became-a-major-issue-in-2016/>.

146. *Id.*

147. *Id.*

148. SAPIRO, *supra* note 144, at 1.

149. Gary Clyde Hufbauer, *Could a President Trump Shackle Imports?*, in *ASSESSING TRADE AGENDAS IN THE US PRESIDENTIAL CAMPAIGN* 5, 5 (2016).

150. Marcus Noland et al., *Impact of Clinton’s and Trump’s Trade Proposals*, in *ASSESSING TRADE AGENDAS IN THE US PRESIDENTIAL CAMPAIGN*, *supra* note 149, at 17, 25.

average applied tariffs averaged around 8 percent and the U.S. applied tariffs averaged around 2.2 percent.¹⁵¹ Differing, Clinton stated that she would set a higher bar for trade agreements, only supporting them if they passed her three-part test.¹⁵² To pass this test, trade agreements must 1) create U.S. jobs, 2) raise wages of U.S. workers, and 3) advance national security.¹⁵³ The nationalist rhetoric touted by these two presidential nominees likely influenced the U.S. government's shift to a more protectionist tone.

Moreover, besides acting responsively to the atmosphere that the presidential nominees created in the United States, the government had to be reactive to the American people. For example, some have described the public sentiment at the time in the following manner: "Trade policy has become a target of voters unhappy with stagnant wages and growing economic inequality."¹⁵⁴ And, "[i]t's hit a certain segment of American workers very hard. They're angry and disaffected. For many of them, trade is to blame. . . . Trade is an easy scapegoat for the economic situation and it is much more easily understandable by an average person."¹⁵⁵

International trade has often been blamed because it is easier "to point to specific manufacturing operations overseas, or to jobs lost due to a plant closing," than it is to highlight overall gains from trade which can be more widespread.¹⁵⁶ Hence, vetoing the reappointment of Chang could be seen as a necessary step to show the American public that their needs were being taken seriously and being placed above the foreign interests of the world community. It also showed that the United States would not support an Appellate Body justice whose judicial interpretations were contrary to U.S. key interests. The United States' relationship with the WTO is best described through this neo-realist quote: "[a]lliances are only temporary

151. *Id.*

152. SAPIRO, *supra* note 144, at 4.

153. *Id.*

154. *Id.* at 1.

155. *The Consequences: How Trade Became a Major Issue in 2016*, *supra* note 145.

156. SAPIRO, *supra* note 144, at 2.

marriages of convenience: today's alliance partner might be tomorrow's enemy, and today's enemy might be tomorrow's alliance partner."¹⁵⁷ The United States no longer viewed its relationship with Chang and the WTO as a useful "marriage" and subsequently took steps to dissolve it.

C. Shree Baboo Chekitan Servansing's Blocked Reappointment (2018)

1. *The United States' Role in the "Anarchical International System."* Neo-realists believe that power is the currency of the international political sphere.¹⁵⁸ In this anarchic international system, there "is no centralized authority or ultimate arbiter that stands above the state."¹⁵⁹ This means there is no sovereign authority to enforce the rules or make sure that those who break the rules are punished.¹⁶⁰ At the time of Servansing's vetoing, the United States was putting its sovereign interests at the forefront. In the international realm, each nation tries to maximize its own power, and the lack of trust between states forces nations to rely on self-help measures.¹⁶¹ By vetoing Servansing, the United States made a statement that its national interests come first and that it would not continue to support an institution whose actions reduced the United States' power. The United States' vetoing act highlighted the fact that it was not dependent on other states, reducing its exposure.

Under neo-realist principles, states do not give up their sovereignty to international bodies.¹⁶² Preceding Servansing's veto, the United States made it apparent that it would not give

157. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 33.

158. *Id.* at 12; Mearsheimer, *Structural Realism*, *supra* note 11, at 77.

159. Mearsheimer, *Structural Realism*, *supra* note 11, at 79.

160. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 32; Mearsheimer, *Structural Realism*, *supra* note 11, at 79–80.

161. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS, *supra* note 11, at 32–33; Mearsheimer, *Structural Realism*, *supra* note 11, at 79–80.

162. Michael Barnett & Kathryn Sikkink, *From International Relations to Global Society*, in THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 94, at 62, 64.

up its sovereignty to the WTO.¹⁶³ These sentiments are reflected in President Trump's 2018 Trade Policy Report to Congress where he affirmed that "[t]he United States will not allow the WTO, or any other multilateral organization, to prevent [it] from taking actions that are essential to the economic well-being of the American people."¹⁶⁴ In addition, U.S. laws have remained supreme over international rulings. For instance, reports issued by the Appellate Body are not self-executing and do not lead to automatic changes in U.S. law and practice.¹⁶⁵ Under the Uruguay Round Trade Agreement, specifically 19 U.S.C. § 3533(f), if a WTO report is adverse to the United States, the USTR will consult with congressional committees to determine whether the report will be implemented.¹⁶⁶ While the United States is a member of the WTO, its sovereignty has taken precedent over the Appellate Body and its rulings.

Highlighting this point, the Trump Administration avowed it would ignore any rulings by the WTO that it deemed adverse to U.S. sovereignty.¹⁶⁷ The administration emphasized that "ever since the United States won its independence, it has been a basic principle of [the] country that American citizens are subject only to laws and regulations made by the U.S. government—not rulings made by foreign governments or international

163. Cathleen D. Cimino-Isaacs, *The World Trade Organization (WTO): U.S. Participation at Risk?*, FED. OF AM. SCIENTISTS (July 31, 2018), <https://fas.org/sgp/crs/row/IN10945.pdf>.

164. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 2 (2018) [hereinafter 2018 TRADE POLICY AGENDA], <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>.

165. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 3 (2017) [hereinafter 2017 TRADE POLICY AGENDA], <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf>.

166. 19 U.S.C. § 3533(f) (2018); 2017 TRADE POLICY AGENDA, *supra* note 165, at 3.

167. Eric Beech, *Trump Administration Would Ignore WTO Rulings It Sees as Anti-US*, *FT*, REUTERS, (Feb. 28, 2017, 8:59 PM), <https://www.reuters.com/article/us-usa-trump-wto-idUSKBN16832U>.

bodies.”¹⁶⁸ While the United States has been an active participant in the WTO’s dispute settlement system, its decision to veto Servansing may be seen as an act to protect its sovereignty and maximize its power.

2. *Benefits Outweighed by the Costs of Appellate Body Adjudications.* Under the neo-realist methodology, states are rational actors and the international political sphere is a constant struggle for power.¹⁶⁹ States are aware of their external environment and think strategically about how to survive in it.¹⁷⁰ Thus, the United States, as a rational actor, had to think strategically about both the long term and immediate consequences of its actions. Pointedly, the United States had to calculate the costs and benefits of different actions in order to maximize its gains. When deciding whether to block the reappointment of Servansing, the United States had to determine if the benefits of Servansing as a judge and support for the current WTO dispute settlement system outweighed the cost of reducing the number of Appellate Body judges (e.g. hindering the effectiveness of the WTO system).

Through its vetoing act, the United States determined that the costs of supporting the WTO through the reappointment of Servansing did not outweigh the benefits it received. The Trump Administration took issue with the WTO appropriating to itself powers that WTO members never intended to give.¹⁷¹ Underscoring this point, USTR Robert Lighthizer stated, “the dispute-settlement process over the years has really diminished what [the United States] bargained for and imposed obligations that [the United States does] not believe that [it] agreed to.”¹⁷² The United States vetoed Servansing because it was greatly concerned with the activist approach of the Appellate Body in regards

168. *Id.*

169. Mearsheimer, *Structural Realism*, *supra* note 11, at 80.

170. *Id.*

171. ROBERT MCDUGALL, CRISIS IN THE WTO: RESTORING THE WTO DISPUTE SETTLEMENT FUNCTION 7 (2018), <https://www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf>.

