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Restoring Binding Dispute Settlement

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ABSTRACT

Binding dispute settlement, meaning the ability to obtain a final judgment of whether a Member of the World Trade Organization (WTO) has acted inconsistently with its obligations, was the defining attribute of the WTO as created in 1995. Global commerce thrived on having the certainty provided by its taking place within this system. For well over a decade, the United States had complained that the dispute settlement system was undermining the trade remedies—antidumping, countervailing duties against subsidies, and safeguard actions against injurious imports—that were allowed under the WTO’s rules. When a populist US administration assumed office in 2017, it blocked appointments to the WTO’s Appellate Body. Today, the WTO dispute settlement system has become balkanized. The European Union and a number of other countries have banded together to put into place an alternative mechanism. Outside this system are the other two-thirds of the WTO Members, including the United States. For most WTO Members, no definitive result can be reached as to whether WTO obligations have been violated, as there is no assurance that WTO dispute settlement will be binding for them. The question addressed in this paper is how to reconstruct a system that the United States could join that would be broadly acceptable to others. The paper sets out a wide range of elements for negotiators to consider to rebuild the WTO dispute settlement system and make WTO agreements enforceable once again.

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THE IMMEDIATE PROBLEM

Although there are many aspects of the World Trade Organization (WTO) that after a quarter-century of experience could usefully be reviewed with an eye to making improvements, the calls for WTO reform from government leaders and their trade ministers were provoked primarily by the fact that the Appellate Body (AB) ceased to exist except on paper. The loss of the AB, and with it, the loss of binding dispute settlement,¹ while not the only deficiency in the multilateral trading system, is the most visible and understandable shortcoming. As a vital part of the WTO's framework for dispute settlement, with no appeals possible but appeals nevertheless being filed, the WTO rules ceased to be enforceable unless alternative arrangements were made by litigants committing themselves to abide by outcomes at either the panel stage or a substitute appeal mechanism.

This turn of events was entirely the work of the United States, which blocked appointments to the AB.² This was not the first use of the power of the veto to affect the appointment process. The European Union had insisted that its candidate be considered at the same time as a Latin American seat became available as a package to skirt US opposition. But preventing a consensus being formed to fill all vacant seats was an entirely new level of obstruction, going beyond composition of the Membership to preventing the dispute settlement system from fully functioning. As the terms ended for two of the three remaining AB Members at midnight December 10, 2019, and three members were needed to hear a case, that body was closed down.

Since that date, the dispute settlement system has deteriorated further. WTO Members—including the European Union,³ the United States, Russia, China, India, Brazil, and Korea—have filed appeals although there is no Appellate Body to hear the case. This growing practice of “appealing into the void” could be seen as simply a preservation of rights were the AB to be reconstituted in the future. Alternatively, it can be viewed as an act of cynicism designed to prevent a prevailing party from having a final judgment, tantamount to a return to the GATT system where panel decisions could be blocked. For any Member that did not make an alternative arrangement, the loss of the AB combined with the practice of invoking it for appeals marked the end of enforceability of the rules of the system.

THE IMPORTANCE OF OBTAINING BINDING OUTCOMES

Dispute settlement under the WTO's Dispute Settlement Understanding (DSU) is “binding,” in that it is intended to be the final adjudication of whether a member's actions are consistent with its WTO obligations. An adverse finding does not

1 For Members not making alternative arrangements for appeals.

2 Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Carl Grossmann Verlag: Bern, 2019). The terms of AB members Ramirez and Van den Bossche expired, and the question was whether the two appointment processes should be combined or separate. The European Union pressed to have the two vacancies joined. The United States opposed. “U.S. Stands Alone Against WTO Appellate Body Member,” *Politico*, May 24, 2016, <https://www.politico.com/tipsheets/morning-trade/2016/05/us-stands-alone-against-wto-appellate-body-member-catfish-drug-slag-with-obama-in-vietnam-dueling-tpp-letters-214457>. The United States in blocking all appointments had adopted a far more extreme tactic. The United States had in the past blocked the reappointment of a Korean Appellate Body Member to a second term. Blocking all appointments was entirely new, however.

3 In this list, appealing into the void is limited by MPIA participants to cases not involving another MPIA participant.

directly compel a Member to change the practice found to be non-conforming but provides very strong incentives for it to do so. Either it will have to pay compensation by making other (MFN) trade concessions in order to keep the WTO-inconsistent practice (the sufficiency of which may be challenged by other Members) or it will be subject to automatically authorized retaliation on its trade by the prevailing party.

Why did the United States and its trading partners agree to binding dispute settlement? GATT panel decisions on complaints could be blocked from adoption by the losing party. Many GATT contracting parties were frustrated by this state of affairs. In the 1980s, America's trading partners deeply resented the US threats of unilateral measures to defend what it saw as its trading interests—whether or not there was any GATT justification for it doing so. For its part, the United States wished to curb trade distortions caused by the European Union's Common Agricultural Policy. To each of these problems, binding dispute settlement seemed to provide an answer. Whatever doubts the United States had about the loss of freedom of action under the new dispute settlement rules, by 1993, in the concluding moments of the Uruguay Round, it was confronted with the new dispute settlement system as part of a package that included a code on intellectual property and an agreement on services, both of which the United States very much wanted. It bought into the deal.

Whether or not at the time either the United States or the European Union saw it clearly, they were engaged in creating a public good—greater certainty for all those engaged in international trade because governments' trade commitments would now be enforceable. World commerce takes place by reason of private contracts. Legal commitments among governments provide the framework within which international commerce flows. Enforceability of commitments is central to the world economy operating within a framework of the rule of law. In the eyes of many learned observers, dispute settlement, underpinning the commitments of sovereigns, was the system's greatest accomplishment. The AB, overseeing the work of dispute settlement panels was awarded the appellation “jewel in the crown.”⁴

NOT EVERY WTO MEMBER WAS AN ADMIRER, BUT MOST WERE

There is more than one objective reality. The dominant American view, while not the only view within its shores, is that the most serious problem with WTO dispute settlement is that of judicial activism amounting to overreach—expanding obligations under the agreements and narrowing rights. The US Trade Representative stated this objection in very broad terms in December 2017 at MC11 in Buenos Aires: “Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table.” Up until that point, widely ignored was the fact that the United States had for the prior two decades found serious fault with how the AB had gone about its

4 Among the problems with the “jewel in the crown” metaphor is that it says too much and too little about the role of binding dispute settlement in the multilateral trading system. Dispute settlement is not a thing wholly apart from the rest of the WTO. What is most important is the crown itself, the entire WTO organization and the system it administers, the Members' means of governing world trade. At the same time, the WTO dispute settlement process is more than an ornament. Rulemaking is arguably the most important part of the WTO, but enforcement of the rules is essential. To lose sight of the whole, to focus on a single part of governance, is to risk having the system work as a whole fail.

tasks and in the results it reached. In the opinion of US officials in a series of presidential administrations, and in the House and the Senate, regardless of party, there was a uniform opinion: the AB had strayed from its original purpose.

The general European view, more popular by far among the WTO Members than the American view, is that the problems of WTO dispute settlement lie in its not having enough capacity, perhaps not being adequately insulated from large Member pressure, and not obtaining sufficient and timely compliance by parties losing a case. In the majority view, the AB members had in the main behaved largely as they were supposed to, coming up with the right answers, and that respect for the rule of law meant that WTO Members were to accept the results whether they agreed with them or not.

There are two possible approaches to a major problem among nations: confront it and deal with it or work around it. The starting position for the European Union, and for the most part all other WTO Members, was that the United States was wholly unjustified in its use of the consensus mechanism to block appointments, and that, therefore, the United States should relent. They expressed frustration not only with the US tactic, but the fact that the United States refused to put on the table proposals that it would find acceptable to fix any shortcomings it saw. Over time, with the hope of a quick retreat by the United States fading, WTO Members came around to expressing an interest in engaging with the American government, hoping that this would be sufficient to open the AB nomination process. However, those seeking restoration of the appellate function were to be disappointed. They felt that they could not find any interlocutor on the American side who would work with them to resolve the issue. For its part, the United States wanted, as a precondition of any talks, a recognition on the part of other Members that the AB had erred, repeatedly telling others: “Members need to engage in a deeper discussion of *why* the Appellate Body has felt free to depart from what Members agreed to.”⁵

THE EUROPEAN UNION COMES UP WITH A WORK-AROUND

After a period of stand-off, to fill the vacuum, the European Union created a substitute for the AB based on Article 25 of the WTO’s DSU, which permits arbitration. In most respects, the mechanism was much like the original. It was called the Multi-Party Interim Arrangement (MPIA).⁶ Agreeing to it as a substitute for the AB was voluntary, applicable only to its participants. Twenty-five WTO Members (counting the European Union as one) joined the substitute appellate mechanism. Participants in the MPIA agreed in advance that in any case between any two of them, any appeals would be made to an appellate panel of three drawn from a group of 10 distinguished individuals named in

5 “United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process.” 2018. *American Journal of International Law* 113(4): 822-831. <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/united-states-continues-to-block-new-appellate-body-members-for-the-world-trade-organization-risking-the-collapse-of-the-appellate-process/EF3F564A66D3CDE698A9DFFF8FAEF77C>.

6 The parties at present are Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; European Union; Guatemala; Hong Kong, China; Iceland; Macao, China; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Peru; Singapore; Switzerland; Ukraine and Uruguay.

advance. Wishing to replicate the original AB as nearly as possible, Brussels explored whether the WTO budget would underwrite not just the costs of the panel of three arbitrators who would decide an appeal, but the 10 MPIA “appeal arbitrators” working in a collegial setting, conferring with each other on every case.⁷ This lent further credence to the view in the United States that the MPIA was designed not to settle individual disputes so much as to authoritatively interpret WTO law.

MPIA Article 5 provides:

Members of the pool of arbitrators will stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable.

The results of an MPIA appeal were to be submitted to the DSB for its ritual adoption,⁸ just as would an AB report. The interim arrangement was designed to largely replicate the prior AB system that the United States had rejected.

The arrangement had some provisions that might in the end find favor with the Americans. It repeated the DSU’s injunction that appeals “shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel.”⁹ It added additional instructions, that issues not appealed are not to be reviewed, and that MPIA arbitrators “address only those issues that have been raised by the parties.”¹⁰ However, the MPIA was greeted by the US government as a rejection of its complaints. More precisely, Washington felt that Brussels did not comprehend the depth and nature of US concerns, even when spelled out. When China joined the MPIA, the Trump administration saw the MPIA as a provocation rather than a well-considered response.

