

“Appellate Body Held Hostage”: Is Judicial Activism at Fair Trial?

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Abstract

The World Trade Organization (WTO) Dispute Settlement System (DSS) is in peril. The Appellate Body (AB) is being held as a ‘hostage’ by the very architect and the most frequent user of WTO DSS, the United States of America. This will bring the whole DSS to a standstill as the inability of AB to review the appeals will have a kill-off effect on the binding value of Panel rulings. If the most celebrated DSS collapses, the members would not be able to enforce their WTO rights. The WTO-inconsistent practices and violations would increase and remain unchallenged. The rights without remedies would soon lose their charm, and we might witness a higher and faster drift away from multilateral trade regulation. This is a grave situation. This piece is an academic attempt to analyse and diffuse the key points of criticism against AB. A comprehensive assessment of reasons behind this criticism could be a starting point to resolve this gridlock. The first part of this Article investigates the reasons and motivations of the US behind these actions as we cannot address the problems without understanding them in a comprehensive manner. The second part looks at this issue from a systemic angle as it seeks to address the debate on whether WTO resembles common or civil law, as most of the criticism directed towards judicial activism and overreach is “much ado about nothing”. The concluding part of this piece briefly looks at the proposals already made by scholars to resolve this deadlock, and it leaves the readers with a fresh proposal to deliberate upon.

Keywords: Appellate Body, World Trade Organization, United States of America, Dispute Settlement, Common Law, Judicial Activism

1. Introduction

The World Trade Organization (WTO) Dispute Settlement Understanding (DSU) is seen as the central pillar of the multilateral trading system. Trade disputes are filed by member governments if they have reasons to believe that another member government is violating a WTO agreement or a commitment it has undertaken as part of the WTO. If member countries fail to arrive at a mutually acceptable decision through consultations, they can bring a formal case before an *ad hoc* Panel whose decisions are binding unless they are appealed for.¹ The

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Panel process is subject to review by a standing Appellate Body (AB) which consists of seven adjudicators (referred to as ‘members’).² The AB lies at the apex of the WTO dispute settlement system. AB decisions are final and binding. Each AB Report is adopted unless the DSB decides otherwise by consensus.³ This provides finality and predictability to the dispute settlement process. The AB members are appointed by consensus of all WTO members through the DSB. Like the common law system for first time appeals, AB’s review jurisdiction is limited to the issues of law invoked in the Panel Report under review.⁴ The members are appointed for a term of four years, with a possibility to be reappointed for another term. Every appeal must be heard by three members.⁵ Designed preliminarily as a safety valve to review Panel decisions, the AB has been used in majority of cases litigated at WTO DSU. Between 1995 and 2014, around 66 percent of cases were appealed. In 2016 alone, nearly 90 percent of Panel decisions were appealed.⁶ This has allowed AB to create robust international trade law jurisprudence. This widely utilised and fundamental institution is now in peril. The AB is being held as a “hostage” by the very architect and the most frequent user of WTO DSS, the United States of America (US).⁷

In the past few years, the US has blocked appointments and reappointments of AB members. Obama administration blocked the reappointment of Jennifer Hillman in 2011 supposedly for failing to defend the US interests and perspectives.⁸ This was repeated in 2016 when it blocked the reappointment of Seung Wha Chang from South Korea on the grounds of his judicial activism and overreaching decision-making approach.⁹ In 2014, it blocked consensus for the appointment of James Gathii who would have been the first and the only black sub-Saharan African member of AB.¹⁰ In August 2018, the US announced its plans to block the reappointment of the AB member from Mauritius, Shree Baboo Chekitan Servansing.¹¹ In addition to this, the US has continued to weaken the AB by blocking appointment of new successors to fill in the vacancies.¹² If this attack is not put to rest, the AB will soon be paralysed as it would not have enough members that are required to review Panel decisions. This will bring the whole DSS to a standstill as the inability of AB to review the appeals will

¹ Art. 17.1, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU]

² DSU, art 8

³ DSU, art 17.4

⁴ DSU, art 17.6

⁵ DSU, art 17.1

⁶ WTO Appellate Body Reports, <https://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm> accessed 25 August 2018

⁷ Of the 176 Rulings that were appealed between 1996 and 2017, 85 involved the US. It is the most frequent complainant and respondent at WTO DSU. (Source: WTO Disputes Database 2018)

⁸ Appellate Body Annual Report for 2011 (June 2012, WT/AB/18), <https://www.wto.org/english/tratop_e/dispu_e/ab_an_rep_e.htm> accessed 21 August 2018

⁹ ‘Statement by the United States at the Meeting of the WTO Dispute Settlement Body’ (May 23, 2016), <https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf> accessed 13 August 2018

¹⁰ Gregory Shaffer, Manfred Elsig, Sergio Puig, ‘The Extensive (Yet Fragile) Authority of WTO Appellate Body’, *Law & Contemporary Problems* 79 (2016) 237, at 271

¹¹ ‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body’ (August 27, 2018) 37, <https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.public.pdf> accessed 28 August 2018

¹² *Ibid*, 36

Forthcoming in Journal of World Trade (53.2) 2019

have a kill-off effect on the binding value of Panel rulings. This is because the parties will lose their rights to get the questionable Panel rulings reviewed. Moreover, with a dysfunctional AB, a member facing an unfavourable Panel ruling would in practice be able to block its adoption by simply filing an appeal. This seems to be a race back to the General Agreement on Tariffs and Trade (GATT) 1947 era where any member could block the adoption of Panel rulings (as it happened in almost half of the cases filed in the GATT 1947 era).

We are facing a grave situation. If the most celebrated DSM collapses, the members would not be able to enforce their WTO rights. The WTO-inconsistent practices and violations would increase and go unchallenged. WTO rights without remedies would soon lose their charm. The aggrieved countries would not have an enforceable right under WTO rules. We might witness a higher and faster drift away from multilateral trade regulation. Demise of this well-designed rule-based mechanism might take us back to the era of power-based free-for-all trading system where big trade players could once again dictate the terms and conditions of trade. Why is US ignoring such grave repercussions and launching an attack on WTO DSM? Can AB's collapse still be averted? The Article addresses and answers these questions in the following sections. Section 2 provides a comprehensive analysis of the underlying reasons behind the US actions to block the appointment or reappointment of AB members. Section 3 attempts to analyse the legal tradition of the WTO framework and addresses concerns pertaining to AB's judicial activism and overreach. Section 4 proposes a way to resolve this deadlock by rethinking the selection process of AB members, carving out a way to provoke new discussions and deliberations on this issue.

2. Why is US doing this? The Explicit and Implicit Reasons

The frustrations of the US against WTO DSM in general and AB in particular have accumulated overtime for multiple reasons. The US has not provided a definitive list of problems it has with the AB; however, it has raised some questions and criticism from time-to-time. The US has raised some of these concerns at Ministerial Conferences and Committee Meetings; however, their concerns have remained largely intact due to consensus requirement for any amendments or modifications to take place in DSM rules and procedures.¹³ It is possible to classify reasons and motivations behind the US actions under four categories. Some of these reasons are explicitly stated by US in one way or the other whilst others are more implicit and an attempt to read in between the lines.

