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# Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis

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## Abstract

The World Trade Organization (WTO) is in crisis. Once the Appellate Body has fewer than three members in office, it will become non-operational, compromising the WTO's compulsory and binding dispute settlement system. Attempts to overcome the opposition of the United States to Appellate Body appointments through majority rule appear legally fragile and politically unwarranted, while purely ad hoc bilateral solutions fall short of reproducing the security provided by compulsory and binding dispute settlement. This article explores and discusses bilateral and 'plurilateral' agreements that willing Members may sign to re-establish compulsory dispute resolution, arguing that the one that best fits the letter and spirit of the Dispute Settlement Understanding is an ex ante agreement to establish an 'appeal Arbitrator' in case of a non-operational Appellate Body. If appropriately designed, such an agreement not only allows willing Members to restore a high degree of security and predictability in their mutual trade relations but also increases the incentives for multilateral negotiations leading to a permanent resolution of the crisis.

## Keywords

Appellate Body – appointments – arbitration – crisis – dispute settlement – World Trade Organization

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\* Assistant Professor, University of Amsterdam. I thank Giorgio Sacerdoti and Hélène Ruiz Fabri for commenting on earlier versions of this article, presented at the Sixth Biennial Conference of the Society of International Economic Law, on 12–14 July 2018, in Washington, DC. The usual caveat applies.

## 1 Introduction

The dispute settlement system of the World Trade Organization (WTO), with the Appellate Body as its 'centrepiece',<sup>1</sup> has long been considered by those involved in international trade governance as the 'jewel in the crown' of the post-1995 multilateral trading system.<sup>2</sup> In 2019, the continued operation of the Appellate Body is at risk, in a crisis on appointments that has been called the WTO's 'crown of thorns'.<sup>3</sup> After blocking the re-appointment of an Appellate Body member (ABM) in 2016,<sup>4</sup> the United States (US) has since mid-2017 been blocking the initiation of the selection process for appointment of new ABMs.<sup>5</sup> The normally seven-member-strong Appellate Body now counts only three members – the minimum necessary for it to hear appeals. The United States has stated that it will not support filling vacancies until other Members agree to find a solution to what it sees as 'persistent overreaching' by the Appellate Body.<sup>6</sup> If the deadlock continues, as is all but certain,<sup>7</sup> on 11 December 2019 the Appellate Body will have fewer than three members and will be unable to hear new appeals,<sup>8</sup> leading to the *de facto* dismantling of the

1 Peter Van den Bossche, 'From Afterthought to Centerpiece. The WTO Appellate Body and Its Rise to Prominence in the World Trading System' in Giorgio Sacerdoti, Alan Yanovitch and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP 2006) 289–365.

2 The expression is often attributed to the first Director-General of the WTO, Renato Ruggiero (see eg Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, CUP 2013) 302).

3 Cosette D Creamer, 'From the WTO's Crown Jewel to Its Crown of Thorns' (2019) 113 *AJIL Unbound* 51–55.

4 WTO, 'Minutes of DSB Meeting on 23 May 2016' (29 August 2016) WT/DSB/M/379, para 6.7.

5 See Pieter Jan Kuijper, 'The US Attack on the WTO Appellate Body' (2018) 45 *LIEI* 1; Robert McDougall, 'The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance' (2018) 52 *JWT* 867; Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2016) 79 *Law & Contemp Probs* 237–273.

6 WTO, 'Minutes of DSB Meeting, 27 August 2018' (30 November 2018) WT/DSB/M/417, para 12.2; WTO, 'Minutes of DSB Meeting of 18 December 2018' (4 April 2019) WT/DSB/M/423, paras 4.1–4.25.

7 See United States Mission to International Organizations in Geneva, 'Statements by the United States at the WTO General Council Meetings' (15 October 2019) <<https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/>> accessed 23 October 2019.

8 Art 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Agreement Establishing the World Trade Organization, Annex 2) (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU) provides: 'The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case.'

WTO's compulsory and binding dispute settlement system. To prevent this from occurring, some WTO Members have entered into bilateral agreements and arrangements either committing not to appeal or establishing a bilateral mechanism to replace appeals with arbitration.<sup>9</sup>

This article examines these agreements and argues that solutions that depend on specific consent accorded in individual cases are flawed in that they do not lead to the continuation of the WTO's compulsory dispute settlement system. While WTO Members may not under WTO procedural rules overrule the US's blocking of appointments, they may establish, through an *ex ante* agreement, a mechanism to safeguard compulsory dispute settlement. Among the possible alternatives, I propose that the one that best fits the letter and respects the object and purpose of the Dispute Settlement Understanding (DSU) is a 'plurilateral' agreement which, employing DSU Article 25 arbitrations, allows parties to disputes to appeal from panel reports to an arbitrator if the Appellate Body is unable to hear an appeal. While arbitration would not be able to fully replace the Appellate Body, it would allow willing WTO Members to continue to pursue trade adjudication with finality, prevent the impasse from paralyzing the organization for all its Members, and create a framework permitting the re-establishment of compulsory and binding WTO dispute settlement.

Following this introduction, Part 2 examines the Appellate Body appointments crisis, considers the US's objections to the Appellate Body's conduct, and discusses the consequences of a non-operational Appellate Body. Part 3 examines the 'multilateral' and 'bilateral' solutions to a non-operational Appellate Body, arguing that the former conflict with both the letter of the DSU and the consensus-based structure of the WTO while the latter fail to ensure the subsistence of compulsory WTO dispute settlement. Part 4 discusses a 'plurilateral' solution, an *ex ante* agreement among willing Members for the preservation of compulsory dispute settlement among them, considering its possible design and the potential impact of its operation on the development of WTO law. Part 5 concludes.

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9 Analyzed below. This article was first written, presented and discussed before these agreements and arrangements were signed. While some of them address points originally raised, key aspects of the proposal – *ex ante* agreement, plurilateral support and openness to accession by other WTO Members – is still missing.

## 2 Blocking the Appellate Body: The United States and the WTO

### 2.1 *The United States' Block of Appellate Body Appointments*

The current administration in the United States has made no secret of its dissatisfaction with the WTO, and in particular with its dispute settlement system. In February 2018, after announcing one of the many rounds of tariffs applied to Chinese products to pressure China into accepting demands for changes in its economic system, President Donald Trump labelled the WTO a 'disaster' for the United States.<sup>10</sup> A few months earlier, the US Trade Representative (USTR), Robert Lighthizer, had expressed a preference for the non-binding dispute settlement system that existed between 1947 and 1994, under the General Agreement on Tariffs and Trade (GATT 1947),<sup>11</sup> stating that, in order 'to have [the WTO] work', its binding dispute settlement system would have to change.<sup>12</sup>

This administration's views are not entirely new. Despite the fact that it was the United States that pressured for the creation of binding and enforceable dispute settlement at the Uruguay Round negotiations,<sup>13</sup> securing approval of the US Senate for the WTO Agreements was a major undertaking, precisely due to the novelty of having an independent adjudicator review the legality of US measures without the possibility of a US block.<sup>14</sup> While the Senate ultimately approved the agreements, the testimonial of John Jackson concerning the constraints imposed by WTO law on US sovereignty is revealing. Jackson stated:

Once the United States deems it necessary to take certain measures or actions to safeguard its significant national interests, it is empowered to escape from the binding of international rules and norms, to breach its international obligation undertaken in the light of international treaties, and to go in its own way. When necessary, the United States does not even

10 Peter S Goodman, 'Trump Just Pushed the World Trade Organization Toward Irrelevance' *New York Times* (New York, 23 March 2018).

11 General Agreement on Tariffs and Trade (signed 30 October 1947, entered into force provisionally on 1 January 1948) 55 UNTS 194.

12 Robert Lighthizer, 'US Trade Policy Priorities: Robert Lighthizer, United States Trade Representative', Center for Strategic and International Studies (18 September 2017) <[https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170918\\_U.S.\\_Trade\\_Policy\\_Priorities\\_Robert\\_Lighthizer\\_transcript.pdf?kYkVT9pyKE.PK.utw\\_uoQVoewnVizj5L](https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170918_U.S._Trade_Policy_Priorities_Robert_Lighthizer_transcript.pdf?kYkVT9pyKE.PK.utw_uoQVoewnVizj5L)> accessed 7 August 2019.

