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Is there a Future for the WTO Appellate Body and WTO Dispute Settlement?

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Introduction

One of the principal achievements of the GATT Uruguay Round of Multilateral Trade Negotiations (1986-1994), which resulted in the establishment of the World Trade Organization ('WTO'), was the creation of a ground-breaking system for the resolution of trade disputes between WTO Members.[2] This system, which replaced the dysfunctional GATT dispute settlement system, is in many respects unique among international, state-to-state dispute resolution systems. The WTO dispute settlement system has compulsory jurisdiction, provides for appellate review and

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[2] See Understanding on Rules and Procedures Governing the Settlement of Disputes ('Dispute Settlement Understanding' or 'DSU'), Annex 2, Marrakesh Agreement on the Establishment of the World Trade Organization.

results in legally binding rulings, compliance with which can be enforced. For more than two decades, this dispute settlement system has served WTO Members very well and was commonly referred to as the jewel in the crown of the WTO. To date, developed and developing country Members alike have brought in total more than 600 disputes to the WTO for resolution.[3] The Appellate Body, the WTO's standing appellate tribunal, rendered since 1995 twice as many judgments, *i.e.*, reports in WTO speak, than the International Court of Justice, and was often called upon to settle disputes on politically sensitive issues relating to, for example, public health, environmental protection, consumer safety, public morals and national security.[4] In 9 of 10 disputes in which the responding party had to bring the challenged measure or legislation into conformity with WTO law, it has done so.[5] Over the past two decades, the WTO dispute settlement system made an important contribution to the objective that within the WTO 'right prevails over might'. As the legendary Julio Lacarte Muró, the first Chair of the Appellate Body, remarked, the WTO dispute settlement system works to the advantage of all Members, but it especially gives security to developing-country Members that, in the past, often lacked the political or economic clout to enforce their rights and to protect their interests.[6]

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[3] See https://www.worldtradelaw.net/databases/searchcomplaints.php.
[4] See https://www.icj-cij.org/en/decisions and https://www.worldtradelaw.net/databases/abreports.php.
[5] See P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization*, 5th edition (Cambridge University Press, 2022), 215.
[6] See J. Lacarte and P. Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System', *Journal of International Economic Law*, 2000, 400. Ambassador Lacarte Muró served as the

The WTO's dispute settlement system is currently, however, in an existential crisis. This crisis was triggered by the United States, which has blocked since 2017 the process of (re-)appointment of members of the Appellate Body. As a result of this blockage, the number of Appellate Body members, normally seven, dropped on 11 December 2019 below the minimum of three needed to hear and decide new appeals from first instance panel reports.[7] Since 11 December 2019, all but two panel reports have been appealed by the losing party to the now paralyzed Appellate Body.[8] These appeals 'into the void' leave disputes in legal limbo because as long as appellate review is pending, there is no legally binding resolution of the dispute.[9] There are currently 21 unresolved disputes pending before the Appellate Body.[10] The paralysis of the Appellate Body has severely undermined the effectiveness and credibility of the WTO dispute settlement system. Not surprisingly, in 2020

Deputy Executive Secretary of the GATT in 1947–8, and as Permanent Representative of Uruguay to the GATT in the 1960s, 1980s and early 1990s. He was the Chair of the Uruguay Round committee that negotiated the DSU.

[7] Of the 13 appeals pending on 11 December 2019, the Appellate Body was still allowed – under Rule 15 of the Working Procedures for Appellate Review – to complete three appeals, including the appeal in *Australia – Tobacco Plain Packaging (2020).* The other ten appeals were left uncompleted.

[8] The panel reports in *Australia - Anti-Dumping Measures on A4 Copy Paper (2020)* and *United States - Anti-Dumping and Countervailing Duties on Ripe Olives from Spain (2021)* were not appealed and thus adopted by the DSB by reverse consensus.

[9] Pursuant to Article 16.4 of the DSU, appealed panel reports cannot be adopted by the WTO Dispute Settlement Body, and thus become legally binding, until after completion of the appeal.

[10] Note that once the Appellate Body is operational again, it will take years to work through this backlog before any new appeals can be heard.

and 2021 there has been a drastic drop in the number of disputes brought to the WTO for resolution.[11]

From a looming to an acute crisis

While the current crisis of WTO dispute settlement was triggered by the United States' blockage of the process of (re-)appointment of Appellate Body members, this crisis has been looming for a long time, and this for several reasons. *First*, over the years, the workload of the dispute settlement system grew steadily, in particular due to the increasing number of claims of WTO inconsistency raised in each dispute and the rising complexity of the measures challenged and the legal arguments made. However, the resources made available did not keep track with this growing workload. *Second*, the institutional imbalance between the successful quasi-judicial branch of the WTO and its ineffective legislative/negotiating branch became ever more apparent. This prompted WTO Members to seek solutions to their trade disputes and concerns about insufficient or missing legal standards through litigation rather than negotiation. This development resulted in the resolution of sensitive trade issues through adjudication, which led to the perception in some quarters of judicial activism by WTO panels and, in particular, the Appellate Body. Already in 2001, Claude Barfield of the Washington-based American Enterprise Institute suggested that the WTO dispute settlement system is 'substantively and politically unsustainable'. Barfield suggested that governments may only continue to obey its rulings if the

