WTO DISPUTE SETTLEMENT POST 2019: WHAT TO EXPECT? WHAT CHOICE TO MAKE?

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INTRODUCTION

Barring an unexpected breakthrough, in less than 6 months the World Trade Organization (WTO) will no longer have a functioning Appellate Body (AB). After 10 December 2019, when the term of two of the remaining three Appellate Body members (ABMs) expires, only a single ABM will remain in office. Three ABMs are needed to hear an appeal. The last time the AB was fully composed (seven ABMs) is now two years ago (June 2017).

In a 28 May 2019 speech, Ambassador Ujal Bhatia (of India), one of the three remaining ABMs, and 2018 Chair of the AB, described the situation, as he sees it, in the following terms:

> the transformation of the AB from 'crown jewel' to a problem child in urgent need of reform in the space of a few months has been as dramatic as it is mystifying … In the next few weeks and months, WTO Members face critical choices regarding the future of the multilateral trading system. Let us be clear – the crisis of the AB is the crisis of trade multilateralism … The choices that are made will define the prospects for international cooperation in trade for the next decades.[2]

Even more gloomy, Professor Peter Van den Bossche (of Belgium), former ABM, ended his farewell speech of the same date on this "somber note":

> There are very difficult times ahead for the WTO dispute settlement system. This system was – and currently still is – a glorious experiment with the rule of law in international relations. In six months and two weeks from now, this unique experiment may start to unravel and gradually come to an end. History will not judge kindly those responsible for the collapse of the WTO dispute settlement system.[3]

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[1] Many thanks to the organizers and participants of the World Trade Institute (WTI) Workshop on *WTO Appellate Review: Reform Proposals and Alternatives*, held in Geneva, at the WTO, on 24 May 2019, which prompted me to write this editorial. Thanks also to Nicolas Lockhart, Gabrielle Marceau, Robert McDougal and other individuals who preferred to remain anonymous for invaluable comments on earlier drafts. All errors and positions expressed remain mine and mine alone. The cut-off date for statistics and developments taken into account in this editorial is 1 July 2019.
[2] *Launch of the WTO Appellate Body's Annual Report for 2018*, Address by Ambassador Ujal Singh Bhatia, 2018 Chair of the Appellate Body, 28 May 2019, available at https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm.
[3] *Farewell Speech of Appellate Body Member Peter Van den Bossche*, 28 May 2019, available at https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

Leaving aside the question of who are "those responsible"[4], what does the imminent demise of the AB mean for the settlement of ongoing and future trade disputes? Section I of this editorial discusses two "unlikely solutions", at least in the short term: the US lifts its veto; a WTO organ unlocks the impasse. Section II turns to four "likely scenarios" that, in combination, and depending on the Member and dispute in question, are set to dominate the system post 2019, at least for an interim period:

(i) the default risk of appeals "into the void" followed by a block on panel reports (Scenario 1),
(ii) no appeal *ex post* or *ex ante* no appeal pacts (NAPs) followed by regular adoption of panel reports by the Dispute Settlement Body (DSB) under the negative consensus rule (Scenario 2);
(iii) Article 25 arbitration appeals making panel and appeal reports automatically binding without DSB adoption (Scenario 3); and
(iv) "floating" panel reports (or interim panel reports) that are neither adopted nor appealed/blocked (Scenario 4).

Parties may also resort to alternative dispute resolution (ADR) mechanisms[5] and discover dispute settlement processes under free trade agreements (FTAs) as parallel or alternative options.[6] These are not further discussed in this contribution, except for the Conclusion (Section III), which also points at ten "things to watch".

This novel, hybrid constellation will take time to crystallize and is likely to have profound effects on WTO dispute settlement and trade cooperation more broadly. A key development to observe is whether automatic adoption or bindingness of panel reports (the true revolutionary aspect of the shift from GATT to WTO[7]) will remain the rule (pursuant to Scenarios 2 or 3), or whether appeals "into the void" leaving panel reports blocked (pursuant to default Scenario 1) will become the "new normal". One alternative outcome could be that a panel report (or interim panel report) is neither adopted, nor appealed/blocked but simply "floats around" as a kind of "expert opinion" for potential use in continued negotiations (Scenario 4).

The transformation from GATT to WTO took half a century.[8] Regular veto rights in the settlement of trade disputes may be back in a matter of months. It is one thing to lose the AB (originally, a mere "afterthought"[9]), quite another to return to pre-WTO dispute settlement where panel outcomes are not automatically binding and power

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[4] *Ibid.*
[5] These ADR options include monitoring, good offices, mediation or "special trade concerns" that can be raised before specialized committees.
[6] For a recent example, see the EU request for the establishment of an arbitration panel under the EU-Ukraine Association Agreement challenging a Ukrainian export ban of unprocessed timber, available at http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf.
[7] See Tweet by Rambod Behboodi, 11 December 2018, available at https://twitter.com/GenevaTradeLaw/status/1072434493414346752 (« People forget that the genius of the Uruguay Round was not the AB - the AB was an afterthought to *address* the genuine innovation. Rather, it was mandatory jurisdiction and negative consensus on adoption").
[8] See Joost Pauwelyn, *The Transformation of World Trade*, 104 Michigan Law Review, 2005, 1-70.
[9] See Peter Van den Bossche, *From Afterthought to Centrepiece: The Appellate Body and Its Rise to Prominence in the World Trading System*, in Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes, eds, The WTO at Ten: The Contribution of the Dispute Settlement System (Cambridge, UK: Cambridge University Press, 2006) at 201.

relations play a greater role. At the same time, it would be wrong to equate a (temporary?) return to GATT-style dispute settlement with the collapse of a rules-based WTO system. Most optimistically, Robert McDougall, a former Canadian diplomat, put it as follows:

> effective trade cooperation, and trade peace, depends on more than just the availability of enforceable dispute settlement … Of course, hard cases will again be more difficult to resolve … But a diminished dispute settlement mechanism is unlikely, on its own, to open the floodgates for trade distorting measures. WTO members will continue to respect their trade obligations, which will remain binding, just as they do their international commitments in other areas … Information exchange and mutual learning, as well as the reputational costs associated with a measure being challenged can all still positively affect the outcome of a dispute, even if formal enforcement options are denied.[10]

Indeed, although it is easy to get nostalgic about WTO dispute settlement as we know it, the system, as it developed in the first 25 years of the WTO, is far from perfect (and this, even if one makes abstraction of US concerns regarding AB "overreach", discussed below).[11] Most importantly, since, as Ambassador Bhatia put it, "the crisis of the AB is the crisis of trade multilateralism"[12] it would be naïve to think that merely appointing new ABMs and reactivating a fully composed AB will fix the DSU's challenges, let alone resolve the current crisis in trade multilateralism. The AB stalemate is a symptom of this crisis, not its cause. Most likely the opposite will be true: only once WTO Members restore trust and find a new accommodation in their trading relations through the WTO's negotiating arm will the impasse in the WTO's enforcement branch start to untangle.

This editorial focuses on panel reports released *after* 10 December 2019. It is, however, important to stress that appeals pending before the AB on that date will likely by carried-over and completed by former ABMs somewhere in 2020/2021. Indeed, for those appeals, the AB is likely to trigger Rule 15 of its Working Procedures. On 1 July 2019, a record 13 appeals were pending before the AB,

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[10] Robert McDougal, *Impasse in the WTO Dispute Settlement Body: Consequences and Responses*, ECIPE Policy Brief No. 11/2018, available at https://ecipe.org/wp-content/uploads/2018/12/ECI_18_PolicyBrief_WTO_11-2018_LY06.pdf. See also Joost Pauwelyn, *Rule-based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties*, 17 Journal of International Economic Law (2014) 739-751 (approaching "rules-based trade" not so much from the perspective of bindingness and automatic dispute settlement, that is "*output* and *effect*", but rather with reference to "*input* and *content* of the rules in the first place (who defines the rules, how were they adopted, are the rules welfare enhancing, coherent and adapted to new developments?)", thereby including as "rules-based" also informal rules and international standards that are not binding and not subject to automatic dispute settlement.