13 Andrew L Stoler, 'The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?' (2004) 3 WTR 99.

14 John H Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results' (1998) 36 *Columb J Transnatl L* 156.

hesitate to withdraw from the international treaties that it deems would restrain it from free action. Such power is the U.S. sovereignty, the sovereignty that the United States persistently retains in hand in the process of the international 'allocation of power'.<sup>15</sup>

What Jackson, and perhaps many who negotiated the WTO Agreements, may not have foreseen was the possibility that this sovereign power could be exercised not outside the WTO system but within it, to prevent the appointment of ABMs. Under DSU rules, any Member has the procedural power to block the appointment of an ABM. Appointments are made by the Dispute Settlement Body (DSB),<sup>16</sup> the sole WTO organ for which the WTO Agreements not only provide specifically that its decisions under the DSU are to be made by consensus<sup>17</sup> but specifically define consensus as situations in which 'no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision'.<sup>18</sup> Although some have proposed interpretative solutions that would allow the WTO political organs to overcome a block (discussed in Section 3.1 below), so far no WTO Member has advanced anything other than a textual interpretation of these provisions read in combination: that, as long as a WTO Member is 'present' at a DSB meeting and 'formally objects' to the appointment of an ABM, no appointment can take place. In fact, under the WTO's consensus-based procedural practice, even the decision to initiate a selection process for a future appointment can be blocked by a single recalcitrant Member.<sup>19</sup>

Although the consensus requirement necessarily implies that WTO Members can veto nominees to the Appellate Body at the stage of the selection process, the first time a formal block was announced was in 2016. The United States, still under the Barack Obama administration, took the then

15 John H Jackson and others, *Legal Problems of International Economic Relations: Cases, Materials and Text* (3rd edn, West, 1995) 305 (citing the Testimony of John H Jackson in *Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Finance Committee*, 103rd Cong 114 (1994), 23 March 1994).

16 DSU, art 17.2, in relevant part: 'The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once'.

17 DSU, art 2.4: 'Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus'.

18 DSU, fn 1: 'The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision'.

19 I thank Victor do Prado for highlighting that, in the practice of WTO political organs, proceeding to a vote would itself require consensus. Consensus is also expected to exist for the adoption of an organ's agenda.

unprecedented move of blocking the re-appointment of ABM Seung Wha Chang for a second four-year term. Arguing that his ‘performance did not reflect the role assigned to the Appellate Body by Members in the DSU’, the United States stated that its block was needed to prevent the emergence of ‘a system where WTO adjudicators overstepped the boundaries agreed by WTO Members in the DSU and the WTO Agreement.’<sup>20</sup> The crisis was eventually solved with the joint appointment, in November 2016, of Hong Zhao and Hyun Chong Kim.<sup>21</sup>

Then, in early 2017, disagreement between the United States and the European Union (EU) – the latter requested that the DSB conduct a joint procedure for the replacement of Ricardo Ramírez-Hernandez, whose term would end on 30 June, and Peter van den Bossche, whose term would end in December – meant that no selection process was initiated for the replacement of Mr Ramírez.<sup>22</sup> When, in August 2017, Hyun Chong Kim resigned from the Appellate Body to assume the position of Trade Minister in Korea,<sup>23</sup> the United States criticized before the DSB the fact that former ABMs still appeared as signatories of reports (one Appellate Body report, circulated on 5 September, was signed by former ABMs Kim and Ramírez),<sup>24</sup> expressed concerns that Appellate Body reports were being signed by persons who were no longer ABMs, and blocked Mexico’s proposal to initiate three selection processes simultaneously.<sup>25</sup>

Negotiations continued, but the United States made it increasingly clear that it would not accept new Appellate Body appointments until its concerns

20 WTO, ‘Minutes of DSB Meeting of 23 May 2016’ (29 August 2016) WT/DSB/M/379, para 6.7. The non-reappointed Member was Seung Wha Chang. Two ABMs, both American, have not sought reappointment: Merit Janow in 2007 and Jennifer Hillman in 2011. One commentator, and former ABM, noted that there was ‘a widely shared belief among those familiar with these developments’ that their decisions were prompted by ‘the negative position towards their reappointment privately aired by the USTR at the time’. Giorgio Sacerdoti, ‘The Future of the WTO Dispute Settlement System: Consolidating a Success Story’ in Carlos A Primo Braga and Bernard Hoekman (eds), *Future of the Global Trade Order* (European University Institute 2016) 45–68, 65.

21 WTO, ‘Minutes of DSB Meeting of 23 November 2016’ (23 January 2017) WT/DSB/M/389, para 13.3. Seung Wha Chang and Hyun Chong Kim are both Korean nationals.

22 WTO, ‘Minutes of DSB Meeting of 22 May 2017’ (18 August 2017) paras 10.3–10.4, 11.3.

23 WTO, *Resignation of Appellate Body Member*, Communication from the Appellate Body (2 August 2017) WT/DSB/73.

24 WTO, ‘Minutes of DSB Meeting of 29 September 2017’ (24 January 2018) WT/DSB/M/402, para 5.11. The third Member of the Division was Ms Hong Zhao. As discussed below, these signatures are permitted under Rule 15 of the Appellate Body Working Procedures (Working Procedures for Appellate Review (16 August 2010) WT/AB/WP/6.

25 *ibid* paras 6.2, 8.2, 8.6.

were addressed. In August 2018, when the first term of ABM Shree Baboo Chekitan Servansing was about to end, the Chairman of the DSB raised the issue of his re-appointment. The United States then specified that it would block his reappointment not due to any objection to his conduct as an individual but due to the Appellate Body's 'abus[ing] the authority it had been given within the dispute settlement system'.<sup>26</sup> Pointing to a 'persistent overreaching' by the Appellate Body, the United States stated that it would continue to block the appointment of new ABMs until this issue was addressed by the Membership.<sup>27</sup>

## 2.2 *The United States' Objections to the Appellate Body's Conduct*

One reason invoked by the United States for blocking Appellate Body appointments is its objection to Rule 15 of the Appellate Body Working Procedures,<sup>28</sup> which allows former ABMs to continue to serve on appeals to which they are assigned during their terms. While, pursuant to the DSU, the Working Procedures are to be drawn up by the Appellate Body itself,<sup>29</sup> the United States contends that Rule 15 contradicts the four-year term limit imposed on ABMs by Article 17.9 DSU and participation in appeals of former ABMs should require express authorization from the DSB. In January 2018, the United States stated that it would block future appointment until WTO Members 'resolve[d] that issue'.<sup>30</sup>

To this objection to the conduct of the Appellate Body the United States adds a second objection. Pursuant to DSU Article 17.5, '[i]n no case shall [appellate] proceedings exceed 90 days', counted from the date a party notifies its decision to appeal to the date the Appellate Body circulates its report. The combination of a heavy workload, a number of highly complex cases,<sup>31</sup>

26 WTO, 'Minutes of DSB Meeting of 27 August 2018' (30 November 2018) WT/DSB/M/417, para 12.2.

27 *ibid.*

28 WTO, 'Working Procedures for Appellate Review' (16 August 2010) WT/AB/WP/6, Rule 15.

29 DSU, art 17.9 (rules of procedure must be drawn up 'in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information').

30 WTO, 'Minutes of DSB Meeting of 22 January 2018' (7 November 2018) WT/DSB/M/407, para 8.7. Interestingly, it was India, rather than the United States, which took issue with this aspect of the Working Procedures when they were circulated (WTO, 'Minutes of DSB Meeting of 21 February 1996' (19 March 1996) WT/DSB/M/11, 12). The United States, speaking after India, did not pronounce on the matter.

31 Particularly challenging have been the disputes between the European Union and the United States regarding subsidies to large civil aircraft. See WTO, *US - Large Civil Aircraft*,

the obligation to ‘address each of the issues raised’ by the parties,<sup>32</sup> and long translation delays as reports get longer, means that Appellate Body reports are now regularly issued more than 90 days after the appeal.<sup>33</sup> The United States takes issue with this practice, and in particular with the fact that, in 2011, the Appellate Body abandoned a ‘long-established practice of consulting and obtaining the parties’ consent where it had considered it could not meet the 90-day requirement’.<sup>34</sup> In these cases, the United States argues, the report should ‘no longer qualif[y] as an Appellate Body report for purposes of the exceptional negative consensus adoption procedure’.<sup>35</sup> In other words, if the Appellate Body exceeds the 90-day limit set in the DSU, its reports would be subject to adoption by positive consensus at the DSB. This would allow any WTO Member, including the losing party in a dispute, to block the adoption of the report, leaving the dispute unresolved.

