Dispute settlement system under attack: A move away from multilateralism?

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Abstract *The WTO Dispute Settlement System represents an unwavering commitment to multilateralism as opposed to unilateral acts of trade retaliation. While the system is not above criticism, it generally withstood the test of time and built up a wealth of case law; it provides member states a reliable forum to settle trade disputes. Notwithstanding the prevalence of Regional Trade Agreements ('RTAs'), empirical data evince that it is still the preferred choice of forum by Member States. But in recent times, the Dispute Settlement System is faced with an unprecedented crisis that foreshadows the death of the WTO Appellate Body. This might lead to a shift from the WTO Dispute Settlement System to that of the RTAs. While it might not be apparent now, this might become a reality should the crisis remain unresolved. This is an urgent problem that requires immediate action, lest the very core of the WTO, i.e., multilateralism, becomes eroded.*

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I. INTRODUCTION

Heralded as the 'crown jewel' of the World Trade Organization ('**WTO**'),[1] the WTO Dispute Settlement System ('**DSS**') presents a major upgrade from its predecessor under the General Agreement on Tariffs and Trade ('**GATT**'). While the DSS certainly has its imperfections, it enjoyed considerable success over the years and withstood the test of time. However, the crisis caused by the United States of America ('**US**') holding the WTO's Appellate Body ('**AB**') hostage is perhaps the DSS' greatest challenge yet. As this crisis remains unresolved since the end of 2019, it spells the inevitable death of the AB and, consequently, the DSS.

This problem remains very much unseen, but spells devastating and urgent consequences. That the US is able to unilaterally paralyse the WTO's legal system only serves to remind states of how politics can hinder negotiations and trade. Thus, advancing bilateralism or regionalism becomes the more alluring option. This paper argues that the death of the DSS will hasten the shift towards bilateralism or regionalism as the DSS is the precarious link holding multilateralism together at the WTO. This paper further posits that the alluring bilateral or regional lifeline – the Regional Trade Agreements ('**RTAs**')[2] — do not provide a satisfactory solution to our dying DSS.

The ensuing discussion will proceed in the following manner. In Part I, a brief discussion on the dispute settlement system under the GATT followed by the DSS would provide an understanding as to why the DSS was so highly regarded and celebrated. In Part II, a detailed examination of the current DSS will highlight the criticisms against the DSS and, more importantly, how the current crisis with the reappointment of AB members will lead to the inevitable death of the DSS. In Part III, the recent crisis is discussed in more detail. In Part IV, the proliferation of RTAs and why the death of the AB would hasten the decline of multilateralism at the WTO will be discussed. In Part V, this paper explores the legal basis of RTA Dispute Settlement Mechanisms ('**RTA DSMs**'), and posits that accepting that RTA DSMs as the way forward would leave glaring gaps that strike at the heart of the WTO's purpose. In Part VI, the authors suggest that the way forward

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1 'WTO disputes reach 400 mark' (*World Trade Organisation*) (6 Nov. 2009) <https://www.wto.org/english/news_e/pres09_e/pr578_e.htm> accessed 3 May 2020. For its use in academic literature, *see* Cosette Creamer, 'From the WTO's Crown Jewel to its Crown of Thorns' (2019) 113 AJIL Unbound 51-55.

2 This term was originally coined by Jagdish Bhagwati, 'US Trade Policy: The Infatuation with Free Trade Agreements' in Jagdish Bhagwati and Anne Krueger (eds), *The Dangerous Drift to Preferential Trade Agreements* (Washington, DC: AEI Press, 1995) to describe the phenomenon of multiple overlapping Preferential Trade Agreements.

would be for States to engage in multilateral negotiations — of which recent events may point towards its increasing necessity.

II. BIRTH OF THE CROWN JEWEL

A comparison with its predecessor under the GATT would highlight the importance of the WTO DSS. Article XXIII:2 of the GATT 1947 mentions that states which are in dispute will deal with the dispute jointly.[3] However, all that the article provided is a general outline on how disputes are to be processed, with no formal procedures or detailed guidelines being specified.[4] Notwithstanding this, a standard practice to appoint a panel of individuals to adjudicate the dispute and prepare a report of its findings had developed over the years.[5] These Panel reports had no effect unless and until adopted by the GATT Council of Representatives ('**GATT Council**').[6] However, as the adoption of the Panel reports required consensus of the GATT Council, the defendant could easily block unfavourable decisions made against them.[7] Thus, the dispute settlement system lacked the 'bite' to ensure that any decision made would be meaningful.

