was on some of these bases that the United States opposed reappointment of one of the AB members in May 2016.

A related substantive problem expressed by the United States and others is that, as a result of the AB overreach, the dispute settlement process may be eroding the negotiation function of the WTO. At the December 2017 WTO Ministerial, U.S. Trade Representative Robert Lighthizer made the point that there was concern about the WTO "becoming a litigation-centered organization." Commentators assert that the AB's approach has thus encouraged members to seek through dispute settlement that which they would have sought through negotiations.

The most salient of the procedural difficulties is that WTO members have been unable to agree on the appointment of new AB members. As mentioned above, one AB member was not reappointed in mid-2016. Another member's term expired on June 30, 2017, and another's expired on December 11, 2017. Yet another member resigned on August 1, 2017, without providing ninety days' notice of leaving as articulated in the AB Working Procedures.

In addition to the problem with reaching agreement on new appointments, concerns have also been raised regarding the terms under which "outgoing" members continue to serve on appeals to which they had been assigned before the expiry of their term. The AB Working Procedures provide that an AB member "may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member …." In some instances, the result has been that only one of three AB members issuing a report in an appeal may have a current appointment.

Some commentators have suggested that these two procedural problems may be related. It may be that more AB members are carrying over their caseloads after the expiry of their terms because no new members have been appointed, and also because appeals are taking much longer than the sixty to ninety days foreseen in the DSU.

In sum, these procedural and substantive issues, among others, have continued to lead to tensions within the institution.

## The Impending Dejudicialization of the WTO Dispute Settlement System?

doi:10.1017/amp.2018.10

*By Richard H. Steinberg**

The Appellate Body (AB) of the World Trade Organization (WTO) is facing a crisis. Appointment of AB members requires a consensus of the Dispute Settlement Body (comprised of all WTO members), and the United States has been blocking a consensus on further appointments since Donald J. Trump became the president. Without new appointments, the ranks of the AB have been diminishing as AB members' terms have been expiring. If this continues (and many expect the United States to continue blocking a consensus on appointments), then in December 2019, through attrition, the number of AB members will fall below the threshold necessary to render decisions, at which point the AB will cease to function.

How should we understand this impending crisis? And what might be a way forward?

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## Challenges to the System

The WTO system is under great pressure. One thing we know for sure about international legal regimes is that they either collapse or become irrelevant if they do not reflect the interests of powerful states. Within several powerful WTO member states and territories, populist discontent with global liberalism has triumphed at the polls. Trump's election in the United States, the Brexit vote in the United Kingdom, and other elections in Europe have signaled dissatisfaction with the freer movement of goods facilitated by the global trading system and the social changes associated with it.

That dissatisfaction is most conspicuous among those left behind by globalization, and those who fear they might be left behind. In the United States, millions of unskilled and semi-skilled workers have seen their jobs and way of life lost to cheaper foreign labor. And those workers voted overwhelmingly for Trump. More broadly, cosmopolitan cities in the United States have benefited financially and culturally from globalization, while the countryside has seen comparatively few benefits, except for large scale agricultural interests. The domestic political ramifications of these distributive consequences of trade began emerging decades ago: opposition to liberalization became a populist rallying cry in the 1990s with Ross Perot's warning of a "giant sucking sound"[1] from freer trade and with the Seattle protests and riots against the WTO in 1999. With Trump's election, the U.S. government is less inclined to support trade liberalization than at any time since the interwar period.

A central populist complaint in the United States focuses on the absence of more reciprocal access to foreign markets, which has meant more domestic losers from trade than would be expected otherwise. China is perceived as the biggest problem. No meaningful multilateral trade law exists to address imbalances associated with Chinese state enterprises, state-owned banks, state-led cybertheft of trade secrets, de facto performance requirements as a condition of foreign direct investment, rules on data storage that allow harvesting by the state, state-supported consumer boycotts, non-reciprocal tariff levels, currency undervaluation, and other issues.

The AB crisis is unfolding in that context and the challenges are daunting. The first challenge arises from the legal culture of the AB, which seems to have viewed its role expansively, as bearing a responsibility to complete international trade law by clarifying ambiguities and filling gaps in WTO agreements. The AB views itself as having a duty to make law. This is problematic because, in doing so, the AB is substituting its judgment for rules that otherwise would be a product of sensitive political negotiations. This judicial lawmaking is particularly problematic in so far as the AB has systematically privileged liberalization over interpretations that accept the political and social importance of WTO exceptions and trade remedies. A strong argument can be made that the AB has done precisely that, systematically degrading trade remedy laws[2]—the very laws that were originally designed to help U.S. workers hurt by globalization.