### 2.3 *Consequences of a Non-Operational Appellate Body*

Since 1 October 2018, every appeal brought to the Appellate Body must be heard by the same three sitting members. Pursuant to Article 17.1 DSU, the Appellate Body is composed of seven Members, ‘three of whom shall serve in any case’. This will in principle allow the Appellate Body to continue to operate until 10 December 2019 and, pursuant to Rule 15, to complete any appeals for which a division has been composed until that day.<sup>36</sup> Even if all three sitting Members agree to continue to hear these appeals, however, some appeals may already be compromised due to rules on conflict of interest. Contrary to what takes place in other international adjudicatory bodies, in the Appellate Body rules for conflict of interest currently operate invisibly, during the composition of divisions.<sup>37</sup> With only three ABMs in office, any conflict of interest of one of the three sitting ABMs will prevent the formation of a division to hear appeals.

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Report of the Appellate Body (12 March 2012) WT/DS353/AB/R (576 pages long) and WTO, *EC – Large Civil Aircraft* (18 May 2011) WT/DS316/AB/R (612 pages long).

32 DSU, art 17.12.

33 The Appellate Body reports in *Indonesia – Iron or Steel Products*, of a relatively short 40 pages, were issued almost one year after the appeal (WTO, *Indonesia: Iron or Steel Products*, Reports of the Appellate Body (15 August 2018) WT/DS490/AB/R; WT/DS496/AB/R, para 1.7).

34 WTO, ‘Minutes of DSB Meeting of 22 June 2018’ (11 October 2018) WT/DSB/M/414, para 5.10.

35 *ibid.*

36 WTO, Working Procedures for Appellate Review (n 28).

37 *ibid* rs 6.3(a), 9. In the ICJ, for example, all judges should in principle participate in a judgment. Declarations of conflict are therefore issued in the open.

A non-operational Appellate Body does not mean that panel reports will become binding as issued. The obligation of WTO Members to comply with the findings contained in panel and Appellate Body reports only arises once reports are adopted and their findings become rulings of the DSB.<sup>38</sup> Pursuant to DSU Article 16.4, once a party to a dispute notifies the DSB of its 'decision to appeal' a panel report, the report is not 'considered for adoption by the DSB until after completion of the appeal'. Without completion of the appeal, panel reports will remain in limbo. They will not produce the effects of an adopted DSB report, such as triggering an obligation of implementation, initiating a reasonable period of time for compliance, or permitting the adoption of trade retaliation in case of non-compliance. While one could compare them to unadopted reports of the GATT era, in fact they will be less authoritative than these reports. GATT-era panel reports represented the final non-partisan assessment of the matter available within the GATT system. Even if not adopted, they did produce much of the political effect of a final assessment. WTO panel reports appealed into limbo, on the other hand, will remain provisional, perpetually subject to a potential reversal or modification of their conclusions by the Appellate Body, if it is recomposed one day.<sup>39</sup>

Unless there is a solution to the crisis, most disputes now at the panel stage will already be subject to the appeal-block of the panel report by any party. Even excluding the exceptionally long cases of the *Tobacco – Plain Packaging* dispute and the *Large Civil Aircraft* disputes, it generally takes between 700 and 1000 days for a party that requests consultations to obtain a panel report assessing the challenged measures. If this average is maintained and the block continues, chances are that panel reports on disputes initiated in 2018 will be issued after December 2019. This in turn means that, absent an agreement on alternative procedures for appeal, any party will be able to appeal the report to a non-operational Appellate Body. And, unless and until the Appellate Body is recomposed, pursuant to DSU Article 16.4 this appeal will prevent the DSB from adopting any reports on the dispute.

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38 DSU, arts 7.1, 11, 19.2, 21.1, 21.3.

39 Complainants may be tempted to treat as wrongdoers respondents found in breach by a panel who refuse to cooperate to allow a final resolution of the dispute, and may retaliate as if the panel report were final. This retaliation would, however, take place outside the boundaries of the legal certainty provided by the DSU procedure, which gives WTO-authorized retaliation a legitimacy that unilateral retaliation does not enjoy.

### 3 Re-Establishing Compulsory Dispute Settlement: Multilateral and Bilateral Solutions

#### 3.1 *The Failure of Negotiated Solutions*

The preferred choice to preserve the multilateral trading system is a negotiated multilateral solution leading to the recomposition of the Appellate Body. In its 2018 Trade Agenda, the United States stated that it supported ‘an agreed upon multinational system to resolve trade disputes’ but was concerned that ‘international bureaucrats improperly set the terms of trade for Americans’, establishing ‘new obligations to which the United States and its elected officials never agreed.’<sup>40</sup> In late 2018, WTO Members put forward a set of proposals for WTO reform, establishing conditions for former ABMS to complete appeals started, clarifying the powers of the Appellate Body to examine domestic law, and establishing a time limit for Appellate Body reports.<sup>41</sup> At the General Council, the United States rejected these proposals, arguing that they constituted ‘revisions to the text of the Dispute Settlement Understanding to permit what is now prohibited’, and that the objective of the United States was ‘to ensure that the system adheres to WTO rules as written.’<sup>42</sup> To the extent that this implies rolling back *en bloc* what other Members understand has become the body of WTO law clarified in dispute settlement as opposed to specific instances of stark disagreement, and perhaps limit the very ability of WTO Members to resort to dispute settlement itself, it is difficult to foresee how the impasse can be resolved.<sup>43</sup>

Unless a negotiated solution is found for the Appellate Body crisis, WTO Members that wish to preserve the compulsory dispute settlement system have three sets of options. First, they may seek to preserve the operation of the Appellate Body ‘multilaterally’, by overcoming the US block through a procedural manoeuvre that would allow a majority of Members to appoint ABMs, or would allow the Appellate Body to continue to issue reports even without sufficient ABMs to hear an appeal. Second, they may enter into bilateral ad hoc agreements allowing specific disputes to be adjudicated without the prospect

40 Office of the United States Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program, (15 March 2018) 3, 22–33.

41 WTO, ‘Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council’ (26 November 2018) WT/GC/W/752.

42 WTO, ‘General Council – Minutes of the Meeting of 12 December 2018’ (20 February 2019) WT/GC/M/175.

43 For proposals from a former Canadian delegate, see McDougall (n 5).

of an appeal-block by the defendant. Third, they may seek an alternative, ‘plurilateral’ solution allowing compulsory dispute settlement to take place among consenting Members, keeping it open for willing WTO Members to adhere to in the future.<sup>44</sup>

### 3.2 *A Multilateral Re-Establishment of Compulsory Dispute Settlement: Strengthening or Weakening the WTO?*

Two ‘procedural solutions’ have been proposed to circumvent the US block and allow the continuation of compulsory WTO dispute settlement after 11 December 2019. Under one type of proposal, Members would seek to vote on appointments to the Appellate Body. The second type of solution would involve the Appellate Body itself changing its procedural rules to allow the continuation of binding dispute settlement after it is rendered non-operational.

Among proponents of a ‘Member-driven’ solution, Pieter Jan Kuijper argues that the WTO Agreement, which permits voting by the General Council and Ministerial Conference ‘where a decision cannot be arrived at by consensus’,<sup>45</sup> is hierarchically superior to the DSU. On grounds that ‘[t]imes of emergency justify emergency measures’, he proposes an exceptional ‘[d]irect appointment of [Appellate Body] members by the General Council applying majority vote’.<sup>46</sup> Jennifer Hillman suggests that there is an ‘ugly’ solution to the Appellate Body crisis: interpreting the DSU in such a way that it allows the appointment of ABMs without consensus. Her argument is that, while DSU Article 2.4 establishes consensus as the sole means for the DSB to make a ‘decision’, Article 17.2 involves not a decision but an ‘appointment’ – a different kind of determination.<sup>47</sup> Ernst-Ulrich Petersmann goes the furthest, arguing that voting would be not an exceptional measure but an entitlement and even a duty of the Membership in the face of ‘illegal’ blocking of appointments: ‘WTO members are *legally required* (“shall”) to overcome illegal “blocking” of the filling of [Appellate Body] vacancies’.<sup>48</sup>

44 The terms ‘multilateral’ and ‘plurilateral’ are used by analogy, to refer to the fact that one set of solutions seeks to bind all Members, like multilateral WTO Agreements do, while the other would apply only to consenting Members, as plurilateral WTO Agreements do.