The conclusion of the Uruguay Round marked the birth of the crown jewel — the DSS. The DSS was a vast improvement over its predecessor. Panel reports are now automatically adopted unless rejected by consensus.[8] This provided the 'bite' that was previously missing as losing parties can no longer block the adoption of unfavourable Panel reports. Additionally, detailed procedures as to the implementation of recommendations and rulings are laid out in the Dispute Settlement Understanding (the '**DSU**').[9] This ensures compliance by parties to the dispute. Further, an independent AB was established.[10] The importance of the AB cannot be understated as it ensures predictability of outcomes by addressing divergence in interpretations in the various Panel decisions.[11] It allows the WTO to build up a credible system of law to address conflicts.

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3 General Agreement on Tariffs and Trade (1947) 55 UNTS 194.
4 William Davey, 'Dispute Settlement in GATT' (1987) 11(1) Fordham Intl LJ 51, 57.
5 *Ibid*.
6 Davey (n 4) 60.
7 Bernhard Zangl, 'Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO' (2008) 52 ISQ 825, 831.
8 Understanding on the Rules and Procedures Governing the Settlement of Disputes (*Dispute Settlement Understanding*) (1994) 1869 UNTS, art 16.
9 *Dispute Settlement Understanding*, art 21.
10 *Dispute Settlement Understanding*, art 17.
11 Bradly Condon, 'Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA' [2018] J World Trade 535, 537.

The DSS joins other judicialized international dispute settlement procedures including, *inter alia*, the International Criminal Court and the European Court of Human Rights, signifying a move towards an international rule of law.[12] The more 'judicial-like' process of the DSS was aimed at restraining unilateral action, especially by the US, and to compel state parties to adhere to the rule of law.[13] However, as we have seen over the years, the US rarely plays by the rules.[14] Its recent actions which have caused the biggest crisis in the WTO to date will be discussed in later parts of this paper. The above comparison with the GATT dispute settlement system illustrates why the DSS' birth was so widely celebrated and why it was bestowed the title of 'Crown Jewel of the WTO'.

III. APPRAISING THE CROWN JEWEL: CRITICISMS OF THE DISPUTE SETTLEMENT MECHANISM

Criticisms regarding compliance issues and the litigious culture promoted by the DSS will be canvassed in this Part briefly. More attention will instead be directed towards the criticism of judicial overreach and activism as it lies at the very heart of the recent crisis that will be detailed in the next Part.

A. Compliance issues

Article 21 of the DSU states that '*[p]rompt compliance with recommendations or rulings of the DSS is essential in order to ensure effective resolution of disputes to the benefit of all Members*'. Yet, timely compliance is only present in about 60% of all disputes.[15] Frequent offenders include the US, the European Union, Canada, Japan and Australia, especially in cases involving one another.[16] The longer a state can carry on its wrongful economic

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[12] Zangle (n 7) 826.

[13] Zangle (n 7) 848.

[14] For instance, the airstrikes in Syria in 2018 without Security Council authorisation; *see* also, the threats to prosecute International Criminal Court Judges should they enter the US.

[15] Pavan Krishnamurthy, 'To Enforce or Manage: An Analysis of WTO Compliance' (2018) 32(3) Emory Intl L Rev 377, 391. *See* also William Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) 42(1) Cornell Intl L J 119, 121.

[16] William Davey, 'Evaluating WTO Dispute Settlement: What Results have been Achieved Through Consultations and Implementation of Panel Reports?' in Yasuhei Taniguchi *et al* (eds), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations and Regionalism in Asia* (CUP 2007) 113, 138.

measures and hold off compliance, the more benefits it can derive.[17] The victim state often has little power to change the *status quo* and can only suffer losses as the other state employs delaying tactics.[18] Therefore, an improvement in the enforcement and compliance of the DSS would bring about greater confidence in the DSS through the protection of victim states.

B. Promoting a litigious culture

While the DSS endeavours to provide a more rule-based system for settling trade disputes and greater adherence to the rule of law, the increased ease and availability of litigation presents its own set of problems. Mr. Alan Wolff, who is now the Deputy-Director General of the WTO, has argued that the DSS has 'increased animosity among the major trading nations'.[19] As a result, 'meaningful consultations do not take place'[20] and only about 20% of consultations have led to an amicable settlement of the dispute without resorting to litigation.[21] Perhaps, this may be due to the overwhelmingly high success rate for complainants over defendants arising due to the systematic asymmetry of the DSS.[22] A study found that the US lost over 100 cases when it acted as the defendant, but only lost 3 cases when it acted as the complainant.[23] Similarly, the European Community lost 95% of the cases where it was acting as the defendant.[24] When the complainant has confidence in winning, there is little reason to settle amicably.

