

18-5 The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures

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The World Trade Organization (WTO) has long been considered an effective institution because of its enforceable dispute resolution procedures. Its process calls for ad hoc panels to issue rulings on disputes over member country compliance with their WTO rights and obligations, subject to review by a standing Appellate Body composed of seven “judges” (technically members!). Decisions by the Appellate Body are final and binding, and generally respected by disputing parties. Since its inception in 1995, the WTO dispute settlement mechanism has resolved an impressive number of trade disputes and has earned a reputation as the “crown jewel” of the global trading system.

Today, however, the dispute settlement mechanism is in crisis. WTO members have failed to negotiate updates to the rulebook, including rules on dispute settlement itself. As a result, the WTO Appellate Body increasingly is asked to render decisions on ambiguous or incomplete WTO rules. Its interpretations of such provisions have provoked charges by the United States and others that binding Appellate Body rulings, which establish precedents for future cases, effectively

circumvent the prerogative of member countries to revise the WTO rulebook and thus undercut the national sovereignty of WTO members. For the past few years, US officials have blocked appointments of Appellate Body members to force WTO members to negotiate new rules that address US concerns and limit the scope for judicial overreach.²

Without resolution of this problem, the Appellate Body soon will not have enough members to review cases and the vaunted WTO dispute settlement system will grind to a halt.³ Should that happen, the WTO would lose its system of final appellate review, and its panel rulings would seldom become binding.⁴ Aggrieved countries would then lose their legal rights under WTO rules.⁵ Failure to resolve this crisis thus runs the risk of returning the world trading system to a power-based free-for-all, allowing big players to act unilaterally and use retaliation to get their way. In such an environment, less powerful players would lose interest in negotiating new rules on trade.

This Policy Brief examines the causes of US discontent, many of them legitimate in nature, and suggests steps to resuscitate the appellate review system. It critiques proposals by some scholars advocating procedural workarounds, which for legal and/or political reasons would be untenable and would not resolve the fundamental issues that have led to crisis. WTO provisions need to be regularly updated via negotiations and targeted “authoritative interpretations” of existing rules approved by WTO member countries, not the Appellate Body.

To ensure the proper functioning of the dispute settlement system, there are several paths forward. For example, WTO members could agree on new procedures calling on the Appellate Body to submit issues of legal uncertainty arising on appeal to respective WTO committees for further discussion and negotiation among WTO members. Such “legislative remand” procedures would link the dispute settlement function with the role of the WTO as a forum for permanent negotiations. When a consensus cannot be reached among all WTO members, the General Council (comprising all WTO members) can use the latent tool of “authoritative interpretations” by a three-fourths majority vote to resolve ambiguities in the WTO text. These steps would return the WTO to its “essential focus on negotiations,” as urged by the Trump administration’s top trade envoy, Robert Lighthizer.⁶

BACKGROUND

The Trump administration's well-known dissatisfaction with trade arrangements has led to US withdrawal from the Trans-Pacific Partnership (TPP) and renegotiations of the North American Free Trade Agreement (NAFTA) and the Korea-US FTA (KORUS). The WTO, the president has said, "was set up for the benefit of everybody but [the United States]."⁷ But the United States has long taken advantage of its dispute settlement system, which it saw as an improvement over the blocking and delaying tactics of respondents in trade disputes under the old GATT (General Agreement on Tariffs and Trade) system. Indeed, in 1988 Congress insisted that the United States press for such a new system during the Uruguay Round of multilateral trade negotiations (1986-1994).⁸ As a

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result, those negotiations produced the Dispute Settlement Understanding (DSU) approved by Congress in 1994 and designed to ensure security and predictability while preserving the rights and obligations of participating countries (DSU Article 3.2). American officials believed that the United States would be the complainant more often than the respondent in disputes. Most of the other parties in the Uruguay Round saw the DSU as a shield against US "unilateralism," particularly the use of Section 301 of the 1974 US trade law which authorized Washington to impose countermeasures against what it deemed to be unfair foreign trade practices.⁹

Senior American officials later changed their minds, however, charging that the new rules infringed on US sovereignty. The final Uruguay Round Agreements Act (URAA) called for a five-year review of the US participation in the WTO.¹⁰ In 1995, Senator Robert Dole, a Kansas Republican who would become the Republican presidential nominee the next year, called for the US Congress to initiate amendments of the DSU, and even consider withdrawing from the WTO, in case of adverse WTO rulings.¹¹

At the Ministerial Conference in Marrakesh that concluded the Uruguay Round in April 1994, countries agreed to fully review the DSU by 1998. The talks, however, failed. Subsequently, at the Doha Ministerial Conference in 2001, WTO members agreed to continue talks on DSU improvement and clarification, separate from the Doha Round talks. But little progress has occurred.