TALKING PAST EACH OTHER

A misreading of the depth of US concerns occurred in part because the United States—in pointing out what it viewed as being an AB that was out of control—cited the most visible instances of misbehavior rather than America’s core

7 “Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU.” Directorate General for Trade of the European Commission. March 27, 2020. https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf. Article 7 of the MPIA states: “The participating Members envisage that appeal arbitrators will be provided with appropriate administrative and legal support...separate from the WTO Secretariat staff... The participating Members request the WTO Director-General to ensure the availability of a support structure meeting these criteria. Multiparty Interim Arrangement for Dispute Settlement Pursuant to DSU Article 25.”

8 Since the Dispute Settlement Body considers adopting reports on the basis of a “negative consensus”, all WTO Members without exception, including the winning party and those who liked the result, would have to join with opponents of a report to block it. This was unlikely to ever happen.

9 A backdoor that the AB had exploited to review factual determinations was left in place. The MPIA panel was given the discretion to meet its 90-day timeline by means “such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU,” subject to the approval of the parties.

10 In addition, while only having a soft 90-day limit for reports, some means are suggested of speeding up decisions—including the MPIA making decisions on page limits, time limits, and deadlines as well as on the length and number of hearings required.

concerns. AB reports, contrary to the terms of the DSU, were often rendered in longer than the 90-day maximum period allowed. To the United States, this practice indicated that the AB considered that it would not limit itself to rare findings of egregious error, but would instead examine every case appealed in detail and come to its own conclusions. The United States also noted that AB members had created for themselves a rule that they could issue reports after the expiration of their terms when they were not yet finished considering a case. To the United States, this was another demonstration of overreach. These were, however, not really the central problems from the US perspective, but largely symptoms of the problem.

WTO Members sought to meet stated US objections in the hope that this would dislodge the United States from its position of unwillingness to fill vacant seats on the AB and bring about full restoration of the dispute settlement process. Ambassador David Walker,¹¹ acting at the request of the Chair of the WTO General Council, gathered the opinions of WTO Members on various reforms to the AB process that most would find acceptable. The package included a requirement that the AB must, in the usual case:

- Honor the DSU's 90-day limit on issuing reports.
- Not assign new cases to AB members near the end of their terms.
- Not review the domestic laws of Members (as these would be considered factual issue).
- Not issue advisory opinions (only addressing issues raised by the parties).

In addition,

- AB reports would not become binding precedent but consulted by future panels solely to achieve greater consistency and predictability of interpretations of rules of the multilateral trading system.

Further, the Walker Principles:

- Reiterated the language already in the DSU that AB decisions could not add to the rights nor diminish the obligations of the Members.
- Instructed AB members to pay heed to the standard of review established in Article 17.6(ii) of the Agreement on Implementation of Article VI GATT, that deference was to be paid to domestic administrators of antidumping proceedings.
- Proposed convening the DSB at least once a year to hear expressions of Members' views on issues generally, unrelated to a particular case, with AB members present.
- Required that a vacancy on the AB would automatically launch the process to fill the position.¹²

¹¹ David Walker was the Ambassador of New Zealand to the WTO through December 2021.

¹² Ambassador Walker's report, which is likely to be reflected in AB reform proposals, is contained in JOB/GC/222 of October 15, 2019. "Informal Process on Matters Related to the Functioning of the Appellate Body—Report by the Facilitator, H.E. Dr. David Walker (New Zealand) JOB/GC/222." World Trade Organization. October 15, 2019. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689.

This was a sincere attempt to understand and deal with US concerns, despite the initial objection of America's trading partners that in the face of the United States not identifying solutions, they did not wish to "negotiate with themselves." The United States during the Trump Administration remained intransigent, waiting for others to agree that the AB had fundamentally overstepped its mandate. It did not feel that it had been invited to participate in serious and deep engagement in the process by which the Walker Principles had been arrived at and felt that the result fell far short of what was needed.

WHAT WAS AMERICA COMPLAINING ABOUT?

What had gone wrong to cause the dispute settlement system to break down in so fundamental a fashion? Why had the United States taken so extreme a measure as rendering inoperative a central feature of the WTO structure?

The United States detailed its objections to the behavior of the Appellate Body in a 174-page document shared with the full Membership of the WTO in February 2020.¹³ The United States alleged that the AB had usurped the rule-making function of the WTO's Members, intruding on their sovereignty and expanding rights and obligations beyond what the parties had negotiated. The United States pointed to what it saw as undeniable evidence of unwarranted judicial activism: second-guessing panel's findings of facts, which is beyond the remit of the AB, filling in gaps in rules where the Members had perhaps been unable to make a rule cover a particular issue. In its view, the AB had engaged in judicial overreach. Compounding these faults, the AB had insisted that the AB's rulings be considered binding precedent (to be adhered to "absent cogent reasons").

In its February 2020 paper, the United States laid out in greater detail its specific charges against the AB:

- *The Appellate Body's erroneous interpretation of the term "public body" threatens the ability of Members to counteract trade-distorting subsidies provided through SOEs, undermining the interests of all market-oriented actors.*
- *The Appellate Body has prevented WTO Members from fully addressing injurious dumping by prohibiting a common-sense method of calculating the extent of dumping that is injuring a domestic industry ("zeroing").*
- *The Appellate Body's stringent and unrealistic test for using out-of-country benchmarks to measure subsidies has weakened the effectiveness of trade remedy laws in addressing distortions caused by state-owned enterprises in non-market economies.*
- *The Appellate Body has limited WTO Members' ability to impose countervailing duties and anti-dumping duties calculated using a non-market economy methodology to address simultaneous dumping and trade-distorting subsidization by non-market economies like China.*

¹³ "Report on the Appellate Body of the World Trade Organization." Office of the United States Trade Representative. February 2020. https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

- *The Appellate Body's creation of an "unforeseen developments" test and severe causation analysis prevents the effective use of safeguards by WTO Members to protect their industries from import surges.*¹⁴

It is worth pausing for a moment to consider the controversy over the practice of "zeroing," a methodology the United States employed to determine whether dumping had occurred, which the AB and panels repeatedly constrained (see box 1).

Box 1 Controversy over "zeroing"

Article VI of the GATT states that "dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to ... a domestic industry." This definition does not by itself inform the reader whether the prices at which imports are sold in the market are to be looked at entry-by-entry or on average. US (and, for that matter, EU) practice aggregated individual sales at less than fair value to determine antidumping margins. To critics this created an artificial dumping margin by not giving full weight to sales made above fair value. To defenders of the practice, it was glaringly clear that law enforcement requires addressing harmful conduct, not averages. They would say "It would be foolhardy to argue with a policeman about to write a ticket to try to make the case that on average, you drove at the speed limit." In the Uruguay Round negotiations, several of America's trading partners asked the United States to agree to end the practice of weighting above-fair value transactions as being at zero above normal value. The negotiating history was clear that the United States rejected this attempt to change its practice.¹⁵ The AB went on to decide that the use of zeroing was to be curbed. Hence the US claim that its trading partners were trying to obtain through litigation what they could not obtain through negotiation.

The more the United States sought to explain its concerns in detail, the less clear the core issues became to many WTO Members. The two most serious US accusations, in terms of their political and substantive importance, got lost. They could, however, be encapsulated in a single sentence, in discourse neither fully articulated nor clearly heard:

14 To countervail a subsidy, there must be a financial contribution from the government. The question arose as to whether certain state-owned or controlled enterprises funneling money into commercial enterprises (often themselves state-owned) met the test of sufficient government involvement to be considered a "public body," and funds coming from them able to constitute subsidies. The AB required that for a public body to be found and therefore its funds to constitute subsidies, an SOE providing the funds must be carrying out government functions and not simply be owned by the government.

15 Petros C. Mavroidis and Thomas J. Prusa. "Die Another Day: Zeroing in on Targeted Dumping: Did the AB Hit the Mark in US-Washing Machines?" Columbia Law School. January 2018. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3355&context=faculty_scholarship. Japan and Korea sought to prohibit zeroing in the Uruguay Round negotiations. The United States, European Union, and Canada, which employed the practice, refused to agree. Mavroidis in 2018 pointed out that some 30 panel and AB cases had examined challenges to zeroing. He concludes: "Now the fact that the proposal was thwarted does not mean that zeroing ipso facto was legal. At best, nevertheless, there was a disagreement between trading nations on this issue at the moment when the ADA was concluded."

These errors [by the Appellate Body] have favored non-market economies at the expense of market economies, rendered trade remedy laws ineffective, and infringed on Members' legitimate policy space. (Emphasis added).

This is the heart of the matter:

In the view of the United States, the Appellate Body had rendered nugatory, had gutted, the trade remedy provisions of the WTO (making anti-dumping and countervailing duties against subsidies less effective), and had rendered the safeguard provision of the WTO agreements unusable. In terms of global competition, the most serious damage was in limiting the ability of the United States and other WTO Members to deal effectively with competition from China.

There would be no quick fixes, no easy solutions to matters this fundamental.

FOR THE UNITED STATES, A FUNDAMENTAL POLICY ISSUE WAS INVOLVED: BALANCE

In the United States' view, the AB, through a series of decisions, had undercut the basic bargain underlying the trading system.¹⁶ Ever since 1934, when the US Congress created a framework for trade negotiations, a fundamental premise of US trade policy was that in entering into agreements that provided for broad trade liberalization, which meant opening the domestic US market for reciprocal market opening abroad in return,¹⁷ that if an industry was harmed by trade, there would be tools available to remedy the harm or at least soften temporarily the adverse impact of injurious trade. Generations of US trade negotiators had promised this to Congress, as well as to domestic industries, firms, and workers. This was no minor issue; it went to the core of the commitment made to obtain the authority from Congress to offer trade concessions. Under the US Constitution, Congress has the power over US commerce. However, Congress does not have the authority to negotiate international agreements. Only the President can do so using his foreign affairs power. What the President could not do with respect to trade barriers imbedded in US law was implement an agreement without Congressional action as it had the exclusive power to regulate trade. To reflect this delicate political balance between liberalization and the freedom to provide selective remedies, the United States had made sure that its trade agreements, including the GATT and the WTO, allowed it to do so.¹⁸

WORKING PAST THE STAND-OFF: A START, BUT NO BREAKTHROUGH

Over time, intransigence in both Washington and Brussels started to give way to small steps toward engagement with respect to the AB impasse. The European Union could agree that the DSU as written did explicitly require that

16 Terence P. Stewart and Elizabeth Drake. "How the WTO Undermines U.S. Trade Remedy Enforcement." Sherrrod Brown: US Senator for Ohio. February 2017. https://www.brown.senate.gov/imo/media/doc/WTO_Undermines_US_Trade_Report.pdf.

