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Finding a Rule-based Solution to the Appellate Body Crisis:
Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement

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Abstract:
The WTO dispute settlement system is in crisis due to the persistent blockage of the appointment of Appellate Body Members by the United States (US). This paper reviews the US criticisms against the Appellate Body and argues that its allegations are unfounded, and its approach is wrong. To deal with the US blockage, various proposals have been made, with the most popular being the Multiparty Interim Appeal Arbitration Arrangement (MPIA) set up by several key Members including the European Union and China. After a thorough analysis of the key features of the MPIA from both theoretical and practical perspectives, this paper argues that the MPIA fails to provide a proper solution to the Appellate Body crisis due to its many defects. Instead, the paper suggests the appointment of Appellate Body members based on majority-voting at the General Council. This paper concludes by noting that only such a rule-based solution can not only solve the current Appellate Body crisis, but also deter similar attempts to sabotage the WTO dispute settlement system in the future.

Introduction

Over the past three years, the United States have been persistently blocking the appointment of members to the WTO Appellate Body, citing various concerns with its alleged "failure to follow the agreed rules".[1] The US blockage has resulted in an unprecedented crisis of the WTO dispute settlement system, which led to the paralysis of the Appellate Body in December 2019 when its membership was reduced to the last one, and ultimately its death in December 2020 when the term of the last member expired.

Initially focusing on the minor procedural errors of specific Appellate Body members, the US criticisms on the Appellate Body has morphed into broader attacks on the substantive jurisprudence and judicial approach of the Appellate Body, as well as the more serious systemic issues on the function of the Appellate Body as an institution. While the US has been gaining more and more sympathizers among the WTO Membership, this paper argues that the US is barking at the wrong tree because most if not all of these problems are not of the Appellate Body's making.

In response to the US complaint, various solutions have been proposed. Currently, the most popular solution seems to be the Multiparty Interim Appeal Arbitration Arrangement (MPIA), set up by a few key Members to provide a makeshift Appellate Body when the real one is not functioning. While recognizing the practical utility of this solution, this paper argues that the MPIA, due to its many defects, cannot provide a proper solution to the Appellate Body crisis. Instead, the paper calls for a rule-based solution, i.e., appointment of Appellate Body members based on majority-voting at the General Council. This paper provides detailed analysis on the legal basis for such a solution, which will not only solve the current Appellate Body blockage but also deter similar attempts in the future.

[1] United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, February 2020, Introduction, at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

I. The Problems Alleged by the US

As the only superpower in the world, the US has never been shy to flex its muscle in various international organizations. In the WTO, this takes the form of setting the agenda, bringing dispute settlement cases, tabling negotiation proposals, and blocking the appointment of Appellate Body members. The last of these - blockage of appointment of Appellate Body members - actually is a more frequent occurrence than people commonly think. For example, in 2011, the US blocked the reappointment of Georgetown law professor Jennifer Hillman to a second term on the WTO Appellate Body.[2] Similarly, in 2013-2104, the United States blocked the potential appointment of James Gathii, a Kenyan who works as a law professor in Chicago.[3] The difference, though, is that before, such blockage largely went unnoticed beyond the narrow circle of trade experts, and never made it into headline news. This time, however, things are of a much different nature as the US sets out to destroy the Appellate Body as an institution.

The saga started in 2016, when the US blocked the second term of Korean law professor Seung Wha Chang reappointment to a second term, accusing him of "deviating from their appropriate role by restricting the rights or expanding the obligations of WTO Members under the WTO agreements".[4] But when Korea proposed former Trade Minister Hyun Chong Kim as Chang's successor, the US dropped its opposition and joined the consensus in approving his appointment.[5]

In 2017, however, things started to change for the worse with a series of unfortunate events: the election of Donald Trump as the US president and the appointment to the position of the United States Trade Representative (USTR) Robert Lighthizer, a trade hawk long known for his hostile views on the Appellate Body; the departure of two Appellate Body members, i.e., Mr. Ramirez-Hernandez and Prof. Van den Bossche, whose terms expired on 30 June 2017 and 11 December 2017 respectively; and the sudden resignation of Kim on 1 August 2017, when he was nominated to be Korea's trade Minister again.[6] Seizing the perfect opportunities, the US complained that Appellate Body members should not have stayed on to decide cases after their terms have officially expired.[7] As such practice has been

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[2] Gary Clyde Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, Peterson Institute for International Economics Realtime Economic Issues Watch, 13 June 2011, at https://www.piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system.

[3] Manfred Elsig, Mark Pollack and Gregory Shaffer, *The U.S. is Causing a Major Controversy in the World Trade Organization. Here's What's Happening*, Washington Post, Monkey Cage, 6 June 2016, at https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/.

[4] J. Caporal, *Debate Erupts over US Blocking Korean Appellate Body Reappointment*, Inside U.S. Trade, 12 May 2016. For detailed discussion on the US blockage of Chang's reappointment, see Henry Gao, *Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis*, in Lo C., Nakagawa J., Chen T. (eds) The Appellate Body of the WTO and Its Reform (Springer, Singapore, 2020), at 215-216, https://doi.org/10.1007/978-981-15-0255-2_13.

[5] Id. at 216.

[6] 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).

[7] Id. at para 5.4.

explicitly provided for under Rule 15 of Working Procedures for Appellate Review, it is regarded by most WTO lawyers as procedural skirmishes at most. But the US made a big fuss about the issue and refused to join the consensus to launch the Appellate Body appointment process before these "systemic issues" were addressed by the Dispute Settlement Body (DSB).[8]

Since then, the US had the opportunity to further refine and develop its justification for the blockage of Appellate Body appointment in a series of official statements,[9] which culminated in a 174-page Report on the Appellate Body of the World Trade organization by the USTR in Feb 2020.[10] It is a long laundry list of grievances that are hastily grouped together, but in an effort to make some sense out of the U.S. concerns, they can be grouped into three areas as follows:

1. Procedural issues: These include the Appellate Body's disregard of the 90-day deadline for appeals,[11] and the Appellate Body's frequent reference to Rule 15 since 2017 to allow the continued service of Appellate Body members on appeals even after their terms have formally expired.[12]
2. Substantive issues: These are mainly issues arising from decisions of panels and the Appellate Body which the US regards as adding to or diminishing the rights and obligations of WTO Members under the WTO Agreements.[13] Some of the leading examples include the "public body" jurisprudence in subsidies and countervailing duties,[14] the prohibition of zeroing practices in antidumping,[15] the restrictions on using out-of-country benchmarks in subsidies cases involving non-market economies,[16] the addition of "unforeseen development" requirement in safeguards,[17] the prohibition on "double remedies" involving the concurrent application of countervailing duties and antidumping duties,[18] and consideration of factors unrelated to national origins when

[8] Id. at para 7.3.

