THE EXTENSIVE (BUT FRAGILE) AUTHORITY OF THE WTO APPELLATE BODY

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I INTRODUCTION

Many may presume that the authority of an international court (IC) is evolutionary and largely unidirectional. This article shows that the authority of the Appellate Body (AB) of the World Trade Organization (WTO) rapidly and almost immediately became extensive, but nonetheless remains fragile and at risk of decline, and even (potentially) rapid decline. The AB is a young but remarkably authoritative IC even though the founders of the WTO did not deign to call it a court, arguably in the hope of constraining its authority. Particularly remarkable is how the AB almost immediately established not merely narrow (litigant-specific) authority and intermediate (membership-level) authority, but extensive field-level authority. Such rapid development of extensive field authority is arguably a unique case in international politics at the multilateral level. Yet this authority remains fragile, and it could decline rapidly.

The WTO’s current system of resolving disputes has been in existence for nearly twenty years and builds radically from a previous system under the General Agreement on Tariffs and Trade (GATT) created in 1948. The interpretation, application, and enforcement of WTO rules take place through a two-tiered dispute settlement system composed of dispute settlement panels and an appeals process, complemented by a peer-review system of over seventy
WTO councils, committees, working parties, and other groupings, including a Dispute Settlement Body (DSB). The AB lies at the apex of the WTO dispute settlement system and consists of seven members appointed by the DSB. These members serve four-year terms that are renewable once. Although the AB members are not formally called judges, the AB operates as an international appellate trade court created to enforce trade rules. Today, the WTO’s dispute settlement system is arguably the most authoritative judicial institution at the multilateral level in world politics.

WTO members broadly accept the AB’s authority to “clarify” the meaning of WTO law, even if begrudgingly when they lose a case. A broad array of WTO members use WTO dispute settlement, and the AB and first-level panels have issued over ninety thousand pages of highly technical and legalistic jurisprudence. This was not the case for dispute settlement under the GATT. Until the 1970s, the GATT was “dominated by an ‘anti-legal’ culture,” in which the authority of panels was highly circumscribed. This article explains the change from a venue based on political negotiations to resolve disagreements to a sophisticated dispute settlement system and presents empirical indicators of the rise of AB authority. The article also addresses, in parallel, the challenges the AB confronts in sustaining its high level of authority, which remains fragile.

Part II of this article defines and presents a typology of IC authority, building from the authority framework described by Alter, Helfer, and Madsen. Part III reviews the transformation from the diplomatic–political GATT dispute resolution mechanism with narrow authority to a fully fledged WTO dispute settlement system with extensive authority. Part IV presents various empirical indicators of the rapid rise of the AB’s extensive authority. Part V analyzes the challenges the AB confronts in maintaining its authority, which shows signs of decline. Part VI concludes regarding the AB’s current and future authority.

II

A TYPOLOGY OF GATT/WTO JUDICIAL AUTHORITY

In accord with the Alter, Helfer, and Madsen framework, this article defines IC authority as a form of power consisting of two components: (1) the recognition and acceptance of an obligation to comply with a court’s rulings; and (2) some form of meaningful practice giving effect to such rulings, whether involving meaningful steps toward compliance or acceptance of authorized
sanctions, a form of contractual remedy.\textsuperscript{6} The typology tracks the degree of the authority of an IC in relation to the IC’s audience.

\textit{Narrow authority} exists when the parties to a particular dispute recognize that they are legally bound by the court’s ruling and take steps to comply with it or be subject to authorized countermeasures.\textsuperscript{7} In the WTO context, narrow authority exists when a respondent and complainant in a particular WTO dispute believe they are bound by the AB’s ruling in that dispute and take meaningful steps to give effect to that legal obligation or accept authorized countermeasures, such as the complainant’s suspension of an equivalent amount of concessions pursuant to Article 22 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, or DSU).\textsuperscript{8} Indicators of narrow authority include partial or full compliance with AB decisions; payment of compensation; or acceptance of authorized countermeasures that end tit-for-tat, retaliatory, protectionist actions. The particular dispute is thus settled through law.

\textit{Intermediate authority} exists when a similarly situated group of actors recognizes the IC ruling as authoritative and responds accordingly.\textsuperscript{9} In the context of the WTO, the group consists of the potential pool of future litigants among WTO Members. When the AB exercises intermediate authority, other WTO Members will modify or consider modifying existing regulatory practices and tailor new regulatory initiatives in light of AB case law. Indicators of intermediate authority include citations of AB case law by participants in a dispute and by panels; greater participation of Members as third parties in WTO litigation because of their concern with the impact of AB decisions in construing the meaning of WTO rules for future cases; increases in the size of WTO delegations and the inclusion of lawyers because of the importance of legal developments in Geneva; evidence of strategic litigation involving trade benefits that do not cover litigation costs; and shadow of law effects from AB decisions—that is, evidence that nonlitigating WTO members modify their laws, practices, and regulatory initiatives in light of AB jurisprudence.

\textit{Extensive authority} exists when a larger field of actors, including other government officials, domestic and international courts, legal professionals, firms, civil society, and academics, follow and argue over the law’s interpretation and practice, and accept the IC’s rulings as authoritative and requiring a meaningful response.\textsuperscript{10} Extensive authority encompasses narrow and intermediate authority (and thus the empirical indicators noted above), but

\begin{thebibliography}{10}
\bibitem{6} Id. at 7.
\bibitem{7} Id. at 10.
\bibitem{9} Alter, Helfer & Madsen, supra note 5, at 5.
\bibitem{10} Id. at 10–11. It could then constitute a juridical field in the sense used by Pierre Bourdieu. See generally Pierre Bourdieu, \textit{The Force of Law: Toward a Sociology of the Juridical Field}, 38 HASTINGS L.J. 805 (1987) (likening the juridical field to a culture, organized around a body of internal norms, assumptions, behaviors, and values).
\end{thebibliography}
goes much further in its normative reach. In the WTO context, it signifies that AB jurisprudence not only affects WTO Members’ understanding of their commitments but also broader political, social, and professional understandings that inform domestic and international policy debates. Indicators of extensive AB authority include widespread use of the WTO dispute settlement system; references to WTO rules in domestic political and administrative processes; citations to WTO case law by domestic courts and other ICs; public participation in WTO fora; casebooks and specialized journals addressing WTO law; articles in legal journals on WTO law and jurisprudence; and academics teaching international trade law. Some of these indicators may not reflect actual changes in nation-state, business, and other behavior, but they nonetheless form part of larger interactional social processes over time that help to embed an IC’s authority, thereby facilitating narrow and intermediate authority.

An IC’s authority can be extensive, yet also fragile in light of the political implications of its decisions. Because of such fragility, just as IC authority can rapidly rise, it can also rapidly decline. An IC may exercise restraint and limit the scope of its rulings in order to protect its authority, thereby constraining its own power. Actors may also limit the scope of an IC’s authority by not bringing cases under its jurisdiction. WTO Members’ purposeful omission to challenge the legality of each other’s preferential trade agreements serves as a prime example of this circumvention of jurisdiction. As a result, an IC may exercise authority in only some areas that fall within its jurisdiction. In addition, compliance with a ruling does not always reflect IC authority, because an actor may, at the same time that it formally complies with a ruling, apply a new measure that undermines the effectiveness of the legal ruling. This phenomenon of “uncompliance” calls into question the IC’s actual authority.

The core research question of this article is: What explains the rapid, almost immediate rise of AB authority, and how stable (or fragile) is it? This article addresses three sets of contextual factors—institutional design, constituencies, and geopolitical context—in combination with the AB’s agency. Institutional design issues include the existence of compulsory or ad hoc jurisdiction; access rules, such as access being limited to nation-states or open to private parties or international secretariats; and alternatives to litigation before the IC, such as conciliation and mediation, on the one hand, and forum shopping to another IC, on the other hand. Constituencies refers to actors within national governments, such as executives, judiciaries, and administrative bodies, and outside of governments, such as legal professionals, corporations, nongovernmental organizations, and academics. Geopolitical context includes structural, material, and ideational power playing out in global, regional, and local contexts. This article addresses the role of these different external factors over time while stressing their interaction with the agency of the AB itself in the construction and maintenance of its authority. The baselines against which this article

11. See discussion infra Part IV.
12. See infra notes 171–175 and accompanying text.
assesses the rise of AB authority are two-fold: the counterfactual of a global trade system without a third party dispute settlement institution, and the actual GATT system before the AB’s creation.

III
THE CONSTRUCTION OF EXTENSIVE AB AUTHORITY FROM A NARROW GATT BASE

A. The GATT’s Patchwork Narrow Authority

To understand the authority of the WTO AB, this article first assesses the development of dispute settlement under the GATT, which was much less legalized in terms of the scope and precision of legal texts and the automaticity of third-party dispute settlement. The GATT membership initially consisted of twenty-three contracting parties, expanded to 102 members by 1979 (the end of the Tokyo Round), and included 123 members in 1994—just before the WTO’s creation. The institutional design of the GATT was less welcoming to legalization. Under the GATT, the entire membership had to approve by consensus the creation of a panel, the selection of the panelists, and the adoption of a panel decision. Because the respondent in a dispute could block the dispute from proceeding at any of these stages, these requirements gave rise to considerable delay and, at times, complete blockage of the proceedings.

