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Power Play Crumbling Rule of Law: The Appellate Body Conundrum and Options to Protect the Right to Appeal

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Abstract

Some consider the dispute resolution mechanism as the crown jewel of the Uruguay Round. There is no doubt that the effectiveness of the World Trade Organization (WTO) completely depends on its robust dispute resolution mechanism. However, some member-countries like the United States (US) have identified certain systemic concerns in the practice and procedure of the Appellate Body (AB) its interpretative approach, engaging in gap-filling, judicial activism, judicial lawmaking and most importantly disregarding the rules agreed by the negotiators during the Uruguay Round of Trade Negotiations. Now, there exists a crisis that might threaten the operation of WTO as an institution, that is, the conundrum of appointing members to the Appellate Body which has resulted in a defunct Appellate Body as currently there are no members available to decide the disputes. This paper explores the crisis in appointing members to the AB and tries to gauge the consequences of not resolving this crisis promptly. And if WTO Members are not able to find a solution to the current crisis, some chances rule-based system of resolving disputes will again fall back in the era of power play where some powerful countries will use the system according to their desires. Therefore, this paper argues that such rule-based options will ensure a level playing field for all WTO Members for a fair adjudication of their disputes irrespective of their political and economic status. There is an immediate need for this conundrum to be resolved at the earliest as trade sanctions are unilaterally issued by some countries and to counter such measures, there is a need for a robust dispute settlement mechanism.

Keywords: WTO, DSU, Appellate Body, Current Crises, Rule Based System

Introduction

The Dispute Settlement Understanding (DSU)[1] of the World Trade Organization (WTO)[2], the agreement containing the rules for dispute settlement, is always considered as one of the best achievements of the Uruguay Round of Negotiation owing to varied reasons.[3] One of the

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[1] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[2] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

[3] Director-General Pascal Lamy, *WTO disputes reach 400 mark* (November 6, 2009) https://www.wto.org/english/news_e/pres09_e/pr578_e.htm

crucial reasons is the introduction of the Appellate Review Mechanism[4] to be provided by a standing Appellate Body (AB) consisting of seven members. The primary task of these AB members is to 'examine the issues of the law covered in the panel report and legal interpretation developed by the panel'.[5] This AB not only adjudicates the dispute between the members but also ensures an independent and impartial resolution of disputes.

While negotiating the DSU, the negotiators believed that the DSU would transform the diplomatic Dispute Settlement System (DSS) which was earlier in place into a more legalized and rule-oriented DSS, which will be binding on the parties to the WTO.[6] On this belief, the DSS was created, and to protect their rights and obligations two quasi adjudicatory bodies were developed, i.e., the Panel and the Appellate Body. These bodies have to work under the mandate given in the DSU and should not surpass the rules given in it.[7]

However, this changed with the advent of the complex cases which started coming before the panel and more specifically before the AB like *US – Wool Shirts & Blouse*,[8] *US – Shrimp*[9], *India – Quantitative Restrictions*[10], *US – Lead and Bismuth II*[11], *U.S. - Cotton Subsidies*[12], and *U.S. - Zeroing of Dumping Margins*[13] *etc.* The interpretation by the AB in these cases had started sowing the seeds of dissatisfaction amongst the WTO Members. As a result, the AB was tagged as 'Judicial Activist'.[14]

This growing dissatisfaction among some of the WTO Members and the aggravated stand taken by some members and mostly by the United States (US) has resulted in this current situation of deadlock on the reappointment and appointment procedure of AB Members. The saga started by the US, first by vetoing the reappointment of its citizen Jennifer Hillman[15] and then vetoing the other members seeking appointment and re-appointment.[16]As a result, the AB has become defunct as of December 2019 and now there is no member left in the AB, as the term of the last sitting member expired on 30 November 2020.

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[4] Andreas R. Ziegler, Scope and Function of the WTO Appellate System: What Future after the Millennium round?, 3 Max Planck Yearbook of United Nations Law 439, 440 (1999).
[5] DSU art. 17.6
[6] Kendall Stiles, *Negotiating Institutional Reform: The Uruguay Round, the GATT, and the WTO*, 2 Global Governance 119 (1996).
[7] DSU art. 3.2.
[8]Appellate Body Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc. WT/DS33/AB/R (adopted May 23, 1997).
[9]Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov 06, 1998).
[10]Appellate Body Report, *India – Quantitative Restrictions On Imports Of Agricultural, Textile And Industrial Products*, WTO Doc. WT/DS90/AB/R (adopted 23 August 1999).
[11]Appellate Body Report, *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DS138/AB/R (adopted Jun 07, 2000).
[12]Appellate Body Report, *United States - Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (adopted Mar 21, 2005).
[13]Appellate Body Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins*, WTO Doc. WT/DS294/AB/R (adopted May 09, 2006).
[14] Bradly J. *Condon, Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA*, 52 Journal of World Trade 535, 538 (2018).
[15] WTO Doc. WT/DSB/M/295 of 30 June 2011.
[16] WTO Doc. WT/DSB/M/379 of 29 August 2016.