17 It should be noted that the United States did win many, perhaps most, of the challenges that it brought against market closure by other WTO Members.

18 Chad P. Bown in a January 2022 paper details the close interrelationship between the scope for employing trade remedies with the hope for achieving dispute settlement reform, particularly with respect to the United States (PIIE Working Paper 22-1 *Trump ended WTO dispute settlement. Trade remedies are needed to fix it*).

AB reports were to be issued no later than 90 days after the AB received an appeal (even if observers might believe that in complex cases or with a heavy caseload, this deadline could and should be extended with the consent of the parties). In addition, Brussels could agree that issues of fact were not to be addressed by the AB, that the AB should address only issues put before it, and that its decisions would not be binding as precedent, although they should be taken into account to promote consistency in interpretations of WTO rules.¹⁹ The Biden administration in turn promised to engage on the subject of WTO dispute settlement.²⁰

Since the primary protagonists over the AB issue were the United States and the European Union, that is where the process needs to begin, and it has to a degree begun quietly already. The central challenge is finding what it would take to close the gap between Washington and Brussels, in a manner that would be acceptable to China, India, and the rest of a very diverse Membership.

A NEW CONTEXT IN WHICH THE ISSUES WILL BE FRAMED

What would have worked as a solution in 2017 or 2018 is unlikely to work now. The conditions are different. The *status quo* from which a negotiation will proceed is not necessarily the DSU as it was, with the AB still functioning. The US position, informally stated in 2017 and in the period immediately following, was “we want what we negotiated [in 1994].” That statement of position may no longer be operative. Given the higher profile of the US-China rivalry, the existing extra-WTO-justified tariffs exchanged by the two, and US national security restrictions on steel and aluminum imports, it is hard to see a solution as simple as adopting the Walker Principles and thereby restoring the AB.

There has been a paradigm shift in US trade policy since President Obama left office.²¹ The Biden administration’s trade policy is driven by two lodestars: being “worker-centered” and “creating new standards to combat the harmful industrial policies of China and other countries that undermine our ability to compete.”²² It is extraordinarily unlikely that a restoration of the AB as it was—a return to the *status quo ante*—fits well by itself with those two objectives, both of which may require, in current parlance, “policy space,” namely freedom of action to remedy harms to workers and counter Chinese economic policies which the Administration sees as damaging to its interests. If there is a WTO component to this strategy, it will not start with the restoration of the AB.

19 “Annex to the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions; Trade Policy Review—An Open, Sustainable and Assertive Trade Policy.” European Commission. February 18, 2021. https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159439.pdf.

20 “Katherine Tai on WTO Dispute Settlement Reform.” International Economic Law and Policy Blog. January 12, 2022. <https://ielp.worldtradelaw.net/2022/01/katherine-tai-on-wto-dispute-settlement-reform.html>.

21 While the United States is no longer likely to shake the trading system with the President threatening US withdrawal from the WTO or a White House aide calling for line-by-line tariff reciprocity at the WTO, there is a distinctly more domestic orientation.

22 “Remarks of Ambassador Katherine Tai Outlining the Biden-Harris Administration’s ‘Worker-Centered Trade Policy.’” Office of the United States Trade Representative. June 10, 2021. <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/june/remarks-ambassador-katherine-tai-outlining-biden-harris-administrations-worker-centered-trade-policy>.

DOES THE TRADING SYSTEM NEED AN APPELLATE BODY, AND IF SO, WHAT KIND?

Why have an Appellate Body?

The idea of having an appellate level came late in the Uruguay Round negotiations, after the key requirement that panel decisions be binding had already been agreed upon. It made eminently good sense to add a second stage to the dispute settlement process. Disputes were going to be heard by a variety of panels comprising panelists of widely differing backgrounds and experience. Their application of the rules (findings of law) would likely be disparate, given that there would be little or no cross membership of panels at any one time. Consistency would be beneficial. Even more important, there was a felt need to correct egregious errors. This logically called for the addition of an appellate level. After all, appeals are possible even in the case of minor crimes in most countries, and those cases involve only individuals. It would seem sensible to have at least the same protection for the interests of sovereign nations. Those intimately involved with the establishment and use of WTO dispute settlement did not anticipate that there would be a large number of appeals. How often would there be egregious errors? Providing that normally the AB would review a panel report and give it a thumbs up or thumbs down within 60 days, and in more complex cases, 90 days, having a time-limited, nonresident appellate mechanism no doubt seemed eminently sensible.

But that is not the way that things worked out. The AB was sensitive to criticism from Members that it had not responded to all the issues raised. The AB appears to have assumed that it had no right to reject hearing a case or an issue as beyond its purview, although this is, for example, common US Supreme Court practice. Moreover, litigants had plenty of incentives to appeal—filing an appeal put off the need for compliance for a while longer, eventually a long while longer possibly calculated in years. The appellant in the meantime would be benefitting from the putatively non-compliant practice. A less knavish motivation—a longer period before compliance was required—would give more, often necessary, time to obtain passage of legislation to amend or withdraw the measure. Filing an appeal would also allow further arguments to be developed. For a country believing sincerely that it was correct, and that the panel decision was erroneous, the option of an appeal gave a country a desired second bite at the apple.

Since the AB never saw a case that it could not resolve or an issue it could not address and was in effect considering cases on the merits *de novo*, taking into account arguments that had not been made before a panel, “completing the analysis” for claims not adjudicated by the panel, and in effect issuing advisory opinions, the chances were improved that there could be a reversal of the panel decision. Even better, from the viewpoint of a litigant, the AB report might create a new general rule condemning practices that the Member bringing the case considered odious, ending them not just for itself in this one case but for all WTO Members for ever more. Filing an appeal could also be useful from the viewpoint of domestic politics. Doing so demonstrated to constituents that their government (and its lawyers) went the last mile to engage on their behalf.

Cases became not only more numerous but more complex, because the more theories and arguments that were raised, the higher the probability of success

on appeal. Briefs filed with the AB and AB reports began to grow like kudzu.²³ Reading the reports and understanding them was itself a time-consuming and mind-numbing task.

The objective of the calls for dispute settlement reform now is generally described as obtaining a process that is “two-stage, independent and binding.” Having two stages may seem obvious, but it was not the only choice. Countries resolve major disputes using arbitration which is final. Article 26.8 of the London Court of International Arbitration (LCIA) requires that parties waive their right to appeal. The Havana Charter of the International Trade Organization (ITO) provided that ITO Members were to settle their differences through arbitration.²⁴ There being an informal current WTO consensus that having two stages makes eminently good sense, the discussion here is aimed primarily at how to construct an appellate level that might be acceptable to all.

IS THE APPELLATE BODY A COURT?

The United States contends that the AB is not, or at least was not intended to be, a court.²⁵ The US argument is as follows: the DSU never calls the AB a “court.” AB Members are not called “judges.” They do not issue “opinions,” but instead file reports to “assist” the DSB in making decisions (through the adoption of the reports). AB reports are not issued by the seven members as a formal matter, but by a division of three AB members. Under the Marrakesh Agreement, the AB has no role in making authoritative interpretations of the WTO agreements:

*The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.*²⁶

The DSU went further, it gives the DSB and not the dispute settlement panels (including the AB) the final authority over dispute settlement, in fact all of the authority:

2.1. The Dispute Settlement Body is hereby established to administer these rules and procedures and... the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

23 Kudzu is an invasive weed in the form of a vine that covers bushes and trees and kills them by blocking the sunlight.

24 Article 93.2 of the Havana Charter provided that “the decision of the arbitrator shall not be binding for any purpose upon the Organization or upon any Member other than the Members participating in the arbitration.” The only obligation of the Members was (1) not to act unilaterally and (2) “the Members concerned shall inform the Organization generally of the progress and outcome of any discussion, consultation or arbitration undertaken under this Charter,” pursuant to Article 93.3.

25 “Report on the Appellate Body of the World Trade Organization.” United States Trade Representative. February 2020. https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

26 Marrakech Agreement Article IX.2.

The panels are limited in their function:

11. The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements.

The DSB and the panels, including the AB operate within another stricture, they are only to clarify what was already present in the agreements:

3. The dispute settlement system of the WTO . . . serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.²⁷

The European Union has now stated that the AB is not a court, in a semantic concession to the United States.²⁸ The problem with this conclusion is that functions matter more than words. *Si anas ut ambulat, et tetrissitare ut anas, anas est.*²⁹ “If it walks like a duck, if it quacks like a duck, it is a duck.” The presence or absence in the name of any body of the word “court” is not determinative of whether it is a court. The General Court of Massachusetts is not a court; it is the state’s legislature. France has a Constitutional Council (*Conseil Constitutionnel*) to determine the constitutionality of laws. It is a court, but not in name. In Britain, until 2005, the appellate function was supplied by the House of Lords which functioned as a court. Reports of the WTO’s AB are in fact final judicial decisions, given the inability of the DSB to prevent a report from taking effect.

The bottom line, despite the textual evidence, despite applying textual interpretation through application of the Vienna Convention of the Law of Treaties (VCLT), and ignoring the plain written intentions of its founders, the WTO found itself with a court. It is the task of negotiators now seeking to restore binding dispute settlement to the WTO to find ways of dealing with that reality. This is no easy task, as saying that the AB is not a court does not keep it from being one.

The majority of Members expressing themselves on the subject felt that the AB was not making law but interpreting existing WTO rules to fit evolving circumstances. Objectively, this is all too often a distinction without a difference. Resolving the degree of allowable elasticity of plain meanings of words to cover

27 “Thoughts on the Geneva Trade Week Session Entitled ‘WTO Dispute Settlement—Where Do We Stand?’” Current Thoughts on Trade—Terence P. Stewart. October 1, 2020. <https://currentthoughtsontrade.com/2020/10/01/thoughts-on-the-geneva-trade-week-session-entitled-wto-dispute-settlement-where-do-we-stand/>. Ambassador of the European Union to the WTO Joao Machado speaking at the Graduate Institute of International and Development Studies in Geneva, Switzerland, quoted by Terence Stewart.

28 “Thoughts on the Geneva Trade Week Session Entitled ‘WTO Dispute Settlement—Where Do We Stand?’” Current Thoughts on Trade—Terence P. Stewart. October 1, 2020. <https://currentthoughtsontrade.com/2020/10/01/thoughts-on-the-geneva-trade-week-session-entitled-wto-dispute-settlement-where-do-we-stand/>. Ambassador of the European Union to the WTO Joao Machado speaking at the Graduate Institute of International and Development Studies in Geneva, Switzerland, quoted by Terence Stewart.

