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The Other Trade War

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Essay

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INTRODUCTION

The trade war[1] is on: beginning in the first half of 2018, the United States has employed half-century-old domestic law to impose tariffs on select products affecting U.S. industries, and other countries have struck back with tariffs of their own on U.S. products coming from battleground U.S. states.[2] It is an atypical war: in this war, the United States has implemented tariff rate increases also on its allies.[3] Some say these reciprocal moves suggest a turn away from the international trade law regime. For international trade policymakers and lawyers, however, the tariff war is only part of the story. Meanwhile, another trade war has been playing out in Geneva on the floor of the Dispute Settlement Body ("DSB") at the World Trade Organization ("WTO").

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1. While the terminology is unnecessarily inflammatory, references to a trade "war" proliferate. Governments, media, and academic commentators have employed war terminology for example by referring to the United States as carrying out a World Trade Organization (WTO) "blockade," taking "an ax" to the WTO, using an "arsenal of weapons" against the WTO Appellate Body, and by contrasting the present moment with trade "peace." I use the war rhetoric here only to situate the underlying disagreements.

2. Kathleen Claussen, *Trade War Battles: The International Front*, LAWFARE (July 27, 2018, 11:16AM), https://www.lawfareblog.com/surveying-trade-war-battlefield-international-front.

3. *Id.* (describing the scope of the duties imposed).

This other trade war holds great consequence both for the global economy and for the development of international trade law.

The other trade war takes as its target the expansion of judicial lawmaking by the WTO Appellate Body ("AB"). Once termed the "crown jewel" of the WTO,[4] the dispute settlement mechanism seems to have lost its shine, at least to some. Once more, governments are resorting to their own trade weapons, rather than relying on the multilateral, institutional approach that has guided the last quarter century. In contrast with the tariff tit-for-tat, the other trade war has the potential to have vast implications for canons of legal interpretation in and the composition of international institutions.[5] This war is comprised of battles regarding the contours of the international trade regime and the governance methods to which its participants agreed. This war faces a tension at its core about the appropriate scope of delegation to international institutions and international dispute settlement design.

What gives rise to this increasing discontent with the current system? The confrontations may seem stronger, but the problems with the system are not new. Nor is this other trade war just the manifestation of a new disdain by the United States for international institutions. Rather, this other trade war began long before recent events. It is the product of an evolution in concerns propounded most frequently by the United States, but shared in part by at least a dozen other governments for over 15 years.

A substantial amount of ink has been spilled on both sides of this debate in recent months, and with increased fervor. This Essay does not purport to provide an additional proposal for reform for policymakers. Rather, it amends the diagnosis and argue that the forest—the broader repercussions for legal design—is more important than the trees—the immediate trade issues. I contest the view that the United States is creating deadlock at the WTO in an unprincipled sovereigntist move, seeking to flex its muscles on the international stage and dismiss international institutions outright. To the contrary, the longstanding concerns about the WTO AB's judicialization are legal and teleological.

4. Manfred Elsig 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), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?noredirect=on&utm_term=.1fa84849eef0.

5. The choice to impose tariffs is certainly related to the crises underlying the other trade war; the two are not entirely distinct. *See supra* Part II.

They are shared in varying respects by several WTO Members. More important still is an acknowledgement of the spectrum of international law ideologies informing the Members' views that, during this period of reconsideration, could have an impact on further dispute settlement design.

In Part I of this Essay, I outline the positions of critics of the WTO dispute settlement system and situate those views in the context of a broader conversation on issues with international trade law. Part II argues for rethinking and disaggregating. While some commentators view the other trade war monoptically as a general crisis precipitated by power politics, I introduce four different crises or conflicts that I believe frame the debate. This Essay's approach challenges the popular perspective on how the present critical juncture developed and offers a more pragmatic acknowledgment of divisions in legal ideology. Part III situates my proposed frame in the larger context of international dispute settlement design and delegation. The Essay concludes that the international dispute settlement "forest" should be the focus of our sustained work, rather than the trade law "trees".

I. THE TRADE LAW SYSTEM & ITS CHALLENGES

The creation of the WTO in 1995 heralded a needed new chapter in the international economic law dispute settlement system. The system that predated the WTO under the General Agreement on Tariffs and Trade ("GATT") was widely considered to suffer from certain weaknesses.[6] One change undertaken to address some of the weaknesses with the GATT system was the creation of an appellate review mechanism to correct serious legal errors or fundamental flaws in panel reports.[7] The European Union ("EU") and the United States were the primary advocates of such a mechanism, although neither intended to create "a

6. *See What's Needed for the GATT After the Uruguay Round?*, 86 AM. SOC'Y INT'L L. 69, 69–71 (1992).

