

From the Board: The US Attack on the WTO Appellate Body

1 INTRODUCTION

It is becoming more and more common knowledge that the US has launched an attack on the composition and the proper functioning of the WTO Appellate Body (AB). This started under the Obama administration and is carried forward by the Trump administration with such enthusiasm that it may well lead to the destruction of one of the most recent and most productive international judicial bodies, barely twenty years after its creation. This editorial will recall briefly the historical background to the present approach of the US and how it has developed from a merely ham-handed attempt to influence the course of the AB into a curious combination of blackmail and the game of chicken by making the survival of the AB as a functioning entity dependent on the other Members of the WTO giving in to certain demands of the US. These demands relate to the interpretation, or even the modification, of certain provisions of inter alia the Anti-Dumping Agreement (ADA) and the Working Procedures for Appellate Review. Next, the merits of some of the US wishes will be discussed and whether it would be wise for other Members to accommodate these wishes. Finally, the question must be raised what options the other Members may have to over-rule the US obstruction inside the WTO or to construe an alternative outside the reach of the destructive impulses of the Trump administration in order to keep an effective dispute settlement system alive.

2 SOME HISTORY

The US was probably too optimistic about winning the large majority of cases after having agreed to compulsory and binding dispute settlement in the Uruguay Round. Once these high expectations had been proven wrong in the practice of dispute settlement in the WTO, the US, under the influence of Congress, and more particularly the House of Representatives, which in the US constitutional system has a big say in trade policy, adopted a rather jingoist attitude to WTO dispute settlement. The first victims of this jingoism were the US female members of the AB, who were appointed after James Bacchus, the first US member, had served for the

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maximum of two terms.¹ It is well documented that Merit Janow (AB member 2003–2007) and Jennifer Hillman (AB member 2007–2011) were not put forward for another term by the Office of the US Trade Representative (USTR) because they were not considered sufficiently aggressive in defending the US position and elected not to write frequent separate or dissenting opinions.² As far as nominations by other Members are concerned, it seems that the US often had a strong aversion from persons who through education or experience had considerable knowledge of the US legal system and US trade law.³ Moreover, having been an academic or having serious knowledge of international law beyond the WTO over the years seem to have become disqualifications as well in the eye of USTR.⁴ Since AB Members are elected under the WTO system of consensus, that was enough to keep such persons out of contention. The most striking example was that of James Gathii, who is a tenured professor with an endowed chair at the law school of Loyola University, Chicago, has widely published in the fields of general international law and international trade law, and has served as an international arbitrator. He was a candidate put forward by his home country, Kenya, for the AB in 2013, but was ruled out almost immediately by the US.⁵

The US lifted the problems concerning the appointment of AB Members to another level by opposing the reappointment of Chang Seung Wha of the Republic of Korea in the summer of 2016 after he had served what was in the eyes of most observers a distinguished first term.⁶ This went counter to an incipient custom that members of the AB would be reappointed for a second (and final) term of four years, if they so wished and had served well during their first term. What was most worrying in this high-handed reaction of the US was that USTR pretended to discern judicial prejudice from questions that Mr Chang asked from the bench and

¹ It is reasonable to assume that the fact that Bacchus had been a Democratic member of the House may have contributed to protect the AB somewhat from congressional ire during his tenure.

² Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AJIL 225, 267–268 (2017), who note that Janow and Hillman probably wrote dissents in favour of US official positions in two important cases. It seems that this was considered insufficient by the US authorities.

³ Nearly every other country would have considered that such knowledge of its internal legal system, and in particular its trade law system, might contribute to greater understanding for that country's position in trade disputes, or would in any case do no harm. That this seems not to be the case for the US may be testimony to the enduring damage that has been done by the notion of 'lawfare' coined by Vice-President Dick Cheney and his supporters in the early 2000s.

⁴ See William J. Davey, *The First Years of WTO Dispute Settlement: Dealing with Controversy and Building Confidence*, in *A History of Law and Lawyers in the GATT/WTO: The Development of the Rules of Law in the Multilateral Trading System* 373, 353–373 (Gabrielle Marceau ed., CUP 2015).

