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An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States

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On the one hand, the dispute settlement system, which has for over two decades established its credentials as an efficient and impartial mechanism, faces the burgeoning pressure of increasingly complex disputes at various stages. On the other, some recent critiques have raised fundamental questions about the way the DSU should be used to resolve disputes. These two challenges are clearly beyond the capacity of the dispute settlement system itself to resolve, and they call for determined political dialogue among WTO Members. Left unaddressed, these challenges can cripple, paralyse, or even extinguish the system. If they are properly addressed, the system can continue to discharge its mandate in the coming years with renewed vigour.[1]

I. Introduction

The WTO's Dispute Settlement Mechanism (DSM)[2] is being threatened with destruction by the United States. For almost a year, the United States had blocked appointment or reappointment of Appellate Body (AB) Members, reducing the number of sitting AB Members to four,[3] based on various procedural and substantive objections to Appellate Body practices, some dating from 2002. Should the United States' continue to refuse to join a consensus to appoint AB Members through September 2018, the number of sitting Members will be reduced to three.[4] While most cases could still be heard with three judges, the large backlog of complex cases could mean that AB reports—required under the Dispute Settlement Understanding (DSU) to be issued in no more than 90 days after appeal,[5] will take far longer to complete. Moreover, some cases in which an AB Member worked on a case in the earlier stages could not be decided at all because of conflict of interest issues.[6]

The U.S. actions are perplexing both to other WTO Members and to outside observers, even to those who sympathize with many of the United States' substantive concerns with AB decision-making. The surprise results both from the intransigence of the United States' delegation

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[1] Statement of Appellate Body Chairman Ujal Singh Bhatia on the release of the Appellate Body's 2017 Annual Report, quoted in *Appellate Body Chair Puts Onus on Members to Resolve Delays*, WORLD TRADE ONLINE, Jun. 22, 2018, available at https://insidetrade.com/trade/appellate-body-chair-puts-onus-members-resolve-delays (last visited Jun. 25, 2017).

[2] Consisting of the Dispute Settlement Understanding (DSU), Annex 2 of the WTO Agreement, Apr. 15, 1994; the Dispute Settlement Body, a committee of the entire WTO Membership created under art. 2.1 of the DSU to administer the rules and procedures; the panels, Appellate Body and their secretariats.

[3] See WTO, Appellate Body Members, *available at* https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Jan. 25, 2018) showing that after the expiration of the terms of Ricardo Ramirez Hernandez and Peter Van den Bossche in 2017 only four active Members remain.

[4] The term of Shree Baboo Chekitan Servansing expires September 30, 2018. *Ibid.*

[5] DSU, *supra* note 2, art. 17.5.

[6] *Id.*, art. 17.3 specifies that Members "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest," as for example if a Member had worked on a matter during the initial panel stages of the proceeding.

and the adamant refusal to date of U.S. Trade Representative Robert Lighthizer to propose any specific solutions to the perceived problems.[7] One trade official in Geneva has suggested bluntly that the U.S. obstructionism is "Buyers' Remorse—We [the United States] made the rules, we know what they mean and they should not apply to us."[8] Even if this is an overstatement it illustrates the level of frustration among WTO bureaucrats and other Member governments, and the view that the United States is a trade bully.[9].

Also, it has seemed strange to many that the United States has not considered one major result of holding the process hostage through September 2018, a situation in which only three AB Members remain, one from the United States, one from China and one from India.[10] Given that the United States is the most frequent user of the DSM, both as Claimant and Respondent,[11] one wonders whether future appeals in which the United States is respondent, likely including a refusal of the United States to afford Market Economy Status to China despite arguably being required to do so under the China's Accession Agreement with the WTO,[12] would benefit by referring the decision to this particular group of three AB Members. While under the Dispute Settlement Understanding AB Members serve independently of their governments, in the real world such independence can probably never be complete.[13]

At this writing in July 2018, it is unclear whether the United States seeks to destroy the DSM (which many believe is the heart of the WTO) and perhaps the entire WTO system of rules, or hopes that by holding AB Members hostage the remaining 163 WTO Members will offer acceptable (yet unspecified) solutions. The Trump Administration, despite its heavy-handed approach, has articulated many of the same concerns that the Obama and earlier administrations have raised beginning in 2002, and that from time to time have been shared by a number of other Member states.

Part II of this section discusses the objections, both substantive and procedural, raised by the United States to the manner in which the Appellate Body operates and in which it analyzes issues and renders decisions. Part III further addresses the crisis created by U.S. intransigence. Part IV discusses several work-arounds being proposed by various other WTO members, none of which are particularly desirable or even legally feasible. Part V is a short summary and discussion of the way forward.

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[7] *See* Bryce Baschuk, *WTO Dispute System Working Despite U.S. Action, Official Says,"* INT'L TRADE DAILY (BBNA), Jan. 25, 2018

[8] *See* Priti Patnaik, WIRE, Oct. 10, 2017, at 2, *available at* https://thewire.in/191205/us-launched-offensive-wtos-dispute-settlement-system/ (last visited Jan. 25, 2017) (quoting an unidentified official).