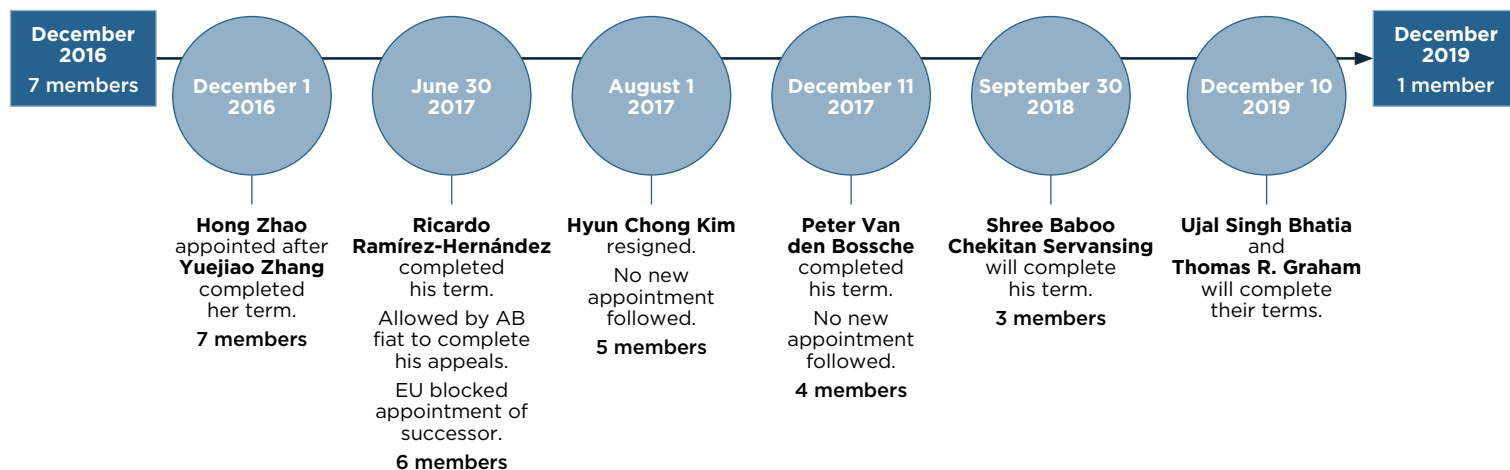
LEGAL FOUNDATIONS OF WTO APPELLATE REVIEW

The Dispute Settlement Understanding (DSU) was negotiated and agreed upon in 1994 as a part of the Uruguay Round "single undertaking" deal. The DSU sets out procedures for settling disputes on the application of WTO obligations. If consultations among disputing WTO members fail to resolve a problem, the case is brought before an *ad hoc* dispute panel whose decisions are binding unless appealed (DSU Article 17.1). Appeals are presented to the WTO Appellate Body, a standing body—unlike the *ad hoc* WTO panels (DSU Article 8)—established by all WTO members acting through the Dispute Settlement Body (DSB).¹² The terms of reference of the appellate review are limited to issues of law raised in the subject panel report (DSU Article 17.6). But the Appellate Body must address each of the issues raised by the parties on appeal, if these fall within the terms of reference (DSU Article 17.12). Consequently, when one of the parties questions the facts reported by the panel, the Appellate Body often reviews them.¹³ But the Appellate Body is instructed not to add or diminish the rights and obligations of WTO members contained in the WTO agreements (DSU Article 19.2).¹⁴ In simple terms, the Appellate Body should not create law for WTO members and should not become a substitute for multilateral negotiations.

The Appellate Body consists of seven members, who are appointed by consensus of all WTO members for four-year terms. They are not full-time officials but visit Geneva as necessary to decide a case. A member can be reappointed only once for another four years. The DSU sets a high standard of independence and impartiality for the Appellate Body; its members shall not be affiliated with any government and may not represent the interests of any specific country (DSU Article 17.1). Although any WTO member can nominate its candidate to the Appellate Body, according to an unwritten tradition some seats are virtually reserved for major powers, including the United States and the European Union.

Appeals must be heard by three members, usually referred to as the "division" (DSU Article 17.1). As a result, the Appellate Body can function only as long as it has at least three members. The United States has blocked the appointment of new Appellate Body members since summer 2017, complicating the task of the understaffed Appellate Body to deal with its heavy workload in a timely fashion.¹⁵ By fall 2018, when the Appellate Body will be left with three members, some appeals may be blocked if any member is recused for impartiality reasons.¹⁶ The Appellate Body will effectively shut down if a solution is not found by December 2019 (see figure 1).

Figure 1 Timeline for the Appellate Body composition, December 2016 to December 2019



The Working Procedures for Appellate Review (AB Working Procedures) provide more detailed procedural rules.¹⁷ These deal, for instance, with the rules of conduct and replacement or resignation of Appellate Body members. The Appellate Body itself has drawn up these procedures, in consultation with the chairman of the DSB and the WTO director-general. The same steps are followed to amend the AB Working Procedures.¹⁸ While approval by WTO members has not been required, members can comment on new rules and proposed amendments to the AB Working Procedures, and the Appellate Body is supposed to take those comments into account. This practice contrasts with the strict consensus requirement for amendment of the DSU rules that govern appellate review (Marrakesh Agreement Article X.8).

WTO appeals are in principle subject to tight deadlines. The proceedings are supposed to be completed within 60 days, and 90 days in exceptional circumstances.¹⁹ The deadlines are often ignored.²⁰ The decisions of the Appellate Body are final and binding after the DSB adopts them. Unlike the GATT era, when an unsatisfied party to a dispute could veto the adoption of a panel report, the DSU established a negative-consensus rule: Each Appellate Body report will be adopted unless the DSB decides by consensus not to adopt it.²¹ Many see this provision as an underpinning of the rules-based system created by the WTO.

Between 1996 and 2017, the Appellate Body dealt with 176 appeals.²² The United States has been a party to 85 disputes subject to an appeal, 55 times initiating the appeal.²³

CAUSES OF US DISCONTENT

US frustrations have accumulated over time, for multiple reasons. The biggest objections question the pattern of Appellate Body decisions, not always involving a case in

which the United States is a party. The United States' main worries are rooted in the alleged "overreach" of WTO panels and the Appellate Body, an issue that requires political will to find a compromise solution. In contrast, technical issues that raise US objections are more susceptible to resolution. The United States has tried to address some of these concerns through negotiations and has tabled several proposals to amend the DSU.²⁴ But no DSU amendments have been adopted, largely because of the cumbersome consensus requirement (Marrakesh Agreement Article X.8).

Procedural Matters

One technical issue has to do with procedures. The United States has repeatedly called on WTO members, acting through the DSB, to assert their authority when the Appellate Body is out of line.²⁵ For example, some Appellate Body members have decided appeals after the expiration of their four-year term, without explicit authorization from the DSB.²⁶ Rule 15 of the AB Working Procedures allows an Appellate Body member to complete his/her work on the ongoing appeal subject to approval by the Appellate Body and upon notification to the DSB. Rule 15 was adopted without approval from the DSB. The United States charges that Rule 15 infringes on the right of the DSB to decide on the appointment or reappointment of the Appellate Body member in question.²⁷ This rule could be amended at the insistence of the DSB, but the fact that no action has been taken arouses US suspicions that WTO members are not serious about resolving other more important issues.

In addition, the United States has expressed concern about the resignation of Hyun Chong Kim on August 1, 2017, without providing the 90-day notice required by Rule 14(2) of the AB Working Procedures. In such cases, it is for the DSB, and not the Appellate Body, to decide the conse-

quences. The United States maintained that Kim should have been replaced by another member of the Appellate Body for the dispute on which he was working. Instead, the chair of the Appellate Body simply informed the DSB about Kim's resignation and the Appellate Body report in the *EU–Fatty Alcohol (DS442)* dispute was adopted even though it was circulated to WTO members only after the resignation.

Finally, the United States has also challenged an unwritten tradition of the quasi-automatic reappointment of an Appellate Body member for a second four-year term. It has challenged this practice several times since 2011, when it blocked the reappointment of its own nominee, Jennifer Hillman.²⁸ On that occasion, the US delegation refrained from explaining its position. Later, with respect to Seung Wha Chang of South Korea, the United States stated that it did not support Chang's reappointment because decisions of the Appellate Body, with Chang's participation in the "division," went far beyond the scope of the appeal, contrary to the WTO's own procedural rules.²⁹

Systemic Concerns

Two systemic issues at the core of the current crisis relate to charges of "overreaching" interpretations and *obiter dicta* in Appellate Body reports. Appellate Body decisions are final and cannot be challenged, except by consensus of the DSB. No challenges have thus succeeded. The Appellate Body was created to correct legal errors by panels—not to manufacture new rights and obligations of WTO members. The Appellate Body serves as a check on WTO panels, but the United States complains that there is no effective check on Appellate Body decisions.³⁰ The impact of "overreaching" Appellate Body decisions is exacerbated by a tradition of *stare decisis*, which has emerged from WTO case law.³¹ As a result, panels depart from previous decisions of the Appellate Body on the same legal issues only in rare instances.³²

US criticism of judicial overreach dates back almost two decades to the Appellate Body ruling in the *US–FSC* dispute in 2000 that the US Foreign Sales Corporation (FSC) tax program provided illegal subsidies to US firms.³³ The Appellate Body rejected the US argument that the 1981 Understanding of the GATT Council—an understanding that paved the way for the FSC tax—constituted an authoritative interpretation of subsidy obligations under Article XVI:4 of the GATT. For the United States this was a slap in the face, as it had previously replaced its controversial Domestic International Sales Corporation (DISC) tax with the FSC tax to meet the terms agreed in the 1981 understanding (Hufbauer 2002).

