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Disruptive Construction or Constructive Destruction?

Reflections on the Appellate Body Crisis

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Abstract

Over the past few months, the blockage of the Appellate Body appointment process by the United State (hereinafter U.S.) has emerged as the biggest existential threat to the World Trade Organization (hereinafter WTO). In response to the criticisms from other WTO Members, the U.S. justified its action as a way to raise people's attention on long-standing problems in the Appellate Body (hereinafter AB). Are the U.S. criticisms valid? Even if assuming that the U.S. allegations are correct, is the specific approach that the U.S. has taken legitimate? Drawing from both the treaty text and jurisprudence of WTO law, this Chapter argues that the U.S. criticisms, especially those concerning the systemic issues in WTO dispute settlement, are deeply flawed. Moreover, the paper also argues that, regardless of the validity of the substantive claims of the U.S., the U.S. has chosen the wrong approach by holding hostage the entire AB appointment process. The paper concludes with practical suggestions on how to overcome the AB crisis and restore its functions.

Key words: Appellate Body, Dispute Settlement, *Stare Decisis*, Precedent, Common Law, Civil Law.

1. Disruptive Construction: The U.S. Criticisms

The U.S. blockage started on 11 May 2016, when the U.S. government announced that they would block the reappointment of AB member Prof. Seung Wha Chang. In a joint statement issued by Deputy United States Trade Representative (hereinafter USTR) Michael Punke and USTR General Counsel Tim Reif, the U.S. stated that:

> *[T]he United States is strongly opposed to Appellate Body members deviating from their appropriate role by restricting the rights or expanding the obligations of WTO Members under the WTO agreements . . . . The United States will not support any individual with a record of restricting trade agreement rights or expanding trade agreement obligations.* [1]

At the Dispute Settlement Board (hereinafter DSB) meeting held later the same month, the U.S. explained its actions by naming four reports in which Prof. Chang allegedly "add[ed] to or diminish[ed] the rights and obligations provided in the covered agreements."[2] In three of the four reports, the U.S. accused Prof. Chang of addressing issues which were moot (*Argentina — Financial Services*), not appealed (*India — Agricultural Products*), or not raised by parties (*US — Countervailing Measures (China)*).[3] According to the U.S., these amounted to *obiter dicta* as they are not related to "issues necessary to resolve the dispute".[4] As to the fourth report (*US — Countervailing and Anti-Dumping Measures (China)*), the U.S. claimed that the AB has adopted "a very problematic and erroneous approach to reviewing a Member's domestic law" by "substitut[ing] the judgment of WTO adjudicators for that of a Member's domestic legal system as to what is lawful under that Member's domestic law".[5]

However, the U.S. opposition turned out to be short-lived, as the U.S. agreed to the launch of the appointment process for the vacancy left by Prof. Chang. On 23 November 2016, Mr. Hyun Chong Kim of Korea was appointed as the successor to Prof. Chang.[6]

After Donald Trump took the office of U.S. president in January 2017, however, things started to take wrong turns. 2017 witnessed the departure of two AB members, i.e., Mr. Ramirez-Hernandez and Prof. Van den Bossche, whose terms expired on 30 June 2017 and 11 December 2017 respectively. Initially, the selection process for their replacements were held up as WTO Members debated over whether a single

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[1] Caporal J (2016) Debate Erupts over US Blocking Korean Appellate Body Reappointment. Inside U.S. Trade. https://insidetrade.com/daily-news/debate-erupts-over-us-blocking-korean -appellate-body-reappointment.

[2] Mission of the United States, *Statement by the United States at the Meeting of the WTO Dispute Settlement Body* (23 May 2016), 1, 12-13. DSB. https://geneva.usmission.gov/wp-content/uploads/sites/290/May23.DSB_.pdf. These four reports: Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1 (adopted 9 May, 2016), at 431; Appellate Body Report*, India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R (adopted 19 June, 2015), at 2459; Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (adopted 16 Jan 2015), at 7; and Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1 (adopted 22 July 2014), at 3027.

[3] *Id.* at 13–15.

[4] *Id.* at 15.

[5] *Id.*

[6] WTO Appoints Two New Appellate Body Members, World Trade Organ (23 Nov 2016). https://www.wto.org/english/news_e/news16_e/disp_28nov16_e.htm.

selection process or two separate processes should be launched.[7] When a consensus started to emerged in June 2017, the U.S. indicated that it "was not in a position to support the proposed decision to launch a process to fill a position on the Appellate Body that would only become vacant in December 2017" due to "the ongoing transition in the U.S. political leadership and the recent confirmation of a new U.S. Trade Representative".[8] In July, however, the U.S. softened its approach by announcing that "despite the ongoing transition in its political leadership, it had received guidance that it would be acceptable to launch a process given the expiry of Mr. Ramírez's second term on 30 June 2017."[9]

Then on 1 August 2017, Mr. Kim tendered his resignation with immediate effect as he was tapped to be Korea's Minister of Trade, a position he formally assumed 3 days later.[10] When the DSB reconvened later that month, the U.S. raised several concerns. First, Mr. Kim had been a member of the AB division in the appeal on "*European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (DS442)", the report of which would only be issued on 5 September 2017.[11] Since the report would bear the name of Kim, who would no longer be an AB member by then, the U.S. is concerned with a potential violation of Article 17.1 of the Dispute Settlement Understanding (hereinafter DSU), which stated that "three [AB members] shall serve on any one case". Similarly, Mr. Ramírez was serving on the same appeal, even though his term had expired on 30 June 2017.[12] Thus, when the AB report is circulated, only one signatory would still be a sitting AB member. The U.S. considered these to be "unprecedented circumstances" and urged the DSB to "consider the implications and decide how to handle this situation". Moreover, in addition to this dispute, Mr. Ramírez also continued to serve on 2 other appeals after expiration of his term[13] pursuant to Rule 15 of Working Procedures for Appellate Review, which provides that "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". While recognizing the expediency of the Rule, the U.S. argued that the power to appoint and reappoint an AB member remained the prerogative of the DSB according to Article 17.2 of the DSU.

In summary, the U.S. insisted that the DSB should consider these systemic issues first before moving forward with the AB appointment process.[14] When other Members criticized the U.S. for linking up the two seemingly separate issues, the U.S. defended its position by stating that these are all part of its "long-standing concerns

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[7] *See* Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 February 2017*, para 11, WT/DSB/M/392 (20 Feb 2017).
[8] *See* Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 19 June 2017*, para 8.3, WT/DSB/M/398 (19 June 2017).
[9] *See* Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 20 July 2017*, para 5.14, WT/DSB/M/399 (20 July 2017).
[10] *See* Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 31 August 2017*, para 5.1, WT/DSB/M/400 (31 Aug 2017).
[11] *Id.* at para 5.3.
[12] *Id.* at para 5.4.
[13] *Id.* at para 5.5.
[14] *Id.* at para 7.3.

frequently expressed in the DSB" and "simply moving forward with filling vacancies risked perpetuating and leaving unaddressed the concerns that the United States believed required the urgent attention of the DSB".[15]

In the ensuing months, the U.S. continued its blockage of the AB selection process, but its "long-standing concerns" regarding the AB remained elusive. These concerns were finally spelt out in detail when the USTR published the 2018 President's Trade Policy Agenda on 28 February 2018.[16] Since then, these concerns have been repeated by the U.S. in several DSB meetings,[17] including most recently the DSB meeting on 25 February 2019.[18]

So far, the U.S. criticisms have been dropped like a laundry list every time they were mentioned and the U.S. has shown no intention to organize then in a meaningful way. In an effort to make some sense out of the U.S. concerns, I have grouped them into three areas:

1. Procedural issues: These include the AB's disregard of the 90-day deadline for appeals,[19] and the AB's frequent reference to Rule 15 since 2017 to allow the continued service of AB members on appeals even after their terms have formally expired.[20]
2. Substantive issues: These are mainly issues arising from decisions of panels and the AB which the U.S. regarded as adding to or diminishing the rights and obligations of WTO Members under the WTO Agreements. [21] Some of the leading examples include prohibition of zeroing practices in antidumping, the "public body" jurisprudence in subsidies and countervailing duties, the addition of "unforeseen development" requirement in safeguards, and consideration of factors unrelated to national origins when deciding whether a treatment is "less favourable" under Article 2.1 of the Technical Barriers to Trade (hereinafter TBT) Agreement.
3. Systematic issues: The U.S. also identified systemic problems relating to the judicial approach of the AB. For example, the AB has required the panels to treat their reports essentially as precedents and follow them absent "cogent reasons".[22] Another related problem is the increasing tendency of the AB to issue "*obiter*

[15] *Id*. at para 7.11.
[16] Office of the United States Trade Representative (2018) USTR's 2018 Trade Policy Agenda and 2017 Annual Report. AMERICA'S TRADE POLICY. http://americastradepolicy.com/ust rs-2018-trade-policy-agenda-and-2017-annual-report/.
[17] See for example, Mission of the United States (29 Oct 2018) Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 1, 53–54. DSB. https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf; Mission of the United States (21 Nov 2018), Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 1, 38-39. DSB. https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_Stmt _.as-deliv.fin_.public.pdf.
[18] Mission of the United States (25 Feb 2019) Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 1, 12–14. DSB. https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb25.DSB_.Stmt_.as-deliv.fin_.public.pdf.
[19] *Id*. at 24–25.
[20] *Id*. at 25–26.
[21] *Id*. at 22–24.
[22] *Id*. at 28.

dicta" or "advisory opinions" which are unnecessary to resolve disputes.[23] According to the U.S., such practices lack proper basis under the DSU and encroach on the exclusive power of the Ministerial Conference and General Council to "make laws" and adopt interpretations. The U.S. also raise concerns regarding the AB's review of the factual findings of the panel, which goes against the DSU as Article 17.6 explicitly limits the scope of appeals to legal issues only.[24] Similarly, the AB regards the meaning of a Member's domestic measure as a matter of law reviewable on appeal, while the U.S. argues that it should be a matter of fact and thus non-reviewable by the AB.[25]

To be fair, many of the U.S. criticisms are not illegitimate and they do raise important questions under WTO law. However, in my view, it is one thing to say that what the AB did was wrong, it is a totally different matter to expect a solution to the issue just by pointing figures at the AB. To start with, some of the problems are not of the AB's own creation. Take the procedural defects identified, for example. The disregard of the 90-day limit is because the deadline is simply impossible to meet in many cases due to the complexity of the legal issues and human resources constraints of the AB and its Secretariat. Similarly, Rule 15 was also introduced on grounds of expediency, as involving another AB member would only cause further delay to the appeal process. The proper solutions to these problems should have been increasing the resources available to the AB or, if that is not possible, relaxing the 90-day rule. As to the complaints on the substantive jurisprudence of the AB, I would note, first of all, that not all WTO Members share the U.S. view that these decisions are wrong. Even if we, for the purpose of argument, assume that there indeed are some jurisprudences that all WTO Members regard as problematic, the more appropriate action should be seeking official interpretation by the WTO General Council or Ministerial Conference. One might argue that this is not possible due to the difficulty for WTO Members to achieve consensus in recent years, but then it is a problem with the legislative branch of the WTO that should not be blamed on the AB.

The systemic issues, however, are much more difficult to tackle. This is because they reflect deeper questions about the nature of the WTO dispute settlement system. Moreover, issues of judicial approach are often part of the judicial style of a tribunal, and it is hard to dictate rules beforehand without severely limiting the judicial discretion accorded to the tribunal. In this Chapter, I will address these issues by first discussing whether the WTO has a system of precedents, then analysing whether the current WTO rules prohibit "*obiter dicta*" or "advisory opinion".[26]

2. A System of Precedents?

[23] *Id.* at 26–27.
[24] *Id.* at 27.
[25] *Id.* at 27–28.
[26] Some of the arguments in the following sections are based on Gao (2018), p. 509–33.

There are two possible ways to argue that the WTO has a system of precedents. The first is arguing that the WTO legal system adopts the Common Law system, which implies the existence of a precedent system as it is a hallmark of Common Law. Even if this argument does not work, one may still argue that the WTO has rules allowing precedents. In this section, I will prove that neither argument is valid.

2.1 Common Law System?

It has long been debated whether the nature of WTO dispute settlement system is more similar with the Common Law System or Civil Law System. In my view, the WTO dispute settlement system has, on balance, more resemblance with the Civil Law System for the following reasons.

First, the main difference between the two legal systems lies in the source of law. While Civil Law countries only recognize formal legislation as the only source of law, Common Law jurisdictions tend to include judicial decisions or judge-made law as a source as well.[27] In the WTO, the paramount role of formal legislations has been repeated *ad nauseam*. These legislations are known, in the WTO parlance, as "covered agreements", i.e., agreements listed in Appendix 1 of the DSU.[28] In the DSU, the phrase "covered agreement" appeared 72 times in the main text and seven times in the Appendixes and footnotes in either singular or plural forms. The key provision is Article 3.2, which emphasizes that the purpose of the dispute settlement system is "to preserve the rights and obligations of Members under the covered agreements". It also warns that the DSB "cannot add to or diminish the rights and obligations provided in the covered agreements" in its recommendations and rulings, which is repeated verbatim in Article 19.1. Similarly, according to Article 7.1 and 11, the function of the panel is confined to examine the consistency of the challenged trade measure with the relevant provisions in the "covered agreements". Such slavish reliance on legislations can only be found in the Civil Law system.

The second difference is the role of the judge. While Common Law judges assume an active role as potential law-maker, the role of the judiciary in Civil Law countries is reduced to that of a technical[29] or even grammatical[30] interpreter within rigid parameters because of the monopolization of the law-making power by the legislature.[31] This approach is grounded in the idea that the Codes provide a complete and perfect set of legal text that can encompass "all cases that life could possibly offer"[32] and judges are "merely applying pre-existing rules—the rules laid down in

[27] *See* Dainow (1966-1967), pp. 423–24. *See also* Sacerdoti (2011), p. 4.
[28] See Understanding on Rules and Procedures Governing the Settlement of Dispute art. 1.1, 15 Apr 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] and Appendix 1 of the DSU.
[29] Dainow, *supra* note 27, at p. 421.
[30] Lasser (1995), p. 1327.
[31] Sacerdoti, *supra* note 27, at p. 4.
[32] Benayas (1982), p. 1645.

the code".[33] Again, such an approach is adopted by the WTO legal system, which does not recognize any source of law other than the sacred "covered agreements". The role of a WTO panel, according to Article 11.1 of the DSU, is to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". The wordings suggest that all that a WTO panel needs to do is to mechanically apply the covered agreements and then determine the conformity of the challenged measure accordingly. Indeed, it could even be argued that, strictly speaking, WTO panel and Appellate Body do not even have the power to "interpret" the covered agreements. Instead, according to Article 3.2 of the DSU, they only have the power to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". On the other hand, one could argue that such approach is naive and unworkable and may even point to the reference to "legal interpretations developed by the panel" under Article 17.6 as an implicit acquiescence of the interpretive power of the panel. But any faith one might place on such implicit interpretive power must be severely shattered in the face of the explicit warning under Article 3.9 that "[T]he provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement". In other words, here the WTO legal system is again taking the traditional Civil Law approach. One could even say that it is much stricter than that of most modern Civil Law countries, and only falls an inch short of the explicit ban on the interpretive power of judges by the Roman emperor Iustinianus in his Codex.[34]