[9] *Id.* at 16.

[10] WTO, Appellate Body Members, *supra* note 3.

[11] 115 as Claimant, 134 as Respondent; the European Union is second, with 91 and 84 cases, respectively. *See* WTO, Disputes by Member, *available at* https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Jan. 25, 2018).

[12] Article 15.2(a)(ii) of China's Protocol of Access to the WTO provides in pertinent that "The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product." It also provides in sub-paragraph 2(d) that "In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession [November 2016]." WTO, Protocols of Accession, *available at* https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm (last visited Jan. 25, 2018).

[13] DSU, *supra* note 2, art. 17.3 provides that Members "shall be unaffiliated with any government." For example, the United States refused to reappoint two consecutive AB judges appointed earlier by the United States, Merit Janow and Jennifer Hillman, apparently because the US Trade Representative was unsatisfied with their willingness to defend US interests.

II. United States' Dissatisfaction with the Appellate Body

A. Overview of U.S. Objections

Probably more than any other GATT Contracting Party the United States was responsible for creating the DSM as a legalistic, quasi-judicial mechanism to replace the less legal, more diplomatic approach that evolved between 1947 and the early 1990s under GATT Articles XXII and XXIII.[14] Still, U.S. dissatisfaction with the current process was evident as early as 2002, as discussed below. It was also reflected in a U.S. proposal during the early stages of the Doha Round negotiations (joined by Chile), advocating a more flexible approach, where the Appellate Body would be required to circulate its reports on an interim basis to the Claimant and Respondent for comment:

> The proposal is particularly aimed at giving parties to a dispute more control over the process and greater flexibility to settle disputes . . . [It] will improve the dispute settlement system by providing greater flexibility, and by giving countries more control over the process in order facilitate the settling of disputes. The purpose of the system is to settle disputes, and these proposals will help do that . . . Under the proposal, parties to a dispute would for the first time have the right to see and comment on an Appellate Body report before it is made final. This would help ensure the best possible final report since parties would have the chance to provide useful clarifications on the facts and the law prior to the issuance of the final report.[15]

Currently, the bulk of the U.S. complaints fall within three areas: a) alleged overreaching by the Appellate Body in a manner that conflicts with the DSU requirement that the panel and Appellate Body not "add to or diminish the rights and obligations provided in the covered agreements;"[16] b) the practice of the Appellate Body of discussing issues which are not before it, creating *obiter dicta* that is in the U.S. view unwarranted; c) other Members' use of the Appellate Body to obtain through litigation benefits that they could not have achieved through negotiations; d) Appellate Body review of facts and of a Member's domestic law *de* novo; and e) the Appellate Body's alleged insistence that its reports be treated as precedent. It is worth noting at well that the United States sees the covered agreements as contractual, while other members and some observers see them more as akin to a constitution. The United States has also objected to the recent

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[14] During the Uruguay Round negotiations, the GATT Contracting Parties were divided between a so-called "legalistic" approach to dispute settlement and one based on diplomacy, "with some Contracting Parties, particularly the USA, arguing for greater legalism, and some other countries, as well as important voices in the global trade policy elite, arguing the advantages of diplomatic flexibility." The legalists stressed time limits for panel decisions, adequate reasons being offered for rulings and an end to the consensus requirement of adoption of reports. *See* Michael Trebilcock, Robert Howse and Antonia Eliason, THE REGULATION OF INTERNATIONAL TRADE 174-175 (4th ed.) (Routledge, 2013).

[15] USTR, *United States Proposes Flexibility Reforms in WTO Dispute Settlement, Dec. 12, 2002*, *available at* https://ustr.gov/archive/Document_Library/Press_Releases/2002/December/United_States_Proposes_Flexibility_Reforms_in_WTO_Dispute_Settlement_printer.html (last visited Jan. 26, 2018).

[16] DSU, *supra* note 2, arts. 3.2 and 19.2.

practice of the Appellate Body and its secretariat permitting Appellate Body Members whose terms have expired to continue sitting on cases for which they were originally empaneled.

The core U.S. complaints about the Appellate Body were set out in USTR's comments at a meeting of the DSB in May 2016 (under the Obama Administration):

> The role of the Appellate Body as part of the WTO's dispute settlement system is to decide appeals of panel reports to help achieve "[t]he aim of the dispute settlement mechanism [, . . .] to secure a positive solution to a dispute," as set out in DSU Article 3.7. And the DSU reminds panels and the Appellate Body not once, but twice [arts. 3.4 and 19.2], that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."[17]

At that same May 23 meeting, the United States indicated that the above complaints were among those resulting in the refusal of the United States to support the reappointment of AB Member Seung Wha Chang.[18]

The principal U.S. concerns were set out more recently in somewhat different form the President's 2018 Trade Policy Agenda.[19] In that report the U.S. also complained repeatedly about the failure of the Appellate Body to adhere to the 90-day deadline for appeals,[20] a problem that has been articulated regularly for several years and by other Members as well as the United States. In June, the United States again criticized the Appellate Body for delaying the issuance of its reports, referring to Article 17.5 of the DSU, which states in part that "In no case shall the proceedings [of the Appellate Body]exceed 90 days."[21] The recent complaints about timing by the United States are ironic given that the failure of the United States to concur in the appointment of new Appellate Body members since mid-2016, resulting in an Appellate Body with only four members as of mid-2018, is at least in significant part responsible for the delays in the issuance of reports!

