

WTO Dispute Settlement Mechanism and Public International Law

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Abstract: The Dispute Settlement Mechanism (DSM) of the WTO is based on treaties, hence the principles of free consent and good faith in the preamble of the Vienna Convention on the Law of Treaties (VCLT) shall apply. However, the United States (US) destroyed the WTO appellate system by blocking the selection of Appellate Body (AB) members, apparently in bad faith. During the time, the negotiation by the WTO members on the DSM reform was overshadowed by lack of free consent and validity of its outcomes. The DSM has been broken for nearly four years and its future remains vague. In this particular situation, a more appropriate approach could be by voting according to the Agreement Establishing the World Trade Organization or collective action to select AB members. The clauses on fundamental change of circumstances and *inter se* agreements in the VCLT could provide a legal basis for this initiation.

Keywords: WTO Dispute Settlement Mechanism (DSM), Appellate Body Crisis, Law of Treaties, Good Faith, Free Consent, Voting, Collective Action

I. INTRODUCTION

Robert Lighthizer, the Trade Representative of the Trump administration, wrote that “killing the Appellate Body was important ... We were able to do this because the judges are appointed by consensus. When, on behalf of the United States, I refused to agree to start the process of bringing new judges on board, the quorum had no way of replenishing its numbers. As a result, the Appellate Body slowly shrank from seven, to six, to five, to four, to three, to two, and finally to one, on November 30, 2020” in his book named *No Trade Is Free*

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Thanks to the following friends for their suggestions: Shuchao Gao, Yongmei Chen, Xiaodong Hong, Fan Cui, Xiaoyong He, Baihua Gong, and Ying Liu.

published in early July of 2023.¹

What comes to mind when the diplomats of other nations engaged in the negotiations of the Dispute Settlement Mechanism (DSM) reform, especially the AB reform, in Geneva read the book?

On the meeting of the WTO Dispute Settlement Body (DSB) held on April 28 in 2023, Guatemala, on behalf of the 128 members, proposed to start the selection process for filling vacancies of the AB; to establish a Selection Committee; to set a deadline of 30 days for the submission of candidacies; and to request that the Selection Committee issue its recommendations within 60 days after the deadline for nominations of candidates.² The proposal was first submitted in January of 2018³ and was read out on every DSB meeting thereafter, which has happened over 60 times so far; however, the United States has never supported it. The United States asserted that members were aware of the longstanding US concerns with the WTO DSM, and those concerns remained unaddressed.⁴

For what Lighthizer said, the US specialists working for WTO dispute settlement in Geneva, do you really believe that the AB should be killed? Is it fair to kill it by interfering the selection procedure? What do you really want, kidnapping AB when it is at crisis? One more thing, does going against almost all WTO members seem appropriate?

The crisis of the Appellate Body is a murder cooked up by Lighthizer. The Appellate Body is not responsible for its crisis, therefore the reform is baseless. Instead of supporting the restoration of the Appellate Body as it ought to do, the new administration of the United States uses it as a counter to push the so-called reform, which is truly inexplicable. The recently published “Objectives

1 Robert Lighthizer, *No Trade Is Free: Changing Course, Taking on China, and Helping America's Workers*, Broadside Books, 2023, p. 84. The Appellate Body had only one member left on December 10, 2019 and her term of office expired on November 30, 2020. See WTO Appellate Body Annual Report for 2019–2020, https://www.wto.org/english/tratop_e/dispu_e/ab_anrep_2019_e.pdf (Last Visited on November 1, 2024); https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (Last Visited on September 4, 2023).

2 See WTO document: WT/DSB/M/478.

3 See WTO document: WT/DSB/M/609/Rev.1.

4 See WTO document: WT/DSB/M/478.

of the DSM Reform” is also confusing.⁵ I have expressed my views about this in other works,⁶ thus I will not reiterate them here. This paper analyzes the occurrence and the current situation of the crisis of the Appellate Body from the angle of the law of treaties, especially the principles of good faith and free consent, and proposes some practical suggestions from the perspective of the WTO decision-making mechanism.

II. DISPUTE MECHANISM

VCLT defines treaty as “an international agreement concluded between states in written form and governed by international law”.⁷ According to this, WTO Agreements are treaties without doubt.

