

# Is the WTO Appellate Body in Limbo? The Roots of the Crisis in the WTO Dispute Settlement Body and the Available Routes Navigating the Quagmire

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## Abstract

In its over 25 years' history, the dispute settlement mechanism of the World Trade Organisation (WTO) has been touted as one of the most active and successful international adjudicatory systems in relation to other international dispute settlement fora. The process in the engagement of the system presents a tripartite structure consisting of consultation, panel and appellate stages, and the enforcement proceedings. The functions of these processes help to promote the trust and confidence of the member states in the WTO trade dispute settlement system. Now the Appellate Body (AB) is paralysed following the incapacitation and consequential suspension of the appellate function of the WTO Dispute Settlement Body (DSB), because of the insufficient membership caused by the United States blockade on the appointment process of AB members. The paper discusses the trajectory of the WTO dispute settlement reform from the GATT regime, the root cause of the suspension of the Appellate Body, and the options available for the disputants in and outside the WTO system. It concludes that the system possesses policy defects if the attitude of a single state can render the AB non-functional and should be transformed when the appellate system is resuscitated.

## Keywords

WTO; GATT; Dispute Settlement Body; Appellate Body; Appellate Body paralysis; dispute settlement mechanism; positive consensus; reverse consensus.

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## 1 Introduction

The *Marrakesh Agreement* (1994) establishing the World Trade Organisation consolidated the WTO Agreements and entered into force in 1995, replacing the *General Agreement on Tariff and Trade* (1947) (GATT).<sup>1</sup> As a result, the WTO came with a more robust dispute settlement mechanism contained in the *Understanding on Rules and Procedures Governing the Settlement of Disputes Agreement* (DSU) of the world trade body.<sup>2</sup> The DSU introduced an appellate system in the international dispute settlement forums, which made it a unique system at the time.<sup>3</sup> Accordingly, the DSU provides a three-stage rule-based system namely the consultation stage,<sup>4</sup> the adjudication state (consisting of the panel<sup>5</sup> and the appellate<sup>6</sup> stages), and the compliance proceedings.<sup>7</sup> The stages of the WTO dispute settlement mechanism (DSM) are a progressive and independent process to the extent that a dispute under the WTO system has a separate process and can end at any stage. Each of these stages has played a very significant role in the WTO dispute settlement system (DSS). However, the WTO DSS has elicited mixed reactions,<sup>8</sup> although some authors have argued that the WTO DSM is relatively the most dynamic and the busiest dispute settlement system in the international community.<sup>9</sup> In its twenty-five years of operation, at least 595 disputes (by 31 March 2020) were initiated under the WTO DSS.<sup>10</sup> More so, appeals were lodged in more than half of the cases in which the WTO Panel issued a report within the period,<sup>11</sup> a record that has often

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<sup>1</sup> WTO Date Unknown [https://www.wto.org/english/thewto\\_e/history\\_e/history\\_e.htm](https://www.wto.org/english/thewto_e/history_e/history_e.htm); Hasan 2016 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*.

<sup>2</sup> WTO Date Unknown [https://www.wto.org/english/thewto\\_e/history\\_e/history\\_e.htm](https://www.wto.org/english/thewto_e/history_e/history_e.htm).; Koul *Guide to the WTO and GATT* 62; Bagwell, Bown and Staiger 2016 *Journal of Economic Literature*.

<sup>3</sup> See Art. 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the WTO Agreement)* (1994) (the DSU); Lee "Introduction of an Appellate Review Mechanism for International Investment Disputes" 474.

<sup>4</sup> Article 4 of the DSU.

<sup>5</sup> Articles 6-8 of the DSU.

<sup>6</sup> Article 17 of the DSU.

<sup>7</sup> Articles 21, 5 of the DSU.

<sup>8</sup> Goldstein and Van Lieshout "Is There a Future for Multilateral Trade Agreements?".

<sup>9</sup> *WTO Handbook on the WTO Dispute Settlement System*; Obersteiner *WTO Dispute Settlement System*; Zimmermann *Negotiating the Review of the WTO Dispute Settlement Understanding* 21-30.

<sup>10</sup> WTO Date Unknown [https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm).

<sup>11</sup> WTO Date Unknown [https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm). This is further discussed in details under section C below.

been referred to as indicative of the WTO member states' appreciation of the appellate system of the WTO DSM. Nevertheless, the appellate stage of the WTO DSM has ceased to function following the exercise of the veto right by a WTO member state, the United States (US), against the appointment of the members of the Appellate Body.<sup>12</sup> The problem created by the vacuum in the WTO DSM is very critical, given that the WTO regulatory framework does not make any provision to avoid such an incident, neither does it provide an alternative to conclusively complete any dispute on the merit of the rights and obligations of the member states under its system, where a losing party insists on requesting an appellate review.

This paper seeks to undertake a critical evaluation of the transformation of the WTO DSM from the GATT regime with the significant changes made, the issues surrounding the crisis in the WTO DSB leading to the suspension of the AB, the implications inherent in the suspension of the AB, and the options available to the disputants. The remaining part of this paper is divided into six sections as outlined below.

In section two the paper discusses the transformation of the WTO dispute settlement system from the GATT regime. Accordingly, it highlights the key changes made in the GATT system, as well as the characteristics and the procedure of the WTO DSM. Notably, the DSU establishes the DSB to administer the WTO DSM.<sup>13</sup> It also introduces the appellate system,<sup>14</sup> and reverse consensus as the means through which the reports of the panel and the AB are adopted.<sup>15</sup> Under section three the paper *inter alia*, discusses the scope of the functions of the AB, which is limited to undertaking the review of the panel reports, and the rate at which the WTO member countries engage the AB in relation to the panel reports. The section helps the reader to appreciate the role and the structural relevance of the AB. In section four the paper analyses the reasons adduced by the US for rejecting further appointment of members of the AB, which includes the accusation that the AB is overreaching its statutory mandate, which overreach is considered as an infringement on the rights of the WTO member countries.<sup>16</sup> The suspension of the AB has occasioned structural incompleteness in the WTO DSM for which reason the complete

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<sup>12</sup> Beattie 2019 <https://www.ft.com/content/f0f992b8-19c4-11ea-97df-cc63de1d73f4>; Pauwelyn 2019 <https://www.wita.org/atp-research/wto-dispute-settlement-post-2019/1-2>.

<sup>13</sup> Article 2, para 1 of the DSU.

<sup>14</sup> Article 17, paras 1-2 of the DSU.

<sup>15</sup> Article 16, para 4; Article 17, para 14 of the DSU.

<sup>16</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation*.

adjudicatory process of the WTO DSS cannot be attained. However, despite the paralysis of the AB, the stages of the WTO dispute settlement process before the appellate stage continue to function properly.<sup>17</sup> Under section five the paper illustrates the implications of the suspension of the AB with particular reference to protectionism by merely "appealing into the void", while the contested trade-inconsistent policy continues to linger.<sup>18</sup> To avoid such a scenario as appealing into the void as a result of the paralysis of the AB, some options are available for the disputants perhaps as temporary measures pending the resuscitation of the AB. In section six the paper discusses the routes available to WTO member parties in potential trade disputes. It covers the discussions on "No-Appeal Agreement Prior to litigation"; "Alternatives to adjudication-based dispute resolution mechanism under the DSU"; "The Proposed Multi-Party Interim Appeal Arbitration"; and "Trade Dispute Settlement under the Regional Trade Agreements (RTAs)". In section seven the paper presents concluding remarks, taking the position that the AB should be resuscitated to restore the trust and confidence of the WTO members in the DSM. The remarks also present the efforts made so far by the DSB to resuscitate the AB, which have led to the suggestion of the "Walker Principles", as well as the potential challenges in adopting the Walker Principles.

## 2 The development of the WTO DSM from the GATT to the WTO regime

The WTO was established by the Marrakesh Agreement of 1994 as an outcome of the Uruguay Round (1986 - 1994). It came into force in 1995 as an elaborate reformation of the GATT, which had some institutional deficiencies owing to the fact that it was intended to be a "provisional" agreement to be subsumed in the proposed International Trade Organisation (ITO) that never came into force.<sup>19</sup> Unlike the GATT, which was a single agreement on trade in goods, the WTO introduces several other separate agreements, including the DSU through the "single undertaking" arrangement.<sup>20</sup> The DSU brought forth a more formal and

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<sup>17</sup> Chow 2020 *Mich St L Rev*.

<sup>18</sup> Pauwelyn 2019 *J Intl Econ L*.

<sup>19</sup> For a detailed history of the WTO, see Zeiler *Free Trade, Free World*; Van Grassek *History and Future of the World Trade Organization*; Barton *et al Evolution of the Trade Regime*; Irwin, Mavroidis and Sykes *Genesis of the GATT*; O'Rourke *International Trading System, Globalization, and History*; Georgetown Law Library Date Unknown <https://guides.ll.georgetown.edu/c.php?g=363556&p=4108235>.

