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Divergence Across the Atlantic? US Skepticism Meets the EU and the WTO's Appellate Body

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Abstract

In 2019, the Appellate Body (AB) of the World Trade Organization's Dispute Settlement System (WTO-DSS) lost its quorum. Instead of the required minimum number of three members, the AB's membership fell to one member only as the US under Donald Trump blocked the appointment of new members upon the expiry of the terms of two incumbent ones. The AB's paralysis produced a high level of shock in the EU. In this article, we take a closer look at the US's decision to paralyze the WTO's AB and the EU's reaction to it. Its point is that it will not be easy to get the US back on board as the factors that drove its decision predate the Trump era. Long before Trump, the tradeoff upon which the US based its acceptance of the WTO-DSS unraveled. For US policy makers, the EU is partly to blame for this as it undermined the system's prompt compliance assumption. More important even is the claim that the system's AB created new obligations for the WTO members to the point where the acceptance of some WTO rules—notably regarding trade remedies—became politically unsustainable in the US itself.

Keywords

trade disputes; trade remedies; transatlantic relations; World Trade Organization

Issue

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1. Introduction

In 2019, the Appellate Body (AB) of the World Trade Organization's Dispute Settlement System (WTO-DSS) lost its quorum. Instead of the required minimum number of three members, the AB's membership fell to one member only as the US under Donald Trump blocked the appointment of new members upon the expiry of the terms of two incumbent ones. The Trump Administration's decision not only paralyzed the crucial appellate stage of the WTO's dispute settlement system, but it also jolted the WTO as a whole.

The AB's paralysis seriously shocked the EU as well. For the EU, the WTO-DSS is fundamental for the enforcement of multilateral (trade) commitments made in the context of the WTO and therefore, for the stability and predictability of the world trading system overall.

The US's position on the WTO-DSS has always been more ambivalent. On the one hand, it hoped that the WTO-DSS would bring what the dispute settlement system of the General Agreement on Tariffs and Trade (GATT) had failed to: prompt compliance with dispute settlement outcomes, and thus the prompt remedial of any WTO agreement violation detected through the WTO-DSS. On the other hand, the new WTO-DSS would tie the US's hands whenever it wanted to retaliate against alleged rule violators. With it, the US gave up its right to do so unilaterally and thus, a certain amount of its sovereignty. Ultimately for the US however, the former outweighed the latter.

In this article, we want to take a closer look at the US's decision to paralyze the WTO's AB. That may seem odd in a thematic issue on transatlantic relations, but it is not. With it and given the EU's reaction to it, the two sides of

the Atlantic first got on a diametrically opposed course regarding this fundamental pillar of the multilateral trading system. More recently however, some convergence has emerged. Indeed, in response to the US, the EU took the lead in the creation of a parallel system of arbitration and voluntary appellate system—the Multi-Party Interim Appeals Arbitration (MPIA)—that could operate without the US and that could temporarily substitute for the AB. Second, in February 2021, the European Commission issued a range of proposals on WTO reform in which it showed openness to deal with some of the US’s complaints about the WTO-DSS and its AB. The EU was not alone in these endeavors, but it did play a leading role in it.

The point of this article is that it will not be easy to get the US back on board. Those that hope that the current paralysis of the AB is due to the idiosyncrasies of one (the Trump) presidency and that with Biden’s entry into the White House it will soon be back to normal, may be in for a rough ride. Indeed, as we hope to show, while Trump presidency’s approach to the WTO-DSS may have been extreme to a certain extent, its underlying drivers predate it. Slowly but steadily, the tradeoff upon which the US based its acceptance of the WTO-DSS unraveled, at least in the eyes of US policymakers.

And for them, the EU is partly to blame for this as it undermined the dispute settlement system’s prompt compliance assumption. But the EU is not the only one that is blamed. More importantly still is the AB. In the eyes of US policymakers, through its activist rulings, the AB created new obligations for the WTO members to the point where the acceptance of some WTO rules—notably regarding trade remedies—became politically unsustainable in the US itself. In an intergovernmental organization like the WTO, they claimed, it is up to the member states to eventually create new rules and not up to the organization’s institutions like the AB. With alleged AB activism illegally undermining the US’s ability to protect itself against unfair trade practices by other WTO members, the WTO-DSS’s political viability itself came under threat in the US.

This article is structured as follows. In the next (second) section, we briefly touch upon the WTO-DSS and how it works, and on the ongoing scholarly debate on the political sustainability of the WTO-DSS. The conclusion here is that in order to understand the US’s position on the WTO-DSS, one needs to look at the way in which the tradeoff between the benefits and the costs of the WTO-DSS for the US changed as a consequence of the way in which the system operated in practice; this in combination with the ability of each WTO member to block the appointment of AB members. As indicated above, the US’s problems with the system’s operation focused on two elements: the lack of prompt compliance and the perceived activism of the AB.

The third section focuses on prompt compliance, and the US’s frustration with the EU in this regard. What is important here is that US trade policymakers believed

this frustration to be an existential problem as far as the WTO-DSS was concerned.

In the fourth section, we dig deeper into the political viability question, a question directly triggered by US perceptions on AB rulings in trade remedy cases and its conviction that these rulings went beyond the existing commitments of the US. These perceptions amplified US frustrations with the functioning of the WTO-DSS, particularly its AB. With these systemic complaints about the WTO-DSS, the US stood out among the WTO membership, as empirical data about these complaints will show. This data emerges from a systematic scouting of the Minutes of the WTO’s Dispute Settlement Body (DSB) between 1995 and 2019.