7. 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, 1986-1992, 2767–68 (Terrance P. Stewart ed. 1993).

strong international court."[8] Rather, the AB was "an inspired afterthought" in the negotiations.[9]

The AB is a standing body of seven persons, three of whom serve on any one case.[10] Those seven persons are appointed by consensus of all WTO Members; thus, a single Member can block an appointment of one of the adjudicators by refusing to join the consensus.[11] AB members serve four-year terms with the possibility of being re-appointed once, again by consensus.[12]

Over its short existence, many WTO Members and commentators have expressed strong support for the AB's work, recognizing its substantial contributions to the legitimacy of the WTO as well as the achievement of its establishment.[13] To observers, the establishment of the AB was a significant step in the development of sophisticated international dispute settlement systems. States and commentators alike have seen the AB as a model for other areas of international law.

At the same time, some WTO Members—especially the United States—have voiced concerns about the AB regarding both the substance of its decision-making and the procedures it has applied. With respect to substantive issues, several Members have expressed a concern that the AB has exceeded its mandate. These governments have criticized the AB for overreaching its authority by filling gaps, construing silences, selectively choosing definitions, and creating obligations not agreed upon

8. Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 286, 294 (G. Sacerdoti et al. eds., 2006). It was the "European Community" until 2009. *See id.*; *see also* Gregory Shaffer et al., *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 237 (2016) (explaining the evolution of the AB and its distinction compared to the prior system).

9. *Id.* This concept of a limited appellate review is further reflected in the small amount of guidance on the Appellate Body in the DSU, that the DSU indicates that the AB should devise its own working procedures (procedural rules) whereas the Members provided a number of baseline points for panels, and that the members are intended to be only part-time. *See also* WTO Decision of 10 February 1995 referring to the need for the AB members to make "sporadic trips" to Geneva.

10. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

11. *Id.* arts. 2.4, 17.2.

12. DSU, *supra* note 10, art. 17.2.

13. *See* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004) (describing other commentators' observations about the success of the system and explaining, presciently, the expansiveness of judicial lawmaking at the WTO).

among Members. For example, the United States commented as early as February 2001 that the AB had "arrogated to [itself] the right to censure particular Members for any reason" and that, in another case, "the Appellate Body's findings . . . verged on an interpretation of a WTO agreement, even though such interpretations could be made only by Members. . . . This was a new obligation, not found in the WTO Agreements."[14] Earlier still, Mexico remarked that: "The Appellate Body had added new obligations on Members. . . . The Appellate Body had contravened the provisions of Article 19.2 of the [Dispute Settlement Understanding ("DSU")], because its findings had diminished and added to the rights and obligations provided in the covered agreements."[15] Pakistan has taken the position in relation to a dispute in 1998: "[T]he Appellate Body had exceeded its authority. The Appellate Body, by giving a new interpretation to certain DSU provisions had overstepped the bounds of its authority by undermining the balance of rights and obligations of Members."[16] Like comments have also been made over the years by Malaysia, Chile, and Argentina, among others.[17]

Members also have expressed concern that the AB has commented on topics not raised by the disputing parties, not essential to resolving the dispute, or not within the dispute's terms of reference. It is on some of these bases that the United States opposed reappointment of an AB member in May 2016 and again in August 2018.[18]

14. Dispute Settlement Body, *Minutes of the Meeting Held in The Centre William Rappard on 19 January 2001*, WTO Doc. WT/DSB/M/97, ¶ 5 (Feb. 27, 2001); Dispute Settlement Body: *Minutes of the Meeting Held in The Centre William Rappard on 16 May 2001*, WTO Doc. WT/DSB/M/105, ¶ 42 (June 19, 2001).

15. Dispute Settlement Body, *Minutes of the Meeting Held in The Centre William Rappard on 25 November 1998*, WTO Doc. WT/DSB/M/51, at 17–18, (Jan. 22, 1999).

16. Dispute Settlement Body, *Minutes of the Meeting Held in The Centre William Rappard on 6 November 1998*, WTO Doc. WT/DSB/M/50, at 5 (Dec. 14, 1998).

17. *See* TERENCE P. STEWART, CAN THE WTO BE SAVED FROM ITSELF? (2018).

18. Bryce Baschuk, *U.S. Blocks Korean Judge from WTO Appellate Body*, BLOOMBERG (May 24, 2016), https://www.bna.com/us-blocks-korean-n57982072872/. That the United States blocks reappointments and new appointments is, in a way, the least harmful move the United States could make. Even if the result is that the Appellate Body stops work or slows to a crawl, the United States remains a participant in the system and advocates reform. Even if those calls for reform are disingenuous, the United States has not exited the system. As discussed further below, where the system provides no other realistic opportunities to be heard, taking steps to protect national interest and ensure that the system works in your interest is a logical, even if problematic, position.