[9] See for example, Mission of the United States, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, Geneva, October 29, 2018, at 53-54, at https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf; Mission of the United States, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, Geneva, November 21, 2018, at 38-39, at https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_.Stmt_.as-deliv.fin_.public.pdf. Mission of the United States, Geneva, Switzerland, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, Geneva, February 25, 2019, at 12-14, at https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb25.DSB_.Stmt_.as-deliv.fin_.public.pdf.

[10] United States Trade Representative, *supra* n. 1.

[11] *Ibid*., at 26-32.

[12] *Ibid*., at 32-37.

[13] *Ibid*., at 81-119.

[14] *Ibid*., at 82-89.

[15] *Ibid*., at 95-104.

[16] *Ibid*., at 105-109.

[17] *Ibid*., at 110-114.

[18] *Ibid*., at 114-119.

deciding whether a treatment is "less favourable" under Article 2.1 of the Technical Barriers to Trade ("TBT") Agreement.[19]

3. Systemic issues: The US also identifies systemic problems relating to the judicial approach of the Appellate Body. For example, the Appellate Body has required the panels to treat their reports essentially as precedents and follow them absent "cogent reasons".[20] Another related problem is the increasing tendency of the Appellate Body to issue "*obiter dicta*" or "advisory opinions" which are unnecessary to resolve disputes.[21] According to the US, such practices lack proper basis under the Dispute Settlement Understanding (DSU) and encroach on the exclusive power of the Ministerial Conference and General Council to "make laws" and adopt interpretations.[22] The US also raises concerns regarding the Appellate Body's review of the factual findings of the panel,[23] which goes against the DSU as Art. 17.6 explicitly limits the scope of appeals to legal issues only.[24] Similarly, the Appellate Body regards the meaning of a Member's domestic measure as a matter of law reviewable on appeal, while the US argues that it should be a matter of fact and thus non-reviewable by the Appellate Body.[25] In addition, the US also alleges that the AB overstepped its authority by opining on matters within the authorities of other WTO bodies,[26] and departed from WTO rules by deeming "subsequent agreements" to be authoritative interpretations of WTO Agreements.[27]

II. Is the Appellate Body the problem?

While the 174-page "*casus belli*" of the USTR appears impressive, a closer analysis reveals that it is both misdiagnosed and misdirected. In terms of the substance of the attack, for example, scholars have argued that the claim that the Appellate Body issues obiter dicta, or advisory opinions is but "dictum on dicta",[28] and the criticism that the Appellate Body engages in "judicial overreach" is but "overreacting".[29] However, even if assuming that the substance of the US complaints are correct, the approach taken by the US is still highly questionable as they have been barking at the wrong tree all along.

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[19] *Ibid*., at 90-95.

[20] *Ibid*., at 55-64.

[21] *Ibid*., at 47-54. For a critique of the US criticisms on precedent and obiter dicta, see H. Gao, *Dictum on Dicta: Obiter Dicta in WTO disputes*, 17 World Trade Review (2018) 3, at 509-533.

[22] *Ibid*., at 62-64.

[23] *Ibid*., at 37-46.

[24] *Ibid*., at 37-46.

[25] Mission of the United States, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, Geneva, February 25, 2019, at https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb25.DSB_.Stmt_.as-deliv.fin_.public.pdf, at 27-28.

[26] *Ibid*., at 69-74.

[27] *Ibid*., at 74-80.

[28] Henry Gao, *supra* note 21, at 509-533.

[29] Zhou Weihuan and Henry GAO, *'Overreaching' or 'Overreacting'? Reflections on the judicial function and approaches of WTO appellate body*. (2019). Journal of World Trade. 53, (6), 951-978.

To started with, even if the problems identified by the US were true, they would be the problems with the judicial approaches of the past Appellate Body Members. The US blockage of Appellate Body appointments, however, hurts only future Members. Is there any way to discipline prospective Members? There has been some anecdotal evidence that certain individuals were denied nomination or not supported in the Appellate Body members' selection process due to their views on certain issues, but at the institutional level, there is no way to pre-screen the jurisprudence or judicial approach of potential Appellate Body members. The only rules applicable here are the DSU and the Working Procedures for Appellate Review.[30] Under Article 17 of the DSU, Appellate Body Members shall be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" and "unaffiliated with any government". Such requirements focus on the qualification of Appellate Body members and does not guarantee that their jurisprudence will be along certain lines. Similarly, the Working Procedures for Appellate Review along with the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes annexed to it only contain rules for conflict of interest and confidentiality requirements, which are also more procedural in nature. To address the US complaints against the Appellate Body, one potential solution could be to amend the DSU or the other rules to require future Appellate Body Members to subscribe to the idea of judicial restraint and shun judicial activism. While such requirement would be unprecedented, there has been similar attempts made before that can provide some hint as to whether such an approach would go down well with the WTO Membership. In 2007, when China nominated to the Appellate Body Prof. Zhang Yuejiao, a former senior official at the Ministry of Commerce of China, Taiwan opposed her nomination over concerns of impartiality.[31] This held up the whole appointment process for all four new Appellate Body members due to be appointed and resulted in a mini crisis.[32] Fortunately, after some political horse-trading, the matter was quickly resolved.[33] At the DSB meeting held after the issue was solved, many WTO Members took the floor to thank Taiwan.[34] But the fact that they all took the trouble to make the intervention also implies that WTO Members do not like the idea of having to haggle over the judicial fittingness of future Appellate Body Members in public. If anything, I would surmise that most Members would prefer to keep such manoeuvring behind the scenes. Thus, the chances of having rules requiring substantive vetting of Appellate Body Members would be rather slim.

Second, there is also a view that a big part of the problem is not with the Appellate Body Members, but with the Appellate Body Secretariat, especially its former director Werner Zdouc. According to this view, Zdouc, "arguably the most powerful international

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[30] WTO Appellate Body, *Working Procedures for Appellate Review*, at Rule 3(2), WT/AB/WP/6, (16 Aug 2010).

[31] Lawrence Chung, *Taiwan Explains Veto of WTO judge*, South China Morning Post, 21 November 2007, https://www.scmp.com/article/616543/taiwan-explains-veto-wto-judge.