The GATT panelists generally did not consist of lawyers and they were not even supported by lawyers within the GATT secretariat until well into the fourth decade of the GATT’s history. The entire membership, in the form of the GATT Council, heard and ruled on disputes until, as the membership grew, the Council created panels of five, and then three, members to hear the case and write the report. The panelists generally consisted of diplomats based in Geneva. The panelists’ reports were initially a matter of a few pages, but as they became more developed, they continued to use vague and compromising language. The result, in Robert Hudec’s words, was the creation of a “diplomat’s jurisprudence,” which was case-by-case, and thus litigant-specific, in orientation. The fact that either the complainant or respondent could block the adoption of the panel’s report spurred the diplomat–panelists—whose governments themselves could later be subject to claims—to write diplomatic compromises that would facilitate settlement. As Joseph Weiler writes, “crafting outcomes which would command the consent of both parties and thus be adoptable was the principal task of the Panellists.”

15. Id. at 167–72, 300.
explains, the original GATT was “like a gentlemen’s club . . . . Its objective was to settle trade problems, not create or clarify trade law.”

The result of this diplomatic infusion into the panels was a narrow, litigant-specific authority of the GATT, at best, and certainly not intermediate authority over the entire membership. The craft of producing acceptable diplomatic reports received support from like-minded trade diplomats in Geneva, but GATT members (and in particular powerful members) remained reluctant to accept legalized discourse or rulings against them. In some cases, reports came to no clear legal conclusion or guidance for the future. In other cases, parties could and did block a report’s adoption, particularly when domestically sensitive policies were at stake. Additionally, even if a report was adopted, no effective system of remedies existed. The GATT contracting parties authorized countermeasures only once during the GATT’s entire history, in a proceeding involving a claim of the Netherlands against the United States in 1953, in which the Netherlands neither adopted the retaliation nor received satisfaction.

Table 1 provides an overview of the number of GATT cases per decade with established panels. It shows a larger number of cases in the 1950s, for which diplomat–panelists wrote short and vague reports aimed to help settle disputes under the new GATT rules. The amount of cases dropped sharply in the 1960s in the context of the Cold War and the rise of the European Community (EC). In the geopolitical context of the Cold War, the United States often refrained from confronting its allies on trade issues.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Complaints</th>
<th>Rulings (% of total)</th>
<th>Settled (% of total)</th>
<th>Withdrawn (% of total)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950–1959</td>
<td>53</td>
<td>21 (40%)</td>
<td>22 (42%)</td>
<td>10 (19%)</td>
</tr>
<tr>
<td>1960–1969</td>
<td>7</td>
<td>5 (71%)</td>
<td>2 (29%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>1970–1979</td>
<td>32</td>
<td>15 (47%)</td>
<td>12 (38%)</td>
<td>5 (16%)</td>
</tr>
<tr>
<td>1980–1989</td>
<td>115</td>
<td>47 (41%)</td>
<td>28 (24%)</td>
<td>40 (35%)</td>
</tr>
<tr>
<td>Total</td>
<td>207</td>
<td>88 (43%)</td>
<td>64 (31%)</td>
<td>55 (27%)</td>
</tr>
</tbody>
</table>

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After the Cold War abated in the 1980s and there was a push for greater trade liberalism in the late 1980s and early 1990s, some GATT contracting parties more frequently used the GATT process, as Table 1 reflects. The process also became more legalized following the GATT contracting parties’ agreement in 1979 to formalize procedural practices under the Tokyo Round Dispute Settlement Understanding. 24 In 1982, the GATT Director-General created a small legal affairs division within the secretariat composed of three lawyers that staffed GATT disputes and became a reservoir of knowledge of GATT case law. These lawyers became important for the drafting of reports, giving rise to a somewhat more legalized jurisprudence in the late 1980s and early 1990s. 25 A number of GATT reports in the 1980s created clearer legal precedent for future litigation, and GATT dispute settlement arguably moved toward the possibility of exercising intermediate authority. 26

In 1988, in the midst of the Uruguay Round of trade negotiations, GATT members agreed to make the formation of panels automatic until the Uruguay Round’s conclusion. 27 The decision was driven, in part, by aggressive U.S. unilateral action to enforce the U.S. government’s view of trade obligations under Section 301 of the 1974 U.S. Trade Act. 28 The contracting parties experience under the GATT and their dissatisfaction with the alternative of U.S. unilateralism provided precursors for the subsequent leap to extensive field authority with the WTO’s AB. 29 Yet most of GATT’s then-expanded membership did not engage with the dispute settlement system. In fact, the EC and the United States were party to 92% of all GATT cases launched, although a larger number of countries became slightly more involved by the end of the GATT period. 30

B. Leap to the AB’s Extensive Authority

The WTO dispute settlement system represents a significant legalization leap in world politics in which the AB rapidly developed extensive field-level authority. The impact of the design changes that went into effect in 1995 quickly became embedded through WTO members’ active use of the new system, often working in conjunction with affected private parties who increasingly referenced the new case law. Although WTO members apparently believed that

24. HUDEC, supra note 19, at 40–55.
27. HUDEC, supra note 19, at 182–88. The decision was implemented on a trial basis starting May 1, 1989.
the AB would be used only infrequently to correct clearly erroneous panel reports.\textsuperscript{31} In practice over 66.85\% of panel decisions have been appealed,\textsuperscript{32} a rate of appeals that provided the AB an opportunity to build a more robust and coherent international trade law jurisprudence.

The dispute settlement reforms of 1995 incorporated five critical design changes that enabled this legalization leap. First, a respondent can no longer block the establishment of a panel, so that all WTO Members have an automatic right to one.\textsuperscript{33} Second, the time period between the initiation of a complaint and the issuance of a panel and AB decision has been formalized.\textsuperscript{34} Although parties may stretch out the process and panels extend time periods in complex cases, the formalized process creates limits that facilitate more expeditious and dependable judicial decisionmaking. Third, AB rulings and panel decisions that are not appealed are automatically binding upon the parties to the dispute.\textsuperscript{35} In theory, the DSB can block their adoption by reverse consensus\textsuperscript{36}—that is, by a decision of all WTO members, including the prevailing party—but this has never occurred in practice. Fourth, the AB reviews the legal bases of the panel findings,\textsuperscript{37} which has led to a more legalized and coherent body of jurisprudence. Fifth, when a respondent does not comply, the complainant can seek authorization to withdraw concessions in an amount determined by binding third party arbitration, which is usually before the original panel.\textsuperscript{38} This decentralized enforcement mechanism grants the complainant leverage by strategically threatening the trade interests of the respondent’s industries. That economic leverage, compounded by Members’ concerns over reciprocity and reputation among the broader WTO membership, enhances the likelihood of compliance.

A number of factors explain why WTO Members agreed to these radical design changes. First, the dispute settlement system’s creation occurred in a particular historical conjuncture—that of the fall of the Berlin Wall and the collapse of the Soviet economic development model, which took place three years into the Uruguay Round negotiations. This historic change, coupled with the parallel success of export-oriented development models in East Asia, facilitated the rise of neoliberal ideology. The United States and EC (since 2003, the European Union, or EU) were the unrivaled economic powers at the time, and they led the negotiations to a successful conclusion. This structural

\begin{itemize}
  \item \textsuperscript{31} Elsig & Eckhardt, supra note 29, at 20.
  \item \textsuperscript{32} Dispute Settlement: Statistics, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (last visited June 5, 2014).
  \item \textsuperscript{33} See DSU, supra note 8, art. VI, § 1, art. VIII, § 5.
  \item \textsuperscript{34} See The process—Stages in a typical WTO dispute settlement case, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm (last visited July 12, 2015) (using a flowchart to show the stages of WTO settlement).
  \item \textsuperscript{35} DSU, supra note 8, art. XVI, §§ 2–4.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id. art. XVII, §§ 1–2.
  \item \textsuperscript{38} Id. art. XXII.
\end{itemize}
and ideational context facilitated the signature of a package of nineteen WTO agreements, backed by formal dispute settlement and representing the institutionalization of global trade competition.

Second, the United States became much more aggressive in advancing its trade interests once it no longer had to prioritize Cold War concerns. Given the relative weakness of the GATT dispute settlement system and the limits of GATT rules over issues of increasing U.S. concern, such as trade in services and the protection of intellectual property rights, the United States increasingly used unilateral pressures to enforce and advance its interests. The targeted GATT members complained to no avail. As a compromise under the new WTO Dispute Settlement Understanding, the United States agreed to exclusively use the WTO dispute settlement system as part of an overall “single undertaking” in which countries agreed to expand the scope of trade rules under the WTO umbrella. The negotiations over the redesigned dispute settlement system, in other words, were conducted in the shadow of U.S. unilateralism in a post–Cold War context.

Third, GATT (and then WTO) members came to accept that there was no meaningful alternative to the GATT for trade disputes, even though developed countries had earlier considered the Organization for Economic Cooperation and Development and developing countries looked to the United Nations Conference on Trade and Development. Even today, despite the proliferation of hundreds of preferential trade agreements with their own dispute settlement provisions, these provisions are not often used. The WTO remains the prime venue for settling trade disputes.