⁵ See Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 L. & Contemp. Probs. 237, 271 (2016).

⁶ It is interesting to note that Mr Chang was educated at Harvard Law School and served a brief stint in a US law firm before becoming a law professor at Seoul National University, while he also served as judge in trade cases, thus showing elements of disqualification that the US must have overcome the first time he was proposed.

from his style of presiding in cases in which he was chair of the AB division hearing a case. Such impressions are normally so subjective, especially when one is subject to tough questioning by members of an AB panel, that one should be exceedingly restrained in making accusations of prejudice out of them, or soon most members of the AB will be considered to have offended the sensibilities of one country or another.⁷

The US rejection of Mr Chang led to a long stand-off, during which Korea did not wish to propose another candidate, while other candidates from Asia were considered for the chair, and the Chinese member of the AB also had to be replaced. The deadlock was only broken in late 2016 by the appointment of Mrs Zhao Hong from China and Mr Kim Hyun-Chong from Korea, who was a former Trade Minister and UN Ambassador of Korea. After only seven months of service on the AB he was called upon to serve as Trade Minister once again in a new Korean government.⁸ He took up this position in early August 2017, after having signed the report of the first Appellate case on which he sat. It is telling that the US was more at ease with somebody with such a strong government background than with Mr Chang's more independent profile.

3 THE PRESENT SITUATION

After having rejected a linkage made by the European Union (EU), which requested a simultaneous procedure for the succession of Mr Ramirez-Hernandez (Mexico, mandate expired on 30 June 2017) and the succession of Mr Peter Van den Bossche (Belgium, mandate expiring on 11 December 2017), the US in late August of 2017 made a different linkage, namely between *any* future appointment of AB members and the modification of Rule 15 of the Working Procedures for Appellate Review. This provision of the Working Procedures states that members of the AB, after expiry of their term, may continue to sit on pending cases that were assigned to them (as member of a division of three, which hears a case). The US was of the view that this provision is illegal, as it is in contradiction with the 'four-year term' mentioned in Article 17(2) DSU. Under Rule 15 Mr Ramirez continued sitting on three pending appeals cases and Mr Van den Bossche will continue to serve on the cases that have been assigned to him before mid-December 2017, when his second term expires.

In the meantime, for as long as the US linkage continues, Mr Kim, Mr Ramirez and Mr Van den Bossche will not be replaced. This will enormously reduce the

⁷ See on the Chang episode also: Steve Charnovitz, *The Obama's Administration's Attack on Appellate Body Independence Shows Need for Reform*, Int'l Econ. L. & Pol'y Blog (22 Sept. 2016).

⁸ Mr Kim had one obvious qualification for AB membership, which was his four-year stint in the Legal Affairs division and the Appellate Body Secretariat of the WTO Secretariat. Mrs Zhao had spent virtually all of her career in government service.

capacity of the AB to decide cases within the normal maximum of ninety days.⁹ By 30 September 2018 the four-year term of Mr Servansing (Mauritius) will expire so that the AB will be reduced to the minimum of members required for hearing an appeal. A year and three months later the terms of Mr Bhatia (India) and Mr Graham (US) will come to an end, which will spell the end of the AB. By that time most, if not all, Members of the WTO will already have stopped appealing cases to the AB, since its composition will no longer be broadly representative of the membership of the WTO.¹⁰ Actually such lack of representativeness will already set in by early 2018, when Europe and Latin-America, and therewith the civil law systems, will no longer be represented.

It is clear that the Trump administration has lifted the alleged controversy over the AB and its functioning to a wholly new level that threatens the proper functioning of the WTO dispute settlement system in the short run and may spell its demise entirely in the somewhat longer term. And that precisely at a moment that, in the longer run, the US and Europe, as relatively declining trade powers,¹¹ are likely to need the protection of a dispute settlement system more and more. The Trump administration, obviously does not think long term about world trade.

