

WTO DISPUTE SETTLEMENT – THE ROAD AHEAD

GARIMA DEEPAK*

I.	INTRODUCTION	981	R
A.	<i>Why the Impasse?</i>	983	R
B.	<i>The Substantive Issue</i>	985	R
C.	<i>Matters of Process</i>	986	R
II.	PLAN A: A NEGOTIATED SOLUTION	986	R
A.	<i>Canadian Proposal</i>	988	R
B.	<i>Chinese Proposal</i>	989	R
C.	<i>Australian and Singaporean Proposal</i>	989	R
III.	UNITED STATES’ REACTION	990	R
IV.	POSSIBLE ALTERNATIVES TO A NEGOTIATED AGREEMENT	991	R
A.	<i>Eliminating the Second Stage of Review</i>	991	R
B.	<i>Agreeing to Abstain from Appeal</i>	992	R
C.	<i>Majority Voting to Appoint AB Members</i>	992	R
D.	<i>Plurilateral Dispute Settlement Agreement without the United States</i>	993	R
E.	<i>Alternative Dispute Settlement Mechanisms under the DSU</i>	994	R
F.	<i>Appeal-Arbitration under Article 25 of the DSU</i> ..	995	R
V.	CONCLUSION	997	R

I. INTRODUCTION

The Appellate Body (AB) is currently facing an existential crisis. With only three of seven members in position—three being the minimum required to hear an appeal¹—its effectiveness is compromised, leading to serious delays. The looming

* LL.M. in International Legal Studies, NYU School of Law (2019); Recipient of the Dean’s Graduate Award; Graduate Editor at *N.Y.U. Journal of International Law & Politics*; Research Assistant to Professor D. Brian King; Formerly worked as a Senior Associate at L&L Partners, New Delhi (India) in the field of international dispute resolution and trade law; I would like to thank Professor Robert Howse for his insightful comments. I also extend my heartfelt gratitude to Professor D. Brian King for his guidance during my LL.M. I would also like to thank the editors at *N.Y.U. Journal of International Law & Politics* for their help in reviewing this comment.

1. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter

paralysis and possible withering away of the AB, which despite its shortcomings has been effective, will be the death knell of the dispute settlement system of the World Trade Organization (WTO). This will, in turn, impact the credibility of the WTO adjudication system, which functions as an independent arbitrator of international trade rules.

The World Trade Organization (WTO) is a multilateral trade organization. Its dispute settlement mechanism ensures an independent, effective, and time bound resolution of trade disputes between countries. It is a two-tier system in which *ad hoc* panels adjudicate disputes² and appeals are made to the AB.³ This dispute settlement mechanism of the WTO has stood the test of time. It has functioned as the supreme court of dispute settlement since 1995, addressing trade concerns, preventing disputes, and keeping markets open, even during economic downturns, by checking protectionism.⁴

For a year and a half, the United States has blocked appointments of AB members, first without assigning any cogent reason, and then citing “systemic” concerns with the functioning of the AB.⁵ By the end of September 2018, the AB membership was reduced from seven⁶ to just three.⁷ If the United States’ intransigence continues, it will shut down the WTO dispute settlement system by December 2019—as at that point,

DSU] (“[The Appellate Body] shall be composed of seven persons, three of whom shall serve on any one case”).

2. *See id.* art. 11 (“[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”).

3. *See id.* art. 17.1 (“The Appellate Body shall hear appeals from panel cases.”).

4. *Understanding the WTO: Basics—What is the World Trade Organization?*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/factl_e.htm (last visited Apr. 14, 2019) (“It’s an organization for liberalizing trade. It’s a forum for governments to negotiate trade agreements. It’s a place for them to settle trade disputes. It operates a system of trade rules.”).

5. *WTO Appellate Body Prepares for Reduced Slate of Judges by Month’s End*, BRIDGES WKLY., Sept. 13, 2018, at 13, 13 [hereinafter *WTO Appellate Body Prepares*].

