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"WTO Dispute Settlement System in Crisis: Can ad hoc members of the WTO Appellate Body be a solution?"

A lot has been said about the crisis in the World Trade Organization (WTO) Dispute Settlement System (DSS) caused by the paralysis of the Appellate Body (AB). This poses a danger for the survival of the WTO trade system as a whole, since one cannot conceive of a WTO treaty system without the "teeth" granted by a two-tier dispute resolution system (the panels and the AB).[1] However, to truly understand the reasons for the present crisis of the system - and thus its solution - one needs to go back to the WTO foundation and why it was necessary to replace the 1947 GATT (General Agreement on Trade and Tariffs).[2]

The GATT functioned smoothly until signatory states realised that the GATT Dispute Settlement System was its principle obstruction to progress.[3] In trade and business the potential for disputes arising from different readings is ever-present. This is true, not least, in international relations and international trade.

[1] See, Bruce Hirsh, *Resolving the WTO Appellate Body Crisis, proposals on overreach*, Volume 1, December 2019; Bruce Hirsh, *Resolving the WTO Appellate Body Crisis. Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators*, Volume 2, June 2020; Clifford Chance, 'The WTO Appellate Body in crisis: The way forward?', November 2019; see also: Matteo Fiorini, Bernard M. Hoekman, Petros C. Mavroidis, Maarja Saluste & Robert Wolfe, 'WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences', European University Institute, Robert Schuman Centre For Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2019/95 (2019).

[2] General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force 1 January 1948), henceforth, GATT.

[3] See, Lisa Sue Klaiman, who notes that the "GATT's dispute settlement mechanism thus was not only time consuming, but also ineffective", Klaiman, 'Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement', *University of Pennsylvania Journal of International Business Law*, vol. 11, no. 3 (1990) pp. 666, 667. Unsurprisingly the GATT DSS has received during its 48 years of activity (1947-1995) only 316 complaints, compared to more than 650 complaints sent to the WTO DSS so far in just 25 years. See, Arti Gobind Daswani, Roy Santana, Janos Volkai, *GATT Disputes (1948/1995)*, Volume 1, WTO, 2018.

1. Differences between the GATT Dispute Settlement Mechanism and the WTO DSS

In short, the GATT and WTO systems were different in two key ways. Firstly, it had a single level of dispute resolution panels. Secondly, the panel's reports required the positive consensus of all GATT members (including the losing party). As a result, most panels' reports were vetoed by the losing party.

Why was a one level dispute resolution system so bad? States could not appeal panel decisions. The loser is, thus, not given a chance of presenting evidence in its favour to a different body of adjudicators. Of course, a properly functioning justice system should have a mechanism to allow the loser to contest an adverse decision. This remedy was not available under the GATT. Panel reports were final, regardless of errors of facts or law.

How did the GATT compensate for the shortcomings of its dispute settlement resolution mechanism?

By providing the loser an opportunity to veto the panel's report by the whole GATT membership. Under this system the necessary independence of the judicial process is difficult to preserve, as countries are given an option to pursue not only justice, but egoistic or opportunistic goals too. The USA once delayed the implementation of a decision against it by eleven years.[4]

While it might have seemed beneficial for developed economies, in the end the system turned out to penalise everyone. The same blocking rights were used by developing nations or member states with non-market economies. This became an obstacle to it. Trade agreements lacked an effective enforcing mechanism.[5]

Hence, at the GATT Uruguay 8th Round of Negotiations 1986-1994, the participating states decided to

[4] See Klaiman, p. 666.
[5] See Pervaiz Khan, Mohammad Asif Khan, 'GATT (1947) and WTO Dispute Settlement Systems: A comparative analysis', *Journal of Law and Society*, vol. 49, no. 73 (2018), p.13.

change this arrangement to make it work more efficiently.[6] They agreed to make panel decisions automatically binding on the parties involved. To do so they introduced the opposite of the consensus rule. The decisions on panel's reports were automatically binding if at least one state approved of the panel report. This would generally be the winning state. This mechanism effectively made panel reports automatically binding in the new WTO.

