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Crisis of the WTO dispute settlement system – MPIA

Master Thesis

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Poděkování

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Introduction

In the beginning was a conflict, shaking the very foundation of the international system. From the turmoil a new 'post-war' world emerged. One determined to prevent war, not just with declarations and promises, but by envisioning a network of cooperation so prosperous, as to deter any from resorting to such conflict ever again. Part of the efforts to share the prosperity and peace was the codification of various international treaties, agreements, and the establishment of international organizations.[1] There was a vision of a liberalized multilateral trading system with strong institutional foundation, that would facilitate and enhance the exchange of goods and services throughout the world. These ambitious quickly disintegrated under the reality of individualistic tendencies of states, nevertheless, something survived. After the failed talks of establishing a rule-based International Trade Organization (ITO) dealt a blow to the spirit of cooperation after the World War II, the General Agreement on Tariffs and Trade (GATT) was salvaged and began its 40 years of providing framework for the multilateral trading system. Transforming into the World Trade Organization (WTO) with the Marrakesh Agreement of

[1] Most notably the Charter of the United Nations and the accompanying Universal Declaration of Human Rights, or the 1951 Treaty of Paris, establishing the European Coal and Steel Community.

1994, the WTO still serves today as the facilitator of trade, a rule-maker, and a venue for settling disputes in a peaceful manner.

The Dispute settlement mechanism of the WTO has been lauded by many to be the crown-jewel of the WTO[2]. It was the triumph of international cooperation and a sign that states agree to pursue a system of rules and compromises, as opposed to favoring might and unilateralism. No good (nor bad) thing lasts forever, and what was once a thriving system capable of resolving even the toughest of disputes, is now but an empty shell. The Dispute settlement system is paralyzed. On the 29th of June 2020, the last report of the Appellate Body was adopted, and on the 30th of November the same year, the Appellate Body had lost its last adjudicator.

Growing animosity towards the functioning of the Appellate Body from the United States led to the blocking of the appointments of new members to the AB, those responsible for rendering decisions in the appellate review, ultimately crippling the system. No agreement was yet reached, and the signatories of the WTO Agreement[3] (WTO members) are now appealing 'into the void'. A number of WTO Members[4], seeing that a resolution is nowhere close, agreed to pursue an alternative solution to the impasse. They agreed on the Multi-Party Interim Appeal Arbitration Arrangement, the MPIA. Remaining in the boundaries established by the WTO dispute settlement system, it provides a venue for like-minded states to continue in cordial dispute resolution.

In the first part of the thesis, I aim to analyze the evolution of the multilateral trading system, from the negotiations beginning during the World War II to the current WTO, with specific focus on dispute resolution. As to not give only an analysis of the structure, procedures and functioning of each system, I will also discuss the nature of each dispute settlement regime (the ITO, GATT, and WTO) and whether they constitute more of a diplomatic or a legalistic system.

The nature (and to some extent role) of dispute settlement mechanisms in the ITO, GATT and WTO has long been a matter of contention. There have been two contrasting viewpoints throughout history. One perspective favors a negotiation-oriented, diplomatic approach, where dispute settlement procedures are seen as a means of assisting negotiators in resolving differences through compromise, rather than being strictly legalistic or juridical. It aims to

[2] Raghu Ram, Jayant (2018), Cracks in the 'Crown Jewel, p2
[3] The Agreement Establishing the WTO is a comparatively short agreement that sets out its role, structure and powers. It was signed in Marrakesh on 15 April 1994, establishing the WTO.
[4] There was 47 states first signing the agreement, more have been steadily joining since then, with Japan as the last nation to join in May 2023.

achieve "*a balanced accommodation of interests, rather than a vindication of rights in a victory versus defeat pattern"*.[5] The alternative approach considers the mechanism a structured, disciplined juridical process in which impartial panels make objective rulings on whether certain activities comply with the set-out obligations. It emphasizes "*legal consistency, predictability, and certainty*" in trade relations.[6]

The hypothesis I have set out to write this thesis with is that *the multilateral trading system has always preferred diplomacy to a rule-based institutionalization, and it was only with the WTO that it changed*. My expectation is that this will be proven correct.

After some 15 years of relatively smooth functioning of the dispute settlement system, cracks began to show and the system ground to a halt. With growing pressure from the US, criticism mounted, and the functioning of the Appellate Body, hearing and deciding appeals by the Members after a panel report has been issued, was put into question. Several grievances were raised, concerning both the procedural and substantive matters of the AB.

In the second part of the thesis, I will explore the roots of the crisis and the failure of the review put in place to aid in preventing such developments. After that, I aim to analyze five specific issues raised by the US. First from the point of view of the US, then a discussion on the arguments raised will follow, and lastly a contemplation on how, if at all, the MPIA addresses each issue. The goal is to see whether there is some merit to the arguments given by the US for blocking the AB and if the MPIA reflects on it. My hypothesis is that *there is some merit to them, however the issues hardly present an egregious violation to the point of blocking the whole dispute settlement system.*

There most likely is a point to the US criticism, the AB does find itself in a peculiar legal position. The foundation it has been provided with has shown itself to be insufficient, and so the WTO members are faced with a dilemma to decide. Are certain aspects of the dispute settlement system and its current practice features or rather exploits? My goal is to provide an analysis of the five issues, specifically the practice of members deciding cases even after their original term had lapsed, the deadlines to issue reports, the issuing of advisory opinions, the scope of the review in the appellate process and the question of precedent, with the view of discussing the

[5] JACKSON, John. Dispute Settlement in the WTO: Policy and Jurisprudential Considerations (1998), Research Seminar in International Economics Discussion Paper 419, p21

[6] WEISS, Friedl. Improving WTO Procedural Law: Problems and Lessons from the Practice of Other International Courts and Tribunals, 2000,

merits of the criticism provided by the US. Each issue is also discussed through the prism of the MPIA and the question of whether the MPIA abates some of the criticism by adopting changes to its procedure, as opposed to the procedure under the DSU, or remains as simply more of the same.

The methods and literature review

The methods employed are standard for a legal-comparative academic work, consisting of logical and systematic studying and interpreting of primary and secondary sources to reach conclusions. The same methods are used in the second part of the thesis, dealing with the crisis of the WTO dispute settlement system and the MPIA. Primary sources such as the relevant international agreements will be examined, as well as various monographies, papers and articles dealing with different aspects of the subject.

The dispute settlement crisis is a contentious issue with far reaching implications, captivating the interest of many. Academics from all around the world have published numerous articles and monographies focusing on different aspects of the dispute settlement system, its rich history, development, and the current crisis. The history of the multilateral trading system has been extensively studied. I would name the monography of authors Irwin, Mavroidis and Sykes, exploring the beginnings of the GATT[7], or the monumental undertaking of John H. Jackson on the law of GATT.[8]

A paper dealing with the nature of the WTO dispute settlement mechanism, with interesting historical perspective was published by T. N. Srinivasan.[9] On the crisis of the dispute settlement system, I would mention the excellent monography by Jens Lehne[10] debating the justification of the US for blocking the appointments to the WTO or the paper by Emilie Eriksson, considering some aspects of the US criticism.[11]

MPIA though being relatively a fresh addition to the international legal system, also enjoys the attention of academics. The paper published by Brian McGarry & Nasim Zargarinejad explores

[7] The Genesis of the GATT (2008)
[8] World Trade and the Law of GATT (1969)
[9] The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives (2007)
[10] Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? (2019)
[11] The WTO Appellate Body Crisis, A contribution to the ongoing discussions (2023)

the powers of the MPIA arbitrators and the implied connotations,[12] while experts on the WTO Petros C. Mavroidis and Bernard Hoekman authored a marvelous treatise on the institutional design and performance of the WTO dispute settlement system.[13]

From the recent domestic academia, Ondrej Svoboda wrote an interesting overview of the dispute settlement mechanism's shortcomings and recent developments, combining the views of a jurist and an expert on international relations[14] and Alzbeta Rucklova delved into analyzing the benefits of the dispute settlement system.[15] No one has yet however taken the approach of analyzing both the nature of the system and the key legal issue, hence I believe that my examination can positively influence and grow the collective knowledge and understanding of the current crisis.

1. The development of the multilateral trading and dispute settlement system

1.1. Genesis of the post-war multilateral trading system

With the end of World War II, a new world order came to be. One characterized by bipolar division with two different ideologies vying for supremacy over the other. Far-reaching social, cultural, political, and economic differences-turned-animosity quickly manifested. While the USSR-led eastern block of countries followed the ideas of socialism and state-mandated economies, their counterpart, centered around the United States of America, instead continued on the path of capitalism and liberal arrangement of both domestic and international policies. The division can be nicely illustrated on the list of nations who ultimately signed the US-led initiative aiming at reducing trade barriers and tariffs, the General Agreement on Tariffs and Trade.[16]

During the war, a group of officials from the United States and United Kingdom began to lay foundation to what would one day become the GATT. While President Roosevelt and Prime Minister Churchill gave their respective representants a broad political direction, the conception of the postwar economic system was left upon the own making of this group. They set out to

[12] Tracing the Powers of WTO MPIA Arbitrators (2022)
[13] WTO Dispute Settlement and the Appellate Body Crisis – Back to the Future? (2020)
[14] The Crisis of the Appellate Body of the World Trade Organization: Its Origins and Consequences (2020)
[15] WTO Dispute Settlement System: The Appellate Body Crisis (2020)
[16] Founding members were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom, and the United States. The case of Czechoslovakia is interesting, the Czechs signed the agreement, but due to a communist-led coup in February 1948, the country re-orientated itself on USSR and state-planned economy, and China.

create a system of international economics that would help prevent future tensions among powerful nations and would contribute to international stability. The envisioned system rested on the creation of an international trade and finance system, better posed to face the challenges of foreign policy cooperation and competitiveness. The inter-war period of chaos and instability proved a valuable lesson, tracing the economic hardships of early 1930s all the way back to the Treaty of Versailles.[17] Key figures of these negotiations were the renowned English economist and philosopher John Maynard Keynes on the side of the UK and Harry Dexter White, a senior US Treasury department official leading the negotiations on the part of USA[18]. Other members included men like James Meade, Richard Hopkins, Cordell Hull, and Henry Morgenthau, either career civil servants or academicians from universities brought onboard during the war.[19]

In 1944, the Bretton Woods Conference took place. One of the most important events in the history of international economics set the stage for the post war financial and commercial system. At the gathering in New Hampshire, United States, some 730 delegates from 44 allied nations deliberated and on the 22nd of July signed the agreement, creating what was henceforth known as the Bretton Woods System.[20] The conference established two key institutions, the International Monetary Fund[21] and the International Bank for Reconstruction and Development[22], with a proposal for the International Trade Organization to supplement the other two. With the system creating a fixed-rate convertibility of the US Dollar and gold[23], US supremacy was apparent. Much to Britain's dismay, London had lost its place as the financial

[17] HUDSON, Michael. Super Imperialism: The Origin and Fundamentals of U.S. World Dominance (2nd ed.). 2003, London and Sterling, VA: Pluto Press, p44, Available at: https://files.libcom.org/files/michael_hudson_super_imperialism_27846

[18] Interestingly enough, White was accused of espionage on the behalf of the Soviet Union on a few occasions. Though he adamantly refused the allegations at the time, in 1997 a bipartisan Moynihan Commission put forward a report where they stated that White's cooperation with the Soviet Union "seems settled". Historians differ to this day on what were White's motives and whether he was not caught up in a web of his own intrigue, from which he sought to strengthen America, rather than undermine it. Nevertheless, White's policy has always been thoroughly Keynesian and the economics he argued could hardly be interpreted as Marxist.

[19] GARDNER, Richard, Sterling-Dollar Diplomacy in current perspective, Winter, 1985-1986, Vol. 62, No. 1 (Winter, 1985-1986), pp. 21-33, International Affairs (Royal Institute of International Affairs 1944-), Available at: https://www.jstor.org/stable/2618064

[20] GHIZONI, Sandra Kollen, Creation of the Bretton Woods System. Federal Reserve History [online] [accessed. 2023-06-26]. Available at: https://www.federalreservehistory.org/essays/bretton-woods-created

[21] The IMF is an international organization that provides financial assistance and policy advice to countries facing economic challenges, particularly those related to balance of payments. It helps countries stabilize their economies, promotes global economic cooperation, and provides resources to support member countries in times of financial crisis.

[22] Part of the World Bank Group, it provides loans and assistance to middle-income and creditworthy low-income countries for development projects aimed at reducing poverty and promoting economic growth.

[23] US held around 65% of the world gold reserves at the time.

center of the world, and it was instead Washington and New York at the forefront of world finance.[24]

The conference recommended that in order to fully accomplish the goals it set out to achieve, an agreement on reducing trade barriers and liberalizing world trade ought to be reached.[25] This was embodied in the International Trade Organization proposal, agreed on during The United Nations Conference on Trade and Employment in Havana between 1947 and 1948. The Havana Charter[26] however never came into force due to the failure to ratify it in the United States Congress. Towards the end of 1950, President Truman declared that he would no longer ask Congress for its approval, making the ITO effectively dead, with no other nation ratifying the agreement.[27] Though the Charter establishing the ITO never came to properly live, the General Agreement on Tariffs and Trade, negotiated in Geneva in 1947, originally as a part of the overarching package, survived[28]. Applied on provisional basis starting from the 1st of January 1948, it stayed in force for over 40 years and established the basis for world trade as we know it today.

GATT, at first being a smaller part of a major international undertaking, soon became the sole vehicle of trade liberalization efforts in the western world. After talks of creating International Trade Organization (ITO) fell apart, ironically due to its main proponent's internal turmoil[29], what was meant at first as just one piece of the puzzle, GATT ultimately became the main driving force and the foundation on which international trade law was developed. In several rounds spanning more than 40 years, GATT has served as both a quasi-international organization and a venue for negotiating tariffs, reduction of trade barriers, adopting several major principles in international law and as a forum for peaceful resolution of bilateral disputes.[30]

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[24] RACHMAN, Gideon, 2008. The Bretton Woods sequel will flop. Financial Times. Available at: https://web.archive.org/web/20140116085300/http:/www.relooney.info/0_New_3860.pdf

[25]Proceedings and Documents of the United Nations Monetary and Financial Conference, United States. Department of State. (1944). "Volume I", Bretton Woods, New Hampshire, July 1-22, 1944 (July 1-22, 1944). Available at: https://fraser.stlouisfed.org/title/430/item/7570, accessed on June 26, 2023.