Since then, the United States has repeatedly charged that the Appellate Body was "creating its own rules."³⁴ Both

developed and developing countries have expressed similar complaints (Stewart 2017, Stewart et al. 2013). Specifically, the United States and others charge that the Appellate Body runs afoul of its obligation to refrain from creating or abolishing rights and obligations for WTO members, as required by Articles 3.2 and 19.2 of the DSU.

The Appellate Body has also addressed issues that were not raised by the parties or were otherwise unnecessary opinions akin to what in legal terms is called *obiter dicta* (Stewart 2017).³⁵ The United States complained that these excursions impede the goal of prompt settlement of disputes (DSU Article 3.3) and wrongly influence future disputes, when treated as precedent by WTO panels.

POTENTIAL SOLUTIONS

Issues raised by the United States have differing levels of complexity and require different solutions. Some issues involving procedures may be more susceptible to resolution. Table 1 summarizes the solutions.

Procedural Issues

On the issue of an Appellate Body member resigning without giving 90-day notice, relevant rules both in the AB Working Procedures and the DSU must be followed. The premature resignation of Kim contrary to Rule 14(2) of the AB Working Procedures seems to be an unfortunate one-time mishap. The chair of the DSB should give WTO members an opportunity to discuss at a DSB meeting a possible solution to similar future cases.

Appellate Body members continuing to serve on ongoing appeals beyond their four-year term is a more complex issue. From an institutional perspective, it seems reasonable to allow a judge working on the case for three months to complete her/his work on that specific case. The International Court of Justice and the International Tribunal for the Law of the Sea also have similar procedures.³⁶

The United States seems particularly concerned about the duration of continued service, as WTO appeals on average take longer than 90 days. To address this concern, the Appellate Body could prohibit the assignment of new cases to a member fewer than 90 days before the end of his/her term. The Appellate Body has the power to amend its Working Procedures and could adopt this new rule as an amendment to Rule 15. Rule 3(1), however, requires that the Appellate Body take such decisions "as a whole." Whether fewer than seven members can amend the Working Procedures depends on how "as a whole" is interpreted and might be challenged by some WTO members.

On reappointment of Appellate Body members, the United States is right on the law and no procedural changes

Table 1 Summary of solutions to the Appellate Body crisis

Concern	Solution(s)	Decision-making procedure		Comments
		Procedural Issues	Timing	
AB members resigning without 90-day notice	The chair of the Dispute Settlement Body (DSB) should give WTO members an opportunity to discuss a possible solution to similar future cases at a DSB meeting	No special procedure required.	Anytime (the sooner the better).	Discussion and positions of the WTO members will be reflected in the minutes of the DSB meeting.
	Amend Rule 15 Appellate Body Working Procedures (AB WP): include paragraph (2) stating that "No Member of the Appellate Body shall be assigned to a new appeal later than 60 days before the final date of his/her appointment."	The AB itself can amend the AB WP in consultation with the chair of the DSB and the WTO director-general (Rule 32(2) AB WP in conjunction with Article 17.9 of the Dispute Settlement Understanding [DSU])	Anytime (the sooner the better).	
AB members serving beyond the four-year term (completion of duties on the appeal)	No specific solution possible.	n.a.	n.a.	Question resides in the diplomatic rather than legal domain.
Reappointment of AB members	AB can voluntarily adopt a practice of refraining from trying to resolve a "constructive ambiguity"	Systemic Issues		
		n.a.	Anytime (the sooner the better).	WTO members' views may differ on the existence of a "constructive ambiguity." This may weaken the WTO dispute settlement system and arguably runs afoul of Article 3.2 DSU (does not provide security and predictability to the multilateral trading system).
AB overreaching in interpretation	Authoritative interpretations of the issues of "constructive ambiguity"	The Ministerial Conference or the General Council by 3/4th vote (Article IX:2 Marrakesh Agreement), upon a recommendation from the DSB, but in practice only consensus is used.	By September 2018	Unwritten WTO tradition to decide by consensus is the major challenge. Most of the substantive issues, where the AB overreached are very controversial and would likely not be supported by consensus. The last resort would be to abandon the existing tradition and go for a 3/4th majority vote.
	"Legislative" remand: AB will submit issues of legal uncertainty in appeals to respective Committees for discussion and negotiations among WTO members	(i) Amendment of the DSU will require consensus (Article X.8 of the Marrakesh Agreement); (ii) Amendment of the AB WP by AB itself in consultation with the chair of the DSB and the WTO director-general (Rule 32(2) AB WP in conjunction with Article 17.9 of the DSU)		Leaves control in WTO members' hands. May be perceived as politically sensitive because Article X.8 of the DSU allows any WTO member to initiate amendment of the DSU by submitting a proposal to the Ministerial Conference. Consensus is the main challenge in option (i). Option (ii) will require at least unofficial approval by WTO members through the DSB, because of the mentioned political sensitivity.

(table continues)

Table 1 Summary of solutions to the Appellate Body crisis (continued)

