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Editorial

Volume 12 of the European Yearbook of International Economic Law (EYIEL) sees the light of day in times which remain challenging for international relations: the COVID-19 pandemic continues to impact the lives of many individuals, societies and nations. Yet, also international political, economic and security crises have a significant effect on global affairs. In these challenging times, it is important to recall one of the cornerstones of the law of the community of states enshrined in Article 2 of the Charter of the United Nations:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.[1]

The implementation of the principle of the peaceful settlement of disputes through various judicial and quasi-judicial mechanisms in international law is nowhere as diverse and differentiated as in the field of international economic law. At the same time, well-established bodies and institutes of dispute settlement in international economic law face significant practical and fundamental questions. The editors have therefore decided to dedicate the focus section of EYIEL 12 to the future of dispute settlement in international economic law. Most contributions were received following a call for papers which attracted a variety of authors at different stages of their professional and academic careers.

The first four chapters address dispute settlement in the World Trade Organisation (WTO). *Lindsey Garner-Knapp, Shaina D. Western* and *Henry Lovat* discuss the relationship between the United States and WTO dispute settlement, in particular the Appellate Body (AB). As a result of the US' blocking of the appointment of new AB members, the institution is currently inactive. Considering that the US was among the principal architects of the AB, this seems remarkable. To assess this development, the authors examine US attitudes and behaviour towards the WTO in the context of broader developments in US domestic and external policy. The authors

[1] Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI (1945).

explore both continuity and change in American attitudes through this examination and find that US behaviour over time is not as perplexing as it may appear. Rather, the current situation 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.

Emmanuel Kolawole Oke focusses on a more specific question and assesses the role of the Appellate Body in preserving the "glocal" space in international intellectual property law. The author uses the term glocal to describe the space available to states to experiment and adjust global rules to suit their local needs. The chapter explores how viewing glocalisation as an autonomous concept can be applied in the context of international intellectual property law and argues that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) should not be conceptualised as simply a global agreement but as an agreement that contains both global and glocal spaces. Built on this, the author critically analyses the role that the AB has played in preserving the glocal space in international intellectual property law.

Even though the WTO's dispute settlement system is the most prominent system of settling disputes in international trade law, it is not the only one. In fact, many regional trading agreements also establish such systems which are, however, not used as frequently as the WTO system. *Annabel Nanjira* therefore compares the efficacy of the African Continental Free Trade Area Agreement (AfCFTA) and the WTO in resolving trade disputes between African States. Apart from comparing the main features of the two systems, *Nanjira* assesses whether recourse to one system automatically bars a state party from seeking a remedy in the other dispute resolution system and highlights lessons for AfCFTA from other dispute settlement mechanisms on the African continent.

In the last chapter addressing dispute settlement in international trade law, *Georgie Juszczyk* comes back to the legitimacy crisis of the WTO's Appellate Body and asks if there are other ways to overcome that crises than through the Multiparty Interim Appeal Arbitration Arrangement (MPIA). *Juszczyk* argues that the crisis currently facing the Appellate Body is one of legitimacy, and the MPIA is not the correct forum for addressing questions about the identity of the WTO. Hence, the MPIA cannot serve as a permanent solution to the AB crisis. Nevertheless, the MPIA offers important lessons to be considered during any future reforms seeking to address the legitimacy crisis.

The second part of the focus section on dispute settlement contains contributions addressing questions from international investment law. The first chapter in this context asks if frivolous counterclaims in international investment arbitration can be prevented through summary dismissals. *Vishakha Choudhary* argues that this option is not a one-way-street: Even though summary procedures can be used for the dismissal of frivolous counterclaims, there are various explicit and implicit restrictions which bar claimants from seeking early dismissal of such counterclaims. Given the emerging practice of including investors' obligations in investment treaties and the increasing frequency with which counterclaims are litigated, precluding investors from challenging frivolous counterclaims runs against the current.

Choudhary highlights that the rationale for summary dismissal procedures is equally relevant to the adjudication of counterclaims and proposes possible rules in this regard.