[11] See Joost Pauwelyn and Weiwei Zhang, *Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload*, 21 Journal of International Economic Law 2018, 461-487, finding that a mere 20 (out of 164) WTO Members represent 85% of all DSU participation as main parties; more cases may be pending than ever but this is mainly because proceedings take longer, not because more new cases are filed (at least not up to 2018); of the cases filed in recent years, close to half of them are trade remedy cases; fewer cases get settled; the appeal rate remains very high (close to 70% of panel reports); and compliance is an increasing problem (close to one in four adopted panel or AB reports have required an additional compliance proceeding).

[12] See above footnote 2.

including four disputes originally filed against the United States and mega-cases such as *Australia – Plain Packaging*.[13] Rule 15 provides that outgoing ABMs "may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal" to which they were assigned before the end of their term. Rule 15 is permissive: there is no obligation for outgoing ABMs to continue to sit on pending appeals nor for the AB to authorize such carry-over even if an ABM requests it. In addition, the US has vehemently objected to the practice of carry-over appeals without specific DSB approval.[14] Yet, the AB has, to date, consistently triggered Rule 15 for outgoing ABMs. If it does so again on 10 December 2019, ABMs will continue to work, and AB reports will continue to be issued well into 2021.

I. "DON'T EXPECT A MIRACLE": TWO UNLIKELY SOLUTIONS

A. The US Lifts Its Veto And New ABMs Get Appointed

A first possibility is that the United States, after more than two years of blocking the process[15], agrees to start the selection procedure to appoint new ABMs and that, by December 11, at least two new ABMs get appointed. In that (unlikely) event, appeals can continue to be heard and WTO dispute settlement survives both with a functioning Appellate Body and automatic adoption of panel and AB reports. This scenario is unlikely.

At the most recent meeting of the DSB, held on 24 June 2019, the United States reiterated that it is "not in a position to support the proposed decision", submitted for the 11th time by what is now a group of 75 WTO Members, to start the selection procedure. In the US' view, the "systemic concerns that we have identified remain unaddressed".[16]

US "systemic concerns" focus on AB "overreaching and disregard for the rules set by WTO Members". A first set of US concerns relate to AB rulings on substantive questions under the WTO treaty which according to the US

> have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.[17]

A second set of US concerns relate to "agreed dispute settlement rules", more specifically, (i) the AB making "advisory opinions on issues not necessary to resolve a dispute", (ii) the AB reviewing "panel fact-finding [in particular, on the meaning of

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[13] For pending appeals, see https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.
[14] See below text at footnote 18.
[15] Article 2.4 of the DSU provides that, unless otherwise stated in the DSU, any DSB decision, including a decision to start the process of nominating new ABMs (as well as the actual decision to appoint new ABMs) requires consensus amongst all (164) WTO Members.
[16] *Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva*, June 24, 2019, at p. 14-15, available at https://geneva.usmission.gov/2019/06/25/statements-by-the-united-states-at-the-june-24-2019-dsb-meeting/.
[17] *Ibid.*, at p. 14.

domestic law] despite appeals being limited to legal issues", (iii) the AB asserting that "panels must follow its reports although Members have not agreed to a system of precedent in the WTO", and (iv) the AB "continuously disregard[ing] the 90-day mandatory deadline for appeals".[18]

The US has linked addressing these concerns to unlocking the appointment of any new ABMs. Although the US has presented its concerns in great detail, it has not, to date, explained what it would need or want to see happening for those concerns to be adequately addressed.[19] Moreover, it remains unclear whether addressing US concerns regarding the AB would be sufficient to break the deadlock. Speaking to the US Senate Finance Committee in March 2019, US Trade Representative (USTR) Robert Lighthizer implied that the US veto regarding AB appointments was used not only as leverage to obtain a course correction in WTO dispute settlement but also to push through larger, substantive reforms at the WTO (concerning, for example, the question of developing country status).[20]

In the meantime, an increasing number of WTO Members have made specific proposals to address US concerns. A process to address those concerns and to solve the deadlock, led by the current DSB Chair, Ambassador David Walker of New Zealand[21], continues and may lead to results, if not by the end of 2019, then perhaps at some point in the future. The first milestone post 2019 is the WTO's 12th Ministerial Conference to be held in Nur-Sultan, Kazakhstan, in June 2020. The next crucial date to watch is the November 2020 US Presidential election.

B. One Of The WTO's Organs Unlock The Impasse

Is there anything that the WTO as an institution could do to overcome the US-initiated blockage? One idea, proposed as early as November 2017 by Pieter Jan Kuijper, a former director of the WTO Legal Affairs Division, calls on either the DSB or the WTO General Council to start the ABM appointment procedure by majority vote, thereby overruling the US veto.[22] Another idea, voiced by Professor Steve Charnovitz, would have the AB itself change its Working Procedures in such a way that once an appeal is filed and the number of ABMs has dropped below four (or, soon, below three), the appeal will be considered as automatically "completed". The appeal would then simply be sent back to the DSB for it to adopt the underlying panel

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[18] *Ibid.*

[19] The US did, however, express the view that it wants a return to 1995, that is to press the « reset button » on the DSU (not a return to the pre-WTO GATT system), see text at footnote 31 below.

[20] *Lighthizer: Appellate Body blocks the only way to ensure reforms*, Inside U.S. Trade's World Trade Online, 12 March 2019 (where Lighthizer is quoted as saying: "If you're not willing to be bold and use the only leverage you have with the WTO, which is to say that we won't approve the appointment of Appellate Body members without reform, I don't know any other way to do it").

[21] See *Informal Process On Matters Related To The Functioning Of The Appellate Body – Report By The Facilitator, H.E. Dr. David Walker (New Zealand)*, 8 May 2019, General Council, JOB/GC/217, listing proposals by, for example, Chinese Taipei, Brazil, Japan, Australia and Thailand. For the most recent proposal, see *Appellate Body Impasse*, Communication from the African Group, 26 June 2019, WT/GC/W/776.

[22] *Guest Post from Pieter Jan Kuijper on the US Attack on the Appellate Body*, IELP Blog, 15 November 2017, available at https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html#comments.

report following the traditional negative consensus rule set out in Article 16.4 of the DSU.[23]

The Kuijper proposal would preserve both the Appellate Body and automatic dispute settlement. The Charnovitz proposal would accept the (temporary) demise of the AB but at least save binding dispute settlement (appealed panel reports would be automatically sent back to the DSB and still be subject to adoption without veto rights).

Either of these proposals could still be acted upon today (the Charnovitz AB proposal would, of course, require at the very least one ABM; the term of the last ABM ends on 30 November 2020). Advocates of these proposals argue that the demise of the AB and return of veto rights to block the adoption of panel reports may happen in a matter of months; once this has happened, to resurrect automatic WTO dispute settlement may take "at least a generation".[24] Hence, so the argument goes, exceptional times justify exceptional measures.

In reality, this scenario is highly unlikely. The legality of both proposals has been questioned.[25] In addition, there is little political appetite amongst WTO Members to sideline the US in this way[26] and/or to set a precedent of majority voting that could backfire against them in the future.[27] Even though Article 17.9 of the DSU grants the AB the power to draw up its own Working Procedures without the need for DSB approval[28], it is hard to imagine that ABMs, in the current climate where they face relentless critique of "persistent overreach", would change their Working Procedures to effectively "take away" the right of Members to appeal panel reports.[29]

In sum, the chances that WTO organs themselves, be it the General Council, DSB or AB, step up to the plate to "save" the AB and/or binding WTO dispute settlement are slim.

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[23] Steve Charnovitz, *How To Save WTO Dispute Settlement from the Trump Administration*, IELP Blog, 3 November 2017, available at https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html.

[24] *Guest Post from Pieter Jan Kuijper*, footnote 22 above.

[25] See, for example, the comments to the Kuijper and Charnovitz blog posts referred to in footnotes 22 and 23 above.

[26] See the DSU statistics provided in the text at footnote 64 below.

