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List of abbreviations

AB	Appellate Body
DSB	Dispute settlement body
DSU	Dispute Settlement Understanding
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATs	General Agreement on Trade in Services
ITO	International Trade Organization
ICC	International Criminal Court
ICJ	International Court of Justice
IMF	International Monetary Fund
ITLoS	International Tribunal for the Law of the SEA
MFN	Most Favored Nation
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
NT	National Treatment
OECD	Organization for Economic Co- operation and Development
TRIPs	Agreement on Trade-Related Intellectual Property Rights
UN	United Nations
US	United States
WTO	World Trade Organization

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Introduction

The World Trade Organization (hereinafter referred to as WTO) was established in 1994 after almost eight years of negotiation between countries known as the Uruguay Round (86-94), and it began operation in January 1995, and currently has 164 member states. WTO came as an initiative by the parties recognizing that there should be global rules that ensure both stability and assurance when it comes to trade. WTO is a successor of the GATT system; the latter had faced many legal problems mainly in the area of agriculture and textile. Yet, the GATT system had shown enormous success in promoting the security of world trade liberalization and it had made continual actions to reduce tariffs and it has helped to increase high rates of world trade growth. One of the main issues that the GATT system faced was mainly that it was focused in favoring of the industrial countries over developing countries and the resolutions of disputes were very slow. Therefore, members came with the initiative that this situation needs to be changed and started negotiations, known as the Uruguay Round that brought into light the WTO.

The scope of WTO is to provide a common institutional legal framework for its members and its main objective is to help members to use trade as a mechanism to raise living standards, create jobs and improve the welfare of people. In addition, WTO provides a forum for resolving disputes amongst members.

Within the establishment of the WTO trade negotiators, international political leaders and policy makers had very high expectations on the WTO especially at the dispute settlement system, after the failure of the GATT system. During the first years of the WTO, the dispute settlement system performed very well. The Appellate Body was performing high quality work and was considered highly professional and authoritative in the interpretation of WTO agreements and its decisions.¹ However, this situation gradually changed. The US started to raise concerns about the Appellate Body's practice and taking actions to reflect its dissatisfaction. Such actions were no-

¹ Lo Chang-fa, Junji Nakagawa and Chen Tsai-fang *Introduction: Let the Jewel in the Crown Shine Again*, in Chang-Fa and others (eds), *The Appellate Body of the WTO and Its Reform* (Springer Singapore Pte Limited, 2019)

ticed in the process of the appointment and reappointment of the Appellate Body members. For example in 2011 the Obama administration chose to not reelect Jennifer Hillman for her second mandate as a member of the Appellate Body, and blocked the reappointment of Seung Wha Chang.² And this situation continued with the Trump and current Biden administration.

Nevertheless, the problems in WTO did not start with Appellate Body dispute settlement, for many years WTO Members including US have raised concerns on how the WTO operates and wanted reforms, but the Appellate Body was the tip of the iceberg. The US used to be the strongest advocate for creation of the WTO Appellate Body and now has paralyzed its function. Due to the persistent blockage of appointments of Appellate Body members, by the end of 2020 the Appellate Body has lost its 'vital function' when the mandate of the last member expired being left as 'court with no judges'.

In order to find a solution WTO Members sought other alternatives and mechanisms to resolve their trade disputes. 47 WTO Members relying on article 25 of DSU on 30 April 2020 notified the organization of a new Multi-Party Interim Appeal Arbitration Arrangement (MPIA). This came as a mechanism to stop the gap arrangement and once the Appellate Body gets its operational function the MPIA would stop operating. Consequently, now we are at the stage where there are two 'parallel mechanisms' that may be used by the WTO Members when resolving the disputes only with a major difference, namely the Appellate Body has lost its function and it cannot hear appeals and new appeals are left 'into the void' and the other interim-mechanism that WTO members may use by agreeing to be part of the MPIA. This raises many concerns such as i) will the WTO members which chose to be part of MPIA still try to resolve the Appellate Body crisis or will they rely on MPIA and ii) does MPIA fall within or outside the WTO system. According to Article 15 of the Agreed Procedures for the MPIA, the arbitral award will only have to be notified and not adopted by the Dispute Settlement Body (DSB). This is in contrast with the WTO dispute settlement mechanism used in panel and Appellate Body reports where the WTO Members support the adoption of such reports by DSB. In contrast, the MPIA arbitral reports are only binding between parties involved in the dispute and it does not bind other WTO Members.

²Lo Chang-fa, Junji Nakagawa and Chen Tsai-fang *Introduction: Let the Jewel in the Crown Shine Again*, in Chang-fa and others (eds), *The Appellate Body of the WTO and Its Reform* (Springer Singapore Pte Limited, 2019) 4

The irony in the situation is that historically, the US has been the most frequent user of the dispute settlement mechanism in the WTO, and so far the US has made it clear about the non-adherence in MPIA. Hence, without the US the MPIA function will be limited, since it may not resolve disputes against the most prolific trade dispute litigator and one of the world's largest economies. Moreover, whether other WTO members chose to be part of the MPIA is still unknown. Therefore, a long-standing solution for the Appellate Body Crisis would have to gather the WTO members on the negotiation table and find a solution that would balance the rule-based dispute settlement system.

World Trade Organization

The WTO was established as a global organization to deal with the rule of trade between nations. Its main purpose is to ensure open trade for all and was established to supervise and liberalize world trade. Before, WTO came to light the world trade was regulated under the General Agreement on Tariffs and Trade (GATT), created in 1947 which was expected to be replaced by the specialized agency operating under the United Nations (UN) known as International Trade Organization (ITO), but ITO never materialized due to the refusal from US to ratify the Havana Character.

Even though the ITO never materialized, within the limits the GATT had shown enormous success in promoting the security of world trade liberalization. Its continual actions in reduction of tariffs speak for itself, which has helped to increase high rates of world trade growth during the 50s and 60s on average of 8% a year.³In addition, the GATT era has increased the ability of countries to trade with each other and to profit from the trade.⁴Yet, with all the success the GATT has shown in trade liberalization, in the 1980s the system needed a thorough overhaul which led to Uruguay Round and ultimately the creation of WTO.

³World Trade Organization(WTO), '*The GATT years: from Havana to Marrakesh*' (World Trade Organization, undated) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed 20 October 2022

⁴ *Ibid*

The WTO was established in 1994 after the Uruguay Round (86-94), and it began operation in January 1995, currently, has 164 member states.⁵ WTO came as an initiative by the parties recognizing that there should be global rules that ensure both stability and assurance when it comes to trade.

The Uruguay Round took almost eight years and almost twice the original schedule but by the end 123 countries took place. At times it seemed to fail but in the end the Uruguay Round brought the biggest reform of the world's trading system since the creation of the GATT. The need for a reform in GATT system was recognized, but in its beginning the establishment of a new international organization was not among Uruguay Round's initial objectives.⁶ The seeds of the Uruguay Round were sown at the GATT members' ministerial meeting in Geneva in 1982, which tended to launch a major new negotiation, but the conference, stalled on agriculture and was regarded as a failure.⁷

It took four more years of exploring and clarifying issues before ministers agreed to launch a new round. In 1986 they launched the new round in Punta del Este, Uruguay. At this round all the original GATT articles were up for a review, the talks were going to extend the trading system into several new areas, such as trade in services and intellectual property and to reform the sectors of agriculture and textile. This was the biggest negotiation mandate on trade ever agreed and the ministers had four years to complete it.⁸

During the first years of the Uruguay Round negotiations were successful and were made major progress with respect to all the instructional issues identified. Two year later in 1988 ministers meet again in Montreal, Canada to clarify the agenda for the remaining two years and to discuss the progress made so far. At this round was decided in principle to implement on a provisional basis, a trade policy review mechanism to improve the adherence to GATT rules. However, the talks ended in deadlock until they meet again in 1989 in Geneva. This round resulted in an agreement attempting to create a greater cooperation between GATT, the International Monetary

⁵ Note: latest member Afghanistan, 29 July 2016

⁶ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 85

⁷ World Trade Organization, *The Uruguay Round* (World Trade Organization, undated) < https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm > Accessed 30 October 2022

⁸ *Ibid*,

Fund (IMF) and World Bank.⁹In addition, it was proposed that the Contracting Parties to meet at least every two years at ministerial level as an attempt to improve the functioning of the GATT.¹⁰

In 1990 Canada proposed the establishment of the international organization on trade called 'World Trade Organization'. The idea was first floated early that year by the Italian Trade Minister Renato Ruggiero.¹¹In the same year the European Community submitted a proposal calling for the establishment of a 'Multilateral Trade Organization'. But these ideas were not expected with enthusiasm by the US and developing countries for several reasons.

In 1991 European Community, Canada and Mexico tabled a joint proposal for an international trade organization that served as the basis for further negotiations which resulted in the draft *Agreement Establishing the Multilateral Trade Organization*, this agreement was part of the 1991 Draft Final Act (Geneva).¹² In the same year was completed the first draft of the Final Act which was compiled by the GATT director-general Arthur Dunkel, who chaired the negotiations at official's level.¹³

In 1992 US and EU had settled most of their differences on agriculture in a deal known as the 'Blair House accord'. By July 1993 US, EU, Japan and Canada announced a specific progress in negotiations on tariffs and related subjects.¹⁴In the same year among other participants the US formally agreed to the establishment of a new trade organization. In addition, the US suggested that the name of the organization to be as initially proposed by Canada 'World Trade Organization'. In 1994 (Marrakesh) was signed the *Agreement Establishing the World Trade Organization* referred as *the WTO Agreement*, by 123 participating governments and entered into force on 1 January 1995.¹⁵ However, the GATT still exists under the WTO's umbrella treaty for trade in

⁹ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 86

¹⁰ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 86

¹¹ *Ibid*,

¹² *Ibid*,

¹³ World Trade Organization, *The Uruguay Round* (World Trade Organization, undated) < https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm > Accessed 30 October 2022

¹⁴ World Trade Organization, *The Uruguay Round* (World Trade Organization, undated) < https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm > Accessed 30 October 2022

¹⁵ *Ibid*,

goods. The creation of WTO was marked as the biggest international trade reform after the Second World War.¹⁶

The WTO agreement covers approximately 98% of the world trade and it has three pillars:

1. GATT- General Agreement on Tariffs and Trade
2. GATS- General Agreement on Trade in Services
3. TRIPS- Agreement on Trade-Related Intellectual Property Rights.

There are seven dimensions of the WTO with particular importance understanding the operation and function of WTO such as:

- i) trade policy commitment;
- ii) tariffs are the only permissible form of protection;
- iii) non-discrimination;
- iv) reciprocity;
- v) enforcement of obligations;
- vi) transparency and
- vii) safety valves.¹⁷

When adhering to WTO there are three layers of legal obligations i) a mutual set of obligations (a provision that binds all members of WTO upon accession) ii) a plurilateral set of obligations (provisions that bind only WTO Members that have acceded to the corresponding WTO legal instruments.) and iii) obligations included in Protocols of Accession (*sui generis* obligations).¹⁸

Tariffs are the only permissible form of protection under the WTO; hence WTO Members cannot use quotas or NTBs to restrict trade in goods.¹⁹ When it comes to the principle of non-discrimination under WTO it has two components: first, the Most Favored Nation (MFN) rule which requires a product made in one member country to be treated no less favorable than a

¹⁶ World Trade Organization(WTO), 'The GATT years: from Havana to Marrakesh' (World Trade Organization, undated) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm > accessed 20 October 2022

¹⁷ Bernard M. Hoekman and Petros C. Mavroidis, *World Trade Organization (WTO) Law, Economics, and Politics* (2nd ed., Routledge c2016) 18

¹⁸ *Ibid* 19

¹⁹ Bernard M. Hoekman and Petros C. Mavroidis, *World Trade Organization (WTO) Law, Economics, and Politics* (2nd ed., Routledge c2016) 19

‘like’ product that originates from another member. And, the national treatment (NT) which requires that the foreign product is not treated differently from ‘like’ or directly competitive domestic product.²⁰ The principle of reciprocity, aims to limit the scope of free riding that may arise from the MFN principle.²¹

The enforcement of policy commitments principle stands for when a country considers that an action taken by another member has the effect of nullifying or impairing negotiated market access commitments or WTO rules it may bring this attention to the attention of the government involved and ask for that policy to be brought into compliance. If such action is not complied with, it may invoke the WTO dispute settlement procedures.²² Transparency is one of the key principles of the WTO, it obliges members to publish their trade regulations; to respond to the request for information from other members; to establish and maintain institutions allowing for review of administrative decisions affecting trade and to notify changes in trade policies to the WTO. The obligation of members of WTO falls within Art. X GATT, Art. III GATs and Art. 63 TRIPS and other WTO provisions.²³

And lastly, the principle of safety valves guarantees governments the flexibility to restrict trade in specific circumstances such as to ensure ‘fair competition’ to attain non-economic objectives and intervention in trade for specific economic reasons. This kind of ‘flexibility’ is guaranteed under WTO to some governments for the protection of public health or national security, to protect members from ‘unfair competition’ that injures drastically the domestic competition, and when there are serious balance-of-payment difficulties when a government desires to support an infant industry.²⁴

Moving further, as mentioned in the introduction part the scope of WTO is to provide a common institutional legal framework for its members and its main objective is to help members to use trade as a mechanism to raise living standards, create jobs and improve the welfare of people. In addition, the WTO provides a forum for resolving disputes among members. Within its objectives WTO provides a forum for monitoring and negotiation of further trade liberalization, the increase of the transparency of the decision-making bodies and process, non-discrimination, co-

²⁰ Bernard M. Hoekman and Petros C. Mavroidis, *World Trade Organization (WTO) Law, Economics, and Politics* (2nd ed., Routledge c2016) 19-20

²¹ *Ibid* 20

²² Bernard M. Hoekman and Petros C. Mavroidis, *World Trade Organization (WTO) Law, Economics, and Politics* (2nd ed., Routledge c2016) 22

²³ *Ibid*, 22

²⁴ *Ibid*, 23

operation with other international economic institutions and giving special provisions for developing countries.

