CHAPTER 3

China, the European Union, and the WTO Dispute Settlement Crisis[1]

LIAO Shiping and Petros C. Mavroidis
Beijing Normal University; Columbia Law School

Effective dispute settlement procedures are critical to sustain cooperation on trade. China has joined the European Union (EU) initiative to establish an interim appeals mechanism that World Trade Organization (WTO) members can use while the Appellate Body (AB) remains unable to function. A resolution to the AB crisis requires commitment of all stakeholders, and especially the major trade powers to agree on reform of WTO dispute settlement to ensure conflict resolution continues to be depoliticised, irrespective whether the future design will continue to include two-instance adjudication or take another form.

1. INTRODUCTION

The WTO dispute settlement system, the crown jewel of the multilateral regime, has been tarnished as a result of actions taken during recent years. Disagreements across the membership regarding the adjudication practice were evident, and had been voiced during the DSU (Dispute Settlement Understanding) review. Undoubtedly though, it is the actions of the Trump administration that led to the downfall of the AB, and provoked the ripple effects that paralysed the adjudicatory function of the WTO. Even if we reserve the status of proximate cause for the downfall to the US attitude, the impact was dramatic.

In this paper, we aim to advance proposals on how to get out of the current crisis. To do that, we first explain the current state of play in Section 2, and then the solution to address the crisis advanced jointly by China and the EU in Section 3. Because the self-professed nature of their joint proposal is an interim solution, in Section 4, we lay out the essential elements of a (more) permanent solution, before we briefly conclude in Section 5.

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2. THE STATE OF PLAY

As things stand, dispute adjudication is moribund. The numbers tell a story. 593 disputes (DS1-593) had been submitted by the end of 2019, an average of almost 24 disputes per year. Five were submitted in 2020 (DS594-598), and 2 in 2021 (DS599-600). How did we end up here?

2.1 The Attitude of the Trump Administration Towards the Appellate Body

The United States was very much behind the strengthening of the General Agreement on Tariffs and Trade (GATT) dispute adjudication during the Uruguay round, unhappy, as Davey (2014) has persuasively argued, with the increasing politicking of adjudication during the last years of the GATT. Hudec's monumental study (1993) has provided empirical support for the derailing of the previously impeccable GATT record. The United States took justice into its own hands, practicing, as per Bhagwati's (1990) inimitable expression, 'aggressive unilateralism'. Abandoning this attitude (exemplified through the use of Section 301) was the *quid pro quo* for de-politicising adjudication in the WTO-era with the adoption of the Dispute Settlement Understanding (DSU).[2] But from early on, some congressmen were having second thoughts regarding the sovereignty that the United States was relinquishing, and Senator Dole advanced proposals to find a middle ground between sceptics and enthusiasts.[3]

And then, the occasional expression of displeasure whenever a hostile report was issued notwithstanding, the United States behaved in line with its DSU obligations. The Obama administration engaged in a minor altercation when it opposed the reappointment of the Korean AB member, Seung Wa Chang. This was the culmination point, the high watermark of its displeasure with a few WTO decisions. Almost immediately thereafter, it did not oppose the appointment of Kim Hyung Chong, another Korean citizen, in his place.

Everything changes with the advent of the Trump administration at the Capitol Hill. Following some early skirmishes, that some might have interpreted as unnecessary bravado, the United States took decisive action like never before, it blocked each and every (re)appointment of AB members since 2017, leading to a reduction from a body meant to comprise seven individuals, down to one individual, and consequently to dysfunction.

Fiorini et al. (2020) have shown that some other members shared, and continue to share, some of the US grievances. No other WTO member though, was willing to adopt the same belligerent attitude towards the WTO, not for now at least. The Trump administration, when it came to its policy towards the WTO, was isolated in Geneva.