The following subsections address many the key U.S. concerns in greater detail.

B. Appellate Body Members Serving after Expiration of Their Terms

[17] Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, May 23, 2016, at 2, *available at* https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf (last visited Jan. 25, 2018).
[18] *Id.*, at 11.
[19] Office of the U.S. Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report, March 2018, available at https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF (last visited Jun. 18, 2018, at pages 25-28 [hereinafter "2018 Trade Policy Agenda"].
[20] *See* DSU, *supra* note 2, art. 17.5.
[21] *Ibid*; *U.S. Opens New Front against Appellate Body Over Delayed Reports*, World Trade Online, Jun. 22, 2018, *available at* https://insidetrade.com/daily-news/us-opens-new-front-against-appellate-body-over-delayed-reports (last visited Jun. 25, 2018).

The Working Procedures for Appellate Review, which were drafted and have been amended on various occasions by the Appellate Body, with notice to but not approval by the Dispute Settlement Body,[22] read in pertinent part as follows:

> 15. 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.

The United States has objected that one of the three Appellate Body Members, Mr. Hyun Chong Kim, who heard the appeal in *US—Certain EC Products*[23] had resigned more than a month before the report was circulated.[24] According to the United States, he should have been replaced by another Member after his resignation. As the United States asserted in the March 2018 Report, "the Appellate Body simply does not have the authority to deem someone is not an Appellate Body member to be a member."[25]

Similarly, Member Ricardo Ramirez had also continued to sit on the case, even though his term had also expired (although he had not resigned).[26] Under the circumstances, the Report in the view of the United States did not meet the requirements of the DSU, and could not be properly adopted under those procedures without the approval of the Dispute Settlement Body, although the United States did not object "in these particular and exceptional circumstances" to the adoption of the Report by DSB consensus.[27] (The United States later indicated that it would "welcome" Professor Ramirez continuing to participate in the appeals to which he had been assigned, but argued that it was the DSB rather than Appellate Body that possessed the authority to decide that issue.[28])

The Appellate Body has contested the U.S. position in a restricted "Background Note" explaining their Rules of Procedure, arguing that "Many international adjudicative bodies follow transitional rules or practices similar to Rule 15 of permitting or requiring an outgoing adjudicator to complete the disposition of cases assigned prior to the expiry of the adjudicator's term of office."[29] However, the Background Note does not address whether such reappointment is the responsibility of the Appellate Body or the Dispute Settlement Body (as the United States argues), although the note lists several precedent for continued sitting of Appellate Body Members in the past to complete pending cases extending beyond the Member's term (although not in situations

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[22] Effective September 2010, available at https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (last visited Jan. 29, 2018).
[23] *European Union—Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, *WT*/DS442/AB/R, adopted Sep. 29, 2017.
[24] May 23 Statement, *supra* note 17, at 7-8.
[25] 2018 Trade Policy Agenda, *supra* note 19, at 25.
[26] May 23 Statement, *supra* note 17, at 8.
[27] *Id.*, at 9.
[28] Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, October 23, 2017, at 8, *available at* https://geneva.usmission.gov/wp-content/uploads/2017/10/Oct.23.DSB_.Stmt_.as-delivered.fin2_.pdf (last visited Jan. 26, 2018).
[29] Background Note on Rule 15 of the Working Procedures for Appellate Body Review, Nov. 24, 2017.

where the Member has formally resigned).[30] This view presumably reflects in part the DSU language, stating that "The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once"[31] as a ground for concluding that the DSB rather than the Appellate Body would properly have responsibility for extending the term of Members whose terms had expired while setting on pending cases.