[27] Majority voting is, however, explicitly provided for in Article IX:1 of the Agreement Establishing the WTO which provides as follows: "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting". Article 2.4 of the DSU provides, however, that "[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus".

[28] Article 17.9 provides: "Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information". AB Working Procedures (WT/AB/WP/6, 16 August 2010), in turn, provide that the AB "shall make every effort to take [its] decisions by consensus" but adds that "[w]here, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority vote" (Rule 3(2)). No quorum is explicitly provided for. Rule 3(1) states that "decisions [other than those relating to an appeal] shall be taken by the Appellate Body as a whole".

[29] In response, one could, of course, argue that it is not the AB that « takes away » the right to appeal but the failure by the WTO Membership to appoint ABMs that caused the AB's demise and, with it, the impossibility to exercise the right to appeal.

II. "CHOOSE CAREFULLY": FOUR LIKELY SCENARIOS

A. Scenario 1: The Default Risk - Appeals "Into The Void" Followed By A Block On Panel Reports

Without a functioning AB, the default risk is that, for panel reports released post 10 December 2019, the losing party appeals the panel report to nowhere, i.e. "into the void", thereby blocking the panel report's adoption by the DSB. One question is whether this will become the "new normal" or remain the exception, a kind of "nuclear option". Predictions are difficult. It would be naïve to think that appeals "into the void" will not happen. Yet, they may occur less than one could think at first blush. Much will depend on how WTO Members react to such appeals.

1. The Option To Appeal "Into The Void" As A *De Facto* Return To The GATT System

Pursuant to Article 16.4 of the DSU an appeal without a functioning AB in place would effectively block the procedure. Article 16. 4 provides that

> [i]f 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.

As long as there is no AB (i.e. less than three ABMs) to "complete" the appeal, the case would remain in limbo and the underlying panel report cannot be adopted. To unblock the process one would then either (i) have to restore the AB so the appeal can be "completed" (this may potentially happen months or even years after an appeal "into the void") or (ii) garner a positive consensus of all WTO Members (including the party or parties that appealed in the first place) to neutralize Article 16.4 and nonetheless adopt the panel report. The latter would, in effect, bring us back to a system akin to that of the GATT, where panel reports could only be adopted by positive consensus of all GATT parties. In other words, the losing party would have to agree to adopt an adverse panel report.

This means that even though the systemic crisis in WTO dispute settlement is, so far, limited to the AB[30], chances are that for panel reports issued post 10 December 2019 the system will lose (at least temporarily and in a sub-set of cases) both the AB *and* automatic adoption or bindingness of panel reports. In other words, WTO Members will still be able to file WTO requests for consultations, and WTO dispute panels will still be automatically established and composed and publicly circulate their final reports. However, when it comes to the adoption of those panel reports by the DSB, the losing party will, in effect, have a veto right against adoption, to be exercised simply by filing an appeal "into the void".

The chances of appeals "into the void" and resulting blockage of panel reports are real unless Members agree to Article 25 appeal arbitration or NAPs, both discussed below. Either of these two alternatives would require *ex ante*, positive action or agreement by Members, not easy given the inherent inertia in government administration.

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[30] To this date, even the US has not criticized the first stage panel process (although it has criticized individual panel reports) or formally objected to automatic panel establishment and adoption of panel reports by negative consensus.

Formally, the US position is that it wants to push the "reset button" on WTO dispute settlement, that is, go back to 1995, when the DSU entered into force and none of the AB "overreach" had yet occurred. What the US insists on is implementation of DSU rules as written, not a reform of these rules. Importantly, such "reset" includes an AB and automatic adoption of panel reports. US Ambassador Shea put it as follows, when rejecting certain DSU reform proposals submitted by other Members at the General Council in December 2018:

> Rather than returning the WTO dispute settlement system to what was agreed to by Members in the Dispute Settlement Understanding, the proposals instead appear to endorse changing the rules to accommodate and authorize the very approaches that have given rise to Members' concerns … The United States has made its views on these issues very clear: if WTO Members say that we support a rules-based trading system, then the WTO Appellate Body must follow the rules we agreed to in 1995.[31]

Informally, however, USTR Robert Lighthizer's nostalgia for GATT dispute settlement is well known. In a September 2017 interview, for example, he stated the following:

> there was a system, it was before 1995, before the WTO, under the GATT … where you would bring panels and then you would have a negotiation. And, you know, trade grew and we resolved issues eventually … it's a system that, you know, was successful for a long period of time.[32]

Lighthizer has a point that, overall, GATT dispute settlement was surprisingly successful.[33] Even with the option for losing parties to block panel adoption, 71% of all GATT-era panel reports issued were adopted by (positive) consensus (96 out of 136).[34] And even un-adopted panel reports (or interim panel reports) are likely to play a guiding role or to reshuffle the bargaining chips in ongoing negotiations (see Scenario 4 below). Following Lighthizer's view quoted above, a panel report (whether interim or final, adopted or not) is then, in essence, just one element, a kind of "expert report", in what remains a political negotiation to settle a trade dispute. WTO rules and panel reports may draw lines in the sand and put a thumb on the scale. Yet, the aim of WTO dispute settlement is, in the words of Article 3.7 of the DSU "to secure a positive solution to a dispute" and a "solution mutually acceptable to the parties to a dispute … is clearly to be preferred".[35]

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[31] *Statements by the United States at the Meeting of the WTO General Council*, Geneva, December 12, 2018, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec12.GC_.Stmt_.items_.7.and_.8.as_.delivered.clean_.pdf. See also US Statements at the June 24, 2019, DSB meeting, footnote 16 above (« The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system").

[32] Interview of USTR Robert Lighthizer by John Hamre, U.S. Trade Policy Priorities, Center for Strategic and International Studies, 18 September 2017, at: www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative.

[33] For a largely positive assessment, see Robert Hudec, The GATT Legal System and World Trade Diplomacy, Butterworth Legal Publishers, 2nd edition, 1990.

[34] See *GATT Disputes: 1948-1995*, Volume 1, 2018, at p. 25, available at https://www.wto.org/english/res_e/booksp_e/gatt4895vol1_e.pdf.

[35] Note, furthermore, that textually pursuant to Article 19.1 of the DSU, panel or AB findings of

There are, however, two wrinkles. Firstly, in the last five years of GATT (1990-1994), as diversity between parties grew, and rules as well as cases became more complex, only 41% of panel reports were adopted by consensus (59%, or 16 out of 27 reports, remained in stalemate).[36] Especially cases that involved, as (losing) defendants, the US or the EEC (as the EU was then called) – the two dominant parties at the time – were routinely blocked. Some of this feet dragging may be due to anticipation of the outcome of the Uruguay Round (UR) negotiations and the prospect to (re-)litigate disputes under new UR rules and procedures. However, with a greater number of powerful players currently in the WTO (not only the US, the EU and Japan, but also, for example, China, Brazil and India) and more economic and political diversity in the Membership (whereas GATT could be described as a "club of like-minded countries", the WTO is quasi-universal), blockage by means of an appeal "into the void" can be expected. Rules and cases today are even more complex compared to 25 years ago. Hence, it would be naïve to think that WTO Members (especially powerful ones) will not appeal "into the void" if and when the opportunity and need arises.

Secondly, although 71% is the overall rate of consensus adoption of GATT-era panel reports, the rate for panels deciding on trade remedies was considerably lower: 43% for Tokyo Round Code Anti-Dumping cases (3 out of 7); 50% for Tokyo Round Code Subsidies cases (7 out of 14).[37] Today the ratio of trade remedy cases compared to other cases is much higher than in the GATT-era. Indeed, while trade remedy disputes only represented 23% of total disputes brought to the WTO from 1995 to 1999, that share almost doubled to 45% between 2012-2016. Trade remedy measures impose direct harm on specific countries and exporters and offer concrete protection to competing domestic producers. It should, therefore, not come as a surprise that losing parties in trade remedy cases (statistically speaking, most likely the defendant, that is, the party who enacted the trade remedy) find it particularly hard to join a consensus in favor of adopting an adverse panel report. Where loss is concentrated (rather than diffuse), the pressure to block an adverse panel ruling will likely be higher.[38]

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violations lead to a mere « recommendation » to the violating Member to bring the measure into conformity with the WTO treaty. Article 19 is even entitled « Panel and Appellate Body Recommendations ». Similarly, pursuant to Article 7.2 of the DSU, setting out the standard terms of reference of panels, a panel's role is « to assist the DSB in making the recommendations or in giving the rulings provided for in" the relevant agreement.