In the final section, we will come to a conclusion. Here, it will be stressed that US frustrations with the WTO-DSS were older than the Trump Administration, and continue to exist after Trump, although the recent European Commission proposals point to a possible convergence between the two sides of the Atlantic with respect to the dispute settlement system of the WTO.

2. A Theory of the World Trade Organization’s Dispute Settlement System: About Compliance Supporters and a Disturbed Tradeoff

The dispute settlement system of the WTO, the WTO-DSS, can be characterized as a system that aims at bringing WTO members into compliance with the WTO agreements through the settlement of disputes about compliance among them. The legal basis of the system is provided by the Understanding on Rules and Procedures Governing the Settlement of Disputes (1994; hereafter DSU), an agreement reached during the Uruguay Round, a set of multilateral trade negotiations that among others, created the WTO.

The WTO-DSS is activated by a non-compliance complaint of one WTO member (the complaining party) against another (the responding party). Such a complaint triggers consultations with the aim of reaching a mutually agreed solution that remedies the problem. In case no such solution can be reached, the complaining party can start a process in which a panel is established by the DSB, a body in which all WTO members are represented. That panel investigates the complaint and produces a report that indicates whether non-compliance with a WTO agreement has taken place and whether this has impaired the benefits “accruing to [the complaining party] directly or indirectly under the [WTO] agreements” (art. 3.3 DSU). Either party can appeal that outcome. When that happens, the AB rules on the legal interpretations made by the panel in the panel report. That ruling is then submitted as a Recommendation to the DSB that adopts it unless there exists a consensus not to do so. This way of working is known as a “negative consensus” (or “reversed consensus”) and makes the adoption of AB Recommendations almost automatic. As Cesare and Romano (2007, p. 812) have

observed, this represents “a radical departure from previous [consensual] practices” in international dispute settlement. Despite its official label as a “Recommendation,” AB decisions are binding and as such, really rulings. The parties are expected to comply with them and this within a “reasonable period of time” to be agreed among the parties or, absent such agreement, within a period of 15 months unless through binding arbitration it is determined that “particular circumstances” warrant a shorter or a longer period. The ultimate objective is to achieve compliance. In case that does not materialize, upon mutual agreement, compensation may be provided by the responding party to the complaining party. In case that fails, upon request by the complaining party, the DSB grants that party the right to retaliate against the responding party unless there exists a consensus not to grant it.

Scholarly work on the operation and effects of the WTO-DSS is extensive. Some scholars focus on the impact of the WTO-DSS’s outcomes on trade (Chaudoin et al., 2016). Others focus on factors that explain compliance with its outcomes or on the legitimacy (and political viability) of the dispute settlement system itself (cf. Brutger & Morse, 2015; Busch & Pelc, 2010; Peritz, 2020). In both cases, findings on the WTO-DSS are often derived from (and compared with) findings from research on international courts in general. This is particularly the case with the WTO’s AB as this body can be characterized as a permanent international court (Alter, 2014, pp. 72, 76).

The compliance question is an intriguing one as the WTO AB lacks the coercive powers to enforce compliance with its outcomes. The same holds however, for both international courts in general, and for domestic courts. All depend on the executive branch for the implementation of their rulings. It is inherent in being a judicial court (Alter, 2014, pp. 20, 32). But for international courts, their being international, raises the question of their independence from national governments, and thus their ability and propensity to abstain from catering to the preferences of these governments. In this respect, Karen Alter developed an “altered politics model,” that is perhaps the most elaborated model to understanding national state compliance with international court rulings. Important here is that compliance does not exclusively depend on the alignment of international courts’ rulings with the preferences of national governments. Whenever an international court ruling does not align, the probability of compliance may increase whenever the cost of non-compliance is increased through the mobilization of so-called compliance supporters (Alter, 2014). It concerns “broader coalitions of actors whose tacit or mobilized support is needed...to induce reluctant governmental actors to embrace an international court ruling” (pp. 20–21) and/or to protect “those actors with the power to generate compliance with an international court ruling...from political retaliation” (pp. 53–54). Through its ruling, an international court provides however, a range of legal, symbolic, and political resources

to these compliance supporters and “advantaging and empowering domestic actors who prefer that domestic policy coheres with international law” (Alter, 2014, p. 49; see also Alter et al., 2016). These resources consist, then, of arguments that can be precedent-setting (non-compliance legitimizes future non-compliance by others), reputational (we sign agreements that we do not want to comply with and are, therefore, untrustworthy), or distributive (non-compliance legitimizes retaliation by foreign governments against us, which will hurt specific constituencies at home).

Alter’s “altered politics model” is directly relevant for the question of the WTO-DSS’s legitimacy. As research by Helfer and Alter (2013) on the legitimacy of international courts shows, inside countries covered by an international court’s jurisdiction, the presence of domestic supporters who want to bolster that court’s legitimacy is crucial for such legitimacy. And as Shaffer et al. (2016) show, the WTO-DSS enjoys that kind of support. Its rulings are relied upon and referred to by domestic agencies (called “trusty buddies” of the WTO-DSS) in national trade policymaking and by domestic courts in trade law litigation. And around the *acquis* generated by these rulings, an epistemic community of private lawyers and legal scholars has emerged.