“WTO Agreements” refers to the WTO series of agreements. WTO adopted a series of agreements when it was established in 1995, including the Agreement Establishing the World Trade Organization, a constitutional “parent agreement”, and four “sub-agreements”, including the Annex 1 Agreements on Trade in Goods, Trade in Services and Intellectual Property Rights, the Annex 2 Rules and Procedures Governing the Settlement of Disputes, the Annex 3 Policy Review Mechanism, and the Annex 4 Plurilateral Trade Agreements. There are now 19 agreements.⁸

The Agreement Establishing the Word Trade Organization stated in the preamble that the parties are resolved to develop an integrated, more viable and durable multilateral trading system by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in

⁵ The United States submitted the *US Objectives for a Reformed Dispute Settlement System* to the WTO in July 2023. It said nothing about the reform of the dispute settlement mechanism but some principles and there were no specific programs, which was perfunctory. See WTO document: JOB/DSB/4.

⁶ Guohua Yang, *Jungles Resurface? The Rise and Decline of the WTO Appellate System*, First Edition, People's Publishing House, 2020; Guohua Yang, How Did the Crisis of the WTO Appellate Body Happen and Where It will Lead Us, *Business and Economic Law Review*, No. 3, 2023, pp. 37–58.

⁷ Article 2 of the Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (Last Visited on September 4, 2023).

⁸ See *WTO Agreements (Chinese and English)*, Translated by Bicheng Suo, First Edition, China Commerce and Trade Press, 2023. See also WTO website: WTO legal texts: https://www.wto.org/english/docs_e/legal_e/legal_e.htm (Lasted Visited on September 4, 2023).

international trade relations with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services. The Annex 1 covers three major areas: trade in goods, trade in services, and intellectual property rights. Among which, trade in goods include aspects of agriculture, sanitary and phytosanitary measures, technical barriers to trade, investment measures, anti-dumping, subsidies and countervailing measures, safeguarding measures, valuation for customs purposes, pre-shipment inspection, rules of origin, import licensing procedures, and trade facilitation. Obviously, the WTO Agreements prescribe the rules of trade.

The WTO Agreements also have the articles of dispute settlement, which is the Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁹ The DSU has 27 articles and it makes provisions on the consultations, the panel, the AB, and the implementation of rulings. The Article 3.2 states that DSM is a central element in providing security and predictability to the multilateral trading system. It should be noted that the DSM ruling of second instance is final. The parties may appeal to the AB if it objects to the ruling of the panel.

The Article 3.2 further stipulates that the WTO members should clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law. It is acknowledged that the customary rules of interpretation of public international law include the Articles 31 (general rule of interpretation) and 32 (supplementary means of interpretation) of the VCLT.¹⁰ It not only clarifies the rules of treaty

⁹ https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (Lasted Visited on September 4, 2023).

¹⁰ The Appellate Body recognized the status of the Articles 31 and 32 as rules of customary or general international law when it settled the disputes of *US – Gasoline* (DS 2, 1996) and the *Japan – Taxes on Alcoholic Beverages II* (DS 8, 1996) on the early days after the WTO was established. It believed that the WTO Agreements shall not be read in clinical isolation from public international law. See p. 17 of the Report of the Appellate Body on *United States – Standards for Reformulated and Conventional Gasoline*, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2ABR.pdf&Open=True> (Lasted Visited on November 4, 2024), and p. 10 of the Report of the Appellate Body on *Japan – Taxes on Alcoholic Beverages II*, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/8ABR.pdf&Open=True> (Lasted Visited on November 4, 2024). See also WTO Analytical Index: DSU – Article 3 (DS reports), paras. 19–20, https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art3_jur.pdf (Lasted Visited on September 4, 2023).

interpretation but also reveals the relationship between the WTO Agreements and the general international law. The WTO Agreements are part of the international law and are the international law in a special realm (trade). They coexist with the general international law,¹¹ and are governed by international law as in the definition of “treaty”.

The WTO has 164 members covering over 95% of the world trade.¹² The majority of states are making trade policies within the framework of the WTO Agreements. It is really a multilateral trading system. It should be noted that the WTO members have submitted to the DSU 618 cases up to now, thus DSM is known as the jewel in the crown of the multilateral trading system.¹³

After over two decades of good functioning of the DSM, the Trump administration started to block the selection of AB members with bad faith since his inauguration in 2017, which made the AB unable to decide on cases due to insufficient members at the end of 2019. To settle the disputes, some members, appealing into the void, brought the ruling of the panel to the AB that did not exist. Some other members resorted to interim arbitration. The WTO members also tried to consult with the United States to address its concerns and even made a written proposal. During this complicated process, attention was drawn to “good faith” and “free consent”, two principles declared in the preamble of the VCLT.