Though the DSB and the Members are continuously trying to break this impasse, they have not yet succeeded.[17] This effort can be seen through the last four years of the DSB meeting, where it has become a common practice for the DSB Chairman and the Members to invite the other Members to launch the selection process for filling up the vacant seats of the AB members.[18] The effort of the members is not only limited to DSB meetings, as members are now discussing this matter even in the General Council as well, in order to break the current impasse. The chair of the General Council has appointed Ambassador, David Walker of New Zealand to launch an informal process in consultation with WTO members to overcome the impasse on the selection of AB members. Currently, there are seven vacant seats in the AB, and any effort for trying to fill the vacancies has gone in vain as the US is not willing to join the consensus on the selection process, until the concerns raised by the US, are answered.[19]

This situation has created a lot of uncertainties amongst the WTO members such as whether the US will withdraw from the WTO as it has done in the past with the Trans-Pacific Partnership or it may renegotiate the terms like the renegotiation of the North American Free Trade Agreement or like the renegotiation of Korea US Free Trade Agreement.[20] Therefore, to keep the US in the system, some WTO Members in the General Council meetings have tried to address the US concerns by proposing certain amendments like the transitional rule for outgoing AB members, issuing of the report in 90 days, findings unnecessary for the resolution of the dispute, and the issue of precedent.[21] However, the uncertainty continues among the WTO Members, as the US is still not satisfied with the proposed efforts and as a result, there still exists a looming threat on the future of the WTO which might leads to the end of multilateralism.[22]

Therefore, this article explores two important questions- (i) whether the US contentions for vetoing the selection process of AB Members are justified; and (ii) the viability of the options given by the Members and scholars to overcome the current impasse. Before exploring these questions, it is pertinent to understand the way AB functions.

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[17] WTO Doc. WT/DSB/W/609/Rev.4 of 18 May 2018.

[18] WTO Docs. WT/DSB/M/376 of 23 March 2016, WT/DSB/M/377 of 22 April 2016, WT/DSB/M/379 23 May 2016, WT/DSB/M/383 of 21 July 2016, WT/DSB/M/387 of 26 October 2016, WT/DSB/M/390 of 16 December 2016, WT/DSB/M/391 of 25 January 2017, WT/DSB/M/392 of 20 February 2017, WT/DSB/M/394 of 21 March 2017, WT/DSB/M/396 of 19 April 2017, WT/DSB/M/397 of 22 May 2017, WT/DSB/M/398 of 19 June 2017, WT/DSB/M/399 of 20 July 2017, WT/DSB/M/400 of 31 August 2017, WT/DSB/M/402 of 29 September 2017, WT/DSB/M/403 of 23 October 2017, WT/DSB/M/404 of 22 November 2017, WT/DSB/M/407 of 22 January 2018, WT/DSB/M/409 of 28 February 2018, WT/DSB/M/412 of 27 April 2018, WT/DSB/M/413 of 28 May 2018, WT/DSB/M/414 of 22 June 2018, WT/DSB/M/415 of 20 July 2018, WT/DSB/M/417 of 27 August 2018

[19] The United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (February 11, 2020) https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf

[20] TETYANAPAYOSOVA et al., THE DISPUTE SETTLEMENT CRISIS IN THE WORLD TRADE ORGANIZATION: CAUSES AND CURE *(*Peterson Institute for International Economicsn, Policy Brief No 1, 2018).

[21] Communication From The European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic Of Korea, Iceland, Singapore, Mexico And Costa Rica To The General Council, WTO Doc. WT/GC/W/752/Rev.1 of 10 December 2018.

[22] Alan Wm. Wolf, *the Future of the WTO and the Multilateral Trading System, DDG Wolff: Efforts to maintain and improve the multilateral trading system will succeed* (December 17, 2018), https://www.wto.org/english/news_e/news18_e/ddgra_18dec18_e.htm.

Establishment and Working of AB

The seeds of the Appellate Review Mechanism were sowed in the Havana Charter as a mechanism for the International Trade Organization. Article 96 of the Charter provided reference to approaching the International Court of Justice by any member whose interest has been prejudiced by the decision of the Conference. However, this remarkable provision never saw the light of the day as the ratification of the Charter in some national legislatures proved impossible.[23] Subsequently, the Agreement which came into force i.e. GATT 1947 to regulate international trade, had missed the provision for the appellate review mechanism. As a result, the Dispute Settlement Mechanism (DSM) in the GATT had operated without any Appellate Review Institution.[24]

Surprisingly, during the initial years of the Uruguay Round of Negotiations, none of the negotiators had thought of creating an Appellate Review Mechanism. This idea was proposed towards the conclusion of the Uruguay Round.[25] However, this idea of introducing an appellate mechanism was not appreciated by the majority of the negotiators as they believed that it will 'increase the complexity and duration of the dispute settlement proceeding'.[26] But because of the efforts of some of the negotiators, like the representative from Mexico, the provision for the appellate review was introduced under Article 17 of the DSU.[27] As a result "a standing body composed of seven persons"[28] for a "four-year term with a possibility of reappointment"[29] was constituted. The main task which was entrusted to this standing body i.e., the AB is to decide "issues of law covered in the panel report and legal interpretation developed by the panel"[30]. While doing so the AB members should use the "customary rules of public international law".[31] Further, the appeals are heard by the "division of three members"[32] which follows the "rule of collegiality."[33]

US Claims and their Legitimacy

The dispute settlement system has been under continuous review since its inception.[34] The negotiators who agreed to the dispute settlement understanding were also sceptical about

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[23] John H. Jackson, The Jurisprudenc of GATT and WTO: Insight on Treaty Law and Economic Relations 196-197 (2000)

[24] Under GATT 1947, there was provision of Contracting Parties to resolve the dispute; however, this practice was changed later to practice the use of panels of 3 or 5 experts. See 1 Raj Bhala, Modern GATT Law: A Treatise on the Law and Potilical Economy of the General Agreement on Tariffs and Trade and Other World Trade Organization Agreements 108 (2nd ed. 2013).