6. DSU art. 17.1.

7. *WTO Appellate Body Prepares*, *supra* note 5.

the AB will no longer have the quorum of three required to hear appeals.

Under Article 16.4 of the Dispute Settlement Understanding⁸ (DSU), WTO Members⁹ cannot adopt the findings issued by a panel until the completion of its appeal by a party to the dispute. Also, WTO Members whose rights are encroached upon cannot impose retaliatory sanctions against the offending WTO Member until the panel ruling becomes binding through adoption.¹⁰ Without a functioning Appellate Body, any party to a dispute will be able to block the adoption of panel rulings by simply filing an appeal of its findings. Thus, there is real danger that the system of dispute settlement at the WTO will be undermined. Moreover, without a robust, independent, and effective mechanism to enforce the rules, Members will not have an incentive to negotiate new rules and remedies. Failure to resolve this crisis, therefore, risks turning the world trading system into an arena of power politics where big players act unilaterally, wielding a truncheon in one hand and picking pockets of smaller Members with the other.

A. *Why the Impasse?*

A number of procedural issues, as well as some substantive matters, are the main U.S. concerns about the AB. From blocking the appointments to the AB on account of the “ongoing transition in [the] political leadership”¹¹ to becoming resolute that Members need to resolve the issue of Rule 15¹² of the

8. DSU art. 16.4.

9. *See id.* art. 2.1 (“With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term ‘Member’ as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement.”). Mirroring this definition, this comment also uses the term Member when referring to parties to the WTO.

10. *Id.* art. 16.4 (“If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.”).

11. Statements by the United States at the Meeting of the WTO Dispute Settlement Body 8 (June 19, 2017), https://geneva.usmission.gov/wp-content/uploads/sites/290/June19.DSB_Stmt_as-delivered.fin_public.pdf.

12. Rule 15 allows the Appellate Body to authorize outgoing members to complete the disposition of those appeals to which that person was assigned while they were a Member. *Analytical Index: Working Procedures for Appellate Review*, WORLD TRADE ORG. (2010), https://www.wto.org/english/res_e/publications_e/ai17_e/wpar_e.htm.

Working Procedures for Appellate Review as a priority,¹³ the United States has given many reasons to support its stance of not commencing the selection process of the new members of the Appellate Body.

The United States also voiced numerous other concerns, including the issuance of AB reports beyond the ninety-day deadline provided for in Article 17.5 of the DSU,¹⁴ concerns with AB findings that were superfluous to the resolution of the disputes,¹⁵ and the scope of appellate review under Article 17.6 of the DSU. Under that article, the AB cannot review panel fact findings, including the meaning of municipal law of a Member.¹⁶

The U.S. President's Trade Policy Agenda of 2018 details the "[United States'] concerns with WTO dispute settlement."¹⁷ That document states, "[t]he United States considers that, when the WTO dispute settlement system functions according to the rules as agreed by the United States and other

13. Statements by the United States at the Meeting of the WTO Dispute Settlement Body 24 (June 22, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf.

14. *Id.* at 9–10.

15. The United States voiced these concerns at the DSB meeting on September 29, 2017 while commenting on DS442, in the DSB meeting on November 22, 2017 on DS477/478, on May 28, 2018 on DS486, and most recently in the DSB meeting held on October 29, 2018. Statements by the United States at the Meeting of the WTO Dispute Settlement Body 9–10 (Sept. 29, 2017), https://geneva.usmission.gov/wp-content/uploads/sites/290/Sept29.DSB_.Stmt_.as-delivered.fin_.public.pdf; Statements by the United States at the Meeting of the WTO Dispute Settlement Body 9–12 (Nov. 22, 2017), https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf; Statements by the United States at the Meeting of the WTO Dispute Settlement Body 18–22 (May 28, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB_.Stmt_.as-deliv.fin_.public.Rev_.pdf; Statements by the United States at the Meeting of the WTO Dispute Settlement Body (Oct. 29, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf.