Third, another key difference between Common and Civil law systems is whether the judicial decisions are made on a collective or individual basis. In Civil Law jurisdictions, "judicial decision is rendered by the entire court as a unit" with judges remain "anonymous". [35] Individual opinions such as "[d]issenting and concurring opinions are forbidden"[36] or at least discouraged.[37] In contrast, a defining feature of Common Law courts decisions is the "personalisation" of views[38], with each judge given the freedom to expound on his own point of view.[39] Indeed, it could even be said that a Common Law judgment is "the sum of the decisions of the individual judges".[40] While the WTO legal system does not directly address the issue, we can find the following hints pointing to stronger influence from the Civil Law system:

A. Under the DSU, strictly speaking, it is not the panel or the AB which decides individual disputes. Their role is limited to making recommendations to the

[33] Posner (2008), p. 144.
[34] Sacerdoti, *supra* note 27, at n.11.
[35] Dainow, *supra* note 27, at p. 432; D. Terris et al. (2007), p. 123.
[36] Lasser, *supra* note 30, at p. 1342.
[37] Sacerdoti, *supra* note 27, at p. 4.
[38] *Id.*
[39] Dainow, *supra* note 27, at p. 432.
[40] Terris et al., *supra* note 35, at p. 123.

DSB,[41] which is the WTO Membership acting on a collective basis.[42] As argued by Debra Steger:

> *[T]he Appellate Body only has jurisdiction for a particular appeal once a notice of appeal has been submitted to the DSB, and that jurisdiction is lost once its report has been circulated and adopted by the DSB. It does not have any continuing jurisdiction outside of these periods during particular appeals. There is no true separation of powers in the WTO. The DSB (a political body) governs the dispute settlement system: it decides to establish panels, adopt panel and Appellate Body reports (which have no legal status until they are "blessed" by the DSB) and authorize suspension of concessions*.[43]

In other words, "[i]t is the DSB that makes decisions, and the role of the Appellate Body is to advise the DSB on what to do".[44] Thus, "[t]heir status is clearly subsidiary to that of the Dispute Settlement Body".[45] Such approach could not be further from the individualist approach in the Common Law system.
B. In the DSU, reference to the panel or AB decision in a given case always refer to "the report", implying that it is the decision by the panel or AB as a whole rather than the sum of individual opinions. The Working Procedure of the AB made this explicit, by stating that the AB shall "make every effort to take their decisions by consensus"[46] as the appellate process is a collegial process that is designed to "ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members".[47] One may argue that this is not the case, as Article 17.1 of the DSU states that only three out of seven AB members shall "serve on any one case" as a Division. However, one should not mistake this to mean that the other four Members play no role as there is the practice of "Exchange of Views",[48] whereby "the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members".[49] To ensure even members who are not part of a Division would make meaningful contributions, the Working Procedures also explicitly state that "each Member shall receive all documents filed in an appeal". As explained by former AB Secretariat Director Valerie Hughes and former AB Chairman Claus-Dieter

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[41] See *e.g*., Art. 11 of the DSU, which states that "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements".
[42] Marrakesh Agreement Establishing the World Trade Organization arts. IV:2 & 3, 15 Apr 1994, 1867 U.N.T.S.154 [hereinafter WTO agreement].
[43] Steger (2017), p. 448.
[44] Matsushita (2017), *supra* note 43, at p. 548.
[45] Bartels (2004), p. 864.
[46] WTO Appellate Body, *Working Procedures for Appellate Review*, at Rule 3(2), WT/AB/WP/6, (16 Aug 2010).
[47] *Id*. at Rule 4(1).
[48] Hughes (2004), pp. 127–28.
[49] WTO Appellate Body, *supra* note 46, at Rule 4(3).

Ehlerman, such exchange of views is not merely rubberstamping the decision of the Division but has been "of enormous benefit to the work of the Appellate Body" by allowing Divisions "to draw on the individual and collective expertise of all members".[50] This is confirmed by the first AB Secretariat Director Debra Steger, who noted that:

[i]n one particular early appeal, the exchange of views took five days, including two days during which the Appellate Body members listened with tremendous respect to a member who was not part of the division for that particular case as he tried several different ways to convince the division of his point of view.[51]

C. Under the DSU, there is no explicit prohibition of dissenting or individual opinions like in the European Court of Justice.[52] The only implicit reference to dissent can be found in Rule 3(2) of the Working Procedure, which states that the AB shall "make every effort to take their decisions by consensus"[53]. While there have been calls to allow dissenting opinions by some scholars,[54] they remain extremely rare in both Panel and AB reports.[55] In practice, as the DSB always adopts the panel or AB report as a whole, the Common Law approach of allowing individual and sometimes conflicting opinions could create difficulties for WTO Members. If a report with dissent is adopted, does it mean that the dissenting opinion is accepted by the WTO Membership as well? Thus, it seems safer to follow the Civil Law tradition of not allowing dissents, or at least not encouraging them. Steger provided some hint into the origin of the AB's aversion of dissent when she noted that one of the reasons for the lack of dissents is because "some of [the Appellate Body members] emphasises that in their legal systems dissents were not common". Apparently, these members must be from Civil Law countries.

D. The fourth hint for the Civil Law influence can be found under Article 14.3 and 17.11, which mandates that opinions expressed in the panel or AB report by individual panellists or AB members "shall be anonymous". Instead, the reports are issued by the "faceless foreign judges"[56] and nobody is supposed to know who authored particular parts of the decision. This again is a hallmark feature of the Civil Law system.

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[50] Hughes, *supra* note 48, at pp. 127–28; Ehlermann (2002), pp. 612–13.
[51] Steger, *supra* note 43, at p. 453.
[52] Terris et al., *supra* note 35, at p. 123.
[53] WTO Appellate Body, *supra* note 46, at Rule 3(2).
[54] Matsushita, *supra* note 44, at pp. 556–57. *See also* Lewis, (2006), pp. 895–931.
[55] This does not mean that there are no disagreements among Appellate Body members, but the Appellate Body worked very hard to reach consensus. *See e.g.*, Lacarte-Muró (2007, pp. 478–79).
[56] Bacchus (2002), pp. 1021–40.

2.2 System of Precedents

While most commentators agree that the WTO dispute settlement system was initially designed more like a Civil Law system, many of them have argued that a system of precedents have been developed over time through the decisions of the WTO's adjudicative bodies, especially those of the AB.[57] Again, I find such view unconvincing.

At the outset, we should recall, as John Jackson has pointed out, "the international legal system does not embrace the common law jurisprudence . . . which calls for courts to operate under a stricter 'precedent' or '*stare decisis*' rule."[58] Thus, it is no surprise that most international tribunals do not follow the rule of *stare decisis*.[59] Some courts explicitly reject the idea. For example, the Statute of the International Court of Justice made it very clear that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[60] While other tribunals do not have such explicit language in their constituting documents, they usually do not recognize the binding authority of previous decisions.[61] There has been some suggestions that the International Criminal Court is different in this regard, as Article 21.2 of the Rome Statute states that "[t]he court may apply principles and rules of law as interpreted in its previous decisions."[62] In my view, however, this is far from acceptance of the doctrine of *stare decisis*, as it merely uses the permissive language "may", which still falls far short of granting binding force to precedents.