Article III of the Agreement Establishing the World Trade Organization has specified the function of WTO; it shall administer the WTO agreements, shall provide a forum for international cooperation on trade related policies, forum for trade negotiations-exchange of trade policy commitments in periodic negotiation and lastly, shall provide a forum for trade dispute settlement.²⁵

The WTO is headed by a Ministerial Conference composed by representatives of all Members, which have to carry out the function and take necessary actions. They have to meet at least once every two years and they have the authority to take decisions on all matters under any Multilateral Trade Agreement if requested by a member, always in accordance with requirements for decision-making procedure in the Agreement and relevant Multilateral Trade Agreement. Under WTO there is a General Council that is composed of representatives of all member states which meets as appropriate. The General Council is managed usually by ambassadors or senior representatives and when needed it turns itself into a body to adjudicate trade disputes or to review trade policies of the member countries. In addition, three subsidiary councils operate under the General Council guidance (the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights).²⁶

The WTO Secretariat is based in Geneva and is headed by a Director-General appointed by the Ministerial Conference. The Ministerial Conference shall also adopt regulations setting out the

²⁵ The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements. 2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference. 3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement. 4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement. 5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies. <[Agreement establishing the World Trade Organization](#)>

²⁶ Marrakesh Agreement Establishing the World Trade Organization, (15 April 1994) LT/UR/A/2 Art.4 <<http://docsonline.wto.org>>

powers, duties and conditions for the Director General and the members of staff as well.²⁷ The secretariat's main responsibilities are to provide technical assistance for developing countries; supply technical and professional support for Councils and Committees; monitor and analyze developments in world trade; to provide information to the public and media and organize Ministerial Conferences.

Failure of the GATT system

The GATT was established after the Second World War (1947) and entered into force in 1948, as a need for a new world order. The idea of a new world order required a political and economic nature. The political nature was seen as the United Nations and the economic nature was the GATT.

Since the beginning the GATT system has faced many problems, and many times has been close to failure when at the end it converted to WTO. Nevertheless, the GATT system operated and had made over 47 years of success in promoting and ensuring the liberalization of world trade. It has helped in reducing custom duties and made the growth of trade and production. In addition, the GATT has held many successful rounds in economic areas such as the Kennedy round which succeeded in the agreement to combat dumping yet failed to agree on agricultural issues at the first attempt of the negotiation for non-tariff measures. Followed by the Tokyo round which has been considered a serious attempt to improve the GATT system. By this round it has drafted the first set of non-tariff for the management of support and countervailing duties; government procurement; customs; valuation; import licensing and levels of anti-dumping duties; civil aviation and lastly the product of dairy and meat.²⁸

The most important round of the GATT was the Uruguay Round which led to the establishment of the WTO. In addition, this round has reached a positive outcome in the abolition of quantitative restrictions on imports. Further, it has regulated trade in goods and has included trade in services and property rights and the most important it has brought a new mechanism to settle commercial disputes.²⁹

²⁷ *Ibid*, Art.4

²⁸ LawTeacher, 'Transformation of GATT into the WTO' (Lawteacher.net, 31st Aug 2021) <<https://www.lawteacher.net/free-law-essays/international-law/transformation-of-gatt-into-the-wto-international-law-essay.php?vref=1>> accessed 22 October 2022

²⁹ *Ibid*,

Yet the GATT system had shown many red flags that could not be unnoticed. There are many reasons why GATT failed to achieve its goals. The GATT system had many legal problems, particularly in the areas of agriculture and textile. Moving further to its nature, the GATT was a set of rules and multilateral agreements without a constituent base; its focus was in trade in goods without paying attention to services and intellectual property rights. In addition, the resolutions of disputes were very slow and the dispute settlement system had become dysfunctional due to the requirement of consensus among all GATT Contracting parties for the adoption of the resolutions in order to become legally binding. Also, one of the main reasons for the 'collapse' of GATT was the favoring of the industrial countries over the developing countries.³⁰

Therefore, the 'collapse' of GATT was not something that would not be expected. These and other factors convinced the GATT members that a new effort should be made to reinforce and extend the multilateral system.

The overall Dispute Settlement process

The dispute settlement system in the WTO has a quite complex effect when it comes to resolving disputes among member states. As in many areas also in the trade many issues that arise while doing business and resolving trade disputes is one of the key activities of the WTO. The WTO as a successor of GATT was established after seven years of negotiation between countries known as the Uruguay Round multilateral trade negotiations, members accord for balanced rights and obligations for WTO Members in matters relating to trade such as internal taxes, tariffs, subsidies, intellectual property rights and services, and others.

The dispute settlement under WTO was developed through the GATT practice. The WTO dispute settlement system has operated since 1 January 1995 and is based on a system of almost fifty years of experience in the resolution of trade disputes from GATT.³¹ As prior mentioned the GATT dispute settlement faced many challenges due to its nature, such as not fixed timetables

³⁰ LawTeacher, 'Transformation of GATT into the WTO' (Lawteacher.net, 31st Aug 2021) <<https://www.lawteacher.net/free-law-essays/international-law/transformation-of-gatt-into-the-wto-international-law-essay.php?vref=1>> accessed 22 October 2022

³¹ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 167

by which parties could prolong the process, the political influence (solutions were often diplomatic compromises).

The most significant challenge that the GATT dispute settlement mechanism faced was related to the fact that the finding and conclusions of the panels of experts adjudication disputes could only become binding when adopted by consensus by the GATT Council. Leaving the responding party with the option to prevent any unfavorable conclusion to become binding.³² Due to this from early 1980 more and more GATT panel reports were not able to become legally binding.

And within the new WTO dispute settlement system, this problem was resolved by providing that panel reports be adopted by negative consensus (meaning a report is adopted unless there is a consensus not to adopt the report).³³

Moving further, the WTO was signed as a single undertaking, which means that members agreed to be bound to the WTO agreement in entire and may not choose what benefits individually.³⁴ Under the WTO an effective dispute settlement system has its primary objective guaranteeing a safeguard balance of rights and obligations, which would directly increase the practical value of commitments that parties commit in an agreement but also preserving the integrity and legitimacy of those agreements.³⁵

A crucial role in the dispute settlement system of WTO is providing security and predictability to the multilateral trading system. Although, international trade in the light of WTO is understood as trade commitments between members under the covered agreements, but in fact these trades are made between private economic operators rather than the state, in this regard members have to make sure that their public international law is in accordance with the covered agreements. Considering this these market participants need predictability and stability in the government laws, rules and regulations that are applied in their commercial activity. Due to this, the Dispute

³² Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 167

³³ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >

³⁴ WTO secretariat, *A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press 2017) 1

³⁵ *Ibid*

Settlement Understanding (DSU)³⁶ aims to provide a rule-oriented system to resolve disputes among Members about the application of the provisions of the WTO agreement.³⁷ By granting a rule-based system, the dispute settlement system makes the trading system more predictable and secure. The dispute settlement system operates as a single integrated system, which means that it applies to all disputes brought under the WTO agreements listed in Appendix 1 of DSU (article 1.1 of DSU), known as “covered agreements”.³⁸ By operating as such a system, the dispute settlement system provides a more coherent and integrated system. Consequently, this means that members cannot bring before the WTO dispute settlement system disputes that are related to rights and obligations outside the “covered agreements”.³⁹

Before jumping to the Dispute Settlement process is important first to explain the role and function of the WTO Dispute Settlement Body. DSB is composed by senior representatives of all 164 WTO Members and according to article 2 of DSU, DSB is established to ‘administer’ the rules and procedures of WTO dispute settlement by i) establishing *ad hoc* dispute settlement panels ii) adopting panels and Appellate Body reports iii) authorizing retaliation measures in case of non-compliance with the rulings and recommendations of adopted panel and Appellate Body Reports.⁴⁰

³⁶ The rules governing dispute settlement in the WTO are set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding and abbreviated as “DSU”.

³⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art.3.2 <<http://docsonline.wto.org> >

³⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art.1.1 <<http://docsonline.wto.org> >

³⁹ Exceptions: Understanding on rules and procedures governing the settlement of disputes article 1.2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the “DSB”), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

⁴⁰ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >

Moving further, in WTO dispute settlement participants are only member governments of WTO which can take part as parties or as third parties. Generally, a dispute arises when a WTO Member considers that another member state adopts measures that are considered to be inconsistent with the obligation under the WTO agreement, nullifies or impairs benefits arising from them (violates a multilateral WTO agreement). The member who considers that another member has violated such agreement is entitled to invoke procedures and provisions and challenge that measure by filing a complaint.

Under the WTO there are two ways to settle a dispute after a complaint has been filed:

1. A mutual agreement between the parties for the solution, usually in the phase of bilateral consultation;
2. Adjudication, which covers also the implementation of the panel and the Appellate Body reports.

Under the DSU the WTO dispute settlement system is to prompt settlement of situations when a member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another member state, by ensuring the maintenance of a proper balance between rights and obligations and a mutual agreement between parties is much preferred when it comes to settling a dispute.

WTO Dispute Settlement has a three-stage mechanism

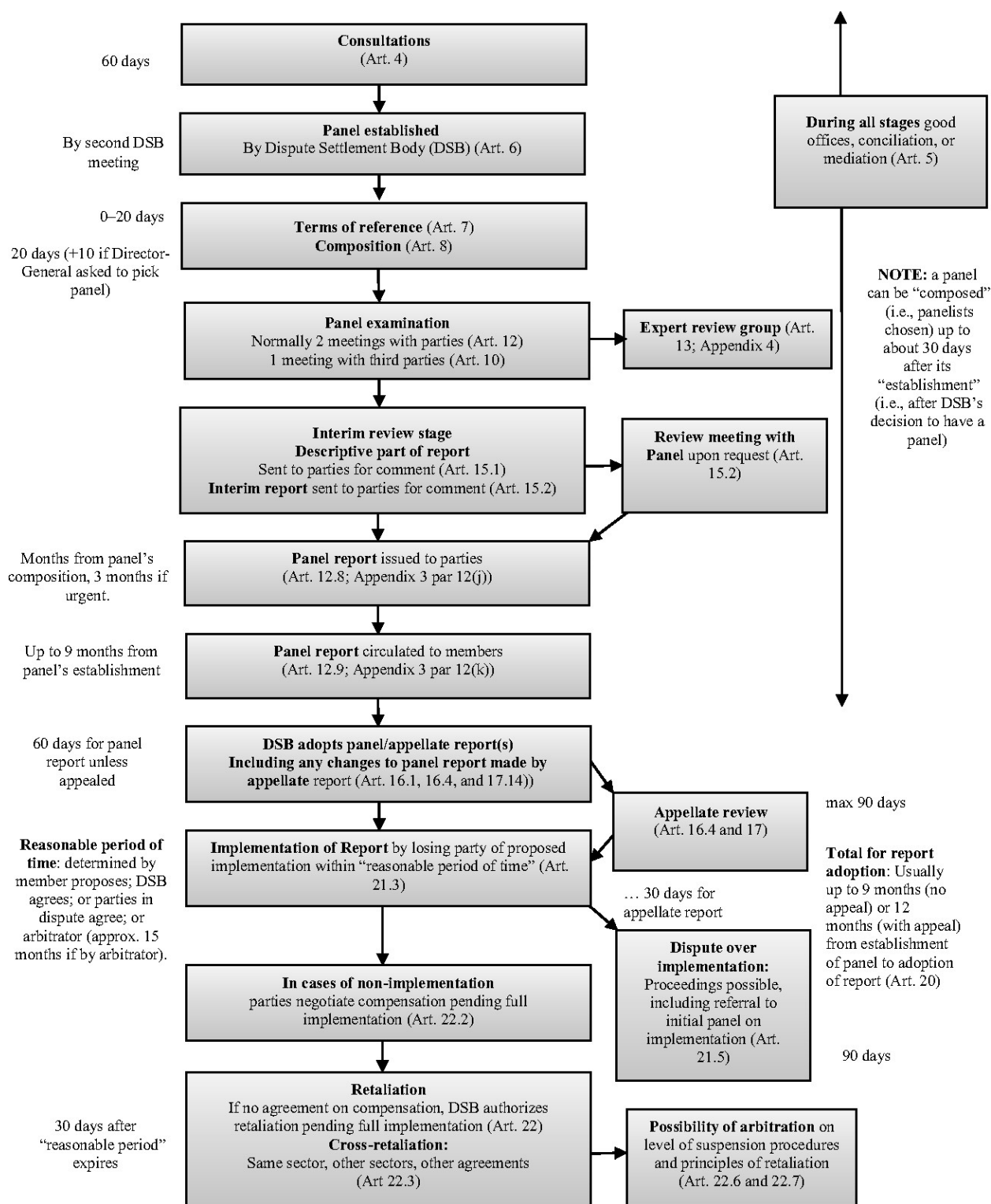
1. Consultation;
2. Resolution of a dispute
 - a. panels procedure and
 - b. Appellate Body procedure;
3. Implementation of the ruling.

