

ORIGINAL ARTICLE

WTO Dispute Settlement: Crown Jewel or Costume Jewelry?

William J. Davey

Guy Raymond Jones Chair in Law Emeritus, University of Illinois College of Law, Champaign, Illinois, USA
Email: wdavey@illinois.edu

(Received 1 February 2022; accepted 1 February 2022; first published online 2 May 2022)

Abstract

The dispute settlement system of the World Trade Organization (WTO) knew considerable success in its early years, being described as the WTO's crown jewel. In recent years, the jewel has become tarnished. Its principal actor – the Appellate Body – is no longer functioning, and the practice of the membership has been to appeal almost all new panel reports, thereby consigning them to a legal limbo from which they seem unlikely to ever emerge. This paper briefly reviews the record of the WTO dispute settlement system, considers the problems that led to its current state and evaluates various proposals that have been made to reinvigorate the system.

Keywords: WTO; WTO Dispute Settlement; Appellate Body

1. The Record of the WTO Dispute Settlement System

Under the WTO's Dispute Settlement Understanding (DSU),¹ its dispute settlement system has exclusive and compulsory jurisdiction over WTO-related disputes.² A WTO member may request consultations with another WTO member if it believes that member is violating WTO rules. If the consultations fail to settle the matter, the complainant may request the establishment of an ad hoc panel to rule on its claim. The WTO Dispute Settlement Body (DSB) must establish the requested panel absent a consensus to the contrary, which means the complainant can insist on a panel. The panel is composed of three individuals, agreed by the parties or, if not agreed, appointed by the WTO Director General. Panelists tend to be current or former trade officials from neutral parties. If a violation of WTO rules is found, the panel recommends that the offending measure be brought into conformity with those rules. The panel report must be adopted by the DSB (absent consensus to the contrary) unless it is appealed. Appeals go to a seven-person Appellate Body, whose members serve four-year terms, renewable once. It hears appeals on issues of law in divisions of three members. The Appellate Body may reverse, modify, or uphold the panel report, and its report, along with the panel report as modified, must be adopted by the DSB absent consensus to the contrary. If compliance does not occur, the complainant may request authority to retaliate by suspending trade concessions equivalent to those lost through the violation. This, too, must be authorized on request absent consensus to the contrary. In the GATT system, there was no appeals process and a recalcitrant party could prevent establishment of a panel, adoption of a report or authority to retaliate by refusing to join the required consensus.³ Thus, the switch

¹Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 3 to the Agreement Establishing the World Trade Organization. The DSU procedures are described in detail in WTO (2017) *A Handbook on the WTO Dispute Settlement System*, 2nd edn. Cambridge University Press.

²DSU, art. 23.

³Davey, W.J. (1987) 'Dispute Settlement in GATT', *Fordham International Law Journal* 11, 51.

to the so-called reverse consensus rule and addition of the Appellate Body were fundamental changes to the GATT approach to dispute settlement.

The more economically developed WTO members have made extensive use of its dispute settlement system. Over 600 consultation requests have been made since 1995.⁴ As of 1 January 2022, there had been over 230 panel reports and about 150 Appellate Body reports adopted, creating a rich jurisprudence concerning WTO rules. In its early years, the system was viewed as quite successful. It effectively dealt with most of the controversial cases or issues in the GATT system that had led to blocked panel reports (i.e., not adopted for lack of consensus).⁵ While the system seldom met the timelines specified in the DSU, especially at the panel level, and while delays in implementation of adverse rulings were common, implementation almost always occurred.⁶ In recent years, however, the system has broken down. The Appellate Body has had no members since December 2019. Consultation requests have dropped sharply (20 in 2019, but only 14 in 2020–2021). Panels continue to be established and there are many panel proceedings in progress. However, since the beginning of 2020, the system has essentially ceased to produce adopted panel reports.⁷ As of 1 January 2022, there were 21 pending appeals, a number that includes all 12 panel reports circulated in 2020 and 2021, save two (one of which may yet be appealed). In other words, members are still going through the panel process, but are not accepting the results. In the GATT system, losing parties usually accepted the results,⁸ but since the demise of the Appellate Body, they do not in the WTO system. This could be a temporary situation as parties may want to keep all options open until the dispute settlement crisis is resolved, but it may mark a more contentious period in trade relations. In any event, the ever-increasing backlog of appeals is a complicating factor that will probably make resolution of the current crisis ever-more difficult.

