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The man getting ready to take on the WTO

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America's relationship with the World Trade Organization is about to get a lot more complicated.

President-elect Donald Trump already has threatened to withdraw from the Geneva-based organization, but his selection of Robert Lighthizer to be the next U.S. Trade Representative last week increases the odds that the U.S. will turn the WTO into a major battlefield.

Lighthizer, a longtime trade attorney who spent his career defending U.S. steel companies and other domestic industries from allegedly unfair foreign competition, can be expected to make a push for a major reform of the WTO's dispute settlement process, or at least carry out such an aggressive litigation strategy that he could shake the group's well-insulated legal system to its core, experts say.

"That's an area Bob knows well," said a trade lawyer who has worked closely with Lighthizer defending domestic companies. "He will try to put pressure on the WTO to rein in some of these outlier decisions."

Legal rulings from the Appellate Body, the WTO's highest panel — where most cases now end up — **have drawn fire in recent years**. A number of decisions systematically dismantled the controversial "**zeroing**" methodology the U.S. used to calculate certain anti-dumping duties, even though WTO rules don't explicitly ban its use. Critics also charge that WTO rules and rulings have rendered toothless any **safeguard actions** employed by past presidents to raise tariffs for sensitive sectors.

Lighthizer has been among those who have long argued that WTO legal decisions undermine sound U.S. trade remedy decisions and undercut the ability to take major safeguard actions. "My sense is that he shares a rather intense disapproval in the Washington trade bar with the Appellate Body's approach to trade remedy laws," said Rob Howse, a law professor and WTO legal expert at New York University.

Back in 2007, Lighthizer wrote that the WTO dispute settlement system was "veering off course."

“WTO jurists have engaged in an all-out assault on trade remedy measures,” he wrote in an online debate with Dan Ikenson, a trade expert at the free-market Cato Institute. “Even legal experts hostile to these laws, as well as the Bush administration, have expressed astonishment at the level to which panels are simply writing new requirements into the WTO agreements.” When it comes to defending emergency safeguard actions that allow the president to unilaterally raise tariffs, Lighthizer called the WTO Safeguard Agreement a “virtual dead letter” that has been interpreted far too strictly.

Trump’s “America first” trade policy could very well change that by pushing WTO case law to its breaking point, either by engaging in an intensive legal campaign that results in long-term changes or — even more likely — by taking actions that result in short-term political gains.

“The question is, do they want to pull the rug out from under the WTO or do they want to reshape it to reflect U.S. concerns?” said Ikenson.

The incoming president has vowed to invoke a number of laws that would allow him to unilaterally raise tariffs against China and other offending countries. Many legal experts say those actions are **nearly certain to face legal challenges for running afoul of WTO rules,** but Lighthizer could be eager to test them in Geneva's trade court.

In testimony delivered in 2010 to the U.S. China Economic and Security Review Commission, he railed against the U.S. stance of taking “an unthinking, simplistic and slavish dedication to the mantra of **‘WTO consistency.’**”

Observers don’t expect a lot of hand-wringing over whether a bold action might violate trade rules with Lighthizer at the helm of USTR and fellow economic nationalists Wilbur Ross and Peter Navarro leading the Commerce Department and the new White House National Trade Council, respectively.

“He’s not going to do anything blatantly anti-WTO, but there’s not going to be too much internal debate,” said one former steel industry source who worked closely with Lighthizer. “I don’t think Bob is going to be dancing on the head of that pin,” the source said, contrasting Lighthizer’s approach to what he views as the Obama administration’s overly cautious approach on whether a punitive trade action would violate WTO rules.

Lighthizer, in his 2010 testimony, went as far as recommending a "derogation" from WTO rules as a "common sense, economically rational analysis" when doing so outweighs any retaliation the U.S. might face.

"This need not be seen as **some fundamental threat to the integrity of the WTO system,**" he said. "Indeed, let me state explicitly that I am not advocating that the United States leave the WTO — that body is too important to us and the global trading system."