11 According to the report of the International Law Commission, international law is a legal system. Its rules and principles (i.e., its norms) are related. The so-called self-contained regime that generally excludes the application of general international law does not exist. The general international law is often cited in the practice of the WTO, especially the interpretation of treaties. See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 2006, https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (Lasted Visited on November 4, 2024), paras. 165–171; Appendix: Draft Conclusions of the Work of the Study Group, <http://undocs.org/en/A/CN.4/L.682/Add.1> (Lasted Visited on September 4, 2023), para. 1. For the relationship between WTO and the general international law (e.g., the law of treaties and the laws of state responsibility), see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, 2003; Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*, Cambridge University Press, 2015.

12 https://www.wto.org/english/thewto_e/thewto_e.htm (Lasted Visited on September 5, 2023).

13 Chronological List of Disputes Cases, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Lasted Visited on November 4, 2024). For the name of the “jewel in the crown”, see WTO, 20 Years of the WTO: A Retrospective, https://www.wto.org/english/res_e/booksp_e/20years_wto_e.pdf (Lasted Visited on September 5, 2023), p. 81.

III. GOOD FAITH

It is noted in the preamble of the VCLT that the principle of good faith is universally recognized. According to the *Black's Law Dictionary*, “good faith” means honesty or absence of intent to defraud or to seek unconscionable advantage; it is also known as *bona fides*. Good faith is the opposite of bad faith, which means dishonesty, such as evasion of the transaction principles, abuse of power, interference with cooperation, or refusal to cooperate.¹⁴ These simple definitions set the standards for the analysis of this paper.

Let us first discuss the United States: Is it in bad faith that the United States destroys the DSM by taking advantage of the selection of AB members?

The AB is a standing body of the WTO, consisting of seven members with a term of four years. Each member can be reappointed once. There are a total of 27 members. Either old members are reappointed or new members are selected almost every year.¹⁵ The DSB is responsible for the work. Candidates are first recommended by WTO members, nominated by the selection committee and finally appointed by the DSB.¹⁶ The Article 17.2 of DSU states that DSB shall appoint persons to serve on the AB. However, the Article 2.4 provides that the DSB shall take a decision by consensus. A decision is considered adopted by consensus if no member makes any official objections on the DSB meeting. The rule of consensus has been generalized in practice. The initiation of the reappointment of selection procedure also requires that no official objections are made.¹⁷ For the past two decades or so, the procedures carry through despite some troubles and disturbances.¹⁸ But in 2017, the event mentioned in the first

14 *Black's Law Dictionary*, Seventh Edition, 1999. For the WTO application of the principle of good faith, see Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*, Hart Publishing, 2006.

15 DSU, Article 17.2. Appellate Body member list available on WTO website: Appellate Body Members, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (Lasted Visited on September 4, 2023).

16 For the selection procedure, see WTO document: Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO, Approved by the Dispute Settlement Body on February 10, 1995 (WT/DSB/1).

17 This is the custom and is not written into law.

18 *Supra* n. 6.

part of this paper happened: the United States opposed the initiation of the procedure.

The “consensus” rule confers the United States and every WTO member the right to object; however, what we are discussing in this paper is not such “right” but the “bad faith”. Apparently, it is an act of bad faith to kill AB by interfering the reappointment and selection procedure. The United States justified its acts by accusing AB of “overstepping its authority” “ignoring the deadline for deciding appeals” “overtime service” “advisory opinions” “*De facto* law” “*stare decisis*”.¹⁹ These issues could have been presented to the WTO members for discussion through many legal means.²⁰ Instead, the United States threw out balloons at the time of reappointment and selection of AB members, triggering the time bomb. If this is not considered an act of bad faith, then I do not know what is.

Let us turn our eyes to the other members. Is it an act of bad faith to appeal into the void or by arbitration?

The first choice of other members is “appealing into the void”. Eighteen cases have been appealed into the void since the AB ceased to hear cases.²¹ All the notifications of appeal stated at the end that the appellant is aware that the AB is, for the time being, unable to function and will await the restoration of the AB to hear the appeal.²² It is an open secret that this is just a way to make the panel’s ruling ineffective. Is it considered an act of bad faith? I am afraid it is not true for all appeals because some cases are serious. The appellants have questions about the panel’s ruling, like what it used to be before the AB crisis.

19 A Summary of the Reasons: United States Trade Representative (February 2020), Report on the Appellate Body of the World Trade Organization, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (Lasted Visited on November 4, 2024). For statement by the United States and comments of other members, see Minutes of Meeting of the General Council in March 2020, WT/GC/M/182, pp. 48–55.