29 *S’il marche comme un canard, s’il cancanne comme un canard, c’est un canard. Si camina como un pato, si grazna como un pato, es un pato.*

new situations is a difficult challenge for reform of the dispute settlement system. The US view is that the AB was engaged in “gap-filling,” making law where there was none, contrary to its appropriate role.

This is not the first time in history that the role of the judiciary has been closely examined for overreach. The French Revolution was fought in no small part to prevent a “*gouvernement des juges*.”

It was an old fear . . . seeing magistrates set themselves up as creators of law, when they should only be “the mouth of the law.” This fear has found a new foundation with the promotion of constitutional courts and other supreme jurisdictions . . . It never ceases to fuel fears of seeing it silently set itself up as a post-democratic power.³⁰

France’s Civil Code attempted to bar judges from making law, to prevent authority that the Revolution had excised from growing back. Civil Code Article 12 with respect to the responsibilities of judges states:

The courts will not be able to make rules and regulations, but they will address the legislature whenever they think it necessary, either to interpret a law or to make a new one . . . The courts may not directly or indirectly take any part in the exercise of the legislative power.³¹

But they do.

ARE APPELLATE BODY DECISIONS BINDING PRECEDENT?

The AB had adopted a doctrine that “absent cogent reasons”, its rulings would control future legal interpretations of the rules in future cases heard by panels. The United States, holding that the AB was not a court, felt that the dead hand of the past should not control future panel decisions, as the AB was not to make law.³²

As noted, while the French Civil Code proscribed judges from making law, it is hard to differentiate making law from expanding the reach of a law through legal interpretation. While as a formal matter, the interpretation of law in a given

30 “Gouvernement des Juges.” La Toupie. February 13, 2013. https://www.toupie.org/Dictionnaire/Gouvernement_juges.htm.

31 Article 12 of the Law of 16-24 August 1790, Code de L’organisation Judiciaire, states: *Ils ne pourront point faire de règlements, mais ils s’adresseront au corps législatif toutes les fois qu’ils croiront nécessaire, soit d’interpréter une loi, soit d’en faire une nouvelle.* Article 10: *Les tribunaux ne pourront prendre directement ou indirectement aucune part à l’exercice du pouvoir législatif, ni empêcher ou suspendre l’exécution des décrets du Corps législatif, sanctionnés par le Roi, à peine de forfaiture.* See also Article 1351 of the Civil Code: “*The courts may not directly or indirectly take any part in the exercise of the legislative power, nor prevent or suspend the execution of the decrees of the Legislative Body, sanctioned by the King, on pain of forfeiture.*” These points are taken from a talk I gave in the fall of 2019 to members of the French Senate to explain what the AB controversy was about.

32 Simon Lester and James Bacchus. “Of Precedent and Persuasion: The Crucial Role of an Appeals Court in WTO Disputes.” Cato Institute. September 12, 2019. <https://www.cato.org/free-trade-bulletin/precedent-persuasion-crucial-role-appeals-court-wto-disputes#the-creation-of-the-appellate-body>. Lester and Bacchus point out that the gap between the AB’s use of “absent cogent reasons” and the “persuasiveness” of prior case reasoning in a future case, the US’ preference is not that great, so that compromise should be possible. That is true only if the US purpose is not to overturn the precedent that it wishes to see consigned to the dustbin of WTO history.

case would be binding only upon the parties before the tribunal, judges would be aware of what other French judges, including in superior courts, had concluded as to what a statute meant. Judges would be unlikely to come to a different conclusion in a case that presented similar issues. In the British tradition, this is the concept of “*stare decisis*,” let the decision stand, which means “precedent is to be followed.” Commentators on the French courts state that judges will often indicate that they are not following precedent when in fact they are doing so, because they accept the reasoning, perhaps because of a desire for consistency, but also the ever-present wish of all judges not to be reversed on appeal.

The European Union came around to agreeing that AB decisions would not overtly be binding precedent, knowing that for the sake of consistency in making interpretations, prior rulings would continue to be very persuasive. It is not easy, nor desired by all, to drive a stake through the heart of the natural tendency to bow to precedent, not when some Members really like the precedent although others do not.

GETTING TO THE RIGHT ANSWER: IS FAR-REACHING STRUCTURAL CHANGE NECESSARY TO FINDING A SOLUTION?

We have learned during the past several years that the bounds of what we thought was normal in international trade relations can readily be breached. The United States had been the prime defender of the multilateral trading system. The world was informed that this was no longer the case when the US President in office in August 2018 called the WTO “the single worst trade deal ever made” and talked of leaving the organization. His administration took down what had become a central feature of the system, the AB.

Taking a longer view, US administrations come and go, and with patience, perhaps building on the consensus position (of all but the United States) that Ambassador David Walker put together would be sufficient to get the AB back, would it not?

It will likely not be sufficient, but it is a start. Sometimes in the practice of medicine, treating symptoms is what is done while seeking a cure. Thus, with regard to the 90-day limit and the ability to continue to decide on a case after an AB member’s term has ended, the Walker Principles might readily fix these issues. In some matters, the divisions among WTO Members go deeper and are far more difficult to deal with, particularly in assuring that the problems that the United States was primarily concerned with will not recur. How, for example, can one assure deference to domestic decision-makers in anti-dumping cases, to applications of methodologies that are either difficult to understand or repugnant to many when understood? And how quickly can state-influenced enterprise issues be resolved given the lack of trust between the protagonists?

Several years ago, when a US official and I were discussing how to meet US concerns, he told me: “Words are not sufficient; we had words and they didn’t work.” This is a reference to, for example, Article 17.6 of the Anti-Dumping Agreement, which requires a degree of deference to national administrative bodies because of their expertise and careful examination of detailed facts. The amount of deference that a court may give is like a rheostat: it can be dialed up or down depending on whether judges reviewing an agency’s action agree with the result or not. US Supreme Court Justice Neil Gorsuch, court observers think, believes that

too much deference has been paid under the *Chevron* doctrine,³³ so the attitude of that court could change in the direction of giving less deference to administrators.

When at the WTO, I tried to get the United States to remedy its problems with the AB by naming persons who had experience in administering trade remedies to vacancies on the body. This would have been one answer to the AB failing to understand what antidumping and countervailing duties were designed to remedy. The response was considered inadequate: “People come and go, and in any event cannot be fully relied upon.” This was evidenced by the US government not renewing for a second term even some Americans who were serving as AB members.

The fundamental problem, I was told, was “cultural.” A problem with this observation is that “culture”—in this case, a culture of judicial restraint, of paying more attention to negotiating history, of the bargains struck and what importance they had—is hard to mandate. Culture changes over time. The US view is that the culture of WTO dispute settlement became that of the boosters of the multilateral trading system: economists, political scientists and business interests who favor free trade. A “pro-free market” stance also favored countries whose products were on the receiving end of trade remedies complaining in WTO dispute settlement against trade remedies. In the eyes of American critics of WTO dispute settlement, the prevailing current in AB decisions regarding trade remedies distinctly favored more open markets, a Humboldt current bringing warming breezes of more trade not less. It is hard to change a current. Supporters of the AB deny that this is the case. But the road to solutions leads through Washington, and that is where there is an abundant lack of trust in the appropriateness of outcomes from the prior appellate system. It is necessary (for the purpose of finding a solution, for those offended by US tactics) to accept that the liberal trade policy bias that the United States feels exists in prior AB jurisprudence is—at least for the Americans—real.

WHAT IS TO BE DONE?

In constructing their new government, a primary concern of the American Founders was that a strong executive would grow back, that the new country would once again be subject to a king, even if this time he was home-grown and not based in London. They did not try to cure this by inserting a plethora of restrictions on presidential authority into the US Constitution because (one suspects) they knew that this would be ineffective. Instead, the Founders created a series of checks and balances in the form of co-equal branches of government, with the legislature and the courts offsetting the executive and the remaining authority delegated to the states and the people through the Bill of Rights. In the case of reconsidering a WTO, a constitutional convention would run into some difficulties. The point of the WTO and the GATT before it is not so much to reserve freedom of action for its nation-state Members, but to impose on nations agreed limits for the benefit of the trade interests of all, for the common good. They are not predisposed to create a more perfect form of governance.

33 In US domestic law, deference to administrators in the interpretation of law when the statute is ambiguous was considered required by the courts, according to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. et. al.*, a US Supreme Court case from 1984.

Nevertheless, given the clear deficiencies in the current institutional framework of the WTO, it is worth considering how the use of checks and balances could result in recreating a stronger world trade organization and a fully functioning dispute settlement system.

Hoekman and Mavroidis in the first of their joint 2020 publications,³⁴ Payasova, Hufbauer and Schott,³⁵ and MacDougall³⁶ provide brilliant synopses and analyses of what ails the WTO, reviewing much of the literature on the subject and coming up with a range of recommendations both for dispute settlement reform and rulemaking. And although I am in full agreement with many of the recommendations, we diverge at certain points. Given their expertise, and that we see many of the system's problems in the same light, this deserves some explanation.

A few years ago, when at the WTO, I thought that it would be a good idea to have AB Members full-time, chosen for their relevant skill sets, with their own clerks, and more independent of a strong-willed entrenched AB Secretariat staff (a source of the "stubbornness" that Hoekman and Mavroidis appear to attribute solely to the AB Members, and in some cases they are certainly right). In a more perfect WTO, it would make sense to have longer fixed terms for AB members. This would provide consistency to rulings. Hoekman and Mavroidis, like I and others, would have the AB refer matters that have not been negotiated and gaps in the rules to the Members.

I place emphasis on building up the strength of the rulemaking and executive and administrative functions of the WTO as necessary before perfecting the AB. If AB-strengthening changes are adopted before there is greater institutional balance, the problem of AB overreach will likely return and increase over time. Not only is sequencing of institutional reforms important, but it is unrealistic to believe the current or a near future US government signing on to changes perfecting the AB. Absent more effective legislative and executive branches at the WTO, providing checks and balances, more radical changes would be needed in the organization of dispute settlement itself—particularly for the AB, how it is constructed and its mandate. The ultimate prize is the restoration of the binding nature of WTO dispute settlement, not restoring the AB to what it was.