C. Limiting Appellate Body Reports to Discussion of Legal Issues Necessary to Resolve the Matters before It

In May 2016, United States "raised systemic concerns about the disregard for the proper role of the Appellate Body and the WTO dispute settlement system in these reports." It complained that in a case between Panama and Argentina, forty-six pages of the report is *dicta*, setting out interpretations of the General Agreement on Trade in Services that effectively consisted of "advisory opinions on legal issues."[32] Similar criticisms were raised in a dispute concerning the Sanitary and Phytosanitary Measures Agreement, with the United States asserting that the AB "report engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal, and even expressed "concerns" in that discussion on findings of the panel that were not raised by either party in the appeal.[33] Further, the Appellate Body was criticized for "revers[ing] the Panel report and [finding] a breach on the basis of an argument and approach entirely of the Appellate Body's creation."[34]

These arguments were also raised by the Trump Administration at a DSB meeting on September 29, 2017. There, the United States objected to statement in the Appellate Body report, *US—Certain EC Products*, on the grounds that it "was obiter dicta as it was not made in response to any issue appealed in that dispute, and therefore was not necessary to resolve that appeal."[35] One of the concerns over such "unnecessary" discussions is that they consume Appellate Body and Secretariat time and resources, detracting from that spent on other pending cases, a particular concern when the Appellate Body has a large backlog of cases. This complaint was also emphasized in the Trade Policy Agenda, with the United States noting that the "purpose of the dispute settlement system is not to produce reports or to "make law," but rather to help Members resolve trade disputes among them. WTO Members have not given panels or the Appellate Body the power to give "advisory opinions" as some national or international tribunals have."[36]

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[30] *Ibid.*
[31] DSU, *supra* note 2, art. 17.2.
[32] *See* May 23 Statement, *supra* note 17, at 3 (referring to *Argentina—Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, adopted May 11, 2016).)
[33] *See* May 23 Statement, *supra* note 17 at 4 (referring to *India—Measures Concerning the Importation of Certain Agricultural Products, WT/*DS430/AB/R, adopted Jun. 19, 2015).
[34] *See* May 23 Statement, *supra* note 17, referring to *United States—Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted Jan. 16. 2015).
[35] *See* Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, September 29, 2017, at 7, *available at* https://geneva.usmission.gov/wp-content/uploads/2017/09/Sept29.DSB_.Stmt_.as-delivered.fin_.public.pdf (last visited Jan. 26, 2017).
[36] 2018 Trade Policy Agenda, *supra* note 19, at 26.

Also in the area of overreaching, one study indicates that a number of Members, including not only the United States but also Mexico, India, Chile, Argentina, Pakistan, Costa Rica, Malaysia and Turkey among others:

> have criticized panels and/or the Appellate Body for overreaching their authority by filling gaps, construing silences, selectively choosing one of many dictionary definitions available to define terms in the texts of the agreements, and creating obligations never agreed to in negotiations among Members. These members believe that, in certain cases, the Appellate Body has failed to respect the negotiated compromises reflected in the agreements and failed to exercise restraint when faced with textual gaps, ambiguity, or silence – which may have been intended by the negotiators. Rather, they believe that the meaning and filling of gaps or silences should properly be left to the members themselves.[37]

D. Litigation as a Substitute for Negotiation?

Expressed concerns of the United States predate the Trump Administration by fifteen years. In a Report by the Bush Administration to Congress in 2002, the Commerce Department noted that:

> [T]he United States does not agree with the approach that WTO panels and the Appellate Body have sometimes taken in disputes, and is concerned about the potential systemic implications. In particular, the executive branch views with concern the manner in which WTO panels and the Appellate Body have applied the applicable standard of review in disputes involving U.S. trade remedy and safeguard matters, and instances in which they have found obligations and restrictions on WTO Members concerning trade remedies and safeguards that are not supported by the texts of the WTO agreements . . . .[38]

In other words, the concerns of the United States have been festering for a long time, even if the only action the United States has taken to remedy the matter after DSU reform in the Doha Round failed, was to block appointment or reappointment of Appellate Body Members beginning in May 2016.

U.S. concerns in this regard have been succinctly summarized by U.S. Trade Representative Lighthizer as follows: "We are concerned that the WTO is losing its essential focus and becoming a litigation-focused organization . . . Too often members seem to believe they can get concessions through lawsuits that they can never get at the negotiating table."[39] Given the large number of unfair trade (antidumping and countervailing duty) cases brought against the

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[37] Terence P. Stewart, *Disputed Court: A Look at the Challenges to (and from) the WTO Dispute Settlement System*, Dec. 20, 2017, at 5, *available at* http://www.stewartlaw.com/Content/Documents/WTO%20Dispute%20Settlement%20System%20-%20Paper%20for%2012-20-17%20GBD.pdf (last visited Jan. 26, 2018).

[38] Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body: Report to Congress Transmitted by the Secretary of Commerce, at 7 (Dec. 30, 2002), cited in Fortune, *supra* note 37, at 8.

[39] *See* Bryce Baschuk, *WTO Faces Paralysis in Dispute Settlement Cases as U.S. Blocks Appointments*, 34 Int'l Trade Rep. (BBNA) 1653 (Dec. 14, 2017) (quoting Ambassador Lighthizer).

United States in the DSM, there may well be some truth to this assertion. There seems little doubt to us that over a period of years the Appellate Body has made it more difficult for investigating authorities to complete an investigation and assess antidumping or countervailing duties in a manner that passes Appellate Body muster.