2. The Current Crisis

The dispute settlement crisis was triggered by the United States.⁹ It has been claiming for almost 20 years that the Appellate Body has interpreted WTO agreements to impose on members obligations to which they never agreed. Consequently, the United States became more concerned about the selection of Appellate Body members. In 2007 and in 2011, it chose not to re-nominate to a second term the persons it had initially nominated for the Appellate Body, even though one of them indicated an interest in continuing to serve. Then in 2016, it refused to join a consensus to approve Korea's re-nomination of a Korean member of the Appellate Body, apparently blaming him for the result of one case that it considered to be mostly in the nature of an advisory opinion. While it did agree to the nomination of another Korean, that person resigned in 2017. Since then, the United States has blocked consensus on appointing new Appellate Body members, such that there are now no Appellate Body members. The United States insists that it will continue this policy until other WTO members agree to unspecified changes in the system.

⁴The WTO website (wto.org) has a dispute settlement section that provides information about each case and general statistics on the use of the system as well. The 12 most frequent participants as complainants and respondents have been the US, the EU, China, Canada, India, Brazil, Japan, Argentina, Korea, Mexico, Australia, and Indonesia.

⁵Davey, W.J. (2005) 'The WTO Dispute Settlement System: The First Decade', *Journal of International Economic Law* 8, 17.

⁶Davey, W.J. (2013) 'The WTO Dispute Settlement System at 18: Effective at Controlling the Major Players?', European University Institute Working Paper RSCAS 2013/29, European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme.

⁷Prior to December 2021, the last unappealed panel report adopted was *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R, adopted 27 January 2020.

⁸According to the WTO's Interactive GATT dispute settlement database, of the 128 panel reports considered for adoption, 75% (96) were adopted, www.wto.org/english/news_e/news21_e/disp_05oct21_e.htm.

⁹This history is recounted in Jackson, J.H., W.J. Davey, and A.O. Sykes (2021) *Legal Problems of International Economic Relations*, 7th edn, West Academic Publishing, 209.

While there is *some* support among *some* WTO members in respect of *some* US complaints, no member supports the current US blocking tactics.

The United States has raised a number of process and substantive objections regarding the Appellate Body decisions.¹⁰ The five main process complaints are (i) the Appellate Body in recent years has failed to meet the DSU's 90-day mandatory deadline for issuance of its reports; (ii) it has permitted Appellate Body members to sit on appeals after the expiration of their terms of office (up to 16 months in one case) despite having no authority to do so; (iii) it issues advisory opinions not necessary for resolution of disputes; (iv) it reviews panel factual findings despite being limited by the DSU to considering legal issues; and (v) it treats its reports as precedent even though only WTO members are authorized to interpret the WTO agreements. Its substantive objections mainly contend that the Appellate Body has overreached and restricted the use of trade remedies (antidumping and countervailing duties, and safeguards) in ways never agreed to by WTO members. Fundamentally, it appears that, rightly or wrongly, the United States believes that when the Appellate Body was created the expectation was that appeals would be rare and limited to correcting significant legal errors by panels. Instead, appeals became the norm and the Appellate Body engaged in searching re-examination of panel reports. In combination with the soon to be evident disfunction of the WTO negotiating process (perhaps not foreseen by those who had just negotiated the comprehensive Uruguay Round agreements), this meant that the Appellate Body quickly and unexpectedly became a major player in the WTO, effectively unchecked by WTO members, in what the United States thought was a member-centered organization.