[32] Reuters, *Taiwan Acts to Bar Judge; W.T.O. Upset*, New York Times, 24 November 2007, https://www.nytimes.com/2007/11/24/business/worldbusiness/24wto.html. See also Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 19 and 27 November 2007*, WT/DSB/M/242, 11 February 2008, at 2.

[33] DSB, *ibid*., at 3.

[34] *Ibid*., at 5-11.

civil servant that nobody has ever heard of",[35] "exerts undue influence at the Appellate Body, including by writing or revising draft appellate reports".[36] It is said that he would review and revise every document submitted to the Appellate Body Members, including the all-important "issues paper" - a summary of the main issues in the dispute based on the parties' submissions.[37] He is also said to participate in all substantive discussions in every cases, and push his own arguments relentlessly.[38] Of course, this view is far from the consensus and is dismissed by both former and current Appellate Body Members, who supported Zdouc with "full confidence"[39] and praised him as could not be "more committed, more knowledgeable, more dedicated, more impartial legal adviser ".[40] At the same time, however, it is worth noting that such highly prejudicial review is held not only by those in the US government, but also by two former Appellate Body Members - both from the US - who have worked with Zdouc during their tenure.[41]

Reasonable people could debate as to whether Zdouc's views on substantive legal issues before the Appellate Body have merits, or whether he indeed have exerted "undue influence" at the Appellate Body. But there is the other related argument, that due to his long tenure at the Appellate Body Secretariat, [42] his overriding concern for maintaining consistency at the Appellate Body could have made it hard for the Appellate Body to "admit and rectify past mistakes"[43] and lead to the "ossification" of the institution, as Hillman put it.[44] This is even more problematic, as Hillman argues, if you take into account the fact that Appellate Body members serve in a part-time capacity while lawyers in the Appellate Body Secretariat work on a full-time basis.[45] Thus, she suggested that there should also be an

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[35] Paul Blustein, *China Inc. in the WTO Dock: Tales from a System under Fire*, CIGI Papers no. 157 (December, 2017), Centre for International Governance Innovation, at 13.

[36] Hannah Monicken, *Appellate Body's Future Could Depend on Whether Its Director Keeps His Job*, Inside US Trade, 13 December 2019.

[37] *Ibid*. see also Debra Steger D, *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, 2017, pp. 447–465, at 453 on a detailed discussion of the origin and evolution of issues paper.

[38] Blustein, *supra* n. 35, at 13.

[39] Hannah Monicken, *WTO Appellate Body Members Condemn 'Misrepresentations' in Media*, Inside US Trade, 6 December 2019.

[40] *Ibid*.

[41] The two Appellate Body Members are Hillman and Graham. See Monicken, *supra* n. 36. For Graham's view, see also Thomas R. Graham, *The Rise (and Demise?) of the WTO Appellate Body*, John D. Greenwald Memorial Lecture, Georgetown Law International Trade Update, 5 March 2020, at https://worldtradelaw.typepad.com/files/t.graham.greenwaldlecture.final_.pdf. For Hillman's views, see also Jennifer Anne Hillman, *A Reset of the World Trade Organization's Appellate Body*, Council on Foreign Relations, 14 January 2020, https://www.cfr.org/report/reset-world-trade-organizations-appellate-body.

[42] Zdouc has served in the Appellate Body Secretariat since 1995.

[43] Blustein, *supra* n. 35, at 13.

[44] Monicken, *supra* n. 36.

[45] Hillman, *supra* n. 41.

eight-year term limit for lawyers in the Appellate Body Secretariat.[46]

In a way, the problem has been solved for now, as Zdouc has been shifted to another division unrelated to dispute settlement activities.[47] Of course, the problem could still resurface in the future if another person is put into the shoes of Zdouc again. However, it is of crucial importance to note that, even in such cases, the alleged problem would be with the Appellate Body Secretariat, rather than the Appellate Body, let alone Appellate Body Members. To block the appointment of new Appellate Body members due to the so-called "undue influence" of staff members of the Appellate Body Secretariat would be as disingenuous as closing down an entire building just because the janitors are too strict.

The third point, relating to the last one, is on the role of the "collegiality" requirement, which, as spelt out in Rule 4.1 of the Working Procedures, includes regular meetings among Appellate Body Members "to discuss matters of policy, practice and procedure"; making available all documents in all appeals to all members; and exchange of views between members assigned to a division with those who are not division members. According to Graham, the requirement "shaded into peer pressure to conform", *i.e.*, those who are not in the division exerting undue influence on the decision.[48] To solve the issue, he suggested that we should "make sure the persons tasked with making the decisions - the arbitrators, the deciders, the successors to Appellate Body Members - control the consideration of appeals from beginning to end. Prohibit anyone other than the team - deciders, and staff working directly on a case - from discussing the case, either in meetings, or in unofficial side-bar chats, unless authorized by the deciders to do so."[49] But his view of the division members bulging to the pressure of non-division members is far from an accurate depiction. Instead, as noted by a leading authority on WTO law, "collegiality notwithstanding, it is only the members of the chosen division that can cast votes each time".[50] Moreover, as numerous former Appellate Body members have correctly pointed out, collegiality, especially the exchange of views, "has truly been the mechanism for the establishment of consistency, coherence, continuity and certainty in the jurisprudence of the Appellate Body", which in turn contributed in its own way to "provide security and predictability to the multilateral trading system".[51] Without such consistency and coherence, the whole dispute settlement system could fall apart, especially as Appellate Body decisions - even the ones contradicting each other - are going to be adopted semi-automatically by the DSB according to the negative consensus rule. Thus, it would not make sense to just remove the collegiality requirement on its own. A more systemic reform is needed to make it work.

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[46] *Ibid*.

[47] Inside US Trade, *WTO Shifts Zdouc to New Division Focused on Knowledge, Info Management*, 26 June 2020.

[48] Graham, *supra* n. 41, at 8.

[49] *Ibid*, at 11-12.

[50] Petros C. Mavroidis & Evan Y. Kim, *Dissenting Opinions in the WTO Appellate Body: Drivers of Their Issuance & Implications for the Institutional Jurisprudence*, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/51, November 2018, at 1, at https://pdfs.semanticscholar.org/d770/edcdc18ce28af76521122a35d6e88bb5817a.pdf.

[51] A V Ganesan, *The Appellate Body and its Formative Years: A Personal Perspective*, 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, 2017, pp. 517-546, at 529.

