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AND THEN THERE WERE NONE...THE DISMANTLING OF THE APPELLATE BODY AND THE FUTURE OF INTERNATIONAL TRADE DISPUTE SETTLEMENT

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AND THEN THERE WERE NONE…THE DISMANTLING OF THE APPELLATE BODY AND THE FUTURE OF INTERNATIONAL TRADE DISPUTE SETTLEMENT

—Moushami P. Joshi*

Abstract — The World Trade Organization is facing a deep institutional crisis. Its appeals court and crown jewel – the Appellate Body – has been rendered inoperable as a result of objections by the United States to appointments of members (or judges) that hear disputes. Objections to appointments has meant that retiring Appellate Body members have not been replaced and vacancies remain unfilled. As a result, no appeals can be heard. The U.S. started blocking appointments in 2017 as a means to bring attention to what it termed as the many transgressions of the Appellate Body. Its complaints include procedural as well as substantive concerns in the functioning of the appeals body. WTO members have put forth numerous proposals to address U.S. concerns, none of which appear to provide acceptable solutions. U.S. objection to appointments continues to this day with no indication of what reforms to the functioning of the Appellate Body might cause the U.S. to yield its ground and lift its veto on appointments. As the impasse carries on, WTO members continue to offer solutions and reforms, including alternative institutional workarounds to preserve the appeals system.

The article evaluates these alternative proposed solutions, including their viability within the larger WTO membership. It also reviews the nature of dispute settlement in pre-WTO days to highlight any parallels which may be relevant to the current crisis, including lessons which can be drawn in support of an enforceable rules-based dispute process. Finally, the article addresses the implications of a non-functioning

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appeals body not only for the resolution of international trade disputes but also for the larger multilateral trading system itself.

I. INTRODUCTION

On December 11, 2019, the Appellate Body ('AB') of the World Trade Organization ('WTO') was effectively shuttered. The WTO's appellate tribunal and 'crown jewel' was left with just one member after the terms of two AB members – Ujal Singh Bhatia and Thomas Graham – expired on December 10, 2019.[1] With this, the AB no longer had the minimum quorum of three members needed to hear and decide on appeals of WTO panel rulings.[2] The proverbial final nail in the coffin occurred on November 30, 2020, when the term of the last sitting AB member expired.[3] As of the date of writing this article, the AB exists in name only.

The AB is composed of seven persons, three of whom serve on any one case.[4] AB members cannot be affiliated with any government.[5] They are appointed for a term of four years which is renewable once.[6] AB members have demonstrable expertise in law, international trade, and the subject matter of the covered agreements.[7] The entire WTO membership, sitting as the Dispute Settlement Body ('DSB'), consensually appoints members to the AB,[8] a process that, up until the present crisis, was undertaken without controversy.

The tale of how the AB was rendered inoperable is as sad as the grim title of the English nursery rhyme mentioned in the title of this article. Since the summer of 2017, the United States ('U.S.') has blocked the appointment of new AB members to replace retiring ones.[9] The U.S. took this extraordinary action because it felt it had no choice but to resort to extreme measures

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1 'Appellate Body Members' (*World Trade Organization*) <www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 18 May 2021.

2 Understanding on the Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 ('DSU'), art 17.1.

3 'Appellate Body Members' (n 1).

4 'Appellate Body Members' (n 1).

5 DSU, art 17(3).

6 DSU, art 17(2).

7 DSU, art 17(3).

8 DSU, art 2(4).

9 *See*, Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 31 August 2017* (WT/DSB/M/400, 31 October 2017) 13; *See also*, Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (*Peterson Institute for International Economics*, March 2018) 3 <www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures> accessed 18 May 2021.

to bring attention of the larger WTO membership to what it believes are the many transgressions of the AB over the years. As the number of AB vacancies rose, multiple WTO member states raised alarm at the developing situation and tried to engage with the U.S.[10] However, this has not resulted in the U.S. giving up its blockage on appointments. As of the date of writing this article, there are sixteen appeals pending before the AB.[11] Of these, the AB will decide four appeals as hearings have already been held in these cases.[12] Apart from these four appeals, other appeals currently pending before the AB will remain in limbo, with the fate of future panel rulings also remaining undecided.

The discussion below in Part II will explore the evolution of international trade dispute settlement from an era of diplomacy to one focused on a rules-based dispute system under the WTO, and highlight lessons from the transition that may be relevant in the current crisis. Part III will explore the causes for the crisis, namely the many concerns raised by the U.S., and evaluate them on merits. Part IV will discuss the responses and solutions proposed by other WTO member states and highlight how member states are conceptualising alternative mechanisms to get around a stalled AB. And finally, in Part V, the article will provide an assessment of the effect that a non-functioning AB will have on panel decisions and the larger multilateral trading system.

II. DELVING INTO HISTORY – DISPUTE SETTLEMENT FROM DIPLOMACY TO LEGALISM

The creation of the WTO dispute settlement mechanism in 1995 was viewed as a momentous event in international law for it signaled the birth of an important new legal institution that had unusually effective powers to regulate international trade and commerce.[13] The road from lax enforcement of the dispute resolution process under the General Agreement on Tariffs and Trade, 1947 ('GATT'), the predecessor of the WTO, to the formal and binding dispute

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[10] Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 28 February 2018* (WT/DSB/M/409, 28 February 2018) 14; Dispute Settlement Body of the World Trade Organization *Minutes of Meeting Held in the Centre William Rappard on 27 March 2018* (WT/DSB/M/410, 26 June 2018) 16; Dispute Settlement Body of the World Trade Organization *Minutes of Meeting Held in the Centre William Rappard on 27 August 2018* (WT/DSB/M/417, 30 November 2018) 36; Dispute Settlement Body of the World Trade Organization *Minutes of Meeting Held in the Centre William Rappard on 26 April 2019* (WT/DSB/M/428, 25 June 2019) 36-37; Dispute Settlement Body of the World Trade Organization *Minutes of Meeting Held in the Centre William Rappard on 28 October 2019* (WT/DSB/M/436, 16 December 2019) 18-19.

[11] For a list of pending appeals, *see*, 'Appellate Body' (*World Trade Organization*) <www.wto.org/english/tratop_e/dispu_e/appellate_body_e.html> accessed 18 May 2021.

[12] 'DSB chair: Four cases could be decided before Appellate Body shuts down; others in limbo' (*World Trade Online*, 4 December 2019) <https://insidetrade.com/daily-news/dsb-chair-four-cases-could-be-decided-appellate-body-shuts-down-others-limbo> accessed 18 May 2021.

[13] Robert E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8(1) Minnesota Journal of International Law 1, 3.

settlement system under the WTO's 'Understanding on Rules and Procedures Governing the Settlement of Disputes' ('DSU') was neither straightforward nor necessarily predictable. However, events leading to the creation of the DSU can serve as reminder of why countries place a premium on an enforceable dispute resolution process and provide lessons for what is likely to happen if that system is allowed to wither away.

The GATT was initially conceived of as a trade agreement that would function as part of a larger International Trade Organization ('ITO').[14] But efforts to create the ITO failed, leaving the GATT standing with a rudimentary structure to enforce its obligations.[15] Accordingly, even the dispute settlement rules were contained in only two provisions and lacked specific procedures and details.[16]

During the early years of the GATT, the focus was on resolving disputes through either diplomatic or political means while avoiding legalisms.[17] Even the process by which disputes were decided underwent changes over this period. At first, it was the GATT Council Chairman who decided dispute rulings.[18] Later, working parties that operated on principles of consensus and negotiation were constituted to decide on disputes.[19] The working parties gave way to panels of three to five third-party experts who began to hear cases.[20] Nonetheless, because panelists were typically diplomats, the adjudicatory processes continued to focus on diplomatic resolution between the parties.[21]

By the late 1970s, GATT dispute settlement saw increased activity due, in part, to the rise in non-tariff barriers, which led to the creation of rules to regulate such barriers.[22] Correspondingly, there was increased codification and legalisation of the dispute settlement procedures.[23] The new procedural rules prescribed that GATT panels were required to formulate their own procedures, organise two to three meetings with the parties where the parties

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14 Hudec (n 13) 4.

15 Hudec (n 13).

16 Petko D Kantchevski, 'The Differences between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement' (2007) 3(1) Brigham Young University International Law & Management Review 79. The author refers to GATT Articles XXII and XXIII which formed the basis of dispute settlement.

17 Kantchevski (n 16) 81.

18 Kantchevski (n 16) 80.

19 Kantchevski (n 16) 80.

20 Kantchevski (n 16) 81.

21 Kantchevski (n 16) 81. *See also*, Hudec (n 13) 6, where the author points out that though early GATT panel rulings were characterised by diplomatic vagueness and a lack of legal precision, they nonetheless had a high compliance rate. This was partly attributable to political will on part of all members and because most government leaders wanted to resolve disputes in this "more-or-less objective, rule-based manner rather than having to negotiate political solutions to every difference that arose."

22 Hudec (n 13) 6. The author states that the U.S. was responsible in large part for this first effort towards legalisation.