This made countries concerned that, given this easy way of adopting panel reports, the system risked becoming inundated with many frivolous decisions lacking the rigor required by careful legal scrutiny. Legal experts who could discern states' wishes would not get an opportunity to analyse them. The solution was to establish a two-tier system of dispute resolution. They established the AB as an important element of this new WTO Dispute Settlement System.[7]

2. The the WTO Dispute Settlement System and why a new crisis arose

For some time, everything seemed to go smoothly and everyone looked happy with the AB.[8] Nonetheless, more often than not, the USA mounted complaints about the system, as it became the single country whose trade policies were challenged most often. Because other countries were not willing to change the system, and the old GATT veto powers were no longer available to it, the US was left with no other choice but to start blocking appointments to the AB, since these appointments can be vetoed. A minimum of three members are required to form an Appeal panel, and by 10 December 2019, when two of the last three members also left the AB, the AB stopped functioning.[9]

In February 2020, the US government tabled an extensive 122 pages report **(10)** explaining the reasons behind its concerns with the work of the AB and why it decided to block new appointments to it and thus

[6] Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, opened for signature 15 December 1993, 33 I.L.M. 1125, 1143 (1994).
[7] Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('DSU').
[8] See Georges Abi-Saab 'The Appellate Body and Treaty Interpretation', in Giorgio Sacerdotal et al. (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006), pp. 453–64.
[9] See, WTO, Appellate Body Appointments, WT/DSB/W/609/Rev.19, 8 December 2020, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DSB/W609R19.pdf&Open=True.

close it.[10] These included that the AB was, among other things, 1) engaged in gap filling and a second guessing exercise by finding obligations or rights, where they did not exist; 2) giving to its decisions a precedential value; 3) overstepping time limits for reports; 4) giving advisory opinions; 5) telling other organs of the WTO system what they should do; 6) extending expired mandates of AB members, among other**.** In essence, the US claimed the AB was working beyond the competence and remit.

3. *What are the solutions to the persistent impasse?*

Since the US itself has not advanced any solutions to its concerns, commentators and the WTO itself have attempted to develop solutions for the crisis.

Some involve creating totally new structures, rather than revitalising the AB itself. These include the Multiparty Interim Appeal Arbitration Arrangement (MPIA), agreed upon by the European Union and 23 WTO Members under article 25 of the WTO Dispute Settlement Understanding (DSU) as an alternative solution bypassing the AB. A second group of countries are adopting agreements to consider panel's reports as binding with the countries renouncing any right to appeal the panel report while the AB is not working. These include an understanding signed between Indonesia and Vietnam.[11] Furthermore, a third group of countries are simply using the tactics of "appeal in the void", so called, because the panel report can never be adopted while the AB is not functioning, reviving the previously replaced GATT system. The US is leading this group with already a number of 'appeals in the void', since the end of 2019.

Certain commentators have also proposed private alternative solutions. Jennifer Hillman's nuanced perspective proposes 3 approaches: 1) a "good" method involving new separate systems for trade remedies and non-trade remedies; 2) the "bad" option of adapting the EU arbitration mechanism created established

[10] USTR Report on the Appellate Body of the World Trade Organization, 7 February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization. pdf. Some American commentators have concurred with some of these US concerns, see for example: Terence P. Stewart and Elizabeth J. Drake, 'How the WTO Undermines U.S. Trade Remedy Enforcement', Alliance for American Manufacturing, February, 2017, available at: http://s3-us-west 2.amazonaws.com/aamweb/uploads/. Other commentators do not entirely agree, and have proposed instead to establish an AB system without the US. See for example: Pieter Jan Kuijper, 'The US attack on the WTO Appellate Body', Amsterdam Law School, Legal Studies Research Paper No. 2017-44, pp. 14-15.