4 THE BACKGROUND TO THE US LINKAGE

Ostensibly the main US argument for making a linkage with the functioning of the AB, namely that Article 15 of the Working Procedures is illegal, has never been raised by the US before. It also has no merit. Like all provisions of the Working Procedures this provision falls under the broad mandate of the AB to write its own rules for appellate review in consultation with the Chairman of the and the Director-General and communicate them afterwards to the Members for their information. The rule has a clear rationale, namely the efficiency and speediness of AB procedures, thus permitting the AB to hew as closely as possible to the ninety days deadline for rendering its report. Respecting this deadline, as well as enhancing the efficiency and speed of the preceding panel procedures, has been a constant concern of Members over the last five years.¹² In principle no AB member, whose mandate has formally

⁹ Art. 17(5) DSU.

¹⁰ Art. 17(3) DSU.

¹¹ According to Eurostat, in 2016 the EU had a 16.8% share in world trade in goods and services, the US 15% and China 13.4%, but the share of the US and of Europe is slowly and steadily declining since the financial crisis of 2008/2009. See DG Trade Statistical Guide, tradoc_151348.pdf, at 24.

¹² The so-called Jara and Brauner processes, led by two successive Deputy Directors-General responsible for Dispute Settlement, have been looking since 2012 for administrative steps to enhance the efficiency of panel procedures. See www.wto.org/english/tratop_e/dispu_e/informal_consultations_e.htm. Since 2016 the 'review of the DS procedures' started at Doha have been put in a format of 12 'thematic issues' and have been given a new impetus in Special Sessions of the Dispute Settlement Body (DSB), see www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm.

expired, can serve more than about two months at the maximum beyond the end of his term.¹³ This prevents a new AB member from having to familiarize him/herself with a pending case in mid-procedure and the AB from holding new hearings in that case for the benefit of the new member – which would lead to a much longer delay. Moreover, it is by no means an exceptional procedure for international courts and tribunals, where judges often have fixed terms.¹⁴

One of the important recurring issues among the US problems with the case law of the AB is the standard of review in anti-dumping disputes. The relevant text was changed at a very late stage of the Uruguay Round negotiations, after most of the texts were closed. Belatedly a group of US congressional assistants, mostly from the House Ways and Means Committee, descended on Geneva, demanding the reopening of certain texts and issues, since otherwise the US Congress would not agree, or so the other delegations were told.¹⁵ One of their main demands was modification of Article 17(6) of the ADA.¹⁶

What is now Article 17(6)(i) ADA was relatively uncontroversial, as it represented the ‘non-de-novo-review’ rule, also known as ‘broad margin of appreciation’ in European administrative law systems, although written in a typical US legislative style. Subparagraph (ii) of Article 17(6) was more contested.¹⁷ Originally the US proposed only what is now the second sentence, which came straight from a 1984 US administrative law case, the so-called *Chevron* case.¹⁸ It is obvious that the other delegations were less than enthusiastic about importing a principle of US administrative law into a treaty text; a principle, moreover, that seemed needlessly to conflate principles of interpretation with the question of granting discretion to the administrative authorities in the application of the law. What was more: a US attempt to

¹³ Some have probably continued longer than that because their cases got delayed for good reasons, such as the sheer volume of the report, including those cases, where the translation burden was exceptional because of such voluminous reports.

¹⁴ See Art. 13(3) Statute of the International Court of Justice, as interpreted by Art. 33 of the Rules of Court, and Art. 26(3) of the Rules of Court of the European Court of Human Rights. See also Gregory Shaffer (co-authored with Manfred Elsig and Mark Pollack), ‘The Slow Killing of the World Trade Organization’, *Huffington Post*, 17 Nov. 2017. This article also contains quantitative data which show that the US has fared slightly better than the average WTO Member before the Appellate Body.

¹⁵ The description of these events is based on personal recollections.

¹⁶ For a recent American view on a possible amendment to this provision, see Simon Lester, *Clarifying AD Agreement Article 17(6)(ii)*, Int’l Econ. L. & Pol’y Blog (22 Oct. 2017).

¹⁷ The full text of Art. 17(6)(ii) ADA reads as follows: ‘the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations’.