At the same time however, the fragility of the WTO-DSS’s legitimacy has been noted (Shaffer, 2008). Already more than a decade ago, Abbott (2003, p. 566) warned that “the transfer of sovereignty which is implied (placing WTO members face to face with their violations and their obligations) is not an easy thing for all governments to accept.” At the same time, Petersmann noticed that “[t]he increasing criticism in the US that WTO dispute settlement jurisprudence has become ‘overextended’ and is ‘politically unsustainable’ is rarely heard in Europe” (Petersmann, 2003, p. 13). Alter’s research seems to provide an explanation for this divergence as far as the European side is concerned. Central here is the attitude toward the sovereign risk of granting authority to an international court. As Alter (2008, p. 40) observes: “The sovereign risk in ceding interpretative authority to courts is that judicial rulings can shift the meaning of law in ways that can be politically irreversible.” Interpretation in “unanticipated and unwanted ways” is central here. European political elites have gradually learned to live with this, even internalized it, specifically through the operation of the EU’s Court of Justice, the adoption of its sometimes radically innovative rulings by national judges in the EU’s member states, and the education and socialization in that sense of new generations of lawyers, judges, and legal scholars in the EU (Alter, 2014, p. 130).

The story on the US side may be different. There, the acceptance of the sovereign risk that comes with granting authority to a system like the WTO-DSS—and specifically its AB—is more fragile. With it comes a heightened risk that criticisms against rulings spill over into criticisms on the legitimacy of the system as such. And given the WTO’s system for the appointment of the members of its AB,

such systemic criticisms have spilled over into the operation of the system itself, or rather, its current paralysis.

For the understanding of the current crisis in the WTO-DSS, we need to deal with two issues. There is, first, the WTO's system for the appointment of the members of its AB and the procedural vulnerability of the WTO-DSS that this entails. Secondly, we need to understand the sovereign risk vulnerability of the WTO-DSS in the US. As we will see, this question is related to the tradeoff that the US made when it agreed with the creation of the WTO's dispute settlement system in 1994 and its evolving assessment of that tradeoff ever since. We will only briefly touch upon the first element here and dedicate most attention to the second, as that one immediately points at a decisive difference between the two sides of the Atlantic and the systemic relevance of that difference for the WTO.

The procedural vulnerability of the WTO AB is rooted in the way in which each of its seven members is appointed. According to article 17.2 DSU, the DSB appoints these members for four-year terms. It does so by consensus (article 3.7 DSU) which—as is mentioned in footnote 1 to article 3.7—means that no member present at the DSB meeting concerned formally objected. As such, each WTO member can theoretically block the appointment or reappointment of an AB member. That is exactly what the US did with several of these (re)appointments up until the point where the AB lost the quorum needed for its operation. The first example of the US explicitly blocking an appointment showed up in 2013 when it refused to approve the appointment of Kenyan candidate James Thuo Gathii (already in 2007, it exerted pressure on one of its nationals, Merit Janow, not to apply for a reappointment, and in 2011 the US decided not to reappoint another of its own nationals, Jennifer Hillman). In May 2016, the US blocked the reappointment of South Korean AB member Seung Wha Chang because “[t]he United States is strongly opposed to Appellate Body members deviating from their appropriate role by restricting the rights or expanding the obligations of WTO members under the WTO agreements” (Punke & Reif, 2016, p. 16). In the summer of 2017, when the succession of Ricardo Ramirez-Hernandez—a Mexican AB member—was at issue, together with the sudden departure of the South Korean member Hyun Chong Kim, and the nearing end of the term of a third one, Belgian AB member Peter Van den Bossche, the US indicated in the DSB that new appointments could only be approved after giving priority to the systemic questions raised about the US at numerous occasions in the DSB (*DSB Minutes*, August 31, 2017, p. 14). With the expiry of the mandate of Shree Baboo Chekitan Servansing (Mauritius) in September 2018, and the one of Ujal Singh Bhatia (India) and Thomas R. Graham (US) in December 2019, the WTO AB lost its quorum. In November 2020, the mandate of the last remaining member—Hong Zhao from China—expired, so that today, no AB member is left.

What happened then with the US so that it decided to block these AB appointments to the point of paralyzing the AB itself? That is, as we alluded to above, a story of a changing tradeoff where the precarious balance between the costs and the benefits of creating a system like the WTO-DSS was perceived to be disturbed by the way in which the system operated in practice. As such, it was not a matter of support or supporters, but a matter of opposition and opponents. As we will see, two elements mattered here: first, the EU's behavior in the WTO-DSS, and second, the perception of AB activism, specifically on trade remedies, in the US. Whereas the former was perceived to undermine prompt compliance through the WTO-DSS—one of the main expected benefits of the WTO-DSS by the US—the latter was perceived to create obligations for the US to which it never agreed.

3. Prompt Compliance and the Emerging Prism of Procrastination

In the tradeoff for the US between the costs and the benefits of creating the WTO-DSS, the expectation of “prompt compliance” mattered a lot; that is, the expectation that the new system would bring non-complying WTO members into compliance with their obligations under the WTO and would do so quickly. For the US, non-compliance had indeed been a serious problem under the GATT, the WTO's precursor. And the GATT's dispute settlement system had proved to be incapable of remedying this because a non-complying member could veto its outcome (cf. Maggi & Staiger, 2018). Consequently, the US increasingly engaged in unilateral sanctioning, this under Title III of its Trade Act of 1974 (better known as Section 301).

In the negotiations of the DSU during the GATT's Uruguay Round, two differences between the EU and the US showed up. Whereas the EU aimed for the multilateralization of enforcement—and thus the restraining of the US's ability to engage in unilateral enforcement—the US strongly cared about compliance—prompt compliance—in the first place by its main trading partners, most prominently the EU. Among US trade policymakers the conviction existed that even if the price of multilateralization was high—as it restrained US ability to make use of its own sanctioning system under Title III of its Trade Act of 1974—the reward was significant as well. It would indeed, after years of frustrations under the GATT, force prompt compliance by the losing party in a dispute. As a November 1998 US paper on the DSU states: “Members want an effective dispute settlement system for the tangible results it can produce, not just the decisions it publishes....Accordingly, the results of this [DSU-]review should enhance *prompt compliance*” (United States Trade Representative, 1998, italics in original).