20 According to the Article IX:2 of the Agreement Establishing the World Trade Organization, the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement.

21 Current Notified Appeals, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (Lasted Visited on September 5, 2023).

22 E.g., Notification of Appeal by India for Tariff-related Dispute (DS584) (May 2023). See WTO document: WT/DS584/14.

As a matter of fact, the AB modifies or overturns the panel's ruling in many cases.²³ Under such circumstances, “appealing into the void” is not an act of bad faith. However, in some cases, the United States that destroyed the AB made an appeal as the respondent when it publicly declared that it would not execute the ruling. Clearly, this was an act of bad faith.²⁴

Another choice of other members is “arbitration”. Some members, citing the Article 25 of the DSU (Arbitration), established the arbitration tribunal to hear the appeals. Two cases have been closed.²⁵ It seems that making appeals based on Article 25 may or may not accord to the Paragraph 1 of Article 31 of the VCLT “interpretation in good faith” because Article 25 is not for the purpose of appeal.²⁶ Some theoretical bases could be found from the perspective of “*inter*

23 According to the Article 17.13 of the DSU, the Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel.

24 The United States made 10 appeals that went into the void. *Supra* n. 21. Unlike the other members who will await the restoration of AB to hear the appeal, the United States will confer with the parties on the settlement and said straight that matters on national security are not susceptible to review by WTO. See WTO document: WT/DS539/9 and WT/DS564/21.

25 The European Union, China, and other WTO members initiated a multi-party interim appeal arbitration arrangement (MPIA) at early 2020 that has been ratified by 53 members. For the MPIA text, see WTO document: Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, Job/Dsb/1/Add.12. I am one of the arbitrators. See WTO document: Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, JOB/DSB/1/Add.12/Suppl.5. MPIA heard the first case *Colombia – Frozen Fries* (DS591) in 2023. The case is available on https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm (Lasted Visited on September 5, 2023). Award available at WTO document: Award of Arbitrator, WT/DS591/ARB25, WT/DS591/ARB25. In the same year, the dispute between Turkey (non-MPIA member) and the EU, *Turkey – Pharmaceutical Products*, was heard according to the agreement of appeal with arbitration between the parties and the MPIA, making it the first case of appeal with arbitration. I was one of the three arbitrators. The case is available on https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm (Lasted Visited on September 5, 2023). Award available at WTO document: Award of the Arbitrator, WT/DS583/ARB25.

See also Guohua Yang, Establishment of the WTO Appeal Arbitration Mechanism, *Journal of Shanghai University of International Business and Economics*, Vol. 27, No. 6, 2020, pp. 29–38; Guohua Yang, The First WTO Appeal Arbitration: *Turkey – Pharmaceutical Products*, *Journal of Shanghai University of International Business and Economics*, Vol. 29, No. 6, 2022, pp. 5–17; Guohua Yang, *Study on the First WTO Appeal Arbitration: Turkey – Pharmaceutical Products*, First Edition, People's Publishing House, 2023.

26 Article 25 is not interpreted to appeal with arbitration. The text of paragraph 1 says “expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties”. This is an authorization for the WTO members to settle their disputes with arbitration in addition to the general settlement procedure where cases are heard by the panel and AB. In other words, the general procedure and arbitration is a choice between A or B. Arbitration is an alternative means of the general procedure.

se agreement” and “subsequent practice”. According to Article 41 of the VCLT (agreements to modify multilateral treaties between certain of the parties only), “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; (b) the modification in question is not prohibited by the treaty and (i) does not affect the enjoyment of 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”. It is safe to say that arbitration is an agreement of some members to modify the treaty, hence it is an “*inter se* agreement”. Furthermore, neither other members nor the treaty is affected. The 1966 draft of VCLT added the “modification of treaties by subsequent practice” (original Article 38) after the “*inter se* agreement” (original Article 37). The text reads that a treaty may be modified by subsequent practice obtaining the agreement of the contracting parties to modify its provisions. The commentary of the International Law Commission explains that this article covers cases where the parties by common consent in fact apply the treaty in an unforeseeable manner. While it is not necessary for every party to be actively involved, it is important to demonstrate that all parties have agreed to the changes. Since some members choose arbitration but no member expresses objection, it is considered that the treaty is modified by subsequent practice with the consent of all members.²⁷ Altogether, arbitration is, in no way, an act of bad faith when the AB is not functioning.