Erlend M. Leonhardsen contributes to the ongoing debates about reforming existing international investment agreements (IIAs) to increase states' discretion with respect to the measures they undertake vis-à-vis foreign investors. Such discretion is most famously associated with the "margin of appreciation" in the case law of the European Court of Human Rights (ECtHR). *Leonhardsen* analyses investment treaty reforms and examines further developments of this doctrine. He shows that the margin of appreciation may be evolving from a "thin" version, which mainly involves discretion, into a "thick" version, involving subsidiarity and the relationship between the ECtHR and national bodies. The author concludes that there are many examples of awards in which tribunals have afforded discretion, resembling such a "thin" version, but only few examples of the "thick" version.

Moving away from the specific questions of investor-state dispute settlement (ISDS) *Domenico Pauciulo* asks if conciliation can be an instrument for the settlement of disputes between sovereign debtors and their creditors. Observing that states' financial instability and debt restructuring are impaired by predatory behaviours of private creditors, including the use of ISDS, the author suggests that conciliation could provide an alternative to judicial and ISDS proceedings to solve disputes involving sovereign debt between private creditors and debtor states because of its procedural and practical benefits. *Pauciulo* proposes to create a compulsory "conciliation scheme" managed by the United Nations Conference on Trade and Development (UNCTAD) Sovereign Debt Workout Institution in order to create a reliable system for the resolution of sovereign debt disputes.

Patricia Cruz Trabanino addresses state counterclaims and the "legitimacy crisis" in investment treaty arbitration. Historically, state counterclaims in ISDS have generally failed due to ISDS's procedural and substantive asymmetry, which contributed to the "legitimacy crisis" of ISDS; yet some tribunals have shown greater openness towards states' counterclaims. *Cruz Trabanino* analyses six such cases which exemplify a more permissive interpretation of the jurisdictional requirements for counterclaims and a novel approach to the imposition of substantive obligations on investors. If future arbitral awards adopt and expand these cases' openness towards counterclaims, they could trigger a trend of increased receptiveness to and success of state counterclaims, potentially mitigating some of the concerns that fuel the backlash against ISDS.

The well-known *Achmea* ruling of the European Court of Justice (CJEU) marked the end of treaty-based intra-EU arbitration and is the starting point of the next chapter: *Berta Boknik* discusses a return to contract-based arbitration as a possible response to *Achmea*. Arguably, ISDS clauses in investor-state contracts neither violate the principle of mutual trust nor the principle of non-discrimination foreseen in Article 18(1) TFEU. However, there are concerns with regard to Articles 267 and 344 TFEU, as well as the autonomy of EU law. Nevertheless, there might be a reason to assess contract-based investment arbitration differently than treaty-based

arbitration and, in fact, subject it to the standard applied to commercial arbitration: the fact that ISDS clauses in investor-state contracts do not represent a system solution.

In the final chapter on investment dispute settlement, *Ioannis Glinavos* focuses on the remit of sovereign discretion on cultural and religious grounds when it intersects with investor protections under international law. Public policy aspects relating to culture and religion are frequently left unexplored by investment tribunal jurisprudence. The author explores options in investment arbitration for foreign investors affected by changes brought about by sovereign decisions based on religious and cultural grounds, shedding light in this politically and emotionally charged corner of international economic law. The paper initiates this discussion by investigating the possibility that the Switzerland-Turkey Bilateral Investment Treaty (BIT) of 1988 may offer bases for compensation to SICPA, the—until recently—operator of the Hagia Sophia museum in Istanbul, a world heritage site of global religious and cultural significance transformed again into an operational place of worship in 2020.

The remaining three chapters of the focus section on dispute settlement in international economic law address other fora than trade and investment dispute settlement. *Willem Theus* asks if International Commercial Courts (ICCs) recently established in various states in Europe, the Middle East and Asia are the new frontier in international commercial dispute resolution. ICCs are as such often in direct competition with international commercial arbitration, yet the line between them has become increasingly blurred in some respects. *Theus* shows that ICCs build on an enduring legacy of "internationalised" national or "hybrid" courts, i.e. courts which have an international element such as serving foreign judges.