The immediate question for the US was, therefore, whether the WTO-DSS would really succeed in promptly countering and undoing rule violations. This question

particularly targeted the EU. The following quote from then Senate Majority Leader Bob Dole is indicative in this respect:

An effective dispute settlement system was one of the major negotiating objectives for the United States. In the GATT talks [i.e., the Uruguay Round], the United States sought to have binding and automatic dispute settlement....The United States supported this idea out of frustration largely with our European friends who maintained agricultural policies that adversely affected every other agricultural export nation. (Congress of the US, 1995, p. S177)

Quite quickly however, cases on bananas and beef treated with growth hormones in the new WTO-DSS indicated to Washington DC that, contrary to what they had hoped, the new WTO-DSS did not prevent the EU from engaging in procrastination, particularly in agricultural trade (cf. Poletti & De Bièvre, 2014). Complaints about EU procrastination not only came from the US, but in the US both the executive and legislative branches pointed at the systemic risks of EU foot-dragging, and this due to the WTO-DSS. With a reference to both the beef hormone and the banana case for instance, Rep. Phil Crane, Chair of the House's Trade Subcommittee at the time, phrased it as follows: "Full implementation of these WTO decisions against the EU will show the world whether Europeans are committed to the credibility and long-term viability of the WTO dispute settlement system" (Congress of the US, 1998, p. H7053).

A similar—albeit more cautious—reaction came from the United States Trade Representative, Charlene Barshefsky:

We have now concluded cases against the EU on the banana regime and the ban on beef from American cattle. In both, WTO dispute settlement panels and Appellate Bodies have ruled in favor of the United States. The EU has an obligation to respect these results and implement them—they have not. Failing to live by these panel results weakens support for the trading system, weakens its deterrent against protectionism, and weakens support for our bilateral relationship. (Barshefsky, 1998)

The problem for the US, however, was that based on the DSU, one could not make a legally airtight argument that the EU was violating its legal commitments under the WTO. Indeed, the debates on EU procrastination revealed a possible contradiction in the DSU that allowed the EU to drag out the process through which compliance with a dispute settlement ruling had to be assessed before sanctioning could be allowed. But for the US, EU insistence on this question—known as sequencing—provided proof that for the EU compliance on sensitive cases prevailed over the credibility of the dispute settlement system as a whole. For the EU, the

sequence question was not one of procrastination or abuse of the DSS, but a question of negotiated rights. Article 21.5 DSU created a right for the respondents in a case to let a dispute settlement panel—and eventually the AB—decide about compliance, and even if that took time, it was a right nonetheless, as much for the EU as for the other WTO members. In the banana case, EU–US divergence came to a head in a DSB meeting where the US representative claimed that "the EC's conduct had been aimed at delaying WTO procedures in prolonging its discriminatory banana regime," and that a systemic issue emerged as a result (*DSB Minutes*, February 1, 1999, pp. 11–13). Would the DSB accept delays, or would it decide to promptly allow retaliation in response to violation and non-implementation of a previous ruling? By allowing prompt retaliation, the DSB "would send a strong message to the world trading system that the WTO Agreement provided an effective mechanism to ensure compliance with WTO obligations, and that it did not encourage prolonged non-compliance or endless litigation" (*DSB Minutes*, February 1, 1999, p. 13). Statements by other WTO members indicated that they also shared this assessment that the EU–US banana stalemate started to negatively affect the credibility of the WTO system as a whole (statements by Argentina, Australia, Brazil, Canada, Colombia, Mauritius, and S. Korea expressed at the same DSB meeting).

The beef hormone and banana cases date from a period long gone. But they matter today, nonetheless. First, they created the conviction in the US that the WTO-DSS could not provide the prompt compliance benefit that the US had expected it would, and that EU procrastination was the culprit. Indeed, for the US, the EU, rather than being loyal for the sake of the system's credibility, actually exploited it to avoid compliance through "a strategy of endless and meritless litigation" (*DSB Minutes*, December 18, 2019; January 27, 2020; July 20, 2020), even at the cost of a system that it claimed to cherish. In the recurrent cases on genetically modified organisms, a real US lassitude with EU non-compliance can be detected, spanning a period between February 2008 and today. It must be noted however that the EU started to lodge similar complaints against US foot-dragging and its systemic risks for the WTO-DSS, particularly in the context of US resistance against rulings on zeroing in anti-dumping measures (cf. *DSB Minutes*, February 19, 2009).

Second, the beef hormone and banana cases revealed contradictions in the DSU that allowed for procrastination by WTO members that lose cases, including by the US itself. These contradictions—most prominently the sequencing question—proved difficult to solve. Doing so got stuck in the negotiations on the revision of the DSU and in the wider problem of the WTO to generate new multilateral trade agreements, and thus successfully fulfil its role as negotiating forum.

In the meantime, procrastination has become a hallmark of the WTO-DSS, a problem compounded by the

system’s overload and its resulting inability to deal with disputes in a timely fashion. Although the WTO membership at large is well aware of this, finding a solution has proved to be extremely difficult. Negotiations on a review of the DSU are already paralyzed for decades.