In an attempt to address the US complaints, the 2019 DSB chair, David Walker of New Zealand, spent several months consulting with the membership and ultimately proposed a decision that had the following elements:¹¹ (a) limits were placed on the ability of Appellate Body members to hear cases after expiration of their terms; (b) the 90-day limit was restated, subject to an agreement by the parties to extend it; (c) it was restated that only issues of law and legal interpretations may be appealed and that municipal law is to be considered an issue of fact; (d) only issues raised by parties may be decided upon by the Appellate Body; (e) precedent is not created in WTO dispute settlement, although previous relevant reports should be taken into account; (f) it was restated that dispute settlement cannot add to or diminish the rights and obligations provided in the WTO agreements and that the provisions of article 17.6(ii) of the Antidumping Agreement – related to its interpretation – should be given effect; and (g) a formal dialog between WTO members and the Appellate Body would be established.

There appeared general support for the proposal, suggesting a willingness of the membership to address the US concerns,¹² but the United States felt that it did not adequately address them and indicated that it could not agree to them in December 2019.¹³ In the US view, the decision largely ratified existing DSU provisions without considering why the Appellate Body had failed to follow those provisions in the past. For the United States, simply re-affirming rules that had been persistently broken could not resolve its concerns.

The US blocking action was initiated by the Trump Administration. That administration, as personified by USTR Robert Lighthizer, was a vehement critic of the judicial-like nature of the WTO system.¹⁴ It seems unlikely to me that another administration would have taken such

¹⁰The most comprehensive discussion of US concerns is found in US Trade Representative, 'Report on the Appellate Body of the World Trade Organization', February 2020.

¹¹Decision of the General Council, 'Draft Decision: Functioning of the Appellate Body', WT/GC/W/791, 28 November 2019.

¹²The Walker Principles were presented as a compromise potentially acceptable to all members, but it is not clear that all members would have accepted the Principles if the United States had. It seems to me that if the Principles could have resolved the crisis, there would have been support in the end, even if grudgingly given by some.

¹³Minutes of General Council of 9–10 December 2019, WT/GC/M/181, 24 February 2020, paras. 5.100–5.124.

¹⁴Pollack, M.A. (2021) 'International Court-Curbing in Geneva: Lessons from the Paralysis of the WTO Appellate Body', <https://ssrn.com/abstract=3870457>, 5–7.

drastic action, but now it has occurred it may be difficult for any administration to reverse course without achieving significant changes to the dispute settlement system. The US complaints are not new; it has been raising some of them since the early 2000s. The Biden Administration, through USTR Katherine Tai, has sounded more positive on the WTO, but seems determined to see significant reforms. Tai has stated: ‘Reforming dispute settlement is not about restoring the Appellate Body for its own sake.’¹⁵ Unfortunately, the longer the impasse exists, the more it will seem to be the ‘new normal’ and the more difficult it will be to end it.

In response to the demise of the Appellate Body, several WTO members, led by the European Union, agreed on the Multi Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (the MPIA).¹⁶ It essentially provides a stop-gap measure for those WTO members who wish to have an Appellate Body-like appeals process. As of 1 October 2021, it had 25 adherents, counting the EU as one, and others will join over time. While it has selected a pool of ten arbitrators, no appeals have been heard so far, but several ongoing panel proceedings will be subject to the arrangement. It is not clear how the MPIA will be serviced (by the WTO Secretariat or by others?) or how frequently it will be used. For example, of the 14 consultation requests submitted in 2020 and 2021, only five involve only MPIA adherents. Thus, for many, probably most, disputes, the MPIA will not apply unless its membership expands significantly or it is often used on an ad hoc basis. So, while the MPIA addresses the current impasse for its adherents, it does not offer a long-term solution for WTO dispute settlement since the United States almost certainly will not join. Indeed, its very existence may impede settlement of the crisis by providing an alternative to resolving it.¹⁷

3. Possible Ways Forward

What are the options for going forward? There are essentially four: A revived Appellate Body that approaches its role differently; a more circumscribed appellate process; a return to a panel-only system, with automatic adoption of reports, preferably with some mechanism for dealing with conflicting or truly bad reports; and a return to the GATT system, with controversial reports blocked. Although the MPIA is not intended to be long-term, it could continue under the latter two alternatives and provide appellate review for those wishing it.