2.1 Procedural Matters Arising from AB Working Procedures

The issues relating to the procedures of AB are of a technical nature.¹⁴ Rule 15 of the AB Working Procedures seems to be a major US concern.¹⁵ It is an internal rule that allows an

¹³ Art X.8, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement]

¹⁴ There are multiple procedural concerns expressed by the US, but this article will only discuss the most significant ones.

¹⁵ Discussions with a former AB member [details withheld]

Forthcoming in Journal of World Trade (53.2) 2019

AB member (whose term has expired) to complete his/her ongoing works on an appeal at hand with the approval of AB and upon its notification to DSB. Since Rule 15 has been adopted as a Working Procedure by AB without approval from DSB, the US has argued that it encroaches upon the rights of member countries to appoint or reappoint the AB member in question.¹⁶ As a result of this rule, several AB members have worked on and decided appeals after the expiry of their tenures. While the US has a reasonable ground to criticise this provision, we cannot deny that the rule has certain benefits. It saves time that would otherwise be required to replace the retiring member and acquaint the new member with the ongoing case. Its absence will make the appellate review process even more burdensome, resource-demanding and time-consuming.

In August 2017, Hyun Chong Kim resigned from his AB membership without providing the ninety days' notice as required under Rule 14(2) of the AB Working Procedures. No adverse consequences followed this erroneous manner of resignation. The criticism of US on this issue is justified, as due process of leaving the body must be followed by AB members. This instance of erroneous practice of resignation can set a bad precedent for future AB members, hence it is important to raise this point and make it heard. The US is also concerned with the implicit tradition of 'quasi-automatic reappointment' of an AB member for the second term.¹⁷ The issue of 'quasi-automatic reappointment' is not just a procedural concern. Article 17.2 of DSU Agreement states that the 'DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once'.¹⁸ The provision shows a premeditated agreement amongst the membership to restrict the tenure of AB members to four-years with the option of serving a second term for another four years. It is possible to construe this provision as members' attempt to maintain their authority over WTO's adjudicatory wing. AB is not a constitutional supreme court; it is a judicial institution created as a result of an agreement between members. Hence, the four years tenure with a possibility for extension could be seen as an attempt by members to create a mechanism of "checks and balances" which can allow them to review the performance of AB members in the previous term, and based on their performance review, decide on the issue of their reappointment for a second term. This observation shows that the purpose of this mechanism is being impaired by the growing tradition of 'quasi-automatic reappointment'. This point of criticism should therefore not be reduced to a mere procedural concern. It is important that members realise the broader purpose of this provision and become more engaged with the performance review considerations at the stage of reappointment.

¹⁶ 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body' (August 31, 2017), <<https://geneva.usmission.gov/2017/08/31/statements-by-the-united-states-at-the-august-31-2017-dsb-meeting/>> accessed 25 August 2018

¹⁷ Tatyana Payosova, Gary Clyde Hufbauer, Jeffrey J. Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', Peterson Institute for International Economics Policy Brief (March 2018), <<https://piie.com/system/files/documents/pb18-5.pdf>> accessed 2 July 2018

¹⁸ DSU, art 17.2

Forthcoming in Journal of World Trade (53.2) 2019

Yet another concern is the increase in the duration of appeal proceedings.¹⁹ While the given time limit for appeal process is 60 days or 90 days for complex appeals, this limit has lately been more of an exception than a rule as it has scantily been observed.²⁰ Currently, an appeal on an average is concluded in around one year.²¹ The US has asserted that the AB members should comply with the time limit agreed by the members. However, it is important to be realistic. In the words of a former AB member, ‘the growing complexity of WTO disputes, the high rate of appeal of panel reports and the number of issues appealed, the amount of jurisprudence, the size of submissions, among other things...’ makes the 90-day rule an unrealistic deadline.²² These reasons justify a revision of the 90-day deadline. If membership wants to stick to this deadline, efforts should be made to amend the size of submissions made by parties, or introduce a process of summary judgments.²³

2.2 The Conceptualisation Matters: Is Appellate Body Really Required?

Trade law community feels that the problems US has with AB may go beyond the procedural issues that have been in discussions lately. Unlike a court that derives its mandate from a constitution, the AB is a standing body for appellate review of Panel rulings and is constituted by way of an agreement between member countries and hence its manner of working and procedures should also be determined by member countries. However, as we have seen above, this has not been the case. This observation resonates with the US concerns and highlights the need to create a mechanism which allows member countries to review the performance of AB members on a regular basis. There may also be a question as to whether it is an efficient layer of adjudication and if it is required for the settlement of disputes between member countries.²⁴ Are Panel rulings not sufficient to enforce WTO rights? Has this second layer of justice caused undue delays in the dispensation of justice in international trade disputes? Of course the AB is not infallible and it has multiple problems, but the fact that it has been used so widely and frequently by member countries testifies that it is indeed an indispensable layer of justice which is required to review questionable Panel decisions.

The US perception seems to indicate that AB has broken the multilaterally negotiated bargain between member countries by exercising judicial activism and overreach. The US for the very first time has bound itself to the binding and compulsory jurisdiction of an international court. It has never done that before. The traditional international adjudicatory institutions have functioned without compulsory jurisdiction. The WTO DSM is a completely different mechanism. Unlike the GATT-era, the rulings are almost automatically accepted unless all

¹⁹ Based on author’s observation findings at G2 Conference on Resolving Disputes in International Economic Law (Georgetown’s Institute of International Economic Law, 11 July 2018) and Society of International Economic Law Conference (12-14 July 2018, American University Washington College of Law)

²⁰ DSU, art 17.5

²¹ For example, in United States — Conditional Tax Incentives for Large Civil Aircraft DS487, the United States notified the DSB of its decision to appeal on 16 December 2016. The Appellate Body report was circulated to Members on 4 September 2017.

²² Proposals outlined in Farewell speech of Appellate Body Member Ricardo Ramírez-Hernández, <https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm> accessed 21 August 2018.

²³ Ibid

²⁴ Discussions with a former AB member [Details withheld]

Forthcoming in Journal of World Trade (53.2) 2019

member countries (including the winning member country) block its adoption. The Trump Administration has recently suggested that the ‘Trump administration may wish to deploy the Appellate Body crisis to force a return to a more politicised dispute settlement system’.²⁵ So, could this be seen as an attempt to go back to the power-based GATT-era where the US could unilaterally block the adoption of a decision as and when it pleases? Before time answers this question, we need to take immediate steps to impede this potential regression.