4. Systemic Complaints, Trade Remedy Cases, and The Political Viability of the World Trade Organization’s Dispute Settlement System

Starting with US complaints rooted in the prompt compliance question, systemic US criticisms on the WTO-DSS started to grow, and here, the US increasingly stood out among the WTO membership. We derive the latter from data generated with three consecutive searches through the (derestricted) minutes of all DSB meetings since 1995. In these searches, the terms “sovereign,” “authoritative interpretation,” “Article IX:2,” and “Article 3.2” were used. Whenever these terms showed up, the intervention of all WTO members on the agenda item at issue were researched for the use of these terms as a way to criticize the AB for overstepping its legal boundaries in a way detrimental to the rights of the WTO members as exclusive interpreters of the WTO Agreements. The focus therefore turned out to be the extent to which the WTO members positioned themselves as critics of the AB. Reading all the interventions was necessary as the meaning of a reference can be different depending on its context.

As is shown in Figure 1, between 1995 and 2019, the US regularly uttered systemic complaints in the DSB, that is, negative criticisms on the way in which the WTO-DSS operated and its negative impact on the WTO system—with its negotiated balance of rights and obligations for each WTO member—as a whole. The US stood out in this regard among the WTO membership. Remarkably, no such complaint from the EU could be detected. Among the big trading powers, therefore, the US and EU were on completely opposite sides on this. Not that the EU never expressed disagreements with outcomes of cases in its DSB-interventions—it did. But when it did, it was never a claim that the operation of the WTO-DSS threatened the balance of the rights and obligations as negotiated by the WTO membership, and that thus, the WTO-DSS’s operation undermined the sovereign rights of the WTO members. Second, US systematic complaints showed up regularly during the whole lifespan of the WTO-DSS. For the other complaining WTO members, a rather haphazard pattern pops up, although for China, it may be too early to draw conclusions. Third, the period in which complaints emerged indicates that such complaints spanned four US presidencies, beginning with the Clinton presidency, escalating under the Bush jr. presidency, and smoothing and then re-escalating under the Obama and Trump presidencies. Therefore, the complaints were not confined to the Trump era. Fourth, the escalating patterns in US complaints about the AB are closely related with the rising role of trade remedy cases against it.

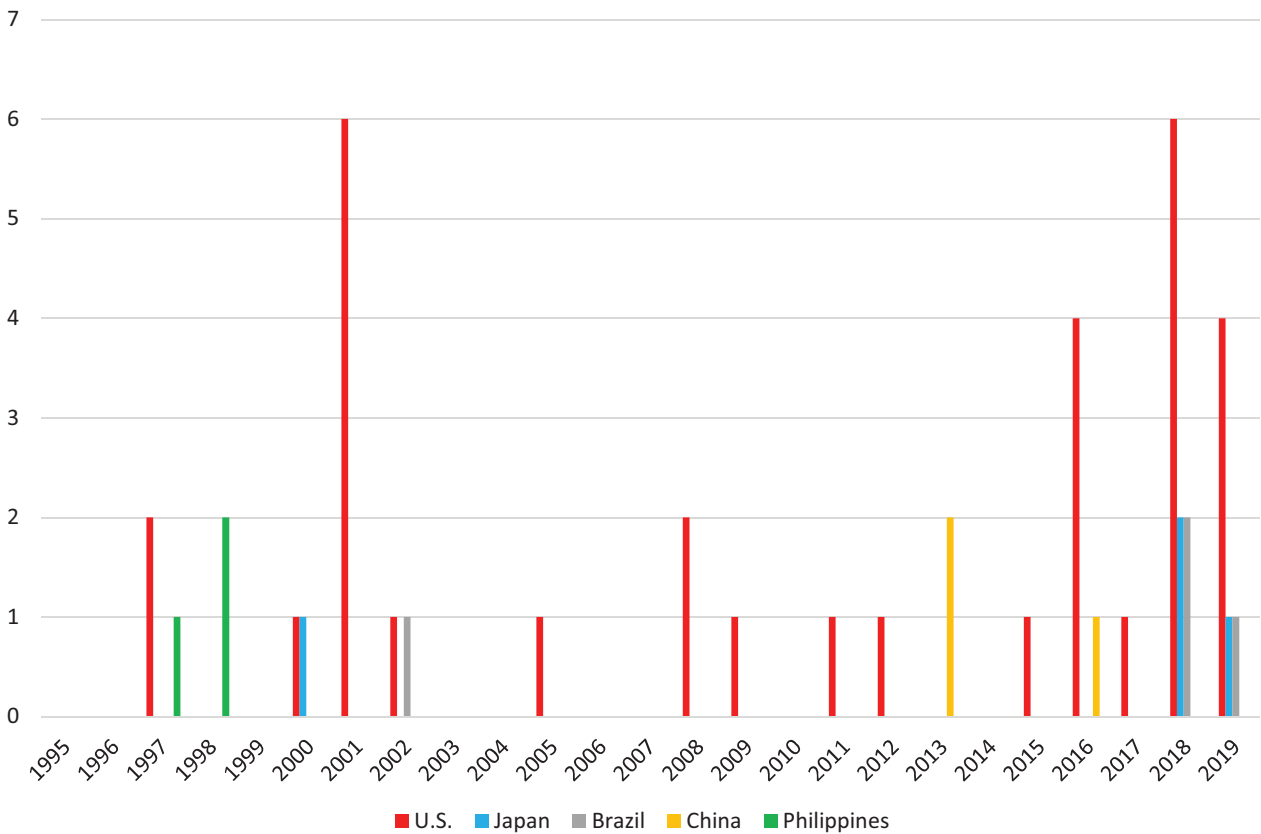


Figure 1. Systemic complaints in the DSB about the WTO-DSS (1995–2019), by year.