3.1 A Revived Appellate Body

3.1.1 Strengthening the Walker Principles

In order to make the Appellate Body functional again, it seems that at a minimum there must be some response to the US position that simply restating existing rules is not enough to address its concerns. Less clear is whether resolving those concerns would satisfy the United States or whether it will insist on ‘correction’ of some of the decisions it has criticized. The Walker Principles address the specific US process complaints, but it is less clear that they address the US assertion that the Appellate Body has imposed new obligations and could continue to do so. In that regard, there have been proposals to strengthen the Walker Principles to make that unlikely. Among the more plausible suggestions are a prohibition on gap-filling,¹⁸ promoting

¹⁵Monicken, H. ‘Tai: Dispute settlement, negotiating reforms “intimately linked” at WTO’, *Inside US Trade Daily Report*, 15 October, 2021.

¹⁶Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes’, JOB/DSB/1/Add.12, 30 April 2020. Among the 12 top users (see note 4), seven have joined the MPIA: Argentina, Australia, Brazil, Canada, China, the EU, and Mexico.

¹⁷See Hillman, J. (2018) ‘Three Approaches to Fixing the World Trade Organization’s Appellate Body: The Good, The Bad and The Ugly?’, www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf.

¹⁸Hirsh, B. (2019) ‘Resolving the WTO Appellate Body Crisis: Proposals on Overreach’, www.nftc.org/default/trade/WTO/Resolving%20the%20WTO%20Appellate%20Body%20Crisis_Proposals%20on%20Overreach.pdf, 6–7; Hufbauer, G.C. (2021)

greater use of *non-liquet*,¹⁹ a requirement to reject ‘aggressive’ interpretations,²⁰ exhortations on the proper limited role of dispute settlement,²¹ rules limiting the influence of the Appellate Body Secretariat,²² and an exemption of trade remedy cases from standard appellate review.²³

The first four added principles mentioned are all variations on a theme, aimed at discouraging expansive interpretations. They would certainly signal to a new Appellate Body that it should be more restrained than its predecessor, but I am not sure how much they would ultimately accomplish. It is extremely difficult to draw the line between mere interpretation and gap-filling, and much ink would be spilt in cases over that issue. In the case of *non-liquet*, there would often be similar disagreements. While it would be useful to have attention focused on these issues, there will be endless disputes over how to resolve them. Thus, compliance would be difficult to monitor.

The role of the Appellate Body secretariat could be altered and that would not threaten the independence of the Appellate Body, but I am not sure that it would have a big impact on decision-making.

The exemption of trade remedy cases from a standard appellate review would address some US concerns, but it would be hard to justify since it would seem to create two classes of obligations and would probably be viewed as totally unacceptable by members such as Japan and Korea.²⁴

3.1.2 Enforcing the Expanded Walker Principles

Assuming that the United States and others would accept the expanded Walker Principles, how could they ensure that the Appellate Body would follow them, especially the vaguer ones, such as not imposing new obligations or, if added, not engaging in gap-filling. The last element of the Walker Principles attempts to address this issue by calling for an Appellate Body–WTO member dialog on issues on a regular basis. This is reminiscent of the 2004 Sutherland Report suggestion to create a DSB group that would review Appellate Body and panel reports and provide informal feedback.²⁵ The function of such a review body would be expanded under a proposal by Hillman, who calls for the creation of an ‘oversight and audit’ committee to ensure that the Appellate Body complies with the Walker Principles. Her proposed committee would be composed of the chairs of key WTO committees and four independent trade law experts. It would meet once a year or when requested by a party involved in an Appellate Body ruling. The committee would review the Appellate Body’s performance and, when asked, determine whether a specific ruling violated

‘How to Revive Dispute Settlement in the World Trade Organization’, in Bown, C.P. et al., ‘Making the Most of the 2021 WTO Ministerial: What the United States Should Do’, PIIE Briefing 21-3, October 2021, www.piie.com/publications/piie-briefings/making-most-2021-wto-ministerial-what-united-states-should-do, 19–20.

¹⁹Hoekman, B. and P.C. Mavroidis (2020) ‘Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?’, 12, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3610&context=faculty_scholarship.

²⁰Hirsh, ‘Resolving the WTO Appellate Body Crisis’, supra note 18, at 8–9.

