



WTO Dispute Settlement and the Appellate Body Crisis

Back to the Future?

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Abstract

Recent survey evidence and proposals made in long-running negotiations to improve WTO dispute settlement procedures illustrate that many stakeholders believe the system needs improvement. The Appellate Body crisis could have been avoided but for the use of consensus as WTO working practice. Resolving the crisis should prove possible because the matter mostly concerns a small number of more powerful WTO members. We make several proposals to revitalize the WTO appellate function. Doing so matters not only for the continued salience of the existing WTO agreements but but is important in keeping the WTO fit for purpose as a forum for negotiation and enforcement of new (plurilateral) agreements on trade-related issues currently not or only inadequately covered by the WTO.

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Bertelsmann Stiftung and WTO Reform

If international trade is not governed by rules, mere might dictates what is right. The World Trade Organization (WTO) serves as a place where trade policy issues are addressed, disputes arbitrated, legal frameworks derived and enforced. Through these functions, the WTO ensures that the rules of trade policy are inspired by fairness and reciprocity rather than national interest. It is more important than ever to vitalise the global public good that it represents against various threats that have been undermining it.

The Global Economic Dynamics project of Bertelsmann Stiftung is a firm believer in rules-based international trade and the WTO. In 2018, we published an extensive report with propositions on how to revitalise the WTO, based on the deliberations of our High-Level Board of Experts on the Future of Global Trade Governance. In 2019 and 2020, we follow up on this report with a series of policy contributions, providing fresh ideas and elaborating on concepts already introduced in the report. These contributions cover the areas of the Appellate Body crisis, dealing with the competitive distortions caused by industrial subsidies, enabling Open Plurilateral Agreements within the WTO while providing reassurance to concerns of the membership at large with such forms of flexible cooperation and, finally, improving working practices in WTO Committees.

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Executive Summary

The dispute settlement system of the World Trade Organization (WTO) — long held to be the crown jewel of the multilateral trading system — is in crisis, potentially endangering the future of the WTO. The United States has been blocking new appointments to the Appellate Body (AB), which plays a key role within the WTO's compulsory third-party adjudication process, as the terms of sitting members expired. As a result, there is no longer a multilateral forum to hear new appeals. For the moment, dispute panels continue to be established, suggesting that WTO members retain confidence in WTO dispute settlement. However, there is uncertainty about how disputes will be resolved if panel recommendations are appealed. Some WTO members are seeking to address the matter by developing alternative appeal mechanisms, notably an EU initiative to have panel reports heard by an ad hoc appellate process. While understandable, such stop-gap solutions risk creating a multi-tier system across WTO members. Some will participate, some will not. The result is unlikely to lead to an internally coherent jurisprudence, the *raison d'être* of any appellate process.

While most WTO members oppose the action of the US, a recent survey of WTO delegations and practitioners (undertaken as part of the Bertelsmann Stiftung-supported research project that this paper contributes to) reveals that the US is not alone in having concerns about the performance of WTO adjudicating bodies. Dispute settlement may be the crown jewel of the WTO, but it has imperfections. This is neither surprising nor contested. The problem is that the WTO membership collectively has been unable — and unwilling — to make timely repairs, and thus allowed the jewel to crack.

Because the establishment of an appellate function and removing losing parties' ability to block the adoption of ruling was a major innovation for the trading system, Uruguay Round negotiators built in a formal review of the operation of the new Dispute Settlement Understanding (DSU). The DSU Review was duly initiated in 1998 and over several years generated many suggestions to improve the operation of WTO dispute settlement. A core American concern, that the AB has sometimes overreached its mandate, was raised in the DSU Review almost two decades ago and led to a proposal by Chile and the US on "improving flexibility and member control in WTO dispute settlement" and more generally to create "some form of additional guidance to WTO adjudicative bodies." This as well as other proposals made in the DSU Review, e.g., an EU suggestion to create a standing panel body (a true court of first instance) were rejected by other WTO members, precluding consensus, the WTO's decision making working practice. Although some WTO members sought to discuss matters raised by the United States during the DSU Review, the need for consensus prevented a flexible response to changed circumstances and priorities.

A core US criticism concerns the AB's alleged overstepping of its mandate, exemplified in the haphazard treatment of the idiosyncratic standard of review embedded in the WTO Anti-Dumping Agreement (article 17.6). This provision, introduced at the insistence of the US delegation in the Uruguay Round, was meant to act as a deferential standard in favour of interpretations adopted by investigating authorities, if panels found that more than one permissible interpretation were possible in any given dispute. The AB was required to give meaning to article 17.6. The US critique is that the AB only paid it lip service, a critique that arguably is well founded in that most panels and the AB have not seriously engaged with article 17.6. It is unfortunate that they did not do so, even though it is difficult to construct the counterfactual outcomes had they observed this legislative imperative.

Where they are not clear, rules should be clarified by the WTO membership. One way to encourage such clarification would be for the WTO membership to stipulate — as a procedural matter — that the AB should request the relevant WTO bodies to clarify the pertinent disciplines, if rulings hinge on the interpretation of the invoked provisions of a WTO agreement in instances where there are gaps or where rules are unclear. At the end of the day, if WTO members are concerned that the AB is exceeding its mandate, they must address this by renegotiating the substantive provisions of specific agreements.

Even if this could be agreed, it will not take away that panels and the AB unavoidably have substantial discretion, as they are called on to interpret the provisions of an incomplete contract (the WTO). Given that it is impossible to

write a complete contract, any reconstituted appeals function should do more than include provisions calling for claims based on vague or unclear language to be sent back to the WTO membership to clarify. Members should also pay more attention to the organizational aspects of adjudication, including procedures used to select adjudicators.

Elements that could usefully find their way into a future negotiation on reforming WTO dispute settlement procedures include creation of a roster of 15–20 permanent panelists and expanding the number of AB members to nine, all serving one term of 8 to 10 years; agreeing that cases be heard by divisions of adjudicators, with decisions taken by simple majority and dissenting opinions published. Particularly important are measures to improve the quality of appointments. This can be achieved by creating a commission of eminent experts well-versed in trade dispute settlement who are entrusted with the task to screen both proposed panelists and AB appointments put forward by the members of the WTO. Moreover, WTO adjudicators should have the right to appoint their clerks, reducing their reliance on the WTO Secretariat.

These suggestions complement the so-called “Walker Principles” put forward by Ambassador David Walker in 2019 to address US concerns with the operation of the AB and to ensure that: (i) appeals are completed within 90 days; (ii) AB members do not serve beyond their terms; (iii) precedent (case law) is not binding; (iv) facts cannot be the subject of appeals; (v) the AB be prohibited from issuing advisory opinions; and (vi) dispute settlement findings cannot change obligations or rights provided by the WTO Agreements. The Walker principles are fully consistent with — and indeed often echo — what is already in the DSU. For this reason, they should be amenable to all WTO members and serve as the basis for the substantive agreement needed to address the core US concern: credible measures to ensure the AB will stick to its mandate.

One lesson from recent events is that more interaction between WTO members and a reconstituted AB is needed. In doing so, it is useful to distinguish between substantive and procedural rules. Procedural changes in the implementation of the DSU lie at the heart of any resolution of the AB crisis. Such changes require deliberations and decisions by the membership to implement specific reforms to improve the operation of the DSU. If necessary, such process-related changes should be subject to a vote, as envisaged by Art. IX WTO. Doing so is not in the DNA of the organization, for good reason. We strongly support the principle of consensus-based decision making when it comes to substantive rules and negotiated rights and obligations. But we are also of the view that voting on procedural reforms that improve the operation of the institution without affecting the rights and obligations of WTO members should not give rise to concerns this is a slippery slope. If procedural reform proposals are well prepared – informed by consultations and supported by the good offices of the Director-General – voting may not be needed in any event. If the membership is bold enough to adopt proposals along the lines indicated here, we might start seeing some light at the end of the dispute settlement tunnel.