2.3 Systemic Issues Bothering the US: Making Implicit Explicit

This unprecedented situation calls for an in-depth assessment of the reasons underlying this situation. It is imperative to look beyond the more apparent reasons and provoke discussions on possible implicit reasons that may lie beneath the root of this crisis. These developments could be interpreted as a disguised attempt by the US to paralyse the multilateral trading system. Recent developments in Trans-Pacific Partnership, Korea-US FTA and NAFTA show the US frustration with trade agreements. Moreover, President Trump has threatened to withdraw from the WTO.²⁶ In the words of President Trump, the WTO ‘was set up for the benefit of everybody but [the United States]... It was set up for the benefit of taking advantage of the United States.’²⁷ As President Trump cannot withdraw from the WTO without congressional approval, the interventions to block the appointment of AB members may as well be a disguised attempt to drown the whole WTO system by paralysing its adjudicatory institutions.²⁸ However, such an interpretation of the US actions is contradictory to its practice. It has long taken advantage of the WTO system. It is indeed the most frequent user of WTO DSM both as a complainant and a respondent. ‘The United States has won 85.7% of the cases it has initiated before the WTO since 1995, compared with a global average of 84.4%. In contrast, China’s success rate is just 66.7%.’²⁹ The recent complaints filed by the US at WTO DSU shows to a large extent that it still believes in the multilateral trading system and has underlying interests in its continuance.³⁰ Then why would US, the most frequent user of DSU, want to amend the present modus operandi of the system? Do we need to “read something in between the lines” here?

²⁵ Gerhard Erasmus, ‘The Appellate Body Crisis’, (Tralac, 15 December 2017) <<https://www.tralac.org/discussions/article/12560-the-appellate-body-crisis.html>> accessed 3 August 2018

²⁶ Gregory Corte, ‘Trump escalates his threats to blow up trade deals: ‘I would withdraw from the WTO’ (USA Today, 30 August 2018), <<https://www.usatoday.com/story/news/politics/2018/08/30/wto-trump-threatens-pull-out-world-trade-organization/1149421002/>> accessed 30 August 2018

²⁷ Gregory Shaffer, *Manfred Elsig and Mark Pollack* ‘The Slow Killing of the World Trade Organization’ (Huffington Post, 17 November 2017), <https://www.huffingtonpost.com/entry/the-slow-killing-of-the-world-trade-organization_us_5a0ccd1de4b03fe7403f82df> accessed 21 August 2018

²⁸ Section 125(b), Uruguay Round Agreements Act 1994 provides that the President requires a joint resolution of the two houses of congress. [Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994), 19 U.S.C. 3501]

²⁹ 2018 Economic Report of the President, at 251, <https://www.whitehouse.gov/wp-content/uploads/2018/02/ERP_2018_Final-FINAL.pdf?utm_source=newsletter&utm_medium=email&utm_campaign=sendto_newsletter&stream=to> accessed 21 August 2018

³⁰ The US has filed 12 complaints since January 2017. World Trade Organization: Disputes by Members, <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> accessed 20 August 2018

Forthcoming in Journal of World Trade (53.2) 2019

It is possible to construe that the US actions and statements against WTO DSM could be its way of telling other member countries that it is now time to pay serious attention to the US concerns regarding WTO DSM and initiate multilateral negotiations leading to its review and revisions. If this interpretation is to be believed, the actions have indeed proven effective as they have brought to forefront the need to review and update the multilateral trading rules. Its anti-liberalisation actions may also be an endeavour to bring China to the negotiating table and diffuse its demand for gaining market economy status in trade remedies investigations. There is an ongoing dispute at WTO on this issue between China and the EU and the US.³¹ China claims that with the expiry of Section 15(a)(ii) of China's Protocol of Accession, the WTO members should revert to the application of normal methodology against Chinese imports.³² China is a staunch user of WTO DSM, and hence these actions could be seen as an attempt by US to force China to give up on its demand to gain market economy status under the shadow of a threat, i.e., the threat being that the US can destroy the WTO's litigation wing if its concerns are not sufficiently addressed.

This move against AB is challenging the independence and impartiality of WTO's litigation wing. Thanks to the US actions, the existence of DSM is under grave threat. If the US continues to block the appointment of AB members, the downfall of AB will amount to the downfall of the whole DSM. Trump administration surely understands this repercussion. Hence, its actions could be seen as an attempt to pressurise the adjudicators to deliver favourable decisions under the shadow of an imminent threat. The recent statements made by Mr Lighthizer strengthen this construction as he warns that the US would have to consider undertaking an action if the WTO finds in China's favour in the recent dispute pending between the US and China over the market economy status of China.³³

This strategy could also be seen as President Trump's way to negotiate under the "shadow of threat" to withdraw. This is not the first instance where President Trump's administration is seen using this negotiating strategy. A recent example that illustrates this point is the manner in which the preliminarily revised text of NAFTA was renegotiated between the US and Mexico after a year-long renegotiation process.³⁴ In his first 100 days at office, President Trump clearly stated that the US would withdraw from NAFTA if it is not revised and renegotiated in light of its objectives and expectations.³⁵ In the recently announced preliminary agreement on the revision of NAFTA, there are two clear victories for the US.

³¹ Request for Consultation from China, *United States-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/R (Dec. 12, 2016)

³² For more details, see Amrita Bahri 'Treatment of Non Market Economies in Anti-Dumping Proceedings: The Mexican Approach', in James Nedumpara & Weihuan Zhou (ed.) *Non-Market Economies in the Global Trading System: The Case of China* (Springer, 2018) 259

³³ See n 31. Shawn Donnan, 'WTO chief warns of risks to trade peace' (Financial Times, 2 October 2017) <http://globaltraderelations.net/images/Article.WTO_and_New_Judges_FT_10.2.17_.pdf> accessed 1 August 2018

³⁴ White House, Economy & Jobs Press Release, 'President Donald J. Trump Is Keeping His Promise to Renegotiate NAFTA' (27 August 2018), <<https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-keeping-promise-renegotiate-nafta/>> accessed 5 September 2018

³⁵ The objections and expectations of the US from NAFTA renegotiations are stated in 'Summary of Objectives for NAFTA Renegotiation', United States Trade Representative (17 July 2017), <<https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>> accessed 4 September 2018

Forthcoming in Journal of World Trade (53.2) 2019

First, a new ‘labour value content’ rule fixes a minimum income threshold and requires that 40-45 percent of auto content shall be made by workers earning at least \$16 per hour. Once enforced, this could significantly move the production of automobile from Mexico to higher wage rate zones such as the US.³⁶ *Second*, increase in the regional value content requirement encourages United States manufacturing and regional economic growth by requiring that 75 percent of auto content be made in the United States and Mexico.³⁷

Currently, Mexican steel and aluminium is subject to a 25 percent duty in the US.³⁸ Mexico has retaliated by imposing duties against certain exports from the United States.³⁹ Mexico has also challenged these duties at WTO DSU.⁴⁰ These actions clearly show Mexico’s frustration against these duties; however, it has chosen to ignore this issue in bilateral NAFTA renegotiations with the US. Perhaps the imposition of tariffs on Mexico and Canada amidst the rounds of renegotiation could also be seen as a pressure exerting strategy which put the US in the driving seat during NAFTA renegotiations. This example shows how the US has augmented its ability to secure better terms of trade through its threats to withdraw from NAFTA altogether and imposition of tariffs on strategic industries. Perhaps, the US is trying to use a similar negotiating strategy with WTO members for gaining an upper-hand during negotiations over WTO DSU. It seems that it is trying to give a near-death experience to AB members and it will release the grip just before the AB actually dies.

