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The WTO DSU 2.0: How Can We Go Back to the Future?

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10.1 INTRODUCTION

The stalemate in multilateral trade negotiations under the auspices of the World Trade Organization (WTO) in combination with the deadlock of the WTO dispute settlement system creates a potent mix. As things stand, it seems quite unlikely that the WTO will go back to 'business as usual' anytime soon, notwithstanding the more co-operative attitude of the Biden administration. With this as a given, solving the dispute settlement deadlock remains a top priority.

Although there seems to be a commitment among WTO parties to work collectively towards resolving the stalemate, it is not yet clear *how* their resolution will be translated into meaningful action. Yet, the existence of such commitment, even without a specified roadmap, is not necessarily a curse and could even prove to be a blessing.

In this chapter, we explain how this opportunity could be used to design a viable dispute resolution regime at the WTO. In particular, we put forward concrete proposals for the establishment of a new WTO court and explain why we believe such a course of action has realistic chances of breaking the current impasse.

In order to elucidate the rationale behind our proposal of a new court, we first present and assess the reasons which allegedly led to the current impasse in Section 10.2. We do this through the lenses of two theoretical models, namely the veto players theory, and Hirschman's 'exit, voice, and loyalty' model which, if employed jointly, can capture the essence and the hidden dynamics of the current impasse. These theoretical perspectives also enable us to appreciate the ability to elicit change to overcome the current impasse by identifying, on the one hand, the existing systemic disincentives that nurture the intransigence of key actors, and by highlighting, on the other hand, the

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possible incentives which in turn could nudge the relevant actors to alter their current position. In the same section, we contextualise the current impasse, which, in our view, reflects wider geopolitical concerns.

We then explain in Section 10.3 why the identity of WTO judges matters, and we go on to elucidate in Section 10.4 the importance (added value) of having a functioning dispute settlement system at times when the wider operation of the WTO (substantive negotiations) has become sluggish and needs to be revived by drawing from the experience of another international ecosystem that promotes trade and integration, albeit via a markedly different degree of intensity, namely the EU. In Section 10.5, we present our own ideal WTO court, expanding on the work already initiated by Hoekman and Mavroidis. In Section 10.6, we explain the reasons why, in our opinion, our proposal can address the current impasse and why it is viable. Section 10.7 recaps our key points.

10.2 SETTING THE SCENE OF ANALYSIS: THE WAY WE WERE(?)

Between 1989 and the end of 2020, the WTO was an anomaly in international relations: its DSU (Dispute Settlement Understanding), the agreement administering dispute adjudication, continued the practice already established at the WTO Montreal Ministerial Conference (1989) to always submit disputes to an impartial judge, irrespective of the willingness of the respondent to do so. This practice came to be known as 'negative consensus', an awkward term for sure, and was, as per Hudec's[1] perceptive account, the consequence of General Agreement on Tariffs and Trade's (GATT) successful handling of trade disputes over the years.

This is the case no more.[2] The WTO appellate body (the second instance court in the DSU architecture) has in effect ceased to exist, and its demise has cast doubt on the wisdom to 'empanel' disputes in the first place, since 'appeals to the void' are (have been) possible. These are appeals launched by parties *despite the absence* of the appellate body, which could bring the final decision regarding a dispute into a never-ending judicial/procedural limbo, since, pursuant to Article 16.4 of the DSU, 'the report by the panel would not be considered for adoption by the dispute settlement body (DSB)

[1] Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Oxford: Butterworth, 1993).

[2] In 2018 the US blocked the appointment of new appellate body members with the immediate consequence of rendering the latter de facto non-functional due to the applicable quorum rules. The US position on this score has so far remained the same, even under the Biden administration.

until after completion of the appeal' (emphasis added). Without a functioning appellate body, the appeal *cannot be completed*, and therefore the panel report cannot be adopted by the DSB. Yet, enforcement is a quintessential element of the WTO regime: why sign the agreement in the first place if enforcement is not on the cards?

Under the current circumstances, some WTO members have had recourse to ingenious measures aiming to avoid the negative effects of non-enforcement. However, the MPIA (Multi-party Interim Agreement),[3] an attempt to provide an interim appeals board spearheaded by the European Union and China, failed in persuading the WTO membership, whereas *ad hoc* agreements to forego appeals are scarce. The consequence has been a dramatic drop in the volume of adjudicated disputes. Hoekman, Mavroidis, and Saluste[4] report that the WTO adjudicated approximately twenty-four disputes per year between 1995 and 2019, if by 'disputes' we understand a submission requesting consultations. The numbers for 2020, 2021, and 2022, the three years without the appellate body, are five, nine, and seven, respectively. This is a far cry from an average of over twenty submitted disputes per year during the first twenty years of the WTO.[5]

There is no point in providing a detailed historical account of how we ended up where we are. It is pertinent, though, to highlight the significance of overcoming the stalemate of the DSU as a condition for enabling the WTO to

[3] It is interesting to note the key characteristics of the MPIA by reference to the wider system. In this regard it is observed that the MPIA exhibits some similarities as well as some differences to the *plurilateral* agreements administered by the WTO. On the one hand, it is similar because it allows those willing WTO members to proceed with forms of cooperation/agreement which will remain under the auspices and the wider system of the WTO without securing the support and participation of the whole membership. On the other hand, as opposed to the existing plurilateral agreements, the mission of the MPIA is *provisional* and connected with a key aspect of the *multilateral* framework: it is in place until the functioning of the main dispute settlement system is restored. Think of it as the smaller reserve wheel, used in case of a flat tyre: it replaces the normal wheel, but not permanently; it simply facilitates the drive to the garage. This is what Art 25 of GATT and the MPIA do: they provide for an *ad hoc*/interim arbitration mechanism. This is quite different from plurilateral agreements such as the Government Procurement Agreement. Why? Because plurilateral agreements are topic-specific and include new or higher levels of commitment for participating members. The MPIA is different in the sense that, from a substantive perspective, the applicable rules of the agreement are those of the multilateral dispute settlement system (the MPIA does not create new substantive commitments).

[4] Bernard M. Hoekman, Petros C. Mavroidis, and Maarja Saluste, 'Informing WTO reform: Dispute settlement performance, 1995–2020' (2021) 55 J World Trade 1–50.

[5] WTO, 'Chronological list of disputes cases', www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (accessed 9 December 2022).

solve the more fundamental impasse connected with the multilateral trade negotiations within the WTO.

Granted, the demise of the appellate body and the ensuing crisis that afflicted the WTO judiciary are the consequence of the hostile attitude adopted by the Trump administration, but as Fiorini et al.[6] have shown through their survey, some key aspects of Trump's criticism are shared by others. Where the US and the rest of the WTO membership parted company is the manner in which their concerns were addressed.

10.2.1 *Contextualising the Dispute Settlement Deadlock*

Understanding the reasons behind the stalemate and the importance of its resolution requires a contextual analysis. Such contextualisation will enable us to assess the relevance of the proposals we present in Section 10.5 and why we believe they may lead some key stakeholders to consider changing their current position. That said, we first need to clearly articulate our point of departure, which is the purpose of the WTO dispute settlement adjudication.

10.2.2 *What Does the WTO Dispute Settlement Adjudication Purport to Achieve?*

The GATT/WTO is no co-ordination game. Players will not align their interests in such a manner that there will be no negative spillovers from each other's actions. Political economy-motivated litigation is to be expected (let us call it 'bad faith' disputes), as, in democracies at least, serving the (national) private sector's interests might yield considerable rewards to the government. But the GATT/WTO is also an 'obligationally' incomplete contract. Horn, Maggi, and Staiger[7] have explained that, since all instruments in equilibrium affect trade (at least potentially and/or indirectly), negotiators face diminishing returns when moving from generic language (e.g. public health protection) to disaggregated language (e.g. the EU legislation on food additives). Consequently, they stop at the generic information level, and judges might be called on to provide the missing information (does the EU legislation amount to the protection of public health, for instance?). Let us use the term 'good faith' disputes for this type of litigation.

[6] Matteo Fiorini et al., 'WTO dispute settlement and the appellate body crisis: Insider perceptions and members' revealed preferences' (2020) 54 J World Trade 667–98.

[7] Henrik Horn, Giovanni Maggi, and Robert W. Staiger, 'Trade agreements as endogenously incomplete contracts' (2010) 100 Am Econ Rev. 394–419.

In practice, it might on occasion be quite difficult to distinguish between the two. Whether a dispute is 'good faith' or 'bad faith' is, after all, a question of private information. Unavoidably thus, the legislator (and not just the WTO legislator) will treat all of them as disputes. The DSU, like many regimes, must operate inevitably as a system organising dispute adjudication without distinguishing between good faith and bad faith disputes. Remedies do not differentiate between the two categories. Thus, the underlying presumption is that all challenged behaviour is not bad faith behaviour.

The allocation of the burden of proof follows this logic. The complainant always carries the burden to produce evidence to establish a prima facie case.

In this constellation, the WTO judge is an agent, not a principal (lawmaker), by virtue of Article 3.2 of the DSU.

