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WTO Appelate Body in crisis: The way forward

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WTO Appellate Body in Crisis:

The Way Forward

ANWARUL HODA

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Abstract

The Appellate Body of the WTO has been in abeyance since December 11, 2019. The situation has been brought about by the US veto on filling up vacancies in the Appellate Body on account of its dissatisfaction with its functioning. Although WTO Members have been discussing proposals to set the matter right, they have not been able to agree on the way forward.

This paper traces the evolution of the dispute settlement in the GATT 1947 and the WTO and analyses the pivotal position that the Appellate Body now occupies in it. It avers that putting the Appellate Body back in position is the most important challenge facing the WTO Members today. The abeyance of the Appellate Body has seriously affected the automatic and binding nature of the dispute settlement system of the WTO that was its hallmark. Binding dispute settlement provides a firmer foundation for a rules-based multilateral trading system. When negotiations play a role in disputes, there is greater scope for power play putting the less powerful economies in an unfavourable position. The paper finds merit in the US criticism of the functioning of the Appellate Body and suggests that the way forward is on the basis of the Draft Decision already prepared for the General Council. A possible addition in the Draft could be the proposal for adoption of an authoritative interpretation suggested in the paper.

***Keywords**: Dispute Settlement, World Trade Organisation.*

***JEL Classification**: F13, F53, F55.*

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WTO Appellate Body in Crisis: The Way Forward

Anwarul Hoda

1. Unmaking of the Standing Appellate Body

The multilateral trading system received a resounding endorsement from major trading nations when they agreed in 1994 to establish the World Trade Organization (WTO). In the Marrakesh Agreement establishing the World Trade Organization, the Parties to the Agreement had declared their determination 'to preserve the basic principles and to further the objectives underlying this multilateral trading system'. However, today the system is in tatters.

Twenty-six years have rolled by since then, without a comprehensive round of multilateral negotiations being held for the liberalisation of trade. The Doha Round has languished for more than 19 years. There is absence of progress also on rulemaking to cover new areas of activity that have emerged in the international economy, such as e-commerce. One of the reasons for the lack of agreement on further liberalisation and rulemaking is the practice of decision making by consensus inherited by the WTO from GATT. In a multipolar world, achieving consensus has become increasingly difficult in an organisation with a large and highly diversified membership.

In all these years, the WTO members had the satisfaction that the dispute settlement system was functioning reasonably well. While the WTO membership is somewhat embarrassed by the lack of multilateral liberalising agreements, it has been quite proud of its achievement in dispute resolution. If the WTO had served as the bulwark against protectionism during the financial crisis of 2007-08, a good part of the credit belonged to its strong dispute settlement system. A large variety of disputes have been resolved since the establishment of the WTO. Dispute settlement has not been an arena merely for the gladiators; smaller players have also got justice, although it must be acknowledged that a handful of cases have proved intractable.

The main feature of the revamped dispute settlement system contained in the Dispute Settlement Understanding (DSU), which is a part of the WTO Agreement, is that it is binding and envisages two levels of adjudication. Further, its processes are automatic, moving from the panel to the appeal process, and passing through the stages of compliance, compensation, and where inevitable, retaliation, within stipulated time frames. The appeal against a panel report is heard by a division of three members of the Standing Appellate Body, and the appellate report is to be unconditionally accepted by the parties. Thus, the Standing Appellate Body has a pivotal position and is virtually the kingpin in the machinery for the resolution of disputes. It puts a seal on the dispute settlement process in each case and guarantees its binding character.

The seven members of the Standing Appellate Body are elected by consensus in the Dispute Settlement Body (DSB), as and when vacancies arise by retirement. But since about the middle of 2017, the United States, has been expressing dissatisfaction with the working of the

Appellate Body and blocking the procedures for appointments to vacancies in the Appellate Body. Four vacancies were already unfilled as on December 10, 2019, and on that day, two more members retired, while the United States maintained opposition to the DSB commencing the process for filling them up. As a result, only one member remained in position, against the three required for a quorum, and the Appellate Body became non-operational. Thus, began a long period of non-functioning of the Appellate Body that has emasculated the dispute settlement system of the WTO.

The makeover of the dispute settlement procedure of the GATT accomplished by the WTO Agreement and its transformation into a binding mechanism has clearly been undone by knocking out the Appellate Body. In the perception of a large majority of WTO Members, this is an adverse development for the world trading system and, for most of them, the restoration of the status quo ante is the top priority for WTO reform. Until they are able to do so, the European Union and 18 other Members have established the Multiparty Interim Appeal Arbitration Arrangement (MPIA) to salvage the situation somewhat and keep the binding dispute settlement system of the WTO still working for disputes among themselves. Members have also held detailed discussions on the US concerns on the functioning of the Appellate Body and worked on a draft decision for the approval of the General Council to address these concerns. However, the US has not agreed to the draft and there is a deadlock on the issue of reviving the Appellate Body.

This paper undertakes a brief study of the crisis in the WTO over the Appellate Body, which threatens to vitiate its dispute settlement system, earlier considered as its distinguishing feature. Section 2 discusses the evolution of the dispute settlement system in GATT/WTO and its transition from moral persuasion and diplomacy in GATT 1947 to a judicial approach in the WTO. Section 3 describes the process leading to the the Appellate Body becoming non-functional and Section 4 analyses the responses, including the establishment of the Multiparty Interim Appeal Arbitration Arrangement (MPIA) and the draft decision for the General Council to improve the functioning of the Appellate Body, in the light of the US criticism. Section 5 undertakes a separate examination of the most serious US concern regarding overreaching and erroneous decisions by the Appellate Body. Section 6 contains suggestions for the way forward.

2. Dispute settlement in GATT/WTO – Transition from moral persuasion and diplomacy in GATT 1947 to a judicial approach in the WTO.

During the period 1947-1994, in the General Agreement on Tariffs and Trade (GATT), the resolution of trade conflicts among the contracting parties was mainly an exercise in diplomacy and moral persuasion. As the complainant contracting party confronted the requirement of consensus at every stage, the process was uncertain and there was no guarantee that the dispute would be resolved.

The skeletal rules in Article XXIII of GATT 1947 provided for a contracting party to raise a dispute when it considered any benefit under the Agreement to be nullified or impaired by the action or inaction of another contracting party. The first step in the procedures required by

Article XXIII was for the aggrieved contracting party to hold consultations on the matter with the concerned contracting party on the basis of a written representation. If the matter was not resolved bilaterally, the contracting party concerned could bring up the matter before the Contracting Parties (the full membership), which was required to investigate the matter and make recommendations or give a ruling. Article XXIII further provided that, if circumstances were serious enough and there was no agreement on suitable compensation, the Contracting Parties could authorise retaliation by the aggrieved contracting party.

