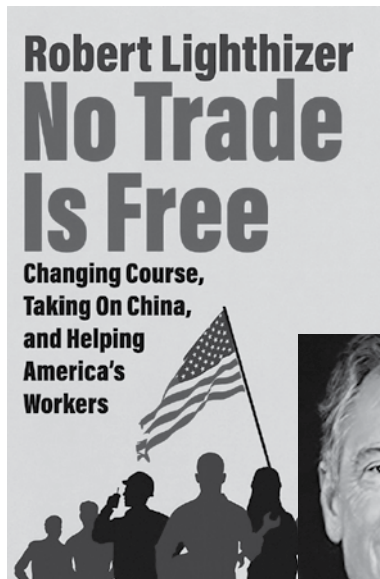


Lighthizer Unchained



An excerpt from
**No Trade Is Free:
Changing Course,
Taking on China, and
Helping America's
Workers** by Robert
Lighthizer (*Broadside
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Robert Lighthizer

*The Trump trade team argues
for WTO reform. The status
quo is not an option.*

The biggest problem facing the United States and most of the Western democracies is the challenge from China. It uses mercantilist practices, largely closed markets, massive subsidies, state-owned enterprises (SOEs), industrial espionage, investment controls, and the like to create huge surpluses. Most of this is not the result of economic forces but of government policies. There is very little that the WTO can do about that. Many of the most destructive Chinese practices are not covered by WTO rules. In other cases, China has been held to violate its obligations, but it simply changes the offending policy and accomplishes its governmental object in another way. To make matters even worse, the Chinese are at the table in the WTO with a veto over any new rule that might effectively challenge them.

While its own rules mean that it can't help market economies that compete with China, the WTO dispute resolution process has actually done things to make it more difficult to challenge China's unfair practices. In a series of decisions, the Appellate Body has struck down U.S. practices that are designed to control Chinese subsidies and illegal dumping. These cases have made it hard for the United States and other countries to counter industrial subsidies and other unfair actions.

Robert Lighthizer served as the United States Trade Representative from 2017 to 2021.

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OFFICIAL WHITE HOUSE PHOTO BY SHELAGH CHAMBERLAIN

President **Donald J. Trump**, Vice President **Mike Pence**, and U.S. Trade Representative **Robert Lighthizer** head to the White House signing ceremony for the United States-Mexico-Canada Trade Agreement on January 29, 2020.

Of course, China itself is a great defender of the current system. Not surprisingly, in June 2022, during the 12th Ministerial Conference in Geneva, the *People's Daily*, the CCP [Chinese Communist Party]'s paper of record, defended the WTO's record and attacked the United States. The article praised the benefits to China, calling its enormous growth a "win-win situation" and attacked the current U.S. policy as "the extremely selfish 'America First' policy." The "win-win" I assume referred to the CCP and a handful of oligarchs. The article went on to praise the statement of the WTO director general Ngozi Okonjo-Iweala, China's ally in Geneva. My reaction to this at the time was that it's only when you are over the target that you see the flack.

A DIRECT THREAT TO U.S. NATIONAL SECURITY

Just when you thought things couldn't get any worse, at the end of 2022, a WTO dispute panel held that it could second-guess decisions the U.S. government makes on sensitive national security issues. The dispute arose from the tariffs imposed by the Trump administration on steel and aluminum imports. In defending a case brought by China and others at the WTO, the United States invoked the "essential security" contained in article 22 of the GATT. This provision reads as follows: "Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action which *it considers* necessary for the

protection of its essential security interests. "It considers" was plainly intended to convey that the exception is self-judging—that's how the United States has interpreted it for more than seventy years. But the WTO panel thought other-

We need a new baseline for all tariffs.

wise and sought to overrule the national security judgments of not one but two U.S. presidents.

Now that one panel has said it can review national security actions relating to steel and aluminum, there's nothing to stop future panels from attempting to undermine the United States with export controls, sanctions, and weapons non-proliferation measures. In fact, China recently sued the United States over new export control rules on semiconductors.

The current USTR Katherine Tai excoriated the ruling in the steel and aluminum case, saying that the WTO was skating on "very, very thin ice" by venturing into this territory and stating that the United States will not comply with this erroneous—and dangerous—opinion. I couldn't have said it better myself. ...

THE NEED FOR CHANGE

Given the Appellate Body's inability to regulate, much less reform, itself, the Trump administration took decisive action to limit U.S. exposure to its destructive influence. We did so by moving beyond the Obama administration's blocking of a particular judge to stopping the formation of the quorum required to conduct business as usual. We were able to do this because the judges are appointed by consensus. When, on behalf of the United States, I refused to agree to start the process of bringing new judges on board, the quorum had no way of replenishing its numbers. As a result, the Appellate Body slowly shrank from seven, to six, to five, to four, to three, to two, and finally to one, on November 30, 2020. Ironically, this last judge was Ms. Hong Zhao, a CCP member from China.

By the time that membership got down to two, the Appellate Body could no longer function. We were well rid of it. Despite some apocalyptic hand-wringing by critics, no one actually missed the Appellate Body, as I pointed out at the time. Indeed, I always note that there is no correlation between actual operations of trade and the existence of this tribunal.

Killing the Appellate Body was important. But more must be done to fix the WTO. Contrary to critics of the Trump administration, absolutely no one is arguing that we should revert from a rules-based system to the so-called law of the jungle in trade relations. But sticking with the current WTO would actually entail betraying the core principles of

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a rules-based system, because this organization has shown itself to be chronically incapable of proceeding according to those principles.

Looking toward the future, the WTO needs to abide by its core principles and make the systematic reforms that it was designed to carry out. Mere tweaking will not be enough.

First, we need a reset on the global tariff system. This practice of countries having wildly different tariffs for the same products is unfair, inefficient, and historically anachronistic. We need a new baseline for all tariffs. There

should be some small number of exceptions permitted to accommodate grave political and economic situations in some countries. The average tariffs of industrialized

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countries would be a good starting point for discussions on this baseline.

Second, we need to stop the FTA end run around MFN treatment. Clearly, defined custom unions of contiguous states, such as USMCA or the European Union, should be permitted, but otherwise countries should have to treat all trading partners equally.

Third, special and differential treatment has to be cut back so that only the poorest countries in the world get special treatment. The rest are either in the trading system or they are not.

Fourth, the WTO needs new rules to stop Chinese economic aggression. Clearly, compensatory tariffs should be allowed in prescribed circumstances. Further, if necessary, countries should have the ability to act unilaterally to counter predatory, mercantilist policies.

Fifth, the concept of a sunset should be incorporated into the WTO agreements. Economies change, and so should the obligations of members. No business would sign an eternal contract with its suppliers, nor should any country.

Sixth, the WTO must adopt a mechanism that assures long-term balanced trade. Commitments must be flexible when a country such as the United States runs up trillions of dollars of deficits for decades.

Finally, the dispute settlement system should be scrapped. A new one, modeled after commercial arbitration, should be put in its place. There should be a one-stage panel process with a vote of the WTO member states being able to overturn the decisions. Further, the decisions should be the basis of party negotiations and not be binding.

The strawman of the law of the jungle versus the status quo cannot obscure the fact that the current system is a massive failure on its own terms—and certainly with respect to U.S. interests. The status quo is not an option. ♦