As is shown in Figure 2, of the whole WTO membership, the US had the highest share of trade remedy cases targeted against it. Cases where anti-dumping was combined with countervailing measures (so-called AD/CVD-cases) were counted as single trade remedy cases, not double ones. In addition, all cases have been consolidated, meaning that cases opened by several countries against a respondent on exactly the same issue were counted as one case. This was for instance so with respect to the steel safeguards taken by George W. Bush in 2002, the quantitative restriction cases (1997) and sugar/sugar cane cases (2019) against India, the raw material (2009 and again in 2016) and rare earth cases (2012) against China, the alcohol beverages cases (1995) against Japan, and the cases against Trump’s steel and aluminum measures in 2018. We treated the latter cases not as trade remedy cases (safeguards) as the original measure was not treated as such by the Trump Administration. It was, instead, treated as a national security measure. As far as the EU is concerned, the number of cases is based on both cases where the EU (formerly European Communities) was the respondent, or where one or more of its member states were targeted. Evidently, countries that became EU members after the WTO was founded are only added in this calculation from the moment that they became such member.

Figure 3 indicates that compared with the EU, the difference is outspoken across the entire timespan of the WTO-DSS with a peak in the period between 2000 and 2004, exactly the period when US systemic complaints reached their peak as well. The pattern for China is still difficult—because preliminary—to detect. The number of cases is still low, although rising, and within them, the share of trade remedy cases has increased, but not monotonously.

The prevalence of trade remedy cases among the dispute settlement cases in which the US has to defend

itself, and US systemic complaints about the WTO-DSS in the context of these cases, has affected the political viability of the WTO-DSS for and in the US. The term “trade remedy” largely covers anti-dumping measures and safeguard measures. The meaning of such remedies is, however, somewhat ambivalent. In principle, they are meant to enable a WTO member to protect itself against competitive advantages generated by unfair practices in other WTO countries or territories. This is most directly the case with anti-dumping measures. In practice, both practitioners and economists see them as tools that governments can use to manage the domestic political costs of increasing import competition due to trade liberalization, this by exploiting the interpretative leeway left by international agreements on them. Efforts to undo dumping are, indeed, often seen as hidden forms of protectionism. Safeguard measures are less ambivalent in this regard as they formally provide the possibility of temporary protection under the condition of suddenly rising imports and, causally related to that, serious injury to domestic producers of similar products. The WTO Agreement on Safeguards provides even for a three-year period in which such measures can be taken without obligations to provide compensation to the countries negatively affected by them.

The case of anti-dumping measures is particularly important and ambivalent here. Important because compared to safeguard measures, anti-dumping measures are politically more attractive to enact. They target specific foreign producers and, therefore, trigger trade conflicts with a limited number of countries, different from safeguard measures that are enacted *erga omnes* and, therefore, trigger reactions from a significant part of the WTO membership. They are ambivalent as they are enacted for either of two reasons: (a) dumping by a foreign producer; or (b) absent such dumping, temporary import-competitive relief for domestic producers. In the

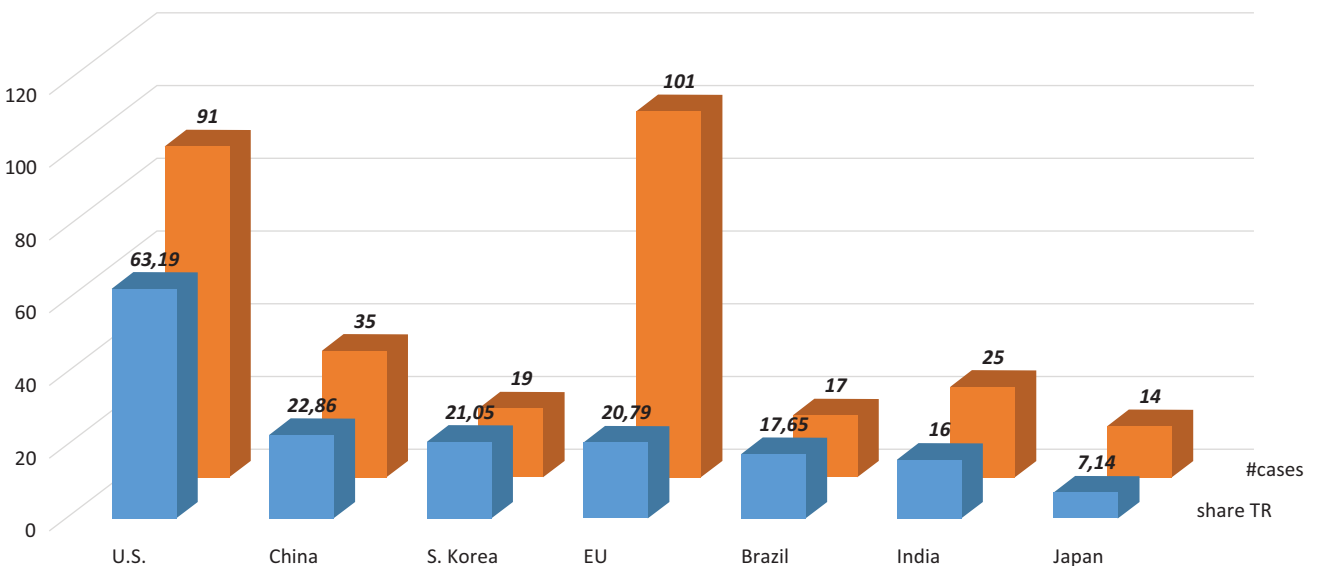


Figure 2. Share of trade remedy cases in all dispute settlement cases (1995–2019), by major WTO member.

