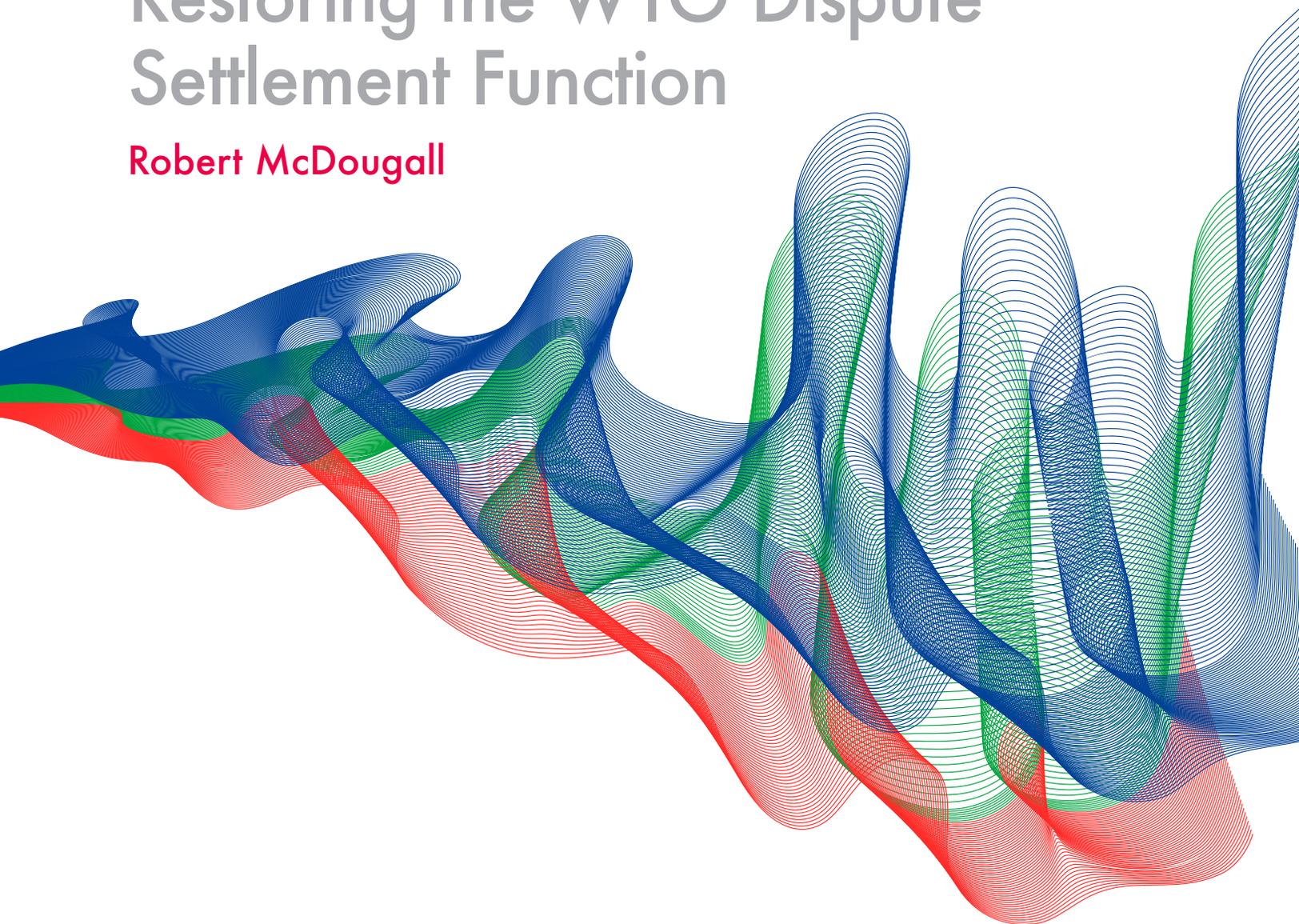

Centre for International
Governance Innovation

CIGI Papers No. 194 – October 2018

Crisis in the WTO

Restoring the WTO Dispute Settlement Function

Robert McDougall



CIGI Papers No. 194 – October 2018

Crisis in the WTO

Restoring the WTO Dispute Settlement Function

Robert McDougall

CIGI Masthead

Executive

President **Rohinton P. Medhora**
Deputy Director, International Intellectual Property Law and Innovation **Bassem Awad**
Chief Financial Officer and Director of Operations **Shelley Boettger**
Director of the Global Economy Program **Robert Fay**
Director of the International Law Research Program **Oonagh Fitzgerald**
Director of the Global Security & Politics Program **Fen Osler Hampson**
Director of Human Resources **Laura Kacur**
Deputy Director, International Environmental Law **Silvia Maciunas**
Deputy Director, International Economic Law **Hugo Perezcano Díaz**
Director, Evaluation and Partnerships **Erica Shaw**
Managing Director and General Counsel **Aaron Shull**
Director of Communications and Digital Media **Spencer Tripp**

Publications

Publisher **Carol Bonnett**
Senior Publications Editor **Jennifer Goyder**
Publications Editor **Susan Bubak**
Publications Editor **Patricia Holmes**
Publications Editor **Nicole Langlois**
Publications Editor **Lynn Schellenberg**
Graphic Designer **Melodie Wakefield**

For publications enquiries, please contact publications@cigionline.org.

Communications

For media enquiries, please contact communications@cigionline.org.

🐦 [@cigionline](https://twitter.com/cigionline)

Copyright © 2018 by the Centre for International Governance Innovation

The opinions expressed in this publication are those of the author and do not necessarily reflect the views of the Centre for International Governance Innovation or its Board of Directors.



This work is licensed under a Creative Commons Attribution – Non-commercial – No Derivatives License. To view this license, visit (www.creativecommons.org/licenses/by-nc-nd/3.0/). For re-use or distribution, please include this copyright notice.

Printed in Canada on paper containing 100% post-consumer fibre and certified by the Forest Stewardship Council® and the Sustainable Forestry Initiative.

Centre for International Governance Innovation and CIGI are registered trademarks.

Centre for International
Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

Table of Contents

vi	About the Author
vi	About the International Law Research Program
1	Executive Summary
1	Introduction
2	The Context for Crisis in WTO Dispute Settlement
4	Innovation in Dispute Settlement under the WTO
8	Objections, Actions and Reactions
12	Options for Restoring the Dispute Settlement Function
17	Choice of Instruments
18	Conclusion
20	About CIGI
20	À propos du CIGI

About the Author

Robert McDougall is a senior fellow with CIGI's International Law Research Program. His focus is on international trade cooperation, multilateral governance, China and the World Trade Organization (WTO), digital trade and dispute settlement. He is also a visiting fellow in the Centre for Trade and Economic Integration at the Graduate Institute of Geneva.

Robert spent 15 years as an international trade lawyer at Global Affairs Canada (formerly Foreign Affairs and International Trade Canada), during which time he provided trade law advice and litigated disputes before the WTO. As permanent delegate to the WTO for five years, he was Canada's representative to the Dispute Settlement Body, to negotiations to improve the dispute settlement system and in many disputes involving Canada.

Previously, as Canada's permanent delegate to the Organisation for Economic Co-operation and Development in Paris, he represented Canada in activities relating to trade, agriculture, science, technology and industry, including major initiatives on innovation, the digital economy and green growth.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

The impasse in the World Trade Organization (WTO) over the appointment of new members of the Appellate Body is just one symptom of crisis in cooperation on trade. Driven by skepticism about multilateralism and binding dispute settlement, and by a growing strategic and economic rivalry with China, the current US administration has elevated longstanding US concerns about WTO dispute settlement to new heights. The inability of WTO members to exercise their collective authority to interpret the meaning of their WTO commitments has meant that the Appellate Body is effectively not subject to any checks and balances. As other WTO members blocked US efforts to negotiate more member control, the United States increasingly turned to unpopular unilateral mechanisms, culminating in the current block on new appointments as part of its more disruptive trade policy.

Assuming the United States will eventually return to rules-based trade, restoring the WTO dispute settlement system to full capacity and enhancing its legitimacy will likely require some changes. This might include improving mechanisms for political oversight, diverting sensitive issues from adjudication, narrowing the scope of adjudication, improving institutional support and providing members more say over certain procedures. Preserving compulsory, impartial and enforceable dispute settlement in the WTO will require an accommodation of different perspectives on how the system should function. Achieving this, in whatever form, will contribute to maintaining and even strengthening multilateral cooperation on trade.

Introduction

The rules-based multilateral trading system is facing unprecedented strain. The unpredictable and often belligerent trade policy actions of the current US administration, inflicted on adversaries and allies alike, have been met with retaliation and legal challenge at the WTO. Regardless of their outcome, new and ongoing adjudication over “national security” justifications for trade measures

and China’s status as a “market economy” will only risk further destabilizing the trading system. Meanwhile, concerns about the WTO’s incapacity to defuse growing trade tensions have largely overshadowed efforts to launch a new negotiating agenda based on even the modest outcomes at the 2017 Ministerial Conference in Buenos Aires.

The stalemate in the Dispute Settlement Body (DSB) over the appointment of new members of the Appellate Body is just one more symptom of crisis at the WTO. If a solution is not found, the already severely compromised dispute settlement system will be rendered dysfunctional by late 2019, if not earlier. The immediate cause is the US refusal to join consensus to launch the appointment process. While the United States initially cited concerns about the practice of Appellate Body members being extended beyond the end of their terms, it is understood to be using the process as leverage to bring about more systemic reform of the system, in particular of the functioning of the Appellate Body.

While concerns of one sort or another about dispute settlement in the WTO have animated successive US administrations almost since the founding of the organization, the current US administration has elevated them to new heights. The escalation by this administration reflects its skepticism about multilateralism in general and binding dispute settlement in particular, and its deep suspicion that global trade rules are increasingly stacked against US interests. It is further complicated by the growing strategic competition for economic dominance between the United States and China that might ultimately be too great for even the multilateral trading system to contain. The more fundamental causes and context of the impasse in the DSB mean that ending it, and restoring the WTO dispute settlement function, will require solutions to much more than just the procedure used to extend Appellate Body members beyond the end of their terms.