This litigious culture manifested itself in the *US — Hot-Rolled Steel* case.[25] There, Japan flooded the US market with an extraordinary quantity of steel over the span of just a few months, driving US producers into deficit.[26] Naturally, the US imposed anti-dumping measures against Japanese steel imports.[27] Even though Japan was the one engaging in what was described as "one of the most callous acts of trade aggression in the entire post-World

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[17] Arie Reich, 'The effectiveness of the WTO dispute settlement system: A statistical analysis' (2017) 11 European University Institute Working Papers 1, 16.
[18] *Ibid*.
[19] Alan Wolff, 'Problems with WTO Dispute Settlement' (2001) 2(2) Chicago J of Intl L 417.
[20] *Ibid* 420.
[21] Reich (n 17) 4.
[22] Chen Rudan, 'The Asymmetry of the WTO Dispute Settlement Mechanism and Chinese Strategy: In what ways do the system and results favour complainants' (2014) 9(2) Frontiers of Law in China 208, 214.
[23] *Ibid* 213.
[24] Rudan (n 22).
[25] Panel Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (*US—Hot-Rolled Steel*), WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X at 4769.
[26] Wolff (n 19) 419.
[27] *US —Hot-Rolled Steel*, para 2.1.

War II period",[28] it commenced proceedings against the US. While the AB found that the majority of US anti-dumping measures were not inconsistent with the Anti-Dumping Agreement,[29] it was somewhat a pyrrhic victory for the US. The Panel report stated that some aspects of the US anti-dumping measure needed to be amended.[30] Japan had thus succeeded in '[eroding] the US antidumping law one piece at a time.'[31] While the DSS brought about greater certainty and adherence to the rule of law, more peaceful alternatives for dispute settlement may have been forsaken and tactics such as the one adopted by Japan may become more prevalent.

However, the DSS presents smaller or developing countries a chance to compete with the bigger players. They are able to leverage the judicial-like system of the DSS to ensure that their rights and obligations are being respected and enforced in accordance with the rule of law.[32] Viewed in this light, perhaps the trade-off is an acceptable or even a desired one.

C. Judicial Overreach and Activism

'Judicial overreach' and 'judicial activism' are often used in a derogatory manner,[33] implying that the courts have failed to adhere to their proper adjudicative role. When the courts are perceived to have embarked on judicial activism, their legitimacy is eroded.[34]

The WTO agreements are full of ambiguity and this is not uncommon. Often, international treaties reflect a compromise between negotiating parties who have vastly divergent views that are impossible to reconcile. As a result, the language used is vague and subject to multiple interpretations. Even in international criminal law where the principle of *nullum crimen sine lege* demands the greatest degree of clarity in its text, state-negotiated treaties have proven to be vague and ambiguous. For instance, the Kampala Amendments to the Rome Statute was famously coined the 'Kampala Compromise', reflecting that the wording of the statute was arrived at after

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[28] Wolff (n 19) 419.

[29] Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X at 4697, para 5.

[30] *Ibid* para 6.

[31] Wolff (n 19) 419.

[32] James Cameron & Karen Campbell, *Dispute Resolution in the WTO* (Cameron May 1998) 53.

[33] Maartje de Visser, 'A Cautionary Tale: Some Insights Regarding Judicial Activism from the National Experience' in Mark Dawson *et al* (eds) *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 188.

[34] *Ibid*.

a decade long struggle, rather than by mutual agreement.[35] The WTO agreements are no exception.

Such ambiguity 'opens the door to judicial activism'[36] and the US is the greatest proponent of such criticisms against the DSS. Most recently, it alleged that the AB has gone far beyond its proper adjudicative role and encroached into the territory of law-making. Four cases were cited in support of the US' position: the *Argentina — Financial Services* case,[37] the *India — Agricultural Products*,[38] the *US — Countervailing Measures (China)* case,[39] and the *US — Countervailing and Anti-Dumping Measures (China)* case.[40] The US argued that in the *Argentina — Financial Services* case, more than two-thirds of the AB's report was *obiter dicta*, interpreting provisions that were not necessary to resolve the dispute.[41] In the *US —Countervailing Measures (China)* case, the AB did not base its reversal of the Panel report on parties' submissions, but on its own arguments.[42] The AB had also allegedly made its own interpretations and analysis of domestic law in the *US — Countervailing and Anti-Dumping Measures (China)* case.[43] These allegations underpin the US' dissatisfaction towards the DSS.

Some have argued against the merits of US' allegations. Forceful and compelling arguments have been made to show why the concept of *obiter dicta* does not exist in the WTO legal system.[44] Notwithstanding the fact that the US' complaints may very well be unmeritorious, it remains that if the DSS is *seen* by states to be overreaching, its legitimacy will be eroded. States who lose confidence in the system would be encouraged to take matters into their own hands. Unilateralism will occur, and it has occurred, leading up to the most recent crisis.

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[35] Claus Kreß and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 J of Intl Crim J 1179.

[36] Condon (n 11) 538.

[37] Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II at 431.

[38] Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015, DSR 2015:V at 2459.

[39] Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:1 at 7.

[40] Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII at 3027.

[41] 'Statement by the United States at Meeting of the WTO Dispute Settlement Body' (*World Trade Organisation*, May 2016) <https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf> accessed 3 May 2020 (*US May 2016 Statement*) 3.

[42] *Ibid* 4.