23 Kantchevski (n 16) 83.

would present their case in written or oral form, and allow third parties with a substantial interest in the dispute to be heard.[24] Nevertheless, the fundamental underpinning of GATT dispute resolution, i.e., the establishment of panels and adoption of reports *by consensus*, meant that defendants effectively had a veto on a negative or potentially negative panel ruling.[25] While the increased legalisation of GATT panel procedure had mixed results, it enabled the panels to produce more legally sophisticated decisions in areas of sensitive trade policy issues, which in turn prompted member governments to bring even more politically sensitive and difficult cases before the GATT.[26] It also led to "panels gradually following previous panel findings, creating predictability within the system" and laid the foundations for the development of a precedential system.[27]

Because the consensus rule effectively gave defendants a veto, cases that were disposed of successfully were made possible due to the cooperation of the defendants.[28] In some instances, there may have been the added pressure to avoid being labelled as 'obstructionist' or the pressure from the international community supporting the right of parties to have their grievances heard by neutral third party decision makers.[29] Adoption of panel reports may have also been facilitated by the panelists themselves, who perhaps tempered or moderated their ruling, knowing that a middle-of-the-ground approach had the most chance of being accepted and adopted by the losing party.[30]

Between 1986 and 1994, the Uruguay Round negotiations were taking shape and negotiators were debating the extent to which the dispute settlement rules should be strengthened.[31] Most delegations did not want to do away with the consensus rule because it was generally agreed that dispute settlement worked better if defendants voluntarily accepted the process and outcome rather than being forced to comply.[32] The U.S. felt differently and the U.S. Congress, which

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[24] Kantchevski (n 16) 83. The 1979 Understanding and 1979 Annex on the Customary Practice of the GATT codified the above procedural developments.

[25] Kantchevski (n 16) 83.

[26] Hudec (n 13) 8.

[27] Kantchevski (n 16) 83.

[28] Hudec (n 13) 9.

[29] Hudec (n 13) 9.

[30] Robert McDougall, 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function' (CIGI Papers No. 194, October 2018, Centre for International Governance Innovation) 5 <www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf> accessed 20 May 2021.

[31] Hudec (n 13) 8, 12. Interestingly, the success of GATT panel reports during these years reduced sharply. Of the twenty-nine GATT panel rulings issued during 1990-95, twelve rulings were not adopted, including six of the last nine rulings. The author hypothesises that this may be due to governments knowing that a more stringent system was in the offing where they would not be allowed to veto adverse rulings. These last GATT panel rulings may have been the final act of defiance by losing governments who saw no incentive to comply with a dispute system that was about to end.

[32] Hudec (n 13) 12.

saw a major problem with the blocking and delaying tactics of the GATT dispute settlement system, in 1988 insisted that the U.S. press for an effective and enforceable dispute settlement system in the Uruguay Round Negotiations.[33] The U.S. also intensified its efforts in this respect by threatening imposition of unilateral tariffs or restrictions against GATT member states it determined had violated GATT obligations or raised trade barriers for American goods and/or services.[34] This face-off eventually led to a compromise where, in exchange for the U.S.'s commitment to not employ unilateral tariffs, other GATT member states agreed to a procedurally tighter dispute settlement system.[35]

The establishment of the AB emerged rather late in the Uruguay Round negotiations, after negotiators had settled on elements to strengthen the panel process.[36] Having granted the panel significant new power, member states felt the need to provide some oversight against erroneous rulings, leading to the creation of the AB.[37] But the new appellate structure also shifted the balance of power from the panel to the AB as it was the latter body which now had the final word on all issues of law.[38] Even in the early years, it was anticipated that the AB would become more assertive over time.[39]

III. START OF THE CRISIS

A. The United States Voices Discontent with the Dispute Process

The U.S. was responsible, more than any other GATT member, for the legalisation of dispute settlement and its shift away from its earlier diplomatic nature. However, almost immediately since the formation of the DSU, there

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[33] *See*, Payosova, Hufbauer and Schott (n 9) 2. The U.S. Congress passed the Omnibus Trade and Competitiveness Act 1988, which at s 1101(b)(1) provides:

> (b) PRINCIPAL TRADE NEGOTIATING OBJECTIVES
>
> (1) DISPUTE SETTLEMENT—The principal negotiating objectives of the U.S. with respect to dispute settlement are-
>
> (A) to provide for more effective and expeditious dispute settlement mechanisms and procedures; and
>
> (B) to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of U.S. rights.

[34] Hudec (n 13) 13.

[35] U.S. commitment to refrain from unilateral trade sanctions is reflected in Article 23 of the DSU, which states that members shall:

> ...not make a determination to the effect that a violation has occurred…except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.

[36] Hudec (n 13) 27.

[37] Hudec (n 13) 27.

[38] Hudec (n 13) 27.

[39] Hudec (n 13) 29.

were voices of discontent on the loss of U.S. sovereignty to the new international quasi-judicial system.[40] The AB's ruling in the *US-FSC* case, where the AB held that the U.S. Foreign Sales Corporation tax program provided illegal subsidies to U.S. firms, led to criticisms of judicial overreach.[41] In 2002, the Bush Administration complained that, in deciding on U.S. trade remedies, WTO panels and the AB had found obligations and restrictions that are not supported by the text of WTO agreements.[42] In the same year, the U.S. criticised the AB for examining the meaning of municipal law when that was a matter of fact, and not one of law.[43] In 2005, the U.S. advocated for a flexible approach in AB proceedings to "give parties more control over the process and greater flexibility to settle disputes" and proposed that the AB circulate its report on an interim basis to the complainant and defendant for comment.[44] Over the years, American concerns about the risk and reality of what it perceived as adjudicative overreach increased but it was unable to convince other member states of the need for more effective checks and balances.[45] Eventually, the U.S. took matters into its own hands. In 2011, the U.S. blocked its own nominee, Jennifer Hillman, from serving a second term – a move speculated to be a result of her failure to defend U.S. trade interests on AB decisions over which she presided. This was a shocking development since AB

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[40] *See*, 'Opening Statement of Hon. Bob Dole, a U.S. Senator from Kansas in Committee on Finance, U.S. Senate, *Word Trade Organization (WTO) Dispute Settlement Review Commission Act: Hearing Before the Committee on Finance, U.S. Senate* (S HRG 104-124, U.S. Government Printing Office 1995) 1. The Senator raised concerns about the new enhanced dispute settlement system vis-à-vis loss of American sovereignty. He noted that, "(f)or the first time, dispute settlement system will be binding…stronger dispute settlement… was indeed a U.S. negotiating objective. The U.S. has won far more than it has lost in GATT cases. But what happens when the U.S. is on the losing side? Losing parties will now be required either to negotiate a resolution, or else pay some kind of compensation, and sanctions could be authorized. In other words, for the first time, GATT decisions will have real teeth." *See also*, 'Statement of Hon. Alan WM. Wolff, Former Deputy U.S. Trade Representative, and Managing Partner, Dewey Ballantine, Washington, DC' in the report. When addressing the WTO's DSU, he states that, "I think we went too far…this WTO system has no checks and balances…The WTO panels must be limited to judicial functions and keep away from legislative activity…It is really a question of sovereignty for the U.S. whether a panel will inappropriately strike down something the U.S. Government has decided."

[41] WTO, *U.S. – Tax Treatment for "Foreign Sales Corporations"*(24 February 2000) WT/DS108/AB/R.*See also*, Payosova, Hufbauer, and Schott (n 9) 4. "The AB rejected the U.S. argument that the 1981 Understanding of the GATT Council – an understanding that paved the way for the FSC tax – constituted an authoritative interpretation of subsidy obligations under Article XVI:4 of the GATT. For the U.S., this was a slap in the face as it had previously replaced its controversial Domestic International Sales Corporation ('DISC') tax with the Foreign Sales Corporations ('FSC') tax to meet the terms agreed in the 1981 understanding."

[42] David Gantz, 'An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the U.S.' (Arizona Legal Studies Discussion Paper No 18-26, 2018) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216633> accessed 20 May 2021.

[43] *See*, Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 1 February 2002* (WT/DSB/M/119, 6 March 2002) [27].

[44] Gantz (n 42) 3.

[45] McDougall (n 30) 8.

members are expected to be unaffiliated with any government.[46] In 2016, the U.S. blocked the reappointment of Seung Wha Chang of South Korea to a second term for participating in appeals decisions which allegedly saw the AB overstep its limitations by adding or diminishing the rights and obligations in WTO agreements.[47] However, no U.S. Administration has done more to erode the institution of the AB than the administration of President Donald J. Trump, which systematically prevented the filling of AB vacancies by blocking the appointment of AB members.[48] In total, it blocked the appointment process five times, leaving the AB with just one member as of December 11, 2019.

B. The litany of U.S. Complaints

The U.S. has listed a number of substantive and procedural issues with the functioning of the AB, which it believes need to be resolved before it can agree to the appointment of new members. Some concerns such as those of "overreach" have been raised by the U.S. in the past, including as far back as the early 2000s.[49] Other concerns such as those about Rule 15 (discussed below) are recent and are in fact practices and procedures of the AB that the Americans had consented to previously.[50] This has led some member states of the WTO to criticise the U.S. for moving the goalpost by adding to its initial

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[46] Gary Clyde Hufbauer, 'WTO Judicial Appointments: Bad Omen for the Trading System' (*Peterson Institute for International Economics*, 13 June 2011) <www.piie.com/blogs/real-time-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system> accessed 21 May 2021.

[47] Information and External Relations Division of the WTO Secretariat, 'WTO members debate appointment/reappointment of Appellate Body members' (*World Trade Organization*, 23 May 2016) <www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm> accessed 21 May 2021.

[48] Payosova, Hufbauer, and Schott (n 9) 3.