[36] See *GATT Disputes*, above footnote 34.

[37] *Ibid.*

[38] See L. Johns and K. Pelc, *Free-Riding on Enforcement in the WTO*, Journal of Politics, forthcoming, on file with the author, arguing that « the likelihood that a country challenges a protectionist policy [in WTO dispute settlement] is linked to how concentrated or diffuse the policy is"; faced with "concentrated policies", such as trade remedies which generally affect only one or a small number of countries as well as one or a small number of companies within each of those countries, the smaller group of victims of the policy have an easier time to overcome the collective action problem of (mobilizing support for, and sharing the cost of) filing a WTO dispute. This may, indeed, partly explain why close to half of WTO disputes filed today relate to trade remedies.

2. The Cost of Appealing "Into The Void"

There are also important costs that may temper appeals "into the void". Four factors come to mind.

Firstly, *self interest*: on balance, even if a panel report may include objectionable findings, both parties may, on aggregate, find the report acceptable. An escalation in the number of appeals "into the void" may also undermine the overall effectiveness of WTO dispute settlement and thereby the underlying interest of the Member concerned.

Secondly, and relatedly, *emulation*: if a Member appeals "into the void", the risk of other Members doing the same in other disputes, including in cases where the appealing Member is on the winning side, increases.

Thirdly, *reputation*: blocking the adoption of a panel report by appealing it "into the void" may be seen as a "bad faith move" and damage the reputation and reliability of the Member in question, including when it comes to credibly negotiating new rules. This reputation cost can be created v-à-v the specific party (or parties) in a given dispute and/or be general towards the entire WTO Membership. It may vary depending on the circumstances. For example, if a WTO Member which has consistently supported the appointment of new ABMs appeals "into the void", that Member can more legitimately claim that it is filing its appeal, not to block panel adoption *per se*, but in the hope that the AB will soon be recomposed so the appeal can be substantively addressed at some point in the near future.

Fourthly, *retaliation*: especially weaker WTO Members may be pushed into accepting an adverse panel report (and not to appeal it "into the void") for fear of retaliation elsewhere, be it another pending trade issue, such as eligibility for trade preferences, or unrelated development aid or military protection. Moreover, an appeal "into the void" may block adoption of the panel report. It will not necessarily prevent the (winning) claimant, especially if it is a powerful Member, from retaliating anyhow and this outside of DSU rules. The claimant may, for example, argue (rightly or wrongly) that since the defendant is blocking the panel report, the claimant is, in turn, no longer bound by the DSU either. Exactly this type of response is what USTR Robert Lighthizer spoke about at an 18 June 2019 US Senate Finance Committee hearing, albeit in the context of the USMCA and the possibility there for a party to block the proceeding by refusing to appoint panel members:

> Our view is that we can enforce our laws in the rare circumstance where there was a blockage by using our unilateral law and the 301. [Section] 301 [of the 1974 US Trade Act] says you should go to the international organization or the agreement for enforcement if there is a violation of a trade agreement, or the WTO in this case. If the other side blocks, the position you would take is that thus you've exhausted your remedies and therefore you could legally use 301 [and retaliate unilaterally].[39]

[39] See US Senate Committee on Finance, Hearing of 18 June 2019, available at https://www.finance.senate.gov/hearings/the-presidents-2019-trade-policy-agenda-and-the-united-states-mexico-canada-agreement (quote starts at 2:03:07, underlining added) and the discussion at

In this event, and leaving aside the question of whether such unilateral retaliation under Section 301 would be WTO consistent, appealing an adverse panel report "into the void" may actually make things worse for the losing defendant. Under a DSB adopted panel report US retaliation would, legally speaking, be capped by the Article 22.4 equivalence standard[40] and monitored by a separate arbitration procedure under Article 22.6.[41] In contrast, US unilateral retaliation outside the DSU may not be so capped, cannot be challenged in Article 22.6 arbitration and may hence "punish" the defendant even more.[42] In the end, power relations may, therefore, push weaker parties *not* to appeal "into the void".

3. The Option To Appeal "Into The Void" Enhances The Role Of Power And May Lead To Escalating "Trade Wars"

The option to appeal "into the void" is likely negative in particular for *weaker* WTO Members. Panel reports *won* by weaker Members but subsequently blocked by an appeal "into the void" will, for weaker Members, become even harder to enforce, in the absence of credible retaliation. In contrast, when weaker parties *lose* before a panel, appealing the report "into the void" is unlikely to prevent retaliation (by the stronger party) anyhow. The opposite may be true for the *most powerful* WTO Members such as the US, EU or China: Panel reports won by those Members but blocked are not likely to stop them from retaliating anyhow or from obtaining some kind of redress; panel reports lost by those powerful Members, in contrast, can be appealed "into the void" with, in many cases, only reputational consequences (discussed above).

The main space to watch then is WTO disputes *amongst equally powerful* players, say, between the US and China. In those disputes, retaliation (even outside the DSU) is credible on both sides, and so are appeals "into the void". In those trade relationships, unless considerable restraint is exercised, WTO dispute settlement post 2019 may quickly evolve into reciprocal blocking of panel reports, resulting retaliation and counter-retaliation without the normal DSU controls and, ultimately,

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https://ielp.worldtradelaw.net/2019/06/ustr-lighthizer-comments-on-naftausmca-state-state-ds-panel-blocking.html.

[40] Article 22.4 of the DSU provides: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment [caused by the original violation]".

[41] According to Schwartz and Sykes, for example, it is neither the AB nor automatic adoption of dispute reports that is the DSU's biggest innovation. Instead, it is the DSU's cap on retaliation. On this view, the DSU is as important, if not more important, for defendants as it is for claimants. In their view, « the institutionalization of a [DSU] sanctioning mechanism was not motivated by a perceived need to increase the penalty for violations, but rather by a need to decrease the penalty. In particular, the GATT system relied on unilateral retaliation and reputation to police the bargain. Toward its end, unilateral retaliation became excessive and interfered with opportunities for efficient breach. The WTO mechanism for arbitrating the magnitude of proposed sanctions is the major innovation under WTO law and ensures that sanctions are not set too high" (Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. Legal Stud. 179-204 (2002), at 179, underlining added).

[42] The unilateral retaliation could, of course, be challenged before a new WTO panel, but this will take time and even if the defendant in the original proceeding wins this challenge, the question remains whether the retaliating claimant would implement such adverse finding for as long as the violation found in the original proceeding persists.

escalating "trade wars" in respect of which WTO rules lose constraining influence. If that were to happen, the entire WTO dispute settlement system may lose its credibility and appeal. Affected traders and potential claimants may simply stop filing disputes as the cost of doing so may no longer be worth the potential benefits that can be derived from the system. Indeed, for weaker Members, why file a request for WTO consultations, and spend one or two years litigating before a panel, if at the end, the losing party can anyhow block the outcome? If, for powerful Members, reputational costs and retaliation can be triggered with or without an adopted panel report, why bother going through the proceeding?

4. What Does The Absence Of An AB and Option to Appeal "Into The Void" Mean for Panels?

Finally, the absence of an AB and threat of appeals "into the void" are likely to have an important impact also on WTO panels themselves.[43] Firstly, "looking above", panels will no longer have an AB "breathing in their neck". What panels decide is either going to be the "final word" or to be appealed "into the void". With the AB gone, the process of interim reports by panels, on which the parties may comment before the final report is issued, may transform itself into a mini-appeal, albeit before the same adjudicators. The absence of AB control may also lead to shorter panel reports. Without an appeal, panels may feel less need to explain their reasoning in great detail, nor to provide alternative findings in case of reversal. In the absence of an AB, precedents may also play less of a role and thereby fill fewer pages. At the same time, the absence of an AB may lead to contradictory panel rulings, even when it comes to the same or similar measures. This may reduce a panel's (or Article 25 arbitrator's) compliance pull and, over time, undermine the predictability and legitimacy of WTO rules. It may also, in turn, further complicate the conclusion of new rules (if reforms or new rules are not subject to binding enforcement, some countries may hesitate to commit in the first place).