Other WTO members countered past US reform efforts with an often equally dogmatic insistence on their own vision of dispute settlement. Their frustration with the current US administration’s erratic trade policy and suspicion of its ultimate intentions make cooperation more difficult than ever. For now, however, time is on the side of the United States. The more incapacitated the system becomes, the more significant the reforms will likely need to be in order to reach agreement to restore it. In any event, despite uncertainty about

the United States' true end-game, addressing some of its longstanding systemic concerns — if this can be done while preserving the compulsory, impartial and enforceable nature of dispute settlement — would actually improve the system's legitimacy and effectiveness in the long run. Indeed, reaching agreement to restore the dispute settlement function might demonstrate that cooperation on international trade is still possible, even in the current contentious trade environment.

This paper contributes to the discussion of possible options to resolve both the immediate procedural impasse and the broader systemic concerns. To that end, the next section sets out the complex challenges facing the rules-based trading system that will complicate efforts to restore the dispute settlement function in the short term. Stepping back, the paper then surveys the evolution of trade dispute settlement, highlighting in particular the emergence of an institutional imbalance in the WTO legal framework that, in part at least, has always threatened the legitimacy of the system. Next, the paper tracks how WTO members, starting with the United States, have responded to this institutional imbalance. A number of possible reforms are evaluated that might pave the way for the restoration of the dispute settlement function, and then options are outlined for instruments that can be used to implement these reforms. The paper concludes with thoughts on both the importance and the complexity of the task at hand.

The Context for Crisis in WTO Dispute Settlement

Almost since its inception,¹ the WTO dispute settlement system has faced controversy of one sort or another. Given the unprecedented and unparalleled consequences that the outcomes can have for sovereign states, this is hardly surprising. For most of this period, however, these controversies never posed any serious threat to the viability of the system. That the challenges have

more recently become almost existential in nature can be attributed to at least three related factors.

First, more than any national administration in recent memory, the current administration is openly skeptical of, and sometimes outright hostile toward, the rules-based international order, including the multilateral trading system. President Donald Trump has frequently criticized the WTO and the dispute settlement system, alleging that both treat the United States unfairly.² United States Trade Representative (USTR) Robert Lighthizer has openly reminisced about the veto that contracting parties enjoyed over dispute settlement under the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT).³ And National Security Adviser John Bolton has not disguised his disdain for the WTO.⁴ Moreover, the equation of national security with economic security in the recent annual national security review,⁵ and the invocation of national security to justify a number of tariffs,⁶ suggest a new direction in US trade policy that does not consider the United States to be bound by the constraints of its international trade obligations. On these facts alone, it is reasonable to conclude that the motivation of the United States is to dismantle the dispute settlement mechanism entirely, and perhaps even the rules-based trading system itself.

Despite these various pronouncements, however, it is not clear that the US administration intends, or would even have the domestic legal and political

1 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 (entered into force 1 January 1995), 1867 UNTS 154, 33 ILM 1144 [Marrakesh Agreement].

2 See e.g. White House, "Remarks by President Trump at 2018 White House Business Session with Governors" (26 February 2018) [White House, "2018 White House Business Session"], online: <www.whitehouse.gov/briefings-statements/remarks-president-trump-2018-white-house-business-session-governors/>; "Trump Threatens to Pull U.S. Out of WTO If It Doesn't 'Shape Up'" (29 August 2018), online: Bloomberg <www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up>.

3 See e.g. Interview of USTR Robert Lighthizer by John Hamre, "U.S. Trade Policy Priorities" (18 September 2017 at the Center for Strategic and International Studies) [Lighthizer interview], online: <www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative>.

4 John Bolton, "Trump, Trade and American Sovereignty", *The Wall Street Journal* (7 March 2017).

5 See "Economic security is national security", in White House, "National Security Strategy of the United States of America" (December 2017) ["National Security Strategy"], online: <www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

6 US Department of Commerce, "The Effect of Steel Imports on the National Security" (11 January 2018), online: <www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf>.

authority,⁷ to pursue such an extreme course. The fact remains that the WTO, with its compulsory and binding dispute settlement system, is too important to the United States to be completely dismantled, even as the United States seeks both substantive and institutional reforms. Indeed, the current US administration has itself expressed support for the WTO,⁸ continues to engage in at least some ongoing activities and negotiations,⁹ and has even launched several new disputes,¹⁰ with plans for possibly more.¹¹ In the absence of a clear statement of intent to dismantle the dispute settlement system, the United States' anti-WTO rhetoric may be seen as principally for domestic political consumption or to generate leverage over other WTO members to achieve its reform objectives. As unpalatable as it may be for other members to engage constructively with the United States on WTO reform questions in such an environment, refusing to do so only out of suspicion of its ultimate motives risks missing an opportunity to de-escalate some of the tensions while improving the trading system for the benefit of all.

Second, one of the causes of escalating US rhetoric and action against the multilateral trading system is the growing strategic competition among the major powers, especially between China and the United States, and to a lesser extent the European Union. China has adopted "Made in China 2025," a state-backed industrial plan designed to make

China a "high-tech powerhouse" over the coming decades.¹² This ambitious plan has exacerbated growing concern about how China's membership in the WTO has turned out. The United States has catalogued a number of concerns about China's policies that it considers unfairly undermine US interests,¹³ concerns that are shared by at least some others.¹⁴ These include forced technology transfer, discriminatory licensing requirements, investment restrictions, theft of intellectual property, support of industry through state-owned enterprises (SOEs), subsidization of excess capacity and lack of transparency in its administration.¹⁵ While some of China's practices may be covered by existing trade rules, and therefore enforceable in WTO dispute settlement, others arguably are not.¹⁶

Since the United States considers, rightly or wrongly, that the current trade rules are stacked against it in its competition with China, it may also consider that any further interpretation and enforcement will only entrench China's advantage. Indeed, one criticism of the dispute settlement system is that it has reduced the scope to use trade defence measures while at the same time making it harder to challenge subsidies provided through SOEs,¹⁷ both developments that are more beneficial to China than to others. The ongoing adjudication over whether China should

7 Joel Trachtman, "Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause versus an Historical Glass Half Empty" (15 October 2017), online: <<https://ssrn.com/abstract=3015981>>.

8 At the 2017 WTO Ministerial Conference, USTR Lighthizer referred to the WTO as "obviously an important institution." USTR, "Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference," December 2017, online: <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr>>.

9 In October 2017, the United States submitted a new proposal. WTO, General Council, "Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements: Communication from the United States" (30 October 2017), WTO Doc JOB/GC/148.

10 Over the summer of 2018, the United States launched disputes against six WTO members (Canada, China, the European Union, Mexico, Russia and Turkey) related to measures those members took in response to US tariffs on steel and aluminum. See also *India—Export Related Measures* (DS 541), consultations requested on 14 March 2018; and *China—Certain Measures Concerning the Protection of Intellectual Property Rights* (DS 542), consultations requested on 23 March 2018.

11 See e.g. "Joint readout of discussion: Meeting between EU Commissioner for Trade Cecilia Malmström, Minister of Economy, Trade and Industry of Japan Hiroshige Seko and US Trade Representative Robert Lighthizer" (on non-market-oriented policies and practices) (10 March 2018) ["Joint readout"], online: <http://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156632.pdf>.

12 See e.g. Jost Wübbecke et al, "Made in China 2025: The making of a high-tech superpower and consequences for industrial countries" (December 2016), Mercator Institute for China Studies, online: <www.merics.org/sites/default/files/2017-09/MPOC_No.2_MadeinChina2025.pdf>; Lorand Laskai, "Why Does Everyone Hate Made in China 2025?", Council on Foreign Relations (28 March 2018), online: <www.cfr.org/blog/why-does-everyone-hate-made-china-2025>.

13 White House, "National Security Strategy", *supra* note 5. See also USTR, "Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974" (22 March 2018) [USTR, "Investigation into China's Acts"]; USTR, "2017 Report to Congress on China's WTO Compliance" (January 2018) [USTR, "Report on China's WTO Compliance"].

14 "Joint readout", *supra* note 11.

15 USTR, "Investigation into China's Acts", *supra* note 13.

16 Mark Wu, "China Inc." (2016) 57:2 Harv Intl LJ; Jennifer Hillman, "Testimony before the US-China Economic and Review Security Commission" (8 June 2018), online: <www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf>.

17 USTR, "The President's 2018 Trade Policy Agenda" (March 2018) at 22–24 [USTR, "President's 2018 Trade Policy Agenda"], online: <<https://ustr.gov/sites/default/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>>. See also William Davey, "Comment on Shaffer/Gao" (2018) U Ill L Rev 36; Michel Cartland, Gerard Depayre & Jan Woznowski, "Is Something Going Wrong in the WTO Dispute Settlement?" (2012) 46:5 J World Trade 979.

be considered a market economy only adds to this tension,¹⁸ with USTR Lighthizer warning that results unfavourable to the United States would be “cataclysmic” for the WTO.¹⁹ Against this backdrop, it is reasonable to suspect the United States of trying to “suspend” the operation of the dispute settlement system to prevent any further consolidation of China’s perceived advantage under the current rules until there is a rebalancing of rights and obligations, whether this is negotiated bilaterally or multilaterally.