The most salient of the procedural difficulties is that WTO Members have been unable to agree on the process for the appointment of new AB members, and the number of members is dwindling—to three as of September 30, 2018.[19] An associated procedural debate relates to AB members overstaying their terms. Some AB members have continued to work on the appeals previously assigned to them through the conclusion of the appeal even after their term has expired.[20] Because appeals are taking much longer than the 60 to 90 days foreseen in the WTO agreements, this practice has meant that some AB members have stayed on for as long as one year after the official end date of their terms.[21] 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.[22] To be sure, the possibility of staying on to complete an appeal is set out in the AB Working Procedures, a set of rules created by the AB in consultation with the Director-General of the WTO and the Chairman of the DSB.[23] Those procedures provide in Rule 15 that an AB member "may, with the authorization of the AB and upon notification to the DSB [the assembly of all the WTO Members], complete the disposition of any appeal to which that person was assigned while a Member . . . ."[24] In other words, the option of staying on was created by the AB itself.

Reconciling the competing views about the AB is essential to resolving the current impasse. Debate over the successes and

19. Brett Fortnam, *U.S.: WTO Appellate Body Has No Authority to Review Panels' Factual Findings*, WORLD TRADE ONLINE (Aug. 29, 2018, 8:46AM), https://insidetrade.com/daily-news/us-wto-appellate-body-has-no-authority-review-panels-factual-findings. The AB has indicated in at least one dispute that it will not be in a position to meet the deadlines required of it due to increased workload for the remaining members. *See* Alex Lawson, *Trump's WTO Appeals Blockade Slowing Progress in Geneva*, LAW360 (Aug. 14, 2018), https://www.law360.com/internationalarbitration/articles/1073061/trump-s-wto-appeals-blockade-slowing-progress-in-geneva.

20. U.S. MISSION GENEVA, Statements by the United States at the Meeting of the WTO Dispute Settlement Body (Nov. 22, 2017), https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf.

21. WTO, *Appellate Body Members*, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Oct. 4, 2018) (noting, in footnote 9, which AB members were extended for this purpose)

22. *See, e.g.*, Appellate Body Report, *European Union Anti-dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WTO Doc. WT/DS442/AB/R (Sept. 5, 2017).

23. *See* Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6, Aug. 16, 2010.

24. Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6, Rule 15, Aug. 16, 2010.

failures of the WTO's hybrid court/arbitration model has prompted fundamental questions: When an adjudicatory institution strays or is perceived to have strayed from its delegated instruction, what options are available to states? Institutional change in an organization with 164 Members, including 36 that were not present for the original design process in the early 1990s, poses a challenge rarely encountered in global legal history. The next Part of this Essay disaggregates the various appraisals of the AB, walking through one central "crisis" of ideology and three further crises that inform the present deadlock.

II. THE FOUR CRISES

The principal concern of critics examining the AB is that the system has appropriated to itself powers that the WTO Members never gave it. According to these voices, including the United States, the AB has taken an overly liberal or activist approach on substance, the scope of its own interpretation and authority, and on certain procedural issues. Such an approach poses a problem for democratically elected governments that believe they have not delegated those authorities. The EU,[25] on the other hand, has a different understanding of just what the system ought to be or do. Whereas the United States advocates a conservative reading, the EU champions more judicial undertakings by the AB.

The debate centers around the language of the WTO agreement governing disputes, known as the Dispute Settlement Understanding[26] ("DSU"), and what it states about the purpose and role of the WTO dispute settlement system.[27] For example, the DSU states that panels and the AB are not to "add to or diminish" the Members' rights and obligations as provided in the WTO agreements; panels and the AB are to "clarify" relevant provisions of the agreements.[28] The United States points to these phrases to argue that the adjudicatory role is limited to applica-

25. Although the EU speaks with one voice at the WTO, one could further parse the EU view to find competing positions among its members that can impede the EU's engagement in some WTO activities. Indeed such competing positions can hinder the EU's ability to act or to propose substantial reform.

26. The agreement is commonly referred to as the Dispute Settlement Understanding ("DSU"). The actual agreement is titled the "Understanding on Rules and Procedures Governing the Settlement of Disputes." *See* DSU, *supra* note 10.

27. *See id.*

28. *Id.* art. 3.2.

tions of the text, not elaborate interpretations, and that Members control the substance and meaning.