[11] WTO, 'Safeguard on certain iron or steel products, Understanding between Indonesia and Vietnam regarding procedures under articles 21 and 22 of the DSU', WTO doc. WT/DS496/14, 27 March 2019.

under article 25 of the WTO DSU; and 3) the "ugly" approach, one that offers certain measures to fix the AB, according to the US's wishes.[12] Pieter Jan Kujper, on the other hand, has suggested more radical solutions involving a new treaty by like-minded states that support the AB as it is by excluding the US from it.[13]

Meanwhile, within the WTO itself, the facilitation of the informal process was established and the then Chair of the WTO Dispute Settlement Body, New Zealand Ambassador David Walker, prepared a draft of WTO General Council Decision. He submitted the Walker Facilitation Draft to the WTO General Council in October 2020 and it offers a starting point with an array of solutions for the problems of concern to the US. The draft is also important because it reflects the broader views of the WTO members consulted during the informal process.[14]

The US has indicated that there was no point in reviewing those solutions, or adopting new rules, without the WTO members first having a frank discussion about why the AB thought it could deviate from the provisions of the WTO DSU. At the WTO DSB meeting on 28 April 2021, the US said it "continues to have systemic concerns with the Appellate Body, which it has explained and raised for more than 16 years and across multiple administrations. The US said it looked forward to further discussions with members on those concerns."[15]

Yet, the US has continued to appeal "in the void" reports, as in recent cases against China and Canada and a number of other countries have followed suit. Consequently, as it looks like the US itself is not annoyed by the crisis, the US can request the so called "appeals in the void", commentators have built on the suggestions contained in the Walker facilitation Draft, while adding to those solutions.[16]

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[12] 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, December 11, 2018.
[13] Kuijper, 'The US attack on the WTO Appellate Body'.
[14] WTO, 'Draft General Council Decision, on Functioning of the Appellate Body', WTO doc. JOB/GC/222, Agenda item 4, INFORMAL PROCESS ON MATTERS RELATED TO THE FUNCTIONING OF THE APPELLATE BODY–REPORT BY THE FACILITATOR, H.E. DR. DAVID WALKER (NEW ZEALAND Annex. at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/222.p.
[15] See summary of the meeting at: https://www.wto.org/english/news_e/news21_e/dsb_28apr21_e.htm, accessed 15 May 2021.
[16] See WTO, 'United States appeals panel report regarding US duties on Korean products', https://www.wto.org/english/news_e/news21_e/ds539apl_19mar21_e.htm; WTO, 'WTO Dispute settlement News Archive' at: https://www.wto.org/english/news_e/archive_e/dis_arc_e.htm. On the meaning and consequences of

Many Experts who commented on the Walker Facilitation Draft have agreed with it or supported a refined version of its solutions. Others, however, went further by stating that those changes need to be both forward- and backwards-looking. For example, Terence P. Stewart has suggested that the solutions should also address "how to restore balance to WTO Members by correcting prior cases where overreach occurred." He identified that this matters a lot to the US and "critical in a number of agreements where there has been a pattern of decisions changing rights and obligations."[17]

4. *New perspectives: Ad hoc members in the AB membership structure*

Do we need retroactive backward-looking solutions to move the AB process forward? If so, how to do this?

The problem with this proposal from certain commentators is that we are talking about concerns that the US has had for an extended period of time. The US has now had to respond to 156 cases submitted against it. Many of them have ended with the US losing and the other parties being assigned the benefits of the sought remedies.[18]

There are 2 ways the new AB could move forward on this particular matter, (i) one would be to make a revision in the interests of the law ('*révision dans l'intérêt du droit'*). This would mean revising but not changing the rights or obligations acquired by the parties as a result of legitimate AB decisions. Whereas this could be done easily, it would be more problematic to make revisions that, ii) result in the reversal of benefits. The benefits and remedies were assigned to parties in a legitimate process and since the cases have been decided and approved by the competent WTO organs, it would seem that states that won these cases have acted in good faith. Although the US would argue that it was done wrongly, the benefits are

"Appeals in the void", See also Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?', *Journal of International Economic Law*, vol. 22, no. 3 (2019), pp. 297-321.

