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# Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?

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## Abstract

Recent survey evidence illustrates that many WTO members and trade practitioners believe that the WTO dispute settlement system needs improvement. We make several proposals to improve the operation of WTO conflict resolution, drawing on proposals made by WTO members in the long-running negotiations to improve WTO dispute settlement procedures. We argue that a focus on technical dimensions of dispute settlement is insufficient to prevent a steady decline in the salience of the organization. Revitalizing the WTO as a forum for rulemaking is needed both to address the cross-border policy spillovers driving trade conflicts between the major trading powers and to improve WTO conflict resolution. Principals – WTO members – should accept that negotiations to clarify and extend existing rules must be an element of a robust system of dispute settlement, and that bolstering WTO dispute settlement is a necessary condition for nascent efforts at plurilateral rulemaking to be successful.

## Keywords

WTO; Appellate Body; dispute settlement; trade agreements; decision-making.

**JEL Classification**: F15; K40

## 1. 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, potentially endangering the future of the organization. Starting in 2017, alarm bells began ringing regarding the implications of the dwindling number of Appellate Body (AB) members, the result of the United States blocking new appointments as the terms of sitting members expired.[1] As of mid-December 2019 the AB had only one member, making the WTO appeals function dysfunctional.[2] Many WTO Members opposed the demise of the AB, reflecting fears that without an appeals mechanism the WTO dispute settlement system will lose much of its predictability and may eventually collapse. The value of negotiated outcomes depends on the ability of signatories to enforce them. If the prospects of effective enforcement decline, there are potentially major consequences for future rule-making efforts in the WTO. The different pillars of the WTO are interdependent. A collapse of its adjudicatory function risks generating a domino effect.[3]

As of May 2020, eleven appeals were pending before the dysfunctional AB, raising the question what the status is of the associated panel reports.[4] It is rather unlikely that WTO members could agree that in the absence of a functioning AB, panel reports will be accepted as the final word. Such a scenario would signal the effective return to the GATT days, with the major difference that the losing party to a dispute cannot prevent adoption of the panel's findings, given that under the WTO negative consensus is required to block adoption of reports. Article 16.4 of the Dispute Settlement Understanding (DSU), the WTO Agreement detailing the process for adjudication of trade disputes, permits appeal of panel reports even if the AB is non-operational. If disputes are submitted to panels and appeal "into the void" remains

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1 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. The first US refusal to join the consensus was in 2016, when it opposed re-appointment of Sheung Wa, a Korean national. The US did not oppose the appointment of his successor, Hyung Chong Kim, or oppose the appointment of Mrs. Hong, a Chinese national, who succeeded Mrs. Zhang, the first ever Chinese member of the AB. Starting in 2017 through the end of 2019, the US opposed all (re-)appointments.

2 Art. 17 DSU stipulates the quorum is three. Matters were compounded because Thomas Graham, who stepped down on December 11, 2019, joined a law firm and thus became ineligible to adjudicate disputes, https://insidetrade.com/trade/former-appellate-body-chair-graham-joins-cassidy-levy-kent. Rule 15 of the AB Working Procedures (WTO Doc. WT/AB/WP/6 of August 16, 2010) states that AB members can continue to serve on a case after the expiry of their mandate, if they were appointed to hear an appeal before their mandate expired.

3 Although retracted within a few days on agreement on a trimmed budget that significantly reduced the expenses of the AB, the refusal of US delegation in November 2019 to agree to a "business as usual" WTO budget for 2020 illustrates that the boundary between the AB crisis and the operation of the WTO more broadly is far from watertight. The US argued that the WTO budget should be reduced given the demise of the AB should lead to re-configuration of the expected expenditure. See https://www.bloomberg.com/news/articles/2019-11-12/u-s-is-said-to-raise-prospect-of-blocking-passage-of-wto-budget.

4 DS316, DS371/RW, DS371/RW2, DS436, DS461, DS476, DS510, DS518, DS523, DS534, and DS541.

possible, issued panel reports will have no legal value.[5] At the time of writing it is unclear how WTO members will address this matter.[6]