[11] In 2020 and 2021 merely 5 and 9 disputes were brought to the WTO for resolution, compared with 39 and 19 disputes in 2018 and 2019. See https://www.worldtradelaw.net/databases/complaintcount.php.

powers of the WTO dispute settlement system are curbed.[12] While strongly disagreeing with Barfield's prescription, others have also warned against excessive reliance by WTO Members on adjudication, instead of seeking political agreement on new rules, to resolve problems arising in trade relations.[13] *Third*, certainly since 2010, some Members, and in particular the United States, adopted an ever more antagonistic discourse against the Appellate Body whenever the latter's rulings were unfavorable. The United States began criticizing vigorously the Appellate Body's jurisprudence especially in the areas of safeguards, subsidies, countervailing and anti-dumping duty measures. *Fourth*, the United States began to undermine the independence and impartiality of WTO adjudicators by, *inter alia*, blocking the reappointment of Appellate Body Members in 2007, 2011 and again in 2016.[14] The current crisis of the WTO dispute settlement system was thus already looming for some time. However, it became acute when, as mentioned above, the United States blocked the process of (re-)appointment of Appellate Body members each time a vacancy arose in June, July and December 2017, in September 2018 and in December 2019.[15] In

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[12] See C. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (American Enterprise Institute Press, 2001), 1 – 68.

[13] See C.-D. Ehlermann, *Some Personal Experiences as Member of the Appellate Body of the WTO*, Policy Papers, RSC No. 02/9 (European University Institute, 2002), 14.

[14] The examples of Jennifer Hillman (US) in 2011 and Seung Wha Chang (Korea) in 2016 were highly publicized.

[15] The last time new Appellate Body members were appointed was in late 2016. Hyun Chong Kim (Korea) and Zhao Hong (China) were appointed by the DSB as of 1 December 2016. Mr Kim resigned July 2017 to become Korea's Minister of Trade; Ms Zhao's term ended on 30 November 2020.

justification of this blockage, the United States stated that it had, and has, serious 'concerns' regarding the functioning of the Appellate Body. The United States criticizes the Appellate Body for alleged 'judicial overreach' as well as 'blatant disregard' for certain procedural and institutional rules.[16]

As to the so-called judicial overreach, the United States accuses the Appellate Body, *first*, of judicial activism, *i.e.*, of creating, through erroneous interpretations of WTO provisions, obligations the United States had never agreed to; *second*, of rendering 'advisory opinions' on issues that were not strictly necessary to rule upon to resolve the dispute at hand; *third*, of reviewing factual findings of the panels and in particular findings on the meaning of domestic law, because they fall outside the Appellate Body's mandate under Article 17.6 of the DSU; and, *fourth*, of considering past Appellate Body reports as having binding precedential value. As to the alleged disregard for procedural and institutional rules, the United States objects in particular, *first*, to the Appellate Body exceeding the mandatory 90-day timeframe for appellate review without the explicit agreement of the parties, and, *second*, to

[16] See US President's 2018 Trade Policy Agenda, p. 22 ff, at https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017; and United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, February 2020, at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf. See also the statement by the United States at the DSB meetings on 22 June 2018 concerning Article 17.5 DSU and the 90-day timeframe for appellate review, on 27 August and 26 September 2018 concerning Article 17.6 DSU and appellate review of panel findings of fact, including on the meaning of domestic law; and on 29 October 2018 concerning the issuance of advisory opinions on issues not necessary to resolve a dispute.

allowing, pursuant to Rule 15 of the Working Procedures for Appellate Review, out-going Appellate Body Members to complete the disposition of appeals, which were assigned to them before their term in office ended. It should be noted, that with the exception of the last concern (regarding the completion of the disposition of appeals by outgoing Appellate Body members), the United States had also under the Obama and G.W. Bush administrations voiced the same or very similar concerns regarding the functioning of the Appellate Body. However, the Trump administration, by blocking the (re-)appointment of Appellate Body members, transformed these 'concerns' into an existential crisis of the Appellate Body. As mentioned above, on 11 December 2019, the number of Appellate Body members in office fell below the minimum of three required to hear an appeal and the resulting paralysis of the Appellate Body has severely undermined the effectiveness and credibility of the whole WTO dispute settlement system. Unless an agreement is reached on how to address the United States' concerns regarding the functioning of the Appellate Body, the WTO's unique experiment with binding international adjudication will sadly come to an end.

2019 Draft General Council Decision on the Functioning of the Appellate Body

In search of an agreement of overcome the current crisis, no less than 22 WTO Members as well as the WTO's African Group have, in late 2018 and in 2019, tabled, either individually or jointly, position papers with proposals to address the US concerns regarding the functioning of the Appellate Body.[17] Some of these position papers, such as

[17] Communication from the European Union, China, India and Montenegro to the General Council, WT/GC/W/753, dated 26

the Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, the Republic of Korea, Iceland, Singapore, Mexico and Montenegro of 10 December 2019, were rather 'skeptical' about the legitimacy of the concerns raised by the United States and made proposals which safeguarded the key features of WTO appellate review.[18] Other position papers, such as the Communication by Japan, Australia and Chile, dated 18 April 2019 and the Communication from Brazil, Paraguay and Uruguay of 25 April 2019 were much more sympathetic to the US concerns and proposed to alter some key features of WTO appellate review.[19] Finally,