2.4 Controversial Common Law Trends and Judicial Activism

The US has challenged AB’s defiance to the spirit and letter of the grand bargain leading to Marrakesh Agreements. It has questioned the decision-making approach of AB members and has accused them of transgressing their mandate of interpreting legal rules. It is alleged that “judicial activism”⁴¹ displayed by AB amounts to the creation of new rights and obligations without gaining consensus of all WTO members.⁴² Hence, the controversial “common law trends” employed by AB members in reviewing Panel decisions can be seen as an encroachment over the legislative powers of WTO members. There are several examples that illustrate how AB members have employed common law trends in decision-making. These

³⁶ Office of the United States Trade Representative Press Release, ‘UNITED STATES–MEXICO TRADE FACT SHEET Rebalancing Trade to Support Manufacturing’ (August 2018), at <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/august/united-states%E2%80%93mexico-trade-fact-sheet>> accessed 5 September 2018

³⁷ *Ibid.*

³⁸ White House Press Release, ‘Presidential Proclamation on Adjusting Imports of Steel into the United States’ (8 March 2018), at <<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/>> accessed 6 September 2018

³⁹ Secretaría De Economía (Mexico), Diario Oficial De La Federación, ‘Decreto Por El Que Se Modifica La Tarifa De La Ley De Los Impuestos Generales De Importación Y De Exportación (5 June 2018)

⁴⁰ United States – Certain Measures on Steel and Aluminium Products (WT/DS551/1, Request for consultations, 5 June 2018)

⁴¹ In this article, the expression “judicial expression” is used to refer to two of its form. The first form is judicial legislation, which refers to the act of judges making laws and ‘legislating from the bench’. The second form is judiciary’s departure from accepted rules of interpretation. [Keenan D. Kmiec, ‘The origins and Current Meanings of Judicial Activism’, California Law Review 92(5) (2004) 1442, at 1471, 1473]

⁴² ‘Statement by the United States’, n 9

trends can broadly be classified into three types: (i) decisions creating rules, (ii) decisions creating persuasive precedents, (iii) decisions creating obiter dicta.

2.4.1 Decisions creating rules

The AB has allegedly created new rights and obligations of WTO members through its interpretation of WTO agreements. The *US-China* dispute over state-owned enterprises in 2011 neatly illustrates this point.⁴³ This dispute pertains to the definition of the term ‘public bodies’. The SCM Agreement deems a “subsidy” to exist where “a government or any public body” offers a financial contribution that provides a benefit to the recipient.⁴⁴ The Agreement fails to define the term “public body”, and AB’s attempt to fill this gap has emerged as a major point of disappointment for the US. The US in this case offered a broad interpretation of this provision arguing that public bodies are entities that are majority owned and controlled by the Chinese government.⁴⁵ China on the other hand proposed a narrower definition as it claimed that public bodies should resemble an ‘entity that exercises authority vested in it by the government for the purpose of performing functions of a government character’.⁴⁶ The AB in this case accepted the Chinese interpretation and ruled that enterprises cannot be considered “public bodies” merely on the grounds of being majority-owned and controlled by government.⁴⁷ This implies that to base a claim on SCM agreement against a state-owned enterprise, a complainant will have to demonstrate (and prove with sufficient evidence) that the enterprise in question is invested with government authority or performs a government function. In the words of a trade lawyer, ‘the test is set up in such a way that no enterprise providing goods or services will pass it. In this way, it completely writes off the concept of “public body” from the SCM Agreement.’⁴⁸

The dispute between China and US in 2014 once again brought to forefront the long-standing debate over the meaning of “public body”.⁴⁹ Recalling the AB ruling in 2011, the Panel in this case ruled that a government’s part ownership or control over an entity is not sufficient to establish that it is indeed a public body for the purposes of Article 1 of SCM Agreement and the key consideration in this determination should be whether the entity in question performs a government function or is vested with government authority.⁵⁰ This interpretation drastically narrows down the scope of SCM agreement as it implies that anti-subsidy measures can only be imposed on entities that either perform government functions or are vested with government authority. In doing so, AB has not specified the type of evidence that a complainant must furnish, and for this reason, US asserts that the AB has failed to provide a clear and practical guidance for the application of WTO rules. The US also asserts that the

⁴³ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011

⁴⁴ Article 1.1 of SCM Agreement defines subsidy as ‘a financial contribution by a government or any public body’. [Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A]

⁴⁵ US — Anti-Dumping and Countervailing Duties, n 43, para 129

⁴⁶ *Ibid*, para 305

⁴⁷ *Ibid*, para 611

⁴⁸ Interview with a trade lawyer [Details withheld]

⁴⁹ Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015

⁵⁰ *Ibid*, para 4.32, page 71

Forthcoming in Journal of World Trade (53.2) 2019

narrow definition of “public body” discourages future complainants to bring a claim under SCM Agreement as it excludes many types of enterprises which are state owned or state controlled. It also argues that these rulings can have a counterproductive effect of encouraging countries (such as China) ‘to act opaquely by concealing the control they exercise over companies, since the burden of proof lies with the complaining administration’.⁵¹

This case is thus a classic example of how AB has affected the rights of complainants in filing trade remedy claims against countries with non-market tendencies. It represents how AB has expanded its judicial authority into the realm of law-making. It is quite paradoxical to notice that the US in this case did not shy away from proposing a common law like broad interpretation of the term whilst it has from time-to-time denounced AB’s display of judicial activism. The US has repeatedly stated that any attempt by AB to fill gaps in the WTO agreements amounts to a violation of Article 3.2 of DSU Agreement that confers the ‘exclusive authority to adopt interpretations’ of Multilateral Trade Agreements to the Ministerial Conference and the General Council.

2.4.2 Decisions creating persuasive precedents

The concept of precedents is widely understood as a distinguishing characteristic of common law tradition. A precedent is a previous case that sets an example or guides the settlement of future disputes with similar facts and legal issues. A precedent could be binding or persuasive in nature. The WTO jurisprudence has shown that AB findings are more or less considered as precedents with a persuasive effect. For example, in the case of *US-Shrimp*, AB confirmed that the Panel ‘was right to use’ and ‘rely on’ the reasoning of AB report and in fact encouraged the Panel to use AB ‘findings as a tool for its own reasoning’.⁵² Moreover, AB explicitly stated that the reasoning provided in its findings should be relied upon by all ‘future panels’.⁵³

In *US-Stainless Steel (Mexico)*, it was seen that AB was ‘deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues’⁵⁴ and hence it chose to reconfirm the precedential effect of its rulings for future Panel decisions. AB explicitly stated that its interpretations of the covered agreements should generally be followed by Panels especially where they are dealing with similar issues.⁵⁵ AB clarified that its reports have a binding force with respect to

⁵¹ Elvire Fabry and Erik Tate, ‘Saving the Appellate Body or Returning to the Wild West of Trade?’ Europe: A Values-Based Power (Policy paper 225, 7 July 2018) at 11, at <<http://institutdelors.eu/publications/sauver-lorgane-dappel-de-lomc-ou-revenir-au-far-west-commercial/?lang=en>> accessed 25 July 2018

⁵² Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, at 107, 109. [Presently derived from Henry Gao, ‘Dictum on Dicta, Obiter Dicta in WTO Disputes’ 2018 World Trade Review 17(3), at 509]

⁵³ *Ibid*, at 107.