Concern	Solution(s)	Decision-making procedure	Timing	Comments
Systemic Issues				
AB's obiter dicta	<p>Amend AB WP in light of the requirements of Articles 17.12, 3.4 and 3.7 of the DSU</p> <p>Authoritative interpretations on the terms of reference and the standard of the appellate review</p>	<p>The AB itself can amend the AB WP in consultation with the chair of the DSB and the WTO director-general (Rule 32(2) AB WP in conjunction with Article 17.9 of the DSU).</p> <p>The Ministerial Conference or the General Council by 3/4th vote (Article IX:2 of the Marrakesh Agreement), upon a recommendation from the DSB, but in practice only consensus is used.</p>	<p>Anytime (the sooner the better).</p> <p>By September 2018</p>	<p>Procedurally easy to implement. Rule 3(1) of the AB WP requires that the AB takes decision "as a whole." Not clear if "AB as a whole" in the Rule 3(1) requires the full composition of the AB or whether three AB members are sufficient.</p> <p>Unwritten WTO tradition to decide by consensus is the major challenge. Potentially easier to reach consensus on these procedural matters, than on substantive issues mentioned above. The last resort would be to abandon the existing tradition and go for a 3/4th majority vote.</p>
Alternatives to Appeal				
<p>Automatic completion of appeals: amend Rule 20 AB WP. AB automatically upholds panel report as soon as appeal is filed (Charnovitz)</p> <p><i>Ad hoc</i> arbitration agreement (Andersen et al.)</p> <p>Plurilateral arbitration agreement (Pohl)</p> <p>Proposals that Don't Work</p>	<p>The AB itself can amend the AB WP in consultation with the chair of the DSB and the WTO director-general (Rule 32(2) of AB WP in conjunction with Article 17.9 of the DSU).</p> <p><i>Ad hoc</i> agreement: Decision would be made by the parties to the dispute and notified to the DSB under Article 25 DSU.</p> <p>Plurilateral agreement: Unclear if plurilateral agreement would have to be adopted by consensus, e.g., under Article X.9 of the Marrakesh Agreement, or like the Information Technology Agreement (ITA) through a Declaration at a Ministerial Conference; unclear whether falls under Article 25 of the DSU.</p> <p><i>Ad hoc</i> agreement: Can be a mutually agreed solution (Article 3.6 of the DSU).</p> <p>Plurilateral agreement: Not clear if plurilateral agreement would have to be adopted by consensus, e.g., under Article X.9 of the Marrakesh Agreement, or like the ITA through a Declaration at a Ministerial Conference.</p>	<p>Anytime, at the latest by September 2018 / September 2019</p> <p><i>Ad hoc</i>: at the latest by the issuance of the interim panel report</p>	<p>Procedurally easy to implement, but may further alienate the United States and frustrate expectations of other WTO members.</p> <p>Not clear if "AB as a whole" in the Rule 3(1) requires the full composition of the AB.</p> <p>Is fully in the hands of WTO Members. The main challenge for the <i>ad hoc</i> arbitration is that parties to the dispute would often assume their chances for a victory even before bringing the case and therefore lack interest to agree on arbitration.</p> <p>Consensus requirement might be the main obstacle for the plurilateral solution. Not clear which legal procedure applies to approval.</p>	
<p>Ex ante agreements not to appeal (Salles)</p>	<p>At the latest by the issuance of the interim panel report</p>	<p>Is fully in the hands of WTO members. Plausible for parties that want to save cost and time and are ready to accept the findings of panels. Might not be favored by parties cautious about the negative outcomes of panel proceedings.</p> <p>Consensus requirement might be the main obstacle for the plurilateral solution. Not clear which legal procedure applies to approval.</p>		

(table continues)

Table 1 Summary of solutions to the Appellate Body crisis (continued)

Concern	Solution(s)	Decision-making procedure		Comments
		Alternatives to Appeal	Timing	
Proposals that Don't Work	Waiver to invoke the right to appeal	Ministerial Conference by consensus (Article IX:1 Marrakesh Agreement), or if no consensus, by 3/4th vote. In practice only consensus is used		Procedurally will be difficult to implement. Consensus is a preferred and traditional solution, but might be difficult to achieve. May further alienate the United States.
	DSB (General Council) vote to appoint AB members (Kuijper)	Voting rules in the Marrakesh Agreement should apply instead of Article 2.4 of the DSU.		Legally not possible: Article IX:1 read in conjunction with footnote 3 in the Marrakesh Agreement and Article 2.4 of the DSU requires DSU to decide by consensus. Will alienate the United States (and other members).
	New dispute settlement agreement among WTO Members minus the US (Kuijper)	Major trading partners to form a coalition of "The Real Friends of Dispute Settlement" and replicate the AB procedures or the whole DSU in a new agreement outside the WTO.		Lacks both political and legal underpinnings. Would enlarge the abyss to the point of no return.

n.a. = not applicable
 Source: Authors' summary.

are needed. If there is no consensus, there is no reappointment. Whether it is useful to cite the individual legal views of Appellate Body members as grounds for denying their reappointment is a diplomatic rather than legal matter.

Systemic Issues

A major systemic concern raised by the United States is continued “overreach” of the Appellate Body in interpreting WTO law. Unfortunately, in practice it is seldom easy to find a clear line between “norm interpretation” and “norm creation” that would be broadly acceptable to the United States and other WTO members. In principle, “norm interpretation” refers to the application of an existing rule to new facts, while “norm creation” refers to the adoption of a new rule.

A major systemic concern raised by the United States is continued “overreach” of the Appellate Body in interpreting WTO law.

A recent case illustrates the challenge of finding a clear line. Following the *US–Clove Cigarettes* (DS 406) dispute in 2012, the United States criticized the overreach of the Appellate Body in addressing whether distinct treatment of menthol and clove cigarettes was justified, since the panel did not address the relevant factual issues.³⁷ The United States also disagreed with the characterization of the legal status of paragraph 5.2 of the 2001 Doha Ministerial Decision as a “subsequent agreement” for purposes of interpreting Article 2.12 of the Technical Barriers to Trade (TBT) Agreement. In the US view, Ministerial Decisions are not “agreements”; for the United States, “agreements” must be approved by Congress. However, with respect to the very same case, the United States (and some other members), welcomed the innovative interpretation by the Appellate Body that, under the TBT Agreement, members “may draw legitimate regulatory distinctions between like products, even where there was a detriment to the competitive conditions” for like imported and domestic products.³⁸

The reach of judicial power is a question that often arises at the national level. Interpretation of the law is the inherent and necessary function of the judiciary. As Alexander Hamilton noted in the Federalist Paper No. 22 of 1787 “[l]aws are a dead letter without courts to expound and define their true meaning and operation” (ASIL 2005). Over the past two centuries, the US political system has come to accept that the US Supreme Court often makes new law when it interprets either the Constitution or statutes.

However, the United States is totally opposed to conferring the same scope of judicial power to an international tribunal, the WTO Appellate Body. The often-cited Article 3.2 of the DSU reflects this tension as it entrusts the WTO adjudicating bodies to interpret WTO law but also to refrain from law-making.

The DSU mandates the Appellate Body and panels to clarify provisions of WTO agreements according to customary rules of interpretation of public international law (DSU Article 3.2). Negotiators have implicitly referred to relevant provisions of the Vienna Convention on the Law of Treaties (Jackson 1996).³⁹ According to the customary rules of interpretation, the Appellate Body and panels shall interpret WTO agreements starting with the ordinary meaning of the term, in the context and in light of the object and purposes of that agreement. The text, the preamble, and the annexes of the WTO agreement, along with other relevant agreements, subsequent agreements, and practices between WTO members are regarded as a part of the context.⁴⁰ If, after this exercise, the WTO adjudicating bodies still arrive at a meaning that is “ambiguous or obscure,” or “manifestly absurd or unreasonable,” only then may they resort to subsidiary means of interpretation that include negotiating history and the circumstances of the treaty conclusion.⁴¹ Thus, the scope of interpretation as envisaged in the DSU is quite broad.