²¹Hirsh, B. (2020) ‘Resolving the WTO Appellate Body Crisis: Proposals on Precedent’, Appellate Body Secretariat and the Role of Adjudicators, 7–8 June 2020, www.nftc.org/default/Trade%20Policy/WTO_Issues/Resolving%20the%20WTO%20AB%20Crisis%20vol2%2006042020.pdf.

²²Hillman, J. (2020) ‘A Reset of the World Trade Organization’s Appellate Body’ (limit AB Secretariat staff to eight-year terms), www.cfr.org/report/reset-world-trade-organizations-appellate-body; Hirsh, ‘Resolving the WTO Appellate Body Crisis’, supra note 21, at 6–7 (provide each AB member with an individual assistant (in lieu of a central staff)). The United States has not formally raised concerns regarding the Secretariat, but they have been voiced by the last two US members of the Appellate Body. The concern is that the staff is more knowledgeable than Appellate Body members and may unduly influence their decisions.

²³Hillman, ‘A Reset of the World Trade Organization’s Appellate Body’, supra note 22, at 4–8 (separate appellate mechanism for or a moratorium on review of trade remedy cases); Hufbauer, ‘How to Revive Dispute Settlement in the World Trade Organization’, supra note 18, at 20 (four-year Appellate Body moratorium on trade remedy and national security issues; panel reports final).

²⁴See Davey, ‘Dispute Settlement in GATT’, supra note 3, at 106–107 (undesirability of two tiers of obligations).

²⁵Sutherland, P. et al. (2004) ‘The Future of the WTO’, WTO, 55–56.

the Walker Principles.²⁶ It is not clear what would happen if the Principles were found to have been violated.

To the extent these processes only produce advice and reaction, their impact is unclear. Perhaps the results of the processes would influence the direction of the Appellate Body. That seemed to happen in respect of the amicus brief controversy.²⁷ After extensive criticism of its receptiveness to such briefs, the Appellate Body seemed to downplay their role. It is likely, however, that often there will be divergent views presented in the review process. If so, it is not clear that the Appellate Body would feel constrained to react in any particular way. Absent the review committee having the power to overrule Appellate Body decisions, it would take a formal interpretation under the WTO Agreement to accomplish that and interpretations are not likely to be adopted under the consensus approach.

Would the United States accept this approach? It would have to trust that its actions in the past few years, plus the Walker Principles, would change the Appellate Body's approach to dispute settlement such that expansive decisions would no longer be made. Without a clear enforcement mechanism, I am not sure that the United States will accept an Appellate Body commitment to 'Trust Us'. Moreover, reconstituting the Appellate Body will be very difficult as the United States and probably some others would have to be convinced that the new Appellate Body will be different, while many others will want it not to be that different. Thus, it is useful to consider alternatives.

3.2 A Limited Appeal

It is often said that the role of the Appellate Body was intended to be quite limited.²⁸ Appeals would be uncommon and intended to correct obviously 'bad' panel reports.²⁹ Indeed, the first nominations to the Appellate Body did not include many trade law specialists, suggesting that the Appellate Body's role was not to delve into the intricacies of WTO rules. It might be possible to revise the system so that expectation was met. For example, to obtain appellate review, a party would first have to convince a Limited Appellate Body that the panel report conflicted with another panel report or reached an implausible interpretation of an agreement. The presumption would be that appeals would be rare and where they occurred would be limited to the narrow issues mentioned. There would be, of course, many requests for review and much time would be spent on arguments over whether the conditions for appeal had been met. Given the support for the MPIA, which aims to replicate the existing Appellate Body, it seems doubtful that there would be broad support for this limited alternative, but it could serve as a standard for ad hoc appellate review under DSU article 25 when a non-MPIA party is in a dispute.

3.3 Panel Only, with Limited Review

One can ask how essential an appellate process is to an effective dispute settlement system? An appellate decision is not necessarily a 'better' decision than a panel decision. Even if it is desirable to have a way to resolve conflicting decisions or to change a really 'bad' decision, is a standing appellate tribunal needed to perform that function?