Secondly, "looking ahead", panels will be acutely aware (as they were in the GATT-era) that the substance of their findings will influence the likelihood of adoption of their report. This may lead to more pragmatic analyses and outcomes. Panels may, for example, be inclined to rule against defendants on the narrowest ground possible (no *obiter dicta*) so as not to upset the losing party too much and thereby avoid an appeal "into the void". The threat of blockage may also restore some balance between WTO adjudicators and control by WTO Members themselves. At the same time, panel reports may also become more political or power-influenced, skew results in favor of the strongest party and thereby undermine the (appearance of) independence of adjudicators and broader trust in the system.

5. Conclusion on Scenario 1

In sum, Scenario 1, appeals "into the void", followed by a block on panel reports, or at least the threat thereof, is likely to play an important role post 2019, especially in sensitive cases (where the pressure to block exerted by losing domestic constituencies

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[43] See, more broadly, Joost Pauwelyn, *WTO Panels Without an Appellate Body : Can Rules-Based Dispute Settlement Survive Post December 2019 under the Status Quo?* IELP Blog, 22 May 2019, available at https://ielp.worldtradelaw.net/2019/05/wto-panels-without-an-appellate-body-can-rules-based-dispute-settlement-survive-post-december-2019-u.html.

will be high) and in disputes where a powerful defendant loses a case against a weaker claimant (think of the US or China defending trade remedy cases) or in disputes between equally powerful parties (think of US-China or EU-US disputes). Complex incentive structures are at play, both in favor and against exercising this option. It is, however, unlikely that Scenario 1 becomes the "new normal". What is clear, however, is that the threat of appeals "into the void" will, in the terminology used by John Jackson, and in what is necessarily a continuum, put a thumb on the scale away from the pole of "rule oriented" and closer to the pole of "power oriented".[44] At worst, the option of appeals "into the void" may lead to escalating "trade wars" and a (temporary) desuetude of the WTO dispute settlement system altogether. This, in turn, could further complicate substantive reform of the WTO and the conclusion of new rules: if reforms or new rules are not subject to binding enforcement, some countries may hesitate to commit in the first place.

B. Scenario 2: Taking a NAP? - No Appeal Followed By Automatic Adoption of Panel Reports

A first option to prevent appeals "into the void" is to find party agreement not to appeal. This may seem like a rational, easy choice to make. Looked at more carefully, no appeal pacts (NAPs) will most likely be hard to conclude.

1. Costs and benefits of appeal with *versus* without an AB in place

How likely is it that disputing parties agree not to appeal a panel report so that the panel report (in the absence of an AB) can be adopted by the DSB, by negative consensus, pursuant to Article 16.4 of the DSU (Scenario 2)?

To date, and *with* an AB in place, both parties refrained from appealing, and the panel report was adopted without an appeal, in only 32% of cases.[45] A recent example is the *Russia – Transit* case, the first WTO report to substantively address a national security defense under GATT Article XXI. For a variety of reasons[46], neither Russia nor Ukraine appealed the panel report and the report was adopted, pursuant to the traditional negative consensus rule, on 26 April 2019.[47] The current WTO appeal rate of 68% is high, compared to other legal systems. It is largely explained by the state-to-state nature of WTO dispute settlement: when a state loses in front of a panel and it has the treaty right to appeal, political constituencies will need good reasons to understand why the government forewent its second bite at the apple. In addition, in 83% of appeals, the AB modified or reversed at least one aspect of the panel report.[48] With such a high success rate before the AB, no wonder parties are inclined to appeal.

However, on appeal, the AB may also make the loss worse (in particular as a result of

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[44] See, for example, John H. Jackson, The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations (Cambridge: Cambridge University Press, 2000) at p. 6–10.
[45] See Pauwelyn and Zhang, footnote 11 above, at p. 13.
[46] For Russia, the end result was positive in that its measures were found to be justified as national security measures. For Ukraine, the panel's reasoning was a win : the panel rejected Russia's argument that GATT Article XXI is self-judging and objectively analyzed, with varying degrees of deference, compliance with the different requirements in Article XXI.
[47] Panel Report on *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted on 26 April 2019.
[48] Statistics on file with the author, based on WTO public data.

a counter-appeal by the other party) or set the adverse panel finding in stone (a "bad" finding by a panel is one thing; getting that finding confirmed by the AB quite another). The risk of losing (also) on appeal puts a break on appeals. Without an AB in place, this risk, and corresponding break, is gone.

Indeed, *without* a functioning AB, the incentive to appeal, at least for the losing party, is obvious: the mere filing of an appeal "into the void", guarantees that the adverse panel finding will remain in limbo (at least until new ABMs are appointed) and cannot be adopted by the DSB (except, perhaps, by positive consensus). At the same time, appealing "into the void" will raise new and often important costs (discussed earlier, namely: self-interest, risk of emulation and retaliation, and reputation costs).

As a result, for panel reports issued post 10 December 2019, the likelihood that neither party appeals is difficult to predict. It will vary depending on the circumstances and parties involved.

2. *Ex Ante* No Appeal Pacts (NAPs): Not Very likely

One possible solution to avoid appeals "into the void" is for Members to sign up to a no appeal pact (NAP) *before* a dispute arises or, at least, before a panel issues its (interim) report. At a time where winner and loser have not yet been identified, foregoing the right to appeal may be easier. As long as both parties consider that they have a fair chance of winning their case before a panel (an assumption that cannot be taken for granted as in 89% of panel reports at least one violation is found[49]), concluding a NAP so as to secure an at least plausible future win (no appeals "into the void") makes sense. In one case to date, *Indonesia – Iron or Steel Products*, the disputing parties (Viet Nam, Chinese Taipei and Indonesia) concluded such NAP, in the context of Article 21.5 compliance proceedings.[50] Paragraph 7 of their so-called "sequencing agreement" provides as follows:

> The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU.

This NAP would have ensured, especially Viet Nam and Chinese Taipei as claimants, that in the event a compliance procedure was needed, the other side would not have the option to appeal and thus block an adverse Article 21.5 panel report.

This raises the question of why a defendant (in this case, Indonesia) would ever agree to a NAP in a specific case? Indeed, if the panel finds *no violation* (the defendant wins across the board, which, on average, happens in only 11% of cases), for the

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[49] See http://worldtradelaw.net/databases/violationcount.php. This percentage is the same for both original and Article 21.5 compliance proceedings.

[50] See *Indonesia – Safeguard On Certain Iron Or Steel Products, Understanding Between Indonesia And Chinese Taipei Regarding Procedures Under Articles 21 And 22 Of The DSU*, WT/DS490/13, 15 April 2019 and *Indonesia – Safeguard On Certain Iron Or Steel Products, Understanding Between Indonesia And Viet Nam Regarding Procedures Under Articles 21 And 22 Of The DSU*, WT/DS496/14, 27 March 2019.

defendant, an appeal "into the void" by claimant(s) has little effect: It merely blocks a finding of no violation; as no violation is confirmed, the defendant does, technically, not need to do anything while the panel is in limbo.

If, on the other hand, the panel *finds a violation* (the defendant loses at least one claim, as happens in 89% of cases), a NAP would write this violation in stone by taking away the defendant's right to appeal. In contrast, an appeal by defendant would block the adoption of the panel report and avoid a DSB finding of violation. In other words, for defendants, whether they win or lose, appeals "into the void" are not an inherent problem.[51] It is, therefore, hard to imagine that defendants would easily agree to a NAP at the start of or pending a specific case. That Indonesia did so in *Indonesia – Iron or Steel Products* is most likely explained by the fact that Indonesia, at the time it signed the NAP, had already withdrawn (or was days away from withdrawing) the offending measure.[52]

Realistically, this makes NAPs – which, in essence, are attractive only for claimants -- only likely if they apply *ex ante* for all possible disputes between two or more WTO Members which, traditionally, have trade disputes where each side is, overall, equally likely to be claimant (such as between Argentina and the US which, to date, each filed 5 cases against the other).[53] And even in such situation, politically speaking, governments may find it hard to *ex ante* give up their DSU "treaty right" to appeal: Although, on balance, considering all bilateral disputes, this may be rational, it will be hard for any government to explain to the losing constituency in a specific dispute why an *ex ante* NAP was concluded.