[25] VICTORIA DONALDSON, *The Appellate Body: Institutional and procedural Aspects*, IN THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1280 (Patrick F. J. Macrory et al, eds. 2005)

[26] *Id.*

[27] MTN/GNC/NG13/W/42, Proposal by Mexico

[28] DSU art. 17.1

[29] *Id.*

[30] *Id.* art. 17.6

[31] *Id.* art. 3.2

[32] *Id.* art. 17.1

[33] *Working Procedure For Appellate Review*, WTO Docs. WT/AB/WP/6 [hereinafter *Working Procedure*] Rule 4.

[34] "Invite the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures." Ministerial Conference 'Decision on the Application and Review of the Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes', 1994

its functioning, therefore, the system was introduced provisionally. That is, the system has to be reviewed after four years of coming into force.[35] Based on the review, the DSU could have been simply terminated by a decision of the Ministerial Conference in Seattle, however, the WTO Members suggested continuing with the system but at the same time Members did not ignore some issues that existed in the DSS.[36] The US administration when implementing the Uruguay Round agreements expressed concerns about a possibility that the dispute settlement mechanism may not prove to be accountable and fair.[37] Therefore, the current situation created by the US is not much of a surprise.

These actions can be attributed to expectations of the US from the WTO. At the time of the Uruguay Round of Negotiation, the US was of the presumption that it will hardly be on the defensive side as the US laws are WTO-consistent. But in reality, the US had turned out to be more on the defensive side. Secondly, the US understands the WTO as a contract[38], and as a consequence, the US, in many of the cases like the *U.S. - Cotton Subsidies* and the *U.S. - Zeroing of Dumping Margins* have argued what is not expressly prohibited is permitted. According to the US, since WTO is a contract, the DSS should interpret the contract in the light of. rights and obligations of the parties agreed at the time of the Uruguay Round of Negotiations and not to add any other obligations which they have not agreed to.

The WTO Members and the AB members (both the former and acting AB members), as well as scholars, have shown a great degree of resistance to the US claims. The AB members have sent letters to the Chairman of the Dispute Settlement Body (DSB).[39] Therefore, it becomes imperative to examine the legitimacy of the claims of the US for understanding an unprecedented situation that has almost asphyxiated the AB.

A. Adjudicative Approach of the AB Members

While vetoing the appointment and reappointment of the AB member, the US had raised concerns about the adjudicative approach of the AB members, particularly that of Prof. Chang. Prof. Seung Wha Chang in his tenure as an AB member participated in nine appeals in which the US was a party or third party to the dispute.[40] During these years, the system

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[35] *Id.*

[36] ERIC WHITE, REFORMING THE DISPUTE SETTLEMENT SYSTEM THROUGH PRACTICE, IN AGREEING AND IMPLEMENTING DOHA ROUND OF THE WTO 264 (HaraldHohman, ed. 2008).

[37] WOLFGANG WEISS, *Reforming the dispute Settlement Understanding*, IN AGREEING AND IMPLEMENTING DOHA ROUND OF THE WTO 279-280 (HaraldHohman, ed. 2008).

[38] Robert Lighthizer, *U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative* (September 18, 2017) https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative.

[39] D. Ravi Kanth, *AB Members Challenge U.S. Over Reappointment of SeungWha Chang, Third World Network*, TWN Info Service on WTO and Trade Issues (24 May 2016), www.twn.my/title2/wto.info/2016/ti160516.htm. and see D. Ravi Kanth, *Trade: Former AB Members censure US on Chang reappointment veto, Third World Network*, TWN Info Service on WTO and Trade Issues (6 June 2016), https://www.twn.my/title2/wto.info/2016/ti160602.htm..

[40] Appellate Body Report, *Argentina – Measures Relating To Trade In Goods And Services*, WTO Doc. WT/DS453/AB/R (adopted May 09, 2016); Appellate Body Report, *Argentina – Measures Affecting The Importation Of Goods*, WTO Doc. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (adopted Jan 26, 2015); ; Appellate Body Report, *China – Measures Related To The Exportation Of Rare Earths, Tungsten, And Molybdenum*, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug 29, 2014); ; Appellate Body Report, *European Communities – Measures Prohibiting The Importation And Marketing Of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted Jun Jun 18, 2014); ; Appellate Body Report, *India – Measures Concerning The Importation Of Certain Agricultural Products*, WTO Doc. WT/DS430/AB/R(adopted Jun 19, 2015); Appellate Body Report, *India – Certain Measures Relating To Solar Cells And Solar Modules*, WTO Doc. WT/DS456/AB/R (adopted Oct 14, 2016); Appellate Body Report,

was frequently used by the US as a complainant or as a respondent. According to the outcome of the result, it was observed that the US claims were accepted in some of the cases, whereas in other cases, the claims were rejected. There was some dissatisfaction among the US administration about Prof. Change, which was communicated to the WTO Members during the DSB meetings.[41] The dissatisfaction of the US came out in the form of vetoing the reappointment of Prof. Chang. The reason behind this was because the US thought that reports in which Prof. Chang was involved contained "*obiter dicta"*[42], *"*lengthy abstract discussion on the issue that was not raised by any of the party to the dispute"[43], "application of new legal standards" [44] and "ignoring the important constitutional principle of that member's domestic legal system"[45].

