

CAN INTERNATIONAL TRADE LAW RECOVER?

FROM THE WTO'S CROWN JEWEL TO ITS CROWN OF THORNS

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The World Trade Organization's (WTO's) dispute settlement system is facing “unprecedented challenges,”¹ with the current U.S. government waging a “stealth war”² on the Organization's Appellate Body (AB). The tactics of this war include procedural objections to the (re)appointment of AB members—those individuals selected to sit in Geneva and rule on trade disputes. Countries have blocked appointments in the past, but the Trump administration's strategy to effectively shut down the AB's ability to hear disputes—by bringing the number of sitting judges below the required three to hear a dispute—represents a new development. In short, the trade regime is dying a slow, piecemeal death, with American challenges “killing the WTO from the inside.”³ Yet the sources of this crisis are not new. The organization's judges and bureaucracy have deftly managed simmering discontent for nearly two decades, but we have now reached a boiling point. In this contribution, I first describe the sources of the current impasse before discussing how the WTO's adjudicative bodies have sought to address government dissatisfaction in the past and the implications of such judicial responsiveness for reform of the system moving forward.

The Slow Tarnishing of the WTO's Crown Jewel

The WTO was intended to act primarily as a negotiating forum for member governments to write new trade rules and resolve political disagreements. The organization describes itself as “member-driven” and WTO officials repeat this phrase almost as a self-affirming mantra.⁴ Yet the Uruguay Round of negotiations considerably strengthened the power and independence of the organization's adjudicative bodies. In contrast to the earlier General Agreement on Tariffs and Trade system, the WTO established a permanent body (the AB) to hear appeals of dispute panel decisions. Additionally, all rulings automatically bind parties to a dispute unless rejected by the entire membership (the so-called “reverse-consensus rule”).

This Dispute Settlement Mechanism (DSM) is often referred to as the “jewel in the crown” of an organization plagued by political division, divisiveness, and malaise.⁵ Over the past two decades, continued paralysis on the

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¹ Ujal Singh Bhatia, [Statement by Appellate Body Chair](#) (June 22, 2018).

² Gregory Shaffer et al., [Trump is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important](#), WASH. POST (Sept. 27, 2017).

³ Eduardo Porter, [Trump's Endgame Could Be the Undoing of Global Rules](#), N.Y. TIMES (Oct. 31, 2017).

⁴ John H. Jackson, [The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited](#), 4 J. INT'L ECON. L. 67, 72 (2001).

⁵ WTO Press Release, [WTO Disputes Reach 400 Mark](#), Press/578 (Nov. 6, 2009).

negotiation front steadily increased pressure on these trade judges. A growing number of disputes required them to adjudicate legal claims and questions that should have been addressed by governments through the negotiation of new rules and the reform of outdated ones. This effectively forced the DSM to engage in practices that in turn—and somewhat perversely—further incentivized governments to “legislate through dispute settlement.”⁶ This has finally brought concerns with the system and its legitimacy to a head.

These concerns are not new to the Trump administration. Indeed, they have preoccupied U.S. administrations across the political spectrum for years.⁷ More critically, they are not unique to the United States but rather are shared by many other governments. These long-standing concerns arose because countries failed to collectively govern the legal order they created, in part because the system has complex, disparate economic impacts both between and within countries. For some governments, these issues with the DSM are not concerning, yet for others, these issues go to the very heart of the system. This suggests that the current impasse involves conflicting views about the primary purpose of dispute settlement: to help resolve conflicting trade interests, or to govern through adjudication. At issue is a tension inherent within public international law more generally, one generated by competing visions of international law as contract and international law as governance.⁸

The Current Thorns

Scholars often distinguish between government criticism of international courts and more severe forms of backlash.⁹ In the context of the WTO, countries have hesitated to lash back at every instance of ostensible judicial lawmaking, but they do often use voice: public and vocal expressions of dissatisfaction with a court’s exercise of authority. The concerns underpinning the current impasse are well-documented in statements governments make during meetings of the political body that oversees the system: the Dispute Settlement Body (DSB). These exercises of voice cover procedural and systemic concerns that now threaten the system’s legitimacy and perhaps even its institutional survival.