In the Anti-Dumping Agreement, which has its own standard of review,⁴² the United States negotiated a restriction on the broad approach agreed upon in the DSU. The relevant part of Article 17.6 of the Anti-Dumping Agreement reads: “Where the panel finds that a relevant provision of the [Anti-Dumping] 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.” It is not clear at what point the panel shall adhere to this rule and whether any ambiguity remains (Jackson 1996, Kuijper 2017).⁴³ The failure of the Appellate Body to use Article 17.6, which is at the heart of the most contentious antidumping cases (i.e., involving “zeroing”), is yet another source of discontent for the United States.⁴⁴

The US delegation has on many occasions sketched out the balance the United States is looking for.⁴⁵ The United States believes that the text of the WTO agreements reflects the expectation of WTO members, which in some cases is deliberately ambiguous. In such cases, “Constructive ambiguity can serve as a placeholder marking an area where negotiators accept that it may be appropriate to agree on disciplines but where further negotiation is necessary before those disciplines can be specified.”⁴⁶ Thus, as the first potential solution, the Appellate Body could refrain from making specific findings

in a dispute when it decides that a “constructive ambiguity” is embedded in the text. This approach would significantly alter current dispute settlement practice, since “constructive ambiguity” questions would go undecided. No longer would the Appellate Body resolve every question raised on appeal, which to some extent would erode the security and predictability of the multilateral trading system (DSU Article 3.2). Instead, issues of “constructive ambiguity” would be delegated to the relevant WTO committees for preparing authoritative interpretations or negotiating new rules.

A related solution would call upon WTO members to adopt “authoritative interpretations,” when the Appellate Body finds a “constructive ambiguity.” The WTO Ministerial Conference and the General Council, both of which represent full WTO membership, have the power to adopt authoritative interpretations.⁴⁷ Although a three-fourths majority is required to adopt authoritative interpretations, WTO members have followed the GATT tradition of making decisions only by consensus. On one occasion the European Communities proposed an authoritative interpretation regarding the “sequencing” of procedures under Articles 21.5 and 22 of the DSU. However, the General Council did not adopt the proposal because the United States opposed it.⁴⁸

In light of this history, the United States could initiate authoritative interpretations for the least controversial issues, where consensus could be reached. The main issues, however, remain extremely controversial. These include “zeroing” in antidumping cases, market economy status of China in light of its WTO Accession Protocol, application of WTO rules to state-dominated segments of the Chinese economy—now simply referred to as “China Inc.” (Wu 2016, Blustein 2017)—and security exceptions under Article XXI of the GATT.⁴⁹ For these controversial issues, authoritative interpretations could be reached only by abandoning the consensus rule and following the supermajority voting rule (three-quarters of WTO members). Although the voting procedure is legal, many WTO members consider it politically undesirable. From a broader perspective, when the Appellate Body overreaches, WTO membership should use the opportunity to agree on an authoritative interpretation that addresses the legal issues differently than the Appellate Body. So far, however, WTO members have failed to follow this approach.⁵⁰ WTO members could agree on additional procedures for the Appellate Body to submit issues of legal uncertainty arising on appeal to respective WTO committees for further discussion and negotiations among WTO members. This new “legislative remand”⁵¹ power of the Appellate Body would, however, require approval by WTO members or at least DSB support to amend the AB Working Procedures.

To deal with *obiter dicta* concerns, US proposals might be a good starting point.⁵² The United States has suggested that the Appellate Body shall “address” irrelevant issues raised on appeal “by explaining that the claim would have no effect on the DSB recommendations and rulings and declining to make substantive findings on it.”⁵³ The Appellate Body could follow US suggestions and amend the AB Working Procedures.⁵⁴ A new provision could state that the Appellate Body shall refrain from interpreting provisions of the WTO agreements not necessary for resolving the dispute in question and shall not entertain claims, the resolution of which will have no effect on DSB recommendations and rulings.⁵⁵ This solution should be easy to implement in the short term.⁵⁶ Alternatively, but much more difficult, WTO members could agree on an authoritative interpretation of the terms of reference and the standard of the appellate review, following the procedures explained above.

Proposals That Don't Work

Other countries have called the current US tactic of blocking Appellate Body appointments “hostage taking.” While this tactic targets the Appellate Body, it will ultimately cripple the entire WTO dispute settlement system.⁵⁷ A provision in Article 16.4 of the DSU does not allow WTO members to adopt findings of a panel (thus rendering them binding) until the appeal filed by a party to the dispute is completed. Most importantly, the WTO member whose benefits under WTO law are damaged cannot retaliate against an infringing WTO member unless there is a binding panel ruling. Consequently, after December 2019 (and perhaps September 2018), without a functioning Appellate Body, any WTO member facing an unfavorable panel ruling can block the adoption of the panel report simply by filing an appeal. This outcome resembles the GATT system where a party to the dispute could veto the adoption of the GATT panel report (which happened in almost half of all cases).

To avoid this outcome, academics and practitioners have suggested six solutions, other than changes to DSU procedures, to try to accommodate US demands. We assess each proposal in the subsections below. Each is flawed; all address a symptom rather than a cause of the crisis. Importantly, these solutions bypass, though to different degrees, the repeated requests of the United States to discuss its procedural and systemic concerns.⁵⁸ None of them is likely to yield a solution to which all WTO members can adhere.

Allow Automatic Completion of Appeals

Under Article 16.4 of the DSU, WTO members can appeal a panel decision and the ruling is not approved until the appeals process is concluded. Inaction by the Appellate Body

thus can block enforcement of DSU rulings. To avoid this blockage, Steve Charnovitz has suggested that the Appellate Body could introduce a new provision in its Working Procedures stating that an appeal shall be considered automatically completed as soon as it is filed unless the Appellate Body decides otherwise.⁵⁹ The findings of the panel would thus become final. While the Appellate Body cannot deprive WTO members of the right to file an appeal per Article 16.4 of the DSU, it can amend its own Working Procedures, in line with Article 17.9 of the DSU.

Academics and practitioners have suggested solutions to try to accommodate US demands.... None of them is likely to yield a solution to which all WTO members can adhere.

There are at least two concerns about this solution. To start, the Appellate Body is required to address the issues raised on appeal according to Article 17.12 of the DSU. It is questionable whether the automatic completion of an appeal would satisfy this requirement. Moreover, even the proposal's proponent recognizes that the United States would strongly object to such unprecedented activism by the Appellate Body.⁶⁰ And it is far from clear that this solution would be politically acceptable to other WTO members. Despite being endorsed by former director-general of the WTO, Pascal Lamy,⁶¹ this solution would increase US hostility toward the WTO.