Second, the AB is challenged by the near complete breakdown of the WTO as a negotiating forum, evidenced by the inability to conclude a trade round since its establishment. The breakdown of the WTO as a legislating institution means that gaps in multilateral trade law have grown wider over the past twenty years. On some broad issues, like many of those identified above pertaining to China, there are no rules—not just gaps in WTO agreements, but large chasms in multilateral trade law. This has put the AB in an impossible position: if it fills those chasms, then it will substitute its purported legal judgment for WTO negotiations on sensitive political-economic matters; if it does

[1] Ross Perot, Comments during the Third U.S. Presidential Debate of 1992 (Oct. 19, 1992).

[2] *See, e.g.*, Terry Stewart, Speech at a panel discussion, The Broken Multilateral Trade Dispute System, presented at the Asia Society Policy Institute (Feb. 7, 2018).

not fill them, then WTO members adversely affected by unregulated behavior must either idly suffer economic and political consequences (an option that is no longer politically tenable), or respond unilaterally and face a dispute settlement case against them for exceeding tariff bindings without legal justification.

The third challenge is the flip side of the legislative problem—what has been called the WTO's "constitutional flaw":[3] unlike functional national judicial systems, there is no effective legislative check on or balance against AB decisions that WTO members find politically unacceptable. Taken together, these three challenges have created nothing less than a crisis for the WTO dispute settlement system.

## Legal Underpinnings

Much of the crisis over filling AB seats results from a fundamental difference of views regarding the purpose of the Dispute Settlement Understanding (DSU)[4] and dispute settlement within the WTO system. To what extent do we expect the AB to fill gaps and clarify ambiguities?

It is now widely accepted that there are divergent views about the very nature of international law across time and place. Anthea Roberts's new book, *Is International Law International?*,[5] which won the Society's prestigious Certificate of Merit this year, makes the point convincingly. And a divergence of views is now increasingly clear on questions about whether and how to interpret WTO law.

In one view, particularly popular in Europe, the AB's job is to engage in expansive lawmaking. In this view, the WTO agreements are incomplete contracts and, in establishing the DSU, the members agreed to delegate a role to the AB that goes beyond rule application and extends to filling gaps and clarifying ambiguities. A central goal of dispute settlement is for the AB to generate completeness of WTO law. Adherents of this view look to the language in DSU Article 3.2, originally proposed by Brussels in the Uruguay Round negotiations, which suggests the AB should "clarify the existing provisions"[6] of the WTO agreements. Consistent with this stance, the European Union (EU) has supported an "evolving public international law" approach similar to that employed by the European Court of Justice. For continental European countries, some of which adhere to monism, accept the direct effect and unqualified supremacy of EU law, and are willing to cite and rely on foreign legal decisions in their own constitutional courts, an expansive lawmaking role for the AB is appropriate and expected.

There is another jurisprudential stance, however, favored by many Americans (and by many Chinese and Russian commentators and jurists), that the AB should be deferential and restrained. In this view, the DSU is intended primarily for rule application and it is inappropriate for the AB to fill gaps and clarify ambiguities. States are sovereign and permitted to do anything that is not expressly prohibited by international law. Hence, DSU Article 3.2 also provides that AB rulings "cannot add to or diminish the rights and obligations"[7] in WTO agreements—language that was originally proposed by the U.S. government in the Uruguay Round. Ambiguous treaty language is to be interpreted as allowing a range of behaviors—and as reflecting agreement to disagree on more specific limitations. Hence, language in the Anti-Dumping Agreement (included at the insistence

[3] Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2(2) Chi. J. Int'l L. 403, 408 (2001), *at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1420&context=cjil.

[4] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401. [hereinafter DSU]

[5] Anthea Roberts, Is International Law International? (2018).

[6] DSU, *supra* note 4, Art. 3.2.