[49] Jennifer Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad, and the Ugly?' (2018) Institute of International Economic Law 4 <www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf> accessed 21 May 2021. Note however that even during this time, the U.S. was the most prolific user and most successful WTO litigator. In 2008, the Office of the U.S. Trade Representative acknowledged it had launched more WTO dispute settlement challenges than any of its trading partners. Of the 373 WTO cases initiated through May 1, 2008, the U.S. was the complainant in 89, or almost one-quarter, of the cases. The European Union is the next-most-frequent user of the WTO dispute settlement system, and is a complainant in 81 cases. U.S. winning percentage in offensive cases that have proceeded to the issuance of legal conclusions by a WTO panel or the Appellate Body is just under 95 percent. Finally, looking at offensive and defensive cases together, (the U.S.) prevailed or was able to settle on favorable terms in about two-thirds of all cases. For the full statement, *see*, 'Statement by Warren Maruyama, General Counsel, Office of the U.S. Trade Representative' in Committee on Finance, U.S. Senate, *Trade Enforcement Act of 2007: Hearing before the Committee on Finance, U.S. Senate* (S HRG 110-1047, U.S. Government Printing Office 2008) 4 <www.finance.senate.gov/imo/media/doc/56757.pdf> accessed 20 May 2021.

[50] Hillman (n 49). Annex A, which presents a helpful table cataloging dates when U.S. concerns were raised, shows that the concerns and attendant blocking of AB appointments precipitated in the middle of 2017. Further, the U.S. in the past has consented to continued service of outgoing AB member Ricardo Ramirez on two disputes under Rule 15, a fact highlighted both by the EU and China at a December 2019 meeting of the DSB.

set of complaints and thereby preventing expeditious resolution on a set of core issues.[51]

1. *Rule 15 of the Appellate Body Working Procedures*

In August 2017,[52] when the U.S. first started blocking the appointment of new AB members, its objection pertained to Rule 15 of the AB's Working Procedures.[53] Rule 15 allows an AB member whose term has ended[54] to continue to sit on an appeal that was assigned when such person was a member. The U.S. has two objections to Rule 15*: first*, that AB members whose terms have expired should not be allowed to hold-over to finish an appeal; and *second*, that it is the DSB as opposed to the AB that has the authority to extend a member's term that has expired.[55]

Rule 15, one of the earlier rules adopted by the AB, was an arrangement to enable appeals to follow their course and prevent delays as a result of the expiration of a member's term.[56] Rule 15 has been resorted to as a matter of course in several disputes, including those where the U.S. was a party, without any objections for over twenty years of its existence.[57] Therefore, the U.S.'s objection to a process to which it had acquiesced for several years was unexpected for the larger WTO membership. The sudden change in heart regarding Rule 15 may be explained by the fact that in the early years, hold-overs by retired members lasted only a few weeks, but with WTO litigation and appeals in particular getting more technical and complex, hold-overs have lasted several

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[51] *See*, General Secretariat of the Council of the European Union, *WTO – EU's Proposals on WTO Modernisation* (WK 8329/2018 INIT, 5 July 2018) 12; *See also*, Amiti Sen, 'India must support all options to end crisis at WTO's dispute settlement system, says expert' *The Hindu Business Line* (New Delhi, 26 March 2019) <www.thehindubusinessline.com/economy/india-must-support-all-options-to-end-crisis-at-wtos-dispute-settlement-system-says-expert/article26645675.ece> accessed 21 May 2021.

[52] Dispute Settlement Body of the World Trade Organization (n 9) 13..

[53] Rule 15 titled "Transition" states: "A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body"; *See*, Working Procedures for Appellate Review (15 February 1996) WT/AB/WP/1 ('Working Procedures').

[54] *See*, DSU, art 17(2).

[55] Gantz (n 42) 5-6.

[56] DSU, art 3(2); *See*, James Bacchus, 'Might Unmakes Right: The American Assault on the Rule of Law in World Trade' (CIGI Papers No 173, May 2018, Centre for International Governance Innovation) 12.

[57] Bacchus (n 56) 11; The U.S. appeared to appreciate the efficiency provided by retired members continuing to serve on appeals assigned to them. At the August 31, 2017 DSB meeting, where the U.S. first indicated it would not support a selection process, it also commented that it "appreciated that the approach of Rule 15 could contribute to efficient completion of appeals. As a party in two pending appeals, the U.S. said that it would welcome Mr. Ramírez's continued service on the appeals to which he had been assigned as of 30 June 2017." For the statement*, see*, Dispute Settlement Body (n 9) 12.

months. While this is a legitimate procedural issue for the consideration of the DSB, whether the U.S. should have held up the selection process on this ground is debatable.

2. *Delay in Circulating AB Reports: Violating the Ninety-Day Time Limit*

Article 17.5 of the DSU states that appeals must generally be completed within sixty days from the date they were filed and in no event must extend beyond ninety days. The same article requires the AB to inform the DSB of the reasons for the delay (if any) and provide an estimate of when the report is likely to be circulated. The U.S. concern on delays in the circulation of AB reports is a fairly new point of contention and hinges on two issues –*first*, that the AB is violating WTO rules by engaging in a practice not permitted by the DSU; and *second*, that the AB does not consult or obtain the agreement of the parties to exceed the ninety – day deadline, something it used to do in its early years but has abandoned since 2011.[58] The U.S. believes:

> The consequence of the Appellate Body choosing to breach DSU rules and issue a report after the 90-day deadline would be that an AB report no longer qualifies…for purposes of the…adoption procedure of Article 17.14 of the DSU.[59]

It is true that appeal timelines have greatly expanded in the more than twenty years of the AB's existence, but that delay cannot solely be placed at the feet of the WTO's highest tribunal.[60] Disputes which have become increasingly technical involve appeals from multiple panel findings and have unfortunately been used by losing parties to delay implementation of the panel's findings by including claims that have little chance of success.[61] In such a scenario, perhaps the ninety-day timeline itself needs a serious re-examination to determine if it is realistic in the present-day context.

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[58] 'Statement by the U.S. at the Meeting of the WTO Dispute Settlement Body' (22 June 2018) 11 – 17 <https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf> accessed 21 May 2021.

[59] (n 58) 20.

[60] Between 2015 and 2017, the time taken for the circulation of AB reports ranged from 131 days at the lower end (in the *EC-Fasteners*, Article 21.5 appeal) to 579 days at the higher end (in the *EC-Aircraft*, Article 21.5 appeal*); See*, Simon Lester, 'The Timing of Appellate Body Report Circulation' (*International Economic Law and Policy Blog*, 27 June 2018) <https://ielp.worldtradelaw.net/2018/06/the-timing-for-circulating-appellate-body-reports.html#comments> accessed 21 May 2021.

[61] (n 60).

3. *Overreach and Gap-Filling*

On the substantive side, the U.S. has frequently complained that the AB has legislated from the bench, a function reserved for the WTO's Ministerial Conference and General Council, instead of limiting itself to clarifying existing provisions.[62] In doing so, it has added to or diminished the rights and obligations of WTO member states under various WTO agreements.[63] The U.S. is of the firm belief that when the DSU calls on the AB to "clarify" relevant agreements, this does not extend to taking on a legislative function by filling textual gaps, informing textual silence or construing textual ambiguity.[64] Where there are gaps or ambiguities in the text of an agreement, the U.S. believes those reflect negotiated compromises of WTO member states and future resolution of such gaps/ambiguities must be left to WTO member - states themselves to sort out.[65]

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[62] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2, art IX(2): "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."

[63] The U.S. is referring to Articles 3(2) and 19(2) of the DSU which state as follows:

Article 3.2 -

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 19.2 - "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

[64] TP Stewart and others, 'The Increasing Recognition of Problems with WTO Appellate Body Decision-Making: Will the Message be Heard?' (2013) 8 Global Trade and Customs Journal 390, 391; In fact, the risk of gap filing was identified as early as 1995 by Alan Wolff in a hearing on the newly established WTO dispute system before the U.S. Senate Finance Committee. At that time, however, the concern was expressed generally with the DSU and not the AB. For instance, Wolff specifically alluded to the WTO Subsidies and Antidumping Agreements as two agreements where the text was left ambiguous as negotiators could not arrive at a consensus. There, Mr. Wolff hypothesised that a WTO panel faced with ambiguous language is unlikely to abstain from opining on grounds that there was no consensus among WTO members about the meaning of the provision. Instead, he believed that a WTO panel would be tempted to create substantive norms and to use legal interpretation to extend international obligations to areas that were not agreed upon. *See*, 'Statement of Hon. Alan WM Wolff' (n 40) 63.

[65] Stewart and others (n 64); Dispute Settlement Body of the World Trade Organization, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Further Contribution of the U.S. on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication from the U.S., Addendum* (TN/DS/W/82/Add.1, 25 October 2005); An unintended and unfortunate fall-out of such "overreach" is that subsequent proposals seeking clarifications to contested issues are blocked on grounds that the AB has already ruled on the contested provision and therefore there is no need for further clarification. *See*, Stewart and others (n 64) 404, where the author cites a number of examples of clarificatory proposals put forth by WTO members that were opposed by other members because the issues was settled through WTO jurisprudence.

Clearly no other WTO member state has raised such strident objections to the AB "interpreting" WTO agreements like the U.S. Many countries hold the view that the AB is an international court with quasi-judicial powers, and the WTO agreements are akin to a constitution text for the WTO and are to be "interpreted broadly considering changing circumstances".[66] The U.S., on the other hand, believes that the WTO agreements are "contracts" between member states which should be interpreted narrowly and as literally as possible.[67] And therein lies the conflict.

The U.S. Government's frustration is particularly evident in its criticism of AB cases involving trade remedies, i.e., anti-dumping, subsidies, and safeguard measures where it believes the AB has engaged in significant overreach and rule-creation. For instance, in the realm of anti-dumping, the U.S. has long taken issue with over a dozen cases where the U.S. Department of Commerce's ('DOC') practice of 'zeroing' was outlawed.[68] With subsidies, it is peeved with cases involving China where it believes the AB's interpretation of 'public body' under the WTO's Subsidies Agreement gives Chinese state-owned enterprises a free-hand to continue providing subsidies.[69] On safeguards, the U.S. believes the AB read in a requirement to show "unforeseen developments" before safeguard measures could be imposed.[70] The fact that the bulk of U.S.