The DSU embeds an ordinal preference for finding a solution which is mutually acceptable to the parties, and which is consistent with the covered agreements. A solution can occur even before a panel has been established, but nothing stops the litigating parties from continuing to consult thereafter. If a settlement proves impossible, the first objective of the dispute settlement mechanism is to secure the withdrawal of the measures concerned. Compensation (in practice, always in the form of tariff retaliation) should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure, pending the withdrawal of the measure. Parties might voluntarily offer compensation, but if compensation is either not offered or not accepted at all, then the injured party may request authorisation to adopt self-help measures. Unlike other areas of international law, *it is not unilateral self-help* measures. The WTO judge will decide what amount of retaliation is appropriate.

Practice under the DSU is thus called to serve the objectives as explained above: settlement, before withdrawal, before retaliation.

10.2.3 *Should One Stay, or Should One Go?*

The current stalemate invites a brief reminder of the dynamics within the DSU system. What are the parties' possible courses of action when the dispute settlement system is seemingly not fully responsive to their preferences or concerns? A useful tool to facilitate such examination is Hirschman's[8] 'exit, voice, and loyalty' theoretical model which, in the context of WTO dynamics,

[8] Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline of Firms, Organizations and States* (Cambridge: Harvard University Press, 1970).

has been used by Pauwelyn[9] and more recently by Paine,[10] together with the 'veto players' theoretical model introduced by Tsebelis.[11] Although these two theoretical models are independent in principle, their parallel deployment in this case enables us to better understand the decisions which led to the current WTO dispute settlement stalemate.

According to Hirschman's 'exit, voice, and loyalty' argument, members of an organisation who are dissatisfied with its performance or operation would consider the option of exiting when the exit (and re-entry) costs are either low or when these costs are offset by the gains of being outside the organisation. A relevant example would be the US approach to United Nations Educational, Scientific and Cultural Organisation (UNESCO) membership. The US, a founding member of UNESCO, exited the organisation in 1984, rejoined in 2003, and withdrew again in 2018. However, when the exit and re-entry costs are high, members would consider using processes and opportunities within the organisation to voice their concerns and make their dissatisfaction apparent. Depending on the capacity, ability, and/or willingness of the organisation to accommodate them in a way that creates the impression that their voices are heard and that they have an input in reshaping or reforming the organisation or its direction of travel, the loyalty of the particular State to the organisation can be strengthened, or weakened, accordingly.

In the case of the WTO, the reasons why the exit option is perceived to be costly is self-evident: WTO exit entails the loss of all membership benefits, such as preferential treatment in a wide array of trade areas and, more critically, the difficulty of replicating such a system of advantages outside the WTO.

Moving now to Tsebelis' 'veto player' model, members of a system (which could be an individual actor or a number of actors acting collectively) become veto players when their consent is necessary for a systemic change (procedural or substantive) to occur.

Looking at the WTO, we observe that regarding substantive commitments and disciplines, there is clearly a veto player system in place in the sense that changes in the disciplines require the consensus of members. By contrast, the WTO's dispute settlement system – and this is one of the peculiarities of the WTO architecture – is based on the abovementioned 'negative consensus'

[9] Joost Pauwelyn, 'The transformation of world trade' (2005) 104 Mich L Rev 1–54.

[10] Joshua Paine, 'The WTO's dispute settlement body as a voice mechanism' (2019) 20 J World Invest Trade 820–61.

[11] George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton, NJ: Princeton University Press, 2002).

according to which dispute proceedings commence even if the respondent does not acquiesce, unless there is consensus among the other members *against* the introduction of the dispute. In other words, the respondent does not enjoy a veto player status. Nevertheless, there is still an element of consensus in the process governing the periodic appointment of new appellate body members. At that point, for a member dissatisfied with the operation of the organisation where the exit option is associated with high exit and re-entry costs, there is an opportunity to voice their concerns by using a part of the organisation's internal process where they hold a veto player position. And this is precisely what the US did with the appellate body: its decision can be viewed as a loud 'voice' manifestation, which illustrates the point.

Having provided a theoretical explanation of the current stalemate, in the next section we will explain the importance of having an adjudicative body composed of judges, whereas in Section 10.5, we will revert to the EU to consider the lessons drawn from having a functioning dispute resolution system at times when substantive negotiations in the same organisation lose momentum. This discussion will provide the background to our proposal discussed in Sections 10.6 and 10.7.

10.2.4 *The Geopolitical Parameter: Are We Facing a New Thucydides' Trap?*

As previously mentioned, having an understanding of the wider geopolitical contest is of paramount importance in order to properly understand the subject of our examination, namely the WTO dispute resolution impasse.

Allison[12] provides a comprehensive historical account of transitions from one superpower to the next. History points to no case where hegemony was exercised collectively. Kindleberger (1986) and Keohane (1984) have explained why it is in the interest of the 'hegemon' to invest in the stability of the world system, whereas Tucker (2022), in a recent provocative statement, presented the first design of how power could be exercised collectively.[13] But this is the world of tomorrow, hopefully. For now, Pax Americana, the successor to Pax Britannica, is waning, and the question is whether we are on the cusp of Pax Sinica. This geopolitical volatility has also affected the workings of the WTO. The US is effectively asking whether and, if so, under

[12] Graham Allison, *Destined for War: Can America and China Escape Thucydides's Trap?* (New York: Houghton Mifflin Harcourt, 2017).

[13] Charles P. Kindleberger, *The World in Depression 1929–1939* (Berkeley: University of California Press, 1986); Robert O. Keohane, *After Hegemony, Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984); Paul Tucker, *Global Conflict* (Princeton, NJ: Princeton University Press, 2022).

what conditions trading with China can (continue to) take place. Its attitude regarding WTO dispute adjudication is, in substantial part, motivated by its ongoing antagonism with China.

The current legislative framework is inadequate to deal with modern challenges. Take the WTO Agreement on Subsidies and Countervailing Measures, which rests on the presumption that national and corporate links coincide (Article 1). But this is non-sensical, as a substantial part of trade is channelled through GVCs (global value chains). China through its OBOR (One Belt One Road) has been subsidising its branches around the world running little risk of retaliation. And we do live a return to industrial policy as the various Chips Acts[14] adopted around the world show. Add to that the fact that industrial policy is routinely justified on national security grounds, the justiciability of which is highly contested by the US (and a few minor players). Is this really the moment for a strong WTO judiciary and a weak legislative (hampered by the consensus rule, which operates as veto). Barfield (2001) warned about this risk, as did Jackson (2000).[15] The risk materialised a few years later. The US, quite unhappy with the outcomes in a few disputes that it had litigated with China, hardened its stance towards the WTO judiciary.[16] But the reason for doing so run deeper.

10.3 WHO WILL BE APPOINTED JUDGE, MATTERS

'Well Sir, goodbye. Do justice!' He turned quite sharply and he said: 'Come here. Come here.' I answered: 'Oh I know, I know.' He replied: 'That is not my job. My job is to play the game according to the rules.'[17]

This is a dialogue between Oliver Wendell Holmes, who responds to the nudge of Learned Hand, two giant personalities in US legal history and legal thinking in general, as reproduced by Dilliard. The reputed jurists understood

[14] The term refers to national legal instruments aimed at boosting domestic production capacity in technologically important areas such as semiconductors.

[15] Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, DC: American Enterprise Institute, 2001); John H. Jackson, *The Role and Effectiveness of the WTO Dispute Settlement System* (Washington, DC: Brookings Trade Forum, Brookings Institution, 2000), pp. 179–219.

[16] Petros C. Mavroidis and André Sapir, *China and the WTO, Why Multilateralism Still Matters* (Princeton, NJ: Princeton University Press, 2021).

[17] Irving Dilliard, *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 3rd ed. (New York: Alfred A. Knopf, 1974), p. 307. See also the excellent analysis of Michael Herz ('"Do justice!" Variations of a thrice-told tale' (1996) 82 Va L Rev 111–61) of this dialogue, the variations of the story that different storytellers have provided us with, and what these variations entail.

their role as agents, leaving the role of principals to the US lawmakers. The institutional design of the DSU took a leaf from this story.

10.3.1 *WTO Judges Are Agents*

The DSU understands that panellists and appellate body members are agents who cannot undo the balance of rights and obligations agreed by the principals, the WTO members. According to Article 3.2 of the DSU:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise 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.

In various other provisions, the DSU provides that the agents (judges) must be independent and competent. We subscribe to all of this. The problem, though, is that independence, impartiality, and competence are standards, not rules. Policing ex ante and ex post is necessary to ensure that judges do adjudicate behind a 'veil of ignorance'. But the DSU process is largely based on self-disclosure, which is not always a guarantee for DSU-consistent behaviour. Why would any agent, in this case WTO judges, submit self-incriminating information, which could be private (and, thus, difficult to discover)?[18] While this may be true also in other contexts (including judicial ones), the nature of the DSU,[19] combined with the nature of the WTO legal framework as incomplete contract[20] par excellence, means that the standards of impartiality, competence, and consistency become even more important and that any diversion is less tolerable.