IV. FREE CONSENT

The preamble to the VCLT states that the principle of free consent is also universally recognized. According to *Black's Law Dictionary*, “consent” means agreement, approval, or permission regarding some act against assault, battery, defamation, invasion of privacy, conversion, and trespass; and “free” means

²⁷ Draft Articles on the Law of Treaties with Commentaries 1966, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (Lasted Visited on September 6, 2023)

freedom from constraints or dominion of others.²⁸ These general interpretations provide some reference for the specialized analysis in this paper.

When the United States brought its concerns to the WTO, other members have been trying to address its concerns through dialog and consultation and have even proposed official written reform programs. The United States, however, did not give its consent. From the angle of the United States, withholding consent is a right and coerced consent is not allowed. However, “free consent” also applies to other members, i.e., whether they are willing to carry out the relevant reforms.

At the early stage, were other members being “deceived”?

The allegations made by the United States against the AB started in 2017 and were discussed in depth by other members. The “Walker Draft” was proposed in response to these allegations.²⁹ It is now clear that the United States is not trying to address the issue at all, but to kill the AB. The “Walker Draft”, then, was the outcome of deception and not the representation of the “free consent” of the members.

At the later stage, were other members being “coerced”?

The negotiations about DSM reform focus on the existence of AB.³⁰ The EU, China, and other members have clearly demanded the restoration of AB.³¹

28 *Supra* n. 14.

29 The “Walker Draft” was proposed by David Walker, Chairman of the Dispute Settlement Body, in 2019 when he was the facilitator of the Informal Process on Appellate Body Matters. See WTO document: Draft Decision Functioning of the Appellate Body, WT/GC/W/791; Minutes of Meeting of the General Council in December 2019, WT/GC/M/181, pp. 12–33.

30 See the outcome document of the twelfth session of the ministerial conference (2022): MC12 Outcome Document, WT/MIN(22)/24/WT/L/1135, para. 4. 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.

31 See EU document: EU Concept Paper on WTO Reform (2018), <https://www.studocu.com/fr-ch/document/universite-de-geneve/introduction-to-the-world-trade-organization-legal-system/eu-concept-paper-on-wto-reform/3362120> (Last Visited on November 4, 2024); Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System (2021), https://knowledge4policy.ec.europa.eu/sites/default/files/NG0221300ENN.en_.pdf (Last Visited on November 4, 2024). China’s document: China’s Position Paper on WTO Reform (2018), <http://sms.mofcom.gov.cn/article/cbw/201812/20181202817611.shtml> (Last Visited on November 4, 2024); China’s Suggestions for WTO Reform, <http://images.mofcom.gov.cn/sms/201905/20190514094326062.pdf> (Last Visited on September 6, 2023).

The United States, on the other hand, is rather equivocal. The situation seems like the United States has something that other members want, which is making things difficult for them. Apparently, it is taking the AB crisis as a “hostage”. What is even worse is that the United States does not say what it wants, which throws the members into endless waiting for the restoration of AB and the functioning of DSM. It even makes people think that the United States will not agree with the “ruling of second instance being final” at all. The AB would become history no matter what the reform ends up. The negotiations under such circumstances are not the “free consent” of the members regardless of the results.

According to the VCLT, deception or coercion will invalidate the treaty. Article 49 stipulates that “if a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty”. Article 50 also provides that “a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations”. The deception and coercion referred to in this paper are not always exactly what is referred to in the VCLT. It raises concerns about “free consent”. Even if the United States agrees with the “Walker Draft” or even if the reform program is adopted, its validity may have defects.

It is necessary to mention that the subject of “consent” in the VCLT is a state. The acts of a state are realized by its representative in the negotiation. Articles 50 and 51 have made it clear that a state may not be bound by the treaty if its consent is procured through the corruption or coercion of its representative. The purpose of distinguishing between a state and a representative is to prevent the situation where a representative cannot represent the state. Other clauses, for instance Article 7 (Full Powers), are for the same purpose. The idea to ponder on is that: Can Lighthizer represent the “free consent” of the United States when he blocks the reappointment and selection of the AB members? On one hand, from the angle of titles, he is the Trade Representative of the United States. On the other hand, from the angle of procedures, his acts are grounded on the “consensus” principle of the DSU decision-making mechanism. Furthermore, does his representation of the United States fall within the scope

of its national law? That way, objections may be made against his acts out of considerations of the interests of the United States. It is not likely to challenge him on international occasions. Nevertheless, the fact that Lighthizer destroys the AB out of personal gains is susceptible of questions about his eligibility to represent the United States. The limitation of positive law does not influence the natural law.³² Similarly, our thoughts about facts and realities should not be influenced by the issues not addressed by the national law and international law.