A feature of Article XXIII that has been carried forward into the DSU was that nullification or impairment could occur for a contracting party even when another contracting party was acting consistently with its obligations. There could thus be what is known as non-violation nullification or impairment.

The practice of referring the matter to a working party, consisting of five to 20 delegations, including the disputants developed when disputes were brought up in the initial years. The working parties strove to resolve the disputes through conciliation and compromise. In 1952, the Contracting Parties established a Standing Panel of Complaints, and in 1955, the practice evolved to appoint ad hoc panels, composed of three to five persons drawn from countries having no direct interest in the matter in dispute. As explained in a report by the Executive Secretary,[1] the principal objective of the change to the panel system was to present 'an objective analysis for the consideration of contracting parties, in which the special interests of individual governments are subordinated to the basic objective of applying the Agreement impartially and for the benefit of the contracting parties'. The transition from working parties to panels was the first decisive step taken in the days of GATT 1947 to make the dispute settlement procedure more judicial in nature. However, negotiations and diplomatic pressures remained at the core of the process for the eventual resolution of disputes.[2]

In the mid-1960s, a groundswell of support for affirmative action in favour of developing countries in trade and development led to the addition of Part IV to GATT 1947. In the same vein, in 1966, special procedures[3] were adopted for cases in which a dispute was raised by a developing country against a developed country. Importantly, these procedures provided for the use of the good offices of the Director General to assist in resolving disputes. These procedures also foreshadowed certain improvements that were to be brought about in the general procedures many years later, during the mid-term review of the Uruguay Round. The establishment of a panel was made virtually automatic, giving assured access to the panel

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1 General Agreement on Tariffs and Trade (GATT).1955. "Considerations Concerning Extended Use of Panels". Note by the Executive Secretary, GATT doc L/392/Rev. 1, October 6, 1955.

2 While we have referred only to working parties and panels, in fact a variety of adjudicatory bodies considered the disputes in GATT 1947. In some cases, the disputes were taken up directly by the Contracting Parties (the full membership) while in others, the Director General provided good offices to assist contracting parties in settling the dispute. In one case, an arbitrator was appointed at the request of parties to the dispute.

3 General Agreement on Tariffs and Trade (GATT). 1966. "Procedures under Article XIII" in Basic Instruments and Selected Documents (BISD), Supplement 14, pages 18-20, Geneva. Contracting Parties to the GATT.

process to developing countries. Further, time limits were placed on the panel to submit the report and the defendant contracting party to report compliance.

Other elements of the customary practice for dispute settlement developed over time and these were codified in the Tokyo Round Understanding on Notification, Consultation, Dispute Settlement and Surveillance, with an annex setting out an Agreed Description of the Customary Practice in the Field of Dispute Settlement,[4] which was a landmark in the development of the dispute settlement system prior to the entry into force of the WTO Agreement. During the Tokyo Round, sub-sets of contracting parties to GATT 1947 adopted non-tariff measure agreements on technical barriers to trade, government procurement, subsidies, customs valuation and anti-dumping. These agreements had their own mini-dispute settlement procedures, which added a modicum of judicialisation. They granted to complainants the right to a panel and stipulated time limits for various stages of dispute settlement procedures.

Despite the improvements from time to time, the dispute settlement procedures in GATT 1947 remained inadequate. All important decisions at critical stages of dispute settlement remained prisoner to the GATT practice of consensus in decision-making, whether for the establishment or composition of a panel, adoption of a panel report or, where necessary, the authorisation of retaliatory suspension of concessions. While, as noted above, notable improvements were brought about in the special procedures for developing countries and in the Tokyo Round plurilateral agreements, decision-making by consensus in the mainstream procedures entailed that there was no assured access to the panel process for contracting parties with a grievance and, when the panel did submit a report, there was no certainty that it would be adopted. Access to the panel process became assured only after a conscious decision was taken at the mid-term Review of the Uruguay Round in December 1988. According to a WTO Secretariat publication,[5] out of 316 cases in which the dispute settlement process was initiated through consultations, panels/working parties were established in 157, reports issued in 136 and adopted in 96. In 28 of the 40 cases in which the reports were not adopted, the main reason was blockage by the parties concerned.

The Dispute Settlement Understanding (DSU) of the WTO – embracing judicialisation

The WTO Agreement brought about a paradigm change in the dispute settlement procedures by making them automatic and binding on Members. The DSU transformed existing procedures radically by introducing several changes, described below.

(i) The most important change is that at all key stages of the procedures, such as the establishment of a panel, the adoption of a panel report or of a report of the Appellate Body, a positive decision is taken unless there is consensus on not doing so. The procedural innovation of reverse consensus makes decision-making at all stages of the

[4] General Agreement on Tariffs and Trade (GATT). 1979. "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" in Basic Instruments and Selected Documents (BISD), Supplement 26, pages 210-18, Geneva. Contracting Parties to the GATT

[5] World Trade Organisation (WTO). 2018. GATT Disputes: 1948-1995, Geneva, WTO Secretariat.

process effectively automatic. Whichever stage we take, there will always be a Member in favour of a positive decision and opposing reverse consensus. For instance, a complaining party requesting for a panel cannot be expected to join the consensus not to establish the panel. When a panel report is submitted, the matter is straightforward: if a party appeals, the report is not adopted. In the case of an Appellate Body report, the party that has obtained a favourable verdict cannot be expected to join a consensus against its adoption.

(ii) A Standing Appellate Body is established to hear appeals on 'issues of law covered in the panel report and legal interpretations developed by the panel'. A panel report is adopted within 60 days of circulation, unless a party formally notifies the Dispute Settlement Body of its decision to appeal. Parties have the right to appeal but they may also forego the right and accept the panel report as final.

(iii) The Appellate Body report is to be adopted by the Dispute Settlement Body (DSB) and 'unconditionally accepted' by the parties, unless there is consensus to the contrary, as mentioned in paragraph (i) above.

(iv) Once the Appellate Body report is adopted, the defendant Member is required to notify the 'reasonable period of time' for implementation of the recommendation. If there is disagreement between the parties on the 'reasonable period of time', Article 21.3 of the DSU provides for arbitration. Further, if there is disagreement on whether there has been compliance, Article 21.5 provides for recourse to dispute settlement procedures.

(v) As an alternative to compliance, the parties may reach agreement on mutually acceptable compensation. If neither the recommendations of the DSB are complied with nor agreement reached on compensation, under Article 22.6, the complainant may request authorisation from the DSB to retaliate. If there is objection to the level of retaliation, the matter may again be referred to the original panel for arbitration.