Yet, a critical issue is the policing of the behaviour of WTO judges: have they really behaved as agents? To appreciate this point, we need to digress into the mode of interpreting the WTO agreements, the 'customary rules of

[18] We offered examples of cases where the membership has questioned the impartiality of appointed adjudicators: see Petros C. Mavroidis, *The WTO Dispute Settlement System: How, Why and Where?* (Cheltenham: Edward Elgar, 2022).

[19] As mentioned above under Section 10.2.2, according to the DSU, the WTO judge decides both the legality and the amount of retaliatory action.

[20] Incomplete contracts are agreements which do not cover all contingencies and aspects in great detail, leaving scope for more negotiations between the parties to the agreement to develop the agreement and resolve/concretise these grey areas.

interpretation' according to the wording of Article 3.2 of the DSU. This is critical because the substantive provisions of the WTO agreements are usually expressed as 'standards', and not as 'rules', which leaves WTO adjudicators with a substantial margin of discretion.[21]

10.3.2 *Agents in a Non-enviable Position*

The explicit reference to 'customary rules' in Article 3.2 of the DSU, and hence the Vienna Convention on the Law of Treaties (VCLT), could be seen as departure from earlier GATT practice when GATT panels were routinely criticised for behaving as if the GATT was a self-contained regime.[22]

As mentioned earlier, the WTO contract is filled with 'standards', which makes it an 'obligationally' incomplete contract. In contrast, in a complete contract, disputes would have been motivated by bad faith because a complete contract would have been regulatorily complete and clear. Feasible contracts, though, are incomplete, as is evident in WTO agreements – contracts dealing with trade integration. All policies affect directly or indirectly, actually or potentially international trade. This explains to a large part, as per the authoritative account of Baldwin,[23] why behind-the-border policies were not identified and were all lumped together under one heading in Article III of the GATT. Contracts (like the GATT/WTO Agreement) are gradually completed, mostly through experience, as elements beyond legislative foresight risk giving rise to disputes.

In the early GATT days, institutional details about dispute settlement did not matter much. The GATT was a relational contract, namely a contract whose operation and effects were based on a relationship of trust. This was facilitated by the fact that early GATT was a contract among like-minded countries. In relational contracts, incompleteness is less of a problem. Good faith permeated the relations between players and substituted the missing

[21] Louis Kaplow, 'Rules versus standards: An economic analysis' (1992) 42 Duke LJ 557–629, provides a very elegant discussion of this distinction.

[22] We have offered an empirical account of WTO practice to make the point that WTO 'openness' to the rest of international law and relations is incoherent (and not linear). Furthermore, in the overwhelming majority of cases, WTO panels have referred to non-WTO law to support conclusions they had already reached while confined within the four corners of the WTO legal regime. See Petros C. Mavroidis, *The Sources of WTO Law and Their Interpretation: Is the New OK, OK?* (Cheltenham: Edward Elgar, 2022).

[23] Robert E. Baldwin, *Non-tariff Distortions of International Trade* (Washington, DC: Brookings Institution, 1970).

words. Disputes were also settled regularly, as Hudec[24] and Daswani, Santana, and Volkai[25] have highlighted.

But things changed as membership changed. As GATT membership expanded, they were all becoming increasingly aware that the presumption of 'good faith' was a shaky basis to fill the gaps for various reasons, ranging from the lack of common perceptions to the lack of common history.[26] In other words, widened membership meant that the 'same wavelength' engagement with the rules by all parties was not a given anymore.

Furthermore, new members did not have property rights over the old regime, and they wanted to have their say in the shaping of the new agreements. The new agreements continued to be incomplete for the reasons already explained, but also because the increasing heterogeneity of the members rendered consensus elusive. The result was that, unlike the GATT, the WTO Agreement is no relational contract, and incompleteness now comes at an additional cost. One cannot rely on good faith as much as before to resolve disputes.

An example will highlight this point. In the 1950s, Germany had been violating its obligations with respect to duties that it had agreed to impose on cereal starch and potato flour. The Benelux countries complained. During the panel proceedings, Germany made the following offer:

> The German delegation, while pointing out that the German Government was not in a position to modify the customs tariff without approval by Parliament and that the delegation was not therefore prepared to indicate a date for the reduction of the tariff rates, agreed to *request the Federal Government to propose to Parliament*, *within three months* after the end of the Ninth Session of the GATT, to grant the following tariff concessions.[27]

This does not look like an undertaking by Germany to implement its obligations. And yet, the Benelux countries agreed and accepted the offer. The Benelux countries and Germany had, of course, co-operated in different fora over the years, and a level of trust had developed between them. Would the Benelux countries have accepted similar promises from countries with which they did not share as much as they did with Germany? For the Benelux countries and Germany (as with many of the initial GATT members),

[24] Hudec, *Enforcing International Trade Law*.

[25] Arti-Gobind Daswani, Roy Santana, and Janos Volkai, *GATT Disputes 1948–1995: Dispute Settlement Procedures* (Geneva: WTO, 2018).

[26] Or even absence of consolidated levels of mutual trust due to historical reasons.

[27] WTO, 'German import duties on starch and potato flour' (7 February 1955) GATT Doc. W.9/178, para. 5 (emphasis added).

GATT was a relational contract whose operation and effects were based on a relationship of trust. For them, what had explicitly been included in the contract was just an outline of their overall agreement. There were additional implicit terms and an implicit understanding regarding the operation of the GATT, which determined their behaviour as well as their relations.

Although the heterogeneity of GATT membership was welcome because it helped transform the GATT into a global organisation, it also meant that all members no longer shared the implicit terms and understandings.

This is as far as the GATT is concerned. Reverting now to the VCLT, it lays down the methods of interpretation without explaining their relative importance. As rightly pointed out by the ILC Fragmentation Report : 'It is in fact hard to think of any approach to interpretation that would be excluded from articles 31 and 32 [VCLT].'[28] As a result, textualists will criticise contextualists; both will be criticised by originalists and modernists, and so on and so forth.

Although this is true for other international regimes where the VCLT's interpretation tools apply, in the case of the WTO and the DSU, an added complication is the even more incomplete nature of the WTO Agreement combined with the structure of the WTO settlement system, which is not designed in a way to promote an institutional alignment or instil an *esprit de corps* among WTO judges, leading to consistent (judicial) outcomes.

To give an example, two different appellate body formations have reached divergent conclusions regarding the understanding of the same terms by applying the VCLT. The appellate body, dealing with the passing of subsidies, within two years and without explanation, totally reversed its case law to the effect that auctioning price exhausts previously bestowed benefits while employing the same VCLT interpretative canon.[29]

All this shows that WTO adjudicators are asked to interpret one incomplete contract (the WTO Agreement) through another incomplete contract (the VCLT). This is no walk in the park.

And then there is the institutional design. The framers of the DSU had spent most of their negotiating capital in bringing about the provisional agreement reached during the Montreal Ministerial Conference (1988), namely, to transform multilateral adjudication from de facto into de jure compulsory third-party adjudication. This is exactly what the negative

[28] ILC, 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc. A/CN.4/L.682 and Add.1, para. 427.

[29] See Mavroidis, *Sources of WTO Law*.

consensus amounted to. Citing archival record, we argued elsewhere[30] that the DSU framers largely based their negotiations on the premise that 'if it works, don't change it'. Several contributions in the comprehensive account that Marceau[31] put together, and especially that of Steger,[32] have underlined that even key institutions like the appellate body were an afterthought.

New challenges piled on in the first twenty-five years of WTO DSU experience: does the current regime of prospective remedies serve the interests of the weaker trading nations? What should be the role of compliance panels? Where to draw the line between compliance panels and arbitrators operating under Article 22.6 of the DSU? What should be the role of the Secretariat, an area where Pauwelyn and Pelc[33] have been quite vocal? There is a lengthy list of complaints, worries, and interrogations, some of which found its way into the inconclusive DSU review.[34]

10.4 THE IMPORTANCE OF HAVING A FUNCTIONING DSB DURING PERIODS OF NEGOTIATION INERTIA: LESSONS FOR THE WTO/DSU FROM THE EU EXPERIENCE

It is important to remember that the DSU stalemate inhabits the environment of a wider WTO legislative crisis, which is really the elephant in the room. The WTO has added only one new multilateral agreement to its arsenal since the Uruguay round package: the ATF (Agreement on Trade Facilitation). In the meantime, we witness a proliferation of FTAs (free trade areas) mushrooming and occupying the trade agenda.[35] This was probably to be expected, as it is behind-the-border policies that segment markets nowadays. To address

[30] Petros C. Mavroidis, 'Mind over matter', in Kyle Bagwell and Robert W. Staiger (eds.), *Handbook on Commercial Policy* (Amsterdam: Elsevier, 2016), pp. 333–78.

[31] Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO* (Geneva: WTO, 2015).

[32] Debra P. Steger, 'The founding of the appellate body', in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO* (Geneva: WTO, 2015), pp. 447–65.

[33] Joost Pauwelyn and Krzysztof Pelc, 'Who writes the rulings of the World Trade Organization? A critical assessment of the role of the Secretariat in WTO dispute settlement', *SSRN*, 2019, https://ssrn.com/abstract=3458872 (accessed 9 December 2022).