45 Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, art IX:1.

46 Kuijper (n 5) 9–10.

47 Jennifer Hillman, ‘Three Approaches to Fixing the World Trade Organization’s Appellate Body: the Good, the Bad and the Ugly?’ (*Institute of International Economic Law, Georgetown University Law Center*, December 2018) 11 <<https://georgetown.app.box.com/s/966hfvosmran4m3ibiblgfszj42za40b>> accessed 7 August 2019.

48 Ernst-Ulrich Petersmann, ‘How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crisis?’ (2018) EUI Working Papers, RSCAS 2018/71, 8 (emphasis in the original).

These solutions are fragile because they appear to contradict the clear terms set out in the DSU for decisions of the DSB. As a rule, the WTO Agreements favor consensus decision-making while featuring fallback voting procedures to allow a majority of Members to overcome resistance by holdout Members.<sup>49</sup> The making of decisions by the DSB, and in particular the appointment of persons to the Appellate Body, appears to be the key exception to this rule. Like every non-dispute-related decision of the DSB, the appointment of persons to the Appellate Body must be made by positive consensus.<sup>50</sup> The DSU specifies that consensus is only achieved when 'no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision'.<sup>51</sup> As long as the United States remains a Member of the WTO and is present at the meeting of the DSB when a proposed appointment is discussed, under the DSU it has the power to withhold support for consensus.

One could consider revising the DSU to change the possibility of consensus-blocking. However, the Agreement Establishing the WTO (AEWTO) is clear that: (i) amending the DSU requires consensus among all the Members;<sup>52</sup> (ii) amending the AEWTO's provisions on amendment also requires 'acceptance by all the Members';<sup>53</sup> and (iii) collective interpretations, which can be made by majority, 'shall not be used in a manner that would undermine the amendment provisions'.<sup>54</sup> In short, amending the WTO Agreements to overcome the consensus requirement for the appointment of ABMs would itself appear to require the consensus of the Membership.

The second type of solution is for the Appellate Body to use its power to modify its Working Procedures to allow the continuation of WTO dispute settlement after the Appellate Body itself becomes non-operational. Steve Charnovitz has suggested a procedural rule providing that, in case of a non-operational Appellate Body, any appealed panel report is upheld 'as is': 'the "completion of the appeal" will occur automatically the same day the appeal is lodged'.<sup>55</sup> While the Appellate Body would remain non-operational, the dispute settlement system would continue to produce final reports.

49 AEWTO, art IX:1: 'Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting'.

50 DSU, art 2(4), 17(2).

51 DSU, fn 1.

52 AEWTO, art X:8.

53 AEWTO, art X:2.

54 AEWTO, art IX:2.

55 Steve Charnovitz, 'How to Save WTO Dispute Settlement from the Trump Administration' (*International Economic Law and Policy Blog*, 3 November 2017) <<https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>> accessed 16 October 2019.

This second type of solution is as problematic as the first one from a textual standpoint, overlooking the obligations of the Appellate Body to 'hear appeals'<sup>56</sup> and 'address each of the issues raised' by the parties.<sup>57</sup> It is difficult for those seeking to enforce the DSB's obligation to fill vacancies in the Appellate Body 'as they arise'<sup>58</sup> to do so at the expense of other obligations established in the DSU.

Arguably, WTO Members have an obligation to cooperate in good faith to ensure the continued operation of the dispute settlement system. However, the failure by one Member to engage in this cooperation would not necessarily allow other Members to overrule the procedural requirement of consensus. As far back as 1950, the International Court of Justice (ICJ) established the principle that, absent specific rules in this regard, the violation of the obligation to compose an international adjudicator does not create for other Members or for the bodies that administer dispute settlement a right to proceed to this composition without the consent of the blocking Member. As the ICJ put it, '[t]he failure of machinery for settling disputes ... is one thing; international responsibility is another'.<sup>59</sup> WTO Members that feel aggrieved could thus bring a dispute against the United States, but not override legal provisions in the DSU and appoint ABMs. And the rationale that emerges from an assessment of the WTO rules governing ABM appointments is that: (a) any WTO Member can prevent the appointment or re-appointment of an ABM; and (b) depriving individual WTO Members of this power requires consensus among the Membership.

Besides any legal impediments, other Members would likely consider the political implications of submitting a matter to majority decision-making, and not just 'consensus minus one'<sup>60</sup> but rule by simple majority.<sup>61</sup> Were they to

56 DSU, art 17.1.

57 DSU, art 17.12.

58 DSU, art 17.2.

59 See in this regard *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229.

60 For an example of 'consensus minus one', see Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 'Report of the Seventh Meeting of the Parties to the Montreal Protocol' sec B (Comments made at the time of the adoption of the decision) (27 December 1995) UNEP/OzL.Pro.7/12, para 130: 'In response to a question from the representative of Brazil, the Secretariat clarified that the practice followed in Meetings of the Parties to the Montreal Protocol was that, when only one Party objected to a draft decision, that decision would be carried by consensus and the position of the dissenting Party would be clearly reflected in the report of the Meeting'

61 The majority required depends on the type of amendment being proposed. See Agreement Establishing the WTO, art IX.

impose a change of rules on one WTO Member, no matter how unreasonable its actions may seem, the WTO Members pressing for majority rule would risk becoming the overruled WTO Member the next time.

Setting aside the consensus rule would break simultaneously two delicate balances. The first is the balance of political decision-making in the WTO, including the balance between the handful of 'large' WTO Members that account for most of international trade<sup>62</sup> and the vast majority of Members whose trade amounts to less than 1% of global trade, as well as the balance among the large Members. If Members were suddenly able to mobilize WTO voting procedures against each other, there would be little stopping them from turning this kind of emergency action into a habit. Rather than leading to ever more constraining trade rules, it is likely that regular outvoting of the economically largest Members would make the whole of WTO law into ever more unrealistic declarations of intentions, drastically affecting the relevance of the organization for the determination of the rules that in fact govern trade relations between its Members.<sup>63</sup>

More broadly, the WTO regime is founded on a second delicate balance. Each WTO Member has agreed to submit existing commitments to adjudication on the condition that it retains full control, through the consensus principle, over the evolution of these obligations. Majority decisions may allow temporary waivers or authoritative interpretations but may not lead to the imposition of new rules on unwilling Members.<sup>64</sup> Creative procedural solutions are problematic not only in that they undermine the very commitment to rules-based dispute settlement that they seek to preserve but also in that they disrupt this broader balance between the acceptance by WTO Members of strong enforcement of their WTO obligations and the preservation by Members of control over changes to these obligations.

62 The six largest importers and exporters (the United States, China, the EU, Japan, Hong Kong (China) and Korea) account for over 55% of international trade in goods. WTO, *World Trade Statistical Review 2019* (WTO 2019) 101.

63 Michael Reisman once noted that the veto at the United Nations Security Council was necessary because, in case of a confrontation between great powers, the Council's ostensibly formidable legal powers would fizzle: 'in a confrontation, the Organization would be casualty' (W Michael Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87 *AJIL* 83, 98).

64 Under AEWTO even amendments that can be agreed on by majority only take effect for Members that have accepted them (arts X:3, X:5) unless they are 'of a nature that would not alter the rights and obligations of the Members' (art X:4). Arts X:3 and X:5 seem to imply that the Ministerial Conference may decide that an Amendment can be imposed on all Members once agreed, in which case unwilling Members are 'free to withdraw from the WTO'.

