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The US, the WTO, and the Appellate Body: From Great Expectations to Hard Times

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Abstract The United States (US) began blocking members' appointment and reappointments to the World Trade Organization's (WTO) Appellate Body (AB) in 2011, causing creeping paralysis of this institution. Currently, the AB has no members and is inactive. The prospects for resurrecting the AB in its pre-crisis form currently appear dim, moreover, though the present crisis may prompt fresh thinking about world trade governance and dispute settlement. The likelihood of an enduring dispute settlement solution replicating the heavily legalised AB system is debatable, given the political and legal dynamics that have led to the present impasse.

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Blame for the current predicament of the Appellate Body is often cast on recent US administrations, with Barack Obama beginning a practice of blocking specific appointments, a strategy that evolved under Donald Trump, and to date appears to remain in place under the Biden administration. Given that the US was one of the principal architects of the AB and the WTO regime more generally, the central role of these administrations in undoing the AB is remarkable. To understand how international trade law and dispute settlement are to move forward, we accordingly need to understand how we reached the present situation.

To this end, we examine US attitudes and behaviour towards the WTO, focusing on the AB specifically and international trade governance more generally, set in the context of broader developments in US domestic and external policy. Our survey extends from the WTO's creation under the Clinton administration to the collapse of the Appellate Body under the Trump administration, using official sources and additional primary and secondary materials to trace US attitudes and conduct. We explore both continuity and change in American attitudes through this examination and outline how we reached the present situation, highlighting in turn potential systemic and institutional changes that may conceivably overcome this impasse. In general, we find that US behaviour over time is not as perplexing as it may appear. Rather, the Trump administration's actions and attitudes can be understood as reflective of longstanding US preferences and concerns, with successive administrations having been unable to address these within the WTO/AB framework as set up in 1995.

1 Introduction

The United States (US) was central to the design of the World Trade Organization (WTO), including the Appellate Body (AB). Yet, US actions have since rendered the AB inert. Accounts of this turn tend to focus on Obama- and Trump-era law and politics,² and while there are references in this literature to broader US concerns, there is relatively little on how these concerns emerged and evolved.³

Proposed solutions to the present situation that do not consider the underlying issues that have shaped US attitudes and behaviour over time are unlikely to prove sustainable.⁴ Identifying and addressing these issues is accordingly central to overcoming the present impasse. Without this, there is a significant risk that proposed “fixes” will prove neither sufficient nor sustainable.

As a first step in identifying these underlying concerns and considering their implications, we trace how domestic and international challenges have shaped US policy and attitudes towards the WTO and AB through four US presidential administrations (Clinton-Trump). We find that many of the now-apparent cracks in the system were in effect politically and legally baked in from the outset.⁵ Consequently, as the WTO and member states seek to move forward with the Biden administration, it is vital to recognise that the current situation does not arise solely from attitudes specific

² Kuijper (2017); Condon (2018).

³ A notable exception to this can be found in: Bown and Keynes (2020).

⁴ Howse (2021).

⁵ Charnovitz (2018); Charnovitz S (2019) How WTO dispute settlement succumbed to the Trump administration. GWU Law School Public Law Research Paper No. 2019-73 https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2728&context=faculty_publications (last accessed 28 February 2021; Kuijper (2017).

to the Trump administration, but rather reflects longstanding and deep-seated US concerns.

To identify US concerns, we focus on US government discourse and policy towards the WTO. To be clear, substantive US concerns about the WTO and AB at any one point may go beyond the issues stated in publicly available documents: it is nevertheless important to have a solid grasp of the stated concerns to understand the evolution of US engagement with the WTO. To this end, we analyse a range of primary and secondary sources, including government and WTO documents, speeches, statements, newspaper articles, and academic literature, paying attention to US concerns and critiques regarding the WTO in general, and the AB specifically. We highlight the interplay between domestic and international forces for each administration, noting how these together shape policy positions and behaviour.⁶

Our purpose here is not to assess the validity or persuasiveness of US claims regarding the WTO and AB at any given juncture or overall, but rather to trace the origins and evolution of these, including how the US has attempted to address its concerns within the WTO/AB system. We are aware that doctrinal and policy claims may be made both in support of and opposition to the views presented by the US. Equally that the views presented may track individual actors' policy preferences at different points. Dismissal of stated US concerns on such grounds, however, has proven counterproductive.

Our nearly three-decade (1992-2021) analysis highlights that while critique has evolved alongside practice within the WTO/AB, core US concerns reflect the AB's genesis and design, and long-standing US domestic debates over foreign economic policy. Our approach foregrounds the effect of change in presidential administrations and Congress in US foreign policy related to the WTO, but also reveals continuity. Taking the long view of these dynamics underlines the scope of the challenge facing those seeking to find a viable, long-term solution to the ongoing dispute resolution crisis. This study has three significant findings regarding US attitudes and behaviours towards the AB and WTO and the challenges required to reinstitute binding trade adjudication.⁷

First, there is a degree of continuity across administrations. The Uruguay Round agreements sowed the seeds of US discontent with the WTO and the WTO/AB. Political misgivings and challenges under Clinton took root under the Bush administration and flowered under Obama. That the reaping occurred under Trump should not mask the longstanding nature of these concerns, which appear to inform US foreign policy under Joe Biden. Indeed, we find that the stated issues and associated policy challenges shaping US concerns have persisted across administrations, manifesting most clearly concern about a lack of transparency in the system and an inefficient dispute settlement.

Second, the withering of the AB cannot be laid solely at the door of the US, given the consensus-based nature of decision making within the WTO.⁸ Indeed, the situation may

⁶ Putnam (1988), p. 427. The approach adopted in this article may be situated in the 'empirical turn' in international law scholarship. (See Shaffer and Ginsburg (2012).)

⁷ By any measure the AB as presently constituted cannot be considered "effective". On factors that may enable effectiveness to be assessed, see Shany (2014).

⁸ "[The] crisis we now face could have been avoided if it had been addressed head-on, as it began to escalate. The WTO is a consensus-based collective. This means that this crisis should not be attributed to one Member...No matter how difficult or insurmountable the issues may seem, all those who are part of the WTO community must be willing to engage and must refrain from putting personal or national trade interests ahead of attempting to come up with a solution." from Ramírez-Hernández R (28 May 2018) Farewell Speech of Appellate Body Member Ricardo Ramírez-Hernández. WTO: Appellate Body,

have been avoided had the WTO's broader membership proved able to address US concerns sooner through institutional reform measures. Moreover, while US grievances are longstanding, elements of these concerns also appear to be shared by other governments.⁹ Because US behaviour is endogenous to the trade regime's operation, a "return to normal" ultimately seems improbable without substantial reform.¹⁰ Last, some responsibility rests with the AB itself, which developed a "prevailing ethos", body of jurisprudence and practices that aggravated US concerns.¹¹

Third, our findings suggest that revision of the Dispute Settlement Understanding (DSU) alone is unlikely to prove sufficient to "resurrect" effective dispute resolution at the WTO: rather, more substantial changes to the current multilateral trade regime are likely to be needed. The US, for its part, seems unlikely to sanction measures to strengthen the AB's ability to function as an independent adjudicatory body within the current institutional framework, while changes to the DSU to satisfy US demands seem unlikely to be palatable to others. Accordingly, rather than focus on tinkering with WTO dispute settlement arrangements, sustainable solutions seem more likely to emerge from a more general reconsideration of the functions, and limits, of multilateral trade rules and governance in the political, economic, and legal context of the 21st century.

2 William J. Clinton (1993-2000) – Paved with Good Intentions

Bill Clinton campaigned for the presidency on the domestic economy, criticising George H.W. Bush's focus on foreign policy.¹² The linkages between domestic and international economic health, however, became evident early in the Clinton administration,¹³ prompting Clinton to embrace trade liberalisation, a view shared by key economic advisors and international partners.¹⁴ Pursuing a liberalising agenda, however, proved politically difficult.

https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm (last accessed 24 February 2021).

⁹ This point is often in US documents and appears in some of the literature on US-AB relations. (See e.g. Lighthizer R, Report on the Appellate Body of the World Trade Organization, USTR, February 2020 https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (last accessed 28 February 2021); Ragosta et al. (2003).) Available evidence suggests that support for the US position has been broader than often recognised, including within the WTO Secretariat. See e.g. Graham TF (5 March 2020) Farewell speech of Appellate Body member Thomas R. Graham. WTO: Appellate Body https://www.wto.org/english/tratop_e/dispu_e/farwellspechtgaham_e.htm (last accessed 27 February 2021). See also observations regarding developing world concern about AB overreach in Babu (2020), pp. 97-99. Despite these critiques, the extent of US dissatisfaction with the AB appears to be unmatched elsewhere.

¹⁰ Graham TF (5 March 2020) Farewell speech of Appellate Body member Thomas R. Graham. WTO: Appellate Body https://www.wto.org/english/tratop_e/dispu_e/farwellspechtgaham_e.htm (last accessed 27 February 2021).

¹¹ Graham TF (5 March 2020) Farewell speech of Appellate Body member Thomas R. Graham. WTO: Appellate Body https://www.wto.org/english/tratop_e/dispu_e/farwellspechtgaham_e.htm (last accessed 27 February 2021); Howse (2021).

¹² Luce E, US Democrats Should Remember, "It's the Economy, Stupid". Financial Times (27 March 2019).