This is important not only from the perspective of enforcing past agreements. It is also important for the prospects of negotiating new rules of the game. Even if the latter are more likely than in the past to be plurilateral in nature, they will need to be enforceable by signatories. An effective DSU is a core reason for concluding new agreements under auspices of the WTO as opposed to pursuing cooperation in the context of trade agreements negotiated outside the WTO.

Introduction

The WTO dispute settlement system – compulsory third-party adjudication – long held to be the crown jewel of the multilateral trading system, is in crisis. As a result of a decision by the United States to block appointments to the WTO Appellate Body (AB) as the terms of sitting adjudicators expired, the appeals function of the WTO became dysfunctional in December 2019 as the number of AB members fell below the minimum (3) needed to consider an appeal of a panel report. As a result, there is no longer a multilateral forum to hear new appeals. Many WTO Members fear that without the AB the WTO dispute settlement system will lose much of its predictability and may eventually collapse. This, in turn, has potentially major consequences for future rule-making efforts in the WTO, as the value of negotiated outcomes depends on the ability of signatories to enforce them.

Although panels continue to be established, there is now significant uncertainty regarding the outcome of new disputes submitted to panels. The WTO has taken no official position regarding the question whether the correct interpretation of Article 16.4 of the DSU¹ entails that an appeal to a nonexistent AB is possible or not.² If not, panel reports will be final, given that the negative consensus rule for blocking adoption of reports (as per Article 16.4 of DSU). If appeal (“into the void”) is possible, panel reports will have no legal value.³ This is not a minor issue. At the moment of writing, there are eleven cases that have been appealed, without an AB to adjudicate them, as it is not operational. What to do? We do not know, is the short answer. This is a matter that will have to be decided soon at the DSB, but no workable solution has been proposed so far.

Some WTO members are seeking to self-insure against this risk by developing alternative appeal mechanisms. A prominent example is an EU-led initiative to bring together countries to agree to have panel reports heard by an ad hoc appeals mechanism that mirrors the AB process.⁴ Such initiatives constitute partial patch-up solutions at best. They risk creating a multi-tier system across WTO members, as some will participate in an appellate process, and some will not. This is unlikely to result in an internally coherent jurisprudence, the *raison d’être* of any appellate process.

The AB crisis is usually presented as the United States against the world. This is surely the case insofar as absent US refusal to agree to new appointments the AB would still be functioning.⁵ That said, many of the issues raised by the United States are not new.⁶ Some were raised over 20 years ago, even though no one might have

¹ DSU stands for Dispute Settlement Understanding, the WTO Agreement detailing the process for adjudication before the competent WTO bodies. The DSU is overseen by the Dispute Settlement Body (DSB), a council in which all WTO members participate that deals with the day-to-day operations of dispute settlement at the WTO.

² Article 16.4 reads: “Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.” The question is whether the part of this provision following the term “DSB meeting” still has a *raison d’être* with the AB reduced to one member, and thus, unable to function. If not, then all panel reports would be adopted automatically, unless a consensus against their adoption emerged. Thus, losing parties could not appeal to an in-existent AB in order to avoid implementing adverse panel findings. Only future practice will respond authoritatively to this question, which, for now, is unresolved. Ironically, the first test case for this involves the US. On December 18, 2019, the US lodged an appeal “into the void” against an Art. 21.5 compliance Panel report (DS436, US countervailing duties on certain steel products from India). In a subsequent document (WTO Doc. WT/DS436/22 of January 16, 2020), the two disputing parties clarified that they would submit an appeal only when an AB Division could be established. At the time of writing, this date is unclear.

³ Petersmann (2019) and Pauwelyn (2019) discuss scenarios and possible paths forward for WTO dispute settlement following the demise of the AB.

⁴ In January 2020, Australia, Brazil, Chile, China, Colombia, Costa Rica, Guatemala, South Korea, Mexico, New Zealand, Panama, Singapore, Switzerland and Uruguay agreed they would join the EU, Canada and Norway in participating in this initiative (<https://www.reuters.com/article/us-trade-wto/eu-china-other-wto-members-agree-temporary-body-to-settle-disputes-idUSKBN1ZN0WM>). For a description of the envisaged mechanism see <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2053>.

⁵ This is clearly reflected in the proposal, supported by 120 members at the time of writing, calling for launching selection processes to fill AB vacancies.

⁶ For a compilation of arguments offered by the US for its stance on AB appointments, see USTR. 2020. “Report on the Appellate Body of the World Trade Organization,” at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

anticipated that lack of resolution would lead to the current crisis. Over the years, many suggestions to improve the operation of WTO dispute settlement were made by WTO members and outside experts, to little effect. The proximate reason is WTO working practice, notably consensus-based decision-making. While consensus has long been recognized as an impediment to decision-making,⁷ it should not be regarded as the central cause of the problem. Increasing geopolitical rivalry between the US and China, and more broadly shifts in the structure of the global economy (the rise of large emerging economies), have led to substantive disagreements between large actors that cannot be addressed through relaxing the consensus constraint. A necessary condition for resolving the dispute on dispute settlement is agreement between the major trading powers.⁸

The plan of the paper is as follows. Section 1 briefly summarizes the main findings of a recent survey of practitioners, stakeholders and WTO delegations regarding their perceptions of the AB and WTO dispute settlement more broadly. In Section 2, we reflect on the experience with the forum established by WTO Members to discuss the operation of the DSU. Some of the issues that led to the demise of the AB are longstanding. Both survey responses and the history of the DSU Review illustrate that while dispute settlement may be the crown jewel of the WTO, it has imperfections. In Section 3 we present some suggestions on dispute settlement reform. Section 4 concludes.

1 WTO Dispute Settlement: Institutional Design and Organizational Performance

How much do WTO members and the trade community care about WTO dispute settlement? Is the United States an outlier in how it assesses WTO performance in this area? Use of WTO dispute settlement procedures is highly skewed towards large and richer players (Horn et al. 2005). A similar pattern applies when the focus of attention is on participation in WTO deliberations on the AB in the 2016-19 period, during which the United States consistently blocked new appointments to the AB. Those who use the system more, engage more in deliberations on reform and efforts to address the AB crisis. Most WTO members are bystanders.

This conclusion is bolstered by a 2019 survey of WTO delegations and other stakeholders to elicit their perceptions regarding the operation of the dispute settlement system (Fiorini et al. 2019; 2020). Officials from 25 WTO members⁹ responded to the survey. A marked preponderance of responses originated in the largest traders, more open and richer economies.¹⁰ A commonality across the survey responses and indicators of participation in dispute settlement is that most developing countries do not engage. Most WTO members asked to complete the survey did not do so.¹¹ Bearing in mind that survey responses are skewed to those with sufficient interest to respond, we draw two main conclusions from the survey responses. First, respondents are generally supportive of the design of WTO dispute settlement, and the basic features of the DSU are regarded as desirable. Second, many respondents expressed some concern with the way the AB has exercised discretion in pursuing its mandate. We explain the results of the survey in what now follows.

McDougall (2018) and Payosova et al. (2018) provide excellent discussions of US concerns.

⁷ See Ehlermann and Ehling (2005) and Tijmes-Lhl (2009) on the role of consensus in WTO decision-making.

⁸ Arguably another necessary condition is to revitalize the multilateral organization as a locus for new rulemaking. In this paper we focus only on the dispute settlement function. Other papers in the Bertelsmann Stiftung project on WTO reform address the second element. See Hoekman and Nelson (2020) and Wolfe (2020a; 2020b).

⁹ For purposes of characterizing responses to the survey total WTO membership is defined as comprising 136, i.e., counting the (then) 28 EU member states as one.

¹⁰ Survey response rates are often low, but in this case, the low level of response is rather striking given that the questionnaire targeted governments and professionals directly concerned with the imminent demise of the AB, a high-profile issue in the Geneva trade community at the time the survey was run (mid 2019).

¹¹ No government officials from China, Japan and the United States responded. Moreover, no officials from large emerging economies such as Mexico, Russia, Indonesia, and Argentina that are active in the DSU and DSB debates participated in the survey.