Some of these concerns stem from a disparity between the growing number of complex disputes and limited institutional resources. The system is simply overloaded. In turn, the AB and Secretariat lawyers (the civil servants of the organization) have attempted to circumvent constraints imposed by an overloaded system by adjusting working procedures and dispute rulings. For instance, the AB repeatedly ignores WTO rules and exceeds its deadline for issuing judgments. Delayed decisions have been accompanied by a lack of transparency, in that the AB no longer consults with governments before missing a deadline. In addition, it has resorted to “self-authorizing” AB members to continue work on disputes after their terms have expired.¹⁰

More centrally, governments increasingly voice dissatisfaction with adjudicators’ adherence to their mandate. Systemic concerns focus on perceived judicial overreach and interpretations of WTO rules that are seen to either add to or diminish countries’ rights and obligations. These concerns arise largely in the areas of government subsidies, technical regulations and standards that create trade barriers, and other types of trade remedies, such as

⁶ Terrence P. Stewart, *The Broken Multilateral Trade Dispute System* 3 (Asia Society Policy Institute, Feb. 7, 2018).

⁷ Office of the U.S. Trade Representative [U.S.T.R.], [2018 Trade Policy Agenda of the President of the United States on the Trade Agreements Program](#) 22-3 (March 2018).

⁸ Harlan Grant Cohen, *International Order between Governance and Contract*, Paper prepared for the Perry World House 2018 Global Order Colloquium.

⁹ Mikael Rask Madsen et al., *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT’L J. L. CONTEXT 197 (2018).

¹⁰ A number of innovative proposals have been developed to address these technical and procedural issues, but I bracket these thorns herein. See, e.g., [Transition on the WTO Appellate Body: A Pair of Reforms?](#) (IIEL Issue Brief 2/2018).

permissible tariffs on injury-causing imports.¹¹ Of course legitimate disagreement can exist over whether a given legal interpretation is *correct*. Moreover, any judicial interpretation necessarily clarifies ambiguities in rules. But it must not be seen to alter obligations. This is a fine line that many governments increasingly see the DSM as crossing, largely because it has operated for decades without new political agreements that fill important interpretive gaps. If adjudicators exercise judicial restraint and abstain from trying to stretch old rules to fit modern trade concerns, they arguably fail to facilitate dispute settlement. When they do adopt progressive interpretations to reflect changing economic realities, governments worry that this unsettles the delicate balance between the organization's judicial and political bodies. Unfortunately, countries see this balance as further unsettled by the AB's expansive approach toward its standard of review for panels' findings of fact, the precedential status accorded previous rulings, and discussion of issues not central to a dispute's resolution.¹² These concerns are not new but have acquired greater urgency, as they are now being linked to procedural ones to hamstringing the entire system.

To be sure, the WTO requires independent adjudicators to clarify often imprecise, unclear, or incomplete trade rules. Yet in the vast majority of legal systems, judicial independence is coupled with some mechanism for legislative override and updating, to course-correct unintended or undesired legal interpretations.¹³ Such a corrective does exist in the WTO through formal amendments to the rules or authoritative interpretations adopted by the political bodies, but in practice governments have had limited opportunity to assert political oversight or guidance, due to the organization's consensus decision-making norm.¹⁴

Improving Judicial Responsiveness at the WTO

WTO members frequently disagree with the legal reasoning of individual rulings, but rarely have they challenged the system's overall authority or legitimacy.¹⁵ Legitimacy refers to a widespread belief that a court has the right and authority to rule.¹⁶ Over the past decade, critiques of this authority—from a range of governments—focused on the issues described above.¹⁷ Governments exercise voice in this way with the explicit intention of signaling to the WTO's judicial bodies their (dis)satisfaction with its exercise of authority and to provide views on preferred jurisprudential or procedural approaches. With this present impasse, we have moved from vocal challenges of the system's authority to severe backlash that questions its overall legitimacy.