2.2 The Appellate Body in Abeyance and the Ripple Effects: Appeals into the Void

The AB crisis could hardly remain self-contained. By virtue of Article 16.4, the DSU panel reports will not be adopted, if an appeal has been lodged. The question of whether an appeal can be lodged to a dysfunctional AB is now of historical interest. Appeals lodged after December 2019, when the AB had been reduced to one member and did not have the

2 Mavroidis (2016) discusses the negotiating record of the DSU. Jackson (1990) had offered a blueprint.
3 Committee on Finance, US Congress, 104th Congress, First Session on S. 16, May 10, 1995, S. HRG. 104-124, at pp. 2 et seq.

necessary quorum of three members to adjudicate disputes anymore, entailed that the panel reports would not be adopted for some time (at least), and thus would have little if any legal significance.

Fifteen panel reports have been appealed so far, and they cannot be discussed anymore, since there is no functional AB division in place to discuss them. There are currently fifteen appeals into the void, namely: DS 316, DS371 twice, as both the original as well as the second compliance panel reports were appealed; DS436; DS461; DS476; DS494; DS510; DS518; DS523; DS533; DS534; DS541; DS543; DS567).

The parties that prevailed in these cases scored Pyrrhic victories, which were never translated into implementation (by the losing party) of adverse findings. There was some consolation for two categories of WTO members: those who entered into ad hoc agreements obliging signatories to accept the panel's findings as definitive, and the MPIA (Multi-Party Interim Agreement).

Indonesia and Vietnam, for example, had been embroiled in a dispute regarding the consistency of safeguard measures that the former had imposed. As their dispute was dragging on, and the end of the AB was approaching, they agreed to waive their right of appeal on one of the remaining issues:

> *The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU.*[4]

We discuss the MPIA in Section 3. The MPIA was not the only attempt to resolve the crisis. Before that, two multilateral processes were initiated and both failed. The DSU Review, and the so-called 'Walker process'.

2.3 Failed Attempts to Resolve the Crisis

The DSU Review was scheduled to start during the first years of the WTO, and aimed to address shortcomings that the implementation of DSU in the real world had revealed. Why not wait for a few years, when membership would have gained more experience of, at the very least, statistical significance? To make things even more problematic, the statutory deadline to complete the review was four years.

This birth defect of the DSU Review was healed in practice. As the four years lapsed, with the membership having nothing concrete to show, the review was extended until August 1999, and then prolonged until the end of 1999, with the intention that the results would be dealt with at the ill-fated Seattle Ministerial Conference (Nov 30 - Dec 3, 1999).[5] No satisfactory conclusion proved possible during that period, and negotiations continued. In

4 WTO Doc. WT/DS496/14 of March 27, 2019.
5 WTO Doc. WT/DSB/M/52 of February 3, 1999.

fact, they were folded into the Doha negotiations, with Ministers establishing a mandate to use the work completed up to that point, as the basis for negotiations to improve and clarify the DSU.[6] Once folded into the Doha round negotiations, the DSU Review suffered the fate of the Doha round – in went on forever.

The June 2019 report, issued by Ambassador Coly Seck of Senegal, who was the latest Chair of the DSU Review, serves as the definitive account on the state of play following more than 20 years of uninterrupted negotiations.[7] The subject matter of negotiations was bottom-up, as every WTO member had the opportunity to include items on the agenda. Ambassador Seck's report mentions that the following issues were raised:

- Time-frames;
- Mutually agreed solutions;
- Third-party rights;
- Panel composition;
- Strictly confidential information;
- Transparency and amicus curiae briefs;
- Remand authority of the AB;
- Effective compliance;
- Sequencing between compliance panels and requests for authorisation to retaliate;
- Post-retaliation;
- Developing country interests;
- Flexibility and member control.

Some of these issues, like sequencing, had *de facto* been resolved in practice, and the DSU Review was supposed to recommend that practice be translated into operational language. It did not manage to do that, even though this was the obvious low-hanging fruit. Others, like the selection of panellists, the available remedies, and/or the participation of developing countries in dispute adjudication, have been hotly debated both in DSU practice, as well as in academia, but took the form of parallel monologues with no agreement in sight, in the realm of the DSU Review.[8]

6 Formally, the DSU Review was not part of the Doha Development Agenda single undertaking but a stand-alone exercise. The decision was taken to merge the two negotiations early on during the Doha round negotiations, WTO Doc. TN/C/M/1 of February 5, 2002, at §30.