[34] See McDougall's excellent account of the content of the discussions: 'The crisis in WTO dispute settlement: Fixing birth defects to restore balance' (2018) 52 J World Trade 867–96.

[35] See the excellent World Bank 'twin' studies: Claudia Hofmann, Alberto Osnago, and Michele Ruta, 'Horizontal depth: A new database on the content of preferential trade agreements. Policy Research Working Paper No. WPS 7981', *World Bank Group*, 2017, http://hdl.handle.net/10986/26148 (accessed 9 December 2022); Aaditya Mattoo, Nadia Rocha, and Michele Ruta (eds.), *Handbook of Deep Trade Agreements* (Washington, DC: World Bank Group, 2020).

them, like-mindedness is a key ingredient, but the widening of WTO membership and the deepening of obligations appear to amount increasingly to a zero-sum game.

Although we do not equate the DSU stalemate resolution with the end of the wider WTO legislative crisis, the boost that the resolution of the appellate body stalemate would provide to the process of substantive WTO negotiations is apparent and acknowledged in the highest echelons.[36]

With this in mind, we argue that there are few cases which highlight the importance of having a functioning dispute resolution system during periods of loss of momentum in (trade) negotiations other than the EU experience during the years which followed France's 'empty chair' practice in the mid-1960s.

Looking at that experience could provide useful lessons for the WTO if one does not lose sight of the inherent differences that characterise the two systems. During this period where decision-making at the Council of the EU (then the European Economic Community) was at best sluggish, a substitute for maintaining some sort of momentum emerged. In the case of the EU, it was the Court of Justice of the European Union (CJEU) that maintained the momentum of integration with a series of important judgments which directly affected the European integration's direction of travel.[37] Likewise, one may argue, in the WTO, the stalemate of trade negotiations left a similar space to be filled by the organ entrusted with the job of resolving disputes within the multilateral trade system. However, this is where the similarities end.

The principals of the EU and of the WTO system had envisaged different roles for their dispute settlement bodies. In the case of the EU, the role of the CJEU is not merely to settle disputes among the principals (one might argue, in fact, that this aspect is not even the most significant one). In addition, the CJEU functions as the ultimate arbitrator for the interpretation of EU law in the context of cases that emerge in disputes which arise before national courts through the mechanism of a preliminary reference embedded in

[36] See statement of DDG Ellard, highlighting the 'existential' need to resolve the stalemate for some members and, one may argue, for the entire WTO system (WTO, 'DDG Ellard stresses need to maintain WTO momentum, importance of dispute settlement reform', 6 December 2021, www.wto.org/english/news_e/news21_e/ddgae_06dec21_e.htm (accessed 9 December 2022)).

[37] E.g., case 8/74, *Procureur du Roi* v. *Dassonville* [1974] ECR 837; case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 114; case 120/78, *Rewe-Zentral* AG v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

Article 267 of the Treaty on the Functioning of the European Union. This is the essence of the *Van Gend & Loos* and *Costa* v. *ENEL* judgments, the cases which established the instrumental concepts – for the purposes of the EU integration process – of *direct effect* and *primacy* of EU law, respectively.[38]

Therefore, although the idea of the role of the judge as an agent who does not challenge the balance agreed to by the principals is a description which could depict, on paper at least, the role of the CJEU in the EU system, there is one key difference: the CJEU assumed the role of an 'active, assertive' agent who is focused not always on the actual rule but rather on the overall incentives, aims, and objectives stated by the principals, and used them to reshape the rules.

It is true that such a role is not an invention of the CJEU; it is mentioned in the treaties, but the vigour, eagerness, and assertiveness in the exercise of its role, at least so far, were not always predetermined in terms of extent and intensity. For example, there is nothing predetermined in the *Van Gend & Loos*,[39] *Cassis de Dijon*,[40] and *Costa* v. *ENEL*[41] cases in the sense that they involve a *choice* of legal narrative scenario by the CJEU – a choice which was not obvious at the time, at least as far as the balance of the rules agreed by the principals was concerned or, to be more precise, as far as the principals' understanding of the balance of the rules they have agreed upon.

Contrary to the EU paradigm, the multilateral system established by the WTO never had ambitions comparable to those of the European experiment. This was clear by the design of the system itself, and its dispute settlement system in particular. In other words, the WTO system *was designed not* as a 'new legal order of international law', to borrow from the language of *Van Gend & Loos*, but rather as a system 'which merely creates mutual obligations between the contracting states'.[42] Likewise, the DSU was not conceived as an institution 'endowed with sovereign rights' and tasked with the role of overseeing a legal system which created rights and obligations not only for its signatory States but also for the natural and legal persons in or connected with those signatory States.

[38] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration* [1963] ECR 1; case 6/64, *Flaminio Costa* v. *ENEL* [1964] ECR 585.

[39] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration* [1963] ECR 1.

[40] Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 42.

[41] Case 6/64, *Flaminio Costa* v. *ENEL* [1964] ECR 585.

[42] *Algemene Transport- en Expeditie Onderneming*, 11.

Moreover, in the examination of the ways in which the CJEU operationalised its role as agent, one needs to recall that in the EU dispute settlement system, the CJEU sits at the apex of a pyramid of enforcement which has as its base and foundation the national judge who functions as the first tier of EU judges for protecting the EU law rights of private and legal bodies. This is true for most of the cases that reach the CJEU, which use the preliminary reference pathway from national courts. This architecture means that the CJEU *does not decide* the cases that arrive before it through the preliminary reference route. The CJEU interprets the rules, and a decision on the dispute is then carried out by the referring court. This means that the CJEU may interpret the EU rules in a particular way that appears to be assertive in the knowledge that the actual application of the rule, including any margin of adaptation (e.g. the decision as to which national measures comply with the principle of proportionality and which do not in a specific case), is taken by the national judge.[43]

The DSU system, on the other hand, does not enjoy this embedded margin because its decisions are 'final' on a specific dispute.

This brings us to a discussion of the specific lessons than can be learnt from the European experience.

The first useful lesson regarding the dispute settlement system design is that when it comes to disputes between member States and/or disputes between EU institutions and member States (inter-State/inter-institutional disputes), the dispute settlement system follows the *one-instance judicial format*: the CJEU is the only and final arbitrator. The two-tier instance format exists for disputes which arise in the context of challenges brought against EU acts by the so-called category of non-privileged applicants (natural and legal persons, only when they have a legal standing), and it involves an application to the General Court (GE) (first instance) and an appeal on matters of law against the decision of the GE to the CJEU (second instance). As this two-tier format relates to actions by natural or legal persons, we think it does not provide a desirable template for the inter-State disputes, which is the nature of the dispute settlement system at the WTO (at the current juncture of the WTO system at least).

[43] See, e.g., case 333/14, *Scotch Whiskey Association and Others* v. *Lord Advocate and The Advocate General for Scotland* [2015] ECR 845, where the CJEU prima facie adopted a strict application of the rules pointing to the illegality of the national measure under scrutiny subject to the application of the test of proportionality by the national judge, and the national judge found in that case that the measure was in fact proportionate, therefore compatible with EU law.

But even if we focus on the institutional design that governs only the inter-State/inter-institutional dispute resolution in the EU (namely the one-instance court paradigm), what is the relevance of the EU experience for the WTO DSU stalemate? After all, during the period of sluggish EU integration, the CJEU adopted a judicial activist stance that made up for and offset, to a degree, the legislative inaction.

We argue that the *opposite* approach should be taken with the resurrection of the DSU. In other words, the revived DSU should apply the agreed rules of the game, within the prescribed time limits, highlighting the cases where lacunae exist, thus passing the ball to a member State's court, as will be analysed in Section 10.6, instead of adopting a 'judicial activist' approach which compensates for the 'legislative inaction'. Such a 'judicial activist' approach, by which the CJEU in effect makes an integration choice, which the member States then either have to live with or legislate upon to ditch or amend it, can be sustained by the design and telos of the EU system, but not by the design and telos of the WTO.

In the WTO case, the term 'less is more', for the judicial practice to find solid grounding and meaning can have positive effects for restarting substantive negotiations.

That said, the fixing of the adjudicative stalemate in the WTO is a pre-requisite for continuing the discussion of the substantive rules and disciplines in the WTO. The comparison with EU experience during the years of legislative inaction does not imply the replication of *what* the CJEU *did* during that period, because the direction of travel between the EU and the WTO were, and still is, different. In the case of the EU, a functioning court led the way towards a pre-agreed pathway and an ever closer Union.

The WTO, however, does not contain any such pre-agreed, ever-closer ambitions; however, it still has a (more modest in comparison to the EU) pre-agreed direction of travel that now desperately needs the shoulders of a functioning adjudicative arm to carry the increasingly damaging weight of inaction. Sometimes 'jumpstarts' require a strong push forward (that was the role played by the CJEU during the years of legislative inaction), whereas at other times, *jettisoning unnecessary* payload/weight is the recommended course of action. It is the latter we envisage in our proposals for the DSU WTO, as we will explain in Section 10.6.