[7] *Id.*

of the U.S. government) provides that where a "relevant provision of the Agreement admits of more than one permissible interpretation," a Member's measure shall be found in conformity with the Agreement "if it rests upon one of those permissible interpretations."[8] Similarly, gaps may mean that the parties could not or did not agree to a rule prohibiting behavior that falls within the gap, so such behavior is permitted. This jurisprudential stance should not be surprising in a country, like the United States, which is fiercely protective of its sovereignty (think, "Live Free or Die," or "Don't Tread on Me"), rarely gives direct effect to treaties, and where it is unthinkable that a treaty or international court decision could enjoy supremacy over the Constitution or a statute enacted subsequent to that treaty. Many Americans, perhaps most, are simply uncomfortable with ceding authority to an international court or tribunal to engage in judicial lawmaking that constrains what our country may do.

## Political Underpinnings

While the AB crisis may be seen through a jurisprudential lens, global structural change is the root of the crisis. The negotiation of new rules would take pressure off the AB, but WTO members have been unable to resolve important bilateral disputes or agree how to fill chasms in multilateral rules.

Bilateral trade disputes initiated by the United States often lead to zero-sum negotiations. Consider U.S.-China disputes. U.S. demands would require opening China's market further, but China has very few market-opening requests of the United States because the U.S. market is comparatively open. Moreover, given the comparative openness of the U.S. market, the U.S. government is usually unwilling to "pay" for opening the Chinese market. Hence, there is little chance of a Pareto-improving bargain.

Broad multilateral negotiations pose a different problem that has proven impossible to solve in the last twenty years: key WTO members' interests have diverged at the same time that power has become dispersed in the WTO. Interests of the largely open advanced industrialized and post-industrial countries differ markedly from those of developing countries and countries like China, where the state has a big role in the economy, protecting and promoting certain industries. Negotiating power sufficiently concentrated in the hands of one or two like-minded members could nonetheless generate an outcome. In the trade context, power depends on market size: threats to close or promises to open a large market can drive an outcome. In 1947, the United States was responsible for 75 percent of the aggregate gross domestic product (GDP) of the Original Contracting Parties, so the United States was able to effectively write the General Agreement on Tariffs and Trade (GATT) and present it as a *fait accompli* to others: if other countries wanted access to our market, then they had to sign on to our rules. From the 1970s through the 1990s, the like-minded former "Quad countries"—the United States, European Union (EU), Japan, and Canada—controlled the WTO agenda: U.S. GDP share had fallen to about 35 percent of GATT GDP by 1973, but the U.S. and EU combined share was around 65 percent of GATT GDP—so together they could drive the agenda in Geneva and in 1995 establish the WTO. Since 1995, the WTO power structure has become multipolar, with the addition of China and Russia, and the rise of Brazil and India, in particular. The U.S. and EU combined share of WTO GDP is now less than 50 percent. The high table of the WTO now usually includes the United States and the European Union, of course, but also China, India, and Brazil—countries with views that diverge markedly from those of the United States and the EU. Add to that the European Union's understandable

[8] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 17.6.ii, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 UNTS 201.

self-absorption—over Brexit, the Greek debt crisis, anti-EU populism in Italy, and the rise of an extreme right in Hungary, Poland, and elsewhere—and associated internal deadlocks. It is hard to see another WTO trade round succeeding.

One consequence of this negotiating deadlock is that WTO members resort to bilateralism or plurilateralism, while gaps in multilateral trade law continue to grow. Another consequence is that the tectonic pressures of new issues all fall on the AB. Recall the European Economic Community (EEC) of the early 1980s: deadlocked by the Luxembourg compromise, the EEC Council could not harmonize regulations, so the European Court of Justice engaged in a "negative harmonization" exercise, striking down some (but not other) intra-European trade barriers, one case at a time; ultimately, that exercise was deemed insufficient, and the Single European Act reconstituted the European legislative process. The AB is in an even worse position to engage in "negative liberalization": at the global level, where views on appropriate rules, the nature of sovereignty, and the role of international law are so divergent, and where resolution of the issues imputes the political-economic structures of great powers, negative liberalization is doomed to failure.

## Ways Forward?

A politically acceptable solution must give WTO members more freedom of action to address the domestic political challenges they face—greater freedom to use trade remedy laws and WTO exceptions as sociopolitical escape valves to help address social dislocations. In so far as anti-WTO populism is rooted in social dislocations associated with the distributive effects of global liberalism, the idea here is to loosen liberal rules by broadening trade remedies, reverting to the social contract implicit in trade remedy laws in the GATT era. Easier safeguard rules, such as abandoning the "unforeseen developments" requirement, or more expansive use of non-violation nullification and impairment theory to deal with growing chasms in trade law, should be considered. This increased freedom of action would also give more open, market-oriented economies leverage to negotiate an end to inequitable trade practices that fall within the growing chasms of trade law, facilitating a rebalancing of market access rules.