1.1 Support for the basic institutional design

Were we to characterize the design of dispute settlement (the DSU) as the legal ‘institution’, and the AB as a key ‘organization’ entrusted with its administration, it is the organizational aspect of dispute settlement, and more specifically its practice, that dominate the concerns expressed by the United States, not the design of the institution as such.¹² It is noteworthy that the institutional design aspects of DSU were heavily negotiated during the Uruguay Round, whereas its organizational features were given little attention. Article 17 DSU leaves the elaboration of AB Working Procedures to the AB. This delegation is no longer accepted by the United States.

Most respondents agree on the objective function of dispute settlement at the WTO, and strongly support the introduction of compulsory third-party adjudication, as negotiated in the Uruguay round. Most regard the AB, as such, and WTO dispute settlement in more general terms, to be of critical importance to the functioning of the world trading system. This is quite rational. There are two foundational reasons why enforcement is necessary for the WTO to function.

First, governments may have incentives to renege on negotiated commitments. Even though the distinction (and ensuing classification) between good- and bad-faith disputes remain an unsolvable conundrum in contract theory, political economy forces might tilt the balance towards less defensible interpretations of agreed obligations, provoke retaliatory reactions by other parties and unravel cooperation. Enforcement through peaceful means is a mechanism to avoid such an outcome.

Second, enforcement is necessary because WTO agreements are incomplete contracts. Disagreements might legitimately arise. Even though it is a quixotic test to distinguish between “bad faith” (political-economy instigated) and “good faith” (the result of contract incompleteness) disputes, there should be no disagreement that WTO practice offers examples of either class of disputes. Contract incompleteness entails that it is impossible to negotiate every policy affecting trade, as potentially any policy can affect trade.

Two options exist to address a need to ‘complete’ the contract: (re-) negotiation and adjudication. Re-negotiation has an advantage over adjudication in that it binds all WTO members. The downside is that it is very onerous, given the large number of WTO members (164), their heterogeneity, and the fact that decisions are adopted by consensus. Adjudication, on the other hand, binds only the parties to a particular dispute, although the de facto precedential character of AB rulings is a mitigating factor. The upside is that adjudication involves only the volition of the complainant. As such, it may be perceived as the only feasible option to complete the contract and allow it to produce its intended results.¹³ Assuming precedent is observed, adjudication becomes quite attractive as means to do so.¹⁴

1.2 Polarization on organization and performance

Although there is widespread agreement in favor of keeping a two-instance compulsory third-party adjudication in place, a substantial share of survey respondents indicate dispute settlement is not doing what it should be doing, and/or does not consistently deliver high quality output.¹⁵ Some 55% of all respondents believe panel reports are sometimes biased. This number increases for Geneva based officials who are involved in dispute settlement,

¹² Hoekman and Mavroidis (2019). Note however that the 2018 USTR Trade Agenda, an official strategy document, seems to detract from negative consensus. See <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>.

¹³ This arguably is too narrow a view given that other forms of dispute resolution are available to WTO Members, such as raising specific trade concerns in Committees. Bolstering the use of such alternative mechanisms to defuse conflicts and resolve concerns is arguably one important dimension of WTO reform. See, e.g., Wolfe (2020a).

¹⁴ The US has, of course, voiced strong criticism against the presumption of binding precedents in WTO case law, a matter on which the DSU is clear.

¹⁵ Specific numbers in this and the following paragraph are from Fiorini et al. *supra* which reports much more detailed results.

70% of whom perceive panel reports are sometimes biased. Many business respondents and legal practitioners believe that the AB has not provided coherent case law (40% and 50%, respectively). Almost one-third (30%) of officials in capitals dealing with dispute settlement agree the AB has not provided coherent case law. More than three-quarters of Geneva-based officials directly involved in dispute settlement who responded to the survey indicate agreement with the statement that the AB has at times acted inconsistently with the DSU.

A sizeable share of survey respondents regard case law as sometimes incoherent and have doubts regarding absence of bias in reports. Of specific relevance to US concerns, 42% of respondents agree the AB has gone beyond its mandate, violating Article 3.2 of the DSU not to undo the balance of rights and obligations negotiated by the membership. The shares are higher for government officials based in Geneva involved in dispute settlement (50%) and practitioners in law firms (60%). We do not know what the basis for these views are. One potential factor may be perceptions of undue influence of the Secretariat in drafting reports.¹⁶ Also of note, is that survey respondents from developing countries were more inclined to agree that WTO dispute settlement is too expensive, that bilateral consultations are preferable to submission of disputes to the WTO, and that the introduction of monetary damages would be desirable in making the system more relevant to them. There are also clear splits across the rich-poor divide regarding whether business is well informed on foreign market access barriers (in rich countries, the response is an overwhelming “yes”, whereas in poor countries, the opposite).

Our takeaways from patterns of use of the DSU, participation in the DSB, and survey responses are that:

- (i) the system is primarily of interest to large and richer players;
- (ii) there is near universal agreement on the appropriateness of the *institutional* framework;
- (iii) many insiders agree with some of the concerns raised by the United States regarding the *operation* of the system; and
- (iv) specific *design* features may reduce the salience of the system for low-income countries.

Some of these dimensions figured in the DSU Review, to which we turn next.

2 The DSU Review: Improving Organizational Performance

Much of the commentary on the AB crisis gives an impression the conflict is a recent one and that it is part of the more general attack by the Trump Administration on multilateral institutions. Unfortunately, the crisis is not totally idiosyncratic, although the very confrontational stance taken by the US Administration is unprecedented. Basic elements of US skepticism about the DSU were already expressed over two decades ago. In 1995, worried about the powers that the newly formed AB might exert, Senator Robert Dole suggested a “three strikes” rule: a US review panel would evaluate whether the AB had overstepped its mandate, and if it happened three times, it would recommend a withdrawal from the WTO.¹⁷ In fact, as Bown and Keynes (2020) note, the current USTR, Robert E. Lighthizer, and the current Deputy Director-General of the WTO, Alan Wolff, spearheaded an initiative before the US Congress arguing that inadequately prepared and biased panelists, GATT bureaucrats advancing their own agenda, and non-transparent procedures were resulting in a re-ordering of US laws. In short, they claimed Senator Dole’s fears had already materialized in the first years of the WTO existence.

In recognition of such concerns (and probably anticipating them), and because the DSU was a major innovation, Uruguay Round negotiators built in a formal review of the operation of the dispute settlement system. The DSU Review was to commence within four years of the entry into force of the WTO. The formal DSU review called for in the Marrakesh decisions was planned to be completed by the end of 1998. The review was subsequently extended until August 1999, with the intention that the results would be dealt with at the Seattle ministerial meeting.

¹⁶ <https://twitter.com/bbaschuk/status/1201923246930759680>.

¹⁷ https://www.joc.com/dole-presses-measure-wto-review-panel-senator-seeks-counter-charges-hes-soft-trade_19951116.html.

No conclusion proved possible and informal negotiations continued. These were folded into the Doha negotiations, with Ministers establishing a mandate to use the work done up to that point as a basis for negotiations to improve and clarify the DSU.¹⁸

2.1 What was the Review meant to accomplish?

The Review was meant to be a forum for WTO members to address problems with the implementation of the DSU and to improve it, if warranted. Envisaged to conclude by 2004, the process never led to any agreement. The Review was tasked with generating suggestions to “improve and clarify” the DSU. It was extended beyond the original deadline of 2004, and formally remains ongoing. In principle, therefore, it provided an institutional mechanism through which matters underlying the AB crisis could have been addressed. Members, consequently, did not have to establish a new group or committee to deal with the AB crisis, since all of them could participate in the Review.

Although pressure for tweaking the DSU was not strong in the early 2000s, given a general sense that it was working well, the Review generated many proposals to improve the operation of the DSU (McDougal, 2018). The majority nevertheless, were not formally agreed. As is the case for other dimensions of dispute settlement, participation in the Review has tended to be limited to the large players, but many developing countries also put forward proposals. Of interest for the topic of this paper is the extent to which the Review included key criticisms voiced by the United States, and whether similar issues were raised by other members.