10.5 WHERE ARE WE NOW, AND WHERE SHOULD WE GO FROM HERE

As we have discussed, the proximate cause for the demise of the appellate body that threw WTO dispute adjudication into disarray was the attitude of

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President Trump and his refusal to appoint appellate body members. But the ultimate cause lies beyond such a whimsical reaction. The DSU review has been ongoing for over twenty years, and a last-gasp effort by the former head of the WTO, Roberto Azevedo, to save the regime has proven futile.[44]

With MPIA and *ad hoc* agreements to forego appeals proving to be, so far at least, an imperfect substitute for the appellate body, the resuscitation of this organ was entertained during the Twelfth WTO Ministerial Conference (the MC12) which was held between 12 and 17 June 2022 at the WTO headquarters in Geneva, Switzerland. Against predictions, MC12 evidenced an in-principle agreement to work together to reform the WTO.

However, discussions so far have failed to both address the root causes of the legislative crisis and resolve the crisis of the judiciary. There is, nevertheless, an intention to work together to address the dispute resolution stalemate.[45]

In what follows, we put forward concrete proposals regarding the future design of WTO adjudication in the hope that we can contribute in a meaningful and timely fashion to the debate about the resolution of the WTO stalemate and invite reflection by relevant decision-makers.

10.5.1 *The New WTO Court*

In our opinion, the key features of the new WTO court should be the following:[46]

- Permanent panellists (to guarantee independence from nominating parties as well as from the Secretariat) are needed.
- Panellists should be genuine experts and not necessarily lawyers, as expertise in international economics could come in handy for the resolution of disputes and the proper understanding of concepts like 'causality', 'like products', 'removing effects of subsidies', 'constructing the counterfactual under Article 22.6', and so on. This variety of experience will become even more relevant and important the further international trade moves into the digital age, requiring the panellists to understand the

[44] Mavroidis, *WTO Dispute Settlement System*. See the relevant discussion in ch. 1.

[45] See, e.g., WTO, 'MC12 outcome document' (22 June 2022) WTO Doc. WT/MIN(22)/24, para. 4, which reads: 'We acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.'

[46] For a more complete discussion of this proposal, see Mavroidis, *WTO Dispute Settlement System*.

impact of modern technologies and the emerging national and international frameworks and standards which regulate them.

- Effective mechanisms should be in place to ensure (to the extent possible) that independence and impartiality are observed, and competence is ensured.
- Long-term appointment (e.g. six to eight years) which is non-renewable will further enhance independence from those nominating.
- Panellists should appoint their own clerks (so the Secretariat staff are not caught in the middle between advising the membership and having to act upon their advice when disputes arrive); although such differentiation in labour distribution might lead to some degree of loss regarding the ability/flexibility of the Secretariat to blur the edges, it will provide gains in the field of procedural and institutional clarity, which are needed at present.
- The WTO court should meet in plenum to discuss specific disputes, but also in chambers with specialised knowledge in various fields of WTO law. Chambers will leave important decisions for the plenum.

Although there is no room for an appellate body in our DSU 2.0, there are two features of the appellate body that should be maintained. First, within the one-instance regime of dispute settlement, we believe it makes sense to introduce precedent-based judgments.[47] Second, we believe the WTO judiciary should be hermetically insulated from the rest of the WTO. We will explain this immediately.

The appellate body, as explained by the chair of the Uruguay round's negotiating group that gave birth to the DSU,[48] was *not* supposed to provide a second look into all panel decisions. It was intended to intervene only occasionally to quash doubts about the proper understanding of the terms of substantive WTO agreements. The appellate body, of course, accomplished more than that. It contributed to the further *depoliticisation* of dispute adjudication in the multilateral trading system. Its legacy will be served through the establishment of a court with permanent judges, but insisting on reinstating the appellate body sounds like the sunk cost fallacy. It is a divisive issue, which can only increase existing divisions. If WTO members can agree on a depoliticised adjudication regime and manage to preserve the precedent-setting

[47] On the contemporary use of precedent in WTO case law, see the thorough analysis of James Bacchus and Simon Lester, 'The rule of precedent and the role of the appellate body' (2020) 54 J World Trade 183–98.

[48] ACWL, 'Interview with Ambassador Lacarte-Muró', www.acwl.ch/interview-with-ambassador-julio-lacarte-muro (accessed 9 December 2022).

function as we suggest, why spend negotiating capital on resurrecting the appellate body? What matters is not one- or two-instance adjudication. What matters is depoliticised dispute adjudication. The appellate body stalemate has been *erroneously* regarded as a *battle for the soul* of the multilateral trade system, leading to counterproductive simplifications which categorise all those who raise concerns about the current state of affairs surrounding the dispute settlement system as opponents of multilateralism. Our proposal instead focuses on the root cause of the issue, not the rhetoric around the issue.

10.5.1.1 A One-Instance Court

The membership should consider appointing a pool of fifteen judges. This is an old idea[49] that the EU launched but did not insist upon. Variations of this idea (e.g. permanent chairs and *ad hoc* panellists) have been floating around as well. No matter what the angle is, institutional guarantees of independence and impartiality, expertise, incentive to invest in acquiring additional knowledge, and appointing permanent panellists represent a net improvement on the current regime.

The court could be divided into chambers of three and five members and adjudicate disputes accordingly, using the value of a dispute (the requested sum) as benchmark for submission to one of the chambers. Chambers could also be allocated specific subject matter areas, and the expertise of the members of the chambers should reflect those subject matter areas.

In this regard, two to four members must have demonstrable expertise in GATS and TRIPS. The appointed judges do not have to be exclusively lawyers. Trade economists and/or experts in international trade policy should be welcome as well. Economics expertise will also be essential for clerks. Many of the issues the panel routinely deal with (e.g. non-discrimination, causality, quantification of damage) require counterfactual analysis, an area where legal expertise has little to offer. Moreover, expertise in emerging modern technologies, digital platforms, and ecosystems bound to affect international trade would be of increased importance, especially in the performance of counterfactual analysis. The plenum will be the precedent-setter, and chambers will be established with a mandate to adjudicate the submitted

[49] There are dozens of accounts on the idea to bring in permanent panellists. For a discussion of all that matters on this score, see William J. Davey, 'The WTO and rules-based dispute settlement: Historical evolution, operational success and future challenges' (2014) 17 J Int'l Econ L 679–700.

disputes. A plenum of fifteen could be requested to intervene and discuss the following issues exclusively:

- confirming the *non liquet* status of questions/issues raised by one of the parties;
- novel issues;
- issues where chambers have reached irreconcilable outcomes.

These three categories relate to the establishment or clarification of important rules and principles defining the WTO system. Given the proposed one-instance structure, it is logical that the resolution of such cutting-edge issues should benefit from the brain power, expertise, and wisdom of the plenum. We will explain them in turn in what follows.

10.5.1.2 *Confirming/Pronouncing* Non Liquet

Non liquet is Latin for 'it is not clear'. Think of the treatment of *amicus curiae* in WTO practice. In DS61,[50] an NGO had submitted a letter to the panel. The panel dutifully refused to entertain it, claiming that it did not have the mandate to do so. The appellate body rejected the panel's approach and instead came up with a halfway house, where *amici* can submit, but panels are not obliged to take their views into account.[51]

What happened next? An extraordinary meeting of the WTO Council was called where all participants, except the US, voiced their disagreement with the ruling. The EU and Canada offered some mild support to the US view. The appellate body had clearly moved into an area which had not been explicitly addressed in the DSU and ruled on the conditions under which *amicus* briefs should be entertained by WTO panels, instead of sending the issue back to the membership. Has this approach been vindicated in practice? Far from it.

[50] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998).

[51] Howse ('Membership and its privileges: The WTO, civil society, and the amicus brief controversy' (2003) 9 ELJ 496–510) mounted a valiant effort and defended this position much better than the appellate body itself had done in its report. But the appellate body position cannot be right. For if it were right, some source of international law (customary? general principles?) will always serve to dictate a particular outcome, when contractual language is silent. But international law does not pre-exist the volition of its actors. It follows it. It exists as long as the stakeholders see gains from cooperation. Unless, of course, someone believes in natural law. But then, proponents must carry the associated (formidable) burden to prove their case.

There is no agreed procedure on submissions of *amicus* briefs across cases. As a result, over time, *amicus* submissions have dwindled, and it is questionable if they have had any influence at all. When considering that this would have been a powerful instrument that could have raised the level of awareness of WTO panels about societal sensitivities, it may have been better for the appellate body to simply refer the case back to the membership and ask for clear guidance on the treatment of *amicus curiae* briefs.

Pronouncing a *non liquet* thus offers at least two advantages:

- the institutional equilibrium of the WTO ecosystem (the balance of rights and obligations) is maintained; and
- from a policy perspective, the membership, armed with the information that an issue that has been debated before a panel has not been (adequately) regulated, will reflect on the need to intervene through legislative means and address the observed gap.

Such a process would create a powerful dynamic, namely a declaration that functions as a 'nudge' to the membership to fill the gap.

The ICJ (International Court of Justice), being a court of general jurisdiction, is opposed, in principle at least, to *non liquet*. It can rule on any issue of international law and is used to having recourse to the general principles of law to resolve disputes when the letter of law does not provide it with enough guidance. Likewise, the use of general principles to fill gaps is par excellence the modus operandi of the CJEU as a court of general jurisdiction of the EU legal order.

