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Shifting the Goalposts: US-Led WTO Reforms of the Dispute Settlement Mechanism

By:

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Introduction

The introduction of the World Trade Organization (WTO) in 1995 was considered a historic milestone for the rules-based trade order instituted in the aftermath of World War II. In particular, the Dispute Settlement Mechanism (DSM), a rules-based dispute settlement system designed to ensure fair resolution of trade disputes among WTO members, was hailed as a "crown jewel" of the new system. Although not devoid of criticism, the two-tier system of the DSM had a relatively excellent start to life. Considered one of the most active international dispute mechanisms, especially since the turn of the millennium, the DSM has handled 621 disputes brought to the organisation, with over 350 rulings issued since its inception in 1995. However, the system's success has waned in recent years, effectively "grinding to a halt" with the U.S. spearheading its sabotage.

Although the US was a major architect for its introduction in 1995, it opposed the appointment of new Appellate Body members, through successive US administrations and there are now no Appellate Body members since 2019. The demise of the Appellate Body created an impasse in the WTO that is yet to be resolved despite several efforts from WTO members. A primary criticism of the current system by the U.S. is that the Appellate Body has overstepped its limits and created new rules not envisaged by the WTO, an approach that the U.S. maintains does not support its interests.

The U.S. is proposing a significant overhaul of the existing WTO dispute settlement system. A decision on these proposals will be made by WTO members at the Dispute Settlement Body and, ultimately, at the 13th Ministerial Conference (MC13) in Abu Dhabi. As WTO's MC13 approaches, the spotlight is on the credibility of the US's proposals to reshape the system it has sabotaged. Although the impasse within the WTO's DSM has also led to alternative proposals from developed nations like the E.U. Multi-party Interim Appeal Arbitration Arrangement (MPIA), the U.S. has been the primary opponent of the current system, making its proposals subject to particular scrutiny.

In this analysis, we argue that the proposed reforms to the WTO's DSM by the U.S. are self-serving, aligning with a consistent pattern of hegemonic powers shifting the goalposts and changing the rules when they face adverse consequences—the "bite"—of a regime they erstwhile championed. Analysing some of the U.S. proposals for reform of the DSM through a Hegemonic Stability Theory (HST) lens, we argue that they reflect the interests of a hegemon dissatisfied with a system that no longer serves its self-interests.

U.S. Opposition and the Appellate Body Crisis

The U.S.’s strategic attack on the DSM can be traced back to the Obama administration. The Trump presidency significantly escalated the U.S.’s efforts to undermine the DSM, with President Trump arguing that the WTO was set up to benefit everyone except the U.S. While these claims were quickly debunked, they bring to the fore the geo-political underpinnings of the U.S. criticism of the DSM. It also highlights how hegemonic powers perceive their interests within international systems, especially when such powers face the bite of a system

they helped create. The fact that the Biden Administration has held the course charted by Trump reflects the bipartisan support in Washington for the U.S.'s approach to the WTO. More importantly, it brings into question the wider motives of the U.S.'s contribution to the crisis in the WTO.

Drawing on the classic views in Hegemonic Stability Theory (HST), which conceptualises a hegemon "…as the dominant power with both the political, economic and other resources and willingness to lay down and enforce its rules in the international political economy"; the U.S. has undoubtedly been a dominant force responsible for framing and ensuring the stability of the rules-based trade order. When the hegemon's influence over a regime wane, it can lead to instability, fragmentation, and erosion of confidence in that regime. In the case of the WTO, the U.S. has played a pivotal role as an architect and supporter since its inception. However, and as the U.S.'s relative power has declined in recent years, it has become increasingly critical of the WTO, taking actions that undermine the organisation's DSM. To buttress this point, a senior Geneva trade diplomat was quoted in POLITICO as saying that "[Major powers] are contesting the norms, they are pushing the rules. And if we don't accommodate and adjust and find a way to keep the big players in the system, then … we do fade into irrelevance." This is an indication of how reliant the system is on the continued patronage of hegemons for its relevance. In view of this, it is arguable that the demands of the U.S. to reform the functioning of the WTO DSM are rooted in broader political concerns of a hegemon that seeks to preserve its continued dominance in an increasingly multi-polar world order, rather than legal concerns about the WTO framework as the US would want one to believe. It is also a stark reminder that the current global trade order, like most other international law/relations regimes, is mis-sold as a level playing field for fostering liberal norms.