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[66] Stewart and others (n 64) 391, 399; Some have commented that "a certain amount of law-making is to be expected in any legal system…because resolving textual ambiguities will inevitably result in clarifications of obligations in a way that one party may not have originally expected." *See*, McDougall (n 30)7.

[67] Stewart and others (n 64) 399.

[68] Zeroing is a practice where the DOC does not give credit for non-dumped sales in arriving at the dumping margin. Instead, it "zeroes" them out, frequently resulting in higher dumping margins for the respondent exporter. The U.S. stance is that zeroing was standard DOC practice at the time that the WTO Agreements were negotiated and the U.S. had specifically refused to support proposals that would prohibit the practice. *See*, TP Stewart and Elizabeth Drake, 'How the WTO Undermines U.S. Trade Remedy Enforcement' (*Alliance for American Manufacturing*, 2017) 4. *See also*, 'Statement by Warren Maruyama' (n 49).

[69] Stewart and Drake (n 68) 4; *See*, Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/2; WTO, *U.S. – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body* (11 March 2011) WT/DS379/AB/R [317]-[318], [320]; The AB, in reversing a panel's ruling, held that in order to determine whether a state-owned enterprise ('SOE') can be said to provide a subsidy, it is not enough that the SOE has majority ownership of the government. A complainant is also required to show that the SOE exercises governmental function.

[70] WTO*, U.S. – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia – Report of the Appellate Body* (1 May 2001) WT/DS177/AB/R [76]. The AB was upholding the panel's decision which held that Article XIX(1)(a) of GATT 1994 was to be read with the safeguard agreement such that the fact of "unforeseen development" was required to be established before the imposition of duties. The U.S. responded by criticising the AB report for introducing "new obligations, not found in the WTO Agreements". *See*, Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 16 May 2001* (WT/DSB/M/105, 19 June 2001) [42]. WTO members do not necessarily agree with American criticism of AB decisions. *See*, Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 8 March 2002* (WT/DSB/M/121, 3 April 2002) [31].

criticism is directed to AB trade remedy rulings is not a surprise. Between 1995 and 2016, of the total 160 disputes before the WTO, 45% or seventy-three cases pertained to trade remedy laws.[71] Of the seventy-three cases, forty-two, or over 57% of cases, were brought against U.S. trade remedy actions and in thirty-eight of those cases, the AB found at least one violation of WTO rules.[72] That the WTO's dispute settlement system should find the U.S. in the wrong in 90% of cases is surprising and a reflection, according to the U.S., of the WTO's overreach because WTO member states themselves negotiated these disciplines and in many instances, WTO rules on trade remedies mirrored existing provisions in U.S. law.[73]

4. *Issuing advisory opinions, reviewing facts, and treating AB reports as precedent*

Among other complaints, the AB has been faulted for issuing advisory opinions, reviewing facts when appeals should be limited to issues of law, and requiring panels to treat AB reports as precedent.

On the first issue, the U.S. faults the AB for dedicating large portions of its reports to issues that are not necessary to resolve the dispute, thereby consuming its time, resources, and resulting in a backlog of cases.[74] But Article 17.12 of the DSU also requires the AB to address each issue raised on appeal and therefore this problem may not necessarily be a reflection of the AB's activism.[75]

Second, the U.S. has faulted the AB for reviewing the meaning of WTO member-states' domestic measures, which it believes amounts to reviewing facts rather than limiting an appeal to issues of law.[76] Unfortunately, the issue

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71 Stewart and Drake (n 68) 2-3.

72 Stewart and Drake (n 68).

73 Stewart and Drake (n 68). Commentators point out that the US's negative track record on trade remedy cases is largely attributable to its obstinance against changing the practice of zeroing. If the U.S. had taken early steps to comply with panel and AB rulings and discarded zeroing, it would not have faced the dozen or so cases from other countries challenging the same practice. *See*, Bacchus (n 56) 19.

74 Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 23 May 2016*(WT/DSB/M/379, 29 August 2016) [6.4]-[6.7]. The U.S. also rejected the reappointment of one AB member from South Korea, Seung Wha Chang, on these grounds. *See also*, Gantz (n42) 6.

75 Article 17(12) of the DSU states: "The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding."

76 Article 17(6) of the DSU states: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."; *See*, Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 1 February 2002* (WT/DSB/M/119, 6 March 2002) [27]. In this meeting, the US, responding to the AB's ruling in *U.S. – Section 211 Omnibus Appropriations Act of 1998* (WT/DS176/AB/R), criticised the AB for concluding that an examination of the meaning of municipal law was within its mandate. On the other hand, a panel's assessment of whether municipal law

is not as simple as it appears. It has become standard practice in WTO litigation for member states to appeal a panel's factual findings on the ground that the panel did not "make an objective assessment of the facts" before it. This frequently requires the AB to evaluate these factual findings, including findings on a WTO member-state's domestic measures under the objective assessment standard.[77] Other WTO member states agree that while the AB should not review facts, the AB can review legal characterisation of municipal law under WTO law in an appeal.[78]

Finally, the U.S. objects to the treatment of previously adopted reports as binding on subsequent disputes.[79] The U.S. blames the AB for introducing the concept of *stare decisis* into its rulings, which results in binding interpretations, a task it believes is reserved for the Ministerial Conference and General Council.[80] In *U.S. – Stainless Steel (Mexico)*, the AB faulted the panel for not

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was consistent with WTO obligations was a legal characterisation and was within appellate review.

77 Article 11 of the DSU states: "…a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…."; *See*, Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 27 August 2018* (WT/DSB/M/417, 30 November 2018) [4.2]-[4.5].

78 Japan, for instance, does not agree that every issue pertaining to municipal law is one of fact. As it stated, "…the review of municipal law to determine whether what the municipal law required would constitute an act prescribed by a covered agreement, or whether governmental actions taken under municipal law would fall within the scope of the measures as defined in, and thus covered by, a covered agreement was certainly a legal characterization of the municipal law at issue under WTO law."; *See*, Dispute Settlement Body (n 77) [4.20]; *See also*, General Secretariat of the Council of the European Union (n 51) 17.

79 Some commentators have argued that American objection to WTO rulings creating precedent or the claim that the U.S. Government always wanted WTO jurisprudence to be precedent free is a myth. Even in the days of GATT panels (pre-WTO), the use of precedent was normal. For instance, in 1976, GATT panels, adjudicating four tax cases involving the U.S. as either a plaintiff or defendant, considered previous GATT caselaw. Likewise, the U.S. itself has adduced previous GATT rulings and AB case law to buttress its legal arguments in a number of WTO cases. For example, in *U*.S. - Gasoline, *Japan* – Alcohol, and *Canada* – Periodicals. "The answer is that the U.S. in 1995-97 was comfortable with asking WTO tribunals to hand down decisions based on prior caselaw"; Steve Charnovitz, 'The Myth of No WTO Precedent' (*International Economic Law and Policy Blog*, 9 December 2019) <https://ielp.worldtradelaw.net/2019/12/the-myth-of-no-wto-precedent.html?cid=6a00d8341c90a753ef0240a4d09cd4200d#comment-6a00d8341c90a753ef0240a4d09cd4200d> accessed 21 May 2021.

80 'Statements by the U.S. at the Meeting of the WTO Dispute Settlement Body' (18 December 2018) [12], [15] <https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf> accessed 21 May 2021. Interestingly, one of the earliest decisions of the AB addressed the issue of precedent by confirming that the generally accepted view under GATT 1947 was that subsequent panels were not legally bound by a previously adopted panel report. However, it also acknowledged that adopted panel reports were an important part of the *GATT acquis*, were often considered by subsequent panels, created legitimate expectation among members, and should be taken into account where they are relevant

following previously adopted AB reports addressing the same legal issues,[81] and held that "absent cogent reasons an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[82] That case concerned Mexico's complaint on one particular aspect of the American zeroing practice where the panel ignored previous AB rulings holding the practice illegal and instead relied on panel reports that had already been reversed by the AB, thus finding in favor of the U.S.[83] In reprimanding the panel, the AB noted that the WTO dispute settlement system aimed to provide security and predictability to the multilateral trading system[84] and created legitimate expectations among WTO member states as to the interpretation of WTO agreements.[85] At the same time, the AB also made clear that AB reports were not binding "except with respect to resolving the dispute between the parties", thus striving for a balance between the mandate in Article 3.2 for predictability as well as the stricture to not add to or diminish the rights and obligations of member-states.[86]

Yet, the U.S. believes that the AB's 'absent cogent reasons' standard leads to the creation of the rule of *stare decisis* in the WTO. Instead, it proposes a 'persuasiveness' standard where a panel may refer to prior AB reports which it believes are persuasive in conducting its own assessment.[87] It is unclear whether insisting on a 'persuasiveness' approach over an 'absent cogent reasons' standard would indeed lead to panels rejecting prior AB rulings involving the same legal question.[88] Underlying the U.S. objection is its long held hope that new members of the AB will overrule previous decisions, particularly those on trade remedies where the U.S.'s creative interpretation in anti-dumping and countervailing cases has been greatly constrained by the AB, or else that panels will disregard AB rulings on these matters and rule in favor of U.S. law.[89]

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to a dispute. For the AB report, *see*, WTO, *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R [13]-[14].

81 WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*(30 April 2008) WT/DS344/AB/R [161].

82 ibid [160].