⁵⁴ Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, 20 May 2008, at 162

⁵⁵ *Ibid*, 160-161

Forthcoming in Journal of World Trade (53.2) 2019

resolving the particular case at hand and thus are not binding on other cases that may arise in the future; at the same time, it noted that the Panels should not ignore legal interpretations and legal reasoning provided in adopted Appellate Body reports for the sake of maintaining security and predictability in WTO dispute settlement system.⁵⁶ The Appellate Body concluded in this case that ‘absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.’⁵⁷ The term ‘absent cogent reasons’ clarifies that Panels can employ a different course of reasoning for the previously decided legal questions by AB if they have clear and convincing reasons to do so. In *US — Countervailing Measures (China)* case, the AB enumerated a number of reasons where Panel can deviate from AB interpretations: (i) when a new multilateral interpretation of the relevant agreement exists, (ii) the previous interpretation has been demonstrated to be unworkable, (iii) it is in conflict with another agreement, or (iv) it is based on a factually incorrect premise.⁵⁸ However, beyond these factors, the AB has not defined the term ‘cogent’, leaving some discretion to interpret this expression in the hands of Panellists. Moreover, it is important to note that none of the AB rulings so far have stated that its rulings should be treated as binding precedents for resolving future disputes. Hence, the system of precedents does exist in WTO legal system, yet these precedents are not binding but persuasive in nature.

2.4.3 Decisions creating obiter dicta

The concept of obiter dicta is a unique phenomenon of decision-making in common law jurisdictions. An obiter dicta is considered to be ‘an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court’.⁵⁹ Law students in common law jurisdictions spend a considerable period of time learning the distinction between the *ratio decidendi* (which forms part of the decision and has a binding force) and *obiter dicta* (which does not form part of the decision and are things said in passing). This typology is used in common law world to draw distinction between those parts of a judgment that form key holding and the ones that are related but are not essential to the holding. *Obiter dicta*, though not having a precedential value, can be employed by parties as persuasive arguments for future courts deciding similar issues.⁶⁰

The US has alleged that AB has often issued opinions on matters that are not raised by the parties. Several reports indicate that AB has recognised that *obiter dicta* are relevant but not essential to a holding.⁶¹ These opinions are issued in the form of dicta that are not essential for the settlement of dispute at hand. The very first case where AB employed the term *obiter*

⁵⁶ Ibid, 161

⁵⁷ Ibid, 160

⁵⁸ Appellate Body Report, United States — Countervailing Measures, n 49, para 7.317

⁵⁹ H. C. Black, *Handbook on the Law of Judicial Precedent, or, The of Case Law* (St Paul Minn., West Publishing 1912) at 166

⁶⁰ Scofield, Robert G. Scofield, ‘The Distinction between Judicial Dicta and Obiter Dicta’, 25 *Los Angeles Lawyer*, 17 (Oct. 2002) at 33, as cited in Gao, n 52, at 509

⁶¹ Gao, n 52

Forthcoming in Journal of World Trade (53.2) 2019

dicta is *Canada-Periodicals* wherein the AB recognised certain parts of the Panel report as *obiter dicta*.⁶² In the case of *Argentina-Financial Services*, the AB report was staunchly criticised by the US as it discussed moot concepts in great detail.⁶³ Two-third of its report was seen as *obiter dicta*.⁶⁴ This amounted to 46 pages of the report.⁶⁵ In the case of *India – Agricultural Products*, the US criticised AB for discussing issues that were not raised by the parties.⁶⁶ In the words of the US, '[th]ese interpretations served no purpose in resolving the dispute – they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body's analysis is comprised simply of advisory opinions on legal issues.'⁶⁷ The US has alleged that AB should resist from writing *dicta* as it is a completely unnecessary exercise. It goes on to state that AB is not an 'academic body that may pursue issues simply because they are of interest to them or may be to certain Members in the abstract'.⁶⁸

Article 17.1 of DSU requires AB to address each of the issues that are raised by parties in an appeal; however, there is no provision in DSU agreement that restricts AB from looking at issues beyond the ones presented by parties to the dispute. Then why is US so averse to *obiter dicta* in WTO jurisprudence? The US has alleged that the task of additional analysis that is not essential to the actual settlement of dispute impedes prompt settlement of disputes.⁶⁹ Its reasoning against the inclusion of *obiter dicta* in a report seems to be in conflict with its criticism against Rule 15 as appointment of a new member who needs a reasonable period of time to be fully acquaint with an ongoing appeal can also cause serious delay in the issuance of AB report. It also alleges that the not-so-relevant paragraphs that offer additional analysis can wrongly influence future settlement of disputes by Panels.⁷⁰ This allegation is justified as Panellists or representing lawyers could view the entire report from AB as a persuasive precedent. This could happen especially if the Panellists or lawyers are from civil law jurisdictions, as legal studies and training in most civil law countries do not generally include training on how to draw a distinction between *obiter dicta* and *ratio decidendi*.⁷¹ The *EC – Fasteners* case illustrates this point. In this case, the legal issue before the AB was whether producers from China should get a country wide dumping duty or individual treatment. However, AB gave a detailed *obiter dicta* on the consequences of the expiry of Article 15(a)(ii) of the China's Accession Protocol on the choice of methodologies.⁷² The lawyers

⁶² Appellate Body report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, p. 33

⁶³ Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, p. 431

⁶⁴ Akhil Raina, 'Mediations in an Emergency: The Appellate Body Deadlock – What It Is, Why It Is a Problem, and What To Do About It', KU Leuven Working Paper No. 199 (March 2018), at 8, <https://ghum.kuleuven.be/ggs/publications/working_papers/2018/199raina> accessed 24 August 2018

⁶⁵ 'Statement by the United States', n 9.

⁶⁶ The US in this AB report pointed to paras 5.142-5.143 [Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015]

⁶⁷ *Ibid*, page 3

⁶⁸ *Ibid*

⁶⁹ 'Statements by the United States at the WTO DSB Meetings' (Geneva, 9 May 2016, 23 May 2016, 14 October 2017 and 29 September 2017)

⁷⁰ *Ibid*.