The above factors are not sufficient, however, to account for the tremendous shift that occurred. Factors largely endogenous to the negotiations contributed significantly to the AB’s creation. The idea for an appellate body developed late in the negotiations when it became clear that the EC and Japan would agree that a party could not block a panel’s establishment and the adoption of its reports in return for a constraint on U.S. unilateralism. Once the EC and Japan agreed to make WTO dispute settlement automatic, the negotiators addressed how to ensure the reliable quality of panel reports. Consensus emerged among negotiators that a review mechanism should be created as a check against poor quality reports. The U.S. support was lukewarm, at best, on the idea of creating the AB, but in the end it accepted the AB’s creation because U.S. negotiators thought that the appeal mechanism

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would only be used in rare cases, would not greatly prolong the process, and would most likely confirm panel findings, allowing the United States to apply retaliatory measures approved by WTO institutions.42 As Peter Van den Bossche put it, the agreement over the AB “was an inspired afterthought, rather than the reflection of a grand design to create a strong, new international court.”43

Some of the design rules could, in theory, constrain the normative authority of the AB, but have so far been less constraining in practice. For example, the DSU does not refer to the AB as a “court,” nor the AB members as “judges,” but rather refers to them as “persons” who comprise “the Appellate Body membership” and who have “demonstrated expertise in law.”44 DSU Article 19 further provides that the AB only makes “recommendations” regarding compliance, such that the AB lacks the injunctive powers of a domestic court.45

In practice, WTO Members retain the option not to comply with an AB ruling but rather to be subject to countermeasures that rebalance concessions. This feature provides some flexibility, so that if the AB issues a decision that a Member finds politically costly, it does not need to defy the AB, but it rather can accept the withdrawal of equivalent concessions. DSU Article 3 also provides that “recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.”46 This suggests that Members can use the AB legal rulings and recommendations as a focal point around which they ultimately settle their disputes, sometimes years after concessions have been withdrawn, as happened in the EC–Hormones47 case—a dispute over the EC’s ban on imports of meat from cattle treated with specific growth hormones—and in the EC–Bananas III48 case. These are reasons why, in the words of former AB Member Claus-Dieter Ehlermann, the WTO dispute settlement system still can be viewed as a “quasi-judicial mechanism.”49

Finally, the formal adoption of the AB’s rulings and recommendations by the DSB provides both an opportunity for Members to criticize AB rulings and an institutional space for Members to be socialized by the rulings. In theory,

42.  Id. at 23.
44.  DSU, supra note 8, art. XVII.
45.  Id. art. XIX.
46.  Id. art. III.
Members can use the DSB meetings to attempt to discipline the AB, especially if the membership appears unified. Such group action, however, has only occurred once, following the AB ruling in the *U.S. Shrimp–Turtle* case regarding the acceptance of unsolicited amicus curiae submissions under DSU Article 13, to which all participating Members but the United States vociferously objected. Ironically, however, the actual practice of DSB approval by reverse consensus of all AB decisions serves to enhance the AB’s authority. The DSB meets every month and most of the WTO membership attends DSB meetings. In preparing for, engaging in, and hearing the discussions at the meetings, Member officials are more likely to internalize the decisions. In no other international dispute settlement system do member state officials regularly meet to discuss legal decisions. In doing so, they inevitably gain better understanding of the decisions and thus are socialized to understand the meaning of the rules in light of these decisions.

C. The Normalization of the AB’s Extensive Authority: Government, Private Party, and AB Agency

A central question, however, remains: How does formal design translate into IC authority in fact? Before the start of the WTO, it was not clear how Members would use the AB. The Chair of the DSU negotiations stated, “We thought that things would go on like in the past, evolving around the panel system; nobody expected that the AB would become as active.”

The AB’s authority was established through the normalization (relative to other domains of international law) of the use of WTO dispute settlement, including appeals, involving all of the world’s large and emerging economies. Table 2 and figure 1 summarize the number of claims brought by the fifteen most frequent WTO complainants, together with their participation as a respondent, third party, or party to an appeal. Although the table demonstrates the dominant use of the United States and the EU, it also illustrates the frequent participation of an array of countries in the development of WTO jurisprudence. Thailand, for example, has participated in a different panel or AB proceeding on average every other month (115 proceedings in nineteen years). Even economically tiny Panama participated in a panel or AB proceeding more than once a year on average (nineteen in seventeen years). Normalizing China’s participation by year of membership places it after the United States and the EU.

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51. WTO Members individually criticize AB rulings but have only done so collectively on the amicus curiae issue, especially following the *U.S. Shrimp–Turtle* decision.


54. Rate for the United States is above two disputes per month since the establishment of the
Table 2: Participants and Third Participants in Panels and Appeals (1995–2013)\(^{55}\)

<table>
<thead>
<tr>
<th>Country</th>
<th>Complainant</th>
<th>Respondent</th>
<th>Third-Party</th>
<th>Total at Panel Level*</th>
<th>Total at AB Level*</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>106</td>
<td>121</td>
<td>114</td>
<td>341</td>
<td>157</td>
</tr>
<tr>
<td>EU</td>
<td>91</td>
<td>77</td>
<td>143</td>
<td>311</td>
<td>137</td>
</tr>
<tr>
<td>Canada</td>
<td>33</td>
<td>17</td>
<td>95</td>
<td>145</td>
<td>64</td>
</tr>
<tr>
<td>Brazil</td>
<td>26</td>
<td>15</td>
<td>84</td>
<td>125</td>
<td>52</td>
</tr>
<tr>
<td>Mexico</td>
<td>23</td>
<td>14</td>
<td>72</td>
<td>109</td>
<td>49</td>
</tr>
<tr>
<td>India</td>
<td>21</td>
<td>22</td>
<td>99</td>
<td>142</td>
<td>51</td>
</tr>
<tr>
<td>Argentina</td>
<td>20</td>
<td>22</td>
<td>51</td>
<td>93</td>
<td>23</td>
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<tr>
<td>Japan</td>
<td>19</td>
<td>15</td>
<td>143</td>
<td>177</td>
<td>76</td>
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<tr>
<td>Thailand</td>
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<td>14</td>
<td>85</td>
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<tr>
<td>China</td>
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<td>152</td>
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<td>Chile</td>
<td>10</td>
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<td>17</td>
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<tr>
<td>New Zealand</td>
<td>8</td>
<td>–</td>
<td>40</td>
<td>48</td>
<td>22</td>
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<tr>
<td>Australia</td>
<td>7</td>
<td>15</td>
<td>83</td>
<td>105</td>
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<tr>
<td>Panama</td>
<td>7</td>
<td>1</td>
<td>8</td>
<td>16</td>
<td>3</td>
</tr>
</tbody>
</table>

WTO. Rate for the EU is 1.85 disputes per month. Rate for China is 1.1 disputes per month. Rate for Canada is .86 disputes per month.

55. Authors’ calculations based on WORLD TRADE ORG., ANNUAL REPORT 2013 18, 74–93 (2013), https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_e.pdf. Total Panel level is based on filed cases. Panel reports are counted as having been appealed where they are adopted as upheld, modified, or reversed by an AB report. The number of panel reports appealed appears lower from these figures than in actuality because AB proceedings can address more than one panel report.
Two additional factors not captured by these depictions are necessary to understand use of the WTO dispute settlement process: first, the private parties that lie behind the disputes, and second, the AB itself in developing a jurisprudence that is conducive to state and private party participation. The combination of actor agency with institutional design and geopolitical context explains the remarkably rapid shift from narrow GATT panel authority to extensive field-level AB authority.

In the WTO’s early days, the most powerful Members, the United States and the EU, were committed to ensuring that the system worked. The United States was initially the most active, bringing a number of high profile cases against the EU, and the EU soon followed suit in order not to be only on the defensive. During the WTO’s first five years, the United States was a party (either as complainant or respondent) in forty-three cases and the EU in thirty-two cases where a panel was established, together constituting 56% of the complaints launched.\(^{57}\)

But the United States and the EU did not bring cases in a vacuum. They did so under pressure by private parties.\(^{58}\) Export-oriented businesses and private lawyers quickly found that they had a material interest in taking advantage of

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56. Id.
the WTO’s automatic dispute settlement system, and a stake in building its authority. With the automaticity of the adoption of WTO panel and AB reports, dispute settlement became more certain. As the system legalized, the financial and professional interests of these actors became more salient. Lawyers prepared legal briefs that they presented to affected private clients and to government officials to spur governments to consider filing cases for their clients. Countries with less legal capacity delegated the drafting of legal briefs and oral argument to these lawyers. In the US–Cotton case, Brazil’s cotton trade association allegedly paid legal fees of around 2,000,000 USD. U.S. and EU-based multinational firms have paid much more. In the US–EU Aircraft disputes, estimated fees are 1,000,000 USD per month and the disputes have continued for years.

Although only governments have formal access to WTO dispute settlement, private parties can shop for governments to bring cases when they and the government have complementary interests. Small developing countries generally are not well-positioned to bring a case on their own because they lack legal capacity to recognize violations and advance claims. However, multinational companies with investments in multiple countries do have this capacity.

This process is exemplified by the case brought by Cuba, Dominican Republic, Honduras, Indonesia, and Ukraine against Australia regarding Australia’s labeling law on cigarette packages, in which large U.S. and European tobacco companies had funded law firms to support the lawsuit. The situation, in practice, is not so different from cases brought by the United States and the EU. In particular, the Dominican Republic, Cuba, and Indonesia have real economic stakes due to large tobacco industries and steady exports. Yet

59. In particular, to implement the WTO Agreements, section 301(a) et seq. of the Trade Act of 1974, designed to address foreign unfair practices affecting U.S. exports of goods or services, 19 U.S.C. § 2102 (2012), provided a formal mechanism to force U.S. Trade Representatives to take actions before the WTO. 19 U.S.C § 2411(a) (2012).
61. Interview with participating actors, in Geneva, Switz. (July 20, 2005).
63. See Gregory Shaffer, Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment 167, 184 (James Hartigan ed., 2009).
65. Id. Yet to the extent developing countries lack internal expertise within their administration to
the funding provided by the tobacco companies makes it possible for these smaller countries to use the system as the United States and the EU routinely do when supported by legal arguments developed by private law firms funded by the private sector. For example, in the EC–Bananas dispute, the United States was the lead complainant even though it did not export bananas; the United States brought the case because Chiquita, in particular, had large investments in Latin America, and Chiquita hired private attorneys to help develop the factual and legal arguments.