This requires at least some dejudicialization of the WTO—addressing disputes with more attention to politics and less legalistically than has been the AB's practice in the last twenty years. One dimension of that dejudicialization would be a departure from the stare decisis principle under which the AB has operated de facto; such a departure would enable the AB to effectively reverse some past decisions that have not been politically astute, and to address each future dispute in its unique diplomatic context. More broadly, dejudicialization would require a sensitivity to politics in dispute resolution that has not been seen since the GATT era. It would mean a radical change in the legal culture of the AB. Some have suggested a litmus test for appointments—a commitment by new AB appointees to exercise judicial restraint—but it is hard to see how such a commitment could be sufficiently credible to serve as the sole basis for resolving the impending crisis. How could we trust that new AB members would remain restrained once they start serving? Others have suggested a new standard of AB review, effectively mandating judicial restraint, but many distrust that proposal, partly because the AB has used clever arguments to defeat prior efforts at restraining them through a narrow standard of review in trade remedy law cases.[9]

Some are now quietly floating the idea of a political check on the AB, such as investing each of five or seven WTO members, presumably the most powerful members and perhaps representatives

[9] *See, e.g.*, Donald McRae, *Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17.6 of the WTO Antidumping Agreement*, *in* The Law of Treaties Beyond the Vienna Convention 164 (Enzo Cannizzaro ed., 2011).

of groups of members, with authority to block AB decisions. Cases of clear rule application, and cases with insignificant political ramifications, are unlikely to be blocked. Operating in the shadow of politics, the AB would become more sensitive to politics and would exercise greater judicial restraint, such as invoking a judicial economy doctrine, ruling only to the extent necessary to yield a decision; in cases of ambiguity, invoking *in dubio mitius*, a canon of treaty interpretation such that if a term is ambiguous, the AB would defer to sovereignty and the preferred meaning that is least onerous to the party assuming an obligation; in cases of gaps, declaring the case *non liquet* ("It is not clear"), in recognition that it is not the place of courts to fill gaps as they are not legislative organs; declaring some cases nonjusticiable, such as when GATT's Article XXI national security exception is invoked. An AB that is less judicialized and more sensitized to the political climate could catalyze WTO members to negotiate new substantive rules that fill the legal chasms that have emerged over the past two decades.

To be sure, many would lament substantial dejudicialization of WTO dispute settlement. But given the impending AB crisis, any proposal to change dispute settlement rules, procedures, or practice must be considered in light of the alternative: the continued blocking of AB appointments, which would render the WTO dispute settlement system inoperable, and would return us to a system that looks a lot like the pre-WTO era of nonbinding dispute settlement and U.S. Section 301 unilateralism.

## Addressing (or Not) Widespread Concerns with the WTO

doi:10.1017/amp.2018.11

*By Terence P. Stewart**

The United States for at least sixteen years has had serious concerns with whether the World Trade Organization (WTO) dispute settlement system was operating according to the terms upon which WTO Members had agreed. While the United States has been a major supporter of the WTO system and the dispute settlement system generally, concerns about sovereignty and the proper functioning of the system have been important since at least 2002, reflected in U.S. legislation and actions by three administrations. Concerns have existed on (1) whether panels and the Appellate Body have honored the limitations contained in Articles 3.2 and 19.2 of the Dispute Settlement Understanding (DSU) not to create rights or obligations; (2) the issuance of advisory opinions on issues not raised or not necessary to the resolution of the dispute; (3) actions of the Appellate Body that permit deviation from the DSU without affirmative authorization by the Dispute Settlement Body (DSB); and, former Appellate Body members continuing to be involved in cases after their term has expired (failure to complete appeals in the DSU required maximum time of ninety days). These are all issues that have concerned the United States for years but also have been raised by other members.

While most disputes may be handled appropriately, the legislative function of the WTO has essentially broken down and the existing "tools" have never been used (and presumably are essentially unusable) to correct erroneous actions by panels or the Appellate Body. In 34 percent of disputes, one or more parties has perceived that the panel or Appellate Body has created obligations not contained in the WTO agreements. There are decisions where significant parts of the Appellate Body report deal with matters not raised by either party and language is contained in decisions that

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