¹⁸ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984), discussed in John H. Jackson & Steven P. Croley, *WTO Dispute Settlement Procedures, Standard of Review and Deference to National Governments*, 90 AJIL 193–213 (1996).

have the application of *Chevron* deference accepted in a GATT anti-subsidy case had been rejected by a GATT panel report that was subsequently blocked by the US.¹⁹ To cut a long story short, after furious negotiation under enormous time pressure, the compromise was the present text of Article 17 (6) (ii) ADA: a reference back to the ‘customary rules of interpretation of public international law’ (also mentioned as the general rule of interpretation in Article 3(2) of the DSU), followed by the US text representing *Chevron* deference.

Why could both the US and other parties agree to this compromise? The US certainly believed that it had won something and has been very frustrated for a long time that the AB has never found reason to apply the second sentence, which embodies the US *Chevron* principle. The others, however, had hoped precisely for this result, and some even expected it. They realized that the customary rules of interpretation of international law as laid down in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties in principle laid down a complete recipe for interpretation of treaty provisions.²⁰ Hence, any tribunal that applies this recipe, in principle should nearly always arrive at one, and only one, possible interpretation (perhaps with very, very rare exceptions). Thus the risk of an application of the deference doctrine of one particular Member State (the US) in WTO litigation would be minimal.

The others’ expectation about the (non)-recourse to the second sentence – which they so much disliked – has been proved right so far, because the AB has clarified the WTO agreements, including the ADA, in conformity with the customary rules of interpretation and thus has seen no reason so far to have recourse to the second sentence of Article 17(6)(ii) ADA. That is entirely in conformity with what the others believed they bargained for, namely at most a very minimal possibility to apply the second sentence.²¹ Given their disgruntlement at these late stage negotiations, they did not want to make the US any

¹⁹ See the (non-adopted) GATT panel report, doc. SCM/185 US – *Countervailing Duties on Lead and Bismuth Carbon Steel Products* (18 Nov. 1994), paras 368–371.

²⁰ A direct reference to Arts 31 and 32 could not be agreed during the Uruguay Round, as France and the US among others had not (and have not) ratified the 1969 Vienna Convention.

²¹ The underlying problem with Art. 17(6) ADA is that paras (i) and (ii) keep each other in an uneasy embrace. If one is to arrive at the application of (ii), a panel or the AB must be willing to start the application of the customary rules of interpretation of international law with the possibility in mind that this may lead to two or more permissible interpretations, which in my view will load the dice in favour of the application of (ii) in many if not all instances. If a panel or the AB apply simply applies the customary rules of interpretation, chances are that they will in many if not all instances arrive at one interpretation and never reach paragraph (ii), as has happened so far. See in this vein and pleading for the first approach above: Donald McRae, *Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement*, in *The Law of Treaties. Beyond the Vienna Convention* 164–183 (Enzo Cannizzaro ed., Oxford: OUP 2011).

the wiser about their reasons for accepting the compromise. The US simply made a bad judgment during this hurried negotiation, probably for want of understanding of interpretation in international law in the new negotiating team sent from Congress. Should the US now, after over twenty years, be helped by other WTO Members to repair their negotiation error, after having taken the AB hostage?²² That would be decidedly an un-American thing to do, especially under the Trump administration.²³

5 OTHER INDICATIONS THAT THE US WANTS TO BE RID OF THE APPELLATE BODY

Moreover, it is doubtful that making concessions to the US on the above or other points that they have advanced would help in any way. There are more indications that the US wants simply to be rid of the AB. These indications are easily discernible in the President's Trade Policy Agenda 2017²⁴ and in the public statements of the new USTR Robert Lighthizer, in particular his policy speech given to an audience at the Center for Strategic and International Studies in Washington DC in September 2017.²⁵

Briefly put, the US priorities can be reduced to four points: (1) 'defend US sovereignty over trade policy'; (2) 'strictly enforce US trade laws'; (3) 'use all possible sources of leverage' to get what the US wants; (4) 'negotiate new and better trade deals with countries in key markets around the world'. The last two points will be carried out on a bilateral basis in order to maximize US leverage. The US priorities are openly anti-multilateralism and anti-WTO. Multilateral deals will have to be renegotiated according to the US wishes,²⁶ or ... the option of leaving such agreements becomes a live possibility, as was suggested in the case of NAFTA. What's more, in combination with point (1), US trade policy will be clearly adverse from

²² The undiplomatic language of hostage taking was actually used by Trade Ministers of various WTO Members during an informal meeting in Marrakesh on 9 and 10 Oct. 2017, called for the preparation of the WTO's 11th Ministerial Conference.