WTO disputes retain a political element as reflected in the tendency of tit-for-tat suits, in which one case spurs the respondent to look for complaints that it can bring. Government officials do so to show their domestic political audience that they are defending the countries’ interests proactively against foreign trading partners, and to create political costs for the foreign government as well. Examples of tit-for-tat suits include the aircraft subsidy litigation between Canada and Brazil and the United States and the EU, and the numerous import relief cases between the United States and China. As a result of these suits, legal wars displace trade wars and, in the process, new legal constituencies form to build a country’s legal infrastructure to engage in these battles, as documented for Brazil, India, China, and other developing countries.

The AB has assisted in this process through its rulings. In the EC–Bananas III dispute, the AB first held that private lawyers could be part of a delegation before the AB when the small Caribbean island of Saint Lucia sought to include them. In doing so, it helped enhance the sophistication of the legal arguments made by governments that otherwise have low levels of internal legal capacity,

66. EC–Bananas, supra note 48, at ¶ 1.


and made it more feasible for them to participate in the first place. Over time, lawyers increasingly have become part of developing countries’ delegations, at first working behind the scenes and later presenting their oral arguments and responding to AB questions. \(^{72}\) Public–private partnerships among government authorities, private business, and private lawyers are now common. In the process, the WTO dispute settlement system has become much more legally and technically complex. Lawyers now frequently make procedural challenges giving rise to new jurisprudence, recursively increasing the need for lawyers.

AB members also had their own interest in consolidating the AB’s authority. Understanding the context of the WTO dispute settlement system thus also requires an understanding of the institutional interests and actions of the AB. The first group of AB members was aware of the powerful instrument given to the AB. One candidate to the AB discussed this matter with WTO Ambassadors in 1995 during the selection procedure. He remembered that “We were asked about the approach the AB should take . . . . I told them that the AB was a slender tender plant that should be protected from too strong winds; the AB should act cautiously . . . . I think the Ambassadors probably liked that.”\(^{73}\)

Another AB Member recalled, “We were aware that we represented the instance of last resort. This was an enormous responsibility; we did not intend to handle this with levity.”\(^{74}\) Once selected, the first AB members wrote their own rules of procedure, because the DSU was silent on many issues. One AB Member recalled that this exercise was important for team building and created a strong sense of collegiality.\(^{75}\) The rules of procedure also facilitated the development of a more court-like system.

This first group of AB members was careful to construct its authority when interpreting WTO substantive rules that at times could be vague and open-ended. The AB’s rulings abandoned the use of diplomatic language aimed at “dispute settlement” in favor of applying the interpretive norms set forth in the Vienna Convention on the Law of Treaties.\(^{76}\) The AB often adopted a technical, formalistic, and text-based approach, frequently citing dictionaries to support its reasoning.\(^{77}\) It routinely and at times harshly overruled panels for deficiencies in

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\(^{72}\) Discussions with private attorneys representing countries in WTO dispute settlement, as well as members of the WTO Secretariat, in Geneva, Switzerland.

\(^{73}\) Interview with a candidate to the WTO Appellate Body, telephone interview (July 6, 2010).

\(^{74}\) Interview with a WTO Appellate Body Member, telephone interview (June 4, 2010).

\(^{75}\) Id.


\(^{77}\) See Gregory Shaffer & Joel Trachtman, Interpretation and Institutional Choice at the WTO, 52
their legal reasoning or their application of treaty interpretation techniques. In the process, it further empowered the WTO legal secretariat that services ad hoc panels, which are still often composed of diplomats: the secretariat holds the reservoir of knowledge of WTO dispute settlement whose technical complexity is growing. The diplomats chosen for panels, in turn, increasingly have a legal background. This turn to formalistic legal reasoning can insulate the AB from challenge by making law appear to be more autonomous. It narrows the audience having the capacity to critique WTO jurisprudence, and it further empowers a narrow community of practitioners, scholars, and government officials with technical knowledge—the WTO legal field.

The AB has also consolidated its authority by striving for consensus among its members and by exercising restraint in issuing concurrences or dissents. Early on, AB members decided to discuss all cases collegially, even though the DSU provides that only three members would be the authors of a report. This practice continues today. Both panel and AB members appear to go to great pains to present the appearance of unanimity—even where unanimity does not actually exist. At the panel level, there were only thirteen individual opinions and seven dissents out of the first 196 cases (constituting 3.3 percent of the 392 opportunities for a separate opinion; and 1.7 percent for a dissent). At the AB level, there were only six separate opinions and two dissents in 119 AB reports (constituting 2.5 percent of the 238 opportunities for a separate opinion; and 1.7 percent for a dissent). As James Bacchus, former Chairman of the Appellate Body, explained,

> Whatever our individual role may be in any particular appeal, each of us strives always to reach a ‘consensus’ in every appeal. We are not required to do so. The treaty does not prohibit dissents . . . , the ‘consensus’ we have achieved in the many appeals that

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81. DSU, *supra* note 8, art. XVII, ¶ 1; see also Ehlermann, *supra* note 49, at 477 (describing the system of exchange of views among all seven Appellate Body members).

82. Calculation by authors. Information on dissents is available at WORLDTRADELAW.NET, http://www.worldtradelaw.net/ (last visited Sept. 18, 2015).

83. *Id.* In contrast, dissents and separate opinions are a common practice before the International Court of Justice as well as investor-state tribunals. For an excellent analysis, see Jeffrey Dunoff & Mark Pollack, *International Judicial Dissent: Causes and Consequences* (unpublished manuscript) (on file with author), https://eustudies.org/conference/papers/download/84.
have been made, thus far, to the Appellate Body has not always been achieved easily.\(^8\)

Even where there are separate opinions, DSU Articles 14.3 and 17.1 require them to be anonymous.\(^8\) Were the practice otherwise, the hermeneutic power of the AB could be reduced because opinions would more easily be identified with individual AB members. By wrapping their rulings in textual and technical reasoning and consensus decisions, the AB members enhance their authority as upholders of the law.

The AB has also exercised agency to enhance its authority by directing its decisions toward administrative bodies instead of legislatures. In a number of cases, with the *U.S. Shrimp–Turtle* case and the *EU–GMO\(^8\) cases being notable examples, the AB and panels respectively found that, although the U.S. and EU legislation did not violate WTO rules, the U.S. and EU regulatory practices did. Thus, to comply, the United States and EU did not need to go back to their legislatures to change the law, but could instead come into compliance through revising their administrative practices. Similarly, in the *US–Section 301 Trade Act* case,\(^8\) the panel found that U.S. statements and administrative practice demonstrated provisionally that the U.S. Section 301 did not need to be revised so long as the United States administered its law in compliance with DSU Article 23, which prohibits unilateral action outside of DSU procedures.\(^9\)

To establish extensive authority, the AB not only had to earn the trust of WTO Members, but it also had to face systemic challenges from civil society. The mass anti-globalization protests against the WTO—starting with the 1999 WTO Ministerial Meeting in Seattle—often singled out AB decisions.\(^9\) The AB responded to those challenges in a number of ways.

First, the AB accepts amicus briefs from any nongovernmental organization, provided that the brief meets certain criteria. When the AB wrote formal criteria it was severely criticized by the WTO membership for failing to adhere to the DSU (with only the United States supporting it), but the AB’s continuing acceptance of amicus briefs evidences AB’s support for this practice. Even though the AB has never formally referenced amicus briefs in its decisions, interviewees state that the AB reads them and thus is subject to the persuasive force they might have.\(^9\)

Second, although WTO rules provide that AB hearings are to be


\(^8\) See DSU, *supra* note 8, art. XIV, ¶ 3 , art. XVII, ¶ 1.


\(^9\) DSU, *supra* note 8, art. XXIII.


\(^9\) Discussions with former members of the AB secretariat and AB members over time.
confidential, the panels and the AB have opened them to the public when the litigants agree. So far, a small but increasing group of Members, including the United States, EU, Australia, Canada, Chinese Taipei, Japan, Ecuador, Brazil, and Mexico, have agreed to open hearings so that the general public can watch them by closed-circuit television. This practice once more makes the proceedings appear to be more transparent and legalistic and thus (potentially) less objectionable. It also broadens knowledge of WTO proceedings among non-state actors.

Third, the AB has interpreted WTO rules in a manner that is much more sensitive to environmental and public morals defenses than earlier GATT panels. In this way, the AB’s modified approach to defenses has defused some of the public critique of nongovernmental actors against WTO rulings being biased in favor of trade concerns over regulatory ones.

A number of WTO Members have complemented these actions by making their submissions to panels and the AB publicly available. Some WTO members, such as the United States, the EU, and Canada, make their submissions public as a matter of policy. Others such as Brazil and Mexico publish submissions on a case-by-case basis. Such actions place greater pressure on other governments to create formal and informal mechanisms to make government decisionmaking in WTO dispute settlement more transparent to affected stakeholders. Brazil, for example, was among the strongest critics of the AB decision to accept amicus briefs in the U.S. Shrimp–Turtle case, but Brazil then decided to attach an amicus brief of a group of NGOs to support its defense in the Brazil–Tyres case, a dispute involving measures that affected the export of retreaded tyres from the EU to Brazil. Brazil’s defense was successful on the basis of environmental and health protection arguments, and the country has subsequently made its filings publicly available.