Third, long before the arrival of the Trump administration and even before the emergence of open rivalry between the United States and China, successive US administrations have expressed concerns about the design and operation of the WTO dispute settlement system, in particular the Appellate Body. While the United States was the original proponent of a strong dispute settlement mechanism in the WTO, concerns that were raised by some almost immediately after the founding of the WTO²⁰ eventually found official expression in proposals²¹ in the negotiations to revise the Dispute Settlement Understanding (DSU).²² The essence of the US proposals is to strike a different balance between the autonomy of WTO adjudicators and the control by sovereign governments over the meaning of their WTO commitments, especially those that were intentionally left imprecise.²³ US concerns have reflected a combination of buyer’s remorse and a realization that the WTO legal framework contained insufficient

checks to preserve even the original balance between WTO members and adjudicators.²⁴

These longstanding systemic concerns are now simultaneously exacerbated by the two newer developments and provide the pretext for the US administration to advance those agendas. Restoring the dispute settlement function is therefore likely no longer a matter of merely reaching agreement on the proper conception of adjudicator autonomy, but may instead depend on adequate resolution of the US administration’s concerns about multilateralism in general and the terms of its trade with China in particular. The present paper does not address those two issues. Eventually, however, the United States will likely return to the view that a compulsory, impartial and enforceable dispute settlement mechanism is in its long-term interest. Even then, it may still insist on a degree of member control that reflects the intergovernmental nature of multilateral trade cooperation, especially that which increasingly takes place in a multipolar world. The starting point in the search for a new equilibrium is a better understanding of the concerns about the features of the existing system.

Innovation in Dispute Settlement under the WTO

The evolution of mechanisms for the settlement of international trade disputes has involved an incremental process of legalization and judicialization.²⁵ While dispute settlement under the GATT originally involved only political and diplomatic approaches, through a succession of agreements and procedural understandings it had already become, by the end of the Uruguay Round, almost a completely

18 *European Union—Measures Related to Price Comparison Methodologies*, WT/DS516; *United States—Measures Related to Price Comparison Methodologies*, WT/DS515.

19 Shawn Donnan, “Trump trade tsar warns against ‘market economy’ status”, *Financial Times* (21 June 2017), online: <www.ft.com/content/4d6ba03e-56b0-11e7-9fed-c19e2700005f>.

20 Alan Wolff, “Testimony before Senate Finance Committee on proposed WTO Dispute Settlement Review Commission Act” (10 May 1995), online: <www.finance.senate.gov/imo/media/doc/Hrg104-124.pdf>. Note, however, that the proposed act in support of which this testimony was provided was not adopted by the US Congress.

21 USTR, “Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement: Communication from the United States” (24 October 2005) TN/DS/W/82 [USTR, “Improving Member Control”]; (25 October 2005) TN/DS/W/82/Add.1.

22 WTO, “Understanding on rules and procedures governing the settlement of disputes”, Annex 2 of the Marrakesh Agreement [DSU], online: <www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>.

23 USTR, “Improving Member Control”, *supra* note 21.

24 Wolff, *supra* note 20.

25 The term “legalization” refers to the “increase in the use of formal legal rules to regulate a particular domain,” whereas the term “judicialization” refers to the “increase in enforceability through adjudication and the possible authorization of sanctions by an independent third party.” See Dirk De Bièvre and Arlo Poletti, “Judicial Politics in International Trade Relations: Introduction to the Special Edition” (2015) 14:(S1) *World Trade Rev* at S3. See also Kenneth Abbot et al, “The Concept of Legalisation” (2000) 54:3 *Intl Organization* 401.

rules-based system that included delegation of authority to independent panels.²⁶

Despite the progressive legalization of GATT dispute settlement, one significant feature remained unchanged: the ability of a contracting party, usually the responding party, to use the practice of consensus decision making to block the adoption of the final panel report, which was required to give it legal effect. The possibility of a veto meant that GATT panels had to be constrained in their legal reasoning and findings to increase the chances that their reports would be accepted by responding parties. Once a responding party agreed to the adoption of a report, however, it was quite likely to comply with the outcome.²⁷ As a result, while adopted GATT panel reports enjoyed a high degree of political legitimacy and high compliance rates, the most contentious trade issues could not be resolved through formal dispute settlement procedures.

The Uruguay Round negotiations resulted in a significant expansion of substantive trade commitments for members of the new WTO. To make these new commitments more credible, GATT dispute settlement practices were consolidated and strengthened in the new DSU. The most important innovation was to make several key stages of the dispute settlement process, including the adoption of final reports, subject to negative (or reverse) consensus decision making,²⁸ which removed the ability of individual members to block the progress of a dispute. A second significant innovation was a mechanism for appellate review. This was introduced only late in the negotiations to overcome concerns about

automatic adoption of bad panel reports and to ensure consistency and coherence across disputes.²⁹

The dispute settlement system embodied in the DSU is therefore a hybrid. The ad hoc panels of experts that emerged under the GATT were retained with only minor changes. Layered on top of this is the more institutionalized and judicialized Appellate Body, tasked with reviewing issues of law and legal interpretation developed by panels,³⁰ in accordance with customary rules of interpretation of public international law.³¹ Despite the conscious move toward legalization and judicialization, however, the negotiating history, architecture and text of the DSU indicate that the intention was never to create an independent judicial system.³² For instance, the DSU does not grant panels or the Appellate Body any inherent or ongoing jurisdiction. Instead, they are subordinate to the DSB, the governing body. This is confirmed by the fact that their mandate is to make “findings as will assist the DSB” in making recommendations and rulings,³³ their “reports” acquire binding legal status only once adopted by the DSB, and they are subject to strict timelines for circulating their reports, the Appellate Body more so than panels.³⁴ Finally, the text of various provisions of the DSU reinforces the subordinate status and role of WTO adjudicators to the DSB.³⁵

26 Robert Hudec, “Comment on: Free trade, sovereignty, democracy: The future of the World Trade Organization” (2002) 1:2 World Trade Rev 211 at 220 [Hudec, “Comment”].

27 Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, NH: Butterworth Legal Publishers, 1993) at 362.

28 In general terms, except in those circumstances where voting is authorized, article IX:1 of the Marrakesh Agreement provides that the WTO “shall continue the practice of decision-making by consensus followed under GATT 1947,” with “consensus” defined in the footnote as when “no Member...formally objects” to a decision. Negative (or reverse) consensus therefore means that a particular step in the dispute settlement process shall proceed unless there is a consensus (i.e., no formal objection) that it not proceed. The DSU (*supra* note 22) provides for negative consensus in the establishment of panels (article 6.1), the adoption of panel and Appellate Body reports (articles 16.4 and 17.14) and the authorization of retaliation (articles 22.6 and 22.7).

29 Debra Steger, “The Founding of the Appellate Body”, in Gabrielle Marceau, ed, *A History of Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge, UK: Cambridge University Press, 2015); Peter Van den Bossche, “From Afterthought to Centrepiece: The Appellate Body and Its Rise to Prominence in the World Trading System”, in Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes, eds, *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge, UK: Cambridge University Press, 2006) at 201.

30 DSU, *supra* note 22, art 17.6.

31 *Ibid*, art 3.2.

32 Steger, *supra* note 29; Richard Steinberg, “Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints” (2004) 98 AJIL 247 at 250.

33 DSU, *supra* note 22, arts 7, 11.

34 For panels, DSU (*supra* note 22) article 12.9 provides that in “no case should the period from the establishment of a panel to the circulation of the report to the Members exceed nine months.” For the Appellate Body, DSU article 17.5 provides that in “no case shall the proceedings exceed 90 days.” Overall, according to DSU article 20, the entire process “shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed.”

35 For example, the DSU provides that appellate review is conducted by a “body” and not a court, composed of “members” instead of judges, and that issues “reports” instead of decisions, containing “findings” and “conclusions,” not rulings.

The division of labour between the WTO's political and adjudicative bodies was further codified in several provisions intended to preserve political control over the interpretation of the substantive commitments that WTO members were in the process of making. First, the DSU provides, in two separate provisions, that WTO adjudicative bodies cannot "add to or diminish the rights and obligations" of WTO members.³⁶ Second, the Marrakesh Agreement reserves to WTO members the "exclusive authority to adopt interpretations" of the obligations contained in the WTO agreements.³⁷ While in practice it may be difficult to distinguish between the "clarifications" that are meant to result from the dispute settlement system³⁸ and the "authoritative interpretations" reserved for members alone,³⁹ the clear intention was nonetheless that there be constraints on the ability of WTO adjudicators to take on an expansive law-making role.

Unanticipated Deficiencies in the WTO Legal Framework

The significance of the removal of the veto over report adoption and the creation of a judicialized institution for appeals cannot be, and generally is not, underestimated. These changes can be credited for the unprecedented success of the adjudication of international trade disputes in the WTO. However, they also fundamentally changed the character of the system in ways that were likely not fully appreciated, or appreciable, at the time. Four characteristics of the legal framework created by the WTO, when taken in combination, have turned out to have unintended consequences for the functioning and legitimacy of the dispute settlement system.

First, the multiple objectives set out in the DSU offer potentially competing visions of the priorities of the dispute settlement system and, by implication,

the mandates of WTO adjudicators. According to various sub-provisions of article 3, the system is expected to provide "security and predictability" to the multilateral trading system, "clarify the existing provisions" of the WTO Agreement, deliver "prompt," "satisfactory" and "positive" settlement of disputes, and maintain "a proper balance of rights and obligations." The Appellate Body in particular "shall address each of the issues raised," but in "no case shall the proceedings exceed 90 days."⁴⁰ All of these objectives are to be achieved while not "adding to or diminishing the rights and obligations" of members and deferring to the members' exclusive authority, under the Marrakesh Agreement, to adopt interpretations of their WTO obligations.⁴¹ Depending on the circumstances, these objectives and limitations can be arranged in various configurations to justify either an expansive law-making mandate for adjudication or a more limited, deferential one.