<sup>20</sup> The broad areas of WTO agreements cover *General Agreement on Tariffs and Trade* (GATT) (for goods), *General Agreement on Trade in Services* (GATS) (for services), trade aspect of intellectual property rights (*Agreement on Trade-Related Aspects of*

legalistic rule-based dispute settlement system, and has been referred to as "the 'crown jewel' of the WTO system".<sup>21</sup> The changes made under the DSU are of two categories: the introduction or creation of certain structural and policy mechanisms, on the one hand, and the modification of some existing others, on the other hand. The significant creations made in the WTO DSU include the creation of the DSB,<sup>22</sup> a special organ of the WTO made up of the representatives of all the member states. The DSB administers the provisions of the DSU,<sup>23</sup> as against the GATT system, which had a fragmented dispute settlement system, where different bodies were variously responsible for the administration of the dispute settlement in different agreements.<sup>24</sup> The Uruguay Round also introduced the appellate system in the WTO DSS as a review mechanism to be undertaken by a standing Appellate Body (AB) under the DSB, in addition to the single panel adjudicatory system under the GATT.<sup>25</sup> The appellate system has often been described as one of the most striking features of the WTO DSS,<sup>26</sup> albeit with reservations in some quarters.<sup>27</sup>

Regarding policy modification, the DSU unified the fragmented procedures for dispute settlement under the GATT.<sup>28</sup> The fragmentation of the procedures for dispute settlement under GATT created a room for "forum shopping", whereby the countries would select among the procedures the one they deemed favourable to approach for their cases.<sup>29</sup> Although the GATT introduced the consultations mechanism, the WTO DSU elaborated it by accepting a mutually agreed settlement as the priority dispute settlement method. The DSU maintains the primacy of the free trade

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*Intellectual Property Rights* (TRIPS)), trade policy review (TPR) (for transparency), and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) (for dispute settlement). See WTO Date Unknown [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm).

<sup>21</sup> Kalderimis "Exploring the Differences between WTO and Investment Treaty Dispute Resolution" 47; Reich 2017 [https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW\\_2017\\_11.pdf](https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf) 1; Steger "Strengthening the WTO Dispute Settlement System".

<sup>22</sup> Palmeter and Mavroidis *Dispute Settlement in the World Trade Organization* 15; Pereira "Speaking Up in the WTO" 25-26.

<sup>23</sup> Article 2 para 1 of the DSU.

<sup>24</sup> Steger 1996 *LJIL* 323.

<sup>25</sup> Joergens 1998 *Law & Pol Int Bus* 193.

<sup>26</sup> Joergens 1998 *Law & Pol Int Bus* 193; Van den Bossche "Making of the 'World Trade Court'" 63-64.

<sup>27</sup> For a critique of the WTO DSM, see Feeney 2002 *Pepp Disp Resol LJ*.

<sup>28</sup> For example, Arts XXII and XXIII of the GATT (which were the basis of dispute settlement under the GATT) made provision for different procedures for the settlement of trade disputes. These are different from those other dispute settlement procedure arrangements provided for in the various Tokyo Round codes.

<sup>29</sup> Croome *Reshaping the World Trading System* 263.

principles, the most favoured nation (MFN) and national treatment (NT), subject to the WTO accepted preferential treatment and concessions. This is in recognition that such a mutual agreement may likely infringe on other members' trade rights. The DSU, therefore, requires that such a mutually agreed solution should not negate the WTO rules. Instead, it must be consistent with them.<sup>30</sup> More so, the timeframe in which the disputing parties should engage in consultations as stipulated under the WTO DSU was missing in the GATT.<sup>31</sup>

The GATT system did not provide for the participation of a third party at the consultation stage,<sup>32</sup> unlike the WTO DSU, where third party participation is allowed from the consultations stage through to the appellate stage.<sup>33</sup> Under the GATT, the terms of reference to the panel are made subject to approval by the GATT Council.<sup>34</sup> In contrast, the DSU also makes a provision for a standard for determining the terms of reference where the parties cannot come to terms within a specified period of time. Accordingly, the parties are allowed only 20 days from the date in which the panel is established to agree on the terms of reference.<sup>35</sup> In a situation where the parties do not agree on the terms of reference in the specified period, the DSU requires the panel to rely on the provisions of the WTO agreement(s) cited by the parties to the cases.<sup>36</sup> However, where it is deemed necessary, the Chairman of the DSB, on the approval of the DSB and in consultation with the parties, may draw up the terms of reference for the panel.<sup>37</sup> Moreover, the GATT made no provision for any timeframe in which a case should be completed, unlike the DSU, which requires the panel report to be circulated within six months and three months in the case of emergency.<sup>38</sup> The implementation of the

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<sup>30</sup> Article 3 para 5 of the DSU. Also see Art 4 para 6 of the DSU.

<sup>31</sup> For example, the combination of Art 4 paras 3, 7, and 8 of the DSU provides for the timeframe in which a party should respond to a request for consultation, the timeframe in which the parties should enter into consultations after the request, and the timeframe after which the requesting party can proceed to the panel stage if the matter is not resolved during consultations. This helps to ensure certainty and to promote quick resolution of the dispute. In contrast, the language of Art XXIII of the GATT is "within a reasonable time". It is arguable that the implications of the non-definition of the timeframe in the GATT regime warranted the change in the DSU.

<sup>32</sup> See GATT Art XXII.

<sup>33</sup> Article 4 para 11 of the DSU. The DSU also makes provisions for other forms of non-party involvement in a dispute, such as *amicus curia* brief acceptance and the use of experts' opinions.

<sup>34</sup> Reitz 1996 *U Pa J Int'l Econ L*.

<sup>35</sup> Article 7(1) of the DSU.

<sup>36</sup> Article 7 paras 1-2 of the DSU.

<sup>37</sup> Article 7 paras 3 of the DSU.

<sup>38</sup> It should be noted that in most instances, the process overshoots the timing, leading to requests for an extension of time. However, the timeframe serves the purpose of

adopted panel report under the GATT was to be monitored in practice by the parties to the dispute, but the DSU introduced a stronger monitoring mechanism. Accordingly, the concerned member in an adopted report of the panel or the AB is required to furnish the DSB its plan of action about the implementation of the report within 30 days after the adoption of the report. In addition, at various intervals of the DSB meetings the member is required to give an update on the progress of the implementation.<sup>39</sup>

A crucial change in policy in the development of the GATT-WTO dispute settlement systems is also the subjugation of (positive) consensus that held sway in the GATT regime and the adoption of reverse consensus (or consensus against) under the WTO system in matters of dispute settlement.<sup>40</sup> This is a milestone in the development of the GATT-WTO dispute settlement system toward ensuring the enforceability of the panel and AB reports. Under the GATT regime, the establishment of the panel and the adoption of the panel's reports were by positive consensus, in which case no one party, including any of the disputants, should object; otherwise, the report would not be adopted.<sup>41</sup> In other words, a party, including the respondent (or the losing party) in a given case, could unilaterally block the panel from functioning in a dispute by rejecting the establishment of the panel, or where the outcome of the case was not favourable the state could render the panel report unenforceable by vetoing the adoption of the report.<sup>42</sup> In some instances, the reports of the panel under the GATT were not adopted because they were vetoed by the losing party.<sup>43</sup> The implications of this were the occasioned loss of time, energy and resources in a dispute settlement process that would be futile only as a result of an objection by a single party. However, the Uruguay Round introduced reverse consensus in the adoption of the panel and the AB reports.<sup>44</sup> The implication is that, although the panel and the AB reports must be adopted by the DSB to make them binding on the parties, by default, they are deemed binding as well as enforceable as such unless they are rejected by all the WTO member states by consensus, including the applicant (or the

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keeping the parties and the adjudicatory panel guided by the WTO objective of the prompt resolution of trade disputes, as envisaged in Art 3 para 3 of the DSU.

<sup>39</sup> Steger 1996 *LJIL* 322-323.

<sup>40</sup> Articles 16 and 17(14) of the DSU; Guan *WTO Jurisprudence*.

<sup>41</sup> Schaefer and Grimes *Japan's Managed Globalization* 82.

<sup>42</sup> Yanovich and Zdouc "Procedural and Evidentiary Issues" 347.

<sup>43</sup> The data from the WTO website show that about 25 per cent of the cases decided under the GATT panel were not adopted. See WTO Date Unknown [https://www.wto.org/english/tratop\\_e/dispu\\_e/gt47ds\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm).

<sup>44</sup> Kudryavtsev "TBT Agreement in Context" 25.

successful party) in the process of adoption.<sup>45</sup> The adoption of the panel and the AB reports is quasi-automatic, with the process taking the form of confirmation of whether there is consensus to reject any judicial report from either the panel or the AB.<sup>46</sup> By this mechanism, the unilateral action of a single party or a group of parties to the contrary will no longer be enough to render the panel or the AB reports useless. This means that consensus now works in the opposite direction under the WTO system, given that under the GATT, while consensus was required to accept the report of the panel, it is now required, but on the contrary, to reject the reports of the panel or the AB under the WTO system. The automaticity in the adoption and the binding nature of the panel or the AB report improved the utilisation of consultations as a means of dispute settlement through a mutual agreement as an alternative to adjudication.<sup>47</sup> It should be noted that in the WTO quarter-century, no unappealed report of the panel or the report of the AB has been quashed on consensus. To this extent, it would be safe to say that the introduction of reverse consensus as a standard for the adoption of the panel or the AB reports is a success story. However, the adoption of reverse consensus was not extended to the appointment of the AB members, who are appointed on consensus by the DSB,<sup>48</sup> for which it is made possible that a state can veto the appointment of the AB members. It could be argued, as it is the reflection of the opinion of the author, that maintaining a positive consensus in the appointment of the judicial members of the WTO DSB is a policy defect, given that an alternative and probably the best option would have been resting such appointments on the level of support of the member states (either by simple majority or by two-thirds majority) based on democratic principles.