Examples of this include, among many others, *US—CDOSA*,[40] about which the United States asserted that "The Appellate Body has created a new category of prohibited subsidies that had neither been negotiated or agreed to by WTO Members . . . A finding that a Member had not acted in 'good faith would clearly and unambiguously exceed the mandate of dispute settlement panels and the Appellate Body."[41] Other cases in which the United States has criticized the Appellate Body's reasoning as flawed include *United States — Countervailing and Anti-dumping Measures (China)*[42] mentioned earlier and Argentina—*Trade in Goods and Services.*[43]

From time to time, we have criticized the Appellate Body in our annual case reviews for rejecting reasonable methodologies for dealing with anti-dumping and subsidies investigations. In *EU—Biodiesel*, we noted

> the Panel and Appellate Body's rejection of what seems to be a reasonable methodology used by the European Union in circumstances where the foreign producers' production costs were unreliable because the prices of the materials costs (the soybean feedstocks) were artificially depressed—well below world commodity prices for soybeans— by the government's export tax policies. . . The use by the European Union as a surrogate price of "the average of the reference prices of soya beans published by the Argentine Ministry of Agriculture for export FOB Argentina" seems to us to be an exercise of reasonable discretion under the circumstances.[44]

Similarly, we noted in *EU—Stainless Steel Tubes* that the Appellate Body had created a new term that appears nowhere in the Subsidies and Countervailing Measures Agreement:

> With respect to the calculation of a "benefit" Article 14(d) of the SCM Agreement, the Appellate Body, for the most part, reinforced previous jurisprudence, indicating that use of alternative benchmarks under Article 14(d) must be based on a finding that in-country prices are not market-determined. However, it also expanded the body of WTO "law" by, in a footnote, explaining the use of the term "government-related entity." It appears as though [] the Appellate Body . . .. creates a new type of entity to use during an analysis under Article 14(d). Time will tell, but as it stands, it appears as though there are now three types of entities— "government,"

[40] *United States—Continued Dumping and Subsidy Offset Act of 2000*, *WT*/DS217/234/AB/R, adopted Jan. 27, 2003.
[41] *See* Stewart, *supra* note 37, at 6-7.
[42] Appellate Body Report, *United States — Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/AB/R, adopted Jul. 22, 2014.
[43] *Argentina—Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, adopted May 11, 2016. *See also* Patnaik, *supra* note 8, at 9-10.
[44] WTO Appellate Body Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R (Oct. 6, 2016), adopted Oct. 26, 2016, discussed in Raj Bhala, David Gantz, Shannon B. Keating & Bruno Germain Simoes, WTO *Case Review 2016*, 34 AJICL 281, 417 (2017).

> "public body," and "government-related"—for purposes of a market benchmark analysis.[45]

It is recognized that the system was not designed to give the last word on interpretation and application of the WTO covered agreements to the Appellate Body. Rather, that authority rests elsewhere, as the WTO Agreement specifies:

> The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.[46]

However, the membership has found it impossible to reach agreement on most controversial issues, including the continuation of the Doha Round of negotiations,[47] so it is unsurprising that no (almost certainly fruitless) effort has been made by the United States or other Members to convince the Membership (or three-fourths of them) to agree on a particular interpretation of a group of covered agreements. The result is in part responsible for the situation which the WTO is now facing.

E. **Review of Facts and Domestic Law; Reports as Precedent**

The United States has also charged that the Appellate Body has on occasion reviewed facts, despite the fact that the DSU limits and appeal to "issues of law covered in the panel report and legal interpretations developed by the panel."[48] It complains in particular that "the Appellate Body consistently asserts that it can review the meaning of a Member's domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for Appellate Body review. Furthermore, when the Appellate Body reviews the meaning of a Member's domestic measure, it does not provide any deference to a panel's findings of fact."[49]

Under the WTO Agreement, binding interpretations of the obligations agreed to in the WTO's covered agreements, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[50] As the United States asserts, "While Appellate Body reports can provide valuable

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[45] WTO Appellate Body Report, *China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes from Japan*, WT/DS454/AB/R (adopted Oct. 28, 2015), discussed in Raj Bhala, David Gantz, Shannon B. Keating & Bruno Germain Simoes, *WTO Case Review 2016*, 33 AJICL 505, 626 (2016).
[46] Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. IX:2.
[47] This was again illustrated at the WTO's Eleventh Ministerial Meeting in Buenos Aires in December 2017. The Members could not even agree on a final communique, and Director-General Azevedo painted a gloomy picture of the results: "We have made important progress in some areas. In most of them it did not prove possible. Members did not manage to agree final, substantive agreements this time." Remarks by DG Azevedo, Dec. 13, 2017, available at https://www.wto.org/english/news_e/spra_e/spra209_e.htm (last visited Jan. 29, 2018).
[48] DSU, *supra* note 2, art. 17.6.
[49] 2018 Trade Policy Agenda, *supra* note 19, at 28.
[50] WTO Agreement, *supra* note 2, art. IX:2.

clarification of the covered agreements, Appellate Body reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed."[51] Under such circumstances, it is inappropriate for the Appellate Body to require that panels must follow its reports in the absence of "cogent reasons."[52] We note that the challenges for the Appellate Body in this dichotomy are significant. On the one hand only the Ministerial Conference and General Council are authorized to issue interpretations, but in more than twenty years neither have been able to agree upon even one interpretation. At the same time the Appellate Body must decide cases, a process which in actual practice will likely result in more than a "clarification" if a decision is to be issued.