[26] HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, available at: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf

[27] VAN DEN BOSSCHE, Peter, 2005. The Law and Policy of the World Trade Organization [online]. Cambridge: Cambridge University Press [accessed. 2023-06-26]., p80,
Available at: http://dx.doi.org/10.1017/cbo9781139165143

28 UNGER, Michael, 2017. GATT rounds: who, what when. Hinrich Foundation [online] [accessed. 2023-06-26]. Available at: https://www.hinrichfoundation.com/research/tradevistas/wto/gatt-rounds/

29 JACKSON, John Howard, 1969. World Trade and the Law of GATT: (a Legal Analysis of the General Agreement on Tariffs and Trade). ISBN UOM:39015001597585, p44

30 BOWN, Chad P.; IRWIN, Douglas A. The GATT's Starting Point: Tariff Levels circa 1947, Assessing the World Trade Organization, 2017, Cambridge University Press: 45–74. doi:10.1017/9781108147644.004. ISBN 978-1-108-14764-4.

GATT ultimately transformed into the World Trade Organization (WTO) in the 90's, with the original agreement part of WTO's charter[31]. The WTO has now functioned for almost thirty years, numerous conferences and retreats have been held and legislation passed. The Dispute settlement system under the WTO has thrived in the first decade of the century, however the last ten years steadily reversed the positive trend and now the system has ground to a halt.

1.2. Dispute settlement under ITO

Although the International Trade Organization as envisioned by the Havana Charter never came to existence, it serves as a testament to what the participating nations (Members) saw as a possible framework for organizing international trade relations in the postwar era. Consisting of 106 Articles and Annexes organized from A to P, it gives us an insight to what might have been the system that ruled international trade.[32] In Chapter VIII – *Settlement of Differences* – the Charter delineates a basis for settling disputes in six articles.

Beginning with Art. 92, titled *Reliance on the Procedures of the Charter*, in the first paragraph the signature parties agree to uphold the exclusivity of procedures under the Charter for any complaints and differences arising out of the operation of the International Trade Organization. In the second paragraph there is a prohibition of recourse to unilateral economic measures in contradiction with the Charter. The article serves to establish the existence and primacy of ITO's own settlement system relating to disputes arising out of its operation, while setting clear boundaries on unsanctioned unilateral measures threatening to undermine the system.

The Charter follows with Art. 93, *Consultation and Arbitration*, outlining an initial procedure for when a member believes an issue to exist. If a member considers that any benefit that is being accrued to them under the provisions of the Charter is being nullified or impaired because of either:

1) a breach of an obligation,

2) by the application of a measure not in conflict with the Charter of another member, or

3) by the existence of any other situation,

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[31]

[32] Havana Charter, Available at: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf

that member may submit a written proposal to such members they consider to be concerned. Those on the receiving end of the complaint shall then give it a dutiful consideration, if both concerned parties agree on the terms, the matter concerned may be submitted to an outside arbitration. The Organization is to be generally informed of steps undertaken. The procedure outlined serves as a basis for shedding light on any issue a member might have with another, the voluntary consultation might be useful, though it requires both cooperation and understanding from the parties concerned, which cannot function in hostile situation.

In case the matter remains unresolved, the issue is to be referred to the Executive Board[33], which shall promptly investigate under Art. 94 – *Reference to the Executive Board*. After the investigation, there are several ordinary ways with which the Executive Board may proceed. It may decide that the matter does not call for any action and it may recommend further consultation for the concerned Members. The option of the arbitration mentioned above is still available, should again a consensus to its terms be reached. Furthermore, in case of a breach of obligation by a Member, the Board may request a certain action to be taken by the member to conform to the provisions of the Charter, as well as the Board may give recommendations for cases where the situation is not one of breach of obligation but of the application of a measure or the existence of any other situation. The Executive Board decides by a majority.[34]

In terms of extraordinary measures, if the Board considers that the previous steps will not be sufficient and a serious injury might not be prevented, it can release Members affected from obligations or the grant of concessions to the extent it considers appropriate and compensatory, having regard to the gravity of the issue at hand. The Executive Board as well as any Member concerned may refer the matter to the Conference for review.[35]

It can therefore be said that what Art. 94 outlines is a first instance of a process, that may amicably end either in the acceptance of recommendations by the Members or by naturally resolving itself through consultations. However, if any Member concerned wishes so or the Executive Board decides to, the matter is referred to the Conference[36], beginning what can be

[33] "The Executive Board is to consist of eighteen members, including eight members of chief economic importance and other members elected by the Conference to represent the different degrees of economic development found within the membership of the organization"- *Sec/36/56,* an official GATT whitepaper.
[34] Art. 79.2 of the Havana Charter
[35] Art. 94, 95 Havana Charter
[36] "The Conference, which will be the policy-making body of ITO, is to be composed of representatives of all members of the organization; each member will have one vote." - *Sec/36/56,* an official UN whitepaper

seen as a second instance in the dispute. The Charter lays out a 30-day window for the request to the Conference to be made.

This second internal round is depicted in Art. 95 – *Reference to the Conference*. The Conference shall confirm, modify, or reverse what was referred to it. The procedure is the same as with the Executive Board, the exception being the Conference might also in similar situation of impending serious injury release a Member of their obligations in the case where the application of a measure is alleged to impede said member, or in other situations. The Charter does not grant a suspensory effect to the Boards decision; thus, the Member is free to act in accordance with the decision while the process before the Conference continues.

If the matter comes to the release of obligations or the suspension of performance of concessions by a Member, the Member on the receiving end of those measures, who is still unsatisfied, might either withdraw from the Organization (pending a 60-day period) or request the Organization to make a request of the International Court of Justice (ICJ) to issue an advisory opinion.[37] Court then in accordance with its statute issues a decision, which is binding upon the Organization. Pending the Court's opinion, the decision of the Conference is in effect. The implications of that are not discussed further, and there are no provisions on enforcement.

1.3. The Nature of the ITO Dispute settlement system

The dispute settlement system under ITO can be seen as three-tiered. First the Executive Board decides, then the Conference, and if a Member is still unsatisfied, the matter is brought before the ICJ in an advisory capacity, which according to the Charter binds the Organization. The most the Organization itself can do is release the affected Member (the complainant) from their obligations towards the offending Member. There is no sanction mechanism for enforcing any sort of a repercussion, not even the ICJ's deliberation. As such, the functioning of the Organization relies mostly on good will and understanding between members and presumes acting towards conflict resolution in good faith.

The ICJ's authority to review the matter at the request of a Member, resp. the Organization, in the form of a 'binding advisory opinion',[38] however hardly constitutes a diplomatic resolution to

[37] Art. 96 of the Havana Charter

[38] Using the term 'Advisory opinion' in this case seems to be a practical and diplomatic compromise. It is hard for me to discern the practical difference between a 'judgment' and a 'binding advisory opinion'.

a dispute, if that aims to be the approach of compromises, rather than vindication of rights. Therefore, the system exhibits telling signs of both approaches. The apparent lack of enforcement provisions and the uncertainty around the meaning of the ICJ's authority further blurs the lines.

1.4. Dispute settlement under GATT

With the failure of ratification of the Havana Charter in signature countries, the International Trade Organization never materialized. The only thing left from the international effort of institutionalizing world trade relations was the General Agreement on Tariffs and Trade. The GATT was an agreement of "*reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce*."[39] It was negotiated alongside ITO, negotiations were held at Geneva from April 1947 to the end of October 1947, when 23 participating countries signed the final act, authenticating the text of GATT. In the years to follow the tariff negotiations under the GATT umbrella saw 33 countries adhering to GATT and some 58,000 tariff rates reduced or leveled in 7 sessions until 1953.[40]

The legal particularities of GATT are interesting in the sense that it was never meant to be an organization, rather it is an international trade agreement, where the contracting parties agree to a set of rules to govern their mutual commercial relations. It contains provisions for protection of tariff concessions, including the use of quantitative import and export restrictions and internal taxes, as well as arrangements for joint discussion. These joint discussions in the form of sessions provide the contracting parties with a forum for settling their differences and further negotiations on trade liberalization.[41]

Dispute settlement process under GATT has evolved during its numerous rounds of negotiations.[42] These negotiations facilitated world trade liberalization, mostly by the use of tariff reductions, and established principles and rules in the international trade world which were

[39] The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 2017, Cambridge: Cambridge University Press. ISBN 978-0-521-78580-8., p414
[40] MGT/33/55. THE GENERAL AGREEMENT ON TARIFFS AND TRADE - What it is and what it has done. GATT Secretariat, 1955, Available at: https://docs.wto.org/gattdocs/q/GG/MGT/55-33.PDF
[41] *Ibid.*
[42] The rounds earned their names usually from a place where they took place – Tokyo, Annecy, Uruguay.

later adopted and built upon by the World Trade Organization. The dispute settlement process was no exception.

Articles XXII and XXIII of the GATT 1947 agreement laid the foundation for the system, which has itself progressively changed during the years via a codification of emerging procedural practices. There were several important documents shaping the system throughout the years. In the form of decisions and understandings it was The *Decision of 5 April 1966 on Procedures under Art. XXIII*, The *Understanding of Notification, Consultation, Dispute Settlement and Surveillance*, adopted on 29 November 1979, The *Decision on Dispute Settlement*, contained in the Ministerial Declaration of 29 November 1982 and The *Decision on Dispute Settlement* of 30 November 1984.[43]

Art. XXII of the GATT establishes a simple procedure of consultation, where it affords every contracting party an opportunity to make a representation to any other contracting party. The contracting party subjected is to "*accord sympathetic consideration*" for such representations. The contracting parties are essentially obliged to hear one another's concerns as the first stage of any sort of a dispute settlement proceedings, with the aim of amicably resolving the matters before they become a real point of contention.

Art. XXIII titled *"Nullification and impairment"* is nearly identical to Art. 93 of the Havana Charter with only a small difference in wording. It permits a contracting party to present a written proposal to the offending party when they feel their benefits are being nullified or impaired. If there is no satisfactory outcome, the matter may be referred to the contracting parties, mirroring the step of the ITO process where the Conference gets involved. Owing to GATT's specific structure (or rather lack thereof), no step resembling that to the Executive Board under the ITO is undertaken. On the level of the contracting parties, the Parties are empowered to authorize suspensions of concessions and obligations in cases where it deems appropriate, and the party may formally request withdrawal from the agreement.[44] Due to the positive consensus required for every step of the process, the whole process was predicated on the parties' diplomatic and negotiating skills.

[43] RÜCKLOVÁ, Alžběta. WTO Dispute Settlement System: The Appellate Body Crisis [online]. Praha, 2019 [cit. 2023-06-26]. Dostupné z: https://theses.cz/id/ozbpfx/. Diplomová práce. Vysoká škola ekonomická v Praze. Vedoucí práce Ludmila Štěrbová., p5

[44] GATT 1947 Articles XXII a XXIII

The literature agrees that major impediment to the efficient functioning of GATT's dispute settlement system was the unilateral consensus that was required for any decision.[45] Consensus was required for an establishment of the panel and for the adoption of its recommendation.[46] This logically meant that even the losing party had to support the respective proposals, which presents the option of blocking the functioning of the system.

The *Decision of 5 April 1966 on Procedures under Art. XXIII* extended the Art. XXII and XXIII when it introduced the concept of a panel to the proceedings. First it gave less-developed members the option to ask Director-General to facilitate a solution in two months. When the matter failed to resolve in two months, it was referred to the rest of the contracting parties. Second round of consultations was conducted and should there still be an issue, a panel of experts was to be appointed. In 60 days, the panel deliberated on a recommendation, which it then presented to the contracting parties. In another 90 days the parties are to be informed on the actions taken in view of the recommendation. Should the nullification and impairment continue, the injured party could be authorized to suspend concessions and other obligations arising from GATT towards the other party.

The workings of the panel were clarified, and the entire system strengthened by the *Understanding on Notification, Consultation, Dispute Settlement and Surveillance* adopted on 29 November 1979. Numerous procedural specifications were provided, such as panel composition and establishment, with a focus on ascertaining swiftness and effectiveness of the entire process.[47] The Ministerial Conference of 1982 in Geneva recognized this and noted that no major change is required in this framework, however it again reiterated the need for cooperation and clarified on some of the provisions of the 1979 Understanding.[48]

1.5. The Uruguay round

The Uruguay Round negotiations, initiated in 1986, emerged as a response to the escalating issues within the GATT dispute settlement system during the 1980s. Recognizing the need for improvement and reinforcement, both developing and developed countries among the

[45] M. MCRAE, Donald, 2021. GENERAL AGREEMENT ON TARIFFS AND TRADE. United Nations Audiovisual Library of International Law., p6
[46] Article XXIII of the GATT 1947
[47] e. g. 3 to 5 members in a panel, non-membership of panel members affiliated with the countries in the dispute, thirty-days establishment and similar.
[48] Ministerial Declaration of GATT, adopted in November 1982

contracting parties to GATT 1947 agreed on the need for significant negotiations related to dispute settlement.

In the midst of the Uruguay Round negotiations in 1989, as progress was being made, the contracting parties were ready to implement certain preliminary outcomes known as the "*early harvest*."[49] As such they adopted the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures. This decision, intended to be applied on a trial basis until the conclusion of the Uruguay Round, already incorporated many of the rules that would later be enshrined in the Dispute settlement understanding (DSU), the defining agreement of today's dispute settlement system. Notably, it introduced the right to a panel and imposed stringent timeframes for panel proceedings (30 days to consider before adoption), addressing the need for expediency in dispute settlement. However, key issues remained unresolved, such as the procedure for adopting panel reports only unilaterally and the absence of appellate review.[50]

As the negotiations progressed and the Uruguay Round concluded, significant changes were finally agreed on. The Round's most pivotal achievement, which fundamentally reshaped the dispute settlement landscape, was the establishment of the DSU. Under the DSU, the right of individual parties to block the appointment of a panel or the adoption of a report was eliminated. The dispute settlement structure had done away with the principle of positive consensus at last, and the DSU introduced the core foundational principles for both the Dispute Settlement Body and the Appellate Body.