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November 2018 and WT/GC/W/753/Rev.2, dated 11 December 2018; Communication from the Separate, Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the General Council, WT/GC/W/763 Rev., dated 8 April 2019; Communication from Thailand to the General Council, WT/GC/W/769, dated 26 April 2019; and Communication from the African Group to the General Council, WT/GC/W/776, dated 26 June 2019. See also, more generally, European Commission, *Concept Paper on WTO Modernisation*, Part 3 on Future EU Proposals on Dispute Settlement, dated 20 September 2018; and Communication from Canada, *Strengthening and Modernizing the WTO: Discussion Paper*, Theme 2: Safeguarding and Strengthening WTO Dispute Settlement, JOB/GC/201, dated 21 September 2018.

[18] See Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico and Montenegro to the General Council, WT/GC/W/752/Rev. 2, dated 11 December 2018. On the US reaction to the Communication from the EU, China, Canada, India and others, see Statements by the United States at the Meeting of the WTO General Council on 12 December 2018 (agenda items 7 and 8). https://geneva.usmission.gov/2018/12/12/statements-items-7-and-8-by-the-united-states-at-the-meeting-of-the-wto-general-council/.

[19] Communication from Japan, Australia and Chile to the General Council, WT/GC/W/768, dated 18 April 2019, and WT/GC/W/768/Rev., dated 26 April 2019; and Communication from Brazil, Paraguay and Uruguay to the General Council, WT/GC/W/767/Rev. dated 25 April 2019

communications like those of Thailand, dated 26 April 2019, and Honduras, dated 21 and 29 January and 4 February 2019, respectively, tried to strike a middle ground.[20] However, almost all WTO Members were, and still are, of the view that whatever legitimate concerns the United States might have regarding the functioning of the Appellate Body, these concerns did not justify the obstruction of the appointment process, which resulted in the paralysis of the Appellate Body. WTO Members repeatedly, and in growing numbers, called upon the United States to allow for the appointment of new Appellate Body members. At the meeting of the DSB on 27 October 2021, no less than 121 WTO Members requested the DSB to take immediately the decision to unblock the appointment process.[21] In response to this request, the United States stated, as it had done in response to numerous similar requests in the past, that it was not in a position to support the proposed decision as it 'continued to have systemic concerns with the Appellate Body'. According to the United States, 'Members had to undertake fundamental reform if the system was to remain viable and credible'. The United States stated that it 'looked forward to … constructive engagement with Members at the appropriate time'.[22]

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[20] Communication from Thailand to the General Council, WT/GC/W/769, dated 26 April 2019; and Communications from Honduras to the General Council, WT/GC/W/758, dated 21 January 2019, WT/GC/W/759, dated 21 January 2019, WT/GC/W/760, dated 29 January 2019, and WT/GC/W/761, dated 4 February 2019.

[21] Dispute Settlement Body, Minutes of the meeting held on 30 August 2021, WT/DSB/M/455, dated 27 October 2021, paras. 8.1-8.27. Included in this number are the EU Members States on whose behalf the European Union spoke.

[22] *Ibid.*, para. 8.23.

In December 2018, the WTO General Council appointed Ambassador David Walker of New Zealand as 'Facilitator' to resolve the differences among WTO Members on the functioning of the Appellate Body.[23] Over the next 10 months, Amb. Walker, met with WTO Members, in small groups and in open-ended informal meetings to discuss the proposals for reform tabled and seek a way out of the crisis. The United States, however, did not table any reform proposal and, reportedly, did not actively engage in the informal meetings but only sent note takers to meetings. Based on the proposals made by Members and the extensive discussions on these proposals, Amb. Walker submitted on 15 October 2019 to the General Council a Draft Decision on the Functioning of the Appellate Body.[24] The Draft Decision aimed at 'seeking workable and agreeable solutions to improve the functioning of the Appellate Body', in the hope to avoid the paralysis of the Appellate Body as from December 2019.[25] The Draft Decision, *inter alia*, addressed: *first*, the US concern regarding judicial activism, by stating that, pursuant to Articles 3.2 and 19.2 of the DSU, Appellate Body rulings 'cannot add to or diminish the rights and obligations provided in the covered agreements; *second*, the US concern regarding binding precedent, by stating that precedent is 'not created through WTO dispute settlement proceedings', but that consistency and predictability in the interpretation of WTO law is 'of significant value to Members'; *third*, the US concern