3. Conclusion on Scenario 2

In sum, post 10 December 2019, there will no doubt be some panel reports that remain un-appealed *and* are automatically adopted by the DSB. Firstly, *ex post* neither party may decide to appeal "into the void" (as in *Russia – Transit*), in particular because of the (variable) cost of such appeals (including reputation costs and risk of emulation and retaliation). Secondly, parties may have concluded a NAP *ex ante* (as occurred, rather exceptionally, in *Indonesia – Iron or Steel Products*). However, such NAPs are, in essence, attractive only for claimants. Hence, it is far from certain that no appeal followed by automatic panel adoption (Scenario 2) will become the new standard practice.

C. Scenario 3: Preserving Appeal And Bindingness - Article 25 Appeal Arbitration

Besides NAPs, a second option to prevent appeals "into the void" is Article 25 appeal arbitration.[54] This option is on the table but Members seem to hesitate to sign up to it.

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[51] But see the potential costs of appeals « into the void », discussed under Scenario 1.

[52] See *Indonesia – Safeguard On Certain Iron Or Steel Products, Communication from Indonesia*, WT/DS490/14 and WT/DS496/15, 16 April 2019 where Indonesia announces the withdrawal of the measure as of 28 March 2019. The NAP agreed to with Viet Nam was sent to the DSB on 22 March 2019, the one with Chinese Taipei on 11 April 2019.

[53] See statistics at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[54] Originally proposed in Scott Anderson, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy and Iain Sandford, *Using Arbitration Under Article 25 of the DSU To Ensure The Availability Of Appeals*, Graduate Institute, Geneva, CTEI Working Papers, 2017-17.

It is the only option that preserves both an appellate stage *and* automatic bindingness of dispute settlement rulings. Whether it becomes a popular option may depend on how the first of these arbitrations plays out in practice.

1. The EU's Article 25 "Interim Solution"

On 16 May 2019, the EU circulated a draft text providing for an "Interim Appeal Arbitration Pursuant to article 25 DSU".[55] Recognizing that "the Appellate Body may at some point no longer be able to fulfil its function, should the blockage of new appointments continue", this proposal takes the form of a bilateral agreement to be signed by the EU and another WTO Member. It replicates as closely as possible existing AB procedures but houses them, based on a dispute-specific bilateral agreement between the two disputing parties, under Article 25 of the DSU.[56] This "interim solution", pending appointment of new ABMs, would apply to any future disputes between the two parties and possibly also specifically identified pending panels. For those disputes subject to the Article 25 "interim solution", the parties agree that they "will not pursue appeals under Articles 16.4 and 17 of the DSU". This prevents appeals "into the void" (Scenario 1) and, in the event of no arbitration appeal in a given case, ensures DSB adoption of the panel report based on negative consensus (as would be the case under Scenario 2, no appeal or NAPs).

For each Article 25 appeal, three arbitrators would be picked by the WTO Director-General in random fashion from a closed list of former ABMs (two nationals of the same Member may not serve on the same case; no exchange of views with the broader roster of former ABMs is provided for). The current Appellate Body Secretariat would provide "administrative and legal support" to the arbitrators. Since Article 25 arbitration awards are, pursuant to Article 25.3, only "notified to the DSB" (they need not be adopted by the DSB), appeal arbitration awards would be deemed to include all panel findings that were not appealed. The parties would "agree to abide by the arbitration award, which shall be final" and, pursuant to Article 25.4, such awards would be subject to the same surveillance, compensation and retaliation provisions as those applied to regular panel and AB reports (Articles 21 and 22 of the DSU).

2. Weighing the Likelihood of Article 25 Appeal Arbitration Agreements

The EU proposal must still be finalized and it remains to be seen how many other WTO Members decide to sign up to it. It is clear, however, that the Article 25 interim solution will not cover all pending and new WTO cases. For starters, it is difficult to imagine that the US would sign up to the proposal (although it might, in specific cases). Yet, as detailed below, the US is a main party (claimant or defendant) in 47% of all WTO disputes filed to date. In addition, other WTO Members have questions about Article 25 appeal arbitration. Some fear that this "interim solution" could become permanent and that, as such, it takes away the urgency related to appointing new ABMs. As December 2019 gets closer, however, these Members may change their mind. Members that have proposed AB reforms to address US (or other)

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[55] The EU draft proposal is available at https://worldtradelaw.typepad.com/files/eu-ab-proposal.pdf.
[56] Article 25 of the DSU, entitled « Arbitration », provides as follows : « 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". Article 25.2 makes such arbitration subject to mutual agreement between the parties.

concerns may also hesitate to "replicate [in Article 25 appeal arbitration] as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review".[57] Yet other Members may be concerned about practicalities and wonder if, and how precisely, Article 25 appeal arbitration would work.[58] Once Article 25 appeal arbitration kicks in and positive experiences are booked, more Members may sign on.

For the EU (and others), the current AB overall functions well (no urgent need for a course correction and thus no problem to "cut and paste" the current AB into an Article 25 appeal process), and not having a second level appeal (if only in the interim) is not an option. Indeed, when it comes to WTO dispute settlement, the EU has stated it has three "red lines": (i) a two stage process (panel and appeal), (ii) independence of the adjudicators, and (iii) binding dispute settlement (automatic adoption or bindingness of panel and appeal reports).[59] Article 25 appeal arbitration meets all three criteria; Scenarios 1, 2 and 4 below (appeals "into the void"; no appeal or NAPs followed by panel adoption; and "floating" panel reports, neither adopted nor appealed/blocked) do not, as they all exclude an effective appeal stage. Scenarios 1 and 4 (appeals "into the void"; "floating" panel reports) exclude both an appeal and automatic bindingness.[60]

While the Article 25 interim solution is gaining traction, equally interesting is that the idea of setting up an alternative WTO dispute settlement system by (plurilateral) treaty outside of the DSU, a kind of "DSU minus the US"[61], has failed to pick up support. In any event, not a single WTO Member has proposed it. There are legal

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[57] EU draft proposal for Article 25 appeal arbitration, see footnote 55 above.

[58] For example, the fact that many WTO disputes have multiple claimants (think of *China – Rare Earths*, WTO/DS431-3, where the EU, Japan and the US were co-claimants) and that not all of those claimants may agree to Article 25 appeal arbitration, may create confusion. Indeed, in such cases, the risk is that an adopted panel report finds one thing, an equally "binding" appeal arbitration another, and this in respect of the same measure. That said, the same risk is already present under the current AB system. An example is *Australia – Plain Packaging* (WT/DS434, 435, 441, 458, 467) where the panel report was appealed by some claimants, in respect of others, the panel report has already been adopted.

[59] *Ibid.*, preambular paragraph 6, referring to "binding character and two levels of adjudication through an independent and impartial appellate review of panel reports" as "essential principles and features of the WTO dispute settlement system". See also Statement by an EU Official speaking in his personal capacity, at a World Trade Institute (WTI) Workshop on *WTO Appellate Review: Reform Proposals and Alternatives*, 24 May 2019, held in Geneva at the WTO headquarters (« It's very simple – three red lines, two stage process, independence of the adjudicators, and binding dispute settlement. And if we look at those three red lines, Article 25 appeal arbitration squarely fits the bill").

[60] Scenario 1, the option of appeals « into the void », may also threaten the independence of panelists, in case they weigh the relative risk of blockage into their substantive assessment, see the discussion in Section II.A.4.