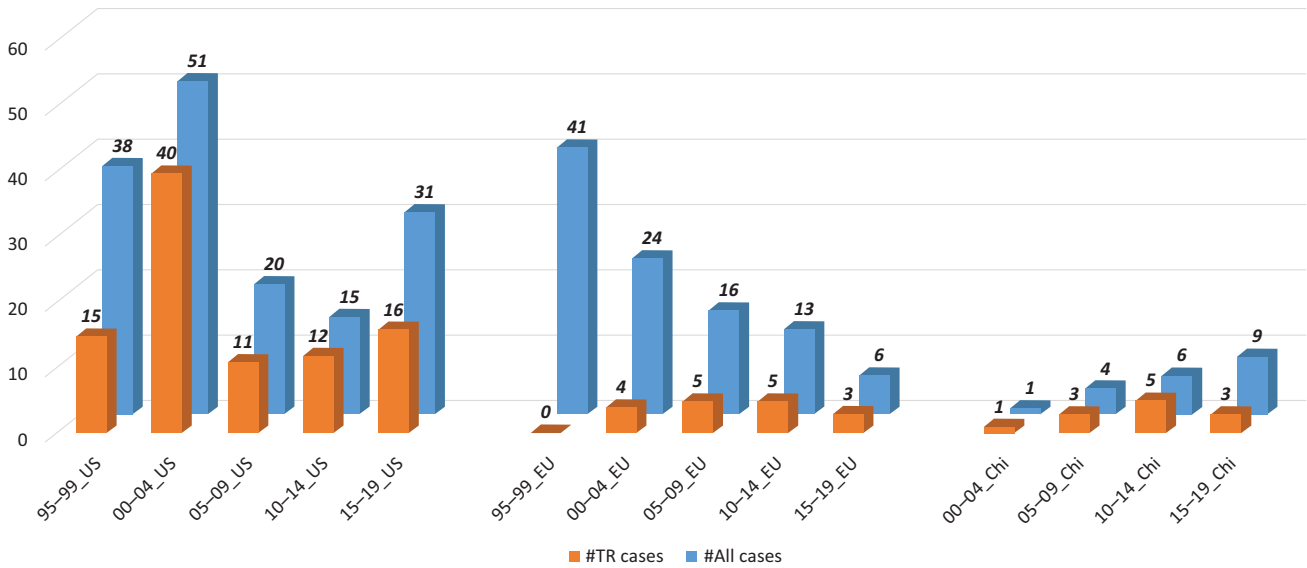


Figure 3. Number of trade remedy cases versus all dispute settlement cases (1995–2019), US, EU, and China.

latter case, trade treaty obligations are violated by the enacting country. Such violations are tolerated however for the sake of preserving the enacting country’s commitment to its trade treaty obligations in general. Scholars have pointed at this as “optimal escape” (Palmer, 2003; Pelc & Urpelainen, 2015; Rosendorff & Milner, 2001) that reflects an optimal outcome of the following tradeoff: The more leeway enabled in the implementation of a trade agreement, the higher the probability that such implementation will disturb the rights and obligations of all parties to the agreement, and with it, the agreement itself. The less leeway however, the higher the probability that domestic pressures will make it impossible for the parties to the agreement to consciously implement it, and with it the sustainability of that agreement itself.

In the WTO-DSS, most disputes on anti-dumping question the way in which the import prices have been established by the enacting country, the market with which these prices have been compared, the calculation of the prices in that market, the equivalence between the anti-dumping measure and the dumping margin, the presence of injuries among industries in the importing country, and the existence of a causal relationship between the claimed dumping and such injuries. All these elements have been provided for in the Anti-Dumping Agreement of the WTO but allow for interpretative leeway in their implementation. With it, numerous disputes about their application have been submitted to the WTO-DSS with the US as a frequent target. In the US however, dispute settlement rulings on these cases have increasingly been seen as a process wherein the gaps—the leeway—left by the US’s WTO obligations on anti-dumping and trade remedies in general have been “filled” by international panels and bodies not entitled to do so. With it, US contestation of the outcome of dispute settlement cases on anti-dumping has gradually but increasingly spilled over into contestation

about the operation of the WTO-DSS itself. This is visible when the comments of the US representatives in the DSB on such cases are compared with those on other issues (but equally brought against the US). Such comparison yields several observations. First, systemic criticisms on the DSS in non-trade remedy cases have been rare, apart from the exceeding of the 90-day limit by the AB, especially since 2005. A notable exception (five years into the DSS’s existence) was the US’s criticism (and warning) that the AB was engaging itself with the interpretation of the WTO agreements, whereas only the WTO members had the right to do so (see DS108, FSC case in *DSB Minutes*, March 20, 2000, p. 11). Since then, if such systemic criticism showed up, it was almost always in the context of trade remedy rulings by the AB.