One of the more recent examples of a president invoking a major safeguard action was in 2002 when President George W. Bush used section 201 of the Trade Act of 1974 to slap steel

imports from the European Union and Japan with tariffs as high as 30 percent. Countries quickly attacked the U.S. at the WTO, and the tariffs, meant to be in place for three years, were lifted just over a year later after the EU threatened to impose more than \$2 billion in retaliatory tariffs.

Lighthizer, at the direction of Trump, could pursue a similar show of strength, knowing that any political objective could be achieved before the WTO delivers any legal rulings. A backlog in cases at the WTO's dispute settlement division is certain to delay any ruling on a major action for years.

“There’s little disincentive to doing these things knowing any final verdict at the WTO is not going to happen until the end of the administration,” Howse said.

Trump’s threat to withdraw from the WTO could itself be used as leverage to apply pressure on the Appellate Body to rein in its interpretations, which has even been called out by the Obama administration for engaging in judicial overreach.

A number of decisions could test that threat in the first half of Trump's presidency. Rulings are expected in cases targeting retaliatory U.S. duties on imports ranging from paper from Canada to steel pipe from South Korea. The Appellate Body is considering a U.S. appeal to a ruling in a case filed by China that once again faulted the U.S. practice of "zeroing" out transactions of above-average value when developing dumping margins under certain circumstances.

Lighthizer could also find an opportunity to slam the WTO legal system when it eventually rules in a major case involving China. Beijing is effectively challenging America's refusal to recognize China as a market economy through its anti-dumping methodology. A loss in the case would basically make it harder for the U.S. to hit China with steep tariffs in trade cases.

Rulings in those cases could fuel Lighthizer's demand for some U.S. oversight of the legal body's decisions. His old boss, former Sen. Bob Dole, suggested that a commission of U.S. judges be formed to review adverse WTO decisions. The idea gained bipartisan support when it was backed up by former Democratic Senate Finance Chairman Max Baucus, who called it an “excellent idea.”

"It wouldn't be a cure-all, but it would start the process of re-instilling some faith in a system that needs it badly," he wrote in the 2007 debate with Ikenson.

Ikenson said a negative finding by a panel of U.S. judges could very well embolden any threat that the U.S. would withdraw from the WTO barring any major legal reforms. Given Trump’s penchant for brinksmanship, other countries might take that threat a little more seriously.

“Lighthizer could bring a lot of cases and tap his fingers on his desk while looking the Appellate Body in the eye saying, ‘What are you going to do about it?’” Ikenson said.

U.S. scrutiny of the WTO dispute process would not be new. The current administration took the unprecedented step last summer of blocking the reappointment of an Appellate Body member, South Korean law professor Seung Wha Chang, arguing that some of the body's legal decisions made during his tenure have gone beyond its legal scope.

The U.S. action sparked outrage among other countries, who saw the move as a direct attack on the independence of the legal body. It also prompted a debate over how to shield Appellate Body legal decisions from being pressured by the reappointment process, by limiting them to a single, longer term.

Obama's commitment to the WTO was unquestioned despite some complaints about various legal rulings. The administration has been a heavy user of the dispute settlement system, particularly with regard to taking action against China.

However, a Trump administration's devotion to the rules-based system and its dispute mechanism is still unclear. **The New York billionaire has threatened to withdraw from the WTO but he also made a vow to instruct USTR to bring cases against China through the trade group's dispute settlement process.**

Lighthizer's own intentions for the WTO will likely be questioned when he is put in the hot seat during his confirmation hearing expected later this month.

In 2003, he was actually one of two people nominated by the then U.S. Trade Representative Robert Zoellick to serve on the Appellate Body. He ultimately lost out to Columbia University professor Merit Janow, who ended up serving a single four-year term.

When asked at the time about the nomination, Lighthizer said he would be interested in going to Geneva to improve the system rather than blow it up. He also acknowledged that a question about whether he had the judicial and diplomatic temperament usually associated with Appellate Body members was "a fair one."

"Your choices, in my view, are to do one of two things," he added in an interview with the The Rushford Report. "Do you criticize the system and hope to kill it, or do you think it is worthwhile to go to Geneva and apply a strict constructionist's perspective, and add a certain credibility?"

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