### 3.3 *The Bilateral Level: In-Dispute Agreements to Not Appeal or Arbitrate*

If a solution at the multilateral level cannot be found, Members willing to ensure that their disputes will be settled with finality may enter into bilateral agreements to ensure that disputes do not take place under the shadow of an appeal-block. Since Article 23.1 DSU requires Members seeking to settle WTO disputes to 'have recourse to, and abide by, the rules and procedures of this Understanding', WTO Members may not simply resort to ad hoc arbitration or adjudication before another court. Rather, they must resort to one of the 'in-regime' options permissible under the DSU.

Possible in-regime agreements include, first, agreements not to appeal from the panel report, such as those included in the sequencing agreements in *Indonesia – Safeguard on Certain Iron or Steel Products* (examined below).<sup>65</sup> Additionally, Members may agree to resort to arbitration under Article 25 DSU. While the wording of Article 25 (analyzed below) suggests that arbitration was originally conceived of as a means of replacing the entire 'substantive' WTO dispute settlement procedure, its text is flexible enough to support an arbitration that replaces, and reproduces the features of, appellate proceedings. Two such 'appeal arbitration' agreements, almost identically worded, have now been entered into between Canada and the EU and between the EU and Norway, although in the seemingly weaker form of 'arrangements' (Appeal Arbitration Arrangements, examined below).<sup>66</sup>

In principle, agreements not to appeal or to arbitrate are both valid and in line with the spirit of the DSU if taken within the framework of an existing dispute. While Articles 16.4 and 17.4 of the DSU provide that parties may appeal from a panel report,<sup>67</sup> in *Peru – Agricultural Products* the Appellate Body con-

65 WTO, *Indonesia – Safeguard on Iron or Steel Products*, Understanding Between Indonesia and Vietnam Regarding Procedures Under arts 21 and 22 of the DSU (27 March 2019) WT/DS496/14, para 7; WTO, *Indonesia – Safeguard on Iron or Steel Products*, Understanding Between Indonesia and Chinese Taipei Regarding Procedures Under arts 21 and 22 of the DSU (15 April 2019) WT/DS490/13, para 7.

66 Communication from Canada and the European Union, 'Interim Appeal Arbitration Pursuant to Article 25 of the DSU' (25 July 2019) JOB/DSB/1/Add.11. Interim Appeal Arbitration Pursuant to Article 25 of the DSU (21 October 2019) <[https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc\\_158394.pdf](https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf)> accessed 23 October 2019. Both arrangements feature an Annex entitled 'Agreed Procedures for Arbitration Under Article 25 of the DSU in Dispute DS X'. Other than the names of the parties, the only difference between the arrangements is cosmetic, in paragraph 8 of the Annex.

67 DSU, arts 16.4 ('... the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal ...') and 17.4 ('Only parties to the dispute, not third parties, may appeal a panel report').

cluded that Members may relinquish their procedural rights under the DSU through 'actions taken in relation to, or within the context of, the rules and procedures of the DSU'.<sup>68</sup> In *Australia – Automotive Leather*, the United States and Australia agreed that there would be no appeal from the compliance panel's report. They complied with the agreement even after the panel reached the so far unique conclusion that compliance required repayment of the illegal subsidy by its beneficiary,<sup>69</sup> something Members at the DSB Meeting stated 'raised very serious systemic concerns'<sup>70</sup> and constituted 'a one-time aberration of no precedential value'.<sup>71</sup>

Agreements not to appeal were entered into between Indonesia and the complainants in *Indonesia – Safeguard on Iron or Steel Products*. In the 'sequencing agreement' usually signed by parties to solve the temporal incongruence between Articles 21.5 and 22.2 of the DSU,<sup>72</sup> the parties inserted a paragraph stating as follows:

The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU.<sup>73</sup>

Similar paragraphs may be inserted in other bilateral agreements, possibly accounting for other reasons for the Appellate Body's inability to adjudicate, such as conflicts of interest. At the same time, it should be noted that these agreements were signed at the compliance stage of the dispute, in which the 'sequencing problem' creates for both parties, and in particular for the respondent, an incentive to cooperate in securing a positive solution to the dispute. At this stage, absent such an agreement, the complainant may proceed directly

68 WTO, *Peru – Agricultural Products*, Report of the Appellate Body (20 July 2015) WT/DS457/AB/R, para 5.25.

69 WTO, *Australia – Automotive Leather (21.5)*, Report of the Panel (21 January 2000) WT/DS126/RW, para 6.22.

70 WTO, 'Minutes of the DSB Meeting of 11 February 2000' (7 March 2000) WT/DSB/M/75, 6 (Australia).

71 *ibid* 8 (Canada). The United States, complainant in this dispute, argued that the remedy was justified due to the 'unique facts' of the case (*ibid* 6).

72 Matilda J Brolin, 'Procedural Agreements in WTO Disputes: Addressing the Sequencing Problem' (2016) 85 Nord J Intl L 65.

73 See WTO, *Indonesia – Safeguard on Iron and Steel Products*, Understanding Between Indonesia and Vietnam Regarding Procedures Under arts 21 and 22 of the DSU (n 62).

to requesting an authorization to retaliate under DSU Article 22.2.<sup>74</sup> The complainant can therefore secure agreement from the respondent by threatening to proceed directly to retaliation in case the respondent does not agree to a procedure capable of securing a final resolution of the compliance dispute.<sup>75</sup>

On the other hand, if one of the parties fails to abide by the agreement not to appeal, this might create systemic problems for the DSB. Pursuant to the second sentence of DSU Article 16.4, '[i]f a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal'. If the DSB is required to make a substantive decision to apply the agreement between the parties rather than the DSU, this decision (like all DSB decisions) must be made by consensus, and is therefore subject to a block by any WTO Member present at the meeting. While in principle WTO Members comply with in-dispute agreements, the lack of enforceability may produce significant legal hurdles if the question arises before the DSB.

A safer alternative is to resort to arbitration under DSU Article 25. This provision allows WTO Members to resort to '[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement' to 'facilitate the solution of certain disputes that concern issues that are clearly defined by both parties'.<sup>76</sup> Article 25.2 provides:

resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

Article 25.2 thus offers Members broad freedom with respect to the scope of arbitration. The requirements it imposes are: (i) mutual agreement between the parties to the dispute to resort to arbitration; (ii) mutual agreement on the

74 See WTO, *US – Certain EC Products*, Report of the Appellate Body (11 December 2000) WT/DS165/AB/R, para 92.

75 The parties may also reinforce the position of the complainant by stating that it may proceed to requesting retaliation in case the respondent fails to abide by the sequencing agreement. The *Indonesia – Iron or Steel Products Sequencing Agreements* arguably do the opposite of that, providing that the complainants 'may request authorization to suspend concessions or other obligations pursuant to arts 22.2 and 22.6 of the DSU only if the procedures laid out in art 21.5, as modified and elaborated in this Understanding, have been followed' (See n 62, para 9). Although non-compliance is unlikely in this case, this paragraph could be read as preventing the complainants from requesting authorization to retaliate in case Indonesia failed to comply with paragraph 7.

76 DSU, art 25(1).

procedures to be followed; and (iii) notification to all Members in advance of the arbitration process. The only Article 25 Arbitration to have taken place so far is evidence of this freedom. This arbitration took place in *US – Copyright*, a dispute brought by the EU against the United States. It concerned not the conformity of a Member's measures with WTO obligations (an adopted panel report had concluded that the US measures were WTO-inconsistent)<sup>77</sup> but the level of nullification or impairment caused by these measures. Thus, the United States and the EU used Article 25 as a replacement not for 'substantive' dispute settlement proceedings but for the Article 22.6 arbitration concerning the level of nullification or impairment of benefits.