On a more theoretical level, *Relja Radović* critically assesses the judicialization and proliferation of international courts and tribunals in international economic law. *Radović* questions whether every dispute resolution mechanism can be deemed judicial. As new trade and investment dispute resolution mechanisms face constraints on their powers, the chapter inquires whether the promotion of such constrains impairs the judicial character of these dispute settlement bodies. *Radović* concludes that the advancement of certain constraints on judicial powers in the field of international economic law marks a departure from the promotion of the judicial towards more administrative dispute settlement means and could lead to a "dejudicialization" of dispute settlement in international economic law.

Sebastian Lukic takes a closer look at the dispute settlement mechanism in the EU-UK Withdrawal Agreement. If a dispute arises and no solution can be reached following political consultation, either the EU or the UK may resort to arbitration. As such a dispute may give rise to questions on the interpretation of Union law, a reference mechanism is built into the Withdrawal Agreement requiring the arbitration panel to request the Court of Justice of the EU to give a ruling on the respective Union law issues; the CJEU's ruling shall then be binding on the arbitration panel. Such direct judicial dialogue between two international judicial fora in the form of a reference mechanism is a rare feature in international treaties.

Outside of the focus section, *Anjum Rosha* and *Clara Thiemann* discuss the most recent new allocation of Special Drawing Rights (SDRs) to the Members of the International Monetary Fund (IMF); a historic event—both for the IMF and its membership. As it is only the fourth general allocation since the SDR was created in 1969, and the largest allocation so far, it provides IMF member countries with an unprecedented level of unconditional liquidity for urgent spending needs or as reserve buffer.

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Part I
The Future of Dispute Settlement in International Economic Law

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

Lindsey Garner-Knapp, Shaina D. Western, and Henry Lovat

Contents

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.

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

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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,[1] and while there are references in this literature to broader US concerns, there is relatively little on how these concerns emerged and evolved.[2]

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.[3] 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.[4] Consequently,

[1] Kuijper (2018) and Condon (2018).

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

[3] Howse (2021).

[4] 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.

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 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.[5]

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 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.[6]

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

gwu.edu/cgi/viewcontent.cgi?article=2728&context=faculty_publications (last accessed 28 February 2021; Kuijper (2018).

[5] 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).)

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

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.[7] Indeed, the situation may 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.[8] Because US behaviour is endogenous to the trade regime's operation, a "return to normal" ultimately seems improbable without substantial reform.[9] Last, some responsibility rests with the AB itself, which developed a "prevailing ethos", body of jurisprudence and practices that aggravated US concerns.[10]

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

[7] "[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, https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm (last accessed 24 February 2021).

[8] 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/farwellspeechtgaham_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.

[9] 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).

[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/farwellspeechtgaham_e.htm (last accessed 27 February 2021); Howse (2021).

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 twenty-first 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.[11] The linkages between domestic and international economic health, however, became evident early in the Clinton administration,[12] prompting Clinton to embrace trade liberalisation, a view shared by key economic advisors and international partners.[13] Pursuing a liberalising agenda, however, proved politically difficult.

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.[14] 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.[15] 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.[16] Despite avowed presidential confidence,[17] however, the appeals proposals—particularly the

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

[12] 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); Lovett (2004) p. 142.

[13] (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-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).

[14] Chorev (2011), p. 151.

[15] Chorev (2011), p. 155; Hopewell (2016), p. 68.

[16] Chorev (2011), Ch. 6; Sutherland (2000), p. 19; Moynihan (2008), p. 272.

[17] 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/

prospect of lengthy proceedings delaying settlements and the perceived risk of US discretion to deploy retaliatory measures being constrained—remained contentious in Congress.[18]

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,[19] 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)[20] 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.[21] Although never enacted, the debates around this measure indicate the extent of political unease with the putative trade regime during this period.[22] Section 125 of the URAA itself, moreover, provides for a 5-yearly review of US participation in the WTO: in 2000, 2005, and 2020 these were accompanied by motions to withdraw the US from the WTO in Congress, all of which failed.[23]

Once in operation, the WTO's institutions and mechanisms were deployed in a manner that proved challenging to member state governments.[24] Specifically, despite having been envisioned originally as a non-standing institution,[25] the AB began to act "like a court and not as part of the enforcement wing of the WTO

content/pkg/PPP-1993-book2/pdf/PPP-1993-book2-doc-pg2180.pdf (last accessed 15 November 2021), p. 2181.]