92. DSU, supra note 8, art. XVII, ¶ 9.
94. The United States and the EU aim to make their submissions public as they give them to the panel. Canada makes them public after the dispute is over. Mexico’s practice is case-by-case and has been changing, including in relation to the practices of its opponent. This is confirmed by e-mails with a representative of each country. See Gabrielle Marceau & Mikella Hurley, Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms 4 TRADE L. & DEV. 19, 26 (2012).
95. See, e.g., Shaffer, Nedumpara & Sinha, supra note 70; Shaffer, Sanchez & Rosenberg, supra note 70.
98. Id. at ¶ 258.
The AB very rapidly consolidated extensive (field-level) authority that incorporates narrow (litigant-specific) and intermediate (member-level) authority, which is unique in international politics at the multilateral level. This part presents specific indicators of this development.

The use of the WTO dispute settlement system quickly became increasingly normalized compared to GATT dispute settlement. Formal complaints and formal panel and AB decisions are much more frequent. The fact that a much wider array of parties brings complaints and more parties are respondents to complaints means that even if the AB were to have only narrow, litigant-specific authority, many more countries would still be affected. Overall, sixty-six WTO Members have been a party to a WTO dispute (as a complainant or respondent) and another thirty-five Members have been a third party, such that, in total, 101 Members have participated as a party or third party in WTO dispute settlement. This constitutes, to our knowledge, the broadest use of any IC by states ever and is an indicator of the AB’s extensive authority in the field.

To help overcome the challenges for developing countries, a group of WTO Members funded the creation of an Advisory Center on WTO Law (ACWL) in 2001, which offers free legal advice and subsidized assistance in dispute settlement proceedings. Since its creation, the ACWL, when acting on behalf of developing countries, has been the third most active complainant within the WTO dispute settlement system, after the United States and the EU, providing support in forty-four WTO dispute settlement proceedings, which constitutes around one-fifth of proceedings initiated since 2001. Since 2000, developing countries—the beneficiaries of the ACWL—have brought nearly 50% of WTO cases.

Policy changes, whether involving compliance, or in the alternative a settlement more favorable to the complainant than the status quo, are a second important indicator of litigant-specific authority. They are difficult to measure, but WTO compliance rates, at least formally, appear to be high for an IC. Complainants sought compliance actions (pursuant to DSU Article 21.5 proceedings) in only twenty-seven of the first 104 decisions (constituting 25%) and sought retaliatory authorization in only nineteen cases (just 18%) through

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100. E-mail from member of the Advisory Centre on WTO Law, to Gregory Shaffer, Chancellor’s Professor, Irvine School of Law (May 7, 2014) (on file with author).
102. Bruce Wilson, former director of the WTO Legal Secretariat, found the following: “In virtually all of these cases the WTO Member found to be in violation has indicated its intention to bring itself into compliance and the record indicates that in most cases has already done so.” Bruce Wilson, Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date, 10 J. INT’L ECON. L. 397, 397 (2007).
When Members sought retaliation, they eventually reached legal settlement in a large number of these cases. Such legal settlement involved acceptance of the retaliation; steps taken toward expanding market access, as in the EC–Bananas III case\(^{104}\) and EC–Meat Hormones case;\(^{105}\) or the provision of other compensatory benefits, such as in the US–Cotton\(^{106}\) and US–Clove Cigarettes cases.\(^{107}\) Moreover, if the AB exercised no narrow authority that led to some meaningful policy change, it is doubtful that such a broad array of WTO Members would use the system.

The AB has gained much more than narrow authority to help resolve ad hoc disputes between litigating Members. It has created a jurisprudence that WTO Members engaged in substantial trade realize they must understand and attempt to shape because that jurisprudence has future implications for their trading interests. Members’ participation as third parties in adjudications before the AB indicates this awareness of WTO jurisprudence’s importance for policy choices. Indeed, there would be no reason for Members to join as third parties if they had no systemic concerns that such decisions would matter for future cases and thus for assessing domestic policy options. The United States has been, in practice, a party or third party in every case that resulted in a panel or AB decision.\(^{108}\) The EU has been a party or third party in over 94% of such decisions.\(^{109}\) In the WTO’s early days, the United States and the EU stood out as frequent third-party participants. Soon, however, other countries recognized the importance of third-party participation. China, India, and Brazil, for example, were a third party in 109, 100, and 84 cases respectively, and 83 WTO Members have been a third party in at least one case.\(^{110}\) In contrast, thirty-two GATT Contracting Parties have acted as a third party in a GATT dispute during the GATT’s forty-eight-year history.\(^{111}\)

Once again, the AB exercised agency in facilitating such third-party
participation. DSU Article 10 provides that a WTO member can be a third party, pursuant to which it can “be heard by the panel and . . . make written submissions to the panel,” when it has “a substantial interest in a matter before a panel.” The AB has interpreted this provision liberally and, in the EC–Sardines case, even let Morocco exercise de facto third-party-type rights by filing an amicus curiae brief when Morocco had failed to reserve its third-party rights before the panel. In doing so, the AB has facilitated an increase in Member engagement and broadened the range of arguments and perspectives that it hears.

Recognizing the implications of WTO law, Members have significantly increased the size of their delegations in Geneva from an average of less than three representatives per Member in 1982 to an average of just under six representatives per Member in 2009, as shown in Figure 2. Many Members have established specialized trade law divisions or hired internal legal counselors for the first time. These delegations’ legal counselors regularly attend discussions regarding WTO case law. In Geneva, the ACWL, Sidley Austin LLP, and the NGO International Centre on Trade and Sustainable Development each regularly organizes meetings to analyze AB decisions. In addition, several governments including Brazil, China, and India have organized and participated in discussion groups domestically.

112. DSU, supra note 8, art. X.
115. See generally Dispute Settlement at the WTO: The Developing Country Experience (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2008) (providing case studies of developing countries).
116. See, e.g., Shaffer, Ratton Sanchez & Rosenberg, supra note 70, at 392; Shaffer, Nedumpara & Sinha, supra note 70, at 13.
The vast majority of Members send officials to all DSB meetings. Many Members also speak at these meetings. The median number of Member-recorded statements in the minutes of the twenty DSB meetings between September 28, 2012 and January 22, 2014 (DSB Meetings 322–341) was twenty-five, with a high of thirty-nine. These meetings in total involved fifty-eight Members in a little over one year. These high levels of attendance and participation indicate a shared understanding that AB jurisprudence has broad implications for WTO Members beyond the litigants.

Another indicator of the AB’s intermediate authority is citations to AB case

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117. Authors’ calculations based on GATT/WTO “Blue Books” (1982–2009). See generally, e.g., WORLD TRADE ORGANIZATION, BLUE BOOK (2009). The Blue Book is the directory of the various WTO units and their telephone numbers, as well as the addresses and contact details of all the Member States’ delegations. It is an internal publication that is only distributed within the organization, to the diplomatic missions, and to other IGOs. The steep increase in the second half of the 1980s is driven by the UR negotiations, which were at full speed between 1987 and 1991. Id.


119. Those Members are: Angola, Antigua and Barbuda, Argentina, Australia, Barbados, Bolivia, Brazil, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominica, Dominican Republic, the EU, Ecuador, Egypt, El Salvador, Guatemala, Haiti, Honduras, Hong Kong, India, Indonesia, Jamaica, Japan, Kenya, Korea, Mexico, Morocco, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, Philippines, Russia, Saint Lucia, Saudi Arabia, Singapore, South Africa, Switzerland, Taiwan, Thailand, Trinidad and Tobago, Turkey, the United States, Ukraine, Uruguay, Venezuela, Vietnam, Zambia, and Zimbabwe. All of the numbers do not include the chair of the meetings. If the chair is included, the number of total participating members is fifty-nine with Pakistan. From January 1, 1995 through December 31, 2013, fifty-one members have made at least one statement. See Cosette Creamer & Zuzanna Godzimiraska, The Rhetoric of Legitimacy: Mapping Members’ Expressed Views on the WTO Dispute Settlement Mechanism 20–21 (iCourts Working Paper Series, No. 16, 2015).
law. Although AB decisions have no formal stare decisis effect, panel and AB reports regularly cite prior panel and AB decisions. In the EC–Seal Products dispute, for example, the AB cited sixty-seven former panel and AB decisions to support its interpretation of WTO texts.\(^{120}\) Joost Pauwelyn finds that 35.4% of AB decisions cross-reference each other, thus forming a “large and dense” body of precedent.\(^{121}\) A clear and functioning hierarchy can be deduced from panels’ recurrent following of AB decisions. Following previously adopted AB reports addressing the same issues promotes a coherent and predictable body of jurisprudence. In only one case, involving the controversial use of an administrative practice known as zeroing by the United States in antidumping procedures, did the AB find it necessary to reprimand a panel for failing to follow previous AB jurisprudence.\(^{122}\) Panels have fallen in line and regularly cite AB jurisprudence in support of their decisions.

Complainants and respondents, in turn, know they must cite AB jurisprudence in their submissions to support their legal arguments. The submissions of several members such as the United States, the EU, Brazil, Australia, Japan, and Mexico are publicly available, and they are full of citations to AB reports. Twenty randomly chosen submissions, including submissions prepared by the ACWL, cite a median of seventeen and one-half and an average of twenty-one separate panel and AB decisions. Moreover, private parties cite to AB jurisprudence as well when they attempt to persuade governments to bring a WTO case, writing sample briefs that a government can adopt wholesale or from which the government can cut and paste.\(^{123}\) Private parties at times write amicus curiae briefs for which our random checks of the rate of citations showed no significant difference with the citation rate in party briefs.\(^{124}\)

Parties’ strategic bringing of cases to shape WTO jurisprudence provides another indicator of the AB’s intermediate authority. In many cases, complainants have targeted countries with smaller markets as a way to build precedent for future cases that involve larger economic claims.\(^{125}\) Similarly, a

\(^{120}\) Based on authors’ calculations.