²³ Would it help against China's trade practices by making it easier to impose anti-dumping duties if Art. 17(6)(ii) were modified or given an authoritative interpretation under Art. IX WTO Agreement so that it could be applied more often? If so – which is debatable – it would affect all other WTO Members as well, while the real problems that many other countries have with China's exports are due to the absence of market economy conditions.

²⁴ See *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program*, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/march/annualreport17>.

²⁵ Transcript and video available at <https://www.csis.org/events/us-trade-policy-priorities-robert-light-hizer-united-states-trade-representative>.

²⁶ 2017 Trade Policy Agenda, at 1–2. (a charitable interpreter could argue that the 2017 Trade Policy Agenda means that 'WTO reports are not binding' as a matter of domestic US law or directly applicable by US courts – which is true for most WTO Members).

binding dispute settlement. It is even suggested in the Trade Policy Agenda that WTO panel and AB reports are not binding,²⁷ which is, of course, contradicted by the explicit terms of the DSU, which states that AB reports shall be unconditionally accepted by the parties to the dispute.²⁸

Robert Lighthizer, who has been a trade law practitioner for a long time and served in USTR under President Reagan, is certainly very experienced in trade policy,²⁹ but still seems to feel best at home in pre-WTO times. He spoke about the ‘GATT agreement as a contract’, believes that the ‘DSU has evolved in a way that it creates new obligations and has reduced a lot of our benefits’.³⁰ He spoke about transparency issues, about issues with the staff³¹ and ‘a whole variety of issues that we have a problem with’, without becoming more concrete than that. What is striking is that he complained about the present dispute settlement system ‘because we don’t agree with the way in many cases the Appellate Body has approached this’ and immediately afterward sang the praises of the old GATT system of panel blocking, followed by negotiations (and in the end unilateral retaliatory measures, one might add). This was indeed a system that was exploited to the hilt by the US in the 1980s, when Mr Lighthizer was working in the US government, and possibly with some success. But to imagine that it could work again for the US seems a wee bit naïve in a system in which China is deploying its full power more and more and EU trade policy is much more unified than it was then. Nonetheless, it is realistic to prepare for the eventuality that US will destroy the AB, whether inadvertently or on purpose matters little. What options are open?

6 WHAT CAN BE DONE?

Recently Steve Charnovitz has advanced the idea that the AB should use its power to amend or redraft the Working Procedures for Appellate Review without the approval of the Members by closing itself to further appeals, once the number of its members falls to four, and doing this in such a way that instituting an appeal from a

²⁷ *Ibid.*, at 3.

²⁸ Art. 17(14) DSU.

²⁹ Reihan Salam, *A Trump Nominee Who Knows What He’s Doing*, Slate (16 May 2017).

³⁰ A direct reference to the words of the last sentence of Art. 3(2) DSU which states that ‘recommendations and rulings of the DSB cannot add to or diminish the rights and obligations in the covered agreements’.

³¹ If the US speaks about issues with the staff, it is important to recall that the US in the GATT period dictatorially intervened in the organization of the GATT Secretariat in order to secure that Anti-Dumping and Anti-Subsidy Panels would be assisted by Rules Division personnel only, and no longer by the Legal Affairs Division personnel, as one member of that division was considered untrustworthy after he had made critical remarks about anti-dumping being used for protectionist ends in an academic publication.

panel report would at the same time trigger the completion of the appeals procedure. This would have the effect of rendering the panel report final unless rejected by a negative consensus.³² This solution – which skirts the edges of the law – would demand great unity and decisiveness inside the AB and support from a large majority of the Member States of the WTO.