Similarly, the concept of precedent is also far from uncontroversial in the multilateral trading system. During the General Agreement on Tariffs and Trade (hereinafter GATT) era, the Contracting Parties took differing views on the issue. The European Economic Community (hereinafter EEC), for example, argued that Panel findings shall be "limited to the specific measures under examination" and should not have precedential effect.[63] The U.S., on the other hand, argued that "when the Council adopted a report, those interpretations became GATT law".[64] Moreover, even GATT panels themselves have not recognized the precedential effect of

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[57] *See* Picker (2008), p. 1083; Bhala (1998), pp. 849-850. [The page seems wrong, since the beginning page of this article is 845. Please kindly check it.]

[58] Jackson (1998), p. 178.

[59] For example, in his comprehensive review on the treatment of precedents by international adjudicators, former ICJ President Gilbert Guillaume notes that, while international courts "construct an entire jurisprudence based on their own precedent", they all "distance themselves in principle from the rule of stare decisis". Similarly, while "[t]he arbitration tribunals are . . . inclined to rely on precedent . . . with rather excessive zeal", "stare decisis rule is no more applied in ICSID than it is in other international jurisdictional instances." *See* Guillaume, (2011), pp. 7–16. *See also* Pauwelyn (2016), at n.1, which notes that "[t]he only international tribunal to date that was set up with a binding rule of precedent (stare decisis) is the Caribbean Court of Justice."

[60] Statute of the International Court of Justice art. 59, 18 Apr 1946, 33 U.N.T.S. 993.

[61] Sacerdoti, *supra* note 27, at pp. 7–10.

[62] Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3.

[63] Chua (1998), p. 177.

[64] *Id.*

previous panel reports. For example, in the 1989 case of *EEC – Restrictions on Imports of Dessert Apples – Complaint by Chile*, the Panel refused to follow the 1980 Panel report on *EEC – Restrictions on Imports of Apples from Chile*[65], even though it involves "the same product and the same parties as the present matter and a similar set of GATT issues".[66]

When the WTO came into being, the Ministerial Conference and the General Council was bestowed exclusive authority to adopt interpretations of the covered agreements.[67] With such explicit grant of the interpretive power, it is not unreasonable to infer that such authorities cannot be exercised by other institutions.[68] This in turn means that, in principle, the legal interpretations adopted by the Panel and AB do not have precedential power. Notwithstanding this, many commentators have argued that *stare decisis* does exist[69] and WTO AB reports do have "precedential value".[70] In the paragraphs that follows, I will investigate the validity of this claim with a detailed survey of the key WTO cases.

The first WTO case to address the precedential effect of panel reports is the 1996 case *Japan — Alcoholic Beverages II*. In its report, the Panel stated that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted panel reports constitute subsequent practice. Such reports are an integral part of GATT 1994, since they constitute 'other decisions of the CONTRACTING PARTIES to GATT 1947'".[71] This view was rejected by the Appellate Body, which noted that, first, under GATT 1947, adopted panel reports only bound "the parties to the dispute in that particular case", but not subsequent panels; second, only "the conclusions and recommendations in an adopted panel report" are binding, but not the "legal reasonings" in the report.[72] Citing the grant of exclusive authority to adopt interpretations by the Ministerial Conference and General Council under Article IX:2 of the WTO Agreement, the AB also held that Panel reports would not "constitute a definitive interpretation of the relevant provisions of [covered agreements]".[73] At the same time, the AB also noted that "[a]dopted panel reports are an important part of the GATT acquis . . . often considered by subsequent panels", which "create legitimate expectations among WTO Members, and, therefore, should be taken into

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[65] Report of the Panel, *EEC – Restrictions on Imports of Apples from Chile*, L/5047 (10 Nov 1980), GATT BISD 27S/98.

[66] Report of the Panel, *European Economic Community – Restrictions on Imports of Apples – Complaint by the United States,* para 12.1, L/6513 (2 June 1989), GATT BISD 36S/135. *See also* Chua, *supra* note 63, at p. 178.

[67] WTO Agreement, Art. IX:2.

[68] Chua, *supra* note 63, at p. 174.

[69] *See e.g.*, Bhala, *supra* note 57, at p. 845; Pelc (2016), at p. 177.

[70] Chua, *supra* note 63, at p. 195.

[71] Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R (adopted 1 Nov 1996), as modified by Appellate Body Report, para 6.1, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[72] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, para 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 Nov 1996).

[73] *Id.*

account where they are relevant to any dispute".[74] Even unadopted panel reports could provide "useful guidance" to future panels.[75] However, to prevent any illusion on the binding effect of panel reports, the AB also made it explicit that "they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[76]

In a way, it is not surprising that the AB took a cautious approach on the precedential value of panel reports in this case. The AB was barely one year old when the case was decided, thus it is better to avoid controversial statements so as not to undermine its own legitimacy as a new institution. Moreover, the AB did not address the precedential effects of its own reports, a question that is only answered in the subsequent case of *US — Shrimp (Article 21.5 Malaysia)*. In that case, the AB expanded its approach in *Japan — Alcoholic Beverages II* in two very important ways. First, the AB confirmed that AB reports, just like panel reports, "provided interpretative guidance" for panels.[77] This is not very surprising, because it is only natural that the AB, as the institution reviewing panel decisions, would have at least the same power as the panel. Second, in addition to confirming that "[t]he Panel was correct in using [the Appellate Body's] findings as a tool for its own reasoning",[78] the AB went one step further by stating that the Panel "was right to use" and "rely on" the "reasoning" of the AB report in *US — Shrimp*.[79] This is one big step towards recognizing the precedential effect of AB reports, as the key in a precedent is its *ratio decidendi* or reasoning. Furthermore, to dispel any speculation that the reasoning in the AB report in *US — Shrimp* applied to the current case only because the two cases concern the same dispute on the same measure between the same parties, the AB also made clear that such reasoning shall be relied on by not only "the Panel in this case", but also all "future panels".[80]

Some "future panels", however, chose to ignore the AB's edict, resulting in a tug of war between the panels and the AB. The most contentious battle is fought over the legality of "zeroing" practices by the U.S., where some WTO panels persistently refused to follow settled AB jurisprudence on the issue. In the *US — Stainless Steel (Mexico)* case, for example, the Panel refused to follow previous AB decisions even though it was aware that its reasoning is very similar to those of the two Panel decisions that have been overruled by the AB.[81] According to the Panel, such an approach is mandated by Article 11 of the DSU, which requires panels to carry out

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[74] *Id*. at 14.
[75] *Id*. at 15.
[76] *Id*. at 14.
[77] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, para 107, WT/DS58/AB/RW (adopted 21 Nov 2001).
[78] *Id*. at para 109.
[79] *Id*. at para 107. The report referred to here is Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted 6 Nov 1998), at 2755.
[80] *Id*.
[81] Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R (adopted 20 May 2008), as modified by Appellate Body Report, para 7.106, WTO Doc. WT/DS344/AB/R (adopted 30 Apr 2008).

an objective examination of the matter at issue.[82] The EU, one of the third parties in the case, became so frustrated that it asked the AB "to unambiguously re-confirm that all panels are *expected and therefore also obliged*, to follow its rulings on these issues" (emphasis original).[83] Their frustration is shared by the AB, which stated that they "are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues".[84] Citing the need to ensure "security and predictability" in the dispute settlement system in Article 3.2 of the DSU, the AB held that "[w]hile the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case."[85] Thus, the AB concluded, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[86]

Does this statement mean that AB reports now shall be treated as binding precedents? While WTO Members differ widely on this issue,[87] the strong wordings of the AB certainly provided plenty of ammunition for the claim that the WTO now has a system of binding precedents, or *stare decisis*.[88] However, I think that such exuberance about the existence of a precedent system in the WTO dispute settlement system is not only irrational but also premature, as the AB itself explicitly stated, at the beginning of its discussion on the issue, that "[i]t is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties."[89] Compared to the highly cautionary language used earlier, the AB has made it very clear, in a straightforward and unequivocal manner, that there is no formal or *de jure* system of precedents in WTO dispute settlement.[90]

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[82] *Id.*

[83] In the World Trade Organization before the Appellate Body AB-2008-1, DS344 United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, *Third participant notification and written submission by the European Communities*, (25 Feb 2008), para 56.

