



(<https://ilareporter.org.au/>)

Home (<https://ilareporter.org.au/>)

Events (<https://ilareporter.org.au/category/event/>)

Submissions (<https://ilareporter.org.au/submissions/>)

About (<https://ilareporter.org.au/about/>)

Editorial Committee (<https://ilareporter.org.au/editorial-committee/>)

## The WTO Dispute Settlement System: Just another Victim on the Road to Tomorrow's GATT? – Markus Wagner and Weihuan Zhou

🕒 09/07/2019 (<https://ilareporter.org.au/2019/07/the-wto-dispute-settlement-system-just-an-other-victim-on-the-road-to-tomorrows-gatt-markus-wagner-and-weihuan-zhou/>)

👤 Editors (<https://ilareporter.org.au/author/ilaaustralia/>)

📁 Analysis (<https://ilareporter.org.au/category/analysis/>), Articles (<https://ilareporter.org.au/category/articles/>)

The current dispute over the future of international trade (oftentimes referred to as a “trade war”) has moved the WTO from an obscure field of research into the public spotlight. These discussions centre on the economic relationship between China and the US

([https://www.brookings.edu/wp-content/uploads/2019/02/us\\_china\\_economic\\_relationship.pdf](https://www.brookings.edu/wp-content/uploads/2019/02/us_china_economic_relationship.pdf)). However, another significant battle is playing out over the future of WTO dispute settlement.

The central question that remains unanswered – and which we are trying to uncover in this post – is why the US has embarked on a process which pits itself against the very large majority of the WTO membership (see only here (<http://www.ictsd.org/bridges-news/bridges/news/wto-members-intensify-debate-over-resolving-appellate-body-impasse>), here (<https://www.pm.gov.au/media/where-we-live-asialink-bloomberg-address>) and here ([https://docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/255199/q/WT/GC/W776.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/255199/q/WT/GC/W776.pdf))) and which has the potential ([https://www.wto.org/english/tratop\\_e/dispu\\_e/ricardoramirezfarwellspeech\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm)) to end WTO dispute settlement. Before the WTO Dispute Settlement Body, the US has complained ([https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec12.GC\\_Stmt\\_items\\_7.a%20nd\\_8.as\\_delivered.clean\\_.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec12.GC_Stmt_items_7.a%20nd_8.as_delivered.clean_.pdf)) about (1) individuals who are no longer formally members of the Appellate Body (“AB”) continuing to adjudicate disputes; (2) non-adherence to the 90-day deadline for issuing AB reports; (3) the use of *obiter dicta* in AB reports; (4) the AB’s misapplication of the standard of review; (5) AB reports having precedential effect; and (6) AB interpretations and decisions having amounted to judicial overreach.

Underlying the US position are three partially interrelated concerns, namely (1) the failure of the legislative function of the WTO; (2) the purported judicial activism the US accuses the AB of; and (3) the inadequate integration of China into the multilateral trading system.

The US actions can best be explained by a desire to return to the power-based system that existed in the GATT era. While almost all WTO Members agree that institutional reforms are necessary, they prefer a more nuanced approach. Unlike in times past, the US has not attempted to build coalitions. More importantly, a return to the power-based system that characterized the GATT cannot bring about a satisfactory solution for the US.

### Legislative Deficit (or Failure)

If – as we do – one understands the WTO as a constitutional system with at least elements of a separation of powers

([https://www.researchgate.net/publication/334083517\\_Article\\_III\\_WTO\\_Agreement\\_-\\_Functions\\_of\\_the\\_WTO](https://www.researchgate.net/publication/334083517_Article_III_WTO_Agreement_-_Functions_of_the_WTO)), it is clear that the legislative function of the WTO has not fared well. Since its inception in 1995, WTO Members have not engaged in substantive legislative reform (<https://ssrn.com/abstract=3399300>) and the Doha Development Agenda is comatose. The US has – rightly in our minds – raised the issue (<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/de%20cember/opening-plenary-statement-ustr>) that the WTO is no longer the main forum for negotiating trade rules. WTO Members’ legislative efforts have led to only a small number of tangible results.

The Doha Ministerial Declaration on TRIPS and Public Health

([https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)) was an important step towards rebalancing the rights of patent holders on one hand and governments on the other in order to protect public health. Its long term efficacy is in doubt (<https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001154>).

Hailed ([https://www.wto.org/english/news\\_e/news17\\_e/fac\\_02jun17\\_e.htm](https://www.wto.org/english/news_e/news17_e/fac_02jun17_e.htm)) by the WTO's Director-General as "the greatest trade reform for a generation" and "ground-breaking", the Trade Facilitation Agreement ([https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm)) ("TFA") entered into force in 2017 and has been accepted by 117 WTO Members (as of June 2019). Replicating regional efforts, the TFA was predicted to reduce transaction costs ([https://www.wto.org/english/tratop\\_e/tradfa\\_e/tfa\\_factsheet2017\\_e.pdf](https://www.wto.org/english/tratop_e/tradfa_e/tfa_factsheet2017_e.pdf)) by reducing administrative hurdles for goods crossing international borders.