[43] *US May 2016 Statement* (n 41) at 5.

[44] Henry Gao, '*Dictum* on *Dicta*: *Obiter Dicta* in WTO Disputes' (2018) 17(3) WTR 509.

IV. AN UNPRECEDENTED CRISIS TO THE DISPUTE SETTLEMENT SYSTEM

Since the appointment of new AB members is only possible by consensus,[45] the US is holding the AB hostage by repeatedly refusing to give consent.[46] As explained earlier, the US has shown its dissatisfaction against the AB. This led to the Obama administration blocking the reappointment of Professor Chang Seung Wha.[47] In a strongly worded statement to the Dispute Settlement Body in May 2016,[48] the US stated that the reports Professor Chang was involved in clearly demonstrated judicial activism and do not accord with the role of the AB.[49]

As of April 2020, there is only one AB member left.[50] Since three AB members are required to serve on one case,[51] this effectively spells the death of the AB and, consequently, the DSS. This problem is further exacerbated by the fact that the final member of the AB, Ms Hong Zhao, was recently alleged by the US to be an ineligible member of the AB under the DSU.[52] As the adoption of Panel reports is suspended until an appeal is completed,[53] an appeal by the losing party will suspend the case indefinitely because there is no AB to hear the appeal. Aggrieved parties would thus lose their legal rights under WTO rules, effectively crippling the DSS entirely. To best understand the magnitude of the problem, we need to consider three aspects of the crisis.

The first aspect is the urgency of the problem. To assume that *only future* cases would be affected would be to underestimate the extent of the problem. Evidence of workload crippling has surfaced as early as 8 June 2018,[54] when the AB indicated its inability to have its report circulated within the 60-day

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[45] *Dispute Settlement Understanding*, art 2.4.

[46] Tetyana Payosova *et al*, 'The Dispute Settlement Crisis in the World Trade Organisation: Causes and Cures' (2018) Peterson Institute for International Economics Policy Brief <https://piie.com/system/files/documents/pb18-5.pdf> accessed 3 May 2020 1.

[47] *US May 2016 Statement* (n 41).

[48] *Ibid*.

[49] *US May 2016 Statement* (n 41) at 3.

[50] *DSM Crisis* (n 46) 3. *See* also, 'Appellate Body Members' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 3 May 2020.

[51] *Dispute Settlement Understanding*, art 17.1.

[52] 'Statement by the United States at the Meeting of the WTO Dispute Settlement Body' (*World Trade Organisation*, 28 February 2020) <https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.Reconvene.Mar5_.DSB_.Stmt_.Item_.8.SC_.Paper_.DS505.as-deliv.fin_.public.pdf> accessed 3 May 2020 ('*US Feb 2020 Statement*') 1.

[53] *Dispute Settlement Understanding*, art 16.

[54] Appellate Body Report, *India – Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/AB/R, adopted 26 April 2019, at [1.7].

period provided for in the DSU[55] due to it being under-staffed. Furthermore, as early as 1 October 2018, all appeals filed were heard by the same three AB members,[56] exacerbating their backlog. Indeed, the problem has crystallised in *United States – Countervailing Measures on Supercalendered Paper from Canada*,[57] where the US rejected the validity of the report, *inter alia*, on the ground that the report was completed only after the expiration of the terms of two AB members.[58] As of April 2020, there are 12 pending appeals,[59] and this number would only grow in the future.

Second, as alluded to above — and perhaps a problem further in the horizon — failure to resolve this crisis runs the risk of 'returning the world trading system to a power-based free-for-all, allowing big players to act unilaterally and use retaliation to get their way'.[60] For instance, in *Morocco – Hot-Rolled Steel*, Morocco withdrew its appeal against Turkey, evincing the Members' appreciation of the fact that their appeals may never be heard.[61] This attacks the very core purpose of why the WTO was built in the first place.

Third, it may fundamentally shift the way disputes between Member states are resolved. Currently, the WTO still has no solution as Members are still unable to reach consensus on a proposal to overcome this long-standing impasse over the appointment of AB members.[62] Members still seek for an alternative rule-based dispute resolution. While seemingly unrelated, the ongoing crisis with the DSS would thus have a direct impact on the WTO in relation to another issue — the proliferation of RTAs — and it is to this issue that our analysis now turns.

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[55] *Dispute Settlement Understanding*, art 17.5.

[56] As 30 September 2018 was when previous AB member Shree Baboo Chekltan Servansing completed his term, leaving 3 members in the AB.

[57] Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R, adopted at 5 March 2020.

[58] *US Feb 2020 Statement*, (n 52) 4.

[59] 'Appellate Body' (*World Trade Organisation*) <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> accessed 3 May 2020.

[60] Payosova (n 46) 1.

[61] Appellate Body Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS5135/AB/R, adopted 8 January 2020, at [1.14].