⁷¹ Frederick Schauer, *Thinking like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) 184

⁷² *European Communities - Definitive Anti-Dumping Measures on Certain Steel Fasteners from China* (WT/DS397/AB/R, report adopted 28 July 2011) para. 289

Forthcoming in Journal of World Trade (53.2) 2019

representing China in the ongoing NME litigation against the US and the EU have held on to this “finding” as their basic line of defence.⁷³ This example illustrates the confusion additional analysis can cause in such litigations. However, there are several benefits of *obiter dicta* that are being overlooked by its critics. Pre-identification and pre-assessment of issues that may form part of future disputes can help developing countries with capacity constraints to prepare and argue their claims in a timely and cost-effective manner. Less ambiguity and more guidance on complex legal issues will help lawyers representing developing countries to prepare their arguments promptly, which would eventually reduce the legal cost a country will be required to spend on hiring legal expertise.⁷⁴ This argument may not be as convincing for the US as it would be for a developing country user of DSM, but it shows that *obiter dicta* can play a capacity-building role for countries with insufficient legal expertise and financial resources.

3. Common versus Civil Law Saga: ‘Much Ado about Nothing’

When it comes to the question of whether WTO legal system is a common or a civil law system, the responses one would receive are quite varied. WTO law scholarship is divided on this issue. Some scholars have argued that WTO legal system is a purely civil law system and any attempt to identify common law elements in it is without any legal or rational basis.⁷⁵ Other scholars have analysed the role of common law concepts such as precedents and *stare decisis* in WTO jurisprudence and have argued that the prevalence of these concepts brings WTO law closer to common law tradition.⁷⁶ In my opinion, it is a matter of who you ask this question to. A common law lawyer will focus on the role precedents have played in WTO jurisprudence and towards clarification of ambiguities in WTO laws. In contrast, a civil law lawyer will demolish the argument of a common law scholar in light of its extensive codification in the form of WTO agreements. Perhaps it is time to ask this question to a scholar who comes from a mixed jurisdiction of law.

Common and civil law in the last few decades have inter-changed their elements in various jurisdictions.⁷⁷ Increasing amount of codification is seen in countries with common law traditions, whereas, several civil law countries have employed common law procedures. For example, much of the UK’s constitutional order is now written down in the form of statutes. United States Statutes at Large is another example of a predominantly common law jurisdiction employing the civil law approach of codification. On the other hand, Mexico, a civil law jurisdiction, has recently employed adversarial justice tendencies into its

⁷³ Discussions with trade lawyer [details withheld]

⁷⁴ Benefits of *obiter dicta* are discussed in Schauer (n 71) 181

⁷⁵ Gao, n 49; John Jackson, ‘Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisals and Prospects’, in A. Krueger (ed), *The WTO as an International Organization* (University of Chicago Press, 1998), at 178; G. Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ *Journal of International Dispute Settlement* 2 (2011) 1, at 7-16

⁷⁶ R. Bhala, ‘Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)’, 14 *American University International Law Review* (1998), at 845; A.T.L. Chua, ‘Precedent and Principles of WTO Panel Jurisprudence’, 16 *Berkeley Journal of International Law* (1998), at 177

⁷⁷ Rodrigo Camarena Gonzalez, ‘From Jurisprudence Constante to Stare Decisis: the Migration of the Doctrine of Precedent to Civil Law Constitutionalism’, 7(2) *Transnational Legal Theory* (2016) 257, at 258

Forthcoming in Journal of World Trade (53.2) 2019

inquisitorial judicial procedures.⁷⁸ Sweden, traditionally considered as a civil law jurisdiction, employs jury system for certain freedom of expression matters including defamation.⁷⁹ This shows that common and civil law features can coexist in a single legal system and both traditions indeed overlap and converge in multiple jurisdictions. Is there a systemic or conceptual problem in acknowledging this overlap and coexistence in WTO legal system? There is no denying of the fact that the system of codification coexists with precedential value of AB reports in the WTO legal system.

The DSU Agreement provides that the system ‘serves to preserve the rights and obligations of Members’ and that its rulings ‘cannot add to or diminish the rights and obligations provided in the covered agreements’.⁸⁰ At the same time, DSS also has the responsibility ‘to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law’.⁸¹ Article 31(1) of the Vienna Convention on the Law of Treaties lays down the general rule of interpretation as it states that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’⁸² Hence, the rules of construction provided in the Vienna Convention give considerable flexibility to interpret WTO provisions as they seek to employ a purposive rule of statutory interpretation. Hence, judicial activism displayed by AB members is not without a legal basis, as the tools of construction allow them to justify their interpretation in multiple ways.

The frustration against this judicial activism starts when AB crosses the line of clarification and interpretation and enters the terrain of gap-filling and law-making. As lawyers, we cannot deny that laws can always be interpreted in more than one way and it is quite difficult to draw a precise line of distinction between these four tasks in practice. *Interpretation* of a legal issue often amounts to its *clarification*. The act of clarifying an ambiguity in a legal provision may sometimes lead to *gap-filling*, and filling a gap or a grey area can be seen by critics as the act of *law-making*. Hence, it is not always possible to draw a clean line of divide between the judicial act of interpretation and the legislative act of law-making as they often overlap and converge in practice. Perhaps AB’s attempt at interpretation and clarification, which falls well within its ambit, is being misconstrued by its critics as the acts of law-making and gap-filling.

The WTO Agreements are drafted with a certain level of ambiguity and hence several provisions of these agreements can be interpreted in different ways. ‘One cannot forget that the people who wrote the WTO agreements were predominantly diplomats. It is of the essence of diplomacy that expressions are used that cater to a large number of people so that

⁷⁸ Código Nacional de Procedimientos Penales, effective since March 5, 2014 [The Code has introduced some elements of adversarial system into criminal procedures such as oral argumentation]

⁷⁹ Torbjörn Vallinder, *The Swedish jury system in press cases: An offspring of the English trial jury?* (Taylor & Francis, 1987)

⁸⁰ Art 3.2 and 19.2, DSU Agreement.

⁸¹ Art. 3.2, DSU Agreement

⁸² Article 31(1), United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

Forthcoming in Journal of World Trade (53.2) 2019

agreement can be reached. Consequently, the WTO agreements contain provisions that are not always the best example of lawyerly rigour and accuracy.⁸³ So, who is responsible to fill these gaps? These gaps can be filled by WTO's legislative wing through multilateral negotiation, which has made a very marginal progress ever since its creation in 1995. Alternatively, ambiguities can be resolved by way of judicial interpretation at Panel and Appellate stages. There is no third option. The decision-making approach of AB should be comprehended in this context.