Enable Appeals through WTO Arbitration

Another suggestion is that WTO members could resort to arbitration proceedings under Article 25 of the DSU as a substitute for appellate review.⁶² Article 25 allows WTO members to settle their disputes through *ad hoc* arbitration within the WTO subject to certain conditions.⁶³

The main advantages of using Article 25 of the DSU are that an *ad hoc* arbitration does not depend on the composition or existence of the Appellate Body and does not require any action by WTO members as a whole, since awards are automatically binding for the parties to the dispute (Anderson et al. 2017). However, arbitration proceedings must be consistent with the object and purpose of the DSU.⁶⁴ In addition, according to Article 25.4 of the DSU, the rules on retaliation envisaged in the DSU would generally apply to arbitration awards. The main difficulty with the *ad hoc* arbitration solution is reaching agreement between the parties. Anderson et al. suggest that the parties should conclude an agreement at the latest by the time the WTO panel's interim report is

issued. A recent statistical analysis of WTO disputes confirms that complainants predominantly win (Johannesson and Mavroidis 2016). Consequently, if a WTO member is quite sure it will lose the dispute, it has no incentive to conclude an arbitration agreement before the interim panel report is issued. To the contrary, it would benefit from the inability of the DSB to adopt the panel report. Thus, in practice, *ad hoc* appeal-arbitration would be limited to cases where both WTO members see an equal chance of winning at the panel level and want to retain a possibility of appeal.

Moreover, in any given dispute two parties may always compromise and even agree on an arbitration outside of the WTO framework instead of an appeal.⁶⁵ This option, however, also requires the agreement of both parties.

Another suggestion is a plurilateral binding arbitration-appeal agreement.⁶⁶ It is, however, not clear whether Article 25 of the DSU would encompass such a plurilateral agreement.⁶⁷ Moreover, if an arbitration-appeal agreement is devised as a plurilateral agreement within the WTO framework, it may require approval by the Ministerial Conference subject to consensus.⁶⁸ Under current circumstances reaching consensus on such a plurilateral agreement is mission impossible.

Reach Ex Ante Procedural Agreements Not to Appeal

Another *ad hoc* solution suggests that parties to a dispute should simply agree to abstain from an appeal.⁶⁹ As Luiz Eduardo Salles notes, WTO members have successfully implemented *ex ante* bilateral procedural agreements.⁷⁰ But it is unclear if an agreement not to appeal can be reached on a plurilateral basis. Such an agreement would give panels the final say, a far-reaching change in the WTO dispute settlement system. *Ex ante* plurilateral protocols have been suggested as a solution to deal with other imperfections in the DSU beyond the current Appellate Body crisis (e.g., to address sequencing, remand, and postretaliation) and may be worthwhile for the WTO membership to explore.⁷¹

Waive Appellate Review by WTO Members

Instead of an *ad hoc* agreement to refrain from appeals, WTO members could adopt a temporary waiver on appellate review. The WTO experience in adopting waivers is very limited for the same procedural reasons as the adoption of authoritative interpretations. Article IX:3 of the Marrakesh Agreement requires a three-fourths majority, but in practice waivers are adopted by consensus.⁷²

Appoint Appellate Body Members by Voting

Some academics describe the current Appellate Body crisis as an emergency that justifies the appointment of Appellate

Body members by a qualified majority vote and not by consensus. Pieter Jan Kuijper has suggested that the general voting rules in the Marrakesh Agreement (Article IX:1) should override the consensus rule in Article 2.4 of the DSU.⁷³ Without delving into the diplomatic constraints on this solution—namely, potential US withdrawal from the WTO—it appears impossible from a legal standpoint. The DSB can adopt decisions only by consensus.⁷⁴

Establish a Dispute Settlement Agreement among WTO Members Minus the United States

Major trading partners could form a coalition and replicate the appellate body procedure or the whole WTO dispute settlement mechanism in a separate agreement outside the WTO framework (Kuijper 2017).⁷⁵ This agreement, however, would not apply to disputes involving the United States, which would have to follow DSU procedures. This solution lacks both political and legal underpinnings and would be an admission of a complete failure of the WTO dispute settlement system.

THE WAY FORWARD

The Appellate Body impasse will soon damage not only the WTO's judicial function but also its viability as a negotiating forum. In practice, there are few options for resolving the crisis unless WTO members commit to new approaches to updating and clarifying WTO rights and obligations. *Ad hoc* procedural fixes put forward by various experts, as reviewed in this Policy Brief, are untenable for either legal or political reasons. Any solution that would alienate the United States, or encourage it to leave the organization, however, would

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only deepen the WTO crisis and encourage major trading nations to ignore or circumvent WTO obligations. The United States would lose too, as other countries, including China, the European Union, Japan, and India would be able to engage in unfair trade practices vis-à-vis the United States without legal constraints. Self-help in the form of unilateral actions would become the operating principle of the world trading system.

The best solution to the current crisis is constructive discussion and negotiations. The call to engage in constructive discussion, however, goes both ways. The WTO Secretariat and the WTO members should engage more with the United States, not less. The Appellate Body and the DSB should start addressing the United States' procedural concerns using available short-term solutions. At the same time the United States, instead of kicking "at the working leg of a limping institution," as aptly put by the *Economist*,⁷⁶ should explore compromise solutions.

Most importantly, WTO members should agree on new procedures for the Appellate Body to submit issues of legal uncertainty arising on appeal to respective WTO committees for further discussion and negotiation among WTO members. Such "legislative remand" procedures would create a productive link between the dispute settlement function and the role of the WTO as a forum for permanent negotiations. If a consensus cannot be reached in those negotiations, WTO members should invoke the latent tool of "authoritative interpretations," authorized by a three-fourths vote of the members, to clarify the issue under dispute. This process would return the WTO to its essential focus on negotiations, with WTO countries rather than Appellate Body members interpreting and augmenting WTO trading rules.