The development of the WTO DSM represents significant changes in the GATT dispute settlement system, but the GATT provisions for dispute settlement were not all bad. They laid the foundation for the retained structure under the WTO. Examples include the mutually agreed solution in line with the rights and obligations of the parties in accordance with the DSU-covered agreements.<sup>49</sup> The modes to such mutually agreed solution as contained in the provisions for consultations, conciliations, good office,

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<sup>45</sup> Popa *Patterns of Treaty Interpretation* 290.

<sup>46</sup> As noted by Tractman, the DSU injunction to the DSB to reject any panel or AB report only on consensus results in "*de facto* automatic adoption, and therefore *de facto* automatic legal effect". Tractman "Jurisdiction in the WTO Dispute Settlement" 133; Zimmermann *Negotiating the Review of the WTO Dispute Settlement Understanding* 139.

<sup>47</sup> Steger 1996 *LJIL* 319.

<sup>48</sup> See Vidigal 2021 *LIEI*.

<sup>49</sup> Article 3 para 7 of the DSU.



and mediation originated from the GATT system. Accordingly, Article 3 of the DSU also maintains adherence to Articles XXII and XXIII of the GATT.<sup>50</sup> Other influences of the GATT dispute settlement regime on the DSU manifest in the retention in the DSU of an *ad hoc* panel whose reports and those of the introduced AB still must be adopted, though on reverse consensus. These practices found their roots in the GATT, although it has been argued in some quarters that the WTO panel should be made a standing panel rather than an *ad hoc* panel.<sup>51</sup>

### **3 Coming about of the WTO Appellate System: Support from the WTO member states and performance of the AB**

It has been noted that the Uruguay Round introduced the AB, a standing organ of the DSB composed of 7 members, from which a three-man-quorum panel will be composed to sit on an appellate review.<sup>52</sup> The responsibility of the AB is limited to undertaking the review of the findings made in the panel reports where a party files an appeal against the panel report to the DSB.<sup>53</sup> The introduction of an appellate review system was a significant innovation as the first of its kind in the international dispute settlement arena, given that an appellate review mechanism was not a style in the adjudicatory system prominent in the international fora at the time.<sup>54</sup> Commentators believe that the introduction of the appellate system in the WTO DSM was perceived to give an aggrieved party from the report of the panel a second chance through a review from a neutral body.<sup>55</sup> As a compensatory introduction, it was a way to rebalance the veto power the states had under the consensus-adoption mechanism in the GATT regime, but which was taken away from the states by the introduction of reverse-consensus as a means of the

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<sup>50</sup> Thus, "Members affirm their adherence to the principles for the management of disputes heretofore applied under Article XXII and XXIII of GATT 1947". See Article 3 para 1 of the DSU.

<sup>51</sup> This request is being championed by the European Union (EU). See Danvivathana "Is it Beneficial to WTO Members to Reform the Panel System?" 87.

<sup>52</sup> Article 17 para 1 of the DSU.

<sup>53</sup> Article 17 para 1 of the DSU. It should also be noted that the AB lacks the powers to admit new evidence or entertain fresh issues not raised in the panel stage, and cannot, by the WTO legal rules, refer cases back to the panel for reconsideration, even where there may be an open factual issue. See Clifford Chance 2019 <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/the-wto-appellate-body-crisis-a-way-forward.pdf>.

<sup>54</sup> Steger 1996 *LJIL* 319; Steger "Appellate Body and Its Contribution to WTO Dispute Settlement" 483; Jackson *World Trading System* 125.

<sup>55</sup> Joergens 1998 *Law & Pol Int Bus* 193.

adoption of the panel and the AB reports by the DSB under the DSU. According to van Den Bossche:

The introduction of appellate review procedure has correctly been explained as a *quid pro quo* for the quasi-automatic adoption of panel reports.<sup>56</sup>

The negotiators in the Uruguay Round understood that leaving the states with the veto power to counter an unfavourable panel report, as was the case in the consensus-based adoption of panel reports under the GATT system, was counterproductive and never the best option. At the same time they were concerned about the (potential) effects of denying the states control over panel reports by the introduction of the reverse-consensus-based adoption method.<sup>57</sup> The removal of this control (which the parties enjoyed in the positive consensus mechanism) from the WTO member states would mean that the states would lose the ability to block "'bad' panel reports from becoming legally binding".<sup>58</sup> This apprehension led to finding a cushioning mechanism for the introduction of reverse-consensus, resulting in the creation of the appellate mechanism and a standing Appellate Body, which was taken to be a safety measure.<sup>59</sup> With the agreement to establish the appellate system, the DSB was required under the DSU to establish a standing Appellate Body.<sup>60</sup> The terms of reference to the AB limit it to reviewing only the issues of law covered in the panel report, as well as the legal interpretations developed by the panel.<sup>61</sup> It remains to emphasise that the US was by far the most persuasive proponent of a more legalistic system of dispute settlement under the WTO, and eventually it had its way through its vehement push for the creation of the appellate system and the establishment of the AB.<sup>62</sup>

Despite the apprehensions of the states, only a few would argue otherwise that the introduction of the appellate review mechanism in the WTO dispute settlement system has been a huge success, at least from the vantage point of an observer focusing on the rate of appeal, which is being taken as the most cogent standard by which to measure performance. From the available statistical record, all the reports of the panel in all proceedings in the first

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<sup>56</sup> Van den Bossche *From Afterthought to Centrepiece* 7.

<sup>57</sup> Van den Bossche *From Afterthought to Centrepiece* 7.

<sup>58</sup> Van den Bossche "Making of the 'World Trade Court'" 64.

<sup>59</sup> Van den Bossche "Making of the 'World Trade Court'" 64.

<sup>60</sup> Article 17 para 1 of the DSU.

<sup>61</sup> Article 17 para 6 of the DSU.

<sup>62</sup> Pauwelyn 2019 *J Intl Econ L* 317; Marceau *History of Law and Lawyers in the GATT/WTO*; Hillman 2020 <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

two years of the functional appellate system were appealed.<sup>63</sup> In other words, there was a 100 per cent record of appeal of the seven panel reports adopted between 1996 and 1997. By 2014, there was a total record of 201 cases to which the panel issued reports.<sup>64</sup> Of the 201 cases reported by the panel, appeals were filed in 136, amounting to a 68 per cent record of appeal.<sup>65</sup> The high frequency of appeal in relation to panel-reported cases may be attributed to a high record of performance by the AB. In general, the frequent usage of the WTO dispute settlement system to which the appellate body contributes immensely has been attributed to the trust and confidence of the member states in the dispute settlement mechanism.<sup>66</sup>

What could also justify the fact that the WTO appellate system is appreciated is the fact that some other regional economic agreements have adopted the appellate system in their judicial forums.<sup>67</sup> It has been argued that the adoption of the appellate system for dispute settlement by those preferential trade agreements was influenced by the trust of the WTO member states and the success of the appellate structure of the WTO DSB.<sup>68</sup>

#### 4 The AB paralysis: The case of the US

Frustrated about unfavourable AB reports against the US and the implications of such unfavourable reports on US local trade policies, in 2016 the Obama administration vetoed the reappointment of an AB member, Professor Seung Wha Chang (Korea), for the second term for six months, in an "unprecedented" unilateral action, as the US trade representative cited longstanding US grievances against the AB.<sup>69</sup> The Trump administration

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<sup>63</sup> WTO Date Unknown [https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm).

<sup>64</sup> WTO Date Unknown [https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm).

<sup>65</sup> See generally WTO Date Unknown [https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm).

<sup>66</sup> Watson *WTO and the Environment* 38. Some scholars have made a case that the high rate of usage or the compliance record is not enough to conclude that the WTO DSM has been successful. See, for example, Elsig, Hoekman and Pauwelyn "Thinking About the Performance of the WTO" 28; Dunkel, Sutherland and Ruggiero 2001 [https://www.wto.org/english/news\\_e/news01\\_e/jointstatdavos\\_jan01\\_e.htm](https://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm).

<sup>67</sup> For example, the two-stage adjudicatory structure of dispute settlement as pioneered by the WTO has been adopted by some regional economic agreements, including the ASEAN Free Trade Area (AFTA) in both its 1996 and 2004 Protocols, the MERCOSUR (added by its 2002 Protocol of Olivos), and the African Continental Free Trade Area (AfCFTA) as contained in Arts 20 and 21 of the Protocol on Rules and Procedures on the Settlement of Dispute.

<sup>68</sup> See Morgan "Dispute Settlement Under PTAs" 251-252.