3.3.1 Permanent Panel Body

One longstanding reform proposal is to create a so-called Panel Body of 15 to 20 or so individuals to serve as panelists in all cases.³⁰ The creation of a Panel Body has been endorsed by Hoekman

²⁶Hillman, 'A Reset of the World Trade Organization's Appellate Body', supra note 22.

²⁷See Jackson et al., *Legal Problems of International Economic Relations*, supra note 9, at 258–259.

²⁸This point is elaborated in Krzysztof Pelc, 'Counterfactuals and Contingency in WTO Dispute Settlement History', this issue.

²⁹Hirsh, 'Resolving the WTO Appellate Body Crisis', supra note 18, at 3–4.

³⁰The pros and cons of a Permanent Panel Body were discussed in a mini-symposium in the *Journal of International Economic Law* 6(1) (2003). See also Davey, 'Dispute Settlement in GATT', supra note 3, at 103–105.

and Mavroidis as a response to the Appellate Body crisis. They argue that with better quality panel reports perhaps an appellate system is not needed.³¹ The Panel Body as a whole could act to resolve conflicts amongst individual panel decisions or reverse truly bad ones, thereby playing the role originally expected of the Appellate Body. This proposal would require a new institution, with its own staff, and thus might be viewed by the United States as little different than the current system that it finds objectionable. While I believe such a change in the panel system would be useful, with or without an Appellate Body, the proposal was controversial when first introduced, and it is hard to imagine finding widespread support for it now.³²

3.3.2 Senior Panels

Another possibility would be to keep the current panel process but create the possibility of review by senior panelists to resolve conflicts or correct truly bad decisions. This could be viewed as MPIA-lite. The informal review mechanism could be structured along the following lines: parties could agree on an ad hoc basis to submit an appeal to an arbitration proceeding under DSU article 25 with the three arbitrators selected by the parties from a list compiled by the WTO secretariat of the seven most experienced³³ panelists (or panel chairs), with the parties taking turns to strike two. Such a procedure would be similar to the Limited Appellate Body, but it would have the advantage of avoiding the creation of a new or rehabilitated institution, as the arbitrators would change over time and the procedure would be ad hoc in nature. It would ensure expertise, and it would give parties an autonomy in selection that they have not had with the Appellate Body, providing a group of decision-makers that parties might be more comfortable with overall. To be practicable, such a system would probably have to be limited to challenges involving conflicts and implausible interpretations.³⁴ It would face the same issues in selecting cases as were noted in respect of a Limited Appellate Body. MPIA adherents would not likely defect, but such a system might serve as an alternative for non-MPIA adherents. It is not inconceivable to me that the United States could accept such a system, at least in some cases, as it would not have the characteristics that the United States has found to be objectionable in the Appellate Body.

3.4 Back to GATT 1947

Given the gloomy outlook for the foregoing reforms, a return to GATT-style dispute settlement may be the result for non-MPIA adherents and those in cases involving them. Currently, the ethos seems to be to appeal all panel reports 'into the void', which if it continues would mean the end of dispute settlement. If that ethos changed such that blockage seldom occurred, whether by agreement or practice, the system could work for many cases, but it would have the defects of the GATT system³⁵ and represent a great step back from the progress made in the Uruguay Round, albeit the results of that round in the end may have been a step too far, as was predicted by some at the time.³⁶ One hopeful sign of a change in practice is that the United States agreed to the adoption of a panel report in late December 2021, even though it disagreed with the panel on several important points.³⁷

³¹Hoekman, P.M. and P.C. Mavroidis (2020) 'To AB or Not to AB?', *Journal of International Economic Law* 23, 1.

³²Davey, W.J. (2002) 'A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?', in Kennedy, D.L.M. and J.D. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Professor Robert E. Hudec*. Cambridge University Press, 496–527.

³³Based on the number of past panels served on. There could be separate lists for trade remedy cases.

³⁴It could be used more broadly, but as a practical matter the most experienced panelists may not be willing to take on many cases. Their experience indicates a loyalty to the system, but they are also an aging group.

³⁵See generally Davey, 'Dispute Settlement in GATT', supra note 3.

