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Dissenting Opinions in the WTO Appellate Body:
Drivers of their Issuance & Implications for the
Institutional Jurisprudence

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Abstract

The Appellate Body (AB) of the WTO has issued over 140 reports but only eight separate opinions, four of which are genuinely dissenting. Such paucity, in fact, is the WTO's implicit tradition inherited from GATT of prioritizing unanimous decisions, hoping they solidify the institution's legitimacy and countries' confidence in the system. But at the more individual level, an AB member's decision to dissent is driven by multiple factors that have implications for the institution's jurisprudence. First, the factors explain how the symbiotic relationship between an AB member and his or her nominating country—whose interests turn out to be closely intertwined—is affected according to the former's personal preferences. Moreover, a subset of the factors—the so-called “evaluators”—can assess the doctrinal significance of dissents and illuminate how each of them is contributing to the WTO's case law development.

Keywords

WTO, Appellate Body, dissenting opinion

JEL Classification: K40

1. The Institutional Setting*

This paper provides a panorama of dissenting opinions expressed so far by members of the WTO Appellate Body (AB), presents the factors that influence an AB member's decision to dissent, and discusses how they affect an AB member's symbiotic relationship with his or her nominating country as well as offer insights into each dissent's doctrinal significance.

We start this section by explaining the institutional setting before we move to the plat de resistance, that is, a discussion and evaluation of dissenting opinions expressed at the AB level. The AB entails much more—namely non-legal professionals and institutional safeguards—than the three judges assigned to each case, despite its relative lack of statutory foundation. The two statutes that are relevant for discussing the institutional provisions are the DSU (Dispute Settlement Understanding) and the WP (Working Procedures) for Appellate Review. Negotiated during the Uruguay Round, the DSU is the statute that regulates the administration of disputes before the WTO. There is only one AB-specific provision—Article 17—as creating the AB was not the main preoccupation of the DSU framers, who were instead focused on establishing the institutional safeguards to avert unilateral initiatives *à la* §301.¹ The WP detail the manner in which the process before the AB takes place.

1.1 AB Plenum and Divisions

The AB is composed of seven individuals serving a once-renewable four-year term but decides cases in divisions of three members.² Divisions are selected randomly on a rotation basis to ensure equal representation among the members, regardless of their nationality.³

Integrity and impartiality are basic tenets of the AB members, who are expected to: (1) strictly adhere to the DSU; (2) disclose all interests and information pertinent to potentially affecting their impartiality; (3) take “due care” in performing their duties...[which include] avoiding any direct or indirect conflicts of interest;⁴ (4) reject other professional responsibilities that are inconsistent with their role in the WTO;⁵ and (5) avoid instructions and advice from any “international, governmental, or non-governmental organization or any private source.”⁶

Although it is the divisions that decide the fate of appeals, disputes are discussed in plenum (e.g., with all seven members of the AB present). This “collegiality” provision is spelled out in Article 4 of WP, and its enactment was conceived as the means to ensure consistency and coherence in decision-making. Nevertheless, collegiality notwithstanding, it is only the members of the chosen division that can cast votes each time.

1.2 Role of the Secretariat

Article 17.7 of the DSU states that the AB will have its own administrative and legal staff (the Secretariat), whose role is to assist the AB members in discharging their duties. The AB does not

* For helpful comments and discussions on this issue, we would like to thank Bill Davey, Henrik Horn, Damien Neven, William Valasidis, and Nils Wahl.

¹ Mavroidis (2016a) discusses this issue extensively drawing from the negotiating record.

² Article 17.1 of the DSU

³ Article 6(2) of the DSU Working Procedures

⁴ Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, Art.III.1

⁵ Article 2(3) of the DSU Working Procedures

⁶ Article 2(4) of the DSU Working Procedures

replicate the US practice of clerks where they are individually assigned to a judge to provide assistance ranging from research to opinion drafting. Instead, the Secretariat (17 trained lawyers as of January 2018, its Director included)⁷ is at the service of all AB members.

The very existence of the Secretariat and its institutional function reinforce collegiality. After all, it is the same clerks that work with different divisions and provide input aiming to guarantee the coherence of case law across cases. Thus, an ethos of collegial understanding is cemented throughout the organization, and it is quite difficult to associate particular AB members with specific views, unless, of course, such references are made in their publications outside the WTO.⁸

According to the Rules of Conduct, the Secretariat is explicitly subject to the same professional standards as AB members.⁹ This likely indicates the Secretariat's significant contribution to the proceedings, with regards to both procedural and substantive assistance it provides. Various provisions support this understanding of the Secretariat's function: Article 18 of WP acknowledges its role as a gatekeeper when it comes to transmitting documents to the AB.¹⁰ The Secretariat is also tasked with communicating the adopted working schedule to parties to the disputes,¹¹ as well as organizing oral hearings.¹² Anecdotal evidence suggests that its role also includes preparation of draft reports.¹³ Blustein (2017), in a recent publication, claims that the Secretariat has had a heavy hand in report-drafting even for the most contentious and politically loaded issues.¹⁴ In this light, a legal ruling in an AB appeal is a product of inputs derived from people of various expertise. The division members not only discuss their case with other AB members not participating in the division but are also advised by the Secretariat. The AB even outsources economics expertise when it deems appropriate since it employs no economists on its permanent staff.¹⁵

With this in mind, in Section 2, we present the statutory basis for separate opinions in the WTO, as well as our own standard to distinguish between dissents and other separate opinions. In Section 3, we look into the actual practice by presenting how many separate and dissenting opinions have been issued thus far. Having established the factual portion of our analysis, we present in Section 4 our understanding of the AB members' rationale for dissenting. It is here we lay out a framework composed of two categories of factors influencing the issuance of dissents—"Evaluators" and "Non-evaluators"—as well as a sequential game describing a hypothetical interaction between an AB member and his or her

⁷ Originally, the idea was to staff the AB Secretariat with a Registrar and three legal officers only (WTO Doc. WT/DSB/1 of June 19, 1995). This must have been a gross underestimation of the volume of work, especially since the AB entertained substantially more disputes in its first than in its second decade (when its size of staff reached 17 people), see Johannesson and Mavroidis (2017).

⁸ Members of the AB avoid publishing while at service probably for fear of expressing views that might be misinterpreted, with the treatise on WTO law coauthored by Peter Van den Bossche (member of the AB between 2009-2017) and Werner Zdouc (the Director of the Legal Service of the AB) being a notable exception.

⁹ Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, Art.IV.1

¹⁰ "No document is considered filed with the Appellate Body unless the document is received by the Secretariat within the time-period set out for filing in accordance with these Rules." Article 18(1) of the DSU Working Procedures

¹¹ "The Secretariat shall serve forthwith a copy of the working schedule on the appellant, the parties to the dispute and any third parties." Article 26(4) of the DSU Working Procedures

¹² "Where possible in the working schedule or otherwise at the earliest possible date, the Secretariat shall notify all parties to the dispute, participants, third parties and third participants of the date for the oral hearing". Article 27(2) of the DSU Working Procedures

¹³ Nordstrøm (2005), and Johannesson and Mavroidis (2015).

¹⁴ Blustein (2017) goes so far as to argue that the Director of the Secretariat must be one of the most influential international bureaucrats in light of its institutional role and function to oversee adjudication at the WTO level. He also describes that in one instance, a US judge, when faced with the risk of non-reappointment, claimed that it was the Director of the Secretariat who should be ousted instead.

¹⁵ Bown (2010) provides evidence from actual disputes and also discusses the pros and cons of the current approach. On the latter issue, see also Mavroidis and Neven (2017).

nominating country, all to capture the interests at stake for judges who consider dissenting in the AB. Section 5 applies the framework to assess the doctrinal influence of dissenting opinions and, more specifically, the zeroing dissents in the context of our sequential game. Section 6 recaps the main conclusions.

2. Taking Dissenting Opinions Seriously

2.1 Consensus, Majority Decisions, and Dissenting Opinions

As per Article 3(2) of WP, the members of the division are expected to “make every effort to take their decisions by consensus.” But many AB members actually have good reasons to pursue consensus, especially because it can reinforce the institution’s legitimacy (in the eyes of users of the system):¹⁶ a more detailed discussion follows in Section 3. Opinions are also anonymous pursuant to Article 17.11 of DSU, which further complicates our analysis of dissenting opinions. After all, the anonymity invites another round of guesswork as to the author’s identity: a critical fact that could shed more light on why a particular dissent was written in the first place. If consensus proves impossible, the matter is decided by a majority vote. The quest for consensus almost unavoidably leads to compromises unless there is a perfect meeting of the minds, which almost always has not been the case. This suggests that the end ruling has often fallen short of some AB members’ intellectual aspirations to adjudicate in a particular way, as at least one member may have had to defer to the views of other(s).

As for dissenting opinions, a clarification on the semantics is necessary, as the term “dissenting” does not appear in the relevant statutes—Dispute Settlement Understanding (DSU) and Working Procedures¹⁷ for the Appellate Review (WP). In fact, no official document of the WTO uses this term. Article 3.2 of WP, for example, makes it clear that the AB can decide cases by majority vote, but does not define or use the term “dissenting” opinion.¹⁸

Such lack of definition in the official text makes the practice of classifying these opinions confusing. Some AB reports use the term “separate” opinion to denote either a concurring¹⁹ (with the majority) or even a dissenting opinion.²⁰ Further complicating the matter is the WTO Analytical Index, an official WTO publication that distinguishes between “separate” and “concurring” opinions,²¹ leaving an impression that the former is synonymous with dissenting opinions. The index also provides a list of both separate and concurring opinions issued so far by the AB members.