<sup>69</sup> Thus, "as the members may be aware, after a careful review of Mr Chang's service on the Appellate Body, the United States has concluded that it does not support reappointing him to a second term, and the United States would object to any

continued with the unilateral blockade of the appointment of AB members from 2017 until in December 2019 when the AB lacked the three-man quorum necessary to undertake an appellate review.<sup>70</sup> It may be said on the basis of what is openly known that the US is by far the most trade-dispute combative member of the WTO, having a record of 124 cases in which it was the complainant and 155 others in which it was the respondent by 2019.<sup>71</sup> Approximately 90 per cent of the cases which the US referred to the AB were decided in its favour.<sup>72</sup> Similarly, the US also lost many cases in which it was the respondent, losing 75 per cent of the cases brought against it. In general, the US win-loss ratio does not differ much from the experience of other states, or it can even be considered more favourable than those of other states.<sup>73</sup>

The manifestation of the US ideal WTO dispute settlement system came with the reforms it proposed in the negotiations toward improving the dispute settlement system of the WTO occurring in parallel with the Doha Round. Regarding improvement in transparency, the US submissions cover "open meetings; timely access to submission; timely access to final reports; *amicus curiae* submissions", and improvement in "flexibility to resolve disputes and members' control over the adoption process."<sup>74</sup>

On the topic of improving flexibility and member control of the adoption process, in 2002 the US made a submission suggesting:

- a) making provision for interim reports at the Appellate Body stage, thus allowing parties to comment to strengthen the final report;
- b) providing a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that are not

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proposal to reappoint him." See WTO 2016 [https://www.wto.org/english/news\\_e/news16\\_e/us\\_statment\\_dsbmay16\\_e.pd](https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pd) para 7. Also see Von Daniels, Dröge and Bög *Ways Out of the WTO's December Crisis*.

<sup>70</sup> WTO *Annual Report for 2019-2020: Appellate Body* 7.

<sup>71</sup> WTO Date Unknown [https://www.wto.org/english/thewto\\_e/countries\\_e/usa\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/usa_e.htm).

<sup>72</sup> Elson *United States in the World Economy* 160.

<sup>73</sup> Reily 2018 <https://www.axios.com/by-the-numbers--wtos-treated-the-united-states-very-badly-1530622593-14ba45da-e0da-462f-974e-f8792a086177.html>.

<sup>74</sup> Some of the US submissions on suggestions for more flexibility and states control in the dispute settlement are contained in the documents: TN/DS/W/13/13 (23 December 2002); TN/DS/W/52 (14 March 2003); TN/DS/W/74 (15 March 2005); TN/DS/W/82 (24 October 2005); TN/DS/W/82Add.1 (25 October 2005); TN/DS/W/82/Add.2 (17 March 2006); TN/DS/W/89 (24 October 2005) as noted in Stewart and Slane *Evaluating China's Past and Future Role in the WTO* 18.

necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference;

- c) making provisions for some form of "partial adoption" procedure, where the DSB would decline to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute;
- d) providing the parties with a right, by mutual agreement, to suspend panel and Appellate Body procedures to allow time to continue to work on resolving the dispute;
- e) ensuring that the members of panels have appropriate expertise to appreciate the issues presented in a dispute;
- f) providing some form of additional guidance to WTO adjudicative bodies concerning (i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful) and (ii) rules of interpretation of the WTO agreement.<sup>75</sup>

In the foregoing, three paragraphs (a, d, and f) make specific reference to the AB. But of major significance is paragraph (f), suggesting provision for further guidance to the panel and the AB. It is obvious from the US requests that it is concerned with the approach of the panel and the AB in the interpretation of the WTO Agreements where the rules are not clear or where they are ambiguous. Thus, as Terence Stewart and Daniel Slane put it:

Proposal (f), concerning providing further guidance to dispute panels and the Appellate Body, reflects the U.S.' attempt to address the tendency of panels and Appellate Body (AB) to fill gaps where the agreements are silent or to clarify the meaning of the agreements through interpretation. This tendency has led to the perception that panels and the AB are creating rights and imposing obligations that Members did not negotiate. Neither panels nor the AB possesses such authority."<sup>76</sup>

In February 2020 the Office of the United States Trade Representative published a detailed report of the US discontentment with the WTO DSB, especially regarding the activities of the AB.<sup>77</sup> The report states that the

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<sup>75</sup> See *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Members Control in WTO Dispute Settlement, Contribution by Chile and the United States TN/DS/W/28* (23 December 2002) 2.

<sup>76</sup> Stewart and Slane *Evaluating China's Past and Future Role in the WTO* 19.

<sup>77</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation*.

WTO AB has arrogated to itself un-negotiated authority which, in effect, decreases the authority of the US and other WTO member states.<sup>78</sup> It argues that, given that the decisions of the AB affect the livelihood of US citizens and those of other WTO member states to whom the states are accountable, the US government lacks the constitutional mandate to subject the fate of the state and its citizens to such international judicial imposition in the absence of any agreement with the US or approval from the US Congress.<sup>79</sup> The report also makes the following statement:

Specifically, the Appellate Body has added to U.S. obligations and diminished U.S. rights by failing to comply with WTO rules, addressing issues it has no authority to address, taking actions it has no authority to take, and interpreting WTO agreements in ways not envisioned by the WTO Members who enter into those agreements. This persistent overreaching is plainly contrary to the Appellate Body's limited mandate, as set out in WTO rules.<sup>80</sup>

This is a paraphrase of the long list of several comments of previous US trade officials and the legislative houses on the overreaching undertakings of the WTO DSB adjudicatory organs, beginning from the early 2000s.<sup>81</sup>

Every objective evaluation will support the position that, to all intents and purposes, the function of a judicial body is the interpretation of the legal rules and the application of the same to the facts in issue to determine the contested rights among the entities before the judicial body.<sup>82</sup> Accordingly, where the enabling law does not permit judicial gap-filling of legal rules, doing otherwise would be tantamount to the usurpation of the function of the rulemaking body.<sup>83</sup> The implication of the judicial creation of rules may be serious, especially in an international organisation, given that here rules are made by the agreement of the parties to govern them. But coming from a judicial body, it becomes the opinion of a few individuals sitting in a judicial panel and is devoid of the usual discussion that weighs the rules in the context of an intended purpose(s) and the possible consequences or implications, as the parties would in their negotiations. Judicial creation of

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<sup>78</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation*.

<sup>79</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation* 1.

<sup>80</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation* 1.

<sup>81</sup> For details of the comments and statements of the various US Legislative Houses and Trade Representatives over the overreaching of the WTO AB, see Appendices A1, A2, B1, and B2 to Lighthizer *Report on the Appellate Body of the World Trade Organisation*.

<sup>82</sup> Grossman 2013 *Temp L Rev* 62.

<sup>83</sup> Under the WTO system, trade rules are made by the member parties themselves through all-member institutions of the WTO, like the Ministerial Conference and the General Council. For a detailed analysis of institutional hierarchy in the WTO and their functions, see WTO Date Unknown [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm).

rules, when it is not a matter of agreement, sounds like an imposition on the members of the organisation. In essence, the WTO dispute settlement mechanism has not been charged with the duty of filling gaps in a poorly drafted treaty by amending it. This is rather a function of the parties themselves.<sup>84</sup> This leads one to reflect on the core objectives and mandate of the WTO DSB, which is the prompt settlement of trade disputes among the WTO member parties to maintain the proper balance of the rights and obligations of the WTO member parties, as well as their accruing benefits in the WTO agreements.<sup>85</sup> It will have to be emphasised again that the WTO panel and the AB are not independent courts whose judgements are automatically binding *per se*. They are only "to make such findings as will assist the DSB in making the recommendations or giving the rulings provided for in that/those agreement(s)."<sup>86</sup> It can then be said that the panel and the AB play legal advisory roles solely in terms of the provisions of the WTO agreements to the DSB, whose adoption of the reports of the panel and the AB confirms whether or not the reports are binding.<sup>87</sup> There are also express requirements in the DSU that the DSB shall clarify the provisions of the covered agreement, based on the standard of the "customary rules of interpretation of public international law", and in doing so the "recommendations and ruling of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."<sup>88</sup> There is, therefore, no possible contradiction of the statement that the injunction to stick to addressing the agreed rights and the obligations of the WTO member states in the dispute settlement process was the desire of the states, which wished to preserve their rights and obligations, and required the panel and the AB also to do so while discharging their assigned functions.

The specific charges of the US against the AB are grouped into two umbrella issues, "*ultra vires* actions and failure [of the AB] to follow WTO rules"<sup>89</sup> on

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<sup>84</sup> Zimmermann "IMF-WTO Interaction" 66.

<sup>85</sup> Article 3 paras 3, 4 and 5 of the DSU.

<sup>86</sup> Article 7 para 1 of the DSU.

<sup>87</sup> To this end, the US has argued that the persons appointed members of the AB are not referred to as judges in the DSU but as "persons" (see Art 17 paras 1, 2, 3 and 8 of the DSU), for the reason that the WTO member parties wanted neither for the AB to function as an independent "Appeal Court", nor to make their reports automatically binding as court judgements; see Lighthizer *Report on the Appellate Body of the World Trade Organisation* 15, 18.

<sup>88</sup> See Art 3 para 2 and Art 19 para 2 of the DSU.