V. DECISION-MAKING MECHANISM

Considering the defects in “good faith” and “free consent”, the current negotiations on DSM are full of theoretical flaws. The efforts are trying to address an issue that does not exist and is caused by a bad faith, like chasing the flowers in the mirror and the moon in the water created by a magician. The negotiations may not be justified, and they do not end well. The results, achieved with deception and coercion, are perhaps not solidly grounded. The execution could be full of twists and turns. Promises made unwillingly are easily broken.

Maybe it is time to reconsider voting or collective action!

When the crisis occurred in 2017, scholars brought up the option to initiate the appointment of AB members by voting, but this option was not adopted by WTO members because of the conventional consensus-based decision-making mechanism.³³ Besides, the outcome is serious if the appointment is advanced leaving out the United States — it is hard to imagine a DSM excluding the United States. Even if votes are cast, the number of members who will vote for the initiation is hard to tell, therefore it is not feasible.³⁴

32 “Positive law” (originated from Latin word *Positum*, meaning “established”) refers to laws enacted by people, especially including codes and statutes. “Natural law” refers to the principles originated from the generalized human nature or sacred justice. *Supra* n. 14.

33 Pieter Jan Kuijper, From the Board: The US Attack on the WTO Appellate Body, November 23, 2017, <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\LEIE\LEIE2018001.pdf> (Last Visited on September 6, 2023); Henry Gao, Finding a Rule-based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement, *Journal of International Economic Law*, Vol. 24, No. 3, 2021, pp. 534–550.

34 It seems to be a consensus of the WTO officials and relevant scholars, but there is no documentary evidence.

It has been four years now and the DSM is totally broken. The intentions of the United States are clear. It will not restore the AB and it may abandon the DSM. It has repeatedly appealed into the void since 2019 and also publicly stated that it will not execute the rulings of some cases.³⁵ It does not make any appeal since then, either as the respondent or the complainant.³⁶ Its *de facto* exit of the DSM makes the “reform” less likely to succeed. Voting could be the last resort after weighing the pros and cons.

Let us go back to the rules. According to Paragraph 1 of Article IX of the Agreement Establishing the World Trade Organization, the WTO shall continue the practice of decision-making by consensus.³⁷ When a decision cannot be arrived at by consensus, the matter at hand shall be decided by voting. It does not limit the matters to be decided and the applicable occasions; hence, it seems the Paragraph is applicable to any matter at hand and any occasions (e.g., the Council and the Commission). Besides, it only stipulates that each member shall have one vote but does not mention the percentage of votes, for instance the simple majority or two thirds majority. The reappointment and selection of AB members are the responsibility of the DSB. DSB is also the General Council, a permanent institution during the recess of the Ministerial Conference — the highest authority, composed of permanent representatives of all WTO members.³⁸ It looks like the matter should be decided by the Ministerial Conference or the General Council by voting and the decisions should be taken by the majority of the votes cast (simple majority). The votes cast may not be equal to the number of member states (164), because some states may not vote.

35 For the dispute of the *United States – Certain Measures on Steel and Aluminum Products* (DS544), the United States held the position that it is a matter of national security and it did not intend to remove the duties. Available at the Office of the United States Trade Representative: Statement from USTR Spokesperson Adam Hodge, December 9, 2022, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge> (Lasted Visited on November 4, 2024). For the dispute of the *United States – Origin Marking Requirement*, the United States expressed the same standing and did not intend to remove the marking requirement. Available at the Office of the United States Trade Representative: Statement from USTR Spokesperson Adam Hodge, December 21, 2022, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge-0> (Lasted Visited on September 6, 2023).

36 *Supra* n. 13.

37 A decision is considered adopted by consensus if no member makes any official objections on the meeting.

38 Articles IV:1, IV:2 and IV:3.

As 128 members have jointly proposed to initiate the section of AB members, simple majority would not be a problem. It even exceeds the higher requirement of three-fourths majority for the interpretation of agreements,³⁹ let alone the vote percentage (two-thirds majority) to amend the agreement.⁴⁰

It should be noted that Paragraph 1 of Article 9 includes a proviso: “unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement”. The footnote adds that decisions by the General Council, when convened as the Dispute Settlement Body, shall be taken only in accordance with the provisions of Paragraph 4 of Article 2 of the DSU. It looks like voting will be a dead end. If votes are cast in the name of the General Council, not the DSB, the simple majority will apply. It sounds inappropriate because the power to appoint AB members is exclusive to the DSB and should not be seized by the General Council.⁴¹

Will it work to vote after the proviso and Paragraph 4 of Article 2 are amended? The answer is negative because the Article 10 (Amendments) of the Agreement Establishing the World Trade Organization has clarified that if consensus is not reached about the amendments to the related agreement, the Ministerial Conference shall decide by a two-thirds majority of the members. But it only applies to the pass of the bill of amendment, the validity depends on the acceptance by all members. Paragraph 2 especially notes that the amendments to Article 9 (Decision-making) shall take effect only upon acceptance by all members. Paragraph 8 underscores that amendments to the DSU shall be approved by consensus and shall take effect for all members upon

³⁹ Article IX:2.