If a mutual agreement between parties via consultation is not reached, the main objective of a dispute settlement is the withdrawal of such a measure that is considered to be inconsistent with

any of the provisions of the “covered agreements.”⁴¹ In case of an infringement of obligation found in the assumed covered agreement, the action is considered a *prima facie* to constitute a case of nullification or impairment.⁴²

⁴¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art.3 para. 7 <<http://docsonline.wto.org> >

⁴² *Ibid*, Art.8



⁴³Fig.1 Flow chart of the Dispute Settlement Process

⁴³See: WTO, *The process — Stages in a typical WTO dispute settlement case* (World Trade Organization, undated) < https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm > Accessed 30 October 2022

1.1 Consultation

The first stage of the dispute settlement under the WTO are consultations that are held confidential between members concerned, without precluding parties that have a substantial trade interest which may request to join. If consultations are requested, it should be submitted in writing and it has to give reasons for the request and identification of the measures and legal basis for the complaint and the DSB shall be notified. If a mutual agreement is not reached within sixty days, the establishment of a panel can be requested.⁴⁴ Also, if the respondent party does not respond in the request for consultation within ten days of the request, or the consultations are not held within thirty days, or a period other agreed between the parties, the complaining party may request the establishment of a panel.⁴⁵

Consultations in dispute resolution are the most cost effective and more satisfactory in long-term trade relations when compared to adjudication by the panel. Not only do they cost less but also in time-consuming comparison when parties choose to follow consultation they may resolve their dispute without further proceedings. Hence, even if the consultation goes wrong the parties may use the consultations as a mechanism to learn more about facts and legal arguments that parties are likely to use in adjudication.⁴⁶

1.2.1 Panel review

If within sixty days parties cannot reach a mutual agreement the establishment of a panel may be requested. The request is made to the Chair of DSB and circulated to all WTO Members. The complainant requests the establishment of a panel in writing,⁴⁷ and within forty-five days of request, a panel is established.

The WTO dispute settlement panels are *ad hoc* bodies established to adjudicate in a particular dispute and are dissolved once they finish their task.⁴⁸ The 'panel request' serves for two main

⁴⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art 4 para.7 <<http://docsonline.wto.org> >

⁴⁵ *Ibid*, Art. 4 para. 3

⁴⁶ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 266

⁴⁷ Note: The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

⁴⁸ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 212

purposes i) to define the scope of the dispute and delimits the jurisdiction of the panel ii) as a due process to notify the respondent and third parties of the nature of the complainant's case.⁴⁹

The panel consists of 3-5 well-qualified government or non-government individuals, and once appointed they must serve in their individual capacities and may not receive instructions. Since one of the main objectives of WTO, is to grant developing countries a level playing field in trading when there are situation that a dispute raises between e developed-country Member and a developing- country Member, the last one may request the inclusion of at least one panelist from the developing-country Member.⁵⁰ The panelists usually are appointed by Members, but if Members can not reach an agreement the DSB appoints them. Under the DSU, the panel has a period of six months to conclude (three months in urgent cases).⁵¹

After the establishment of the panel, each party in the dispute deposits a written submission to the panel. The panel hearing is closed for the public, only the dispute parties and third parties with interest (if allowed by the panel). During the hearing, parties represent their arguments. If necessary for clarification the panel may seek professional advice from the Expert Review Group.

Then, the panel makes an objective assessment based on the facts of the case and the conformity with the relevant covered agreements. The panel issues the interim report to parties of the dispute which contains the factual and argument sections of the draft report and sets a time period for the parties to submit their comments in writing. After the expiration of the time period to receive comments, the panel issues the interim report including the descriptive section and also the panel's findings and conclusions. Again, within a time period which is set by the panel, dispute parties may submit a written request to review the precise aspect of the report before the circulation of the final report to the Members. If such a request is received by the panel, then the panel shall hold a further meeting with the parties on the issues pointed in the written comment, but if there

⁴⁹ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 212

⁵⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art 8 para.10 <<http://docsonline.wto.org>>

⁵¹ note: DSU, art.12 point 9 When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

are no comments received the interim report will be considered as a final and will be circulated to the members (three weeks after dispute parties have received it).⁵²

Within, sixty days after the date of the circulation of the final report to the Members, the report has to be adopted unless a party i) notifies the DSB, that wants to appeal in such case the report won't be considered for adoption until after completion of the appeal or ii) the DSB decides by consensus not to adopt its report.⁵³

1.2.2 Appellate review

Against the panel's final report dispute parties may appeal issues of law and legal interpretation developed by the panel. The appeal may modify or reverse or uphold the panel's findings and conclusions. Appeals should not last longer than sixty days, maximum of ninety days. And within 30 days the DSB has to accept or reject the appealed report. Rejection is only possible by consensus. The Appeal's decision is final and binding.

1.3 Implementation

The aim of the dispute resolution process is to promptly bring a violation measure in compliance with GATT/WTO disciplines. If the DSB ceases that a Member's state measure violates a WTO law, it needs to bring 'prompt compliance'⁵⁴ with the recommendation and rulings of the DSB or without due delay, the panel has to set a time period within measure that must be withdrawn.

Members must inform the DSB of their intention to comply within thirty days. If it is impossible to comply immediately, Members shall have a reasonable time period to comply with the recommendations and rulings which can not exceed a period of fifteen months.⁵⁵

⁵² Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art.15 <<http://docsonline.wto.org> >

⁵³ *Ibid*, Art. 16 para. 4

⁵⁴ Yong-Shik Lee, *Reclaiming Development in the World Trading System* (2nd edn Cambridge University Press 2016) 258-259

⁵⁵ DSU, Art. 21 para. 3 The reasonable period of time shall be: (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval, (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement, (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings (12). In such arbitration, a guideline for the arbitrator (13) should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

The implementation of the recommendations and rulings shall be surveillance by DSB. If implementation fails to comply within a reasonable time period, there is a possibility of Compensation (voluntarily negotiated) mutually acceptable within 20 days. Although, if dispute parties cannot agree on a satisfactory compensation then the complaining party may request DSB to suspend concession or obligation under the covered agreements (trade sanction) equivalent to the level of nullification or impairment.⁵⁶

Process of Appellate Body dispute settlement

The Appellate Body was established in 1995 and it serves as a mechanism for appellate review. It serves as a second instance in dispute settlement where parties of the dispute may appeal the report of the DSB. The authority to establish the Appellate Body was given to the Dispute Settlement Body by article 17 of DSU.

Even though the Appellate Body is constituted as a ‘court’ and members are in the position of ‘judges’, these concepts are far from the judicial institution concept. First, it is not a coincidence that the Appellate Body institution is not called ‘World Trade Court’ and second, the language used in article 17 of DSU stipulates clearly that the people serving in the Appellate Body are referred to as ‘persons’.⁵⁷

The other issue that differs Appellate Body from ‘normal courts’ is the composition number of the judges of the Appellate Body in comparison with international courts such as the International Court of Justice (ICJ), the International Criminal Court (ICC) and the International Tribunal

⁵⁶ DSU, Article 22 para. 3 In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures: (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment; (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement; (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

⁵⁷ Peter V.D. Bossche, *The making of the ‘World Trade Court’: the origins and development of the Appellate Body of the World Trade Organization*, in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 65

for the Law of the SEA (ITLoS) which are composed of fifteen, eighteen and twenty-one judges, making the AB capacities smaller compared to the above courts.⁵⁸

As mentioned above in the section of Appellate Body review, after the final report is issued dispute parties, may appeal the decision regarding the issues of law and legal interpretation developed by the panel.

In case *EC- Hormones (1998)*,⁵⁹ the Appellate Body found that factual findings of the panel review were excluded from the scope of appellate review.⁶⁰

In that dispute, the Appellate Body found that factual facts were findings of issues that are outside the scope of the subject of appellate issues. The appeal review is only limited to the questions of law covered in panel reports and legal interpretations developed by the panel. Therefore, the findings that are outside the scope of the appellate review are not subject matter for the Appellate Body to review.⁶¹

Moving further, dispute parties may file for appeal any time before the panel report is adopted by DSB, by a written submission to the DSB and Notice of Appeal to the Appellate Body Secretariat. The Appellate Body is established by the DSB, after the appealed decision only by the dispute parties and not third parties. The Appellate Body may uphold, modify or reverse the final findings and conclusions of the panel of the dispute. The Appellate Body reports are final and binding and they shall be adopted by DSB, unless all members decide not to.

The composition of the Appellate Body consists of seven persons, three of whom have a recognized expertise in international trade law and are unaffiliated with any government and are broadly representative of the Membership of WTO. During the time they serve they must avoid direct and indirect indications from others and serve with merits. Also, they must avoid partici-

⁵⁸ Peter V.D. Bossche, *The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization*, in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005) 65-66

⁵⁹ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135 <https://www.wto.org/english/tratop_e/dispu_e/hormab.pdf>

⁶⁰ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 238

⁶¹ *Ibid* 238

pation in any appeal if direct or indirect may cause a conflict of interest. The parties may request the disqualification of a member on the grounds of violation of the *Rules of Conduct*. These persons are chosen by DSB to serve for Appellate Body for a period of four-year term and each may only be reappointed once. They serve in rotation and such rotation is determined in the *Working Procedures of the Appellate Body*.⁶²

All the decisions are made by the division of three Members assigned to that appeal, however in order to ensure consistency and coherence in the case laws all seven Members of the Appellate Body may exchange opinions and their views with each other on issues raised by the appeal. The idea behind this is to express opinions and different views to contribute to the quality and consistency of the Appellate Body, which has been highly criticized by the US. Nevertheless, the decision and final conclusions are given individually by the division assigned. The decision is made by consensus, if the decision can not be made by consensus the *Working Procedures* provide the option that in those matters the issue to be decided by majority vote.⁶³ Due to the current situation there are no members on the Appellate Body, the last sitting member mandate has expired in November 2020.⁶⁴

The proceedings of the Appellate Body are confidential; the working procedures have to be drawn up by the Appellate Body in consultation with the Director-General and Chairman of DSB. Third parties may participate in the appeals process by filing a written submission or notifying the Appellate Body Secretariat for their intention to attend the oral hearing. The oral hearing generally should be held between thirty and forty-five days after the notice of appeal is filed. The purpose of the oral hearing is to provide the parties the opportunity to present their case before the division and also for them to argue their opinions and respond to questions before Appellate Body division. During the whole process the participants, third parties as well as division members are precluded from having any contact and communication regarding the matters concerning the appeal without the presence of the participants in absence.

⁶² Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art 17 para. 1,2,3 <<http://docsonline.wto.org> >

⁶³ Peter V. D. Bossche and Zdouc Werner, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017) 236

⁶⁴World Trade Organization(WTO), 'Appellate Body' (World Trade Organization, undated) <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm > accessed 20 October 2022.