2.2 Issues discussed in the DSU Review

A June 2019 report by Ambassador Coly Seck (Senegal), the latest Chairperson of the group charged with review and updating of the DSU, provided an update on the state of play after 20 years of discussion.¹⁹ This report is at the same time an admission that the process was deadlocked and a succinct description of what has happened so far. We say “so far” since, technically, the Review is still running. As of 2019, matters that had been tabled dealt with the following subjects: (i) mutually agreed solutions; (ii) third-party rights; (iii) strictly confidential information; (iv) sequencing; (v) post-retaliation; (vi) transparency and amicus curiae briefs; (vii) timeframes; (viii) remand; (ix) panel composition; (x) effective compliance; (xi) developing country interests, and (xii) flexibility and Member control.

Although some major issues like remand were on the agenda, many others were not. These included fundamental design issues such as the nature of available remedies, liability rules (caps), and operational issues such as the use of panelists not included in national rosters and whether the WTO Secretariat should have discretion in adding panelists to the approved roster. WTO members had different views on the salience of the various subjects included on the DSU Review negotiating agenda. Since the focus in this paper is to examine the AB crisis within the larger WTO crisis, and since it is the United States that created the former, we divide the subjects addressed in the Review into those raised by the US delegation and those raised by the rest of the membership. The United States was isolated in some, but not all the concerns it raised.²⁰

¹⁸ Formally, the DSU Review was not part of the Doha Development Agenda single undertaking but a stand-alone exercise. See WTO Ministerial Declaration, Fourth Session of the Ministerial Conference, WT/MIN(01)/DEC/1, para. 30.

¹⁹ “Special Session of the Dispute Settlement Body: Report by the Chairman, Ambassador Coly Seck,” TN/DS/31, June. Geneva: WTO. These include issues such as the remedies available (e.g., Bronckers and van den Broek, 2005) and the feasibility-cum-incentives to use of dispute settlement procedures by and against low-income countries (e.g., Bown and Hoekman, 2008).

²⁰ We abstract from the question whether the US decision that led to the AB crisis was the consequence of its disillusion with the Review process, or the outcome of a separate process aiming to insulate the current US administration from the nation’s international obligations. What we are interested in is to determine what issues were raised by the US in the DSU Review.

2.2.1 Issues raised by the United States

Issues raised by US reflected its view that the AB is an agent of the WTO membership (the principals), and, as a result, has no business going beyond what the principals tasked it with through the DSU. In practice, the US argued, it had done so. The agency nature of the AB is, of course, unambiguous. The wording of Article 3.2 of DSU leaves no doubt in this respect:

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

It is the alleged violation of the institutional mandate that the current critique of the AB by the United States aims to redress. It was raised in the Review under agenda items that came to be called “Flexibility and Member control” and “Additional guidance for WTO adjudicative bodies.” Discussions under this heading did not explicitly focus on potential re-engineering of Article 3.2 of DSU, but instead revolved around increasing political (member) control and oversight of the AB.

A 2002 proposal put forward by the US and Chile²¹ on “improving flexibility and member control in WTO dispute settlement” was aimed in large part to address the US concern regarding some AB rulings on safeguards and subsidies. AB practice in the realm of safeguards had made recourse to this instrument a quasi-impossibility (Sykes, 2003). Moreover, the AB finding that the US FSC (Foreign Sales Corporation) legislation, which exempted US exporters from US taxes, was an export subsidy, generated significant ire in the United States. It is unlikely that the Chile-US proposal was motivated by concerns about the AB case law on antidumping (zeroing), since cases on this matter before 2002 concerned the use of zeroing by the EU. Whatever the case, the proposal called for removal of specific panel or AB findings by mutual agreement of the disputing parties; permitting for the partial adoption of DS reports, and “some form of additional guidance to WTO adjudicative bodies” (Hauser and Zimmermann (2003). Many WTO members rejected this on the basis it would benefit the large players in the WTO. The same was true for a complementary proposal by the US to make the dispute settlement process more transparent and open to the public.

2.2.2 Issues raised by other members

Other proposals made in the DSU Review might have helped prevent the AB crisis if they had been adopted. An example is an EU suggestion to establish a permanent body of panelists (i.e., a true first instance court). This could have reduced the need for appeal by improving the quality and consistency of reports, and reducing the discretion of (reliance on) the WTO Secretariat in the selection of panelists and drafting of reports.²² The EU subsequently withdrew this proposal due to lack of support, reflecting concerns that members of a permanent panel body might be ‘too’ independent (Hauser and Zimmermann, 2003). The idea of permanent chairs, and ad hoc panelists gained some traction originally, but subsequently, died a slow death as well.

It is fair to conclude that the WTO membership did not see eye to eye on the focus of the DSU re-negotiation. This was in and of itself a very important hurdle for the membership to overcome, as failure to agree on at least prioritization of issues to negotiate led to the establishment of a long, unmanageable list. Another problematic feature of the DSU Review was the agenda included matters where little meaningful was likely to emerge. Examples

²¹ WTO Doc. TN/DS/W/28 of December 23, 2002.

²² Working practice is that the WTO secretariat proposes panelists and the Director General decides in instances where the parties cannot agree to selection of panelists.

include questions about effective compliance and developing countries' interests. Compliance can never be effective unless one addresses the asymmetric bargaining power of institutional players, an issue that many members did not want to address. Past practice must have persuaded the membership that developing countries' concerns were adequately addressed through introduction of longer transitional periods, and/or institutions of dubious effectiveness (such as provisions calling for developing countries' interests to be taken into account). Instead of focusing on the low-hanging fruits and crystalize into law areas of emerging agreement, negotiators embarked on an open-ended discussion where nothing was agreed until everything had been agreed.

Some of the issues raised by the United States during 2018-19, e.g., the continued application of Rule 15, or the distinction between facts and law could and should have appeared on the agenda of the DSU Review but did not.²³ The rigidity of WTO working practices (consensus) precluded the Review from playing the role intended by the framers of the WTO treaty. While the counterfactual cannot be determined, it seems reasonable to assume that at least some, and perhaps many, US concerns could have been addressed.

A necessary condition for this would have been greater willingness to accept proposals on which there was broad agreement and flexibility in agenda setting. An insistence on making the dispute settlement negotiations a package deal (a mini 'single undertaking') resulted in no agreement on anything. Combined with rigid insistence to stick to an agenda established in the early 2000s essentially made the DSU Review an exercise in futility. Worse, as discussions dragged on for years, the process came to be regarded as one that could not be used to address the increasingly urgent disputes about dispute settlement.

2.3 Paying the price for an inflexible approach

Although the need for consensus impeded a resolution on the matters raised, the organization of discussions did not help either. Participants opted for a "Christmas tree"-type of approach, where all and sundry would table their wish list, and discussions would proceed on that basis. It is not hard to imagine alternative approaches with greater prospects of success. WTO members could for example have decided first on what practice has revealed to be missing from current rules or proceeded based on grievances regarding practice. It appears there was no attempt to establish criteria for including items in the agenda.

Once items had been included in the long agenda, the approach taken towards the negotiations was to pursue "sequential focused work", with the DSB in Special Session (i.e. in negotiating mode) discussing one issue at a time.²⁴ A reason for this was to reduce the scope for WTO members to engage in issue-linkage attempts.²⁵ Furthermore, the DSU Review started as an attempt to collect the low-hanging fruits, where de facto agreement had emerged through consistent practice. A prominent illustration is the 'sequencing issue'. This pertained to the question whether requests for authorization to retaliate must await the definitive outcome of a compliance panel. The short answer is yes. Request for retaliation cannot, as a matter of (legal) logic precede a finding of lack of compliance. Otherwise, the risk is that a member could be authorized to retaliate against practices that eventually

²³ Rule 15 appears in the Working Procedures of the AB. It allows for members who have been appointed in an AB division to adjudicate a dispute, to continue their work until completion of the proceedings, even if their mandate has in the meantime expired. The United States has cast doubt on the legitimacy of this practice, since in its view, it has been abused. The AB, on the other hand, is not a trier of facts, and should confine itself to review of legal issues. The US critique in this respect is that the AB, by conflating issues of law and facts, has on occasion ended up discussing factual issues (such as understanding of domestic law, which is, as per WTO standing jurisprudence, a factual issue), over which it has no jurisdiction.