Second, like many international agreements, the Marrakesh Agreement and the GATT contain text that is imprecise and indeterminate, including gaps, overlaps and even conflicts.⁴² There may be several reasons for this, including, for example, intentionally negotiated constructive ambiguity, insufficient legal review and parallel negotiations over similar types of obligations.⁴³ Many provisions may also constitute "incomplete contracts" in that they use general language that later needs to be interpreted and applied in transaction-specific circumstances.⁴⁴ Clarifying treaty obligations that may be imprecise, indeterminate, ambiguous or incomplete, whether intentional or not, is one of the objectives of dispute settlement. However, in these circumstances an effective mechanism for political course correction would be required to manage the risks and consequences of interpretations

36 DSU, *supra* note 22, arts 3.2, 19.2.

37 Marrakesh Agreement, *supra* note 1, art IX:2. DSU (*supra* note 22) article 3.9 further acknowledges the hierarchy of "authoritative interpretations" over the results of dispute settlement.

38 DSU (*supra* note 22) article 3.2 provides that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements."

39 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" (2005) 8:803 J Intl Econ Law.

40 See DSU, *supra* note 22, arts 17.12, 17.5.

41 Marrakesh Agreement, *supra* note 1.

42 Hudec, "Comment", *supra* note 26 ("many of the WTO's existing legal texts suffered from gaps, papered-over differences and other forms of legal incoherence" at 212). See also Lorand Bartels, "The Separation of Powers in the WTO: How to Avoid Judicial Activism" (2004) 53 ICLQ 861 at 871.

43 Bartels, *supra* note 42. See also USTR, "Improving Member Control", *supra* note 21.

44 Judith Goldstein & Richard Steinberg, "Regulatory Shift: The Rise of Judicial Liberalization at the WTO" in *The Politics of Global Regulation*, Walter Mattli & Ngaire Woods, eds (Princeton, NJ: Princeton University Press, 2009) at 211.

that were not intended or anticipated by, and are not acceptable to, WTO members.

Third, as it turns out, compared to the high degree of political control exercised over disputes by GATT contracting parties, the opportunities for WTO members, either individually or collectively, to assert political oversight over adjudicator interpretations have turned out to be limited. All legal systems have some mechanisms of political control, and in many domestic legal systems, co-equal branches of government provide checks and balances on each other.⁴⁵ While in principle the WTO's adjudicative bodies are subordinate to its political bodies, and can be overridden by interpretations adopted by these bodies, consensus decision making among the increasingly diverse and fractious membership effectively precludes any collective action.⁴⁶ A large majority of members could disapprove of a result of adjudication, but it could still be adopted as final and binding as long as even one member approves, with little prospect of "legislative" reversal of the outcome in the future. Although this imbalance has been widely acknowledged,⁴⁷ the legitimacy risks have been downplayed on the grounds that political control can still be exercised effectively through the expression of individual member views in the DSB, the control over appointment and reappointment of adjudicators, and ultimately the refusal to comply.⁴⁸

Finally, the combination of the multiple objectives of dispute settlement, the need for determinations on imprecise obligations, and ineffective political oversight has meant that WTO adjudicative bodies, and the Appellate Body in particular, enjoy a

considerable degree of autonomy⁴⁹ to affect the rights and obligations of WTO members in ways that were not only not intended, but in fact were explicitly prohibited. Indeed, WTO adjudicative bodies benefit from more immunity from political override than domestic judicial bodies, even those explicitly granted judicial independence in a system of separation of powers between co-equal branches of government. Even in the European Union, due to the more limited EU membership, its comparatively like-minded nature and qualified majority voting on many issues, EU member states have more effective opportunities to overturn erroneous or politically unpalatable judgments of the Court of Justice of the European Union (CJEU).

While these four characteristics of the WTO legal framework do not make an expansive role for adjudication inevitable,⁵⁰ it is generally acknowledged they have allowed WTO adjudicators to engage in a degree of unintended law making.⁵¹ Over the years, different configurations of adjudicators, supported by different configurations of Secretariat legal support, have balanced the objectives and limitations of the dispute settlement system in different ways. Some results have reflected the "extraordinary circumspection and care" demanded of adjudicators by the weaknesses of the political bodies.⁵² Other results amount to a "declaration of independence" in pursuit of greater authority, autonomy and a more expansive law-making mandate for the institution.⁵³

A certain amount of law making through adjudication is to be expected in any legal system, if only because resolving textual ambiguities will inevitably result in clarifications of obligations in a way that one party may not have originally expected. Where there may be some disagreement, however, is over how significant this law making is in the WTO and whether it has positive or

45 Bartels, *supra* note 42 at 866–68.

46 Hudec, "Comment", *supra* note 26 ("the WTO's inability to legislate on controversial issues would deprive WTO law of a safety valve that most other legal systems possess – the power to reverse errant rulings by legislation" at 212). See also Claus-Dieter Ehlermann, "Six Years on the Bench of the 'World Trade Court': Some Personal Experiences as Member of the Appellate Body of the World Trade Organization" (2002) 36:4 *J World Trade* 605.

47 See Claude Barfield, "Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization" (2001) 2:2 at 403–15. See also the response by Hudec, "Comment", *supra* note 26. See also Ehlermann & Ehling, *supra* note 39 (warning that "if the legislative response...is not available or not working, the independent (quasi-) judiciary becomes an uncontrolled decision-maker and is weakened in its legitimacy" at 813).

48 Steinberg, *supra* note 32 at 249; Laurence Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 *Cal L Rev* 899.

49 See Ehlermann, *supra* note 46 ("In view of the weakness of the political decision-making process, the responsibility of the AB is enormous. It must proceed with extraordinary circumspection and care", at 606).

50 Steinberg, *supra* note 32 at 250.

51 *Ibid.* See also Andrew Lang, "The Judicial Sensibility of the WTO Appellate Body" (2017) 27:4 *Eur J Intl L* 1096; Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary" (2016) 27:1 *Eur J Intl L* 9.

52 Ehlermann, *supra* note 46 at 606.

53 Howse, *supra* note 51 at 28. See also Hélène Ruiz Fabri, "The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story" (2017) 27:4 *Eur J Intl L* (celebrating the "rise of a fully-fledged judicial power" at 1080).

negative consequences, including whether it preserves or upsets the carefully negotiated balance of concessions and whether it enhances or complicates efforts to address problems in trade cooperation. On these points, there is a considerable divergence of views among WTO members.

Objections, Actions and Reactions

It is tempting to consider that the crisis in the WTO dispute settlement system, and the rules-based trading system more generally, started with the election of the current US administration. Instead, almost from the very founding of the WTO, the United States has only awkwardly accepted the encumbrances on its freedom of action that the move to the WTO represented. As soon as it became clear that there were few checks and balances on this new institutionalized and judicialized system, the United States began a slow escalation of efforts to restore a balance more acceptable to it. Other members, and in many ways the institution itself, have seen no real reason to engage with these US efforts, focusing instead on consolidating the independence and authority of the institution, while exploiting the various decision-making rules to contain and limit US desire for reform. The arrival of the most recent US administration has only brought these longstanding differences into clearer view, but in a manner that now may even pose an existential threat to the system as a whole.

The United States as Persistent Objector

It was the United States that originally sought to strengthen the dispute settlement system in the Uruguay Round,⁵⁴ the judicialization of which was initially resisted by other major powers such as

the European Union⁵⁵ and Brazil.⁵⁶ Shortly after the founding of the WTO, however, the United States seems to have had second thoughts about the risks created by combining negative consensus adoption of reports with positive consensus member override.⁵⁷ Early in the formal negotiations to revise the DSU, the United States sought amendments that would provide more checks and balances in WTO dispute settlement, specifically by providing for more “flexibility and member control,” as well as guidance on the “interpretative approach” to be followed by adjudicators.⁵⁸ These proposals have been discussed extensively and continuously since their formal introduction, although progress has not been possible.⁵⁹

Over the intervening years, the United States appears to have grown more concerned about what it considered the risk and the reality of adjudicative overreach, especially given its ongoing failure to convince other members of the need for more effective checks and balances. It has expressed these concerns in a variety of circumstances over the years, but they are now most succinctly summarized in the US president’s 2018 Trade Policy Agenda.⁶⁰ They fall into three categories of concern: certain substantive interpretations of WTO adjudicative bodies; certain systemic approaches adopted by these bodies, especially the Appellate Body; and certain procedural actions of the Appellate Body that the United States considers to be beyond its authority.

Under the category of substantive concerns, the United States considers that WTO adjudicators have on a number of occasions “added to or diminished” the rights and obligations of WTO

54 Hudec, “Comment”, *supra* note 26. See also Andrew Stoler, “The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?” (2004) 3:1 World Trade Rev 99.

55 EC, “Communication from the European Economic Community” (24 September 1987), MTN.GNG/NG13/W/12, online: <www.worldtradelaw.net/document.php?id=history/urdsu/W12.pdf>.

56 Brazil, “Communication from Brazil” (7 March 1988) MTN.GNG/NG13/W/24, online: <www.worldtradelaw.net/document.php?id=history/urdsu/W24.pdf>.

57 Wolff, *supra* note 20; Stoler, *supra* note 54 (“United States negotiators got what they wanted, but they don’t want it any longer” at 155).

58 USTR, “Improving Member Control”, *supra* note 21.

59 Ronald Saborio, “Report by the Chairman Dispute Settlement Body in Special Session to the Trade Negotiations Committee” (12 December 2015) TN/DS/28.

60 USTR, “President’s 2018 Trade Policy Agenda”, *supra* note 17. See also “Statements of the United States at the August 2018 Meeting of the Dispute Settlement Body”, items 4 and 15 [USTR, “US Statements, August 2018”], online: <https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_Stmt_as-delivered.fin_public.pdf>.

members, contrary to the express prohibition in the DSU.⁶¹ It cites specific instances of interpretations related to subsidies, technical barriers to trade, safeguards, anti-dumping duties and countervailing duties, which the United States considers do not reflect what was negotiated by members.⁶² Some of these examples may simply be the sour grapes of a losing party, others may involve interpretations based on ambiguous obligations that reflect incomplete negotiation, and still others may reflect legitimate concern that adjudication simply provided the wrong answer. Regardless of the underlying reason for the concern, they involve interpretations that might, in a well-functioning system, be subject to review in the political bodies to confirm whether the results maintain or modify the “proper balance between the rights and obligations” of members.⁶³ Such a discussion is unlikely in the current legal framework, and even if it were to occur, any member that has benefited from the contested interpretation would simply pocket the advantage and block any attempt to exercise collective political override.