Weil,[52] siding with Lauterpacht,[53] has suggested that the reason why *non liquet* was not declared in contentious proceedings is simply because of the common belief that litigation must be brought to an end (*ut sit finis litium*), irrespective of whether law is 'complete' or not: when parties submit voluntarily to a judge, they do so in order to settle their dispute. *Non liquet* frustrates the will of the parties to end their dispute, and therefore academics have argued against it (and courts have discarded its existence).

Weil[54] continues by saying that the aforementioned reasons which support the refutation of *non liquet*, in fact, constitute proof that international law is

[52] Prosper Weil, '"The court cannot conclude definitively . . .": *non liquet* revisited' (1998) 36 Colum J Transnat'l L 109–19.

[53] Hersch Lauterpacht, 'Some observations on the prohibition of "non liquet" and the completeness of the law', in Frederik M. van Asbeck (ed.), *Symbolae Verzijl: Présentés au Prof. J.H.W. Verzijl, à l'Occasion de son LXXième Anniversaire* (The Hague: Martinus Nijhoff, 1958), pp. 196–221.

[54] Weil, 'The court cannot conclude definitively . . .'.

riddled with gaps: why would recourse to general principles be necessary if there were no gaps in the first place? And if all that is not prohibited were permitted, how to manage the potential conflicts resulting from the exercise of unbridled national sovereignty? Recourse to general principles as an autonomous source of law will always lead to the demise of *non liquet*, especially since, as Lauterpacht[55] notes, the completeness of law is a general principle in and of itself. It thus becomes a self-fulfilling prophecy: if (international) law is complete, how could there ever be an instance of *non liquet*?[56]

Contract completeness has occupied the minds of not only international lawyers but also contract theorists and international economists. Antràs,[57] building on the seminal contribution by Grossman and Hart, has adequately explained why, in practice, trade agreements, like the WTO Agreement, cannot specify what is to be done in every possible future contingency. Horn, Maggi, and Staiger[58] have added an interesting dimension, namely that incompleteness is also due to the fact that negotiators face diminishing returns. This is the case because not all instruments (policies) affect trade in the same manner, and it is only reasonable that negotiators focus on those that affect trade the most. When shifting to instruments that exert less impact on trade, the outcome is not the same, even though the effort to negotiate could be the same. Recourse to aggregate language (vagueness) is a way to mitigate these problems (lumping all behind-the-border instruments under one heading, for example). But this is the best one can hope for, and, of course, there is an associated cost inherent in this approach: an agent (usually a judge) asked to pronounce on an eventual dispute will have to disaggregate the language while enjoying substantial discretion when doing so. The risk for error increases, as it is sometimes unclear what policies fall under a heading expressed in aggregate language. To provide an illustration: one can easily show why the freedom of establishment of foreign investors can affect the sale of their traded goods. Does this mean that WTO members must observe the principle of most favoured nation when entering into bilateral investment treaties? The conventional wisdom suggests a response in the negative. But it is not the text of Article III.4 of GATT that makes this point clear. It is State practice. The contract per se is hardly clear on this issue.

[55] Lauterpacht, 'Some observations'.

[56] Compare Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994).

[57] Pol Antràs, 'Grossman-Hart (1986) goes global: Incomplete contracts, property rights, and the international organization of production' (2014) 30 J L Econ & Org 118–75.

[58] Horn et al., 'Trade agreements'.

Since the WTO contract is incomplete, should the WTO 'judge' (panels and the appellate body) complete it, when necessary? This brings us straight into the discussion of institutional balance in the WTO. While the WTO contract does assign the power to amend and interpret the covered agreements to the membership, it does not address the interplay between the legislative and the judicial function, other than in what is covered in Article 3.2 of the DSU.

There is not one single instance where WTO panels have pronounced a *non liquet*. And yet, there are three reasons why the claim for *non liquet* pronouncement in the WTO seems well founded:

- WTO members are entrusted with the exclusive competence to adopt authentic interpretations of the Agreement Establishing the WTO (Article IX.2). This demonstrates that the role envisaged for the WTO court is to apply the agreed rules. The settlement of disputes is the corollary of such application. This is a clear distinction from other jurisdictions – for instance, the EU institutional framework where the authoritative interpretation of the agreed rules lies with the CJEU. The DSU design lacks such delegation from the principals.
- WTO panels cannot undo the balance of rights and obligations as struck by the principals (WTO members); that is, they can neither add to the obligations assumed nor diminish the rights conferred (Article 3.2 of DSU).
- Finally, the WTO practice reveals that recourse to the general principles of law is not an independent source of law, but a mitigating factor which could usefully point to the correct interpretation of the WTO sources of law, which is the Agreement Establishing the WTO and its various Annexes. WTO panels have never adjudicated disputes using 'equity' as the legal benchmark for pronouncing on alleged inconsistencies.

Let us use an analogy to illustrate this point: let us consider the WTO and the EU as two distinct concert halls. Let us imagine now the principals/States as the trustees of these halls but, more importantly, as the composers of the musical pieces (the agreements) that will be played in the two halls. In our analogy, the courts are the musicians who play the musical pieces. In the case of the EU concert hall, the composers entrusted the musicians with a wide scope for interpreting the musical pieces. The musicians can change the rhythm, add 'staccatos' and 'rests', fill in gaps in the musical pieces, and even add some lines in order to achieve the desired and pre-agreed overall musical effect (ever closer Union). By contrast, the design of the WTO hall does not envisage such wide powers of interpretation for the musicians, let alone the

power to add lines in the musical piece, because the overall instruction to the musicians is to 'play just the music you were given'.

Furthermore, there is a precedent of *non liquet* in GATT/WTO jurisprudence. In 1952, the GATT panel on Belgian Family Allowances[59] faced a challenge against a Belgian measure that imposed a tax only on imported goods originating from countries which had not implemented a system of family allowances comparable to one Belgium itself had implemented. This dispute raised the issue of how much of its behind-the-border regime a GATT member can apply to imports.

The panel report reads like a *non liquet*. Only the words *non liquet* are missing from the first sentence:

> 8. The Panel felt that the legal issues involved in the complaint under consideration are such that *it would be difficult for the CONTRACTING PARTIES to arrive at a very definite ruling*. On the other hand, it was of the opinion that the Belgian legislation on family allowances was not only inconsistent with the provisions of Article I (and possibly with those of Article III, paragraph 2), but was based on a concept which was difficult to reconcile with the spirit of the General Agreement and that the CONTRACTING PARTIES should note with satisfaction the statements made at the Sixth and Seventh Sessions by the Belgian representatives and should recommend to the Belgian Government to expedite the consideration and the adoption of the necessary measures, consistent with the General Agreement, including a possible amendment of the Belgian legislation, to remove the discrimination complained of, and to refer to the CONTRACTING PARTIES not later than the first day of the Eighth Session.[60]

The panel thus refrained from providing a definitive ruling. It observed the inconsistency of the challenged measure with the spirit of the GATT, its likely inconsistency with Article III.2 of GATT (which constituted the heart of the complaint against Belgium), and left it at that. This is a classic case of *non liquet*.

The point we are making here is that there is a precedent of *non liquet* in the WTO/GATT jurisprudence. The mechanism we are proposing is to support this approach by providing a specific institutional pathway in the dispute settlement system: such matters will go to the plenum to be decided. This will ensure that *non liquet* would not be a distant or hypothetical

[59] WTO, 'GATT panel report, *Belgian Family Allowances*, G/32' (7 November 1952) GATT BISD 1S/59.

[60] Ibid., para. 8 (emphasis added).

prospect, an outlier, in the modus operandi of the dispute settlement system, but a possible outcome which now has its proper institutional outlet, the plenum.

A pronouncement of *non liquet* is anyway in consonant with Article 3.2 of the DSU and hence warranted from a legitimacy perspective. It is also warranted from an effectiveness perspective if the *amicus* saga serves as an illustration. Through their patchwork solution in DS61, the appellate body judges deprived the membership of the opportunity to reflect on the necessity to step in and 'complete' the contract by adding, for example, a paragraph in Article 13 of the DSU that would explain under what conditions *amici* could file before WTO panels. Had the appellate body done just that in DS61, maybe the saga of filing *amicus* to the WTO would have been a happier story. As things stand, there is absolutely no basis to think that *amici* briefs have had any influence in the shaping of WTO case law.

10.5.1.3 Novel Issues

What constitutes a novel issue could be a matter of agreement, as it could be a case of disagreement between disputing parties. Furthermore, the WTO court could agree or disagree with such a view. Let us go back to 1995. The first GATS or TRIPS or SPS (Sanitary and Phyto-sanitary Measures) dispute – to provide but a few illustrations – by definition dealt with novel issues. None of these agreements existed before the advent of the WTO. But what about disputes under Article III of GATT (National Treatment)? Should GATT 1994 be considered a distinct instrument from the original GATT, with the consequent firewall between the two? The appellate body established an umbilical cord between the two instruments when holding that the adopted GATT panel reports were part of the GATT *acquis* that it would consider. And what about *obiter dicta* – remarks in passing which are not necessary to resolve a dispute – by GATT panels? What if an issue discussed in an *obiter dictum* in 1991 becomes a claim before a panel in 1996? Is it a novel issue, or not? All this is to state that disputes can legitimately arise regarding the novelty of an issue.