Understanding the Geopolitical Underpinnings of the U.S.'s Proposals

A closer look at some of the U.S. proposals gives more insight into the geopolitical underpinning of the legal arguments by the U.S. For example, Ravi Kanth of the Third World Network (TWN), reviewing details of the U.S. proposals that were published in SUNS #9771 dated 27 April 2023, indicates that the U.S. may be advocating a return to the positive consensus model of the GATT era. A purview of the U.S.'s track record in the WTO DSM gives an insight into the

thinking behind this proposal. The U.S. has had a good run of success when it was the complainant in a case – with over 90% of its cases going in its favour. Conversely, when the U.S. was a respondent, it lost over 80% of cases brought against it. Reverting to a positive consensus model would mean that there must be no objection from any contracting party to the decision. In the GATT era of the positive consensus model, the parties to the dispute were not excluded from participation in this decision-making process to veto the use of the DSM. In other words, the respondent could block the establishment of a panel. Moreover, in the GATT era, the adoption of the panel report also required a positive consensus, and so did the authorisation of countermeasures against a non-implementing respondent. The respondent could also block such actions. Interestingly, the veto was not frequently used by Members involved in disputes in the early years of the GATT, with a large majority of the cases being settled. The veto was, however, a disincentive for parties to bring cases in instances where the complainant suspected that the respondent would exercise its veto. In essence, the threat of veto was a political tool that would dissuade a country with limited resources from pursuing its claim against a superpower with deep pockets and extensive experience utilising the DSM. The system depended on the goodwill of the powerful nations that ensured its legitimacy, given that there was no guarantee that these nations would not use their veto power, particularly in economically significant or politically sensitive areas such as anti-dumping. We are also reminded in a WTO Briefing on the history of the DSM about the psychological effect of the veto on Panels in the GATT era: "*even when panel reports were adopted, the risk of one party blocking adoption must often have influenced the rulings. The three panellists knew that their report had also to be accepted by the losing party in order to be adopted. Accordingly, there was an incentive to rule not solely on the basis of the legal merits of a complaint but to aim for a somewhat "diplomatic" solution by crafting a compromise that would be acceptable to both sides.*" If this is the direction that the U.S. wants the WTO to take, we will be going back to a model where political might holds sway.

The One-Tier Dispute Settlement System being proposed by the US has been criticised by the TWN as a shift favouring a "might is right" approach. Even if the Appellate Body survives in some form as envisioned by the U.S., there are also reports that the U.S. proposes that countries decide when they can invoke

a national security exception as it did in a recent case that it lost — DS556: U.S. – Certain Measures on Steel and Aluminium. If this is correct, this will be another ace up the sleeve of superpower WTO Members that can be deployed at will to violate trade rules legally — rather than let the Appellate Body decide. This reinforces the narrative of a superpower seeking to preserve a carte blanche to choose when it will abide by the rules. Of course, this is subject to the belief that hegemons that guarantee the global rules system would not do anything to usurp a system dependent on them for its relevance. The attitude of the U.S. does not give room for much confidence in this belief.

The details of the U.S.'s proposals reflect the broader issue of how hegemonic powers perceive their interests within international systems. When hegemons feel the bite of a system they helped create, they question the system's legitimacy and/or advocate for changes that seek to preserve their continued dominance of the system. It emphasises the need to scrutinise the motivations behind proposed reforms to the DSM and their potential impacts on the equality of participation in global economic governance. For example, Codeço (2022) argues that the roots of the WTO crisis "…*stand in the ongoing process of hegemonic transition since the U.S. – the traditional patron of free trade – perceives such an order as beneficial to China, which is the emerging power that has been grasping huge advantages from international trade*." This perspective is shared by Sarah Aarup, who believes that in Washington’ s view, the WTO’s strict enforcement of its trade rules hurt U.S. jobs and industry while enabling China’s rise as a mercantilist superpower." Could this be true? Are the attacks on the DSM part of a wider policy strategy by the U.S to counter the growing influence of China? If so, it will be a dangerous precedent to allow the U.S. to have its way on this issue.

Conclusion

The ongoing proposals by the U.S. and other developed nations to reform the WTO's Dispute Settlement Mechanism underscore a consistent pattern of hegemonic powers shifting the goalposts and seeking to change the rules when faced with adverse consequences of systems they impose on developing countries. It also prompts us to reconsider the roles and responsibilities of developing nations as they navigate the complex dynamics of geopolitical contestations that are intertwined with the international trade order. In this

symposium, the contribution from Clair Gammage and Franziska Sucker explores the implications of the U.S. proposals for developing countries and highlights the specific risks to those Members if this model for dispute settlement is adopted.

The ongoing discussions regarding the World Trade Organization's Dispute Settlement Mechanism (DSM) reform are a turning point in global trade relations. By focusing primarily on the legal grounding of the U.S. proposals – which have some merit - to reform the system, we risk overlooking the broader geopolitical motivations of a hegemon who believes that the WTO regime no longer serves its best interests. The United States' attempts to restructure the DSM highlight the challenges of creating a balanced global system. These dynamics directly impact trade for nations worldwide, particularly developing countries.

In conclusion, the WTO's DSM reform saga reminds us of the ongoing power struggle between the powerful and the marginalised in the international arena. Nevertheless, it also indicates that change is a continuous and necessary process. As the global community awaits the outcomes of MC13, all stakeholders must advocate for reforms that genuinely embody the principles of fairness, equity, and shared prosperity.

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