[61] In support, see, for example, *Guest Post from Pieter Jan Kuijper*, footnote 22 above and *Van den Bossche Farewell Speech*, footnote 3 above («if consensus among all WTO Members on such reforms is not possible, a coalition of willing WTO Members should consider establishing a new parallel dispute settlement system that would copy the existing, but dysfunctional, DSU, in order to settle WTO disputes between them in an orderly and rules-based manner. While recourse to Article 25 of the DSU for appellate review or agreements between parties not to appeal may, for some time and in some cases, allow Members to ensure the availability of WTO dispute settlement, these are not long-term solutions"). See also James Bacchus, *Saving the WTO's Appeals Process*, CATO Institute, 12 October 2018, at www.cato.org/blog/saving-wtos-appeals-process and Pascal Lamy, *Trump's Protectionism Might Just Save the WTO*, Washington Post, 12 November 2018, at www.washingtonpost.com/news/theworldpost/wp/2018/11/12/wto-2.

technical[62] as well as practical[63] reasons for this. More important is, probably, the reality that the US, for many and in many ways, remains too large a player to exclude or neglect. WTO dispute settlement statistics[64] speak for themselves: the US has been a main party (claimant or defendant) in 47% of all WTO consultation requests filed to date (21% as claimant or co-claimant, 26% as defendant); of 38 panel proceedings currently pending, 21 (55%) involve the US as a main party; of all AB reports issued to date, the US was a main party in 68% of appeals[65], in a staggering 42% of all appeals the US was the original defendant.[66] With this in mind it is hard to picture a long-term solution that does not, in some way, involve the US.

3. Conclusion on Scenario 3

In sum, while we are likely to see cases under Scenario 3, especially cases involving the EU, Article 25 appeal arbitration -- the only scenario that preserves both an appellate stage *and* automatic adoption or bindingness of reports -- will not cover all disputes. How many Members, and in what types of cases disputing parties will sign on to this scenario remains to be seen.

D. Scenario 4: Pulling the Plug - "Floating" Panel Reports, Neither Adopted Nor Appealed/Blocked

As powerful headwinds exist for each of the scenarios above, another possibility is that panel reports (interim or final) are released but then get neither appealed, nor adopted. Instead, they simply "float" around, without being technically binding or blocked, for potential use in continued negotiations between the disputing parties. This scenario aligns with the view of USTR Robert Lighthizer, referred to earlier, where a panel report (whether interim or final, adopted or not) is, in essence, just one element, a type of "expert report", in what remains a political negotiation to settle a trade dispute.[67]

One such example may already be in place. In *EU – Price Comparison Methodologies*, a highly contentious case about the so-called "market economy status" of China, the much anticipated interim report of the panel was issued in April 2019 and reportedly found in favor of the defendant, the EU.[68] In response, China, the losing claimant, requested the suspension of the proceedings, which the panel, in June 2019, granted.[69] The interim report, which remains confidential, is, however, likely to play some role in continued negotiations between the EU and China over the

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[62] One issue is, for example, that Article 23.1 of the DSU provides that when WTO Members seek redress for an alleged violation of the WTO covered agreements «they shall have recourse to, and abide by, the rules and procedures of this Understanding". Providing for the settlement of WTO disputes pursuant to an outside agreement (rather than under the existing DSU) may thus be problematic.
[63] One practical question would, for example, be who pays for such "alternative DSU" and who would provide secretarial support.
[64] Statistics are derived from http://worldtradelaw.net/databases/abreports.php.
[65] 96 out of 141 AB reports.
[66] 59 out of 141 AB reports.
[67] See the text at footnote 32 above.
[68] See Bryce Baschuk, *China Loses Market-Economy Trade Case in Win for EU and U.S., Sources Say*, Bloomberg, 18 April 2019.
[69] See Communication from the Panel, *EU – Measures Related to Price Comparison Methodologies*, WT/DS516/13, dated 17 June 2019.

issue. It draws a line in the sand and puts a thumb on the scale in favor of the EU.

For post December 2019 panel reports (or interim panel reports) something similar may materialize. Imagine that, overall, the defendant wins (as reportedly happened in *EU – Price Comparison Methodologies*). In that event, the losing claimant has an interest to request the panel to suspend the proceeding[70] in order to avoid that the final panel report sees the light of day, let alone that this report gets adopted by the DSB and becomes "binding". In contrast, if, overall, the claimant wins and the panel finds (important) violations of the WTO treaty, the losing defendant may be hard pressed to block the report but at the same time want to avoid the (reputational and other) costs of appealing "into the void", described earlier. For the winning claimant such appeal "into the void" would also be a sub-optimal outcome. Depending on the power balance between the parties, and the credibility of the defendant's threat of appealing "into the void", the resulting compromise may then well be that the winning claimant does not insist on getting the panel report adopted by the DSB within 60 days following the negative consensus rule set out in DSU Article 16.4 (it could simply refrain from putting the item on the DSB agenda[71]), as long as the losing defendant, in turn, commits not to appeal the panel report "into the void". In this case, the panel report would be neither adopted, nor appealed or formally blocked (for interim reports, the report would not even be made public), but simply "float" around while still potentially playing a useful role in continued negotiations.

III. CONCLUSION AND THINGS TO WATCH

The crisis in WTO dispute settlement is likely to get worse before it gets better. In the short term, the US is unlikely to lift its block on ABM appointments (the first "unlikely solution"). Three main factors will influence if and when the US may lift its veto. A first challenge is to find a legal-technical solution to US concerns of AB "overreach" that satisfies both US calls for more Membership control and the "red lines" of other WTO Members, especially the three EU "red lines" of a two stage process, independence of adjudicators and binding dispute settlement.[72] A second, and arguably more important (and more difficult) challenge is to negotiate a political solution to substantive trade concerns that plague the WTO more broadly, in particular, "rebalancing" the China-US relationship. A third influencing factor is how, in the interim, WTO dispute settlement will unfold. If it works out positively for the United States -- more focus on negotiation rather than litigation, in a way that frustrates neither core US offensive nor defensive interests -- there will be little pressure on the US to change the status quo. If, in contrast, post 2019 WTO dispute settlement leads to widespread blockage of panel reports and escalating retaliation, and other US efforts to obtain and enforce trade commitments unilaterally or bilaterally, especially as against China, fail, the alternative of "more binding" WTO dispute settlement may once again gain traction and meet US support. Lest it be forgotten, in the early 1990s, frustrated by panel blockage in the GATT, it was the US

[70] Note that DSU Article 12.12 provides that « [t]he panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months". The panel, therefore, has some discretion to accept or deny the request.

[71] Note, however, that doing so the claimant would lose the possibility to have recourse to Article 21.5 compliance and Article 22 retaliation proceedings, a non-negligible cost related to the non-adoption of the panel report.

[72] See footnote 59 above.

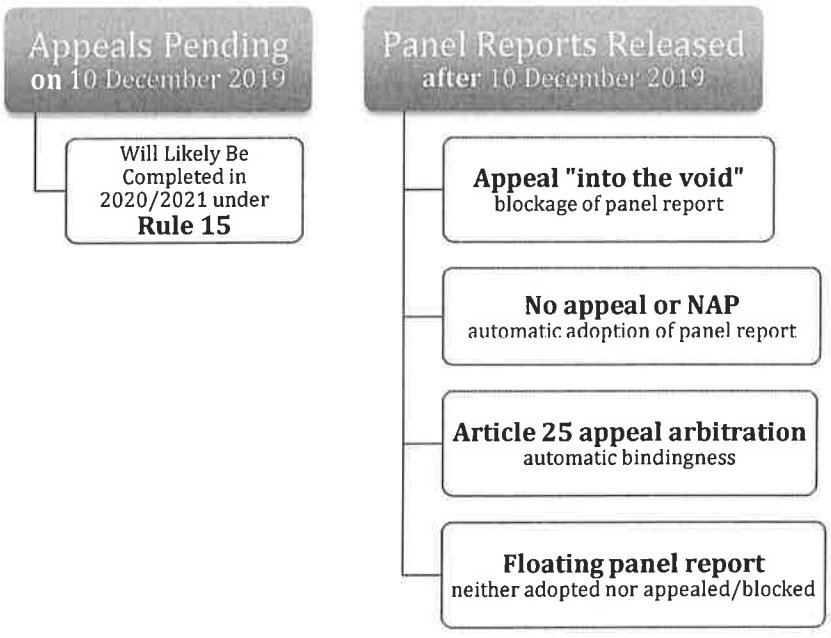
(not the EU) that proposed and most strongly advocated more "legalized" dispute settlement.[73]

A second "unlikely solution" is the General Council, DSB or AB itself "coming to the rescue" of the AB and/or binding dispute settlement, by turning to majority voting or changing the AB Working Procedures. This option is unlikely both for legal technical and political reasons. The same is true for the idea of an alternative WTO dispute settlement system by (plurilateral) treaty, a kind of "DSU minus the US". As things stand today, the US is just too large a player to be sidelined (it has been a main party in 47% of all WTO disputes and in 68% of all AB proceedings to date).