7 'Special Session of the Dispute Settlement Body: Report by the Chairman, Ambassador Coly Seck,' WTO Doc. TN/DS/31, cited above.

8 McDougall (2018) provided an eloquent description of the failure to conclude on the DSU Review.

Anticipating the failure of the DSU Review, Director-General (DG) Azevedo appointed a very well respected individual, and genuine expert on all things WTO, the Ambassador of New Zealand to the WTO, David Walker, to head a process aiming to avert the AB crisis.[9] It is quite clear that Ambassador David Walker, who is a PhD economist, was appointed against the disappointing background of an inconclusive DSU Review. He was the designated rescuer, entrusted with the task of saving multilateral adjudication. He might have hoped to go about his task heading a more high-level, political process, where people who mattered in the national capitals would be implicated. Had this been the case, it would no longer be an average WTO delegate wdo would have been asked to participate in the DSU Review. But this did not prove to be the case.

Ambassador Walker's mandate included issues that had appeared in the DSU Review, and, arguably, should have been addressed well before the crisis had erupted. Following extensive consultations with numerous delegations to the WTO, and having carefully listened to grievances expressed, he formulated his pathway forward. His 'Walker Principles' were meant to address the US concerns with the operation of the AB, and ensure that:

- Appeals are completed within 90 days;
- AB members do not serve beyond their terms;
- Precedent in case law is not binding;
- Facts cannot be the subject of appeals;
- The AB be prohibited from issuing advisory opinions;
- Dispute settlement findings cannot change obligations or rights provided by the WTO Agreements.

The 'Walker Principles' are thus, fully consistent with, and indeed often echo, what is already in the DSU. David Walker, without fanfare, aimed to underline the basic features of the agreed, depoliticised DSU, which the trading nations had signed up to. By emphasising the spirit of the Uruguay round negotiations, and adding a couple of points of interest primarily to the United States, the hope was that the United States would abandon its destructive attitude, and return to the negotiating table. Alas, this very honourable endeavour did not manage to tilt the balance within the Trump administration, and bring the US back to the WTO drawing table. In December 2019, it became clear to all that the AB was no more.

9 WTO Doc. JOB/GC/222 of October 15, 2019.

Thus, the membership was left with insurance mechanisms to avert a total breakdown of dispute adjudication. We have already discussed how bilateral, ad hoc, agreements avoid the trap of an appeal into the void. We now turn to the joint China-EU initiative to establish the MPIA.

3. CHINA, AND THE EU REACT: THE ADVENT OF THE MPIA

3.1 What is the MPIA?

Several lawyers from the Geneva office of Sidley Austin LLP were the first to publicly put forward the basic idea of appeal arbitration for an alternative of the AB. In view of the WTO's delay in initiating the selection of AB members, they suggested referring to the arbitration process under article 25 of the DSU as a provisional alternative for the AB.[10] The EU and Canada, and the EU and Norway, respectively informed the WTO of their willingness to invoke article 25 as an appeal procedure for the settlement of disputes between them.[11] On April 30 2020, the EU, China, and 17 other members informed the WTO of the MPIA, which shifted the attention towards the proposal from bilateral level to the 'plurilateral' forum. Til now, there are 24 WTO members who participate in the MPIA, and the total number of participants is 51, covering nearly one-third of the WTO members, if counting EU members individually.

The MPIA consists of a position statement and a detailed arrangement. The position statement is relatively brief, emphasising the necessity of retaining the appeal procedure to be an integral part of the WTO dispute settlement. In addition, the statement specifically states that consistency and predictability of the interpretation of the covered agreements are of great value to WTO members. Thus, it is within expectations that a large number of WTO precedents will become an important part of the legal arguments in the future awards under the MPIA.

The arrangement consists of 15 items, of which the key elements are:

- General Provisions
- Arbitration Procedure
- Arbitrator Pool

The participating Members commit that they will not pursue appeals under Articles 16.4 and 17 of the DSU, but will instead use the appeal arbitration procedure based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 of the

10 Andersen et al, Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals, Centre for Trade and Economic Integration Working Papers, CTEI-2017-17, 2017.