¹³ Barshefsky C, Charlene Barshefsky Oral History. Presidential Oral Histories Miller Center, University of Virginia [Charlene Barshefsky Oral History | Miller Center](https://www.millercenter.org/oral-history/charlene-barshefsky) (last accessed 24 February 2021); Lovett (2004) p. 142.

¹⁴ (24 February 1993) The president's news conference with Prime Minister John Major of the United Kingdom. Public Papers of POTUS <https://www.govinfo.gov/content/pkg/PPP-1993-book1/pdf/PPP->

Clinton inherited from Bush a draft set of Uruguay Round agreements, with US input into the latter shaped principally by an ambition to address trade deficits.¹⁵ The result was a “grand bargain”, with the US overcoming developing world hesitance over multilateral regulation of investment, services and intellectual property rights via a combination of threats and concessions on agriculture and textiles.¹⁶ A key US objective in these negotiations was a ‘legalised’ and enforceable dispute resolution mechanism to make it more difficult for counterpart states to stymie trade disciplines: this resulted in the creation of new dispute settlement institutions – the Dispute Settlement Body (DSB) and the Appellate Body - and the removal of governments’ ability (under the previous General Agreement on Tariffs and Trade (GATT) regime) to unilaterally prevent the adoption of adverse reports.¹⁷ Despite avowed presidential confidence,¹⁸ however, the appeals proposals - particularly the prospect of lengthy proceedings delaying settlements and the perceived risk of US discretion to deploy retaliatory measures being constrained - remained contentious in Congress.¹⁹

Congressional passage of the WTO agreement was accordingly - and unsurprisingly - difficult. Opposition emerged principally amongst “labor, environmental, and consumer-protection activists” and business associations, as well as from conservative political actors,²⁰ resulting in the administration relying on Republican votes to overcome Democratic recalcitrance. In a concession to Republican Senate leader Bob Dole, the 1994 Uruguay Round Agreements Act (URAA)²¹ was also closely followed by the introduction in the Senate of the 1995 WTO Dispute Settlement Review Commission Act: this legislation would have provided for a federal commission to review the operation of the WTO DSU/AB, holding out the prospect of US withdrawal if the commission decided that the AB had exceeded its power or acted improperly.²² Although never enacted, the debates around this measure indicate the extent of political unease with the putative trade regime during this period.²³ Section 125 of the URAA itself, moreover, provides for a five-yearly review of US participation in the WTO: in

1993-book1-doc-pg196.pdf (last accessed 1 November 2020; (9 March 1993) Exchange with reporters prior to discussions with President Francois Mitterrand of France. Public Papers of POTUS, <https://www.govinfo.gov/content/pkg/PPP-1993-book1/pdf/PPP-1993-book1-doc-pg257-2.pdf> (last accessed 1 November 2020)

¹⁵ Chorev (2011), p. 151.

¹⁶ Chorev (2011), p. 155; Hopewell (2016), p. 68.

¹⁷ Chorev (2011) ch. 6; Sutherland (2000), p. 19; Moynihan (2008), p. 272.

¹⁸ Clinton argued that the new dispute settlement mechanisms would “provide for a more effective and expeditious dispute resolution mechanism and procedures which will enable better enforcement of United States rights.” (Clinton WJ (15 December 1993) Letter to Congressional Leaders on the General Agreement on Tariffs and Trade, Public Papers of POTUS, <https://www.govinfo.gov/content/pkg/PPP-1993-book2/pdf/PPP-1993-book2-doc-pg2180.pdf> (last accessed 15 November 2021), p. 2181.)

¹⁹ Elsig (2017), p. 311.

²⁰ Chorev (2011), p. 159.

²¹ Pub.L. 103–465, 108 Stat. 4809, enacted December 8, 1994.

²² Chorev (2011), p. 160; Stutchbury M, Dole wants law to let US quit WTO. Australian Financial Review, 18 November 1994 <https://www.afr.com/politics/dole-wants-law-to-let-us-quit-wto-19941118-jfjqp> (last accessed 24 February 2021).

²³ WTO Dispute Settlement Review Commission Act 1995 H.R.1434 - 104th Congress (1995-1996): [WTO Dispute Settlement Review Commission Act | Congress.gov | Library of Congress](https://www.congress.gov/104/plaws/pub1434/PLAW-104-1434-1995-12-08) (last accessed 25 February 2021); see concessions made in defence of antidumping and countervailing practices to US steel industry in Chorev (2011), pp. 170–72; Palmer D. Exclusive: Congress can take vote to withdraw from WTO in July. Politico, 23 June 2020. <https://www.politico.com/news/2020/06/23/exclusive-congress-can-take-vote-to-withdraw-from-wto-in-july-336115> ; Herman (1996).

2000, 2005, and 2020 these were accompanied by motions to withdraw the US from the WTO in Congress, all of which failed.²⁴

Once in operation, the WTO's institutions and mechanisms were deployed in a manner that proved challenging to member state governments.²⁵ Specifically, despite having been envisioned originally as a non-standing institution,²⁶ the AB began to act "like a court and not as part of the enforcement wing of the WTO institution... the Appellate Body created itself as a judicial branch in a distant, even potentially contentious or oppositional, relationship with the WTO institution."²⁷

Numerous AB measures can be associated with this trend,²⁸ developed initially through a series of decisions in the late 1990s. *Japan–Alcohol*,²⁹ for example, saw the AB in 1996 diminish the normative value of GATT panel reports. This was followed in 1997 by *EC–Bananas*,³⁰ where the AB permitted private counsel to represent a state party in proceedings,³¹ and 1998 in *EC–LAN Equipment* where the AB explicitly subordinated negotiating history as an interpretive tool to the disciplines of the Vienna Convention on the Law of Treaties (VCLT).³² These decisions ran counter to the expectations of GATT-era 'trade-insiders',³³ with similar divergences apparent between the AB's understanding of its role and previous GATT-era practice evidenced in *India–Patents* (1998),³⁴ *India–Quantitative Restrictions* (1999),³⁵ *Turkey–Textiles* (1999),³⁶ and notably *Shrimp–Turtle* (1998)³⁷ and *EC–Asbestos* (2001).³⁸ In these two last cases, the AB ushered in a non-traditional approach, in the former explicitly taking into account non-trade international law and values.

In a subsequent WTO General Council (GC) meeting, it became clear how far the AB had gone beyond insiders' expectations: 'most [WTO] members' heavily criticised the

²⁴Fergusson, I., Davis, C. (2020) The WTO Withdrawal Resolutions. Congressional Research Service. https://www.everycrsreport.com/files/2020-05-21_IN11399_3aee22dd470f642306e23883f95b2c04d55e9a88.pdf

Ciminio-Isaacs C., Feferlan R and Fergusson F. (2020). World Trade Organization: Overview and Future Direction. Congressional Research Service. <https://crsreports.congress.gov/product/pdf/R/R45417>

²⁵ Hopewell (2016), p.38.

²⁶ Wagner (2020), p.71.

²⁷ Howse (2016), p. 31; Unterhalter (2015), p.469.

²⁸ Howse (2016), p.31.

²⁹ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 9 January 1998.

³⁰ Appellate Body Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, adopted WT/DS27/AB/R, 11 December 2008, DSR 8 November 2012.

³¹ Ehrenhaft (2001), p. 985.; Cortell and Peterson (2005), p.33.

³² Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998.

³³ Howse (2016), p.32.

³⁴ Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998.

³⁵ Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 17 December 1998.

³⁶ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999.

³⁷ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, WT/DS58/AB/RW, adopted 21 November 2001.

³⁸ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

AB in the aftermath of its formal (albeit not de facto) welcoming of *amicus* briefs in proceedings, with the AB advised to “exercise extreme caution in future cases until Members had considered what rules were needed.”³⁹ The US was also the sole defender of “the Appellate Body’s exercise of jurisdiction to set out the procedure for submission of amicus briefs.”⁴⁰ This support was in line with the Clinton administration’s broader push for transparency as a means of building confidence in and the legitimacy of the AB.⁴¹ Indeed, consistent with this position, the US itself was an “early adopter” of the new dispute settlement process – even though its record of success was mixed.⁴²

A further key juncture during Clinton’s presidency was the collapse of the WTO ministerial meeting in Seattle in 1999. The designers of the WTO had anticipated that the organisation would serve as a standing negotiation forum, enabling continual updating and progressive liberalisation of international trade.⁴³ The perceived need for negotiating “rounds” re-emerged quickly, however, with the US proposing to launch a “Millennium Round” in 1999. The Seattle meeting failed in this ambition, however, principally owing to a lack of consensus amongst key trade partners, aggravated by US ambitions to promote environmental and labour issues and greater transparency within the trade regime, as well as the mass protests that had accompanied the meeting, illustrating the extent of domestic public concern about “globalisation”.⁴⁴

Overall, three themes emerge during Clinton’s tenure that later prove critical for the AB and US-WTO relations more generally. First, while the administration touted the benefits of a rules-based trading system, many US concerns about the WTO system were present from the outset. Perhaps most critically, the US sought to ensure that other states observed their international commitments, but chafed when the US was itself found to be acting inconsistently with its own commitments, particularly where panel rulings were overturned by the AB.⁴⁵

³⁹ Chair of the Council, WTO GC, Minutes of Meeting Held in the Centre William Rappard, WT/GC/M/60 (Geneva 22 November 2000), p. 28; Cortell and Peterson (2005), p. 36.

⁴⁰ Howse (2016), p. 41; citing account in Charnovitz (2002), pp. 219–40.