³⁶Hudec, R.E. (1993) *Enforcing International Trade Law*, Butterworth, 364–365.

³⁷*United States – Anti-dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R, adopted 20 December 2021.

4. Prospects for Resolving the Crisis

The United States caused the crisis and only some movement by the United States can resolve it. It is useful to ask: What is the United States really concerned about? Does it really want to solve the crisis?

4.1 Is It Really about Substance?

If the US concerns are really about substance, particularly in trade remedy cases, can they be addressed without changes in the rules to reflect the US viewpoint? This would be very difficult. Many, if not most, WTO members agree with the Appellate Body decisions that the United States objects to. In the area of trade remedies, there are many more targets of such actions than there are users with major markets. While those members, in order to save the dispute settlement system, may agree to some changes, they are probably loth to go very far in that direction. It would be difficult to give up those favorable decisions on trade remedies obtained through the dispute settlement system, especially if they doubt that they could ever achieve them again in negotiations. Yet it is hard to see how the United States can accept no change in some rules.

4.2 Is It Really about Binding Dispute Settlement?

More fundamentally one can ask if the real US problem is with binding dispute settlement in the WTO? Given that there will always be ambiguities in WTO agreements and fierce disputes over outcomes, is it hopeless to think that they can be satisfactorily resolved by adjudication rather than negotiation, which leads to questions concerning the desirability of judicial-like dispute settlement.³⁸ Perhaps the operation of a successful dispute settlement system hinges on the appointment of 'superhuman' panelists and Appellate Body members, which is likely to occur only rarely.

In this regard, it is useful to recall that although the United States pushed for stronger dispute settlement in the Uruguay Round, as directed by Congress, signs of buyers' remorse quickly appeared. The WTO implementing legislation was passed in the Senate with President Clinton's commitment not to block the creation of the so-called Dole Commission that would have had federal judges review certain WTO decisions involving the United States. That never came to pass, but it signaled an early problem in US support for binding dispute settlement.³⁹ In the first major controversial case in the WTO – the *EC-Bananas* case,⁴⁰ the United States retaliated before it was authorized because of its view that it had a right to retaliate even though the arbitration on the level of retaliation had not finished (which it did 30 days later). The EU challenged the action and, of course, won, but it was another indicator that US acceptance of the system was not complete.⁴¹ In that regard, it is useful to recall that Bob Hudec, the authority on GATT dispute settlement, questioned the wisdom of moving to a more-judicial like dispute settlement system precisely because he had seen no sign that the United States had changed its attitudes so as to accept it.⁴² The earlier US withdrawal from the general compulsory jurisdiction from the International Court of Justice⁴³ and its refusal to join the International Criminal Court are both signs that the United States basically has problems with compulsory binding dispute settlement at the international level. Indeed, one can ask whether the early 1990s were an

³⁸For the pros and cons of rule-based (judicial) versus power-based (negotiation) dispute settlement in international trade, see Jackson et al., *Legal Problems of International Economic Relations*, supra note 9, 181–191.

³⁹Horlick, G.N. (1995) 'WTO Dispute Settlement and the Dole Commission', *Journal of World Trade* 29(6), 45–48.

⁴⁰*European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27 (1997).

⁴¹*US-Import Measures on Certain Products from the European Communities*, WT/DS165.

⁴²Hudec, *Enforcing International Trade Law*, supra note 36, at 364–365.

⁴³Text of 'US Statement on Withdrawal from Case before the World Court', *New York Times*, sec. 1, p. 4, 19 January 1985.

aberration insofar as countries were willing to commit to binding international dispute settlement.⁴⁴