11 Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes. JOB/DSB/1/Add.11, 25 July 2019. Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes. JOB/ DSB/1/Add.11/ Suppl.1, 21 October 2019.

DSU. This choice will make the appeal process return and leave no place for both 'appeal into the void' and shelving the panel decision. The main provisions of the arbitration procedure established through MPIA, which, as per the MPIA statute, include 19 articles in total, are generally the same as the regular appeal procedure in article 17 of DSU. Additionally, some improvements have been made, including that any appeal examined by the arbitrator should be limited to dispute resolution, the award should be rendered within 90 days, a time limit is specified, and the arbitrator may consult with the parties on specific measures (such as limiting the number of pages of written submissions and the hearings). The improvements above are reminiscent of the Trump administration's criticism of the AB, echoing some of them, such as the advisory opinions within the AB reports, frequent 'overdue adjudication' and tackling of 'issues of fact'.

Almost following the same way of the selection of the AB Members set in article 17 of the DSU, a pool of arbitrators, consisting of ten standing appeal arbitrators, who are unaffiliated with any government and are of recognised authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally, has to be established. Each appeal will be heard by three appeal arbitrators selected from the pool, and the minutes of the proceeding will be forwarded from the panel to the arbitrators selected. All members of the pool of arbitrators were determined in July 2020.[12]

3.2 Can the MPIA work?

Far more than just an appeal approach for resolving disputes between dozens of WTO members, the MPIA is a model for responding to the crisis in the event of the dysfunction of the AB. As discussed in Baroncini (2020), the flexible, dynamic, and open nature of the MPIA is crucially attracting the attention of more WTO Members: any interested country may join the interim solution at any time, through a simple notification to the Dispute Settlement Body (DSB), declaring the endorsement of the contingency measures. Likewise, a participating member may decide to cease its participation in the MPIA just by notifying its intention to the same institution. Participants to the appellate contingency measures may also agree to depart from the MPIA discipline with respect to a specific dispute. Theoretically speaking, the WTO dispute settlement crisis will be alleviated if more WTO members choose to join the MPIA. The operation of the MPIA, if everything goes smoothly, is bound to shed some light on the future mechanism, whether the AB returns or not.

12 The final 10 arbitrators were Mr. Mateo Diego-Fernández Andrade (Mexico), Mr. Thomas Cottier (Switzerland), Ms. Locknie HSU (Singapore), Ms. Valerie Hughes (Canada), Mr. Alejandro Jara (Chile), Mr. José Alfredo Graça Lima (Brazil), Ms. Claudia OROZCO (Colombia), Mr. Joost Pauwelyn (EU), Ms. Penelope Ridings (New Zealand), Mr Guohua YANG (China). See WTO document: Statement on a Mechanism for Developing. Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes. Job/DSB/1/Add.12/Suppl.5, 03 August 2020.

Even the many features listed above, do not mean that the MPIA is a perfect design for saving the fading of the crown jewel of the multilateral trade regime. The legitimacy of the MPIA under the WTO Agreements is still unclear. Baroncini (2020) correctly argues that the MPIA's choice is to base the interim solution on the existing alternative mechanism contemplated in Article 25 of the DSU, combined with the already-in-force WTO Working Appellate Procedures and Rules of Conduct, overcomes the thorny issue of indicating which procedural rules would be advisable to choose for the temporary arbitration to guarantee WTO-coherent proceedings and awards. However, it is the Article 25 of the DSU, not the MPIA, which sets a possible approach for the potential awards to be incorporated into the jurisprudence of the WTO. The MPIA itself is not a covered agreement or a plurilateral agreement under the Annex 4 to the WTO Agreement within the WTO legal framework. Judging from the text of Article 25 of the DSU, whether it is applicable for the appeal is still pending, since no explicit treaty language says so. Even presuming the answer is positive, whether it is WTO-consistent for the MPIA Members to make an *inter se* agreement is also pendent. As clearly written in Article 17 of the DSU, it is the AB, not any other body, that hears appeals from panel cases. Although the paralysis of AB *de facto* made the article 17 into a nominal clause, this article is still legally valid. Judging from the perspective of general international law, establishing the MPIA as an alternative for appeal is an *inter se* agreement between several WTO Members. When it comes to the legality of an *inter se* agreement, Article 41 of Vienna Convention on the Law of the Treaties is the most relevant rule.[13] The Marrakesh Agreement establishing the WTO says nothing on the modification, but something on amendment (Article 10), and it is critical to evaluate whether the MPIA has affected the rights and obligations of the other WTO members.