Some WTO members have sought to self-insure against this risk by developing an alternative appeal mechanism for as long as the AB remains defunct. The MPIA (Multi-Party Interim Appeal Arbitration Arrangement),[7] the fruit of an EU-led initiative, commits signatories that have acted as complainants or respondents in panels to either accept a panel report or to use the MPIA to appeal findings through a process that closely mirrors what the AB would do. The MPIA is an open plurilateral agreement: participation is open to any WTO member while its provisions apply only to signatories. The initiative is an important illustration of the shift to plurilateral cooperation by WTO members. There is much to be said in favor of open plurilateral agreements as a means of overcoming the constraints associated with the WTO working practice of consensus-based decision-making, and as a mechanism to recognize the existence of differences in societal preferences and priorities across countries.[8] However, a plurilateral approach to dispute settlement is very much second-best for the trading system. This is because it is unlikely to result in an internally coherent jurisprudence, the *raison d'être* of any appellate process. Moreover, it will not help to support the nascent shift to plurilateral cooperation in the WTO. Plurilateral agreements by their very nature will have varying membership reflecting differences in interests and objectives across WTO members. Engagement by WTO members in one or more new plurilateral initiatives will be facilitated by access to a uniform dispute settlement process through which commitments can be enforced. A common system of dispute settlement that can be used across all existing WTO agreements as well as new plurilateral agreements will ensure greater predictability, facilitate incremental expansion in participation and lower transactions costs.

The AB crisis is usually presented as the United States against the world. Absent US refusal to replace AB members as their terms expired, the AB would still be in place and functioning. The situation, nevertheless, is more complicated. Even though other WTO members did not support the US method to express dissatisfaction with the workings of the AB,[9] many of the issues raised by the United States are not new.[10] Some were tabled almost 20 years ago in the long-running and unsuccessful DSU Review.

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5 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."

6 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. Petersmann, "How Should WTO Members React to Their WTO Crises?," 18 *World Trade Review*, 2019, 503 and Joost Pauwelyn, "WTO Dispute Settlement Post 2019: What to Expect?" 22 *Journal of International Economic Law*, 2019, 297 discuss possible approaches WTO members may take absent an operational AB.

7 The MPIA builds on DSU Art. 25, which provides for arbitration of disputes among WTO members if all parties agree and notify their decision to pursue arbitration to the WTO. The text of the MPIA was circulated as WTO Doc. JOB/DSB/1/Add.12 (April 30, 2020). As of end May 2020, twenty one WTO members had signed on to the MPIA: Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador, the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay.

8 Hoekman and Mavroidis, "WTO à la Carte or WTO Menu du Jour: Assessing the Case for Plurilateral Agreements," 26 *European Journal of International Law*, 2015, 319; Hoekman and Sabel, "Open Plurilateral Agreements, International Regulatory Cooperation and the WTO," 10 *Global Policy*, 2019, 297.

9 As is clearly reflected in the proposal to the DSB, eventually supported by 120 WTO members, calling for launching selection processes to fill AB vacancies. See WT/DSB/W/609/Rev.17, 18 February 2020.

10 McDougall, "The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance," 52 *Journal of World Trade*, 2018, 867 and T. Payosova, G. Hufbauer and J. Schott, "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures," Washington D.C.: Peterson Institute for International Economics Policy Brief 18-5, 2018 provide excellent discussions of US concerns and options to address them.

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. Consensus also permitted the United States to block new AB appointments. Long recognized as an impediment to decision-making,[11] consensus has become more difficult to attain due to rising geopolitical rivalry between the US and China, and more broadly shifts in the structure of the global economy (the rise of large emerging economies).

Agreement between the major trading powers is a necessary condition for resolving the dispute settlement crisis. Such cooperation must extend beyond dispute settlement. Even if the AB crisis is resolved, the WTO cannot serve as a forum to adjudicate anything else but disputes regarding WTO law. It is not a court of general jurisdiction in all matters regarding the interpretation of international law, like the International Court of Justice (ICJ). If the legislative function of the WTO continues to stall, the volume of adjudication before the WTO will suffer as well, even if the membership manages to overcome the AB crisis. The WTO therefore confronts a two-fold challenge: (i) to address the current conflict on the operation of the dispute settlement mechanism; and (ii) addressing the policy spillovers that have led to major trade tensions between the large trading powers, notably the US and China. In what follows we argue that these two challenges share a common feature: they call for revitalizing the WTO as a forum for rulemaking.

The WTO is still breathing on the rulemaking front, but only shallowly so. Plurilateral cooperation has been the name of the game for over 20 years, reflected in the many preferential trade agreements (PTAs) that WTO members have concluded since 1995. As argued in previous work, PTAs are no longer the outside option, they have become the default option.[12] In part, this reflects the use of issue-linkage strategies and veto playing in WTO deliberations that is made possible because of the consensus working practice. More fundamentally, it reflects the nature of the policies involved: consensus on an issue may be impossible, if national preferences differ substantially. The WTO must accommodate plurilateral cooperation if it is to 'compete' with PTAs. In 2017, WTO members started down this track by launching plurilateral negotiations. This is a positive development. For the WTO to remain relevant, this process must result in substantive agreements. The feasibility of achieving such outcomes – whether on a plurilateral basis or encompassing all WTO members – will depend in part on effective enforcement. In turn, effective enforcement calls for a greater willingness by the membership to negotiate – and for arbitrators to be required to call on the WTO membership to do so – in instances where rules are not clear or missing.