[18] Elsig (2017), p. 311.

[19] Chorev (2011), p. 159.

[20] Pub.L. 103-465, 108 Stat. 4809, enacted December 8, 1994.

[21] 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).

[22] 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* (last accessed 25 February 2021); see concessions made in defence of antidumping and countervailing practices to US steel industry in Chorev (2011), pp. 170–172; 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 (1995).

[23] Fergusson and Davis (2020), 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.

[24] Hopewell (2016), p. 38.

[25] Wagner (2020), p. 71.

institution. . . the Appellate Body created itself as a judicial branch in a distant, even potentially contentious or oppositional, relationship with the WTO institution."[26]

Numerous AB measures can be associated with this trend,[27] developed initially through a series of decisions in the late 1990s. *Japan–Alcohol*,[28] for example, saw the AB in 1996 diminish the normative value of GATT panel reports. This was followed in 1997 by *EC-Bananas*,[29] where the AB permitted private counsel to represent a state party in proceedings,[30] 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.[31] These decisions ran counter to the expectations of GATT-era 'trade-insiders',[32] with similar divergences apparent between the AB's understanding of its role and previous GATT-era practice evidenced in *India–Patents* (1998),[33] *India–Quantitative Restrictions* (1999),[34] *Turkey–Textiles* (1999),[35] and notably *Shrimp-Turtle* (1998)[36] and *EC–Asbestos* (2001).[37] 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 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."[38] The US was also the sole defender of "the Appellate Body's exercise of jurisdiction to set out the

[26] Howse (2016), p. 31; Unterhalter (2015), p. 469.

[27] Howse (2016), p. 31.

[28] 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.

[29] 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.

[30] Ehrenhaft (2001), p. 985; Cortell and Peterson (2005), p. 33.

[31] 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.

[32] Howse (2016), p. 32.

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

[34] 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.

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

[36] 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.

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

[38] 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.

procedure for submission of amicus briefs."[39] 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.[40] 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.[41]

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.[42] 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, though, 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".[43]

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.[44]

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[39] Howse (2016), p. 41; citing account in Charnovitz (2002), pp. 219–240.

[40] 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.

[41] Cameron (2005), p. 119.

[42] "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.

[43] 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.

[44] 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*.[45]

The US also expressed concerns about timely decision-making and transparency—concerns shared by other states, including Australia, Canada, Hong Kong, and Norway.[46] 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

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

[46] 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, pp. 1–6) which Australia supported faster derestriction of document including minutes WT/GC/W/414, paras 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.

over non-market economies and bring about the transformation of the latter into democratic, market-economy states.[47]

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.[48] To broaden WTO membership to include non-market economies, accession protocols were developed, requiring non-market economies to restructure their markets.[49]

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.[50] The administration framed this initiative as facilitating Chinese economic and political reform via WTO membership.[51]

Having recently joined, developing states were reluctant to grant further concessions in negotiations, arguing that significant concessions had already been made on accession.[52] 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

[47] Fukuyama (1992).

[48] Huang (2009), p. 62.

[49] Huang (2009), p. 62.

[50] Jones (2004), p. 20; Devereaux et al. (2006), p. 281.

[51] 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.

[52] Hopewell (2020).

an "unfair playing field".[53] The continued absence of Clinton's vaunted political liberalisation in China has haunted subsequent US administrations.[54]

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".[55] Internationally, however, Bush's foreign policy was principally shaped by the events of 11 September 2001 and the ensuing wars in Afghanistan and Iraq.[56] 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.[57]

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.[58] 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.[59] Critically, the early years of the Doha Round illustrated the difficulty in progressing multilateral trade liberalisation beyond the Uruguay agreements.[60] This stalemate signalled effective 'legislative' deadlock and greater reliance on the AB to settle disputes.

Despite a smattering of early victories, for the Bush administration the AB accordingly emerged as a critical arena of contention. This tendency became evident

[53] Hopewell (2016).

[54] 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.

[55] Moens (2004).

[56] Moens (2004).

[57] Quinn and Turner (2020).

[58] Hopewell (2016), p. 89.

[59] 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.