There are three guiding principles of WTO dispute settlement: provide security and predictability to the multilateral trading system, clarify existing provisions, and secure positive resolution to disputes. AB decisions have upheld all three principles. Even though AB decisions have no formal *stare decisis* effect, previous AB reports are regularly cited and referred to in panel and AB reports. For example, in the case of *EC-Seal Products*, AB cited sixty-seven panel and AB decisions to justify its interpretations of WTO legal provisions.⁸⁴ Joost Pauwelyn has found that 35.4 percent of AB decisions have cross-referenced each other, and the Panels have recurrently followed AB decisions with a few exceptions.⁸⁵ Parties to the disputes have also based their arguments and counterarguments on past AB decisions in their written as well as oral submissions. The US is no different; it has repeatedly and consistently cited AB decisions in its written submissions. For example, in the case of *US-Countervailing Duty Investigation on DRAMs*, the US cited nearly twenty-five AB reports only in its first written submission.⁸⁶ It also cited a GATT Panel Report from 1994 in defence of its arguments on the issue of considering the recipient's "creditworthiness" in assessing whether a government-provided loan confers a benefit.⁸⁷ This confirms that the US has made extensive use of precedents to support their legal arguments not just from WTO era but also from the GATT era. This practice shows that the US has, together with other member countries, considered AB decisions as part of the WTO *acquis*. The vast jurisprudence created by AB decisions promotes predictability and security in the multilateral trading system. It guides future Panellists and parties through WTO disputes. It also provides guidance to dispute settlement forums and parties to disputes under preferential trade agreements.

AB does not issue rulings; it only issues recommendations. These recommendations are subsequently adopted by all member countries by way of consensus. This stage (where member countries consider the adoption of AB's recommendations) allows them the space to

⁸³ Luis Olavo Baptista, 'A Country Boy Goes to Geneva', in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, 2015) 559, 566

⁸⁴ Shaffer et al, n 10, at 260

⁸⁵ Joost Pauwelyn, 'Minority Rules: Precedent and Participation before the WTO Appellate Body', in Joanna Jemielniak, Laura Nielson, Henrik Palmer Olsen (eds.), *Judicial Authority in International Economic Law* (Cambridge University Press 2016), 141-172

⁸⁶ United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (Drams) From Korea WT/DS296, First Written Submissions of the US dated 21 May 2004, <https://ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file632_5539.pdf> accessed 3 August 2018

⁸⁷ *Ibid*, at 64

Forthcoming in Journal of World Trade (53.2) 2019

review and if required criticise these recommendations. It is interesting to note that the membership has almost always welcomed these recommendations. It was only on one occasion in the case of *US Shrimp-Turtle* where the entire membership collectively – except the US – objected to the acceptance of unsolicited amicus curiae briefs by AB under Article 13 of DSU Agreement.⁸⁸ This shows that there is no general discontent with the working of AB. To the contrary, the frequency of its use shows that the membership believes in this institution and has found it indispensably valuable.

As we are rapidly witnessing changes in international trade and commerce with new technological innovations such as 3-D printing of goods, smart contracts and crypto-currency, WTO law disciplines are at risk of becoming obsolete. They are at the risk of becoming obsolete if they do not regulate new ways in which foreign trade transactions are conducted. This risk can only be mitigated by revising and updating the current rules through multilateral negotiations. Since WTO's negotiation wing has not worked well, its litigation wing appears to have compensated for the lack of progress in multilateral negotiations by employing different interpretations and hence clarifying legal complexities through dispute resolution.

This jurisprudential development can sometimes have the effect of developing laws or filling legal gaps, but WTO members can undo these developments by adopting authoritative interpretations of legal provisions. AB can employ an interpretation for the sake of resolving a trade dispute, and WTO members can multilaterally review and if required change this interpretation through their right under Article IX:2 of the WTO Agreement which provides Ministerial Conference and General Council 'the exclusive authority to adopt interpretations' of WTO agreements. This argument should not be construed as one attacking the doctrine of separation of powers, as the role of judiciary is certainly different from the law-making role played by treaty negotiators. However, international judges play a crucial role in shaping and defining law and policy. This is especially true in multilateral trade law regime, where Member-deadlock in negotiations and ambiguity in legal provisions have necessitated the judiciary to play a proactive role in clarifying the provisions.

4. Resolving the Deadlock: Concluding Thoughts

AB derives its power from WTO membership. In fact, the very existence of AB is a result of membership's will. WTO is a member-driven organisation, and the members are the supreme most authority to decide how different organs of WTO should function in the future. WTO membership has created a comprehensive system to settle disputes with an appellate authority to ensure that WTO rights are effectively enforced. This system has emerged as the most successful achievement of multilateral trading system. With the passage of time, and due to failures in multilateral negotiations, some parts of this system may have become obsolete and thus need revision. However, it does not deserve to die, especially at the hands of a single member country.

⁸⁸ Ibid, at 247

Forthcoming in Journal of World Trade (53.2) 2019

In an attempt to rescue the AB, scholars have made several proposals. Steve Charnovitz has advanced the idea that AB members should close themselves to further appeals. This would have the effect of rendering panel reports to be adopted as final unless rejected by a negative consensus.⁸⁹ Pieter Jan Kuijper proposed that the selection of members can be made by majority or super-majority voting in place of consensus. Kuijper also proposes that a new tribunal established under a newly negotiated multilateral dispute settlement treaty can provide for an appellate authority.⁹⁰ Other proposals include using the bilateral arbitration mechanism (provided in Article 25 of DSU agreement) to set up a temporary appeal procedure.⁹¹ None of these proposals try to address the US concerns with an inclusionary approach. They in fact do the opposite: they can have the effect of hastening US's disengagement from the multilateral trading system. This is not an ideal outcome for any WTO member. It is important to engage with the US and give it a fair hearing.

In the words of a former AB member, 'WTO needs the US and the US needs the WTO. It is essential to bring US to the negotiating table. The US so far has not put any proposal on the table. No matter how drastic or unacceptable, it is important to at least put a proposal on the table.'⁹² In July 2017, the European Union advanced a proposal for the appointment of the AB members. In this proposal, it proposed to restart the selection process of AB members to fill-up the vacancies, establish a selection committee for the appointment of AB members, and set a deadline for the members to submit their nominations for candidates, and for the selection committee to issue its recommendations to DSB on the appointment of AB members by September/October 2017.⁹³ Several Latin American countries made a similar joint proposal regarding the issue.⁹⁴ Subsequently, the two proposing group of members came together and made a joint proposal.⁹⁵ This joint proposal once again mirrored the points raised in the initial EU proposal, with the only exception that it recommended the proposed Selection Committee to carry out its work without a specific deadline.