172. Patnaik, *supra* note 61.

to procedural issues, interpretative approaches, and substantive interpretations.

President Trump echoed these sentiments proclaiming “that the WTO system was ‘set up for the benefit of taking advantage of the United States.’”¹⁷³ He further noted that countries were engaging without consequence in illegal actions (e.g. product dumping, subsidized goods, currency manipulation, predatory industrial policies) and that the United States would not tolerate these trade abuses.¹⁷⁴ Moreover, instead of being a forum for negotiation, the United States viewed the WTO dispute settlement system as a litigation driven system where judges imposed their own policy preferences.¹⁷⁵ For example, Lighthizer stated, “[t]oo often members seem to believe that they can gain concessions through lawsuits that they could never get at the negotiating table.”¹⁷⁶ Overall, the United States, as a rational actor, determined that the benefits of participating in the WTO’s dispute settlement system did not offset the negative consequences of improper Appellate Body actions.

Lastly, around the time of Servansing’s veto, the Trump Administration embraced a preference for bilateral negotiations and treaties.¹⁷⁷ The United States viewed bilateralism as far more

173. William Davey, *Comment on Shaffer/ GAO*, 2018 U. ILL. L. REV. ONLINE 36, 38 (2018) (quoting Bryce Baschuk, *U.S. Keeps WTO Members Guessing on Participation in Buenos Aires*, BLOOMBERG BNA: INT’L TRADE DAILY (Dec. 8, 2017), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=124667308&vname=itdbulali-sues&wsn=499884500&searchid=30985302&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0, <https://illinoislawreview.org/online/comment-on-shaffer-gao/>).

174. *Id.* at 37–38 (citing *Remarks by President Trump at APEC CEO Summit, Da Nang, Vietnam*, WHITEHOUSE.GOV (Nov. 10, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/>).

175. *Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Dec. 11, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr>.

176. *Id.*

177. Geoffrey Gertz, *What Will Trump’s Embrace of Bilateralism Mean for America’s Trade Partners?*, BROOKINGS (Feb. 8, 2017), <https://www.brookings.edu/blog/future-development/2017/02/08/what-will-trumps-embrace-of-bilateralism-mean-for-americas-trade-partners/>.

favorable to its interests than multilateral platforms. Under the neo-realist ideology, the international system creates “powerful incentives for states to look for opportunities to gain power at the expense of rivals, and to take advantage of those situations when the benefits outweigh the costs.”¹⁷⁸ President Trump believed that in previous trade negotiations and talks involving multiple countries, U.S. negotiators allowed other countries to gain at America’s expense.¹⁷⁹ The Trump Administration contends that through one-on-one negotiations, the United States “will have greater leverage and thereby be able to capture a greater share of the gains from any agreement.”¹⁸⁰ Ultimately, under the neo-realist framework, it was more beneficial for the United States to adopt a policy favoring bilateralism than it was to support a dispute resolution system that the United States believed distorted its trade obligations and limited its ability to efficiently administer trade remedies.

3. *National Interests & The Protectionist Effects of the Trump Presidency.* Protecting a state’s national interest is a core neo-realist principle. The sovereign’s domestic interests are always placed at the forefront in its decision-making.¹⁸¹ At the time of Servansing’s vetoing, the United States was concerned about protecting its national interests. These included promoting job creation in the United States and protecting American workers and businesses.¹⁸² Specifically, President Trump stated, “[e]very action [the United States takes] with respect to trade will be designed to increase [its] economic growth, promote job creation in the United States, promote reciprocity with [its] trading partners, strengthen [its] manufacturing base and [its] ability to defend [itself], and expand [its] agricultural and service industry exports.”¹⁸³ The United States viewed the Appellate

178. Snyder, *supra* note 78, at 149, 152.

179. Gertz, *supra* note 177.

180. *Id.*

181. Donnelly, *supra* note 94, at 155.

182. 2018 TRADE POLICY AGENDA, *supra* note 164, at 3.