It is probably much better – and fairer to the remaining members of the AB – to find a solution in the political organs of the WTO or among a large group of Member States, excluding the US, outside, but close to the WTO. A solution, moreover, that should recognize that the WTO is about to lose one of its two main functions so carefully constructed in the ‘nineties: the dispute settlement function that guarantees a peaceful solution to trade disputes and helps to prevent them from ballooning into political disputes that might well contribute to violent conflict between states further down the road. If this capacity of the WTO is destroyed, we will not be able to reconstruct it for at least a generation. This is no small matter, it is a true emergency.³³ Times of emergency justify emergency measures, also in the law of international organizations.³⁴ They allow states to invoke the *clausula rebus sic stantibus* in treaty law.³⁵ They allow states and organs of international organizations to take decisions that are arguably legal, but that they would not take under normal circumstances. The ambush killing of the AB by the US clearly falls outside ‘normal circumstances’.

The WTO itself offers the opportunity of a simple solution, which can be temporary and proportionate, only for as long as the US continues to obstruct the replenishment and functioning of the AB. This is the recourse to majority voting.³⁶ Members of the AB are appointed by the DSB and Article 2(4) DSU determines that the DSB decides by consensus.³⁷ However, Article IX:1 of the WTO Agreement states that, when no consensus can be reached, decisions may be taken by a majority of the votes cast. On the other hand, this ‘escape from consensus’ is qualified in turn

³² Steve Charnovitz, *How to Save the WTO Dispute Settlement from the Trump Administration*, Int’l Econ. L. & Pol’y Blog (3 Nov. 2017).

³³ Even if there are more important emergencies in international relations in the world today, such as the threat of (nuclear) war in the Koreas and in Europe and the threat of global warming, this does not mean that the lesser threat to the WTO should not require some concentrated thinking and action.

³⁴ An old example is the Uniting for Peace Resolution of the General Assembly of the UN, GA Res. 377 (V), of 3 Nov. 1950, which empowered the General Assembly to act in cases of threat to the peace or breach of the peace when, due to the veto of one of its permanent Members, the UN Security Council failed to exercise its ‘primary responsibility’ for maintaining international peace and security. Recall also the continued decision-making in the Council of Ministers of the EEC during the French policy of the ‘empty chair’ and the continuation of the system of agricultural subsidies by the Commission during this period on the basis of reference quantities of the year before. Thanks to Claus-Dieter Ehlermann and Frank Hoffmeister for reminding me of this episode.

³⁵ Art. 62 Vienna Convention on the Law of Treaties.

³⁶ Often referred to as ‘the nuclear option’ in the WTO Secretariat, as it has hardly ever been used. Nevertheless recourse to majority voting is perfectly legal.

³⁷ There is special consensus rule (the so-called negative consensus) for the adoption of panel and Appellate Body reports (a consensus to reject the report).

by the words ‘except as otherwise provided’. If this is interpreted as a reference also to Article 2(4) DSU, the consequence would be that the DSB can never decide by majority voting. However, Article XVI:3 WTO clearly creates a hierarchy between the WTO Agreement and the other Multilateral Trade Agreements, including the DSU³⁸ and in the end the DSU, therefore, could have recourse to the rule of Article IX:1 WTO. Moreover, the (re)appointment of AB Members could be placed directly on the agenda of the General Council of the WTO, as has happened in the past, when Members wanted to censure the AB for making rules related to the handling of *amicus curiae* briefs.³⁹

Direct appointment of AB members by the General Council applying majority vote, *under the strict limitation* that this is an exceptional one-off measure connected to the threat of malfunctioning of the AB, and accompanied by explicit openness to further discussions with the US, seems to be the best possible option for action inside the WTO. Ideally, merely the threat of majority voting may create leverage to arrive at consensus. For example, when the accession of Russia to the WTO was taken hostage by Georgia to resolve its bilateral conflict with Moscow, a clear hint to the effect that Georgia might well be outvoted in the WTO if need be, made the Georgian government rethink the issue.⁴⁰