34 Bernard Hoekman, Petros C. Mavroidis, and Maarja Saluste. 2021. "Informing WTO Reform: Dispute Settlement Performance, 1995-2020." *Journal of World Trade* 55(1): 1-50. Bernard Hoekman and Petros C. Mavroidis. 2020. "Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?" European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2020/06. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3610&context=faculty_scholarship. Bernard Hoekman and Petros C. Mavroidis. 2020. "To AB or Not to AB? Dispute Settlement in WTO Reform." *Journal of International Economic Law* 23(3): 1-20. Bernard Hoekman and Petros C. Mavroidis. "Burning Down the House." in Bernard Hoekman and Ernesto Zedillo eds. *21st Century Trade Policy: Back to the Past?* (Brookings Institution Press: Washington DC, 2020).

35 Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott. "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures." Peterson Institute for International Economics. March 2018. <https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures>.

36 Robert McDougall. "Crisis in the WTO: Restoring the WTO Dispute Settlement Function." Centre for International Governance Innovation. October 2018. <https://www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf>.

Politics is the art of the possible, and it is rarely pretty in its process and too often not very attractive in its results. It requires a compromise of what is preferred for what might be on offer. The US Congress torpedoed the International Trade Organization. That should serve as a caution. Congress accepted the WTO and the DSU on the basis of a promise that there would be a domestic judicial review process for WTO case outcomes adverse to the United States. That promise was not kept, that domestic review mechanism was never put into place. The only trade agreement of major consequence that Congress has approved since the WTO Agreement in 1994 is the US-Mexico-Canada replacement (and to a large extent, a continuation) of NAFTA, and a political price was paid to obtain that.³⁷ The history of Congressional review of trade agreements provides lessons indicating that there will be parameters as to what will be politically feasible to enable the United States to join a reconstructed binding WTO dispute settlement system.

ALTERNATIVE PATHS FORWARD

It is widely recognized that reforms are needed to the DSU. Many of the suggestions for reform can be grouped under one of three headings: (1) perfecting the existing dispute settlement structure; (2) assuming that the United States will not accept a return to the system as it existed previously and that it will not accept reform limited to only cosmetic changes (so it is necessary view the way forward as a negotiation and consider what elements might be deployed to restore binding two-stage dispute settlement); and (3) by default, accepting a single stage of dispute settlement consisting of independent arbitration panels. The second and third paths move further away from a court structure.

Whatever path is chosen for reconstituting binding dispute settlement, the emphasis throughout should be bringing about the settlement of individual disputes as a higher priority than using dispute settlement to clarify WTO obligations, as important as the latter is. Clarifying the rules should be left to the Members. This is, in fact, what the DSU provides. The use of good offices of the Secretariat and mediation should be emphasized as favored parts of the dispute settlement process. Other alternatives, such as the filing of specific trade concerns (STCs), having a forum for providing reactions to the STCs, providing for the filing of notifications and counter-notifications, valuing serious deliberation within committees with respect to the issues raised, and crafting lists of best practices more generally—all should be preferred to adjudication. First and foremost, of course, Members are expected to live up to their obligations without the threat of compulsion, and this they largely do. Dispute settlement is for instances where they arguably fall short.

³⁷ The United States also provided Permanent Normal Trade Relations to China, allowing China into the WTO.

(1) Creating a more perfect judicial system

This path involves a rejection of reality. It requires putting aside thinking about how the current impasse was created and overcoming therefore the counterintuitive nature of the exercise. With those caveats, and as an intellectual exercise, there are a number of ways in which to strengthen and improve dispute settlement at the WTO with a focus on making the Appellate Body more of a court. This is the path of greatest affinity for most of those who are devoted to the multilateral trading system. It was my first reaction before the reality of the divided WTO membership forced consideration of alternatives.

In broad strokes, this is what would be involved: pay more attention to the selection process for prospective AB members, have each serve for only a single but longer term of office of seven to nine years,³⁸ give each AB member one or more clerks, and in the case of a vacancy in the AB, begin the nomination process automatically. AB members would be full-time with no other work, paid or unpaid, that could detract from their dispute settlement duties. Decisions by an AB panel member would not be valid after that member's term, but the remaining two panel members could still issue a decision in consultation with the other AB members. A 90/120-day limit would only be breached in extraordinary cases, and subject to a specified upper limit, at which point the case would be referred to the General Council. To improve caseload capacity, the AB could be expanded to nine Members.

One can give more than a touch of pragmatism to this option (with the hope that this might narrow the gap with the United States some day). In its decision restoring the AB, the General Council would provide language reinforcing the deference to be given to domestic authorities in anti-dumping cases (and countervailing duty cases). It would require the AB to clearly state its reasoning in opinions, make all hearings public, have decisions made only on the issues raised by the parties, and call for an annual meeting with the General Council for the AB members to hear views on the operation of the dispute settlement system. Precedents contrary to General Council guidance would be given no persuasive weight. As an additional option, a statement would be included that trade remedies would be recognized as having equal validity with other provisions of the WTO agreements. (Although this last point is correct, it is hard to imagine it being adopted by consensus.)

One can supplement AB reforms by aiming for higher quality in the first-instance panel process with a specialized roster of arbitrators. Technical assistance from the ICC, LCIA, and others—including not least the WTO Legal

38 Giorgio Sacerdoti. "The Future of the WTO Dispute Settlement System: Confronting Challenges to Consolidate a Success Story," in *Future of the Global Trade Order*, Carlos A. Primo Braga and Bernard Hoekman, eds. (European University Institute: Florence, 2017).

Changes designed largely to increase the capacity and the independence of the AB: going from seven to nine members, giving them longer fixed terms, making the AB members full-time (rather than commuters with other interests), and improving compliance. "WTO—EU's Proposals on WTO Modernisation." Council of the European Union General Secretariat. July 5, 2018. <https://perma.cc/CQ4S-3N2N>.

The Commission suggested to its Member States that a single and non-renewable six to eight-year term might be a useful reform for the sake of independence and efficiency. This suggestion would solve the problem of renewals getting conditioned or blocked, which the European Union and the United States had engaged in. The Commission added that once the United States unblocked the appointment process, the European Union would be willing to engage in discussions on the United States' substantive concerns.

and Rules Divisions—would be sought on improvements to be made in first-stage adjudication. Incentives could be provided to settlement, having the losing party at the panel stage owe compensation from the date of the adverse panel decision. Emphasis can be given to alternative means of resolving disputes, such as the good offices of the Director-General and Deputy Directors-General, or the filing of specific trade concerns in committees of jurisdiction. Costs can be awarded to the winning party for any appeal (other than against a least developed country, or upon other criteria).

It is possible to comb the extensive writings of Hoekman, Mavroidis, Lester, Hufbauer and Schott, and the sources that they cite, to compile suggestions as to how to improve the system. What should not be included in a recommended list is to move to voting in the Dispute Settlement Body. Resort to voting is a much larger issue of governance for the WTO than trying to get dispute settlement back on track. However, the fiction of DSB “adopting reports” from panels or the AB can be retained if this is desired, for as constructed it has no meaning. The DSB is engaged solely in rubber-stamping judicial decisions.

Important caveat:

It is unlikely that the United States would agree to binding dispute settlement without a carve-out for dealing with non-market competition from and in China, self-determined national security measures (what John Jackson called “interface” mechanisms),³⁹ or without policy space for trade remedies. This caveat applies to all options.

(2) Reconstituting an Appellate Body for two-tier dispute settlement

An overview

Where to begin? Negotiations would best start with a few basic concepts—that the shared objective is literally the settlement of disputes. The WTO consists of sovereign nations joined together for the purpose of cooperation on matters affecting international trade. They have made rules and they wish them to be effective. Where there are differences, they wish them settled amicably, without retaliation. Dispute settlement must be backed up by a judicial process, but that should not be the first option. It should be the default when other attempts at resolution fail. Heading off disputes by sharing measures in draft works well for product standards, along with filing specific trade concerns. While rulemaking in the WTO has become rare, consensus has been reached, for example, in the Committee on Technical Barriers to Trade (TBT) on best practices. The DSU provides for consultations, but those have become all too often a mere formality in a headlong flight toward adjudication. Good offices of the Director-General are available but are not often sought. Too much emphasis has been placed on adjudication as a first rather than as a last resort.

39 David Kennedy. 1995. “The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law.” *American University International Law Review* 10(2): 671-716.

A fresh look should be given to the WTO's institutional framework. Attention needs to be given to the roles of all the main institutional elements of the WTO—the Dispute Settlement Body, the General Council, and the Secretariat. As long as the other institutions of governance are inactive, there will be a problem of expecting too much from adjudication. The framework of the WTO lacks checks and balances. The AB is subject to criticism when the DSB and General Council do not perform their assigned functions. In a domestic national setting, if the courts exceeded their mandate, the legislature, often on the initiative of the executive branch, can change or clarify the law. In the WTO, rulemaking has proved to be nearly impossible. The Secretariat, the WTO's executive, has no role other than supporting panelists and AB Members. The solutions supplied in the current DSU, assigning a role to the General Council and Dispute Settlement Body, have been wholly ineffective.

Confining WTO reform to changes in the AB will require more far-reaching change than if a broader approach is taken. While a holistic approach is needed, that is not the most likely point where talks would begin, as indicated by the Walker Principles. Members are most likely to concentrate immediately on how the AB should operate.

The parameters for negotiation

The basis for negotiation should be clearly stated at the outset that the effort is aimed at restoring binding dispute settlement. Almost all WTO Members who have expressed an opinion on what WTO dispute settlement should encompass have subscribed to restoring the AB, with some changes to meet current and past criticisms. The MPIA has moved in this direction (although the United States' view has been that it did not go far enough). No WTO Member, including the United States, has excluded the possibility of having binding, independent, two-stage (panel and appellate level) dispute settlement.

The WTO has forcefully demonstrated that it is nearly impossible to make progress in negotiations in a meeting of the whole. To start the process, it is necessary to have the United States and the European Union intimately involved. They have been the primary antagonists but share a number of common interests. The two already have cooperated on a number of WTO reform initiatives in a trilateral format, with the inclusion of Japan. It is not essential that there be a trilateral base from which to build a broader consensus, but it is one way in which to proceed. The process could also include at the outset Brazil or Canada or another one or two active Members. Their work product would be an interim arrangement for disputes between any two of the parties to the talks, designating it as a “New MPIA (NMPIA).” The circle could then be broadened to other MPIA parties and a number of non-MPIA parties. If all WTO Members were comfortable with the outcome, this could become an updated DSU.

One can assume that the European Union would wish the outcome to be as close as possible to the current MPIA, and that the United States would wish policy space with respect to worker-centered trade remedies and include flexibilities to deal with non-market-oriented competition.