Article 25 arbitrations are 'WTO solutions', in the sense that resorting to Article 25 does not breach the obligation to have recourse exclusively to DSU procedures to settle WTO disputes.<sup>78</sup> Additionally, pursuant to DSU Article 25.4, an Article 25 arbitral award produces all the legal effects of an adopted panel or Appellate Body report under DSU Articles 21 and 22. It triggers a prompt compliance obligation for the violator, initiates a reasonable period of time for compliance, and allows complainants to resort to retaliation in case of persistent non-compliance.<sup>79</sup>

At the same time, Article 25 arbitration is subject to the requirement, under DSU Article 3.5, that '[a]ll solutions' to WTO disputes, 'including arbitration awards', be consistent with the WTO Agreements, and 'not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements'. This makes Article 25 arbitration distinct from other arbitration mechanisms in which parties would have full autonomy to determine the applicable law. While arbitral Awards are not subject to adoption by the DSB, WTO Members are in principle unable to request an Article 25 Arbitrator to issue an Award contradicting their WTO obligations, a limitation that the Arbitrator itself is arguably required to enforce. The requirement for Article 25 Arbitrators to control the conformity of the arbitral agreement with both the letter and the spirit of the DSU was acknowledged by the Article 25 Arbitrator in *US – Copyright*, who noted that 'the absence of a multilateral control over recourse to [Article 25]' made it 'incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system'.<sup>80</sup>

77 WTO, *US – Copyright*, Award of the Arbitrator (Article 25) (9 November 2001) WT/DS160/ARB25/1.

78 DSU, art 23(1), 23(2)(a); See Section 3 above.

79 DSU, art 25(4).

80 See *US – Copyright* (n 77), para 2.1.

The relative flexibility offered by Article 25 means that Members may agree to use arbitration under Article 25 as a replacement not for the whole dispute settlement process but exclusively for the appeal stage. This alternative, promoted by a number of practitioners<sup>81</sup> and enshrined in the Appeal Arbitration Arrangements, would allow the dispute settlement system to continue to operate as usual, with the panel remaining responsible for the 'heavy lifting' in terms of gathering evidence and making findings of fact, while the appeal Arbitrator is tasked with reviewing issues of law.

If individuals are appointed as appeal Arbitrators on a case-by-case basis by the parties, Members might wonder why they do not simply appoint the same individuals to serve as panelists, saving themselves the time and cost of an additional procedural step. One could argue that review is per se a good thing in that it allows reflection over a previous decision. At the same time, practical considerations make it unlikely that governments and private parties would be willing to fund an additional procedure when they would be unable to draw from it any additional benefits in terms of security, predictability and broader authority over the development of WTO rules that they obtain from the panel report. Only if the appeal Arbitrator can produce these effects would its addition to the system be justified.

The Canada-EU and EU-Norway Appeal Arbitration Arrangements avowedly aim 'to replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU'.<sup>82</sup> They do so by establishing an ex ante commitment (or rather 'intention') by the two parties 'to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure ... if the Appellate Body is not able to hear appeals of panel reports in any future dispute between [the parties] due to an insufficient number of its members'.<sup>83</sup> Besides including a draft agreement to be filed with a panel once the latter is established,<sup>84</sup> the Appeal Arbitration Arrangements incorporate some of the specific authority of the Appellate Body by requiring those serving as appeal Arbitrators to be former ABMs.<sup>85</sup>

81 See Scott Andersen and others, 'Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals' (2017) CTEI Working Papers No CTEI-2017-17; Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) PIIE, Policy Brief 2018-5.

82 Appeal Arbitration Arrangements (n 66), para 2.

83 *ibid* para 1.

84 *ibid* Annex ('Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X').

85 *ibid* para 3.

At the same time, by avoiding the title of ‘agreement’ and establishing an ‘intention’ rather than a legal commitment,<sup>86</sup> the Appeal Arbitration Arrangements appear to leave the door open for a defendant to reject the applicability of the arrangement to a specific dispute. The arrangements, and future similar documents, may thus provide a solution for parties that agree to engage in binding dispute settlement with regard to a specific dispute, avoiding the prospect of an appeal-block. However, they do not reestablish a system of compulsory dispute resolution. As the original drafters of the appeal arbitration proposal noted, ad hoc agreements require the consent of parties to the dispute once the dispute has been initiated.<sup>87</sup> This empowers the defendant to refuse to consent after knowing the terms of the dispute, which in turn creates an incentive for the defendant to establish conditions for granting this consent, including with respect to the arbitrators appointed and to the scope of the dispute.<sup>88</sup>

Restoring compulsory dispute settlement, even among willing WTO Members, requires that these Members go beyond ad hoc agreements within specific disputes or arrangements that, like the ones between Canada and the EU and between the EU and Norway, leave the door open for a respondent to refuse consent. It requires an ex ante agreement establishing a mechanism for compulsory dispute settlement alternative to the WTO’s ordinary dispute settlement mechanism, pre-empting the possibility of withdrawal of consent or appeal-block by the complainant. In order to be effective, this agreement must also go beyond two or a handful of parties and involve a critical mass of willing WTO Members.

#### 4 The ‘Plurilateral’ Solution: Compulsory Adjudication Through an Ex Ante Agreement to Arbitrate

##### 4.1 *Ex Ante Agreements and the Limits of Party Flexibility Under the DSU*

This section discusses how WTO Members may go beyond bilateral agreements to arbitrate or not to appeal and set up a ‘plurilateral’ agreement, signed among willing Members prior to any particular disputes (i.e., ex ante),

86 Appeal Arbitration Arrangements (n 66), paras 1, 4.

87 Andersen and others (n 81), para 16.

88 In the GATT era, the United States only agreed to establish a panel on its embargo on Nicaragua if the panel did not adjudicate on the GATT Security Exception (WTO, *United States – Trade Measures Affecting Nicaragua*, Report of the GATT Panel (not adopted) (13 October 1986) L/6053, para 1.4).

to ensure the continuation of compulsory dispute settlement among these Members in the absence of a functioning Appellate Body. In principle, this can be done through an agreement not to appeal, through an agreement to arbitrate under Article 25, and through an appeal arbitration agreement under Article 25. However, it is submitted that the agreement not to appeal could lead to enforceability issues, and the ex ante agreement to arbitrate could conflict with the object and purpose of Article 25. On the other hand, an appropriately designed appeal Arbitrator could ensure binding compulsory dispute settlement and hold a degree of authority over the interpretation of WTO commitments that a regular arbitrator would not hold.

The key legal obstacle to ex ante agreements establishing alternatives to the DSU's compulsory dispute settlement procedures is the centrality of the ordinary DSU dispute settlement procedure to the DSU objectives of 'provid[ing] security and predictability to the multilateral trading system' and 'preserv[ing] the rights and obligations of Members under the [WTO] agreements',<sup>89</sup> and the corresponding resistance to allowing Members to deviate from this procedure. In *US/Canada – Continued Suspension*, the Appellate Body noted that the compulsory dispute settlement procedure is the one that 'must be followed when parties do not avail themselves of the consensual and alternative means of dispute resolution provided in the DSU'.<sup>90</sup> And the Article 25 Arbitrator in *US – Copyright* referred to the 'alternative' character of the arbitration procedure, noting that recourse to arbitration had to be 'consistent with the object and purpose of the DSU'.<sup>91</sup>

Resort to these alternative means of dispute resolution is itself limited. DSU Article 3.5 precludes their use to undercut WTO rules:

All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

While parties to a dispute may relinquish their procedural rights,<sup>92</sup> in *Peru – Agricultural Products* the Appellate Body restricted this possibility to 'actions

89 DSU, art 3.2.

90 WTO, *US/Canada – Continued Suspension*, Reports of the Appellate Body (16 October 2008) WT/DS320/AB/R; WT/DS321/AB/R, para 340. See *ibid* paras 341–345.

91 *US – Copyright* (n 77), paras 2.3, 2.5.

92 WTO, *EC – Bananas (21.5 II)*, Reports of the Appellate Body (26 November 2008) WT/DS27/AB/RW2/ECU; WT/DS27/AB/RW/USA, para 340.

taken in relation to, or within the context of, the rules and procedures of the DSU.<sup>93</sup> An *ex ante* agreement to relinquish procedural rights under the DSU would seem to contravene not only DSU Article 3.5 (which arguably applies only once a matter is ‘formally raised’ before the DSB), but also DSU Article 3.7, which only permits mutually agreed solutions to disputes that are ‘consistent with the [WTO] agreements’.

With regard to an *ex ante* agreement not to appeal, even prior to questions of enforceability there is the question whether any such agreements are permissible.<sup>94</sup> Article 17(4) of the DSU provides that ‘parties to the dispute ... may appeal a panel report’. A recalcitrant WTO Member might plausibly argue that this provision establishes a procedural right to appeal and that, once it notifies the DSB of ‘its decision to appeal’, under Article 16.4, the DSB is precluded from even considering the panel report for adoption until the appeal is completed.<sup>95</sup> Open-ended *ex ante* agreements not to appeal, therefore, seem both legally questionable and difficult to enforce against a recalcitrant defendant.