[60] Hopewell (2016).

early in Bush's tenure: for example, in *India-Textiles* in 2001,[61] 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.[62] 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,*[63] prompting ire from Washington DC.[64] The US similarly—accompanied by New Zealand—exhibited concerns in *Canada-Dairy (2002)* about procedures adopted by the AB in that case.[65]

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.[66] 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.[67] 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.[68]

The US under Bush also appeared reluctant to comply with adverse AB rulings, especially where congressional action was required. This tendency was particularly

[61] 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.

[62] 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.

[63] 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.

[64] 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).

[65] 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.

[66] Bush GW (20 July 2001) G7 Statement in Genova. 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.

[67] Rosenblum-Bazquez E, International trade update, Mondaq Business Briefing, 30 October 2002.

[68] 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.

apparent in litigation over the Byrd Amendment,[69] 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".[70] An adverse panel report on the Byrd Amendment in October 2002 was swiftly followed by an unsuccessful appeal to the AB.[71] The Bush administration's initial reaction to the latter was focused on complying with the adverse ruling.[72] Congress, however, proved more resistant, with bipartisan resistance delaying the Byrd Amendment's removal until 2005.[73]

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.[74] In 2007, 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:[75] 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

[69] USTR. USTR pledges compliance with WTO ruling on Byrd Amendment—Underlying anti-dumping laws not affected, USTR emphasizes. State Department Press Releases and Documents, 16 January 2003.

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

[71] Hervey (2003).

[72] 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.

[73] Rus (2007), pp. 427–443.

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

[75] Elsig and Pollack (2014), pp. 391–415. Jennifer Hillman was subsequently nominated by Bush for this position.

prominent developing states—Brazil, India and China—pushed against developed states' preference for further liberalisation, focusing on implementing existing trade disciplines.[76] 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.[77] 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.[78] Moreover, the WTO regime proved pivotal to avoiding a return to global protectionism in dealing with the economic crisis.[79]

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.[80] This phrase has developed specific connotations in American trade policy, referring to "reciprocal" trade concessions, where foreign markets would lower trade barriers, provide market access, and ensure protections for intellectual property

[76] Hopewell (2016).

[77] Schott (2009), pp. 150–153.

[78] Bartels (2013), pp. 47–76.

[79] Drezner (2014).

[80] 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).

rights.[81] In short, Obama's administration was pro-trade, provided that trade reflected America's interests, priorities and values.[82]

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:[83] 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.[84]

The Obama administration also emphasised the value of a "rules-based" trading order as being "in the interest of all Americans".[85] 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.[86] To facilitate more effective US prosecution of these trade disputes, Obama established a Trade Enforcement Unit within the Office of the USTR.[87] His administration also launched cases against China and the EU.[88] The

[81] Hopewell (2016).

[82] 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.

[83] 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.

[84] 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.

[85] 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.

[86] The trade enforcement unit was originally set up via executive order but was put into law in 2015 see Obama Announces Creation of Trade Enforcement Unit (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).

[87] Obama Announces Creation of Trade Enforcement Unit (2012), pp. 144–157.

[88] 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-

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.[89]

At first glance, it appears this strategy paid off, in the form of significant US "wins" at the panel and AB level.[90] 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.[91] 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.[92] 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.[93]

The US lost several significant cases during this period,[94] some of which were troubling to the administration.[95] *US – Clove Cigarettes (2012),*[96] for example,

press-office/2017/01/12/fact-sheet-obama-administrations-record-trade-enforcement (last accessed 27 February 2021).

[89] 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.

[90] 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.

[91] Schwartz and Sykes (2002).

[92] 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.

[93] 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).

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

[95] 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.

[96] 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.

proved particularly difficult,[97] 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".[98]

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.[99] 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 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.[100] 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.[101]

In 2013–2014, the US then blocked the appointment to the AB of James Gathii, an American citizen supported by Kenya, prompting Kenya to withdraw his nomination.[102] Finally, in 2016 the Obama administration announced that it would block the reappointment of South Korean member Seung Wha Chang for a second term,

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

[98] 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).

[99] Bown and Keynes (2020).

[100] 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.

[101] 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 outself 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).

[102] 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).