[23] Ambassador Walker served as DSB chair and later as General Council chair.
[24] General Council, Informal Process on Matters related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand), JOB/GC/222, dated 15 October 2019, Annex.
[25] *Ibid.*, para. 1.22

regarding advisory opinions rendered by the Appellate Body, by stating that the latter may only address issues raised by the parties and to the extent necessary to resolve the dispute; *fourth,* the US concern regarding appellate review of panel findings on the meaning of municipal law, by stating that the meaning of municipal law is to be treated as a matter of fact and therefore, pursuant to Article 17.6 of the DSU, not subject to appellate review; *fifth,* the US concern regarding the 90-day timeframe for appellate review, by stating that, pursuant to Article 17.5 of the DSU, the Appellate Body is obligated to issue its report within 90 days of the notice of appeal and that this timeframe can only be extended with the agreement of the parties; and *sixth,* the US concern regarding Rule 15 of the Working Procedures for Appellate Review, by providing that only the DSB can authorize an outgoing Appellate Body member to complete the disposition of an appeal after the expiry of her/his term in office, provided that the hearing in the appeal took place prior to the expiry of the term. The Draft General Council Decision was a carefully constructed compromise between the Members engaged in the discussions on the functioning of the Appellate Body, which preserved the core features of WTO appellate review while at the same time addressing US concerns. However, the hope that the Draft Decision would allow the WTO to avoid the paralysis of the Appellate Body as from 11 December 2019 was very short-lived. On the same day as it was submitted to the General Council, the United States rejected the Draft Decision as insufficient to address its concerns. According to the United States, 'the fundamental problem was that the Appellate Body was not respecting the current, clear language of the DSU' and that some Members 'appeared willing to tolerate

– or even encourage – those actions'.[26] For the United States, the fundamental question, which Members failed to address, was why the Appellate Body felt free to disregard the clear text of the DSU and other WTO agreements.[27] In response to this question, the United States suggested that the failure of the WTO negotiating function led 'to unchecked institutional creep by the Appellate Body as Members pushed to achieve through litigation what they had not achieved or could not achieve at the negotiating table'.[28] The United States observed that some Members apparently considered the Appellate Body to be an independent international court which 'inherently had more expansive authority than what was provided in the DSU, for example, to create jurisprudence and fill gaps in the WTO Agreements'.[29] The United States also noted that 'some Appellate Body members viewed themselves as "appellate judges" serving on a "World Trade Court" that was the "centerpiece" of the WTO dispute settlement system, rather than one component of it'.[30] The United States argued that

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[26] General Council, Minutes of Meeting, held on 15 and 16 October 2019, WT/GC/M/180, dated 3 December 2019, para. 4.51.

[27] *Ibid*., para. 4.51 and 4.52. See also General Council, Minutes of Meeting, held on 9 December 2019, WT/GC/M/181, dated 24 February 2021, para. 5.103.

[28] *Ibid*., para. 4.52. See also General Council, Minutes of Meeting, held on 9-10 December 2019, WT/GC/M/181, dated 24 February 2021, para. 5.106.

[29] *Ibid*., para. 4.53. See also General Council, Minutes of Meeting, held on 9-10 December 2019, WT/GC/M/181, dated 24 February 2021, para. 5.107.

[30] See e.g. Claus-Dieter Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization', *Journal of World Trade*, 2002, 605-639; Peter Van den Bossche, 'The Making of the "World Trade Court": The Origins and Development of the Appellate Body of the World Trade Organization', in R. Yerxa & B. Wilson (eds),

'such an expansive vision of the Appellate Body was not reflected in the DSU and had not been agreed to by the United States'.[31] The United States' position on the functioning of the Appellate Body arguably reflects: *first*, its strong disagreement with especially those parts of the Appellate Body jurisprudence which, in its view, restricts the ability of the United States to protect its domestic industry from import competition by using trade remedy measures; and *second*, its wish to return to a pre-WTO situation in which a binding dispute settlement mechanism with quasi-judicial features would not interfere with US sovereignty and it could use its economic and other power to 'resolve' trade disputes with trading partners.[32] In sharp contrast with the very critical assessment by the United States of the functioning of the Appellate Body, the European Union stated at the General Council meeting of 9 December 2019, *i.e.*, two days before the Appellate Body

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Key Issues in WTO Dispute Settlement: The First Ten Year (Cambridge University Press, 2005), 63-79; and Peter Van den Bossche, 'From Afterthought to Centerpiece: The Appellate Body and its Rise to Prominence in the World Trading System', in G. Sacerdoti, A. Yanovich and J. Bohannes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006), 289-325.

[31] General Council, Minutes of Meeting, held on 15 and 16 October 2019, WT/GC/M/180, dated 3 December 2019, para. 4.53. See also General Council, Minutes of Meeting, held on 9-10 December 2019, WT/GC/M/181, dated 24 February 2021, para. 5.107.

[32] On 17 June 2020, during briefings to the US House Ways and Means Committee and Senate Finance Committee, Amb. Robert Lighthizer, the United States Trade Representative, reportedly said that 'he would be content if the AB is never restored, arguing that the WTO members need to talk about a new dispute settlement system' and that 'he believes the original (GATT) non-binding system that encouraged countries to work out their disputes was better'. See Washington Trade Daily, 18 June 2020, www.washingtontradedaily.net.

was paralyzed by the United States, that the Appellate Body 'had served well all Members in an independent, highly professional and, given the circumstances, very efficient manner' and that it 'therefore commended all the present and past members of the Appellate Body on their work as well as the staff working on the Appellate Body's secretariat.'[33] The European Union argued that: 'Members should remedy the current situation by boosting the WTO's negotiating arm rather than chopping off its dispute settlement arm'.[34] Other WTO Members, including China, made similar statements of strong support for the WTO dispute settlement system in general and the Appellate Body in particular.[35] Those WTO Members disagreed with the United States that the Appellate Body had systematically engaged in judicial overreach and demonstrated consistent disregard for procedural and institutional rules.[36]

