

World trade returns to the law of the jungle

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Global trade is reverting to the most established doctrine of them all: Might is right.

U.S. President Donald Trump is on track to kill the World Trade Organization's highest court next year, which means the world is now poised to take a giant leap backwards to the years before 1995 in terms of resolving trade disputes.

Before the mid-1990s, trade was governed by the General Agreement on Tariffs and Trade, which allowed something closer to the law of the jungle to prevail. Big countries and trade blocs had a far greater ability to steamroller their will over smaller nations. Conflicts were resolved by diplomatic muscle rather than the strict letter of trade law.

Officials in Geneva, Brussels and Washington said the U.S. administration, led by Trade Representative Robert Lighthizer, had made a calculation that GATT rules are in America's strategic interest.

“Lighthizer wants to go back to the days of the GATT, that’s obvious,” said one EU official.

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America's tactic to return to GATT is to block the appointment of judges at the Appellate Body, the WTO's top court, that works on everything ranging from the dumping of ultra-cheap Chinese steel, to the eternal subsidy battle between Boeing and Airbus. By December 2019, or earlier, the court will not be able to function because there simply won't be enough judges.

Only last week, the United States rejected a proposal by a broad coalition of countries to save the Appellate Body. U.S. ambassador to the WTO Dennis Shea said the "proposals do not effectively address the concerns that WTO members have raised" and complained that the court does not "follow the rules we agreed in 1995."

Alan Wolff, deputy director general of the WTO, conceded in a speech on Monday in Washington that the prognosis was bad. "One former member of the Appellate Body said that the U.S. was asphyxiating the Appellate Body. My own view is: It's more of an assisted suicide. But the result is the same and it's not a good result."

EU Commissioner for Trade Cecilia Malmström last month warned that "the world would lose a system that has ensured stability in global trade for decades."

The key advantage of the GATT system for big countries was that losing parties in trade rulings could block them. "In both systems, in the GATT and in the situation of Appellate Body limbo, the losing party has the ability to prevent the dispute settlement from having any effect," said Simon Lester, from the Cato Institute.

One EU official expressed hope that the backsliding towards GATT could still be averted by negotiating a reform with the United States, or that the U.S. would soon realize its mistake and resuscitate the court. But other officials said it was clear that the coming years would be shaped by a return to GATT reality.

Malmström argued this was a mistake because the big advantage of the WTO Appellate Body over the previous system was that it had been able to tame big countries, such as China. "China sometimes violates the rules, but once there is a judgement in the WTO they comply," she said.

A return to the illiberal norm

Wolff struck a sinister note during his speech, comparing the crisis of the WTO to a wider collapse of social order and saying it was possible to argue that "the last 70 years were an aberration. That's not the norm. Major countries go to battle with each other, regularly. And free trade is not the norm, an illiberal world is the norm."

Wolff said going back to a GATT system was unworkable, because big powers like the U.S. had become too aggressive to comply with non-binding rulings from panels. "Would the U.S. comply with the negative decision of a panel that was non-binding? ... I don't think so."

"What we are talking about is a slight shift towards a more power-oriented system away from a rules oriented system" — *Simon Lester*

That would lead to further escalation of the spiraling global trade war, he said.

Other trade experts insisted that the GATT doesn't mean total anarchy. Panels of arbitrators could still rule on whether a certain tariff was tolerable under international rules, but it was only enforceable if both countries accepted.

"Although there are rules now, power is important. What we are talking about is a slight shift towards a more power-oriented system away from a rules oriented system," said Lester.

Holger Hestermeyer, who teaches trade dispute resolution at King's College London, said that the system would work for big players like the U.S., China and the EU, which had sufficient weight to enforce rulings by threatening to curtail access to their large markets.

Two officials in Geneva agreed that big countries would be able to assert their rights under the international rulebook.

But the GATT system had a second, more insidious way of favoring big players, which Lighthizer might be yearning for. Rulings would become less a question of law and more about striking a diplomatic balance, said Hestermeyer.

"The system under GATT was really a diplomatic system, because both parties in a dispute must agree to the ruling in order for it to be implemented. So as a GATT arbiter you actually are no longer strictly a jurist — which in fact they usually weren't by training. Instead, for your ruling to be effective, you have to find a solution that both parties can live with," Hestermeyer said.

Hestermeyer argued this would further tilt the balance in favor of big countries. "Strong countries, such as the U.S., will have more influence under that system. And this is the system which I believe the U.S. government now wants."

When Antigua beat America

Rulings based merely on the legal merits, in the style of the WTO, would no longer be viable, Hestermeyer argued. He pointed to a case the U.S. lost against tiny Antigua in 2005. America had inadvertently liberalized online gambling and betting in its WTO commitments, and Antigua's massive offshore gambling industry demanded access to its market.

Under GATT rules, arbitrators would either have sought a compromise solution or America would have blocked the ruling.

Lester also pointed to an American law called the Byrd Amendment, which rewarded U.S. companies for filing anti-dumping complaints by awarding them the tariffs that were collected. Australia, the EU and other countries successfully sued the U.S.

"Congress actually had to pass a new statute," he said. "Without the WTO, I don't think you could have gotten the U.S. to change."

Lester also identified a case that the EU lost against Peru: "The EU wouldn't let the particular kind of sardines caught in Peru be labelled with the word sardines. They had to put on the technical name which was '*Sardinops sagax*.' So Peru brought a complaint against the EU, and the EU lost."

"There is a reason why the GATT system was replaced" — *Holger Hestermeyer*

The WTO itself supported this argument in an article, saying that "the structural weaknesses of the old GATT dispute settlement system were significant ... there was an incentive to rule not solely on the basis of the legal merits of a complaint, but to aim for a somewhat 'diplomatic' solution."

Lester noted cases where the WTO's Appellate Body caused the U.S. or the EU to mend their ways, which they would not have done under GATT. He noted that the U.S. was forced to both change the way it calculates dumping duties and its policy of handing the proceeds of tariffs to U.S. producers.

Hestermeyer said the loss of an authoritative court of last resort would hurt everybody in the long term. "There is a reason why the GATT system was replaced," he said.

"Small and medium-sized countries, most countries really, stand to lose more than the big ones. But in the long term I would say that even the big ones will lose, because the trust in the system will collapse."