Under the category of systemic concerns, the United States has expressed a number of grievances about how WTO adjudicators, in particular the Appellate Body, have defined the scope of their mandates. It refers in particular to a number of instances that it considers involve *obiter dicta* or advisory opinions in reports, unauthorized review on appeal of the factual findings of panels, in particular those related to domestic law, and the inappropriate legal status given to past adjudicator reports.⁶⁴ The concern is not so much that adjudicators have modified the rights and obligations of members, although this may also be the result in certain circumstances. Instead, it is about adjudicators exceeding their mandates by providing legal reasoning and findings on issues beyond those necessary to resolve disputes, or

by treating their own past analysis almost as an authoritative, even binding, source of interpretation of WTO obligations. These concerns reveal a disagreement about the nature of the dispute settlement system. Whereas the United States considers the system to be more akin to contract arbitration, it considers that some important members and perhaps the Appellate Body itself see it as “evolving kinds of governance” (*sic*).⁶⁵

Under the category of procedural concerns, the examples cited by the United States are simply procedural manifestations of its concerns about the mandate of the Appellate Body. First, it objects to the approach taken by the Appellate Body since 2011 when it cannot meet the strict deadline in the DSU for circulating its reports to members.⁶⁶ Second, it now objects to the Appellate Body deciding on its own to extend Appellate Body members beyond the end of the terms fixed in the DSU, which it is authorized to do under rule 15 of the Working Procedures for Appellate Review.⁶⁷ In the case of compliance with the 90-day deadline, the United States objects to a change in Appellate Body practice, whereas in the case of extensions of Appellate Body members, the United States now objects to a rule that it had previously accepted for almost 20 years. Both issues involve provisions of the DSU that impose conditions on the Appellate Body, adherence with which the United States considers to be essential to the legitimacy of the system. But more importantly for the United States is that the subordination of the Appellate Body to the DSB means that only the DSB can decide to waive compliance with either of them. In other words, the United States objects to the

61 USTR, “President’s 2018 Trade Policy Agenda”, *supra* note 17.

62 *Ibid* at 23–24.

63 DSU, *supra* note 22, art 3.3.

64 USTR, “President’s 2018 Trade Policy Agenda”, *supra* note 17 at 26–28. See also USTR, “Statements of the United States at the May 2016 Meeting of the Dispute Settlement Body” (16 May 2016) [item on reappointment of an Appellate Body member] [USTR, “US Statements, May 2016”], online: <www.wto.org/english/news_e/news16_e/us_statement_dsbmay16_e.pdf>; USTR, “Statements of the United States at the November 2017 Meeting of the Dispute Settlement Body” (22 November 2017) [item on adoption of reports in *Indonesia—Horticultural Products*] [USTR, “US Statements, November 2017”], online: <https://geneva.usmission.gov/wp-content/uploads/2017/11/Nov22.DSB_.pdf>.

65 Lighthizer interview, *supra* note 3. See also Anthea Roberts, *Is International Law International?* (Oxford, UK: Oxford University Press, 2017). See also Ricardo Ramírez-Hernández, “Farewell Speech of Appellate Body Member”, WTO Appellate Body (28 May 2018), online: <www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm> (“is the WTO a contract or a constitution?”).

66 USTR, “President’s 2018 Trade Policy Agenda”, *supra* note 17 at 24–25. See also USTR, “Statements of the United States at the June 2018 Meeting of the Dispute Settlement Body” (22 June 2018) [item on DSU, article 17.5] [USTR, “US Statements, June 2018”], online: <https://geneva.usmission.gov/wp-content/uploads/2018/06/Jun22.DSB_Stmt_as-delivered.fin_.public.pdf>.

67 WTO, *Working Procedures for Appellate Review* (adopted 16 August 2010), WTO Doc WT/AB/WP/6; USTR, “2018 Trade Policy Agenda”, *supra* note 17 at 25–26. See also USTR, “Statements of the United States at the March 2018 Meeting of the Dispute Settlement Body” (27 March 2018) [item on Appellate Body matters] [USTR, “US Statements, March 2018”], online: <https://geneva.usmission.gov/wp-content/uploads/2018/03/Mar27.DSB_Stmt_as-delivered.fin_rev_.pdf>.

Appellate Body's claim of independent authority to determine its own schedule and roster of members.

As a result of its substantive concerns about the law-making character of certain interpretations, its systemic concerns about certain approaches taken by the Appellate Body, and its procedural concerns about the Appellate Body unilaterally disregarding the treaty limits placed upon it, the United States has sought to exercise more political control over the operation of the dispute settlement system. It initially attempted to engage in negotiations to strengthen the legal framework for political oversight.⁶⁸ It has been persistent in its objections, in the DSB and elsewhere, to what it considers were instances of adjudicator overreach.⁶⁹ With consensus decision making preventing any collective action, the United States began resorting to techniques to exercise unilateral influence over the adjudicative process. It started by refusing to support the reappointment of two US nationals on the Appellate Body, first in 2007 and again in 2011. This tactic eventually expanded to include requests to "interview" any Appellate Body member seeking reappointment, culminating in its refusal in 2016 to support the reappointment of Seung Wha Chang, the Appellate Body member from Korea.⁷⁰ Starting in 2011, along with some other members, the United States began confronting the Appellate Body about the latter's claim of independent authority to deliver reports after the deadline without seeking the agreement of the parties or the permission of the DSB.⁷¹

This sequence of events highlights the long history of US concerns about, and responses to, what it considers to be adjudicative overreach under the judicialized system that was established in the WTO. Whether or not one agrees with US concerns, its motivations or its tactics, it is hard to say that the United States has not acted consistently and

persistently across successive US administrations.⁷² The current impasse is just the latest instalment in a longstanding, but progressively escalating, effort to bring about, either through collective or individual action, a different balance between the political and adjudicative functions of the WTO. However, what started out as an effort to restore a degree of member control and provide guidance on appropriate interpretative approaches now may be about much more, given the current US administration's concerns about multilateralism and the terms of its trade with other major economies.

Reactions of Other Members

There is, of course, room for legitimate disagreement about whether political checks and balances on adjudicative outcomes are necessary or sufficient, about whether WTO adjudicators have in fact exceeded their mandate and, if so, whether either of these present a problem for the dispute settlement system specifically or for trade cooperation generally. For starters, US proposals to introduce more "flexibility and member control" into the DSU have received very little support from other members, in part out of concern that the real objective was to restore power-based features to the dispute settlement system in which the United States could use its leverage to achieve more favourable results. There is no doubt some truth to this, and past and recent statements from USTR Lighthizer have only served to heighten such concerns.⁷³

Regarding US concerns about certain substantive interpretations, many of these concerns have been shared by one or more other members on different occasions.⁷⁴ Statements of disagreement in the DSB are not in themselves confirmation of WTO adjudicator error or overreach, as losing parties will invariably criticize, and winning parties will

68 USTR, "Improving Member Control", *supra* note 21.

69 USTR, "President's 2018 Trade Policy Agenda", *supra* note 17; USTR, "US Statements, August 2018", *supra* note 60; USTR, "US Statements, May 2016", *supra* note 64; USTR, "US Statements, November 2017", *supra* note 64; USTR, "US Statements, June 2018", *supra* note 66; USTR, "US Statements, March 2018", *supra* note 67.

70 "US Statements, May 2016", *supra* note 64.

71 USTR, "US Statements, August 2018", *supra* note 60; USTR, "US Statements, June 2018", *supra* note 66. See also WTO, *Minutes of the meeting of the Dispute Settlement Body* (held on 10 July 2012) WTO Doc WT/DSB/M/319.

72 There have nonetheless been occasions where the United States has supported what could be seen as adjudicative law making, including controversial rulings related to the submission of *amicus curiae* briefs and open hearings, and the Appellate Body's self-assigned authority to "complete the analysis." On the first, see WTO, *Minutes of the General Council Meeting* (held November 2000), WTO Doc WT/GC/M/60. On the second, see WTO, *Minutes of the Dispute Settlement Body Meeting* (held July 1997), WTO Doc WT/DSB/M/36.

73 Lighthizer interview, *supra* note 3.

74 Terrence Stewart, "The Broken Multilateral Trade Dispute System" (Washington, DC: Asia Society Policy Institute, 2018), online: <www.stewartlaw.com/Content/Documents/Terence%20P.%20Stewart%20-%20The%20Broken%20Multilateral%20Trade%20Dispute%20System.pdf>.

invariably praise, the outcome.⁷⁵ However, it is also not necessarily the case that just because a party lost, its criticism is biased and unfounded, and that adjudication delivered an appropriate and legitimate outcome. Since very few members comment in the DSB on the results of disputes in which they were not the main parties, evaluating the legitimacy of certain interpretations on the basis of DSB discussion of specific disputes is fraught with difficulty.⁷⁶ More than anything, the unrepresentativeness of DSB discussions, combined with the ability of a successful disputing party to block any effort to collectively override a given interpretation, only confirms that in the end there are no effective checks and balances on the WTO adjudicative function.⁷⁷

There is even less agreement with the United States on its systemic and procedural concerns about certain approaches of the Appellate Body. For a variety of reasons, many other members have more ambitious expectations for the dispute settlement system than the United States. They see the Appellate Body, as the institution often sees itself, as an independent world court charged with providing clarification, and even promoting evolution, of the trade rules for the benefit of all members.⁷⁸ The European Union (i.e., the European Commission) may be more comfortable with activist adjudicators, given the contribution the CJEU has made to constructing the internal EU legal order; other powerful members may tolerate unchecked adjudicator law making as long as it affects the rights and obligations of the United States proportionately more than it does them; and smaller WTO members may support a strong tribunal as their last defence against potential pressure from more powerful states. For many, therefore, adherence to precedent provides predictability, *obiter* provides needed clarity over imprecise obligations, and it is natural for an

independent tribunal to control its timetable. That the negotiating history, architecture and text of the DSU may not support these more ambitious expectations is either only a matter of semantics⁷⁹ or just evidence that the system has evolved beyond the original intention reflected in the DSU.