1.6. The nature of the GATT Dispute settlement system

While the GATT system displayed fundamentals native to the diplomatic approach, it adopted more legalistic elements over time.[51] The GATT's diplomatic norms were criticized for lacking the provisions for enforcement necessary to achieve compliance. Scholars note the tension within GATT between the precise and detailed substantive obligations outlined in its articles and the ambiguous and uncertain enforcement procedures that do not distinguish between breaches of legal obligations and other grievances. This contradiction reflects a jurisprudence primarily

[49] Historic development of the WTO dispute settlement system. [Online] Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm#txt3
[50] NARAYANAN, S., 2003. Dispute Settlement Understanding of the WTO: Need for Improvement and Clarification. Indian Council for Research on International Economic Relations., p10
[51] SRINIVASAN, T. N., 2005. The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian, and Legal Perspectives. SSRN Electronic Journal [online]. [accessed. 2023-06-26]. Available at: doi:10.2139/ssrn.898904, p3

shaped by diplomats rather than lawyers.[52] The GATT's settlement resolution was also somewhat disjointed, where a lot of agreements contained in them various provisions regarding the settling of disputes.

While members had access to panel proceedings (if negotiations were to fail), which would on paper produce a resolution, the caveat was the consensus required. The dispute settlement system was governed by consensus every step of the way, making it possible for a single member to block the entire proceedings, most importantly the adoption of a report. This undoubtably breeds an atmosphere of members rather resorting to under-the-counter negotiations, seeing that the system will likely not yield a resolution in a timely manner.[53]

Surprisingly enough, the system worked without any major problems until the 1980's, when consensus appeared to be harder to achieve. This was rather paradoxically in part due to the fact that the Tokyo Round of negotiations, concluded in 1979, saw the adoption of two documents on GATT procedures.[54] These strengthened the procedures, orienting them towards a more legalistic approach which sparked greater interest among the contracting parties in utilizing the strengthened procedures. They however did not represent a concise and truly enforceable system, and as the 1980s unfolded, the issues brought forth became more difficult and sensitive and its shortcomings, embodied in the consensus requirement, were laid bare.[55]

1.7. WTO Dispute Settlement

As mentioned above, a groundbreaking development occurred with the adoption of the Understanding on Rules and Procedures governing settlement of disputes (the DSU) at the end of the Uruguay Round of negotiations. It is now part of the WTO agreements as Annex 2 to the Marrakesh Agreement establishing the World Trade Organization. In its own words: "*The*

[52] HUDEC, Robert, Essays on the Nature of International Trade Law by SRINIVASAN, T. N., 2005. The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian, and Legal Perspectives. SSRN Electronic Journal [online]. [accessed. 2023-06-26]. Available at: doi:10.2139/ssrn.898904
[53] BUSCH, Marc L. and Eric Reinhardt, 2003. The Evolution of GATT/WTO Dispute Settlement. Trade Policy Research. Available at: https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=ac1b5da39f9c6397d95f51d7d4628f45f5131510
[54] An *Agreed Description of Customary Practice* and an *Understanding on Dispute Settlement*
[55] Historic development of the WTO dispute settlement system. [Online] Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm#txt3

dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."[56]

The DSU significantly enhances the dispute settlement procedures of the GATT. These improvements include:

1) Establishing a unified dispute settlement system: The DSU establishes a unified dispute settlement system that covers all aspects of the WTO, including trade in services and intellectual property.
2) Reinforcing the right to initiate panel processes: The DSU reaffirms and clarifies the right of a complaining government to initiate a panel process, preventing any blocking attempts at this stage. This ensures that dispute cases can proceed without undue delays and hindrances.
3) Establishing a new appellate procedure and limiting the consensus requirements: The DSU introduces a novel appellate procedure with the Appellate Body and introduces significant changes regarding the consensus[57]

The timely and structured resolution of disputes is of significant importance. It serves to prevent the adverse consequences of unresolved international trade conflicts and addresses imbalances between stronger and weaker participants. By ensuring that disputes are settled based on established rules rather than relying on power dynamics, a more equitable outcome can be achieved.

The DSU is of an overarching nature since it provides to WTO members a compulsory venue to resolve their disputes. This exclusivity has a double legal impact. First it sets out what is viewed as prohibited in the context of international trade, and second it ensures that members cannot submit their grievances to another forum.[58] The Understanding covers the *Agreement Establishing the World Trade Organization, Multilateral Agreements on Trade in Goods*, *General Agreement on Trade in Services*, *Agreement on Trade-Related Aspects of Intellectual Property Rights* and the plurilateral agreements *Agreement on Trade in Civil Aircraft* and

[56] The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 2017, Cambridge: Cambridge University Press. ISBN 978-0-521-78580-8, p355
[57] JACKSON, John, 2000. The Role and Effectiveness of the WTO Dispute Settlement Mechanism. Brookings Trade Forum [online]. 2000(1), 179–219 [accessed. 2023-06-27]. Available at: doi:10.1353/btf.2000.0007, p8
[58] HOEKMAN, Bernard M., Research Fellow at the Center for Economic Policy Research and Senior Economist Bernard M HOEKMAN and Petros C. MAVROIDIS, 2007. World Trade Organization (WTO): Law, Economics, and Politics. Routledge. ISBN 9781134121564., p78

Agreement on Government Procurement.[59] This marks a departure from a former practice under GATT of a member choosing under which agreement to pursue a dispute resolution.

The DSU further applies to all "*covered agreements,*"[60] including new ones such as the *Agreement on Agriculture*, the Agreement on the Application of Sanitary and Phytosanitary Measures, the *Agreement on Antidumping,* the *Agreement on Subsidies and Countervailing Measures*. Some of the covered agreements also contain their special rules and procedures applicable only to them. They serve as *lex specialis* and thus prevail in the case of conflict with the general rules of the DSU.[61]

A conflict typically arises when a trade policy measure of one Member is viewed as in conflict with the obligations set out in the WTO Agreement by another Member or Members. Such a measure can be challenged under the dispute settlement system by the party that feels aggrieved.

If the parties involved in a dispute fail to reach a mutually agreed solution, the complainant is entitled to a procedure governed by the established rules. This procedure involves an impartial body, consisting of panels and the Appellate Body, which examines the merits of the complainant's claims. The desired outcome, if the complainant succeeds, is to rectify the measure that is deemed inconsistent with the WTO Agreement. Compensation and countermeasures, such as the temporary suspension of obligations, serve only as a secondary response (as outlined in Art. 3.7 of the DSU).

The system is equally significant for respondents whose measures are challenged, as it offers an opportunity to defend themselves against the complainant's claims. In this manner, the dispute settlement system upholds the rights and obligations of Members as stated in the WTO Agreement (Art. 3.2 of the DSU). The decisions rendered by the involved bodies are intended to correctly interpret and apply the rights and obligations outlined in the WTO Agreement. They must not change the applicable WTO law between the parties or, in accordance with the DSU, augment or diminish the rights and obligations established in the WTO Agreements (as stated in Art. 3.2 and 19.2 of the DSU).

[59] RÜCKLOVÁ, Alžběta. WTO Dispute Settlement System: The Appellate Body Crisis [online]. Praha, 2019 [cit. 2023-06-26]. Available at: https://theses.cz/id/ozbpfx/. Diplomová práce. Vysoká škola ekonomická v Praze. Vedoucí práce Ludmila Štěrbová., p7
[60] Listed in DSU Appendix 1
[61] DSU Art. 1(2)

It is important to note that participants in the dispute settlement system may only be the governments of the WTO Members. It follows that no private entities, be it individuals, companies or NGOs, may play a direct role in the proceedings. Since most often they are the ones directly exposed to the measures allegedly violating the WTO Agreement, they pressure their governments who then act on their behalf and bring the matter forward. Such a process is often internally codified. Some marginal role can be attributed to such actors however, mainly in the form of submitting *amicus curae* briefs.[62]

1.7.1. WTO Bodies involved in the Dispute settlement system

The dispute settlement process involves multiple bodies. The most crucial one is the Dispute Settlement Body (DSB), the rest are the parties, the Director-General and the WTO Secretariat, panels, and the Appellate Body (AB). The panels and AB are the bodies where the dispute resolution's substantive proceedings take place.

Originating from the General Council's mandate and legitimacy (Art. IV:3 of the WTO Agreement), the DSB is an administrative, political body, consisting of governmental representatives nominated by WTO Members. These are civil servants, usually from the Members' diplomatic corps affiliated with ministry of foreign affairs and/or trade. Its task is to oversee the entire dispute settlement process.

The DSB possesses the power to carry out several key actions in the dispute settlement process. These actions include establishing panels to handle disputes, adopting the reports issued by panels and the Appellate Body, monitoring the implementation of rulings and recommendations, and authorizing the suspension of obligations outlined in the covered agreements (Art. 2.1 of the DSU).[63] Details of the procedure will be discussed in a following chapter.

The DSB functions based on the general consensus, either positive or negative. The general rule is to take decisions by consensus, which is defined as being achieved when no present Member formally objects.[64] The major development mentioned in the previous chapter is the fact that in

[62] WTO. Disputes - Dispute Settlement CBT - Introduction to the WTO dispute settlement system - Participants in the dispute settlement system - Page 1 [online] [accessed. 2023-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm
[63] WTO, Disputes - Dispute Settlement CBT - WTO Bodies involved in the dispute settlement process - The Dispute Settlement Body (DSB) - Page 1 [online] [accessed. 2023b-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm
[64] Footnote 1 to Art. 2.4 of the DSU

some of the most important instances, the DSB must approve the decision unless there is a negative consensus against it. If only a single Member wishes for the decision to be taken, it shall be taken, they merely need to insist.[65] These are the decisions to establish a panel, adopt a panel and Appellate Body report and authorize retaliation.

The Director-General (DG) of the WTO and the WTO Secretariat also play a role in the dispute settlement process. The DG can offer their assistance, including good offices, conciliation, or mediation, to help Members settle disputes[66]. They are also responsible for convening meetings of the DSB and appointing panel members. In cases involving least-developed countries, if consultations fail to produce a satisfactory solution, the Director-General can offer their assistance upon request before a panel is requested[67]. To DG reports the staff of the WTO Secretariat, which further serves in a supporting role to Members and the DSB.[68]

The institution of panels has been a vital part of the system ever since the GATT days. Panels are composed of three (in exceptional cases that might rise to five) persons, that have been previously suggested by the Members. Such a person must be a "*well qualified governmental and/or non-governmental individual"*[69] It is these panels whose establishment can no longer be so easily blocked. The function of panels is to make an objective assessment of the facts of the case, to determine the conformity to and applicability of the relevant covered agreements. The goal of panels is to provide the DSB with a basis on which the DSB can make recommendations or give rulings.[70]

The DSU in its groundbreaking Art. 17 creates the Appellate Body (AB) as a standing institution to review Panel rulings. It is composed of seven persons, each appointed for a four-year term by the DSB. They must possess a demonstrated expertise in law and international trade and must not be affiliated with any government. The Appellate Body must be diverse, as to be "*broadly representative of membership in the WTO."*[71] Of those seven persons, cases are heard in divisions of three members, however every member is expected to keep themselves informed on

[65] WTO, Disputes - Dispute Settlement CBT - WTO Bodies involved in the dispute settlement process - The Dispute Settlement Body (DSB) - Page 1 [online] [accessed. 2023b-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm
[66] DSU Art. 5.6
[67] DSU Art. 24.2
[68] WTO. Disputes - Dispute Settlement CBT - Introduction to the WTO dispute settlement system - Participants in the dispute settlement system - Page 1 [online] [accessed. 2023-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s2p1_e.htm
69 DSU Art. 8.4, 8.6
70 DSU Art. 11
71 DSU Art. 17.3

ongoing disputes. This serves to ensure consistency of rulings through a collegiality of members.[72] The AB is currently unable to deliberate on any review appeals. On 30 November 2020, the term of the last sitting member expired, and the AB is now vacant.[73]

International trade disputes often involve complex scientific or technical questions. Panelists, who are experts in trade but not necessarily in scientific fields, have the right to seek information and technical advice from experts. They can gather information from any relevant source, but they must inform the Member before seeking information from individuals or bodies within their jurisdiction.[74] Additionally, specific provisions in the covered agreements authorize or require panels to seek expert opinions on relevant matters.[75]

1.7.2. Dispute resolution procedures

The WTO dispute settlement procedure is generally initiated when one Member (the complainant) requests consultations regarding the conduct of another Member (the respondent). Upon transmission of the request to the secretariat, a DS number is assigned to the dispute, and all relevant documents bear this DS number. In some cases, multiple complaints may be consolidated into a single proceeding, resulting in more than one DS number for a particular set of issues involving complaints against different WTO members. When multiple countries bring complaints against the same measure, a single panel consolidates and reviews these complaints.[76]

The first stage of the formal dispute settlement process consists of the mandatory bilateral consultations between the complainant and the respondent. These consultations aim to reach a satisfactory solution without resorting to litigation. They also help clarify the claims and nature of the measure in question for the complainant. The complainant must address the request for consultations to the responding member and notify the request to the DSB, as well as relevant councils and committees. The complainant can request consultations under specific articles of

72 MATSUSHITA, Mitsuo, Thomas J. SCHOENBAUM, Petros C. MAVROIDIS and Michael HAHN, 2015. The World Trade Organization: Law, Practice, and Policy. Oxford University Press. ISBN 9780191066917., p87
73 WTO. Dispute settlement - Appellate Body. Dispute settlement - Appellate Body [online] [accessed. 2023a-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm
74 DSU Art. 13.1
75 WTO. Disputes - Dispute Settlement CBT - WTO Bodies involved in the dispute settlement process - The Dispute Settlement Body (DSB) - Page 1 [online] [accessed. 2023b-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s6p1_e.htm
76 JACKSON, John, 2000. The Role and Effectiveness of the WTO Dispute Settlement Mechanism. Brookings Trade Forum [online]. 2000(1), 179–219 [accessed. 2023-06-27]. Available at: doi:10.1353/btf.2000.0007, p186

the GATT 1994 or GATS, which determine the ability of other WTO members to join as third parties. If held pursuant to the relevant articles[77] other members are allowed to join the dispute. They may join on both sides of the dispute, either because they feel similarly aggrieved by the measure or because they maintain a similar measure, which they fear might be challenged as well.[78]

The WTO Members are encouraged to be prudent about invoking the dispute settlement procedures. Art. 3.7 of the DSU cautions to consider whether the action "*would be fruitful"* and "*would secure a positive resolution to a dispute."* The preference for an amicable, diplomatic solution in international relations is evident, though it cannot always be achieved. When a written request for consultations is submitted in with the stated reasons for the request, the process officially begins. The responding member must accord "*sympathetic consideration"* and afford "*adequate opportunity"* to the request and consultations.[79] A response is expected in 10 days, no more than 30 days may pass since the receipt to enter the consultations. Should the respondent fail those deadlines, the establishment of a panel may immediately be requested. Otherwise, if no compromise is reached, the complainant can request the establishment of a panel after 60 days.