The negotiating choices for restoring an AB would no doubt start with giving it further instructions as to what its role is to be and what are its limits. There are also questions about the structure of the AB—a single term, a shorter or

longer term, how many AB members there should be (the MPIA has ten), what sort of expertise should be included, making reappointment as automatic as possible, etc. Were the DSB to have a real role in oversight of the AB, then the specifications for the AB could be less constraining. Were there to be a role for the Secretariat, the same may hold true. The parts of the system are interrelated.

Table 1 (see page 26) contains a menu of elements for a possible negotiation leading to restoring an appellate stage to which all WTO Members might ultimately agree. It is designed to stimulate a more detailed discussion on AB reform. Some of the elements listed are from the Walker Principles, created as a result of his consultations with WTO Member delegations. More than a few of the ideas in the following grew out of my own discussions with colleagues at the WTO while I was serving there from 2017 to 2021, as the AB crisis grew. In particular, there were long talks with DDG Karl Brauner and AB staff member Kaarlo Castren, both of whom have intimate knowledge of the workings of WTO dispute settlement. The ideas also evolved from discussions with WTO Members, including Ambassadors, members of their delegations, and officials in capitals, with past AB members and staff, and expert observers who are students of the process. A number of the elements are also contained in the rich trove of current literature on this subject. I am indebted to all but take full responsibility for the clearly personal menu of elements that follow. There are some innovations that I have not seen elsewhere that would certainly benefit from debate.

An initial problem for dispute settlement is that the rules of the system do not cover every contingency, and they often pose questions of motive. Examples of other areas where there is inadequate coverage by the rules are domestic industrial subsidies, some internet services, and many other services more broadly. Trade measures designed for coercion are hard to be judged in terms of their WTO consistency if they also take on the guise of a standards or antidumping measure.

There is a problem posed by asymmetry of coverage. How is dispute settlement to address practices that are harmful but not covered by the rules, when at the same time, responses in a rules-based system are likely to be covered by the rules?

The NMPIA format offers a convenient path for evolving within the WTO framework a flexible means to allow for experimentation with different elements of dispute settlement. What it cannot do is restore the AB unless it becomes acceptable to all.

(3) Single-stage dispute settlement

One tier—Panel decisions are final

- *Pro:* This option has the benefit of simplicity. It is the path perhaps least likely to establish precedent, although this cannot be assured. With a highest-quality roster of arbitrators, as with the LCIA and like bodies, the mechanism can earn the trust of WTO Members.
- *Con:* This is not what the WTO Members who have expressed themselves say that they are seeking. Moreover, single-stage dispute settlement can create unappealable but incorrect outcomes and inconsistent results for cases with similar fact patterns.

- *Comment:* Some of the lack of uniformity can be avoided if the operation of the panels is overseen by the appointment of an OLC reporting to the DSB.⁴⁰ In the case of serious inconsistency, the OLC can be entrusted with certain powers to intervene. The OLC would inform a panel if, in its view, the question cannot be decided under existing rules because the WTO Members had not yet negotiated a solution. In that case, the OLC would notify the DSB of the gap in the rules and recommend appropriate action. Prior to a panel being formed, it could issue on request, after briefing, an analytical report which could obviate the need for litigation.

Given the massive global network of arbitration, often, as with the LCIA, without appeal possible, would not single-stage, initial panel only, dispute settlement suffice for the WTO? The answer is, perhaps.⁴¹ That depends on whether the sole objective is settling a given dispute before a given panel or maintaining a single set of rules for the global trading system. As both are desirable, a premium needs to be placed on consistency and predictability. And once that last sentence is uttered, one is on one's way back to a judicially-driven rules system. So, some guardrails will be required.

WHICH OF THE THREE OPTIONS TO START TALKS WITH?

On balance, preserving an appellate function in dispute settlement is desirable, for consistency of decisions and to correct panel errors. A tactical question is how to begin the discussion. It may make sense to start where the system is currently on paper, if no longer in reality—that is, start with the current DSU and decide how to repair it.

The problem at this point is not primarily technical; it is political. In the end, balance will have to be restored to the system to obtain US acceptance. Pragmatism, creativity, and agility, if applied to this issue, can provide WTO dispute settlement with an appellate function having a legitimacy that will find general support.⁴²

CONCLUSION

To solve the crisis of WTO dispute settlement, part of the larger WTO crisis, there needs to be heightened engagement of Members dedicated to making improvements in the global trading system. Binding dispute settlement must be restored, but it is unlikely to be what it was, and it will very likely need to

40 This office has, so far as I know, not been suggested elsewhere.

41 Bernard Hoekman and Petros C. Mavroidis. 2020. "To AB or Not to AB? Dispute Settlement in WTO Reform." *Journal of International Economic Law* 23(3): 1-20.

42 "DDG Wolff: 'There is reason for optimism about the future of the multilateral trading system'." World Trade Organization. October 15, 2018. https://www.wto.org/english/news_e/news18_e/ddgra_15oct18_e.htm. "WTO Dispute Settlement Misunderstandings: How To Bridge the Gap Between the United States and the Rest of the World." International Economic Law and Policy Blog. April 19, 2020. <https://ielp.worldtradelaw.net/2020/04/wto-dispute-settlement-misunderstandings-how-to-bridge-the-gap-between-the-united-states-and-the-res.html>. "For most economists, anti-dumping and safeguards are, in practice, simply forms of permitted protectionism, whereas countervailing duties try to address a real problem (trade-distorting subsidies). As a policy matter, it is important to continue to make the case against protectionism. However, as a matter of politics, preserving a system with broad benefits requires compromise. The practice of trade remedies needs to be accommodated."

be part of a package. It is unrealistic to assume that dispute settlement can be solved solely on the basis of small adjustments made to the DSU. Either there would have to be exclusions from dispute settlement that would be very large—for use of trade remedies and measures to counter forms of state intervention in commerce that the current substantive rules cannot adequately address—or parallel negotiations will need to provide those rules.

An interim solution can take the form of a New MPIA (NMPIA), applicable only to signatories. This would avoid the need for a negotiation in which 164 Members are sufficiently satisfied with the result that none would block its adoption. In effect, the United States and the European Union would agree to a modified MPIA and invite others to join. It would be applicable to those who chose to join it. If the NMPIA (a US-EU MPIA) was less desirable to MPIA participants than their current arrangement, the two MPIAs could coexist as readily as if the United States and the European Union agreed to be bound by any first-instance panel decision.

Another approach to negotiations of a permanent solution to dispute settlement might be to include it as part of a broader package with substantively unrelated agreements, such as for e-commerce, trade and health, environmental issues related to climate change, improved access in various service sectors, dealing with industrial subsidies, and even issues in agriculture. The art of negotiation needs to be rediscovered if difficult problems are to be addressed with Members stretching to reach more ambitious results based on closer international cooperation. It may help to have enough on the table for trade-offs to take place. After Doha, many officials came to the conclusion that rounds are impossible as a means to reach an agreement and one off-deals might work. That conclusion is worth revisiting after years of stasis on services, agriculture, industrial subsidies, and other major issue areas that are not being addressed successfully. How much needs to be put in the pot on the international poker table for the parties not to walk away from the game?

Part of any new package of agreements should be WTO reform, and it should not be limited to dispute settlement, but complementary to it. Institutional reform will be needed to support rulemaking and the administration of the global trading system at the WTO, or trade issues will increasingly be dealt with in other settings: regionally (although CPTPP is ceasing to be even notionally regional), by subject matters (e.g., digital trade), and sometimes bilaterally. Where new rules arise in other, non-multilateral settings, disputes will migrate to resolution in other fora under sub-multilateral agreements if they are dealt with effectively at all.

The evolution of the world trading system, either fragmenting further or finding a path back to multilateralism, is a relatively slow process. In the meantime, what happens with disputes in Geneva before there is the reconstruction of an agreed appellate level? Some WTO Members will opt for having the panel stage non-appealable—that is, final. More countries will likely join the MPIA or perhaps there might be an NMPIA.⁴³ Those not choosing one of these alternatives will seek to continue to warehouse appeals on the basis of the

43 Most Members joining an alternative dispute settlement system, an MPIA, creates for non-participants the same effect as an opt-out through the action of others, rather than a decision taken by those left outside.

fiction that the AB exists. This default position for the conduct of international trade relations will impose costs. It may be that, as lack of enforceability of WTO agreements makes multilateralism less attractive, this will cause an acceleration of the move to the negotiation of regional trade agreements and single subject preferential trade agreements, a tendency that is underway in any event due to the current inability of WTO Members to reach clearly enforceable new agreements within the WTO.

Inertia in the form of the *status quo* will not be kind to the future of the multilateral trading system, and it should not be accepted with resignation. Investment is needed, by business, by NGOs, by labor, and by the governments that are the stewards of the system, to improve the trading system, to make it more relevant to current needs, and to meet future challenges.

Table 1

Reconstituting an Appellate Body for two-tier dispute settlement

The Authority of the Appellate Body

- 1 It cannot expand or limit the rights or obligations of the Members.
- 2 Issues that cannot be resolved based on explicit existing obligations shall be referred to the Dispute Settlement Body and the WTO Members for resolution.
- 3 Appeals may only be brought for issues of law, not fact.
- 4 AB decisions are to be confined to issues raised by the parties.
- 5 AB panels shall not issue advisory opinions.
- 6 Where an AB panel finds it necessary due to shortcomings in a panel report, the AB panel can (within 60 days of taking on a case) remand it for further consideration to the panel.
- 7 Decisions are applicable only to the case being heard. There is no presumption of precedential value. However, a searchable compendium of interpretations by the AB and first-instance panels will be maintained by the Office of Legal Counsel (a new OLC, explained below) of the WTO Secretariat and supplied to panels.
- 8 Special terms of reference could be mutually agreed by the parties to specific disputes, including stipulation to certain facts and limitations on the scope of issues submitted for adjudication.
- 9 Matters of national security are political in nature and a rebuttable presumption of deference will be provided to Members. This deference shall not be used to allow the provision of disguised protection to an industry, where the claim of an essential security interest is found to be frivolous.
- 10 Major issues of systemic importance, such as export restrictions on vaccines, would be referred to a special working party to foster a systemic response.

Expansion of the Roster of Appellate Body Members, Appellate Body Panel Composition

- 1 The Appellate Body shall be composed of highly qualified persons of recognized authority with demonstrated expertise in law,⁴⁴ international trade, **and** the subject matter of the covered agreements generally. AB members should each to the extent possible combine the skills of being a lawyer and a trade negotiator. It is optimal to have both of these kinds of experience.