The claims of the US endorsed the general criticism on the AB that it goes beyond the mandate and creates or diminishes the rights and obligations of the members which were not originally negotiated. These criticisms are not new. From its inception, the AB has grown in the shadow of these criticisms. These criticisms were always associated with the AB as an institution. However, the US action targeted a single AB member and this raised serious concern in the WTO. These criticisms made by the US were not only related to the adjudicative approach but also raised a question about the rule of collegiality, which is enshrined under the *Working Procedure for Appellate Review* (*working procedure*).*[46]*

The AB members through their letter to Ambassador Xavier Carim further countered the US argument for attributing the report of the division to a single member of the division. They stated in their letter that:

> "*Appeals are heard and decided by three Members who are chosen randomly to constitute the Division for each case … During a Division's consideration of a case, there is always a formal, intensive exchange of views, in-person in Geneva, between the three Division Members and the AB Members who are not on the Division ... Our reports are reports of the Appellate Body*."[47]

Therefore, the argument criticizing the adjudicative approach of a particular member lacks legitimacy as the decisions are made by the division comprising of three AB Members. Moreover, Article 17 of the DSU states that *"Opinions expressed in the Appellate Body*

United States – Certain Country Of Origin Labelling (Cool) Requirements, Recourse To Article 21.5 Of The DSU By Canada And Mexico, WTO Doc. WT/DS384/AB/RW, WT/DS386/AB/RW (adopted May 29, 2015); Appellate Body Report, *United States – Countervailing Duty Measures On Certain Products From China*, WTO Doc. WT/DS437/AB/R (adopted Jan 16, 2015).; Appellate Body Report, *United States – Countervailing And Anti-Dumping Measures On Certain Products From China*, WTO Doc. WT/DS449/AB/R (adopted Jul 22, 2014).

[41] WTO Docs. WT/DSB/M/378 of 9 May 2016, WT/DSB/M/379 of 23 May 2016, WT/DSB/M/386 of 14 October 2016, WT/DSB/M/402 of 29 September 2017, WT/DSB/M/403 of 23 October 2017, WT/DSB/M/404 of 22 November 2017

[42] WTO Docs. WT/DSB/M/379 of 23 May 2016

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Article 17.1 of the DSU and Rule 6 of the *working procedure* expressly provides for a division consisting of three members to hear and decide an appeal. Further, paragraph 11 of Article 17 of the DSU expressly states that, "opinion expressed in the AB reports by an individual serving on the AB shall be anonymous". Paragraph 3 of Rule 4 of the *working procedure* states that, "[i]n accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with other members before the division finalizes the appellate report for circulation to the WTO members." Therefore, the reports issued by the division were subjected to the rule of collegiality, which ensured consistency and coherency in the reports.

[47]Kanth, *supra* 39.

report by individual serving on the Appellate Body shall be anonymous.[48] Therefore, the parties to the dispute can't know about the adjudicative approach of a particular AB member.

The other concern raised by the US relating to the adjudicative approach followed in the cases presided by Prof. Chang was that he engaged in judicial activism or judicial overreach or gap-filling or judicial lawmaking. In the technical sense, the meaning of these terminologies is different. However, concerning the DSS, it can be assumed that the AB goes beyond the mandate provided in the DSU.

The AB is ascribed to a task for interpreting the issue of law. For a legal interpretation, the AB is allowed to take the recourse of customary rules for interpreting the public international law.[49] This approach is a part of the legalistic theory which advocates for the well-defined legally binding rules and efficient dispute settlement mechanism, as there is no place for the diplomatic approach. Hence, the rules need to be properly drafted and formulated.[50] However, this does not hold true for all the WTO agreements. Some scholars like Henrik Horn and Petros C. Mavroidis are of the view that WTO is an incomplete contract,[51] whereas other scholars are of the view that WTO Agreements often contain deliberate ambiguities as they were deliberately left during the negotiations which are termed as constructive ambiguities.[52]

The significant question that arises in the DSS probably owes to the presence of ambiguities or gaps and the need for someone to fill these gaps or to remove those ambiguities. The Ministerial Conference or the General Council can be considered as a legislative organ of the WTO that can amend any of the WTO Agreement or can adopt authoritative interpretations based on the strict requirement of the rule of consensus.[53] But the consensus is difficult to achieve, therefore, the room for certainty regarding the gaps or constructive ambiguities in the WTO Agreements is still open and poses a serious question as to who will fill these gaps or remove the ambiguities if not done by the Ministerial Conference or the General Council.