The remainder of the paper is organized as follows. Section 2 briefly summarizes the main findings of a recent survey of trade practitioners and WTO delegations regarding their perceptions of the AB and WTO dispute settlement more broadly. In Section 3, 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. Section 4 argues that the inability to agree to revise dispute settlement processes parallels the failure of the WTO members to update the substantive rules of the game and that this is in part due to the working practice of consensus decision-making. The incipient shift towards plurilateral club approaches is a constructive response to this dynamic, but we argue their success is premised on effective conflict resolution mechanisms. Section 5 presents several suggestions on dispute settlement reform, emphasizing a need to rely more on negotiation in instances where rules are not clear or do not exist. Section 6 concludes.

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[11] See Ehlermann and Ehring, "Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?" 8 *Journal of International Economic Law* 2005, 51 and Tijmes-Lhl, "Consensus and majority voting in the WTO," 8 *World Trade Review*, 2009, 417 on the role of consensus in WTO decision-making.

[12] Hoekman and Mavroidis, op. cit.

## 2. WTO Dispute Settlement: Institutional Design and Organizational Procedures

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.[13] 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 trade practitioners to elicit their perceptions regarding the operation of the dispute settlement system.[14] Officials from 25 WTO members[15] responded to the survey. Both developed and developing WTO members participated, as did law firms engaging in WTO dispute settlement process, academics and think tanks. Importantly, a marked preponderance of responses originated in the largest traders, more open and richer economies, the heaviest users of the system.[16] A commonality across the survey responses and indicators of participation in dispute settlement is that many developing countries do not engage. Most WTO members asked to complete the survey did not do so.[17] All in all, while many WTO members engaged, proportionately, it is the heaviest users of the system that decided to do so. Bearing thus, in mind that survey responses are skewed to those with enough 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.

### *2.1 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.[18] 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.

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[13] H. Horn, P.C. Mavroidis and H. Nordström, Is the Use of the WTO Dispute Settlement System Biased?, in P.C. Mavroidis and A. Sykes (eds.), *The WTO and International Trade Law/Dispute Settlement*, Cheltenham, UK: Edward Elgar, 2005.

[14] See M. Fiorini, B. Hoekman, P.C. Mavroidis, M. Saluste and R. Wolfe, 2019, "WTO Dispute Settlement and the Appellate Body Crisis: Detailed Survey Results," at https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/MT_WTO_Dispute_Settlement_and_Appellate_Body_Crisis.pdf list all the questions asked and provide descriptive information on responses received. The survey targeted legal practitioners, WTO delegations, business associations, trade-focused NGOs, think tanks and academics.

[15] In what follows for purposes of characterizing responses to the survey total WTO membership is defined as comprising 136, i.e., we count the (then) 28 EU member states as one.

[16] 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).

[17] 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

[18] B. Hoekman and P.C. Mavroidis, "Burning Down the House? The Appellate Body in the Centre of the WTO Crisis," EUI Working Paper RSCAS 2019/56. We 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).

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. 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 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.[19] Assuming precedent is observed, adjudication becomes quite attractive as means to do so.[20]

### *2.2 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.[21] Some 55% of all respondents believe panel reports are sometimes biased. This number increases for Geneva based officials who are involved in dispute settlement, 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, which calls on adjudicating bodies 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.[22] Also of note, is that survey respondents from developing countries were more inclined to agree that WTO dispute settlement is too

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19 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 R. Wolfe, "Reforming WTO Conflict Management: Why and How to Improve the Use of "Specific Trade Concerns"," 2020. At https://www.bertelsmann-stiftung.de/en/publications/publication/did/reforming-wto-conflict-management.

20 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.

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

22 https://twitter.com/bbaschuk/status/1201923246930759680.

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 Dispute Settlement Body (DSB), the WTO council overseeing the operation of the DSU, 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.*

## 3. The DSU Review

Much of the commentary on the AB crisis gives the impression that the conflict is a recent one, 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.[23] In recognition of such concerns, 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. 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.[24]

### *3.1 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 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.

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

[24] 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. Some of the concerns had been addressed in practice. Sequencing is a very good example. The WTO Analytical Index mentions various agreements destined to observe sequencing (https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art21_oth.pdf). But recently, in DS316, it was not observed yet again, the existence of an agreement notwithstanding. Inconsistent practice was one of the main reasons why DSU Review was necessary.

Although pressure for tweaking the DSU was not strong in the early 2000s, given a general sense that it was working well, the Review still generated many proposals to improve the operation of the DSU.[25] 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.

### *3.2 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.[26] 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.[27]

#### 3.2.1 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)

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[25] McDougall, op. cit.