III. The United States' Risky Approach to Reforming the Appellate Body

As Part II indicates, I have considerable sympathy for many of the concerns that have been expressed regarding the allegations of excessive dicta in Appellate Body reports, general overreaching, and encouraging Members to use litigation to obtain modification of the covered agreements (particularly the ADA and the SCMA) in place of negotiations in Geneva. In particular, we agree with the U.S. Trade Representative's Office under the Trump, Obama and Bush Administrations that some Appellate Body reports are ultimately inconsistent with the DSU requirement that panel and Appellate Body Reports "cannot add to or diminish the rights and obligations provided under the covered agreements."[53]

That being said, as I suggested in the introduction to this discussion, the approach that the United States has taken to date (through March 2018) of blocking all Appellate Body appointments or reappointments for almost a year and declining to present any proposals for reform that if accepted would satisfy the United States, is mystifying. It strikes us and many others not only as unproductive bullying but as raising a threat to the continued functioning of the Appellate Body and probably to the future of the WTO itself.[54] The United States is stubbornly refusing to budge on the reappointment issue, despite increased pressures from 58 Members to immediately begin the process of filling the three outstanding Appellate Body vacancies.[55]

It also remains unclear whether the United States seeks to totally emasculate the dispute settlement system and has fully considered the implications of an international trading regime with myriad rules but no enforcement. Or perhaps the Trump Administration wishes to be able to use the unilateral remedies provided under Section 301(b) of the Trade Act of 1974, as amended, which the Executive Branch under USTR to take action under "an act, policy, or practice of a foreign country is [that] unreasonable or discriminatory and burdens or restricts United States

[51] 2018 Trade Policy Agenda, *supra* note 19, at 28.
[52] *Ibid.*
[53] DSU, arts. 3.2, 19.2.
[54] *See Ministers Show 'Particular concern' for WTO Appellate Body in Davos Meeting,* WORLD TRADE ONLINE, Jan. 26, 2018 (noting that "many ministers at the meeting expressed the "need to preserve and enhance the functioning of the multilateral trading system" with an emphasis on the regular WTO bodies and the "WTO's Dispute Settlement Mechanism").
[55] *U.S. Rejects Proposal Brought by 58 Members to Fill WTO Appellate Body Slots,* WORLD TRADE ONLINE, Jan. 22, 2018.

commerce"[56] without regard to WTO rules or to action against the use of Section 301 by the panels, Appellate Body and, ultimately, the target Member state. Or perhaps also the U.S. Trade Representative has concluded that if the United States imposes Section 232[57] tariffs and/or quotas on imported steel and aluminum for specious "national security" reasons, as seems likely to occur at this writing,[58] avoiding DSM review is desirable.

The U.S. emasculation of the Appellate Body seems to us to be particularly surprising at a time when China is flexing its economic muscles through the gigantic "Belt and Road" project combining a network of seaports, railroads and roads stretching from China to Eastern Europe,[59] and the "Made in China 2025" initiatives (the latter almost certainly supported with massive government subsidies that will be illegal under WTO rules[60]) designed to guarantee Chinese dominance in such fields as energy, robotics, electric cars, artificial intelligence by 2025.[61] Not only the United States but all other WTO Members would be effectively barred from challenging such actions to the extent they are inconsistent with the covered agreements.

The longer the list of U.S. complaints is matched by a lack of reform proposals[62], the more likely it is that other Members will a) conclude that the United States is more interested in destroying the system than reforming it, and b) seek out methods for bypassing the Appellate Body once its membership has declined to the point where it can no longer render reports (three members in cases where there is a conflict of interest). As current Appellate Body Chair Ujal Singh Bhatia has noted, "An erosion of trust in this system can lead to the re-emergence of power orientation in international trade policy . . . Delays compel WTO Members to look for other solutions, particularly elsewhere."[63] Such "other solutions" within the WTO and DSU framework are discussed in the next section.