#### The Environmental Goods Agreement

(<https://dfat.gov.au/trade/organisations/wto/negotiations/ega/Pages/environmental-goods-agreement.aspx>) was launched as an effort to reduce tariffs on environmental goods. Talks stalled in 2016 over the goods to be covered (coverage was modest and a reduction of non-tariff barriers was not part of the negotiations ([https://www.iisd.org/sites/default/files/publications/commentary\\_green\\_goods.pdf](https://www.iisd.org/sites/default/files/publications/commentary_green_goods.pdf))). Future efforts include the development of rules on e-commerce (<file:///C:/Users/markusw/Downloads/htt%20ps%3A%2Fwww.reuters.com%2Farticle%2Fdavos-meeting-ecommerce%2Fdavos-nearly-half-wto-members-agree-to%20talks-on-new-e-commerce-rules-idUSL1N1ZP08O>) and discussions on expanding services negotiations ([https://www.wto.org/english/tratop\\_e/s%20erv\\_e/s\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/s%20erv_e/s_negs_e.htm)).

While collective efforts by all Members are clearly required to re-invigorate the legislative function of the WTO, the return to the power-based system of the GATT will only jeopardize those endeavors. Going back to allow power politics a bigger or even decisive role in dispute settlement will significantly reduce the incentives of Members to negotiate new rules. Moreover, less powerful WTO Members would no longer be able to engage meaningfully in formal dispute settlement, lest the responding party object to the initiation of the dispute. Indeed, if rules are likely to succumb to power and become unenforceable, why negotiate new ones in the first place?

#### Judicial Overreach

The legislative failure is the root cause of the US allegation of judicial overreach. To properly exercise its judicial function, the AB necessarily needs to fill gaps or clarify ambiguities in the incomplete WTO treaty. Legal texts always require interpretation and the WTO agreements are no exception: some of the most (in)famous examples include the meaning of "public body" (<https://www.kluwerlawonline.com/abstract.php?area=Journals&id=TRAD2012031>), what constitutes "exhaustible natural resources" ([https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art20\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf)) or "like products" (<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199260782.001.0001/acprof-9780199260782>), or what makes a regulatory measure "necessary" ([https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art20\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf)) to achieve a chosen policy objective. Even if the AB ceases to function by the end of 2019, the issue of judicial overreach will persist with any adjudicative body that takes over its role (i.e. panels or arbitrators). This issue, therefore, cannot be resolved by WTO tribunals themselves. Rather, the onus is on WTO Members to supply sufficient textual guidance for judicial interpretation or to

utilize existing mechanisms (such as “authoritative interpretations” envisaged under Article IX:2 of the WTO Agreement ([https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm#articleIX](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleIX))) to exercise proper political oversight over judicial decisions.

A power-based system will provide WTO Members the flexibility to veto judicial decisions they regard as problematic. However, history has shown that such flexibility will be utilized by economically powerful countries to their benefit. The very idea of creating a rules-based system ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3399300](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399300)) in the Uruguay Round was to avoid WTO Members not complying with the new organization's judicial decisions. This will lead to situations in which WTO Members like the US could refuse implementing an unfavourable decision while other, weaker, WTO Members will have to think much more carefully about taking such a path. This will in turn result in a significant imbalance of the rights and obligations of WTO Members and considerable negative impacts on the credibility and legitimacy of the WTO. As Members' support evaporates over time, the WTO as an institution may not survive such a development.

## China

The legislative failure is also at the heart of US accusations against China being a “bad player” in the multilateral trading system. Given China's record of compliance (<https://www.bloomsburyprofessional.com/uk/chinas-implementation-of-the-rulings-of-the-world-trade-organization-9781509913558/>) with adverse rulings of WTO tribunals, the US's accusation is misleading. Instead of blaming China for non-compliance, the real problem lies in the limits of the existing rules ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3209613](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209613)), WTO rulings (which often only address some very specific aspects of a challenged regulatory regime) and the WTO dispute settlement mechanism in general. In other words, the external restraint that the WTO has imposed on China has been insufficient to promote the Chinese economy into a full-fledged market economy as the US expected. A more systemic problem, indeed, concerns the two different models underpinning the US and China economically. However, WTO rules are not designed to compel Members to change their market structure or hamper their economic growth. This means that the two economic powers may need to address their fundamental differences via bilateral talks (<https://www.ft.com/content/f01fc012-9a2e-11e9-b8ce-8b459ed04726>) the conclusion of which would pave the way for further negotiations with other WTO Members.