The MPIA is an interim arrangement and it is uncertain how long it can last and how many cases can be heard.[14] Simon Lester (2020) has made elaborations on the uncertainties about the MPIA on its legal culture and attitude towards technically tough issues. Besides, it is even more uncertain how many members will join the MPIA. The initiative of the potential participants, to some extent, will be restrained, as they will be incapable of nominating an arbitrator, since the pool is not subject to reselection until 2022.

13 Article 41 reads as follows: 'Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.

14 There are currently only four cases that may fall into the scope of the MPIA, if any disputing party claims to appeal: DS522, DS524, DS537, DS591. See Canada-Measures Concerning Trade In Commercial Aircraft, Agreed Procedures For Arbitration Under Article 25 of The DSU. WT/DS522/20, 03 June 2020; Costa Rica - Medidas Relativas A La Importación De Aguacates Frescos Procedentes De México Procedimiento Convenido Para El Arbitraje Previsto En El Artículo 25 Del Esd . WT/DS524/5, 03 June 2020; Canada-Measures Governing the Sale of Wine, Agreed Procedures for Arbitration Under Article 25 of the DSU. WT/DS537/15, 03 June 2020; Colombia-Anti-dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands , Agreed Procedures For Arbitration Under Article 25 of The DSU. WT/DS591/3, 15 July 2020.

The operation of the MPIA also needs some institutional support. At this stage, there is uncertainty regarding the identity of parties that will bear the financial cost of the endeavor. The point is, seeking funding from the WTO is not a realistic option, because traditionally, there is no budget for the proceeding initiated under article 25 of the DSU. Administrative staff and legal assistants are also required for the daily communications among arbitrators and the hearings. It should be noted that the Ambassador of the United States wrote to the DG of the WTO on June 5, 2020 expressing an objection to the MPIA, claiming that the MPIA was no more than a duplication of AB, stressing the particular concern of using WTO resources and funding to support the MPIA.[15] The frank opposition to the MPIA from the US casts a shadow on the future work of the endeavour.

4. ADDRESSING THE CRISIS

On June 28 2018, China published the White Paper on China and the World Trade Organization,[16] generally defining its position on the firm support of the reform of the WTO dispute settlement reformation.[17] Following two joint proposals submitted to the WTO with other WTO members requesting the discussion on concerns raised by the US,[18] China, on May 13 2019, submitted to the WTO an individual proposal on WTO reform, which strongly recommended the start of a negotiation without delay to appoint the AB members in order to return to an effective functioning of the dispute settlement mechanism.[19]

China seems to take the return of the AB as the priority of the reformation on dispute settlement. However, the return of the AB is not the return of the WTO. As we will discuss later, the idea of depoliticisation of the dispute settlement and its implementation is the nucleus. Another responsible response for an influential trade member like China, is to act as an active promoter of multilateral trade negotiations in future rounds. To some extent, the activism of the dispute settlement mechanism lies in the standstill of the multilateral rules-making process. If China, based on commitments already made in the Comprehensive Agreement on Investment (CAI) with the EU, offers broader and substantial concessions with regards to trade and trade-related topics at the multilateral level, and succeeds in pushing the other major WTO members to conclude some new agreements within the WTO framework, then the need for a comprehensive and compulsory dispute settlement will re-emerge for the uniform application of the new agreement and the interpretation of the ambiguous clauses therein.