<sup>89</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation* 4.

the one hand, and on the other hand, "Erroneous Interpretations of WTO Agreements".<sup>90</sup>

On the charges of *Ultra Vires Actions and Failure to Follow Rules*, the US alleges that:

- a) Contrary to the principle of prompt settlement of disputes, the Appellate Body has consistently breached the mandatory deadline for the completion of appeals.<sup>91</sup>
- b) Contrary to WTO rules, the Appellate Body has unilaterally declared that it has the authority to allow individuals formerly serving on the Appellate Body, whose terms have expired, to continue to participate in and decide appeals.<sup>92</sup>
- c) The Appellate Body has exceeded its limited authority to review legal issues by reviewing panel findings of fact, including factual findings relating to the meaning of WTO Member's domestic law.<sup>93</sup>
- d) The Appellate Body has overstepped its role under Dispute Settlement Understanding by rendering advisory opinions on issues not necessary to assist the Dispute Settlement Body in resolving a dispute.

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<sup>90</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation* 8.

<sup>91</sup> The emphasis here is the criticism of the longer duration of the appellate review than what is stipulated under the DSU. For example, Art 3 of the DSU emphasises the prompt settlement of trade disputes as being "essential to the effective functioning of WTO and the maintenance of a proper balance between rights and obligations". Art 17 para 5 of the DSU stipulates the duration of an appellate review to be within 60 days and not exceeding 90 days. The argument of the US under this heading is, therefore, that an appellate review beyond the 90 days' maximum statutory duration is a violation of the principle of the prompt settlement of disputes, which thus infringes on the rights of the WTO member states, and also undermines their trust in the WTO rule-based system.

<sup>92</sup> The US argues that the AB goes *ultra vires* its mandate by unilaterally inserting in "Rule 15" of its Working Procedure a rule that enables AB members whose tenure has expired to continue their previous function in an appeal.

<sup>93</sup> The mandate of the AB as stipulated in Art 17 para 6 of the DSU is limited to the review of the appeals originating from the panel reports solely on the "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, it is the position of the US that the AB's delving into fact-finding is *ultra vires* the authorities of the AB, and has contributed to the long duration of the appeal review process.



- e) The Appellate Body wrongly claims that its reports are entitled to be treated as binding precedent and must be followed by panels, absent "cogent reasons."
- f) The Appellate Body has asserted that it may ignore the text of the Dispute Settlement Understanding explicitly mandating it to recommend a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules.<sup>94</sup>
- g) The Appellate Body has overstepped its authority and opined on matters within the authority of other WTO bodies, including the Ministerial Conference, the General Council and the Dispute Settlement Body.<sup>95</sup>

On the charges of *Erroneous Interpretations of the WTO Agreements*, the US has equally made a compilation of some interpretations of the AB it considered erroneous as follows:

- i) The Appellate Body's erroneous interpretation of "public Body" favours non-market economies providing subsidies through state-owned enterprises over market economies.
- ii) The Appellate Body has undermined WTO Members' legitimate regulatory space by essentially converting non-discrimination obligations into a "detrimental impact" test.
- iii) The Appellate Body's prohibition of "zeroing" to determine margins of dumping has diminished the ability of WTO Members to address injurious dumped imports.

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<sup>94</sup> The scope of what the panel or the AB will do where in any case it concludes that a contested measure is not consistent with a WTO trade rule in any of the covered agreements is limited to recommending that the Member concerned shall "bring the measure into conformity with that agreement." However, the AB has expressed the opinion that where the contested measure is withdrawn during the panel or the appellate proceedings, it is not necessary that the panel or the AB should make a recommendation. In other words, in such a situation it becomes a matter of discretion to complete the case and make a ruling as to the statutory requirement. The issue is, therefore, that adopting such a discretionary standard is not a matter of agreement by the member states. It has such consequences as leaving a loophole for gamesmanship where a party may agree to withdraw a contested measure to get the dispute discharged (not on its merit) by the panel or the AB, only to restore the same measure later.

<sup>95</sup> See generally Lighthizer *Report on the Appellate Body of the World Trade Organisation* 4-8.

- iv) The Appellate Body's flawed test for using out-of-country benchmarks weakens the ability of WTO Members to address trade-distorting subsidies, particularly those in non-market economies.
- v) The Appellate Body has radically diminished the right of the WTO Members to impose safeguard measures.
- vi) The Appellate Body's erroneous interpretation of the Subsidies Agreement has limited the ability of the WTO members to simultaneously address dumped and subsidized imports from non-market economies like China.<sup>96</sup>

The alleged *ultra vires* actions and erroneous interpretations by the AB are argued by the US to have amounted to "impermissible gap-filling" and introducing rules that were not negotiated by WTO members into the WTO agreements, thus "adding to or diminishing the rights and obligations of WTO Members, something that Members expressly prohibited it from doing."<sup>97</sup>

It has also been argued in some quarters that there is little doubt that the AB has in some instances created rights and obligations for the WTO member states through gap-filling, as opposed to the agreements of the parties made through negotiations.<sup>98</sup> This is further argued to be part of the reasons behind the high rate of appeal in the WTO DSM, as the disputing states push further through appeal to have non-existing rights and obligations created, or to have silent and ambiguous provisions of WTO Agreements interpreted in a manner that creates un-negotiated rights and obligations for the sovereign states.<sup>99</sup> Indeed, the charges against the AB over the tendency to unilaterally fill gaps in the WTO agreements through judicial means had been complained about by some former ranking officials of the GATT and the WTO. For example, in 2001, Arthur Dunkel and Peter Sutherland jointly stated that:

We are struck by the very high level of trade dispute settlement cases being handled in the WTO. In one sense, this is a sign of the success and effectiveness of the new system which emerged from the Uruguay Round. It is notable that developing countries are making increased use of the system as complainants. Our concern is that the dispute settlement system is being used as a means of filling out gaps in the WTO system; first, where rules and

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<sup>96</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation* 9-12.

<sup>97</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation* 8-9.

<sup>98</sup> Picker "AB Crisis as Symptomatic of the WTO's Foundational Defects" 59; Babu "WTO Appellate Body Overreach and the Crisis in the Making".

<sup>99</sup> See Terrence *Broken Multilateral Trade Dispute System* 3.

disciplines have not been put in place by its member governments or, second, are the subjects of differences of interpretation. In other words, there is an excessive resort to litigation as a substitute for negotiation. This trend is dangerous in itself. The obligations which WTO members assume are properly for the member governments themselves to negotiate. The issue is still more concerning given certain public perceptions that the process of dispute settlement in the WTO is over-secret and over-powerful.<sup>100</sup>

This appears to be similar to the US position. The difference is only in the approach towards having the issues fixed in the WTO DSS. The joint report seems to blame not the AB but WTO member states for their dilatory approach towards implementing WTO trade rules, which borders on (in)discipline and (lack of) willingness to compromise among the WTO member states. The loopholes in the WTO agreements and the inability of the WTO member states to close the gaps through negotiations<sup>101</sup> leads to the increasing trade friction and the frequent resort to litigation. Another point arising from the joint statement is that the renegotiation of the WTO DSU has long been overdue. Stripping the AB of the statutory quorum for the business of appellate review represents a practical step unilaterally taken by the US, the effect of which may be to get the WTO member states to the negotiating table to redefine the functions and the scope of the mandate of the adjudicatory organs of the WTO DSB.<sup>102</sup> It would also allow the US and other WTO member disputants to cherry-pick from the favourable and unfavourable panel rulings before the resuscitation of the AB. No matter how the WTO member states make use of the DSM without the AB, it appears awkward to employ unilateral means for a multilateral concern. So far, the US seems to be acting alone in the suspension of the AB. Even though most of the WTO member states support the renegotiation of DSU, as many agree that the AB has overreached its mandate, no other WTO member state explicitly supports the unilateral action of the US to paralyse the AB.<sup>103</sup>

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<sup>100</sup> Dunkel, Sutherland and Ruggiero 2001 [https://www.wto.org/english/news\\_e/news01\\_e/jointstatdavos\\_jan01\\_e.htm](https://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm).

<sup>101</sup> According to Robert McDougall, "the inability of WTO members to exercise their collective authority to interpret the meaning of their WTO commitments has meant that the Appellate Body is effectively not subject to any checks and balances." McDougall *Crisis in the WTO* 1.

<sup>102</sup> McDougall *Crisis in the WTO* 1.

<sup>103</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=25331](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=25331); González and Jung 2020 <https://voxeu.org/content/developing-countries-can-help-restore-wto-s-dispute-settlement-system>.