16. DSU art. 17.6. *See* Statements by the United States at the Meeting of the WTO Dispute Settlement Body 10 (Aug. 27, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.public.pdf.

17. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 22–28 (2018) [hereinafter 2018 TRADE POLICY AGENDA].

WTO Members, it provides a vital tool to enforce WTO rights and uphold a rules based trading system.”¹⁸

B. *The Substantive Issue*

The United States has also voiced concerns with respect to the AB’s substantive interpretations in certain disputes pertaining to subsidies, antidumping, and countervailing duties; standards under the Technical Barriers to Trade Agreement; and safeguards with the effect of “adding to or diminishing rights and obligations”¹⁹ of WTO Members. The United States began raising issues and offering criticism of the AB’s decisions,²⁰ which it alleges create rights and obligations on account of AB overreach, beginning from at least the year 2000.

The strong and sustained criticism by the United States is embedded in a fundamental premise that the WTO AB is not an international court in the trade arena with the power to create its own jurisprudence.²¹ On the contrary, the United States maintains that the AB is merely a judicial tribunal contracted by members, meant to interpret the provisions of the WTO covered agreements.²²

The above substantive concerns have been riling the United States for more than a decade. Other Members like Costa Rica, India, Pakistan, Mexico, Canada, Malaysia, Argentina, Chile, and Japan have also voiced their concerns against the overreach by the AB in the last two decades.²³ However, none of them is as stringent and tenacious as the United States or expressed frustration at Members accommodating the transgressions of the AB rather than telling the adjudicative

18. *Id.* at 22.

19. *Id.*

20. TERENCE P. STEWART, *THE BROKEN MULTILATERAL TRADE DISPUTE SYSTEM* 7 (2018).

21. *See* 2018 TRADE POLICY AGENDA, *supra* note 17, at 26 (“The purpose of the dispute settlement system is not to produce reports or to ‘make law,’ but rather to help Members resolve trade disputes among them. WTO Members have not given panels or the Appellate Body the power to give ‘advisory opinions’ as some national or international tribunals have.”).

22. *Id.* (“Indeed, both the Dispute Settlement Understanding and the WTO Agreement expressly provide that WTO Members, acting in the Ministerial Conference or General Council, have the ‘exclusive authority’ to render an authoritative interpretation of the WTO agreements.”).

23. STEWART, *supra* note 20, at 31.

body to abide by the rules agreed to in 1994. Additionally, none of them has held the AB hostage. Therein lies the problem, leading to the search for solutions and a scramble to break the AB impasse and preserve the WTO dispute settlement system.

C. *Matters of Process*

In addition to the substantive concern regarding rule-making by the Appellate Body, the U.S. Trade Policy Agenda of 2018 also highlights some procedural concerns²⁴ regarding the functioning of the AB. In view of these concerns, the priority of the WTO Members is trying to break the impasse in the filling up of the vacant positions of the AB members. The WTO Members, academics, think tanks, and experts looked through a number of ideas to arrive at a possible breakthrough. Most believe that an independent, two-stage dispute settlement system is necessary for the fair adjudication of the rules of international trade.²⁵ This effort to swiftly find an acceptable way of ending the impasse in appointing AB members is therefore likely to remain on the top of the agenda of the WTO in the coming weeks and months.

II. PLAN A: A NEGOTIATED SOLUTION

To resolve the deadlock, some WTO Members are actively considering proposals to address the U.S. concerns related to the functioning of the AB.

The European Union (EU) initiative²⁶ comprises two textual proposals that address the U.S. concerns in the following ways:

1. The first EU proposal,²⁷ co-sponsored by twelve other Members, seeks to amend Article 17 of the

24. 2018 TRADE POLICY AGENDA, *supra* note 17, at 24–28.

25. Marina Foltea, *Options for Breaking the WTO Appellate Body Deadlock*, TRADE PACTS (Jan. 23, 2018), <https://tradeacts.com/news/options-for-breaking-the-wto-appellate-body-deadlock/>.