(vi) In disputes in which authorisation is sought by Members to take retaliatory measures, the DSU restricts cross-retaliation between sectors. All goods are deemed to belong to the same sector, but a principal sector as identified in the 'Services Sectoral Classification List' and each of the categories of intellectual property rights constitute a different sector. Cross-retaliation under another agreement is possible only if retaliation in other sectors of the same agreement is not practicable or effective and if the circumstances are serious enough.

(vii) Time limits are prescribed for every stage of the procedure, from the request for consultations onwards. Panels have been given nine months in all and the Appellate Body another ninety days.

(viii) In all disputes that have been raised, the matter is kept under surveillance until it is fully resolved, and the measure complained against has been brought into conformity with the provisions of the WTO Agreement.

Once a Party exercises its right to appeal against a panel report, the role of the Appellate Body becomes pivotal for the settlement of the dispute. The report of the Appellate Body is

to be adopted by the DSB virtually automatically and accepted by the parties unconditionally. Subsequent procedures follow like clockwork, whether it is to arbitrate on the time frame for compliance, to resolve disputes if any on whether there has been compliance, or to authorise measures for retaliation or cross-retaliation, where necessary.

Dispute settlement procedures have thus emerged from the mould of negotiations and moral persuasion in GATT 1947 and become a judicialised mechanism in the WTO. Zimmerman [6] has neatly described the evolution as follows:

'Summarising the evolution of multilateral dispute settlement between the earliest days of the GATT and ITO drafts on the one hand and the new DSU procedures under the WTO on the other, one finds a gradual and very cautious evolution of the dispute settlement system from a rather diplomacy-oriented towards a more adjudication-oriented mechanism'.

3. Appellate Body – Countdown to crisis

As mentioned earlier, the Appellate Body is composed of seven persons in all, of whom three serve in rotation on any one case. The members are appointed for a term of four years, but each of them is eligible for reappointment for one more term. When Appellate Body members retire, new candidates are proposed on nomination by the WTO Members and selection procedures ensue.

From the time of the entry into force of the WTO Agreement in January 1995 until the beginning of 2017, vacancies in the Appellate Body were filled up as they arose, without much ado. Trouble arose first in May 2016 when the US vetoed the proposal for reappointment of Mr Seung Wha Chang for a second four-year term. The US explained that the decision to oppose the reappointment was taken after it had reviewed the Appellate Body reports in which Mr Seung had participated and found that the adjudicative approach reflected in these reports did not accord with the role assigned to the Appellate Body by the DSU. Some other Members expressed concern at the objection raised by the US as they felt that disapproval of re-appointment could affect the independence and impartiality of the AB members. They also found it problematic that the decision taken by a division and discussed and approved by the full Appellate Body was being made an issue for the reappointment of a particular AB member. In the end, the US view prevailed and Mr Seung was not offered a reappointment. After that the US raised no further problem and a replacement for Mr Seung was appointed according to agreed procedures.

However, as the new Administration, which had been voted to office in November 2016 settled down, the US position began to harden on the appointment of Appellate Body members. Two vacancies were to arise in the year 2017, the first on June 30 and the second on December 11, and differences arose initially on whether there should be a single process or independent processes for filling them up. At the meeting of the DSB on May 22, 2017, the EU pushed for a simultaneous process, but the US demurred in respect of the second

[6] Zimmerman, Thomas Alexander. 2006. Negotiating the Review of the WTO Dispute Settlement Understanding, Cameron May 2006.

vacancy on the ground that the proposal involved starting the selection process far in advance, and also mentioned the fact that the US political leadership was in transition and the US Trade Representative had just been confirmed. Subsequently, another vacancy arose due to the resignation of a member, and on August 31, 2017, filling up of all three vacancies came up for consideration before the DSB. At that meeting, the US broadened its opposition to cover all three vacancies and opened a new front by raising questions on a procedural issue. The criticism was centred on Rule 15[7] of the Working Procedures of the Appellate Body that provides for a retiring member to be allowed to serve on the Body on a transitional basis. Without referring specifically to this rule, the US posed the question 'whether a person whose term of appointment had expired, should continue serving, as if a member of the Appellate Body, on any pending appeals'.[8]

The US blockage of the selection process of Appellate Body members that began on August 31, 2017, has continued until the time of writing (October, 2020). At the meetings of the DSB that followed, Rule 15 of the Working Procedures remained the focal point of US criticism for almost a year and the US sought discussion on the issue before it could agree to resume the selection process. But, before long, it became apparent that the US dissatisfaction with the functioning of the Appellate Body was not limited to Rule 15 and the full list of criticism appeared in the US Trade Policy Agenda 2018, published in March 2018. It was at the meeting held on October 19, 2018, that the US spelt out in the DSB all points of its concern. The US was concerned that the Appellate Body had been reviewing fact finding by the panel, insisting on a system of precedents, disregarding the mandatory deadline of 90 days for submitting reports on appeals and issuing advisory opinions on issues not necessary to resolve a dispute. The most important criticism was 'persistent overreaching', and the US faulted the Appellate Body for adding obligations going beyond the text of the WTO Agreement, particularly in respect of subsidies, anti-dumping duties, countervailing duties, standards and technical barriers to trade, and safeguards.

At successive meetings of the DSB, several Members proposed launching the selection process for the vacancies that kept increasing but, on each occasion, the US disagreed, repeatedly citing its criticism of the Appellate Board functioning. A feature of the debates at these meetings was that several proposals were made to address US concerns, including a comprehensive one[9] by the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, the Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro, but the US refrained from making any suggestion on the way forward. By the time the DSB met at the end of October 2019, there were four vacancies already and with two more members due to retire on December 10, 2019, the meeting was the last chance to initiate action on the selection process in order to prevent the situation in which the Appellate Body would lose the quorum from arising. At the meeting, all Members except the US, supported

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7 The full text of Rule 15 reads as follows: 'A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.'

8 WT/DSB/M/400

9 WT/GC/W/752

the proposal to launch the selection process for the six vacancies. They urged the US to delink addressing the issues it had raised from the process of filling up vacancies to avert the crisis of the AB becoming non-functional. They also referred to the fact that the informal process, led by Ambassador Walker acting as facilitator, was working on those issues and had already produced a draft proposal that was to be considered by the General Council. However, the US did not relent and the proposal for commencing the selection process could not be approved. The Appellate Body remained functional until December 10, 2019, but on the next day, it went into abeyance. With only one member in position, it did not have the minimum number necessary to be able to take decisions, and the position continues to be the same until today.