Indeed, as all Appellate Body reports have to be adopted by the DSB before it can come into effect, it is no surprise that all discussions on the Appellate Body would invariably lead to the DSB. Again, the naysayers are going to state that since the negative consensus rule applies to the adoption of the Appellate Body report, the formalistic power of the DSB in not adopting of the Appellate Body report is without significance.[52] However, the fact that non-adoption is a possibility, however remote, still tells us a lot about the relationship between the Appellate Body and DSB. This is made even more explicit by Article 7.1 of the DSU, which states that the terms of reference of a panel is to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)". As Appellate Body decisions are based on panel reports, it would not be illogical to assume that the role of the Appellate Body is also to "assist the DSB in making the recommendations or in giving the rulings". This view is supported by former Appellate Body member Prof. Mitsuo Matsushita, who stated that it is the DSB "that makes decisions", while the Appellate Body is just an "auxiliary body" that advises "the DSB on what to do".[53] Thus, at the end of the day, we should not ask why the adviser made the wrong advice. Instead, we should ask why the decision-maker kept adopting the wrong advice given by the adviser.

Furthermore, in response to those who claim that the negative consensus decision-making rule makes it impossible for the DSB to reject the Appellate Body report, it can be argued that, should the WTO Members be really unhappy with specific Appellate Body decisions, they can always resort to other well-established mechanisms in the WTO Agreements. For example, pursuant to Article IX.2 of the WTO Agreement, the General Council could adopt interpretations of specific provisions in WTO Agreements and reverse problematic Appellate Body jurisprudence. The fact that this has never happened could be interpreted to mean that WTO Members are overall quite satisfied with the Appellate Body decisions; or even if the WTO Members are unhappy, their unhappiness has not reached such a level that enables them to overcome the political obstacles necessary to get a consensus decision adopted at the General Council level. However, even in the less flattering latter case, the problem clearly is with the decision-making mechanism of the WTO, rather than with the Appellate Body. Thus, any solution, if at all, must come from the political organs of the WTO such as the General Council.

III. The popular but false solution

To address the concerns of the US, many proposals have been offered by both WTO Members[54] and scholars.[55] As most of these proposals have yet to come into fruition,

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[52] USTR, *supra* note 10, at 1.

[53] Mitsuo Matsushita, *Reflections on the Functioning 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, 2017, pp. 547–558, at 548.

[54] European Commission, *WTO Modernisation: Introduction to Future EU Proposals*, 18 September 2018, https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf. WTO, General Council, *Strengthening and Modernizing the WTO: Discussion Paper — Communication from Canada*, JOB/GC/201, 24 September 2018. *Proposal by The European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro, on AB Reform*, WT/GC/W/752/Rev.2, 10 December 2018. WTO, General Council, *Adjudicative Bodies: Adding to or Diminishing Rights or Obligations under The WTO Agreement – Communication from Australia and Singapore*

however, I will not spill more ink on them here. Instead, I will focus on the only proposal that has been up and running - the Multiparty Interim Appeal Arbitration Arrangement (MPIA).

The idea for a parallel appeal mechanism was first mooted by Prof. Pieter Jan Kuijper, former Director of the Legal Affairs Division of the WTO Secretariat. In a blog post on the International Economic Law Blog on 15 November 2017, he first proposed "a solution outside the WTO" by "The Real Friends of Dispute Settlement".[56] As he outlined in his blog post,

> "*As soon as the US would have caused the membership of the Appellate Body to fall to a number, which would make it obviously impossible to deliver Appellate Body reports within or near the deadline of 90 days, this group would already have drawn up a new treaty. It would contain a procedure for appellate review only, or even a complete dispute settlement procedure, based on existing provisions of the DSU with the fewest changes possible, as otherwise the drafting would take too long. Provisional application of this treaty should be possible in order to ensure that it would become operational very quickly. The sitting members of the Appellate Body would resign and be taken over as members of the Appellate Tribunal of the new treaty, to be joined by newly selected members*."[57]

While the interesting, the Kuijper proposal was difficult to implement in the short term as it requires new treaties, which is rather unlikely given the state of play in Geneva. The problem is fixed by another proposal floated at around the same time by six lawyers from Sidley Austin, which suggested utilizing the existing arbitration mechanism under Article 25

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to the General Council, WT/GC/W/754 (30 Nov. 2018); WTO, 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/215, 1 Mar. 2019; WTO, General Council, *Informal Process on Matters related to The Functioning of the Appellate Body – Communication from Japan and Australia*, WT/GC/W/768, 18 Apr. 2019.

[55] See generally Tetyana Payosova, Gary Clyde Hufbauer & Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, Peterson Institute for International Economics Policy Brief 18–5, Mar. 2018, at https://piie.com/system/files/documents/pb18-5.pdf; Robert McDougall, *Crisis in the WTO: Restoring the WTO Dispute Settlement Function*, CIGI Papers No. 194, Oct. 2018, at www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf; Jennifer Hillman, Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, The Bad and The Ugly?, Inst. of Int'l Econ. L., Georgetown University Law Center, IIEL Issue Briefs, 10 Dec. 2018, at www.law.georgetown.edu/wpcontent/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf; Andrew Stoler, *Crisis in the WTO Appellate Body and the Need for Wider WTO Reform Negotiations*, Inst. for Int'l Trade, The University of Adelaide, Policy Brief 01, Mar. 2019, at https://iit.adelaide.edu.au/system/files/media/documents/2019-04/IIT%20PB02%20Crisis%20WTO%20Appellate.pdf; Ernst-Ulrich Petersmann, *How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crises?*, EUI Working Paper RSCAS 2018/71, Dec. 2018, at http://cadmus.eui.eu/bitstream/handle/1814/60238/RSCAS_2018_71.pdf?sequence=1&isAllowed=y.

[56] Guest Post from Pieter Jan Kuijper on the US Attack on the Appellate Body, International Economic Law and Policy Blog, 15 Nov. 2017, at https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html. This was later turned into an editorial in Legal Issues of Economic Integration. See '*From the Board: The US Attack on the WTO Appellate Body'*. Legal Issues of Economic Integration 45, no. 1, (2018): 1–12.