15 https://insidetrade.com/sites/insidetrade.com/files/documents/2020/jun/wto2020_0268a.pdf.
16 http://english.www.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm.
17 http://www.scio.gov.cn/zfbps/32832/Document/1632334/1632334.htm
18 WT/GC/W/752, WT/GC/W/753.
19 WT/GC/W/773.

The EU, in a recent official communication,[20] reiterated its view that the future of WTO dispute settlement is inexorably linked to the re-emergence of the AB. Acknowledging that some of the points of critique that the US delegation had raised criticising the working of the AB, it has argued in favour of a new (reinvigorated) AB, which:

- Will not be bound by precedent.
- Will observe and practive judicial economy.
- Will not deviate from mandatory time-lines.
- And will be independent.

Even if the EU means that there should be no *stare decisis*, that is, an obligation to follow precedent, this point makes little sense. Even in common law countries, the highest court in the hierarchy can change course, and the AB is at the top of the WTO pyramid. This seems like more of an attempt to placate the United States than anything else. Judicial economy has its pros and cons, as Busch and Pelc (2010) have shown. It all depends on the manner in which it is used. After all, what is strictly necessary to resolve a dispute is a matter of judgment. But one can hardly disagree with the EU that excesses, adopting that is an *obiter dictum* that is remotely, if at all, connected to the dispute resolution, should be avoided. In fact, in Hoekman and Mavroidis (2021), we argue that, because WTO judges are agents by legislative fiat (Article 3.2 of the DSU), and thus, are limited to a role of agents tasked to observe a specific mandate, they should pronounce a *non liquet* as well, whenever they face a case where there is no law, or where the law is manifestly unclear. Mandatory timelines make absolutely no sense. For starters, their observance depends not only on the judicial body, but also on the parties to the dispute. Furthermore, there are disputes concerning one provision that has already been interpreted *ad nauseam* in the past, as there are disputes with various novel issues. In function of which class of disputes will the deadline be set? If this was such a good idea, why not adopt it at home as well? Thirdly, there are hardly any domestic courts that must wrap up within a predetermined period, as human prescience is bounded. Finally, mandatory deadlines might provide judges with the wrong incentives, as they might privilege brevity over accuracy and correctness and clarity. No harm done, if an indicative list were adopted.

No one would argue that judiciary must be depoliticised. Having gone through the seventies' and eighties experience, adequately discussed in Hudec (1993), the WTO membership decided, for good reasons, to turn the page. This is the quintessential element of the DSU, and it must be retained in the DSU 2.0 that will hopefully (eventually?) emerge from the negotiations to kick-start WTO dispute adjudication once again.

20 COM (2021) 66 final, Brussels, February 18, 2021.

This is the one area where few, if any, would disagree with the statement that no change is warranted: the spirit of depoliticised dispute resolution, exemplified through the endorsement of compulsory third-party adjudication and negative consensus, must be preserved at all costs. This was, after all, the driving force behind the negotiation of the DSU. The AB was not the key concern of the DSU negotiation. The key concern was how avoid politicking in dispute adjudication. Theself-professed reason of the United States for going unilateral was its disappointment with scoring inconsequential wins before GATT panels: the EU had blocked adoption of various reports dealing with farm subsidies. The United States was also disappointed with the turn of events in the Domestic International Sales Corporations (DISC) dispute.[21] Following these misadventures, it took justice into its own hands. It was willing to give up on unilateralism, if the other trading nations were willing to give up on politicking in the realm of dispute adjudication.

The DSU was built on this foundation. It was a very laudable effort to weave de-politicisation into the legal/judicial fabric of the emerging multilateral institution. Neither the United States, nor its partners, have explicitly renounced the idea of keeping the DSU politicised. The question is what should be done to keep the depoliticised context, while addressing the concerns of the United States and others. In what follows, we try to respond to this question.