¹⁶ Flett (2010) has advanced various arguments to this effect.

¹⁷ Article 17.9 of the DSU empowers the AB to adopt, in consultation with the Chairman of the Dispute Settlement Body (DSB) and the Director-General, its own WP. The WP complement the DSU by fleshing out the details on the composition, professional standards, and procedural rules of the AB, so these statutes essentially constitute the “workhorse” of adjudication before the body. Subject to the terms of the WP, the AB in *US—Lead and Bismuth II* (§39) reaffirmed its broad authority to adopt extra procedural rules, so long as they do not contradict the DSU or other WTO agreements.

¹⁸ The AB has updated its WP a few times so far. The most recent amendments were recorded in WTO Doc. WT/AB/WP/W/11 of July 27, 2010, and incorporated into the procedures that are currently in force, reflected in WTO Doc. WT/AB/WP/6 of August 16, 2010.

¹⁹ *EC—Asbestos* at §149.

²⁰ *India—Solar Cells* at §5.156.

²¹ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_07_e.htm at §889.

2.2 Proposed Benchmark for Classifying Opinions as Dissenting

In this paper, we use a classification standard different from that in the WTO Analytical Index: the term “dissenting” instead covers cases where a separate opinion substantively deviates from the majority either with respect to the outcome reached, or the rationale for it, or both.

To our count, four dissenting opinions have been issued so far. Even taking into account that the AB only issued about 140 reports,²² the number is low by any reasonable benchmark especially for those trained in common law. Here, the passage of time indicates the AB’s established attitude towards dissenting opinions: issuing only four of them over 23 years may be a sign of reluctance to step out of the comfort zone of unanimous decisions.

While our datapoints are few, the very sparing use of dissenting opinions invites an analysis of why this is the case. The intuition must be that the AB members write them only when they feel quite strongly about an issue, as they appear willing to compromise in the overwhelming majority of cases. This is only an intuition, of course, but what else can it be? It is quite unlikely that teams of three judges (the “AB divisions”), endlessly rotating since January 1, 1995, consistently agree on everything, ranging from their understanding of “quantitative restrictions” to that of “likeness” to the applicable standard of review in relevant cases. Why unlikely? First, the majority of AB members has quite different backgrounds, even though they are routinely recruited following government service at home. The WTO membership as a multilateral union, after all, is only a superficial link because it is quite vast (164 members) and heterogeneous, composed of governments pursuing varying agenda.

Second, even if the AB members leave their government hats (as they are supposed to, by virtue of Article 17.3 of DSU) upon arrival in Geneva and instead pick up cosmopolitan habits as nondiscriminatory adjudicators, an absolute meeting of the minds still seems implausible. One could counterargue, of course, that the Vienna Convention on the Law of Treaties (VCLT), the legal instrument that the AB uses to interpret the WTO contract, will always lead to predictable results. But detailed analysis of case law on the empirical front shows that this has not always been the case—not even with respect to the most fundamental disciplines, as the analysis by Grossman et al. (2013) on nondiscrimination suggests. The fact that there is no strict adherence to the rule of precedents²³ increases the likelihood for disagreements, though to be fair, they have not occurred frequently in practice.

WTO’s hesitation towards dissents is reminiscent of the GATT. Hudec’s (1993) monumental study reveals that only sparingly did GATT panelists move to issue dissenting opinions. The GATT was, of course, struggling to ensure that users would keep faith in the system, from which they could simply walk away by not consenting with panel rulings. Unanimous decisions were a key to this endeavor since panels likely found it difficult to persuade actual and potential users mainly through majority decisions.²⁴ Dissenting opinions, thus, were expressed only in areas where individual panel members felt strongly about an issue, notwithstanding the widespread culture of compromise.

The WTO’s dispute settlement mechanism is the natural follow-up to the GATT way of resolving disputes, having inherited its culture. Even more to the point, many of the same institutional components (especially the WTO Secretariat) served both GATT as well as WTO panels. Under these circumstances, it is quite reasonable to take dissenting opinions seriously. They are powerful signaling mechanisms with unique functions, and the frugal attitude of AB members towards issuing them is in and of itself an argument in favor of understanding them as such.

²² Our cut-off date is January 31, 2018.

²³ In *US—Stainless Steel (Mexico)*, the AB held that it expected subsequent panels to follow its rulings (§§ 158-162). This comes very close to de facto *stare decisis*, but the “zeroing” story that we detail later proves that this has not always been the case. In some past cases, the AB also reversed its rulings without explicitly stating so. See, for example, the case law understanding of the key term “less favourable treatment”, in Grossman et al. (2013).

²⁴ See Schröder (2015).

3. Practice

We have previously explained how we define “dissenting” opinions: as shown below, the coverage of the former for the purposes of this paper does not coincide with all cases where separate opinions have been issued.

3.1 *Separate Opinions Issued So Far*

So far, the appellate body has issued separate opinions in seven different disputes on a total of eight occasions:

<u>DS Number</u>	<u>Title of Dispute</u>	<u>Agreement Invoked</u>	<u>Subject-Matter</u>
135	<i>EC—Asbestos</i>	GATT	Domestic measure
267	<i>US—Upland Cotton</i>	Agriculture	Export credits
294	<i>US—Zeroing (EC)</i>	Anti-dumping	Zeroing
316	<i>EC—LCA</i>	Subsidies	Pass-through
316	<i>EC—LCA</i>	Subsidies	Complete analysis
350	<i>US—Continued Zeroing</i>	Anti-dumping	Zeroing
456	<i>India—Solar Cells</i>	DSU	Role of DSB
464	<i>US—Washing Machines</i>	Anti-dumping	Zeroing

3.2 *Dissenting Opinions*

According to our benchmark (whereby the separate opinion does not subscribe to the rationale, outcome of the majority decision, or both), we can discard four cases that does not qualify as “dissenting”.

In *EC—Asbestos*, the separate opinion was issued by an AB member of the division who simply wanted to emphasize why the final decision was the correct one. In this regard, there is nothing expressed in the opinion that is substantively at odds with the majority ruling or rationale.

US—Continued Zeroing is a case similar to *EC—Asbestos* in that it also reaffirms the majority decision. In addition, the separate opinion is a plea for parties to stop arguing in favor of “zeroing”, the anti-dumping practice followed in some quarters whereby positive dumping margins are “zeroed out”, resulting in an inflation of the dumping margins. The author of the opinion explains that its probable intellectual merits notwithstanding, the view that zeroing can be reconciled with the WTO is simply not in the cards anymore following numerous panel and AB reports that had previously condemned it.

India—Solar Cells is another opinion that clearly doesn’t pass the litmus test. The dissent concerns the issue of whether the AB should have exercised judicial economy. The dissent appears to rebut the US view that the AB should not adjudicate appealed issues that are not strictly necessary to dispose of the case. Assuming it were followed in the future, the AB could be drafting longer, but not necessarily different reports, especially since the opinion does not address the manner in which the AB should respond and correct its current methods of adjudication.

EC—LCA includes two separate opinions, each on the pass-through of subsidies (e.g., whether previously bestowed subsidies had been extinguished through change of ownership) and on whether the AB had access to enough facts to complete its legal analysis of the US’ claims on displacement of Boeing’s large civil aircrafts. The three members of the division express three divergent opinions regarding the pass-through of subsidies and its function (§§726 et seq.): in other words, there is no

majority opinion. To further complicate the matter, though the three opinions led to different legal analyses, they still managed to agree on the final outcome, having concluded that the determination on pass-through is ultimately unnecessary to justify the majority's holding. Under these circumstances, we reluctantly classify this as a consensus decision that fails the aforementioned benchmark.²⁵ Nevertheless, the second dissenting opinion in *EC—LCA* does qualify as a dissenting opinion, discussion of which we later return to.

As a result, we are left with four genuine dissents by our own standard: those issued in *US—Upland Cotton*, *US—Zeroing (EC)*, *EC—LCA* (regarding the completion of legal analysis on displacement), and *US—Washing Machines*.

3.3 Subject-matter of Dissents

The dissent in *US—Upland Cotton* (§§631-641) concerns the consistency of export credits guarantees provided by the United States with its WTO obligations (and, more precisely, Article 10.2 of the Agreement on Agriculture). From the dissenter's view, this provision does not reflect a binding obligation, but rather provides an acknowledgment that disciplining export credit guarantees should occur in the period following the successful conclusion of the Uruguay Round.

US—Zeroing (EC) (§§259-270) concerns the question of whether there was sufficient nexus between certain measures allegedly taken to comply with the original recommendation and the recommendation itself so that they could come under the AB's terms of reference. Indirectly, however, the opinion also touches on zeroing because the whole dispute concerned the practice's consistency with the WTO, and by excluding certain measures from the scope of the AB review, no pronouncement on the consistency of the excluded measures with the WTO would have taken place.²⁶ It isn't that the subject-matter of this dissent is zeroing: to be fair, the opinion could have been issued in any other case involving implementation, as it only considers the existence of nexus between the measure to comply and the recommendation. Nevertheless, the dissent here has implications for zeroing because, had it been adopted, it would have been a meaningful elaboration on how the practice should be analyzed under set circumstances.