The scholars of the trade law have stated that because of the diminishing ability of the legislative organ, the judicial organ, i.e., the Panel and the AB have encroached upon the legislative powers.[54] The panel and the AB are trying to fill the gap or remove the ambiguities as and when the case demands. Deviating from the traditional role of adjudication gave rise to questions concerning the role of the AB in the WTO. The questions raised were whether the AB should interpret the WTO Agreements narrowly and literally and leave the matter

[48] DSU art. 17.11
[49] *Id.* Art. 3.2
[50] Katherine Nolan, *A Crumbling WTO at the Hands of the Appellate Body - How Appellate Body Overreaching is Undermining the WTO System*, Georgetown University Law Centre, (2016).
[51] Henrik Horn et al., *The GATT/WTO as an Incomplete Contract* (2006), https://pdfs.semanticscholar.org/fbbc/f2066cfda2e3073df2dc6024c72cd4e9ef49.pdf and Bernard M. Hoekman & Petros C. Mavroidis, *The Dark Side of the Moon: 'Completing' the WTO Contract through Adjudication* (Nov. 2012), http://globalgovernanceprogramme.eui.eu/wp-content/up loads/2012/11/Hoekman-Mavroidis-MESSERLIN-FESTFIN.pdf.
[52]ELVIRE FABRY AND ERIK TATE, SAVING THE WTO APPELLATE BODY OR RETURNING TO THE WILD WEST OF THE TRADE? 8 (Policy Paper No 225, 2018).
[53]See Article IX and X of the Marrakesh Agreement Establishing the World Trade Organization, which also provides for the provision of voting and three forth majority.
[54] Nolan, *supra* 50.

undecided or whether the AB should find the meaning of the unclear text or and engage itself in filling the gaps that were deliberately excluded.[55]

Considering that the answer to most of the questions is in the affirmative. There are high chances for the AB Members to exceed the mandate, thus, ending up in judicial activism. or judicial overreach or gap-filling or judicial lawmaking. But under Articles 3.2 and 19.2, the DSU has expressly stated that the 'Panel and Appellate Body cannot add to or diminish the rights and obligations provided under the covered agreements. Therefore, some scholars believe that AB on numerous occasions has conferred the rights and obligations on WTO Members by filling the gaps and by interpreting the ambiguous language in a way that was not negotiated by the WTO Members.[56]

In *India – Measures Concerning the Importation of Certain Agricultural Products*[57], the US thought that the AB had engaged in the lengthy abstract discussion on the issue that was not raised by any of the parties to the dispute. These charges were with respect to the discussion of the AB related to Article VI[58] of the SPS Agreement. It is a common practice among the AB and the Panels, that before dealing with the particular issue they provide a brief discussion on the issue or the interpretation of the provision of the covered agreement. This becomes significant because quite often the parties have a different understanding of the provisions which can be seen through their arguments so it is imperative for the AB and panels to decide an issue by first interpreting the provisions of the covered agreement alleged to be violated. This was the case in this dispute as well. The AB before deciding the issue first interpreted Article VI of the SPS Agreement.[59] Further in this case this had become more warranted because this was the first case where the AB had addressed the provision of Article VI. Therefore, the discussion related to Article VI of the SPS Agreement was well within the purview of the AB mandate as this issue was raised by the parties.[60] The second discomfort which the US claimed, in this case, was related to the discussion on the issues that were not appealed. While concluding the interpretation related to Article VI, the AB in two of the paragraphs[61] had shown their concerns to the Panel's interpretation of Article VI of the SPS Agreement which was not appealed by the parties. However, the AB had exercised restraint from making any findings on the Panel's interpretation. This gives rise to a question as to why the AB will engage in discussing the issues which are not appealed when quite often it misses its 90-day deadline. Therefore under this circumstance, the US claims may seem to be well justified.

In *Argentina – Measures Relating to Trade in Goods and Services*[62], the US claimed that two-third of the report comprises of *obiter dicta.* The dispute in this case related to eight measures including financial, taxation, foreign exchange, and registration measures imposed by Argentina. The Panel in this case had given important findings relating to "likeness" and

[55] Thomas R. Graham, *Present At The Creation Hofstra University Law* School (February 6, 2013), https://law.hofstra.edu/_site_support/files/pdf/news/events/lectures/2013/02/graham-shapiro-lecture-address.pdf.
[56] Terrence P. Stewart, *Disputed Court: A Look at the Challenges to (and from) the WTO Dispute Settlement System*, Global Business Dialogue, (December 20, 2017).
[57]Appellate Body Report, India – Measures Concerning the Importation of Certain Agricultural Products, WTO Doc. WT/DS430/AB/R (adopted Jun 19, 2015) [hereinafter India - Agricultural Products].
[58] Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence
[59]*India - Agricultural Products*, Para 5.129- 5.144.
[60] DSU art. 3.2.
[61]*India - Agricultural Products*, Para 5.142 and 5.143.
[62] Appellate Body Report, *Argentina - Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/AB/R (adopted Apr 14, 2016) [hereinafter Argentina - Financial Services].

"treatment not less favorable" under the GATS Agreement.[63] The parties not concurring with the Panel's interpretation on "likeness" had appealed certain interpretations of the Panel. The AB while deciding the issue of "likeness" had reversed the Panel's findings on "likeness" which was the entire basis for the case.[64] Further, the AB noted that *"[o]ur reversal of these findings means that the Panel's findings on "treatment no less favourable" are moot because they were based on the Panel's findings that the relevant services and service suppliers are "like". Moreover, as a consequence of our reversal of the Panel's "likeness" findings, there remains no finding of inconsistency with the GATS"*. The AB then went on to analyze the panel's interpretation on "treatment no less favourable" which has to lead to dissatisfaction to the US, as the US thought that having decided the issue of "likeness"s which was the basis of the appeal, the AB should have stopped there and there was no need for the AB to decide the other issues as the AB has itself considered those issues moot.[65] This leads to an important question whether AB should leave the issues raised in the appeal undecided, once they have decided the primary issue? This argument is not convincing because the AB is under the mandate to decide any issue of law covered under the panel report and the legal interpretation developed by the panel when appealed by the parties.[66] So the AB is bound to decide all the issues raised in the appeal as they fall within the scope of appellate review. The US contention that the two-third of the report comprises of *obiter dicta* does not seem to be valid as the AB in two-third of its report has discussed important provisions related to 'prudential exception' which will help guide the future panel and AB reports.