On the other side, the EU and some other Members emphasize provisions in the DSU that they say support an integrative and law-making function for adjudicators. For example, the DSU states that panels and the AB should maintain "security and predictability" and help the parties settle their disputes "in accordance with customary rules of interpretation of public international law."[29]

Further, the United States notes that Article 17.6 of the DSU concerning the AB states that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel," in contrast with Article 11 of the DSU which refers to the function of *panels* and states that panels should "make an objective assessment of the matter . . . and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[30] In the view of the United States, whereas panels review law and fact, the AB is only permitted to review issues of law. The United States has catalogued instances in which it claims the AB "consistently reviewed and even reversed panel fact-finding . . . under different legal standards that it has had to invent, and it has reached conclusions that are not based on panel factual findings or undisputed facts."[31] China and Canada recently disputed the U.S. position at the DSB, arguing that "most" Members believe the AB can review a panel's findings, pointing to 10 disputes before the AB in which the United States cited Article 11 as a basis for the AB's review.[32]

These competing readings of the DSU reflect a foundational divergence. To the United States, the WTO agreements constitute a contract to be interpreted strictly; to some other Members, they form a constitution for independent institutions that empowers those institutions to elaborate and resolve ambiguities

29. *Id.*

30. DSU, *supra* note 10, art. 17.6, 11.

31. U.S. MISSION GENEVA, Statements by the United States at the Meeting of the WTO Dispute Settlement Body, at 10 (Aug. 27, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.public.pdf.

32. Brett Fortnam, *China Rebuts U.S. Claims that Appellate Body Cannot Review Factual Findings*, WORLD TRADE ONLINE (Sept. 28, 2018), https://insidetrade.com/daily-news/china-rebuts-us-claims-appellate-body-cannot-review-factual-findings. Notably, at that meeting, the EU sided with the United States, arguing that only panels are triers of fact.

and lacunae in the constitutional foundation.[33] Put differently, where the agreements are silent or ambiguous, the United States advocates deference to the Members, while others such as the EU would support filling-in the gaps.[34] The nature of the U.S. complaint for 15 years across three presidential administrations is that "the AB has not limited itself to . . . precisely what's in the agreement."[35] On this view, the ways in which the AB has exceeded the scope of its delegation include: the AB's issuance of "advisory opinions," the inclusion of *obiter dicta*, the expansion of rights and obligations beyond the text, the disregard of the 90-day deadline for appeals, the continued service of AB members after the expiration of their terms, the treatment of past reports as precedential, and the AB's creation of a standard of review over factual findings.

The dispute over the scope of the delegation and the WTO AB's so-called activism comprises the first of the four crises identified here. This is the legal, ideological, or **constitutional crisis** facing the WTO. The question as to whether the AB has exceeded its constitutional delegation is at the heart of what divides the Members today.

33. *U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative*, CTR. STRATEGIC & INT'L STUDIES (Sept. 18, 2017), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170918_U.S._Trade_Policy_Priorities_Robert_Lighthizer_transcript.pdf?kYkVT9pyKE.PK.utw_u0QVoewnVi2j5L. Lighthizer argued that often where panels got it wrong was where they did not view the GATT agreement as a contract and that it should be read that way. *Id.* He acknowledged that Europeans and others see the system differently as part of their broader acceptance of the international law enterprise. *Id.*

34. *See* Steinberg, *supra* note 13. Some observers have noted that the complex nature of disputes that reach the AB may in effect force the AB's clarifying ambiguities to effectively resolve the dispute. To the extent complex problems implicating ambiguities arise, the U.S. position as characterized by some in the Trump Administration appears to be that the AB should conclude that it cannot reach a decision on the question presented.

35. *U.S. Trade Policy Priorities*, *supra* note 33.

Scholars are likewise divided.[36] While some have acknowledged and assessed the problem over many years,[37] others have not viewed the AB's "vast jurisprudential *acquis*"[38] as a problem or have even encouraged greater judicialization. Most commentators and Members would not dispute that the AB developed its authority through a series of critical moments[39]; what they would dispute is whether the AB was intended to or ought to serve as a system of authoritative judicial review. Debates in academia over the reach of trade-adjudicator control are further manifestations of the constitutional crisis. The other crises I highlight below derive from this fundamental conflict of ideology.

The second of the four crises is a **political crisis,** which is shriller now than previously. This crisis complicates any resolution of the constitutional crisis. It is related to the divisions of the legal debate, but it is not entirely enveloped by that conversation. The perception of the Trump Administration is that, at the WTO, the United States seems weak, even if it has won often.[40] To this Administration, the wins are not the point: it is the

36. Scholars are also divided on other, related understandings of the purpose of the WTO dispute settlement system. While all may agree that one purpose is to encourage compliance, some see the ultimate end goal as accommodating efficient breaches and providing compensation, whereas others see it as enforcing rules. For some initial treatment of these issues generally, see Alan Sykes, *The Dispute Settlement Mechanism: Ensuring Compliance?*, *in* THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 560 (M. Daunton,et al. eds., 2012). The scholarly divide is also memorialized in an exchange between Judith Bello and John Jackson debating the legality of a breach of the WTO agreements. *See* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416 (1996); John H. Jackson, *The WTO Dispute Settlement Understanding Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L.60 (1997).