After the oral hearing, the Appellate Body drafts its report without the presence of the dispute parties and opinions by members serving on the Appellate Body remain anonymous. Within 30 days of the circulation of the Appellate Body Report to the Members, the DSB has to adopt the report, unless the DSB decides by consensus not to adopt such a report.⁶⁵

The result of an appeal may modify, reverse or affirm the panel's decision, and once circulated to DSB it becomes immediately public. The power that Appellate reports hold is that they are final and binding and parties must unconditionally accept it as a whole. Under article 17 para. 5 of DSU, the Appellate Body has to issue its report no later than 90 days from the day that dispute parties notify for their intention to appeal.

Appellate Body Crisis

From the beginning of the WTO dispute settlement system was admired and worshiped and it stood as a model for the system of international investment dispute settlement. The Appellate Body has a major role when it comes to protecting the rights of WTO members and the paralyzed situation caused by the US has led to serious concerns to the dispute settlement mechanism. The importance of a dispute settlement is to provide stability and security for companies in the trade business knowing that rules will be respected and that any infringement of them there will be consequences. Therefore, the binding character of dispute settlement is critical to protect the interest of WTO members against inappropriate measures and prevents unilateral actions that limit market access rights. In this way, the most urgent WTO reform is finding an agreement between members to restore the dispute settlement system function and take action to the appointment of the Appellate Body members.

Nevertheless, since the beginning of its function the WTO dispute settlement was followed with reform proposals by WTO members even in the early stages of Doha Rounds.⁶⁶ During the years the WTO dispute settlement was overloaded with cases and under a lot of pressure that came increasing day by day, especially in the beginning of 2010s. There are several reasons for the

⁶⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art. 17 para.14

⁶⁶ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >

looming crisis that was about to occur. First, the workload of panels and the Appellate Body was significantly increased during the years due to the complexity and the incensement of cases brought to the WTO for resolution and on the other hand, the resources for dispute settlement fell short. Second, the WTO members were seeking change to the WTO law more and more through adjudication rather than negotiations. Which made it impossible for the members to “correct” errors made by the Appellate Body. Third, this situation served to make allegations of judicial overreach by the Appellate Body especially, by the US. And fourth, the US took action affecting the independence and impartiality of Appellate Body members.⁶⁷

During the years of the functioning of the WTO, Members have been frustrated with the main functions of WTO and were seeking to make reforms when it comes to the monitoring of member states’ policies and providing a forum to negotiate trade agreements and arbitration disputes. For several years, WTO Members have stressed the issues of “Developing Country ” status when two-thirds of WTO’s members still claim this status, which gives them advantage in certain benefits and exemptions when it comes to obligations set from the WTO agreements in comparison to developed countries. Even though their economic development suggests that many of these members have the capacity to take full obligations. Yet, there is no universal definition for developing and developed status and WTO allows self-classification.⁶⁸

When it comes to negotiation the WTO members have stressed out the difficulty in reaching a full consensus required for new agreements, obligations and rule changes. The failure of many countries to comply with notification and transparency obligations has made negotiating new rules and agreements even more difficult.⁶⁹

Also, many countries have raised concerns with the WTO dispute settlement system when it comes to resolving trade conflicts between members, especially the US, which has repeatedly stated its concerns about the Appellate Body. In addition, the US has listed several issues regarding the Appellate Body’s “degradation” by extending its authority beyond its original mandate.

⁶⁷ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >

⁶⁸ Jack Caporal, *WTO Reform: The Beginning of the End or the End of the Beginning?* (the Center for Strategic and International Studies, 2018) < <https://www.csis.org/analysis/wto-reform-beginning-end-or-end-beginning> > accessed 20 October 2022

⁶⁹ *Ibid*,

The US has claimed the Appellate Body has violated DSU provisions in several cases by overstepping its competencies.

The US and the collapse of Appellate Body

The ‘collapse’ of the Appellate Body from the US persistence was something expected. Over the years the US has been seeking reforms and has raised many issues regarding the function of WTO, in regard to the Appellate Body. Due to the persistent blockage of appointments of Appellate Body members by the US, on 11 December 2019 the Appellate Body was left with only one member and that was the day when the Appellate Body was no longer able to hear and decide any new appeals. By the end of 2020, the mandate of the last member expired, and now the Appellate Body is left as ‘court’ with no ‘judges’.

Since 2011, the US has blocked the appointment and re-appointment of members of the Appellate Body, which has caused the ‘paralyzation’ of the Appellate Body, and has caused the biggest crisis in the history of the WTO Appellate Body. More precisely, the US has been repeatedly vetoing the initiation process to nominate and appoint Appellate Body members and now the Appellate Body is paralyzed without any member. Such action has caused new appeals not to be able to be revised by a panel and leaving notified appeals unresolved. The US has accused the Appellate Body of a ‘judicial activism’ on the matter related to anti-dumping measures, countervailing measures, subsidies, safeguard measures and technical trade barriers. According to the US, the Appellate Body’s case law limits its ability to restrain the importation of goods, which harm its domestic industry.⁷⁰ Hence, to address this issue has been proposed to institute an annual ‘dialogue’ between DSB and Appellate Body on developments of case law. Even though, article 17.14 of DSU already provides with ‘the right of Members to express their view on an Appellate Body report’, and parties use this right at the DSB meeting at which the report is adopted. Whether the proposal for an annual meeting between DSB and Appellate Body would bring any difference is doubtful. However, this gives an additional possibility for Members to express their

⁷⁰ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >

disagreement with developments of the Appellate Body's case law and it may be useful, especially if the discussions are made in general development and not only in specific cases.⁷¹

Moreover, the US over the years has raised concerns for the malfunctioning of the Appellate Body and its inconsistency with the WTO dispute settlement rules by:

- i) treating its rulings as binding precedent;
- ii) exceeding the deadline of 90 days for appellate review;
- iii) allowing AB members to complete their work on appeals after the end of their term;
- iv) expanded its authorization and scope of review;
- v) issuing 'advisory opinions'.

The US has been an enormous critic of the process of the appointment and reappointment of members which has caused the total paralyzation of the Appellate Body, and yet whilst it wants reforms it does not provide the opportunity for the new members to perform differently. Under article 17 DSU members of AB shall be "*...persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally [...] shall be unaffiliated with any government.*"⁷² such criteria is set for their qualification as a member and it does not represent or guarantee that their jurisprudence will strictly follow specific lines.⁷³

(Treating its rulings as binding precedent)

The US has raised concerns about adjudicative approaches of the Appellate Body, such concerns were also accorded and pointed out by the European Union.⁷⁴ In the view of the US the Appellate Body has been wrongfully approached to precedent and by using the '*cogent reasons*' has

⁷¹ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#)>

⁷² Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art. 17.3

⁷³ Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, (Volume 24, *Journal of International Economic Law*, 2021), 536

⁷⁴ Commission, Annex to the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy COM/2021/66 final, 7 <[Annex to the Trade Policy Review Communication](#)>

locked in its errors and has put them beyond correction.⁷⁵ Both the US and EU agree on the fact that adjudicators have to exercise judicial economy and not be bound by ‘precedent’. The EU agrees that adjudicators should exercise judicial economy and are not bound by ‘precedent’ but the adjudicators should also take into account previous rulings to the extent they find them relevant in the dispute they have before them. Nevertheless, the panels in the WTO Appellate Body should be strictly limited in addressing legal issues and the independence of a panel is crucial for the cases to be decided exclusively on their merits.⁷⁶

(Exceeding the deadline of 90 days for appellate review)

Moreover, the US has raised concerns about the 90-day deadline for completing appeals. According to the US, since 2011 the Appellate Body (*case US-Tyres*) has continuously breached article 17.5 of DSU⁷⁷, by overcoming the deadline of 90 days. The US has stated that this case was the first time since the establishment of the Appellate Body that has occurred for AB to not been able to perform its duty under the deadline without prior having the consent of the parties. Hence, the US concerns were that since that case the AB, continued its practice without getting prior consent from the parties for the delay to fulfill its deadline. Therefore, the US has proposed to add “unless the parties agree otherwise” to article 17 para.5 of DSU. The US has stressed out that this action diminished the rights of WTO members and threatens confidence in WTO. With such action AB has increased its own authority and the failure to be bound by a deadline AB frees itself to take into hand issues that are not necessary to resolve the disputes. Also, failure to consult with members about extending the deadline contributes to the lack of transparency which conflicts with WTO objectives.⁷⁸

⁷⁵ Bruce Hirsh, *Resolving the WTO Appellate Body Crisis, Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators* (vol.2 National Foreign Trade Council/Tailwind Global Strategies 2020) 4 <[Resolving the WTO Appellate Body Crisis](#)> accessed 22 October 2022

⁷⁶ European Commission, *Report on Reforming the WTO. Towards a sustainable and effective multilateral trading* (Publications Office of the European Union, 2021) <[Reforming the WTO towards a sustainable and effective multilateral trading system](#)>, 9

⁷⁷ As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days

⁷⁸ United States Trade Representative (USTR), ‘*Report on the Appellate Body of the World Trade Organization*’ (2020) <[Report on the Appellate Body of the World Trade Organization](#)> 32

(Allowing AB members to complete their work on appeals after the end of their term)

Another issue raised by the US regarding the ‘misconduct’ of the Appellate Body is the outgoing AB member not approved by WTO Members. US stressed that AB has extended its powers by adopting rule 15 of Working Procedure⁷⁹ which allows persons whose terms as AB members have expired to continue to participate and rule disputes. This action taken by AB is in contrast to the legal provisions of the DSU and WTO agreements. The US also stressed that according to article 17.2 of DSU the DSB (which includes all members of WTO) is entitled to appoint and re-appoint persons who serve in AB. Hence, AB has used rule 15 of the Working Procedure to justify the continued serving of a person (Mr. Chang case)⁸⁰ in the Appellate Body even after his/her term ended and DSB had declined the re-appointment for the AB.⁸¹

(Expanded its authorization and scope of review)

The US has also stressed that the Appellate Body has expanded its authorization and scope of review. The Appellate Body has exceeded its limited authority to review legal issues by reviewing panel findings facts and has included factual findings relating the WTO Members’ domestic law which violates article 17.6 of DSU.⁸² The US stated that by this action the Appellate Body has violated DSU, by reviewing the meaning of Member’s domestic law *de novo* as a legal issue. This approach of the Appellate Body is considered inconsistent with the functioning of the dispute settlement system and is beyond the Appellate Body’s competencies, and it needs a reminder that AB serves to review specific interpretations and issues of law and can not expand on ‘*de novo*’ facts. Such action taken has caused complexity and delay in almost every dispute and such outcome does not reflect the Dispute Settlement System as agreed by WTO Members.⁸³

⁷⁹ Working Procedures for Appellate Review, Rule 15 (WT/AB/WP/6) A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.

⁸⁰ See: Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, regarding Mr. Chang May 23, 2016 <[1 Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016](#)> 7. [THE ISSUE OF POSSIBLE](#)> Accessed 22 October 2022

⁸¹ United States Trade Representative (USTR), ‘Report on the Appellate Body of the World Trade Organization’ (2020) <[Report on the Appellate Body of the World Trade Organization](#)> 33

⁸² An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. art 17.6

⁸³ United States Trade Representative (USTR), ‘Report on the Appellate Body of the World Trade Organization’ (2020) <[Report on the Appellate Body of the World Trade Organization](#)> 37-46

(Issuing 'advisory opinions')

The US has expressed its concern regarding the 'Advisory Opinions' that the Appellate Body has issued on issues not necessary to resolve the disputes. By such action, the Appellate Body is considered to be violating article 3.7 and Article IX:2, by issuing advisory opinions contrary to the purpose of the dispute settlement system. In respect of this matter, the US has pointed out that the function of the dispute settlement system of WTO agreements is to secure a positive solution and not to produce interpretations or to make law. When it comes to abstract questions, making law or binding precedent these are none of the Appellate Body task and none of the WTO Members has agreed on. Such action not only contributes to delays in the appeals process given the fact that the time to draft an advisory opinion but also such opinions are treated as binding "precedent".⁸⁴

Many critics state that the situation with WTO dispute settlement crisis started with the Trump administration, but if we look the chronology of the ongoing US issue with Appellate Body, actions were first taken in 2011 by President Obama's administration when the US blocked the re-appointment of Jennifer Hillman's in WTO Appellate Body,⁸⁵ regarding the judicial interdependence of the jury. To continue in 2016 the blockage of reappointment of Mr. Seung Wha Chang⁸⁶ and continues with the current president Biden administration.

The US concerns are not to be ruled out, they have some legitimacy and are also shared with other WTO members. Appeals started and did not conclude within the 90 days rule; Appellate Body members have been working in cases after finishing their term, and; appellate body reports often go beyond their critical issue; the re-examination of facts; and use of "precedent".⁸⁷ However, to overcome this situation a permanent solution needs to be found which requires both the procedural and substantive concerns of the US to be addressed.