83 WTO (n 81) [146].

84 DSU, art 3(2).

85 WTO (n 81) [157]-[160].

86 WTO (n 81) [158].

87 'Statements by the United States' (n 80) [36].

88 Simon Lester and James Bacchus, 'Of Precedent and Persuasion: The Crucial Role of an Appeals Court in WTO Disputes' (*Cato Institute*, 12 September 2019) <www.cato.org/free-trade-bulletin/precedent-persuasion-crucial-role-appeals-court-wto-disputes#the-creation-of-the-appellate-body> accessed 21 May 2021.

89 ibid.

IV. WTO MEMBER STATES AND AMERICAN STONEWALLING

A. The Failed General Council Decision

With the U.S. unrelenting in its opposition to appointment of AB members, and the December 20, 2019 deadline only a year away, the WTO's highest decision-making body, the General Council, in December,2018, launched an informal process to overcome the impasse under the leadership of David Walker, Ambassador of New Zealand and Chair of the DSB, acting as facilitator. The intended outcome of the informal process was to unblock the selection process with a focus on solution-oriented approaches.[90] Ambassador Walker conducted a number of consultations with members to arrive at "points of convergence" towards addressing American concerns.[91] In October,2019, the facilitator presented his conclusions with a recommendation that it be presented as a draft decision of the General Council.[92] The Walker Proposal addresses American concerns in the following manner:[93]

1. Rule 15:
    a. The proposal clarifies that only the DSB has the authority to fill AB vacancies as they arise.
    b. AB members nearing the end of their terms may be assigned to a new division up until sixty days before the expiry of their term.
    c. An AB member so assigned may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term.

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[90] 'General Council Chair appoints facilitator to address disagreement on Appellate Body' (*World Trade Organization*, 18 January 2019) <www.wto.org/english/news_e/news19_e/gc_18jan19_e.htm> accessed 21 May 2021.

[91] General Council of the World Trade Organization, *Agenda Item 4: Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)* (JOB/GC/215, 1 March 2019); *Agenda Item 4(A): Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)* (JOB/GC/217, 8 May 2019); *Agenda Item 5(B): Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)* (JOB/GC/220, 25 July 2019).

[92] General Council of the World Trade Organization, *Agenda Item 4: Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)* (JOB/GC/222, 15 October 2019). Ambassador Walker engaged in further informal consultations post the October meeting and tweaked his proposal to reflect additional feedback from WTO members. For the modified proposal, *see*, General Council of the World Trade Organization, *Agenda Item 5: Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand) and Draft Decision of the Functioning of the Appellate Body (WT/GC/W/791)* (JOB/GC/225, 9 December 2019). The original as well as the amended proposal are referred to herein jointly as the 'Walker Proposal'.

[93] General Council, *Agenda Item 4*(n 92) 5-6.

d. The selection process to replace outgoing AB members will be automatically launched 180 days before the expiry of the term.

e. Where an AB vacancy arises due to other reasons, the DSB shall launch the selection process immediately to fill the said vacancy.

2. Ninety-day timeline:

a. The Appellate Body is obligated to issue its report no later than ninety days.

b. In cases of unusual complexity or periods of numerous appeals, the parties may agree with the AB to extend the time-frame for issuance of the AB report beyond ninety days. Any such agreement will be notified to the DSB by the parties and the Chair of the AB.

3. Municipal law:

a. 'Meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal.

b. DSU does not permit the AB to engage in a *de novo* review or to 'complete the analysis' of the facts of a dispute.

c. Urges member states engaged in appellate proceedings to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a *de facto* '*de novo* review'.

4. Advisory Opinion:

a. Issues that have not been raised by either party may not be ruled or decided upon by the AB.

b. The AB shall address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to assist the DSB in making the recommendations or in giving the ruling provided for in the covered agreements in order to resolve the dispute.

5. Precedent:

a. Precedent is not created through WTO dispute settlement proceedings.

b. Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to member-states.

c. Panels and the AB should take previous Panel/AB reports into account to the extent they find them relevant in the dispute they have before them.

6. Overreach:
    a. As provided in Articles 3.2 and 19.2 of the DSU, panel and AB findings and recommendations of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.
    b. Panels and the AB shall interpret provisions of the WTO Anti-dumping Agreement in accordance with Article 17.6(ii) of that Agreement.
7. Regular dialogue between the DSB and the AB:
    a. The DSB, in consultation with the AB, will establish a mechanism for regular dialogue between WTO member states and the AB where member states can express their views on issues, including in relation to implementation of this Decision, in a manner unrelated to the adoption of particular reports.
    b. Such mechanism will be in the form of an informal meeting, at least once a year, hosted by the Chair of the DSB.
    c. To safeguard the independence and impartiality of the AB, clear ground rules will be provided to ensure that at no point should there be any discussion of ongoing disputes or any member of the AB.

As is evident, the Walker Proposal addressed all grievances voiced by the U.S. and offered a solution for how they may be tackled and dealt with by the AB and the DSB.[94] The idea behind presenting it as a draft decision of the General Council was to enable WTO member states to adopt the above clarifications on a majority basis.[95] But even this was not to be.

At an October, 2019 General Council meeting, the U.S. rejected the Walker Proposal as allowing WTO member states to "paper over" problems and essentially giving the Appellate Body a reason to continue operating the

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[94] Some commentators faulted the Walker Proposal and the ensuing draft decision as an instance of "dignifying and giving into the invalid criticisms of the U.S." that the Appellate Body has acted outside its designated role. *See*, Charnovitz (n 79).

[95] The recital to the Walker Proposal states that it was intended to be adopted as a decision of the General Council by majority voting under Article IX(1) of the WTO Agreement.

Article IX(1) of the WTO Agreement states as follows: "…Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement." Footnote 3 to this Article clarifies that where the General Council convenes as the DSB and takes decisions, those decisions can only be taken in accordance with Article 2(4) of the DSU which requires consensus.

Commentators suggest that the appropriate forum for such a decision was at the DSB level as opposed to the General Council as it is the DSB which administers rules of the DSU. Any decision to change or clarify the interpretation of DSU rules should be undertaken by "consensus" as required under Article 2(4) of the DSU.

way it has.[96] It accused WTO member states of being willing to tolerate AB rule-breaking and stated that it did not see how the WTO could find a solution to a problem that not all member states agreed exists.[97] The U.S. urged member states to engage in the deeper "why" question, i.e., "why did the Appellate Body feel free to disregard the clear text of the agreements?"[98] Only by understanding how the WTO got to this point would the membership find meaningful solutions.[99] The Walker Proposal was presented to the WTO membership on December 9, 2019 for approval, and predictably, the U.S. objected to the adoption of the draft decision.[100] It reiterated its well-worn "why question" and argued that no solution could be reached until its fundamental question was answered.[101] The U.S. claimed that "no member has been more constructively and consistently engaged on these substantive issues than the United States" and accused WTO member states of not engaging with the U.S. on this question.[102] It expressed cynicism with the many solutions expressed in the Walker Proposal, stating that the new language would only allow the Appellate Body to continue to act the way it had and that there was no reason to believe the new language could produce a different result.[103]

WTO member states have roundly condemned American stonewalling, with the European Union calling out the U.S. for not putting forward "any single proposal or counterproposal of its own,"and depriving other member states of "their right to a binding and two-step dispute settlement system even though this right is specifically envisaged in the WTO contract."[104]

In order to salvage some piece of the process, the WTO's former Director-General ('DG') Roberto Azevêdo launched intensive consultations to resolve the impasse on December 10, 2019 (the last day of the functioning of the

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96 U.S. Statement at the WTO General Council meeting in Geneva, 'Statements Delivered to the General Council by Ambassador Dennis Shea, U.S. Permanent Representative to the World Trade Organization' (15 October 2019) <https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/> accessed 21 May 2021.

97 ibid.

98 U.S. Statement at the WTO General Council meeting (n 96).

99 U.S. Statement at the WTO General Council meeting (n 96).

100 U.S. Statement at the WTO General Council meeting in Geneva, 'Ambassador Shea: Matters Related to the Functioning of the Appellate Body' (9 December 2019) <https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/> accessed 21 May 2021.

101 'U.S. opposes Appellate Body Decision at WTO General Council; EU Laments 'Unprecedented' Situation' (*World Trade Online*, 9 December 2019) <https://insidetrade.com/daily-news/us-opposes-appellate-body-decision-wto-general-council-eu-laments-%E2%80%98unprecedented%E2%80%99> accessed 21 May 2021.

102 ibid.

103 'U.S. opposes Appellate Body Decision at WTO General Council; EU Laments 'Unprecedented' Situation' (n 101).

104 'EU Statement by Ambassador João Aguiar Machado at the General Council Meeting, 9 December 2019' (*EEAS*, 9 December 2019) <https://eeas.europa.eu/delegations/world-trade-organization-wto/71695/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-general-council-meeting-9-december-2019_en> accessed 21 May 2021.

AB).[105] In what will appear as more pandering to the U.S., the DG is appeared to have stated that his consultations led him to believe that perhaps the Walker process addressed only a "subset of issues" and did not address all of the U.S.'s problems.[106]

B. Member States Take Matters Into their Own Hands: The Use of Article 25 Arbitrations

Recognising that the American blockage of the appointment of AB members was not going to end anytime soon, the European Union has, since then, taken matters into its own hands and decided with Canada and Norway that any appeals from disputes between the parties would be decided under the arbitration process provided for in Article 25 of the DSU.[107] This step comes with the recognition that, in the current situation, a losing party will be incentivised to appeal an unfavorable panel ruling to a non-functional AB, thus preventing its adoption by the DSB.[108] This *de facto* veto on adoption will prevent a winning party from seeking enforcement of the ruling either through compliance procedures or through retaliation because both are premised on adoption of the panel or AB rulings by the DSB.[109] The European Union has maintained that when it comes to WTO dispute settlement, it has three "red lines" - (i) a two-stage process; (ii) independence of adjudicators; and (iii) binding dispute settlement (automatic adoption or binding nature of panel and AB reports).[110] It is no wonder then that the European Union took the lead in crafting Article 25 arbitration agreements with its trading partners.