183. 2017 TRADE POLICY AGENDA, *supra* note 165, at 1.

Body as a mechanism that was hindering its ability to achieve these ideals. The Trump Administration reiterated this assertion stating, “the WTO is undermining [the United States’] ability to act in its national interest.”¹⁸⁴ The United States did not want to support an international body—by reappointing Servansing—that was dispensing interpretations that weakened U.S. benefits and rights, while also increasing its treaty obligations.

Differing from the last presidency, the Trump Administration has promoted a protectionist agenda.¹⁸⁵ Under the neo-realist framework, states are never certain about the intentions of other states; they don’t know how much power is needed to feel secure and consequently remain in a permanent quest for power.¹⁸⁶ President Trump’s protectionist actions and need for power in the international arena are evidenced by the steep tariffs he imposed on goods worth billions of dollars from the European Union, Canada, Mexico, and China.¹⁸⁷ President Trump derived this authority from Article XXI of the General Agreement on Tariffs and Trade which grants authority to WTO members to take necessary action to protect essential security interests.¹⁸⁸

During the time preceding Servansing’s blocked reappointment, the Trump Administration used tariffs to protect the United States’ national interests (e.g. the U.S. steel and aluminum industry) from foreign competition.¹⁸⁹ President Trump imposed trade restrictions on nearly \$50 billion of imports of steel and aluminum.¹⁹⁰ The United States noted

184. 2018 TRADE POLICY AGENDA, *supra* note 164, at 28.

185. Beech, *supra* note 167.

186. Snyder, *supra*, note 78, at 151.

187. *Trade Wars, Trump Tariffs and Protectionism Explained*, BBC NEWS (May 10, 2019), <https://www.bbc.com/news/world-43512098>.

188. *Statement by Ambassador Robert E. Lighthizer on Retaliatory Duties*, OFF. OF THE U.S. TRADE REPRESENTATIVE (June 26, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/statement-ambassador-robert-e>.

189. *Trade Wars, Trump Tariffs and Protectionism Explained*, *supra* note 187.

190. Chad Brown, *Protectionism Was Threatening Global Supply Chains Before Trump*, PETERSON INST. FOR INT’L ECON. (Nov. 8, 2018, 1:45 PM), <https://piie.com/blogs/trade-investment-policy-watch/protectionism-was-threatening-global-supply-chains-trump>.

several concerns regarding China's trade policies that unfairly undermined U.S. interests. In particular, these included "forced technology transfer, discriminatory licensing requirements, investment restrictions, theft of intellectual property, support of industry through state-owned enterprises (SOEs), subsidization of excess capacity and lack of transparency in its administration."¹⁹¹ With the prevalence of unfair trade practices and the unique state-driven Chinese economy, the United States did not believe that the Appellate Body in its current state would protect its interests. Accordingly, the imposition of tariffs and the vetoing act were two decisions that the Trump Administration deemed essential to the national security of the United States.

IV. CONCLUSION

The WTO's Appellate Body remains a vital component in its ability to efficiently resolve trade controversies. Although the United States' history of vetoing WTO Appellate Body appointments has been confounding at times, a rationale is illuminated when viewed through neo-realist lenses. For the United States, a nation in an anarchical system, there simply is no higher power than the United States itself. Its sole concern is maximizing power, thus, legitimizing the WTO Appellate Body only when beneficial to its own interest. The United States, as a rational actor, made cost-efficient decisions to veto the reappointments of Seung Wha Chang and Shree Baboo Chekitan Servansing because the Appellate Body was acting contrary to its core national interests. While the United States' disapproval of the Appellate Body and its justices remains controversial, it has opened up a platform for dialogue on the subject. Effective dialogue between WTO members is even more critical now given the current paralysis of the Appellate Body. Hopefully, through flexibility and compromise, WTO members will be able to make the necessary appointments to revive the WTO's crown jewel.

191. MCDUGALL, *supra* note 171, at 3.