[62] 'DG Azevêdo to launch intensive consultations on resolving Appellate Body impasse' (*World Trade Organisation*, 9 December 2019) <https://www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm> accessed 3 May 2020.

V. THE SHIFTING ENVIRONMENT OF TRADE DISPUTE RESOLUTION

Since the establishment of the WTO, the number of RTAs has increased at an exponential rate.[63] More and more countries are turning to bilateral or regional negotiations and turning away from the multilateral approach at the WTO. The web of rules of origins of the numerous RTAs is commonly referred to as the 'spaghetti-bowl effect', highlighting the messiness and proliferation of RTAs.[64] This proliferation is primarily due to the unsatisfactory state of affairs following the Doha Development Round (the '**Doha Round**'). What began as an ambitious effort to secure and improve the standing of developing countries in international trade[65] turned out to be a wearisome endeavour. Yet many promises, especially those of a 'rebalanced trading system', have yet to be fulfilled.[66] Hopes of the Doha Round achieving its promised goals are all but dashed as it continues to stall. As a result, many states have directed their efforts away from negotiations at the WTO and turned instead to negotiations with selected trading partners.[67] After all, negotiations between like-minded states are more efficient and likely to produce fruitful results.[68] This is in stark contrast to the multilateral negotiations at the WTO involving over 160 countries,[69] where consensus is exceedingly difficult to achieve. Therefore, there is a 'renewed sense of urgency for the WTO' and it 'must act to avoid the fate of being eclipsed into irrelevance',[70] as states turn away from the WTO.

While it remains debatable whether RTAs as a whole do more harm than good for the WTO, countries that are excluded from the RTAs will generally be harmed by the proliferation of RTAs.[71] RTAs may be a tool for exclusion

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[63] Henry Gao, *The WTO Dispute Settlement Mechanism: A Trade Court for the World* (Geneva: International Centre for Trade and Sustainable Development and the Inter-American Development Bank 2018) 1.

[64] Bhagwati (n 1).

[65] 'The Doha Round' (*World Trade Organisation*) <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development> accessed 3 May 2020.

[66] Maria Panezi, 'The WTO and the Spaghetti Bowl of Free Trade Agreements' (2016) 87 CIGI Policy Brief t 2.

[67] Kent Jones, *Reconstructing the World Trade Organization for the 21st Century: An Institutional Approach* (OUP 2015) 161.

[68] Michael Ewing-Chow, 'Southeast Asia and Free Trade Agreements: WTO Plus or Bust?' (2004) 8 SYBIL 193, 196.

[69] 'Members and Observer' (*World Trade Organisation*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 3 May 2020.

[70] Henry Gao and C. L. Lim, 'Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a 'Common Good' for RTA Disputes' (2008) 11(4) JIEL 899, 900.

[71] Panezi (n 66) 3.

of developing and least-developed countries, who may not have much to bring to the table to negotiate RTAs.[72] This would be antithetical to the aims of the Doha Round and worsen the disparity of power at international trade; this is not a desirable outcome. But how does this relate to the DSS?

Many RTAs provide states the choice to choose between the WTO DSS or the dispute settlement mechanism under the specific RTA, and some even mandate that states must use the WTO DSS to resolve any disputes under the RTA.[73] In fact, there is empirical evidence to show that many states chose the WTO DSS instead of their RTA DSM.[74] There are good reasons why this is the case.

The DSS has withstood the test of time. Since its inception in 1995, over 500 disputes have been brought before the DSS and over 350 rulings have been issued.[75] The publication of case summaries and handbooks by the WTO, coupled with the well-maintained Analytical Index,[76] which serves as a comprehensive guide for the judicial interpretation of terms in the various agreements, provide a great degree of certainty for disputing parties. They are better able to evaluate their chances of success based on the merits of their case.

In contrast, RTA DSMs are untested and trapped in a 'vicious circle'.[77] No state wants to be the first to enter uncharted waters and break the 'vicious circle'.[78] Therefore, there is a dearth of case law. Given that dispute settlement is a costly endeavour with important implications,[79] states much rather turn to the tried-and-tested WTO DSS. For instance, a dispute between the Philippines and Thailand concerning custom and fiscal measures affecting cigarettes could have been brought under the ASEAN dispute settlement mechanism but the WTO DSS was instead invoked.[80] Therefore, the WTO

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72 *Ibid*.
73 Gao (n 63) 2.
74 *Ibid* 3.
75 'Dispute Settlement' (*World Trade Organisation*) <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 3 May 2020.
76 'WTO Analytical Index' (*World Trade Organisation*) <https://www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm> accessed 3 May 2020.
77 Gonzalo Villalta Puig & Lee Tsun Tat, 'Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solutions for the ASEAN Economic Community' (2015) 49(2) J of World Trade 277, 287.
78 Walter Woon, 'Dispute Settlement the ASEAN Way' (11 December 2012) <https://cil.nus.edu.sg/wp-content/uploads/2010/01/WalterWoon-Dispute-Settlement-the-ASEAN-Way-2012.pdf> 18 accessed 3 May 2020.
79 *Ibid*.
80 Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV at 2203.