Reflecting this broader conception of the role of adjudication, many members accuse the United States of attempting to undermine the “judicial independence” of the Appellate Body and the “international rule of law.”⁸⁰ While these claims seem to be justified in light of the more recent pronouncements of senior members of the US administration, including the president himself,⁸¹ they do not address the longer standing concerns of the United States that institutional imbalance undermines the legitimacy of the WTO (and may even be partly responsible for provoking the worrying rhetoric of the current US administration). These members seem to consider judicial independence only in binary terms; anything that interferes with the absolute right of a tribunal to be wrong will, by definition, revert the dispute settlement system to a power-based system. But even if the WTO legal framework envisaged an independent judiciary — although the United States disputes this⁸² — judicial independence does not exist in a vacuum. A true system of separation of powers depends upon the dynamic interaction between equally effective rule making and adjudicative bodies. There can be said to be a “politically optimal level of judicial independence.”⁸³ In the case of the WTO, the relatively weaker and ineffective rule-making function magnifies the power of the adjudicators, along with the implications of their legal findings and conclusions.

75 Cosette Creamer & Zuzanna Godzimirska, “[De]Legitimation at the WTO Dispute Settlement Mechanism” (2016) 49 Vand J Transnat’l L 275.

76 *Ibid.* See also Steinberg, *supra* note 32.

77 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” (2013) 1:1 JL & Courts 61 (“To the extent that override is, in practice, off the table, indirect controls will be ineffective” at 66).

78 Van den Bossche, *supra* note 29; Howse, *supra* note 51; Fabri, *supra* note 53; Isabelle Van Damme, “Treaty Interpretation by the WTO Appellate Body” (2010) 21:3 EJIL 605 (“From the outset, the Appellate Body made the conscious choice to function as if it were a court” at 606).

79 See e.g. Joseph Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement” (2001) 35:2 J World Trade 191 (“the Appellate Body is a court in all but name” at 201).

80 WTO, *Minutes of the Meeting of the Dispute Settlement Body* (held on 28 May 2016) WTO Doc WT/DSB/M/379. See also James Bacchus, “Might Unmakes Right: The American Assault on the Rule of Law in World Trade”, CIGI, CIGI Papers No 173, 18 May 2018.

81 White House, “2018 White House Business Session”, *supra* note 2; Lighthizer interview, *supra* note 3; Bolton, *supra* note 5.

82 USTR, “President’s 2018 Trade Policy Agenda”, *supra* note 17; USTR, “US Statements, November 2017”, *supra* note 64. See also Steger, *supra* note 29.

83 Erik Voeten, “International Judicial Independence”, in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, UK: Cambridge University Press, 2012) 421 at 424.

Other members, and in more recent years the institution itself, have never adequately acknowledged this concern or engaged with the United States in a genuine discussion of how to accommodate diverging expectations about the appropriate institutional balance. They had no reason. The negative consensus rule that allows any dispute settlement report to be adopted virtually automatically, combined with the positive consensus rules that effectively prevent any collective censure of adjudicators or efforts to modify the DSU, have allowed the Appellate Body to pursue its “declaration of independence”⁸⁴ unchecked by any political oversight that might have helped ensure the legitimacy of the outcomes, and of the system more generally. It should perhaps now not come as a surprise that the same consensus rules that have been used so effectively to sideline US concerns for many years are now being used by the United States to ensure that its concerns can no longer be sidelined. Since all members share the responsibility for allowing it to come to this point, all members bear the responsibility to find a way forward.

Options for Restoring the Dispute Settlement Function

It is likely that the fate of the WTO dispute settlement system no longer depends only on the ability of WTO members to reach an accommodation on the essential features and operation of that system. It may now be linked, directly or indirectly, to the outcomes of changing perceptions of the value of institutionalized multilateral cooperation and the shifting global balance of economic power.⁸⁵ Restoration of the dispute settlement function may only be possible as part of a new bargain that updates the balance of rights and obligations, as was the case for the new features of the DSU that only came into force as part of the conclusion of the Uruguay Round.

84 Howse, *supra* note 51.

85 Zaki Laidi, “Is Multilateralism Finished?”, *Project Syndicate* (18 May 2018), online: <www.project-syndicate.org/onpoint/is-multilateralism-finished-by-zaki-laidi-2018-05>.

As the current turmoil in international trade relations attests, such a bargain may be difficult to achieve. But at a minimum, this may require updating the rules to ensure a level playing field between market-oriented economies, for which the trading system was originally designed, and economies that retain significant non-market features, to which the current rules may not adequately apply.⁸⁶ Such a revision might include new interpretations of existing rules (for example, dealing with subsidies, anti-dumping duties and safeguard measures, etc.), in some cases by modifying interpretations that emerged in previous WTO disputes. It might also include the introduction of new or strengthened disciplines (for example, dealing with SOEs, competition, transparency, and so forth). The content of these new substantive rules is not the focus of this analysis, but if and when the major economies recommit to the rules-based trading system, it will presumably retain a binding dispute settlement system. Based on the evaluation offered in the previous sections, this section focuses on possible features of a restored and updated dispute settlement function.

In the initial stages of the impasse in the DSB over Appellate Body appointments, there was some discussion of excluding the United States from decision making or recreating a separate mechanism for appellate review to operate without US involvement.⁸⁷ The idea was to deprive the United States of its leverage over the regular system while allowing other members continued access to appellate review. Fortunately, it does not appear that any WTO member government officially endorsed these proposals. In addition to many legal and practical challenges with attempting to work around the US stranglehold on the Appellate Body, doing so would be counterproductive. For instance, overriding the United States through voting would only further undermine the legitimacy of the system and make its unravelling even more likely. The United States would be unlikely to submit to, or abide by the results of, an appeal heard by an Appellate Body division composed

86 Wu, *supra* note 16.

87 Robert McDougall, “The Search for Solutions to Save the WTO Appellate Body”, *European Centre for International Political Economy* (December 2017), online: <<http://ecipe.org/publications/the-search-for-solutions-to-save-the-wto-appellate-body>>; Tetyana Payosova, Gary Hufbauer & Jeffrey Schott, “The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures”, *Peterson Institute for International Economics, PIIE Policy Brief 18-5* (March 2018).

of any members appointed over its objections. Likewise, creating a parallel system would not deprive the United States of leverage, but would in fact give it exactly what it appears to want: either a much weaker ad-hoc appeal mechanism or an exemption from binding dispute settlement outright. The United States would likely eventually sign up to a parallel ad-hoc appeal mechanism and push to dismantle the original one. In any event, for most members, for whom the United States is their largest trading partner, a dispute settlement mechanism that does not apply to the United States holds vastly diminished appeal.

Guiding Principles for the Dispute Settlement System

The future of rules-based multilateral trade cooperation depends instead on achieving an accommodation of the various interests in the operation of a dispute settlement system. Arriving at such an accommodation might be facilitated by consideration of a number of guiding principles by which dispute settlement should operate.

- A compulsory and binding dispute settlement system, including automatic initiation of disputes and adoption of results, is an essential feature of the rules-based trading system.
- WTO members have the responsibility to administer, collectively, the dispute settlement system, including the right to modify the mandate of adjudication and to override any interpretation advanced by adjudicators.
- The primary objective of the dispute settlement mechanism is to resolve disputes between members in a prompt and positive manner, and all other objectives are incidental and subordinate to this task.
- Retaining trust in the system requires that adjudicators remain independent and impartial, and that members refrain from any action that might undermine this impartiality.
- To preserve the delicate political balancing act that multilateral trade agreements represent, adjudicators should exercise

“extraordinary circumspection and care”⁸⁸ in interpreting WTO obligations.

- The purpose of appellate review is to protect against erroneous panel results and incoherence between panel reports, and is not meant to be an opportunity for re-evaluation of the facts or for expansive advisory analysis of legal provisions.
- To retain the legitimacy of the system and the overall balance of rights and concessions, an effective mechanism of political counterbalance is both necessary and appropriate.
- Not every trade dispute can be or should be resolved through adjudication, so there should be effective opportunities, and the will to use them, for alternative and conciliatory dispute settlement.

With these principles in mind, a number of possible changes could be made to restore and update the dispute settlement function and enhance its legitimacy. Changes could be made in five areas, including to: improve institutional balance; redirect some issues away from adjudication; clarify the mandate and approach of adjudication; improve the institutional support for adjudication; and address a number of procedural issues.

Improve Institutional Balance

As already indicated, all legal systems have some mechanism for political control. Legitimacy is difficult to sustain in its absence. It is a question of achieving the right balance. Under the GATT, individual countries could block the dispute settlement process, which improved its legitimacy but undermined its effectiveness. By removing this right completely, which addressed the effectiveness problem, the WTO has perhaps gone too far the other way, which has undermined its legitimacy. This institutional imbalance was recognized early in the life of the WTO,⁸⁹ and over the years there have been proposals to strike a different balance between

88 Ehlermann, *supra* note 46. See also John Jackson, “Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT” (1987) 13:1 *J World Trade* 1 (“Internationally, a case can be made that in order to encourage nations to be willing to submit themselves to an adjudicatory system, it will be necessary for that system to be cautious in interjecting the judges’ choices of policy goals into previously agreed rules. Therefore, the rules should be cautiously and restrictively interpreted or applied” at 10).

89 Hudec, “Comment”, *supra* note 26; Ehlermann, *supra* note 46; Barfield, *supra* note 47; Stoler, *supra* note 54.

political control and adjudicator independence. But nothing has been done to correct the situation.