The dissent in *EC—LCA* (§1149) reflects a disagreement between members on whether the AB had enough factual basis to complete its analysis on the displacement of Boeing's aircrafts. Here, the dissenter disagrees with the majority view that the division can complete the analysis regarding displacement of nonsubsidized goods if, as conceded in the AB report, it cannot properly define the relevant product market.

In *US—Washing Machines*, the dissenting opinion (§§5.191-5.203) tackles the issue of zeroing head on. The dissenting member takes the view that zeroing was consistent in the exceptional context of weighted average to transaction (W-T) methodology.

3.4 The AB Divisions that Have Issued Dissenting Opinions

The table below reflects the details of AB members who participated in the divisions that have issued dissenting opinions, including their jurisprudential background and whether they were in their first or second term at the time of their AB reports.

²⁵ Arguably, this case could be classified as "dissenting", which is precisely what the WTO Analytical Index, op. cit., has done. The problem is that dissents require a benchmark, as the dissenter must diverge from an official majority opinion. On the pass-through of subsidies, every AB member disagrees with one another, thereby rendering the diverging opinions logically impossible to qualify as "dissents".

²⁶ In fact, Blustein (2017) in his account makes the link to zeroing the story's centerpiece rather than a merely peripheral issue.

Case (DS No.)	AB Report Date	Deciding AB Members	Nationality & Jurisprudential Background	Term
<i>US—Upland Cotton</i> (DS267)	Mar. 3, 2005	Merit E. Janow	US	First
		Luiz Olavo Baptista	Brazil	First
		A.V. Ganesan	India	Second
<i>US—Zeroing (EC)</i> (DS294)	May 14, 2009	Shotaro Oshima	Japan	First
		Lilia R. Bautista	Philippines	First
		Jennifer Hillman	US	First
<i>EC—LCA</i> (DS316)	May 18, 2011	David Unterhalter	South Africa	Second
		Lilia Bautista	Philippines	Second
		Peter Van den Bossche	EU	First
<i>US—Washing Machines</i> (DS464)	Sep 7, 2016	Thomas Graham	US	Second
		Ricardo Ramirez	Mexico	Second
		Ujal Singh Bhatia	India	Second

It can thus be concluded that an unrevealed subset of the eleven different members—three from the US, two from India, and one each from Brazil, EU, Japan, Mexico, the Philippines, and South Africa—issued the genuine dissenting opinions.

4. Factors Influencing the Issuance of Dissenting Opinions

In this section, we present a sequential game describing the interaction between an AB member and his or her nominating country to assess how different factors—each categorized either as a “evaluator” or “non-evaluator” of dissents—affect a judge’s decision to diverge from the majority opinion. However, one should not see in the taxonomy more than what the term “taxonomy” denotes, and should not understand the “evaluators” and “non-evaluators” as two distinct groups separated by a wall. First, all five factors in the two categories are applicable to any case an AB member decides, in addition to situations where the sequential game’s premise—that the judge and his or her home country in the same dispute doctrinally diverge as to an issue—applies. Furthermore, all the factors are at least partially dependent on each other. Legal education and background, for example, may dictate or guide the manner in which AB members approach legal precedents²⁷ principles, and their applications, thereby influencing the judges’ adherence to the institutional mandate.

4.1 AB Members v. Nominating Countries

Multiple factors can affect the overall attitude of judges towards issuing dissents, and their relative weights are often difficult to measure because they vary depending on personal preferences. Individuals’ different moral standards, for example, have varying impact on the way judges approach disputes. Guided by nationalistic sentiments or personal interests, some AB members might be more inclined than others to lend a sympathetic ear to the voices of their respective governments and rule in favor of them. In principle, of course, this should not be the case, pursuant to Article 17.3 of DSU. But AB members still might overlook this statutory guidance, especially if their post-AB employment is largely in the hands of the governments that nominated them. In the WTO, after all, member nations have always

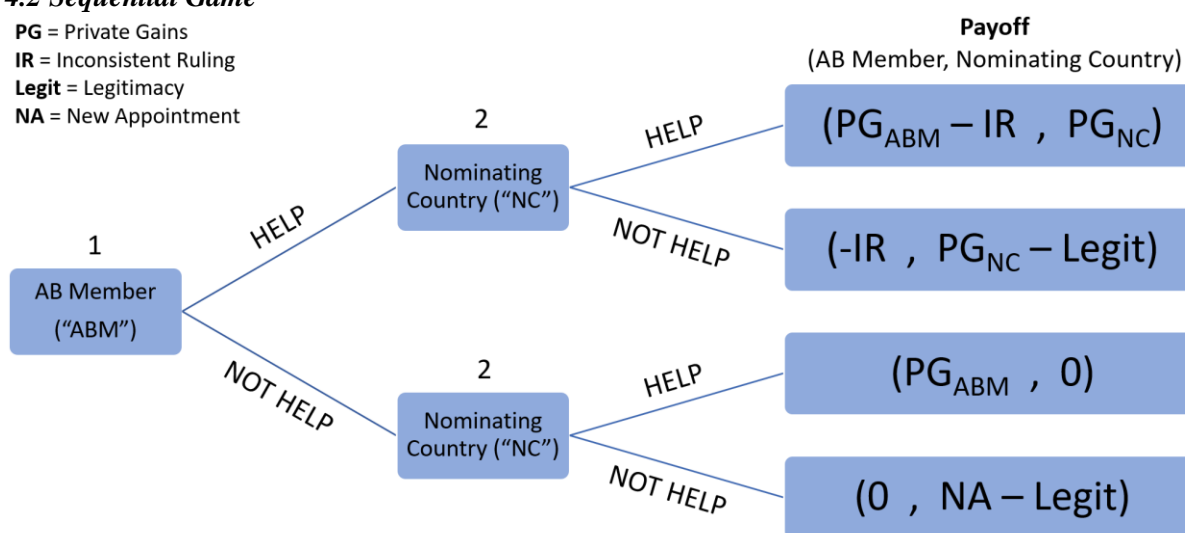
²⁷ There is substantial literature on this issue as far as other courts are concerned. There are, of course, those like the European Court of Justice that only issue consensus decisions. But the literature regarding the rationale for and effects of dissenting opinions presented before the US Supreme Court is probably the most comprehensive. There are dozens of studies, but for the narrow purposes of this paper see, Ginsburg (2010); and Urofsky (2015).

nominated their own citizens to the AB through formal proposals: there has never been a case where a WTO member nominated a foreigner, even though the DSU does not prohibit such action.

On the flipside, the unbroken record of 23 home-nominated AB members having served in the WTO in and of itself suggests that WTO members are incentivized to nominate their own citizens to the body.²⁸ AB members are, of course, expected to impartially consider the legitimate interests of their countries as well as those of others. But one might also wonder whether the practice to consistently nominate nationals lends support to the argument advanced by Pogge (2014) that it is “widely expected and accepted that [AB members] give disproportionate weight to the interests of their own country and its governing elites.”²⁹ For AB members who are inclined to behave in a “patriotic” manner, the guaranteed anonymity of opinions ironically makes it easier to further such interests without revealing their true motives, despite the rule’s intent to protect the system. That said, the favoritism is less important in cases where the AB member’s intellectual leanings align with his or her country’s interest: the home country will be satisfied with the rulings regardless of its expectations for the AB member. This is likely why the US nomination process involves extensively asking where a candidate stands on a particular issue, as per Elsig and Pollack (2014).³⁰ Favoritism does make a difference, however, when the AB member’s intellectual leanings are at odds with his or her country’s interests. In such cases, analyzing the AB member’s decision to help revolves around the interests at stake for both the AB member and his or her home country.

4.2 Sequential Game

PG = Private Gains
 IR = Inconsistent Ruling
 Legit = Legitimacy
 NA = New Appointment



In light of the ample room for an AB member (“ABM”) to behave against the letter and spirit of Article 17.3 of DSU—as it is simply impossible for the institutional mechanism to cover all bases—ABM and his or her nominating country (“NC”) face a sequential game scenario during ABM’s term(s) if 1) both participate in one or more of the same case, 2) their positions on a disputed claim materially diverge, and 3) NC is on the losing side of the dispute(s).

Here, each action or variable is broadly defined for the model’s simplicity sake. Where the majority ruling is against NC, ABM can decide whether to “help” NC by writing a dissent supporting NC’s positions. The dissent would amount to a long-term private gain for NC (“PG_{NC}”) of keeping the issue

²⁸ In three different papers, Elsig alone or with co-authors provides a comprehensive account of the nomination process and its biases. See Elsig (2013), Elsig and Pollack (2014), and Elsig, Puig, and Shaffer (2016).

²⁹ Pogge (2014) at p. 587.

³⁰ Elsig and Pollack (2014) at 408-09.

controversial and paving the road towards potentially overturning the ruling. For ABM, “helping” NC also amounts to a payoff deduction because of ruling inconsistently with his or her own belief (“IR”). IR thus assumes a broad definition as well, ranging from ABM’s sense of guilt to personal value placed on intellectual consistency and integrity. If ABM decides to “not help”, neither PG_{NC} nor IR is included in the final payoffs of NC and ABM, respectively.