\(^{122}\) Appellate Body Report, United States—Final Anti-Dumping Measures on Stainless Steel from Mexico, ¶¶ 62–68, WTO Doc.WT/DS344/AB/R (adopted Apr. 30, 2008). In zeroing, the United States sets at zero the negative differences between the prices of a product when compared to its U.S. import prices. Because negative amounts are excluded, this practice often results in the calculation of a margin and an antidumping duty in excess of the actual dumping.

\(^{123}\) Shaffer, supra note 58, at 49.

\(^{124}\) To review the full text of selected amicus curiae briefs submitted in ongoing and past WTO dispute settlement proceedings, see WTO Amicus Submissions, WorldTradeLaw.Net, http://www.worldtradelaw.net/static.php?type=public&page=amicus.

large subset of WTO cases involves a small amount of affected trade that alone would not justify the costs of litigating the case.\textsuperscript{126} One explanation for these cases is that the complainant wishes to set precedent for future disputes,\textsuperscript{127} thus implicitly recognizing that the AB wields more than narrow, case-specific authority.

The AB’s interpretations of WTO texts have become part of the WTO \textit{acquis} and, in practice, are authoritative for future disputes. They thus can inform settlements in the shadow of the law. A particularly telling indicator of the AB’s intermediate and extensive authority is where countries modify contemplated legislation or regulation without a dispute ever being brought. One practicing attorney stated that “nineteen of every twenty client matters involving WTO legal issues never lead to formal WTO claims, and the clear majority of them settle favorably.”\textsuperscript{128} For example, following other countries’ public complaints referencing WTO rules, the Obama Administration revised its signature American Recovery and Reinvestment Act during the height of the financial crisis,\textsuperscript{129} pursuant to which it had designed government procurement regulation to increase domestic employment by favoring domestic products.

Although the above indicators suggest that the AB has attained at least intermediate authority, the AB almost immediately established extensive field-level authority as well, reaching deep within state institutions and affecting perceptions of a broad array of actors regarding the existence of a field of law. As a result, AB decisions have broad implications for domestic institutions, professions, and governing norms.\textsuperscript{130}

The pressure to constrain domestic regulation in light of AB interpretations of WTO rules is not just external, but also can come internally because nation-states are not monolithic entities, but rather consist of rival factions, some of which use WTO rules as leverage to advance their policy agendas. These actors within nation-states can be viewed as “trusty buddies” of the WTO when their interests align with trade liberalization; they mediate the global and the local.\textsuperscript{131} Nation-states’ trade agencies interact with other agencies, and they can act as the overseers of not only foreign compliance with WTO rules, but also with domestic compliance so as to avoid WTO disputes. The U.S. Trade

\begin{footnotesize}
\begin{enumerate}
\item[127.] Professor Puig has also documented how these WTO decisions set precedents that may be persuasive to, and adopted by, tribunals outside the WTO context. Puig, supra note 64, at 37.
\item[128.] Interview with private attorney in WTO practice, by telephone (July 11, 2014).
\item[131.] Id. at 5.
\end{enumerate}
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Representative plays this role in the United States, the European Commission in Europe, and the Indian Department of Commerce and Industry in India. The agencies respond to export-oriented interests catalyzed by WTO law. These agencies and export-oriented businesses and trade associations indirectly become allies of the WTO system.\(^{132}\)

This enrollment of domestic public and private actors affects politics in smaller developing countries as well. For example, the ACWL was created to assist developing countries in WTO disputes, and it has issued over 1,800 legal opinions on WTO law to developing countries since 2001; around 71% of these opinions were issued to its lower income (Category C) Members.\(^{133}\) Yet about one-third of its legal opinions concern the WTO compliance of the requesting country’s own internal measures and proposed measures, exemplifying a mechanism through which awareness of WTO law diffuses so as to induce Member compliance and avoid disputes.\(^{134}\)

Even in jurisdictions that do not grant WTO jurisprudence direct effect, national judges increasingly are aware of such jurisprudence and arguably attempt to conform to it when such an interpretation is permissible under national law. Indian courts, for example, have referred to WTO law in developing their antidumping jurisprudence even though India is a dualist jurisdiction.\(^{135}\) The Mexican Supreme Court has similarly used WTO–AB decisions to assess the consistency of Mexican law with its international obligations.\(^{136}\) A U.S. Court of International Trade judge shared that the Court’s judges always read WTO jurisprudence that implicates decisions within their jurisdiction even though their decisions must rely on U.S. law.\(^{137}\)

Citations by other ICs provide yet another indicator of extensive AB authority. In recent years, regionalism or the adoption of preferential trade agreements have added a new layer to international trade law. All members of the WTO are parties (or scheduled to become parties) to at least one of the


\(^{134}\) Id.

\(^{135}\) Madhurendra Nath Jha, *India: A Three-Tier Judicial Review System, in DOMESTIC JUDICIAL REVIEW OF TRADE REMEDIES: EXPERIENCES OF THE MOST ACTIVE WTO MEMBERS* 287, 288–89 (Müslüm Yilmaz ed., 2013). A dualist jurisdiction is one in which the international and national legal planes are distinct so that international law only imposes obligations in interstate relations and should not be directly applied by national courts.

\(^{136}\) See, e.g., Comercio Exterior. El decreto publicado en el diario oficial de la federacion el 17 de agosto de 2005, que impone temporalmente una cuota arancelaria del 20% a algunos bienes originarios de los Estados Unidos de America, es constitucional, Suprema Corte de Justicia de la Nacion [SCJN], Semanario Judicial de la Federacion y su Gaceta, Novena Epoca, Tomo XXVI, Septiembre de 2007, Tesis 1a CLXXXIX/2007, Pagina 376 (Mex.) (referencing theUS—Offset Act (Byrd Amendment)), https://www.scjn.gob.mx/libreria/Decima2013Docs/XVII_FEB.pdf.

\(^{137}\) Discussion with member of U.S. Court of International Trade, New York, NY (Oct. 2013).
more than 400 preferential trade agreements.¹³⁸ These agreements in theory could weaken AB authority, but in fact, such trade agreement dispute settlement systems are infrequently used and when they are, adjudicators in charge of deciding disputes often rely on the interpretation in WTO law of similarly worded terms. Preferential trade agreement adjudicators’ citation to and common interpretation of terms such as “like products” and “less favourable [treatment]” reveal the influence of AB jurisprudence.¹³⁹ Parties to the North American Free Trade Agreement (NAFTA), for example, tend to litigate matters in the WTO when they have a choice, in part because it is much easier to stall and block the formation of a NAFTA panel. But when panels are formed, they cite WTO law, as in the Mexico–U.S. Cross-Border Trucking dispute¹⁴⁰ and the U.S.–Canada Softwood Lumber dispute.¹⁴¹ Similarly, investor–state tribunals, operating under bilateral investment treaties, cited WTO jurisprudence forty-one times between 2000 and 2013.¹⁴²

Beyond courts, knowledge of WTO law as a field has developed significantly around the world; this growth of knowledge can facilitate the internalization of WTO law within nation-states so that it shapes normative understandings. For example, think tanks with specialists on international trade law have sprouted in developed countries and larger emerging economies. In 2010, the WTO launched a new WTO Chairs Program to support research and outreach in developing countries. It initially launched Chairs in fourteen different developing countries and seven new ones were added in 2014.¹⁴³ The WTO also offers internships in Geneva, online courses and occasional seminars, as does the ACWL. Thousands of people from around the world have participated in

¹³⁸. See Andreas Dür, Leonardo Baccini & Manfred Elsig, The Design of International Trade Agreements: Introducing a New Database, 9 REV. INT’L ORGS. 353, 357 (2014) (noting that “with the exception of Mongolia, all but a few tiny (island) countries have signed at least one PTA since World War II”). Design of Trade Agreements Database, a collaborative effort mapping international trade agreements and exploring causes and effects, has identified more than 600 agreements. See DESIGN OF TRADE AGREEMENTS DATABASE, http://www.designoftradeagreements.org/ (last visited July 12, 2015).


¹⁴³. In addition, as of 2013, the WTO was supporting 107 WTO Reference Centers that house WTO-related documentation in developing countries, including through CD-ROMs and internet support. See Reference Centres Programme, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/develop_e/train_e/ref_centres_e.htm (last visited July 13, 2015) (providing resources and contact details).
Additionally, basic knowledge of WTO law has developed within sections of the private bar in many countries. This knowledge can be used not only to engage in WTO dispute settlement, but also in domestic policy deliberations and in domestic trade litigation. Brazil, India, and China, for example, have worked to facilitate the development of such private expertise in order to diffuse WTO law-related capacity. The private bar, in particular, has proliferated to serve clients on import relief matters permitted under WTO law—that is, antidumping, countervailing duty, and safeguards cases.\footnote{Authors’ calculation based on Training News Archive, WORLD TRADE ORG., https://www.wto.org/english/news_e/archive_e/train arc_e.htm. The WTO hired around seventy to eighty interns per year from 2007 through 2013. In addition, the WTO online training lists over 1,000 people. WTO online courses attract more than a thousand developing-country participants, WORLD TRADE ORG., (Jan. 19, 2009), https://www.wto.org/english/news_e/news09_e/etraining_19jan09_e.htm. For a list of programs organized by the WTO, see Training News Archive, WORLD TRADE ORG., https://www.wto.org/english/news_e/archive_e/train arc_e.htm. For the programs provided by the ACWL, see Annual Training Course, Advisory Center on WTO Law, http://www.acwl.ch/e/training/annual_training_course.html.} From 1994 through 2012, India initiated 667 antidumping investigations, Argentina engaged in 352 investigations, and Brazil conducted 339 investigations.\footnote{Chad P. Bown, Global Antidumping Database, THE WORLD BANK (June 2015), http://go.worldbank.org/KR19BTSEQ0.} Overall, developed country G20 members imposed antidumping measures that, between 1993 and 2009, affected around 1,200 to 2,000 product lines each year, reaching a peak in 2002. Developing country G20 members’ activity steadily rose from close to zero measures in 1994 to around 600 in 2000, 1,200 in 2004, and 1,600 in 2009.\footnote{Chad P. Bown, Taking Stock of Antidumping, Safeguards and Countervailing Duties, 1990–2009, 34 THE WORLD ECON. 1955, 1978–79 (2011).} By 2011, developing country G20 members imposed a greater share of these measures against imports from other emerging economies than from high-income economies, a trend that applies not only to imports from China but to imports generally from emerging economies.\footnote{Chad P. Bown, Emerging Economies and the Emergence of South–South Protectionism, 47 J. WORLD TRADE 1, 3–30 (2013).}