In this vein, in Hoekman and Mavroidis (2020), we argue that preserving the depoliticised character of the DSU should be the focus of negotiators. AB, or no AB, this is not the key issue. What matters is that judges are left alone to decide on disputes. Conversely, the membership should probably rethink the wisdom of the current system of selecting panellists. Even if one does not endorse the views expressed in Pauwelyn and Pelc (2019) regarding the influence of the WTO Secretariat in the drafting of reports, there are undeniable agency costs when the common agent (WTO Secretariat) is tasked to propose (and often select) judges. Recent practice shows that the overwhelming majority of panellists chosen have no prior approval of the membership, as they are not chosen from the agreed roster.

5. CONCLUDING REMARKS

The crisis of WTO dispute adjudication is the consequence of the attitude of the Trump administration, and the inability of the DSU Review to address some real concerns that the membership has voiced. It would be counterproductive to tackle the crisis of the WTO judiciary in self-contained manner, as, unless the wider legislative crisis has been also addressed, the WTO judiciary risks seeing the volume of disputes submitted to it waxing. The EU and China have recently renewed their commitments to international adjudication by participating in the MPIA, and also in the CAI. The commitment of all

21 Both Hudec (1988) and Jackson (1978) have discussed the importance of this dispute, and its influence on the turn of events. It was a genuine inflection point in the history of GATT adjudication, that precipitated reform.

stakeholders, and especially the most important ones, is necessary for the WTO dispute settlement of the future to continue to be depoliticised, irrespective whether the future design will include a one- or two-instance adjudication.

REFERENCES

Bhagwati, J N (1990), 'Aggressive Unilateralism: An Overview', in Bhagwati, J and H Patrick (eds), *Aggressive Unilateralism, America's 301 Trade Policy and the World Trading System*, Harvester Wheatsheaf.

Busch, M L and K J Pelc (2010), 'The Politics of Judicial Economy at the World Trade Organization', *International Organization* 64: 257–279.

Davey, W J (2014), 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success and Future Challenges', *Journal of International Economic Law* 17: 679-700.

Baroncini di E (2020), 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement', available at https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=43858.

Fiorini, M, B M Hoekman, P C Mavroidis, M Saluste, and R Wolf (2020), 'WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences', *Journal of World Trade* 54: 667-698.

Hoekman, B M and P C Mavroidis (2021), 'Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?', *European Journal of International Law*.

Hoekman, B M and P C Mavroidis (2020), 'To AB or Not to AB? Elements of a Response to a Question Never Asked', *Journal of International Economic Law* 23: 703-722.

Hudec, R E (1993), *Enforcing International trade Law: the Evolution of the Modern GATT Legal System*, Butterworth.

Hudec, R E (1988), 'Reforming GATT Adjudication Procedures: The Lessons of the DISC Case', *Minnesota Law Review* 72: 1443-1481.

Jackson, J H (1990), 'Restructuring the GATT System', Council of Foreign Relations.

Jackson, J H (1978), 'The Jurisprudence of International Trade: the DISC Case in GATT', *American Journal of International Law* 72: 747-781.

Mavroidis, P C (2016), 'Mind over Matter', in Bagwell, K and R W Staiger (eds), *Handbook on Commercial Policy, Handbooks in Economics*, Elsevier.

McDougall, R (2018), 'The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance', *Journal of World Trade* 52: 867–896.

Pauwelyn, J and K Pelc (2019), 'Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement', available at SSRN: https://ssrn.com/abstract=3458872 or http://dx.doi.org/10.2139/ssrn.3458872.

Lester S (2020), 'Can Interim Appeal Arbitration Preserve the WTO Dispute System?', available at: https://www.cato.org/publications/free-trade-bulletin/can-interim-appeal-arbitration-preserve-wto-dispute-system.

ABOUT THE AUTHOR

LIAO Shiping is a Professor at Beijing Normal University. His areas of speciality are public international law, international trade law, international investment law, and the extraterritoriality of Chinese law and US law. He serves as a member on the International Law Advisory Broads of Chinese Ministry of Foreign Affairs and Ministry of Justice.

Petros C. Mavroidis is Professor at Columbia Law School. He has acted as Chief Reporter for the American Law institute study on WTO (2013). His most recent publication is *China and the WTO,* coauthored with Andre Sapir, Princeton Univeristy Press (2021).