As a means of alternative dispute resolution, the Members can agree on using binding arbitration in lieu of the DSU procedures[80]. In this case, the parties to the dispute are free to define the issues and the procedures. The arbitration award given in such a case is enforceable through the WTO. DSB and WTO sanctions may be imposed for non-compliance.[81] Resorting to arbitration has been exceedingly rare until the inception of the MPIA in 2020, as we will discuss later.

If consultations fail to resolve the dispute within 60 days (or 20 days in urgent cases), the complaining party may request the establishment of a Panel. The Panel must be established at the next DSB meeting unless consensus is reached not to establish one.[82] Panels typically consist of three qualified individuals chosen from lists maintained by the Secretariat, (in exceptional cases

[77] e. g. the Art. XXII of GATT 1994, Art. XXII:1 of GATS or corresponding provisions in other covered agreements
[78] RÜCKLOVÁ, Alžběta. WTO Dispute Settlement System: The Appellate Body Crisis [online]. Praha, 2019 [cit. 2023-06-26]. Dostupné z: https://theses.cz/id/ozbpfx/. Diplomová práce. Vysoká škola ekonomická v Praze. Vedoucí práce Ludmila Štěrbová., p16
[79] DSU Art. 4.2
[80] DSU Art. 25
[81] WTO. Arbitration. Disputes - Dispute Settlement CBT - WTO Bodies involved in the dispute settlement process - The Dispute Settlement Body (DSB) - Page 1 [online] [accessed. 2023b-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s5p5_e.htm
[82] DSU Art. 8.3 - The rule of negative consensus as mentioned above.

five). If the parties fail to agree on panelists within 20 days, the Director-General appoints them. Panelists cannot be citizens of the states involved in the dispute, including customs unions and common markets.

The parties also have 20 days from the Panel's establishment to agree on the terms of reference, usually called ‘claims’, which identify the specific measures and provide a concise summary of the legal basis of the complaint. Once the terms of reference are adopted, they cannot be changed throughout the dispute settlement process, although parties can expand the claim without altering its basis. The content is vital since it determines the scope of panel’s jurisdiction and examination.[83]

Once the request for panel establishment is adopted, the Secretariat puts forward potential panelists, subject to approval by the concerned members. If no agreement is reached on the panel's composition within 20 days of the request, the parties can request the Director-General's intervention to determine the panel's composition. Following this, the panel proceedings commence, as outlined in Appendix 3 of the DSU, which provides a comprehensive working calendar with specified time periods. Deliberations within the panel remain confidential, and parties involved must refrain from any attempts to influence the panel's decision. While the general expectation is for the panel to circulate its final report within six months from its formation, the unfortunate reality is that panel proceedings often extend to twelve months or even longer.[84]

The Panel process comprises two main components: (1) written submissions from parties and third parties, and (2) oral hearings involving parties and third parties. During this process, the Panel has the authority to gather information and technical advice from suitable sources, and it exercises discretion in determining which evidence to accept or reject. Moreover, the Panel can request an advisory report from an Expert Review Group. Following these steps, the Panel submits a draft report to the disputing parties, who have the opportunity to comment on it. After the parties voice their comments, an interim report containing factual findings and legal conclusions is prepared by the Panel.[85] The interim report is provided to the parties, which can further ask for a meeting to discuss the report. The Panel then decides whether further

[83] DSU Art. 7.1
[84] RÜCKLOVÁ, Alžběta. WTO Dispute Settlement System: The Appellate Body Crisis [online]. Praha, 2019 [cit. 2023-06-26]. Dostupné z: https://theses.cz/id/ozbpfx/. Diplomová práce. Vysoká škola ekonomická v Praze. Vedoucí práce Ludmila Štěrbová., p16
[85] MATSUSHITA, Mitsuo, Thomas J. SCHOENBAUM, Petros C. MAVROIDIS and Michael HAHN, 2015. The World Trade Organization: Law, Practice, and Policy. Oxford University Press. ISBN 9780191066917., p93

proceedings are needed and if not, the Panel completes a final report that is put to DSB for adoption.[86]

After the report is circulated to members, the DSB is granted a 20-day period to consider it. Any objections to the report must be raised at least 10 days before the DSB meeting. The report must be adopted by the DSB within 60 days of its submission, unless there is a negative consensus against adoption. If a party has indicated its intention to appeal, the DSB cannot consider the report until the appeal process is completed.[87] If there however is no appeal, the dispute immediately enters the implementation phase.

1.7.3. The Appellate review

Either the claimant or the respondent may appeal the report to the Appellate Body (AB). The AB operates in divisions of three members each. Its members are appointed for four-year terms and must not have any government affiliation. With the authority to uphold, modify, or overturn legal interpretations made by the Panel, the AB plays a crucial role. The appellate process is generally required to be completed within 60 days, but it must not exceed 90 days. Within 30 days of the circulation of an AB report, the report must be adopted by the DSB unless a consensus decision is reached by the DSB to not adopt the report. Following the circulation of an AB report, the report must be adopted by the DSB within 30 days, unless a consensus decision by the DSB opposes its adoption.[88] The procedure for selecting specific AB members for each dispute is kept strictly confidential to ensure impartiality and fair decision. With the power to uphold, modify, or overturn legal interpretations made by the Panel, the AB plays a vital role.

The DSU is sparse with articles concerning the appellate review process. Only the Art. 17 and Art. 16.4 of the DSU specifically refer to the review process and the AB has adopted its own 'Working procedures for Appellate Review'[89] pursuant to Art. 17.9 of the DSU. The appellate review follows a similar pattern to the panel process. Oral and written submissions are followed by a hearing held by the AB members, ending with the preparation of an AB report. An AB report has two sections – a part describing the factual and procedural background of the dispute

[86] JACKSON, John, 2000. The Role and Effectiveness of the WTO Dispute Settlement Mechanism. Brookings Trade Forum [online]. 2000(1), 179–219 [accessed. 2023-06-27]. Available at: doi:10.1353/btf.2000.0007, p187
[87] DSU art. 16.2, 16.4
[88] MATSUSHITA, Mitsuo, Thomas J. SCHOENBAUM, Petros C. MAVROIDIS and Michael HAHN, 2015. The World Trade Organization: Law, Practice, and Policy. Oxford University Press. ISBN 9780191066917., p84
[89] Working procedures for appellate review. WT/AB/WP/6, DISPUTE SETTLEMENT: APPEALS PROCEDURES. Available at: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm

with summaries of the arguments by the parties and third parties, and 'findings' section, where the AB states whether the appealed panel findings and conclusions are upheld, and what led the AB in detail to such conclusion.[90]

Following the adoption of either the panel report or the Appellate Body report, the losing member must take steps to ensure compliance with WTO rules or seek a mutually acceptable resolution in cases of non-violation complaints. The concerned member is then granted a reasonable period to implement the recommendations and rulings provided by the panel. Art. 21.3 of the DSU offers three options for determining this implementation period: the member can propose a specific timeframe, subject to approval by the DSB; alternatively, the parties involved in the dispute can mutually agree on a timeframe within 45 days of the report's adoption; or, within 90 days of the panel report adoption, an arbitrator can determine the implementation period. However, in practice, the implementation period often extends as members tend to opt for arbitration at later stages of the dispute.[91]

The DSB is charged with monitoring the implementation of recommendations by the panel and AB. The concerned member provides the DSB with continuous reports of the steps they have taken. If there is a disagreement in the way how the implementation is being undertaken, parties may request a special compliance panel procedure.[92] Ultimately, in the case of non-compliance with the recommendations, the DSB may grant a permission to suspend concessions or other obligations enjoyed by the losing member until a solution is reached.[93]

The reports adopted by the AB and the panel constitute an obligation for the losing member to bring its actions or measures into conformity with WTO rules. The issue of panel jurisdiction and binding/precedential has been a point of friction for a long time and is one of the reasons for the current crisis, as shall be discussed in a later chapter.

The scope of the AB's review authority is set out in Art. 17.6:

> "*An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.*"

[90] WTO. Appellate Review. Disputes - Dispute Settlement CBT - Introduction to the WTO dispute settlement system - Participants in the dispute settlement system - Page 1 [online] [accessed. 2023-06-27]. Available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p4_e.htm
[91] MATSUSHITA, Mitsuo, Thomas J. SCHOENBAUM, Petros C. MAVROIDIS and Michael HAHN, 2015. The World Trade Organization: Law, Practice, and Policy. Oxford University Press. ISBN 9780191066917., p94
[92] DSU Art. 21.5
[93] DSU Art. 22.8

The goal of the dispute settlement system is set out in Art. 3.2:

> *"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."*

1.8. The nature of the WTO's dispute settlement system

The WTO system as compared to GATT's is leaning significantly more towards the legalistic approach. The WTO established a structured, two-tiered system, with the practice of negative consensus for many of its vital proceedings. It unified the disjointed settlement proceedings found in many agreements into a single system, to be used as a basis for all disputes. The WTO reinforced the panel process, giving each member a distinct right to initiate the panel proceedings. It introduced the Appellate Body, with its significant review power, which created (for better or worse) a body of jurisprudence spawning a predictable and reliable regime. The WTO with its strong dispute settlement system favors the certainty and consistency provided by the legalistic approach. However, it is important to acknowledge that both the GATT and the WTO systems combine elements of diplomatic and legalistic approaches in their dispute settlement mechanisms.[94]

The DSU reflects the objective (mainly of the U.S) of creating a more judicial mechanism for dispute resolution. A system that is fairer, more predictable, and less reliant on diplomatic negotiations. While the DSU still incorporates diplomatic elements, such as the goal of reaching a "*mutually agreed solution*" and provisions that encourage negotiation, it primarily establishes a rule-bound process that is a beyond the GATT process.[95] Yet it is still built on the pre-existing GATT regime. The WTO Agreement Art. XVI (1) states that: "*except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the*

[94] SRINIVASAN, T. N., 2005. The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian, and Legal Perspectives. SSRN Electronic Journal [online]. [accessed. 2023-06-26]. Available at: doi:10.2139/ssrn.898904, p3

[95] SHEDD, Daniel T., 2012. Dispute Settlement in the World Trade Organization (WTO): An Overview. Congressional Research Service. Available at: https://www.everycrsreport.com/reports/RS20088.html, p1

decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947."[96]

The motivation for the shift in approach (from GATT's diplomatic to WTO legalistic) stemmed from the USA's and ECs' increased unilateralism tendencies that developed in the 1980s. With the renewed interest in dispute settlement mechanism in particular from developing countries, developed countries with USA leading the charge felt that they were getting the shorter end of the stick due to the lack of enforcement of GATT rules. This led to the USA threatening unilateral action under its own trade laws with the aim of correcting what they viewed as unfair.[97]

The Uruguay rounds negotiators had valid reasons for wanting to make the system more legalistic. On one hand, they feared that if the GATT system was not strengthened, the unilateralism tendencies of major trading countries would only increase. On the other hand, there was a fear also that what success the USA saw with their policies would make them ironically disinterested in pursuing a more robust dispute settlement system. The WTO system was ultimately adopted as a more rigid and structured rule-based framework.

[96] WTO Agreement Art. XVI:1

[97] SRINIVASAN, T. N., 2005. The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian, and Legal Perspectives. SSRN Electronic Journal [online]. [accessed. 2023-06-26]. Available at: doi:10.2139/ssrn.898904, p6

2. The Crisis of the dispute settlement system

The dispute settlement system is currently in crisis. The AB cannot deliberate or make rulings, there are no members left in the AB. How did this happen? What came to pass that the multilateral trade system finds itself in this situation? In this chapter I will examine roots of the crisis, explore how the DSU review failed and how the US began its blocking of the appointments, ultimately leading to the vacant AB.

2.1. Roots of the US's criticism of the Dispute Settlement System

The United States has historically taken advantage of the dispute settlement system within the WTO, considering it an improvement over the previous system used in trade disputes under the old GATT system.[98] In 1988, the US Congress insisted on the establishment of a new system during the Uruguay Round of multilateral trade negotiations, resulting in the approval of the DSU in 1994. The DSU aimed to ensure security, predictability, and the preservation of rights and obligations among participating countries. As mentioned in a previous chapter, others in the Uruguay Round viewed the DSU as a shield against US unilateralism, particularly concerning the growing use of Section 301 of the 1974 US trade law, which authorized countermeasures against perceived unfair foreign trade practices.[99] American officials believed at the time that the United States would act as the complainant more often than the respondent in disputes, hence the US support for further institutionalization with stronger rule based system.

The US's view changed late into the negotiations, when senior American officials began claiming that the new rules encroached upon US sovereignty. The Uruguay Round Agreements Act mandated a five-year review of US participation in the WTO, and in 1995, Senator Robert Dole, a Kansas Republican and the future Republican presidential nominee, called for potential amendments to the DSU and even contemplated the idea of withdrawing from the WTO in the event of adverse WTO rulings.[100] Senator Dole, worried about the AB overstepping its mandate,

[98] VAN DEN BOSSCHE, Peter, 2005. The Law and Policy of the World Trade Organization [online]. Cambridge: Cambridge University Press [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.1017/cbo9781139165143, p7

[99] PAYOSOVA, Tetyana, 2018. The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures. Peterson Institute for International Economics. Available at: https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures, p2

[100] WTO Dispute Settlement Review Commission Act by PAYOSOVA, Tetyana, 2018. The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures. Peterson Institute for International Economics. Available at: https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures, p2

suggested a 'three strikes' rule. A US review panel would evaluate controversial Appellate Body decisions and when it determined that on three separate occasions the AB had indeed overstepped, it would recommend a US withdrawal from the WTO.[101] The fears of the US of the dispute settlement system getting out of control indeed have a long history.