As developing countries have adopted, developed, and used these forms of import relief laws, the domestic profession has grown.\footnote{Cf. Mark Wu, Antidumping in Asia’s Emerging Giants, 53 HARV. INT’L L.J. 1, 3–4 (2012) (discussing the growth of antidumping measures imposed by India and China, accompanied by a subsequent growth in proceedings).} This professional work can provide an entry point into WTO work, since around 50% of WTO cases since 2005 have been import relief cases. Out of the 123 Panel reports appealed between 1995 and 2013, around 48% of them invoked the WTO antidumping,
subsidies, or safeguards agreements.\textsuperscript{150}

The development of WTO law as a field of academic study provides another indicator of the rise of extensive AB authority. The more investments made into institutions, firms, and careers related to WTO law, the more authoritative that WTO law—and the AB’s place in clarifying its meaning—can potentially become. A growing number of English language casebooks on GATT and WTO law are in circulation, from only one in the 1970s\textsuperscript{151} to around a dozen today. In the United States alone, 106 law professors in the American Association of Law Schools listed themselves as teaching (or having taught) an international trade law-related class in 2011.\textsuperscript{152} This expansion has been complemented by a growing European Law Students’ Association Moot Court Competition on WTO law that in its most recent and twelfth edition attracted more than 100 teams from all over the world.\textsuperscript{153}

Scholars form part of the broader epistemic trade law community that, in aiming to influence interpretation, also help to solidify it as a legal field. Today, an interpretive community assesses and criticizes the reasoning of panel and AB decisions. Figure 3 shows the increase in articles written on WTO law over time as listed in the U.S. Westlaw law review database, with a significant increase in the second half of the 1990s, peaking in 2006. Similarly, the number of journals dedicated to international trade law has increased to at least around twenty-five.\textsuperscript{154} The diffusion of this knowledge of WTO law facilitates the acceptance of AB authority among a broader, although specialized, community—the trade law field.

\begin{itemize}
\item \textsuperscript{150} Authors’ own compilation based on data from \textsc{WORLDTRADELAW.NET}, http://www.worldtradelaw.net/ (last visited Sept. 13, 2015).
\item \textsuperscript{151} See generally John H. Jackson, Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations (1st ed. 1977).
\item \textsuperscript{153} See \textsc{ELSA Moot Court Competition}, http://elsamootcourt.elsa.org/; Corrina Muckenheim, Reaching Out to the World: The ELSA Moot Court Competition on WTO Law in Annex: ELSA Moot Court Competition (EMC2) at 464.
\item \textsuperscript{154} For example, the Journal of International Economic Law was established in 2006, and the \textsc{World Trade Review} was first published in 2008, each complementing the earlier Journal of World Trade, established in 1967. Additionally, new journals are being published in countries of emerging economies, such as \textsc{Trade, Law and Development} in India, established 2008, and the Asian Journal of WTO and International Health Law and Policy in Taiwan, first published in 2006. For a list of international trade law journals, see \textsc{Journal Links}, \textsc{WORLDTRADELAW.NET}, http://www.worldtrade law.net/static.php?type=public&page=journals (last visited Mar. 6, 2015).
\end{itemize}
Most broadly, WTO cases are covered to a much greater extent in world media than were GATT cases, helping to embed this jurisprudence as a field of law. WTO panel and AB decisionmaking is at times in the spotlight of international media on account of late-1990s civil society protests against the WTO and the ongoing politics of trade relations. The careful language used by panels and the AB in cases involving environmental and health issues, in which they stress the importance of environmental and health regulation, is targeted at these broader audiences. Government officials realize the importance of the audience of WTO cases. For example, a U.S. representative in the US–Cotton case brought by Brazil—a dispute involving subsidies provided to U.S. producers, users, and exporters of upland cotton—stated that “he had not fully realized that he was about to lose the case until his wife told him ‘that she read about the case in the New York Times! (…) at that stage I knew we would lose the case.’”

Similarly, in the 2006 Brazilian Presidential campaign, “the two main candidates argued tirelessly about which party (the Workers’ Party or Social Democratic Party) won more claims at the WTO.”

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155. The authors’ methodology of the figure, which depicts articles published per year, was as follows: The search was conducted in Westlaw’s database of law reviews and journals on May 21, 2014 using the search terms (1) date(year) and (2) atleast10(wto or gatt), which requires at least 10 occurrences of the term “wto” or “gatt.”


The mobilization of nongovernmental organizations and the public in general regarding the WTO provides another indicator of extensive AB authority. The overall participation of the interested public in the WTO forum increased in the 1990s, culminating at the 1999 Seattle Ministerial meeting. In response, the WTO decided to open its doors once a year for nongovernmental organizations and private actors (such as trade federations) to convene and exchange views. Figure 4 shows the level of participation in the forum over time. These processes can help to diffuse knowledge of WTO law, as interpreted and applied by the AB, indirectly supporting its authority before a broader public.

Figure 4: Participation in the WTO Public Forum

V
Ongoing Challenge of Maintaining Authority

The previous part showed that the WTO rapidly acquired extensive authority after its formation. But just because the WTO obtained such authority does not mean that its authority is secure. This part explains why the AB’s extensive authority remains fragile. The primary challenge any IC faces is compliance. When Members use WTO dispute settlement and respondents implement AB rulings, or AB rulings facilitate the payment of compensation, the AB’s authority is reinforced. When Members refuse to comply with its rulings or to pay compensation, and when they delay and subsequently comply in only a symbolic way to evade the rulings by enacting replacement measures

158. Authors’ calculations based on data from the WTO Secretariat regarding Public Forum participation from 2002 through 2011 (on file with author).
that restrict trade in a similar amount, the AB’s authority is undermined and Members and affected private actors can lose faith in the reliability of the system. Some believe that with the length of the proceedings, the increasing use of delay tactics, and the limitations on retrospective remedies, AB rulings do little to dissuade large countries like the United States and China from advancing policies that are contrary to WTO rules.\footnote{Mark Wu, \textit{A Free Pass for China}, N.Y. TIMES, (Apr. 2, 2014), http://www.nytimes.com/2014/04/03/opinion/a-free-pass-for-china.html. These concerns of course, are hardly unique to the WTO. See generally Yuval Shany, \textit{Assessing the Effectiveness of International Courts: A Goal-Based Approach} 106 AM. J. INT’L L. 225 (2012) (discussing the relatively low prospects of success in WTO litigation).}

There are limits to states’ willingness to comply with AB rulings and those limits can affect the politics of AB interpretation, constraining the AB’s autonomy and power to change behavior. In rare cases, both the complainant and the respondent may question a decision because of its systemic implications. This occurred most notably in the \textit{Australia–Automotive Leather} case.\footnote{Panel Report, \textit{Australia—Subsidies Provided to Producers and Exporters of Automotive Leather}, WTO Doc. WT/DS126/RW (adopted Jan. 21, 2000).} The United States won the case involving Australian subsidies to automotive leather producers and the panel issued a recommendation that Australia not only remove the subsidies, but that the recipient pay them back to the Australian government.\footnote{Id.} Even though it won the case, the United States disagreed with this aspect of the ruling because it opposed the application of retrospective remedies in antidumping and subsidies cases, which could also be applied against the United States.\footnote{See World Trade Organization, Minutes of Meeting of the WTO Dispute Settlement Body of March 7, 2000, WTO Doc. WT/DS/M/75(2000) (“The United States did not agree with every word of the Panel Report. The Panel’s remedy went beyond that sought by the United States.”).} No WTO panel or AB decision has since recommended any retrospective remedies, even though WTO rules are not clear on this issue, and even though weak remedies are a weak link in the system’s effectiveness. The rebuke, which was supported by other WTO Members, appears to have effectively constrained the authority of the AB in interpreting WTO rules to provide for stronger remedies.

The potential response of parties to a panel or AB decision can shape these decisions, so that the AB’s authority is always constrained by its immediate as well as its broader audience. As noted earlier, in many cases, the WTO panel or the AB found that a country’s administrative practice, not its underlying national law, was WTO-inconsistent.\footnote{See, e.g., Panel Report, \textit{United States—Sections 301-310 of the Trade Act of 1974}, ¶¶ 7.53–7.54, WTO Doc. WT/DS152/R (adopted Dec. 22, 1999). \textit{See generally Sharif Bhuiany, \textit{Mandatory and Discretionary Legislation under the WTO}}, 5 J. INT’L ECON. L. 571 (2002) (discussing the distinction between discretionary and mandatory legislation within the WTO context).} These findings facilitate compliance. More broadly, compliance appears to be more challenging in cases involving regulatory policies that implicate environmental protection and social welfare.\footnote{See Thomas Sattler, Gabriele Spilker & Thomas Bernauer, \textit{Does WTO Dispute Settlement Enforce or Inform?}, 44 BRIT. J. POL. SCI. 877, 877 (2014) (finding empirical support for the argument that WTO dispute settlement primarily serves as an enforcement device).}
Civil society follows WTO decisions in these areas more closely, and domestic pressure on respondent governments not to comply can be significant. These types of cases arguably have spurred a corresponding softening of WTO jurisprudence in this area (especially regarding GATT Article XX defenses and their analogues) to reduce civil society challenges to the WTO for privileging trade over social welfare concerns, and correspondingly to ease compliance prospects. The more AB jurisprudence moves toward accommodating Members’ policy choices regardless of their impact on trade, the less it implicates state behavior, constraining the AB’s overall power.