44 This is not to say that each AB member needs to be as a formal matter, a lawyer, but it helps. There are many subtleties of litigation: when an argument is germane, when a statement in a report is dictum, where burdens of proof lie. Equally, the subject at hand is commerce, and to promote fair commerce, trade negotiators created rules. Understanding what the original negotiators intended, and when they reached a compromise or an impasse, is assisted if one has had relevant experience. The “and” in the text above that is in bold font is in the current DSU.

- 2 The number of AB members serving at any time with in-depth knowledge of the conduct of domestic trade remedies proceedings shall be commensurate with the share of cases on that subject.
- 3 AB members shall not be affiliated with any government.
- 4 The number of AB members is increased from seven to 25.⁴⁵
 - A major complaint concerning current WTO dispute settlement is the seemingly interminable delays in getting an answer. One way of getting back to speedier dispute settlement results is to increase the number of AB members. The MPIA representing 25 WTO participants (at the time of writing, early 2022) and already has 10 MPIA appeal arbitrators.
 - How extreme is expanding the number of AB members? A complaint of the old AB (the one the WTO had until December 2019) was overwork. A few years ago, the WTO Director-General congratulated the dispute settlement system for hearing its 500th case over the course of the first 20 years of the WTO. The ICC in recent years typically handles about twice that volume of cases in a single year. International commercial arbitration is considered highly reliable, which we know because it continues to be relied upon in cases involving very large commercial and financial stakes. There seems to be a sufficient number of skilled arbitrators to meet the demand, through the ICC, LCIA, and like bodies.⁴⁶ An AB of 25 members is hardly a large number compared with the vast demand for adjudication that is taking place worldwide. There are cost-savings to be achieved as well: it is usual for arbitrators to, in the main, write their own opinions, rather than involving Secretariat staff.
 - A larger roster of AB members would allow for diversity by geographic representation and gender.
 - It would allow for specialization.
 - » To the extent possible, AB panel members should have relevant experience. As noted, as many cases are about trade remedies, there should be added to the roster a sufficient number of persons with expertise, and preferably hands-on national administrative experience, to sit on cases having to do with anti-dumping, subsidization, countervailing duties, safeguards, and balance of payments measures. If there were

45 Expansion of the number of AB Members, and for that matter, panelists who were more like stand-alone arbitrators, might also make the WTO dispute settlement more accessible to developing countries. Increasing the supply might drive down cost.

46 The International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolutions (ICDR), the Swiss Chamber's Arbitration Institution (SCAI), the Vienna International Arbitral Centre (VIAC), the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Stockholm Chamber of Commerce Arbitration Institute (SCC), and the International Institute for Conflict Prevention and Resolution (CPR).

cases on other specialized areas, the same care should be taken with appointments.⁴⁷

- » Appellate panels should have the requisite expertise with respect to trade remedies.
 - The DSB, on the advice of the Office of Legal Counsel (OLC), would be tasked with assuring that this mandate is adhered to.
- 1 The dispute settlement system would be made available for settlement of disputes under regional and bilateral free trade agreements (RTAs and FTAs).
 - This would contribute to the centrality of a single world trading system.
 - » If this practice grew, it could require separate expert staffing from the Secretariat.

Term of Office of Appellate Body Members, Operation of Appellate Body Panels

- 1 AB members would serve for two-year terms. Re-appointment for a second term is presumed to be automatic absent objection by positive consensus in the DSB for compelling reasons which must be stated. Non-reappointment is to be considered extraordinary.
- 2 An AB member shall serve a maximum of two terms on the roster.
- 3 The terms would be staggered so that one-third of the serving AB members' terms would come to an end every two years.
- 4 An allegation of expansion of rights or obligations by an AB member or members will be heard by the **Dispute Settlement Review Committee (see DSB discussion below)**, which shall make its recommendation to the DSB for disposition. Decisions of the DSB on this matter would be taken by positive consensus.
- 5 No case is to be assigned to an AB member within the last 90 days of that member's term.

47 Jennifer Hillman. "Three Approaches to Fixing the World Trade Organization, the Good, the Bad and the Ugly?" Institute of International Economic Law. December 10, 2018. <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>. Jennifer Hillman, Professor at Georgetown University Law Center, Fellow at the Council on Foreign Relations, and a former AB Member, has an alternative that equally recommends itself: "One option would be to create a special Appellate Body to hear only appeals of trade remedy decisions. This special appellate institution—call it the Rules Appellate Body—could be made up of members chosen in large part because of a strong background in trade remedy law." This to some extent echoes the US court system, which has specialized courts for consideration of appeals from trade remedy decisions of the US administrators of the applicable laws. Hillman suggests another approach from national trade remedy cases: have initial panel decisions final. She argues persuasively that these cases have already been looked at very carefully in domestic proceedings. I would add that an extraordinary challenge might be brought to an AB trade remedy expert panel if the allegation was made supported by evidence that the consideration was arbitrary, capricious, and not up to a minimum standard of fairness and objectivity.

- 6 Decisions can be rendered after the term of office of an AB Member by agreement of the parties for up to 60 days, unless a longer period is approved by the DSB (by positive consensus) in extraordinary circumstances.
 - 7 No report from an AB panel will be valid if issued after 90 days from the date of referral to the AB, unless the period of validity is extended by the DSB for an additional period not to exceed an additional 90 days for good cause shown, on application of the parties to the dispute.
 - 8 An interim AB panel report containing the dispositive findings of the AB panel will be given to the parties and the OLC ten days before the issuance of a final report. Upon motion for reconsideration by a complainant or a respondent, the AB panel will have 30 days to issue a final report.
 - 9 As a general rule, hearings conducted by first-instance and AB panels shall be open to the public.
- AB members are to be remunerated only for work on appeals to which they have been assigned—and on the same basis as panelists.

Standards of Review

- 1 The primary guide for settling a dispute is traditional contract interpretation, requiring panels to discern the intention of those drafting the rules, relying wherever possible on negotiating history. There is no “plain meaning” of language that is not obvious on its face. The original intent of the parties to the negotiation is controlling.
 - WTO Agreements are to be viewed as contractual arrangements. What was negotiated at the time was all that had been agreed to. Negotiating history is to be a primary source for interpretation as to the scope of the rules. The rules cannot be expanded by the AB to fit later circumstances to the extent that an interpretation could not have been within the clear intention of the negotiators,⁴⁸ particularly when the negotiating history was crystal clear that a given point (zeroing) had been the subject of attempts at negotiation which were rebuffed.
- 2 The WTO provisions for trade remedies are deemed to have co-equal importance with other WTO provisions. They are not to be deemed exceptions to be narrowly construed.
- 3 Deference is to be given to domestic tribunals that have detailed, reliable processes with respect to findings of fact.⁴⁹ The standard of review that is applicable in Article 17.6 of the Anti-Dumping Agreement is to be regarded as definitive guidance:

48 Trade measures evolve in kind. There is room for interpretation as to what a rule is to cover when technology or other factors bringing about change undermine the value of a trade concession or a rule. All that can be done is to give guidance with respect to how the process of interpretation is to take place.

49 In US domestic law, deference to administrators in the interpretation of law when the statute is ambiguous was considered required by the courts, according to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. et. al.*, a US Supreme Court case from 1984.

- *i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.*
- *(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.⁵⁰*
 - » The first sentence of subparagraph. (ii) is not to be read to take precedence over the second sentence, nor is resort to the Vienna Convention on the Law of Treaties (VCLT) to be used to nullify the quest for identifying more than one permissible interpretation.⁵¹

The WTO Secretariat's Role

1 A new independent Office of Legal Counsel would be created within the Secretariat⁵²

- The OLC would advise the Director-General and Secretariat on any legal questions involving interpretation of WTO Agreements.
- The OLC would be responsible as an independent guardian of the system and would not otherwise take sides in any panel or AB process.

2 Pre-litigation

- Upon request, skilled and experienced independent OLC staff would give informal, confidential non-binding analytical reports on the merits of a case, helping to narrow issues for decision.
- Upon request, Deputy Directors-General would provide good offices to potential litigants to seek resolution of differences without resorting to litigation.

3 After a request for consultations is filed, good offices to be utilized

- Parties are required to utilize good offices of the Director-General and Deputy Directors-General before a panel would be formed.

⁵⁰ Anti-Dumping Agreement Article 17.6.

⁵¹ Isabelle Van Damme. *Treaty Interpretation by the WTO Appellate Body*. (Oxford University Press: Oxford, 2009). Van Damme discusses the interpretation taken by various AB divisions on the interplay of interpretation under the VCLT and the Anti-Dumping Code sections quoted above, on pages 68-72 of her book.

⁵² Not to be confused with the existing OLC, a very small office of two lawyers dealing with legal issues involving personnel and other administrative matters.

4 Litigation

- The Office of Legal Counsel (OLC) would be expected to file amicus briefs on key points of legal interpretation, confined to the negotiating history to discern the intention of the parties to the agreement. The OLC would identify areas where there appeared to be no coverage within a WTO agreement of the practice which is the subject to the dispute.
- The OLC, if it found that a matter was not covered by the rules as negotiated, and the panel or AB panel had not declared itself unable to resolve a dispute as a result of the absence of an applicable rule, would refer the matter to the DSB for action, with copies to the WTO committees having subject matter jurisdiction.

5 Independent investigation

- The OLC would investigate suspected serious deviations from the WTO rules on the part of any Member that would have significant systemic implications.
- The OLC would publish its conclusions, identifying “questionable conduct” without itself initiating litigation, unless the systemic implications were deemed extremely serious, and then only after consultation with the Chairs of the General Council, the DSB, and the Trade Policy Review Board, in which instance, OLC would bring a case directly to the AB for necessary adjudication,⁵³ and where existing rules were insufficient, refer the matter to the General Council.
- The OLC would regularly publish a watch list of measures that appeared to be on their face unjustified, and had a past, current, or expected substantial negative effect on trade.

6 Relation to the Dispute Settlement Board

- The OLC would review the decisions of panels and AB panels and advise the DSB through triennial reports whether the intention of the parties, as discerned from negotiating history, was being applied, and include any recommendations as to remedies with respect to deviations from the intent of the parties to the negotiation.

Role of the Dispute Settlement Board

- 1 A major cause of allegations of AB overreach is that there are no checks and balances built into the system to avoid judicial activism. The DSB, for all intents and purposes, has no role in the administration of the dispute settlement system other than the power of appointment.