⁸⁴ United States Trade Representative (USTR), 'Report on the Appellate Body of the World Trade Organization' (2020) <[Report on the Appellate Body of the World Trade Organization](#)> 47-54

⁸⁵ Gary Clyde Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System* (Peterson Institute for International Economics, 2011) <[WTO Judicial Appointments: Bad Omen for the Trading System | PIIE](#)> Accessed 22 October 2022

⁸⁶ Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016 <[Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016 7. THE ISSUE OF POSSIBLE](#)> Accessed 22 October 2022

⁸⁷ Marianne Schneider-Petsinger, *Reforming the World Trade Organization Prospects for transatlantic cooperation and the global trade system* (Chatham House, 2020) 19, <[Reforming the World Trade Organization](#)> Accessed 22 October 2022

EU and Appellate Body

Over the years several reform proposals have been addressed by WTO member countries to overcome the Appellate Body crisis. Some have brought their approaches to the situation as a single country and some have brought their approaches as groups looking for temporary and permanent solutions. Such as the famous Canada's 'white paper' suggesting improvement of the 'efficiency and effectiveness' of the ability of WTO to monitor members and 'safeguarding and strengthening the dispute settlement system', hence this paper did not have specific policy proposals but rather was designed for shaping future conversations.⁸⁸

The European Union has played a critical active role in finding a 'dialogue' to the emergency of the situation caused and wanting to resolve the dispute settlement crisis. In 2018 European Union issued a concept paper⁸⁹ for WTO modernization and creating a better level playing field by creating stronger rules and strengthening transparency. This paper had reform proposals regarding the Appellate Body crisis. According to this paper, it is recommended to expand the number of Appellate Body panels from seven to nine judges, reschedule Appellate Body employment hours from part-time to full-time, and expand resources to the Appellate Body Secretariat.⁹⁰

Same year EU and 11 other WTO Members⁹¹ presented a proposal for a solution to the functioning of the Appellate Body.⁹² Also, in 2018 the EU and China set up a joint working group on WTO reform, focused on resolving the Appellate Body Crisis; moreover, the EU is part of the "Ottawa Group", which is a small and diverse group of WTO members pursuing bottom-up WTO reform.

⁸⁸ Jack Caporal, *WTO Reform: The Beginning of the End or the End of the Beginning?* (the Center for Strategic and International Studies, 2018) < <https://www.csis.org/analysis/wto-reform-beginning-end-or-end-beginning> > accessed 20 October 2022

⁸⁹ See: European Union concept paper for the WTO modernization (European Commission for Trade, 2018) < [WTO modernisation - introduction to future EU proposals - concept note](#) >

⁹⁰ Jack Caporal, *WTO Reform: The Beginning of the End or the End of the Beginning?* (the Center for Strategic and International Studies, 2018) < <https://www.csis.org/analysis/wto-reform-beginning-end-or-end-beginning> > accessed 20 October 2022

⁹¹ Australia, Canada, China, Iceland, India, Mexico, New Zealand, Norway, Singapore, South Korea and Switzerland

⁹² European Commission, 'WTO reform: EU proposes way forward on the functioning of the Appellate Body', (2018) < https://policy.trade.ec.europa.eu/news_en > accessed 20 October 2022

Moreover, in 2018 the EU, the US and Japan issued a trilateral statement calling for reform in reporting and monitoring and updated rules governing self-classification of developing country status.⁹³ In February 2021, European Commission published Communication on Open, Sustainable and Assertive Trade Policy and regarding the WTO reforms the revitalization of the dispute settlement system with a reformed Appellate Body as the most urgent reform.⁹⁴

The EU has proposed to find a common ground and to restore the function of the Appellate Body including fulfilling the empty seats. In this communication the EU has set out its position regarding the reforms of the Appellate Body.⁹⁵ The role of AB should be strictly limited into addressing legal issues raised on appeal; deadlines and timelines have to be strictly respected both levels at the panel and appellate body stage of dispute; in order to provide security and predictability to the multilateral trading system the negative consensus rule should be maintained as well as AB independence.⁹⁶

Article 25 as a “get through”

DSU has given its members an alternative to adjudication by panels and the Appellate Body, through arbitration. Such an alternative is given under article 25 of DSU. Article 25 of DSU may be used only by a mutual agreement between parties. They must agree on the arbitration as well as the procedures to be followed. The parties are free to depart from standard procedures of DSU and rules and the procedures they consider appropriate for arbitration.⁹⁷

⁹³See: Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, (2018) < <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-trilateral>> accessed 20 October 2022

⁹⁴ Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy COM/2021/66 final, <https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf>

⁹⁵ Commission, Annex to the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy COM/2021/66 final, <[Annex to the Trade Policy Review Communication](#)>

⁹⁶David O'Sullivan, Christophe Bondy, Charlotte Brett & Alexandre Genest, The EU's Approach to Reforming the WTO Towards a Sustainable and Effective Multilateral Trading System, (Lexology, 2021) < <https://www.lexology.com/library/detail.aspx?g=32e9a4cb-d3b3-4c2e-8ec6-30677989ee9>> Accessed 22 October 2022

⁹⁷World Trade Organization, *Dispute Settlement without recourse to Panels and the Appellate Body* (World Trade Organization, undated) < https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm> accessed 5 October 2022

The parties must notify about their agreement to resort to arbitration to all WTO Members. Third parties may become parties to arbitration only by the agreement of the parties that are already engaged in the arbitration. Moreover, the parties have to agree to abide by the award which must be notified to the DSB and relevant Councils and Committees. Articles 21 and 22 of the DSU on remedies and the surveillance of implementation of a decision apply *mutatis mutandis* to the arbitration award.⁹⁸

As many proposed, the use of arbitration as an alternative was seen as a rescue from the crisis that was about to begin in the Appellate Body. Many critics and scholars had different opinions whereas the approach to the arbitration could be a way through the “blockage of the trade dispute settlement”. The establishment of arbitration under article 25 was seen as a parallel dispute settlement identical to the current one only with a major difference that countries who chose to be part of the WTO arbitration could fill the empty seats and can decide to have the same seven appellate jurists to resolve all arbitral appeals and they would not need the consent of US because US would be out.⁹⁹

The arbitration gives the freedom from not being bound to the prior agreement by other WTO members before proceeding with such an alternative. Hence, it would take only the mutual decision of at least two countries engaged in a trade dispute and they would be entirely free to agree beforehand to use arbitration for the entire dispute proceeding or just for the appeal.¹⁰⁰

On the other hand critics of *ad hoc* arbitration have pointed out that members who chose to use arbitration as a mechanism would have no incentive to bind themselves to arbitration if they already expect an unfavorable outcome. Therefore, a plurilateral general arbitration agreement signed by the members would be a greater chance of success for using article 25 of DSU as an alternative. This agreement would not only define the scope and procedures but the binding signatory respondents in the dispute.¹⁰¹

⁹⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6 Art. 25 para. 4

⁹⁹ James Bacchus, Saving the WTO's Appeals Process, (CATO institute, 2018) <<https://www.cato.org/blog/saving-wtos-appeals-process>> Accessed 22 October 2022

¹⁰⁰ *Ibid*,

¹⁰¹ William Alan Reinsch, *Article 25: An Effective Way to Avert the WTO Crisis?* (Center for Strategic & International Studies (CSIS) 2019) < <https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis> >) Accessed 22 October 2022

Given the flexibility that article 25 of DSU offers to WTO Members, without the US as being part of the arbitration system trade conflicts involving the world's largest economy will not be settled.¹⁰² An arbitration mechanism without the US is sought to be a limited utility.

Multi-Party Interim Appeal Arbitration Arrangement (MPIA)

Given the situation caused, the WTO members had to seek other alternatives and mechanisms for their trade disputes to be resolved until a satisfactory solution for the situation is found. From many proposals, one of the disused alternatives was the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).

The idea for MPIA was introduced in November 2017, by Pieter Jan Kuijper, a former Director of the Legal Affairs Division of the WTO Secretariat as a solution outside the WTO. While interesting, this idea, as Kuijper proposed, was difficult to implement in the short term as it requires new treaties. The solution to this problem was proposed by Sidley Austin, which proposed to utilize the existing arbitration mechanism under article 25 of DSU. This idea was supported by James Bacchus former Appellate Body Chair, a year later.¹⁰³ Inspired by these proposals, the EU sought this opportunity to establish an alternative and proposed that this alternative be called “Interim Appeal Arbitration Pursuant to Article 25 DSU”.¹⁰⁴

The interim appeal mechanism was intended to be agreed upon between a WTO member and the EU, and be used as an appeal mechanism as the AB was expected to be non-functional by the end of December 2019. The idea behind this interim solution was to stop the gap arrangement and once the Appellate Body would gain its function back, this mechanism would stop operating. According to the EU, this mechanism shows the determination of the EU in preserving the essen-

¹⁰² William Alan Reinsch, *Article 25: An Effective Way to Avert the WTO Crisis?* (Center for Strategic & International Studies (CSIS) 2019) < <https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis> > Accessed 22 October 2022

¹⁰³ Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, (Vol.24, Journal of International Economic Law, 2021), 540

¹⁰⁴ See: Arrangement of Interim Appeal Arbitration Pursuant to Article 25 of the DSU (2019) <[Interim Appeal Arbitration Pursuant to Article 25 of the DSU](#)>

tial principles and features of the WTO dispute settlement system. In addition, this mechanism would include the binding character and two level adjudication with an independent and impartial panel. Therefore, this mechanism is proposed as an interim solution in the 'extraordinary' circumstances.¹⁰⁵

On 19 July 2019, the EU and Canada, announced a joint statement of the establishment of an interim appeal arbitration arrangement under Article 25 of the DSU.¹⁰⁶ Following that year, the EU and Norway announced a similar agreement. The peak point of the EU was when it switched its gears from a bilateral mechanism to a multi-party mechanism. This action came after the paralyzation of the Appellate Body in 2019.

Due to these circumstances on January 2020, the EU and 16 other WTO Members¹⁰⁷ announced that they will start working on measures that would allow for WTO dispute report appeals between themselves as an interim multi-party arbitration forum in accordance with article 25 of DSU until the WTO Appellate Body starts to operate again.

On 27 March 2020, the EU, China, and 14 other EU Members, reached an agreement on an MPIA.

On 30 April 2020 a group of 47 WTO members officially notified WTO¹⁰⁸ for the creation of a new MPIA and their intention to use this mechanism to arbitrate their trade disputes under WTO, until the Appellate Body emerges from the collapse. In the notification letter members stated that their intentions are to preserve and replicate the substantive and procedural norms of the WTO's Appeal arbitration procedure which will include independence and impartiality. Also, members

¹⁰⁵ Rajesh Sharma, WTO Appellate Body at Cross Roads: Options and Alternatives, in Chang-Fa and others (eds), *The Appellate Body of the WTO and Its Reform* (Springer Singapore Pte Limited, 2019) 247-250

¹⁰⁶ European Commission, 'Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement', (2019) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_4709> accessed 6 October 2022

¹⁰⁷ Statement by Ministers: "We, the Ministers of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, Uruguay, remain committed to work with the whole WTO membership to find a lasting improvement to the situation relating to the WTO Appellate Body. We believe that a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features. Meanwhile, we will work towards putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among ourselves, in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding, and which would be in place only and until a reformed WTO Appellate Body becomes fully operational. This arrangement will be open to any WTO Member willing to join it. We have instructed our officials to expeditiously finalise work on such an arrangement. We have also taken proper note of the recent engagement of President Trump on WTO reform."

¹⁰⁸ World Trade Organization, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, JOB/DSB/1/Add.12, 30 April 2020 <[Multi-party interim appeal arbitration arrangement pursuant to article 25 of the DSU](#)>

reaffirmed that they will stay committed to finding a solution to the Appellate Body crisis and that MPIA will stop operating as soon as the Appellate Body restores its function.