²⁴ In response to some participants wanting to make more rapid progress, the work on the last four issues on the DSU agenda (panel composition; effective compliance; developing country interests, and flexibility and Member control. was pursued through separate, parallel meetings (WTO, TN/DS/31, 2019, p. 3).

²⁵ "In the absence of a collective political will to promptly complete the DSU negotiations, proponents have in some cases sought to establish linkages across unrelated issues. While such approaches are common in multilateral trade negotiations, this has also limited the ability for the various proposals to be considered on the basis of their individual merits." (ibid, para 1.11)

are found to be WTO-compliant.²⁶ When this type of ‘harvesting’ proved more difficult than anticipated, the Christmas tree became unmanageable, and none of the items appearing on the agenda was negotiated to conclusion. The most contentious issues, including those the US delegation had been voicing inside and outside the WTO, were never discussed in comprehensive manner, let alone with a view to conclude an agreement.

Subsequent to the initiation of the AB crisis in 2017, some WTO members expressed the view that several initial negotiating agenda items were no longer relevant, and that other, more urgent matters, should be addressed on priority basis. The crisis should have provided the membership with enough incentive to change course and discuss whatever was necessary to redress the downfall of the AB. The inability to respond flexibly to changed circumstances and priorities is an illustration of the inefficiencies associated with the WTO working practice based on consensus. Many WTO members tend to argue that WTO bodies must stick to the mandate given to them by the Ministerial Conference. While this may reflect a fear of being blind-sided and/or steam-rolled by large players, the result is counter-productive rigidity. The experience of the DSU Review illustrates the opportunity cost of WTO working practice. Furthermore, the mandate is quite often open-ended anyway.

2.4 An attempt to save the day through a separate process

The specific issues raised by the United States starting in 2017 regarding the functioning of the AB eventually became the focus of a separate process launched by the General Council in December 2018. Ambassador David Walker (New Zealand) was appointed as “facilitator”, a WTO term denoting an individual is entrusted with the task of organizing a narrowly defined specific negotiation/task.

Ambassador Walker’s mandate included issues that had appeared in the DSU Review and arguably should have been addressed well before the crisis erupted. Several of the issues included but not negotiated in the DSU Review, and inserted in the mandate of Ambassador Walker, map into concerns raised by the United States in the DSB as justification for its decision not to join a consensus to appoint new members of the AB. These concerns included the fact that the AB often did not issue findings within the timeframe specified in the DSU and that the AB sometimes exceeded its mandate by filling gaps or ruling on matters where the WTO rules were ambiguous (item xii). Providing the AB with the ability to remand cases back to panels (item viii) is also relevant in this regard, as this would help ensure that the AB does not perceive a need to step in for panels.

2.5 A “half-baked” AB and a dysfunctional legislative process did not help

Over time, absence of AB restraint on zeroing led to rising ire in the United States – as was predicted by some early commentators, notably Barfield (2001). A necessary condition for resolving such tensions was also well understood: a functioning political decision-making mechanism. In their assessment of the DSU Review, Hauser and Zimmerman (2003) noted that rulings by adjudicative bodies on matters where negotiators were unable to agree on clear treaty text inevitably would create political tensions that in turn would be difficult to correct because of the consensus working practice.

The organizational aspects of adjudication had not been discussed seriously during the DSU negotiation. The negotiating record provides ample evidence to the effect that not much thinking went into the organizational aspects of the AB.²⁷ A natural consequence was that the primary legislation was quite rudimentary. The AB was left to determine detailed working procedures for itself. This is where Rule 15 was decided, which became a flagship of discontent for the US delegation at least. One can only speculate what the situation might have been had such working procedures been clarified and agreed by the principals in the DSU Review, the mechanism foreseen by

²⁶ Following the initial EC-Bananas III litigation, where the opposite had been the case, decision to authorize countermeasures had followed findings by compliance panels to the effect that the findings of the original panel had not been implemented. The only exception to this rule is the December 2019 report on the Airbus-Boeing saga (DS316).

²⁷ Hoekman and Mavroidis (2019). See also Peter Van den Bossche (2006).

Uruguay Round negotiators to address such matters, as opposed to de facto delegation to the agent (the AB) on how to regulate its operations.

Similarly, the DSU Review shied away from asking whether adjudication before the WTO would eventually pay the price (and if so, what?) in case the WTO legislative function would continue to under-perform. In short, no medium-run strategic thinking went into the DSU Review at all, and the “thornier” of issues plaguing adjudication at the WTO were not discussed in any depth. Informal dialogue orchestrated by the Secretariat to complement the DSU Review also led nowhere, in part because it was explicitly limited to matters not tabled in the Review, for which there was no mandate to negotiate. As a result, these informal dialogues were limited to identifying potential efficiency gains in dispute settlement process.²⁸ The consultative process undertaken by the Chair of the DSB, Ambassador David Walker in 2019, proved to be too little too late, as by that time the key protagonists were deeply entrenched in their positions. These consultations were forced to address the relatively insignificant procedural issues raised by the United States, such as timeframes and Rule 15, diverting attention from the core issues falling under the broad heading of “WTO Member control” in the DSU Review discussions. Worse, the membership could not reach agreement on the minor issues either.

In short, observed DSU deficiencies were not addressed through legislative interventions informed by deliberations in the DSU Review. This is the heart of the issue as far as the crisis of WTO dispute settlement is concerned, and arguably must be confronted to assure the continuing policy relevance of the WTO. But this is only one part of the wider crisis.

3 The AB Fight: A Crisis in a Wider Crisis

There is a commonly held view that the AB crisis would ipso facto be over, if the United States were to change its mind and accept new AB appointments. This view ignores both the perceptions of many insiders that the operation of the dispute settlement system needs to be improved, as well as, crucially, the broader challenges confronting rule-making in the WTO. Addressing the latter is part and parcel of addressing the AB conflict.

3.1 Imbalance between rulemaking and adjudication

The tensions created by the imbalance between consensus-based rulemaking and independent adjudication were already identified in the mid-1990s. The problem and its potential repercussions were clearly elucidated by Claude Barfield who pointed to two concerns (Barfield, 2001). First, instances where the AB would “legislate” issues that could not be resolved because of the inability of the membership to achieve consensus. Second, adjudication of disputes on matters that are highly divisive (political) – what Hudec called “wrong cases” (Hudec, 1980). Barfield cites various trade practitioners, including the current Deputy-Director General of the WTO, Alan Wolff, who is quoted stating:

[The main problem of the current system is] the inappropriateness of placing on dispute settlement the burden of resolving major issues among the largest trading nations that in the final analysis cannot be resolved other than by negotiation among sovereign states ... There is no substitute for commercial diplomacy in relations among sovereign states. Resolution of differences where matters of national interest are concerned cannot be fobbed off for third party resolution in the trade arena, just as they cannot in the

²⁸ This process was launched in 2010 and engaged with WTO Members, panelists, trade law practitioners and Secretariat staff involved in WTO dispute settlement. See “Secretariat’s informal consultations concerning the panel process” at https://www.wto.org/english/tratop_e/dispu_e/informal_consultations_e.htm.

foreign policy context.²⁹

Barfield proposed both an *ex ante*- and an *ex post* mechanism to redress both types of problem cases. *Ex ante*, a ‘deciding officer’ (a WTO official entrusted with this function), would work with litigants to find mutually agreed solution instead of submitting disputes to formal adjudication. *Ex post*, a representative (but not majoritarian) sample of the WTO membership could decide on non-adoption of submitted reports. Today’s discussions, viewed from this prism, sound like *déjà vu*. Barfield was not alone at pointing out the dangers of an unsustainable institutional imbalance. Others, notably Hudec, countered, legitimately so we might add, that the proposed solutions were open to potential abuse (Hudec, 2002).