4.3 Can a Strong Dispute Settlement System Co-Exist with a Weak Political System?

Even if the United States could in theory accept binding dispute settlement without rule changes, one can ask if a powerful judicial institution (like the Appellate Body) can ever comfortably co-exist with a dysfunctional political institution (the consensus-based WTO ministerial conferences/General Council) in one organization. In such a case, there is no check on the judiciary, save through the process of appointing its members.⁴⁵ I think that such co-existence would be possible. Indeed, had the Appellate Body accorded governments the same discretion in trade remedy cases as it did in health and environmental cases or, more narrowly, if it had not reversed a handful of panel decisions under the dumping, subsidies, and safeguard agreements,⁴⁶ it would probably be operating today. Thus, I do not think it can be said that the system was ultimately doomed to fail.⁴⁷ But the combination of a weak political system and a strong judicial system will always be problematic.⁴⁸ There is little doubt that if a ‘reformed’ Appellate Body follows the practice of the original,⁴⁹ the dispute settlement system would collapse again. The role of dispute settlement cannot be to settle what negotiators did not. It is crystal clear that there was never any intention that it should do so. Thus, the WTO system must rein in its ambitions to decide all issues and be more willing to conclude that a complainant has not proved its case.

4.4 The Upshot

It seems likely that at best the current crisis will linger. For cases involving those that liked the Appellate Body, the MPIA will provide some comfort. Unfortunately, to the extent it succeeds, it may delay resolution of the crisis, but even with success, it is hard to believe that its adherents will be content with a system where only they can be held accountable for rule violations. For the cases not subject to the MPIA, the best that can be hoped for is that there is a change in practice such that panels issue narrower reports dealing only with the issues that absolutely must be dealt with and that the membership accepts the GATT ethos, i.e., the presumption that most panel reports will be adopted. If a member cannot imagine a system without a second bite at the apple, it should join the MPIA or agree to an ad hoc arrangement such as the senior panel process suggested. Otherwise, the result will be a largely ineffective dispute settlement system characterized by a de facto creation of two classes of obligations – those that are enforceable and those that are not, the distinction being based not on the obligation in question but by the identity of the

⁴⁴Hillman, ‘A Reset of the World Trade Organization’s Appellate Body’, supra note 22, at 2–3.

⁴⁵See Hoekman and Mavroidis ‘Preventing the Bad from Getting Worse’, supra note 19, at 12–13. See also C. Barfield (2001) *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*. AEI Press.

⁴⁶One can imagine that different results on four issues – unforeseen developments in safeguards, zeroing in antidumping, and public enterprise in subsidies, along with serious consideration of the interpretative rule in article 17.6 of the Antidumping Agreement – would have forestalled much criticism of the Appellate Body by US-based entities.

⁴⁷Davey, W.J. (2006) ‘The WTO: Looking Forwards’, *Journal of International Economic Law* 9(3), 9–23 (WTO dispute settlement system not ‘ultimately doomed to fail’).

⁴⁸See Posner, E. and J.C. Yoo (2005) ‘Judicial Independence in International Tribunals’, *California Law Review* 93, 1 (independent international tribunals inevitably issue decisions that diverge from understandings of the countries that created them).

⁴⁹The longest serving Appellate Body member summarized that practice in describing the role of the Appellate Body as follows: ‘[T]he WTO agreements... are a masterpiece of “constructive ambiguity”... As a result, there is much need for “clarification”, a task which [DSU article 3.2] explicitly assigns to the WTO dispute settlement system, and thus ultimately to the Appellate Body.’ Van den Bossche, P. (2021) ‘The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?’, WTI Working paper No. 02/2021, at sec. 4.2.1, www.wti.org/media/filer_public/c2/ef/c2efc2de-ce85-45c7-9512-9286e14fca47/wti_working_paper_02_2021.pdf.

member in question, i.e., MPIA adherent or not. Such a situation cannot be viewed as acceptable in the long run.

All of this is not a very uplifting view of the future. The one positive factor I would note is that it is hard to believe that the United States will be able to play a leadership role in trade negotiations without supporting some sort of effective dispute settlement system. Thus, in the long run, to maintain its leadership role, the United States will have to decide the extent to which it can accept binding dispute settlement in trade matters and will have to compromise on dispute settlement.⁵⁰

⁵⁰Davey, 'The WTO: Looking Forwards', supra note 46, at 14–17 (US sovereignty were not threatened by WTO dispute settlement; United States has long-term interest in effective WTO dispute settlement). See also Hufbauer, 'How to Revive Dispute Settlement in the World Trade Organization', supra note 18, at 20.