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[105] 'DG Azevêdo to Launch Intensive Consultations on Resolving Appellate Body Impasse' (*World Trade Organization*, 9 December 2019) <www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm> accessed 21 May 2021.

[106] 'Azevêdo to Consult with Heads of Delegation on 'Missing Pieces' in Walker Appellate Body proposal' (*World Trade Online*, 10 December 2019) <https://insidetrade.com/daily-news/azev%C3%AAdo-consult-heads-delegation-%E2%80%98missing-pieces%E2%80%99-walker-appellate-body-proposal> accessed 21 May 2021.

[107] 'Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement' (*European Commission*, 25 July 2019) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2053> accessed 21 May 2021; 'EU and Norway agree on interim appeal system in wake of World Trade Organization Appellate Body blockage' (*European Commission*, 21 October 2019) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2074> accessed 21 May 2021.

[108] Article 16(4) of the DSUstates:

> "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. *If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal....*" (emphasis supplied).

[109] *See*, DSU, arts 20, 21(3), 21(5), and 22(1).

[110] Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22(3) Journal of International Economic Law 297.

The process initiated by the European Union, Canada, and Norway gained further momentum when the original three proponents, joined by sixteen other member-states, signed onto a Multi-Party Interim Appeal Arbitration Arrangement ('MPIA') under Article 25 of the DSU.[111]

The MPIA may well work as a viable alternative particularly as it addresses several of the procedural issues that are at the center of the U.S. objection.[112] Incidentally, Article 25 arbitration was conceived during the Uruguay Round negotiations, when the U.S. proposed a system of binding arbitration as an "alternative to the normal dispute settlement process".[113] Because Article 25 arbitrations are based on mutual agreement of the parties, the process is flexible enough to replicate the essential features of the appellate process under Article 17 of the DSU, including the AB's Working Procedures.[114] The arbitration is binding on the parties and is "subject to the same surveillance, compensation and retaliation provisions as those applied to regular panel and AB reports".[115] The big difference between Article 25 arbitration awards and regular panel or AB reports is that the awards are only "notified" to the DSB as opposed to regular panel and AB reports which are "adopted" by the DSB.[116] Thus, it is still unclear what the DSB can do to enforce an unadopted appeal award.[117]

The MPIA envisages that an appeal arbitration will be heard by a bench of three arbitrators who will be selected from a pool of ten standing arbitrators.[118]

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[111] The MPIA was announced on March 27, 2020. *See*, <https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158684.pdf> accessed 21 May 2021. The agreement was notified to the WTO on April 30, 2020 and includes, as its signatories, Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, and Uruguay. For more on this, *see*, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in Conduct of WTO Disputes* (JOB/DSB/1/Add.12, 30 April 2020). Since the original signatories, Benin, Ecuador, Montenegro, Nicaragua, and Macau (China) have also joined the MPIA.

[112] It should be noted that parties to the arbitration mechanism will have to fund the process themselves as the U.S. has opposed the use of WTO funds for Article 25 arbitrations. *See*, 'Hope remains for WTO dispute settlement despite Appellate Body impasse' (*World Trade Online*, 23 December 2019) <https://insidetrade.com/daily-news/hope-remains-wto-dispute-settlement-despite-appellate-body-impasse?s=em> accessed 21 May 2021.

[113] Scott Andersen and others, 'Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals' (2017) CTEI Working Papers 2017-17, 2.

[114] ibid 1; *See*, DSU, art 25(2).

[115] Article 25(4) states that Articles 21 and 22 of the DSU shall apply *mutatis mutandis* to arbitration awards.

[116] *See*, DSU, arts 16(4)., 17(14), and 25(3).

[117] Hillman (n49) 9.

[118] *See*, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) annex 1 [7]. On July 31, 2020, the signatories to the MPIA announced the pool of ten arbitrators to the WTO. *See*, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Supplement* (JOB/DSB/1/Add.12/Suppl.5, 3 August 2020).

The agreement states that an appeal will be limited to issues of law covered by the panel report, be limited to issues that are raised by the parties, and only address issues necessary for the resolution of the dispute.[119] The appeal decision is to be issued within 90 days following the filing of the notice of appeal and may be extended by an agreement of the parties.[120] Recognising that WTO appeals have been hobbled by voluminous submissions, the agreement permits the arbitrators to streamline the appeal process by placing page limits as well as limiting the number of hearings.[121] Arbitrators may also propose that parties exclude claims based on Article 11 of the DSU in order to respect the ninety-day appeal deadline.[122]

The appeal arbitration process will become operational as between disputing parties when the parties state their intention to enter into an arbitration agreement by notifying it within sixty days of the establishment of a panel, thereby ensuring that a decision to appeal by either party is not contingent on the results of a panel ruling.[123] Further, since panel reports under this process could still be adopted by the DSB, the parties have agreed to suspend panel proceedings for twelve months in order to activate the appeal process.[124] If, however, an appellant withdraws its appeal during arbitration, it will trigger the resumption of the panel proceedings, meaning that the panel will be allowed to issue its report.[125] Where the panel has been suspended for more than twelve months and therefore, authority for the panel has lapsed, the arbitrators will issue an award that will incorporate the conclusions of the panel in their entirety.[126]

The success of an Article 25 arbitration process will depend on how some of the early arbitrations play out. Other WTO member states may sign onto

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[119] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) annex 1 [9]-[10].

[120] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) [12], [14].

[121] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) [12].

[122] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) [13].

[123] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) [3].

[124] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) [4]. Note: Article 12.12 of the DSU states that if a panel is suspended for more than twelve months, the authority for establishment of the panel lapses.

[125] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) [13]. The likely consequence will be that the losing member will appeal the panel report thus preventing its adoption by the DSB.

[126] *Statement on a Mechanism for Developing Documentation and Sharing Practices and Procedures in Conduct of WTO Disputes* (n 111) [18]. This will mean that the panel ruling as an award will be notified to the DSB but it is less clear whether this will allow the winning member to seek compliance, surveillance, and compensation in accordance with Articles 21 and 22 of the DSU.

the MPIA if the arbitration appeal creates a sense of legitimacy, predictability, and enforceability previously associated with the AB process. It is unlikely the U.S. will consider entering into Article 25 agreements and it is further unlikely that smaller countries will be able to hold large countries like the U.S. to their WTO commitments in the absence of the AB.[127] Already the European Union is contemplating imposing retaliatory tariffs on WTO member states that appeal a panel ruling (thereby blocking its adoption) against the European Union instead of agreeing to an Article 25 arbitration process.[128] It will have to be seen whether the threat of retaliatory unilateral tariffs by the European Union prompts WTO member states to become signatories to the MPIA.

C. Other Proposals and Options

Several other proposals have been tabled, which serve to preserve the integrity of the system, preserve DSB adoption by preventing appeals, provide work-arounds or result in overhauling the system altogether. They each have their limitations, which are discussed below:

1. *Outvote the United States*

A simple and fairly straightforward solution to ending this unprecedented blockage would be for the entire WTO membership to get together, engage in the process of selecting AB members, and get the AB back to its full-bench strength of seven members by a majority vote.[129] The selection process could be undertaken by the WTO's General Council or the DSB, and if the U.S. vetoes the process, it would simply be outvoted by the majority of the membership.[130] While appearing easy, this is perhaps the most controversial and politically unviable alternative to ending the impasse. For one, there are serious doubts whether, legally speaking, either the General Council or the DSB can even undertake such majority voting to appoint AB members.[131] Second,

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[127] Hillman (n 49) 9.

[128] 'EU proposes law enabling retaliation before WTO authorization' (*World Trade Online*, 12 December 2019) <https://insidetrade.com/daily-news/eu-proposes-law-enabling-retaliation-wto-authorization> accessed 21 May 2021.

[129] Pieter Jan Kuijper, 'Guest Post from Pieter Jan Kuijper on the U.S. Attack on the Appellate Body' (*International Economic Law and Policy Blog*, 15 November 2017) <https://ielp.worldtradelaw.net/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html> accessed 21 May 2021.

[130] The proposal requires invoking Article IX(1) of the WTO Agreement, which provides for majority voting. *See,* (n 95). There are also legal questions as to whether the General Council can sit as itself to appoint AB members or would have to sit as the DSB for this purpose since the matter is, more appropriately, under the realm of the DSU.

[131] Even though Article IX(1) of the WTO Agreement provides for majority voting, it is subject to alternative voting arrangements provided in this "Agreement or in the relevant Multilateral Trade Agreement." Article 2(4) of the DSU can be said to be one such alternative arrangement as it provides that when the DSB has to take a decision, it will do so by consensus. Several scholars believe that the appointment of AB members qualifies as a decision of the DSB.

and more importantly, there is neither political will nor appetite among WTO member states to sideline the U.S. in this manner. The U.S. is the most dominant participant in WTO litigation and accordingly any solution to the logjam should involve the U.S.[132] The U.S. being the largest economy in the world[133] holds incredible leverage over its trading partners. Any country considering siding with the majority vote risks being unilaterally sanctioned for the move.

2. *Avoid Appeals into the Void*

As stated before, one of the main problems resulting from a non-functioning AB is that losing parties will see this as an opportunity to delay enforcement of decisions against themselves. Parties will file an appeal from an unfavorable panel decision, thus preventing adoption of the panel report by the DSB ("appeal into the void"). The dispute will essentially end up "stuck" until such time as the AB is functional again.