37. *See* Steinberg, *supra* note 13; *see also* Mitsuo Matsushita, *The Dispute Settlement Mechanism at the WTO: The Appellate Body Assessment and Problems*, *in* THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION § 23 (Martin Daunton et al. eds., 2012); Roger P. Alford, *Reflections on U.S. Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNATIONAL L. 196 (2006); John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation*, 6 J. INT'L ECON. L. 113 (2003).

38. Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 10 (2016).

39. Rob McDougall outlines these moments effectively. ROBERT MCDOUGALL, CTR. FOR INT'L GOVERNANCE INNOVATION, CRISIS IN THE WTO: RESTORING THE WTO DISPUTE SETTLEMENT FUNCTION (2018), https://www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf.

40. *See, e.g.*, Jennifer Epstein, *Trump Says WTO Is Treating the U.S. 'Very Badly' Despite Wins*, BLOOMBERG (July 2, 2018, 1:34 PM), https://www

losses and the cases that have never been or could never be brought because the system does not accommodate the problems or the players of today. And, as per the constitutional crisis, it is also the AB's perceived encroachment on Members' rights to regulate, especially in the area of trade remedies—safeguards, zeroing in the case of antidumping, and countervailing duties—designed to provide the United States and others with corrective measures for injured domestic industries. The U.S. Trade Representative (USTR), Robert Lighthizer, made this point in an interview last year saying that "a lot" of decisions coming out of the trade remedies cases are "indefensible."[41] Those cases are especially important for this Administration's trade law leadership and for its positioning with constituents, such as large scale manufacturers and their workers. In Ambassador Lighthizer's opinion, the WTO's power extends too far without any backstop for the United States. Hence, this is a political crisis.

To achieve its trade law goals, the United States today has turned to domestic tools. The tools, the application of which many U.S. trading partners deem inconsistent with the WTO rules, enable major economic actions in short order. These "three-digit" moves, so-called in reference to the three-digit statutes under which the Trump Administration has taken action (e.g., Sections 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962)[42] manifest the strong U.S. views about the proper role of the WTO. The Trump Administration's actions reflect its apparent view that the WTO has pushed the United States into a corner that continues to shrink, preventing the government from taking vital steps to save major industries. The three-digit maneuvers are, to their advocates, ways to move beyond the inability of the WTO regime to effectively regain a competitive edge for the United States. The leading economic governance philosophy is still centered on free trade, but the political winds have changed to prompt the use of domestic tools rather than the multilateral system, which some believe has failed the United States.

A remaining piece of the political puzzle is the U.S. separation of powers and the potential role of the U.S. Congress. The three-digit statutes are delegations of authority from Congress.

.bloomberg.com/news/articles/2018-07-02/trump-says-wto-is-treating-the-u-s-very-badly-despite-wins.

41. *U.S. Trade Policy Priorities*, supra note 33.

42. 19 U.S.C. § 2251; 19 U.S.C. § 2411; 19 U.S.C. § 1862.

Seeing the potential economic and legal consequences of the executive's recent moves, Congress is exploring ways to take those authorities away.[43]

As noted above, long before the Trump Administration, the United States had raised concern with substantive and procedural issues in the WTO dispute settlement system. Taking those into consideration, one might view the problem not as U.S. recalcitrance but rather as a lack of action on the part of other WTO Members to address those percolating issues. Despite the signs of trouble for the last two decades, few attempts at change have been made.[44] This is the third of the four crises: the **responsiveness crisis**. The responsiveness crisis manifests in at least three ways: failure of the membership to act—exacerbating the ideological and political divisions; failure of the adjudicators or their staff to be attuned to the growing discontent; and failure of the negotiating rounds to lead to meaningful reform.

First, the U.S. Congress and three U.S. administrations made clear their distress over many years and not just in cases where the United States lost or where the United States was a party. More important, at least 18 other Members have made comments on the record to the same effect.[45] Although many Members, including the United States, criticize the WTO dispute settlement system when they face a losing result, the range and frequency of these institution-specific comments go beyond disappointment with legal outcomes. Their focus on the AB's overreach suggest that at least some Members subscribe to or sympathize with the U.S. position. Notwithstanding these views, no reforms have been made.[46]

43. Kathleen Claussen, *Trade War Battles: Congress Reconsiders its Role*, LAWFARE (Aug. 5, 2018, 11:00AM), https://www.lawfareblog.com/trade-war-battles-congress-reconsiders-its-role.

44. *Farewell Speech of Appellate Body Member Ricardo Ramírez-Hernández*, WTO (May 28, 2018), https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm.