[17] Terrence P. Stewart, 'WTO Appellate Body Reform: Revisiting thoughts on how to address US Concerns', *Current Thoughts on Trade*, July 2020, https://currentthoughtsontrade.com/2020/07/12/wtos-appellate-body-reform revisiting-thoughts-on-how-to-address-u-s-concerns/

[18] See, WTO, '"Unprecedented challenges" confront Appellate Body, chair warns', 22 June, 2018, https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm; see also, WTO, 'Appellate Body Annual Report for 2017', February 2018, WTO doc. WT/AB/28, 22 June 2018, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/AB/28.pdf&Open=True; see also the list of cases by WTO members, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#usa.

generally considered legitimate. The question is: In these cases, should the new AB now reverse those benefits and assign to the US a right to some sort of compensation to be paid or offered by the other party? This is an issue worth considering, as it is not a question of right or wrong, but a question of *res judicata*.

We should note that these issues would not arise for forward-looking solutions. In this sense, if the previous decision is wrong, and the US were entitled to take anti-dumping measures, the new AB should say so. This would be a reversal of a previous wrong decision to apply for future cases. In other words, the US would now be entitled to take those anti-dumping measures, if similar cases happen again.

b) Introducing *ad hoc* members in the AB membership structure

Commentators and AB members have voiced support for a permanent AB due to the increase in the workload, and their inability to deal with such cases with the limited body membership**,** which explains the time it takes to review cases.

The US has rightly complained that this situation vitiates the whole purpose of having this appellate system, which should be to take prompt decisions in two or three months after cases are brought to its attention. In this way the interested states could mitigate the adverse effect of the other state party's wrong actions in time. But, when decisions are taken years after the relevant facts, the risk is there that these facts might simply no longer be there. The whole purpose of seeking adjudication to counteract illegal actions is lost with colossal damage to the party seeking the redress.

One solution that we are willing to share and propose for discussion is the introduction of *ad hoc* AB members. The practice of having *ad hoc* judges to deal with large backlog of cases was used successfully during the work of the UN International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Hague. It helped to cope with outstanding cases during the final stages of its work In the 2000s. However, the practice is more common as a legal institution that allows a party to a dispute before the International Court of Justice to have a judge of its own choice or nationality, when the country is not represented by a judge of its own nationality. We are proposing a legal institute of *ad hoc* members here in the sense in which it was used by the ICTY during its final stages to deal with its intense workload.

These *ad hoc* members would be available to deal with cases submitted beyond the number of panels already established by the AB - two panels each time with three members each. In the system that we propose for discussion, the AB would have seven permanent members and fourteen members with a statute of dormant *ad hoc* members, leaving five new potential Appeal panels ready and available to work. The AB would thus be made up of twenty-one members.

The dormant *ad hoc* members would be invited and become active ad hoc members to enable the quick resolution of emerging cases (i) to avoid large case backlogs and help the expeditious and strict implementation of a ninety-day time limit on the preparation of appeal reports. Once the case is over, they should return to their status of dormant *ad hoc* members. They would support a streamlined process that focuses on the case at issue and concentrates exclusively on legal matters and free of advisory opinions or precedential value constraints. With this system, there would be no need to introduce changes into the Dispute Settlement Understanding (DSU) that clearly stipulates a three-month time limit to submit an appeal panel report.

The *ad hoc* members should also be used to quickly fill gaps (ii) left in the AB by outgoing permanent members, without conducting new selections. When they are invited to fill a vacant position and become a permanent member, the time spent reviewing cases as active *ad hoc* members should not be counted towards defining the start and end date of their four-year term as permanent AB members.

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