MPIA Procedure

The MPIA procedure is based on the WTO Appellate settlement mechanism and parties intend to keep as closely as possible the practice of Appellate Review consistent with article 17 of DSU. The MPIA is structured in three parts. The first part covers core principles and substantive elements of MPIA's appeal mechanism and is issued as a political communication to the DSB. The second part (Annex 1) covers a model template of procedural rules for arbitration under art. 25 of DSU. And the third part (Annex 2) covers the selection process of arbitrators.¹⁰⁹

Parties must express their mutual agreement pursuant to article 25.2 of DSU that want to enter into arbitration as laid down under article 25 of the DSU. They have to agree on arbitration and procedures as well. The arbitration may initiate if the Appellate Body is not able to hear an appeal under articles 16.4 and 17 of DSU.¹¹⁰ MPIA arbitrators shall govern by provisions of the DSU and other rules applicable to Appellate review. In addition to this, the arbitrators may adapt the Working Procedures for Appellate Review and timetable for appeals provided for therein.¹¹¹

Same as in the Appellate Body as well as in arbitration the appeal will be limited to "issues of law" and legal interpretation developed by the panel.¹¹² Arbitrators have to address only issues that are necessary to resolve the dispute as well as address only issues that have been raised by the parties.¹¹³

¹⁰⁹ *Caroline Glöckle*, Bridging the gap: the MPIA as a valuable short-term solution to the impasse of the WTO's Appellate Body?, (Völkerrechtsblog, October 2020) <doi: [10.17176/20210107-184051-0](https://doi.org/10.17176/20210107-184051-0)> Accessed 20 October 2022

¹¹⁰ For the purposes of these agreed procedures, such a situation is deemed to arise where, on the date of issuance of the final panel report to the parties, there are fewer than three Appellate Body members. For greater certainty, if the Appellate Body is able to hear appeals at the date on which the final panel report is issued to the parties, a party may not initiate an arbitration, and the parties shall be free to consider an appeal under Articles 16.4 and 17 of the DSU.

¹¹¹ The Agreement on the Multi-party interim appeal arbitration arrangement pursuant to Article 25 of the DSU para. 11

¹¹² *Ibid*, para. 9

¹¹³ *Ibid*, para. 10

The arbitration has the same power as the Appellate Body panel; it may “uphold, modify or reverse” the legal findings and conclusions of the panel. The arbitration award may include recommendations as predicted under article 19 of DSU. Any findings of the panel that were not appealed shall be deemed as part of the award of the arbitration together with the arbitrator’s own findings.¹¹⁴

The panel of arbitration shall be composed by three persons selected out of 10 standing appeal arbitrators.¹¹⁵ These arbitrators will be led on the same principles and methods applied to form a division of the Appellate Body under article 17.1 of DSU and Rule 6(2) of the Working Procedures for Appellate Review, including the principle of rotation.¹¹⁶ The arbitrators are free to discuss their decision to the appeal with other members of the arbitration, without prejudicing the exclusive responsibility and the freedom of arbitrators with respect to such decisions and their quality.¹¹⁷

The arbitration procedure initiates by filing a Notice of Appeal with the WTO secretariat, which should include the final report in the working languages of the WTO. The Notice of Appeal should be notified to the other party/parties and third parties in the panel proceedings.¹¹⁸ The arbitration may be initiated only by the parties of the dispute. Third parties may make written submissions and shall be given the opportunity to be heard by the arbitrators.¹¹⁹

The parties jointly request the panel to provide:

- i. the lifting of confidentiality with respect of the final panel report under the Working Procedures of the panel;
- ii. the transmission of the panel record to the arbitrators upon the filing of the Notice of Appeal : Rule 25 of the Working Procedures for Appellate Review shall apply *mutatis mutandis*;

¹¹⁴ The Agreement on the Multi-party interim appeal arbitration arrangement pursuant to Article 25 of the DSU para. 9

¹¹⁵ Pool of arbitrators: *Mateo Diego-Fernández ANDRADE, Thomas COTTIER, Locknie HSU, Valerie HUGHES, Alejandro JARA, José Alfredo Graça LIMA, Claudia OROZCO, Joost PAUWELYN, Penelope RIDINGS, Guohua YANG*

¹¹⁶ The Agreement on the Multi-party interim appeal arbitration arrangement pursuant to Article 25 of the DSU para. 7

¹¹⁷ *Ibid*, para. 8

¹¹⁸ *Ibid*, para. 5

¹¹⁹ The Agreement on the Multi-party interim appeal arbitration arrangement pursuant to Article 25 of the DSU para. 16

- iii. the transmission of the final panel report in the working languages of the WTO to the parties and to the third parties.¹²⁰

After filling out the Notice of Appeal the parties request the arbitrators to issue the award within 90 days.¹²¹ The time- period of 90 days to issue the award may be extended by the proposal of the arbitrators to the parties.¹²² The arbitration award is final and the parties have to abide.¹²³ In accordance with article 25.3 of DSU, the award shall be notified but not adopted by the DSB.¹²⁴

In the arbitration, the parties have the right to withdraw at any time during the arbitration, by notifying the arbitrators. Such notification shall be given also to panel and third parties.¹²⁵

Currently MPIA party members are: Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; European Union; Guatemala; Hong Kong, China; Iceland; Macao, China; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Peru; Singapore; Switzerland; Ukraine and Uruguay.¹²⁶

Concerns about MPIA as a short-term solution

The MPIA as an interim short- term solution covers three important innovations and some of the US concerns regarding the Appellate Body. Firstly, the MPIA model template (Annex1) covers the issue regarding the 90 days deadline to issue reports under article 17.5 of DSU. Under Annex 1 para.14 the arbitrators may extend such a deadline only with the support of the dispute parties as the US claimed in their concerns.¹²⁷

¹²⁰ The Agreement on the Multi-party interim appeal arbitration arrangement pursuant to Article 25 of the DSU para.4

¹²¹ *Ibid*, para. 12

¹²² *Ibid*, para. 14

¹²³ *Ibid*, para. 15

¹²⁴ *Ibid*, para. 15

¹²⁵ *Ibid*, para. 18

¹²⁶ Geneva Trade Platform, Multi-Party Interim Appeal Arbitration Arrangement (MPIA) (undated)

< https://wtoplurilaterals.info/plural_initiative/the-mpia/ > Accessed 22 October 2022

¹²⁷ Caroline Glöckle, *Bridging the gap: the MPIA as a valuable short-term solution to the impasse of the WTO's Appellate Body?*, (Völkerrechtsblog, October 2020) <doi: [10.17176/20210107-184051-0](https://doi.org/10.17176/20210107-184051-0)> Accessed 20 October 2022

Secondly, under para.10 of Annex 1, the MPIA reminds arbitrators to limit their legal assessments only on issues necessary for the settlement of the dispute raised by the parties of the dispute and not to engage in *obiter dicta*-like discussions, as the US has claimed in their criticism against Appellate Body's procedure practice.¹²⁸

Thirdly, the model template in Annex 1 includes another element to enhance the judicial economy. Under MPIA, the arbitrators are encouraged to foster judicial economy by proposing, in contrast to Art.17.12 of DSU which obliges the AB to consider each of the issues raised.¹²⁹

However, there are many concerns about why MPIA would not be the best option for a long-term period. First, the issue of whether it is the MPIA within or outside of the WTO system. In view of the fact that while the Kuijper proposal was seeking a solution outside the WTO, the Sidley and Bacchus proposals were based on article 25 of DSU, which was the one adopted by the MPIA, as a 'more organic evolution of dispute settlement practice' first proposed by Canada in 2016.¹³⁰

In addition, the 'language' used under article 25 of DSU leaves many details unclear of the arbitration mechanism. It is safe to say that the only certain thing is the use of article 25 of DSU for dispute resolving would have to be voluntarily agreed by the parties of the dispute, which agree in arbitration and to bind the final award of arbitration.¹³¹ Hence, whether the MPIA relies in WTO system or not the arbitration procedure and the Appellate Body review differ in aspect that in MPIA, relying under Article 15 of the Agreed Procedures for the MPIA, the arbitral award will only have to be notified and not adopted by the DSU. Which differs from the WTO dispute settlement mechanism used in a panel and Appellate Body reports, where the WTO Members support the adoption of such reports by DSU. In contrast, the MPIA arbitral reports are only binding between parties involved in the dispute and it does not bind other WTO Members.¹³²

¹²⁸ Caroline Glöckle, *Bridging the gap: the MPIA as a valuable short-term solution to the impasse of the WTO's Appellate Body?*, (Völkerrechtsblog, October 2020) <doi: [10.17176/20210107-184051-0](https://doi.org/10.17176/20210107-184051-0)> Accessed 20 October 2022

¹²⁹ *Ibid.*

¹³⁰ Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, (Volume 24, *Journal of International Economic Law*, 2021), 541

¹³¹ Note: the voluntary nature is in line with article 15 of the Agreed Procedures of MPIA.

¹³² Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, (Volume 24, *Journal of International Economic Law*, 2021), 541

Second, the MPIA is open for accession of new parties but is still unclear whether other members of WTO will join or not. Even though the MPIA has ‘resolved’ many concerns of the US such as ‘addressing only issues that are necessary for the resolution of a dispute’ and the problem with ‘exceeding the 90 days deadline to issue a report’ yet the US has made it clear that it is unlikely to join the MPIA. In June 2020 the US rejected the EU-led interim appeal arbitration arrangement via a letter to the WTO Director-General.¹³³ In this letter the US has listed several reasons why they reject MPIA as a ‘short-term’ solution.

The non-adherence of the US, in MPIA ‘collapses’ disputes that WTO Members have with the US, leaving unresolved. Historically, the US has been the most frequent user of the dispute settlement mechanism in the WTO. Therefore, without the US the MPIA function would be limited, since it may not resolve disputes against the most prolific trade dispute litigator and one of the world’s largest economies.¹³⁴ Whether the US will join the MPIA in the future is yet to be seen, so far the US has not shown any indication.

Third, another concern is the ‘bilateral nature’ of MPIA. In 2019 the European Commission introduced an amendment to Regulation (EU) No 654/2014¹³⁵, which would allow the EU unilaterally to impose tariffs on the losing party of the dispute that tries to ‘appeal into the void’ and not join arbitration. By such action the EU tries to force WTO Members to accept MPIA by threatening to use unilateral sanctions which are prohibited under article 23.1 of the DSU.¹³⁶ Therefore, similar actions may be taken by other MPIA parties, especially those that are major traders by adopting similar regulations or practices.¹³⁷

¹³³ see: *US rejects EU-led interim appeal arbitration arrangement* (Published in SUNS 2020) <<https://twi.my/title2/wto.info/2020/ti200608.htm>> Accessed 22 October 2022

¹³⁴ Ali Amerjee and Himaansu Servansingh, *The Multiparty Interim Appeal Arbitration Arrangement: will the US be missed?* (Linklaters,2020) <<https://www.linklaters.com/en/insights/blogs/tradelinks/2020/july/the-multiparty-interim-appeal-arbitration-arrangement-will-the-us-be-missed>> Accessed 22 October 2022

¹³⁵ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 654/2014 of the European Parliament and of the Council Concerning the Exercise of the Union’s Rights for the Application and Enforcement of International Trade Rules’, COM(2019) 623 final 2019/0273(COD) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019PC0623>>

¹³⁶ Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, (Vol.24, Journal of International Economic Law, 2021), 544

¹³⁷ *Ibid*,

What's next? Reforming the WTO Dispute Settlement mechanism

The paralyzation caused to the WTO Appellate Body is not to be sought as the end of the WTO dispute settlement trading system. The panel stages still continue to function only that the Appellate Body is paralyzed. Yet, parties of a dispute may still appeal against the panel's report only that those appeals are not heard and are led “into the void”. This situation has its implication to the rule-based dispute settlement process and it is incompatible with WTO objectives, the endless waiting for a dispute to be solved it's not what WTO members signed for. This may lead parties to take action into their hands and find a solution.

Despite all that, the two- tier dispute settlement system brought by the Uruguay Round in 1995 had shown remarkable success. From 1995-2021 more than 600 disputes have been brought before DSS. During this period 52 WTO members initiated at least one dispute, 61 members as respondents, and 90 members as third parties.¹³⁸ Moreover, till December 2021, 365 panels were established and 277 panel reports were circulated.¹³⁹ In the same period appeals were notified in 186¹⁴⁰ disputes and till October 2021, 148 Appellate Body reports have been adopted.¹⁴¹

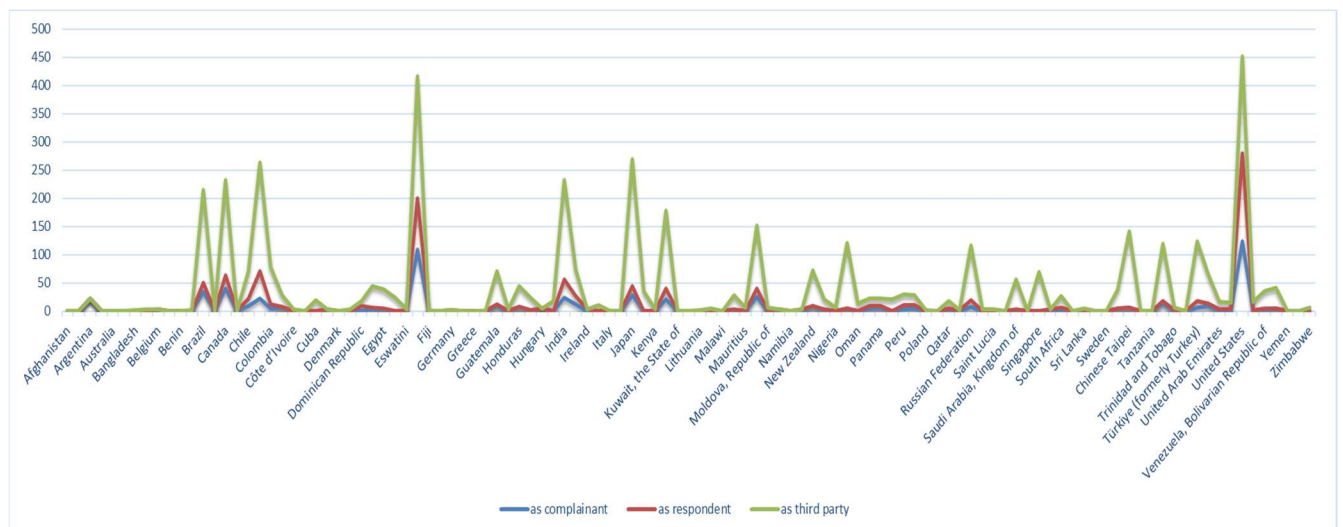
The US used to be the strongest advocate for the creation of the WTO Appellate Body and now has paralyzed its function. Data (1995-2019) shows that the US was the most active user of the WTO dispute settlement mechanism.