In *United States – Countervailing Duty Measures on Certain Products from China*[67] and *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*[68], the US had accused the AB of an independent investigation and that it applied a new legal standard. The US also contended that AB decided the rights in the abstract, while ignoring other important constitutional principles of that member's domestic legal system. Given the fact of the cases in *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, the AB's mandate was to decide whether the GPX Legislation, which was the core of the dispute, is inconsistent with Article X:2 of the GATT as China argued that it imposed a new requirement before the notice was published. While deciding this question, the AB has engaged itself in the interpretation of the domestic law to evaluate "prior published practice" and this was highly criticised by the US administration.[69] However, this criticism is not well-founded as the AB in its previous reports had clearly stated that whenever it is required to conduct a detailed examination of a law which as is at issue, the AB can do so.[70] And in *China Auto Parts*[71] also the AB made it clear that it can review the Member's municipal law as and when the case demands. This is a slippery slope because there are certain uncertainties related to municipal law and the question always hangs

[63] Panel Report, Report, *Argentina - Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/R.
[64] *Argentina - Financial Services*, Para 6.71 -6.80.
[65] *Id*, Para 6.83.
[66] DSU art.17.6
[67] Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/R (adopted Jan 16, 2015) [hereinafter U.S. - Countervailing Measures (China)]
[68] Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WTO Doc. WT/DS449/AB/R (adopted Jul 22, 2014) [hereinafter U.S. - Countervailing and Anti-Dumping Measures (China)]
[69] WTO Doc. WT/DSB/M/348 of 22 July 2014, Para 7.7.
[70] Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Para 200, WTO Doc. WT/DS184/AB/R (adopted on Aug 23, 2001).
[71] Appellate Body Report, China – Measures Affecting Imports of Automobile Parts, Para 225, WTO Doc. WT/DS339/AB/R (adopted Jan 12, 2009)

if the issues relating to municipal law is an issue of fact or an issue of law. This question has greater significance because the AB can only decide the issues of law.

Similarly, in the case of *US – Countervailing Duty Measures on Certain Products from China*, the US criticised the AB for applying a new legal standard while deciding the appeal. This US claim is also not well-founded as the AB had adjudicated only on the issues raised in the appeal and had used the defined legal standards which can be traced back to the AB Jurisprudence and are also consistent with the covered agreements.

B. The Resignation of Mr. Kim With Immediate Effect

The US had raised its concern with respect to Mr. Kim's resignation. According to the US, paragraph 2 of Rule 14 of the *Working Procedure for Appellate Review* explicitly provides for 90 days waiting period after communicating the notification of resignation to bring the resignation into effect. However, in Mr. Kim's case, the AB had ignored the 90 days rule.

The *Working Procedure for Appellate Review* under Rule 14 clearly states the rules related to the resignation of the AB members. This resignation process is a two-tier system. Firstly, the member willing to resign should notify his or her intention to the Chairman of the AB, and after receiving the notification, the Chairman of the AB must further communicate it to the Chairman of the DSB, the Director-General, and the other members of the Appellate Body.[72] Secondly, after notifying the intention, the member has to wait for 90 days to put the resignation into effect.[73] Further, Rule 14 provides some flexibility, which means that there can be a deviation from this rule after consulting the DSB.[74] In this case, the DSB was not consulted but the resignation took immediate effect. Hence, the US claim is justified as the AB had not followed its own rules.

The other concern of the US is also related to Mr. Kim's Resignation. The DSU under paragraph 1 of Article 17 and paragraph 1 of Rule 6 of the *Working Procedure* for the AB explicitly provides that three Members should decide an appeal. Before giving the resignation Mr. Kim was assigned to decide the *EU – Antidumping Measures on Imports of Certain Fatty Alcohols* along with two other members. However, because of his resignation with immediate effect, Mr. Kim ceased to be a member and this means that Mr. Kim is no longer authorised to decide the appeal and the AB should have immediately assigned another member to the division. This did not happen and when the reports were circulated for adoption, they consisted of the signature of three Members including Mr. Kim. Therefore the concern raised by the US seems to be genuine because the resignation happened before the completion of the appeal and Mr. Kim had no authority to sign the report when he ceased to be an AB member. This indicates a clear violation of the rules by the AB as there is no provision under the DSU or *Working Procedure* for Appellate Review which endorsed this unprecedented activity of the AB.

C. **Transition Period of Rule 15 of the Working Procedure for Appellate Review**

The US further showed its concern about the reports issued by the person who was no longer a member of the AB.[75] The US had taken this position because two former AB members Mr. Ricardo Ramírez-Hernández and Prof. Peter Van den Bossche continued to decide the

[72]Working Procedure Rule 14.1
[73]*Id*. Rule 14.2
[74]*Id*.
[75] WTO Doc. WT/DSB/M/400 of 31 August 2017.

appeals despite ceasing to be a member.[76] The US thought that AB by permitting the member for disposing of the appeals under Rule 15, who had completed their terms, was acting inconsistent with the provision of Article 17.2 of the DSU and the AB do not have any authority to do so. This power is only vested with the DSB and only the DSB can decide whether the person who ceased to be an AB member can be deemed to be an AB member.[77] Precisely, the crux of the US argument reflects more towards the members controlling the process and substance of the DSU. Thus, the US contends that the power to give extension to any of the AB members lies with the WTO Members exercised in a DSB Meeting and not with the Appellate Body itself.