What complicates the game is NC’s subsequent choice to “help” ABM by either reappointing (if it’s ABM’s first term) or assisting with his or her post-WTO employment (second term). More details on the distinction between first and second terms follow, but NC’s “help” either way would lead to ABM’s private gain (“ PG_{ABM} ”). PG_{ABM} here also holds a broad definition but is still limited to ABM’s career prospects. If NC does “not help”, PG_{ABM} does not factor into ABM’s payoff. But for a NC dealing with a first-term ABM, “not helping” ABM amounts to its own payoff deduction because NC is effectively hurting the institution’s legitimacy by choosing not to reappoint (“Legit”), damage from which is eventually bound to bite NC back. Finally, if both first-term ABM and NC decide to “not help” each other, NC enjoys the benefit of being able to make a new appointment (“NA”), especially for WTO members like the US and EU that have always had an appointed AB member on the roster.³¹ But in a game involving a second-term ABM, both the NA and Legit factors are immaterial.

Here, one of the few caveats worth mentioning is that each “help” and “not help” choice allocated to ABM and NC does not apply to just one case in which the two have diverging opinions, but rather represents ABM’s entire term—first or second—possibly embodying multiple situations where ABM and NC participate in the same case. Moreover, the definition of “help” is not only temporally and substantively broad but also subjective, so it is ultimately the receiving end who decides whether the helper truly provided “help”. One could easily imagine a scenario in which ABM thought he or she sufficiently “helped” NC throughout the years, while NC concludes otherwise. It is also noteworthy that each action or payoff variable mentioned in the game could be broken down into further sub-actions or sub-variables, respectively, to make the model more complex.

Using backward induction to obtain the subgame perfect equilibria, assuming that ABM is serving his or her *first term*:

Starting with Nominating Country

Top two nodes

Payoff_{NC}(HELP) vs Payoff_{NC}(NOT HELP)

$PG_{NC} > PG_{NC} - \text{Legit}$:
 → NC will “HELP” unless Legit = 0.

Bottom two nodes

Payoff_{NC}(NOT HELP) vs Payoff_{NC}(HELP)

$(NA - \text{Legit}) < 0$	$(NA - \text{Legit}) > 0$
→ NC will “HELP”	→ NC will “NOT HELP”

Equilibria

$(NA - \text{Legit}) > 0$

Payoff_{ABM}(HELP_{ABM} → HELP_{NC}) vs Payoff_{ABM}(NOT HELP_{ABM} → NOT HELP_{NC})

³¹ This seems to have become the case for China as well, by now. The importance of this observation could increase in future practice, as others as well (India, Russia) “knock on the door” for permanent seat in the AB.

$$\begin{array}{ll} PG_{ABM} - IR > 0 & PG_{ABM} - IR < 0 \\ \rightarrow \text{ABM / NC will "HELP"} & \rightarrow \text{ABM / NC will "NOT HELP"} \end{array}$$

$$(NA - Legit) < 0$$

Payoff_{ABM}(HELP_{ABM} → HELP_{NC}) vs Payoff_{ABM}(NOT HELP_{ABM} → HELP_{NC})

$$\begin{array}{l} PG_{ABM} - IR < PG_{ABM}: \\ \rightarrow \text{ABM will "NOT HELP"} \text{ unless } IR = 0. \text{ NC will "HELP"} \end{array}$$

The equilibria obtained using backward induction offer insights into how NC's and ABM's variable payoffs affect the game's outcome. It is suggested that the final payoffs for both largely depend on two set of choices: 1) "NA v. Legit": how much NC values the prospect of replacing an unhelpful AB member, at the expense of damaging the institution's legitimacy, and 2) "PG_{ABM} v. IR": how much ABM values personal gains, at the expense of feeling guilty or compromising his or her intellectual integrity. For example, if NC values new appointments more than securing the institution's legitimacy, while ABM values personal gains more than the penalty she receives from helping NC, then the equilibrium dictates that both ABM and NC will help each other to respectively gain payoffs of (PG_{ABM} - IR) and (PG_{NC}).

4.3 Evaluators of Dissents

Among a total of five factors that affect an AB member's decision to issue dissents, three of them also serve as benchmark for their "quality", or doctrinal influence. More specifically, these factors could determine how important a particular dissent is for the development of WTO case law—a measure perhaps worth tracking for the purposes of fostering a more robust legal institution. What thus follows is a discussion of how the WTO's institutional function (its mandate), a dissent's potential impact, and case law maturity affect AB members' decision to dissent.

4.3.1 The Institutional Mandate

By virtue of Article 3.2 of DSU, AB members are agents, not principals, representing the institution: they must respect the balance of rights and obligations struck by the WTO members to which they cannot add and from which they cannot detract. But there is some ongoing discussion whether the AB has been overstepping its bounds, the culmination point being the debate over AB's power to invite amicus curiae briefs.³² A legal discussion of the issue is embedded in the panel and AB reports on *US—Softwood Lumber IV*, which sheds light on possible circumstances under which the AB could stir controversy over judicial activism.

There, the question was whether the United States could have used a benchmark other than those explicitly mentioned in the body of Article 14 of SCM (Subsidies and Countervailing Measures) in order to calculate the benefit conferred to Canadian timber producers through the notorious "stumpage" programs. The panel understood that there was a problem since this provision obliged members to use "in country" benchmarks, even when prices were obviously nonmarket prices. Absent a market price, it is impossible to quantify the amount of subsidy, which by definition requires market counterfactual. In this case, Canadian prices were heavily influenced by subsidies and the United States had used an out of Canada benchmark. The panel signaled the problem against this background but refrained from inventing a new benchmark, leaving the task instead to the legislators. The AB went one step further,

³² In Mavroidis (2002), we discuss the episode in detail.

and against the explicit wording of Article 14 of SCM, which undeniably characterizes the list of benchmarks included therein exhaustive, provided the United States with the possibility of using any other “reasonable” benchmark. This was arguably a case where the AB overstepped its bounds by “add[ing] to...the rights” of the US and thus violated Article 3.2 of DSU, but it did not create too much havoc across the membership.³³

In the context of our conditioned sequential game, the institutional mandate influences IR: the personal penalty ABM suffers from ruling in contrary to his or her intellectual leanings. For those who place a lot of value on the institutional or their intellectual integrity, the IR deduction will likely be large if they have to overstep the bounds of the institutional mandate in order to “help” their nominating countries. Although ABM’s action is still subject to NC’s payoffs and variable equilibria discussed in Section 4.2, the higher the IR penalty is, the more probable it is for ABM to “not help” NC.

4.3.2 Anticipated Impact

At some institutions like the US Supreme Court, a dissent might help the majority clarify its view. This is especially so in the US, where majority opinions often refer to dissents and address their rationales head on. This function is arguably less applicable to the WTO, where only dissents refer to majority opinions, but not the other way around.

Nevertheless, the AB dissents could still become influential by shaping future case law and attracting public attention. In light of the ever-growing complexity and scope of the WTO regime, there is always a possibility that dissents—those already issued or to be issued—may contribute to the reversal of prior rulings or become widely known because they touch on the most sensitive of trade issues. Such anticipated impact would be plausible unless the case law reaches a point of maturity that altogether decreases the frequency of dissents among the presiding AB members.

In the context of our sequential game, dissents’ anticipated impact functions similarly to the institutional mandate in that it influences IR in the same direction. The more value AB members place on the institutional or their intellectual integrity, the more uncomfortable they would become about their dissents—which are contrary to their intellectual leaning—shaping future case law: an increase in IR penalty. AB members who consider “helping” their countries would probably prefer their separate opinion to remain relatively unknown to the public. The best-case scenario, in fact, for these AB members would be to only have their nominating country notice that they have delivered. But even the most “helpful” AB members, of course, would not likely compromise anonymity for this effect; they would rather hope that the dissent’s very existence would be a strong enough indication for their countries that they sufficiently “helped”. According to the equilibria laid out in Section 4.2, ABMs facing a NC that values the prospect of replacing an “unhelpful” first-term ABM more than the resulting institutional penalty ($NA - Legit > 0$) will decide to “not help” if they place more value on IR than private gains ($PG_{ABM} - IR < 0$).

4.3.3 Maturity of Case Law

The crux of “maturity” involves asking whether case law—at the time when a dissenting opinion was issued—reached a stage of evolution where the same response has been routinely given to the same question, the variation of facts notwithstanding. However, because the standard for “maturity” is far from concrete, the term is used *faute de mieux*. Discussing an issue’s maturity in the WTO could be more difficult than in the US law context, in which many more cases have been adjudicated. There are also multiple trade issues whose case law has become quite mature, but it would still be hasty to assume that this factor always prevents AB members from dissenting, especially when their anonymity (at least to the public) is guaranteed. As we discuss later in further details, even the relative case law maturity of

³³ In Mavroidis (2016) we discuss this issue in detail in pp. 234 et seq.

zeroing—an issue already adjudicated many times—did not prevent the AB from issuing multiple dissenting opinions.

But a judge ruling against “mature” case law is not necessarily baseless, and it is unwarranted to take an inflexible position. Consider, for example, the US Supreme Court’s decision on vertical restraints. Following the decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), US courts did not distinguish between vertical and horizontal restraints to trade until, awoken by advancement in the economics literature, started distinguishing between the two in the 1970s.³⁴ New arguments, in other words, can always be introduced to effectively rebut an established orthodoxy.