[26] "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 "Financial Compensation in the WTO," 8 *Journal of International Economic Law* 2005, 101 and the feasibility-cum-incentives to use of dispute settlement procedures by and against low-income countries (see e.g., Bown and Hoekman, "Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough," 42 *Journal of World Trade* 2008, 177.

[27] 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.

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 Chile[28] 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.[29] 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"[30] 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.

### 3.2.2 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.[31] The EU subsequently withdrew this proposal due to lack of support, reflecting concerns that members of a permanent panel body might be 'too' independent.[32]

Proposals by developing countries addressed issues that reflect size and capacity differentials. One proposal was to introduce retroactive remedies, including payment of legal costs by the losing party, in instances where a WTO member does not implement a ruling. Another was to permit collective retaliation, many WTO members have long resisted on the basis that the objective is not to punish but to maintain a balance of rights and obligations (the reciprocal bargain). A practical problem with collective retaliation is that it implies a direct intrusion in sovereignty– the WTO would be requiring its members to raise tariffs.[33] A more fundamental problem is that it is not incentive compatible. Developed countries might find it quite easy to undo a coalition of developing countries by offering tailor-made preferences to some. Trade history offers only one instance of a challenge against preferential schemes, even though discriminatory practices abound. The fear of losing out on some, even if imperfect gifts, can be a powerful incentive for beneficiaries to "bite the bullet". It is not very surprising therefore that developing countries withdrew their proposals on remedies. The majority of those proposing collective retaliation eventually joined other groups and supported proposals that did not address the question of retaliation.

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

29 Sykes, The Safeguards Mess: A Critique of the WTO Jurisprudence, 2 *World Trade Review*, 2003, 261.

30 Hauser and Zimmermann, The Challenge of Reforming the WTO Dispute Settlement Understanding, 38 *Intereconomics - Review of European Economic Policy*, 2003, 241.

31 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.

32 Hauser and Zimmerman, op. cit.

33 Pauwelyn, "Enforcement and countermeasures in the WTO: rules are rules—towards a more collective approach," 94 *American Journal of International Law* 2005, 335.

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 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 considered). 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.[34] 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.

### *3.3 The price of neglecting institutional design dimensions and inflexible approaches*

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 [illegible] could 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 each issue sequentially[35] in the Special Session of the DSB (i.e. the DSB in negotiating mode) to reduce the scope for WTO members to engage in issue-linkage attempts.[36]

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[34] 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 of 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.

[35] 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).

[36] "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)

The DSU Review started with 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 are found to be WTO-compliant.[37] 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.

Once it had become clear that the AB dispute was likely to have serious repercussions, one would expect the membership to change course. 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. The experience of the DSU Review illustrates the opportunity cost of WTO working practice. This is not to say no efforts were made. The absence of results from the DSU Review induced several informal efforts aimed at improving the operation of dispute settlement. One was a dialogue orchestrated by the Secretariat focused on matters not tabled in the Review, i.e., for which there was no negotiation mandate. This did not lead to significant results.[38] A more meaningful effort was a separate consultation process launched by the General Council in December 2018, facilitated by Ambassador David Walker (New Zealand). This focused on the specific issues raised by the United States regarding the functioning of the AB. Unfortunately, this proved to be too little too late.[39]

At the end of the day the lack of attention paid to the organizational dimensions of adjudication during the Uruguay Round came home to roost.[40] Because the primary legislation (the DSU) was quite rudimentary in this regard, the AB was left to determine detailed working procedures for itself. This is where Rule 15 was decided, a core element of US discontent. 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 Uruguay Round negotiators to address such matters. The bottom line is that the "thornier" issues plaguing adjudication at the WTO were not addressed through legislative interventions informed by deliberations in the DSU Review. Arguably this is the heart of the matter.

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[37] 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).

[38] 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.

[39] Several issues included in Ambassador Walker's mandate were part of the DSU review, including adherence to timeframes, gap-filling and rulings on matters where WTO rules are ambiguous (item xii of the DSU Review). Providing for remand authority (item viii of the Review) was not part of the consultation, but arguably could have helped by reducing a perceived need by the AB to step in for panels.

[40] The DSU negotiating record provides ample evidence little attention was given to the organizational aspects of the AB. See e.g., P. Van den Bossche, "From Afterthought to Centerpiece, the WTO Appellate Body and its Rise to Prominence in the World Trading System," in G. Sacerdoti, A. Yanovich and J. Bohannes (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System*, Cambridge: Cambridge University Press, 2006, 289.