Before analysing the US contention, it is crucial to understand Rule 15 of the *Working Procedure for Appellate Review.* Rule 15 is a transition rule, which provides for the disposition of the appeal assigned to the member before the completion of his or her term. This transitional period can be given only on the authorisation of the AB and upon notification to the DSB. This rule is a part of *Working Procedure for Appellate Review* which was notified to the Members in 1996.[78] This procedure was drafted by the original AB Members, as paragraph 9 of Article 17 of the DSU explicitly states that the working procedures can be drawn in "consultation with the Chairman of the DSB and the Director-General" and it further requires "communicating to Members for their information".[79] This rule falls outside the scope of DSU but this is not a novel idea because other international adjudicative bodies follow a similar type of transitional rule. For instance, the Statute of International Court of Justice under Article 13 also provides a similar provision for the Members whose term has expired. Therefore, the US argument that the AB has no authority to extend the tenure of the AB member seems to be illegitimate. Moreover, since the inception of the AB, this rule has been applied 16 times and none of the Members showed any discomfort including the US. Therefore, it will be right to conclude that the Rule15 of the *Working Procedure for Appellate Review* is a legitimate rule and the reports issued by these Members are also legitimate, as the reports are issued within the bound of the DSU.

Though Rule 15 plays an important role in the disposition of appeal however it does not mean that there are no ambiguities in this Rule. Certainly, they do exist. For instance, initially, when this Rule was framed, none of the AB members may have thought that in the future the AB seats may be left vacant. Therefore, the AB Members might have thought that recourse to this Rule will only be for a shorter duration as the vacancy of AB will be filled as and when the vacancy arises. Secondly, they must have thought that the AB will never be short of its full strength. The reality now is different and the vacancies are left vacant for years together. As a result of the last four years, the AB has functioned without its full strength. The AB has to give the appeals to the available members even with the huge possibility of expiration of their terms during the case. For instance, in the case of Prof. Peter Van den Bossche and Ricardo Ramírez-Hernández, when the AB assigned the cases to the division including them, they were part of the division on a majority of the disputes because the AB was not comprised of its full seven members as required by Paragraph 1 of Article 17

[76] Pursuant to Rule 15 of the Working Procedures for Appellate Review, the Appellate Body notified the Chairman of the DSB that it had authorized Mr. Ricardo Ramírez-Hernández and Mr Van den Bossche to complete the disposition of the appeals to which he had been assigned prior to that date

[77] WTO Docs. WT/DSB/M/402 of 29 September 2017, WT/DSB/M/403 of 23 October 2017

[78] Working Procedure was first adopted by the Appellate body on February 7, 1996 and came into force on February 15, 1996.

[79] VICTORIA DONALDSON, *The Appellate Body: Institutional and procedural Aspects,* IN THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1280, 1282-1284 (Patrick F. J. Macrory et al, eds. 2005).

of the DSU. When their term expired, the AB invoked Rule 15 for disposing of the appeals which were assigned to them when they were members.

The other possibility that the AB Members might have not imagined while framing Rule 15 is the average duration for completion of the appeal. The DSU provides a maximum of 90 days period for disposing of the appeal. However, it has become a common practice for the AB to extend the time limits and this practice can be witnessed since 2011.[80] Therefore, it becomes vital to extend the member's tenure for disposing of that appeal. Considering these circumstances, invoking Rule 15 of the *Working Procedure for Appellate Review* by the AB has become quite inevitable.

Options Available to Break the Current Impasse

The deployment of a strategic ploy by the US for the appointment and reappointment of the AB Members has caused great concern among the WTO Members and trade scholars. Reacting to the situation, some Members and trade law scholars have identified some solutions to break the current impasse. Some of these solutions are proposed by the group of WTO Members in the General Council meeting.[81] These solutions proposed certain amendments under Article 17 of the DSU. For instance- first, there was a proposal to include a transition rule under Paragraph 2 of Article 17 which directly addresses the issue raised by the US that the AB does not have the authority to deem someone who is not an AB member to be a member. Secondly, the proposal also suggested providing flexibility in the 90 days rule by amending Paragraph 5 of Article 17 which adds a consultation process with the parties to the dispute in case if the AB thinks it will circulate its report beyond the 90 days. Lastly, it also suggested some amendments to the adjudicative approach of the AB which states that the AB should address issues raised in the appeal to the extent necessary for resolving the dispute.

There are other sets of suggestions for breaking the current impasse given by the trade scholars that are worth considering to keep the wheels of DSS turning. For instance, Jens Hillebrand suggested using an *ad hoc* arbitration system for appeal through the arbitration under Article 25 of the DSU.[82] Luiz Eduardo Salles suggested "bilateral agreements between the parties to the dispute."[83] According to Salles' approach, the parties to the dispute would enter into the "procedural agreement not to appeal."[84] Steve Charnovitz's suggestion is a little tyrannical, as he observed the temporary quiescent of the AB in case the AB was having "three or more expired terms".[85] One of the most talked-about approaches is to use a majority voting system (also called "the nuclear option").[86] In comparison to the other options that required amendment of DSU or the *Working Procedure for Appellate Review*, this option

[80]Elvire, *supra* 52

[81] WTO Doc. WT/GC/W/752/Rev.1 of 10 December 2018.