26. *Commission Concept Paper on WTO Modernisation: Introduction to Future EU Proposals*, at 14 (Sept. 18, 2018), http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf [hereinafter *Commission Concept Paper*].

27. Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WTO Doc. WT/GC/W/752

DSU and make a rule in the Working Procedures of the AB as follows:

a. Adoption of a transitional rule for out-going AB members providing that “[t]he outgoing person shall complete the disposition of an appeal in which the oral hearing has been held.”²⁸ This will limit the period and the number of appeals an AB member can work on after the expiration of his term.

b. Amendment of the ninety-days provision in Art 17.5 of the DSU to provide that “in no case shall the proceedings exceed 90 days, unless the parties agree otherwise on a proposal from the Appellate Body.”²⁹ This will reduce the number of delayed AB reports.

c. Introduction of a footnote seven in Art 17.6 of DSU restricting the AB from interpreting the municipal laws of Members.³⁰

d. Amendment of Article 17.12 of the DSU to restrict the AB from making findings on issues that are not necessary to resolve a dispute or give obiter dicta, and state that the AB will address issues raised by parties “to the extent this is necessary for the resolution of the dispute.”³¹ Indirectly, this amendment will also address adherence to the timeline of ninety days for AB reports.

e. Addressing the issue of precedents, holding annual meetings of the AB with Members in Dispute Settlement Body (DSB) to provide a “channel of communication,”³² where Members can voice their concerns related to AB approaches, “systemic issues or trends in the jurisprudence.”³³

(Nov. 26, 2018), <http://images.mofcom.gov.cn/sms/201811/20181127202503275.pdf> [hereinafter First EU Proposal].

28. *Id.* annex, ¶ 1.

29. *Id.* annex, ¶ 2.

30. *Id.* annex, ¶ 3.

31. *Id.* at 2.

32. *Commission Concept Paper*, *supra* note 26, at 17.

33. *Id.*

This would provide feedback to the AB without affecting its independence.

2. The second EU proposal,³⁴ co-sponsored by India and China, seeks enhancement of the independence and effectiveness of the AB by:
 - a. Increasing the number of AB members from seven to nine to deal with the growing number of appeals.
 - b. Making the job of AB member a full-time occupation.
 - c. Providing AB members with a single six-to-eight year term.
 - d. Capping the time during which AB members can continue discharging their duties after the expiration of their terms if alternate members are not appointed at two years.
 - e. Automatically launching efforts to replace outgoing AB members a number of months before the end of their term.

The EU initiative is structured in this two-part manner as a tactical maneuver designed to attract wider support among WTO members. This division ensures that the first proposal deals exclusively with the procedural concerns raised by the United States—to be addressed urgently, with the resulting unblocking of selection of new AB members. The second proposal, on the other hand, focuses on enhancing the capacity and independence of the AB in order to ensure its proper functioning in the long term.

In addition to the two textual proposals of the EU and others to address the AB impasse, several other Members floated suggestions as well.

A. *Canadian Proposal*

The Canadian proposal³⁵ addresses the AB impasse by clearly acknowledging that the AB added to Members' rights

34. Communication from the European Union, China and India to the General Council, WTO Doc. WT/GC/W/753 (Nov. 26, 2018), <http://images.mofcom.gov.cn/sms/201811/20181127202519302.pdf> [hereinafter Second EU Proposal].

35. Communication from Canada, *Canada—Strengthening and Modernizing the WTO: Discussion Paper*, WTO Doc. JOB/GC/201 (Sept. 21, 2018).

and obligations. It suggests that in the interim, Members should be allowed to provide “binding and non-binding guidance to adjudicative bodies on specific issues.”³⁶ Regarding the systemic and procedural practices of the AB, Canada suggests the following reforms:³⁷

1. Limit AB findings to those findings necessary to the objective of settling the specific dispute;
2. Focus the review on legal issues by clarifying the standard of review to be applied by the AB to panels in relation to factual findings and those related to the operation of domestic law;
3. Develop guidance for the AB on consultations with parties when the AB cannot meet its deadline.