An important question is how to reduce the prospects of the types of situations identified by Barfield from arising. Here, the WTO could learn from the doctrine of “*non liquet*”, where a court can deny ruling on an issue if it finds it has no law at its disposal to do so. In a way, the insistence of the United States to introduce Article 17.6 in the WTO Agreement on Antidumping, is a “mild” form of *non liquet*. The ICJ (International Court of Justice), being a court of general jurisdiction, is opposed, in principle at least, to *non liquet*. There is of course a difference between the ICJ and the WTO. The latter, per the DSU, is empowered to adjudicate only trade disputes and must do so without undoing the balance of rights and obligations as struck by the framers (Article 3.2 of DSU). The question is who should decide whether a dispute put forward is a case of *non liquet*? While we recognize that a WTO panel (or the AB if cases are appealed) dealing with the specific dispute may be reluctant to do so, asking adjudicators to do so may be the most straightforward approach. A pronouncement of *non liquet* would entail that the membership should reflect on the necessity to step in and “complete” the contract.

This would cover both instances where rules are unclear and cases where issues are raised that have a bearing on the functioning of the WTO contract but are not yet regulated at the multilateral level. The argument for adjudicators not stepping in for the WTO membership in the latter type of situations is particularly strong. In such instances the WTO membership must address the matter. As discussed further below, a way of putting the burden on the shoulders of the membership as opposed to the adjudicative function would be to clarify – as a procedural matter – that the AB should request the relevant WTO committees and bodies to clarify the pertinent commitments, if rulings hinge on the interpretation of the invoked provisions of a WTO agreement. This innovation would clarify that an implication of Art. 3.2 DSU is that *non liquet* applies, if there are gaps or serious ambiguity in the applicable rules.³⁰

3.2 Responding to US concerns

In what follows, we assume, consistent with the survey responses discussed above, that the WTO membership continues to be in favor of a two-instance compulsory third party adjudication. We further assume that voting to commence the process of appointing new AB members³¹ is not in the cards, reflecting fears this will set a precedent and potentially confront WTO members with unwanted outcomes in other areas down the road.

The simplest way to resolve the AB crisis would be to ask the United States what would be required for it to withdraw its blocking veto. WTO members did this repeatedly during 2019 to no effect. There are good reasons to believe that some of the US concerns were either *ex post facto* justifications or diversions. An example is the alleged overstepping of the 90-day deadline for rulings imposed by the DSU. The AB has generally violated the statutory deadline to issue a report by only a few days on average (Johannesson and Mavroidis, 2017). Panels

²⁹ Barfield (2001, p. 118).

³⁰ An alternative approach could be to call on a group of eminent personalities to provide guidance in instances where there is ambiguity in the rules. This route was adopted in the CETA which provides for an expert group to provide guidance on the applicability of the prudential carve out for financial services. See Cantore (2018).

³¹ See Petersmann (2019) for an argument this was the appropriate response to the US decision to block all new AB appointments.

routinely have incurred much longer delays. On average, panels issue reports 15.5 months after their establishment. The statutory deadline is 6-9 months. If the United States cares about respect for deadlines, it should chastise panels. It has not. There is of course, a mitigating factor here: while WTO members are the masters of the process at the panel-stage, this is not the case at the appellate level, where the AB has more of a role in dictating procedural issues. Nevertheless, this, by itself, does not explain the observed discrepancy we highlight here.

A consistent feature of US criticism has been the haphazard treatment of the idiosyncratic standard of review embedded in the WTO Agreement on Antidumping. Article 17.6 of this agreement, introduced at the insistence of the US delegation in the Uruguay round, was meant to act as a deferential standard in favor of interpretations adopted by investigating authorities if panels find there is more than one permissible interpretation. US negotiators' understanding was that Art. 17.6 served as a green light for 'zeroing', a practice designed to inflate dumping margins (Cartland, Depayre, and Woznowski, 2012).³²

We have little sympathy for antidumping as an instrument of protection, and even less for the practice of zeroing. Our antipathy is predicated on economic first principles. Whatever one's views on this matter, AB members are agents per Article 3.2 of DSU, and must not undo the balance of rights and obligations determined by the principals. The AB was required to give meaning to Art. 17.6 of the Agreement on Antidumping. The US critique is that they only paid lip service to it. This critique is well founded. Panels and the AB have routinely repeated a statement to the effect that the Art. 17.6 standard of review is not at odds with the generic standard of review, and, as a result, have not seriously engaged with Article 17.6. In all likelihood little would have changed with respect to zeroing case law had the AB approached the interpretative issue from the angle of Article 17.6. It is unfortunate it did not do so (Mavroidis and Prusa, 2018).

Linked to the zeroing discussion is the claim by the US that the AB has been overstepping its mandate. In the case of zeroing disputes, it is a matter of debate whether the AB overstepped its mandate in its handling of Article 17.6.³³ While it may have misconstrued the agreed standard, its actions are hardly a clear-cut case of diminishing rights agreed and acknowledged by the framers. There was no widespread agreement over zeroing as otherwise the text would say so explicitly. Art 17.6 is an example where negotiators papered over a disagreement, raising the question if and how panels and the AB should address such instances. We return to this below.

Leaving zeroing aside, there are other cases where the AB has clearly overstepped its mandate, even though no WTO Member – including the United States – has complained about it. Any time the AB “completes the analysis” it effectively deprives the membership of the two-instance adjudication they had agreed upon. Because of the “incompleteness” of the original WTO contract, staying within the mandate is probably the hardest DSU discipline for the AB to observe. In case of egregious violations, like the case law concerning “completing the analysis”, it might be easy to pronounce in favor of disrespect of the mandate.³⁴ Most issues, however, are not egregious. The law vs. facts dichotomy is an illustration to this effect. Factual issues can be presented as legal issues with some imaginative expression. This might explain why, notwithstanding any sympathy some WTO Members may have with the United States on this score, there is no agreement on the appropriate course of action to address the situation.

Re-negotiation of the zeroing issue is probably the wisest path forward, as case law continues to be erratic on this matter.³⁵ An alternative approach would be to exempt antidumping and countervailing duty cases from appellate

³² The views expressed by these authors are particularly salient because the first two coauthors were Uruguay round negotiators and the third was a GATT Secretariat member in charge of antidumping. Nevertheless, the three authors might be overstating their claim here. The negotiating record reveals little explicit discussion on zeroing. The US concerns went beyond this, and this is why the United States requested that a deferential standard of review be inserted in both the antidumping and subsidies context. A declaration agreed to this effect called for eventually symmetric treatment of the two agreements, even though the membership never managed to agree to “export” the Article 17.6 standard into the Agreement on Subsidies and Countervailing Measures.

³³ On overreach and the legal literature on this question see Zhou and Gao (2019).

³⁴ This is not to deny there are factors that help understand why such outcomes might arise in practice, e.g., the absence of remand, and the ensuing urge of the AB to issue rulings within short time limits.

³⁵ In April 2019, the panel on US-Price Differential Methodology (DS534) went head on against 25 years of AB case law and found that zeroing can be WTO-consistent.

review.³⁶ While this would address one major source of US dissatisfaction with the AB, this ‘pragmatic solution’ falls short in resolving the more fundamental problem that arises when rules are fuzzy or leave gaps. Where they are not clear, rules should be clarified by the WTO membership. The same is true more generally with respect to claims that the AB has overstepped its mandate in filling gaps. Such matters call for action by WTO members to clarify the applicable rules. One way to reduce the pressure on the AB in such instances would be for the WTO membership to require the AB not to rule on matters where the rules are unclear (as is already required by Art. 3.2 DSU which prohibits the AB from undoing the balance of rights and obligations reflected in WTO agreements) and go beyond this by requiring the AB to ask the WTO bodies that are responsible for the implementation of the agreements invoked in a dispute to clarify the rules or fill a gap.³⁷ In parallel with measures to further professionalize adjudication (see below) that should reduce the likelihood that adjudicators do not adhere to Art. 3.2. for idiosyncratic reasons, this should substantially attenuate concerns that the AB might exceed its mandate.