Why do we suggest that novel issues should, preferably, go to the plenum? Largely because we would like to see the record set straight, from the beginning. Granted, conflicting jurisprudence can contribute to innovation, but at the cost of uncertainty regarding transaction costs (is interpretation A or interpretation B the correct one?). For this reason, we want to reserve the role of precedent-setter for the plenum. It should be clarified at this point that we do not envisage this precedent-setting as manifestation of law-making by the

court. On the contrary, we understand the decision on novel issues as part of rule interpretation within the confines of the agreement. If such interpretation is not possible, we revert to the *non liquet* scenario. The important issue is that the decision as to the distinction between a novel issue and *non liquet* will be taken by the same and well-equipped institutional mechanism, the plenum, thus ensuring consistency.

This brings us to the discussion regarding *stare decisis* (stand by things decided) and how we understand the term. The DSU does not address this issue. Still, the DSU does make some room for precedent-based judgments. Article 17.6 reads: 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' Issues of law, by definition, cut across cases. What was requested from the appellate body was effectively to explain how the law should be understood, irrespective of facts-intensive idiosyncratic elements. The appellate body waited for some time before providing its own understanding on how it viewed its institutional role, in light of the mandate the DSU had provided it with.

In DS344, *US – Stainless Steel (Mexico)*, it revisited all prior case law and held that it expected panels to follow its prior rulings dealing with the same issue.[61]

In addition, in *Japan – Alcoholic Beverages II*, the appellate body found that

> adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[62]

The reference to 'legitimate expectations' is important. This reference highlights a fundamental shortcoming of the system: an incomplete contract, such as the WTO, not benefiting from the opportunities for clarifying the nuances of the undertaken obligations, *or* one that creates the space for 'mixed messages' due to an *inconsistent application* of the rules, undermines legal certainty even more.

[61] See, in particular, WTO, *US – Stainless Steel (Mexico), Report of the Appellate Body*, WT/DS344/AB/R (20 May 2008), §158: 'It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports that have been adopted by the DSB.'

[62] WTO, *Japan – Taxes on Alcoholic Beverages II, Report of the Appellate Body*, WT/DS8/AB/R, WT/DS8/AB/R, WT/DS11/AB/R (4 October 1996), p. 14.

It also shows that precedent-based decisions were thus not only appropriate but expected from panels as well. In large part, panels respected such precedents set by the appellate body, but with some notable outliers, with zeroing[63] being the most prominent one. It could also be argued that the appellate body followed its precedents by and large, but by tailoring the ambit of its decisions, it has eviscerated the scope of precedent to an extent.

We emphasise the importance of precedent because, ultimately, legal rulings and judicial awards aim to provide some certainty about transaction costs. Conflicting case law undoes that. And yet, as already stated, competition across jurisdictions may yield gains from innovation. How can we maximise gains from innovation without reducing innovation costs? Usually, this is done by assigning one court with the jurisdiction to apply and interpret the law and thus reap the benefits from innovation. This will be an informed court, a court that has good knowledge of the way in which issues are being debated and resolved in lower jurisdictions. It will also be a court that maintains the right to change its mind when new theories appear. It must be stressed here that our view is not about following precedent for the sake of following precedent. At the end of the day, precedents matter precisely because of the force of their reasoning, and not because of their cult-like features.[64]

In short, our argument is that, within the confines of the powers transferred to the WTO, the new DSU should assign to the plenum the power to deviate from precedent.

In *Spector Motor Service Inc.* v. *Walsh*,[65] Judge Learned Hand explained in the most pertinent terms why lower courts should refrain from acting as precedent-setters:

> It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not choose to appeal. In either event the actual decision will be one which the judges do not believe to be

[63] Zeroing is the methodology used by the US to calculate anti-dumping charges against foreign goods. The methodology is controversial because it arguably leads to higher anti-dumping duties.

[64] The US complained about the use of 'precedent' by WTO courts. This was quite paradoxical, as the US legal system is based on precedent. It is more likely that the US was unhappy, not with the overall use of precedent but with the fact that, in the name of precedent, WTO panels would not undo the prior (hostile to the US position) appellate body rulings on zeroing.

[65] *Spector Motor Service Inc.* v. *Walsh* 139 F. 2d 809 (2d Cir. 1944).

> that which the higher court would make. But nothing has yet appeared which satisfies me that the case at bar is of that kind; and, as I have said, I can see no good reason for making any distinction between one kind of federal activity and another. The way out is in quite another direction and includes both. Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it.

It is precisely the same reasoning that justifies why chambers should leave it to the plenum to decide cases where a change in case law is warranted.

10.5.1.4 Irreconcilable Case Law

As we contemplate a court-based dispute settlement mechanism for the WTO with plenum and various chambers, the latter might be dealing with overlapping issues. One cannot thus exclude the possibility of conflicting views resulting in irreconcilable case law. In the WTO case law, it is not only on zeroing where we observe divergent positions; in fact, conflicting case laws regarding the most foundational obligations exist.

Already in the GATT era, the panels on *US – Taxes on Automobiles* and *Japan – Taxes on Alcoholic Beverages I* had reached antithetical understandings of the term 'like products'. In the WTO years, the appellate body resolved the conflict only in name: while rejecting the aims-and-effects test (espoused by the panel report on *US – Taxes on Automobiles*) in DS8,[66] a few years later in DS135,[67] it fitted regulatory concerns under the guise of unproven consumer preferences under the 'marketplace test'.

A clearer conflict exists with respect to the understanding of the term 'less favourable treatment': the appellate body reports on DS169,[68] DS302,[69] and DS401[70] are simply irreconcilable. The highest WTO judicial organ first stated that disparate effects suffice to qualify the challenged measures as less

[66] WTO, *Japan – Taxes on Alcoholic Beverages II*.

[67] WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (12 March 2001).

[68] WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS169/AB/R (11 December 2000).

[69] WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (25 April 2005).

[70] WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, DS401/AB/R (22 May 2014).

favourable treatment. It then held the opposite view, to the effect that treatment is not less favourable if disparate effects are justified by a regulatory rationale, which is unrelated to the origin of goods. And later it reverted to the issue only to caution all of us that we had misunderstood it. As a result, when subsequently it decided to return to a 'disparate effects full stop' test, it did so without deviating at all from prior case law.[71]

The apex of inconsistencies is the case law on 'pass through' of subsidies. Recall briefly that, following a decade-long conflicting case law, in DS316,[72] the three members of the appellate body read past the decisions in irreconcilable ways and then worked together to resolve the dispute before them (which involved, inter alia, the analysis of pass-through).[73]

There are also instances where case law is not internally incoherent but is, on its face, irreconcilable with the rationale of the law itself. This demonstrates a lack of understanding of the parameters which justify government intervention or regulation when there is divergence between the preferences of the consumers and the 'private' information – namely information not shared with the consumers or disregarded by the latter – held by the government which leads it to take regulatory action. How, for example, the appellate body overlooked in DS381[74] the impact of conformity assessment on the likeness of goods traded is hard to understand. If WTO members can lawfully assess the conformity of imported goods with domestic regulatory requirements, how can consumer preferences matter? Do regulatory requirements not exist precisely because States' and consumers' preferences were at variance?

Decisions which are irreconcilable either with case law or with the rationale of the law itself create uncertainty about the status of law and, of course, reduce the confidence of the WTO membership in the judiciary. In similar cases, the plenum should intervene and settle the issue one way or the other.

Such cases also demonstrate that the set of skills that WTO judges ought to possess go beyond the safeguarding of doctrinal consistency. This reinforces our argument about the need to ensure that the body of WTO judges must be composed of genuine experts (not necessarily lawyers) to ensure not only the

[71] We discussed all this case law in detail in Petros C. Mavroidis, *The Regulation of International Trade*, vol. 1 (Cambridge: MIT Press, 2016), pp. 374 et seq. and 383 et seq.

[72] WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (18 May 2011).

[73] In Petros C. Mavroidis, *The Regulation of International Trade*, vol. 2 (Cambridge: MIT Press, 2016), pp. 223 et seq., we provide a detailed discussion, quoting from the appellate body report.

[74] WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (16 May 2012).

doctrinal consistency of case law but also the coherence of case law with the internal rationale of the relevant rules. The plenum would be an appropriate forum where all the wealth and variety of the WTO court's expertise can be deployed, thus limiting the probability of the emergence of problematic judgments.

10.5.1.5 No More Excessive Compartmentalisation

The DSU sacrificed the efficiency and speedy resolution of disputes on the altar of third-party adjudication. The natural question to ask is whether there is a genuine trade-off between third-party adjudication and the speedy resolution of disputes.