2020 Multi-Party Interim Appeal Arbitration Arrangement

In the wake of the failure to adopt the Draft General Council Decision on the Functioning of the Appellate Body, 17 WTO Members announced on 24 January 2020 that, while they remain committed to finding a solution to the Appellate Body crisis, they would work together 'towards putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among

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[33] See General Council, Minutes of Meeting, held on 9-10 December 2019, WT/GC/M/181, dated 24 February 2021, para. 5.140.
[34] *Ibid*., para. 5.138.
[35] *Ibid*., paras. 5.176-5.183
[36] See e.g. Statement by Amb. ZHANG Xiangchen (China) at the WTO General Council meeting on 15 & 16 October 2019 on http://wto2.mofcom.gov.cn/article/chinaviewpoins/201910/20191002905004.shtml.

themselves'.[37] At the initiative of the European Union, they instructed their officials to 'expeditiously finalise work' on a multi-party arrangement for appeal arbitration under Article 25 of the DSU. This DSU article provides for 'arbitration within the WTO as an alternative means of dispute settlement'. On 27 March 2020, 16 WTO Members announced that they had reached an agreement on the *Multi-Party Interim Appeal Arbitration Arrangement under Article 25 of the DSU*, commonly referred to as the 'MPIA'. This MPIA became effective on 30 April 2020, when it was notified to the DSB.[38] The MPIA is an interim arrangement intended 'to preserve, in disputes among Members participating in the MPIA, a functioning and two-step dispute settlement process, as envisaged by the DSU'.[39] It is designed to remain in place only until a lasting

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[37] See https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf. In 2019, the European Union had already concluded bilateral arrangements for appeal arbitration under Article 25 of the DSU with Canada and Norway, under which former Appellate Body Members would serve as appeal arbitrators. See e.g. for the EU/Canada Arrangement https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf

[38] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, JOB/DSB/1/Add. 12, dated 30 April 2020, https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf. Note that out of the 17 WTO Members which in January 2020 committed themselves to working towards an appeal arbitration arrangement, only Korea did not become, and still is not, a party to the MPIA. When the MPIA was notified to the DSB on 30 April 2020, 19 WTO Members had signed up to this arrangement.

[39] See EU Statement at the Regular DSB meeting – 29 June 2020, Agenda point 13, available at https://eeas.europa.eu/delegations/world-trade-organization-wto/81752/eu-statement-regular-dsb-meeting.

improvement to the Appellate Body situation is found.[40] The MPIA applies to all disputes between participating WTO Members.[41] Parties to the MPIA commit not to appeal panel reports to the paralyzed Appellate Body, *i.e.*, agree not to appeal panel reports into the void, but will resort to appellate arbitration under Article 25 of the DSU.[42] As explicitly stated in the MPIA, appeal arbitrations under this arrangement are to a large extent governed, with any necessary adjustments, by the provisions of the DSU and other rules and procedures applicable to appellate review under the DSU, such as the Working Procedures for Appellate Review.[43] At the same time, the MPIA contains some procedural innovations, to enhance the procedural efficiency and streamline the proceedings.[44] In this regard, note that the MPIA states that 'the parties *request* the arbitrators to issue the award within 90 days following the Notice of Appeal' (emphasis added)[45] and that 'to that end,

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[40] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, JOB/DSB/1/Add. 12, dated 30 April 2020, paras. 1 and 15 and Annex 1, para. 2.

[41] See *ibid.*, para. 9 and Annex 1, para. 6. With exception of those where the interim panel report has already been issued by the date the MPIA enters into force or by the date of its enforcement by a new participant.

[42] However, if neither party appeals under this appeal arbitration procedure, the panel report is circulated and adopted by the DSB in the usual way. The MPIA is to be put into practice in specific disputes through individual appeal arbitration agreements based on the model annexed to the arrangement.

[43] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, JOB/DSB/1/Add. 12, dated 30 April 2020, Annex 1, para. 11.

[44] See *ibid.*, Annex I, para. 12.

[45] *Ibid*. However, Annex 1, para. 14 suggests that this is more than a mere 'request'. Para. 14 states: 'On a proposal from the arbitrators, the parties may agree to extend the 90-day time-period for the issuance of

the arbitrators may take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process'.[46] Such organizational measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required.[47] To issue awards within the 90-day timeframe, the MPIA arbitrators 'may also *propose* substantive measures to the parties' (emphasis added).[48] In this regard, explicit reference is made to 'an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU'.[49] The MPIA also circumscribes the mandate

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the award'. Party consent may thus be required to exceed the 90-day timeframe. Note that the Draft General Council Decision on the Functioning of the Appellate Body of 15 October 2019 stated: 'Consistent with Article 17.5 of the DSU, the Appellate Body *is obligated* to issue its report no later than 90 days from the date a party to the dispute notifies its intention to appeal' (emphasis added) and 'In cases of unusual complexity or periods of numerous appeals, the parties may agree with the Appellate Body to extend the time-frame for the issuance of the Appellate Body report beyond 90 days'. Neither the Draft Decision nor the MPIA address the issue of the legal value of a report or award issued after 90-day timeframe without the parties' consent.