[82] Jens Hillebrand Pohl, *Maintaining trust in WTO adjudication: the arbitration 'safety valve'* (21 December 2017) https://www.maastrichtuniversity.nl/blog/2017/12/maintaining-trust-wto-adjudication-arbitration-'safety-valve'.

[83]Luiz Eduardo Salles, *Bilateral Agreements as an Option to Living through the WTO AB Crisis* (November 23, 2017 08:33 AM) https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-on-bilateral-agreements-as-an-option-to-living-through-the-wto-ab-crisis.html.

[84] *Id.*

[85] Steve Charnovitz, *How to Save WTO Dispute Settlement from the Trump Administration* (November 03, 2017, 12:01 PM), https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html

[86] Pieter Jan Kuiper, *The US Attack on the Appellate Body* (November 15, 2017, 07:22 AM) https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html#comments

does not require any amendment, as it is already available under Paragraph 1 of Article IX of the WTO Agreement. Pieter Jan Kuiper suggested the framing of a new treaty on the procedure for appellate review or the provision of the DSU by major trading partners excluding the US.[87]

Some others suggested measures emphasising a standalone approach but this is not pragmatic. For instance, the solution suggested by Charnovitz for taking the option of the appellate review from the Members lacks legitimacy, as the appellate review mechanism is one of the innovations of the system that provide security and predictability to the members. Moreover, this option requires amendment in the DSU, and it seems impossible owing to the requirement of the consensus.[88] Similarly, the other options are given by Pieter Jan Kuiper for drafting of new treaty outside the WTO and the option of "nuclear voting" seems ineffective as well. Before advocating such options, it must be borne in mind that there cannot be a future for WTO without the US as it is one of the major trading partners. It can only be wondered that how many WTO Members will agree to such an option of creating a new treaty or of "nuclear voting"? There is not even a remote possibility of this idea because the WTO is framed on the idea of collective efforts by the Members or collective compromises as pointed out by Akhil[89].

Of all the suggestions, Jens Hillebrand proposal to use the *ad hoc* arbitration system for appeal under Article 25 of the DSU has found its way to the WTO. A group of twenty WTO Members under the leadership of the EU has communicated to the DSB on the "Multi-Party Interim Appeal Arbitration Arrangement" (MPIA).[90] The MPIA is not only limited to these twenty members as Paragraph 12 provides that other WTO members who want to join the MPIA can do so by notifying the DSB that they endorse this communication. This MPIA is a temporary solution that has been put in place to provide an appellate solution under Article 25 of the DSU until the AB resumes its function. The MPIA provides for ten standing appeal arbitrators composed of the participating Members who are to be selected through the process given under Annex 2 of MPIA out of which three arbitrators will be selected to address the dispute as per the same procedure given under the DSU under Article 17.1 and Rule 6(2) of the *Working Procedures for Appellate Review*, including the principle of rotation. Regarding the qualification of these ten standing appeal arbitrators, it is proposed to be the same as provided under paragraph 2 of Article 17 of the DSU i.e. "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally and are not affiliated with any government". Regarding the other provisions related to jurisdiction, the deadline for completion of the appeal in the MPIA, the WTO Members have relied upon the same provisions as given under Article 17 of the DSU. For instance, the parties to the dispute are allowed to appeal only the issues of law covered in the panel report and legal interpretation developed by the panel.[91] The MPIA also provides for 90 days timeline from notice of the appeal by the parties to the dispute.[92] Therefore, it is correct to say that the effort of these WTO members establishes a rule-based DSS that provides some temporary relief in protecting the important rights of the WTO members agreed during the Uruguay Round, that is, the right to appeal.

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[87] *Id.*

[88] AKHIL RAINA, MEDIATION IN AN EMERGENCY: THE APPELLATE BODY DEADLOCK – WHAT IT IS, WHY IT IS A PROBLEM, AND WHAT TO DO ABOUT IT 13 (KU Leuven, Working Paper No. 199, 2018)

[89] *Id* at 14.

[90] WTO Doc. JOB/DSB/1/Add.12 of 30 April 2020.

[91] *Id*. Paragraph 9 of annex 1 and DSU art. 17.6

[92] *Id*. Paragraph 12 of annex 1 and DSU art. 17.5

Conclusion

Upon agreeing with the Unterhalter observation, "it is clear that the WTO, without its DSS, would be considered by most observers and participants a weaker institution".[93] The current crises in the WTO have led AB to be a defunct institution which has affected the functioning of the entire DSU which is one of the important pillars of the WTO. Therefore, to overcome the current crises, the WTO members have to take collective efforts or collective compromise for keeping the wheels of DSS turning. Though the concern raised by the US is not much of substance as most of them are associated with the outcome of the results, they do raise an alarm about some inconsistencies, which exist in the system that had triggered this present situation. The scholars and WTO members are trying to break the current impasse by suggesting various solutions. The signing of MPIA by some WTO members has shown their commitment to a rule-based system and has found a way to keep the review mechanism going on. Although it is just a temporary solution, it addresses all the legitimate concerns raised by the US. Therefore, it can be hoped that the WTO members will soon come up with a permanent solution to current crises by keeping MPIA as a base for future negotiations.

[93] DAVID UNTERHALTER & ROBERTO AZEVÊDO, *The Authority of An Institution*, IN A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 466–475 (Gabrielle Marceau ed., 2015).