2.2. Review of the Dispute Settlement Understanding

The conclusion of the Uruguay Round in April 1994, marked by the Ministerial Conference in Marrakesh, saw an agreement among countries to conduct a comprehensive review of the DSU by 1998. Since the DSU was such a major innovation, the review was to commence within four years of the entry into force of the WTO. Unfortunately, these talks proved unsuccessful. Later during the Doha Ministerial Conference in 2001, WTO members reached a consensus to initiate separate discussions on enhancing and clarifying the DSU, distinct from the Doha Round negotiations. However, there had been minimal advancement in this regard.[102]

Its purpose was to generate suggestions for enhancing and clarifying the DSU. Even today, it still formally remains ongoing. In theory, this provided an institutional mechanism to address the underlying matters of the AB crisis, eliminating the need for the establishment of a new group or committee, as all members could participate in the Review. Given the belief that it was functioning effectively at first, there was not much pressure to change the DSU in the early 2000s. The Review generated some proposals to enhance the DSU's operation, however, majority of these proposals were not accepted and the system overall had very little tangible results. Participation in the Review has been limited to the major players, but several developing countries also presented their own suggestions. In 2019 a report by Ambassador Seck, then a chairperson of the working group tasked with review of the DSU, provided an update on the current situation after 20 years of discussion. The report both serves as an acknowledgment of the deadlock and a description of what has transpired so far.[103]

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[101] HOEKMAN, Bernard and Petros C. MAVROIDIS, 2022. WTO Dispute Settlement and the Appellate Body Crisis - Back to the Future? Bertelsmann Stiftung. Available at: https://cadmus.eui.eu/bitstream/handle/1814/70208/Hoekman_Mavroidis_2020.pdf?sequence=1&isAllowed=y, p6

[102] PAYOSOVA, Tetyana, 2018. The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures. Peterson Institute for International Economics. Available at: https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures, p3

[103] HOEKMAN, Bernard and Petros C. MAVROIDIS, 2022. WTO Dispute Settlement and the Appellate Body Crisis - Back to the Future? Bertelsmann Stiftung. Available at: https://cadmus.eui.eu/bitstream/handle/1814/70208/Hoekman_Mavroidis_2020.pdf?sequence=1&isAllowed=y, p12

It can be safely said that the efforts of the DSU review did not amount to much if anything at all. The process was slow, inflexible, and impeded by the need for consensus to change anything. The organization of discussions was lacking, no attempt was made to establish criteria for including which items to be put on the agenda. The most contentious issues were never discussed in a comprehensive manner, instead the efforts opted for collecting the low-hanging fruits, where agreement had already emerged through consistent practice without objection.[104]

2.3. The US blockage of the appointments

US's discontent with its position in the dispute settlement system and the AB first notably manifested itself with the appointments of its members to the AB. James Bacchus served as the first US member in the AB, he was in office for the maximum number of two terms. He was replaced in 2003 by Merit Janow, who served for only one term. Her successor, Jennifer Hillman had also served only one term before being replaced. They were supposedly not put forward for another term by the US administration because they were not assertive and aggressive enough in defending the position of the US in the AB.[105]

The US had also blocked the appointments of numerous well-qualified persons in the past. In 2013 they had rejected James Gathii, a tenured professor with endowment at a Chicago university with plenty of experience with international arbitration and expertise in international trade law. In 2016 the US stepped up its opposition by rejecting the reappointment of the Korean law professor Chang Seung Wha[106], on the grounds of apparent judicial prejudice,[107] arguing that this blockage was vital to prevent the emergent practice of overstepping the boundaries by AB members.[108]

In early 2017 the US rejected the request of the EU to conduct a joint procedure for the replacement of two AB members whose term was about to end, thus no replacement process was initiated. Later the same year the same followed when yet another member's term was expiring,

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[104] *Ibid. p13*
[105] DUNOFF, Jeffrey L, Mark A. POLLACK. (2017) The Judicial Trilemma, The American Journal of International Law; Washington Vol. 111 (2), DOI:10.1017/ajil.2017.23, p2
[106] Mr Chang studied at Harvard Law School and according to most observers had served a distinguished first term.
[107] KUIJPER, P.J., 2018. From the Board: The US Attack on the WTO Appellate Body. Legal Issues of Economic Integration [online]. 45(Issue 1), 1–11 [accessed. 2023-06-27]. Available at: doi:10.54648/leie2018001, p2
[108] VIDIGAL, Geraldo, 2019. Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis. The Journal of World Investment & Trade [online]. 20(6), 862–890 [accessed. 2023-06-27]. Available at: doi:10.1163/22119000-12340160, p867

and the AB was now at a severely reduced capacity to decide cases.[109] The US had made it increasingly clear that it would not be accepting any new AB members until its concerns with the AB's functioning were addressed. This repeated itself with yet another US refusal, stating that it did not have any particular objections to the members' conduct as individuals, but rather the AB's "*abusing the authority it had been given within the dispute settlement system"* and pointing to a "*persistent overreach"* by the AB in its conduct.*[110]*

During the General Council meeting on December 12, 2018, WTO Members reached an agreement to initiate an informal process with the aim of resolving the deadlock concerning the appointment of Appellate Body members. Ambassador David Walker from New Zealand was designated as the 'facilitator', working alongside the Chair of the General Council to lead this effort. Commencing in January 2019, the meetings were held with the view that "*the immediate outcome of the informal process should be the unblocking of the selection process* (of Appellate Body Members) *and that discussions between members should be solution-oriented, focused and issue specific*."[111]

Several key issues were discussed in the 'Walker' process, as it came to be known:

1) Practice of Appellate Body Members completing appeal proceedings even after their mandate had expired
2) Proceedings exceeding the time limit of 90 days
3) Municipal Law review – issues of law and of fact
4) Issue of Advisory opinions
5) Question of precedent
6) Selection process of AB Members
7) Judicial overreach

On the 28th of November 2019, almost a year after his appointment, H.E. David Walker presented a draft decision to the General Council of the WTO. The text included many articles and compromises on the key issues presented. The US representatives however ultimately

[109] KUIJPER, P.J., 2018. From the Board: The US Attack on the WTO Appellate Body. Legal Issues of Economic Integration [online]. 45(Issue 1), 1–11 [accessed. 2023-06-27]. Available at: doi:10.54648/leie2018001, p3
[110] WTO, 'Minutes of DSB Meeting of 27 August 2018' (30 November 2018) WT/DSB/M/417, para 12.2
[111] KWA, Danish and Aileen KWA, 2019. Lights Go Out at the WTO's Appellate Body Despite Concessions Offered to US. South Centre. Available at: https://www.southcentre.int/policy-brief-70-december-2019/#more-13344, p2

decided not to adopt the report and the proposed alterations, further exacerbating the crisis, now to a critical level.

On December 2019, the number of AB members dropped to two, below the minimum of three needed to decide new appeals. Since then, the overwhelming majority of reports has been appealed by the losing party, and with not enough members to hold the hearings and render a decision, these appeals are effectively 'into the void'. [112]This paralysis of the AB has severely negatively impacted credibility of the system and its effectiveness. Today, the AB is empty, the unresolved issues are in a legal limbo and the system has been left crippled.

In response to the US blockage, a sub-set of WTO Members signed in April 2020 the Multi-Party Interim Appeal Arbitration Arrangement, the MPIA. The goal of which is to provide an interim response to the functional demise of the AB, with its own appellate review proceedings.[113] Originally counting 20 Members, the MPIA now unites 26 Members[114] in their pursuit of a viable alternative, preserving the functioning of the multilateral trading system.

2.4. Multi-party Interim Appeal Arbitration Arrangement

In April 2020 an interim solution in response to the collapse of the WTO's Appellate Body was created in the MPIA. A group of 20 WTO members[115] let a statement circulate, where they agree to use MPIA as a mechanism to arbitrate WTO disputes which would have otherwise been left in the limbo of the non-functional AB. The members make several things known in the preamble. They reaffirm their commitment to a multilateral rules-based system and acknowledge the need for an independent and impartial appeal stage. They state their determination to find a solution to

[112] VAN DEN BOSSCHE, Peter, 2022. Is there a Future for the WTO Appellate Body and WTO Dispute Settlement? World Trade Institute. Available at: https://boris.unibe.ch/164517/1/WTI_Working_Paper_01_2022.pdf, p3

[113] PAUWELYN, Joost, 2023. The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New? World Trade Review [online]. 1–9 [accessed. 2023-06-27]. Available at: doi:10.1017/s1474745623000204, Available at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B279E8A106380A510AAA28F4E1A4130F/S1474745623000204a.pdf/wtos_multiparty_interim_appeal_arbitration_arrangement_mpia_whats_new.pdf

[114] The latest to join being Japan in spring 2023.

[115] These being Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay, members whose delegations signed the statement. It can be argued that the EU itself consists of 27 WTO members, hence the number of 47 members might also be used.

the AB crisis and emphasize their belief in the WTO dispute settlement system. In the member's view, this is a temporary agreement. [116]

The MPIA functions as an interim appeal arbitration procedure under Art. 25 of the DSU. The members agree not to pursue appeals under the DSU's Art. 16.4 and 17 and instead use the possibility provided by Art. 25 of the DSU to mutually agree on arbitration proceedings. The Art. 25 offers arbitration as an alternative method of settling disputes under the WTO. The nature of arbitration is such that it offers high degree of autonomy and procedural flexibility to disputing parties,[117] the parties are free to draft or specify rules of conduct to govern the dispute, reflecting their specific interests. The panel procedure stays the same (under the DSU provisions), but the appeals happen under the MPIA. The MPIA provides a framework for the appeals procedure in its Annex 1, the option to individualize the dispute as compared to ad-hoc arbitrations is as such limited. The DSU must also still be adhered to, certain mandatory provisions cannot be omitted. This can be gleaned from Art. 3.5 of the DSU, which provides for the consistency of arbitral awards with the WTO law, as such making it impossible to choose contravening applicable law.[118] Arbitral awards awarded under the MPIA enjoy the *surveillance of implementation* regime (Art. 21), as well as the *compensation and suspension of concessions* framework (Art. 22), owing to the provision of Art. 25.4, applying both *mutatis mutandis* to arbitral awards.

The paragraph 11 of the Annex 1 leaves little room for arguing that the appeals procedure is a continuation of the DSU model, stating that "unless otherwise provided for in these agreed procedures, the arbitrations shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review."[119] The MPIA does provide some substantial changes in the appellate review, which will be discussed and compared to the grievances that the US rose against the current AB system in the following chapter.

[116] STATEMENT ON A MECHANISM FOR DEVELOPING, DOCUMENTING AND SHARING PRACTICES AND PROCEDURES IN THE CONDUCT OF WTO DISPUTES. JOB/DSB/1/Add.12, 2020, Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504
[117] MCGARRY, Brian and Nasim ZARGARINEJAD, 2022. Tracing the Powers of WTO MPIA Arbitrators. McGill Journal of dispute resolution. 8(2). Available at: https://mjdr-rrdm.ca/articles/volume-8/tracing-the-powers-of-wto-mpia-arbitrators/, p6
[118] *Ibid. p7*
[119] Paragraph 11 of the MPIA, Annex 1

3. Specific issues raised by the US, discussion on their merits and the MPIA's response

Let us now explore the specific issues raised by the US in the dispute settlement crisis. The aim is to examine the US issues concerning the functioning of the AB as set out in the Office of the United States Trade Representative (USTR) report of 2020.[120] The following issues will be discussed:

1) The AB practice of letting members finish their case work even after the expiration of their mandate
2) The practice of disregarding the mandatory 90-Day deadline for issuing an AB report
3) The controversial rendering of advisory opinions
4) The exceeding of AB's review authority
5) The binding nature of AB reports

After laying out the basis of each issue, I will be discussing the merits and legal persuasiveness of the points raised by the US. After that, a short overview of what the MPIA has to say (if anything) regarding those issues.

3.1. The Appellate Body practice of allowing members to finish their case work even after the expiration of their mandate

WTO Members enjoy the exclusive authority to appoint and reappoint persons to the Appellate Body, as provided by the Art. 17.2 of the DSU. These persons are appointed to a four-year term, with up to one reappointment available. This decision is taken by the DSB by positive consensus. The AB has adopted a procedural rule in its Working Procedures[121] that offers the departing members of the AB an opportunity to complete an appeal which they have previously adjudicated, it reads as follows:

> *"A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any*

[120] INFORMAL PROCESS ON MATTERS RELATED TO THE FUNCTIONING OF THE APPELLATE BODY – REPORT BY THE FACILITATOR, H.E. DR. DAVID WALKER (NEW ZEALAND), JOB/GC/222, Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/222.pdf
[121] Working Procedures for Appellate Review, Rule 15 (WT/AB/WP/6).

appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body."

In the view of the US, this rule is contrary to the DSU. It bases its argument on the grounds of the AB overstepping their boundaries and infringing upon the sovereign rights of the Members. The US argues that despite the clear text of the DSU, the AB has through its Working Procedures usurped a power it does not and may not possess pursuant to the aforementioned provision of the DSU.

The US likens the AB's conduct to an employee refusing to follow the law, while pointing to a procedure of their own making saying they can refuse to follow the law. While the DSU provides the AB with the authority to establish its own working procedures in the Art. 17.9,[122] the AB itself noted that "*the discretion in establishing own working procedures does not extend to modifying the substantive provisions of the DSU*." [123] In the view of the US, the practice constitutes a breach of the DSU, rather the modification of the substantive provisions, by having illegitimate members participate in appeals, which puts into question the legitimacy of reports adopted in such a manner.[124]

3.1.1. Discussion:

The US arguments regarding the interpretation of Art. 17.2 of the Dispute Settlement Understanding (DSU) are primarily based on the wording of the provision. They assert that the wording of Art. 17.2 prohibits the practice of Rule 15, leaving no room for alternative interpretations. While this interpretation seems plausible when considering the wording alone, it must be acknowledged that Art. 17.2 does not explicitly address the permissibility of a transition rule like Rule 15. The article states that DSB appoints and reappoints individuals for a four-year term, implying that no one else can appoint Appellate Body members.