IV. The Unattractive Alternatives to a Fully-Staffed Appellate Body

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[56] 19 U.S.C. §2411(b)(1) (1988).
[57] 19 U.S.C. §1862 (1962).
[58] *See Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House*, COMMERCE.GOV, Feb. 17, 2018, *available at* https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination (last visited Feb. 19, 2018) (suggesting several quota and tariff remedies to restrict U.S. imports of steel and aluminum).
[59] *See* Tian Jinchen, '*One Belt and One Road': Connecting China and the World,* McKinsey& Company, July 2016, available at https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/one-belt-and-one-road-connecting-china-and-the-world (last visited Jan. 30, 2018) (discussing what China hopes will be the modern equivalent of the ancient Silk Road).
[60] *See WTO Agreement on Subsidies and Countervailing Measures*, Annex 1 of the WTO Agreement, *supra* note ___, arts. 1-3, available at https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Jan. 29, 2018) (making most subsidies provided by a government or public body that consist of a financial contribution that is specific to an industry or group of industries actionable, and export subsidies illegal).
[61] Tristan Kenderdine, *China's Industrial Policy, Strategic Emerging Industries and Space Law,* ASIA & THE PACIFIC POLICY STUDIES/WILEY ONLINE LIBRARY, May 12, 2017, available at http://onlinelibrary.wiley.com/doi/10.1002/app5.177/full (last visited Jan. 30, 2018)
[62] *See* Bryce Baschyk, *WTO Dispute System Working despite U.S. Action, Official Says*, INTL 'TRADE DAILY (BBNA), Jan. 25, 2018 (reporting on the absence of any specific U.S. reform proposals).
[63] *See* Brian Flood, *Head of Troubled WTO Appellate Body Wins New Term*, 34 INT'L TRADE REP. (BBNA) 1681, Dec. 21, 2017) (quoting Mr. Bhatia).

Not surprisingly, several proposals have been floated by Members and those observing the problem from outside, most of which are not likely to be fully invoked until after the end of September 2018, when if the United States continues to block a consensus on appointments and reappointments the number of sitting Appellate Body Members will fall to three. All of these seem designed in significant part to "find a way to exclude the US from its decision-making and its operations, even if only temporarily"[64] or to permit the WTO Membership to avoid the politically and painful process of seeking to directly address U.S. concerns.

Of the proposals, the one that is mostly likely feasible at least to attempt would be the reliance by willing WTO Members on an arbitration process that is included in the DSU but to date has been largely unused. Under this mechanism,

> 1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
> 2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
> 3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
> 4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.[65]

This mechanism stands in parallel to the panel/Appellate Body system set out elsewhere in the DSU. It seems open to use by Members if—and only if—the disputing Members agree to resort to it for each dispute. Otherwise, once arbitration is completed the enforcement mechanisms in the DSU apply, all without resort to the Appellate Body. If the current impasse continues, it seems likely that some Members who strongly support the survival of the DSM in some form will eventually resort to arbitration.

In terms of resolving the issues, perhaps the most sensible (albeit politically unlikely) approach would be for the United States and a group of Members to seek to draft a series of "interpretations" of the DSU which would "fix" the DSM, and then seek to enact them through action of the General Council (since the Ministers are not scheduled to meet again until late 2019), as provided under the WTO Agreement. There, as noted earlier, both bodies have "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[66]

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[64] Robert McDougall, *The Search for Solutions to Save the Appellate Body*, ECIPE Bulletin no. 3/2017, Dec. 2017, available at http://ecipe.org/publications/the-search-for-solutions-to-save-the-wto-appellate-body/ (last visited Jan. 30, 20178).
[65] DSU, art. 25.
[66] WTO Agreement, *supra* note 2, art. IX:2.

The hurdles include a) agreement on a series of interpretations by both the United States and a significant group of Members, and b) adopting the interpretation by consensus or, failing that, by a three-fourths majority.[67]

Unfortunately, the idea of a consensus on such a tentative agreement by the Members seems far-fetched. While a vote is theoretically possible, the near-phobia many members, including the United States, exhibit toward voting would cause opposition entirely apart from the substance of any reform proposals. Many would fear setting a precedent for other votes in which the United States or other powerful Members would likely be on the losing side, and thus be unacceptable not only to the United States, but probably to Brazil, China, India, Russia, Japan and the EU, among others, as well. Moreover, given that the United States' complaints about the Appellate Body often relate to almost universally unpopular U.S. methodologies for application of its anti-dumping laws (e.g., zeroing and NME analysis),[68] it seems highly unlikely that any broad agreement, even well short of consensus, could be reached.

Another option, suggested at Georgetown's Institute for International Economic Law, proposes several relatively minor amendments to the DSU. Under that proposal, AB judges whose terms had expired would serve on the cases to which they had been assigned only if the oral argument had already taken place. This would mean that where AB proceedings greatly exceeded the 90-day limit in the DSU the carry-over would be limited to the period between the oral argument and the issuance of the decision, typically no more than two and a half months.[69] Arguably, this could be done without modifying the AB's procedural rules, article 15, with the AB refraining from authorizing carry-over unless the hearing had occurred.