¹³⁸ World Trade Organization, *Dispute settlement activity — some figures* (World Trade Organization, undated) < https://www.wto.org/english/tratop_e/dispu_e/disputstats_e.htm > Accessed on 23 October 2022

¹³⁹ *Ibid*,

¹⁴⁰ *Ibid*,

¹⁴¹ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021)<[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >



¹⁴² Fig. 2 Dispute Settlement Cases (1995-2019)

From the years 1995-2019 from the date published in the official website of the WTO the US has used the WTO dispute settlement mechanism in resolving disputes as a respondent in 156 cases, as complainant 124 cases and 172 cases as a third party.¹⁴³ Followed by the EU, with 110 cases as complaint, 91 as respondent and 216 as a third party.¹⁴⁴ When compared with other dispute settlement (state to state) systems such as the International Court of Justice (ICJ) or International Tribunal for the Law of the Sea (ITLOS), it shows a very high level of quality. In the same period (1994-2021) ICJ has issued 77 judgments and 5 advisory opinions and ITLOS issued 14 judgments and 2 advisory opinions since 1996.¹⁴⁵

Usually, issue raised in WTO dispute are often politically sensitive as they concern the legality under WTO law of national legislation and policies for the protection of core society values and interest, it is important to be noted that the rulings in many WTO disputes have shown an enormous success in compliance with its rulings. In more than 80% of the disputes the respondent had to withdraw or amend their measures which were found to be inconsistent with WTO law.

However, there are several issues that need to be reformed in WTO and especially in the dispute settlement system of WTO. A long-standing solution for the Appellate Body Crisis would have

¹⁴² note: due to the large number of data some country names are not displayed in the figure. see: <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>

¹⁴³ World Trade Organization, 'Disputes by member', (undated) https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed 20 October 2022

¹⁴⁴ *Ibid*,

¹⁴⁵ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](https://www.wti.org/publications/working-papers/2021/02/2021-02-the-demise-of-the-wto-appellate-body-lessons-for-governance-of-international-adjudication/)>

to gather the WTO members on the negotiation table and find a solution that would balance the rule-based dispute settlement system.

Yet, the US has not given a clear indication that will unblock the Appellate Body, even if all or most of the key concerns of the US are resolved. As mentioned above there are many proposals on how to overcome this situation and some may not entirely approach the US concerns but highlight some issues. One of the proposals that suited the most the US is the proposal of New Zealand ambassador and Permanent Representative to the WTO David Walker. Walker's proposal consists of principles that were designed to approach US concerns.¹⁴⁶

Former member of Appellate Body Hillman Jennifer has noted that resetting the WTO Appellate Body would consist in adopting Walker's principles; establishing a new oversight committee and audit to ensure compliance and restricting the term limits of the WTO Secretariat's legal staff no longer than eight years.¹⁴⁷

First, Walker's Principles were designed to make the Appellate Body more efficient in resolving disputes. Those principles require that the Appellate Body respect its timetable and make its decision in ninety days; Appellate Body members leave their duty after finishing the second term of service (eight-year period of serving); members to treat facts as facts; to address only issues raised by dispute parties and only to the extent necessary to resolve the dispute; opinions not to be given advisory; not use previous Appellate Body or panel reports as a precedent; not to add to the obligations or take away rights of the parties in the WTO rules.¹⁴⁸

Second, in order to build trust the WTO has to at least once a year and when requested to establish an oversight committee¹⁴⁹ and audit to ensure compliance that the Appellate Body will ad-

¹⁴⁶JOB/GC/217<https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689,255861,253985,253661,253388,251873&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>

¹⁴⁷ Jennifer A. Hillman, 'The United States Needs a Reformed WTO Now' (Prepared statement by Jennifer A. Hillman, presented to the US Senate Committee on Finance, July 2020) 8, <<https://www.finance.senate.gov/imo/media/doc/29JUL2020Hillman-CoFRSTMNT.pdf> > Accessed 20 October 2022

¹⁴⁸ *Ibid*, 8

¹⁴⁹The oversight committee could be made up of the chairs of the lead WTO committees—its General Council, Council for Trade in Goods, Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property Rights, and the Dispute Settlement Body, with the chair of the Dispute Settlement Body appointing four additional independent trade-law experts to the committee to ensure a proper representation of expertise. (furthermore see: page 8, *Prepared statement by Jennifer A. Hillman*, presented to the US Senate Committee on Finance, July 2020)

here to the Walkers principles. The committee's task has to be to assess whether the Appellate Body has adhered to Walker's principles or not.¹⁵⁰

Third, the limitation of members term of the Appellate Body Secretariat to no longer than eight years as an Appellate Body member. Adopting a mobility principle would allow staff rotations through WTO offices, which would bring new perspective; reduce the use of past decisions as precedent and help restore the balance between Appellate Body members and the Secretariat staff.¹⁵¹

The reforms above would adjust the Appellate Body more efficiently in light of US concerns and Walker's principles offer just that. The US needs assurance that the Appellate Body works in the spirit of WTO's Dispute Settlement Understanding. The creation of an oversight process will ensure that the Appellate Body will judge on its consistency with Walker's principles and staff rotation will bring new perspectives and fresh thinking when it comes to making final decisions.¹⁵²

For the US to achieve its goals it would best work to reform the Appellate Body and restore its initial function as a mechanism to solve trade dispute settlements in light of DSU. While refusing to negotiate the amendments to the Appellate Body the US has been leading the charge in two institutional reforms a) regarding the ability of the countries to self-declare as 'developing countries' and b) the non-compliance with the requirements to notify the WTO of changes in trade regimes or levels of subsidies.¹⁵³ Within the improvement of the function of the Appellate Body the US could agree on unblocking appointments of members and revitalization of dispute settlement mechanisms and on the other hand the rest of WTO members to clear the criteria which define countries as 'developing' for the purposes of WTO's special treatment.¹⁵⁴ In this way the US gets both the reforms in the Appellate Body but also gets a guarantee that countries that no longer are considered 'developing' (based on their wealth) can not longer claim special privileges under the WTO special treatment and are rich enough to be in OECD or the G20. And on the other hand, the WTO members get a functioning and improved dispute settlement system.¹⁵⁵ Yet,

¹⁵⁰ Jennifer A. Hillman, 'The United States Needs a Reformed WTO Now' (Prepared statement by Jennifer A. Hillman, presented to the US Senate Committee on Finance, July 2020) 8, < <https://www.finance.senate.gov/imo/media/doc/29JUL2020Hillman-CoFRSTMNT.pdf> > Accessed 20 October 2022

¹⁵¹ *Ibid*, 9

¹⁵² *Ibid*, 9

¹⁵³ *Ibid*, 10

¹⁵⁴ *Ibid*, 10

¹⁵⁵ Jennifer A. Hillman, Statement 'The United States Needs a Reformed WTO Now' (Prepared statement by Jennifer A. Hillman, presented to the US. Senate Committee on Finance, July 2020) 10, Accessed 20 October 2022

such a process is unlikely to start until the US indicates which of the many proposed ideas for reforming the Appellate Body would suit best.¹⁵⁶

An international adjudicative body, court or tribunal in order to be effective has to meet three essential conditions i) its acts and its ability to act as an adjudicator ii) to be independent and impartial and iii) settling disputes in a timely manner, in consistence with the requirements of the due process and to have all the financial and human resources to do so.¹⁵⁷ In the WTO Appellate Body case these criteria were not met. The abuse of these criteria has resulted in the current crisis that the WTO dispute system is facing and this situation holds lessons for the governance of international adjudication. Such lessons consist on i) ensuring that the appointment of judges cannot be blocked *sine die* ii) ensuring that the term in office as well as the legal positions and terms of employment of their support staff do not affect the adjudicators' independence and impartiality iii) providing a reasonable and realistic time that allows proper consideration to examine all the issues raised in a dispute iv) to give the adjudicative body sufficient financial and human resources to perform its work and lastly v) for the losing parties to avoid making persistently unfounded allegations of judicial overreach that aims to undermine the authority and credibility of the adjudicative body.¹⁵⁸

Conclusions

The paralyzation of the Appellate Body from the US persistent blockage of appointments and reappointments of Appellate Body members is with no doubt the biggest crisis in the history of the WTO dispute settlement system. On 11 December 2019 the Appellate Body was left with only one member and from that day the Appellate Body no longer was able to hear and decide any new appeals. By the end of 2020, the mandate of the last member expired and new appeals were led 'into the void'. The paralysis of Appellate Body has not only deprived WTO members of the appellate review of panel reports but also it has diminished the whole WTO dispute settlement system. Since 2019, all panel reports have been appealed to the paralyzed Appellate

¹⁵⁶ Jennifer A. Hillman, 'The United States Needs a Reformed WTO Now' (Prepared statement by Jennifer A. Hillman, presented to the US Senate Committee on Finance, July 2020) 10, < <https://www.finance.senate.gov/imo/media/doc/29JUL2020Hillman-CoFRSTMNT.pdf> > Accessed 20 October 2022

¹⁵⁷ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) < [The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >

¹⁵⁸ *Ibid*,

Body, ensuring that an unfavorable panel report would not become legally binding.¹⁵⁹ This situation has its implication to the rule-based dispute settlement process, and it is incompatible with WTO objectives, the endless waiting for a dispute to be solved it's not what WTO members signed for. The WTO dispute settlement system mechanism is to provide security and predictability to the multilateral trading system to its members. And under DSU the dispute settlement system is to prompt settlement of situations when members consider that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another member state, by ensuring the maintenance of a proper balance between rights and obligations.

Yet, the WTO problems did not start with the Appellate Body function. For many years not only the US but also other WTO members have raised their concerns for reforms when monitoring member state policies, providing a forum to negotiate trade agreements and arbitration disputes. They have also been raising their concerns about the issues of 'Developing Country' status when two-thirds of WTO members still claim that status and benefit from the privileges that such status carries with them under the WTO. WTO Members have stressed that the negotiations are being harder from day to day and is being more difficult to reach a full consensus for new agreements, obligations and rule changes. In addition, the failure of many countries to comply with the obligation of transparency and notification has made it even harder to negotiate new rules and agreements. Many countries have raised their concerns with the WTO dispute settlement system when it comes to resolving trade conflicts, but the US has been the strongest 'advocate' of this matter. The US has repeatedly stated its concerns about the Appellate Body and listed several issues regarding the Appellate Body 'degradation' by extending its authority beyond its original mandate. In addition, the US has claimed the Appellate Body has violated DSU provisions in several cases by overstepping its competencies.

Given the situation caused, the WTO Members had to seek other alternatives and mechanisms for their trade disputes to be resolved until a satisfactory solution for the situation is found, such as MPIA. The idea behind MPIA as an interim solution was to stop the gap arrangement and once the Appellate Body would gain its function back, this mechanism would stop operating.

¹⁵⁹ Peter Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >

Even though the MPIA as an interim short-term solution covers some of the US concerns regarding the Appellate Body such as the 90 days deadline to issue reports and the reminder for arbitrators to limit their legal assessments only on issues necessary for the settlement of the dispute raised by the parties of the dispute and not to engage in obiter dicta-like discussions, without the US, the MPIA function would be limited, since it may not resolve disputes against the most prolific trade dispute litigator and one of the world's largest economies.