Until recently, the organization's adjudicative bodies responded to spikes in collective dissatisfaction by seeking to build up their political capital among stakeholders in distinct ways.¹⁸ The WTO's Secretariat—both the Legal Affairs and Rules Divisions that assist panels and the separate AB Secretariat—has been absolutely central to

¹¹ See, e.g., Stewart, *supra* note 6, at 5-9.

¹² European Commission, *Concept Paper: WTO Modernisation*, (Sept. 2018); U.S.T.R., *supra* note 7, at 26-28.

¹³ Robert McDougall, *Crisis in the WTO: Restoring the WTO Dispute Settlement Function* 7 (CIGI Papers No. 194, Oct. 2018).

¹⁴ Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article XI:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT'L ECON. L. 803 (2005).

¹⁵ Cosette D. Creamer, *Between Law and Politics: Judicial Balancing of Trade Authority in the WTO*, Unpublished Manuscript (2018); Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EJIL 9, 11 (2016).

¹⁶ Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW 309, 313 (Rüdiger Wolfrum & Volker Röben eds., 2008).

¹⁷ Cosette D. Creamer & Zuzanna Godzimirska, *(De)Legitimation at the WTO Dispute Settlement Mechanism*, 49 VAND. J. TRANSNAT'L L. 275, 320 (2016).

¹⁸ See, e.g., Creamer, *supra* note 15; Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J. L. & COURTS 61, 63-64 (2013).

monitoring systemic concerns and helping to identify practices to cultivate that political capital. These lawyers pay attention to government statements within the DSB and flag issues of concern for the adjudicators. This often leads the judicial bodies to slightly adjust rulings to account for these collective concerns or to signal their recognition of the issue through the language they use within decisions. Indeed, the growing legitimacy of the dispute settlement system during its first two decades largely stemmed from such sensitivity and subtle responsiveness to changing government preferences.¹⁹ Yet as recently noted by the current AB Chair, “legitimacy is a fragile virtue, and its longevity cannot be taken for granted.”²⁰

Myriad proposals have been suggested to cure the current impasse.²¹ I focus here on one area for reform that I see as the most pressing *and* feasible. One of the core issues of this crisis relates to judicial overreach. Reinvigorating political oversight is central to overdue institutional rebalancing and requires further clarification by and guidance from the membership as a whole on the mandate and approach to adjudication. This could be accomplished through the formal amendment of dispute settlement rules or an authoritative interpretation, particularly of those provisions that outline the DSM’s mandate. In the long term this will be necessary, but it likely will not occur in the near term without resorting to voting.

More immediately and as a precursor to formal clarification, members can provide a type of informal authoritative interpretation.²² Governments can call a special session of the DSB during which they provide public and detailed views on those interpretative practices or judicial techniques they view as constituting a breach of the requirement that the DSM refrain from adding to or diminishing members’ rights and obligations. Separate follow-up sessions could be held to discuss specific issues such as precedent and AB review of panel fact-finding. The WTO Secretariat can compile, curate, and annotate these DSB statements to help identify areas of consensus or majority views. Such guidance would not legally bind the DSM, but it would provide a roadmap for how to rebuild the system’s legitimacy through the subtle process of responding to core constituents’ preferences and engaging in “majoritarian activism.”²³ Admittedly, sophisticated views on WTO law require legal expertise and institutional resources that smaller and less wealthy countries simply do not have at their disposal. In fact, resource-constrained governments rarely express views on dispute rulings during regular DSB meetings for this very reason. To ensure widespread participation in these special sessions, better resourced governments as well as the Advisory Centre on WTO Law could organize working groups to help inform resource-constrained countries about particular judicial interpretations and systemic issues. At the very least, this would allow these governments to formulate positions in order to have their views recorded during these special sessions.