[84] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, para 162, WT/DS344/AB/R (adopted 20 May 2008) [hereinafter US – Stainless Steel (Mexico)].

[85] *Id.* at para 161.

[86] *Id.* at para 160.

[87] See *e.g.*, David's discussion on the heated debate between WTOP Members when the Appellate Body Report in *US – Stainless Steel* was adopted. F. David (2009), pp. 8–9.

[88] See Sacerdoti, *supra* note 27, at p. 14; Davis C (2016) Deterring Disputes: WTO Dispute Settlement as a Tool for Conflict Management, 20. https://scholar.harvard.edu/files/cldavis/files/davis201 6.pdf; Cho (2016), pp. 20–21; Alford R (2008) The Role of Precedent at the WTO. Opinion Juris. http://opiniojuris.org/2008/05/02/the-role-of-precedent-at-the-wto/.

[89] US – Stainless Steel (Mexico), *supra* note 84, at para 158.

[90] This view is shared by many Appellate Body insiders. For example, Unterhalter stated that "[t]he WTO dispute settlement system knows no formal system of precedent" in D. Unterhalter, *supra* note 43, at p. 473. Matsushita stated that "in the WTO jurisprudence *stare decisis* is not recognized" in Matsushita, *supra* note 44, at p. 552. Hughes stated that "*stare decisis* does not apply in the WTO dispute settlement system" in Hughes, *supra* note 48, at p. 421.

Therefore, at most, one can only claim the existence of a *de facto* precedent system in the WTO, but "it is certainly not *stare decisis*",[91] as pointed out by John Jackson, who argued that:

> *[the] precedent effect in the jurisprudence of the WTO . . . is not so powerful as to require panels or the Appellate Body considering new cases to follow prior cases, with the possible exception that once prior cases have been numerous regarding a particular issue and approach, and apparently accepted by all Members of the WTO, then the language of the Vienna Convention about "practice under the agreement," may suggest a stronger impact. But short of that situation, it appears that the 'flavor' of the precedent effect in the WTO is still somewhat fluid, and possibly will remain somewhat fluid for the time being*.

To paraphrase Jackson, much of the confusion regarding the precedential effect of the panel and AB reports arose because the word "precedent" is a "complex concept" with "many flavors".[92] To avoid this, Jackson proposed to view the word as "a multi-layered concept, or at least as having a number of different approaches of different flavors". However, as we can see from the foregoing discussion, such an approach could still lead to confusions. Instead, I would suggest ceasing to refer to the previous decisions of the AB as precedents, but to call them as "jurisprudence" instead.

Moreover, as Beshkar and Chilton have argued, conferring binding force on AB reports could raise substantive systematic costs.[93] For example, WTO Members might rush to bring cases, or at least participate as third parties, in a bid to shape the jurisprudence through litigation.[94] Wrong judicial precedents might perpetuate over time as the consensus requirement makes it difficult for the legislative branch to correct them.[95] All these will be unfair for the small and poorer countries as they are less likely to participate in WTO disputes.[96]

In addition to these practical reasons, I would add another very important constitutional reason. The Appellate Body was set up as a "safety valve"[97] to check against "rogue" panels[98] which might render "bad reports".[99] It was never meant to be a judicial branch that is on par with the legislative branch to safeguard the so-called separation of powers as under some domestic legal systems. Elevating AB reports to the status of binding precedents could seriously undermine the nature of the WTO as a "Member-driven" organization.[100]

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[91] Jackson (2006), p. 177.
[92] *Id*. at p. 173.
[93] Beshkar and Chilton (2016), pp. 386–388.
[94] *Id*. at pp. 386–387.
[95] *Id*. at pp. 387–388.
[96] *Id*. at p. 387.
[97] Hudec (1990), p. 191.
[98] Hughes, *supra* note 48, at pp. 121–122.
[99] Steger, *supra* note 43, at p. 447. *See also* Van den Bossche (2006), pp. 292–294.
[100] For discussions on WTO as a "Member-driven" organization, see Elsig (2016), pp. 345–363.

3. Prohibition of Obiter Dicta or Advisory Opinion?

As I have argued above, the WTO does not have a system of precedents as it is not based on the Common Law system nor recognizes the concept of precedents. From this, it naturally follows that there is no room for *obiter dicta* either, as the concept is unique and "essential"[101] to the Common Law system. According to the doctrine of *stare decisis*[102] or precedents, later courts are supposed to follow the holdings by earlier courts.[103] Without the concept of *dicta*, everything stated by the earlier courts would be binding on the later courts. This might not be a problem if the court always restricts itself to what is absolutely necessary for the resolution of the case at hand, but this is rarely the case. Instead, as has been observed by Llewellyn and Aldisert, judges tend to "over-state" their case "in the heat of the argument" and "overwrite opinions",[104] with the result that "discussion outran the decision".[105] Or worse still, judges may deliberately "plant" *dicta* to steer the development of the law and "preempt colleagues who might later decide a further issue in a manner not to our liking".[106] These concerns make it necessary to draw the distinction.

This should have been more than sufficient to conclude the debate on "dicta" in WTO dispute settlement system. However, for the sake of completeness, I'd still analyse in detail here whether the WTO might still have rules against *dicta* even though it does not have a system of precedent. This is more than pure academic speculation, as many WTO Members, especially the U.S., has repeatedly referred to certain parts of panel reports as "*dicta*" in their written submissions. Moreover, in view of the controversy surrounding the usage of the term "*obiter dicta*", the U.S. has, in its more recent statements, changed its wording to "advisory opinions", which it defined as "a non-binding statement on a point of law given by [an adjudicator] before a case is tried or with respect to a hypothetical situation."[107]

This point, however, is highly contestable as what a WTO Member might view as "*obiter dictum*" or "advisory opinion" may often be a necessary link in the panel's overall analysis leading to the final findings. For example, in a case involving the non-discrimination obligations, the panel would have to first determine if the two products are alike before deciding whether the measure at issue is indeed discriminatory. If the panel makes a negative finding on likeness, this does not mean that the panel should stop its analysis there, because such a finding might be overturned on appeal. Thus, a more prudent course of action for the panel would be to continue making findings on the discrimination issue, lest the AB do not have sufficient facts to "complete the analysis" when the likeness finding is reversed.[108]

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[101] Posner, *supra* note 33, at pp. 192–193.
[102] According to Black's Law Dictionary, *stare decisis* means "to stand by things decided". However, there has been considerable confusion in determining what "things" have in fact been "decided". *See e.g.*, Steinman (2013), p. 1810; Abramowicz and Stearns (2005), p. 1094.
[103] McAllister (2011), p. 161; Stanford Law Review (1952), p. 513; Greenawalt (1989), p. 431.
[104] Llewellyn (1996), pp. 43–44.
[105] Aldisert et al. (2009), p. 19.
[106] McAllister, *supra* note 103, at p. 177.
[107] Mission of the United States, *supra* note 17, at p. 10.
[108] For an analysis on the issue, see Yanovich and Voon (2006), pp. 933–950.