The dispute settlement system of the WTO can still work up to the panel stage, and if a panel report is not appealed, it would be adopted by negative consensus and the dispute would be resolved. But if the losing party appeals, the case will go into the void and will remain unresolved indefinitely in the absence of the Appellate Body. Of course, the parties can still negotiate a conclusion, which may or may not be based on the panel report. In fact, there will be a great danger of the outcome being guided by power play rather by rules or by considerations of equity or fairness. In GATT 1947 days, when decision making required a positive consensus, it was often the case that the panel report was not adopted, and the dispute remained unresolved. In the DSU, the change to decision by negative consensus ruled out the possibility of a similar blockage and greatly improved the dispute settlement process. By getting the decision-making organ – the Appellate Body – itself put in abeyance, the US-initiated action effectively reverses that change. Now an appeal will put the panel report in limbo, and it cannot be taken up for adoption.

With the Appellate Body put in abeyance, the dispute settlement procedures will languish as a pale shadow of what the DSU had originally put in position. Without the Appellate Body, these procedures will be neither automatic nor binding and can no longer be said to constitute 'a central element in providing security and predictability to the multilateral trading system', as envisaged in Article 3.2 of the DSU. The multilateral trading system embodied in the WTO Agreement stands gravely weakened.

The most important motivating factor for the US to put the dispute settlement system of the WTO into such a diminished position is dissatisfaction with the Appellate Body findings on US measures under its trade remedy legislation. The Appellate Body ruling on the use of zeroing [10]by the investigating authorities while taking anti-dumping actions was a particular source of concern, as the US believed that in the last phase of the Uruguay Round negotiations, it had wrested an agreement that allowed it to continue with the practice. Criticism of the Appellate Body runs deep in the US and it is linked to the existential threat perceived by the domestic iron and steel industry due to the view taken by the Appellate Body on the trade remedy legislation in the US.

[10] Please see page 17 below for an explanation of zeroing.

The change in the US Administration's world view on international co-operation on trade policy could be another factor. From the time it was elected to office, the present leadership has expressed preference for bilateralism and abhorrence for multilateralism. As a matter of fact, at the meeting of the DSB on January 27, 2020, the US delegation in its statement[11]referred prominently to bilateral engagement as a method to resolve a dispute. Earlier, on September 18, 2017, the United States Trade Representative, Robert Lighthizer, speaking on US trade priorities at the Centre of Strategic Studies (CSIS), referred in highly favourable terms to the non-binding dispute settlement system under GATT 1947, 'as one where you would bring panels and then you would have a negotiation. And trade grew and we resolved issues eventually. And it's a system that was successful for a long time'.[12] More recently, in an op-ed published in the Wall Street Journal on August 21, 2020, Ambassador Lighthizer has proposed in clear terms that 'the WTO's dispute-settlement system should be totally rethought. The current two-tier system should be replaced with a single-stage process akin to commercial arbitration, in which ad hoc tribunals are impanelled and resolve particular disputes in an expeditious manner.'

The deeper game that the US has, and the Wall Street Journal op-ed brings it in broad daylight, is to convert dispute settlement in the WTO from a multilateral rules-based exercise to what will be in the ultimate analysis a bilateral process. If the US succeeds in its aim, individual WTO Members will get back political control of the dispute settlement process, which they had lost to a great extent as a result of judicialisation. The implication also is that economic strength and diplomatic clout will once again be the prevailing influence in dispute resolution as was the case in the pre-WTO era.

4. Responses to the non-functioning of Appellate Body

For most WTO Members other than the US, the main task is to restore the status quo ante in the WTO dispute settlement procedures to keep the rules-based multilateral trading system strong. The preference of most WTO Members is to negotiate and reason with the US to keep the basic structure of the two-tier adjudication and its automatic and binding nature intact. In the interim, they are willing to consider temporary arrangements.

4.1 EU Gambit – Multiparty Interim Appeal Arbitration Arrangement

WTO Members other than the US have viewed with alarm developments leading to the AB ceasing to function and they are worried even more because of the US refusal to discuss the solution. In their search for solutions, they have identified Article 25 of the DSU on arbitration as providing the way out of the problem. This Article envisages recourse to arbitration as an alternative means of dispute resolution within the WTO, based on mutual agreement between the parties. Relying on this provision, on 30 April 2020, the EU and 18

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[11] Geneva.usmission.gov, quoted in Inside U.S. Trade, 28 January 2020

[12] Lighthizer Robert, Remarks at the Centre of Strategic Studies (CSIS) on US Trade Policy Priorities, Sept 18, 2017, Washington D.C. quoted in Working Paper 20-4 of the Peterson Institute of International Economics, Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0, Chad P. Bown and Soumaya Keynes, March 2020.

other WTO members[13] notified[14] the establishment of the Multiparty Interim Appeal Arbitration Arrangement (MPIA), which will remain operational only as long as the Appellate Body continues to be in abeyance.

The main objective of the participating Members is to preserve the essential features of the WTO dispute settlement procedure, including its binding character and the two level-adjudication, which are both put in jeopardy in the absence of an Appellate Body that is able to hear appeals under Articles 16.4 and 17 of the DSU. In the MPIA, the parties indicate their intention to enter into an arbitration agreement in future WTO disputes with other parties to the Arrangement. They reserve their right to terminate participation in the MPIA at any time in future, but the appeal arbitration agreement will continue to apply to disputes that are pending on the date of withdrawal.

The agreed procedures for arbitration are set out in a separate annex, which is a part of the MPIA. The procedures will follow closely the appeal procedures provided in Article 17 of the DSU and cover the compliance stage as well; the Working Procedures for Appellate Review will also apply. In the light of the US criticism of the AB exceeding the mandatory 90-day time limit, new provisions have been introduced to help in adherence to the time limit. The arbitrators are authorised to take measures to streamline proceedings by taking decisions on page limits, deadlines and length of hearings. Article 21 of the DSU on the Surveillance of Recommendations and Rulings and Article 22 on Compensation and Suspension of Concessions will be fully applicable to disputes under arbitration.

A standing pool of 10 arbitrators was constituted by the parties to the MPIA in accordance with the procedures agreed to by them and the list was notified to the WTO on July 31, 2020, making the Arrangement operational on that date. As in the case of AB, three persons from the Standing Pool will constitute a division to hear an appeal.

The MPIA is an important initiative as it has sent a signal to the US that a significant segment of the WTO membership is determined to keep alive the binding two-step adjudication of the WTO Agreement. No doubt some important WTO Members, such as Japan, Korea, Indonesia, Malaysia, Thailand, India, South Africa, and Argentina have chosen to keep aloof. Some of them may be worried that signing MPIA will be construed as an act of defiance by the USA and provoke unilateral action.