In the sequential game context, the maturity of relevant case law disincentivizes ABM from dissenting by increasing IR, like institutional mandate or anticipated impact. The more established the relevant case law in a dispute, the more uncomfortable ABM would feel about dissenting, especially when the opinion is at odds with his or her intellectual leanings. After all, the WTO law benefits from a de facto stare decisis; when the system expects such deference to legal precedents, advancing a view that one does not fully believe in becomes particularly difficult for an ABM that respects the institution. Similarly to the two aforementioned factors, ABMs facing a NC that values the prospect of replacing an “unhelpful” first-term ABM more than the resulting penalty ($NA - Legit > 0$) will decide to “not help” if they think the resulting private gains is not worth the penalty ($PG_{ABM} - IR < 0$).

4.4 Nonevaluators of Dissents

Unlike the three “evaluators”, there are two factors personal to AB members that do not dictate a dissent’s doctrinal influence. First, we assess through the lens of the sequential game whether the term a particular AB member serves—first or second (with the member aware that reappointment is impossible pursuant to Article 17.2 of DSU)—affects the tendency to dissent. In a similar vein, we also discuss how the judges’ personal backgrounds determine individual payoffs in the sequential game.

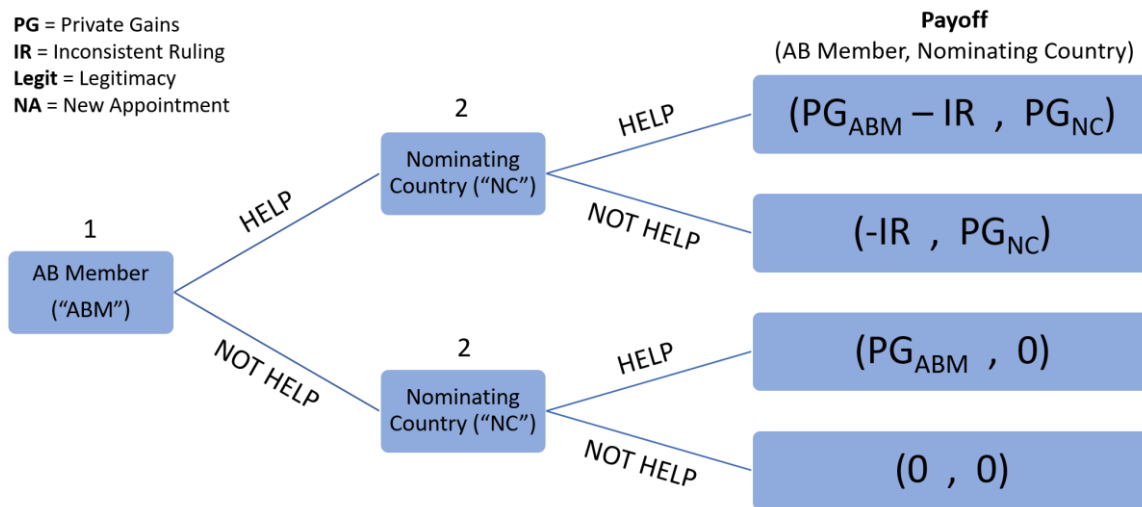
4.4.1 First or Second Term

Under the circumstances of the sequential game, whether ABMs are in their first or second term can change the entire rulebook, even if the distinction does not determine the quality of dissents. While the payoff equilibria for a first-term ABM are discussed in Section 2.3, they are different for a second-term ABM, as NC’s payoffs become much more simplified. When NC faces a second-term ABM in a dispute, variables “NA” and “Legit” become immaterial, as NC neither is empowered to reappoint ABM nor suffers from any self-induced compromise of the institution’s legitimacy.

The payoff change that ABM faces is a bit more nuanced. On average, judges serving the second time likely stand less to gain from “helping” NC because reappointment is no longer at stake (a decrease in PG_{ABM} compared to the first game in Section 3.2). But the resulting PG_{ABM} would still vary depending on ABM’s circumstances and preferences. Some second-term judges may not hope for NC’s “help” either because they already have secured post-WTO employment, or decided against receiving personal favors from the government. These ABMs would have much less to gain (an even larger decrease in PG_{ABM} compared to the first game in Section 2.3) from “helping” NCs and, unconstrained by reappointment-related aspirations, may be more inclined to issue opinions consistent with their intellectual leanings. On the other hand, judges whose future aspirations depend on cooperating with NC would continue doing so even during their second term. Viewed in this light, it should not come as a surprise that dissenting opinions have been issued by judges serving either their first or second term.

³⁴ Hovenkamp (2005). See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 511 U.S. 877 (2007), which finally overruled *Dr. Miles* almost a century later.

As noted in Section 3.4, six AB members in their first (and sometimes only term)³⁵ and six during their second term participated in the four divisions that issued the dissenting opinions, thus lending support to this proposition.



A backward induction for this simplified game would lead to an outcome where NC will always be indifferent between “helping” and “not helping”, while ABM will likely choose to “not help” because $Payoff_{ABM}(NOT\ HELP_{ABM} \rightarrow HELP_{NC})$, or PG_{ABM} , is always larger than $Payoff_{ABM}(HELP_{ABM} \rightarrow HELP_{NC})$, or $(PG_{ABM} - IR)$ unless “ $IR = 0$ ”: an assumption that is quite unlikely.

Admittedly, the model above warrants qualitative elaboration to better address ABM’s nuanced situation in reality. Although other variables have been omitted for sake of simplicity, NC will never truly be indifferent between “helping” and “not helping” ABM. If ABM does “not help” NC, the latter may bear a grudge and derive some utility—likely minimal, but enough to induce the country to take one action over the other—by choosing not to help ABM with securing a job post-WTO (schadenfreude). On the flipside, NC may also feel more inclined to “help” if it is lacking in WTO experts to appoint to government posts and, therefore, is partially dependent on ABM. Because ABM decides to “help” or “not help” only after considering NC’s move thereafter, NC’s payoff changes influence ABM’s action as first mover. The incorporation of potential subfactors, in this respect, provides a more complete picture of how the first v. second term distinction affects an ABM’s decision to dissent.

4.4.2 Education and Expertise

The AB members’ jurisprudential background including legal education and career can also shed light on their likelihood of issuing dissent, albeit less directly than the four aforementioned factors. Article 17.3 of DSU states that:

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

Here, expertise in international trade or the covered agreements is not necessarily confined to jurisprudential expertise. Though a legal license or training is not required, the AB members who ruled

³⁵ Blustein (2017) points to an admittedly hard-to-prove causal relationship between expression of dissent and reappointment when discussing the evolution of “zeroing” case law.

in the dissent cases are all licensed lawyers with extensive legal backgrounds. It is also notable that nationality and education do not necessarily coincide. A Japanese lawyer trained in the US will carry the approach he or she was taught in the US school.³⁶ Some of the AB members have been exposed to foreign education, but not exclusively to it.

In our sequential game scenario, personal background can indirectly affect PG_{ABM} —ABM’s potential gain from helping NC—because countries differ as to their treatment of ABMs who leave the WTO. But more importantly, ABMs’ jurisprudential background can influence IR: the degree of guilt or discomfort upon “helping” NC out. If ABM hails from a jurisdiction whose judges infrequently dissent or downplay the importance of dissenting opinions, his or her discomfort with dissenting in the WTO would be significant. On the flipside, if ABM originates in a jurisdiction that acknowledges the importance of dissents, he or she would feel more inclined to issue similar opinions even without prior experience.

That said, the doctrinal status of dissents varies across jurisdictions, so predicting how ABMs’ background affects their payoffs requires looking into countries’ judicial practices. Since dissenting opinions are anonymous, we cannot easily assign them to individual judges. But we do know that each AB member who issued a dissent originate in any of Brazil, the EU, India, Japan, Mexico, the Philippines, South Africa, and the US.

In this light, a quick comparison of the jurisdictions suggests that the United States is the clear winner: dissenting opinions in the US, especially at its Supreme Court, are frequently issued,³⁷ often become “canonical or prophetic” in the sense that they influence future decisions,³⁸ and often garner a great deal of public attention, largely because “the arguments and framing perspectives employed by dissenting justices... provide reporters with the opportunity to emphasize conflict and controversy.”³⁹

The other jurisdictions fall short of the US standard with respect to at least one criterion. Brazil and Mexico, for example, have unique legal structures that undermine the influence of dissenting opinions. Although dissents are issued by the Brazilian Supreme Court,⁴⁰ they are written individually and simultaneously without discussion among the justices. The end result, according to experts, is that the Court produces no formally unified majority opinion,⁴¹ as dissents resemble “defeated opinions” that do not challenge the majority. Consequently, they usually neither influence future decisions nor attract public attention.⁴² The effects of the Mexican Supreme Court rulings are “inter partes, as opposed to erga omnes, meaning that despite the declaration of unconstitutionality of a norm in a given case, it remains valid for the rest of the population.”⁴³ The restriction of the scope of decisions removes at least one reason for issuing a dissent, namely to influence future jurisprudence.

³⁶ On this score, see the very comprehensive treatment of this issue in Roberts (2017).

³⁷ Unlike in Japan, for example, American judges in the lower courts are also empowered to issue dissenting opinions, although the frequency is lower in practice.

³⁸ Urofsky (2015) at p. 7.

³⁹ Zilis (2015) at p. 172.

⁴⁰ da Silva (2013).

⁴¹ Rosevear et al. (2015).

⁴² Da Silva (2013) pp. 483 et seq.