⁴¹ Clinton WJ, United States: Statement by H.E. Mr. William J. Clinton, President, Geneva WTO Ministerial 1998, 18 May 1998 https://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/clinton_e.htm (last accessed 1 December 2020); Barshefsky C, Prepared for delivery, Institute for International Economics, Clinton Digital Library, 15 April 1998, <https://clinton.presidentiallibraries.us/items/show/45791> (last accessed 25 February 2021), pp. 9-10.

⁴² Cameron (2005), p.119.

⁴³ “The Uruguay Round was an incredible undertaking and it was presumed that the scope and scale of such a negotiation would no longer be possible, even if certain topics were reopened, but by 1996 there were new calls for rounds.” The Uruguay Round. Understanding the WTO: Basics, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last accessed 26 February 2021); quoting Roberto Azevedo “I think that when the WTO came into force back in 1995, it was clear that it would need to keep updating itself even though it was built to avoid rounds....Well, six years later, from 1995, a new round was launched. I think that kind of single undertaking with that kind of ambition at that time was a very tall order for an organization that had been born just six years earlier. I think that maybe was the original sin” in WTO at 25: Conversations with former DGs. WTO, 25 November 2020 <https://www.youtube.com/watch?v=gUfVcHLW6QE> (last accessed 28 February 2021), ts. 5:03-6:03.

⁴⁴ Washington and Ottawa were behind the push for greater WTO transparency and Odell highlights that while this proposition had the potential to be seen as a mutual gain, for others it was deemed to be a loss in Odell (2009), pp. 273-299.

⁴⁵ <https://www.govinfo.gov/content/pkg/CRPT-106hrpt672/html/CRPT-106hrpt672.htm> 11 May 2021.

Prominent political figures of the time also expressed concerns about judicial “overreach” from the outset both as an abstract concern and in relation to adverse rulings: although encompassing a range of elements, the overarching criticism typically levelled is that the AB has, in one fashion or another, exceeded its mandate, notwithstanding Article 19(2) of the DSU stating that the “Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.” Indeed, domestic US concern about overreach was evident in an early loss in *US-Gasoline*.⁴⁶

The US also expressed concerns about timely decision-making and transparency – concerns shared by other states, including Australia, Canada, Hong Kong, and Norway.⁴⁷ These problems were framed during this period as inefficiencies in a system that generally promoted US interests: accordingly, the US goal was to help the system function more in accordance with American expectations.

Second, once in operation, it rapidly became apparent how difficult the consensual nature of decision-making amongst WTO member states made it to amend the WTO agreements (including the DSU), or otherwise to rein in the AB. This difficulty put more pressure on the AB, with litigation effectively substituting for substantive treaty negotiations amongst WTO members.

Third, the WTO was established in a moment of American power preponderance, when the “victory” of liberal, democratic, market economies seemed inevitable following the collapse of the Soviet bloc. With the “end of history” having arrived, a prevailing US presumption was that over time market economies would prevail over non-market economies and bring about the transformation of the latter into democratic, market-economy states.⁴⁸

With the US leading the way and building on GATT trade rules that presumed members were committed to a market economy, these assumptions were embodied in the WTO.⁴⁹

⁴⁶ Sanger, D Trade group orders U.S. to alter law for first time. The New York Times, 18 January 1998.

⁴⁷ Clinton highlights that unilateral action in trade disputes was held back in reserve because previous dispute settlement processes had been time consuming and that the dispute settlement process needed to be quick and fair in Clinton WJ (23 February 1996) Exchange with reporters prior to discussions with PM Ryutaro Hashimoto of Japan in Santa Monica, California. Public Papers of the POTUS. Clinton also states the need for quick disputes particularly in the modern economy In Clinton WJ (1998) United States: Statement by H.E. Mr. William J. Clinton, President, Geneva WTO Ministerial 1998 https://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/clinton_e.htm (accessed 27 February 2021). Regarding transparency, Clinton argued that transparency inside and outside the WTO was necessary and that the WTO needed to be more efficient (Clinton (17 December 1999) United States-European Union summit statement on the World Trade Organization. Public Papers of the POTUS). Similarly, the US put forward proposals on increasing transparency in WTO (11 October 2000) General Council Informal consultations on external transparency October 2000: Submission from the United States, WTO GC WT/GC/W/413, p. 1-6) which Australia supported faster derestriction of document including minutes WT/GC/W/414 para 5-6, Canada supported the US and proposed significantly greater public access and transparency including webcasting, document access, public dialogues WT/GC/W/415, Hong Kong, China “shares the view that a more transparent organization is not only essential to building confidence in the multilateral trading system, but also helps Member governments bring the public on board in pursuing further multilateral trade liberalisation” (para 2) but did not support “direct participation of civil society in the Organization” (para 9) WT/GC/W/418, and Norway supported increased transparency through faster derestriction of some documents and greater public engagements WT/GC/W/419.

⁴⁸ Fukayama (1992).

⁴⁹ Huang, C. (2009), p.62.

To broaden WTO membership to include non-market economies, accession protocols were developed, requiring non-market economies to restructure their markets.⁵⁰

This period accordingly saw the widening of participation in the WTO to more developing economies, including the preparation for China joining the WTO which would occur early in the Bush administration. For example, in bilateral US-Chinese negotiations over Permanent Normal Trade Relations (a necessary precursor to China joining the WTO), United States Trade Representative (USTR) Charlene Barshefsky achieved extensive Chinese concessions across a range of issues.⁵¹ The administration framed this initiative as facilitating Chinese economic and political reform via WTO membership.⁵²

Having recently joined, developing states were reluctant to grant further concessions in negotiations, arguing that significant concessions had already been made on accession.⁵³ Yet, as developing economies grew - in the case of China, without the political reforms anticipated by Clinton - US confidence in the WTO institutional arrangements for these states also began to wane, with the persistence of “special and differential treatment” for these states giving rise to claims that the WTO permitted an “unfair playing field”.⁵⁴ The continued absence of Clinton’s vaunted political liberalisation in China has haunted subsequent US administrations.⁵⁵

3 George W. Bush (2001-2008) – Crisis at Home and Abroad

The 2000 presidential election was the closest in American history, with Bush initially promising a more “compassionate conservatism”.⁵⁶ Internationally, however, Bush’s foreign policy was principally shaped by the events of 11 September 2001 and the

⁵⁰ Huang, C. (2009), p.62.

⁵¹ Jones (2004), p. 20; Devereaux et al. (2006), p. 281.

⁵² Clinton explicitly expressed that bringing China into the WTO would lead to economic reforms in China in Clinton WJ (8 March 2000) Message to the Congress transmitting proposed legislation on Permanent Normal Trade Relations with China. Public Papers of POTUS, <https://www.govinfo.gov/content/pkg/PPP-2000-book1/pdf/PPP-2000-book1-doc-pg409.pdf> (last accessed 27 February 2021), p. 409; Webster highlights both the hopes for reform that the WTO would have for China’s economic policy and lingering US concerns about the extent China would comply in practice. He finds that China’s track record is mixed and has trended towards paper compliance or other superficial changes to problematic laws, allowing inconsistent rules to remain in effect, not entirely dissimilar from other states in Webster (2014), p. 525; The lack of genuine reforms is a US criticism of China and the WTO in United States Trade Representative (2020) 2020 Report to Congress on China’s WTO compliance. <https://ustr.gov/sites/default/files/files/reports/2020/2020USTRReportCongressChinaWTOCompliance.pdf> (last accessed 25 February 2021).

Barshefsky C, Charlene Barshefsky Oral History. Presidential Oral Histories Miller Center, University of Virginia [Charlene Barshefsky Oral History | Miller Center](#) (last accessed 24 February 2021), pp. 16-17.; Kantor M, Michael “Mickey” Kantor Oral History, Presidential Oral Histories: Bill Clinton, 28 June 2002.

⁵³ Hopewell (2020).

⁵⁴ Hopewell (2020).

⁵⁵ Van den Bossche and Zdouc (2019), p. 29.; High-level meeting on integrated initiatives for Least-Developed Countries trade development, WTO, WT/LDC/HL/M/1, 26 November 1997; Moore M, The WTO is not a world government and no one has any intention of making it one, Moore tells NGOs. WTO News: 1999 Press Release, 29 November 1999 https://www.wto.org/english/news_e/pres99_e/pr155_e.htm (last accessed 26 February 2021) where Moore links trade liberalisation and social policies and values.

⁵⁶ Moens (2004).

ensuing wars in Afghanistan and Iraq.⁵⁷ These international challenges were compounded by the collapse of the dotcom bubble, a gasoline price crisis, and later by the housing bubble presaging the Great Recession.⁵⁸

In terms of foreign economic policy, Bush built on Clinton's successes, with the Doha "Development" round of trade negotiations commencing in November 2001, and Congress granting President Bush – for the first time since lapsing under Clinton in 1994 – fast-track Trade Promotion Authority. The focus on national security following 9/11, however, limited Bush's ability to prioritise trade and international economic governance.

The extent to which the Doha Round truly focused on development is debatable.⁵⁹ Bush made mixed statements on the topic: a primary focus, for example, was cutting subsidies, but the US predicated this on concessions from the European Union (EU) and Japan.⁶⁰ Critically, the early years of the Doha Round illustrated the difficulty in progressing multilateral trade liberalisation beyond the Uruguay agreements.⁶¹ This stalemate signalled effective 'legislative' deadlock and greater reliance on the AB to settle disputes.