3.3 Ex ante vs. ex post solutions

Fixing the AB crisis requires consensus as dispute settlement applies to all members. This does not imply that all WTO members must engage actively: the way to consensus starts with agreement among the relatively small group of WTO members that is most concerned with a functioning conflict resolution mechanism, that is, the large trading powers that are customarily the most active participants (see Section 2 above). Such agreement is not only necessary but probably sufficient, given that the United States has made clear that veto-players have nowhere to hide by becoming the ultimate veto player itself. The US has demonstrated it is no longer willing to play the role of a benign hegemon and accept that other (developing country) WTO members engage in ‘business-as-usual’ linkage games.

In our view, corrective actions to introduce stronger checks and balances on the AB must operate *ex ante*. Flirting with ‘back end’ solutions, such as introducing a mechanism to correct the AB *ex post*, can only give AB members the wrong incentives. Panels and the AB unavoidably will have substantial discretion, as they must interpret one incomplete contract (the WTO) by using another incomplete contract (the Vienna Convention on the Law of Treaties, which does not assign specific weights to its various elements). Feasible contracts like the GATT/WTO are obligatorily incomplete *ex ante* (Horn et al. 2010). If it were possible to write a more complete contract, that would have happened. By this, we do not deny that marginal improvements are impossible. To the contrary, we have already argued in favor of a legislative solution to clarify the status of zeroing in WTO law. Intelligent legislators are in constant reactive mode and ‘complete’ the contract gradually based on (learning from) experience.

Greater selectivity when appointing adjudicators and paying more attention to the organizational aspects of dispute settlement processes could do much to prevent the type of situation that has arisen. Experienced and highly qualified adjudicators would not have totally neglected Art. 17.6, for example. In the case of the GATT, organizational aspects of adjudication were to be part of the International Trade Organization (ITO), which never saw the light of day. This explains the original birth defect. Subsequently, the focus was on rulemaking and legal institutions, not on the organizational aspects of dispute settlement.³⁸ This is not to say that the system did not work well. As Hudec explained in his monumental study of GATT dispute settlement, it is largely thanks to GATT’s pragmatic resolution of disputes that the system evolved into compulsory third-party adjudication following the Montreal Mid-Term Review of 1988 (Hudec, 1993).

As the membership gradually became more heterogeneous, it became more difficult for the GATT to operate as a

³⁶ See Hillman (2018) and Schott and Jung (2019).

³⁷ This is exactly what the panel on US-Softwood Lumber IV did, when facing the question of out-of-country benchmarks under Article 14 of the SCM (Agreement on Subsidies and Countervailing Measures). It expressed its sympathy with the US view, but declared it had no power to undo the balance of rights and obligations as struck by the framers. The AB did just that. The United States, however, did not complain of aggressive overstepping of the mandate (which it clearly was) by the AB, since it had profited from the decision.

³⁸ Davey (1987) provides an excellent account of the evolution of GATT dispute settlement until the launch of the Uruguay round. His narrative makes clear that efforts concentrated in crystallizing practice into legal documents of varied legal value.

relational contract. Hudec shows that the rate of adoption of panel reports in the post-Tokyo round era fell dramatically. By the time of the Uruguay round, GATT contracting parties had accumulated extensive experience regarding the vicissitudes of dispute settlement and the problems posed by the absence of detailed procedures. They also were fully aware that they should focus on organizational aspects as part of the establishment of the WTO. Importantly, they had also acquired first-hand experience with ‘back end’ solutions—the notion that greater ex post political review of dispute settlement and ‘member control’ could address perceived adjudication mistakes. The best example is the transatlantic DISC dispute on taxation, where the GATT Council decided to undo in part the findings of the dispute settlement panel, only to provoke the wrath of the aggrieved party, the United States. Jackson and Hudec provide excellent accounts of the litigation, and its eventual aftermath.³⁹ This experience helped incentivize the process of shifting towards a more rules-based dispute resolution system. Those proposing ‘back end’ solutions today should be reminded of the scars the DISC litigation left on the GATT dispute settlement system.⁴⁰

One would expect that, against this background, negotiations would include a focus on the organizational aspects of dispute adjudication, the neglected issue under the GATT. It was not meant to happen. This was not for lack of volition but because DSU negotiators had bigger fish to fry (or so they thought). Their efforts concentrated on addressing US unilateralism, with little to no effort devoted to organizing the work of panels and the AB (Mavroidis, 2016). It is high time this happened.

3.4 Some specific suggestions

The following elements could usefully find their way into a future negotiation on WTO dispute settlement reform:⁴¹

- Professionalize the panel stage of the DSU by creating a standing roster of 15-20 permanent panelists, where:
 - Panelists should serve for one long term of 8-10 years;
 - Depending on criteria to be defined (new issues; value of disputes etc.), disputes are heard by divisions of 3 (relatively less important), or divisions of 7 (relatively more important);
 - Decisions are taken by majority; and
 - Dissenting opinions are published.
- Expand the AB to comprise 9 members as opposed to 7 (in recognition of the case load observed in recent years), with:
 - Appointees serving one long term of 8-10 years on a full-time basis;
 - Cases decided by divisions of three AB members;
 - Decisions taken by majority vote;
 - Publication of dissenting decisions; and
 - The collegiality requirement is maintained.
- To increase the prospects that qualified and experienced individuals are appointed as adjudicators, WTO members should establish a commission of eminent experts – a combination of lawyers, economists and experienced WTO practitioners who are well-versed in GATT/WTO dispute settlement. This group would be tasked with screening both nominations for panelist and AB appointments put forward by WTO members and asked to determine if proposed adjudicators are eligible for the proposed job.
 - Article 255 TFEU⁴² could serve as inspiration for such ex ante scrutiny of proposed adjudicators;

³⁹ Jackson (1978); Hudec (1988).

⁴⁰ See Mavroidis (2016) for discussion of this case. US business proposals made in December 2019 calling for an oversight body, including independent experts, do not constitute what we call back end solutions as they are limited to review and issuing a recommendation whether the AB has violated one of the Walker principles (discussed below). See <https://insidetrade.com/daily-news/business-pro-trade-groups-propose-fixes-wto-appellate-body>.

⁴¹ Some of these suggestions have also been made by other observers, e.g., Busch and Pelc (2009) and McDougall (2018).

⁴² Article 255 of the Treaty on the Functioning of the European Union (TFEU) reads as follows. “A panel shall be set up in order to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before

- The members of the commission should be decided on a consensus basis by the WTO membership;
- WTO members select adjudicators (fill vacancies) from the pool of candidates the Commission has determined to be eligible for the respective positions.
- Both the AB members, as well as panelists, should have the right to appoint their own clerks.
 - The number of clerks serving each judge should be decided *ex ante*;
 - AB members may select only one clerk of their own nationality.

There is, of course, much more to think about when determining how to improve WTO adjudication. The above are basic axes that could help address some important dimensions such as the quality of judges, the incentives of adjudicators to please their nominating party, and potential confusion regarding the functions of the WTO Secretariat. Take the last point, and more specifically, the allegation that the Secretariat unduly influences the outcome of disputes. Nordström was the first to ask the question whether the WTO Secretariat behaved like “secretaries” or goes beyond this in holding the pen when drafting reports (Nordström, 2005).