⁴³ 2016 Global Review of Constitutional Law, IConnect-Clough Center, p. 131

In Japan and the Philippines, though dissenting opinions are commonly issued by their respective highest courts,⁴⁴ they have seldom been adopted by future majority opinions, indicating their less “canonical or prophetic” nature compared to the US counterparts.⁴⁵

India, followed by South Africa, appears to be the jurisdiction with the least influential dissenting opinions, as the rate of disagreement in the Indian Supreme Court, especially in the most recent decades (1991-2000 and 2001-2010) has stayed very low, at 1.72% and 2.70% respectively.⁴⁶ The highest courts of South Africa are also similar to their Indian counterparts in infrequently issuing dissents, albeit to a lesser degree. Although relevant literature on South African courts has been scarce post-Apartheid, the rate of consensus among judges in both the South African Supreme Court of Appeal and the Constitutional Court hovered around 90% between 1970 and 2000, with very few dissents issued.⁴⁷

In the EU, the European Court of Justice does not allow dissents: in its sixty years of existence, it has remarkably never issued a dissenting opinion. Judges in Luxembourg, for example, have also developed a culture of compromising towards a commonly acceptable ruling. Even if one points to Article 32 of the Statute of the Court (secrecy of deliberations) as the applicable legal rule, the lack of dissents has in fact been more customary. None of the founding member states had at the time a system of dissenting opinions, while all states had some kind of rule concerning the secrecy of deliberations. It is often said that the opinions of the Advocate Generals are the substitute for dissents, although this is less than a satisfactory explanation.

Ultimately, the lack of dissenting opinions in the ECJ serves as a signal that AB members from the EU may similarly be less inclined to issue dissents. In contrast, the US dissenting opinions’ relatively prized status may suggest that AB members, who are trained and/or have practiced in the US, not only have had exposure to written dissents, but are also likely to believe that they are doctrinally significant.

4.5 Balancing of Factors

It is noteworthy that while the sequential game captures ABM’s and NC’s decision-making over time, the payoff variables are affected incrementally by the ABM’s decision in each case to write a dissent. Moreover, each of such decisions follows a strategic balancing of the aforementioned factors that occurs even during deliberation of cases to which NC is not party. For example, ABM may intentionally buy goodwill and defer to other judges in cases 1) not involving NC and 2) on which he or she does not have strong opinions, in order to enforce a certain view in other cases of greater interest to NC.

Occasionally, the relevant factors may cancel each other out. A decision to issue a separate opinion follows a balancing of factors that are weighed differently depending on the individual. AB members, for example, may consider that their dissent’s persuasiveness on an issue is potentially conflicting with negative institutional ramifications, such as compromising the WTO regime’s integrity (from an impartial cosmopolitan’s perspective) or doctrinal consistency (for those who are strongly concerned of dissents’ anticipated impact). Because such balancing is largely subject to personal preferences, each ABM’s exact payoff is hard to fathom. Therefore, assigning in a definitive manner a pinpointed rationale to the issuance of a dissent also becomes a difficult task.

There are, of course, institutional insurance mechanisms that address ABM’s possible favoritism to NC. For example, reappointments require approval by the membership, and WTO members are

⁴⁴ Goodman (2013) at pp. 112 et seq.; Bueza (2016).

⁴⁵ In the Philippines, for example, dissenting opinions were used to overrule previous holdings only on several occasions, such as when Justice Gregorio Perfecto’s dissent in *Moncado v. People’s Court* (1948) was adopted by a more liberal court in *Stonehill v. Diokno* (1963). Cruz et al. (2012) at p. 127; Itoh (2011) at p. 1640.

⁴⁶ Singh et al. (2016) at p. 44.

⁴⁷ Barnard et al. (2012) at p. 721.

empowered to punish “nationally”-minded judges seeking reappointment. In a similar vein, because the formula for selecting AB divisions is unknown to the judges, it will be difficult for them to strategize and influence the outcome of any given case.

The ultimate problem is that unless AB members reveal what drives their decisions, their adherence to Article 17.3 of DSU is only subject to speculation, as they have little incentive to confess upon violation. The sequential game thus captures their payoffs under different scenarios but is unable to assign actual numbers to these variables for each ABM.

5. Implications

Both the “evaluators” and “non-evaluators” affect AB members’ decision to dissent, but it is only the former that also shed light on a dissenting opinion’s influence and doctrinal status. When the four dissents are assessed according to the “evaluators”, the only one that satisfies all three factors is *US—Upland Cotton*: arguably the most desirable dissent from the WTO’s perspective. Assessing the dissents this way can benefit the development of WTO case law, as it reveals how and when such opinion contributes to the constructive deliberation of disputes.

In addition, zeroing deserves special attention because it illustrates a possible face-off situation between ABM and NC that affects the former’s decision to dissent in a dispute. More generally, the example also sheds light on the relationship dynamics between ABM and NC, as well as how political interests can influence WTO jurisprudence.

5.1 WTO’s Most Desirable Dissent

The requirement for the first factor—institutional mandate—asks whether a dissent’s ruling or rationale constitutes judicial activism, against the spirit of Article 3.2 DSU.

As for *US—Upland Cotton*, its dissent most likely adhered to the institutional mandate, despite its majority opinion suggesting otherwise. After all, the wording of the challenged provision (Article 10.2 of SCM) clearly supports the dissenter, who argues that the development of disciplines is a matter for the future:

Members **undertake to work toward the development** of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, **after agreement on such disciplines**, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith. (emphasis added)

The wording here could not have been any clearer: in fact, as we explained elsewhere in more detail,⁴⁸ it is arguably the majority view that undid the balance of rights and obligations. The provision leaves us with no doubt that at the moment when the Uruguay round agreements had been concluded, there was no agreement on how to treat export credits. Since the majority opinion could not point to subsequent actions to this effect, the only logical conclusion was that there was no international discipline on export credits, which is also what the dissent stood for. It is thus astonishing that the (majority of the relevant division of the) AB, renowned for its attentiveness and attachment indeed to textualism, “saw” a legal discipline in this provision.

As for *US—Washing Machines*, zeroing is, in fact, a methodology for finding dumping whose consistency (or the lack thereof) with the WTO does not prejudice the balance of rights and obligations in one way or another. It is, therefore, a matter of interpretation to what extent positive dumping margins

⁴⁸ Mavroidis (2016), vol. 2, Chapter 3.

should be accounted for when calculating dumping margins.⁴⁹ Similarly to its counterpart in *US—Upland Cotton*, the dissenting opinion here does not compromise the institutional mandate by advancing its view in the context of W-T methodology.

The dissent's adherence to the institutional mandate in *US—Zeroing (EC)* is trickier because it is the AB that used a second compliance panel and “close nexus” to avoid incentivizing recalcitrant members from changing their implementing measures while procrastinating implementation: arguably a move lying beyond the ambit of DSU.

The AB's use of a second compliance panel in one dispute can be interpreted as judicial overreaching beyond the prescribed scope of DSU. Indeed, measures taken beyond the reasonable period of time to implement cannot be the subject of a compliance panel, but rather of an entirely new panel that would allow for countermeasures in case of non-implementation. Since there is only one reasonable period of time, there can only be one compliance panel that discusses all measures adopted during this period. In this light, the AB's use of “close nexus”—the condition that measures taken outside a reasonable period of time are closely related to those taken during the implementation period—was a maneuver to demonstrate judicial pragmatism and avoid potential issues of legality concerning possible countermeasures.

The proponents of AB's move would argue that the second compliance panel and “close nexus” analysis reduce the time of implementation; after all, the AB had to somehow address the undeclared measures taken to comply. But if remedies were retroactive (as is the case in almost all other areas of international law), countries would have had little incentive to be recalcitrant and procrastinating in the first place. Having to pay for all damage starting from the moment of illegality would have been the surest way of incentivizing swift implementation. While Article 19 of DSU does not dictate prospective remedies on its face, this is what panels have consistently recommended in practice. Therefore, it could be argued that the WTO imposed prospective remedies contrary to GATT practice, and then tried to alleviate the problem of “cheap exit” from contractual obligations with its case law ruling on second compliance panel and “close nexus” that went against the spirit of DSU.

Given the concerns over the AB ruling, assessing its dissent's adherence to the institutional mandate is more difficult. Labeling the dissent as a case of judicial activism would be unfair as the opinion detracts from a controversial majority ruling. But because the dissent also takes the second compliance panel for granted, its respect for the institutional mandate is arguably weaker than its counterpart in *US—Upland Cotton*.

Finally, *EC—LCA* concerns an issue that is now water under the bridge. But again, while “completing the analysis” is now routinely practiced, it is hardly reconcilable with the letter and spirit of the DSU for one very simple reason: every time the AB completes its analysis, it deprives the parties to a dispute of a two-instances adjudication.

The second factor—maturity of case law—implies that the less mature a dispute's relevant case law, the more a dissent can add to the healthy judicial discussion of an issue. Case law maturity is also related to the first factor because an opinion dissenting from a time-tested majority view is more likely to be perceived as judicial activism. As for *US—Upland Cotton*, the dissent there faced an immature case law, unlike the three others.⁵⁰ As previously stated, the AB had to face the question of consistency of export credit guarantees, export credits, and insurance with Article 10.2 of the Agreement on Agriculture, and the ensuing prohibition embedded in Article 3.1(a) of the SCM Agreement. This was the first case of its kind, previously unadjudicated. Although the scope and definitional elements of a subsidy were largely

⁴⁹ In *Mavroidis and Prusa* (2018), we argued that since anti-dumping duties are about impositions on all imports, it should be all imports during an investigating period that should be taken into account.