However, Rule 15 of the Working Procedures does not grant the power to appoint members; instead it allows the Appellate Body to assign a former member a limited task of completing work on an appeal they were originally assigned. This task is time-limited, typically less than 90

[122] "Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the D-G, and communicated to the Members for their information."
[123] India – Patents (US) (AB) (1998), para. 92
[124] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p36

days.[125] The language of Rule 15 itself acknowledges that the person involved has ceased to be an Appellate Body member and is deemed a member solely for the purpose of completing the appeal. The counterargument to this interpretation is that, despite the absence of explicit appointment language in Rule 15, the Appellate Body's authorization for this limited extension is functionally equivalent to an appointment decision.

It is important to note that similar practice is quite common in international adjudication bodies. Rules similar to Rule 15 can be found in the Statute of the International Court of Justice[126], the Statute of the International Tribunal for the Law of the Sea[127] and the European Court of Human Rights.[128] There is also obvious logic to it - it is more efficient to have a person already invested into the process also finish it, rather than delay the proceedings by bringing in a new person altogether.[129]

The US makes the argument that the AB has surpassed its authority while drawing up the Working procedures. They have modified the substantive provisions by granting itself the ability to extend an AB member's term in regard to Rule 15, effectively substituting the appointment process envisioned by the WTO Agreement and the DSU. It is prudent to again mention the fact, that the regulation of the AB on the DSU level is at best barebones. Only a single Art. 17 deals in detail with its functioning, the rest is delegated to the Working procedures.[130] I am not alone in making the argument,[131] that given the skeletal nature of the AB regulation, the fact that such a rule is not unusual, since its employed by other international tribunals, and the fact that it serves a clearly defined, well understood and sensible objective, that such a rule is hardly in violation of the DSU. In my view, liking the Rule 15 to usurping the appointment process is both reaching and questionable, notwithstanding the general principle of interpreting provisions in good faith.[132]

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[125] DSU Art. 17.5.
[126] Art 13.3. states: *„The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun."*
[127] Art. 5.3 has the almost exact same wording as the Art. 13.3 of the ICJ Statute.
[128] Art. 23.3 of the European Convention on Human Rights
[129] KWA, Danish and Aileen KWA, 2019. Lights Go Out at the WTO's Appellate Body Despite Concessions Offered to US . South Centre. Available at: https://www.southcentre.int/policy-brief-70-december-2019/#more-13344, p2
[130] DSU Art. 17.9
[131] LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941, p37
[132] Art. 31 (1) of the Vienna treaty on law of contracts

3.1.2. MPIA

Due to its interim nature, the MPIA deals with the issue of arbitrators-in-transition rather elegantly. A 'pool of arbitrators' is composed by consensus upon the MPIA's creation as specified in Annex 2 to the MPIA. In paragraph 5, the Members agree to periodically re-compose the pool of arbitrators, starting two years after its composition, should the reasons for establishing MPIA still apply. Since there are no precise terms for each arbitrator to remain in the pool, the issue of transitions like those claimed under DSU should not occur. The re-composition of the pool of arbitrators is up to a diplomatic process, not a legal one, there is only the imperative that Members will "*periodically, partially re-compose the pool of arbitrators.*[133]"

3.2. The practice of disregarding the mandatory 90-Day deadline for issuing an AB report

Art. 17.5 of the DSU states the mandatory requirement of completing appeals within 90 days, without any exceptions. Up until 2011, the Appellate Body adhered to this rule, deviating from it only in rare instances with the consent of the parties involved. However, starting in 2011, the Appellate Body began routinely disregarding the 90-day deadline without providing any explanation or justification. Despite objections raised by the United States and other Members, this has been ongoing for a couple of years now.[134]

In the period between 1996 and 2011, the AB has strictly adhered to this deadline, exceeding it only in 14 cases out of a 101. In each of those cases, it made sure to consult the parties concerned and obtain their consent to do so.[135] The US notes a previous practice of the AB, where 'deeming letters' were submitted. Acknowledging that a breach of Art. 17.5 was inevitable to occur, the WTO Members decided to deem the future report as if it had been circulated on time.

With the appeal in *US – Tyres (China)* case, the AB suddenly and without explanation departed from the long-held practice of informing and consulting the parties when it considered that it could not meet the 90-day requirement. The US had then made clear along with other Members their concerns with this unexplained delay. Despite these protests, this continued in the future, culminating in a roughly 48% increase in the time for an appeal to get resolved between 2011

[133] Annex 2, paragraph 5 to the MPIA
[134] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p26
[135] *Ibid. p27*

and 2017. Since May 2014, not a single appeal has been completed within the 90-day period and the average from 2014 to 2017 has increased to 149 days. [136]

The US bases its criticism with this practice on the fact that in its view, had the AB limited itself only to core issues necessary for resolution, rather than with all the issues raised by the parties, it would have been possible for the AB to comply with the 90-day deadline. As such, the main reason for the delays was the AB's overreach and bogging itself down with unnecessary considerations.[137] Another argument is that it is not for the AB to decide whether to adhere to the 90-day deadline or not, and if such delays do occur, the AB is supposed to seek out an agreement from the parties for issuing a delayed report.[138]

3.2.1. Discussion:

In my view, both the criticism of disregarding the deadline in and of itself and the supposed necessity to seek out an agreement are without much merit. First of all, it is hard to comply with the impossible. If it is not in the AB's power to put out a report in 90 days, then while being in breach of the DSU, criticizing the AB for deciding not to adhere to the rule is without much ground. If the AB is struggling with too much workload, requesting strict compliance without providing either more resources, time, or better institutional conditions, is from a practical point of view nonsensical, as Brazil's delegation succinctly points out.[139]

Similarly, if the US's overarching point of criticism is non-compliance with Art. 17 of the DSU, then requesting a makeshift adjustment stemming from the good-willed approach of the AB to ask for permission in the case of delays, be made mandatory, would itself be contrary to Art. 17. There is simply no basis in either Art. 17 or the Working procedures for such process. It is my view that the steps undertaken by the AB in consulting the members were made as an effort to mitigate the negative implications of not adhering to the deadline. Saying that since this prior

[136] *Ibid. p30*
[137] Minutes of the DSB meeting of 22 June 2018 (WT/DSB/M414), Available at: https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_S005.aspx?MeetingId=150270&Language=1&StartDate=&EndDate=&SubjectId=&SearchPage=&CatIdsHash=2012219571&languageUIChanged=true#, paragraph 5.16 – 5.19.
[138] LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941, p46
[139] Minutes of the DSB meeting of 22 June 2018 (WT/DSB/M414), Available at: https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_S005.aspx?MeetingId=150270&Language=1&StartDate=&EndDate=&SubjectId=&SearchPage=&CatIdsHash=2012219571&languageUIChanged=true#, paragraph. 5.30.

practice ceased to be applied is a violation of the DSU is null, since there is no such obligation there. Again, a simple question must be asked – what is the point of asking for a permission to delay, when this delay will occur, nonetheless? The only answer is to placate the parties and try to keep high the spirit of cooperation. It is however not a violation of the DSU to cease doing it.

On the issue of AB burdening itself with unnecessary deliberations, it is important to point out that the breadth and complexity of reports has significantly risen. A communication from the AB made in May 2013 lays out in inarguable terms the reality that the work needed for each report to be issued rose substantially. The first panel reports issued in the 1990's had on average 62 exhibits, whereas at the time of the report, this number rose to 552, with the average page-count more than doubling to 364. Similarly, the average number of pages submitted in a case before the AB also more than doubled to 450. While the question of unnecessary deliberations is a slightly different one, this increase in complexity cannot be overlooked when debating the AB's adherence to the 90-day deadline.

Determining whether the AB could have been more austere in its breadth of deliberation is a question requiring an insight beyond the scope of this thesis. Judicial economy is an important tool at a judiciary body's disposal, it is my view that while a balance must be struck, delays in a process is a price worth paying for a complete, rigorous, and well-argued decision. Providing the AB with more resources, simplifying the procedure or employing other measures to shorten the time needed to render a decision could be a straightforward and fitting solution to keeping the deadlines.

3.2.2. MPIA

MPIA reiterates the adherence to the 90-day deadline, in keeping with the prompt settlement principle of the dispute settlement system. The Arbitrators are directed to strictly keep the deadline, and to that end, they are given several distinct powers. Arbitrators are given the option to "*take appropriate organizational measures to streamline the proceedings… such measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required."*[140] The Arbitrators might also propose substantive measure to the parties, including exclusion of certain claims, if it is necessary to issue the award in 90 days. This exclusion might be explicitly based on the "*lack of objective assessment of facts pursuant to*

[140] Paragraph 12 of Annex 1

Art. 11 of the DSU".[141] Serving both to expedite the process and to somewhat specify the scope of review.

The Annex also presumes consultations in case of modifying the time-limits, as opposed to mere notification, requiring the consent of both parties.[142] Question remains what would happen if parties were to deny the request, nevertheless, the MPIA tries to rectify the shortcomings of the AB's non-adherence to the 90-day time-limit.

3.3. The controversial rendering of advisory opinions

The WTO Agreement and DSU clearly state that the dispute settlement system is not meant to generate interpretations or create abstract laws. Its purpose is to aid WTO Members in securing a positive solution to a dispute. The DSU grants authority to a WTO panel to make findings that assist the DSB in recommending to a Member to rectify a WTO-inconsistent measure and align it with WTO rules. However, the panel is not authorized to make additional findings, statements, interpretations, or recommendations. Despite these limitations, it is the view of the US that numerous AB reports have extensively deliberated on issues that were either not presented to them or unnecessary for resolving the dispute at hand.[143]

The resource-intensive and time-consuming process of drafting unnecessary delays the process and potentially rids the Members of an opportunity to participate in an issue which might be pertinent to them. The main US argument rests on the fact that the DSU was clearly meant to resolve specific disputes, not to produce interpretations or make abstract laws. The AB is limited to assisting the DSB in discharging its functions under the DSU, which is, again, to provide dispute-specific resolutions. It mentions Art. IX:2 of the WTO Agreement, which reserves the exclusive authority to adopt interpretations of the WTO Agreements (the DSU) to the General Council. The DSU itself contains a provision pointing to a right of Members to seek an authoritative interpretation from the General Council, which the AB has no place to substitute.[144]

[141] Paragraph 13 of Annex 1
[142] Paragraph 14 of Annex 1
[143] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p47
[144] DSU Art. 3.9

3.3.1. Discussion

Illegitimate advisory opinions can be defined in the US's view as any rulings on legal issues that "*would not assist the DSB in making a recommendation under Art. 19.1 of the DSU to bring a WTO-inconsistent measure into compliance with WTO rules*",[145] specifically those not relevant or necessary for the resolution of a particular dispute.

There is no provision under which the AB could issue opinions going beyond the particular issue. The activity of the AB pursues a single goal, that is to resolve the specific issue. However, the text of Art. 3.2 also emphasizes both "*security and predictability*" and the "*clarification of the existing provisions*." Exercising judicial economy must in my opinion step aside when an option to shed some light on contentious issues presents itself.

Rendering advisory opinions going above the case at hand could pose a challenge to the principle of fairness and due process. It must be remembered that since the AB resorts to using advisory opinions as a venue for voicing its legal stances, they do possess certain authority for future cases.[146] While parties can join the proceedings as third parties, this does not solve the issue of the AB making an opinion without hearing those Members who objectively could have their own arguments to sway the AB's decision. Ridding them of this right seems to me to be a valid objection to the practice.

There is definitely some merit in pointing out the fact that recourse to time and resource consuming advisory opinions detracts from the ability to give prompt resolution. It is my view that this is again part of a broader problem of insufficient legal basis which the AB must work with. Additionally, it touches on the controversial precedential power of prior AB rulings, which will be discussed later.

3.3.2. MPIA

The MPIA states that the arbitrators shall concern themselves only with matters necessary for the dispute's resolution. Only those issues that have been raised by the parties shall be addressed.[147] The arbitrators then must not concern themselves with anything but the issue at hand, going

[145] Minutes of the General Council meeting of 20 February 2019 (WT/GC/M/175), Available at: docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=253311,251667,249777,248597,246615,244853,243101,240275,238906,237843&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False, paragraph 6.166.

[146] Albeit, such authority is a point of contention as well, as discussed elsewhere.

above that is not permitted. Due to the nature of the MPIA, being an interim agreement with a limited number of parties, with view of one day reconciling the dispute settlement system, there would hardly even exist a reason to issue advisory opinions. These would serve to provide the arbitrators views on the matters beyond the scope, that is not what the MPIA is about.

By explicitly stating these limits, the MPIA aims to resolve any potential issues coming forward. It is indeed difficult for me at the present to imagine a situation where the arbitrators might be tempted to create a "body of jurisprudence" from issuing such advisory opinions, due to the interim nature of the MPIA. However, a situation might arise in the future, where the AB appointments and the wider debate around the dispute settlement system in the WTO still will not be settled. In such a situation, it is not unfathomable that certain issues resulting from the deadlock at WTO might need solving. In such a case, hopefully negotiations between the Members will take place, which will lead to a solution enjoying far more legitimacy (and legality) then rule-making by the appeals review body.

3.4. The issue of the Appellate Body exceeding its review authority

The WTO Members authorized the AB to revise legal findings. As opposed to panels, who are authorized to make both factual and legal findings, the AB is by the language of Art. 17.6 limited to review the "*issues of law and legal interpretations developed by the panel*." Contrary to this, the US argues that the AB has routinely reviewed both the meaning of a Member's domestic law and the "*ascertainment of facts*" made by the panel, even though the WTO Members previously agreed that it is an issue of fact, not to be a subject to an appellate review. This has resulted among other things in an increase in length and complexity of appeals, further exacerbating the issue of sticking to the deadlines.