In order to avoid this situation, and to preserve the binding nature of WTO dispute settlement, one proposal calls for declaring appeals to be completed once a notice of appeal is filed.[134] The proposal calls for amending Rule 20 of the AB's Working Procedures to state that an appeal will be completed on the same day that a new appeal is filed.[135] Practically, under this proposal, a losing party will be unable to keep the unfavorable panel report in suspension by appealing into the void. Instead, the filing of the appeal will trigger the legal fiction, i.e., that an appeal is completed on the day it is filed. As a result, the appealed panel report will instead be circulated to the DSB for timely adoption.[136] While this option will mean that the AB is rendered inconsequential, it will at a minimum preserve the binding nature of WTO dispute settlement.[137]

Practical problems arise with this proposal. Rule 32 of the AB's Working Procedures states that the AB can amend the rules in accordance with Article 17(9) of the DSU. That Article simply calls for consultation by the AB with the

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Even if the General Council were to sit as the DSB for purposes of appointment, footnote 3 to Article IX(1) of the WTO Agreement would preclude majority voting as it refers the action back to the DSB under Article 2(4) of the DSU for decision making by consensus.

132 Pauwelyn (n 110) 18.

133 Jonathan Gillham, Barret Kupelian and Hannah Audino, 'Global Economy Watch: Predictions for 2021' (*PricewaterhouseCoopers*, 2020) <www.pwc.com/gx/en/research-insights/economy/global-economy-watch/predictions-2021.html> accessed 21 May 2021.

134 Steve Charnovitz, 'How to Save WTO Dispute Settlement from the Trump Administration' (*International Economic Law and Policy Blog*, 3 November 2017) <https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html> accessed 21 May 2021.

135 (n 134). Rule 20 of the AB's Working Procedure states: "An appeal shall be commenced by notification in writing to the DSB in accordance with paragraph 4 of Article 16 of the DSU and simultaneous filing of a Notice of Appeal with the Secretariat."

136 Charnovitz (n 134).

137 Charnovitz (n 134).

Chairman of the DSB and the WTO DG and for communication to the entire WTO membership for informational purposes.[138] It does not require approval of the DSB itself. The proposal while innovative requires the AB to be highly proactive, which would be highly unlikely even if it was fully staffed. Implementing the proposal is impossible in the current situation given that it has no member and is effectively shuttered.

3. *No Appeal Pacts*

A related proposal involves the disputing parties agreeing to forego their right to appeal, which again seeks to avoid the problem of appeals into the void.[139] A No Appeal Pact ('NAP') would be viable only if the agreement is entered into before a dispute arises or before a panel issues its reports, i.e., before winners and losers have been decided.[140] The viability of an NAP at any other time is questionable as the losing party will have very little incentive to forgo its right to appeal (by blocking DSB adoption), thereby allowing for the enforcement of an unfavorable ruling against its interests. Even otherwise, complainants generally have a high success rate at the panel stage. According to some estimates, in 89% of panel reports, atleast one violation is found.[141] By contrast, the chances of a defendant winning across the board are as low as 11%.[142] Therefore, even without a panel decision, it can be assumed that there is high probability of finding some violation against the defendant. Accordingly, this proposal may not be workable because it is unlikely that parties (especially frequent defendants) would opt out of the option to appeal, thereby keeping a dispute in limbo.

4. *Plurilateral Agreement Excluding the United States*

A fourth option involves forming a coalition of WTO member states to draft up a plurilateral agreement which replicates the AB procedure or even the whole of the WTO dispute settlement procedure.[143] The plurilateral agreement would decide on disputes between the agreement's parties, to the exclusion of the U.S.[144] This option is unworkable because of the sheer effort in generating collective will to negotiate and enforce such an arrangement. Importantly, any plurilateral agreement will need to be approved by consensus of the entire

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[138] DSU, art 17(9).

[139] Luiz Eduardo Salles, 'Guest Post on Bilateral Agreements as an Option to Living through the WTO AB Crisis' (*International Economic Law and Policy Blog*, 23 November 2017) <https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-on-bilateral-agreements-as-an-option-to-living-through-the-wto-ab-crisis.html> accessed 21 May 2021.

[140] Pauwelyn (n 110) 14.

[141] Pauwelyn (n 110) 14.

[142] Pauwelyn (n 110) 14.

[143] Kuijper (n 129).

[144] Kuijper (n 129).

membership, which is inconceivable since the U.S. will veto the arrangement.[145] Even otherwise, the viability of an agreement excluding the United States is questionable, since a large percentage of disputes concern trade remedies imposed by the U.S. and this agreement will do nothing to redress those grievances.[146]

V. CONCLUSION

The U.S. has effectively, and single-handedly, shuttered the AB.[147] Many were hopeful that with the election of Joe Biden as President, the U.S. would recommit itself to upholding multilateralism, the WTO, and a functioning dispute settlement system.[148] That is only partly true. While the new U.S. Administration has made it a priority to repair partnerships and alliance jeopardised by the Trump Administration,[149] it does not appear it will lift its objection on the issue of filling AB vacancies.[150] If anything, the Biden Administration is continuing to block appointments on grounds of "systemic

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[145] WTO Agreement, art X(9); Garima Deepak, 'WTO Dispute Settlement – The Road Ahead' (2019) 51 New York University Journal of International Law and Politics 981, 993.

[146] Stewart and Drake (n 68) 4.

[147] The Trump Administration even opposed the compensation structure for the AB and insisted on sharp cuts to the operating funds, from two million U.S. dollars to one hundred thousand U.S. dollars. WTO members eventually bowed to US pressure. *See*, 'WTO gives preliminary OK to 2020 budget that would slash Appellate Body funds' (*World Trade Online*, 5 December 2019) <https://insidetrade.com/trade/wto-gives-preliminary-ok-2020-budget-would-slash-appellate-body-funds> accessed 21 May 2021. *See also*, 'Statements by the European Union at the WTO General Council Meeting, 9-10 December 2019' (*EEAS*, 10 December 2019) <https://eeas.europa.eu/delegations/world-trade-organization-wto/71834/statements-european-union-wto-general-council-meeting-9-10-december-2019_en> accessed 21 May 2021.

[148] The Biden Administration, very early in its tenure, displayed its recommitment to the WTO by withdrawing its objection to the candidature of Dr Ngozi Okonjo-Iweala as the WTO's next DG after the resignation of its former DG Roberto Azevêdo in 2020 in the midst of the AB crisis and a global pandemic. Dr Iweala was the WTO's consensus candidate, save for objection by the Trump Administration, which blocked her appointment and put the WTO in a state of limbo. *See*, 'Biden administration backs Okonjo-Iweala for WTO director-general' (*World Trade Online*, 5 February 2021) <https://insidetrade.com/daily-news/biden-administration-backs-okonjo-iweala-wto-director-general> accessed 21 May 2021.

[149] *See*, Office of the United States Trade Representative, *Fact Sheet: 2021 Trade Agenda and 2020 Annual Report* (2021) <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2021/march/fact-sheet-2021-trade-agenda-and-2020-annual-report> accessed 21 May 2021.

[150] Newly-appointed United States Trade Representative Katherine Tai's answers in response to questions from U.S. Senators at her recent confirmation hearing indicate that the Biden Administration will continue to dig into the same positions on AB reform as espoused by the prior administration. *See*, Committee on Finance, United States Senate, *Hearing to Consider the Nomination of Katherine C. Tai, of the District of Columbia, to be United States Trade Representative, with the rank of Ambassador Extraordinary and Plenipotentiary* (25 February 2021) <www.finance.senate.gov/imo/media/doc/Katherine%20Tai%20Senate%20Finance%20Committee%20QFRs%202.28.2021.pdf> accessed 21 May 2021.

concerns with the Appellate Body" that have been raised and explained across multiple administrations.[151]

As WTO member states continue to engage with the U.S. to break the deadlock, a more fundamental question remains. It is profoundly unclear to the larger WTO membership what concessions, changes or undertakings it would take for the U.S. to lift its veto on appointments.[152] While several WTO member states do not fully agree with the issues raised, they have nonetheless entertained the many American complaints and attempted to address them through numerous fixes. For its part, the U.S. has not tabled a single proposal in response to the solutions put forward since 2017 or explained why the changes proposed do not address its concerns.[153] Thus far, most U.S. complaints have been of such a nature that finding a solution would not be a problem (e.g., Rule 15 and the ninety-day issue) as they would involve procedural fixes and/or changes to the AB's Working Procedures, which will not be difficult to achieve if the WTO membership agrees on the solution. As for substantive concerns (municipal law, advisory opinions, precedent, and overreach), the draft General Council Decision of December 9, 2019 incorporates an understanding that reflects American concerns. Besides, the dialogue mechanism between the AB and DSB proposed by the draft Decision is precisely the kind of mechanism where member states can express their concerns directly on AB transgressions, which will help it to correct course.

Several countries have questioned whether there is good faith behind American opposition given that the U.S. Administration under President Trump took to the disingenuous tactic of asking the 'why' question in response to new proposals or solutions proposed by member states.[154] Concerns were also raised that stalling appointments to the AB allowed the Trump Administration to continue imposing unilateral tariffs on WTO countries.[155] In March 2018, the Trump Administration announced the imposition of Section 232 tariffs on steel and aluminum imports from a number of countries, including its allies, under

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[151] *See*, 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body' (22 February 2021) 12 <https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb22.DSB_.Stmt_.as_.deliv_.fin_.public.pdf> accessed 21 May 2021.