## 4. Revitalizing the WTO as a forum for rulemaking: green shoots?

Since the creation of the WTO, new rulemaking on trade-related policies mostly has been the domain of PTAs. This pattern was documented over 15 years ago for agreements involving the EU and the United States.[41] More recent research confirms this observation. PTAs increasingly include policy areas not addressed by the WTO and/or go further ('deeper') than WTO disciplines.[42] Moreover, the EU and the United States are no longer the primary drivers of this trend – it has become a widespread phenomenon.[43] One reason for the emphasis on PTAs has been the difficulty of attaining consensus in the WTO on new issues. Given that club-based approaches to deepening trade cooperation are the revealed preference of many WTO members, the challenge for the WTO is to become more salient in providing a forum for negotiation of plurilateral agreements and offer a platform for the gradual multilateralization of specific dimensions of PTAs.

Initial steps in this direction were taken at the end of 2017 with the launch of plurilateral "joint statement initiatives" and "dedicated discussions." After more than a decade of fruitless Doha round stalemate, at the end of 2017 groups of WTO members decided to go down this track with the launch of plurilateral talks ('joint statement initiatives') on e-commerce, domestic regulation of services, investment facilitation and measures to support the ability of small firms to use the trading system. Many of the subjects that are the focus of deliberation in these groups involve 'behind-the-border' regulation. Their subject matter overlaps with the type of issues that arose in the DSU context in that to a significant extent the negotiating agenda centers on agreeing on what constitutes good practices, organizational design, and administrative processes. This contrasts with the bread and butter of trade agreements: negotiating away border barriers through reciprocal exchange of market access concessions. This technology is less effective to reduce the trade costs associated with non-tariff measures that reflect domestic regulatory choices. Other approaches to internalizing policy externalities are required because it is not possible to "cut" domestic regulation A by x% in exchange for an equivalent "cut" in foreign regulation A, let alone to exchange a "cut" in regulation A for a "cut" in regulation B.[44]

There is a further complication. Except for TRIPs, WTO members are free to design their policies if they apply them in non-discriminatory manner. This is the essence of the negative integration approach embedded in the GATT: policies are unilaterally defined and must be applied in non-discriminatory manner. GATT-think does not make room for "binding" domestic policies. This means, that, if at all, reciprocity will obtain only at the time the negotiation occurs. Since WTO members retain the right to change their policies in the future, reciprocity is only accidental at any point in time after the original negotiation, as policies can become more restrictive if they apply in a non-discriminatory manner. Reciprocity, under the circumstances, becomes a dead letter the day after concluding the original negotiation. Non-discrimination does nothing to encourage one WTO member from adopting more liberal policies or to discourage another from imposing more restrictive domestic policies over time.

Commitments on nondiscriminatory domestic policies affecting trade and investment require a different logic. It becomes necessary to determine areas in which governments have similar goals, seek to agree on what makes for good policy in each area, and to accept that governments may use different approaches to pursue similar goals. This is not straightforward as countries may have different goals and disagree on what makes for good policy. It is, therefore, not surprising that cooperation on domestic

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41 Horn, Mavroidis and Sapir, Beyond the WTO? An Anatomy of the US and EU Preferential Trade Agreements, 33 *The World Economy*, 2010, 1565.

42 E.g., Dür, Baccini and Elsig, "The design of international trade agreements: Introducing a new dataset," 9 *Review of International Organizations*, 2014, 353; Hofmann, Osnago and Ruta, "The Content of Preferential Trade Agreements," 18 *World Trade Review*, 2019, 365.

43 The CPTPP is a prominent example, as are the many agreements negotiated by countries such as Australia, Singapore, Mexico, Chile, etc.

44 Hoekman and Sabel, op. cit.

regulation occurs among like-minded players in plurilateral settings. This goes beyond PTAs. They also span sector-specific cooperation outside trade agreements. EU adequacy decisions regarding data protection that permit free cross-border data flows are an example.[45] The EU timber importation regime – the Forest Law Enforcement, Governance and Trade (FLEGT) program – is another.[46]

Pursuit of plurilateral agreements under WTO auspices that span cooperation of this kind will help ensure the organization stays relevant. For the green shoots to take root and create fertile ground for additional initiatives – including efforts to revisit Doha round issues – they must generate meaningful outcomes. One dimension of the 'value proposition' offered by the WTO in this regard is enforcement, as new (plurilateral) agreements must have effective conflict resolution mechanisms. To some extent enforcement is likely to be agreement-specific, reflecting the idiosyncrasies of the subject matter and content of plurilateral agreements.[47] But insofar as they entail binding enforceable policy commitments, signatories must have access to an effective dispute settlement mechanism. It is likely that a necessary condition for all the major players to consider participating in new plurilateral agreements is that their associated conflict resolution mechanisms address the institutional design weaknesses of the DSU that led to the AB crisis. Doing so through more general reform of the DSU will support the shift towards plurilateral rulemaking in the WTO.