On one end of the spectrum are the ideas of reverting to individual member veto⁹⁰ or allowing disputing parties to remove certain parts of reports prior to adoption.⁹¹ These proposals would reintroduce power-based features into the system and therefore would unlikely be unacceptable to most members (and have indeed been rejected for that reason in the negotiations to revise the DSU). On the other end of the spectrum are proposals that Appellate Body members serve one term of longer duration than the current single terms and that they be made permanent.⁹² These changes would deprive WTO members of the opportunity to interfere with the functioning of the Appellate Body, but in themselves do not address the underlying legitimacy concerns and would probably just divert the pressure elsewhere. They would therefore likely be unacceptable to some, at least not without the introduction of another effective means to exercise political oversight.

The answer to restoring balance and enhancing legitimacy lies instead in strengthening collective political oversight of disputes. This might include increasing political control over the launch and finalization of certain disputes, or certain stages of disputes, or increasing the chances of political override of the results of adjudication. Some ideas include greater recourse to voting,⁹³ minority blocking of report adoption,⁹⁴ adoption of parts of reports,⁹⁵ or some form of review of the results of adjudication by expert groups.⁹⁶ The introduction of “interim review” of appeal reports might provide an opportunity for the Appellate Body to be sensitized

to issues of specific concern.⁹⁷ It will be extremely difficult to move away from consensus (positive or negative) in the area of dispute settlement, but it is becoming obvious that the current approach does not sufficiently safeguard the delicate balance between political and legal considerations in the interpretations of the trade rules.

Redirect Some Issues Away from Adjudication

The de facto automaticity and lack of political filters in the dispute settlement system have created an environment in which any issue can be subject to adjudication, despite its potential ramifications for the integrity of the trading system. Some trade disputes just should not be resolved through adjudication, including where WTO obligations are imprecise as a result of incomplete negotiations or where an issue is so politically sensitive that an adjudicated outcome risks undermining the system (national security, for example). These disputes may be better resolved outside the adjudicative process. The current system relies on self-restraint in avoiding such sensitive disputes, but as the membership of the WTO grows and trade disputes reach further and further into domestic regulation, that self-restraint may be starting to break down. Some additional filters could be introduced in its place.

First, the more contentious trade rules could be made non-justiciable, removing them from the jurisdiction of adjudication, either *ex ante* or on a dispute-specific basis. A mechanism could be developed to allow a member to petition the governing bodies (or an expert group) to exempt a matter from adjudication, perhaps on condition that an alternative political or conciliation process be initiated to resolve the issue. Second, WTO adjudicators could be authorized to decline to hear, or to make findings on, controversial matters, either on their own initiative or in response to a petition from a party. This could also be done either as part of a request for leave to appeal (*certiorari*) or by abstaining from making findings in the course of a dispute (*non liquet*). It could also be connected to a process that refers the matter to the governing bodies for political resolution (a form of “legislative remand”).⁹⁸ Third, to facilitate resolution of sensitive issues, the Appellate Body could be allowed to

90 Lighthizer interview, *supra* note 3; Barfield, *supra* note 47.

91 USTR, “Improving Member Control”, *supra* note 21.

92 Bacchus, *supra* note 80. The European Union has also proposed such an amendment: see EC, “European Commission presents comprehensive approach for the modernisation of the World Trade Organisation” (18 September 2018), online: <http://europa.eu/rapid/press-release_IP-18-5786_en.htm>.

93 Jennifer Hillman, “Moving Towards an International Rule of Law”, in Gabrielle Marceau, ed, *A History of Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge, UK: Cambridge University Press, 2015) 60 at 75.

94 Hudec, “Comment”, *supra* note 26; Barfield, *supra* note 47.

95 USTR, “Improving Member Control”, *supra* note 21.

96 Peter Sutherland, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium: Report by the Consultative Board to the Director-General* (Geneva, Switzerland: WTO, 2004) at 56.

97 USTR, “Improving Member Control”, *supra* note 21.

98 Payosova, Hufbauer & Schott, *supra* note 87.

suspend its proceedings in certain circumstances, similar to what panels can already do, either on its own initiative if it considers the issue too sensitive or in response to an individual or joint request from the parties.⁹⁹ Panels might be encouraged, even instructed, to make more use of their prerogative to “consult regularly with the parties to the dispute to give them adequate opportunity to develop a mutually satisfactory solution.”¹⁰⁰

Clarify the Mandate and Approach of Adjudication

As detailed as it is, the DSU is still imprecise and incomplete on a number of matters, including the objectives of the system, the standards of review, and the scope of adjudication and of appellate review. Further guidance could be provided in these areas to streamline the adjudicative function.

First, it could be clarified that the primary objectives of the dispute settlement system are the “prompt, satisfactory and positive settlement of disputes” and the “maintenance of the balance of concessions,” that adjudicators need only “clarify existing provisions” when necessary to achieve these primary objectives, that the function of adjudicators is to “assist the DSB in making recommendations,” and that it is the achievement of these primary objectives that provides “security and predictability” to the trading system. A prioritization of the objectives in this way would provide guidance to adjudicators about when and how to elaborate findings related to certain provisions.

Second, the standard of review to be employed by adjudicators when reviewing national measures could be further elaborated. A more prescriptive and deferential standard of review could be adopted to supplement the current requirement to make an “objective assessment of the facts,”¹⁰¹ especially in cases where obligations are ambiguous or cases involving national measures that result from quasi-judicial proceedings. This might include reviving the issue of whether the standard of review set out in article 17.6 of the

Anti-Dumping Agreement, broadly interpreted, is “capable of general application.”¹⁰²

Third, the mandate of the Appellate Body could be clarified to introduce a higher standard of deference toward panel findings. At a minimum, this might include a higher standard of review of panel factual findings than that employed under article 11, as well as explicit exclusion from appellate review of panel findings related to the operation of national laws.¹⁰³ To minimize the risk of advisory opinions and *obiter dicta*, the Appellate Body could be instructed to “address each of the issues” only in a manner necessary to resolve the dispute before it. More ambitiously, the Appellate Body could be given the authority to decide which appeals, or which parts of appeals, to hear (*certiorari*), based on broadly defined circumstances such as when panel reports risk creating inconsistency, demonstrate evidence of manifest legal error, involve matters of significant public interest or of systemic interest to the trading system, or disputes over imprecise obligations.

Fourth, further guidance could be provided on the appropriate approach to be taken to interpretation.¹⁰⁴ Based on the reference in DSU article 3.2 to “customary rules of public international law,” the rules of interpretation of the Vienna Convention on the Law of Treaties are employed to interpret WTO obligations, which places initial emphasis on the ordinary meaning of the text over other techniques to determine the meaning and results in frequent recourse to dictionary definitions. Additional guidance could be provided that reiterates the importance of giving clear effect to the intention of WTO members as fully and fairly as possible.¹⁰⁵

Finally, the role and status of past adjudicator reports could be further clarified. While the current practice of *de facto* precedent contributes to the predictability of the trading system, a more vibrant and transparent “dialogue” between

99 USTR, “Improving Member Control”, *supra* note 21.

100 DSU, *supra* note 22, art 11.

101 *Ibid.* See also Jan Bohanes & Nicolas Lockhart, “Standard of Review in WTO Law”, in Daniel Bethlehem et al, eds, *The Oxford Handbook of International Trade Law* (Oxford, UK: Oxford Handbooks Online, 2009).

102 WTO, *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (1995), online: <www.wto.org/english/docs_e/legal_e/40-dadp2.pdf>.

103 USTR, “Report on China’s WTO Compliance”, *supra* note 13 at 27–28. See also the *Comprehensive and Economic Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 30 October 2016 (provisionally entered into force 21 September 2017) [CETA], art 8.31(2).

104 USTR, “Improving Member Control”, *supra* note 21.

105 Steinberg, *supra* note 32; Cartland, Depayre & Woznowski, *supra* note 17.

adjudicators might better serve the integrity and legitimacy of the dispute settlement system in the long run.¹⁰⁶ This dialogue might be encouraged by eliminating the requirement for “collegiality”¹⁰⁷ among Appellate Body members (relying instead on the maxim of “the one who hears must decide”) and eliminating the bias against dissents, both horizontal (i.e., on the same panel or Appellate Body division) and vertical (i.e., from panels of prior Appellate Body reports). There might also be a mechanism for the DSB to adopt, on consensus, only parts of a panel or Appellate Body report,¹⁰⁸ or alternatively, to adopt only the findings and recommendations, relegating the entirety of the reasoning to background.¹⁰⁹

Improve Institutional Support for Adjudication

The institutionalization and judicialization of dispute settlement in the WTO have contributed significantly to the effectiveness of trade adjudication and the “security and predictability” of the trading system. As part of recalibrating the balance between WTO political bodies and adjudication, and to protect against the politicization of the adjudicative bodies and against the consolidation of institutional biases, additional changes might be made to the institutional structures of adjudication.

First, the process for selection of adjudicators could be improved. The judicialization of the politics that are embedded in constructively ambiguous obligations risks leading to the politicization of the “judiciary.” This may already be seen in the nomination process. A more neutral, arms-length mechanism for the appointment of adjudicators could be developed, perhaps as part of a set of reforms that also removes some of the more politically sensitive issues from adjudication. At a minimum, this might include a clearer

statement of the eligibility requirements for those seeking to be appointed to adjudicator roles.

Second, more could be done to balance the role of adjudicators and their permanent secretariats, perhaps by mandating more frequent turnover in the dispute settlement secretariats. This might include caps on the duration of senior management positions, for example in the case of the Appellate Body, to a term shorter than the longest term of an Appellate Body member. For legal staff, a system of law clerks might be considered, again with the objective of making the adjudicators the most experienced and knowledgeable in the institution and preserving the support function of the Secretariat.

Address a Number of Procedural Issues

Several procedural controversies over the years have interfered with the proper functioning of the dispute settlement system, some of which can largely be seen as reflecting US efforts to apply pressure to WTO adjudicators in the face of the country’s failure to achieve more formal mechanisms of political oversight.¹¹⁰ While it is unlikely that these procedural issues can be addressed without some resolution of the broader substantive and systemic issues, resolution of the broader issues might also reduce the risk of these procedural crises being repeated. They might be addressed together.