45. See STEWART, *supra* note 17 and accompanying text.

46. Not until early fall 2018 did Canada and the EU announce significant reform proposals. On September 18, the EU proposed wide-ranging reforms that would tackle rulemaking, transparency, and dispute settlement. The proposal walks through almost point-by-point the U.S. demands. *See* Brett Fortnam, *EU, in WTO Reform Proposal, Targets Appellate Body, Forced Tech Transfer*, INSIDE U.S. TRADE (Sept. 19, 2018). Around the same time, Canada announced it would propose a reform package in October 2018 that would "1) improve the efficiency and effectiveness of the monitoring function; 2) safeguard and strengthen the dispute settlement system; and 3) lay the foundation for modernizing the substantive trade rules when the time is right." *See* Isabelle Hoagland, *Eyeing October Summit in Ottawa, Canada Prepares WTO Reform Pitch*, INSIDE U.S.

Second, the responsiveness crisis also extends to the AB itself. Early on, the AB recognized the delicate balance struck by the language of these provisions.[47] But this recognition was lost with time. Rather than seeking to adapt, the AB carried forward and in some instances doubled down. As one commentator describes it, the expansive mandate the AB has taken on was neither required nor inevitable but rather the outcome of choices made by various adjudicators and their legal support.[48]

The final piece of the responsiveness crisis has little to do with the dispute settlement system at all: it is the larger WTO purpose and activities, specifically the WTO's negotiating function. In December 2017 at the WTO Ministerial Conference, the USTR made clear that concerns about the dispute settlement system had intensified due to the unsuccessful negotiating rounds over two decades. In those rounds, Members were unable to reach agreement on changes to the functions or substance of the regime, and likewise to be responsive to prior U.S. concerns. The absence of change in negotiation has given the dispute settlement system an outsized influence. According to Ambassador Lighthizer, the WTO has become "a litigation-centered organization."[49] The AB's activist and expansive approach has encouraged Members to seek through dispute settlement that which

TRADE (Sept. 25, 2018), https://insidetrade.com/daily-news/eyeing-october-summit-ottawa-canada-prepares-wto-reform-pitch. Other members are rumored to be hosting reform-focused gatherings in November 2018 as they perceive the system to have reached a state of crisis. To be sure, the most recent U.S. position—that the AB ought to act in accordance with the U.S. interpretation of the DSU provisions and that trading partners should simultaneously be proposing reforms for the United States to receive and consider—is both inconsistent and overly convenient, allowing the United States to do nothing but continue to bemoan the lack of responsiveness even if those responses would appear not to appease it. *See The WTO: Looking Forward*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Oct. 12, 2018), https://www.csis.org/events/wto-looking-forward.

47. Appellate Body Report, *United States Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 19, WTO Doc. WT/DS33/AB/R (Apr. 25, 1997) ("Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.").

48. Robert McDougall, *Options for Restoring the WTO Dispute Settlement Function*, __ J. WORLD TRADE __ (forthcoming 2018) (on file with the author).

49. *Lighthizer: WTO Becoming Too Focused on Litigation, Must Concentrate More on Negotiations*, WORLD TRADE ONLINE (Dec. 11, 2017, 10:22AM), https://insidetrade.com/daily-news/lighthizer-wto-becoming-too-focused-litigation-must-concentrate-more-negotiations.

they would have sought through negotiations. In other words, the WTO's legislative function has broken down; there is no feedback loop to keep dispute settlement decisions in check. That lack of responsiveness further drives the U.S. animus toward the AB.

The Members that missed the warning signs and the U.S. calls for change—even if those calls were premised on earlier miscalculations by the United States about how the system would serve its interests—may have themselves misconceived the balance necessary to sustain the fragility of the system. Renegotiating the terms of the system or negotiating an authoritative interpretation of certain fundamental provisions is today not just costly or unreliable, it is seemingly impossible.

The responsiveness crisis is related to the fourth and final crisis: the **structural crisis**. By that, I refer to a phenomenon that Richard Steinberg has highlighted: WTO Members' interests have diverged at the same time global economic power has become more dispersed.[50] As can be seen in the behavior of governments in many international settings, the mood on international institutions and multilateral rulemaking has changed.[51] This climate means governments are more skeptical of certain types of binding and compulsory international dispute settlement compared to the 1990s when those designs had not yet been tried.

The structural crisis is most clearly visible when looking at the new place of China. The rise of China was one of at least three unanticipated elements at the time of the WTO's creation. But it is not just China's rise that contributes to the crises: it is its state-owned enterprise architecture and the way through which it carries out its trade policy by skirting the multilateral rules. Some in the Trump Administration appear to believe that any multilateral dispute settlement system is destined to fail when it comes to China because China will always seek to circumvent the rules.

Here again, the constitutional crisis informs divergent views: advocates see (and the Obama Administration saw) the WTO system as capable of managing the China issue by way of

50. Richard H. Steinberg, *The Impending Crisis of the WTO Dispute Settlement System*, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 112TH ANNUAL MEETING (forthcoming 2019).