## 5. Suggestions for Dispute Settlement Reform

In what follows, we assume, consistent with the survey responses discussed above, that the WTO membership continues to favor a two-instance compulsory third party adjudication. We further assume that voting to commence the process of appointing new AB members[48] 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.[49] Panels 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.

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

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45 M. Ferracane, "Restrictions on Cross-Border Data Flows: A Taxonomy," ECIPE Working Paper No. 1/2018, Brussels, 2017.

46 Overdevest and Zeitlin, "Experimentalism in Transnational Forest Governance: Implementing EU Forest Law Enforcement Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana," 12 *Regulation & Governance*, 2018, 64.

47 See e.g., Hoekman and Sabel op. cit. and R. Wolfe, "Informal learning and WTO renewal: Using thematic sessions to create more opportunities for dialogue," 2020. At https://www.bertelsmann-stiftung.de/en/publications/publication/did/informal-learning-and-wto-renewal.

48 See Petersmann, op. cit. for an argument this was the appropriate response to the US decision to block all new AB appointments.

49 Johannesson and Mavroidis, The WTO Dispute Settlement System 1995-2016: A Data Set and Its Descriptive Statistics, 51 *Journal of World Trade*, 2017, 357.

'zeroing', a practice designed to inflate dumping margins.[50] Over time, absence of AB restraint on zeroing led to rising ire in the United States. 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. Likely 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.[51]

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.[52] 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.[53] 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.[54] An alternative approach would be to exempt antidumping and countervailing duty cases from appellate review.[55] 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

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[50] This argument is developed in an article by two Uruguay round negotiators and the GATT Secretariat member in charge of antidumping at the time—see Cartland, Depayre and Woznowski, Is Something Wrong in the WTO Dispute Settlement? 46 *Journal of World Trade*, 2012, 979. However, the negotiating record reveals little explicit discussion on zeroing. The US concerns went beyond this, explaining 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 in 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.

[51] Mavroidis and Prusa, Die Another Day: Zeroing in on Targeted Dumping – Did the AB Hit the Mark in US-Washing Machines? 17 *World Trade Review*, 2018, 239.

[52] On the issue of overreach and references to the legal literature on this question, see, e.g., Weihuan Zhou and Henry Gao, "'Overreaching' or 'Overreacting'? Reflections on the Judicial Function and Approaches of WTO Appellate Body," 53 *Journal of World Trade,* 2019, 951.

[53] 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.

[54] 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.

[55] See J. Hillman, *"Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly," 2018, at* https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf.

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.[56] 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.

### *5.1. Dispute Settlement: Agents and Principals*

The tensions created by the imbalance between consensus-based decision-making and independent adjudication were already identified in the mid-1990s. In a prescient book, Claude Barfield pointed to two major concerns.[57] First, the prospect that the AB would "legislate" issues that could not be resolved because of the inability of the membership to achieve consensus. Second, that adjudication would be invoked for highly divisive (political) matters – what Hudec called "wrong cases."[58] Barfield cites several trade practitioners to this effect, including 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 foreign policy context.[59]

Barfield proposed both an ex ante- and an ex post mechanism to redress both types of problem cases.[60] 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. This would come close to "meditation", as we know it from practice. 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.

We believe that in addressing these types of issues 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

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[56] 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.

[57] C. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, American Enterprise Institute: Washington, D.C., 2001. See also Tarnllo, The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions, 34 *Law and Policy in International Business*, 2002, 109; Zimmerman, WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation, 60 *Aussemwirtschaft* 2005, 27; Ragosta, Joneja and Zeldovich, WTO Dispute Settlement: The System is Flawed and Must be Fixed, 37 *The International Lawer*, 2003, 697.

[58] Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 *Cornell International Law Journal*, 1980, 145.

[59] Barfield, op. cit., 118. See also Wolff, Reflections on WTO Settlement, 32 *The International Lawyer*, 1998, 951.

[60] In his review of his book, Hudec noted that Barfield's proposed solutions were open to potential abuse. See Hudec, Book Review, 1 *World Trade Review*, 2002, 211.

Antidumping, is a "mild" form of non liquet. The ICJ, being a court of general jurisdiction, is opposed, in principle at least, to non liquet, even though because of the difference between the ICJ and the WTO, one would have expected the ICJ to have followed a different path. WTO adjudication bodies, per the DSU, are empowered to deal only with 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 ICJ can rule on any issue of international law and is used to having recourse to general principles of law to resolve disputes when the letter of law does not provide it with enough guidance. WTO adjudicators are reticent in emulating this technique. Consistent empirical analysis suggests that panels and the AB have had recourse to general principles only to cement a finding they had already reached.[61] Recourse to general principles reduces the need to invoke non liquet. And yet, the ICJ has used it in the Nuclear Tests case,[62] while WTO panels and the AB never saw the need for it.

