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A dangerous approach

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Nominations for the US Supreme Court are intense, partisan battles. The stakes are high, and political actors go all out to win. By contrast, appointments to international courts tend to be more diplomatic affairs, as the issues are narrower and the courts have less power.

Nevertheless, the Trump administration has brought the rough-and-tumble culture of US judicial politics to the appeals court of the World Trade Organization (WTO), by blocking all new appointments as the terms of the current judges expire. It's a dangerous approach -- not just for the United States, but for all of the WTO's 164 members. If the Trump White House continues down this path, the court will soon have too few judges to function.

In blocking new appointments, the Trump White House is undermining a tribunal that enforces the rules of a trading system that has served WTO members for well over 20 years, and continues to be crucial to the group's interests.

For instance, as part of the Trump administration's efforts to force China to offer better protections for intellectual property, in March it filed a WTO complaint related to Beijing's discriminatory technology licensing requirements. If the administration wants this complaint to have any impact, it will need a functioning appellate court to see the case through to the finish.

During the creation of the WTO, governments tried to improve the dispute settlement system by adding a process for appeals. It is called the "Appellate Body," with the absence of "court" in the title, likely a nod to the sensitivity around the international adjudication of domestic laws and regulations.

The Appellate Body is made up of seven members -- another sensitivity-based term, to avoid the word "judge" -- with a balanced geographic distribution, but always one from the United States and one from the European Union. They serve a four-year term, which can be renewed once.

For the Appellate Body's first few years, appeals went fairly smoothly and its decisions were mostly well-received. Subsequently, however, the Appellate Body ruled on a few cases involving the calculation of anti-dumping and countervailing duties by the US Commerce Department. In finding the United States in violation of WTO obligations, the Appellate Body incurred the wrath of influential industries and their lawyers, and in doing so created enemies in US trade policy circles.

In response, the US began to take the role of the Appellate Body more seriously, and under the George W Bush administration it raised some concerns and proposed several reforms. One concern it cited was the tendency of the Appellate Body to "fill the gaps" when interpreting

provisions that were intentionally left ambiguous; it felt that by doing so, the tribunal was overstepping its authority.

The US views on these issues continued under the Obama administration, and to help make its point, Washington decided not to reappoint the American judge (Jennifer Hillman, a former US government official), and later blocked the reappointment of the Korean judge (a law professor named Seung Wha Chang). Through these actions, the US was sending a message about how it wanted the Appellate Body to approach its job.

The Obama administration's tactics were contentious and surprised some people, but the Trump administration has now taken confrontation to the extreme: Based on similar concerns as those raised by the previous administrations, it is blocking all appointments to the Appellate Body until some changes are made.

As a result, as the current members' terms expire, new members are not available to replace them, and the Appellate Body is now down to four members. In September, when another member's term expires, that number could drop to three, at which point the Appellate Body might not be able to function.

What exactly does the Trump administration want changed? While it hasn't proposed specific reforms, it has expressed a number of concerns about the system. Some seem somewhat minor and easy to fix, such as the procedures for extending the term of a member to allow that person to serve on an ongoing case that continues after the term expires.

Other concerns are more fundamental, such as the proper standard of review the Appellate Body should apply when reviewing the fact-finding of panels and the meaning of domestic laws and regulations. Broadly speaking, the administration believes the Appellate Body is being too "activist" in its review.

The US concerns are not unreasonable, and are worthy of discussion. However, the best way to promote change is to propose specific amendments to the rules, and then to lobby other governments to support those amendments.

By contrast, the Trump administration's obstructionist approach to appointments is extremely dangerous. If the appeals court cannot function, all WTO member governments suffer, including the US. When governments, including the US, bring WTO complaints, they want them heard and resolved quickly. With the appeals process slowed by a lack of judges, the system will experience long delays (it was already taking much longer than expected, so anything more could be devastating), or even stop working altogether.

Holding the system hostage without proposing specific reforms is unproductive. The US is in the midst of several ongoing complaints. In addition to the intellectual property complaint against China, it is also involved in two related to China's agricultural protectionism. Undermining the WTO dispute settlement system hurts the US' chances of resolving issues of foreign protectionism.

If the Trump administration wants to fulfill its goal of taking on “unfair trade,” it should care about keeping the system working, and let the Appellate Body do its job.

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