Despite a smattering of early victories, for Bush administration the AB accordingly emerged as a critical arena of contention. This tendency became evident early in Bush's tenure: for example, in *India-Textiles* in 2001,⁶² the AB adopted a standard of review for anti-dumping measures that the US viewed as inconsistent with more deferential wording permitting member states greater discretion and flexibility that US negotiators understood they had successfully included in the Anti-Dumping Agreement (ADA).⁶³ Steel also emerged as a challenging issue area, with US measures to safeguard domestic industries from foreign competition held by the AB to be inconsistent with GATT 1994 and the Agreement on Safeguards in 2003 in *US-Steel Safeguards*,⁶⁴ prompting ire from Washington DC.⁶⁵ The US similarly – accompanied by New Zealand – exhibited concerns in *Canada-Dairy (2002)* about procedures adopted by the AB in that case.⁶⁶

⁵⁷ Moens (2004).

⁵⁸ Quinn and Turner (2020).

⁵⁹ Hopewell (2016), p. 89.

⁶⁰ USTR (2004) 2004 Trade policy agenda and 2003 annual report. https://ustr.gov/archive/Document_Library/Reports_Publications/2004/2004_Trade_Policy_Agenda/Section_Index.html (last accessed 28 February 2021), pp. 5-6.

⁶¹ Hopewell (2016).

⁶² Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 24 April 2003.

⁶³ Tarullo (2003), pp. 373-393. Debate here has revolved around the AB's treatment (or overlooking) of Article 17.6(ii) of the Anti-Dumping Agreement.

⁶⁴ Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117.

⁶⁵ Quoting Scott McClellan In White House Report, Nov. 10: U.S. steel subsidies. State Department Press Releases and Documents (10 November 2003); Quoting Richard Mills In Temporary safeguard measures justified under WTO rules, USTR spokesman says. State Department Press Releases and Documents: The Washington File, Washington (10 November 2003).

⁶⁶ Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW2 WT/DSB/M/116, adopted 9 May 2003.

Reflecting a bipartisan sense that the AB appeared to have exceeded its mandate, Bush called for reforms to the AB in 2001. The proposed reforms, echoing Clinton, centred on transparency: public access to DSB meetings, timely reports, and amicus curiae submissions at the AB.⁶⁷ In 2002, the administration proposed suggestions to the WTO Negotiating Group on Rules, providing, inter alia, for greater access to DSB meetings: these gained support from the EU and Norway, again suggesting that these objectives had some international support.⁶⁸ Finally, in the Bush administration's final days, the US put forward three recommendations to improve the AB's functioning: changing AB members' positions to full-time roles, increasing support staff, and providing professional development.⁶⁹

The US under Bush also appeared reluctant to comply with adverse AB rulings, especially where congressional action was required. This tendency was particularly apparent in litigation over the Byrd Amendment,⁷⁰ passed in the Clinton administration's waning days (over Clinton's objections), which mandated that domestic businesses harmed by dumping receive associated countervailing duties. To provide a flavour of the responses this legislation provoked, then-EU Trade Commissioner Pascal Lamy observed in July 2002 that the Byrd Amendment was not a US-EU problem "but a US-rest of the world problem... [flying] in the face of the letter and spirit of the WTO rules".⁷¹ An adverse panel report on the Byrd Amendment in October 2002 was swiftly followed by an unsuccessful appeal to the AB.⁷² The Bush administration's initial reaction to the latter was focused on complying with the adverse ruling.⁷³ Congress, however, proved more resistant, with bipartisan resistance delaying the Byrd Amendment's removal until 2005.⁷⁴

The Bush administration also saw the politicisation of the AB appointment procedure. Famously, one of the administration's nominees in 2003 was Robert Lighthizer – later Trump's USTR, and already an outspoken critic of the WTO regime.⁷⁵ In 2007,

⁶⁷ Bush GW (20 July 2001) G7 Statement in Geneva. Public Papers of POTUS, <https://www.govinfo.gov/content/pkg/PPP-2001-book2/pdf/PPP-2001-book2-doc-pg880.pdf> (last accessed 24 February 2021), pp. 880-883; Bush GW (21 October 2001) APEC economic leaders declaration Shanghai, China. Public Papers of POTUS, <https://www.govinfo.gov/content/pkg/PPP-2001-book2/pdf/PPP-2001-book2-doc-pg1278.pdf> (last accessed 24 February 2021), pp. 1278-1286; Rosenblum-Bazquez E, International trade update, Mondaq Business Briefing, 30 October 2002.

⁶⁸ Rosenblum-Bazquez E, International trade update, Mondaq Business Briefing, 30 October 2002.

⁶⁹ USA (16 January 2009) Improvements for the WTO Appellate Body. WTO DSB, WT/DSB/W/398 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DSB/W398.pdf&Open=True> (last accessed 27 February 2021), pp. 1-2.

⁷⁰ USTR. USTR pledges compliance with WTO ruling on Byrd Amendment - Underlying antidumping laws not affected, USTR emphasizes. State Department Press Releases and Documents, 16 January 2003.

⁷¹ WTO dispute panel rules against US Byrd Amendment on anti-dumping. Market News International, 17 July 2002.

⁷² Hervey (2003).

⁷³ USTR Deputy Allgeier urges WTO market access work go on - in Geneva, he cites development issues' prominence. State Department Press Releases and Documents. 19 July 2002.

⁷⁴ Rus (2007), pp. 427-443.

⁷⁵ United States nominates WTO Appellate Body candidates. Office of the United States Trade Representative, 5 September 2003, https://ustr.gov/archive/Document_Library/Press_Releases/2003/September/United_States_Nominates_WTO_Appellate_Body_Cidates.html (last accessed 17/2/2021), Robert Lighthizer quoted In We fret over terrorism, but we still like Bush is it the Texan twang or Teflon. National Journal, 13 September 2003. As Bacchus would later note: "After nearly 25 years, Lighthizer remains unreconciled to the decision by the US Congress in 1994 to support inclusion of the establishment of a binding dispute settlement system

moreover, when Merit Janow stepped down, the US explicitly sought a nominee for the “US seat” on the AB who was persuasive and who shared US concerns about the WTO:⁷⁶ the AB member nomination process became a political focal point for the US before either Obama or Trump.

Across the Bush administration, we also see themes emerge regarding the WTO and AB that echo closely those of the Clinton years. As with Clinton, the Bush administration appeared to support the rules-based trading order and was willing to comply with adverse WTO AB rulings, but was increasingly constrained by domestic politics. Second, during the Doha Round the difficulty of significantly altering the Uruguay “bargain” became glaringly evident, the challenges posed by the emergence of developing countries within the WTO proving particularly salient as prominent developing states – Brazil, India and China – pushed against developed states’ preference for further liberalisation, focusing on implementing existing trade disciplines.⁷⁷ The growing economic weight of these states in turn made acceding to developing country demands more difficult, contributing again to the atrophy of the “legislative” arm of the WTO and placing tremendous pressure on an Appellate Body increasingly identified by the US government as a key venue in shaping international trade law and policy.

4 Barack H. Obama (2009-2016) – Enforcement to Blockages

During the 2008 Democratic primary, both Barack Obama and future Secretary of State Hillary Clinton adopted somewhat sceptical views of the international trading system. Echoing previous administrations, the Obama campaign in particular raised concerns about the environment and working conditions. There was also a sense from Obama, however, that the outgoing Bush administration had not defended US trade interests sufficiently at the WTO, particularly with reference to China.⁷⁸ When Obama took office in 2009, though, his primary focus was on dealing with the consequences of the collapse of the housing market and recession, and subsequently on the ensuing political backlash and right-wing mobilisation.⁷⁹ Moreover, the WTO regime proved pivotal to avoiding a return to global protectionism in dealing with the economic crisis.⁸⁰

The primary stated trade aim of the Obama administration during this period was to ensure a “level playing field”, allowing American workers to reap the benefits of trade.⁸¹ This phrase has developed specific connotations in American trade policy, referring to “reciprocal” trade concessions, where foreign markets would lower trade barriers,

as part of the WTO, when approving the Uruguay Round trade agreements” Bacchus (2018), p. 6; Merit Janow was subsequently appointed to the position.

⁷⁶ Elsig and Pollack (2014), pp. 391-415. Jennifer Hillman was subsequently nominated by Bush for this position.

⁷⁷ Hopewell (2016).

⁷⁸ Schott (2009), pp. 150-153.

⁷⁹ Bartels (2013), pp. 47-76.

⁸⁰ Drezner (2014).

⁸¹ USTR (2009) 2009 Trade policy agenda and 2008 annual report. <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report> (last accessed 28 February 2021); Obama B (22 January 2010) Remarks at a town hall meeting and a question-and-answer session in Elyria, Ohio. Public Papers of the POTUS, <https://www.govinfo.gov/content/pkg/PPP-2010-book1/pdf/PPP-2010-book1-doc-pg55.pdf> (last accessed 25 February 2021).

provide market access, and ensure protections for intellectual property rights.⁸² In short, Obama’s administration was pro-trade, provided that trade reflected America’s interests, priorities and values.⁸³

Over the course of the Obama administration there was also a shift in broader US trade liberalisation priorities, as reflected in the annual Trade Policy Agenda. Initially, the Obama administration focused on the WTO negotiations and worked to revive the Doha Round negotiations that had reached an impasse in 2008:⁸⁴ bilateral and plurilateral agreements were presented as second-order considerations. Over time, however, this switched, with the latter – especially the Trans-Pacific Partnership (TPP) – presented as higher priority for trade policy than WTO negotiations.⁸⁵

The Obama administration also emphasised the value of a “rules-based” trading order as being “in the interest of all Americans”.⁸⁶ The first term of the administration focused on enforcing WTO rules, which the administration argued had been insufficiently pursued under Bush, enabling parties such as China to maintain “unfair” trade practices.⁸⁷ To facilitate more effective US prosecution of these trade disputes, Obama established a Trade Enforcement Unit within the Office of the USTR.⁸⁸ His administration also launched cases against China and the EU.⁸⁹ The US enforcement strategy, however, albeit almost certainly inadvertently, ultimately exacerbated US concerns about “pre-existing conditions” at the AB, with more cases imposing a greater workload on members and subsequently delaying decision-making.⁹⁰

⁸² Hopewell (2020).