Second, not all trade remedy cases against the US attracted systemic criticism from its representatives in the DSB, even if the US was on the losing side. Such criticisms started to show up from 2001 on, first somewhat reluctantly and increasingly virulently. Indeed, out of the 33 trade remedy cases against the US that resulted in AB-reports, 14 were accompanied with systematic criticisms from the US in the DSB (note that at this moment, 11 such trade remedy cases are still pending). There is no clear pattern here between anti-dumping, countervailing, or safeguard cases. The most virulent US attacks against the AB came, however, all in anti-dumping cases that dealt with zeroing. In these cases, the US representative referred to the “deeply flawed, and failed reading of the Anti-Dumping Agreement” (*DSB Minutes*, May 20, 2008, p. 10), the neglect by the AB of the key role that the acceptance of several, potentially “permissible” interpretations of anti-dumping methodology had played in reaching an agreement on anti-dumping in the Uruguay Round negotiations (*DSB Minutes*, Feb. 19, 2009, p. 20), and the fact that it created obligations “that had never been contemplated at the time the Anti-Dumping

Agreement had been negotiated and adopted” (*DSB Minutes*, Sep. 26, 2016, p. 13). The issue of zeroing can indeed be seen as something that really poisoned an already difficult relationship between the US and the AB, knowing that the trade remedy rulings against the US since 2001 instigated the problems between them. As the following quote from the 2005 report of the US House Ways and Means Committee succinctly states:

U.S. trade remedy laws have occasionally been impacted by dispute settlement panels that read more exacting, and sometimes impractical, requirements into WTO agreements. While the United States retains effective use of all of its trade remedy options, the panel “gap filling” in this and other areas raises very important concerns. (U.S. House of Representatives, 2005, p. 7).

The reference to “more exacting” is particularly important here. It reflects the irritation about the AB’s narrowing down of the US’s trade remedy leeway and the spillover of that irritation to the WTO-DSS as a whole. That such sensitivity about this “narrowing down” exists is not a surprise. It particularly affects the ability of policymakers to manage the costs of deindustrialization (cf. Posen, 2021), most notably in those US states that matter for the electoral outcome in the Electoral College, and thus the election of the president, but also members of Congress (Autor et al., 2020). The popularity of both left-wing and right-wing populist candidates and campaign messages in the US has further compounded this (Copelovitch & Pevehouse, 2019). With it, the sovereign risk that the creation of the WTO-DSS represents to the US became larger and palpable.

For the EU and trade remedy cases, the question of a reduced leeway through the WTO-DSS is much less of an issue, at least for now. Its trade remedy measures are far less targeted in the WTO-DSS compared with the US, and even if they are, they have not resulted in debates about new obligations being created through the WTO-DSS. This is partly related to the fact that the EU and its member states are much more used to supranational authority than the US is (Krämer-Hoppe & Krüger, 2017). That is not to say, however, that the EU is not affected by the rising popularity of both left-wing and right-wing populist candidates and parties, or more generally, by a globalization backlash—it is (Dür et al., 2020). The EU’s institutional characteristics—both in a hard (multi-level) as in a soft (socialization in favor of multilateralism) sense—have until now, however, prevented that this backlash would translate itself into a turning away from the WTO-DSS. Consequently, the EU’s reaction to the paralysis of the WTO-DSS due to the US was to play—together with a number of other WTO members—a leading role in saving it, and this in two ways: First, with the creation of a temporary parallel system of arbitration—the Multi-Party Interim Appeals Arbitration (MPIA)—and second with a range of proposals for WTO reform that

indicate that on some US complaints with respect to the AB, the EU is prepared to move along. This is particularly the case with respect to timelines (“justice delayed is justice denied”), and the need for the AB to exclusively address the legal issues raised by the appellants and this to the extent necessary to solve the dispute (so-called judicial economy; European Commission, 2021, p. 7). With it, the Commission recognizes some of the US complaints as “valid,” specifically about “certain adjudicative approaches of the AB as well as about specific rulings in certain cases,” a cautious reference to the zeroing issue mentioned above. At the same time, the EU stressed the importance of the AB’s independence and “the central role of dispute settlement in providing security and predictability to the multilateral trading system” (European Commission, 2021, pp. 7–8).

5. Conclusion

The dispute settlement system of the WTO is currently paralyzed. Even if the Trump Administration made the decision that led to this paralysis, its roots go deeper than the idiosyncrasies of one (populist) US presidency (cf. Riddervold & Newsome, 2022). In this article, we tried to show that the roots go back to the early days of the WTO-DSS, the difficult tradeoff for the US to agree with its creation due to its perceived sovereign risk, and the EU’s role in frustrating the benefits that the US expected from it. We also tried to show how the operation of the WTO-DSS—and particularly its AB—jeopardized the optimal escape in trade remedies that US policymakers believed to be needed to manage the political costs of trade liberalization at home. With it, the US approach to the WTO-DSS became diametrically opposed to the one of the EU, although the EU more recently recognized somewhat cautiously that some of the US’s concerns are valid.

The question of the US’s approach to the WTO-DSS goes deeper, however. It is clear from statements from the current Biden Administration that a return to the level of supranational—even if indirect—enforcement is almost impossible. These statements make indeed clear that for the US, the WTO-DSS should not be a system of litigation but rather a system that pushes the parties to a dispute into mutually agreeing on a solution rather than outsourcing this to a supranational judicial institute like the WTO’s AB. That remains substantially different from the litigation system that the EU prefers. What Goldstein and Martin wrote in 2000, namely that “legalization of the trade regime has...moved the nexus of both rule-making and adjudicating rule violations into the center of the [WTO] regime *and away from the member states*” (2000, p. 630, italics by the author), became and remains exactly the biggest problem with the WTO-DSS for the US.

Whatever the EU and other WTO members prefer and with a rising China in the background, and whoever is in office in Washington DC, a return to the old WTO-DSS seems out of the question.

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Conflict of Interests

The author declares no conflict of interests.

Supplementary Material

Supplementary material for this article is available online in the format provided by the author (unedited).

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