Similar issues may arise with respect to an open-ended *ex ante* agreement among Members to resort to Article 25 instead of panel proceedings. On the one hand, in *Mexico – Soft Drinks*, the Appellate Body found that a WTO Member ‘is *entitled* to a ruling by a WTO panel’.<sup>96</sup> This would allow a complainant to resort to a regular WTO panel even if arbitration had been agreed to. More importantly, the logic set out in Article 3.5 would seem to prevent the use of Article 25 to undermine the WTO’s compulsory dispute settlement system. In *US – Copyright*, the arbitrator took upon itself to examine the compatibility with DSU rules of the arbitration agreement providing it with jurisdiction, and suggested that an agreement to resort to Article 25 would be void if it were used to ‘circumvent the provisions’ of the DSU.<sup>97</sup>

This principle is reflected in DSU Article 25.1, which provides that arbitration exists to assist in ‘the solution of *certain* disputes that concern issues that are *clearly defined* by both parties’ (emphases added). This wording casts doubt on whether Members can enter into *ex ante* agreements to arbitrate yet uncertain disputes concerning yet undefined issues. If the panel procedure is available and operational, agreeing to settle an indefinite number of disputes

93 WTO, *Peru – Agricultural Products*, Report of the Appellate Body (n 68), para 5.25.

94 See Section 3.3 above.

95 DSU, art 16.4: ‘If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.’

96 WTO, *Mexico – Soft Drinks*, Report of the Appellate Body (6 March 2006) WT/DS308/AB/R, para 52 (emphasis in the original).

97 *US – Copyright* (n 77) fn 22.

through a parallel adjudication system rather than through recourse to WTO panels would seem to ‘circumvent’ the WTO’s compulsory dispute settlement system.

On the other hand, an *ex ante* agreement by certain WTO Members to have an arbitrator hear appeals in case of a non-operational Appellate Body arguably conforms to both the spirit and the letter of Article 25. The Arbitrator in *US – Copyright* concluded that the agreement that established it was lawful because it did not undermine but fulfil the purpose of WTO dispute settlement. Its decision, it pondered, was likely to contribute to the prompt settlement of the dispute between the parties; did not affect the rights and obligations of other Members; and (despite the expectation that the award would be used to determine the amount of monetary compensation rather than to achieve immediate compliance) was compatible with the object and purpose of WTO dispute settlement, in that the arbitration could ‘pave the way to implementation without suspension of concessions or other obligations’.<sup>98</sup>

Following this reasoning, Members agreeing *ex ante* to resort to Article 25 for appeals, in case the Appellate Body is non-operational, would be acting to ensure the effectiveness of the dispute settlement system. It is the eclipsing of compulsory dispute settlement, caused by a non-operational Appellate Body, that prevents the WTO dispute settlement system from being able to address nullification or impairment of benefits accruing to Members and preserve the rights and obligations of Members under the WTO Agreements.

#### 4.2 *The Design of the Ex Ante Agreement to Arbitrate: Authority and Legitimacy*

Article 25 is flexible with respect to the types of disputes that parties may bring before an arbitrator.<sup>99</sup> The requirement that Article 25 arbitration concern ‘issues that are clearly defined’<sup>100</sup> can be fulfilled by clarifying, in the *ex ante* agreement, that the issues to be dealt with by the appeal Arbitrator are the issues of law covered in the appealed panel report and the legal interpretations developed by the panel that one or both of the parties dispute.<sup>101</sup> The disputes subject to arbitration would thus not be uncertain but would concern

<sup>98</sup> *ibid* paras 2.4–2.7.

<sup>99</sup> The *US – Copyright* arbitration concerned the amount of nullification or impairment caused by a violation, not the substantive disagreement between the parties regarding their rights and obligations.

<sup>100</sup> DSU, art 25.1.

<sup>101</sup> This wording mirrors DSU art 17.6, which provides that ‘[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel’. This is reflected in the Appeal Arbitration Arrangements (n 66) Annex, para 9.

a specific set of facts, as identified in the appealed panel report, and the correctness of the legal findings and interpretations made by the panel, which would be 'defined' by the parties when appealing the report.

Tasking the arbitrator solely with revising legal interpretations has both legal and practical advantages. It preserves the procedural right of parties to a dispute before a WTO panel to appeal from the panel report.<sup>102</sup> It also avoids the difficulties of the fact-finding aspects particular to the panel procedure. Finally, entrusting an appeal Arbitrator with appeals has the advantage that the party dissatisfied with the panel report has an incentive not to undermine the agreed mechanism but to use it to reverse the negative results at the panel stage, thus operating within the agreed system.

In order to prevent the *ex ante* agreement from constituting a means to circumvent the dispute settlement provisions of the DSU, this agreement should only operate in situations in which the Appellate Body is unable to perform its functions. These could include situations in which, besides formally having three or more sitting members, the Appellate Body cannot form a division to hear an appeal due to conflict of interest by one or more ABMs. This would ensure that the Article 25 arbitration serves to preserve the rights and obligations of the parties under the WTO Agreements, including its compulsory dispute settlement system, rather than to circumvent them.

The Appeal Arbitration Arrangements go some way towards achieving this objective. They ostensibly apply to 'any future disputes' in which 'the Appellate Body is not able to hear appeals of panel reports', replacing the appeal under Article 17 of the DSU with an appeal arbitration procedure.<sup>103</sup> Arbitrators are to be selected by the WTO Director-General among former ABMS, to review 'issues of law covered by the panel report and legal interpretations developed by the panel'.<sup>104</sup> They also provide that the arrangement will 'cease to apply as soon as the Appellate Body is again fully composed', ensuring that it will not replace an operational compulsory WTO dispute settlement system.<sup>105</sup> What remains missing is an agreement that, indeed, binds Members to resorting to appeal arbitration, making it compulsory and self-enforcing rather than an 'intention', and that is plurilateral in character, involving a significant number of willing Members and being open to accession by other Members.

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102 See n 64. This requires interpreting 'appeals' that the Appellate Body 'shall hear' under DSU art 17.1 as only one type of appeal, with art 16.4 permitting parties to select other means of appeal, as long as their choice is consistent with the DSU.

103 Appeal Arbitration Arrangements (n 66), para 1.

104 *ibid* Annex, para 9.

105 *ibid* para 6.

To be clear, a multi-party agreement to arbitrate is neither a multilateral nor a plurilateral WTO Agreement, both of which require a decision by a WTO organ.<sup>106</sup> By contrast, a 'plurilateral' agreement to arbitrate under Article 25.2 does not require a collective decision by the Membership, but only that the Members concerned enter into an agreement to resort to arbitration and notify their agreement to all Members 'sufficiently in advance of the actual commencement of the arbitration process'. As long as it is notified to all Members, an *ex ante* agreement to appeal arbitration may be entered into by some WTO Members only, without a decision by any WTO organs.

Entering into such an agreement would allow the Members parties to this agreement to continue to subject their relations to compulsory dispute settlement. At the same time, parties to such an agreement should be conscious that, in the absence of an operational Appellate Body, decisions of appeal arbitrators may have an impact on the broader development of WTO law, affecting the set of mutual expectations that constitute the trade regime. These decisions will be all the more relevant if a dispute involves not only parties to the *ex ante* agreement (which can proceed to an appeal arbitration) but also non-parties, i.e. Members that did not sign up to the agreement to arbitrate. These Members may be legitimately concerned that arbitrators will be making decisions that affect their interests – both their trade interests and their systemic interest in the interpretation of WTO rules – without input from them.