[152] Hillman (n49) 4. The author notes a remark made by former U.S. Ambassador to the WTO, Dennis Shea, that there was nothing to negotiate or change with respect to the WTO AB, since all that the U.S. wanted was for the AB to apply the rules as they were written when the WTO was created in 1995. Alternatively, Ambassador Shea said that American concerns are those that have been articulated at recent meetings of the WTO's Dispute Settlement Body. *See also*, 'DDG Wolff: "There is reason for optimism about the future of the multilateral trading system"' *(World Trade Organization*, 15 October 2018) <www.wto.org/english/news_e/news18_e/ddgra_15oct18_e.htm> accessed 21 May 2021.

[153] Dispute Settlement Body of the World Trade Organization, *Minutes of Meeting Held in the Centre William Rappard on 28 May 2018* (WT/DSB/M/413, 31 August 2018) [30], [32].

[154] 'With the Appellate Body Hobbled, WTO Disputes Headed for Uncertainty in 2020' (*World Trade Online*, 23 December 2019) <https://insidetrade.com/daily-news/appellate-body-hobbled-wto-disputes-headed-uncertainty-2020> accessed 21 May 2021.

[155] (n 154).

specious reasons of "national security".[156] In June 2018, the Administration began the first of its multi-round imposition of Section 301 tariffs targeting China.[157] Countries on the receiving end retaliated with their own tariffs against U.S. imports and filed WTO cases challenging the tariffs.[158] Most of these cases are in early stages of the panel process and are unlikely to see a decision soon.[159] In any event, shuttering the AB allowed the U.S. to stall a final verdict on the legality of its measures. Even otherwise, with a non-functioning AB, panel decisions against the U.S. can, and most likely will, be appealed into the void.[160] In such a scenario, original complainants will be left in a quandary – do they wait for the AB to be functional again and allow an appeal against the U.S. to go ahead, or do they impose retaliatory measures against the U.S. for its stalling tactics?

As the WTO complaints against U.S. imposed Sections 232 and 301 duties illustrate, a non-functioning AB risks turning every new trade dispute into a trade war.[161] While that may well happen, in reality, the exercise of unilateral

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[156] President of the United States of America, 'Proclamation 9705 of March 8, 2018 – Adjusting Imports of Steel Into the United States' (2018) 83(51) Federal Register 11625 <www.govinfo.gov/content/pkg/FR-2018-03-15/pdf/2018-05478.pdf> accessed 21 May 2021.

[157] Office of the United States Trade Representative, 'Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation' (2018) 83(119) Federal Register 28710 <https://ustr.gov/sites/default/files/2018-13248.pdf> accessed 21 May 2021. *See also*, Office of the United States Trade Representative, 'China Section 301 – Tariff Actions and Exclusion Process' (October 2020) <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> accessed 21 May 2021.

[158] For a list of such cases, *see*, 'Chronological List of Dispute Cases' <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 21 May 2021.

[159] (n 154).

[160] For instance, the case brought by China against the U.S. challenging the imposition of Section 301 tariffs (DS543) was ruled in favor of China. Predictably, the U.S. appealed the finding to the non-functioning AB. *See*, *United States – Tariff Measures on Certain Goods from China: Notification of an Appeal by the United States Under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")* (WT/DS543/10, 27 October 2020). Likewise, in a dispute with India, the U.S. appealed a recent compliance panel ruling in a case that India brought to the WTO alleging violation of countervailing duty rules by the U.S. Department of Commerce, thereby blocking its adoption. *See*, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India: Notification of an Appeal by the United States Under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")* (WT/DS436/21, 19 December 2019); 'U.S. Appeals WTO Dispute to Non-Functioning Appellate Body' (*World Trade Online*, 18 December 2019) <https://insidetrade.com/daily-news/us-appeals-wto-dispute-non-functioning-appellate-body> accessed 21 May 2021.

[161] Indeed, China imposed retaliatory tariffs on the U.S. against the latter's unilateral imposition of Section 301 tariffs even before the ruling of the panel on the legality of the U.S. tariffs. *See*, Stephan Becker, Moushami Joshi and Stephanie Rosenberg, 'World Trade Organization Panel Finds Section 301 Tariffs on Chinese Products Violate WTO Rules, but Decision Unlikely to Have Impact on Tariffs' (*Global Trade & Sanctions Law*, 5 October 2020) <www.globaltradeandsanctionslaw.com/world-trade-organization-panel-finds-section-301-tariffs-on-chinese-products-violate-wto-rules-but-decision-unlikely-to-have-impact-on-tariffs/> accessed 21 May 2021.

retaliation may be more nuanced. In this respect, history of the GATT dispute settlement serves as a useful guide. This is because the rationale that will guide a losing defendant to "appeal into the void" under current circumstances in the WTO is similar to how defendants exercised a veto on panel formation or adoption of panel reports under the GATT, and therefore, similar power dynamics are likely to play out.

While every WTO member state that is a losing defendant in a panel case will technically have the option to delay adoption of an unfavorable panel report by "appealing into the void", it may be constrained in exercising that option if the winning party is a politically and economically powerful country. In such instances, the powerful winning party will likely threaten retaliation in the form of tariffs, the removal of preferential market access benefits or even the withholding of aid in order to prevent appeals into the void.[162] On the other hand, weaker WTO member states that bring cases against powerful nations may not have the tools to force adoption of panel rulings by the latter. Unless a weaker member state has a credible retaliatory tool with which to enforce a ruling, panel reports unfavorable to powerful defendant countries will likely be appealed into the void and stay in limbo.[163] Over time, weaker countries may refrain from filing WTO complaints and wasting finite financial resources knowing that a powerful counter party will anyway block the adoption of the panel report by appealing into the void, a situation frequently seen under the GATT.[164] On the other hand, disputes between equally powerful nations may play out differently as a powerful winning complainant will not hesitate to retaliate against a powerful defendant that appeals a panel ruling into the void.[165] It is conceivable that in such scenarios, the winning party will use the panel report as leverage to negotiate an acceptable outcome – a situation frequently encountered with GATT panel rulings which served as the basis for negotiating diplomatic or political solutions.[166]

It is conceivable that WTO panel reports may themselves evolve or change over time. As previously discussed, GATT panels moderated their rulings with the hope that a defendant would not block adoption of the ruling.[167] Likewise, WTO panel rulings may become less technical and rule on narrow grounds against defendants in the hope that the ruling will not be appealed – thus enabling parties to reach a compromise.[168] Not having the AB to act as a check on panel rulings may also mean that disputes with similar fact-patterns may end

[162] Pauwelyn (n 110) 10.
[163] Pauwelyn (n 110) 11.
[164] Kantchevski (n 16) 138.
[165] Pauwelyn (n 110) 11-12.
[166] Pauwelyn (n 110) 8. Former United States Trade Representative Robert Lighthizer expressed a fondness for negotiated settlements under the GATT stating that the GATT system eventually produced successful outcomes.
[167] *See*, Part II of this paper.
[168] Pauwelyn (n110) 12.

up with contradictory and divergent rulings.[169] Article 25 arbitrations may act as a check on this development but only if more countries join the MPIA.

Without an appellate mechanism, the predictability and legitimacy of WTO rules will be undermined.[170] In the short run, however, we are likely to see a high rate of appeals into the void just as it happened under the GATT in the late-1980s to early-1990s before the establishment of the WTO and the DSU.[171] Then, countries exercised their right to veto one last time knowing that a more stringent and enforceable disputes system was imminent. In the present day, defendants realise that unless alternative dispute resolution structures are conceived of and adopted by a large majority, the WTO dispute system is likely to weaken, and losing countries will have no incentive to comply with unfavorable panel rulings unless forced to by the opposite party.

Over time, countries may again come around to the idea of a binding rules-based dispute settlement system. This will happen when the limitations of retaliation and cross-retaliation are felt sharply across the board by powerful and not-so-powerful countries, when domestic constituents such as manufacturers, farmers, and importers, who eventually have to bear the costs of retaliation in the form of higher tariffs on imports of inputs, barriers to market entry, and loss of entire markets, will compel a re-think. It may also come from the realisation that negotiating political or diplomatic solutions to every dispute is resource intensive, leads to narrow victories, may not result in complete policy change, and most importantly, may not provide international businesses with the predictability they need.[172]

While this crisis is the crisis of the AB, the bigger looser in the long run may well be the WTO itself. The U.S. has blamed the AB of overreach and taking on the negotiation functions assigned to member states and the General Council. But it is equally true that the negotiating arm of the WTO has fared badly in the past few years. The Doha Round is dead and apart from the Trade Facilitation Agreement, member states have been unable to agree on other multilateral trade rules.[173] As former AB member Ujal Singh Bhatia remarked, "Why would people come to the WTO to negotiate rules if they are not sure the rules can be enforced?".[174] And he is right – a non-functional dispute settlement system rife with stalling tactics and threats of retaliation bears the

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169 Pauwelyn (n 110) 12.

170 Pauwelyn (n 110) 12.

171 Hudec (n 13).

172 Hudec (n 13) 10.

173 Phil Levy, 'What's Wrong with the World Trade Organization?' (*Forbes*, 30 October 2018) <www.forbes.com/sites/phillevy/2018/10/30/whats-wrong-with-the-world-trade-organization/?sh=7572b3023a49> accessed 21 May 2021.

174 Ana Swanson, 'Trump Cripples W.T.O. as Trade War Rages' *The New York Times* (Washington, 8 December 2019) <www.nytimes.com/2019/12/08/business/trump-trade-war-wto.html> accessed 21 May 2021.

serious risk of eventually eroding trust in the multilateral trading system itself, an outcome that countries can ill afford.