⁸³ Obama B (7 July 2010) Remarks announcing the President’s Export Council. Public Papers of the POTUS, <https://www.govinfo.gov/content/pkg/PPP-2010-book2/pdf/PPP-2010-book2-doc-pg1022.pdf> (last accessed 25 February 2021), pp. 1022-1026.

⁸⁴ USTR (2009) 2009 Trade policy agenda and 2008 annual report. <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report> (last accessed 28 February 2021); Obama B (7 July 2010) Remarks announcing the President’s Export Council. Public Papers of the POTUS, <https://www.govinfo.gov/content/pkg/PPP-2010-book2/pdf/PPP-2010-book2-doc-pg1022.pdf> (last accessed 25 February 2021), pp. 1022-1026. Re the Doha Round, under Obama member states reached the ‘Bali package’ which was not nearly as ambitious as planned or as needed; moreover, many states failed to implement the package. Differences remain on deadlines and forums for post-Bali work on agriculture. World Trade Organization: 2014 News Items, 16 September 2014, https://www.wto.org/english/news_e/news14_e/agcom_16sep14_e.htm#implementingbali (last accessed 25 February 2021) offers a discussion on the period after the agreement was reached, India did not accept it by the agreed upon deadlines and states were unable to reach a solution.

⁸⁵ This trend is noticeable in the Presidential Trade Policy Agendas where the focus of the reports moves from the WTO to regional and bilateral agreements over the course of his administration.

⁸⁶ USTR (2009) 2009 Trade policy agenda and 2008 annual report. <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report> (last accessed 28 February 2021), p. 3.

⁸⁷ The trade enforcement unit was originally set up via executive order but was put into law in 2015 see Anon (2012), pp. 144-157; Anderson C, Standing up for American workers & businesses: The Obama administration’s trade enforcement record. The White House: President Barack Obama, 24 February 2016 <https://obamawhitehouse.archives.gov/blog/2016/02/24/protecting-american-workers-businesses-obama-administrations-trade-enforcement> (last accessed 25 February 2021).

⁸⁸ Anon (2012), pp. 144-157.

⁸⁹ Office of the Press Secretary (12 January 2017) FACT SHEET: The Obama Administration’s record on the trade enforcement, The White House, <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/fact-sheet-obama-administrations-record-trade-enforcement> (last accessed 27 February 2021).

⁹⁰ Ehlermann (2017), pp. 705-734 notes that the increased complexity of these cases (panel reports length, legal issues raised in appeals, and number of parties) additionally adds to the workload.

At first glance, it appears this strategy paid off, in the form of significant US “wins” at the panel and AB level.⁹¹ Despite these victories, however, it proved difficult for the administration to persuade respondents to comply with AB rulings. Delays in rulings and settlements in turn led to growing US concern that the AB was neither effective nor efficient, particularly as the DSU permits only forward-looking sanctions, making settlement delays costly for states that are affected by unfair trade practices.⁹² For example, the 2011 AB report in *EC and Certain Member States – Large Civil Aircraft* was touted as a US success during Obama’s re-election campaign.⁹³ This was followed, however, by further rounds of panel and AB litigation, with retaliation only authorised under the Trump administration: at the time of writing this dispute is unresolved.⁹⁴

The US lost several significant cases during this period,⁹⁵ some of which were troubling to the administration.⁹⁶ *US – Clove Cigarettes (2012)*,⁹⁷ for example, proved particularly difficult,⁹⁸ with the US explicitly critiquing the AB report on grounds of judicial overreach, claiming that the AB had “placed itself in the position of the regulator”.⁹⁹

In terms of AB reform, the Obama administration also moved from more traditional tactics – calling for AB reforms – to more extreme measures, blocking specific, individual appointments to the AB of individuals based on their views or perceived conduct so that candidates that were more acceptable from a US point of view could be chosen instead.¹⁰⁰ Whereas earlier US administrations had expressed similar concerns using means and methods commonly adopted by other states parties, this move was significant as the US stepped outside the “consensus” of commonly acceptable modes of behaviour at the WTO, exercising a veto right that had not been previously used. The

⁹¹ Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135; Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7.

⁹² Schwartz and Sykes (2002).

⁹³ Appellate Body Report, *European Communities and Certain Member States -- Measures Affecting Trade in Large Civil Aircraft* WT/DS316/AB/R, adopted 28 May 2018, authorization to retaliate 14 October 2019, 2nd recourse Panel report circulated 2 December 2019.

⁹⁴ Consultations on this case began in 2005 (under Bush), the AB decision was circulated in 2011, AB report adopted in 2018, and retaliation was authorised in 2019 see Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* WT/DS316/AB/R, adopted 28 May 2018, authorization to retaliate 14 October 2019, 2nd recourse Panel report circulated 2 December 2019, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm (last accessed 16 February 2021).

⁹⁵ Notably, the US continues to lose on issues of zeroing and countervailing duties and in its subsidies to Boeing.

⁹⁶ Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft* (Second Complaint), WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7.

⁹⁷ Appellate Body Report, *United States -- Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, WT/DS103/AB/RW2, WT/DSB/M/116, adopted 4 April 2012, DSR 3 October 2014; Obama administration’s reaction to this decision was to ignore the ruling see WTO tells U.S. to change flavored cigarette rules: The Hill reports. The fly on the wall, 5 April 2012.

⁹⁸ Trade reps examine WTO ruling against Tobacco Control Act. FDA Week, 13 April 2012.

⁹⁹ WTO (24 April 2012) WTO adopts clove cigarette rulings; Antigua and Barbuda seeks resolution in gambling case. WTO News https://www.wto.org/english/news_e/news12_e/dsb_24apr12_e.htm (last accessed 27 February 2021).

¹⁰⁰ Bown and Keynes (2020).

implications of this move should also not be understated: in unilaterally withholding consent to the appointment of AB members, the administration not only expressed the seriousness and depth of American concerns, it risked diminishing the potential effectiveness of the AB by limiting its ability to function.

This tactic was implemented for the first time in 2011, when the US took the then-unprecedented step of blocking the reappointment of American AB member Jennifer Hillman.¹⁰¹ Both candidates nominated to replace Hillman, John Greenwald and Thomas Graham, shared administration concerns about overreach – though once appointed Graham was unable to address them.¹⁰²

In 2013-14, the US then blocked the appointment to the AB of James Gathii, an American citizen supported by Kenya, prompting Kenya to withdraw his nomination.¹⁰³ Finally, in 2016 the Obama administration announced that it would block the reappointment of South Korean member Seung Wha Chang for a second term, maintaining that the reports he participated in did “not accord with the role of the Appellate Body”.¹⁰⁴

This tactic of blocking appointments and reappointments, importantly, targeted specific individuals based on their writings or past rulings, reflecting US concerns about how they had decided cases previously or might decide cases if appointed or reappointed. The AB as an institution was not itself the principal “target” of these measures - though certainly affected by them - but rather the targets were specific members or nominees. Indeed, when Obama left office in 2017, there remained six members on the AB, with several appointments made during his tenure, including Graham’s reappointment in 2015: it was only under the subsequent Trump administration that the practice of blocking appointments evolved into a campaign against the AB as an institution.

US attitudes towards and concerns about the AB during the Obama administration were, moreover, not markedly inconsistent with those of previous administrations. The administration, for example, emphasised the importance of trust in a rules-based system. US trust, however, was predicated on the assumption that under a “properly-constructed” system, the US would generally prevail in trade disputes: American losses were in turn attributable to unreasonable AB practices or problems with the rules.

A target of US ire during this period was the differentiated obligations of member states that maintained developing country status within the WTO system, despite being

¹⁰¹ There was debate at the time about the non-reappointment as to whether this was due to Hillman specifically or a desire for the Obama administration to pick their own candidate see USTR Blocks Hillman’s bid for second WTO Appellate Body term. Inside U.S. Trade, 29 April 2011.

¹⁰² Greenwald (2003) argues that AB rulings had gone beyond the letter of the negotiated texts and wrote out flexibility that governments had purposely built into the treaty. Graham, who was a AB Member for 8 years, stated in his farewell speech that from the outset he largely agreed with longstanding ‘US critique of the Appellate Body’s departure from that proper role’ see Graham TF (5 March 2020) Farewell speech of Appellate Body member Thomas R. Graham. WTO: Appellate Body https://www.wto.org/english/tratop_e/dispu_e/farwellspeechtgaham_e.htm (last accessed 27 February 2021).

¹⁰³ Elsig M, Pollack M, Shaffer G, The U.S. is causing a major controversy in the World Trade Organization: Here’s what’s happening. Washington Post, 6 June 2016 <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/> (last accessed 15 February 2021).