[46] *Ibid*. Query whether these measures will be helpful. *First*, in 2015, the Appellate Body already consulted WTO Members on the possibility of imposing page limits. At the time, most WTO Members consulted were less than enthusiastic about the imposition of page limits. *Second*, the Working Procedures for Appellate Review already provide for many time limits and deadlines, which are (too) demanding. *Third*, with the exception of the original and compliance proceedings in *EC and certain member States – Large Civil Aircraft (2011, 2019)* and *US – Large Civil Aircraft (2nd complaint) (2012, 2019)*, there has always been only one hearing and the duration of these hearings seldom exceeded two days.

[47] See *ibid*.

[48] *Ibid*., Annex 1, para. 13.

[49] *Ibid*. It is difficult to imagine that the party which considers that the panel failed to make an objective assessment of the facts will ever be

of the appeal arbitrators. Appeal arbitrators are to review only issues of law, may only address the issues necessary to resolve the dispute, cannot add to or diminish the rights and obligations provided in the WTO agreements and are to provide consistency and predictability in the interpretation of these rights and obligations.[50] Note, however, that mandate of appeal arbitrators under the MPIA does not in any meaningful way differ from the mandate of Appellate Body members under Article 17 of the DSU. According to the MPIA, appeals are dealt with by three arbitrators selected randomly from a pool of 10 standing arbitrators.[51] The pool of arbitrators is made up of persons of recognized authority and demonstrated expertise.[52] In July 2020, the parties to the MPIA notified the DSB that they had agreed on the composition of the pool of arbitrators.[53] The appeal arbitrators will be provided with appropriate administrative

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willing and/or able to accept the arbitrators' proposal to drop its Article 11 DSU claim(s) of error.

[50] See *ibid.*, Preamble and Annex 1, paras. 9-10.

[51] Para. 5 of the MPIA states: 'In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable'. To give effect to this provision, para. 8 of Annex 1 of the MPIA provides that arbitrators '*may* discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators ...' (emphasis added). It is unclear whether there will be an 'exchange of views' in each appeal arbitration, as is the case in appellate proceedings under Article 17 of the DSU.

[52] See *ibid.*, paras. 4-6, and Annex 1, para. 7.

[53] See https://trade.ec.europa.eu/doclib/docs/2020/august/tradoc_158911.12-Suppl.5%20(002).pdf. The MPIA Pool includes: Mateo Diego-Fernández Andrade (Mexico), Thomas Cottier (Switzerland), Locknie Hsu (Singapore), Valerie Hughes (Canada), Alejandro Jara (Chile), José Alfredo Graça Lima (Brazil), Claudia Orozco (Colombia), Joost Pauwelyn (European Union), Penelope Ridings (New Zealand), and Guohua Yang (China).

and legal support, subject to the necessary guarantees of quality and independence.[54] Pursuant to Article 25 of the DSU, the appeal arbitration awards are final and binding on the parties, and the panel reports will be attached to the awards.[55] Article 21 of the DSU, regarding the surveillance of implementation including compliance proceedings, as well as Article 22 of the DSU, regarding compensation and arbitration on the suspension of concessions, apply to arbitration awards emanating from Article 25 procedures.[56] In its statement at the DSB meeting of 29 June 2020, when the MPIA was introduced by its proponents, the United States underlined that it does not object to WTO Members utilizing Article 25 of the DSU or other informal procedures to help resolve disputes.[57] If any Member considers that use of the arbitration provision in Article 25 may assist it in securing a positive solution to a dispute, as foreseen under Article, the United States in principle supported such efforts. The United States objected, however, to any arrangement that would 'perpetuate the failings' of the Appellate Body. According to the United States, the MPIA

[54] See *ibid.*, para. 7. The MPIA envisages that the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work, only to appeal arbitrators. The MPIA parties requested the Director General to ensure the availability of a support structure meeting these criteria.

[55] See also *ibid*., Annex 1, para. 15 and footnote 10.

[56] See *ibid*, Annex 1, para. 17.

[57] See Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, June 29, 2020, Multi-Party Interim Appeal Arbitration pursuant to Article 25 of the DSU (JOB/DSB/1/ADD. 12), Agenda item 13, available at https//Geneva.usmission.gov/wp-content/upload/sites/290/Jun29.DSB_.Stmt_.as-deliv.fin_.public13218.pdf.

'incorporates and exacerbates some of the worst aspects of the Appellate Body's practices', and it does so by: *first*, weakening the mandatory deadline for completing Appellate Body reports; *second*, contemplating appellate review of panel findings of fact; *third*, failing to reflect the limitation on appellate review to those findings necessary to resolve the dispute; *fourth*, promoting the use of precedent by identifying 'consistency' (regardless of correctness) as a guiding principle for decisions; and *fifth*, encouraging arbitrators to create a body of law through litigation.[58] For the United States, the real goal of the MPIA is not to help the participants resolve disputes but to create an ersatz Appellate Body that would, at best, 'perpetuate the failings' of the original Appellate Body.[59] The United States has made it known that it objects to use any WTO financial or staff resources in support of appeal arbitration under the MPIA.[60]