## 5 The Appellate Body in a comma: Implications for protectionism and more

From the testimonies of other WTO member states, even though there is a need for a renegotiation of the DSU, the Contributions of the Appellate Body of the WTO in the dispute settlement mechanism have been frequently noted.<sup>104</sup> As in any other hierarchical judicial system where appellate jurisdiction is recognised, the AB functions as an institution for error correction, clarification, and interpretation of legal rules or issues on questions of law arising from the lower court – the panel under the WTO DSU. The review function is a source of assurance to the disputing parties that the ruling of the lower court was made or not made in error. As already noted, the AB is statutorily a seven-member body of a three-man quorum for an appellate review.<sup>105</sup> On the 10th of December 2019, the tenures of two of the three last members of the AB expired, and the AB was left incapacitated for lack of a quorum.<sup>106</sup> Presently, the AB has no sitting member. The tenure of the last member of the AB elapsed on 30th November 2020 and no appointment of members of the AB has so far been made.<sup>107</sup> The lower stages of the WTO dispute settlement structure, the consultations and panel stages, continue to function. However, there is no provision under the DSU to skip any stage of the WTO dispute settlement process, neither is there any provision limiting the litigation process to the panel stage. In other words, the litigants in the WTO DSM still reserve their rights to request an appellate review of the panel report, irrespective of the fact that the AB has been paralysed. They are "appealing into the void". Although the WTO member states agree under the DSU that the mutually agreed solution of dispute settlement is the most preferred means to settle trade disputes,<sup>108</sup> a WTO member state whose local measure is adjudged to be inconsistent with WTO agreements is under a binding obligation to remove such inconsistent measure only when the report of the panel or that of the AB is adopted by the DSB,<sup>109</sup> yet the DSB is barred from adopting a panel report for which an appellate review has been properly requested.<sup>110</sup> Given this condition, the outcome of the suspension of the AB is not limited

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<sup>104</sup> See WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=25331](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=25331).

<sup>105</sup> Article 17 para 1 of the DSU.

<sup>106</sup> WTO 2019 [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm).

<sup>107</sup> WTO 2019 [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm).

<sup>108</sup> See Art 3 para 7 of the DSU.

<sup>109</sup> Article 16 para 4 and Art 17 para 14 of the DSU.

<sup>110</sup> Article 16 para 4 of the DSU.

to the accumulation of requests for appellate review that cannot be discharged while the AB is paralysed, it also gives a non-yielding litigant that lost at the panel stage the leeway to "legally" perpetrate protectionism by refusing to remove the contested inconsistent measure, merely by "appealing into the void",<sup>111</sup> while the measure inconsistent with the trade rule persists. Even though such persistence would have a negative effect on trade and would also be morally reprehensible from the perspective of the principles of free trade, the action is legal in this situation, since the parties continue to possess their rights to appeal a panel report in the WTO DSM, even without a functioning AB. As Peter van den Bossche, a former AB member, stated in his farewell speech on 28th May 2019:

One can predict with confidence that, once the Appellate Body is paralysed, the losing party will in most cases appeal the panel report and thus prevent it from becoming legally binding. Why would WTO members still engage in panel proceedings if panel reports are likely to remain unadopted and not legally binding? ... It is therefore not only appellate review but also the entire WTO dispute settlement system that will no longer be fully operational and may progressively shut down.<sup>112</sup>

One recent incident of appealing into the void is in respect of the case of *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia – (Second Complaint)*<sup>113</sup> (hereafter, EU – Cost Adjustment Methodologies II). On 28 August 2020 the EU submitted a notice of appeal to the DSB against selected parts of the panel report.<sup>114</sup> In reaction to the notice of appeal, the complainant, the Russian Federation, noted that "it was disappointed with the EU's decision and that the EU's action, in the absence of a functioning Appellate Body, essentially means that the matter was being appealed 'into the void'. The EU was seeking to escape its obligations by not trying to resolve the

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<sup>111</sup> Pauwelyn 2019 *J Intl Econ L* 303-304.

<sup>112</sup> WTO 2019 [https://www.wto.org/english/tratop\\_e/dispu\\_e/farwellspeech\\_peter\\_van\\_den\\_bossche\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm).

<sup>113</sup> WTO 2020 [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds494\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds494_e.htm). See also the Panel Report (WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=266247,266136,265305,265306,261188,260809,250535,232648,227956,132820&CurrentCatalogueIdIndex=2&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=266247,266136,265305,265306,261188,260809,250535,232648,227956,132820&CurrentCatalogueIdIndex=2&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)).

<sup>114</sup> WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=266247,266136,265305,265306,261188,260809,250535,232648,227956,132820&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=266247,266136,265305,265306,261188,260809,250535,232648,227956,132820&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).

dispute."<sup>115</sup> This concern notwithstanding, Russia also submitted a (counter) notice of appeal to the DSB in respect of the same case.<sup>116</sup>

The longer the paralysis of the AB lingers, the greater the negative effects. It is not known at this point what will become of the long-pending appellate requests, which would have been numerous, especially where the appealing parties are not yielding to mutual agreements. This should be of serious concern, because if the AB was scarcely able to produce an appellate review within the statutory timeframe, it should not be expected that the situation will improve with such a backlog of appellate requests to attend to when it is reconstituted unless the statutory number of AB members is increased.

A further implication of the suspension of the AB is that the contributions of the AB,<sup>117</sup> which has a record of over sixty-eight per cent appeal requests of the panel reports,<sup>118</sup> will be lost for its lack of quorum. The situation may generate a sense of loss of hope or trust in the judicial system, leaving the dispute settlement mechanism of the WTO, which has been praised as the most successful international judicial system ever, to live on only in history. Some commentators have expressed their fears that the demise of the AB "is a future move away from multilateral rules designed to promote global free trade and toward a 'law of the jungle.'"<sup>119</sup> In the opinion of Jennifer Hillman, a former Appellate Body member, paralysing the AB could render the WTO DSS powerless and serve "to turn every future trade dispute into its own mini trade war."<sup>120</sup>

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<sup>115</sup> WTO 2020 [https://www.wto.org/english/news\\_e/news20\\_e/dsb\\_28aug20\\_e.htm](https://www.wto.org/english/news_e/news20_e/dsb_28aug20_e.htm).

<sup>116</sup> WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=266247,266136,265305,265306,261188,260809,250535,232648,227956,132820&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=266247,266136,265305,265306,261188,260809,250535,232648,227956,132820&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).

<sup>117</sup> Van den Bossche *From Afterthought to Centrepiece*; Lee "WTO Appellate Body as a Trailblazer".

<sup>118</sup> WTO Date Unknown [https://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm).

<sup>119</sup> Nebehay 2019 <https://www.reuters.com/article/us-wto-trade-usa/u-s-takes-aim-at-judges-pay-in-new-attack-on-wto-system-idUSKBN1XW1ZO>.

<sup>120</sup> Jennifer Hillman quoted in McBride and Chatzky 2020 <https://www.cfr.org/background/how-are-trade-disputes-resolved>.

## 6 Navigating the WTO DSM without the AB: Temporary options available for the disputants within and outside the WTO system

### 6.1 *No-appeal agreement prior to litigation*

A singular effect of the suspension of the AB is the *de facto* returning the WTO DSM to the GATT 1947 system, but unlike the latter, the suspension of the AB creates a vacuum in the WTO dispute settlement process. The disputing parties who want to stick to the adjudicatory process can only get to the panel. The best of the possible outcomes in the WTO dispute settlement process in the pendency of the AB, as believed by the author, will be allowing the DSB to adopt the panel report. This can be achieved in two ways: first, through a prior "no appeal agreement" entered into by the disputing parties;<sup>121</sup> or second, by the volition of the losing party at the panel, which is also the standard in the normal WTO DSS, where the losing party at the panel stage does not request the appellate review.<sup>122</sup> It is the opinion of the author that a non-appeal agreement prior to litigation would help to avoid frustrating the panel report by appealing into the void, which would not only increase the log of unresolved trade disputes but also allow the party to perpetrate the contentious anti-WTO trade rule. One more advantage that could be attributed to the no-appeal agreement is its potential to reduce the overall timeframe in a full-blown WTO dispute settlement process if stretched to the appellate review.

### 6.2 *Alternatives to adjudication-based dispute resolution mechanism under the DSU*

Apart from the regular litigation process in the WTO DSS (that is, consultations through appellate review), the DSU also makes provision for good offices, conciliation, mediation, and arbitration. Under Article 5 of the DSU, the parties to a dispute under the WTO DSS can resort to good offices, conciliation and mediation, which can be offered by the Director-General in an *ex officio* capacity.<sup>123</sup> Using these media must be by agreement of the parties to the dispute.<sup>124</sup> The request for good offices, conciliation and

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<sup>121</sup> Pauwelyn 2019 *J Intl Econ L* 310. There is also evidence that some countries involved in trade disputes have had "no appeal agreement[s]". See Stewart 2020 <https://www.wita.org/blogs/disputes-appellate-body/>.

<sup>122</sup> For instance, Art 16 para 4 of the DSU allows for 60 days from the circulation of the panel report to its adoption by the WTO member parties in which a party to a dispute should officially notify the DSB of its intention to appeal the panel report.

<sup>123</sup> Article 5 para 6 of the DSU.

<sup>124</sup> Article 5 para 1 of the DSU.

mediation may be made at any time and the process may be terminated at any time.<sup>125</sup> The proceedings of these media and the position taken by the parties are required to be confidential and without prejudice to the rights of the parties in further proceedings.<sup>126</sup> With the agreement of the parties to a dispute, good offices, conciliation and mediation proceedings can run concurrently with the panel proceeding.<sup>127</sup> It is not on record that parties to a WTO dispute have invoked good offices, conciliation and mediation.