DSS is the best place to hear RTA disputes and to harmonise RTAs.[81] This would turn a crisis into an opportunity, making RTAs the 'building block' of multilateralism rather than 'stumbling blocks'.[82]

But with the impending death of the AB, it may finally give states the impetus to break the 'vicious circle' and turn to the RTA DSMs. The building up of case law over time would allow the RTA DSMs to gain the confidence of States. Once this happens, turning to the WTO DSS will no longer be an attractive option. This may very well be the final nail in the coffin for the WTO and hopes of the DSS being a 'trade court for the world'[83] would be dashed.

That the US alone is able to cripple the DSS to meet its own needs further reminds states once more how powerful states can strong-arm their way in the WTO and impede progress. Consequently, negotiations with other like-minded states would prove to be more attractive, which was what led to the proliferation of RTAs in the first place.

Given the above, and in light of the AB crisis, it is entirely possible for RTAs to completely devour the multilateral approach at the WTO. However, it is posited that there are the two questions of whether RTAs can and should complete its takeover, which will be examined below.

VI. WILL THE DSS REALLY BE DEVOURED BY REGIONAL TRADE AGREEMENTS?

To answer the question of whether RTA DSMs can really devour the DSS, it is of course necessary, to first address the substantive scope of RTAs. This is a logically prior question because if RTA DSMs cannot hear disputes concerning *all* breaches of WTO covered agreements, then it cannot be said to devour the DSS. Rather, it simply takes a small bite of the DSS.

Not *every* obligation that can be found in WTO agreements is replicated in RTAs; many of them in fact simply make reference to WTO agreements. For instance, Article 7.5 of the US — Singapore Free Trade Agreement states:

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[81] Gao (n 63); Gao and Lim (n 70).
[82] Gao and Lim (n 70).
[83] Gao (n 63) 3.

> '*[e]ach Party retains its rights and obligations under Article XIX of GATT 1994 and the WTO Agreement on Safeguards. This Agreement does not confer any additional rights or obligations except that a Party taking a global safeguard measure may exclude imports of an originating good from the other Party if such imports are not a substantial cause of serious injury or threat thereof.*'

What this means is that there will inevitably still be disputes concerning certain WTO obligations between RTA partners that can only be heard by the WTO DSS. Further, it would not be realistic for each and every RTA to be amended to be all-encompassing.

We turn next to consider those obligations that are contained within RTAs that do not explicitly reference WTO agreements, but replicate WTO obligations in substance. One common example would be the elimination of custom duties amongst RTA partners, which in substance replicates Article II of the GATT. This brings into focus the problem of overlapping jurisdiction between the WTO DSS and the RTA DSMs. While commentators have proposed that there are certain deconflicting techniques including, *inter alia*, *lex posterior*, *lex specialis*, and *lis pendens*, ultimately only a choice of forum clause provides certainty in times of conflict.[84] But such clauses are not present in all RTAs. For instance, in a survey of over 200 RTAs with technical barriers to trade provisions, 24% of them do not have such clauses, and in fact, 5% do not even have their own dispute settlement mechanisms.[85]

Thus, it is doubtful whether RTA DSMs can truly devour the WTO DSS. Not only must the obligations be amended to be all-encompassing, choice of forum clauses must also be included. Such practical difficulties significantly diminish the chances of a complete shift towards RTA DSMs.

Lastly, the authors argue that States should not allow the RTA DSMs to devour the DSS. The title of Article 23 of the DSU, 'Strengthening of the Multilateral System', speaks for itself. Its goal is to clearly reject the notion of unilateral self-help, where multiple panels have stressed '*the primacy of the multilateral system and rejection of unilateralism as a substitute for the*

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[84] *See* generally, Yang Songling, 'The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause' (2014) 23(1) Michigan State Intl LR 107; Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28(1) EJIL 13; Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' (2003) The Canadian YB of Intl L 83.

[85] Ana Cristina Molina and Vira Khoroshavina, 'How Regional Trade Agreements Deal with Disputes Concerning their TBT Provisions' (2018) WTO Staff Working Paper ERSD-2018-09, 4.

procedures foreseen in that agreement'.[86] To allow the RTA DSMs to devour the DSS would be detracting from this fundamental principle of the WTO.

VII. THE WAY AHEAD: RESTORING THE SHINE OF THE CROWN JEWEL

In a fairly recent speech, the Chair of the AB called for Member states to '*maintain and preserve the trust, credibility, and legitimacy that the WTO dispute settlement system in general and the Appellate Body in particular have built over more than 20 years*.'[87] While he did not direct the speech to any state in particular, it was obvious that the call for 'constructive dialogue' was directed specifically at the US. This plea seemingly falls on deaf ears, given the aggressive international relations policy of the US under the Trump administration. This is the same government which threatened to withdraw from the WTO not too long ago.[88] Even with the upcoming 2020 elections, it would be overly optimistic to hope that the US' stance would soften with a change in President — and in any case, it would be too late as the AB members have already retired from the AB.