B. *Chinese Proposal*

In 2018, China published its own position on WTO reform generally.³⁸ Regarding the AB impasse, it only says that WTO reforms should address and resolve the issue of AB member appointment blockage as soon as possible.³⁹ As a position paper, it offers no further details on this issue.

C. *Australian and Singaporean Proposal*

The proposal from Australia and Singapore,⁴⁰ discussed in the WTO General Council meeting of December 12, 2018, focuses on the “Adjudicative Bodies adding or diminishing rights or obligations under the WTO Agreement.” It seeks to address the substantive issue of overreach by panels and the AB immediately, while also finding solutions to the procedural issues related to the AB enumerated in the U.S. Trade Policy Agenda of 2018. It also reiterates the suggestions of the Canadian proposal, which both Australia and Singapore support.

36. *Id.*

37. *Id.*

38. Jennifer Freedman, *Flash: China Publishes Position on WTO Reform*, BORDERLEX (Nov. 23, 2018), <https://www.borderlex.eu/flash-china-publishes-position-on-wto-reform/>.

39. *Id.*

40. Communication from Australia and Singapore to the General Council, *Australia & Singapore—Adjudicative Bodies: Adding to or Diminishing Rights or Obligations Under the WTO Agreement*, WTO Doc. WT/GC/W/754 (Nov. 29, 2018).

III. UNITED STATES' REACTION

In the General Council meeting of December 12, 2018, the United States turned down the various proposals for a quick resolution to the AB impasse. More specifically, the United States made the following points;⁴¹

1. The First EU Proposal⁴² appeases the AB by seeking to change the DSU provisions to make legal the current problematic approach of the AB.⁴³
2. The Second EU Proposal is a step in the wrong direction, as it seeks to strengthen the AB and its support systems. Thus, the proposal encourages overreach by the AB, which is one of the United States' main concerns.⁴⁴

At the Meeting of the WTO DSB on January 28, 2019,⁴⁵ the United States maintained its stand on the AB impasse without offering any alternative proposals. This U.S. response has increased the suspicion that U.S. substantive and procedural concerns regarding the AB are a pretext for holding the system hostage in order to get concessions in other areas of interest, such as having reciprocal trade⁴⁶ and enhancing transparency commitments.⁴⁷ In addition, the United States wants to address its concerns on the issues relating to China, such as industrial subsidies leading to excess capacities, government

41. Statements by the United States at the Meeting of the WTO General Council, (Dec. 12, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec12.GC_Stmt_items_7.and_8.as_delivered.clean_.pdf [hereinafter December 12 U.S. Statements].

42. First EU Proposal, *supra* note 27.

43. For instance, instead of enforcing the agreed rule of DSB deciding on tenures of the AB members or the obligation of the AB to give reports in sixty-to-ninety days, it sought to change the rules to allow or authorize such AB deviations under different circumstances. *Id.*

44. December 12 U.S. Statements, *supra* note 41, at 3.

45. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, (Jan. 28, 2019), https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan28.DSB_Stmt_as-deliv.fin_public.pdf.

46. See 2018 TRADE POLICY AGENDA, *supra* note 17, at 4 (“Countries that refuse to give us reciprocal treatment or who engage in other unfair trading practices will find that we know how to defend our interests.”).

47. *Id.* at 30 (“[T]he United States advocates for countries to improve the transparency of their policies and programs by providing mandated notifications on a timely basis.”).

support to state owned enterprises (SOEs) or rules to check the forced transfer of technology.

While clearly a negotiated solution to the AB impasse is the preferred option, there is no certainty that it will work. Considering the signals emanating out of Washington, D.C., even the greatest of optimists would not give it more than a thin chance of success.