On 1 January 2022, 26 WTO Members were a party to the MPIA, including Brazil, Canada, China, the European Union and Mexico, *i.e.*, five of the ten most frequent users of the WTO dispute settlement system. The number of parties to the MPIA is expected to increase further. At present, the parties in seven disputes have notified the DSB that they have agreed – under the terms of the MPIA – to Procedures for Arbitration under Article 25 of the DSU.[61] It

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[58] *Ibid*.
[59] *Ibid*.
[60] See Bryce Baschuk, *U.S. Pledges to Block Funding for EU's WTO Appellate Body Proxy*, Bloomberg Law, 12 June 2020, https://news.bloomberglaw.com/international-trade/u-s-pledges-to-block-funding-for-eus-wto-appellate-body-proxy
[61] See https://ielp.worldtradelaw.net/dsu-25-interim-appeals/. See e.g. *Canada – Measures Concerning Trade in Commercial Aircraft*

is expected that the appeal, if any, in *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico* (DS524), will, in early 2022, be the first appeal heard and decided by an MPIA tribunal. Others will definitely follow. However, the MPIA is but an interim and partial 'solution' to the current crisis of WTO dispute settlement.

Possible Ways to Overcome the Current Crisis

To preserve the rules-based multilateral trading system, it is imperative that the Appellate Body crisis and its destructive impact on the effectiveness and credibility of the WTO dispute settlement system are addressed. While the MPIA is at present, and perhaps for some time, all that is possible to address the crisis, the WTO requires an effective dispute settlement system involving all its Members, including the United States. While the United States has been very clear about what it considers to be the errors of the Appellate Body, it has been quite vague regarding what kind of dispute settlement system it would want the WTO to have. Merely stating that this system should be the system provided for in the DSU is not helpful when Members differ

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(complaint by Brazil), Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS522/20, dated 3 June 2020; *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (complaint by the European Union, Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS591/3, dated 15 July 2020; *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico* (complaint by Mexico), Agreed Procedures for Arbitration under Article 25 of the DSU, WT7524/5/Rev.1, dated 2 December 2021; *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia* (complaint by Australia), Agreed Procedures for Arbitration under Article 25 of the DSU WT/DS602/3, dated 20 December 2021.

fundamentally as to what that system is. What gives hope, however, is that other WTO Members have shown considerable willingness to address the concerns of the United States regarding the functioning of the Appellate Body, even though they do not share (all of) these concerns. The 2019 Draft General Council Decision on the Functioning of the Appellate Body is the best example of this. Future negotiations, if and when the United States is willing and able to engage in them, could and should build on this Draft Decision, which preserves the core features of binding, two-stage, independent and impartial dispute resolution. However, these future negotiations should not be limited to 'fixing' the Appellate Body, but also address the known shortcomings of the other stages of WTO dispute settlement. WTO Members have been discussing these shortcomings in the consultation, panel and implementation stages since 1998, first in the context of the DSU review discussions, and subsequently in the context of the Doha Development Round negotiations on DSU reform. In the course of the years, there has been a large number of useful proposals for improvement of the WTO dispute settlement system.[62]

In reflecting on the WTO dispute settlement system of the future, a first question that needs to be answered is whether WTO dispute settlement really needs appellate review. In a paper published in 2020, Bernard Hoekman and Petros Mavroidis argue that it does not, but that what is needed, instead, is the establishment of a permanent panel body of 15 panelists – full-time adjudicators with no affiliation with any government and appointed for a period of eight years,

[62] All publicly available documents relating to the DSU reform negotiations can be found on the WTO website as TN/DS documents.

non-renewable.[63] This is by no means a new idea. The European Union already tabled a proposal for such permanent panel body in 1998.[64] The establishment of a permanent panel body does, however, not make appellate review redundant. There is no doubt that, if wisely selected, permanent panelists would produce high-quality panel reports, which arguably may not need review. Also, to the extent that the permanent panel body would hear important cases *in plenum* and would have exchanges of views among all panelists in other cases, there would arguably be no need for appellate review to ensure the consistency of the case law. However, the need for appellate review remains. In many disputes, the key issues and interests at stake are too important to be decided in a one-stage dispute settlement system. Also, parties often have more focused and detailed legal argumentation on appeal than they had before the panel. This has allowed the Appellate Body to come to better motivated decisions. In general, the decisions reached by a two-stage dispute settlement system have more legitimacy and authority than decisions reached by a single-stage dispute settlement system. Hoekman and Mavroidis see single-stage WTO dispute settlement as a solution to the

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[63] See Bernard Hoekman and Petros Mavroidis, 'To AB or Not to AB? Dispute Settlement in WTO Reform', *Journal of International Economic Law*, 2020, 703-722.

[64] See Dispute Settlement Body, Special Session, Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, dated 13 March 2002. Note that this proposal, first made in the context of the DSU review discussions, and repeated in 2002 in the context of the Doha Development Round negotiations on DSU reform, got very little support from other WTO Members. See also Thomas Cottier, 'The WTO Permanent Panel Body: A Bridge too Far?', *Journal of International Economic Law*, 2003, 187.

current crisis.[65] But is this so? Would a final, binding finding of WTO inconsistency by a permanent panel body be more acceptable to the United States (and others) than a finding of inconsistency by the Appellate Body? At present most WTO Members are strongly in favour a two-stage dispute settlement system. President Trumps's USTR, Robert Lighthizer, clearly was not, but where does the Biden administration stand on this?