First, the deadline for appeals could be clarified. In the current dispute settlement environment, the mandated 90-day deadline for the Appellate Body appears increasingly unrealistic. If the mandate for adjudication and the role of the Appellate Body were to be narrowed along the lines described above, the ability to meet this deadline should improve. Otherwise, as part of a package of reforms that improves institutional balance in other ways, the deadline could be removed, extended or deemed to be met when certain objective conditions are met or the DSB decides to do so.¹¹¹

Second, the process for reappointing Appellate Body members could be better regulated. The recent US insistence on “interviewing” Appellate Body members seeking reappointment has been

106 Meredith Kolsky Lewis, “Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement” (2012) 48:1 *Stan J Intl L* 1. See also Jacob Katz Cogan, “Competition and Control in International Adjudication” (2008) 48:2 *Va J Intl L* 416 at 449.

107 Claus-Dieter Ehlermann, “Experiences from the WTO Appellate Body” (2003) 38 *Tex Intl LJ* 469 (“The system of ‘exchange of views’ could have been criticized by WTO Members as being contrary to the DSU. It is remarkable that this has not been the case” at 477).

108 USTR, “Improving Member Control”, *supra* note 21.

109 Henry Gao, “Dictum on Dicta: Obiter Dicta in WTO Disputes” (2018) 17:3 *World Trade Rev* 509.

110 See the section in this paper entitled “Objections, Actions and Reactions.”

111 USTR, “US Statements, June 2018”, *supra* note 66.

a source of controversy. While it seems to be agreed that reappointment is not automatic, there is disagreement about which justifications can be used to deny reappointment.¹¹² As currently one of the only mechanisms to exercise political control, it might be difficult to remove the need for reappointment altogether. The improvement of other opportunities for collective member oversight as well as the establishment of agreed rules of engagement for reappointment might mitigate the risk that individual members will attempt to influence Appellate Body members this way or make it possible to reach agreement to eliminate the need for reappointment.

Third, the impasse in the DSB over the appointment of new Appellate Body members is ostensibly about the conditions and procedures by which the final terms of outgoing members can be extended. Despite the longstanding practice of the Appellate Body alone granting extensions, the current length of appeals justifies some concern.¹¹³ The solution to this issue is largely technical and should be straightforward to implement once the broader political issues have been addressed. It might involve, for example, limits on appeals being assigned to members late in their terms, stipulated conditions under which a member assigned to an ongoing case will not be extended, and limits on the ability of extended members to interact with appeals in which they are not involved.

Choice of Instruments

The legal framework of the WTO provides several instruments to implement revisions to the operation of the dispute settlement system. Which one is used would depend upon the level of ambition and complexity, and expectations about timing. The most notable are amendments to the DSU, “authoritative interpretations” of provisions of the DSU or other WTO agreements, decisions of the General Council or DSB, and amendments to the Working Procedures for Appellate Review. There may be other approaches.

112 USTR, “US Statements, May 2016”, *supra* note 64.

113 USTR, “US Statements, March 2018”, *supra* note 67.

DSU Amendments

The most certain way to modify the operation of the dispute settlement system is through amendment of the DSU. Amendment would likely be required for any structural or institutional changes, and could also be used to make provisions of the DSU more prescriptive about the mandate of adjudication. Unlike most other WTO agreements, the DSU can be amended by consensus in the General Council, and the amendments would take effect immediately.¹¹⁴ The history of efforts to amend the DSU, however, suggest that this is unlikely to be achievable in a timely manner. As legally simple as it might be, attempting to amend the text of the treaty risks evolving into discussion of whether other amendments should also be pursued. Engaging in a more far-reaching reform exercise might delay the process and extend the period of diminished capacity of the dispute settlement system.

Authoritative Interpretations

As already discussed, article IX:2 of the Marrakesh Agreement provides members with the “exclusive authority to adopt interpretations” of the Multilateral Trade Agreements, including the DSU, as long as they do not “undermine the amendment provisions in Article X.”¹¹⁵ Authoritative interpretations could be used to address many of the issues raised.

Despite the sophistication of WTO dispute settlement, the text of the DSU is still imprecise and incomplete in many important areas, for example, regarding the mandate and interpretative approach of adjudicators. Authoritative interpretations could elaborate on certain provisions of the DSU or modify any procedural principles and rules of interpretation that have been created by WTO adjudicators. There are some limits to what can be done by authoritative interpretation. More significant structural changes such as the number and status of Appellate Body members, the requirement for reappointment, a system to request leave to appeal, or an improved mechanism for collective oversight, would all be difficult to implement solely through interpretations. But other issues, such as prioritizing the objectives of

114 See *Marrakesh Agreement*, *supra* note 1, art X:8. Article IV:2 provides that the General Council conducts the functions of the Ministerial Conference between its sessions.

115 *Marrakesh Agreement*, *supra* note 1, art IX:2.

dispute settlement (articles 3 and 19.2), establishing various standards of review (articles 11, 12.7, 17.6 and 17.12), limiting the scope of appeal (articles 17.6 and 17.12), and providing guidance on interpretative approaches (article 3.2), among others, could be implemented by adopting interpretations of the relevant provisions of the DSU.

Authoritative interpretations could also be adopted to “override” various interpretations in past WTO reports that members might agree need to be overturned or further clarified. Obtaining agreement on most of these would likely be difficult and time consuming, but members might want to consider what kinds of substantive corrections might be feasible and agreeable if more dramatic changes to the dispute settlement system are unacceptable.

DSB Decisions

The DSB has the authority and the responsibility to “administer [the] rules and procedures” set out in the DSU.¹¹⁶ Except for those decisions that explicitly require negative consensus, all other decisions of the DSB are to be taken by positive consensus.¹¹⁷ Positive consensus decisions of the DSB are quite rare, with appointments and reappointments of members of the Appellate Body probably constituting the largest number of such decisions over the years (outside of adoption of meeting agendas and annual reports). A number of possible adjustments could be implemented by consensus DSB decision. These might include, for example, guidance on the interpretative approach to be employed by adjudicators, supplemental criteria for the qualifications of Appellate Body candidates, regularization of the launch of the appointment process, rules of engagement for collective meetings with Appellate Body members seeking reappointment, and procedures to be adopted in cases of reports issued beyond the prescribed deadlines, among others.

Amendments to the Working Procedures for Appellate Review

WTO members cannot, on their own, change the working procedures for appellate review, as responsibility for drawing up and maintaining them

lies with the Appellate Body itself.¹¹⁸ However, if the DSU were amended or interpreted in a manner that had consequences either for the current working procedures or for the current operation of dispute settlement, the Appellate Body would have an obligation to amend the working procedures to make them consistent with the revised or interpreted DSU. For example, if it is agreed that only those members of the Appellate Body that hear a case should be involved in developing the findings in that dispute, or that adjudicator dissents should not be actively discouraged, these principles could be implemented through revisions to, or authoritative interpretations of, the relevant provisions of the DSU (for example, articles 17.1, 17.3 or 17.11). In such circumstances, the Appellate Body would need to amend the paragraphs of the working procedures that deal with “collegiality” (rule 4) and dissent (rule 3.2) to make them consistent with this interpretation of the DSU.

Conclusion

These are turbulent times for international trade cooperation. Ongoing structural transformation of the global economy and political upheaval in a number of countries have unsettled multilateral approaches to cooperation that have largely worked well for the past 70 years. It is not surprising that binding dispute settlement is caught in the fray, given its essential role in preserving the security and predictability of the rules-based trading system. Indeed, while the major innovations codified in the DSU have contributed to the success of the system, they also changed its nature in ways that have had unintended consequences that may have contributed to global discontent.

Resolving the impasse in the DSB requires renewed reflection on how well the current dispute settlement system has served the interests of WTO members. While the usual assessment is justifiably positive, the success of the system cannot be measured only by the number of disputes launched and the rate of compliance. It must also be assessed by how well it retains legitimacy among states and their ongoing consent to be bound by its outcomes. While it may be tempting to blame the

¹¹⁶ DSU, *supra* note 22, art 2.1.

¹¹⁷ *Ibid*, art 2.4.

¹¹⁸ *Ibid*, art 17.9.

impasse solely on the skepticism of the current US administration toward multilateralism and binding dispute settlement, such a view ignores the long and escalating history of concerns, some of which have been widely shared by other members. The current situation instead suggests that certain weaknesses, and certain grievances, should have been taken more seriously over the years.

While the future of the rules-based trading system is now uncertain, the optimistic assessment is that whatever system emerges from the dust of current trade tensions, it will retain binding dispute settlement. It will likely not, however, be retained unchanged from its current form. At a minimum, given the resurgence of sovereignty concerns, there will need to be a more sustainable balance between the political and adjudicative functions of the WTO. To that end, this paper has outlined potential changes in a number of areas, including improving mechanisms for political oversight, removing sensitive issues from adjudication, narrowing the scope of adjudication and improving institutional support. A more sustainable balance would also help to avoid a number of procedural controversies that have plagued the WTO, especially in recent years.

Any negotiated outcome at this point will need to balance a diversity of legitimate perspectives on how the dispute settlement system should function. Not all of the ideas for specific changes presented in this paper are desirable, feasible or likely agreeable. In particular, focusing on the extremes of either reverting to individual state vetoes or further entrenching the independence of adjudicative bodies are likely to lead only to instant deadlock. The restoration of the dispute settlement function might be based instead on an eclectic mix of pragmatic changes to the current system, implemented through a variety of legal instruments. In uncertain times, reaching agreement on a dispute settlement system that is compulsory, impartial and enforceable, however that is achieved, can help preserve, and even enhance, multilateral cooperation on trade.

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

**Centre for International
Governance Innovation**

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

 @cigionline