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ENDNOTES

1. Negotiators were reluctant to apply the word “judges” to Appellate Body members, suggesting that WTO countries did not envisage vesting the members with the same authority as judges of national or international courts.
2. The European Union refused to approve a replacement for an Appellate Body member when a Latin American member’s term ended. It insisted that a selection process for the vacant seat (unofficially reserved to the countries of Latin America) should be launched together with a selection process for the “European” seat that became vacant in December 2017. See, for example, DSB, Minutes of Meeting, February 20, 2017, WT/DSB/M/392, paras 11.2 to 11.3. Most recently the United States confirmed, in November 2017, that it will continue blocking appointments of Appellate Body members. See Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 22, 2017, https://geneva.usmission.gov/wp-content/uploads/2017/11/Nov22.DSB_.pdf. See also Shaffer, Elsig, and Pollack (2017).
3. Soumaya Keynes and Chad P. Bown, “Holding the WTO Hostage, Trump Style,” PIIE Trade Talks, Episode 4, September 22, 2017. By September 2018 the Appellate Body will have only three AB members. Under current rules three members must decide a case, so when one member is unable to serve due to a conflict, a three-member panel would not be available.
4. Only if all disputing parties decided not to appeal the panel ruling would it become binding.
5. Article 16 of the DSU provides that if a party to the WTO dispute has notified its decision to appeal, WTO members can consider adopting the panel report through the Dispute Settlement Body only after the appeal is completed.
6. Robert Lighthizer, “Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference”, December 2017, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr>.
7. See, for example, John Brinkley, “Trump Is Quietly Trying to Vandalize the WTO,” *Forbes*, November 27, 2017; Shawn Donnan and Benedict Mander, “Trump Attack on WTO Sparks Backlash from Members,” *Financial Times*, December 10, 2017; *Economist*, “As WTO members meet in Argentina, the organization is in trouble,” December 7, 2017.
8. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, August 23, 1988, Sec. 1101(b)(1).
9. Section 301 of the Trade Act of 1974 authorizes the president to retaliate against foreign practices that unfairly hinder US exports.
10. The Uruguay Round Agreements Act, Pub. L. 103-465, December 8, 1994, Sec. 125(a).
11. WTO Dispute Settlement Review Commission Act, 104th Congress, introduced January 1, 1995. See testimony by Alan W. Wolff before Senate Finance Committee on the bill, www.finance.senate.gov/imo/media/doc/Hrg104-124.pdf. See also Debevoise and Perkins (1995).
12. The General Council, which is a WTO body representing all WTO members, among others convenes to discharge its responsibilities of the Dispute Settlement Body according to the DSU (see Articles IV(2) and (3) of the Marrakesh Agreement).
13. Parties sometimes challenge panels’ assessment of the facts for not being objective under Article 11 of the DSU.
14. An equivalent provision in Article 3.2 of the DSU is envisaged for WTO dispute settlement as a whole.
15. Currently, seven appeals are pending and more are expected in 2018 from some controversial disputes, including cases on methodologies applicable in antidumping proceedings, which relate to interpretation of market economy status of China (e.g., DS515 and DS516). See also *Economist*, “America Holds the World Trade Organisation Hostage,” September 23, 2017.
16. This may be the case with the disputes involving interpretation of China’s WTO Accession Protocol (for instance, *U.S.–Price Comparison Methodologies*, DS515). Hong Zhao of China, one of the three remaining Appellate Body members, may have to recuse herself from these appeals to ensure an impartial outcome of the appellate review.
17. See WT/AB/WP/6.
18. Rule 32(2) of the Appellate Body Working Procedures. There are also special procedures for consultations between the chairperson of the DSB and WTO members with respect to amendments to the Appellate Body Working Procedures; see WT/DSB/31.
19. Article 17.5 of the DSU. In practice, the average duration of appeals between 2011 and 2015 was five months (Johannesson and Mavroidis 2016, 14). In some cases, for example, on export subsidies, appeals are subject to even shorter deadlines of 30 and 60 days, respectively (Article 4.9 of the Agreement on Subsidies and Countervailing Measures).
20. The increasing legal and factual complexity of the disputes has largely contributed to these delays (Ehlermann 2017, Johannesson and Mavroidis 2016).
21. Article 17.4 of the DSU. At least one-third of GATT Panel reports were never adopted.
22. WTO, Appellate Body Reports, www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm. In total, over 520 disputes have been submitted to the WTO dispute settlement mechanism since 1995. Many were settled by consultations before, or after, panel proceedings were initiated.
23. There are few clear-cut wins and losses in the WTO dispute settlement process, as WTO members within one dispute may win on some of their claims and lose on others. A rough estimate suggests that between 2015 and 2017 the United States prevailed in four out of nine appeals and lost only in two. The main victories on appeal included *India–Solar Cells* (DS456) and *US–Tax Incentives* (DS487). The United States did not prevail in *US–Washing Machines* (DS464) and *US–Tuna II (Mexico) (Article 21.5)* (DS381). Note, however, that the amended 2016 US Tuna Measure was upheld by the

second compliance panel: Panel Reports, *US-Tuna II (Second Recourse to Article 21.5)*, WT/DS381/RW/2 and WT/DS381/RW/USA, October 26, 2017.

24. See, for example, WTO DSB, “Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement,” Contribution by Chile and the United States, TN/DS/W/28, December 23, 2002; WTO DSB, “Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding,” Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication from the United States, TN/DS/W/82, October 24, 2005, and Addendum, TN/DS/W/82/Add.1, October 25, 2005.

25. Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 23, 2017, <https://geneva.usmission.gov/2017/10/24/statements-by-the-united-states-at-the-october-23-2017-dsb-meeting/>.

26. Most recently the United States reiterated its concerns with respect to Appellate Body reports signed by Ricardo Ramirez Hernandez after the expiration of his term on June 30, 2017.

27. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, August 31, 2017, <https://geneva.usmission.gov/2017/08/31/statements-by-the-united-states-at-the-august-31-2017-dsb-meeting/>.

28. Gary Clyde Hufbauer, “WTO Judicial Appointments: Bad Omen for the Trading System,” PIIE RealTime Economic Issues Watch blog, June 13, 2011.

29. Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, May 23, 2016, www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf. The current and the living former Appellate Body members reacted to the US position by submitting letters to the DSB on May 18 and 31, 2016 explaining the importance of the reappointment practice for impartiality and independence of the WTO dispute settlement (see <http://worldtradelaw.typepad.com/files/abletter.pdf>).

30. As noted, a ruling of the Appellate Body can be blocked only if all WTO members vote against it.

31. The *stare decisis* principle says that once a legal issue is resolved in one case, the same interpretation should apply in subsequent cases that raise the same issue. Although *stare decisis* is not a DSU rule, panels and the Appellate Body have come to apply it. See Appellate Body Report, *US-Stainless Steel (Mexico)*, WT/DS344/AB/R, paras 156 to 162.

32. Appellate Body Report, *US-Continued Zeroing*, WT/DS350/AB/R, para. 365.

33. Appellate Body Report, *US-FSC*, WT/DS108/AB/R.

34. DSB, Minutes of the Meeting, April 3, 2002, WT/DSB/M121, para. 35.

35. Statements by the United States at the meetings of the WTO Dispute Settlement Body on May 9, 2016, May 23, 2016, October 14, 2017 and September 29, 2017.

36. Judges in those tribunals enjoy a much longer term of service (nine years), which arguably contributes to their independence and impartiality (Ehlermann 2017).

37. DSB, Minutes of the Meeting, June 27, 2012, WT/DSB/M/315, paras 74 to 75.

38. *Ibid.*, para. 73.

39. WTO jurisprudence affirmed that Articles 31 and 32 of the Vienna Convention on the Law of Treaties attained

the status of “customary or general international law.” See Appellate Body Report, *US-Gasoline*, p. 17; Appellate Body Report, *Japan-Alcoholic Beverages II*, 10.

40. Article 31 of the Vienna Convention on the Law of Treaties.

41. Article 32 of the Vienna Convention on the Law of Treaties.

42. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 17.6. Notably, this rule applies to antidumping measures only, which, however, constitute a significant share of cases in the WTO that are of importance to the United States.

43. In *US-Hot-Rolled Steel* the Appellate Body found that “permissible interpretation is found to be appropriate after application of the pertinent rules of the Vienna Convention.” See Appellate Body Report, *US-Hot-Rolled Steel*, WT/DS184/AB/R, July 24, 2001, para. 60.