Compared to the allegations from WTO Members, what is even more worrying is the usage of the concept of "*dicta*" by the AB itself in its own reports. What does the AB mean by "*dicta*" then? Again this can only be found out from the AB's own words.

The very first case where the AB mentioned *dicta* is the *Canada – Periodicals* case, in which the AB held that, the statement by the panel in *EEC – Oilseeds*[109] that "it can reasonably be assumed that a payment not made directly to producers is not made 'exclusively' to them" is "*obiter dicta*" because the panel already found that subsidies paid to oilseeds processors were not made "exclusively to domestic producers".[110] However, the AB does not explain further why such statement is considered *dicta*. We can only surmise that the statement is regarded as *dicta* because it is about a moot issue.

In the *US — Shrimp (Article 21.5 — Malaysia)* case, the AB told us what is *not dicta* by stating that "[t]he reasoning in our Report in *United States — Shrimp* on which the Panel relied was not dicta; it was essential to our ruling".[111] This suggests that *dicta* is something that is not essential to the ruling of the AB.

In the *US — Gambling* case, the AB visited the issue again, when the parties debated whether the Panel's statement on whether "practice" as such may be challenged as a "measure".[112] The AB ruled that, as Antigua, the Complaint, was not challenging a practice as such, the Panel's statement did not constitute a "'finding' of the Panel". Thus, the AB concluded, "the Panel's statement on 'practice', in our view, was a mere *obiter dictum*, and we need not rule on it."[113] Ironically, however, the AB followed this statement with yet another *dictum* on *dicta*, by stating that "*We nevertheless express our disagreement with the Panel's understanding of previous Appellate Body decisions. The Appellate Body has not, to date, pronounced upon the issue of whether 'practic' may be challenged, as such, as a 'measure' in WTO dispute settlement*."[114]

From these three cases, we can see that the AB's main criteria for distinguishing *dicta* from holding is whether the statement at issue is relevant or essential to the decision. However, like with any other legal issue, the AB's position here must be supported by provisions in the covered agreements. Unfortunately, the covered agreements do not include any explicit prohibition of *dicta*. Instead, the claim that *dicta* are not allowed can only be inferred from WTO provisions, as the U.S. alleged in their statement at the DSB meeting on 23 May 2017. According to the U.S., "more

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[109] GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins*, para 137, L/6627 (25 Jan 1990), GATT BISD 37S/86.

[110] Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, para 33, WTO Doc. WT/DS31/AB/R (adopted 30 July 1997).

[111] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (adopted 21 November 2001), at para 107.

[112] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, paras 129-30, WT/DS285/AB/R (adopted 20 Apr 2005).

[113] *Id.* at para 131.

[114] *Id.* at para 132.

than two-thirds of the Appellate Body's analysis [in *Argentina – Measures Relating to Trade in Goods and Services*]—46 pages—is in the nature of *obiter dicta*" because:

> *The Appellate Body reversed the panel's findings on likeness and said that this reversal rendered moot all the panel's findings on all other issues, including treatment no less favorable, an affirmative defense, and the prudential exception under the GATS. Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS. These interpretations served no purpose in resolving the dispute—they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body's analysis is comprised simply of advisory opinions on legal issues.*[115]

As mentioned earlier, such a position is premised on the Common Law view that the law-making power of the court arises from its function to solve disputes, thus the rulings which are necessary to resolve the disputes become the holdings, while those which are unnecessary become *dicta*. Therefore, the hidden assumption of such argument is that the roles of the Panel and AB are limited to resolving trade disputes. A closer reading of the DSU reveals, however, not only there is no support for such a view in the text of the DSU, but also the DSU explicitly requires the panel and AB to go beyond merely solving disputes.

First, according to Article 3.2 of the DSU, the WTO dispute settlement system serves not only to "preserve the rights and obligations of Members under the covered agreements", but also to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". As explained by Article 3.4, the first function is achieved through "prompt settlement" of disputes. But this apparently does not apply to the second function, as clarifications of treaty provisions often have to be conducted beyond the narrow confines of individual disputes. Indeed, it could be argued that the use of the term "clarify" here widens the general roles of panels and AB and enables them to provide "guidance" to the Members' future conducts under the covered agreements.[116]

Second, the panel is under an explicit obligation to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".[117] This means that, even if a provision cited by a party turns out to be inapplicable because the issue is moot, the panel still has to address it. Otherwise, the panel could well be accused of failing to fulfil its obligation under Article 7.2 and 11, especially if the AB decides to overturn the panel's finding that the specific provision is inapplicable.

Third, Article 17.12 imposes similar obligation on the AB with even more explicit language by requiring the AB to "address each of the issues raised in accordance with paragraph 6 during the appellate proceeding." Again, failure to

[115] Mission of the United States, *supra* note 2, at p. 13.
[116] Sacerdoti (2006, p. 49).
[117] DSU, Art. 7.2.

comply with the obligation could expose the AB to allegations of violations of its duties under the DSU.

Fourth, more importantly, even for issues or provisions not raised by the parties, neither Article 7 nor Article 17 prohibits the panel or the AB from considering or ruling on such issues. To the contrary, as every lawyer knows, they often need to consider the unnamed provisions in order to assess the contexts of the provisions at issue in the litigation. One might argue that such a restriction can be found under Article 17.6, which states that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." However, this provision at best only delineates what may be appealed by the parties to the dispute, but it does not impose restrictions on what the AB may rule upon. Even though Article 17.12 refers to Article 17.6, one cannot conclude that the AB is thus subject to the same restriction as it only states that "[t]he Appellate Body shall address each of the issues raised in accordance with [Article 17.6]". To the contrary, had the Members intended to also limit the power of the AB, they would have used the same language as Article 17.6 here by stating that "the rulings of the Appellate Body shall be limited to issues raised in accordance with paragraph 6 during the appellate proceeding."

To sum up, as the discussions above have illustrated, the covered agreements do not provide any basis for the prohibition of dicta or advisory opinion. Thus, if anything, the AB's announcement on so-called "*dicta*" in panel and AB reports is nothing but *dictum* on *dicta*. This approach is dangerous not only because it lacks legal basis in the covered agreements, but also because it could backfire when Members in turn borrow the term and accuse the AB itself of rolling out *dicta* or "advisory opinion", which is exactly what the U.S. has done in the reappointment saga.

4. Disruptive Construction or Constructive Destruction?

To sum up the discussions above, the U.S. criticisms against the AB are only half correct. It is true, as they have claimed, that the WTO does not have a formal precedent system. However, this also means that their allegations of dicta or advisory opinions are unwarranted.

Now even if we were to take a step back, and assume, for the sake of the argument, that both of the U.S. claims are correct. Does this then justify the approach the US has been taking on the issue? To senior U.S. officials, the answer has always been yes. For example, Dennis Shea, U.S. Ambassador to the WTO, stated that "for more than 15 years and across multiple U.S. Administrations, the U.S. has been raising serious concerns with the AB's disregard for the rules set by WTO Members."[118] However, nobody paid any attention for all those years. Thus, as USTR Robert Lighthizer put it, blocking AB appointments is "the only leverage [the U.S.

[118] Mission of the United States, *supra* note 18, at p. 12.

has] with the WTO",[119] because, according to Shea, "the discussion of WTO reform would not have happened but for the disruptively constructive leadership of the United States".[120]

Many observers, however, have doubts as to whether the U.S. approach is really constructive. For example, while WTO Director General Robert Azevedo acknowledged that "some fruits [might] fall" when someone "begins to shake the tree pretty hard", he also warned that "you don't kill the tree by shaking it too hard".[121] In my view, even if the U.S. does not kill the AB, its approach is still quite destructive, as it will create a bad "precedent" of holding the AB hostage, and other countries could follow suit in the future. At the same time, it is also worth pointing out that the U.S. approach is not really constructive at all, because it fails to address the root of the problem: the inability of the legislative branch to reach decisions. Thus, even if the U.S. approach worked, which is highly unlikely, it would only create bad "dicta" as changes at the AB would not contribute to resolving the WTO decision-making crisis.