⁵⁰ In a separate publication, one of us has taken the view that the separate opinion is the correct one, *Mavroidis* (2016) volume 2.

decided in *US—FSC* and *Canada—Dairy*,⁵¹ their applicability to the three measures set forth in Article 10.2 had never been discussed. Therefore, it appears fair to conclude that there was no maturity in case law when this dissent was issued.

US—Zeroing (EC) and *EC—LCA* discuss issues (close nexus and completing the analysis, respectively) that had been discussed a number of times. While yet another round of AB’s consideration without a settled agreement likely indicates the failure of prior rulings to persuade all AB members of its intellectual legitimacy, the case law has certainly been developing over time, to a greater extent than the question adjudicated in *US—Upland Cotton*.

The dissenting opinion in *US—Washing Machines* represents the apex of this discussion, issued amidst over a dozen of reports that had found the practice of zeroing to be inconsistent with the WTO rules.⁵² The separate (but not dissenting) opinion in *US—Continued Zeroing*, for example, is an apology to the effect that the debate over zeroing should by then be water under the bridge. Moreover, the dissent in *US—Washing Machines* offers neither new arguments nor distinguishing factors explaining why zeroing should be tolerated within the four corners of the particular methodology discussed in the case.⁵³

The main question of zeroing can be formulated as following: is discarding positive dumping margins a “permissible” interpretation of the term “dumping margin”? In Mavroidis and Prusa (2018), we explained why this should not be the case. The AB, its numerous reports on zeroing notwithstanding, has yet to rule as such: it has consistently outlawed zeroing, without adding a phrase explaining why discounting positive margins is an impermissible interpretation of the current Anti-dumping Agreement. On the other hand, the proponents of zeroing could have found refuge within the idiosyncratic standard of review applicable to anti-dumping cases and embedded in Article 17.6(ii) of the Agreement on Anti-dumping. Zeroing, in this light, has remained contentious until recently, while some doctrinal gaps remain for the AB to fill. But it is also undeniable that with more than twenty relevant cases now decided, the case law has reached its maturity.

The third factor—anticipated impact—is more difficult to analyze as a forward-looking indicator. A dissent would have the biggest impact as a legal opinion if a later AB division uses it as a basis to overturn precedents. Of the four dissents, none has been used this way to overturn the original majority view. But in light of each dispute’s relevant case law maturity, the dissent facing the highest probability of such usage is that of *US—Upland Cotton*. The other three cases, in contrast, have built on their respective case law that is now relatively settled, which suggests that their dissents are less likely to make an impact.

5.2 Zeroing in on Zeroing

Among the issues covered by the four dissents, zeroing warrants attention because it illustrates a face-off situation between ABM and NC that influences the former’s decision to dissent in a dispute.

The fact that there have been twenty disputes so far on zeroing, and that its adjudication involved a rare instance where the panel did not follow AB’s prior ruling suggest that the subject has been contentious in the WTO.⁵⁴ But asking why zeroing has become controversial is what truly explains the dissenters’ motives in the two zeroing cases. More specifically, it is worth exploring whether the US, a party to almost all of the zeroing disputes, benefited from American AB members setting their own

⁵¹ See the AB report, *US—FSC* at §136, and the AB report on *Canada—Dairy* at §87.

⁵² Mavroidis and Prusa (2018) discuss the most recent case yet and refer to all prior case law.

⁵³ The basic argument that without zeroing there would be “mathematical equivalence” with the other methodologies does not hold water, as this depends on how the “pattern” of transactions has been selected. Furthermore, this claim had been considered in prior case law; see Mavroidis and Prusa (2018) who discuss this issue.

⁵⁴ Mavroidis and Prusa (2018) at 408-09

convictions aside to rule in its favor. Given that 1) one American AB member participated in each of the two divisions that produced the dissents dealing directly and indirectly with zeroing, 2) the US has conducted extensive ideological vetting with its nominated AB members, and 3) the dissents support the US position in the respective disputes, the suspicion that American AB members may have written these opinions at the very least cannot be discarded out of hand.⁵⁵

The anonymity of dissents renders any investigation into possible favoritism extremely difficult: there is no evidence that unequivocally identifies the dissents' authors. There are, however, textual and circumstantial indications suggesting that the dissenters in *US—Zeroing (EC)* and *US—Washing Machines* were Jennifer Hillman and Thomas Graham, respectively. As for *US—Washing Machines*, the dissent includes an extensive cross-lingual comparison between the English and French texts of the WTO agreement:

5.200. Regarding the text of the second sentence of Article 2.4.2 in other official languages, the French version reads:

Une valeur normale établie sur la base d'une moyenne pondérée pourra être comparée aux prix de transactions à l'exportation prises individuellement si les autorités constatent que, d'après leur configuration, les prix à l'exportation diffèrent notablement entre différents acheteurs, régions ou périodes, et si une explication est donnée quant à la raison pour laquelle il n'est pas possible de prendre dûment en compte de telles différences en utilisant les méthodes de comparaison moyenne pondérée à moyenne pondérée ou transaction par transaction.

5.201. By referring to "[les] prix de transactions à l'exportation prises individuellement", which translates literally in English as "the prices of export transactions taken individually", the French text of the second sentence of Article 2.4.2 puts emphasis on the selection of individual transactions.

Interestingly, this turns out to be an interpretive technique that only the AB divisions with Thomas Graham have used, unless judges were referring to similar analysis in past reports or directly addressing a party's claim based on cross-lingual interpretation.

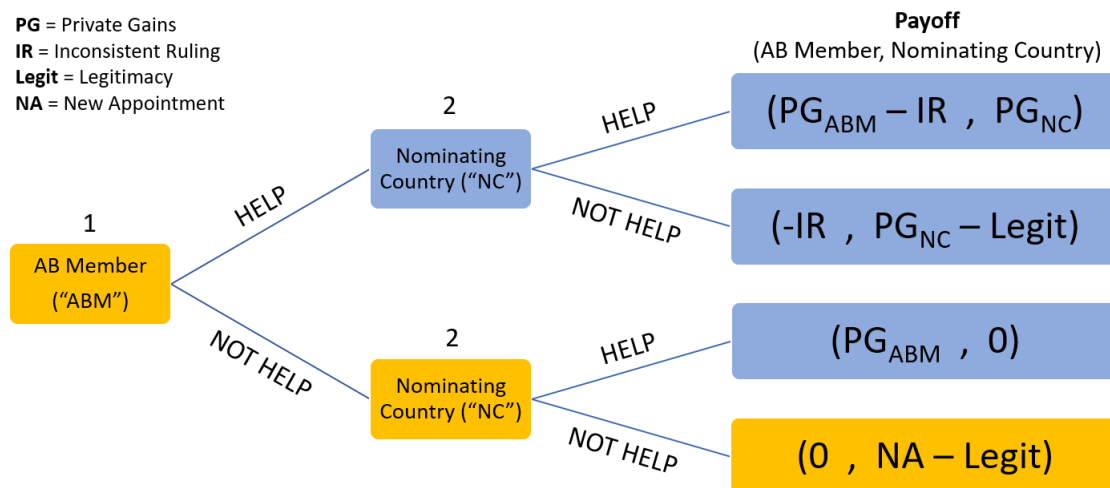
⁵⁵ See also Blustein (2017), who has checked with various sources on this score.

DS No.	AB Division	Citation
DS487	Graham	5.11. The term "over" in Article 3.1(b) is a preposition expressing a preference between two things. This is also reflected in the other authentic language versions of the SCM Agreement, with the French text of Article 3.1(b) reading "subventions subordonnées ... à l'utilisation de produits nation de préférence à des produits importés", and the Spanish text reading "las subvenciones supeditadas al empleo de productos nacionales con preferencia a los importados". In the context of the phrase "contingent ... upon the use of domestic over imported goods", the term "over" therefore refers to the use of domestic goods in preference to, or instead of, imported goods.
	Van den Bossche	
	Servansing	
DS456	Van den Bossche	5.65. Beginning with the phrase "products in ... short supply", we note that this language refers generally to products "available only in limited quantity, scarce". We understand the phrase "products ... in short supply" to refer therefore to products in respect of which there is a "shortage", that is, a "[d]eficiency in quantity; an amount lacking". This understanding is reinforced by the fact that the French and Spanish versions of Article XX(j) refer to "pénurie" and "penuria", respectively, which translate best as "shortage" in English.
	Chang	
	Graham	
		Note: The report here only cites its past ruling in <i>EC—Asbestos</i> , in which a cross-lingual analysis was performed:
DS453	Chang	6.21. The Appellate Body has considered that the word "like" refers to something sharing a number of identical or similar characteristics or qualities. Furthermore, the Appellate Body has held that the term "similar" as a synonym of "like" echoes the language of the French version of these provisions, "produits similaires", and the Spanish version, "productos similares". These terms imply some kind of comparison. While what is being compared is different in the context of trade in goods and trade in services, we consider that, in the context of both trade in goods and trade in services, "likeness" refers to something that is similar.
	Bhatia	
	Zhang	
DS397 (Art. 21.5)	Ramirez-Hernandez	Footnote to 5.101. (p. 41) We find further support for our interpretation in the equally authentic French and Spanish versions of Article 6.4 of the Anti-Dumping Agreement. In the French and Spanish versions of Article 6.4, the phrase "that is not confidential as defined in paragraph 5" is, respectively, " <i>qui ne seraient pas confidentiels aux termes du paragraphe 5</i> " and " <i>que no sea confidencial conforme a los términos del párrafo 5</i> ". (emphasis added)
	Graham	
	Servansing	
DS449	Bhatia	Yes, but a cross-lingual analysis was the basis for one of the party's claims, which the AB extensively addressed.
	Chang	
	Zhang	
DS412 DS426	Ramirez-Hernandez	Yes, but a cross-lingual analysis was the basis for one of the party's claims, which the AB extensively addressed.
	Bhatia	
	Unterhalter	