Much ink has been spilt over potential solutions to the crisis and there are some who have suggested legalistic solutions. For instance, some have proffered a possible interpretation of Article 17.2 of the Dispute Settlement Understanding to include a mandatory filling of AB positions or to argue that the US has breached a general duty of good faith while participating in the consensus-based decision-making process.[89] Others have suggested the signing of a new treaty which excludes the US.[90] Indeed, the European Union, China, and several other WTO Member states have agreed on a

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[86] Panel Report, *United States — Shrimp*, WT/DS58/R, adopted 6 November 1998, para 7.43.

[87] "Unprecedented challenges" confront Appellate Body, chair warns' (*World Trade Organisation*, 22 June 2018) <https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm> accessed 3 May 2020.

[88] Christine Wang, 'Trump threatens to withdraw from World Trade Organisation' (*CNBC*, 30 August 2018) <https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html> accessed 3 May 2020.

[89] Vinayak Panikkar *et al*, 'Guest Post: Taking Recourse to the DSU to Save Dispute Settlement at the WTO (Part B)' (*International Economic Law and Policy Blog*, 7 March 2019) <https://worldtradelaw.typepad.com/ielpblog/2019/03/guest-post-taking-recourse-to-the-dsu-to-save-dispute-settlement-at-the-wto-part-b.html> accessed 3 May 2020.

[90] Pieter Jan Kuijper, 'Guest Post from Pieter Jan Kuijper on the US Attack on the Appellate Body' (*International Economic Law and Policy Blog*, 15 November 2017) <https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-from-pieter-jan-kuiper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html> accessed 3 May 2020.

temporary body to settle disputes *inter se* until the AB is properly restored.[91] This could be the first step towards the establishment of a new treaty. While these suggestions have some merits to them, they are not desirable. The first two suggestions are merely temporary and, in any case, a legalistic approach to the issue would not address the loss of legitimacy and confidence caused by the US holding the DSS hostage.[92] As for the temporary dispute settlement mechanism, it is but a stopgap measure. Further, it is submitted that this would only hasten the move away from the WTO, which is not desirable. Suggestions of excluding the US from decision making or for the AB to carry on without US involvement were also mooted.[93] However, such measures would be counterproductive and undermine the legitimacy of the system further.[94] Therefore, any approach must necessarily be diplomatic in nature and aim at restoring the confidence in the multilateral negotiation process at the WTO.

It is argued that the solution must come in two stages. First, serious efforts must be made to address the US' concerns specifically and to reach a compromise that all parties can accept. Thereafter, the WTO must then signal to all Member States that the AB crisis would not repeat itself and seek to restore the confidence in the DSS and its legitimacy.

Given that the US' main concern is with regard to judicial overreach and the alleged *obiter dicta* present in Panel reports, the root of the problem must be addressed. Any meek attempts at negotiations would fail due to the hard stance of the US. Negotiations must be upfront and directed at the US' allegations. Strengthening of political oversight to prevent judicial overreach is perhaps the best approach to take.[95] Authoritative interpretations could also be adopted with a three-fourths majority of Member States[96] and this would prevent 'judicial law-making' by the AB. Another solution would be to adopt only the legal conclusion but not the legal reasoning of the Panel report.[97]

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[91] 'EU and 15 World Trade Organisation members establish contingency appeal arrangement for trade dispute' (*European Commission*, 27 March 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2127> accessed 3 May 2020.

[92] Robert McDougall, 'Crisis in the WTO Restoring the WTO Dispute Settlement Function' (*Centre for International Governance Innovation Papers*, 16 October 2018) 14 <https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function> accessed 3 May 2020.

[93] *Ibid* 12.

[94] McDougall (n 92).

[95] McDougall (n 92) 14.

[96] Gao (n 44) 533.

[97] *Ibid*.

Regardless, the WTO's solution must be a delicate one. While it *must* address the concerns of the US and concessions must be made, the WTO *cannot* be seen to yield to any and all requests of the 'hostage-taker'. As a trade envoy who wished to remain anonymous puts it, the US is sending '*a signal loud and clear to other AB members that if they do not deliver judgements that would suit the American interests, then the AB member's second term will not be granted*'.[98] To allow the US to fully dictate and choose judges who favour them would seriously undermine the legitimacy of the DSS. Therefore, any concessions should be couched as a concerted effort to improve the DSS and address the issue of 'judicial law-making' and must be framed as a mutually beneficial compromise so as not to set an undesired precedent for other states to do the same and strong-arm the WTO. This would also demonstrate that meaningful results *can* still be reached through multilateral negotiations.