[57] *Id*.

of the DSU.[58] In a paper published a year later, former Appellate Body Chair James Bacchus also supported the idea of Article 25 arbitrations.[59]

Drawing inspirations from these proposals, the EU led the effort to establish an alternative. On 25 July 2019, the EU and Canada announced the establishment of an interim appeal arbitration arrangement under Article 25 of the DSU.[60] On 21 October 019, a similar arrangement was reached by the EU with Norway.[61] When the Appellate Body became paralyzed in December 2019, the EU switched from the bilateral mechanism to a multi-party mechanism. On 24 January 2020, the EU and 16 WTO Members announced that they will start working on "contingency measures that would allow for appeals of WTO panel reports in disputes among ourselves, in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding, and which would be in place only and until a reformed WTO Appellate Body becomes fully operational".[62] On 27 March 2020, the EU and 15 WTO Members reached an agreement on a Multiparty Interim Appeal Arbitration Arrangement.[63] On 30 April 2020, the MPIA members officially notified the MPIA to the WTO,[64] which turned the arrangement into effect.[65] On 31 July 2020, the MPIA parties notified to the WTO the agreed pool of arbitrators,[66] which set the Arrangement in motion.[67]

An interesting experiment, the MPIA is also a strange animal as it embodies many contradicting elements, including the following:

First, it is unclear whether the MPIA is within or outside of the WTO system. While

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[58] Scott Anderson, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy, and Iain Sandford. 2017. *Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals*. CTEI Working Paper CTEI-2017-17. Centre for Trade and Economic Integration, at http://repository.graduateinstitute.ch/record/295745/files/CTEI-2017-17-.pdf.

[59] James Bacchus, *Saving the WTO's Appeals Process*, Cato Institute, 12 Oct. 2018, at https://www.cato.org/blog/saving-wtos-appeals-process.

[60] *Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement*, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_4709. The text of the arrangement is at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf.

[61] *EU and Norway Agree on Interim Appeal System in Wake of World Trade Organization Appellate Body Blockage*, 21 Oct. 2019, at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2074. The text of the arrangement is at https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf.

[62] *Statement by Ministers*, Davos, Switzerland, 24 Jan. 2020, at https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf.

[63] *EU and 15 World Trade Organization Members Establish Contingency Appeal Arrangement for Trade Disputes*, 27 Mar. 2020, at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2127.

[64] WTO, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, JOB/DSB/1/Add.12, 30 Apr. 2020.

[65] *Interim Appeal Arrangement for WTO Disputes Becomes Effective*, 30 Apr. 2020, at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143.

[66] *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes* – Supplement, JOB/DSB/1/Add.12/Suppl.5, 3 Aug. 2020.

[67] *The WTO Multi-party Interim Appeal Arrangement Gets Operational*, 3 Aug. 2020, at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176.

the Kuijper proposal envisaged the arrangement to be "a solution outside the WTO", the Sidley and Bacchus proposals are based on Article 25 of the DSU. The latter approach is the one adopted by the MPIA, which sought to anchor the Arrangement to the DSU from the very beginning. It was notified to the DSB as an addendum to the "Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO", which was first proposed by Canada in 2016 as a voluntary initiative to "foster a more organic evolution of dispute settlement practices."[68]

However, merely paying lip service to WTO dispute settlement provisions and procedures does not automatically legitimize the initiative. The language in Article 25 is laconic and leaves many details of the Arbitration mechanism unclear. The only thing certain is that it is supposed to be a voluntary arrangement, as both the resort to arbitration and the acceptance of the final arbitration reward are subject to mutual agreement of the parties. Such voluntary nature is confirmed by Article 15 of the Agreed Procedures for the MPIA, which further confirms that arbitral award shall only "be notified to, but not adopted by, the DSB". This is very different from the compulsory nature of the normal WTO dispute settlement process, which grants to panel and Appellate Body reports the full support of all WTO Members through the adoption of these reports by the DSB. In contrast, the MPIA arbitral award is only binding among the disputing parties in a specific case, but it does not bind other WTO Members, or even the same parties in future disputes. In many regards, it is akin to mutually agreed solution (MAS) in WTO disputes, which, given the checkered compliance record of MAS, does not bode well for the future of the MPIA as a suitable dispute settlement mechanism.[69]

Second, it is equally unclear as to whether the MPIA is meant to appease or further aggravate the US. On the one hand, many of the clauses in the MPIA do address specific concerns of the US on the Appellate Body. For example, by stating that the arbitrators shall only address those issues that "are necessary for the resolution of the dispute" or "have been raised by the parties", Art. 10 of the Agreed Procedures follows the US position against the issuance of obiter dicta or advisory opinion by the Appellate Body. Similarly, the problem of the Appellate Body exceeding the 90-day limit is addressed by Art. 12. To make sure that the award may be issued within the 90 day time-period, Art. 13 also provides the arbitrators power to exclude claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.

Notwithstanding these concessions, the US has regarded the MPIA with scepticism and even outright hostility since it came into being. This is because the very nature of the MPIA as a binding appeal mechanism is antithesis to the US' conceptualization of WTO dispute settlement. First, the US is against the very idea of a two-level adjudication mechanism. In 2003, when Robert Lighthizer was nominated, together with Merit Janow, to the Appellate Body, he still held a healthy respect for the Appellate Body, by stating that he would rather "apply a strict constructionist's perspective, and add a certain credibility" to the

[68] WTO, *Minutes of Meeting Held in the Centre William Rappard on 21 July 2016*, WT/DSB/M/383, 11 October 2016, at para 9.3. See also the detailed explanation on the background in Valerie Hughes, *Canada: A Key Player in WTO Dispute Settlement*, Canada in International Law at 150 and Beyond | Paper No. 11 — February 2018, at https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.11%20Hughes WEB.pdf.

[69] See Di Hao, *Compliance Problems Under WTO Disputes Settled by Mutually Agreed Solution*, 49 Georgetown Journal of International Law 887 (2018).

Appellate Body, rather than kill it.[70] However, ever since he lost that bid, Lighthizer's animosity towards the Appellate Body has been growing. When he returned as the USTR in 2017, it was widely believed that Lighthizer would "try to put pressure on the WTO to rein in some of these outlier decisions [by the Appellate Body]".[71] Later, when Lighthizer discovered that he was able to paralyze the Appellate Body through a simple blockage, his eyes are set on bigger target: killing the Appellate Body. In his op-ed in the Wall Street Journal on 20 August 2020, Lighthizer argued that "the WTO's dispute-settlement system should be totally rethought. The current two-tier system should be replaced with a single-stage process akin to commercial arbitration, in which ad hoc tribunals are impaneled and resolve particular disputes in an expeditious manner."[72] If the aim of the US is to get rid of the appellate stage, there is no reason why it would accept an "ersatz Appellate Body" that "incorporates and exacerbates some of the worst aspects of the Appellate Body practices".[73]

Second, the US also opposes efforts to make the MPIA decisions binding, especially as "precedents" binding on future dispute settlement panels. Earlier on, the EU's bilateral arrangements with Canada and Norway tried to maintain the precedential status of the interim appeal arbitration awards by explicitly stating that they "shall be deemed to constitute Appellate Body reports adopted by the DSB for the purposes of interpretation of the covered agreements".[74] However, such language has been removed from the MPIA's version of Agreed Procedures, probably in response to protests from the US. This is confirmed again by Lighthizer's op-ed, which states that the rulings of "these one-off panels should apply only to the parties in the dispute, and not become part of an ever-evolving body of free-trade jurisprudence".[75] It is well known that the point of binding precedents is to create a set of uniform jurisprudence for WTO disputes. But given the strong opposition of the US, a precedential system will never be acceptable to the US. On the other hand, however, if an appeal mechanism cannot create a set of uniform jurisprudence, it would become pointless or even counterproductive as all it does is to add just another layer of conflicting jurisprudence on top of the already messy jurisprudence at the panel level.