The US has rejected these proposals, but it is nevertheless an admirable initiative by members to resolve this deadlock.⁹⁶ The joint proposal made by the EU (twenty-eight member

⁸⁹ Steve Charnovitz, 'How to Save the WTO Dispute Settlement from the Trump Administration', International Economic Law and Policy Blog (3 November 2017), <<http://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>> accessed 21 August 2018

⁹⁰ Pieter Jan Kuijper, 'The US Attack on the WTO Appellate Body', Amsterdam Law School Legal Studies Research Paper No. 2017-44, at 12, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076399> accessed 28 August 2018

⁹¹ Ibid, at 15

⁹² Observation analysis, n 19

⁹³ WTO Dispute Settlement Body: Appointment of Appellate Body Members, Proposal made by the European Union (10 July 2017, WT/DSB/W/597/Rev.2)

⁹⁴ WTO Dispute Settlement Body: Proposal Regarding the Appellate Body Selection Process, Communication From Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru (13 October 2017, WT/DSB/W/596/Rev.5)

⁹⁵ WTO Dispute Settlement Body: Appellate Body Appointments, Proposal By Argentina; Australia; Brazil; Chile; China; Colombia; Costa Rica; Ecuador; El Salvador; The European Union; Guatemala; Honduras; Hong Kong, China; Kazakhstan; Korea; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Panama; Paraguay; Peru; The Russian Federation; Singapore; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; Uruguay and Viet Nam (12 January 2018, WT/DSB/W/609/Rev.1)

⁹⁶ Ibid

Forthcoming in Journal of World Trade (53.2) 2019

countries), together with twenty-two other member countries, shows a concerted effort of these WTO members to address the issue of selection of AB members. This concerted effort shows that many member countries are committed to the continual existence of the appellate review process. However, the underlying issue is that none of these proposals have tried to address the key concerns of the US behind this move. In these proposals, they have neither addressed nor discussed the issue relating to Rule 15, the concern of ‘quasi-automatic reappointment’ process, or the issue pertaining to judicial activism. To engage the US, it is important to address the problems and engage in serious discussions with the US to find mutually acceptable solutions to the problems.

A commendable attempt in this regard comes from the recent proposals made by the European Commission.⁹⁷ The Commission has offered various proposals to address the US concerns pertaining to the 90-day deadline, judicial activism and the mandate. In this Concept Paper, the EU has expressed strong willingness to engage with the US in addressing its concerns regarding the Panel and the AB overstepping their mandate and engaging in the act of judicial legislation. It also proposes to increase the number of AB members from seven to nine. This increase would reduce the workload of each AB member and hence could allow the members to promptly issue their decisions. The 90-day deadline being a key concern of the US, the EU’s initiative to address this concern may break the deadlock we are facing today. The Commission has also proposed that the AB members can be appointed on a full-time basis. This will increase their overall availability in Geneva and hence the number of hours they will have to work on resolving the appeals, hence mitigating the possibility for time delays in decision-making.

The EU has also proposed a provision for an annual meeting of the AB with the WTO members to allow the latter to discuss and communicate their concerns on various systemic and procedural issues with the AB members on a regular basis. This channel of interaction between WTO members and AB members will allow them to build mutual trust and confidence amongst them on various issues of appellate review. This initiative could therefore reduce or minimise the possibilities of such a deadlock (as we are facing today) in the future. The Commission has also proposed to strengthen and expand the resources of the AB Secretariat; however, this will escalate the cost concerns of WTO members. A cost-effective way to strengthen the AB Secretariat could be to recruit higher number of interns to assist AB members with research and analysis. This will increase the overall human resource and expertise available with the AB. This can help speed-up the decision-making process. Moreover, it will also contribute in awareness and capacity building as it will give young trade law enthusiasts the opportunity to closely observe the multilateral dispute settlement process. The US has already signalled that it cannot accept some of these proposals.⁹⁸ Nevertheless, this initiative is a much-desired step towards engaging the US. Unless its

⁹⁷ European Commission Concept Paper, ‘WTO Modernization’, <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf> accessed 5 October 2018

⁹⁸ Tom Miles, 'U.S. says it cannot support some of EU's ideas for WTO reform' (Reuters, 4 October 2018), <<https://www.reuters.com/article/us-usa-trade-wto/u-s-says-it-cannot-support-some-of-eus-ideas-for-wto-reform-idUSKCN1ME2C3>> accessed 5 October 2018

Forthcoming in Journal of World Trade (53.2) 2019

concerns are acknowledged by other members, the US may continue to block further appointments.

Perhaps, we can start by addressing the issues that can be fixed easily, such as the issue of Rule 15 (which the EU Commission has mentioned and dismissed in its proposal). The issue of Rule 15 can be addressed simply by revising the Working Procedures of AB. The Georgetown University has made a sound proposal on this. It proposes that the ‘carry-over could be limited to those cases where the oral hearing (on the merits) has occurred or started.’ The AB member should be replaced only in a case where the hearing has not yet been held.⁹⁹ Other challenges, especially the ones pertaining to judicial activism and its conceptualisation, are more difficult to address. However, the starting point to address these concerns is to convince the US to seriously engage in discussions. Perhaps, it will be easier to engage the US in discussions if initial steps are taken to address some of its concerns. Addressing and solving the procedural issues can send a signal from members to the US that they are now willing to engage in serious multilateral negotiations to deal with deeper and broader concerns relating to WTO’s litigation wing.

One of the proposals which could serve to disperse the US concerns could be to redesign the selection process of AB members. In doing so, the WTO membership (for the selection of AB members) can consider employing a listing procedure similar to the one used to select ad-hoc panellists for the panel procedure.¹⁰⁰ This proposal would require the AB Secretariat to maintain an indicative list of potential AB members that could be drawn for an appeal on a case-to-case basis in place of having a fixed tenured assignment. The WTO members can nominate candidates that meet the eligibility requirements of AB member (as stated in Art 17.3 of DSU Agreement), and these nominations can be considered and approved by way of consensus at DSB meetings on a regular basis. The approved candidates can then be added to the indicative list of potential AB members maintained by the AB Secretariat. On an appeal being filed, AB Secretariat can propose nominations to the appellant and the appellee. If either appellant or appellee disagrees with these nominations, the decision could be taken by the WTO Director General (DG) in consultation with the four deputy DGs, DSB and parties to the dispute.

This proposal can address the US concerns on one hand and the members’ interest in keeping AB alive. The list system would ensure continual existence of the appellate review procedure as no single member would be able to strangle the AB. It will be easier for DSB to accept nominations of candidates for the indicative list by way of positive consensus as compared to appointing or reappointing AB members for a fixed tenure of four years. It would also enable members to appoint those candidates that have proved their impartiality, precision and coherence in legal interpretation of WTO provisions. This would allow members to minimise or avoid the appointment of those members that are known for their judicially active approach of decision-making or their procedural disobedience (such as failure to provide a

⁹⁹ ‘Transition on the WTO Appellate Body: A Pair of Reforms?’ Georgetown University IIEL Issue Brief 2/2018, <<https://georgetown.app.box.com/s/jwcvlz2thwtv3dhgdne0nkfk3vlpv3sf>> accessed 29 August 2018

¹⁰⁰ The selection of panellists is described in DSU Agreement, Art 8.4

Forthcoming in Journal of World Trade (53.2) 2019

notice of resignation). This proposal could also potentially address the US concerns on 'quasi-automatic reappointment' culture and Rule 15 as AB members will no longer have a fixed tenure and the disputing parties will be able to select an appellate judge based on its performance review. This system has worked well for the panel procedure, and hence it deserves a consideration for the appellate review procedure as well. This proposal has an inclusionary approach, and it can ignite fresh discussions with the US.

Let us try to fix the problems that can be fixed. Let us not consider the alternatives of AB at this stage. Considering its alternatives indicates that we are already giving up on this institution. It will be very unfair to let the AB die in this manner.