REVISITING THE MULTILATERAL TRADING SYSTEM

This panel was convened at 9:00 a.m., Saturday, April 7, 2018, by its moderator Hugo Perezcano Diaz of the Centre for International Governance Innovation, who introduced the panelists: Jennifer Hillman, of the Georgetown University Law Center; Richard Steinberg, of the UCLA School of Law; Terence P. Stewart, of Stewart & Stewart; and Rufus Yerxa, of the national Foreign Trade Council.

INTRODUCTION: ANATOMY OF THE WTO IMPASSE
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By Kathleen Claussen*

With the creation of the World Trade Organization (WTO) in 1995, major changes were made to the dispute settlement system that had previously governed international trade disputes. Prior to the WTO, the dispute settlement system that had evolved under the General Agreement on Tariffs and Trade (GATT) was widely believed to suffer from certain structural weaknesses. One perceived weakness was that the establishment of a dispute settlement panel or the adoption of a panel’s report required a positive consensus of all the GATT contracting parties, effectively allowing respondents to block losing outcomes against themselves. Thus, one major change that resulted from the Uruguay Round of negotiations (which led to the creation of the WTO) was the replacement of the positive consensus rule with a negative consensus rule such that to block establishment of a panel or adoption of a panel report, all WTO members have to agree not to establish or not to adopt the report.

Another major change involved the creation of an Appellate Body (AB). The WTO AB was established under an agreement called the Dispute Settlement Understanding (DSU). The AB is a standing body of seven persons. Three of the seven serve on any one case in rotation. Those seven persons are appointed by consensus of the Dispute Settlement Body (DSB) (comprised of all WTO members). Each AB member serves for a four-year term with the possibility of being reappointed once.

Over the AB’s 23-year history, many WTO members and commentators have expressed strong support for its work. At the same time, members have also voiced concerns of substance and of procedure. The United States has been particularly vocal on some of these issues, dating back as early as 2001 and across three U.S. presidential administrations.

With respect to substance, several members have expressed a concern that the AB has engaged in activity beyond its mandate. These countries have criticized panels and the AB for overreaching their authority by, according to these countries, filling gaps, construing silences, selectively choosing definitions, and creating obligations not agreed among members. Members also have expressed concern that the AB has on occasion commented on topics not raised by the disputing parties, not essential to resolution of the dispute, or not within the dispute’s terms of reference. It

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was on some of these bases that the United States opposed reappointment of one of the AB members in May 2016.

A related substantive problem expressed by the United States and others is that, as a result of the AB overreach, the dispute settlement process may be eroding the negotiation function of the WTO. At the December 2017 WTO Ministerial, U.S. Trade Representative Robert Lighthizer made the point that there was concern about the WTO “becoming a litigation-centered organization.” Commentators assert that the AB’s approach has thus encouraged members to seek through dispute settlement that which they would have sought through negotiations.

The most salient of the procedural difficulties is that WTO members have been unable to agree on the appointment of new AB members. As mentioned above, one AB member was not reappointed in mid-2016. Another member’s term expired on June 30, 2017, and another’s expired on December 11, 2017. Yet another member resigned on August 1, 2017, without providing ninety days’ notice of leaving as articulated in the AB Working Procedures.

In addition to the problem with reaching agreement on new appointments, concerns have also been raised regarding the terms under which “outgoing” members continue to serve on appeals to which they had been assigned before the expiry of their term. The AB Working Procedures provide that an AB member “may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member ….” In some instances, the result has been that only one of three AB members issuing a report in an appeal may have a current appointment.

Some commentators have suggested that these two procedural problems may be related. It may be that more AB members are carrying over their caseloads after the expiry of their terms because no new members have been appointed, and also because appeals are taking much longer than the sixty to ninety days foreseen in the DSU.

In sum, these procedural and substantive issues, among others, have continued to lead to tensions within the institution.

**THE IMPENDING DEJUDICIALIZATION OF THE WTO DISPUTE SETTLEMENT SYSTEM?**

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*By Richard H. Steinberg*

The Appellate Body (AB) of the World Trade Organization (WTO) is facing a crisis. Appointment of AB members requires a consensus of the Dispute Settlement Body (comprised of all WTO members), and the United States has been blocking a consensus on further appointments since Donald J. Trump became the president. Without new appointments, the ranks of the AB have been diminishing as AB members’ terms have been expiring. If this continues (and many expect the United States to continue blocking a consensus on appointments), then in December 2019, through attrition, the number of AB members will fall below the threshold necessary to render decisions, at which point the AB will cease to function.

How should we understand this impending crisis? And what might be a way forward?