As a result, it appears certain that finding a negotiated solution to the AB impasse will be a drawn-out and difficult process. It, therefore, becomes imperative to consider an alternate plan that preserves some elements of the dispute settlement system.

IV. POSSIBLE ALTERNATIVES TO A NEGOTIATED AGREEMENT

The alternatives discussed below include a variety of options which would significantly change the dispute settlement system in use today.

A. *Eliminating the Second Stage of Review*

Professor Steve Charnovitz suggests amending the Working Procedures under Article 17.9 DSU to disallow the AB from accepting any new appeals in the event of three or more expired terms in the AB membership, as in the present scenario.⁴⁸ While a simple solution, this suggestion presents several important challenges.

Most importantly, eliminating the second stage of review would render an appeal automatically complete as soon as it is filed, thereby depriving the WTO Members of their right to appeal. Consequently, ad hoc panels would become the sole adjudicators of disputes.

This would also imply extinguishing rights negotiated by Members when they approved the creation of the WTO, thus changing the nature of the WTO without a formal process to fundamentally reformulate the system. Additionally, a single stage dispute settlement could affect the quality of the adjudi-

48. Steve Charnovitz, *How to Save WTO Dispute Settlement from the Trump Administration*, INT'L ECON. L. & POL'Y BLOG (Nov. 3, 2017), <https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>.

cation system, as it would extinguish the possibility of rectifying mistakes made by the panel.

Given these challenges, it is unlikely members will accept this proposal. In fact, some Members may be willing to consider alternative options only if they *preserve* the structure of a two-stage dispute resolution, the independence of the AB, and the binding nature of the AB's decision.

B. *Agreeing to Abstain from Appeal*

Another option could be that Members agree in advance, on a case by case basis, not to appeal. Brazilian trade lawyer Luiz Eduardo Salles introduces this suggestion.⁴⁹ He argues that procedural agreements not to appeal would significantly reduce costs for parties, especially developing countries. They could also shorten WTO dispute settlement timeframes, leading to faster resolution of disputes.⁵⁰

This approach, however, suffers from the same shortcomings associated with the option to eliminate second stage review. The savings in time, cost, and effort are more than offset by the disadvantages associated with this option.

C. *Majority Voting to Appoint AB Members*

Pieter Jan Kuijper, former Director of the WTO's Legal Affairs Division, proposes a process for majority voting under Article IX(1) of the Marrakesh Agreement⁵¹ to resolve the AB impasse.⁵²

Others support this option⁵³ and it has been identified as an alternative that would favor recourse within the WTO

49. Luiz Eduardo Salles, *Bilateral Agreements as an Option to Living through the WTO AB Crisis*, INT'L ECON. L. & POL'Y BLOG (Nov. 23, 2017), <https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-on-bilateral-agreements-as-an-option-to-living-through-the-wto-ab-crisis.html>.

50. *Id.*

51. Marrakesh Agreement Establishing the World Trade Organization art. IX, ¶ 1, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

52. Pieter Jan Kuijper, *What to do About the US Attack on the Appellate Body?*, INT'L ECON. L. & POL'Y BLOG (Nov. 15, 2017), <https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuijper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html>.

53. Foltea, *supra* note 25.

framework.⁵⁴ However, there are certain legal and political difficulties making it ultimately impracticable

First, there is a concern that the use of majority voting⁵⁵ may lead to the United States quitting the WTO in the event they are out-voted. Second, WTO decisions are taken by consensus and it is “very exceptional”⁵⁶ to vote. A previous suggestion of voting in 1999 on the issue of the selection of a new Director-General (DG) was not well-received, especially by the developed countries.⁵⁷ Finally, the Marrakesh Agreement provides that the WTO *may* resort to voting when decisions cannot be made by consensus. However, this option is not available when the founding documents provide a specific method of arriving at a decision. For the functioning of the DSB, paragraph 4 of Article 2 of the DSU prescribes consensus as the decision-making method.

As such, there is a procedural limitation in using voting to resolve the AB impasse.