A second proposal designed to encourage Members to join in the consensus for appointing new AB Members, would require a DSU modification providing an AB Member whose term had expired would continue to serve until after his/her replacement had been appointed.[70] While this would require a consensus of the Membership—a tall order under the current impasse—it is legally possible to amend the DSU simply by consensus in the DSB and then in the Ministerial Conference or General Council.[71]

Other short to mid-term options seem to us to be even less feasible. These would include action by the Appellate Body to amend its own rules to dispose automatically of appeals (making

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[67] *Ibid.*

[68] With the practice of zeroing, for example, as of 2012 the EU, Brazil, China, Ecuador, Japan, Korea, Mexico, Thailand and Vietnam are among the Members who have charged that zeroing is a violation of the Antidumping Agreement. In the view of all of them, zeroing increases the dumping margins by decreasing the export price (compared to the home market price or "normal" value by setting at zero all transactions where the export price is larger than the home market price, instead of taking the algebraic sum of all transactions. *See* EU Commission, *What is Zeroing*?, Feb. 6, 2012, *available at* http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149065.pdf (last visited Jan. 29, 2017) (listing Members that have challenged the United States' methodology and providing examples of the practice).

[69] *See Transition on the WTO Appellate Body: A Pair of Reforms?*, IIEL Issue Brief 2/2018 (February 2018), at 3, *available at* https://georgetown.app.box.com/s/jwcvlz2thwtv3dhgdne0nkfk3vlpv3sf (last visited Feb. 28, 2018) (noting that in the longest running AB proceeding, *Indonesia-Licensing*, all but 72 of the 265 days required to complete the proceeding occurred before the hearing).

[70] *Id.*, at 6-7.

[71] *Id.*, at 6, citing Article X:8 of the WTO Agreement.

the adoption of panel reports automatic); and any type of voting in the General Council or elsewhere that represented a departure from consensus or a departure from long-followed practice.[72] The latter would seem to include any actions taken by other bodies of the WTO to usurp the functions of the Dispute Settlement Body, where all decisions are taken by consensus.[73] Nor is there likely to be much support for taking the Members' frustration with the United States to other WTO Bodies, such as the General Council, where voting is theoretically (but not practically) possible, unless of course the United States withdraws from the WTO.

In the longer term, the other Members will be forced to contemplate an WTO without U.S. participation. Even if the United States does not formally withdraw—an eventuality that is no longer in my view beyond the realm of possibility—the remaining Parties would be free to try to move forward with what former WTO Director General Pascal Lamy has termed the "lonesome cowboy" scenario, in which the United States either withdraws or the remaining Members "in order to resist this U.S. offensive, build a WTO minus the U.S." As Lamy notes, "If a major power does not want to play by the rules of international disciplined trade, the others will have to react."[74]

V. Conclusion

While the United States clearly has a reasonable basis for considerable dissatisfaction with some of the Appellate Body's procedural and substantive practices, few observers are convinced that this unhappiness is worth emasculating the Dispute Settlement Mechanism, and with it risking the destruction of the rules-based international trading system that the United States was instrumental in fashioning seventy years ago. A return to the law of the jungle does not seem to be in the United States' medium and longer-term interests, particularly at a time when the emerging economic superpower (China) is currently far more protectionist than the United States, although the U.S. may catch up with its growing embrace of mercantilism and "America First" if current trade policies are pursued and expanded. Whether at this juncture a change in tone by the United States, and an expressed willingness to negotiate and compromise would be sufficient to move the WTO toward a compromise, or whether the well has been poisoned beyond the possibility of such efforts, but it seems to us to be worth making the attempt. The United States will be tested again in the coming months when a decision is made whether to reappoint by September 30, 2018 Shree Baboo Chekitan Servansing of Muaritius to a second term.[75] However, a recently leaked version of a bill would effectively abandon U.S. adherence to MFN treatment, the cornerstone of the GATT/WTO system.[76] Even if such legislation has no chance of being passed by the Congress,

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[72] *See* McDougall, supra note 64 (listing some of the various alternative proposals).

[73] DSB, *supra* note 2, art. 2:4 provides that "Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.

[74] *See* Tom Miles, *WTO Should Prepare for Life Without U.S., Ex-Chief Lamy Says*, REUTERS, Feb. 19, 2018, *available at* https://www.reuters.com/article/us-usa-wto/wto-should-prepare-for-life-without-u-s-ex-chief-lamy-says-idUSKCN1G326S (last visited Feb. 20, 2018) (quoting Lamy's statements).

[75] *See* Bryce Baschuk, *WTO Appellate Body Crisis Reaches New Phase,* Int'l Trade Daily (BBNA), Jun. 18, 2018, *available at* http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=136316601&vname=itdbulallissues&jd=00000164002ede44a7e550fec9100000&split=0 (last visited Jun. 16, 2018).

[76] *See* Jonathan Swain, *Exclusive: A Leaked Trump Bill to Blow up the WTO,* AXIOS, Jul. 1, 2018, *available at* https://www.axios.com/trump-trade-war-leaked-bill-world-trade-organization-united-states-d51278d2-0516-4def-a4d3-ed676f4e0f83.html (last visited Jul. 15, 2018).

its existence suggests that the U.S. Government tactics relating to the Appellate Body have a broader objective, that is to destroy the WTO and the post-war rules-based economic system.

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