Given missing expertise and weak incentives, it is to be expected that the Secretariat is influential (Johannesson and Mavroidis, 2015). That said, panelists and AB members have the last word. Even if this is not the case *de facto*,⁴³ irrespective of the extent to which the Secretariat is an actor in dispute settlement, there are good reasons to create stronger firewalls when it comes to dispute adjudication. Two distinct functions – providing advice to WTO members on legal issues and providing advice on the same issues to panels – are in practice conflated, and can easily be confused, casting doubt on the “impartiality” of panels, even if the bias is unconscious.⁴⁴

Our suggestions complement the principles proposed by New Zealand Ambassador David Walker to address US concerns with the operation of the AB.⁴⁵ These include ensuring that appeals are completed within 90 days; that Appellate Body members do not serve beyond their terms; that precedent (case law) is not binding; facts cannot be the subject of appeals; the AB be prohibited from issuing advisory opinions; and that its findings cannot add obligations or take away rights provided by the WTO Agreements. All of these are fully consistent with – and indeed often echo – what is in the DSU. For this reason, they should be amenable to all WTO Members and serve as the basis for the substantive agreement needed to address the core US concern – credible measures to ensure the AB will stick to its mandate.

One lesson from recent events is that more political oversight and interaction between WTO members and a re-constituted AB is needed. Some type of advisory review body, as proposed by the US business community, with a mandate to assess and report on compliance by the AB with the “Walker Principles”⁴⁶ may help provide greater assurance that matters relating to the performance of the AB can be given greater attention in the DSB. However, at the end of the day insofar as members believe the AB is exceeding its mandate (e.g., in filling gaps) this calls for (re-)negotiating the substantive provisions of specific agreements.

In thinking about how this can be encouraged, it is helpful to distinguish between substantive rules on the one

the governments of the Member States make the appointments referred to in Articles 253 and 254. The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.”

⁴³ As argued for example by Pauwelyn and Pelc (2019).

⁴⁴ The US business community has proposed “term limits for members of the Appellate Body secretariat no longer than eight years, equal to the maximum term for an AB member, to rebalance power within the appeals process, give primacy to the reasoning of Appellate Body members and ensure staff help to write decisions, not make them.” See <https://insidetrade.com/daily-news/business-pro-trade-groups-propose-fixes-wto-appellate-body> and Hirsh (2019).

⁴⁵ WTO, “Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker,” JOB/GC/222, 15 October 2019.

⁴⁶ US business groups suggest such a body to comprise the chairs of key WTO committees plus four independent trade law experts. These suggestions are consistent with the thrust of proposals made by the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico in a 26 November 2018 communication to amend the DSU to address the procedural issues raised by the United States (see WTO, WT/GC/W/752).

hand and organizational-cum-procedural matters on the other, in particular the operation of WTO bodies tasked with implementation of WTO agreements. In the area of dispute settlement one such procedural change would be to permit the AB to remand cases back to panels in cases where panels exercised judicial economy and the AB reverses a panel decision.⁴⁷ Another, more important change, would be to require the AB to ask the relevant WTO bodies to clarify the applicable substantive rules in instances where there are gaps or rules are unclear (Payosova et al, 2018).

Such changes need approval from the membership. i.e., the DSB. Extensive preparatory work will be required before such proposals can be placed on the DSB agenda for a decision. As these are matters that relate to the operation of the WTO, preparing the ground should involve the active engagement of the Director-General as an 'honest broker' and the leader of the organization. Insofar as the large traders and most of the membership supports such procedural changes, if necessary, recourse can be made to voting, as foreseen by Art. IX WTO. In practice, we believe that the need for voting will be limited if procedural changes are well prepared and supported by the key players.

Sceptics might argue that the prospects of any such agreement in the current context are rather dim. We do not underestimate the difficulty associated with re-establishing trust among the large players, a sine qua non for agreement on procedural DSU reforms. In our view the Walker process is a good illustration that consultations and dialogue among WTO members can identify areas where there is broad support for considering specific actions of a procedural nature. While no action on Ambassador Walker's report proved possible before the demise of the AB in early December 2019, the process clearly demonstrated that many WTO members were willing to revisit Art. 17 DSU (which leaves the elaboration of its working procedures to the AB to determine) as well as other procedural provisions in the DSU.

Concluding Remarks

The dispute settlement crisis is an opportunity to address concerns regarding the quality of output of WTO courts, and their respect of the institutional mandate. To this effect, we have advanced some proposals aiming to ensure the independence and impartiality of WTO courts, and respond to the stated preference of the institutional stakeholders and the business community (as evidenced in the responses to the survey that we have conducted) for a two-instance compulsory third-party adjudication that will predictably interpret the agreed trade agreements. Efforts to pursue 'plan B' approaches to put in place appellate type review on a plurilateral basis, as is being pursued by the EU,⁴⁸ are understandable responses to the deadlock but do not engage with the fundamental problems that have been raised by the US. Plan B responses are also second-best as they do not fulfill the role the AB was meant to address: to oversee all of WTO case law.

Resolution of the AB impasses requires the subset of WTO members most concerned with effective dispute settlement to launch negotiations on specific *procedural* dispute settlement reforms, building on the 'Walker principles'.⁴⁹ Professionalization of WTO dispute settlement, as we propose above, will only be possible if accompanied by measures to ensure that the core US concern is addressed, i.e., that adjudicators do not exceed their mandate and engage in rule-making. This can be achieved by putting in place clear guidance for the AB that requires cases where findings hinge on interpretation of unclear treaty provisions, call for 'gap filling' or establishment of rules to be sent to the pertinent WTO bodies with the request to clarify the applicable rules or negotiate them. If it is not possible for the membership to do so, the dispute simply will not be resolved. This is necessary, not sufficient to revitalize the WTO. There is an urgent need for renewed substantive rulemaking in order to reduce the incentives for WTO members to use the DSU to address matters that are not clearly regulated by the WTO agreements. The WTO reform discussions that some members have engaged in since

⁴⁷ This would enhance the efficiency of the dispute settlement process by avoiding the parties having to launch a new case to address the arguments that the panel did not consider.

⁴⁸ See <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2053> and https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113.

⁴⁹ A necessary precondition for this in the short term may be an agreement dealing with disputes regarding the US invocation of Section 232 of the US trade expansion act of 1962, which permits the imposition of trade restrictions to safeguard US national security.

2018 provide a basis on which to build. This must confront the core working practices of consensus and special and differential treatment (Hoekman, 2019). In doing so, we believe it is helpful to differentiate between process and procedure on the one hand, and substantive disciplines on the other. There are very good reasons for consensus when it comes to (changes in) the substantive rules of the game that apply to specific trade-related policies. WTO members should be able to decide not to join a consensus that alters their rights and obligations if they perceive this is averse to their interests. But consensus should not enable countries to block others that wish to explore cooperation in an area. Nor should consensus apply to processes and the day-to-day business of WTO bodies such as whether to invite outside experts to inform the deliberations of a committee (Wolfe, 2020b).

This applies to dispute settlement as well. Procedural changes in the implementation of DSU by the institution lie at the heart of any resolution of the AB crisis. Such changes require deliberations and decisions by the membership to implement specific reforms to improve the operation of the DSU. If necessary, such process-related changes should be subject to a vote, as envisaged by Art. IX WTO. Doing so is not in the DNA of the organization, for good reason. We strongly support the principle of consensus-based decision making when it comes to substantive rules and negotiated rights and obligations. But we are also of the view that voting on procedural reforms that improve the operation of the institution without affecting the rights and obligations of WTO members should not give rise to concerns this is a slippery slope. If institutional/procedural reform proposals are well prepared – informed by consultations and supported by the good offices of the DG – voting may not be needed in any event.

We end with a suggestion for WTO members to consider at MC12 with a view to re-invigorate multilateral cooperation on dispute settlement. The burden of completing the contract where needed to resolve a conflict on the WTO membership clearly should not be placed on the dispute settlement bodies. Requiring adjudicators to ask the WTO bodies responsible for overseeing implementation of the agreements invoked in a dispute to clarify instances where the substantive rules are unclear and consideration of the complementary institutional-cum-procedural changes we have proposed, together with the suggesting made in the report by Amb. Walker would do much to improve the implementation of the DSU. Action along these lines at MC12 could help bring a much-needed breath of fresh air into the WTO. If the membership is bold enough to adopt proposals along these lines, we might start seeing some light at the end of the tunnel.

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