D. *Plurilateral Dispute Settlement Agreement without the United States*

Kuijper also proposes another plan involving a coalition of major trading partners entering into an arrangement that replicates either the AB procedure or the whole WTO dispute settlement mechanism in a separate agreement outside the WTO framework.⁵⁸

This alternative presents several issues that make it a non-viable option. Negotiating a new plurilateral agreement would be challenging and require a significant amount of time for

54. Robert McDougall, *The Search for Solutions to Save the WTO Appellate Body*, EUR. CTR. FOR INT’L POL. ECON. (Dec. 2017), <http://ecipe.org/publications/the-search-for-solutions-to-save-the-wto-appellate-body/?chapter=all>.

55. This option is referred to as “the nuclear option.” *Deadlock at the WTO: Pathways to Maintaining an Effective System for Appellate Review*, GRADUATE INST. GENEVA (Nov. 30, 2017), <https://www.graduateinstitute.ch/communications/news/deadlock-wto-pathways-maintaining-effective-system-appellate-review>.

56. PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 151 (4th ed. 2017).

57. *Id.*

58. Kuijper, *supra* note 52.

negotiation and adoption.⁵⁹ A plurilateral agreement within the WTO framework would also need approval by the Ministerial Conference by consensus.⁶⁰ Under prevailing conditions within the WTO, agreement on a plurilateral arrangement appears next to impossible.⁶¹ With a large trading partner like the United States out of the plurilateral arrangement, other Members may not find it worthwhile to enter.

Moreover, this proposition is asymmetric and provides an unfair advantage to any Member that does not join. By this logic, the U.S. measures will not be subject to WTO discipline if the United States stays out of the plurilateral arrangement. However, other Members will be bound by the plurilateral dispute settlement disciplines and their measures will be subject to disputes. This result would be untenable for Members given that it confers a definite advantage on the United States.

E. *Alternative Dispute Settlement Mechanisms under the DSU*

Article 5 of the DSU provides a number of alternative dispute settlement procedures such as good offices, conciliation, and mediation.⁶² Parties to a dispute may resort to these methods if they agree to do so. These procedures may be initiated or terminated at any time by the parties to the dispute. Confidentiality is guaranteed under Article 5.2 of the DSU and the assistance of the DG is offered in his *ex officio* capacity⁶³ to help resolve the dispute. No third parties are allowed under these procedures. After the termination of these procedures, the complaining party may proceed with the request for the establishment of a panel.⁶⁴

Some shortcomings of this alternative include the lack of flexibility to use these procedures after the issuance of the

59. Foltea, *supra* note 25.

60. Marrakesh Agreement art. X, ¶ 9.

61. TETYANA PAYOSOVA, GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *THE DISPUTE SETTLEMENT CRISIS IN THE WORLD TRADE ORGANIZATION: CAUSES AND CURES* (2018).

62. DSU art. 5.

63. *See id.* art. 5.6 (“The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.”).

64. *See* DSU art. 5.3 (“Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.”).

findings by the panel, the requirement of an agreement between parties, and the lack of a binding nature similar to the AB report.

F. *Appeal-Arbitration under Article 25 of the DSU*

Scott Anderson and other solicitors propose the use of the arbitration process under Article 25 of the DSU as a “temporary avenue to enable appeals of panel reports.”⁶⁵ This option has gained the most traction among the WTO Members as an alternate plan because it provides for the continuation of a second stage of review and is “softer,”⁶⁶ and more temporary than the majority vote option.