It might be important not to single out the US too much. In that case, the General Council could take a decision, obviously needing the support of a very large majority, identifying certain categories of decisions that in future could be taken by such a super-qualified majority. The nomination of AB members would have to be one of these categories. This is a technique of simplifying decision-making in international organizations without amending their founding treaties that has been tested to good effect in the OECD, another organization seemingly stuck in the straightjacket of consensus, but in need of increased effectiveness of decision-making after its membership nearly doubled in the last two decades.⁴¹

However, if WTO Members are so strongly against majority voting as to shy away from action inside the WTO, they will have to seek a solution outside the WTO. Such a solution requires a large number of Member States (which should include at least the major trading powers) immediately to start a negotiation group called ‘The

³⁸ This provision is cast in terms of conflict between provisions of the WTO Agreement and provisions of the other Multilateral Trade Agreements. Providing for an additional method of decision-making in the WTO, which is not available in the DSU, would constitute such a conflict.

³⁹ Special Session of the General Council of 22 Nov. 2000, see WTO doc. WT/GC/M/60.

⁴⁰ See F. Hoffmeister, *Institutional Aspects of Global Trade Governance from an EU Perspective*, in *The EU's Role in Global Governance* 145, 150–151 (B. van Vooren, S. Blockmans & J. Wouters eds, OUP 2013).

⁴¹ This idea was originally launched in: Pieter Jan Kuijper with Gabrielle Marceau, *From Seattle to Doha. From the Surreal to the Unreal – A Personal Account*, in Gabrielle Marceau ed., *supra* n. 4, at 382, 374–388. See OECD, *Revised Resolution of the Council on a New Governance Structure for the Organization* (doc. C (2006)/78/Rev. 1, 10 Feb. 2011).

Real Friends of Dispute Settlement', from which the US would be excluded. As soon as the US would have caused the membership of the AB to fall to a number, which would make it obviously impossible to deliver AB reports within or near the deadline of ninety days, this group would already have drawn up a new treaty. It would contain a procedure for appellate review only, or even a complete dispute settlement procedure, based on existing provisions of the DSU with the fewest changes possible, as otherwise the drafting would take too long. Provisional application of this treaty should be possible in order to ensure that it would become operational very quickly. The sitting members of the AB would resign and be taken over as members of the Appellate Tribunal of the new treaty, to be joined by newly selected members. On a voluntary basis the Members of the AB Secretariat could leave the WTO as well and join the new Appellate Tribunal. Moreover, this new Tribunal could be opened up as Appeals Tribunal from decisions of the dispute settlement mechanisms of regional Free Trade Agreements. The costs of this new Tribunal could be defrayed by member contributions, which would not be too onerous for the members, since their contributions to the WTO budget should drop, as the expenses for the AB (and perhaps also the panel procedures) would become redundant. Insofar as having recourse to this treaty and its dispute settlement mechanism were to imply a breach of obligations under the DSU, and notably of the compulsory nature of the procedure to seek redress of a violation of obligations under the WTO Agreements (Article 23 DSU), this could be justified by invoking the *rebus sic stantibus* doctrine.

An intermediate approach between staying within the WTO framework, while exceptionally having recourse to (super-)majority voting, and stepping outside the WTO framework by the expeditious creation of a parallel appellate procedure, would be the recourse to the arbitration procedure of Article 25 DSU as a vehicle for an appellate procedure that would shadow the normal WTO procedure of Articles 21 and 22 DSU.⁴²

On balance the majority vote solution is probably the best because it permits an exact dosage of the 'emergency measures' and it keeps the AB anchored inside the WTO. It may lead to the US leaving the WTO in a huff, but it may be possible to repair that under a future administration. Moreover, an impulsion to walk away from the WTO may confront the US with the reality that leaving will make it into an international trade pariah that can be treated in trade matters as other countries please. It might finally dawn on even the Trump administration that such is not a pleasant perspective even for what now is still the second trading nation in goods and services in the world.

P.J.K.

⁴² This possibility is developed in Scott Andersen et al., *Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals*, available