53 Jeffrey J. Schott and Euijin Jung. “The WTO’s Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes.” Peterson Institute for International Economics. December 2019. <https://www.piie.com/publications/policy-briefs/wtos-existential-crisis-how-salvage-its-ability-settle-trade-disputes>. Schott and Jung would have the AB, where it found that the rules did not cover, on its own motion choose to refer a matter to the committees having jurisdiction over the subject matter.

- 2 Going forward, gaps in rules would be identified by AB panels and/or the OLC and referred to the DSB and the appropriate WTO committees with subject matter interest for potential resolution.
- 3 The Chair of the DSB would convene a **Dispute Settlement Review Committee** consisting of five Chairs of WTO Committees and five Secretariat Directors to issue a triennial report on the operation of the AB, including monitoring for areas where potential overreach may have occurred. This **Dispute Settlement Review Committee** would accept submissions from Members suggesting areas where overreach may have occurred. Expert opinions would be sought on cases wherever expertise would be needed or would otherwise be beneficial.⁵⁴ Relevant WTO Committees (such as Anti-Dumping, Subsidies, TBT, Services, TRIPS, etc.) and staff would be invited to attend.
- 4 Any group of no less than 10 WTO Members could identify a particular finding for an **in-depth analysis by a special apolitical expert group constituted by the DSB**, so as to provide a “measured report of constructive criticism for the information of the WTO system, including the Appellate Body and panels.” Such a report could be provided to the DSB for information, and conceivably could even be adopted by the DSB.⁵⁵
- 5 The DSB has the responsibility to fill AB vacancies as they arise. The nominating process is to be automatically begun six months before the expiration of any term.
- 6 The Chairman of the DSB is responsible for the DSB becoming, to the extent possible, an effective body. The Chair should be active in attempting to get conflicts resolved wherever the Chair deems it would be productive, prior to and during litigation. It is the responsibility of the Chair to bring political acumen to the goal of settling disputes. Where, for example, the result is almost fully for one party at the level of the first-instance panel, and for the other party at the appellate level, this may be *prima facie* cause for the Chair to seek to resolve the matter directly working with the two parties, and to suggest to them (in consultation with the OLC) that one or the other of the panels be reconvened to reconsider some elements of the case.
- 7 DSB chairs would serve for two-year terms rather than one.

54 “WTO Dispute Settlement Misunderstandings: How To Bridge the Gap Between the United States and the Rest of the World.” International Economic Law and Policy Blog. April 19, 2020. <https://ielp.worldtradelaw.net/2020/04/wto-dispute-settlement-misunderstandings-how-to-bridge-the-gap-between-the-united-states-and-the-res.html>. Simon Lester suggested an alternative to the DSB addressing overreach. He would have the General Council or a Ministerial Conference vote (three-quarters of Members required to carry an issue) on whether the reasoning (not the result of an individual report) was in error, thus making law. The problem with voting is the difficulty or ease of getting enough votes—that is, an unpopular position might not carry, while a popular but erroneous position might do so. Nevertheless, this is a recognition that the Members have to rediscover their legislative (rulemaking) power and reassert it. The question is how best to do it. This approach could be combined with the DS Review Committee recommended above.

55 “The Future of the WTO: Addressing Institutional Challenges in the New Millenium: Report by the Consultative Board to the Director-General.” World Trade Organization. 2004. https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

Ancillary Changes

- 1 Reports of the AB panels are to be readable, to contain clear findings together with a full justification of reasoning that allowed each finding to be made, with only brief summaries of submissions and arguments, with reference to online documents submitted by the parties and any amicus briefs for greater detail.
- 2 Operating procedures shall be adopted, covering imposition of strict page limits for written submissions, guidelines for briefs, focused hearings and questions to the parties, subject to approval by the DSB by positive consensus, or if no consensus, by the DSB chair and the OLC.
- 3 Any official meetings among AB members other than those serving on an AB panel will be open for virtual attendance by WTO Members and the Secretariat.
- 4 The roster is not a collegium and is not to gather to discuss cases, except in open meetings. Pending cases are not to be discussed outside of the AB panel seized with the case.
- 5 The parties can, by mutual agreement, suspend temporarily or terminate an AB consideration of a case, in order to promote⁵⁶ settlement.

First-Instance Panel

- 1 Emphasis is placed on experience, with the appointment of highly qualified individuals.
- 2 Part of WTO Reform is to review and include suggestions on improvements to the panel process. There have been many useful suggestions in this regard. Addressing these is beyond the scope of the present analysis, which focuses on the most serious issue with respect to WTO dispute settlement, restoring binding dispute settlement.⁵⁷ With the restoration of binding dispute settlement, panel quality and efficiency should also be addressed, as well as more effective means to assure compliance with dispute settlement decisions, including collective action.

Effective Date for Compliance

- 1 The obligation for compensation/removal or adjustment of the non-conforming measure dates from the first-instance panel report if that report is not reversed on appeal
 - The incentive for delay is thus removed, and the burden for delay falls on the party losing at the first instance panel.

⁵⁶ One element is the use of experts, which while desirable in complex cases, should not unduly delay reaching a result.

⁵⁷ Giorgio Sacerdoti. "The Future of the WTO Dispute Settlement System: Confronting Challenges to Consolidate a Success Story." in *Future of the Global Trade Order*, Carlos A. Primo Braga and Bernard Hoekman eds. (European University Institute: Florence, 2017).

Interim WTO Dispute Settlement Provisions

1 Appeals into the void are disallowed⁵⁸

- The Secretariat has no authority to accept appeals when there is no AB in place (when there are no AB Members serving).

2 Panel decisions are final if no other arrangement for an appeal is made between the parties

Voluntary Nature of the Dispute Settlement System

1 Opt-in/Opt-out

- No WTO Member would be compelled to join the dispute settlement system.
 - » Any Member not agreeing to be subject to the DSU would have no access to it and would not have any enforceable rights under the WTO Agreements. It would in effect be reduced to observer status.
- No WTO Member would be compelled to have disputes adjudicated by a reconstituted AB panel but would then be required to abide by first-instance panel decisions or those of an MPIA for a period of five years (before being allowed to opt back in) for any cases in which it is a party, as either complainant or respondent.
- An opt-out of the system would be possible by category—for example, limited to trade remedy cases (AD, CVD, safeguards, national security), with the consequence that it could neither bring nor be subject to a case involving measures of the kind specified. Opt-outs would have a sunset at five years, renewable for additional periods.⁵⁹
- To prevent gaming the system with respect to individual cases, a Member deciding to opt in would be obligated to stay in for the next four cases brought against it. Not appearing would result in a default judgment.

58 Bernard M. Hoekman and Petros C. Mavroidis. "Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?" European University Institute, Robert Schuman Centre for Advanced Studies Global Governance Programme Working Paper No. RSCAS 2020/06. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3610&context=faculty_scholarship. Bernard Hoekman and Petros Mavroidis note in their important essay: "The WTO has taken no official position regarding the question whether the correct interpretation of Article 16.4 of the DSU entails that an appeal to a nonexistent AB is possible or not." This sentence is accurate but has a lot more packed into it than what is on the surface. How can the WTO take a position? No Member has decided to take this question to a panel. The rule-making function of the WTO can be cranked up every now and then for a huge effort, such as the Trade Facilitation Agreement or the ban on agricultural export subsidies, but these took years in the making, and a very concentrated effort. The Dispute Settlement Body has never taken a position. The General Council has not interpreted the DSU. There is no General Council of the WTO Secretariat that gives opinions on the meaning of WTO agreements.

59 Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott. "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures." Peterson Institute for International Economics. March 2018. <https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures>. Jennifer Hillman (2018) suggests a (temporary) moratorium on appeals of panel decisions involving trade remedy disputes. Schott and Jung (2019) suggest that the moratorium on appeals should be permanent and limited to AD/CVD cases (as opposed to all trade remedies such as safeguards). AD/CVD cases would still be subject to binding dispute panel decisions. My suggested variant avoids completely removing trade remedy cases from appellate jurisdiction.

- Non-application, either complete or by category of case, between two Members would also be an option but it should not affect the rights of third Members (MFN). This provision would allow two Members engaged in a strategic competition to make special arrangements for achieving maximum mutually-acceptable coverage of WTO rules between them, without blocking change in the system as a whole, or having complete non-application of the DSU between them.
- **Domestic means to invoke an opt-out (United States)**
 - » Congress approved the Uruguay Round Agreements, and therefore the creation of the WTO, because of an agreement between then-President Bill Clinton and the co-authors of a Senate proposal, Robert Dole and Daniel Patrick Moynihan.⁶⁰ Their proposal was to have a US panel of retired federal judges review WTO rulings that were adverse to the United States to determine whether the decisions were correctly reached. The legislation did not become law, despite the endorsement of the President and the Chair and Ranking Minority Member of the Senate Finance Committee.
 - » The Dispute Settlement Review Commission Act can be reconsidered,⁶¹ revised to implement rights under the amended DSU, as a means to determine if the President should decide whether or not to opt-out of AB review (an opt-out from the WTO would not be included as an option).
 - » Putting into place an independent review of AB decisions and requiring in law that the opt-out be invoked only upon a Commission decision, and with Congressional approval expressed in a joint resolution, would eliminate any likelihood of an ill-considered US opt-out taking place.
- **Testing a reformed two-stage system**
 - » One of the last sitting AB members, Thomas Graham, recommended in 2019 that the AB be given another chance, with some changes made in staffing to demonstrate that it would be able to meet US objections without changes in the DSU. That option was not tried.
 - » The only way to determine if a new system would work is with another try, after making changes that are broadly acceptable to WTO Members. The trial period could be five or 10 years, with a sunset clause requiring consideration of renewal of, or making permanent, the system at the end of that period.

60 "General Agreement on Tariffs and Trade." C-SPAN. November 23, 1994. <https://www.c-span.org/video/?61755-1/general-agreement-tariffs-trade>. There would be no WTO without President Clinton's commitment to a domestic judicial review commission and domestic US procedures for withdrawal from the WTO triggered by WTO dispute settlement engaging in overreach.

61 "Hearing Before the Committee on Finance, United States Senate One Hundred Fourth Congress First Session on S.16—World Trade Organization Dispute Settlement Review Commission Act." United States Senate Committee on Finance. May 10, 1995. <https://www.finance.senate.gov/imo/media/doc/Hrg104-124.pdf>. "S.16—WTO Dispute Settlement Review Commission Act." Library of Congress. January 4, 1995. <https://www.congress.gov/bill/104th-congress/senate-bill/16/text>.



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