Let us start with the wedge that the framers of the DSU drove between compliance panels and arbitration under Article 22.6 of the DSU. The only reason why the two processes have been compartmentalised is that compliance panel reports are appealable. One might wonder whether this makes any sense, as the DSU framers also decided against the possibility to appeal arbitral awards under Article 22.6 with no explanation at all. What if a finding that a measure is inconsistent with the WTO Agreement included a recommendation to withdraw the challenged measure anyway, as per Article 3.7 of the DSU? Would we need a compliance panel then? Withdrawing an illegal measure is, after all, the only good faith measure of implementing a decision. Keeping an illegal measure in place amounts to persisting illegality. And, of course, replacing it with another measure is tantamount to adopting a new measure.

Faced with such situations, panels stepped in and expanded their mandate by reviewing the consistency of all sorts of measures that have a 'nexus' (a very elastic term) with the measures challenged in the original proceedings. By not recommending the obvious statutory remedy, for example, withdrawal of the challenged measure, they opened a Pandora's box.

And what has the world trading community come to realise when the box was opened? What has the WTO membership found in there? Not much in terms of resolving the aforementioned problem, which could be characterised as 'delete and replace by an equally illegal measure'. First, there are serious doubts whether compliance panels, as they now stand, have contributed to the implementation of the findings of the original panels/appellate body, the holy grail of WTO dispute settlement. In large part, this is the case because they responded to the rather difficult question, 'Is what X did enough?' The difficulty of answering such a question is that it relies on the deciphering of a web of often cryptic rulings in panel/appellate body reports pronouncing the illegality of challenged measures.

We argue that the emphasis should be on reviewing whether 'X has withdrawn the illegal measure'. After all, is not withdrawal the objective of dispute settlement, as per the wording of Article 3.7 of the DSU? When withdrawal has not been recommended, human ingenuity can lead interested agents to all sorts of variations of withdrawal-like implementing measures. And it can also lead compliance panels to (very) complicated evaluations.

Second, the data provided by Hoekman, Mavroidis, and Saluste[75] show that compliance panels take a long time, an awfully long time sometimes. Consequently, the entire process is time-burdened. In principle, though, there is no need for this stage at all. Indeed, compliance proceedings are not replicated in other jurisdictions. Usually, either withdrawal is recommended or even more drastic suggestions are put forward. In short, the DSU could have been designed to serve compulsory third-party adjudication with no excessive compartmentalisation. As things stand, the same people decide whether:

- the complaint should be upheld (step 1);
- the respondent needs time to implement, and, if so, how much (step 2);
- the respondent has complied in the agreed time (step 3);
- and, if not, what the level of countermeasures should be (step 4).

With this in mind, the following observations are pertinent: first, it is clearly not necessary to count three-and-a-half years, roughly, between the first and the last step. Secondly, it is not obvious what other information is required for the panel to decide on steps 2–4 in addition to the information it possess already to decide step 1. Why can the original panel not, considering the current DSU objectives, recommend withdrawal within a reasonable time already at stage 1? If it does not happen, then the question should be, what the remedies in case of non-compliance should be?

At the moment of issuing its decision, the WTO court can also calculate the amount of retaliation in cases of non-compliance during the proscribed period. The WTO court should offer the respondent the choice between paying a lump-sum compensation (calculated based on trade effects, to avoid issues with sequential enforcement) or realigning its tariff protection.

10.5.1.6 Deadlines

Requesting panels to complete their work in six – and exceptionally nine – months is asking too much. Consistently, panels miss the statutory deadline,

[75] Hoekman et al., 'Informing WTO reform'.

irrespective of whether they act as original or compliance panels or even as arbitrator under Article 22.6. Arbitral tribunals dealing with comparable issues take as much or even longer than the time the panels de facto need to complete the process. DSU deadlines should be revised upwards.

Some might demur that, by doing so, a lengthy process will become even lengthier. But the trading community can economise a lot through the amendments we have suggested above (e.g. a one-instance body and no artificial compartmentalisation of the process). The WTO court should be given between twelve and fifteen months to adjudicate disputes, allowing it to extend when warranted.

10.6 HOW DO THE PROPOSALS SQUARE WITH THE 'EXIT, VOICE, AND LOYALTY' PARADIGM?

Arguably, the reformed court would constitute a reshaping of the current arrangements because of strong 'voice' manifestations, such as the appellate body stalemate. This means that the proposal is consistent with the 'voice' paradigm. But how does it square with the 'exit, voice, loyalty' equilibrium? Arguably the proposal does two things.

First, it shelters the judicial function from the implications of political signalling that members would, without a doubt, continue to attempt in the political arm of the dispute settlement system within the operation of the DSB. As Paine[76] argues, the DSB makes a significant contribution to the implementation and operationalisation of recommendations and rulings. Although its role appears uneventful due to the system of reverse consensus on the basis of which it functions, it plays another important role: that of a 'voice mechanism' where States can express their concerns and thus potentially diffuse some tensions. This, he argues, can have a legitimising effect on WTO adjudication, but can also undermine judicial independence due to the signals that member States may send to panels[77] at the panel formation stage regarding a dispute. It is at this point that our proposed WTO court would shelter the judicial function of the DSU.

Second, that sheltering is accompanied by a more modest circumscription of the realm of the sheltered adjudicative body, which does not create risks for a loss of control from the members, or, to be more precise, it softens the perception of such risk on the part of member States, given that the risk of loss of control is embedded in the third-party adjudication based on accepted

[76] Paine, 'WTO's dispute settlement body'.
[77] Ibid., p. 826.

commitments. If this is correct, then we may see a reduction of the members' need to resort to the use of the DSU as a 'voice' forum. The mechanism of identifying gaps at plenary and alerting the membership of such gaps is intended to play that role. Thus, the proposals appear to strengthen and support the 'voice' mechanisms of the WTO by the *renvoi* of 'jurisdictional boundary hot potatoes' to the membership. To use the musical analogy again, the essence of the proposed solution vis-à-vis the grey zone issues is for the musicians (the plenum) to ask the composers (membership) to decide if they want to add new lines to the musical score (the applicable rules).

10.6.1 *Uptake of Proposals*

Having presented the proposals and contextualised their likely impact within the WTO habitat, we need to address the elephant in the room regarding the likelihood of the proposals' uptake: why would the membership and those members who have used the DSU as a mechanism to 'voice' their dissatisfaction – for example, the US – accept the proposed new system if they were not happy with the appellate body?

We believe that one reason is the clarity and arguably faster resolution of disputes facilitated by the one-instance adjudication. Another reason is that the quality of appointed judges will lead to more consistent application of the rules. We argue that the solution we propose has the potential of addressing, for example, the US reservation formulated against the workings of the appellate body. If one looks at the reservation expressed by various quarters on the US side, the problem is not with the idea of a third party (the court) having a decisive impact on matters which touch upon US trade policy per se. It is with the third party transitioning from 'agent' to 'principal by stealth'. The conclusion of the *US Trade Representative 2020 Report* is indicative:

> By holding itself out as an ersatz 'Supreme Court of International Trade' that creates 'WTO law', the Appellate Body has diminished the stature of dispute panellists and diminished the impact of the WTO agreements as written.[78]

It is true that the US is against the 'precedential' effect of appellate body decisions, but we argued that this reservation is predicated on the appellate body or any other adjudicating body going beyond the text and filling the gaps or engaging in 'common law' modus operandi. By contrast, what we propose is

[78] United States Trade Representative, 'Report on the appellate body of the World Trade Organization', February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (accessed 9 December 2022), p. 120.

a body which functions on clear instructions, among others, to raise the flag of *lacunae legis* – not to step in and fill the gap – and be more flexible regarding precedent. We do not know if this would convince the US to drop their reservations towards the 'precedential' impact of the court's decisions immediately. We think, nevertheless, that it would make such softening of stance more palatable and less 'costly' given the potential yield of bringing the WTO dispute settlement system back on track and possibly helping substantive WTO negotiations to jumpstart.

10.7 CONCLUDING REMARKS

The WTO will have to address its legislative crisis against a background where consensus voting as practised in the WTO looks increasingly like the exercise of veto power. Even if the current crisis has been addressed, it simply cannot be that the WTO will continue to adjudicate disputes regarding agreements concluded in the past century. These agreements reflect today's concerns only in small part.

Solving the crisis of the judiciary is the necessary, but not sufficient, condition for solving the wider legislative crisis at the WTO. It is the necessary first step towards rekindling cooperation at the trade front. The negotiating partners should not miss this opportunity. The heterogeneity of the membership suggests that a lowering of expectations is probably warranted. One should recall in this respect that the upcoming negotiation of the DSU post-MC12 will be the first where China would express its views on dispute adjudication. So far China has participated in the DSU review, of course, but the mandate of MC12 requests WTO members to reach tangible outcomes by 2024.

What matters is to keep the key element of the current DSU intact. It should continue to be depoliticised. Judges should fulfil their role in an appropriate fashion, namely, behave like agents who comprehend the limits of their mandate. Reshuffling the court along the lines that we suggest will not only facilitate negotiation but also maintain the precious depoliticised nature of WTO adjudication while contributing to the fast resolution of disputes with a court which possesses the necessary expertise and skills to discharge its entrusted duty in an independent, diligent, and efficient manner.