How, then, should we solve the AB crisis? In a recent paper,[122] former AB Member Prof. Jennifer Hillman provided three approaches to fix the AB, which she called respectively as:

1. The Good, i.e., to have a separate system for trade remedies, which involves either creating "a special AB to hear only appeals of trade remedy Decisions" or abolishing appeals from panel decisions in trade remedies cases;
2. The Bad, i.e., to bypass the AB process and channel appeals through the Arbitration proceeding under DSU Article 25;
3. The Ugly, i.e., to "fix the procedural matters readily fixable, run the selection process and then appoint new members by vote".

While I agree that the three options are the most likely solutions, I differ in my preferences among the three approaches. In my view, the first option is far from "Good". If anything, it is a rather "Bad" solution as it defeats the very purpose of having an AB, which is to provide a set of uniform jurisprudence on WTO law. If the U.S. can have a special AB for trade remedies cases, what prevents other WTO Members from requesting special AB chambers for other issues, such as SPS & TBT cases for the EU, or intellectual property rights cases for China? On the other hand, the second option is not really that "Bad", but it could turn "Ugly" in many cases. This is because Article 25 itself states that "resort to arbitration shall be subject to mutual agreement of the parties". If a Member already wins at the Panel stage, why

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[119] James Lankford: Senator Lankford Attends Finance Committee Hearing on the World Trade Organization (12 Mar 2019). Market Screener. https://www.marketscreener.com/news/James - Lankford-Senator-Lankford-Attends-Finance-Committee-Hearing-on-the-World-Trade-Organization--28155024/?utm_medium=RSS&utm_content=20190312.

[120] The WTO: Looking Forward (12 Oct 2018). Ctr for Strategic Int Stud. https://www.csis.org/events/wto-looking-forward.

[121] Donnan S and Baschuk B (2018) Trump's Threat to Leave the WTO Could Be a Saving Grace, Bloomberg Businessweek. https://www.bloomberg.com/news/articles/2018-10-12/trump-s-threat-to-leave-the-wto-could-be-a-saving-grace.

[122] Hillman J, Three Approaches to Fixing the World Trade Organization's Appellate Body: the Good, the Bad and the Ugly?. Geo U Law Ctr, https://georgetown.box.com/s/966hfv0smran4m31biblgfszj42za40b. Accessed 18 Mar 2019.

would it agree to arbitration at the risk of losing its victory? Moreover, as such arbitrations are handled by *ad hoc* arbitration panels, they would not produce a consistent jurisprudence as the AB.

As to the last option, while Hillman did recognize that it could be "potentially beautiful", she argued that it can turn "Ugly" as resorting to voting would break the WTO's long-standing consensus tradition and raise legitimacy concerns about the AB and its members appointed this way. In my view, however, this is exactly why this option is "Good". It is not a "Bad" option as it is legally available under the existing WTO rules. Moreover, it avoids the "Ugly" implications arising from the first two options, such as raising the consensus needed to pass the DSU amendments or getting the two disputing parties to agree to arbitration.

Moreover, given the urgency of the AB crisis, I would go even one step further than the Hillman proposal by suggesting that WTO Members should just jump start the appointment process by forcing a vote through the General Council without addressing the procedural issues first, as that would only further delay the process. I understand that such a move would be highly controversial. To start with, one could argue that consensus is the only decision-making rule under the DSU as Article 3.4 provides that "[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". Therefore, the argument goes, you can not resort to anything other than consensus. In response, I would cite to Article IX.1 of the WTO Agreement, which provides that, "[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting." This confirms the availability of voting when consensus is not possible. As it has not been "otherwise provided" under the DSU, voting should be available for the AB appointment issue too.

Again, one could counter that it has been "otherwise provided", as the footnote to Article IX.1 provides that "[d]ecisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding." As DSU Article 2.4 only refers to consensus, this means that voting is not possible. My response to this argument is twofold:

First, to solve the conflict between the two provisions, we can refer to Article XVI.3 of the WTO Agreement, which provides that "[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict." Applying this conflict rule to the current situation, the voting rules under Art. IX.1 of the WTO Agreement would apply.

Some might argue that the conflict rule doesn't apply here, as it is the WTO Agreement itself which states that the only decision-making rule applicable to the DSB is DSU Article 2.4. Thus, there is no conflict between the WTO Agreement and the DSU, and the special rules under the footnote to Article IX.1 shall apply as per the *lex specialis* rule. This brings up my second point, which is that the General Council should take over the issue from the DSB and make a decision. The legal basis for such action can be found under Article IV of the WTO Agreement, which provides the following:

1: The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2: In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council.

3: The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding.

In other words, as the Ministerial Conference has the authority to decide all matters under any WTO Agreement, and the General Council assumes the functions of the Ministerial Conference when the latter is not in session, the General Council has the authority to decide issues under the DSU as well. This has happened in the past, such as the debate over amicus briefs in 2001 and the more recent discussions on AB selection in 2018.[123]

To sum up, my suggestion for solving the AB crisis is very simple. The Members shall first put the issue of AB appointment on the agenda of the meeting of General Council, then try to have the issue decided by consensus. If the U.S. does not block the consensus, then all is well. If, however, the U.S. decides to continue its blockage, the Members can invoke the voting provisions under Article IX.1, which provides that "[d]ecisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement". As there is no special majority requirement for this issue, the matter can be decided by simple majority, which is much easier to obtain than the two-third majority requirement for DSU amendments[124] or the three-fourth majority requirement for official interpretations.[125] The U.S. will not be pleased, but will they withdraw from the WTO as some people fear? In a recent statement before the U.S. Senate Committee on Finance, Lighthizer stated that "[t]he WTO is a valuable institution, and offers many opportunities for the United States to advance our interests on trade. As I have said before, if we did not have the WTO, we would need to invent it."[126] Thus, notwithstanding angry threats from President Donald Trump to the contrary,[127] it is highly unlikely that the U.S. would pull out.

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[123] Hillman, *id*. at p. 13. See also WTO General Council, *Minutes of the Meeting Held in the Centre William Rappard on November 22, 2000*, WT/GC/M/60 (22 Nov 2000).
[124] WTO Agreement, Art. X.1.
[125] WTO Agreement, Art. IX.1.
[126] R. E. Lighthizer, *Testimony of Robert E. Lighthizer before the U.S. Senate Committee on Finance*, UNITED STATES SENATE COMMITTEE ON FINANCE (12 Mar 2019), https://www.finance.senate.gov/download/03122019-lighthizer-testimony.
[127] C. Wang, *Trump Threatens to Withdraw from World Trade Organization*, CNBC (30 Aug 2018), https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html.

Meanwhile, the blockage problem will be solved, and an invaluable lesson will be taught to other Members which might contemplate the same course of action.