51. Joost Pauwelyn and Rebecca Hamilton have chronicled many instances of state "exit" from international courts and tribunals – a trend that others have called a "backlash." *See* Joost Pauwelyn & Rebecca J. Hamilton, *Exit from International Tribunals*, 2018 J. INT'L DISP. SETTLEMENT 1.

an expansive interpretation of the rules whereas critics see Chinese behavior as falling beyond that which the agreements anticipated. At least one commentator has taken the position that either the system must change to accommodate the Chinese internal structure and methods or China must be forced to leave the WTO.[52] Exacerbating matters, as noted above, efforts by the United States as well as U.S. manufacturers and producers to use trade remedies tools as a sort of escape valve to combat problematic Chinese exports have been circumscribed by some of the most expansive AB decisions. Any demands the United States may make toward China to open its economy are complicated by a mismatch with how much the United States could or would do in return.

The role of China in pushing the constitutional and other crises to a tipping point should not be understated. In some respects, the approach the USTR has taken to combat China and to deepen competition is to act more like China.[53] It appears that the Administration both fears China and seeks to replicate some of its state-centric ways. But this is not the 1980s world and China is very different from Japan—the actor against whom like tools were used then.[54] It remains to be seen how much the multilateral system can stretch for both the United States and China.

A second unanticipated element was the abundance of appeals and the number of cases brought against the United States. Up to 2014, 68 percent of all panel reports were appealed.[55] 159 of the 561 disputes filed by August 1, 2018 were filed against the United States. The United States has brought 130 disputes against others, which means 37 percent of the cases not brought by the United States have been brought against it.[56]

52. *Testimony of Jennifer Hillman Before the U.S.-China Economic and Review Security Commission: Hearing on U.S. Tools to Address Chinese Market Distortions* (2018). For a fuller analysis of China's rise see Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115 (2018). *See also* Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. J. INT'L L. 261 (2016).

53. Quinn Slobodian, *You Live in Robert Lighthizer's World Now*, FOREIGN POLICY, (Aug. 6, 2018, 5:46PM), https://foreignpolicy.com/2018/08/06/you-live-in-robert-lighthizers-world-now-trump-trade/.

54. Bob Davis, *In Trade Fight, China Today Differs From 1980s Japan*, WALL ST. J. (Apr. 8, 2018 12:36 PM), https://www.wsj.com/articles/in-trade-fight-china-today-differs-from-1980s-japan-1523202722.

55. *Dispute Settlement: Statistics*, WTO, https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (last visited Sep. 21, 2018).

56. *Dispute Settlement: Disputes by Member*, WTO, https://www.wto.org/

In its August 27, 2018 statement to the DSB, the United States argued that appeals are taking far too long due to the extensive factual review that the AB carries out in many instances, despite that the DSU does not permit such a review. It may also be that more Members appeal losing panel reports on the basis that the AB is likely to review the factual predicate for the panel's decision.

A third unforeseen element was the proliferation of free trade agreements (FTAs). The politics on FTAs run hot and cold, but they have not helped to demonstrate the strength of a rules-based enforcement system for the United States. In the case of the North American Free Trade Agreement (NAFTA), flaws in the dispute settlement design mechanism have led the parties to use the WTO dispute settlement system instead. Further, six months after the start of the Trump Administration, the United States lost its first FTA case since the last NAFTA case in 2001.[57] Even prior to learning this outcome, this Administration appeared skeptical of dispute settlement processes in FTAs, seeing them as unacceptable usurpations of authority in which outsiders dictate U.S. policy. The structural crisis is made manifest not just in global power shifts but also in revised views on the utility of international institutions such as plurilateral FTAs and of dispute settlement mechanisms.

Each of these crises contributes to the current impasse at the WTO and each has a ripple effect that extends far beyond. In economic terms, the ripple extends to farmers, consumers, and workers around the globe as states escalate their punitive tariffs on foreign products. In legal terms, the interactions at the WTO may have lessons for other international bodies.

III. IMPLICATIONS FOR INTERNATIONAL DISPUTE SETTLEMENT

An examination of this "other" trade war is vitally important not only for trade law but also to the extent it might portend a new direction in international dispute settlement more generally. The WTO impasse has repercussions for debates over how to conceive of state delegations to adjudicatory bodies, especially

english/tratop_e/dispu_e/dispu_by_country_e.htm, (last visited Sep. 21, 2018).

57. *In the Matter of Guatemala Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr, (last visited Sep. 21, 2018) (providing access to all relevant case materials).

given that the WTO system is regularly touted as a "model." This work thus confronts issues of dispute management design and the sustainability of third party mechanisms in international economic law.