4.2 Draft Decision for the General Council

While some Members have pushed the idea of the MPIA, others have worked hard to deal with the US criticism of the working of the Appellate Body. We have referred earlier to the informal process of consultations led by Ambassador David Walker, the then Chairman of the Dispute Settlement Body (DSB), acting as Facilitator. Ambassador Walker has sought to

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[13] The full list of participating Members is Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong (China), Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay.

[14] WTO Doc JOB/DSB/1/Add.12

address the US concerns in a draft decision[15] proposed for consideration of the General Council, and we take a critical look at the suggestions in that draft to deal with the US concerns that are summarised (and shown in italics) in the following paragraphs. How far do the suggestions meet these concerns? The US has rejected the draft once and will need to be persuaded to agree to enter into discussions and negotiations on it.

> *The AB reports are submitted in breach of the mandatory 90-day time limit and there is no consultation with the parties or notification to the DSB when the time limit is exceeded.*

The draft decision emphasises the need for the AB to adhere to the time limit, but is also pragmatic in providing for extension in complex cases or when there is a crowding of appeals. Such extension is to be allowed with the agreement of the parties and upon due notification to the DSB.

Ensuring timely completion of the dispute settlement procedures is an important part of the reform envisaged in the DSU and the maximum duration permitted is nine months for panels and 90 days for the AB. After adhering to the stipulated time frame in the initial years, the AB has been less mindful of it in later years.[16] It must be said in defence of the AB that while the workload has increased immensely beyond what was anticipated at the time of negotiation, due both to the growing number of appeals and the increasing complexity of cases, there has been no increase in the number of its members beyond the seven envisaged in the DSU. Reiteration of the original time frame for appeals while providing for extension with the consent of parties and re-emphasising notification to the DSB will not only respond to US criticism but will undoubtedly be in the interest of the entire membership.

It is possible that other reforms dealt with below, such as steering clear of advisory opinions and issues of fact, will result in saving on time and help the AB in adhering to the time frame. If this expectation is not realised, the membership should be prepared to revisit the question of strengthening the AB and other improvements that had been proposed earlier but not agreed to by the Members. The number of Appellate Body members could be increased from seven to nine. In order to reinforce independence, each member could be given a single tenure of six to eight years instead of two of four years. To improve efficiency, the rule could be introduced that the selection process would be launched six months before the expiry of the term of office of a retiring member.[17]

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15 WT/GC/W/791

16 As Bacchus and Lester have observed, while the US is critical of the AB for taking more time than permitted in submitting their reports, it has not even referred to the much longer delays that have occurred in the submission of reports by panels (James Bacchus and Simon Lester, Trade justice delayed is trade justice denied. How to make WTO dispute settlement faster and more effective? Cato Institute, November 2019). At present, the focus is on resolving the Appellate Body crisis, and the focus of attention of Members is on dealing with the US concerns, but it is equally necessary to ensure that panels adhere to the stipulated time limits.

17 These three proposals have been made in WTO doc. WT/GC/W/53, submitted by the European Union, China and India.

The AB has allowed members to serve on the AB even after the expiry of term. Although this is being done by the AB under Rule 15 of its Working Procedures the US makes the point that only the DSB has the authority to extend the term of members.

The draft decision lays down transitional rules for outgoing members so that any temporary extension of the tenure of such members is seen to be done under the express authority of the WTO Members, acting through the DSB. The draft decision also lays down two relevant disciplines to provide for smooth transition in the working of the AB when individual members retire: members about to retire may be assigned to a new division only up to 60 days before the expiry of their term; and they may complete the appeal process in cases in which 'the oral hearing has been held prior to the normal expiry of their term'.

The AB has made findings on issues relating to facts although the DSU limits its role to addressing only legal issues. The US is particularly concerned that the AB has treated the meaning of a Member's domestic law as a legal issue, and not as an issue of fact.

The draft decision reiterates that Article 17.6 of the DSU limits the scope of appeals to issues of law and does not allow the Appellate Body either to undertake a fresh review or to 'complete the analysis' of the facts of a dispute. It also clarifies that the 'meaning of municipal law' 'is to be treated as a matter of fact' that cannot be subject to appeal.

The AB has issued advisory opinions not necessary for discharging its main responsibility to assist the DSB in resolving the dispute. In the USTR Report on the Appellate Body,[18] the argument is made that issuing advisory opinions are attempts to produce interpretations for which the Appellate Body is not authorised. Under Article IX:2 of the Marrakesh Agreement, 'the exclusive authority to adopt interpretations' of that Agreement and the Multilateral Trade Agreements is reserved for the Ministerial Conference and the General Council. Another objection raised is that the time taken in drafting advisory opinions contributes to delays in the appeals process.

During the discussions in both the DSB and the General Council, there was wide agreement on the need to curb the tendency in the AB to rule on issues outside the mandate laid down in Article 17 of the DSU. The draft decision contains two elements that comprehensively address the US concern: first, that the AB may not rule or decide upon any issue that has not been raised by the parties; second, that the AB may address the points raised by the parties only to the extent necessary to resolve the dispute.

The AB has insisted that panels treat its rulings as a binding precedent in future cases. The US argues that if the AB ruling in one case is to be a precedent for future disputes it would get the status of an interpretation. Under Article IX of the Marrakesh Agreement

[18] Office of the United States Trade Representative, Report on the Appellate Body of the World Trade Organisation, February 2020

only the Members, acting through the Ministerial Conference or the General Council, have the exclusive authority to adopt interpretations.

The draft decision addresses the issue of precedents through the following three simple sentence.

> '15. Precedent is not created through WTO dispute settlement proceedings.
>
> 16. Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.
>
> 17. Panels and the Appellate Body should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them.'

In assessing the appropriateness of the draft decision to address the issue of binding precedent, we need to recall that the view taken by the AB on the issue has evolved over the years. Its current view is encapsulated in the following quote from a 2008 AB Report:

Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, *absent cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.'[19]

Hirsh[20] argues that the draft decision addressing the issue of precedent needs to be amplified to provide that adjudicators must be guided only by the covered agreements and the customary rules of interpretation of public international law and that there is no need for them to deal with previous AB reports and give reasons for not following them.

On the other hand, Lester and Bacchus[21] of the Cato Institute are of the opinion that the US views on precedent are not dissimilar, as it had made the following statement in the same WTO dispute:

'This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. For example, to the extent that a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter'.[22]

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[19] WTO Document, WT/DS344/AB/R, para160, United States- Final Anti-Dumping Measures on Stainless Steel from Mexico.

[20] Bruce Hirsh, "Resolving the Appellate Body Crisis: Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators" National Foreign Trade Council/Tailwind Global Strategies (December 2019)

[21] Simon Lester and James Bacchus, Of Precedent and Persuasion: The Crucial Role of an Appeals Court in WTO Disputes, Free Trade Bulletin, No74, September 12, 2019, Cato Institute.