Reference

Abramowicz M and Stearns M (2005) Defining Dicta. Stanford Law Rev 4: 953–1094

Aldisert RJ et al. (2009) Opinion Writing and Opinion Readers. Cardozo Law Rev 1: 1–44

Alford R (2008) The Role of Precedent at the WTO. Opinion Juris. http://opiniojurisorg/2008/05/02/the-role-of-precedent-at-the-wto/. Accessed18 Mar 2019

Bacchus J (2002) Table Talk: Around the Table of the Appellate Body of the World Trade Organization. Vanderbilt J Transnational Law 4: 1021–1040

Bartels L (2004) The Separation of Powers in the WTO: How to Avoid Judicial Activism. Int and Comp Law Q 4: 861–895

Benayas C de la V (1982) Judicial Method of Interpretation of Codes. La Law Rev 5: 1643–1660

Beshkar M and Chilton A (2016) Revisiting Procedure and Precedent in the WTO: An Analysis of US — Countervailing and Anti-Dumping Measures (China). World Trade Rev 15(2): 375–395

Bhala R (1998) Myth about Stare Decisis and International Trade Law (Part One of a Trilogy). Am Univ Int Law Rev: 845–956

Caporal J (2016) Debate Erupts over US Blocking Korean Appellate Body Reappointment. Inside U.S. Trade. https://insidetrade.com/daily-news/debate-erupts-over-us-blocking-korean - appellate-body-reappointment. Accessed 13 May 2016

Cho S (2016) Precedent as a Social Phenomenon: System, Language and Symbol. Chicago-Kent Research Paper Series 1: 1–28

Chua ATL (1998) Precedent and Principles of WTO Panel Jurisprudence. Berkeley J Int Law 2: 171–196

Ctr for Strategic and Int Stud, The WTO: Looking Forward. https://www.csis.org/events/wto-looking-forward. Accessed 18 Mar 2019

Dainow J (1966-1967) The Civil Law and the Common Law: Some Points of Comparison. Am J Comp Law 3: 419–435

David F (2009) The Role of Precedent in the WTO – New Horizons?. Maastricht Faculty of Law Working Paper No. 2009-12: 1–24

Davis C (2016) Deterring Disputes: WTO Dispute Settlement as a Tool for Conflict Management. Paper presented at the Annual Meeting of the International Political Economy Society

Donnan S and Baschuk B (2018) Trump's Threat to Leave the WTO Could Be a Saving Grace. Bloomberg Businessweek. https://www.bloomberg.com/news/ar ticles/2018-10-12/trump-s-threat-to-leave-the-wto-could-be-a-saving-grace. Accessed 18 Mar 2019

Ehlermann CD (2002) Six Years on the Bench of the "World Trade Court" Some Personal Experiences as Member of the Appellate Body of the World Trade Organization. J World Trade 4: 605–639

Elsig M (2016) The World Trade Organization at Work: Performance in a Member-driven Milieu. Rev Int Organ 3: 345–363

Gao H (2018) Dictum on Dicta: Obiter Dicta in WTO disputes. World Trade Rev 3: 509–533.

Greenawalt K (1989) Reflections on Holding and Dictum. J Leg Educ 3: 431

Guillaume G (2011) The Use of Precedent by International Judges and Arbitrators. J Int Dispute Settlement 1: 5–23

Hillman J, Three Approaches to Fixing the World Trade Organization's Appellate Body: the Good, the Bad and the Ugly?. https://georgetown.box.com/s/966hfv0 smran4m31biblgfszj42za40b. Accessed 18 Mar. 2019

Hudec RE (1990) Dispute Settlement. In Schott J (ed.), Completing the Uruguay Round: A Results-oriented Approach to the GATT Trade Negotiations, Peterson Institution for International Economics, Washington, D.C.

Hughes V (2004) The WTO Dispute Settlement System: A Success Story. In Lacarte J and Granados J (eds), Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches, Cameron May, London, 121–122

Jackson J (1998) Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects'. In Krueger A (ed), The WTO as an International Organization, University of Chicago Press, Chicago, pp. 161–180

Jackson JH (2006) Sovereignty, the WTO, and Changing Fundamentals of International Law. Cambridge University Press, Cambridge

Lacarte-Muró J (2017) Launching the Appellate Body. In Marceau G (ed), A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System, Cambridge University Press, Cambridge, pp. 476–481

Lankford J (2019) Senator Lankford Attends Finance Committee Hearing on the World Trade Organization. Market Screener. https://www.marketscreener.co m/news/James-Lankford-Senator-Lankford-Attends-Finance-Committee-Hearing-on-the-World-Trade-Organization--28155024/?utm_medium=RSS&utm_content= 20190312. Accessed 18 Mar 2019

Lasser M. de S-O-I'E (1995) Judicial (Self-)Portraits: Judicial Discourse in the French Legal System. Yale Law J 6: 1325–1410

Lewis MK (2006) The Lack of Dissent in WTO Dispute Settlement. J Int Econ Law 4: 895–931

Lighthizer RE (2019) Testimony of Robert E. Lighthizer before the U.S. Senate Committee on Finance. United States Senate Committee on Finance. https://www.finance.senate.gov/download /03122019-lighthizer-testimony. Accessed 18 Mar 2019

Llewellyn KN (1996) The Bramble Bush: On Our Law and Its Study. Oxford. New York

Matsushita M (2017) Reflections on the Functioning of the Appellate Body. In Marceau G (ed), A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System, Cambridge University Press, Cambridge, pp. 547–558

McAllister M (2011) Dicta Redefined. Willamette Law Rev 2: 161–210

Office of the United States Trade Representative (2018) USTR's 2018 Trade Policy Agenda and 2017 Annual Report. America's Trade Policy. http://america stradepolicy.com/ustrs-2018-trade-policy-agenda-and-2017-annual-report/. Accessed 28 Feb 2018

Pauwelyn J. (2016) Minority Rules: Precedent and Participation before the WTO Appellate Body. In Jemielniak J et al. (eds), Establishing Judicial Authority in International Economic Law, Cambridge University Press, Cambridge, pp. 141–172

Pelc KJ (2016) The Welfare Implications of Precedent in International Law. In Jemielniak J et al (eds), Establishing Judicial Authority in International Economic Law, Cambridge University Press, Cambridge, 173–187

Picker C and Picker CB (2008) International Law's Mixed Heritage. A Common/Civil Law Jurisdiction. Vanderbilt J Transnational Law:1083–1140

Posner R (2008) How Judges Think. Harvard University Press, Cambridge

Revisited D (1952) Stanford Law Rev 4: 509–518

Sacerdoti G (2006) The Dispute Settlement System of the WTO in Action: A Perspective on the First Ten Years. In Sacerdoti G et al. (eds.), The WTO at Ten: The Contribution of the Dispute Settlement System, Cambridge University Press, Cambridge, 49

Sacerdoti G (2011) Precedent in the Settlement of International Economic Disputes: The WTO and Investment Arbitration Models. Bocconi Leg Stud Research Paper No. 1931560: 4

Steger D (2017) The founding of the Appellate Body. In G. Marceau (ed), A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System, Cambridge University Press, Cambridge, pp. 447–465

Steinman AN (2013) To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare decisis. Va Law Rev 8: 1737–1810

Terris D et al. (2007) International Judges and International Law. In Terris D et al. (eds), The International Judge: An Introduction to the Men and Women Who Decide the World's Cases, Brandeis, Waltham, pp. 102–130

Van den Bossche P (2006) From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System. In Sacerdoti G et al. (eds.), The WTO at Ten: The Contribution of the Dispute Settlement System, Cambridge University Press, Cambridge, 292–294

Wang C (2018) Trump Threatens to Withdraw from World Trade Organization. CNBC. https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html. Accessed18 Mar 2019

WTO Appoints Two New Appellate Body Members. World Trade Organization. https://www.wto.org/english/news_e/news16_e/disp_28nov1 6_e.htm. Accessed 23 Nov 2016

Yanovich A and Voon T (2006) Completing the Analysis in WTO Appeals: The Practice and its Limitations. J Int Econ Law 4: 933–950