⁴⁰ Article IX:1.

⁴¹ According to Article 17.2 of the DSU, the DSB shall appoint persons to serve the Appellate Body ... “Shall” seems to be the exclusive authorization for DSB, which means the job is exclusive to DSB. In addition, the footnote to Article IX:1 mentions the General Council only, not the Ministerial Conference. It seemingly corresponds to the exclusive authorization for DSB and should not be interpreted that the Ministerial Conference can fulfill the responsibility of DSB on its behalf to select AB members by simple majority. According to Article IV:1 of the Agreement Establishing the Word Trade Organization, the Ministerial Conference shall have the authority to take decisions on all matters in accordance with the specific requirements for decision-making in this Agreement and other Agreement. It appears that even if the Ministerial Conference can fulfill the responsibility of DSB on its behalf, decisions shall be made by consensus, which is the “specific requirements for decision-making” in Article II:4.

approval by the Ministerial Conference. To sum up, it is impossible to amend the decision-making mechanism and DSU by voting.⁴²

There are three voting systems if a consensus is not reached: simple majority for general matters; two-thirds majority for amendments to the agreements, e.g., amendments to the Agreements on Trade in Goods, Trade in Services, and Intellectual Property Rights; three-fourths majority for interpretation of agreements.⁴³ Besides, Amendments to the decision-making mechanism itself shall take effect only upon acceptance by all members.⁴⁴ Moreover, amendments to DSU should be approved by consensus. Briefly speaking, voting is not applicable to these 2 amendments. The level of significance of the matter is reflected and restricted by the voting system of simple majority, two-thirds majority, and three-fourths majority. The decision-making mechanism itself and DSU shall be amended unopposed. Decision-making cannot be amended by voting not only because it is a fundamental institutional provision but also that there is a flaw in the logic. It could be a cycled decision-making if voting is adopted to decide whether or not voting should be used. DSU cannot be amended by voting because it is a fundamental institutional provision as important as the “principle of the most-favored-nation”.⁴⁵

However, the occurrence and development of the AB crisis, especially the obvious bad faith, deception, and coercion, is not expected by the WTO members. Is there anything WTO members can do under the circumstance?

42 According to Article XVI:3 of the Agreement Establishing the World Trade Organization, in the event of a conflict between a provision of this Agreement and a provision of Annex Agreements, the provision of this Agreement shall prevail to the extent of the conflict. However, this is not a conflict between the Agreement and the DSU.

43 For instance, accession (Article XII:2) and waiver (Article IX:3).

44 It is the same as the amendments to the most-favored-nation principle and tariff concessions (Article X:2). For details of the decision-making mechanism, see Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, Third Edition, Cambridge University Press, 2013, pp. 136–147; Claus-dieter Ehlermann and Lothar Ehring, Decision-making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade? *Journal of International Economic Law*, Vol. 8, No. 1, pp. 51–75; Dmitri v. Verenyov, Vote or Lose: An Analysis of Decision-making Alternatives for the World Trade Organization, *Buffalo Law Review*, Vol. 51, No. 2, 2003, pp. 427–482.

45 *Ibid.*

The conflicts between positive law and natural law come into sight again. WTO's three major functions: negotiation rules, supervised implementation, and dispute settlement are indispensable.⁴⁶ The situation where the DSM is not functioning should be the fundamental change of circumstances not foreseen by the members as referred to in Article 62 of the VCLT. The essential basis of members' consent is fundamentally changed and the scope of obligations under the treaty is significantly influenced. Although the provisions of VCLT cover the extreme circumstances of terminating or withdrawing from a treaty, it sheds light on the restoration of the DSM: WTO members should have the right to take emergency measures under extreme circumstances. This is the gap-filling role of the general international law to the international law in special regimes.⁴⁷