There is a legitimate question to ask here: who should decide whether the law needed to adjudicate (elements of) a dispute put forward is missing, and hence, that we have 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 matters are raised that have a bearing on the functioning of the WTO contract but are not (yet) regulated at the multilateral level. To illustrate, we present an example of each type of situation.

Consider first an example where the rules are unclear: the status of BITs (bilateral investment treaties) under the GATT. Investment and trade can be both complements and substitutes. Trade can be enhanced through FDI (foreign direct investment), e.g., a Canadian company using a factory in Japan that imports parts and components used to produce products that are shipped to many destinations. FDI may also remove the rationale for trade if what would have been exported to a market is instead produced for the local market by an affiliate. Focusing on the former scenario, assume Canada has signed a BIT with Japan and China claims this is a measure affecting trade and that Canada must observe the MFN (most-favored-nation) obligation. Do BITs come under the purview of MFN? The dominant view is predicated on practice and responds in the negative. What if China nonetheless raises a claim before a panel? What would be the legal reason for objecting to the Chinese claim?

An example of the second case (no law) is the treatment of amicus curiae. Empirical analyses of this practice before the US Supreme Court shows that amicus curiae have been influential in shaping decisions.[63] This issue is not regulated in the DSU. The AB came up with a halfway house, where amici can submit, but panels are not obliged to take their views into account. There is no agreed procedure on submissions across cases. As a result, over time, amici submissions have dwindled, and it is questionable if they have had any influence at all. Considering evidence that this could be a powerful instrument to help raise awareness of WTO panels to societal sensitivities, it may have been better for the AB to simply refer the case back to the membership and ask for clear guidance on treatment of amicus curiae. The AB did not do so. Instead, its imaginative understanding of Article 13 DSU did not help address this issue.

The argument for adjudicators not stepping in for the WTO membership in the latter type of situation (no law) is particularly strong. In such instances the WTO membership must address the matter. As discussed above, putting the burden on the shoulders of the membership as opposed to the adjudicative

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61 G. Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*, Cambridge University Press, 2015; Mavroidis, No Outsourcing of Law? WTO Law as Practiced by WTO Courts, 102 *American Journal of International Law*, 2008, 421.

62 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226.

63 Kearney and Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 *University of Pennsylvania Law Review*, 2000, 743.

function would be to require – as a procedural matter – the AB to 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.

### *5.2 Non Bis Peccatur (A Cat Won't Sit on a Hot Stove Twice)?*

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 inevitably incomplete ex ante.[64] 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.[65] 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.[66]

As the membership gradually became more heterogeneous, it became more difficult for the GATT to operate as a relational contract. Hudec shows that the rate of adoption of panel reports in the post-Tokyo round era fell dramatically.[67] 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

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64 Horn, Maggi and Staiger, Trade Agreements as Endogenously Incomplete Contracts, 100 *American Economic Review*, 2010, 394.

65 Davey, Dispute Settlement in GATT, 11 *Fordham International Law Journal*, 1987, 51 provides an excellent account of the evolution of GATT dispute settlement until the launch of the Uruguay round. Davey makes clear that efforts concentrated in crystallizing practice into legal documents of varied legal value.

66 R. Hudec, *Enforcing International Trade Law*, Butterworths: London, UK, 1993. A more recent study has confirmed this point. See A. Daswani, R. Santana and J. Volkai, GATT Disputes 1948-1995, Dispute Settlement Procedures, Cambridge University Press, 2018.

67 Ibid.

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.[68] 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.[69]

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.[70] It is high time this happened. The following elements could usefully find their way into a future negotiation on WTO dispute settlement reform:[71]

- 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

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[68] Jackson, The Jurisprudence of International Trade: the DISC Case in GATT, 72 *American Journal of International Law*, 1978, 747; Hudec, Reforming GATT Adjudication Procedures: The Lessons of the DISC Case, 72 *Minnesota Law Review*, 1988, 1443.

[69] See P.C. Mavroidis, *The Regulation of International Trade*, Cambridge MA: MIT Press, 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.

[70] P.C. Mavroidis, Dispute Settlement in the WTO: Mind over Matter, in K. Bagwell and R. Staiger (eds.), *Handbook of Commercial Policy* (Amsterdam: North-Holland, 2016).

[71] Some of these suggestions have also been made by other observers, see e.g., Busch and Pelc, "Does the WTO Need a Permanent Body of Panelists?" 12 *Journal of International Economic Law*, 2009, 579 and McDougall, op. cit. We assume that a reformed WTO dispute settlement system retains an appeals body. Hoekman and Mavroidis, "To AB or Not to AB? Dispute Settlement in WTO Reform," EUI Working Paper RSCAS 2020/34, argue that the basic goals of the DSU do not require an AB – a strengthened panel stage may suffice.