Resorting to arbitration as provided for under Article 25 of the DSU is also by mutual agreement of the parties to a dispute, and it shall be notified to all WTO member parties in advance. Such agreement is required to spell out the procedure to be followed in the arbitration process.<sup>128</sup> Where parties agree to recourse to arbitration, they shall explicitly agree to abide by the arbitration award, which shall also be notified to the WTO DSB and the Council or Committee of any relevant agreement to which any issue raised in the arbitration relates.<sup>129</sup> Pertinently, other members may be allowed to join as third parties to arbitration proceedings where the primary parties to the dispute (the complainant and the respondent) agree on the joining of such third parties.<sup>130</sup> While these media provide alternatives to adjudication, they are rarely used by WTO member states.<sup>131</sup> With the paralysis of the AB, the member states may have to increase their use of arbitration. This would eliminate the possibility of appealing into the void, since an arbitration award is not subject to appeal, and the implementation of an arbitration award is also governed by Articles 21 and 22 of the DSU, as in the case of the implementation of the adopted panel and AB reports. The arbitration process can also serve an appellate purpose where the parties to a dispute would want a review opportunity in a two-step adjudicatory system of dispute settlement. In this scenario, an appeal for a review of the panel report can lie as arbitration proceedings under Article 25 of the DSU, whereby the parties to a dispute would allow a mutually agreed arbitrator to review the contested panel report.

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<sup>125</sup> Article 5 para 3 of the DSU.

<sup>126</sup> Article 5 para 2 of the DSU.

<sup>127</sup> Article 5 para 5 of the DSU.

<sup>128</sup> Article 25 para 2 of the DSU.

<sup>129</sup> Article 25 para 3 of the DSU.

<sup>130</sup> Article 25 para 3 of the DSU.

<sup>131</sup> It is only in one case between the European Communities and the US that the WTO member states resort to arbitration under Art 25 of the DSU. See WTO 2001 [https://www.wto.org/english/tratop\\_e/dispu\\_e/160arb\\_25\\_1\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/160arb_25_1_e.pdf); Van den Bossche and Zdouc *Law and Policy of the World Trade Organization* 187, 298.



### 6.3 *The proposed multi-party interim appeal arbitration*

In the attempt to deal with the potential incidence of appealing into the void, some WTO members are working on creating a temporary appellate mechanism to fill the structural gap created in the WTO DSS by the suspension of the AB, pending the resuscitation of the AB. Accordingly, the EU and a group of sixteen other like-minded countries in December 2019 agreed to establish a multi-party interim appeal arbitration arrangement (MPIA-Arbitration).<sup>132</sup> As Phil Hogan, the EU Commissioner for trade, has noted, the objective of the MPIA-Arbitration arrangement as an interim cum contingency measure is aimed at "maintaining the two-step dispute settlement process", and at "guarantee[ing] that the participating WTO members continue to have access to a binding, impartial and high-quality dispute settlement system among them."<sup>133</sup> The MPIA-Arbitration arrangement is pursuant to the arbitration provision under Article 25 of the WTO DSU, in which case the subscribing members will agree to the binding arbitration reports emanating from the arbitration review of the panel report. In April 2020 twenty WTO member states subscribing to the MPIA-Arbitration arrangement (MPIA-Arbitration participating members) submitted to the WTO DSB a notice of agreement to resort to the arbitration procedure pursuant to Article 25 of the DSU. The MPIA-Arbitration arrangement will provide an appellate system for the review of panel reports in any case in which the MPIA-Arbitration participating members are parties among themselves, and the losing party at the panel wishes to proceed for an appellate review.<sup>134</sup> It is emphasised that the MPIA-Arbitration process is not intended to replace the AB but to fill the vacuum in the appellate function of the WTO DSB, pending when the AB will regain quorum to legally function.<sup>135</sup> In effect, the participating members of the MPIA-Arbitration bar themselves from pursuing appellate review under Articles 16.4 and 17 of the DSU during the pendency of the AB, where the disputing parties all

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<sup>132</sup> Originally, these countries included the European Union, Switzerland, Norway, Canada, Australia, New Zealand, Brazil, China, Chile, Mexico, Columbia, Republic of Korea, Costa Rica, Guatemala, Panama, Singapore and Uruguay. By the 30th of April 2020, Hong Kong, Iceland, Pakistan and Ukraine had also subscribed to the MPIA-Arbitration arrangement, increasing the number of participating members to 20. See European Commission 2020 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2106>.

<sup>133</sup> European Commission 2020 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2106>.

<sup>134</sup> WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=263504](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504); European Commission 2020 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2106>.

<sup>135</sup> European Commission 2020 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>.

subscribe to the MPIA-Arbitration. In practice, the MPIA-Arbitration process will take the substantive procedure established for the AB under Article 17 of the DSU,<sup>136</sup> and will also follow the compliance procedure under the DSU.<sup>137</sup>

The arbitrators to sit on appeal under the MPIA-Arbitration arrangement will be a quorum of a three-man arbitration panel composed from a pool of 10 standing arbitrators (Pool of Arbitrators), who will be selected by the MPIA-Arbitration participating members.<sup>138</sup> Accordingly, the members of the Pool of Arbitrators will be nationals of participating members of the MPIA-Arbitration arrangement, who will be "persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally",<sup>139</sup> and they shall be knowledgeable in WTO dispute settlement.<sup>140</sup>

While the MPIA-Arbitration mechanism is intended to provide an alternative to the paralysed AB, the invocation of the process remains subject to participation in the MPIA-Arbitration arrangement by the disputing states, as the agreement will be binding on the participating states only. Noticeably, many of the frequent users of the WTO DSM have subscribed to the arrangement,<sup>141</sup> but it is the opinion of the author that the support for and the performance of the new system cannot be conclusively assessed at this time, given the fact that the structural arrangement has not yet been concluded. The author also observes that so far, the 20 participating members of the MPIA-Arbitration arrangement barely make up to 12 per cent of the current 164 WTO member states, although it is expected that some other WTO member states would join the system if the paralysis of

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<sup>136</sup> WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=263504](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504) para 3.

<sup>137</sup> WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=263504](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504) para 9.

<sup>138</sup> WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=263504](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504) para 4.

<sup>139</sup> WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=263504](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504) paras 4-5.

<sup>140</sup> Pursuant to the MPIA-Arbitration agreement on the establishment of a ten-member standing Pool of Arbitrators, the EU has taken the first step to nominate its candidate, Prof Just Pauwelyn, to make the membership of the pool. See European Commission 2020 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2145>.

<sup>141</sup> At the moment, the 20 members of the MPIA-Arbitration Arrangement include Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the EU, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay. See WTO 2020 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=263504](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504).

the AB continues to linger. There is still a huge gap left to be filled. For instance, there are bound to be cases involving the MPIA-Arbitration participating members and non-participating members not willing to agree to the MPIA-Arbitration arrangement and not yielding to allowing the adoption of the panel report.

#### **6.4 Trade dispute settlement under the regional trade agreements (RTAs)**

There has been a proliferation of free trade agreements latterly, including regional trade agreements (RTAs).<sup>142</sup> Under the WTO system, RTAs are recognised to include "any reciprocal trade agreement between two or more partners, not necessarily belonging to the same region."<sup>143</sup> This would cover preferential trade agreements<sup>144</sup> as well as bilateral trade agreements, regional,<sup>145</sup> sub-regional,<sup>146</sup> and inter-regional trade organisations.<sup>147</sup> According to the WTO record, the number of regional trade agreements in force increased from 88 in 200 to 214 in 2010 and 349 by the middle of 2021.<sup>148</sup> RTAs are characterised by their unique or related DSSs. For instance, it is conventional for the states to incorporate a dispute settlement mechanism in their bilateral trade agreements.<sup>149</sup> Accordingly, the parties have the option to engage in trade dispute settlement based on bilateral arrangement, as in the case of Comprehensive Economic and Trade Agreements (CETAs). "In most case" the dispute settlement mechanisms

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<sup>142</sup> Bartels and Ortino *Regional Trade Agreements and the WTO Legal System*; Trakman 2008 *JWT*.

<sup>143</sup> WTO Date Unknown [https://www.wto.org/english/tratop\\_e/region\\_e/scope\\_rta\\_e.htm](https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm).

<sup>144</sup> For example, the Partnership Agreement between the Members of the African, Caribbean, and Pacific Group of States of the One Part, and the European Community and its Member States of the other Part (the *Cotonou Agreement*) signed in 2000.

<sup>145</sup> For example, the EU, North American Free Trade Agreement (NAFTA), MERCOSUR and AfCFTA.

<sup>146</sup> For example, the Economic Community of West African States (ECOWAS), Southern African Development Community (SADC), East African Community (EAC), ASEAN Free Trade Area (AFTA) and European Free Trade Association (EFTA).

<sup>147</sup> For example, the Preferential Trade Agreement between MERCOSUR and the Southern African Customs Union (SACU).

<sup>148</sup> WTO Date Unknown <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>. This means that regional trade agreements (RTAs) cover preferential trade agreements, bilateral, regional, and sub-regional trade agreements.