In addition to the practical difficulties outlined above, the MPIA also suffers from various constitutional birth defects, with the main ones being the following:

The first is the denying WTO Members their rights to appeal. Under Art. 2 of the Arrangement, the participating Members "will not pursue appeals under Articles 16.4 and 17 of the DSU" when they resort to the MPIA. It is unclear whether such prohibition is mandatory. If it is, then it would violate the right to appeal guaranteed under Art. 16.4 of the DSU, as well as the broad requirement that the Members "shall have recourse to, and abide

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[70] Greg Rushford, *Bob Lighthizer, WTO jurist?*, The Rushford Report, Oct. 2003, at http://www.rushfordreport.com/2003/10_2003_Publius.htm.

[71] Adam, Behsudi, *The Man Getting Ready to Take on the WTO*, Politico, 15 Feb. 2017, at https://www.politico.com/agenda/story/2017/02/robert-lighthizer-wto-000304/.

[72] Robert E. Lighthizer, *How to Set World Trade Straight*, Wall Street Journal, 20 Aug. 2020, https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341.

[73] D. Ravi Kanth, *US Rejects EU-led Interim Appeal Arbitration Arrangement*, Third World Network, SUNS #9134, 9 Jun. 2020, https://twn.my/title2/wto.info/2020/ti200608.htm.

[74] See e.g., para. 8 of the Agreed Procedures of the two arrangements.

[75] Lighthizer, *supra* n. 72.

by, the rules and procedures of this Understanding" as per Art. 23.1 of the DSU. If it not mandatory, however, then the MPIA could easily fall apart when a party "appeal into the void"[76] by filing an appeal with the defunct Appellate Body after losing an MPIA arbitration.

The second issue is the binding nature of MPIA awards. Even though the MPIA has retreated from its earlier position of creating binding precedents, its current position of binding only among the parties to the dispute is also rather untenable. First of all, as mentioned earlier, according to the original design of the DSU, the panel and Appellate Body are not decision-makers, and their decisions only becomes binding when they are adopted by the DSB, the political body comprising all WTO Members. The MPIA, however, explicitly states that the award will only be notified to, but not adopted by the DSB. Thus, its binding force cannot come from the DSB. Instead, as made clear by the Agreed Procedures, an award only becomes binding because the parties agree to abide by it. But then this would create a logical problem, as even the Appellate Body decision needs DSB adoption to become binding, yet an interim mechanism like the MPIA would be binding without adoption by the DSB. Some might brush off this concern as mere semantics, but there is more to that. The requirement for the adoption of Appellate Body report by the DSB implies that there is always a possibility, however slight it might be, for not adopting the report. Yes, an MPIA award, by getting rid of the requirement for DSB adoption, also made it impossible for the disputing parties to reject the award. In this sense, we could say that the MPIA, as an extra-WTO mechanism, is more binding than the Appellate Body. Defenders of the MPIA may argue that an MPIA award only binds the parties to the dispute, like the MAS. But there is a crucial difference between the MPIA and MAS: The MAS is independent of panel decisions and does not affect panel reports. The MPIA, however, is supposed to "uphold, modify or reverse the legal findings and conclusions of the panel". In other words, the MPIA, as an arrangement between two WTO Members who are parties to a specific dispute, could change the decisions of the panel, an institution that is duly established by the DSB, which is composed of all WTO Members.

It could be argued that the discussions above give too much credit to the "binding" nature of MPIA awards, as an MPIA disputant can always withdraw from the arbitration and return to the normal WTO dispute settlement process. However, due to the way Article 18 of the Agreed Procedures of the MPIA are structured, the ability to withdraw is a right that in practice can only be exercised by the Appellant, but not the Appellee, especially if the latter does not file a cross-appeal.[77] One may argue that this rule is simply copied from Article 30.1 of the Working Procedures for Appellate Review. In practice, the Appellate Body has remedied the problem through its report in *EC - Sardines*, by stating that "the right to withdraw an appeal must be exercised subject to these limitations" such as "fair, prompt and effective resolution of trade disputes" or "good faith".[78] However, it is unclear as to whether such jurisprudence could be followed by the MPIA, because first of all, such Appellate Body

[76] See Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What To Expect?*, 22 Journal of International Economic Law (2019) 297-321.

[77] Henry Gao, *How to Game the MPIA, or, How to Avoid Being Taken Advantage of in the MPIA*, 20 Jun. 2020, International Economic Law and Policy Blog, at https://ielp.worldtradelaw.net/2020/06/how-to-game-the-mpia-or-how-to-avoid-being-taken-advantage-of-in-the-mpia.html.

[78] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 Oct. 2002, DSR 2002:VIII, p. 3359, at paras. 139-140.

ruling is just *obiter dicta*; and second, as the MPIA is essentially premised on bilateral agreements, it is unclear whether the disputing parties do have rights as under a multilateral agreement, especially if such "rights" could directly affect the interests of the other party.

Lest anyone has doubts on the bilateral nature of the MPIA, the European Commission introduced an amendment to Regulation (EU) No 654/2014 in December 2019.[79] Essentially, it would allow the EU to unilaterally impose retaliatory tariffs when the other party, in a dispute that the EU won at the panel stage, tries to "appeal into the void" by filing an appeal before the Appellate Body and refusing to join an arbitration.[80] Adopted by EU Member States in April 2020, the Regulation essentially tries to force other WTO Members to accept the MPIA using threats of unilateral sanctions.[81] Notwithstanding its obvious violation of the rule prohibiting unilateral measures under Art. 23.1 of the DSU, its effectiveness is virtually guaranteed by the economic clout of the EU. In time, it would not be surprising to see other MPIA parties, especially those which are also major traders, to follow suit, either by enacting similar regulations or by adopting similar practices. Put it another way, the MPIA parties are essentially letting out the demon of unilateralism by trying to buttress the authority of the faux Appellate Body in an apparent effort to save the real Appellate Body.