In a 1998 report, the AB stated that "*findings of fact, as distinguished from the legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the AB*." However, at the same time it has also asserted that there were grounds for review of the panel's *ascertainment of facts*. In US's view, the AB has missed a crucial question of threshold. That is, how is the AB to combine the limitation of *issues of law and legal interpretations* with the mentioned *ascertainment of facts* by the panels? Since the AB has not engaged itself on this

[147] Paragraph 10 of Annex 1

question, the faulty argumentation compounded on itself and progressively illegitimately embiggened the AB's review authority.[148]

In the view of the US, this has led to the AB empowering itself to second-guess the panel's factual assessment and substitute it with its own view completely by volition. The DSU provides no basis for this standard of review.[149]

Furthermore, the AB's understanding of Art. 11 has been steadily growing more extensive regarding the review of municipal law. The US argues that while the issue of domestic law being consistent with WTO obligations is indeed a question of law, the own meaning of the municipal law is a separate question of fact. Beginning in the 1998 case of *India – Patents (US),*[150] the AB started the practice with the justification that: "*Just as it was necessary for the Panel in this case to seek a detailed understanding of the operation of the Patents Act…so too is it necessary for us in this appeal to review the Panel's examination of the same Indian domestic law*."[151] Though this practice had been criticized even then, the AB continues to follow the same approach.[152]

The US goes on to criticize that such a conduct has only contributed "*complexity, duplication and delay*" to the dispute settlement system. The AB lacks the authority for such a scope of review, as well as the means to conduct such a resource-intensive review. This has led to a significant increase in the workload of the AB, which the AB also complained about in the past.[153] A link can be seen to the delays in the process mentioned above.

3.4.1. Discussion:

The US's main argument towards the illegitimate review of facts rests on the absence of any meaningful threshold where to stop. Simply put, once the AB opened the floodgates with the

[148] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p39
[149] The AB has based this interpretation on the phrase "should make and objective assessment" in Art. 11 dealing with panels, where it saw that an erroneous assessment made by a panel would violate Art. 11, which in turn would constitute an issue of law, permitting AB's review.
[150] India – Patents (DS50), paragraph 55
[151] *Ibid. paragraph 68*
[152] United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379), para 101
[153]LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf,, p83

assertion that whether an "*objective assessment of facts"*[154] had been made by the Panel is up for debate, it is hard to find a threshold to discern this. The US is of the rather puritan view that the AB should simply never question the factual findings of the panels. I believe this however misses a rather obvious and crucial question – what if there are egregious errors in the Panel's report? Would it not constitute a legal question then, if nothing else, going back to elementary principles of due law?

On the other hand, prof. Lehne succinctly points out that: "*If every shortcoming in a panel's fact finding were to be considered as failure to make an objective assessment of the facts under Art. 11, then there would be nothing left of the limitation of appellate review to issues of law under Art. 17.6.*"[155] The AB has however considered this and provided a demonstrative enumeration of possible errors it viewed as constituting a breach of the obligation to make an *objective assessment of the facts*. These would be 1) the deliberate disregard of, or refusal to consider, the evidence submitted to a panel and 2) the willful distortion or misrepresentation of the evidence put before a panel.[156]

Further building on this, the AB emphasized this view and limited itself further with the assertion that just reaching a different outcome in its deliberation on facts does not constitute a reason enough to invoke the violation of Art. 11. The AB stated that it will not "*interfere lightly*" with the panel's fact-finding authority.[157] Moreover, it is important to note that prior to a US statement in 2018 at a meeting of the DSB, the US had never raised any objection to the AB's practice. In 2001 the US has explicitly noted that while the factual review was out of scope for the AB, it was possible when "*the finding* [of the panel] *was inconsistent with obligation to make an objective assessment of the facts, in accordance with Art. 11 of the DSU*."[158]

[154] EC – Hormones (DS26), paragraph 132
[155] LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941, p67
[156] EC – Hormones (DS26), para 132
[157] European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft, (DS316) para. 88.1
[158] Minutes of the Dispute Settlement Body meeting of 1 February 2001 (WT/DSB/M/119), Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32807,61407,59532,36504,23714,102328,90963,20861,89522,109235&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

It is widely believed that when a panel in international law makes a finding, it can be one of three.[159] First those that are purely legal, second purely factual and third that involve the application of facts to the law. The third category can sometimes prove difficult. It can be described as "*questions of applying the law to the facts*" or "*the legal characterization of the facts*".[160]

Regarding the question of review of municipal law, the US has continuously and relentlessly pointed out that the AB is overstepping its boundaries. Consistent criticism of the practice began in 2002 in the *US – Section 211 Appropriations Act*[161] and continued in the *China – Auto Parts* case of 2009, *US – Countervailing and Anti-Dumping Measures* in 2014 and in 2016 in the *EU – Biodiesel* case. Academic literature also noticed this problem and criticized it – notably prof. Lester in 2012 noted that "*the AB's decision to consider…. as a law application issue stretches the boundaries of Art. 17.6 of the DSU.*"[162]

The literature on this topic somewhat agrees with the assessment made by the US.[163] In 2002, the AB brought forward a view, building on the 1998 *India – Patent*s case, that since a panel examines the municipal law of a WTO Member with the aim of assessing its compliance with the WTO obligations, that it makes a legal assessment. Therefore, since the AB is called upon to review legal issues, then the panel's assessment of whether municipal law complies with WTO obligations is subject to appellate review under Art. 17.6 of the DSU. This is what the US views as a "*logical misstep*[164]," and I am not alone in assessing that this view has a lot of merit.[165] An issue of WTO law is the question of whether a measure (of municipal law) complies with WTO

[159] BOHANES, Jan and Nicolas LOCKHART, 2012. Standard of Review in WTO Law. In: The Oxford Handbook of International Trade Law [online]. B.m.: Oxford University Press, p. 378–436 [accessed. 2023-06-27]. Available at: http://dx.doi.org/10.1093/oxfordhb/9780199231928.013.0014
[160] S. Lester, The Appellate Body's Review of the Meaning of Domestic Law, International Economic Law and Policy Blog, 4 March 2018.
[161] Minutes of the Dispute Settlement Body meeting of 1 February 2001 (WT/DSB/M/119), Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32807,61407,59532,36504,23714,102328,90963,20861,89522,109235&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True, paragraph 27
[162] LESTER, Simon (2012), The Development of Standards of Appellate Review for Factual, Legal and Law Application Questions in WTO Dispute Settlement, Trade Law and Development 4, pp. 125 – 149, p149
[163] ERIKSSON, Emilie, 2023. Analysis: The WTO Appellate Body Crisis A contribution to the ongoing discussions. B.m.: Kommerskollegium - National Board of Trade Sweden. Available at: https://www.kommerskollegium.se/en/publications/reports/2023/the-wto-appellate-body-crisis/, p5
[164] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p43
[165] LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941, p74

obligations. Not whether the municipal law *itself* is in compliance. The AB goes further in its practice and emphasized that panel's interpretation can have legal and factual aspects, which makes the authority in Art. 17.6 rather broad[166] and the distinction between factual and legal hard to see. The AB asserts that while determining the elements of texts or measures, that is, which words it contains is an issue of fact, determining the meaning of those words becomes an issue of law.[167]

3.4.2. MPIA

As scope of the appeal is defined in paragraph 9 of the Annex:

> "*An appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel.*"

The same way as in the DSU's Art. 17.6.

Paragraph 10, dealing with the arbitrators' obligations in the appeal process states:

> "*The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues."*

It is my view that this serves both to limit the potential extraneous practice by the arbitrators (such as the advisory opinions mentioned above) and to limit the appeals to issue of a law. Taken together, the arbitrators shall not deliberate on issues of factual review, since those are contrary to paragraph 9 – limited to law – as well as to paragraph 10, promoting judicial economy.

Paragraph 13 provides:

> *"If necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Art. 11 of the DSU."*

[166] US – Countervailing and Anti-Dumping Measures (China)
[167] LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941, p75

This awards the arbitrators a venue to exclude claims based on the alleged lack of an '*objective assessment of facts'*, which could lead the arbitrators down a path of factual review. There is a question what this alleged lack of *objective assessment of the facts* constitutes. In my view it is to be interpreted as the panel's failure to establish proper factual findings. If a party makes such the arbitrators might propose a '*substantive measure'* to exclude the claim. They are not required to do so. Both the element of volition and the time-constraints conditions are perplexing and from a systematic reading of the text redundant.

The arbitrators are in paragraph 10 made to address only those issues that are 1) necessary for the resolution of the dispute and 2) only those that have been raised by the parties, and paragraph 9 specifically provides for review of law and legal interpretation. Taken together, it seems to me that the arbitrators ought to make this exclusion of claims *ex officio*, since they are not in the scope of the appeal review. And if anything, they should not rule on such issue, due to it being outside the scope of the review. It will be interesting to observe what the practice brings.

The MPIA does not contain provisions deliberating on the review of municipal law as a factual/legal review. The question thus cannot be in my view satisfactorily answered. Further clarification will have to occur.[168]

3.5. Binding nature of the AB reports

The US is of the view that the AB is illegitimately stepping in as a rule-maker, since it claims precedential effect for its own rulings and reports.[169] The Dispute settlement process exists to resolve specific disputes within the limits of the DSU. While some interpretation of rules is allowed - the Art. 3.7 of the DSU permits the bodies under the DSU to "*Clarify the existing provisions of the agreements in accordance with customary rules of interpretation of public international law*" - the exclusive authority to adopt interpretation is reserved to the Members via different procedures in the Ministerial Conference and the General Council.[170]

[168] The Walker report suggested an adoption of a paragraph stating that "*The 'meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal.*" The fact that MPIA chose not to adopt such a provision settling the matter is telling. It seems to me to insinuate a lack of consensus on this issue among the drafters of the MPIA.
[169] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p55
[170] DSU Art. 3.9

Over time a practice developed, where the AB asserted that the previous legal interpretations in its reports must be treated as binding by the panels, absent what the AB calls "*cogent reasons*".[171] The US believes this is in direct contrast to the text of the DSU. The panel or the AB is to apply only customary rules of interpretation of international law to assist the DSB in determining whether a measure is inconsistent with the WTO Agreement. They are not to extend their own decisions under this interpretative umbrella. Part of the problem is the fact that such findings are adopted by negative consensus[172], feeding the US's fear of being bound by a rule they have not negotiated on.

Since the panels are created to make findings in a specific dispute, the US argues that if it were to apply the reasoning in prior AB reports it would violate its responsibility to treat a dispute as one that is unique. The US concedes that an AB interpretation is not without any value. If the reasoning is sound and persuasive, the panel may of course refer to it while conducting its review in a different case. Nevertheless, considering such a prior reasoning as an authoritative, mandatory view for later panels to follow goes beyond the scope of the DSU.[173]

Shortly after concluding the Uruguay round of negotiation, the AB in its 1996 report *Alcoholic Beverages II* made clear that the exclusive authority enjoyed by the Ministerial Conference and the General Council[174] cannot be supplanted with the negative consensus procedure of the DSB. Though it may be considered, subsequent panels are not bound by a previous report adopted by the DSB.[175]

This practice changed in 2008 with the Stainless Steel case.[176] The AB introduced for the first time the concept of *cogent reasons*. In order to ensure "*security and predictability"*, as stipulated by Art. 3.2 of the DSU, adjudicatory bodies are to resolve the same legal questions in the same way as previous cases, absent *cogent reasons.* The US goes on to provide a list of reasons for why it views this as profoundly flawed. It sees it as a failure to understand the role of panels and the AB, an erroneous interpretation of the DSU, inappropriate analogies to other international

[171] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p55
[172] As mentioned above.
[173] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p57
[174] Art. 3.9 of the DSU
[175] Japan – Alcoholic Beverages II (DS8)
[176] United States — Anti-Dumping Determinations regarding Stainless Steel from Mexico (DS325)

law forums and the assumption of hierarchical structure in the DSU.[177] These could be again summarized as a misinterpretation of the AB's part in the dispute settlement system.

A 2013 study[178] analyzed AB reports regarding their citation of previous rulings, exploring how AB legal opinions influenced later practice. The conclusion was that the AB has opted for strongly adhering to its previous decisions, establishing a de facto rule of precedent.[179] The panels have been following in AB's step, with notably only three instances of an outright refusal to follow AB's reasoning.[180] In conclusion, there is strong evidence that no matter the claims of AB's precedential authority, there in fact exists such a relationship in the dispute settlement system.

3.5.1. Discussion:

The US's view is established on the basis of Art. 3.9, where the exclusive authority to adopt new rules is enjoyed by the General Council and/or the Ministerial Conference. In my opinion conflating rulemaking and a practice of adhering to previously established practice is faulty. Though it can be reasonably argued that both operate on the same axis, the former is on one end, whereas the latter oscillates from this end to the other. Prohibiting the AB completely from drawing out of its previous jurisprudence would severely hinder the dispute settlement system of achieving its goal of providing "*security and predictability to the multilateral trading system*."

Notably, to compare with another international adjudicatory body, the ICJ follows a similar approach to AB's *cogent reasons*. In its 2008 judgment it noted that it would not depart from its settled jurisprudence unless it were to find "*very particular reasons*" to do so.[181] The Art. 59 of the Statute of the ICJ explicitly states that "*the decision of the Court has no binding force except*

[177] LIGHTHIZER, Robert. E, 2020. Report on the Appellate Body of the World Trade Organization, Office of the United States Trade Representative. Available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf, p59
[178] PAUWELYN, Joost (2016), Minority rules: precedent and participation before the WTO Appellate Body in LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941
[179] The study found that in 108 reports until 2013, the AB made a total of 2 957 cross-references, amounting to an average of 27.4 cross-references per report with an observable upwards trend.
[180] LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941, p86
[181] LEHNE, Jens, 2019. Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? [online]. Carl Grossmann [accessed. 2023-06-26]. Available at: http://dx.doi.org/10.24921/2019.94115941, p95

between the parties and in respect of that particular case"[182], how is this then reconcilable with the apparently contradictory 2008 judgment?

The issue of following precedents is in my view not a black and white, yes or no question. An elementary principle of law dictates that like cases be determined alike. There is a good reason for that, if the objective is fair, impartial and legitimate rule of law, there must be internal coherence. Stating that nothing of the sort is permissible and that every case must be decided on its own is surely valid as a sentence, however it runs afoul simple logic. Long term judicial deliberation must ultimately always lead to an internally coherent body of case law. The US itself recognizes, as stated above, that if a reasoning is sound and permissible, it may serve as an inspiration for future decisions. However, the US also says that this must not be 'authoritative' since that would go beyond the DSU. There cannot be a stable, predictable, and clear system of conflict resolution without some sort of a continuity and certainty, and there cannot be certainty without the belief of the participants that what was once (twice, thrice…) decided, will be decided the same way again.