Members may also recognize the AB’s formal legal authority to interpret WTO law but evade its impact and thus again constrain its overall power to meaningfully shape nation-state behavior. One tactic is “foot dragging.” The United States, for example, delays complying with WTO rulings, such as antidumping rulings, by forcing Members to litigate cases one by one, which enables the United States to slow changes to its practices. At times, such foot dragging can give a WTO member increased flexibility to eventually formally comply with an AB ruling but without any economic consequences because of the delay. This delay tactic often occurs in safeguards cases, in which WTO rules permit a Member, on certain conditions, to maintain a safeguard action against imports for three years without being subject to retaliation. Because it can take three years to fully litigate such WTO cases, and because there are no retrospective remedies for a breach, a Member can impose an illegal safeguard with impunity for a sustained period, as the United States did in a steel safeguards case that the Bush Administration adopted in 2002, with the 2004 presidential election in mind. Similarly, India lost the India–Autos case against the United States but, in practice, was able to use the drawn-out dispute settlement process to continue its local content requirements to develop local manufacturing know-how and to enhance competitiveness in its automotive sector. Government officials contend that the policy was successful; India now exports cars to the Middle East, South Asia, and Central Asia, creating a new hub in regional competition with Thailand and Indonesia.

Another, even more troubling tactic to avoid the WTO’s impact is


167. GUZMAN & PAUWELYN, supra note 145, at 530.


170. Interview with Indian official (Jan. 18, 2010).
“uncompliance,” in which a Member formally complies with a ruling but adopts other measures that have an equivalent protectionist effect that nullifies the ruling’s impact. When a party formally complies but then finds another means to deny market access to the complaining Member, the AB lacks power to change behavior in a meaningful way. One unpublished empirical study found that imports to a respondent country did not typically increase following a successful WTO claim, a finding that might give pause to traders hoping to rely on the WTO dispute settlement system, especially in light of the WTO’s weak system of remedies. China in particular has been accused of adopting such tactics, formally complying in a way that does not result in increased imports. The United States and the EU have contended that China has gone further by threatening to retaliate against United States and European companies that invest in China in order to deter the companies from providing U.S. and EU officials with necessary background evidence to support a claim, and to lobby the United States or the EU not to bring it. Such a tactic treats the filing of a legal case as a hostile political act. These tactics appear to have had some success, reflected in one high-level EU official’s statement at a meeting of business representatives that bringing a WTO case was like using a “nuclear weapon.”

The geopolitical context for WTO dispute settlement has changed since the WTO’s creation, which also could pose challenges for the AB’s authority. In particular, the BRIC nations have grown in economic importance and the United States and the EU have declined as economic powers. If powerful Members such as the United States and the EU believe that China takes advantage of WTO rules while engaging in policies that provide it with trade advantages—such as U.S. politicians’ contention that China intentionally intervenes in currency markets to advantage Chinese exports—then the entire system is at risk. If a powerful country such as the United States no longer has faith that the dispute settlement system can resolve trade concerns in line with its long-term interests, the system could unravel.

There have been, in parallel, more aggressive challenges to AB interpretations. A number of antidumping practitioners in the Washington, D.C. trade bar, some former trade negotiators, and a former high-level

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171. See generally David J. Townsend & Steve Charnovitz, Preventing Opportunistic Uncompliance by WTO Members, 14 J. INT’L ECON. L. 437 (2011) (showing that WTO members can “uncomply” without facing economic consequences).


175. Discussion with participant at such meeting, in London, U.K. (May 14, 2014).
secretariat member have accused the AB of “judicial activism” that has undermined the prospects for future negotiations.\footnote{176} Although law is always subject to different interpretations and some of these commentators and their clients have stakes in that interpretation, the failure of the Doha negotiations (other than a marginal Trade Facilitation Agreement) shows that there is considerable imbalance between the WTO dispute settlement and political institutions. If the political system cannot correct what, in particular, powerful Members view as unwarranted AB interpretations, then Members may become disaffected or appoint less independent AB members.

The selection process of new AB members has correspondingly become more politicized.\footnote{177} This politicization threatens the AB’s authority by calling into question its judicial independence. AB Member David Unterhalter powerfully evoked these concerns in his January 2014 farewell speech regarding the threat to the independence of AB members from the appointment process and thus the “legitimacy and authority of the WTO dispute settlement system.”\footnote{178} While the screening processes of candidates in Geneva and capitals were originally rather light and politicization was more about reputational effects of having a national on the AB, today WTO Members explore through careful screening the exact preferences and dispositions of candidates.\footnote{179} This increased politicization became manifest in the 2013 through 2014 deadlock over the appointment for the successor of David Unterhalter. WTO Members were unable to reach consensus given that there were two African candidates (one Kenyan and one Egyptian) who had support from powerful WTO Members, and no side was willing to capitulate.\footnote{180} In particular, the United States refused to support the candidacy of Professor James Gathii, the Kenyan candidate, a Chicago-based law professor who was not part of the Geneva diplomatic community but who otherwise appeared to have support from the vast majority of the membership, including the EU. In September 2014, the DSB finally appointed Mr. Shree Baboo Chekitan Servansing, a career diplomat of Mauritius without a law degree, to fill the vacant position. To the extent the WTO membership chooses AB members based on their sensitivity to diplomatic concerns rather than legal expertise, the AB’s reputation and its authority outside of a narrow Geneva community could decline. The resulting AB rulings could provide less principled guidance for future dispute settlement, thus also reducing the AB’s intermediate authority.

\footnote{176}{See, e.g., Terence P. Stewart et al., The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message Be Heard? 8 GLOBAL TRADE & CUSTOMS J. 390 (2013); Cartland et al., \textit{supra} note 78, at 989–91.}


\footnote{178}{David Unterhalter, Appellate Body Member, WTO Dispute Settlement Body, Farewell Speech in Geneva, CH (Jan. 22, 2014), http://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm.}

\footnote{179}{Elsig & Pollack, \textit{supra} note 177, at 404–07.}

\footnote{180}{Discussion with an AB Member (Jan. 28, 2014).}
The United States and other Members already have turned away from the WTO for purposes of trade negotiations, as witnessed in the proliferation of preferential trade agreements, particularly the negotiation of agreements involving significant amounts of global trade, such as the Transpacific Partnership and the Transatlantic Trade and Investment Partnership, which may have their own dispute settlement mechanisms. 181 Even if these treaties are adopted and new mechanisms are created, the WTO dispute settlement system could remain dominant because of the multilateral publicity it casts, which can more effectively induce compliance on account of broader reciprocity and reputational effects. However, if the United States, EU, and others turn to these bilateral and plurilateral dispute settlement mechanisms for disputes among them, this move could significantly weaken the authority of the AB. If the dispute settlement bodies under these agreements become more active, they could also increase jurisdictional conflicts over the interpretation of similar substantive provisions.

Data presented earlier on public interest in the WTO measured by proxies such as output of the academic community (Figure 2) and participation by private actors in the WTO Public Forum (Figure 3) shows signs of declining public interest. Although these changes might relate to the lack of progress in the Doha Round negotiations, they also raise questions regarding the WTO’s and AB’s larger public profiles. If they decline, so may the AB’s extensive authority.

VI
CONCLUSION

The WTO AB’s rapid development of extensive authority is a unique case in international politics at the multilateral level. Contrary to most assumptions, the AB shows how the development of IC authority is not necessarily evolutionary, going through progressive stages from narrow authority (between litigants) to intermediate authority (before a similarly situated group) to extensive field-level authority (before a broader audience of government officials, other courts, legal professionals, business associations, civil society organizations, and academics). The establishment of extensive AB authority represents a legalization leap in which international dispute settlement moved rapidly, and almost instantaneously, from limited narrow authority under the GATT to significantly more expansive authority.

The AB’s authority, although extensive, nonetheless remains fragile. The WTO is still an interstate dispute settlement system, so private parties have no direct access to the AB. The AB thus directly confronts state pressure and at times shapes its decisions to facilitate Member compliance with them. The AB appears to be under greater pressure today than at any other time in the WTO’s history. States created the AB and they can also undermine it, especially powerful ones such as the United States. Although the AB still enjoys significant power to shape state behavior, its authority is threatened by major geopolitical shifts, such as the rise of China as an economic power, the failures of the WTO negotiating process and Members’ corresponding turn to other treaties for trade negotiations that provide potential new fora for dispute settlement, and accusations from the United States—in particular, of AB “judicial activism” that appears to be aimed at curtailing the AB’s authority.

For the moment, AB authority is extensive. But just as the AB’s authority rapidly and almost instantaneously rose, so it could rapidly fall. AB members appear to be conscious of the limits of their authority and have shaped their jurisprudence to ease Members’ concerns. But even while they have some agency to induce compliance and reliance on the system, broader structural changes and potential U.S. disenchantment could pose deeper challenges to the AB’s authority, which shows signs of decline.