In the interim, post 2019 WTO dispute settlement will neither be linear nor homogeneous. Appeals pending on 10 December 2019 will most likely be carried-over pursuant to (the contested) Rule 15. For panel reports released *after* that date, four scenarios emerge:

(i) appeals "into the void" blocking the panel report,
(ii) no appeal *ex post* or *ex ante* no appeal pacts (NAPs) followed by DSB panel adoption using the negative consensus rule,
(iii) Article 25 appeal arbitration with automatically binding results,
(iv) "floating" panel reports (interim or final), neither adopted, nor appealed/blocked.

The Flowchart below depicts these various possibilities:



Only Article 25 appeal arbitration preserves both an appellate stage *and* automatically binding dispute settlement. No appeal or NAPs give up on appellate review but

[73] See Gabrielle Marceau, The History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System, CUP, 2015.

safeguard DSB adoption of panel reports by negative consensus. Appeals "into the void" and "floating" panel reports involve neither an appellate stage nor automatic bindingness of results. They also risk adding a considerable dose of power politics into the process. The possible follow-up given to panel reports issued post December 2019 is summarized in the Table below:

	Panel Reports Subject To **Rule 15 Appeal**	Panel Reports Subject To **Article 25 Appeal Arbitration**	Panel Reports Subject To **No Appeal Pact**	Panel Reports **Appealed "Into the Void"**	**"Floating"** (Interim) Panel Reports
Effective Appellate Stage					
(Automatically) Binding					
Negative Consensus Adoption by DSB					
Panel Report Formally Blocked					

It is unlikely that Article 25 appeal arbitration will be universally adopted. The US will not sign on to it (although exceptional cases are possible), and also other WTO Members have questions. In some cases, both parties may decide *ex post* not to appeal or give up their right to appeal *ex ante* (via a NAP). However, it is far from certain that this will become the new norm. Firstly, to date, only 32% of panel reports are not appealed. Although appealing "into the void" may impose important costs, in particular, reputational costs as against other Members, if a losing party can simply appeal and thereby block adoption of an adverse panel ruling, the temptation and pressure from domestic constituencies to appeal will be high. Secondly, *ex ante* agreeing not to appeal makes little sense for defendants. In 89% of cases, a panel finds at least one violation. Why then would a defendant forego its right to appeal?

This means that as default, that is, unless parties overcome the inertia linked to the status quo, for some (or many) panel reports issued after 10 December 2019, the losing party will have the option to appeal "into the void". This would mean a *de facto* return to the GATT days where parties had a veto to block adverse panel reports. In some cases the losing party may decide *not* to appeal, be it because of self-interest, the risk of emulation or retaliation or reputational costs linked to blocking the procedure. However, appeals "into the void" can be expected: firstly, based on the blockage rate of 59% of GATT panel reports between 1990 and 1994; secondly, given the increasing share of trade remedy cases (which historically have witnessed an even higher blockage rate) now as compared to the GATT days; finally, as today, compared to 25 years ago, there is a higher number of powerful Members, more diversity between Members and a higher degree of complexity of rules and cases.

Appeals "into the void" may happen especially in politically sensitive cases, disputes where a powerful defendant loses against a weaker claimant, and in disputes between equally powerful parties. This leaves a final option: panel reports (interim or final) are released but then get neither appealed, nor adopted. Instead, they simply "float" around, without being technically binding or blocked, for potential use, as a type of "expert report", in continued negotiations between the disputing parties. This may be an attractive compromise in some cases whereby the winning party avoids an appeal "into the void" and the losing party prevents DSB adoption (or even publication of the panel's interim report).

Importantly, the threat of appeals "into the void" will move the system, in what is necessarily a continuum between "rule oriented" and "power oriented", closer to the pole of "power oriented". At worst, the option of appeals "into the void" may lead to escalating "trade wars" and a (temporary) desuetude of the WTO dispute settlement system altogether. This, in turn, could further complicate substantive reform of the WTO and the conclusion of new rules: if reforms or new rules are not subject to binding enforcement, some countries may hesitate to commit in the first place.

Disputes could, of course, still be settled through WTO consultations, monitoring, good offices, mediation and the filing of "special trade concerns" before specialized committees. Dispute settlement under free trade agreements (FTAs) may also fill some of the void, as illustrated by a recent EU arbitration request under the EU-Ukraine Association Agreement.[74] A 2013 paper finds, for example, that 19% of trade disputes filed before the WTO are between parties that have concluded an FTA.[75] Updated to 1 July 2019, approximately one third of WTO consultation requests, if filed today, would be between parties that have an FTA in place which provides for judicial or quasi-judicial dispute settlement.[76] However, major dyads still lack an FTA (think of EU-US or US-China), some FTAs such as NAFTA are notorious for providing blockage loopholes (e.g. in the appointment of panelists[77]) and most FTAs exclude trade remedies from dispute settlement (whilst trade remedies in recent years represent close to half of WTO disputes filed).

Here is a list of 10 things to watch in the coming months:

1. Will the number of ABMs drop below three on 11 December 2019?
2. Will the General Council, DSB or AB itself, do anything to "save" the system?
3. Will the AB trigger Rule 15, notwithstanding US criticism in this respect, so that outgoing ABMs can complete appeals pending on 10 December 2019?

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[74] See footnote 6 above.

[75] Claude Chase, Alan Yanovich, Jo-Ann Crawford, and Pamela Ugaz, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, WTO Staff Working Paper, ERSD-2013-07, 10 June 2013, at p. 47. The same study (at p. 13-15) also finds an increasing « legalization » of FTA dispute settlement systems over time.

[76] See WTO Disputes, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm and Regional Trade Agreements Database, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx, analysis on file with the author. The 1/3 outcome makes abstraction of the subject matter of the dispute and whether it would fall under the jurisdiction of the FTA mechanism (as noted in the text, trade remedies disputes before the WTO would mostly not be covered by the FTA dispute mechanism).

[77] See footnote 39 above.

4. For panel reports circulated after 10 December, how many WTO Members will sign on to the EU's proposal for Article 25 appeal arbitration and in what specific disputes will this actually happen? Will such arbitration work effectively?
5. How many Members will conclude NAPs (no appeal pacts) and in what types of cases?
6. In the absence of Article 25 agreements or NAPs, will parties that lose before a panel, restrain themselves from appealing "into the void"? Or will such appeals (which mean that panel reports remain in limbo) become the "new normal"?
7. Will appeals "into the void" stop winning claimants from retaliating or will such appeals lead to rather tougher retaliation outside of the DSU?
8. Will Members (especially weaker ones) continue to file (new) disputes before the WTO or will the prospect of blockage steer traders and Members away from the system?
9. Will panels (and Article 25 appeal arbitrators) continue to refer, and stick to, pre 2019 AB findings or will contradictory rulings emerge? Will new realities lead to the appointments of different types of panelists?
10. Will reliance on alternative dispute resolution (ADR) increase post 2019, or will ADR decline as the shadow of "hard" dispute settlement shrinks? Will WTO Members increasingly resort to dispute settlement under FTAs and, if so, will FTA processes turn out to be effective avenues for the settlement of (most or only some) trade disputes?