¹⁰⁴ USA (23 May 2016) Statement by the United States at the meeting of the WTO Dispute Settlement Body. WTO, Geneva, https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf (last accessed 27 February 2021), p. 3.

middle-income countries.¹⁰⁵ These concerns were evident in Congress, which in turn constrained executive conduct.¹⁰⁶ In reviewing Obama's record, there are echoes of Clinton's and Bush's emphasis on transparency at the AB. Generally, though, even with Obama's new, more aggressive tactics, the US again made little progress in furthering reforms. The WTO and other member states' ongoing failure to address US concerns presaged the subsequent hardening of US attitudes and conduct under Trump.¹⁰⁷

Second, US attitudes and behaviours under Obama underline the hazards of legislative deadlock in the GC. During Obama's tenure, the Doha Round stuttered on, with an arguable highlight the Bali Package of 2013. A "package deal" remained elusive, however, reflecting the challenges of growing membership in the post-Uruguay era, as well as the strong preferences of various groups of states and prevailing norms around consensus-based decision-making. Where progress was made in negotiations, moreover, these were in narrower, issue-specific areas, limiting the ability of parties to consider broader trade-offs or other means of promoting broader trade liberalisation goals.

Third, dating back to Clinton, there was a longstanding American expectation that with growing trade and enlargement of the economic pie globally, domestic and international living standards would increase alongside development in environmental regulations, workers' rights and wages.¹⁰⁸ When this failed to transpire as anticipated, however, the US already had relatively low barriers to trade "wired-in" in both the WTO and regional trade agreements. Consequently, the US turned to more ambitious regional trade initiatives to secure trade partner commitments to labour and environmental standards. The Obama administration, for example, effectively leveraged access to Japan's market during the TPP negotiations to obtain concessions from trade partners with which the US already had trade agreements.¹⁰⁹

5 Donald J. Trump (2017-2021) – Playing the Trump Card

During the 2016 presidential election campaign, both Donald Trump and Hillary Clinton expressed scepticism about US trade policy, reflecting concerns among the American public that trade agreements had not delivered promised benefits.¹¹⁰ Trump's election

¹⁰⁵ The Uruguay Treaty provides special and differential obligations for developing states. Developing state status is self-defined and as such many middle-income countries are classified as developing states. (See: https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm)

¹⁰⁶ The fast-track trade promotion authority granted to Obama, for example, stated that: "[t]he principal negotiating objectives of the United States with respect to dispute settlement and enforcement of trade agreements... [included] (C) to seek adherence by panels convened under the Dispute Settlement Understanding and by the Appellate Body to— (i) the mandate of those panels and the Appellate Body to apply the WTO Agreement as written, without adding to or diminishing rights and obligations under the Agreement; and (ii) the standard of review applicable under the Uruguay Round Agreement involved in the dispute, including greater deference, where appropriate, to the fact finding and technical expertise of national investigating authorities". (Defending Public Safety Employees' Retirement Act (HR 2146, Title I - Trade Promotion Authority, Sec. 102(b)(16)).

¹⁰⁷ Condon. (2018), pp. 535-556.

¹⁰⁸ Indeed, the Preamble to the Agreement establishing the WTO (Apr. 15, 1994, 1867 U.N.T.S. 154) references employment and environmental sustainability.

¹⁰⁹ Froman M, Lindsay J (25 July 2017) Remaking Trade. The President's Inbox <https://www.cfr.org/podcasts/remaking-trade> (last accessed 27 February 2021).

¹¹⁰ Roberts D and Felton F, Trump and Clinton's free trade retreat: a pivotal moment for the world's economic future. The Guardian, 20 August 2016, <https://www.theguardian.com/us->

consequently saw substantial changes in trade policy, including imposition of tariffs premised on national security interests¹¹¹ and greater attention to trade deficits and surpluses.¹¹²

Trump's trade policy and positions were, however, neither as clear nor as consistent as those of previous administrations: to an extent, the administration repeated the calls for free and fair trade made under previous administrations.¹¹³ The Trump administration also reiterated concern that trade agreements incentivised corporate offshoring to benefit from weaker labour and environmental standards.¹¹⁴ Trump also, however, "repudiated the longstanding American establishment consensus favoring commercial globalization, which he described...as the 'rule of corrupt power-hungry globalists' who want 'the globe to do well' and who don't 'care about our country so much.'"¹¹⁵

Trump's approach to trade policy was also more aggressive than previous administrations. Shortly after taking office, he walked away from the Trans-Pacific

[news/2016/aug/20/trump-clinton-free-trade-policies-tpp](https://www.ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf) (last accessed 15 February 2021); USTR (2017) 2017 Trade policy agenda and 2016 annual report, Executive Office of the President of the United States <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf> (last accessed 28 February 2021).

¹¹¹ Lester S, Zhu H (25 June 2019) Closing Pandora's box: The growing abuse of the national security rationale for restricting trade. CATO Institute, Policy Analysis No 874. <https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade> (last accessed 27 February 2021).

¹¹² This trend is noticeable in Trump's rhetoric, for example "We racked up nearly \$4 trillion in trade deficits in goods with China during those years. And the numbers are absolutely astounding — what's been happening over the last 10 years in particular" in Trump DJ (23 May 2019) Remarks by President Trump on supporting America's farmers and ranchers. The White House Office of the Press Secretary <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-supporting-americas-farmers-ranchers/> (last accessed 18 January 2021). There is a more general focus on "reciprocal" trade agreements and highlighting deficits as a negative impact of trade both from Trump and other senior administration officials Trump DJ (22 January 2020) President Trump news conference in Davos, Switzerland. C-Span <https://www.c-span.org/video/?468400-1/president-trump-holds-news-conference-davos> (last accessed 28 February 2021). Moreover, the USTR Office focuses more on deficits and balanced trade. See USTR (2017) 2017 Trade policy agenda and 2016 annual report, Executive Office of the President of the United States <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf> (last accessed 28 February 2021) which highlights trade deficits, a striking change from the Obama-era reports. See USTR (2020) 2020 Trade policy agenda and 2019 annual report, Executive Office of the President of the United States https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf (last accessed 28 February 2021) for a section on the WTO at 25 highlights trade imbalances under the WTO era.

¹¹³ "President Trump is working to open new markets for American goods and services, while ensuring any deal is enforceable and creates a level playing field for our workers and companies" quoted in President Donald J. Trump will promote worldwide economic growth and prosperity at the G20 summit. Whitehouse.gov, 27 June 2019.

¹¹⁴ USTR (2019) 2019 Trade policy agenda and 2018 annual report. Executive Office of the President of the United States https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf (last accessed 28 February 2021).

¹¹⁵ Schlesinger JM, Vierira P, Peker E, WTO Members work to overhaul trade watchdog amid Trump's criticism; failure to meet U.S. demands could leave global commercial court in limbo: 'every case potentially becomes a trade war,' one WTO official says. The Wall Street Journal Online, 23 October 2018.

Partnership¹¹⁶ and demanded the renegotiation of the North American Free Trade Agreement (NAFTA).¹¹⁷ Trump also initiated a “trade war” with China, using a series of escalating tariffs to exert pressure in bilateral negotiations, seeking to diminish China’s economic strength.¹¹⁸ Under Trump, the US also pressured South Korea to classify itself as a developed country for WTO purposes.¹¹⁹

Critically, although tone and tenor towards the international trading system sharpened under Trump,¹²⁰ the concerns evinced about the WTO/AB - and associated techniques adopted - were strikingly consistent with those of preceding administrations. In justifying policies, for example, the administration explicitly highlighted the history of US dissatisfaction with the world trade regime and institutions and the failure of previous efforts at reform.¹²¹

Prominent voices also raised claims of AB overreach, with the Office of the USTR (under Lighthizer) observing in 2018 that the AB tended to read “text into the Agreement, applying standards of its own devising”,¹²² and in 2019 that “[w]e will not allow the WTO Appellate Body and dispute settlement system to force the United States into a straitjacket of obligations to which we never agreed”.¹²³ Similarly, USTR’s 2018 Trade Policy Agenda and 2017 Annual Report highlighted concerns about AB “advisory opinions” and *obiter dicta* - ranging in its reports beyond the issues strictly required to resolve a dispute - noting that the “US has repeatedly raised concerns for more than 16 years on this issue.”¹²⁴

¹¹⁶ Trump DJ, Presidential memorandum regarding withdrawal of the United States from the Trans-Pacific Partnership negotiations and agreement. Trump White House Archives, 23 January 2017 [Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement – The White House \(archives.gov\)](#) (last accessed 21 January 2021).

¹¹⁷ President Donald J. Trump is keeping his promise to renegotiate NAFTA. Fact Sheet: Trump White House Archives, 27 August 2018 [President Donald J. Trump is Keeping His Promise to Renegotiate NAFTA – The White House \(archives.gov\)](#) (last accessed 21 January 2021).

¹¹⁸ Ward A, Trump’s China strategy is the most radical in decades — and it’s failing. Vox, 19 September 2018 <https://www.vox.com/world/2018/9/18/17790600/us-china-trade-war-trump-tariffs-taiwan> (last accessed 28 February 2021).

¹¹⁹ Chung J and Roh J, South Korea to give up developing country status in WTO talks. Reuters, 25 October 2019 <https://www.reuters.com/article/us-southkorea-trade-wto-idINKBN1X401W> (last accessed 21 January 2021).

¹²⁰ Carnegie and Carson (2019) find that Trump focuses more of his rhetoric on trade violations than his predecessors, generating pessimism about trade compliance more broadly.

¹²¹ USTR (2020) 2020 Trade policy agenda and 2019 annual report, Executive Office of the President of the United States https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf (last accessed 28 February 2021), p.7.