44. “Zeroing” is a US practice by which imports that enter the United States at prices *above* the “fair value” determined in an antidumping case are ignored for the purpose of calculating the dumping duty. The Appellate Body has ruled several times that “zeroing” is not permitted under the WTO Agreement on Article VI (dealing with dumping).

45. See, for example, WTO DSB, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Further Contributions of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, Addendum, TN/DS/W/82/Add.1, October 25, 2005.

46. *Ibid.*

47. According to Article IX:2, the authoritative interpretations are to be recommended by the Council overseeing the functioning of the subject Agreement. It is not crystal clear whether the DSB or the General Council is entrusted with authoritative interpretations to the DSU. If the DSB, then a consensus rule would apply. But since the General Council has the ultimate power to adopt authoritative interpretations to any WTO agreement, the three-fourths supermajority rule has the stronger claim.

48. General Council, Minutes of Meeting held on February 15 and 16, 1999, WT/GC/W/143, at 32; General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement establishing the World Trade Organization, Communication from the United States, WT/GC/W/144.

49. The United States also believes that the Appellate Body created new obligations and limited existing rights when it found that paying antidumping duties to firms found to be injured by dumping was impermissible. See Appellate Body Report, *US-Offset Act (Byrd Amendment)*, WT/DS217/AB/R; WT/DS234/AB/R, January 16, 2003. With respect to security exceptions, the United States suggested that the panel’s findings should simply recognize that Article XXI of the GATT has been invoked. See Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 22, 2017, 6.

50. For instance, this was the case with the controversial issue of *amicus curiae* briefs (General Council, Minutes of Meeting held on November 17, 2000, WT/GC/M/60, November 22, 2000).

51. The “legislative remand” shall not be confused with the judicial remand, i.e., the Appellate Body’s authority to return the case to the original panel to reexamine issues of fact. Currently, the Appellate Body does not have either remand power. See, for example, Pierola (2005).

52. *Obiter dictum* refers to a judge's opinion that is not essential to resolution of the dispute and therefore is not legally binding. In the WTO context *obiter dicta* can be remedied by judicial economy. Judicial economy can be applied by WTO adjudicating bodies when parties to a dispute challenge the same measure under several WTO provisions. When the measure is found to be inconsistent with a particular WTO rule, usually it is not necessary to analyze the consistency of the same measure with other rules that were invoked by the complainant.
53. Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 22, 2017, 10.
54. For example, it could be stated that Article 17.12 of the DSU, which requires the Appellate Body to address all issues submitted on appeal, shall be read in conjunction with Articles 3.4 and 3.7 of the DSU, which clarify as to how the Appellate Body shall address these issues. Namely, Articles 3.4 and 3.7 of the DSU state that the aim of the WTO dispute settlement system is to achieve a satisfactory and positive settlement of the dispute.
55. The Appellate Body, in fact, refrained from entertaining certain "unnecessary" claims in several cases. See, for example, *US-Upland Cotton*, WT/DS267/AB/R, paras. 510 to 511, 747; *India-Solar Cells*, WT/DS456/AB/R, paras. 5.156 to 5.163 (separate opinion of one Appellate Body member).
56. Assuming that the Appellate Body, with fewer than seven members, can make decisions consistent with Rule 3(1) of the Appellate Body Working Procedures.
57. Steve Charnovitz, "How to Save WTO Dispute Settlement from the Trump Administration," International Economic Law and Policy blog, November 3, 2017.
58. See Robert McDougall, "The Search for Solutions to Save the WTO Appellate Body," ECIPE Bulletin no. 3/2017.
59. Charnovitz, "How to Save WTO Dispute Settlement from the Trump Administration."
60. *Ibid.*
61. Tom Miles, "WTO is most worrying target of Trump's trade talk: Lamy," Reuters, November 14, 2017.
62. See Andersen et al. (2017) and Jens Hillebrand Pohl, "How to Break the Impasse over Appellate Body Nominations," Maastricht University blog, September 29, 2017.
63. For an example of arbitration proceedings under Article 25, see Awards of the Arbitrators, *United States-Section 110(5) of the US Copyright Act (Art. 25)*, WT/DS160/ARB25/1, November 9, 2001 (in that case, the arbitration proceedings were instituted to determine the level of nullification or impairment of benefits to the European Communities as a result of the US measure).
64. Award of the Arbitrators, *United States-Section 110(5) of the US Copyright Act (Article 25)*, WT/DS160/ARB25/1, November 9, 2001, para. 2.5.
65. On some occasions, WTO members can decide to forego their WTO right to a dispute settlement, for example, by agreeing to an arbitration outside the WTO framework, as was the case according to Article XIV of the US-Canada Softwood Lumber Agreement (2006), which provided for a commercial arbitration under the London Court of International Arbitration Rules. This agreement was notified under Article 3.6 of the DSU as a mutually agreed solution (WT/DS264/29, G/L/566/Add.1, G/ADP/D42/2).
66. Pohl, "How to Break the Impasse over Appellate Body Nominations."
67. The wording of the provision suggests that arbitration can be agreed upon by the parties to a specific dispute.
68. It is unclear what approval procedure applies to such procedural plurilateral agreements. Notably, Article X.9 of the Marrakesh Agreement requires consensus of the Ministerial Conference to add new plurilateral agreements to its Annex 4. Some of the WTO plurilateral deals, for example, the Information Technology Agreement, were approved by means of a Ministerial Declaration. See WTO, Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, December 13, 1996.
69. Luiz Eduardo Salles, "Bilateral Agreements as an Option to Living Through the WTO AB Crisis" International Economic Law and Policy blog, November 23, 2017.
70. See, for example, Understanding between Argentina and the European Union regarding Procedures under Articles 21 and 22 of the DSU, *Argentina-Import Measures*, WT/DS438/24, January 20, 2016; Agreement between US and Australia on Article 21.5 Procedures, *Australia-Automotive Leather II*, WT/DS126/8, October 4, 1999, para. 4; Agreement on Procedures between Ecuador and the United States, *US-Shrimp (Ecuador)*, WT/DS335/8, October 25, 2006.
71. Robert McDougall, "Making Trade Dispute Settlement More Accessible and Inclusive," Centre for International Governance Innovation, November 2, 2017.
72. As of September 30, 2011, there have been 31 waiver decisions, most of them in connection with various trade preferences. See WTO Analytical Index, *Marrakesh Agreement Establishing the World Trade Organization*, para. 204.
73. Pieter Jan Kuijper, "The US Attack on the Appellate Body," International Economic Law and Policy blog, November 15, 2017.
74. Article XI:1 of the Marrakesh Agreement specifies that "except as otherwise provided" WTO bodies can take decisions by vote. Then, the Marrakesh Agreement specifies that DSB decisions shall be taken only by consensus; see footnote 3 referring Article 2.4 of the DSU.
75. See also Pieter Jan Kuijper, "The US Attack on the Appellate Body," International Economic Law and Policy blog, November 15, 2017.
76. *Economist*, "The World Trade Organisation: Situations Vacant," December 9, 2017, 69.

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