[22] US statement in WT/DS344/AB/R quoted in Lester and Bacchus referred to in Footnote 21.

One may not agree with the view taken by these authors that there is not much difference between the US persuasiveness approach and the Appellate Body 'absent cogent reasons' approach.

But the important point to note is that the draft decision does not refer to the AB's 'absent cogent reasons' approach at all and merely provides that previous panel and AB reports must be taken into account, while leaving the judgement to panels and the AB on how much of these earlier reports is relevant for the case before them.

> *The AB has been overreaching and adding to or subtracting from the rights and obligations embodied in the covered agreements, particularly those relating to trade remedies.*

The draft decision reiterates what is provided in Articles 3.2 and 19.2 of the DSU that Panels and the Appellate Body as well as the DSB 'cannot add to or diminish the rights and obligations provided in the covered agreements'. In addition, it requires Panels and the Appellate Body to 'interpret provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 in accordance with Article 17.6 (ii) of that Agreement'.

The most serious concerns for the US are the overreaching and what it considers to be erroneous decisions by the Appellate Body. While the draft decision has dealt adequately with other US criticisms, it falls short as far as the suggestions on this criticism are concerned. A bald restatement of the provisions of Articles 3.2 and 19.2 of the DSU, as proposed in the draft decision, will not carry us very far. Neither will the call for compliance with Article 17.6 (ii) of the Anti-Dumping Agreement be of much avail. We examine further cases of overreaching and erroneous decision and make a suggestion on the possible way to deal with them in the next section.

Before we go to the next section, it needs to be mentioned that the draft decision also makes an important suggestion for the DSB to establish a mechanism for regular dialogue between WTO Members and the Appellate Body. In the past, this channel of communication has proved to be of great value for Members to convey their thoughts on points that arise in the functioning of the Appellate Body.

5. Dealing with overreaching and erroneous decisions

The USTR Report on the Appellate Body of February 2020 referred to earlier lists out on an illustrative basis six specific Appellate Body findings and recommendations, relating mostly to subsidies and trade remedy measures on which the US complains of overreaching. We examine further three out of these six issues, viz., zeroing in the Anti-Dumping Agreement, 'public body' in the Agreement on Subsidies and Countervailing Measures and 'unforeseen developments' in the Agreement on Safeguards, to explore how improvements can be made in the draft decision with regard to 'overreaching' and 'erroneous decisions'.

'Zeroing' in Anti-Dumping

The relevant provision, Article 17.6 (ii) of the Anti-Dumping Agreement, which was negotiated in the closing stages of the Uruguay Round to take care specifically of the US concerns on the practice of zeroing in anti-dumping cases, is quoted below:

'the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.'

The US relies on the deferential standard of review embodied in Article 17.6 (ii) of the Anti-Dumping Agreement to contend that the Appellate Body must find the measure to be in conformity with the Agreement. It emphasises that the zeroing methodology is not prohibited and maintains that it is permissible under the Anti-Dumping Agreement.

Before we go forward, we need to understand the zeroing methodology in the context of rules and procedures laid down in the WTO Anti-Dumping Agreement.

A product is considered as being dumped if the export price is less than its home market price. When dumping occurs, and the dumped products cause material injury to the domestic industry, the importing country has the right under the Anti-Dumping Agreement to impose an anti-dumping duty that does not exceed the margin of dumping. To determine the margin of dumping, the investigating authority makes a comparison of the export price with the home market price. The usual practice is to calculate the dumping margin by taking the weighted average of the difference between the export price and the home market price of the product in question in all the transactions during the investigation period. The US departs from the usual practice in certain categories of anti-dumping cases and excludes, or sets a value of zero, for the transactions in which the export price is higher than the home market price. This practice is called "zeroing". Exporting countries are critical of the practice because the exclusion from averaging of the transactions in which the export prices are higher than the home market price gives an upward bias to the level of anti-dumping duty that is levied. To illustrate the difference that zeroing makes let us consider the simple example of a firm in the EU exporting to the US. It makes three home market sales and three export sales to the US at unit prices shown below:

EU (home market) sales	US (export) sales	Margin of dumping
$ 100	$90	$10
$ 100	$110	-$10
$ 100	$ 95	$5

The average dumping margin in percentage terms with all three transactions included, works out to $ (10-10+5)/$295x 100= 1.69%. If the dumping margin in the transaction in which the export sale is at a price higher than the home market sale is set at zero, the average dumping margin will work out to $ (10+0+5)/295=5.08%

In *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')*[23] in 2006, the Appellate Body ruled as follows:

'In our analysis of whether the zeroing methodology, as applied by United States in the administrative reviews at issue, is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, we have been mindful of the standard of review set out in Article 17.6(ii) of the Anti-Dumping Agreement. Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), do not, in our view, allow the use of the methodology applied by the United States in the administrative reviews at issue. This is so because, as explained above, the methodology applied by the USDOC in the administrative reviews at issue results in amounts of assessed anti-dumping duties that exceed the foreign producers' or exporters' margins of dumping. Yet, Article 9.3 clearly stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."'

The Appellate Body has not found the zeroing methodology to be a permissible interpretation and, therefore, has not proceeded to apply the second sentence of Article 17.6 (ii) of the Anti-Dumping Agreement. However, the controversy on the legitimacy of the use of zeroing methodology remains alive. A paper[24] jointly authored on the subject in 2012 by three participants in the 1993 negotiations has stirred the pot. The authors put forward the view that the US delegation believed that Article 17.6 would enable continuation of the practice of zeroing. Hoekman and Mavroidis[25] observe that 'the AB members are agents as per Article 3.2 of the DSU and must not undo the balance of rights and obligations negotiated by the principals.' On the other hand, Kiujper[26] is of the view that the expectation in other delegations in the Uruguay Round negotiations was that the application of the customary rules of interpretation of international law should nearly always lead to only one interpretation and, consequently, there would be no occasion to apply the 'deference doctrine'

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23 WTO Document WT/DS294/AB/R

24 Cartland, Michael, Gerard Depayre, and Jan Woznowski, 2012 Is Something Going Wrong in the WTO Dispute Settlement? Journal of World Trade, 46, no.5 (2012): 979-1015. At the negotiations on the issue in 1993, Cartland was the representative of Hong Kong and Depayre of the European Union. Woznowski was the Director in the GATT Secretariat responsible for the Rules Division.