¹²² USTR (2018) I. The president’s trade policy agenda. 2018 Trade policy agenda and 2017 annual report, Executive Office of the President of the United States <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> (last accessed 28 February 2021), p.24.

¹²³ USTR (2019) 2019 Trade policy agenda and 2018 annual report. Executive Office of the President of the United States https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf (last accessed 28 February 2021), p.27.

¹²⁴ USTR (2018) I. The president’s trade policy agenda. 2018 Trade policy agenda and 2017 annual report, Executive Office of the President of the United States <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> (last accessed 28 February 2021), p.22-28.

Concerns were also raised about appeals exceeding the DSU's 90-day deadline and the AB not consulting parties about delays. There were also broader concerns about a lack of transparency regarding the release of AB reports, echoing previous administrations' focus on enhancing the AB's transparency.¹²⁵

The politicisation of the AB member appointment process culminated under Trump. USTR's 2020 Trade Policy Agenda and 2019 Annual Report unapologetically notes, that "[t]he Trump Administration took action by exercising its right as a WTO Member to decline to approve new Appellate Body members, forcing the WTO to engage in a long-overdue debate about the role of the Appellate Body".¹²⁶ In response, other WTO members proposed amendments to AB processes, including permitting AB members to sit on cases to conclude reports commenced during their terms of office.¹²⁷

The US not only objected to these proposals, however, it went further.¹²⁸ In a 2020 DSB meeting on *US – Supercalendered Paper* it claimed that the AB's report was invalid.¹²⁹ This claim disputed the standing of AB members whose terms of appointment had formally ended when the report was submitted to the DSB.¹³⁰ The US also challenged the standing of the sole remaining serving AB member on the grounds of affiliation with the Chinese Ministry of Commerce, which the US argued contravened WTO rules.¹³¹

Given Trump-era tactics, there were more substantive conversations amongst WTO members about institutional reforms during this period. Yet from the US perspective most of the proposed measures would provide the AB more discretion in key areas: these discussions tended to aggravate the Trump administration.¹³²

Despite the more bombastic tone of American trade policy and more aggressive measures adopted towards the AB, the attitudes during the Trump administration were remarkably consistent with previous US administrations. Indeed, the administration reiterated that: "[t]he United States remains committed to fulfilling its obligations under WTO agreements", adding, however, that: "[u]nder the leadership of President Trump...

¹²⁵ USTR (2018) I. The president's trade policy agenda. 2018 Trade policy agenda and 2017 annual report, Executive Office of the President of the United States <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> (last accessed 28 February 2021), p.22-28.

¹²⁶ USTR (2020) 2020 Trade policy agenda and 2019 annual report. Executive Office of the President of the United States, https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf (last accessed 28 February 2021), p.12.

¹²⁷ Anon (2019), p.822.

¹²⁸ WTO (14 May 2020) Dispute Settlement Body - Minutes of meeting, WT/DSB/M/441; also Lighthizer R, Report on the Appellate Body of the World Trade Organization, USTR, February 2020 https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (last accessed 28 February 2021).

¹²⁹ WTO (14 May 2020), Dispute Settlement Body - Minutes of meeting, WT/DSB/M/441, p.19.

¹³⁰ Appellate Body Report, *United States — Countervailing Measures on Supercalendered Paper from Canada*, WTO, WT/DS505/AB/R, adopted 6 February 2020.

¹³¹ The US claims the CV used to hire her was misleadingly translated. WTO (14 May 2020) Dispute Settlement Body - Minutes of meeting, WT/DSB/M/441, p.19.

¹³² Vaughn S, 111: Trade policy under Trump. Trade Talks, Interview, 25 November 2019. "It is very troubling to see that China believes that giving more authority to the Appellate Body would be in China's interest" from USTR (2019) 2019 Trade Policy Agenda and 2018 Annual Report. Executive Office of the President of the United States, https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf (last accessed 28 February 2021), p.26.

the United States will certainly reject efforts by the AB to create new obligations to which WTO Members have not agreed.”¹³³ Moreover, the administration framed its actions, including Trump’s AB appointment-blocking strategy, as consistent with support for a rules-based international system. It argued that forcing difficult conversations about WTO/AB reform was within the rules and that these measures were designed to counteract what it deemed to be rule-breaking behaviour by the AB.¹³⁴

6 Analysis: Consistency and Change Across Administrations

Each of the administrations covered in this study has had a different relationship with the WTO and AB. Despite these differences, however, the persistence of central US concerns and claims regarding the WTO and AB is remarkable. Accordingly, it is impossible to dismiss the current impasse as reflecting a temporary, aberrant strand of US policy. Equally, given the persistence over time of US concerns, other WTO members and the AB itself also bear some responsibility for the consequences of collective failure to assuage these concerns.

6.1 Consistency

All US administrations surveyed have, at different times, challenged the transparency, scope, and management of WTO dispute settlement processes. Despite this, however, there has also been a consistent *formal* US commitment to rules-based international trade governance.

Each administration has used the DSB and AB, suggesting sustained recognition of the value of maintaining this “form” of international trade dispute resolution. Equally, however, as put by Jennifer Hillman: “[t]he US view across multiple US Administrations had been clear and consistent: When the Appellate Body overreached and abused the authority it had been given within the dispute settlement system, it undermined the legitimacy of the system and damaged the interests of all WTO Members who cared about having the agreements respected as they had been negotiated and agreed.”¹³⁵

Making substantive changes to the DSU or to broader WTO agreements will likely be challenging. The US has persistently raised concerns with the WTO and pushed for reforms, in some instances with support from other member states.¹³⁶ Yet, given the reversion to a *de facto* panel-only system, with appeals “into the void”,¹³⁷ it is unclear

¹³³ USTR (2019) 2019 Trade Policy Agenda and 2018 Annual Report. Executive Office of the President of the United States, https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf (last accessed 28 February 2021), p.27.

¹³⁴ Elsig M, Pollack M Shaffer G, Trump is fighting an open war on trade. His stealth war on trade may be even more important. The Washington Post, 27 September 2017. <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/> (last accessed 28 February 2021).

¹³⁵ WTO (25 March 1998) Dispute Settlement Body - Minutes of meeting, WT/DSB/M/441.

¹³⁶ Babu (2020); See WTO (9-10 December 2019) GC - Minutes of meeting, WT/GC/M/181 [directdoc.aspx \(wto.org\)](#) (last accessed 3 March 2021), s5 for discussion and support of the Walker report/principles and US support (albeit weak) from Nigeria s.5.51, Barbados s5.64, Canada s5.171, and Australia s5.175 yet the US refused support for the draft(s5100-5.124).

¹³⁷ See Pauwelyn (2019).

what reforms would now be acceptable to the US. Indeed, a central problem in recent years has been that “no one knows for certain exactly what the United States seeks in terms of changes to the Appellate Body.”¹³⁸

Moreover, even if the US wished “for the Appellate Body to apply the rules as they were written when the WTO was created in 1995”,¹³⁹ such an “ideal-form” body, tailored perfectly to US understandings of the covered agreements, is unlikely to appear. Member states that have used the AB to secure trade policy “wins” against the US may be reluctant to agree to US demands.

Consequently, while each of the administrations discussed here has brought forward proposals to address US concerns, including Clinton’s call for greater transparency, Bush’s commitment to the Doha Round, Obama’s efforts to promote transparency at the AB, and even, arguably, Trump’s “forcing the debate” on the DSU and future of the AB, all these efforts at reform have fallen flat.

Arguably US views of the WTO were based on faulty initial assumptions. Clinton presented the WTO as a tool to promote economic liberalisation and development.¹⁴⁰ Accordingly, US policy anticipated that economic development would lead to enhanced labour and environmental protections globally.¹⁴¹ These developments, in turn, were expected to bring about a “level playing field” in trade.

These expectations appear to have been misplaced, however. Formal changes from developing to developed country status have been the exception rather than the rule. Moreover, the greater the share of developing states in the global economy, the greater the prospect that the persistence of “special and differential” benefits on the part of such states will prompt concerns and claims of market distortion from developed states.¹⁴²

6.2 Change

AB and WTO dispute settlement arrangements have evolved in ways not necessarily anticipated by those who negotiated and drafted the WTO agreements.¹⁴³ Indeed,

¹³⁸ Hillman J (2018) Three approaches to fixing the World Trade Organization’s Appellate Body: The good, the bad, and the ugly?. Institute of International Economic Law, Georgetown University Law Centre, Washington DC <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf> (last accessed 25 February 2021), p.4.

¹³⁹ Hillman J (2018) Three approaches to fixing the World Trade Organization’s Appellate Body: The good, the bad, and the ugly?. Institute of International Economic Law, Georgetown University Law Centre, Washington DC <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf> (last accessed 25 February 2021), p.4, n. 10.

¹⁴⁰ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154, Preamble.

¹⁴¹ Clinton highlighted increasing funding for labour and environmental standards as part of the WTO agenda in The Clinton Administration agenda for the Seattle WTO, Clinton White House Archives, 24 November 1999 <https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-007.html> (last accessed 28 February 2021).

¹⁴² Hopewell (2020).