Out of all cases appealed to the AB during Graham's tenure (from December 2011), there are six AB reports other than *US—Washing Machines* that make cross-lingual comparisons among different versions—English, French, and Spanish—of the WTO agreement at issue. Of the six, only the AB reports of cases Graham partook in ruling—DS487, DS456, and DS397, which are shaded light grey in

the table below—make a genuine cross-lingual reference to non-English texts in performing a substantive analysis. DS449 and DS412/425 can be distinguished from the previous three because the AB’s such analysis is triggered by a party’s claim directly referring to English, French, and Spanish versions of the text at issue. DS453 is also different because the cross-lingual reference there is only a part of the AB’s extensive citation of its past report. Here, the cross-lingual reference is consistent with Graham’s textualist style as a legal interpreter. It is immaterial whether he speaks French or Spanish; given the WTO Secretariat’s capabilities and role, Graham could have received assistance from French- or Spanish-speaking staff members there. As incumbent AB members rotate between cases, such stark difference between cases that Graham did and did not participate in serves as a piece of evidence that he was indeed the author of the dissent in *US—Washing Machines*.

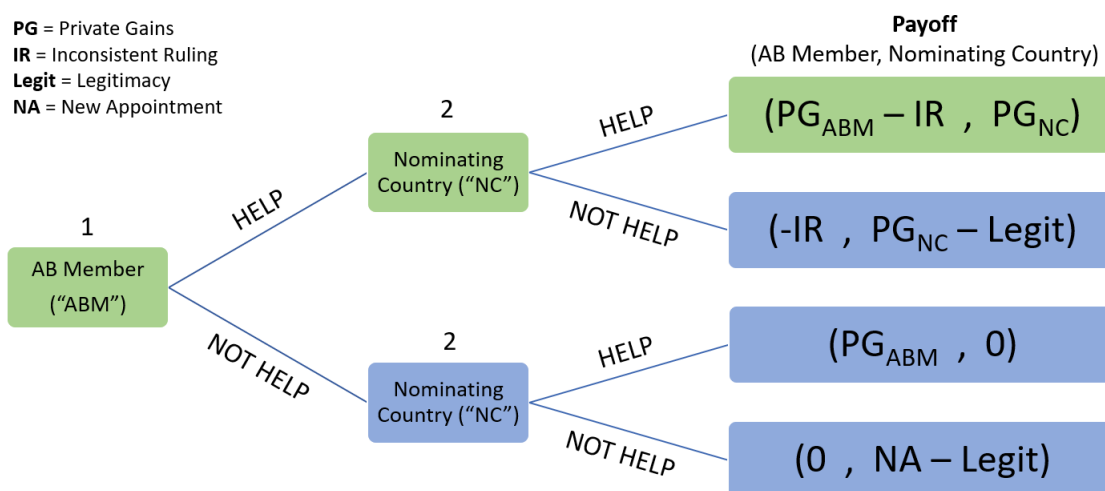
As discussed in Section 4.4.2, considering the personal background of AB members also point to Hillman’s and Graham’s possible authorship of the zeroing dissents. Their training predominantly in US law, a jurisdiction in which dissenting opinions are highly regarded as contributors to case law development, suggests that the two members are more likely than non-US judges to issue dissents. That said, it would be hasty to assume that Oshima and Bhatia were not the dissenters respectively in *US—Zeroing (EC)* and *US—Washing Machines* just because their backgrounds in Japanese and Indian law, where dissenting opinions do not enjoy the same prized influence as their US counterparts. These diverging backgrounds, nonetheless, add to the possibility that Hillman and Graham were the dissenters.



Though the sequential game itself cannot identify the dissenters, assuming they were Hillman and Graham, it sheds light on their thought process as AB members nominated by their home country. As for Hillman, the US government decided not to “help” by reappointing her for a second term. This would have been very unlikely if the government (NC) thought that Hillman (ABM) had “helped”, as NC’s payoff from “helping” was PG_{NC} , whereas its payoff from “not helping” was $PG_{NC} - Legit$. Unless the costs of undermining the institution’s legitimacy by denying a second term was zero to the US ($Legit = 0$), its government would have always opted to “help” ABM. A more plausible scenario, then, is that Hillman did “not help” and the US, valuing its opportunity to nominate another AB member (NA) more than its institutional repercussions ($Legit$), also did “not help” (orange path in the chart above).

Here, it is the US’ perception that dictates whether Hillman truly “helped”, meaning that Hillman may have either decided to “not help”, or have “helped” but failed to perform to her government’s satisfaction. In a similar vein, it also remains unknown if she would not have dissented but for her government’s expectations. Hillman may have written the dissent either because she truly believed in the rationale from the beginning, or against her intellectual leanings to satisfy her government. The dissent also could have been a middle ground between the two, reflecting Hillman’s decision to make a

balanced compromise: though it supported the US position, the opinion, after all, avoided AB’s core ruling on zeroing, but rather on its scope of review.



As for Graham, the US government’s decision to reappoint him for a second term sheds light on his thought process, assuming again he wrote the dissent in *US—Washing Machines*. In light of its decision with Hillman and Seung Wha Chang, the US most likely has a payoff equation of “NA – Legit > 0”, as previously mentioned. With “not help” clearly being the better option for NC if ABM does “not help”, Graham probably “helped” his government and was successfully reappointed (green path in the chart above). That said, the US is known for extensively vetting its AB candidates, so reappointment could have also meant that Graham’s intellectual leanings aligned with his government’s interests, and the sequential game simply didn’t apply.

As such, while the identity of dissenters in zeroing—a standout among all trade issues that produced separate opinions—remains unconfirmed, there is considerable evidence that point to Hillman and Graham as the likely authors. The controversy over zeroing also appears rooted, at least partially, in the mutuality of payoffs between the US and their nominated AB members: their decisions to “help” or “not help” are heavily dependent on each other’s, evidenced by the sequential game.

Admittedly, the American AB members have been under considerable pressure from early on. Following the advent of the WTO, US Senator Bob Dole had proposed the three strikes rule, whereby the United States should be prepared to withdraw from the WTO in case a commission of five US federal judges finds that on three occasions the WTO’s dispute settlement body exceeded its powers or abused its mandate.⁵⁶ The US also repeatedly criticized the rulings on zeroing, arguing that the AB was unwilling to seriously entertain the standard of review embedded in the AD Agreement calling for a tolerance of “permissible” interpretations. More recently, WTO experts have attributed the current malaise regarding the succession of some AB members to the US’ staunch opposition to multilateral institutions.⁵⁷ In various statements and tweets, the Trump Administration has strongly expressed its dissatisfaction with the current performance of the AB.⁵⁸

Despite its significance as an example illustrating the ABM-NC relationship, whether zeroing deserves all the time and legal resources invested by countries to litigate the matter remains murky. Aside from the legal discussions’ and rulings’ contribution to the WTO jurisprudence, as Bown (2017)

⁵⁶ Bob Dole, *3-Strikes Test for the WTO*, Washington Post, May 8, 2000.

⁵⁷ Elsig et al. (2017).

⁵⁸ See, for example, World Trade Online, October 19, 2017, available at <https://insidetrade.com/inside-us-trade/lighthizer-spells-out-wto-appellate-body-concerns-azev%C3%AAado-meeting>

shows in his insightful paper, the volume of trade involving zeroing is very small. According to Bown, the practice historically has been irrelevant for the US' anti-dumping measures on China, whose non-market economy status allows the US to "inflate" dumping margins. Zeroing is thus only relevant for investigations involving non-China imports, but in 2016, the accumulation of US anti-dumping in effect on non-China imports was only 2.1 percent of total US imports from countries other than China: a level quite low to be considered substantial.

6. Conclusion

Admittedly, the small number of dissenting opinions issued so far makes a systematic analysis of the issue difficult. But its low count is also a perennial characteristic of trade law adjudication that precisely necessitates an investigation into why this is the case.

By our definition, only four of the total eight separate opinions qualify as dissenting. Upon assessing them against our "evaluators", we find that only one of those opinions (expressed in *US—Upland Cotton*) met our threshold of legitimacy. This is not the case with respect to the remaining opinions, and especially those concerning zeroing.

In this paper, we have attempted to advance a framework that would help answer whether dissenting opinions—those already issued and to be issued—would be the outcome of political expediency as opposed to genuine intellectual disagreement among AB members. Assuming that the WTO's dispute settlement system overcomes the current appointment- and legitimacy-related challenges and holds itself as a salient buttress of the international trading system, the institution will likely see more dissents issued in the future. Dissenting opinions could be of critical help in this process towards institutional maturity: our "evaluators", in this light, could serve as a benchmark for separating the wheat from the chaff.

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