Following which, the provisions in the DSU relating to the reappointment of AB members must be amended to prevent history from repeating itself.[99] A signal must also be sent to all Member States that the DSS is functioning as perfectly as before. Understandably, the DSS' legitimacy would be diminished by the US' actions. Notwithstanding this, due to its tested system and the wealth of jurisprudence, the DSS still has an overwhelming advantage over RTA DSMs. The DSS must therefore re-establish its attractiveness as a destination for the resolution of trade disputes, especially for RTA disputes. Of course, this presupposes that the 'vicious circle' within the RTA DSMs has not yet been broken and states have not completely turned their backs away from the WTO.

Despite the recent trade war between US and China,[100] the authors remain optimistic that multilateral negotiations can still take place as both economic power houses have evinced intentions to work together via the signing of the recent deal in January 2020,[101] as well as both the parties' participation in the Joint Statement on Electronic Commerce.[102] Scholars share this optimism as these may be '*place[s] where some of the negotiations can start to unblock*

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[98] D. Ravi Kanth, 'US body blow to DSU, creating systemic crisis' (2016) 8241 SUNS<https://www.twn.my/title2/wto.info/2016/ti160514.htm> accessed 3 May 2020.

[99] Specifically, art 2.4 and art 17.2.

[100] 'Trade war leaves both US and China worse off' (*United Nations Conference on Trade and Development*, 6 November 2019) <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2226> accessed 3 May 2020.

[101] 'US and China sign deal to ease trade war' (*BBC News*, 15 January 2020), <https://www.bbc.com/news/business-51114425> accessed 3 May 2020.

[102] 'Joint Statement on Electronic Commerce' (*World Trade Organisation*, 2019) WTO Doc WT/L/1056, <https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf> accessed 3 May 2020.

and have some creative pathways. If this moves, perhaps there's interest in unblocking some other areas.'[103]

Admittedly, due to the recent global pandemic, the relationship between the two countries has soured considerably. But post-pandemic, economic cooperation for recovery of the domestic economy and global trade is crucial. As commentators have noted, '*[t]he COVID-19 pandemic has made the fragility of the international trading regime and commercial ties among countries even more evident. The lack of a captain to steer the ship out of the storm can be felt today more than ever before*'.[104] And as global trade takes an unprecedented hit,[105] Deputy Director-General Wolff has called for the planning of trade recovery post-pandemic.[106] It is hoped that in light of this global crisis, with tremendous impact on trade felt by all, the interests of states would be aligned, at the very least, in seeking to restore the global trade system. Failure to do so is not an option and the problems posed are far greater than just the death of the AB.

VIII. CONCLUSION

The DSS has gained a formidable reputation and built up a considerable amount of case law over the years. Letting it all go to waste would be detrimental or even fatal to the WTO. Further, the DSS could be the silver bullet in combating the threat of the proliferation of the RTAs.

It has been shown that the US has taken an uncompromising position with regard to international relations. The above solutions are of course merely speculative; there is very little evidence that the US is even receptive to negotiations and compromise, especially with the state of the China-US relationship. Some may take a realist view to international relations at the WTO, that all States, especially the US, act *solely* for their own interests.

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[103] Alvin Lee, 'Addressing WTO gridlock and future trade issues' (*Research@SMU Nov 2019 Issue*, 8 November 2019) <https://research.smu.edu.sg/news/2019/nov/08/addressing-wto-gridlock-and-future-trade-issues?fbclid=IwAR2SQS8OjdQ9X10s7VSSzqEMUElWeCobr-rkzuXv_4aqsZLV7cl5jR5KKbU> accessed 3 May 2020.

[104] William Reinsch *et al*, 'Trade Symptoms of the Pandemic' (*Centre for Strategic & International Studies*, 3 April 2020) <https://www.csis.org/analysis/trade-symptoms-pandemic> accessed 3 May 2020.

[105] 'Trade set to plunge as COVID-19 pandemic upends global economy' (*World Trade Organisation*, 8 April 2020) <https://www.wto.org/english/news_e/pres20_e/pr855_e.htm> accessed 3 May 2020

[106] 'DDG Wolff: Time to start planning for the post-pandemic recovery' (*World Trade Organisation*, 9 April 2020) <https://www.wto.org/english/news_e/news20_e/ddgaw_09apr20_e.htm> accessed 3 May 2020.

Ultimately, it may be all about exercising power and control for self-interest.[107] But the authors take a more hopeful view, that states, including the US, can cooperate for the greater good and progress,[108] in order to fulfil the noble goals set out under the Marrakesh Agreement, especially in a world where global economic recovery is very much needed.

[107] Knud Erik Jørgensen, *International Relations Theory: A New Introduction*. (New York: Palgrave MacMillan 2010) 78.
[108] *Ibid* 57–58.