One can argue about the level of judicial activity of the AB. The obvious lackluster foundation of the AB's institutional determination, the lack of effort and more importantly no tangible results in rectifying the blank spaces in WTO's dispute settlement law, all contribute to the unenviable position the AB finds itself in, when it must make decisions in an environment like this. Taking such an extreme position as the US did towards the question of binding precedence however surely does not in any way help to resolve the issue.

3.5.2. MPIA

The MPIA does not contain an explicit endorsement or denouncement on the matter of precedents. In the preamble it re-affirms that predictability and consistency in interpreting rights and obligations is of significant value to Members. In the same breath it adds that arbitration awards cannot add to or diminish the rights and obligations provided under the WTO Agreement and the covered agreements.[183] There seems to be a consensus on the validity and need for

[182] The prohibition of "stare decisis", which is the legal principle of "staying with that which what was ruled", i.e the precedents.
[183] STATEMENT ON A MECHANISM FOR DEVELOPING, DOCUMENTING AND SHARING PRACTICES AND PROCEDURES IN THE CONDUCT OF WTO DISPUTES. JOB/DSB/1/Add.12, 2020, Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=26350, Preamble

continuity, while at the same time there is an understandable hesitation toward steps that could be viewed as adding to the Members' obligations.

It would be prudent to point out that regarding the WTO process, the arbitration awards need not be adopted by the DSB, as opposed to AB reports. The AB reports are adopted by negative consensus, so in virtually every case they do get adopted. This poses an interesting question – how do the arbitral awards relate to the WTO jurisprudence? Since they are not adopted by the DSB, they surely ought not to add to the WTO jurisprudence. Due to the negative consensus, the adoption is in my view rather a symbolic one.[184] Therefore the lack of adoption is an unsteady argument. The arbitral awards are not made on the WTO grounds, which seems to be a much stronger one.

Nevertheless, with MPIA's growing membership and the AB's non-functionality, the MPIA remains as the international arbitrary body (or rather framework) putting out decisions and creating a body of cases which inadvertently constitute something resembling jurisprudence. It will be interesting to see how these two (yet one) pillars of trade dispute resolution systems interact with each other.

[184] What a journey from the GATT's unanimous consensus.

Conclusion

The goal of the thesis was to explore some of the aspects and inner workings of the multilateral trading system, mainly its dispute settlement system. In the first half the thesis discusses the history and nature of the dispute settlement system throughout its different iterations, in the second, it inspects the current crisis and its roots, some of the issues, and an attempt to move forward after a stalemate. A method of systematic logical analysis common to legal science was employed, in drawing conclusions from logical arguments by deliberating on possible interpretations and their merits.

The first chapters focused on the genesis of the multilateral trading system and the difficulties in its nascent stage. The International Trade Organization never materialized, and its dispute settlement system was only a part of an unratified international agreement, it never came into effect. Nevertheless, it serves as a source of knowledge in examining the development of the conflict resolution in international trade law.

The ITO's dispute settlement system was essentially three-tiered with mandatory consultations. The members are expected to submit a complaint to their perceived wrongdoer, and both are to try and negotiate a solution. There is a strong emphasis on discussing, considering each other's proposals and options to resolve the matter amiably at any point. However, if a solution is not found, the matter gets referred to the Executive Board and then the Conference. A member still unhappy with the outcome might appeal to the ICJ to provide a 'binding advisory opinion', however the provisions lack any specifications of enforcement.

Answering the question about the nature of the ITO system proved more difficult than anticipated. It is my belief that the strong emphasis on consultations and the lack of enforcement speaks for the diplomatic approach, while the right of members to appeal all the way to the ICJ and getting a 'binding advisory opinion' (whatever would that mean) can be construed as an aspect of a legalistic approach. With not enough sources to go on, the distinction can be argued in favor of both the diplomatic and legalistic approaches.

Since the ICJ's authority was never tested, and the ITO was never faced with enforcement of the 'binding advisory opinions', it is hard to argue how would the practice have evolved. It

nevertheless remains that the ITO had a remarkably innovative approach to conflict resolution in its vision of the multilateral trade system.

The GATT's dispute settlement system and its nature and the Uruguay round of negotiations were the focus of the following chapter. After the failure of the ITO, only the GATT survived as a basis for forming the multilateral trading system. It can be said that despite the bleak outlook at the beginning, the GATT proved to be a success. Alongside its dispute settlement system, GATT continuously evolved and gradually transformed the multilateral trading system, culminating in the creation of the WTO. The dispute settlement system also went through a lot of changes. It started out as a diplomatic and somewhat teethless system, plagued with the consensus requirement and significant issues stemming from numerous agreements having various. Eventually after a codification in 1979, when the system became somewhat more legalistic, the issues mounted and the need for a further codification was apparent.

The next chapters focused on the Uruguay round of negotiations in the latter part of the 1980's, which culminated in adoption of the Marrakesh Agreement of 1994, and the creation of the WTO. The DSU was negotiated at that time as well, creating the dispute settlement system in the multilateral trading system we have today. Major developments were the unification of previously disjointed practice into a single system, the reinforcement of the right to initiate panels, the consensus requirement being turned around and the creation of the Appellate Body and its review. The WTO's system can be thus seen as a progress from the uncertainties of GATT. It is a legalistic system consisting of two-tiers of review with little room to obstruct and mechanisms for implementation of rulings.

The evolving nature of dispute settlement systems in the world of institutionalized international trade showcases an interesting ambivalent relationship. The plan to create a blend of a diplomatic and a legalistic settlement system in the ITO was thwarted at the hands of its spiritual creator, the US. Only the few articles in GATT survived; a bare system based on consensus and diplomacy. Through practice, it became apparent that if stability, functionality, and reliability is to be achieved, the framework must be amended. The WTO Agreement, answering the calls of the US for reform, has in the DSU a system of a strong legalistic and rule-based underpinning.

The US was one of the main proponents of further institutionalization of the system in the Marrakesh agreement. Now, after some 30 years, we find ourselves at an impasse once again, with the US seeking to revise the structure of international dispute settlement in multilateral

trading relationships by way of blocking the appointments to the AB. This in turns cripples the dispute settlement system and endangers the whole system at large. And it seems that the system is again shying away from legalism to embrace the uncertain, yet flexible negotiations of diplomacy.

The hypothesis of the multilateral trading system preferring diplomacy to rule-based system throughout its history was not necessarily confirmed. While it is true that the WTO signified a turn towards a legalistic nature of the dispute settlement system, the ITO was by no means a strictly diplomatic system. With unilateralistic tendencies on the rise again. It is going to be interesting to observe what the future brings to the multilateral trading system.

In the second half the thesis explores the crisis of the WTO dispute settlement system, its roots, the failure of the DSU Review and discusses five specific issues at length. There has always been some criticism towards its functioning, which does not come as a surprise since it is now an international organization of 159 countries. In the last decade or so, the criticism has picked up and with the US at the center, the Appellate Body was rendered effectively dead by the blockage of the appointments of new members. The US argued the AB did not adhere to the DSU, that it overstepped its authority and engaged in judicial activism.

Five key issues were analyzed and discussed. First, I presented the US's arguments suggesting that the AB is in breach of the DSU. Then I set out to determine whether there was a merit to those arguments. Last the stance of MPIA on the issue was examined.

The practice of members serving on the AB after their term has ended is the first contentious issue. The US presents a view that since it is up to the WTO Membership to appoint adjudicators to the AB, the AB's practice is an overreach that encroaches on the WTO Members rights. I believe I have found that while the argument can be made by reading the provisions in a vacuum, a broader view suggests that it in fact does not constitute anything extraordinary in the context, and rather serves to expedite the time and resource intensive process. The MPIA should not find itself in a similar situation, due to its rather flexible provisions.

The issue of not keeping to the mandatory timelines was discussed second. The US suggests that the AB is somewhat deliberately engaging in violating the DSU by overstepping the mandatory timelines. I have found that since the complexity and number of issues for the AB to decide significantly raised, while resources stayed the same, that was the more likely reason for the AB's conduct. Criticizing symptoms while ignoring the causes will never amount to much. The

AB had to make do with a lacking foundation and chose to go the path of rendering decisions, rather than being silent and choosing to not make a resolution, which is in my view a welcome approach. The MPIA tries to solve some of the causes by giving the arbitrators q power to lessen the scope of the reports they ought to make.

The controversy surrounding the rendering of advisory opinions in the WTO centers around whether the AB has exceeded its authority by addressing issues beyond the scope of specific disputes. The United States argues that the AB has engaged in extensive deliberations on matters that were either not presented or unnecessary for resolving the dispute at hand, contrary to the purpose of the dispute settlement system. There is some merit to the US arguments, since the AB is undoubtedly called upon to resolve the issues at hand and not to make broader deliberations. Nevertheless, in the pursuit of the stated goals of predictability and certainty, I believe that rendering of such opinions can be justified. MPIA prohibits such conduct, by explicitly stating that only those issues that have been raised by the parties shall be discussed.

Fourth, the thesis examines the question of the scope of the appellate review. The AB has the authority to review 'law and legal interpretations' made by the panel. The interpretation of this provision by the AB, leading it to the establish its authority to review the 'ascertainment of facts' made by the panel and the provisions of the municipal law, drew the ire of the US. I would argue that while there is again some merit to the points raised by the US, the AB showed due effort to establish certain boundaries and to 'not interfere lightly' with the findings of panels. A narrow interpretation of the ability of the AB to review facts is detrimental to the dispute settlement system and worse than the alternative. Adopting a strictly prohibitive approach is from the nature of the issue detrimental to the dispute settlement system and the principle of due process of law. Regarding the review of municipal law, the practice developed by the AB has in my opinion extended its authority beyond what can be seen as a sound interpretation of the Art. 17.6 of the DSU. The MPIA tries to establish some coherence, in my view it however fails to do so beyond question. The issue of interaction between paragraphs 9, 10 and 13 of the Annex 1 to the MPIA does not have a clear answer yet and it seems to have been left by the MPIA signatories for further debate down the line.

Last issue deals with the binding nature of the AB reports. Similar to the issue of advisory opinions, the question touches upon the role of the AB in the dispute settlement system and the extension of its authority. US critiques the 'cogent reasons' view of the AB and believes that there should not be any sort of a precedence practice in the appellate review. I believe that this

position is untenable in the face of its logical implications and inconsistent with the stated aim of the system, which is to provide stability, security, and predictability. The MPIA re-affirms that the signatories value consistency and predictability, there seems to be a consensus on the need for continuity, however no clear boundaries have been outlined and only practice will tell.

I believe that my second hypothesis has confirmed itself. The severity of the alleged breaches by the AB hardly constitutes a reason to throw a wrench into the working of such an important and high-profile system. It is true that the AB has at times extensively interpretated the DSU. But what else was to be done? The DSU review failed to accomplish anything, and the WTO Membership at large seems incapable to agree on any meaningful change. The path the AB chose, favoring resolution, predictability and healthy jurisprudence, at times at odds with a less-than extensive interpretation of the DSU, was in my opinion a legal and necessary one. The question to ultimately ask is what kind of dispute settlement system or better yet international system do we want to foster? If the US had wanted to, it could surely have found a compromise instead of resorting to crippling the system. We will see with time, if the system can yet be salvaged or if something else is going to take its place.

The MPIA tries to answer some of the contentious questions, and as an interim arrangement that is commendable. However, some of the harder questions still remain unresolved and the MPIA can be hardly seen as revolutionary. It is not the solution some may have hoped for. Nevertheless, the multilateral trading system has in the MPIA a valid and welcome forum for those wanting and willing to find compromise.

List of Abbreviations:

GATT – General Agreement on Tariffs and Trade

WTO – World Trade Organization

ITO – International Trade Organization

DSU – the Understanding on Rules and Procedures governing settlement of disputes, also known as the Dispute settlement understanding

AB – Appellate Body

DSB – Dispute Settlement Body

ICJ – International Court of Justice

MPIA – Multi-party Interim Appeal Arbitration Arrangement

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Abstrakt

Systém řešení sporů Světové obchodní organizace je v krizi. Zánik jeho Odvolacího orgánu znamená těžké časy pro mnohostranný obchodní systém. Odvolací orgán je nyní bez rozhodců, jejich jmenování zablokovaly Spojené státy a dříve oslavovaný systém je nyní ochromen. Vyvíjel se od druhé světové války a prošel mnoha obměnami. Prvním cílem této práce je prozkoumat povahu různých režimů řešení sporů v rámci ITO, GATT a WTO a určit, zda představují spíše soudní nebo diplomatický systém. Druhým cílem této práce je analyzovat krizi odvolacího orgánu. Jelikož řešení je v nedohlednu, skupina členů se dohodla na podepsání Mnohostranného prozatímního ujednání o odvolání při rozhodčím řízení (MPIA). Spojené státy vznesly na praxi Odvolacího orgánu řadu stížností a námitek a práce se s některými z nich vypořádá. Především půjde o otázky rozsahu pravomocí a limitů, kterých se Odvolací orgán (ne)drží. Práce se zaměří na kritiku USA a protiargumenty a na otázku, zda MPIA nějakým způsobem napravuje některé z vnímaných nedostatků.

Klíčová slova: Mnohostranný obchodní system, Světová obchodní orgnizace, Odvolací organ, MPIA, system řešení sporů

Abstract

The Dispute settlement system of the World Trade Organization is in a crisis. The demise of the Appellate Body signals tough times for the multilateral trading system. The Appellate Body is now devoid of its adjudicators, their appointment blocked by the US. The celebrated system of dispute resolution has been crippled. Evolving since the second world war it saw many iterations. The first goal of this thesis is to explore the nature of the different dispute settlement regimes of the ITO, the GATT and the WTO and determine whether they constitute a judicial or a diplomatic system. The second goal of this thesis is to analyze the Appellate Body crisis. With no resolution in sight, a group of members agreed to sign the Multi-party Interim Appeals Arrangement (MPIA), resorting to arbitration in place of the non-functioning Appellate Body. The US has raised numerous objections to the practice of the Appellate Body and the thesis shall touch upon a number of them with a thorough discussion, mainly on the extent of its authority and the limits of its functioning. The thesis will examine the criticism of the US, counterarguments and whether the MPIA rectifies any of the perceived shortcomings.

Key Words: Multilateral Trading System, the World Trade Organization, the Appellate Body, the MPIA, dispute settlement system