Another issue regarding the MPIA is its 'bilateral nature'. As mentioned above in 2019 the European Commission had introduced an amendment to Regulation (EU) No 654/2014, which would allow the EU unilaterally to impose tariffs to the losing party of the dispute that tries to appeal 'into the void' and not join arbitration. The 'threatening' to use unilateral sanction falls outside the scope of WTO and is prohibited under Article 21.1 of the DSU. Hence, the risk of similar actions being taken by other MPIA parties, especially those that are major traders by adopting similar regulations or practices is much expected.

Therefore, the most urgent step is to gather the WTO Members on the negotiation table and find a solution that would restore the dispute settlement system function and take action to the appointment of the Appellate Body members.

Bibliography

1. Amerjee Ali & Servansingh Himaansu, *The Multiparty Interim Appeal Arbitration Arrangement: will the US be missed?* (Linklaters, 2020) <<https://www.linklaters.com/en/insights/blogs/tradelinks/2020/july/the-multiparty-interim-appeal-arbitration-arrangement-will-the-us-be-missed>> Accessed 22 October 2022
2. Bacchus James, *Saving the WTO's Appeals Process*, (CATO institute, 2018) <<https://www.cato.org/blog/saving-wtos-appeals-process>> Accessed 22 October 2022
3. Caporal Jack, *WTO Reform: The Beginning of the End or the End of the Beginning?* (the Center for Strategic and International Studies, 2018) <<https://www.csis.org/analysis/wto-reform-beginning-end-or-end-beginning>> accessed 20 October 2022
4. Chang-fa Lo, Junji Nakagawa and Tsai-Fang Chen *Introduction: Let the Jewel in the Crown Shine Again* in Chang-Fa and others (eds), *The Appellate Body of the WTO and Its Reform* (Springer Singapore Pte Limited, 2019)
5. European Commission, 'Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement', (2019) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_4709> accessed 6 October 2022
6. European Commission, *Report on Reforming the WTO. Towards a sustainable and effective multilateral trading* (Publications Office of the European Union, 2021) <[Reforming the WTO towards a sustainable and effective multilateral trading system](#)>, accessed 20 October 2022
7. European Commission, 'WTO reform: EU proposes way forward on the functioning of the Appellate Body', (2018) <https://policy.trade.ec.europa.eu/news_en> accessed 20 October 2022
8. European Union concept paper for the WTO modernization (European Commission for Trade, 2018) <[WTO modernisation - introduction to future EU proposals - concept note](#)> accessed 20 October 2022
9. Gao Henry, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, (Volume 24, *Journal of International Economic Law*, 2021),
10. Geneva Trade Platform, *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)* (undated) <https://wtoplurilaterals.info/plural_initiative/the-mpia/> Accessed 22 October 2022
11. Glöckle Caroline, *Bridging the gap: the MPIA as a valuable short-term solution to the impasse of the WTO's Appellate Body?*, (*Völkerrechtsblog*, 12 October 2020) Accessed 20 October 2022
12. Hillman Jennifer A., 'The United States Needs a Reformed WTO Now' (*Prepared statement by Jennifer A. Hillman*, presented to the US Senate Committee on Finance, July 2020) <<https://www.finance.senate.gov/imo/media/doc/29JUL2020Hillman~CoFRSTMNT.pdf>>, Accessed 20 October 2022
13. Hirsh Bruce, *Resolving the WTO Appellate Body Crisis, Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators* (vol.2 National Foreign Trade Council/Tailwind Global Strategies 2020) <[Resolving the WTO Appellate Body Crisis](#)> accessed 22 October 2022

14. Hufbauer Gary Clyde, *WTO Judicial Appointments: Bad Omen for the Trading System* (Peterson Institute for International Economics, 2011) < [WTO Judicial Appointments: Bad Omen for the Trading System | PIIE](#) > Accessed 22 October 2022
15. Hoekman Bernard M. and Mavroidis Petros C. , *World Trade Organization (WTO) Law, Economics, and Politics* (2nd ed., Routledge c2016)
16. Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, (2018) < <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-trilateral> > accessed 20 October 2022
17. Kanth D. Ravi, *US rejects EU-led interim appeal arbitration arrangement* (Published in SUNS 2020) <<https://twm.my/title2/wto.info/2020/ti200608.htm>> Accessed 22 October 2022
18. LawTeacher, 'Transformation of GATT into the WTO' (Lawteacher.net, 31st Aug 2021) <<https://www.lawteacher.net/free-law-essays/international-law/transformation-of-gatt-into-the-wto-international-law-essay.php?vref=1> > accessed 22 October 2022
19. Lee Yong-Shik, *Reclaiming Development in the World Trading System* (2nd edn Cambridge University Press 2016)
20. O'Sullivan David, Bondy Christophe, Brett Charlotte & Genest Alexandre *The EU's Approach to Reforming the WTO Towards a Sustainable and Effective Multilateral Trading System*, (Lexology, 2021) < <https://www.lexology.com/library/detail.aspx?g=32e9a4cb-d3b3-4c2e-8ec6-30677989eef9> > Accessed 22 October 2022
21. Reinsch William Alan, *Article 25: An Effective Way to Avert the WTO Crisis?* (Center for Strategic & International Studies (CSIS) 2019) < <https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis> >) Accessed 22 October 2022
22. Schneider-Petsinger Marianne *Reforming the World Trade Organization Prospects for transatlantic cooperation and the global trade system* (Chatham House, 2020), <[Reforming the World Trade Organization](#)> Accessed 22 October 2022
23. Sharma Rajesh, *WTO Appellate Body at Cross Roads: Options and Alternatives*, in Chang-Fa and others (eds), *The Appellate Body of the WTO and Its Reform* (Springer Singapore Pte Limited, 2019)
24. Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016 <[1 Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016 7. THE ISSUE OF POSSIBLE](#)> Accessed 22 October 2022
25. United States Trade Representative (USTR), 'Report on the Appellate Body of the World Trade Organization' (2020) < [Report on the Appellate Body of the World Trade Organization](#) >
26. Van den Bossche Peter *The making of the 'World Trade Court': the origins and development of the Appellate Body of the World Trade Organization*, in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement* (Cambridge University Press 2005)
27. Van den Bossche Peter & Werner Zdouc, *Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2017)
28. Van den Bossche Peter *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?* (WTI working paper no.02/2021) <[The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?](#) >
29. World Trade Organization, 'Appellate Body' (www.wto.org, undated) <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm > accessed 20 October 2022.

30. World Trade Organization, 'Disputes by member', (www.wto.org, undated) https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Accessed 20 October 2022
31. World Trade Organization, *Dispute settlement activity — some figures* (www.wto.org, undated) < https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm > Accessed on 23 October 2022
32. World Trade Organization, *Dispute Settlement without recourse to Panels and the Appellate Body* (www.wto.org, undated) < https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c8s2p1_e.htm > accessed 5 October 2022
33. World Trade Organization, 'The GATT years: from Havana to Marrakesh' (www.wto.org, undated) < https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm > accessed 20 October 2022
34. World Trade Organization, *The Uruguay Round* (World Trade Organization, undated) < https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm > Accessed 30 October 2022
35. WTO secretariat, *A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press 2017)

Case:

1. EC-Hormones, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135

Legislation:

2. Arrangement of Interim Appeal Arbitration Pursuant to Article 25 of the DSU (2019)
3. European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 654/2014 of the European Parliament and of the Council Concerning the Exercise of the Union's Rights for the Application and Enforcement of International Trade Rules', COM(2019) 623 final 2019/0273(COD)
4. Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/D-1/6
5. Commission, Annex to the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy COM/2021/66 final
6. Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy COM/2021/66 final
7. JOB/GC/217
8. Marrakesh Agreement Establishing the World Trade Organization, (15 April 1994) LT/UR/A/2
9. Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, JOB/DSB/1/Add.12, 30 April 2020

Annex 1

Abstract

The paralyzation of the Appellate Body from the US persistent blockage of appointments and re-appointments of Appellate Body members is without a doubt the biggest crisis in the history of the WTO dispute settlement system. This situation has its implication to the rule-based dispute settlement process, and it is incompatible with WTO objectives, and the endless waiting for a dispute to be solved it's not what WTO members signed for. The US, once the strongest advocate for the creation of the WTO Appellate Body, has now paralyzed its function. By the end of 2020 within the expiration of the mandate of the last member the Appellate Body became totally paralyzed and lost its vital function and now new appeals are simply led 'into the void'. The paralysis of Appellate Body has not only deprived WTO members of the appellate review of panel reports but also it has diminished the whole WTO dispute settlement system. Since 2019, all panel reports have been appealed to the paralyzed Appellate Body, ensuring that an unfavorable panel report would not become legally binding. This situation has its implication to the rule-based dispute settlement process, and it is incompatible with WTO objectives, the endless waiting for a dispute to be solved it's not what WTO members signed for. To get through the situation WTO Members found an interim short-term solution in MPIA. Yet this solution raises many concerns such as i) will the WTO Members which chose to be part of MPIA still try to resolve the Appellate Body crisis or will they rely on MPIA and ii) does MPIA fall within or outside the WTO system. Amongst many proposals to overcome the situation, the proposal of New Zealand ambassador and Permanent Representative to the WTO David Walker consists of principles that were designed to approach US concerns. This thesis is focused on the situation caused by the paralyzation of the Appellate Body, reforms proposed and actions taken, and; concerns of the actual situation. The work is separated in two parts. The first part includes briefly the creation of WTO, the failure of the GATT and the Overall WTO dispute settlement process with a major focus on the Appellate Body process. The second part includes the Appellate Body crisis, the US concerns over the appellate body and its recommendations, the EU recommendations and initiatives, the creation and concerns about MPIA, and lastly the actual situation and what is being proposed to overcome this situation.

Annex 2

Abstract

Die Lähmung des Berufungsgerichts aufgrund der andauernden Blockade der USA bei der Ernennung bzw. Wiederernennung von Mitgliedern des Berufungsgerichts, stellt zweifellos die größte Krise in der Geschichte des Streitschlichtungssystems der WTO dar. Diese Situation hat Auswirkungen auf den Streitbeilegungsprozess und ist mit den Zielen der WTO nicht vereinbar. Das endlose Warten auf eine Streitbeilegung ist auch nicht im Sinne der Mitglieder der WTO. Die USA, einst der stärkste Befürworter der Einsetzung eines WTO-Berufungsgerichts, hindern es nun an seiner Arbeit. Mit dem Ablauf des Mandats des letzten Mitglieds im Jahr 2020 wurde dem Berufungsgericht seine Funktionsfähigkeit genommen, wodurch neue Berufungen nunmehr einfach "ins Leere" laufen. Die Lähmung des Berufungsgremiums hat den WTO-Mitgliedern nicht nur die Berufungsprüfung von Panelberichten verwehrt, sondern auch das gesamte WTO-Streitbeilegungssystem geschwächt. Seit 2019 werden alle Panel-Berichte beim gelähmten Berufungsgremium angefochten, um sicherzustellen, dass ein ungünstiger Panel-Bericht nicht rechtsverbindlich wird. Diese Situation wirkt sich auf den regelbasierten Streitbeilegungsprozess aus und ist mit den WTO-Zielen unvereinbar, das endlose Warten auf die Lösung eines Streits ist nicht das, wofür die WTO-Mitglieder unterschrieben haben. Um die Situation zu überbrücken, fanden die WTO-Mitglieder eine vorübergehende Lösung in der Mehrparteien-Interimsvereinbarung (MPIA). Diese brachte allerdings auch einige Bedenken mit sich. Etwa ob die WTO-Mitglieder, die sich für die MPIA entschieden haben, dennoch versuchen werden, die Krise des Berufungsgerichts zu lösen, oder sich nunmehr auf die MPIA verlassen und ii) ob sich die MPIA innerhalb oder außerhalb des WTO-Systems wiederfindet. Unter den vielen Vorschlägen zur Überwindung der Situation findet sich auch jener des neuseeländischen Botschafters und ständigen Vertreters der WTO, David Walker, dessen Vorschlag die Bedenken der USA ansprechen soll. Diese Arbeit befasst sich mit der Krise des Berufungsgerichts, den Vorschlägen für Reformen und andere Maßnahmen sowie den Bedenken zur derzeitigen Situation. Die Arbeit ist in zwei Teile unterteilt. Der erste Teil umfasst die Entstehung der WTO, das Versagen des GATT und den Gesamtprozess der Streitbeilegung der WTO mit dem Schwerpunkt auf dem Verfahren vor dem Berufungsgericht. Der zweite Teil umfasst die Krise des Berufungsgerichts, die Bedenken der USA hinsichtlich des Berufungsgerichts und seiner Empfehlungen, die Emp-

fehlungen und Initiativen der EU, die Einführung des zum MPIA und die daraus resultierenden Bedenken sowie die aktuelle Situation und die Vorschläge zur Überwindung dieser Situation.