IV. The rule-based true solution

The many problems with the popular solutions to the Appellate Body crisis do not mean that there is no way to solve the problem. There is, and unlike the other solutions discussed above, it does not require the introduction of new rules or institutions because it has already been provided for in the rule books of the WTO.

Put simply, the solution is to appoint the Appellate Body Members at the General Council by majority vote, as provided for under Article IX.1 of the WTO Agreement.[82] The legal basis for this approach can be found under Article IV of the WTO Agreement, which provides in paragraph 1 that the Ministerial Conference "shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements". As its functions are conducted by the General Council in the intervals between meetings of the Ministerial

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[79] European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules*, COM/2019/623 final, 12 Dec. 2019, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019PC0623.

[80] Yves Melin & Jin Woo Kim, *The carrot and the stick: a tale of how the EU is using multilateral negotiations and threats of unilateral retaliation to buttress the multilateral, rule-based trade system, and protect its markets*, Reed Smith Client Alert 2020-274, 28 Apr. 2020, at https://www.reedsmith.com/en/perspectives/2020/04/the-carrot-and-the-stick-a-tale-of-how-the-eu-is-using-multilateral.

[81] European Commission: DG Trade, *Proposal for a Regulation amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules*, 12 Dec. 2019, at https://www.europeansources.info/record/proposal-for-a-regulation-amending-regulation-eu-no-654-2014-concerning-the-exercise-of-the-unions-rights-for-the-application-and-enforcement-of-international-trade-rules/#:~:text=The%20initiative%20concerns%20an%20amendment,in%20order%20to%20ensure%20the.

[82] For a detailed explained of the option, see Gao, *supra* n. 4, at 234-236.

Conference,[83] the General Council also has the authority to decide on all matters.

Detractors, however, are quick to point out that the latter part of Art. IV.1 states that such decision shall be made "in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement". Furthermore, Art. 2.4 of the DSU explicitly states that, "[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". Thus, the argument goes, the decision, even if made by the General Council, shall still follow the consensus rule.

Such view is problematic and reflects misunderstandings of several features of the WTO system:

First, it ignores the fact that the consensus decision-making rule under Art.2.4 of the DSU only applies when the decision is taken by the DSB. However, as my proposal calls for the matter to be moved to the General Council, it is unreasonable to assume that the General Council would be bound by the same consensus rule. Doing so would essentially rewrite the language of Art. 2.4 from "[w]here the rules and procedures of this Understanding provide *for the DSB to take a decision*, it shall do so by consensus" into ""[w]here any WTO body takes a decision on any matter within the scope of this Understanding, it shall do so by consensus" (emphasis added). Clearly, this is not what the drafters have put in the DSU and the current wording shall be given effect.

Moreover, according to Art. IV.3 of the WTO Agreement, "[t]he General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding". My proposal calls for the matter to be moved to the General Council, and as the General Council here is not convening as the DSB, it shall not be subject to the constricting consensus rule under the DSB. To argue otherwise and require the General Council to always follow the consensus rule when it decides on matters relating to dispute settlement would essentially mean that, whenever the General Council decide on issues relating to dispute settlement, it automatically becomes the DSB, even if it is not convened as the DSB as per Art. IV.3 of the WTO Agreement. Such an approach would conflate the distinctions between the General Council and DSB as different institutions, and contradict the explicit treaty language that the General Council only acts as the DSB when it convenes as the DSB. Furthermore, by requiring the General Council to always follow the consensus rule in such instances, it would render inutile the carefully-crafted decision-making rules under the WTO Agreement, especially those under Arts. IX and X.

Second, it also ignores the totality of the cited clause in Art. IV.1, which provides that Ministerial Conference shall decide "in accordance with the specific requirements for decision-making *in this Agreement and* in the relevant Multilateral Trade Agreement" (emphasis added). The argument that all matters on dispute settlement, even if moved to the General Council, can only be decided as per the consensus rule under the DSB only gives effect to the second half of the sentence, but renders the first part meaningless. If the drafters only wished to give effect to the decision-making rule in the specialized agreement, they would have stated "in accordance with the specific requirements for decision-making in the relevant Multilateral Trade Agreement". The addition of "in this Agreement" means that the

[83] WTO Agreement, Art. IV.2.

General Council is not bound only by the decision-making rule in the specialized agreement, and should also consider the decision-making rule in the WTO Agreement itself. If there are conflicts in the decision-making rules of the two Agreements, we should 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". In other words, the decision-making rule under the WTO Agreement shall prevail.

Last, such view also contravenes the object and purpose of the DSU. According to Article 3.2, the dispute settlement system of the WTO is "a central element in providing security and predictability to the multilateral trading system". Similarly, Article 3.2 states that the "prompt settlement" of disputes is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". By blocking the appointment of Appellate Body members, and thus paralyzing the Appellate Body, the US has not only made it impossible to have "prompt settlement" of disputes, but also endangered the "security and predictability to the multilateral trading system". Indeed, if Lighthizer were to have his way, the current two-tier dispute settlement system painstakingly negotiated in the DSU would be gone and "be replaced with a single-stage process akin to commercial arbitration, in which ad hoc tribunals are impaneled and resolve particular disputes in an expeditious manner".[84] In essence, the US is not merely refusing to join the consensus to start the Appellate Body appointment process, it is abusing its power in bad faith to bypass all the carefully-designed decision-making rules under Art. X of the WTO Agreement to force a major amendment to the DSU on all other WTO Members. If, at this critical juncture, the other WTO Members still refuse to invoke the majority voting process already provided for under the WTO Agreement, then they have essentially become accomplices to the US in its murder of the Appellate Body.[85]

So why then, have so many WTO Members and experts alike, either ignored the voting option outright or brushed it off as untenable? The answer is that there has long been a collective phobia of voting that stems from an age-old tradition of institutional stigmatization of the practice. A good summary of the anti-voting culture can be found in the minutes of the April 1992 Council meeting discussion of Egypt's request for a waiver under Article XXV:5 in connection with the modification of its schedule of concessions.[86] When Egypt, frustrated that its waiver request was not approved with consensus, suggested that the matter be decided by voting, the contracting parties bombarded Egypt for "violat[ing] the GATT tradition"[87] in raising such "unprecedented request".[88] Warning that "the whole spirit of the [GATT] system … was at stake", Switzerland stated that "a vote in the Council was a final recourse, to be taken when all other possibilities for reaching a consensus had been exhausted."[89] Concurring with Switzerland, Mexico argued that voting should be regarded "like an atomic

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[84] Lighthizer, *supra* n. 72.