Based on the VCLT, the "*inter se* agreement" mentioned in the preceding arbitration part could provide one explanation. The voting system can be invoked as an amendment to the WTO Agreements between certain members (binding on these members alone). Certain members can propose to the Ministerial Conference or the General Council to vote to initiate the selection of AB members. It is not prohibited and it will not affect other members and the treaty. In fact, this strategy is in compliance with relevant principles, e.g., the nature of the DSM as in Paragraph 2 of Article 3 of the DSU to provide security and predictability to the multilateral trading system and preserve the rights and obligations of members and the objectives in the Marrakesh Declaration Establishing World Trade Organization to build a stronger and clearer legal framework, including a more effective and reliable DSM.⁴⁸

Furthermore, in addition to voting, is it possible for 128 or more members to collectively initiate the selection of AB members and for the AB to hear

46 See Article III of the Agreement Establishing the World Trade Organization.

47 The gap-filling role of the general international law to the international laws in special regimes. *Supra* n. 11, International Law Commission (2006); Appendix: Draft Conclusions of the Work of the Study Group, para. 15.

48 See *WTO Declarations and Decisions (Chinese and English)*, Translated by Bicheng Suo, First Edition, China Commerce and Trade Press, p. 273, para. 1. See also WTO website: Marrakesh Declaration of 15 April 1994, https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm (Lasted Visited on September 4, 2023).

For detailed explanations of the relationship between *inter se* agreement and WTO, see Americo B. Zampetti, Patrick Low and Petros C. Mavroidis, Consensus Decision-making and Legislative Inertia at the WTO: Can International Law Help? *Journal of World Trade*, Vol. 56, No. 1, 2021, pp. 1–26.

future appeals of these members alone? The interim arbitration mechanism, with 53 members at present, is similar, but it is legally grounded on Article 25 of the DSU, while the collective action is lacking of legal basis. The *inter se* agreement can also support the collective action in the same way as advancing the voting. It is also an amendment to the WTO Agreements between certain members. The only difference is that the Agreement is amended to collective action instead of voting.⁴⁹

VI. CONCLUSION

Reviewing the process of the AB crisis, evaluating the current situation of DSM, and looking forward to the future of the reform negotiation may make things clear and help us make the right decisions. The AB, a negative asset after being deliberately destroyed by someone, is somehow used by his successor to push for the DSM reform, which is absurd. Other stubborn WTO members are still expecting something to happen. An analysis based on good faith and free consent of the VCLT helps us to see through the mist and find an innovative way out from the perspective of the WTO decision-making mechanism.

In the book mentioned at the beginning of this paper, Lighthizer recalled that he was Deputy Trade Representative for President Reagan in the 1980s, and his boss, the Trade Representative, was Ambassador William E. Brock. The boss wanted a binding “court system” and the position of the US government was set, but Lighthizer himself did not agree because the US could lose more than it could win. He had no other way because the boss had the final say.⁵⁰ At the beginning of his new book, he said that in December 2016, he went to meet President Trump at Mar-a-Lago, knowing that he would be appointed as the Trade Representative. Sitting across from Trump, he thought to himself, “This

49 The means of collective action is also enlightened by the cited article of Pieter Jan Kuijper. It proposed a solution beyond the WTO systems: the Real Friends of Dispute Settlement containing a procedure for appellate review or a complete dispute settlement procedure basically based on existing provisions of the DSU. The sitting members of the AB could resign and be taken over as members of the Appellate Tribunal of the new treaty, so could the members of the Appellate Body Secretariat. The costs of this new Tribunal could be borne by the related members.

50 *Supra* n. 1, Robert Lighthizer, p. 69.

is not just a job, but a chance to fight a battle that I had been preparing for my whole life”.⁵¹ That year, he was 70. During the Trump administration, we have seen the wars he has fought.⁵² The attack on AB is to correct what his boss had done 30 years ago, making the WTO no longer binding. Such honesty should wake people up from their dreams, right?

⁵¹ *Ibid.*, p. 9.

⁵² *Ibid.*, For Sino-US Trade War, see the *White Paper on the Facts and China's Position on Sino-US Trade Friction* Released by the Information Office of the State Council, https://www.gov.cn/zhengce/2018-09/24/content_5324957.htm (Last Visited on November 4, 2024). See also Guohua Yang, *The International Law in Sino-US Trade War*, *Wuhan University International Law Review*, No. 3, 2018; Guohua Yang, *WTO Litigation under Sino-US Trade War*, *China Law Review*, No. 5, 2018; Guohua Yang, *The International Law Basis for China's Trade Countermeasures*, *Business and Economic Law Review*, No. 1, 2019.