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.[72]

  - Article 255 TFEU[73] could serve as inspiration for such ex ante scrutiny of proposed adjudicators;
  - 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.[74] Given missing expertise and weak incentives, it is to be expected that the Secretariat is influential.[75] That said, panelists and AB members have the last word. Even if this is not the case de facto,[76] 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.[77]

Our suggestions complement the principles proposed by New Zealand Ambassador David Walker to address US concerns with the operation of the AB.[78] These include ensuring that appeals are completed within 90 days; that Appellate Body members do not serve beyond their terms (assuming of course, that

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[72] Weiler has argued along the same lines. See Weiler, The Rule of Lawyers and the Ethos of Diplomats, 35 *Journal of World Trade*, 2001, 191.

[73] 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 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."

[74] Nordström, "The World Trade Organization Secretariat in a Changing World," 38 *Journal of World Trade* 2005, 819.

[75] Johannesson and Mavroidis, Black Cat, White Cat: The Identity of the WTO Judges, 49 *Journal of World Trade*, 2015, 685.

[76] As argued by J. Pauwelyn and Krzysztof Pelc, "Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement," 2019, at: http://dx.doi.org/10.2139/ssrn.3458872.

[77] US business groups have 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 B. Hirsh, "Resolving the WTO Appellate Body Crisis: Proposals on Overreach," paper commissioned by the National Foreign Trade Council (December 2019)..

[78] 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.

they have been effectively replaced beforehand); 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 reconstituted AB is needed. Some type of advisory review process to assess the consistency of the operation of WTO dispute settlement bodies with the 'Walker Principles'[79] 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 hand and organizational-cum-procedural matters on the other, i.e., 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.[80] 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.[81] 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 DSU provisions.

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[79] See e.g., the proposal 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).

[80] 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.

[81] Payosova et al. op. cit. This, of course, implies going back to consensus-decisions. But here the WTO membership will have to ask itself what is preferable: to continue with judicial activism, which could comport all sorts of negative consequences, or ensure that the membership is fully behind a rule?

## 6. Concluding Remarks

Numerous scholars have held up the WTO dispute settlement system as the organization's crown jewel.[82] That the jewel has imperfections is neither surprising nor contested. The problem is that the WTO membership collectively was unwilling to make timely repairs and allowed the jewel to crack. The dispute settlement crisis is an opportunity to address concerns regarding the quality of output of WTO adjudicating bodies, and their respect of the institutional mandate. To this effect, we have advanced some proposals aiming to ensure their independence and impartiality, and respond to the stated preference of WTO members and trade practitioners for a two-instance compulsory third-party adjudication system that will predictably interpret the agreed trade agreements.

Overcoming the AB crisis is critical for the survival of the WTO. In contrast to nascent plurilateral approaches to cooperate on new issues or deepen existing rules, a plurilateral approach to dispute settlement as has been put in place through the MPIA is not desirable as a long term solution. The 'plan B' thinking that underlies the MPIA is a constructive and appropriate response to the AB deadlock but must be time limited and complemented by a concerted effort to address the long-standing concerns about the operation of the AB. WTO dispute settlement procedures must apply to all WTO members. If they do not, WTO case law will cease to provide the predictability demanded by traders, and the prospects for new rulemaking – whether multilateral or on a plurilateral basis – will be affected negatively. For the WTO to offer a robust platform for negotiation and implementation of open plurilateral agreements (OPAs) as either a complement or a substitute for PTA-based cooperation, it needs to offer an effective dispute settlement system to all WTO members considering participation in OPAs. The alternative is OPA-specific conflict resolution mechanisms, which would lead to even greater divergence in case law, and more generally remove a key incentive for States to consider plurilateral cooperation under the umbrella of the WTO as opposed to doing so outside the WTO.

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'. 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 rulemaking. 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. Non liquet throws the ball back to the principals, where it belongs: the WTO membership. More broadly, it is WTO members that need to agree on new rules in new areas – and revisit existing rules where these need to be updated. An inability (or unwillingness) to do so – lies at the heart of the problem confronting the WTO and ultimately will lead to the organization becoming less relevant even if the AB can be resuscitated.

The WTO reform discussions that some members have engaged in since 2018 provide a basis on which to build.[83] 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.

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[82] A search in Google Scholar on the keywords WTO, jewel and crown returned over 1000 citations (June 2020).

[83] Hoekman, "Urgent and Important: Improving WTO Performance by Revisiting Working Practices," 53 *Journal of World Trade*, 2019, 373.

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. 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, especially if action is taken to place the burden of completing the contract where needed to resolve a conflict on the WTO membership, not the dispute settlement bodies.

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