<sup>149</sup> For example, ch 15 of the *Free Trade Agreement Between the Government of The Republic of Mauritius and the Government of the People's Republic of China* (hereafter, Mauritius-China Free Trade Agreement), signed 17 October 2019. Also see ch 7 of the *Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China* (2020).

of the various RTAs recognise the right of the parties also to use the WTO DSS, in which case the parties can forum shop between the latter and the former fora. For instance, under its "Choice of Forum" provision, the Free Trade Agreement between the Government of the Republic of Mauritius and the Government of the People's Republic of China requires that:

Where a dispute arises under this Agreement and under any other agreement to which both Parties are a party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. The forum selected by the complaining Party [...] shall be used to the exclusion of other fora.<sup>150</sup>

As in the bi-lateral scenario, states can also resort to the dispute settlement arrangements in mega-regional and sub-regional free trade blocs, since they also provide security for trade liberalisation among the members of the various RTAs.<sup>151</sup> It could be argued that RTAs might be of preference to the states in a trade dispute to avoid the possible inconclusiveness that may occur under the WTO DSM because of the paralysis of the AB. Nevertheless, a potential or actual trade dispute may connect or affect some other states that do not share common membership of a given RTA. There is also a tendency of the DSMs of the RTAs to overlap with the WTO system.<sup>152</sup> These, in addition to the high compliance level to the outcome of the WTO dispute settlement process, might be considered by the states as advantages for using the WTO DSM over the dispute settlement systems under the RTAs.

## 7 Concluding remarks

A succinct statement of the position of this intervention is that the WTO dispute settlement system should be fixed with a functional Appellate Body for the reasons that all of WTO member states, including the US, want it so<sup>153</sup> and because the WTO through its agreements regulates as high as 98 per cent of the world trade volume, which has seen global merchandise exports grow from \$54 billion in 1948 to over \$20 trillion by 2018.<sup>154</sup> This would mean that almost all the possible trade friction in the global trade

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<sup>150</sup> Mauritius-China Free Trade Agreement Art 15.3 paras 1 and 2.

<sup>151</sup> Froese 2014 *Manchester J Int Econ Law*.

<sup>152</sup> Busch 2007 *International Organisation*.

<sup>153</sup> It should be noted that the US itself would benefit from the paralysis of the AB, being the highest beneficiary of the system and controlling about 27 per cent of the world trade which is subject to the WTO agreements. The US is, in fact much more at risk with a non-functional AB given its huge volume of trade and trade engagements with the vast majority of other countries.

<sup>154</sup> Stuart 2019 <https://www.forbes.com/sites/stuartanderson/2019/12/09/new-proposal-seeks-to-save-world-trade-organization/?sh=58b6c57361db>.

could be resolved under the WTO dispute settlement system. The WTO member states have shown a high degree of trust and confidence in the WTO DSM. At this juncture, it remains to know what the WTO member states are doing to restore the AB. On an informal ground, the chairman of the WTO DSB has appointed the New Zealand Ambassador and Permanent Representative to the WTO, David Walker,<sup>155</sup> as a "facilitator" of the process to "seek workable and agreeable solutions to improve the functioning of the Appellate Body."<sup>156</sup> Accordingly, Walker has commenced consultations and presented a report on a multi-pronged approach to resolving the AB crisis – the Walker principles. These principles focus on the six issues that allude to most of the US's demands. These are as follows. First; that the AB members whose terms have expired should cease to perform any official AB function.<sup>157</sup> Second; that the AB should maintain the 90 days maximum timeframe contained in the WTO DSU for the appellate review process.<sup>158</sup> Third; that municipal law and facts should not be subject to appellate review.<sup>159</sup> Fourth; that the AB should not be requested to issue an advisory opinion as opposed to its mandate to review cases emanating from the panel.<sup>160</sup> Fifth; that the previous decisions of the DSB should not be treated as binding on subsequent (similar) cases (a case against judicial precedence in the WTO jurisprudence).<sup>161</sup> Sixth; that the AB decisions should not add to or diminish from the rights and obligations of the WTO

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<sup>155</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=25331](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=25331) para 1.37.

<sup>156</sup> Hillman 2020 <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

<sup>157</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) paras 1.16-1.19.

<sup>158</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) paras 1.20-1.23.

<sup>159</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) paras 1.24-1.27.

<sup>160</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) paras 1.28-1.30.

<sup>161</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) paras 1.31-1.33.

member states provided for in the WTO agreements.<sup>162</sup> To ensure that the AB abides by the Walker principles, further measures have been suggested, including the creation of an "oversight committee" which would regularly audit the activities of the AB as a means to assess whether the AB has adhered to or deviated from the Walker Principles.<sup>163</sup>

Having witnessed the increased volume of appeal requests, the author suggests that there is a need to increase the membership of the AB to reduce the workload, and to increase slightly the statutory duration of the appellate review process to make the AB improve on its efficiency. But these are not the crucial issues at hand, as they are very soft grounds that may not attract disagreement. The WTO member states may have been confronted with challenges greater than how they perceive them. It could be argued that the US unilateral blockade on the appointment of the AB members is being driven by its scepticism of the multilateral trading system, the binding trade dispute settlement system with little or no state control, and the purported application of uniform WTO rules on free-market economies, on the one hand, and the existence of a partially controlled economy in the case of China (the question of the free-market status of China) on the other hand. Certainly, these issues will be on the front burner for consideration in any attempt to recalibrate the WTO dispute settlement system, but the real issue will be getting the WTO members to agree. The experience of the Doha Round, for example, has shown the weakness in the WTO and the inability of the WTO member states to get to terms on issues of divergent interest among the developed countries themselves, and between developed and developing countries, because of which the Development Round has lasted for about two decades with no significant progress made. The more specific issues regarding the crisis bedeviling the DSB are first, whether China would accept the liberalisation of its economy, as the US would want to be negotiated. The US has argued that China, not being a full market economy, gets away with some WTO free trade-inconsistent measures, especially when it comes to the application of anti-dumping duties and countervailing measures.<sup>164</sup> The fact that the US concerns about the rulings of the adjudicating organs of the DSB, especially the AB, began in the early years of the millennium, after China had joined

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<sup>162</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) paras 1.34-1.38.

<sup>163</sup> Hillman 2020 <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

<sup>164</sup> Lighthizer *Report on the Appellate Body of the World Trade Organisation* 114.

the WTO in 2001, should not be ignored. The second issue is whether other countries, developed and developing countries alike, would accept more state control of the WTO dispute settlement. In this case, what degree of state control (as the US is urging) is desirable? Will developing countries not be sceptical of the influence of the developed countries in the fear that more state control will return the WTO DSM from the rule-based system to a power-based system, as in the era of GATT? Such a concern among the developing countries is obvious in the response of the South African Trade Ambassador, who noted that:

... It is necessary that there should be a debate about making the dispute settlement system more effective and efficient but that cannot be confined to only trying to find answers to the expressed concerns of one Member [the US]. Any debate on the reform, including the issue of the Appellate Body, also needs to address concerns about accessibility, costs and efficiency from the point of view of the mass of the Membership that are hardly ever participating in the procedure of the dispute settlement mechanism. It will be a fatal mistake to consider that a return to the proper functioning of the dispute settlement mechanism would be paid with other unfair demands for the WTO reform.<sup>165</sup>

These other interests are not dealt with in the Walker Principles, which focusses only on the US concerns, but for the AB to be genuinely restored these divergent interests must also be addressed. It appears that the restoration of the AB will be subject of the usual kind of WTO negotiations, characterised in recent years by uncertainty as to their outcome and duration. Again, the WTO member states should consider adopting a more democratic approach to the appointment of the judicial members where the support of the majority will pass a nominee, as the system that allows a member state to unilaterally overturn the support of all other WTO members is indicative of a policy defect and detrimental to the wishes of the majority of the WTO members.

Finally, it is pertinent to emphasise that the suspension of the Appellate Body of the WTO is not wholly the making of the Trump Administration. Rather, it was because of US consideration of the effects of the WTO jurisprudential activities on its trade policies and the failure of its efforts to get the activities of the DSB adjudicatory organs recalibrated and redefined in the last two decades.<sup>166</sup>

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<sup>165</sup> WTO 2019 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=25331](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=25331) 98-99. Emphasis added.

<sup>166</sup> Hillman 2020 <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

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## List of Abbreviations

AB	Appellate Body
AfCFTA	African Continental Free Trade Area
AFTA	ASEAN Free Trade Area
DSB	Dispute Settlement Body
DSM	dispute settlement mechanism
DSS	dispute settlement system

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DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
J Intl Econ L	Journal of International Economic Law
JWT	Journal of World Trade
Law & Pol Int Bus	Law and Policy in International Business
LIEI	Legal Issues of Economic Integration
LJIL	Leiden Journal of International Law
Manchester J Int Econ Law	Manchester Journal of International Economic Law
MERCOSUR	Southern Common Market
Mich St L Rev	Michigan State Law Review
MPIA	multi-party interim appeal
Pepp Disp Resol LJ	Pepperdine Dispute Resolution Law Journal
RTA	regional trade agreement
Temp L Rev	Temple Law Review
TPR	trade policy review
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
US	United States of America
WTO	World Trade Organisation