Member-driven reform of the system is desperately needed to enhance the feedback mechanism between the WTO’s political membership and its judicial bodies in a way that does not undermine the independence of the latter.²⁴ Improving judicial responsiveness to stakeholders’ concerns does not represent the replacement of

¹⁹ Joost Pauwelyn, *The WTO 20 Years On: ‘Global Governance by Judiciary’ or, Rather, Member-Driven Settlement of (Some) Trade Disputes Between (Some) WTO Members?*, 27 EJIL 1119, 1120 (2016).

²⁰ Bhatia, *supra* note 1. See also Gregory Shaffer et al., *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 237 (2016).

²¹ For summaries, see Tetyana Payosova et al., *The Dispute Settlement Crisis in the World Organization: Causes and Cures* (PIIE Policy Brief 18-5, Mar. 5, 2018); McDougall, *supra* note 13, at 12-18.

²² For a similar proposal, see Cosette D. Creamer & Zuzanna Godzimirska, *Deliberative Engagement Within the World Trade Organization: A Functional Substitute for Authoritative Interpretations*, 48 NYU J. INT’L L. & POL’Y 413 (2016).

²³ Stone Sweet & Brunell, *supra* note 18.

²⁴ Another proposal that would also enhance this feedback mechanism is the creation of “legislative remand” procedures, under which the AB could be called on to “submit issues of legal uncertainty arising on appeal to respective WTO committees for further discussion and negotiation.” See Payosova et al., *supra* note 21, at 1.

the rule of law with the rule of power or the “right of might.”²⁵ Responsiveness also need not impair judicial independence and is distinct from the third corner of the “judicial trilemma”: accountability.²⁶ This type of responsiveness is at the heart of the DSM’s legitimacy and its right to rule.

The European Union recently took the lead in introducing a set of reforms to address many of the collective concerns underpinning the current impasse. One of the proposals echoes the call above for reinvigorated political guidance and judicial responsiveness, in suggesting an annual meeting between the AB and the DSB, during which governments can express their views on jurisprudence and approach, thereby providing an “additional ‘channel of communication’” between the organization’s political and judicial bodies.²⁷ Other like-minded countries, including India and China, joined this effort. But it will take the entire WTO membership—and sincere engagement by the United States—to turn this vision into a reality.

Conclusion

I cannot purport to know the Trump administration’s true intentions. Perhaps it is trying to weaken the multilateral trade order past administrations helped create, by tarnishing the WTO’s crown jewel and crippling a rules-based dispute settlement system. If this is the case, trade professionals have suggested a number of ways to continue the dispute settlement function. In my view, trying to work around the United States by voting to override its objection to AB appointments will only tarnish the system further.²⁸ The least harmful option would be to create a temporary and separate mechanism for appellate review, through existing arbitration mechanisms within the WTO.²⁹ Problematically, however, this will leave in limbo disputes involving the United States that are central to the broader crisis facing international trade law. These include a U.S. challenge to China’s intellectual property practices and disputes over American national security tariffs on steel and aluminum imports.

Repeatedly recognizing the need for reform of the dispute settlement system yet dithering over its shape and enactment in the futile hope that somehow the issues will resolve themselves is what created this current crisis. With collective governance impossible for well over a decade, the United States is now resorting to a unilateral tactic to, among other plausible goals, effectively force the membership to collectively govern. Is holding a gun to the WTO’s crown jewel the most appropriate way to bring about much-needed changes? Perhaps not. But it may be the only tactic that gets that member-driven car started.

²⁵ James Bacchus, *Might Makes Unright: The American Assault on the Rule of Law in World Trade* (CIGI Papers No. 173, May 2018).

²⁶ Another critical area of reform relates to the AB appointment process, though reforms in this area must be coupled with those that address institutional imbalances and judicial responsiveness. On judicial independence and accountability, see Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AJIL 225 (2017).

²⁷ WTO General Council, *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council*, WT/GC/W/752 (Nov. 26, 2018).

²⁸ Jan Pieter Kuijper, *What to Do About the US Attack on the WTO Appellate Body?*, INT’L ECON. L. & POL’Y BLOG (Nov. 15, 2017).

²⁹ Scott Anderson et al., *Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals* (CTEI Working Paper CTEI-017-17, 2017).