Unlike requests for panel establishment or recourse to arbitration under Article 21.3—for determining the reasonable period of time (RPT) in a dispute, and Article 22.6—for determining the level of retaliation, arbitration under Article 25 is not dependent on any action by the DSB.⁶⁷ Arbitration under Article 25 of the DSU commences as a result of an agreement by the parties to the dispute arising under a covered agreement. Other Members receive notification in advance of the start of the proceedings and may even be allowed to participate in the arbitration as third parties.⁶⁸ Parties to the dispute resorting to arbitration under Article 25 must agree on a set of procedural rules applicable to the arbitration process in addition to agreeing to abide by the arbitration award.⁶⁹ Thus, in contrast to other dispute settlement proceedings, an arbitration award is not dependent on the DSB for adoption and only requires notification to the DSB and the relevant council or committee.⁷⁰ Article 3.5 of the DSU requires that arbitration awards must be consistent with all the WTO-covered agreements.⁷¹

65. Scott Andersen et al., *Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals* 1 (Ctr. for Trade & Econ. Integration, Working Paper No. CTEI-2017-17, 2017).

66. Foltea, *supra* note 25.

67. Andersen et al., *supra* note 65, at 2.

68. VAN DEN BOSSCHE & ZDOUC, *supra* note 56, at 2.

69. *Id.* at 187.

70. See DSU art. 25.3 (“Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.”).

71. *Id.* art. 3.5.

Using arbitration as an appellate mechanism has a number of advantages. The process is swift and relatively inexpensive, even for developing countries, and it can be an effective system of dispute settlement appeals for clearly defined issues. Surveillance of implementation of recommendations and rulings provided in Article 21 of the DSU could apply to appeal arbitrations, including the concept of an RPT for implementing the arbitration findings and recommendations. Additionally, Members could seek compensation and suspension of concessions as provided in Article 22 of DSU, in cases where measures are found by the WTO to be inconsistent.⁷²

These features make the arbitration process under Article 25 of the DSU a suitable alternative method of dispute settlement at the WTO, as it has the necessary teeth to be an effective enforcement mechanism. This option of *ad hoc* arbitration is the best way to preserve the right of appeal of the Membership while retaining the features of the current appeal proceedings.

However, this option also presents some problems. If the United States does not agree to appeals in the form of arbitration, it will be free from the provisions of Articles 21 and 22 of the DSU, which provide a system of binding and enforceable arbitration decisions, while the members who opt for it will be bound by these provisions. Accordingly, there is an element of asymmetry in this approach.

Arbitrators also come from developed countries and may, therefore, may exhibit a bias in favor of their own country. Additionally, Members will have an incentive to conclude an appeal arbitration agreement before a panel report if they perceive an equal or better chance of winning at the panel stage. Furthermore, until now, thus far only the United States and the European Union have resorted to Article 25, in the *U.S.—Copyright Act*⁷³ dispute. The fact that it has not been used by others might make the Members hesitant to utilize this option now.

72. *Id.* art. 22.

73. Award of the Arbitrators, *United States—Section 110(5) of the US Copyright Act: Recourse to Arbitration Under Article 25 of the DSU*, WTO Doc. WT/DS160/ARB25/1 (Nov. 9, 2001).

V. CONCLUSION

The impasse at the WTO necessitates the preservation of the AB's independence. The best option for the preservation of a binding, two-stage dispute settlement system is the appeal-arbitration under Article 25.

The advantages of this approach are that it would be the closest to the existing AB mechanism and could also draw upon the resources of the AB Secretariat at the WTO. Since many Members are in favor of a two-stage dispute settlement system, it is likely that they would agree to binding arbitration at the appellate stage even before the panel proceedings begin. This approach ensures that the dispute settlement system at the WTO does not regress to that of the GATT, where even the losing member could block acceptance of the finding under the positive consensus rule.⁷⁴ Lastly, it ensures effective enforcement of arbitration awards.

Perceptions differ on whether the WTO is at a crossroads, in dire straits, or in a full-blown crisis. However, the coming weeks and months will be crucial in deciding whether the WTO will endure and prevail or be reduced to an organization that lacks the ability to enforce its rules.

⁷⁴ Jakob Hanke, *World Trade Returns to the Law of the Jungle*, POLITICO (Dec. 31, 2018), <https://www.politico.eu/article/wto-gatt-trade-tariffs-dispute-back-to-gatt-law-of-the-jungle-returns-to-tradeland/>