25 Hoekman, Bernard M. and Petros C. Mavroidis, 2020. 'Preventing the Bad from Getting Worse: The End ofthe World (Trade Organisation) as We Know It?' European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2020/06 (2020). Available at: https://scholarship.law.Columbia.edu/faculty_scholarship/2606

26 Kuiper, P. J., From the Board: The US Attack on the WTO Appellate Body, Legal Issues of Economic Integration 45 no. (2018). 1-12 Kluwer Law International BV, The Netherlands.

embodied in the second sentence. Thus, the situation on the issue of zeroing is that the language of the text of Article 17.6 (ii) that emerged from the negotiations did not clinch the matter one way or the other, and the participating representatives left with varying expectations. This has resulted in a spate of disputes in the WTO.

'Public Body'

The Agreement on Subsidies and Countervailing Measures (ASCM) provides that a subsidy shall be deemed to exist if 'there is a financial contribution by a government or any public body within the territory of a Member'. The definition of public subsidy is important for determining the scope and applicability of the disciplines of the ASCM, but the agreement does not explain the term. The interpretation by the AB of what constitutes a public body has become a source of dissatisfaction for the US.

In the dispute *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Panel interpreted the term 'public body' to mean 'any entity controlled by a government' but the AB reversed this finding and made the ruling that '[a] public body within the meaning of Article 1.1 (a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority.'[27] At the time when this report was adopted by the DSB, the US had expressed strong reservations against it on the ground that the AB had effectively collapsed the terms "government" and "public body" although in Article 1.1 (a)(1) of the ASCM, they were 'separate concepts with distinct meaning'.[28] During the Appellate Body hearing, as many as seven third participants, Australia, Argentina, Canada, the European Union, Japan, Mexico, and Turkey had expressed agreement with the definition put forward by the panel, which the AB had overturned. At the time of adoption, the same Members expressed concern on the AB report, particularly on the point that the AB report had equated the terms "government" and "public body".

The severest criticism of the AB findings has come from within the AB in a dissenting judgement in a subsequent case, which contained the observation that '[t]he majority has repeated an unclear and inaccurate statement of the criteria for determining whether the entity is a public body.'[29] The dissenting AB member expressed the view that 'if a government has the ability to control the entity in question and/or its conduct then the entity could be found to be a public body within the meaning of Article 1.1 (a)(1)'. In the author's view, government's ability to control the entity appears to be a much more logical definition of a 'public body' than the requirement that the entity 'possesses, exercises or is vested with governmental authority'.

The 'public body' issue has also figured in the trilateral trade talks among the EU, the US and Japan along with the discussion on industrial subsidies, in which China's subsidy practices

[27] WT/DS379/AB/R (paragraph 317)
[28] WT/DSB/M/294 (paragraph 98)
[29] WT/DS/437AB/R (paragraph 5.5.1)

are the target. The Joint Statement[30] issued after the meeting at Washington D.C. on January 14, 2020, contains the following paragraph:

‘The Ministers observed that many subsidies are granted through State Enterprises and discussed the importance of ensuring that these subsidizing entities are captured by the term “public body”. The Ministers agreed that the interpretation of “public body” by the WTO Appellate Body in several reports undermines the effectiveness of WTO subsidy rules. To determine that an entity is a public body, it is not necessary to find that the entity “possesses, exercises or is vested with governmental authority.” The Ministers agreed to continue working on a definition of "public body" on this basis.

The debate on public body is central to the concern among major industrialised countries, and indeed among emerging countries, that the WTO Agreement does not effectively discipline China’s trade distorting subsidies.

‘Unforeseen developments’

Article XIX of GATT 1994 and the WTO Agreement on Safeguards enable WTO Members to take emergency safeguard action (and raise tariffs, for instance) on any product on which a surge in imports causes or threatens serious injury to domestic producers. Article XIX of GATT 1994 begins with the lines, ‘If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers…’ In the WTO Agreement on Safeguards, there is no mention of ‘unforeseen developments’ in Article 2, which stipulates the conditions under which safeguard action can be taken. In fact, the negotiating history in the Uruguay Round reveals that an earlier draft of the Agreement on Safeguards included a reference to unforeseen developments, but it was excluded from the final text. In Argentina-Footwear Safeguards (WT/DS 164/AB/R) and Korea-Dairy Safeguard (WT/DS98/AB/R), the AB had taken the view that "the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement" and that the two texts must be read "harmoniously" and as "an inseparable package of rights and disciplines" and ruled that while imposing safeguard measures, Members were obliged to demonstrate that the increased imports were a result of unforeseen developments. In US-Lamb Meat (WT/DS178/AB /R), the AB went further and added that the published reports of investigation under Article 3.1 of the Agreement on Safeguards must contain ‘a “finding” or “reasoned conclusion” on “unforeseen developments”. Here, the AB seems to have gone too far in stressing the importance of the provision on ‘unforeseen developments’. The central issue before the competent authorities while taking safeguard action is whether there is serious injury or threat of such injury from a surge in imports and not whether such an increase is related to unforeseen developments.

[30] Trade.ec.europa.eu/doclib/docs/2029/January/tradoc_158567.pdf accessed 19 Sept 2020, 3.15 pm

The US criticism at the time of adoption of the report in US-Lamb Meat was that the text of Article XIX did not provide the basis for the AB finding that a Member needs to demonstrate unforeseen development before taking safeguard action and that such demonstration had to appear in the report of the competent authority. A general point of policy made by the US is that the AB ruling on unforeseen developments and other rulings have made the use of safeguard action extremely difficult, which would have the effect of making Members very cautious in agreeing to reduce or eliminate tariffs in future negotiations. There is merit in this point as well.

For matters in which serious questions of overstepping by the Appellate Body are raised, the best option would be for Members to go back to the negotiating table on the relevant WTO provisions, as in many cases the origin of the problem is the lack of clarity in those provisions. On complex matters such as zeroing, renegotiation of the provision is the only way forward. However, for other matters in which there is convergence among an overwhelming majority that the Appellate Body findings have gone in the wrong direction like the 'public body' issue in the Agreement on Subsidies and Countervailing Measures and the 'unforeseen developments' issue in the Agreement on Safeguards, the alternative route of authoritative interpretations is also worth considering. Article IX.2 of the Marrakesh Agreement provides for decisions on an interpretation to be adopted by a three-fourths majority of Members. However, the customary practice in the decision-making procedure of the WTO has brought in a complexity. Will the membership be agreeable to a simplification of the procedure?

Article IX. 1 of the Marrakesh Agreement reads as follows:[31]

"The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement."