¹⁴³ “I think we can be encouraged already by the operation of the new system. First, governments are making use of it...Around 20 cases have come to the Dispute Settlement Body - a number far greater than any single year of the GATT’s 47-year existence. Second, the rapid automatic procedure together with the knowledge that at its conclusion the system is enforceable seems to be concentrating minds and encouraging quick settlements through the initial consultative process... And that is the objective - to resolve trade disputes quickly, not, primarily, to generate jurisprudence” in Ruggiero R, The global

scholars and retiring AB members alike have noted the development of a distinct dispute settlement “ethos” within the AB, reflected inter alia in a preference for consensus decision-making and more limited discretion for member states than the drafters of the WTO agreements might have anticipated.¹⁴⁴ Critically, this dominant ethos appears to be at odds with longstanding US expectations and preferences.¹⁴⁵ At the same time, the cases submitted to the AB have also grown in both number and complexity.¹⁴⁶

The AB remains, moreover, only one element of the WTO’s institutional architecture. One of the original expectations of the WTO was that it would provide a standing venue for the continuous negotiation and that trade agreements would be updated to reflect changing economic circumstances and to address lacunae or ambiguities in the 1994 agreements. The WTO’s “legislative” arm has, however, ossified as attested by the drawn-out, unsuccessful Doha Round. These legislative failures have led member states to rely on the DSB and AB, drawing the AB into matters perhaps better resolved in a legislative setting.¹⁴⁷

Reflecting the above, viable “fixes” must recognise that US challenges to the WTO’s dispute resolution regime are endogenous to the conduct of both the AB and of other member states. Given this tendency, it may for example be preferable in future for a reconstituted AB to be able to refer issues back to the DSB or GC to consider, providing an “escape valve” to save the AB from stepping into a quasi-legislative role itself. In similar fashion, to address “level playing field” concerns both from the US and other developed countries, it may be helpful to revisit the discretion of individual states to accord to themselves “developing” status and hence benefit from special and differential rights.

In a 2018 interview, when there were still four AB members, then-WTO Director General Roberto Azevedo warned of the potential paralysis of the AB. He equally observed, though, that: “[t]here is nothing in my contacts with the United States that indicates that there is a possibility of the United States leaving the WTO... They are

challenge: opportunities and choices in the multilateral trading system. WTO News: 1995-99 Speeches - Renato Ruggiero, Former DG, 16 October 1995 https://www.wto.org/english/news_e/spr_e/harvar_e.htm (last accessed 26 February 2021).

¹⁴⁴ When Seung Wha Chang was not reappointed both former (Letter to Ambassador Xavier Carim from WTO AB Members 31 May 2016, <http://worldtradelaw.typepad.com/files/abletter.pdf> (last accessed 28 February 2021), pp. 1-3) and current (AB members challenge US over reappointment of Seung Wha Chang. SUNS #8244, 20 May 2016, <https://twn.my/title2/wto.info/2016/ti160516.htm> (last accessed 28 February 2021)) members expressed their concern about US actions. See similarly: Zhao H. (30 November 2020) Farewell speech of Appellate Body member Prof. Dr. Hong Zhao, WTO : AB https://www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm (last accessed 28 February 2021) which acknowledges scope for different understandings of the AB and different views around the nature and purpose of international adjudication.

¹⁴⁵ For example Brown CP and Keynes S, Why Trump shot the sheriffs: The end of WTO dispute settlement 1.0. Peterson Institute for International Economics Working Paper; Unterhalter D (22 January 2014) David Unterhalter Farewell speech of Appellate Body Member, https://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm (last accessed 28 February 2021); Zhao H. (30 November 2020) Farewell speech of Appellate Body member Prof. Dr. Hong Zhao, WTO : AB https://www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm (last accessed 28 February 2021).

¹⁴⁶ Zhao H. (30 November 2020) Farewell speech of Appellate Body member Prof. Dr. Hong Zhao, WTO: AB https://www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm (last accessed 28 February 2021); Van Damme (2010), pp. 605-648.

¹⁴⁷ Condon (2018).

concerned with some issues that are discussed here but they have also told me that ... the organization is very important ... and that they want reforms”.¹⁴⁸

For such reform to take place, however, *all* members’ concerns need to be appreciated. We presume that the broader WTO membership seeks both to revitalise the trade regime and its dispute settlement function and get US buy-in to this endeavour. If the latter is correct, then the membership must collectively address US concerns: “tinkering at the margins” may risk further institutional distress.¹⁴⁹ Given the persistent shortcomings in the WTO’s legislative arm and the knock-on effect that has had on the AB, moreover, focusing exclusively on reform of the WTO’s judicial arm is likely insufficient to address US concerns about judicial “gap-filling”. As Hong Zhao, the last-departing AB member observed in November 2020, “[t]here needs to be a grand bargain, where issues old or new, trade-related or not, shall be put on the table. Then let the Members draw a blueprint with a vision, and make it happen, either all at once or step by step.”¹⁵⁰

It remains an open question whether the WTO and AB can be reformed to address US concerns in a manner that will enable functional international trade governance, or whether the current, impaired institutional infrastructure will persist, at least for the time being, as a “new normal”.

7 Conclusions: Biden and Beyond...

Initial indications are that Biden administration’s attitudes and actions towards the WTO and AB will be broadly consistent with those of his predecessors. There are some indications that the US will constructively engage with WTO. Biden supported the election of Nigerian Dr. Ngozi Okonjo-Iweala as the new WTO Director General, replacing Azevedo, and enabling Okonjo-Iweala’s appointment by consensus.¹⁵¹ Okonjo-Iweala recognised this shifted position and highlighted the significance of US support, observing to the GC that: “[w]ithout the recent swift action by the Biden-Harris Administration to join the consensus of the membership on my candidacy, we would not be here today.”¹⁵² With a new DG interested in finding a “third way” to work at the WTO,¹⁵³ and a new administration signalling renewed openness to cooperation with other members and the new DG, there may be more readiness to address the issues facing the WTO and AB.

The persistence of US concerns over the preceding 25 years indicates, however, that any sustainable solution will likely require substantial institutional changes, particularly to

¹⁴⁸ Azevedo quoted in The WTO warns of the risk of “paralysis” of the institution by the United States. CE Noticias Financieras English, 20 February 2018.

¹⁴⁹ For an overview of possible steps that have been suggested see Hillman (2018).

¹⁵⁰ Zhao H. (30 November 2020) Farewell speech of Appellate Body member Prof. Dr. Hong Zhao, WTO:AB https://www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm (last accessed 28 February 2021).

¹⁵¹ History is made: Ngozi Okonjo-Iweala chosen as Director-General. WTO News, 15 February 2021 WTO | 2021 News items - History is made: Ngozi Okonjo-Iweala chosen as Director-General (last accessed 16 February 2021).

¹⁵² Okonjo-Iweala N, Statement of Director-General elect Dr. Ngozi Okonjo-Iweala to the Special Session of the WTO GC, WTO, 13 February 2021 [dgno_15feb21_e.pdf](https://www.wto.org/english/press/p/dgno_15feb21_e.pdf) (wto.org) (last accessed 21 February 2021), p.1.

¹⁵³ New WTO Director-General Ngozi Okonjo-Iweala addresses the media. SABC News, 15 February 2021 <https://www.youtube.com/watch?v=-GWz90Ry0PA> (last accessed 21 February 2021).

the AB. Critically, the Biden administration has maintained Trump's strategy of blocking all AB appointments until systemic issues that have spanned multiple administrations are addressed.¹⁵⁴ In her Senate confirmation hearings, moreover, incoming USTR Katherine Tai both echoed the concerns of previous administrations and suggested consistency with historic US positions and policy.¹⁵⁵ Specifically, she highlighted that the AB would not be revived without addressing underlying US concerns with AB overreach and that addressing US concerns within the existing WTO framework will be challenging.¹⁵⁶

Asked about WTO reform, Tai also stressed US engagement and leadership in the system, again consistent with previous emphases in the rules-based system. In line with our analysis, she also highlighted the need for systemic reforms: “[w]e need to be having hard conversations in Geneva in a constructive way to be asking ‘What is the value of the WTO to its members? Is it accomplishing the goals that its founders and members expect of it?’ And also, in today’s world of 2021, how does the WTO rise to the challenges in today’s world?”¹⁵⁷

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<https://doi.org/10.1177/0002716213496054>

¹⁵⁴ USA (22 February 2021) Statements by the United States at the meeting of the WTO Dispute Settlement Body. WTO, Geneva, https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb22.DSB_.Stmt_.as_.deliv_.fin_.public.pdf, (last accessed 27 May 2021), p.12.

¹⁵⁵ Bade G, At USTR, a Straight-shooter will have to navigate Biden's old guard in Washington. *Politico*, 1 February 2021 <https://www.politico.com/news/2021/02/01/katherine-tai-ustr-biden-463668> (last accessed 28 February 2021).

¹⁵⁶ Tai K. Hearing to consider the nomination of Katherine C. Tai, of the District of Columbia, to be United States Trade Representative, with the rank of Ambassador Extraordinary and Plenipotentiary. Senate Finance Committee, 25 February 2021. <https://www.finance.senate.gov/imo/media/doc/Katherine%20Tai%20Senate%20Finance%20Committee%20QFRs%2028.28.2021.pdf>, (last accessed 27 May 2021).

¹⁵⁷ Tai presentation in (25 February 2021) At Finance Hearing, Portman secures Commitment from USTR nominee to conduct top-to-bottom review of U.S.-China trade relationship, pursue reform at World Trade Organization. Senator Rob Portman Website, <https://www.portman.senate.gov/index.php/newsroom/press-releases/finance-hearing-portman-secures-commitment-ustr-nominee-conduct-top-bottom>, (last accessed 27 May 2021).

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