[85] Henry Gao, *Murder on the Multilateral Express*, The Interpreter, 10 Dec. 2019, at https://www.lowyinstitute.org/the-interpreter/murder-multilateral-express.

[86] GATT, Minutes of Meeting Held in the Centre William Rappard on 30 April 1992, C/M/256, 29 May 1992.

[87] Statement of Jamaica, *ibid*., at 11.

[88] Statement of the US, *ibid*., at 9.

[89] *ibid*., at 11.

weapon -- to be stored but not used."[90] To sum up, while the contracting parties could not reach a consensus to approve Egypt's waiver request, they seemed to have a much easier time forming the consensus against its request for voting. Their main concern is that "forcing a vote would set a bad precedent in the GATT",[91] "open the way for similar actions in the future and … be inimical to a variety of interests and concerns, both individual and collective, in the future."[92]

Such slippery slope argument, however, would only work if there is still possibility for the emergence of a consensus down the road. But with Lighthizer stating unambiguously his intention to go back to the GATT-style panel-only dispute settlement system, anyone who still harbours the hope of reaching consensus at last would be guilty of naivete. To borrow Mexico's expression, the "atomic bomb" has already been dropped by the US. Unless the other WTO Members finally muster the necessary political will to respond with their own "nuclear option" - voting, they will lose the final window of opportunity to deflect the deadly weapon and cause irreparable damage to the two-stage dispute settlement system, one of the key distinguishing features of this "extraordinary achievement that comes close to a miracle".[93]

Indeed, we are probably approaching the point of no return faster than we thought, especially with the MPIA now coming into action. While the MPIA, with all its problems discussed in the last section, will never be as good as the Appellate Body, its very existence will provide a false comfort that a replacement has been found for the defunct Appellate Body. Thus, paradoxically, the more successful the MPIA is, the further WTO Members will sail away from their ultimate destination: the restoration of the Appellate Body proper. In the end, the "interim" solution that was hastily put in place as a "contingency measure" will becomes a permanent fixture in the system. There is no shortage of such precedents in the history of the multilateral trading system, with the most famous examples being the perpetuation of the agricultural waiver for the US and EU in the early dates of the GATT, and, ironically, the abandoning of explicit provision of majority voting under Article XXXV of the GATT in favour of consensus - something never appeared in the pages of the original GATT.

Another worrying trend is that, the longer the WTO Members sit on the Appellate Body impasse without any real action, the more everyone will get used to the illegal and bad-faith blockage of the US. As it is often said, when a broken window is not fixed in time, more stones will be thrown at the house. This is what we have already started to witness. For example, in July 2020, the US blocked the appointment of the Acting WTO Director General, which was widely regarded as a routine decision that is easy to make.[94] To make it even worse, some other WTO Members also started to emulate the US when they saw that the crying baby always gets what it wants. For example, in February 2020, a DSB meeting was

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[90] *ibid*., at 12.

[91] Statement of Sweden, *ibid*., at 10.

[92] Statement of Jamaica, *ibid*., at 11.

[93] C.-D. Ehlermann, *Some Personal Experiences as Member of the Appellate Body of the WTO*, Policy Paper RSC No 02/9, The Robert Schuman Centre for Advanced Studies, European University Institute, at 44.

[94] *Exclusive: WTO Unlikely to Get Interim Leader as U.S. Insists on Its Candidate, Causes Impasse*, https://www.reuters.com/article/us-trade-wto-usa-exclusive/exclusive-wto-unlikely-to-get-interim-leader-as-us-insists-on-its-candidate-causes-impasse-idUSKCN24U2P2.

suspended due to a fight between the Philippines and Thailand regarding the Philippines' request to impose retaliatory tariffs on imported Thai goods.[95] To me, these episodes hardly came as surprises. If nothing is done against the first guy who throw the nuclear bomb, it would not be long before everyone in town starts to do the same.

V. Conclusion

When the US first raised its objections over Appellate Body appointment three years ago, many in the WTO regarded the US action as illegal and shocking. However, three years later, many seem to have become more and more sympathetic to the US position. Such sentiment is reflected in WTO Director General Robert Azevedo's words in 2018, "[t]his guy comes along, and he begins to shake the tree pretty hard. So let's make sure that some fruits fall".[96] Indeed, the US action, while drastic, did prompt some serious reflections on the roles and functions of the Appellate Body, as well as those of the WTO dispute settlement system in general.

However, as I argued earlier in this paper, even if the US were right in its substantive grievances against the Appellate Body, the approach it has taken is far from appropriate. Those people who thought otherwise has been proven wrong as the US started to reveal their cards. In particular, Lighthizer has made clear, with his latest op-ed, that he is not just content with just getting some fruits. Instead, he wants to "kill the tree".

In an effort to save the Appellate Body, many proposals have been proffered. Among them, the MPIA is the most popular, and the only one up and running at this moment. However, as I have demonstrated in this paper, the MPIA, with its many constitutional and practical defects, is unlikely to be the saviour of the Appellate Body many have hoped. Instead, it would probably create more problems than it sought to remedy, with the main ones being the creation of a bad precedent of an extra-WTO appeal framework, as well as a false hope that deflates the political will among WTO Members to find a proper solution.

The proper solution, as I have argued, is to force a decision on Appellate Body appointment with majority voting at the General Council. However, because WTO Members regard voting with absolute horror, this option has proven to be rather unpopular, if not impossible. Unless the Members can overcome their irrational fear of voting, which has been explicitly provided for in the WTO Agreement, they will not be able to find a permanent solution against the US, or any other WTO Members wanting to do the same. And while they are waiting for the miracle to happen, the miracle tree that has been blossoming for the past 25 years, would have been killed.

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[95] WTO, *DSB Meeting Suspended Over Disagreement between the Philippines and Thailand in Cigarette Dispute*, 28 Feb. 2020, at https://www.wto.org/english/news_e/news20_e/dsb_28feb20_e.htm.

[96] *Trump's Threat to Leave the WTO Could Be a Saving Grace*, 12 Dec. 2018, https://www.bloomberg.com/news/articles/2018-10-12/trump-s-threat-to-leave-the-wto-could-be-a-saving-grace .