As the ongoing US-China dispute demonstrates, power politics is unlikely to change China's behaviour. To help China to further its transition towards a market-oriented economy, what is needed (<https://www.cato.org/publications/policy-analysis/disciplining-chinas-trade-practices-wto-how-wto-complaints-can-help>) is a rules-based international trading system. Indeed, China has continued market liberalization unilaterally (<http://www.chinadaily.com.cn/a/201903/01/WS5c77a5bea3106c65c34ec020.html>), although more ambitious reforms are needed on politically sensitive issues such as state-owned enterprises (<https://cup.columbia.edu/book/the-state-strikes-back/9780881327373>). As the Chinese government stated unequivocally in “China and the World Trade Organization ([http://english.gov.cn/archive/white\\_paper/2018/06/28/content\\_281476201898696.htm](http://english.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm))” in 2018, a multilateral trading system that would earn China's firm support must continue to promote

“the principles of rules, openness, transparency, inclusiveness and non-discrimination, and ... remain the main channel to address global trade issues.” A power-based system is – according to its own statement – not desirable for China; nor would it be effective in further integrating China into the global economy.

## Conclusion

The US has raised legitimate concerns over the legislative deficit; the relationship between the legislative and judicial branches in the WTO; and how a powerful economic player such as China can be integrated into the existing multilateral trading system. What is less clear is how its current tactics are going to lead to a positive conclusion – unless of course the ultimate goal for US policies is diminishing the power of international institutions it was once crucial in developing. Rather than undermining the WTO, it would have been in the US's own interest to play a more constructive role in shaping the WTO's legislative agenda, bearing in mind that its own interests may not always win out. Moreover, rather than antagonizing its former allies through the imposition of tariff barriers on e.g. steel and aluminium products (<https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/01/trump-has-an-announced-massive-aluminum-and-steel-tariffs-here-are-5-things-you-need-to-know/>) by – irresponsibly and against the advice of the Pentagon (<https://www.reuters.com/article/us-usa-trade-steel/u-s-defense-department-says-prefers-targeted-steel-aluminum-tariffs-idUSKCN1G706A>) – invoking national security as a justification, the US would have been better off building a strong coalition in the face of the serious challenge that comes from China as a rising economic power. That would have required not only long-term planning, but also the willingness to make concessions. Neither one seems to be in supply in the White House.

*Markus Wagner is Associate Professor of Law at the University of Wollongong and Executive Vice-President of the Society of International Economic Law. Email:*

*markus\_wagner@uow.edu.au (mailto:markus\_wagner@uow.edu.au). Weihuan Zhou is Senior Lecturer and Member of the Herbert Smith Freehills China International Business and Economic Law (CIBEL) Centre, Faculty of Law, UNSW Sydney. Email: weihuan.zhou@unsw.edu.au (mailto:weihuan.zhou@unsw.edu.au).*

Ownership, Restitution of Nazi-looted Art and International Law: David Cassirer et al. v Thyssen-Bornemisza Collection Foundation – Benjamin Teng (<https://ilareporter.org.au/2019/06/ownership-restitution-of-holocaust-era-art-and-the-interface-between-public-and-private-international-law-david-cassirer-et-al-v-thyssen-bornemisza-collection-foundation-benjamin-teng/>)

Did the War on Iran Just Begin? The Use and Abuse of International Law in the Strait of Hormuz – Natalie Klein (<https://ilareporter.org.au/2019/08/did-the-war-on-iran-just-begin-the-use-and-abuse-of-international-law-in-the-strait-of-hormuz-natalie-klein/>)



The official blog of the International Law Association (Australian Branch) (<http://ila.org.au/>).

## Editors-in-Chief

Molly Thomas

Jessica Honan

## Assistant Editors

Paivi Adeniyi

Liam MacAndrews

Alan Zheng

## Sign-up for our updates

To sign up for an email digest of recent posts to the *ILA Reporter* and a compilation of events and opportunities for early career international lawyers, please enter your details below.

Email Newsletter

Sign up for our email newsletters

## Recent Posts

Call for Expressions of Interest, Panel on SAARC Due Diligence Mechanism at the Indian Society for International Law Conference, October 2024 (<https://ilareporter.org.au/2024/09/call-for-expressions-of-interest-panel-on-saarc-due-diligence-mechanism-at-the-indian-society-for-international-law-conference-october-2024/>)

Calls for Applications: Assistant Editors and Co-Editor-in-Chief, ILA Reporter (<https://ilareporter.org.au/2024/09/calls-for-applications-assistant-editors-and-co-editor-in-chief-ila-reporter/>)

Calls for Submissions: Nygh and Brennan Prizes and International Law and Event: Sea Level Rise Webinar, 10 September 2024 (<https://ilareporter.org.au/2024/07/nygh-and-brennan-prizes-and-sea-level-rise-webinar/>)

The Metamorphosis of Soft Law in Mauritius/Maldives: Part 2 – Jack McNally (<https://ilareporter.org.au/2024/03/the-metamorphosis-of-soft-law-in-mauritius-maldives-part-2-jack-mcnally/>)

Call for Submissions: Australian International Law Journal, 29 September 2023 (<https://ilareporter.org.au/2023/08/call-for-submissions-australian-international-law-journal-29-september-2023/>)



---

All right reserved © Copyright 2017 - ILA (<http://ila.org.au>)