The Appeal Arbitration Arrangements formally endow awards issued under their aegis with interpretative authority, providing that, as long as arbitrators are constituted by former ABMs, 'awards of other arbitrators under similar appeal arbitration procedures shall be deemed to constitute Appellate Body reports adopted by the DSB for the purposes of interpretation of the covered agreements'.<sup>107</sup> This is interesting especially given that the WTO Agreements themselves do not grant broad interpretative authority to panel or Appellate Body reports. Indeed, the AEWTO endows the WTO Ministerial Conference and General Council with 'exclusive authority to adopt interpretations' of the WTO Agreements.<sup>108</sup> In one of its early reports, the Appellate Body found that

106 AEWTO, arts X:1, X:6, X:8, X:9.

107 Appeal Arbitration Arrangements (n 66) Annex, para 8.

108 AEWTO, art IX:2. On the notion of 'extensive authority', see Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' in Karen J Alter, Laurence R Helfer, and Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018) 24, 33–34.

this provision was ‘reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere’.<sup>109</sup>

It was only in the 2008 report in *US – Stainless Steel (Mexico)* that the Appellate Body decided to respond to a panel’s open disagreement with one of its interpretations by stating not only that interpretations contained in adopted panel and Appellate Body reports ‘become part and parcel of the *acquis* of the WTO dispute settlement system’, influencing future interpretations, but also that the DSU establishes a ‘hierarchical structure’ between panels and the Appellate Body which implies that the ‘relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case’.<sup>110</sup>

Setting aside the appropriateness of these specific statements, there is a degree of inevitability in the interpretative authority of adjudicatory decisions. The entire field of international investment law has been shaped by arbitral awards without any formal authority over subsequent tribunals.<sup>111</sup> In the WTO, besides citing adjudicators outside the framework of the organization,<sup>112</sup> the Appellate Body has referred to decisions by the *ad hoc* Arbitrator established by the Doha Waiver on Bananas.<sup>113</sup> Whether or not the *ex ante* multi-party agreement acknowledges this, arbitral proceedings that are used will inevitably lead to decisions whose authority extends beyond the specific dispute before the appeal Arbitrator.

To ensure that arbitrators carry a corresponding degree of legitimacy, three aspects may be relevant. First, who makes the decisions; second, to what extent proceedings are open to non-parties to the dispute; and third, how non-parties to the agreement can accede to it, in such a way that they cannot engender a permanent downgrading of the WTO compulsory dispute settlement system into an optional system that Members can resort to only when convenient,

109 WTO, *Japan – Alcoholic Beverages II*, Reports of the Appellate Body (4 October 1996) WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, 13.

110 WTO, *US – Stainless Steel (Mexico)*, Appellate Body Report, (20 May 2008) WT/DS344/AB/R, para 161.

111 See Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018); Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009).

112 See eg WTO, *US – Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 17 (citing the International Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights).

113 WTO, *EC – Bananas III (Article 21.5 II)*, Reports of the Appellate Body Report (n 92) para 447 and fn 482 9 (referring to WTO, *EC – The ACP-EC Partnership Agreement II* (7 October 2005) WT/L/625, para 127).

withdrawing from it once they lose immediate interest – which would amount to circumventing the WTO's dispute settlement provisions.

With respect to the individuals that should act as arbitrators, one way to infuse legitimacy in the process is to have sitting and former ABMs act as arbitrators, with the possible addition of those who have been proposed officially until the point at which the Appellate Body became non-operational. In order to select the arbitrators that will hear a particular appeal, the appointing authority could be the WTO Director-General. The Appellate Body Secretariat itself or one of the WTO legal divisions could be primarily tasked with assisting arbitrators, in the same way that they assist in other DSU arbitrations, thus ensuring that decisions are technically sound and take into account the larger body of WTO practice and jurisprudence. With the exception of opening the system for proposed ABMs (which would provide the alternative system with a broader array of arbitrators), the Appeal Arbitration Arrangements incorporates all of these elements.<sup>114</sup>

With regard to the openness of proceedings, DSU Article 25.3 allows parties to an arbitration agreement to determine whether other WTO Members may become parties to the arbitration proceedings, possibly determining not only whether other Members may join as co-complainants (or respondents) but also whether they may intervene as third parties.<sup>115</sup> The parties entering into an *ex ante* agreement may be tempted to restrict third party rights to Members that join the agreement. In doing so, however, they would diminish the legitimacy of the arbitrator's decisions. A non-signing Member prevented from submitting its views and contributing to the decision would feel legitimately entitled to disregard the decision. By opening the arbitration to input from all WTO Members, signatories would increase the authority of the appeal Arbitrator to guide the development of WTO law.<sup>116</sup> This element is incorporated in the Appeal Arbitration Arrangements as well, through the provision that third parties to the panel proceedings 'may make written submissions to, and shall be given an opportunity to be heard by, the [appeal] arbitrator'.<sup>117</sup>

To be fully operational, the *ex ante* multi-party agreement should seek to prevent non-signatories from adhering to it *à la carte*, engaging in *ad hoc* arbitral appeals when it suits them while retaining the ability to appeal-block the adoption of panel reports in other cases. The agreement may, for example, set

114 Appeal Arbitration Arrangements (n 66) paras 2–3 and Annex, para 7.

115 DSU, art 25.3: 'Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration'.

116 DSU art 25.3 provides that '[t]he parties to the proceeding shall agree to abide by the arbitration award'.

117 Appeal Arbitration Arrangements (n 66) Annex, para 11.

up a long survival clause for Members that withdraw from it or provide that, once a critical mass of Members become signatories or have recourse to the agreement, parties should propose to the Ministerial Conference its universalization as an amendment to the WTO Agreements (whether as a plurilateral or a multilateral agreement). While Members' consent remains a requirement, the agreement should ensure that those that adhere to it strive to restore the core commitment to compulsory and binding dispute settlement that characterizes the WTO regime.

This final element of bindingness and compulsoriness, which would require providing the alternative agreement with full enforceability by not requiring an additional expression of consent within the context of each individual dispute, is, together with the broader 'plurilateral' element, absent from the Appeal Arbitration Arrangements. This makes the arrangements a good starting point for negotiations of a multi-party agreement, but one that falls short of providing a binding and compulsory alternative to the WTO dispute settlement system once – as seems all but certain at the time of publication – the Appellate Body ceases to be operational.

## 5 Conclusion

The current crisis over Appellate Body appointments threatens to render non-operational the WTO Appellate Body, preventing the continued operation of the WTO's binding and compulsory dispute settlement system. Solutions aimed at circumventing the US block of appointments are both legally fragile and politically perilous, threatening the delicate balance established in the WTO Agreements between the creation of a non-blockable enforcement mechanism, on the one hand, and control by the Members over the creation of new obligations, on the other.

Members may consider alternative possibilities to secure compulsory settlement of their WTO disputes. Bilaterally, parties to existing disputes may agree not to appeal panel reports, to seek arbitration under DSU Article 25, or to use arbitration under Article 25 as a replacement exclusively for the appeal stage. Although all of these options are possible after a dispute emerges, this may not help Members that wish to preserve the compulsory dispute settlement system rather than being required to agree anew, within the context of each dispute, to the enforceability of WTO obligations.

If they wish to preserve compulsory and binding dispute settlement, Members could enter into an *ex ante* agreement that applies 'plurilaterally', i.e. only among its signatories. *Ex ante* agreements not to appeal panel reports

or to submit disputes directly to an Article 25 arbitrator would be problematic under DSU rules, which aim to prevent Members from circumventing DSU procedures. On the other hand, an *ex ante* agreement to submit appeals to arbitration in case of a non-operational Appellate Body would seem to conform to both the letter and the objective of Article 25. While accepting this form of Article 25 appeal arbitration will require arbitrators to apply various legal instruments simultaneously to establish consent, arbitration is no stranger to cases in which consent is established through a series of complementary legal instruments.<sup>118</sup>

Not all Members will join the *ex ante* agreement immediately. However, if the number of signatories is sufficient to ensure the subsistence of compulsory dispute settlement among a significant number of Members, this system will not only serve to settle their disputes; it will also (inevitably) guide the development of WTO rules and interpretations. An arbitration system that were accepted as authoritative by a majority of the Membership would likely have significant influence over the WTO legal regime, even if its pronouncements did not bind all Members. If Members that remain outside this institution and prefer not to engage with it are confronted with its pronouncements and determinations as authoritative interpretations of WTO rights and obligations, their incentives may tilt towards engagement with such an institution – and, in the end, possibly towards working to restore the Appellate Body itself – rather than preserving their freedom to make individual pronouncements on legality while seeing the trade regime develop in a different direction through the institutionalized practice of other Members.

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118 See Patrick Rambaud, 'L'affaire des "Pyramides": suite et fin' (1993) 37 AFDI 567.