In interpreting the above provision, it would be logical to make a distinction between matters such as waivers,[32] accessions and authoritative interpretations in which the Marrakesh Agreement provides separately for decision by a super-majority (three-fourths or two-thirds) and other matters in which a simple majority is sufficient. In 1995, there was a discussion

[31] Footnotes excluded

[32] The procedure for waivers is more complicated than what the summary in this sentence conveys. A request for waiver is to be submitted to the Ministerial Conference for consideration in accordance with the practice of decision-making by consensus. However, the Ministerial Conference is required to establish a time limit not exceeding 90 days for consideration of the request and, if consensus is not reached within such time limit, the decision is to be taken by a three-fourths majority. The request for waiver has initially to be submitted to the Goods, Services or TRIPS Council for a report to the Ministerial Conference.

among Members on whether the General Council should first seek to adopt decisions by consensus or proceed straightaway to a vote on waivers and accessions. At the end of discussions, the Chairman read out a brief statement (WT/L/93), the implication of which is that the General Council should initially seek to obtain decision through consensus.[33] Since then, the practice in the WTO has been to adopt the decision by consensus for both waivers and accessions. It should be noted that in GATT 1947, Article XXV specifically provided for voting for waivers and Article XXXIII similarly provided for voting for accessions, and the practice was in accordance with what the rules provided.[34] The practice in the WTO has really diverged from that in GATT 1947 on these matters, even though the opening sentence of Article IX.1 requires the WTO to continue 'the practice of decision-making by consensus followed under GATT 1947'. There is no such decision in respect of an authoritative interpretation, but in the only case in which a request[35] was made in 1999 (by the EU) for an authoritative interpretation of Article 21.5 of the DSU, the decision was blocked because of an objection by the US. The inference from the 1999 experience of the EU is that the practice in the WTO in respect of an authoritative interpretation is also for decision-making by consensus. As provided specifically in Article IX.2, decisions on authoritative interpretations would also involve an additional step in that recommendations of the Council overseeing the functioning of the relevant agreement need to be obtained before adoption of the interpretation by the Ministerial Conference or the General Council.

Since a three-fourths majority in the General Council for the interpretation to be adopted is already a tough requirement, there is a case for simplifying the procedures for obtaining the decision under Article IX.2 by resorting to voting straightaway after the initial attempt at consensus has not succeeded. A decision could be taken by the Ministerial Conference or the General Council that, when a request is received for an interpretation, the Goods, Services or TRIPS Council, would forward their recommendations after one round of discussions. Further, the Ministerial Conference or the General Council would make an attempt to obtain consensus the first time the matter appears on the agenda but would put it to vote at the next session. If the procedure for decisions under Article IX.2 is simplified in this manner, authoritative interpretations can become easier to obtain and serve the same purpose as a second appeal. The binding nature of dispute settlement in the WTO greatly strengthens the multilateral trading system, but a few cases of erroneous AB rulings have put its credibility under strain. Facilitating authoritative interpretations under Article IX.2 to set the jurisprudence right in such cases may just be the medicine that the doctor ordered.

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33 WT/GC/M/8 and WT/L/93

34 For example, see the waiver decision on the Generalised System of Preferences (GATT document L/3545 of 28 June 1971), adopted by 48 votes in favour and none against; see report of the Working Party on the Accession of Honduras, L/7299 of October 11, 1993, the last paragraph refers to the vote by contracting parties after the negotiations have been completed.

35 General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, Communication from the European Communities, WT/GC/W/133, 25 January 1999; General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, Communication from the European Communities, WT/GC/W/143, 5 February 1999.

Such a proposal can be taken up at any time in the course of the functioning of the WTO but the current crisis makes it relevant at this stage. It could be offered as an additional item to be included in the draft decision for the General Council prepared by Ambassador Walker in response to the US criticism of overreaching and erroneous decisions by the AB. In the light of the customary practice overhang of decision-making by consensus, Members may get daunted by such a proposal for voting. Voting may also appear to be against the spirit of a 2003 decision,[36] which discouraged recourse to voting 'in respect of any future decisions in the WTO', but three points need to be made in its favour while putting it forward. First, the proposal is derived from provisions of GATT 1947, which is supposedly the original source of the practice of decision-making by consensus, but which actually provided for voting for waivers and accessions, in law and practice. Second, Article IX.3 (a) already provides for voting for requests for waiver. Third, inflexibility on decision-making by consensus has brought the WTO to the brink of a crisis and it is time for Members to consider a change. The suggestion will certainly not be a silver bullet but it could be of value in providing an avenue for correction of the jurisprudence if the prevailing view is that the Appellate Body recommendations in a particular case are deficient or not acceptable for policy reasons. It would provide a way to deal with the most profound US criticism of the AB overreaching and taking decisions of doubtful validity.

6. The Way Forward

Putting the Appellate Body back in position is the most important challenge facing the WTO Members today. It is important because the abeyance of the Appellate Body has seriously affected the automatic and binding nature of the dispute settlement machinery of the WTO that was its hallmark. It has become apparent that what the US really wants is to discontinue the binding two-stage dispute settlement system of the WTO and revert to the approach that existed earlier in GATT 1947 in which the appellate stage did not exist and there was substantial scope for negotiations in the settlement of disputes. Doing away with compulsory jurisdiction of the Appellate Body will clearly be a retrograde step as it would reintroduce negotiations as the basis of settlement of disputes. When negotiations play a role in disputes, there is greater scope for power play and the less powerful economies are put in a less favourable position. It is a challenge because there is a deep divide on the issue between the US on the one hand and most other Members of the WTO on the other. It is widely recognised that there is merit in the US concerns on the functioning of the Appellate Body and it is necessary to make the necessary corrections in it. But it would be wrong to throw out the baby with the bath water. At present, there appears to be no alternative for other Members but to keep pressing for the restoration of the Appellate Body and for reform in its functioning on the basis of the draft decision that has been prepared for the General Council. Consideration could be given to possible amplification of the draft with the proposal on simplifying the procedure to adopt an authoritative interpretation suggested in this paper. Such simplification will facilitate dealing with overstepping and erroneous decisions by the Appellate Body, which is the most serious concern for the US. Pressure could be put on the US to fall in line with other Members by enlisting the support of other major trading nations

[36] WTO Document WT/L/509, Procedures for the Appointment of Director Generals.

to the MPIA. There is no real reason for Members like Japan and South Korea not to be on board and with persuasion, they may shed their initial hesitancy.

Epilogue

A new Administration has been voted to power in the US in the elections in November 2020. The President-elect has not made any pronouncement so far on WTO matters but there are preliminary indications of a change in approach towards external economic relations. Withdrawal of the US blockage of appointments to the Appellate Body has entered the realm of possibility. The author believes that the package of reform relating to the Appellate Body developed in the context of US criticism should be implemented irrespective of any possible change in the US approach. It would bring about an improvement in the functioning of the Appellate Body.

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