If it is agreed that WTO dispute settlement needs appellate review, *i.e.*, that the WTO needs the Appellate Body, the next question is what the proper role of the Appellate Body in WTO dispute settlement is. In a paper published in 2021, Thomas Cottier argues that any reform of the WTO dispute settlement system should put panels at the heart of the system and that the role of the Appellate Body should be recalibrated.[66] While the Appellate Body has over the past two decades reviewed legal findings of panels in full and *de novo*, Cottier proposes that the Appellate Body should, in most cases, adopt a much more deferential standard of review. He proposes that the Appellate Body would apply a standard of reasonableness when reviewing most legal findings of a panel. The Appellate Body would limit itself to determine whether the panel finding appealed is properly argued and substantiated. If a panel's legal finding is based on a reasonable and legitimate interpretation of the law, the Appellate Body should, according to Cottier, uphold the panel's finding. In most appeals, the Appellate Body would therefore not develop its own line of legal argumentation on the issues on appeal, which is how the Appellate Body has understood its task in the past. While the standard of

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[65] See Hoekman & Mavroidis, *op. cit.*, 705 and 718.

[66] Thomas Cottier, 'Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review', *Journal of International Economic Law*, 2021, 1-23.

reasonableness would be the Appellate Body's principal standard of review of legal findings, it would not be its only standard. Cottier suggests that for panel findings concerning, what he refers to as, 'constitutional issues' of WTO law, the proper standard of appellate review would still be full and *de novo* review. Such 'constitutional issues' would include the interpretation of fundamental principles and exceptions, special and differential treatment, issues relating to the rule of law, governance and transparency, and issues relating to the relationship between WTO law and other areas of international law. Situations in which panels have adopted conflicting interpretations of WTO law would, according to Cottier, also justify full and *de novo* review. This is a very interesting line of thinking but how is the Appellate Body to distinguish between findings on 'constitutional issues', which warrant full and *de novo* review, and findings on other issues which would be subject to only a review of their reasonableness. Does a finding on the legality of the zeroing methodology raise a 'constitutional issue'? Arguable not, but this is nevertheless a politically very sensitive and controversial issue for some WTO Members. Does a finding on the meaning of the concept of 'public body' raise a 'constitutional issue'? Probably yes, as it concerns the fundamental question of whether the WTO system accommodates state-capitalist as well as market-capitalist economic systems. Generally speaking, many of the appeals heard by the Appellate Body raise important questions of the policy space left to a WTO Member under WTO law, and thus questions regarding the extent to which WTO law limits national sovereignty. Do these questions not raise issues of a constitutional nature and do panel findings on such issues not warrant full and *de novo* appellate review? Cottier himself recognizes the problem of distinguishing between 'constitutional issues'

and other issues, and writes that: 'there is no formal difference between fundamental principles and technical or plain rules in treaty law. Often they are overlapping'.[67] In determining the appropriate standard of appellate review, a differentiation between findings raising 'constitutional issues' or other issues may not be helpful. However, Cottier's call for more deference by the Appellate Body to panel findings deserves careful consideration. Such deference may be warranted if and when the current *ad hoc* panels are replaced by a permanent panel body of the kind already proposed by the European Union in 1998. The establishment of a permanent panel body would, however, constitute a further 'judicialization' of WTO dispute settlement and it is doubtful that this is acceptable to the United States.

Conclusion

As long as there is no agreement on the reform of the Appellate Body, appellate review of panel findings will only be available under the MPIA and only to the parties to the MPIA. This state of affairs, while obviously far from ideal, does offer a welcome opportunity for MPIA tribunals to experiment with approaches to appellate review different from the approach taken by the Appellate Body. While the appeal arbitration procedure under the MPIA is based on the substantive and procedural aspects of appellate review pursuant to Article 17 of the DSU, the MPIA also allows – as noted above – for flexibility, and room for experimentation, in order to improve appellate review. MPIA tribunals could and should experiment with a more deferential standard of appellate review, possibly by

[67] *Ibid*., 16-17.

drawing a distinction between findings on ‘constitutional issues’ and findings on other issues, as suggested by Thomas Cottier. MPIA tribunals could and should also experiment with different ways of addressing other problems which have haunted the Appellate Body and are high on the list of concerns the United States has with the Appellate Body, such as judicial activism, advisory opinions, the 90-day timeframe for appellate review, the role of precedent, and the review of factual findings of the panel. Adopting a more deferential standard of appellate review – if it can be consistently applied – may mitigate some of these concerns but will not make them disappear. MPIA tribunals will be confronted with the same realities and constraints as the Appellate Body struggled with for over two decades. Experimentation by MPIA tribunals with different approaches to appellate review may result in a better understanding of, and appreciation for, the approach taken by the Appellate Body. However, experimentation with different approaches to appellate review may also prepare the ground for the reform of the Appellate Body and more broadly WTO dispute settlement. Carefully preparing that ground for reform through experimentation by MPIA tribunals is better than now rushing into reform negotiations which – in the current political context – may result in a new WTO dispute settlement system not worth having. There is a future for the Appellate Body and WTO dispute settlement, but it would be wise not to seek reform in haste and without careful consideration of what kind of appellate review and dispute settlement will serve the rules-based multilateral trading system best.