Many of the quasi-judicial mechanisms conceived in the last century are facilitative management systems, not strict compliance regimes.[58] Most have limited powers to develop enforceable judgments. They face the challenge of developing solutions based on law that will practically resolve the often politicized question before them. For example, under the GATT dispute settlement system, panels that wanted their decisions to be palatable to losing parties might have taken that into consideration to avoid the prospect of not being adopted. At that time, the "adoption" (the formal acceptance) of a panel's report required a positive consensus of all the GATT contracting parties, allowing respondents to block losing outcomes against themselves.[59] The normalization of the WTO dispute settlement system may have given a false sense of insulation from this prior feeling of institutional insecurity in recent years, especially where powerful states are involved.

Other state-to-state arbitral bodies face the same considerations. In sensitive cases involving control of natural resources or boundary delimitation issues that have occupied national agendas for decades if not centuries, adjudicators confront a nearly insurmountable task. In these contexts, the adjudicator is not merely adjudging the merits of the dispute but also is implicitly called upon to contextualize the case in his or her application of the law. Some institutional designs incentivize sensitivity to power politics. At least one commentator has proposed that the AB do just that. In what Steinberg calls dejudicialization,[60] akin to what contract scholars might deem relational contract theory, the AB members would bear in mind these sensitivities underlying the constitutional crisis and view disputes through that lens.

International legal systems that create quasi-judicial roles without providing clear guidance on what that role entails, what

58. Karen Alter has broken down courts in multiple ways, including in their adjudicatory functions. *See generally* KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

59. Mary Footer, *The Role of Consensus in GATT/WTO Decision-making*, 17 NW. J. INT'L L. & BUS. 653 (1997).

60. *See* Steinberg, *supra* note 50.

is the place of precedent, and whether consistency among interpretations matters, among other fundamental questions, risk precisely these types of conflicts of norms and of legal ideologies. When other international courts and tribunals have experienced similar crises of legitimacy after asserting their judicial independence and seeking to expand their authority,[61] parties to those courts have responded. For instance, when the European Court of Justice expanded its power into the political and social sphere, the parties to the Court sought to use the Maastricht Treaty to limit the court to enforcing only economic treaty provisions of the union.[62]

A public law model suggests the need for rules *and* institutions in international dispute management, but the form of the institutions remains a significant question for policymakers even after many years of experimentation. Once the institutions are created, what can states do in the face of what they consider to be institutional self-aggrandizement?[63] Because some states view the institution to which they delegate as an independent trustee and others see the institution as a beholden agent, it is challenging for dispute settlement bodies to sort the task before them. The WTO AB especially must confront these issues. While states have not resolved their issues, the AB bears the brunt of the conflict. The AB receives the criticism, but the problem lies a stage earlier: with the divergent views on delegation among states.

As seen in the WTO AB impasse, the clash between positivist and integrationist perspectives, and a changing equilibrium among those schools of thought in domestic politics, is forcing a renewed discussion regarding the legitimacy of institutionalizing international economic law dispute management. This clash implicates a consensus that has enjoyed more than twenty years of growth in authority. On the horizon are new FTAs, changes to model bilateral investment treaties, and challenges to existing courts and tribunals. The trade experience emphasizes that the scope, nature, form, and function of states' delegations matter.

61. Pauwelyn & Hamilton, *supra* note 51.

62. *See* Karen Alter, *Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT. ORG. 121 (1998).

63. The WTO is not unique in facing that criticism. Other courts have been said to extend their jurisdiction, such as the International Tribunal for the Law of the Sea and the International Court of Justice.

CONCLUSION

Despite some limited proposals on the table,[64] some governments may choose to wait until the next U.S. presidential election before trying to reconcile views and end this other trade war, but there is little indication that the U.S. position will shift significantly with new leadership. Still, despite the gridlock, the United States continues to participate in the WTO, including in dispute settlement. U.S. officials regularly refer to the maintenance of a strong rule-of-law system for global trade. In fact, the United States has proposed reforms to other parts of the WTO system as recently as early 2018. The USTR said in late September 2018 that the WTO is "an important body and . . . . . if we didn't have it we'd have to invent it."[65] In 2017, speaking of the dispute settlement system, he said, "We have to figure out a way to . . . have it work."[66]

The tension between diplomatic and legal mechanisms for transnational enforcement is not new, nor is it isolated to the international trade law regime. The evolution of the "crisis" has important implications for other international institutions. As more cases are filed against the United States in international courts and tribunals, and as more international agreements seek to set up dispute settlement mechanisms, an examination of the delegation and design issues at the WTO takes on greater meaning. What is clear amid all the noise is that whatever the change to move international trade dispute settlement system forward, it cannot and will not be small.

64. *See Farewell Speech*, *supra* note 44; *see also supra* note 46 (discussing the Canadian and EU reform proposals under discussion).

65. Hoagland, *supra* note 46.

66. *U.S. Trade Policy Priorities*, *supra* note 33.