

The WTO's Collapsing Judicial and Legislative Wings: Is "Consensus" the Real Elephant in the Room?

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Abstract

The World Trade Organization (WTO) has three main functions: (i) it provides a negotiation forum where Members can negotiate new agreements and understandings, (ii) it provides a judicial forum where trade disputes between countries can be settled, and (iii) it acts as an executive forum for the administration and application of the WTO agreements, including capacity-building and training in this respect. Currently, it is only performing its executive function, as the other two functions remain stalled. The authors in this paper analyze two challenges that have contributed to paralyzing the WTO's legislative and judicial functions. With this assessment, the authors suggest that the "real elephant in the room", i.e., the root-cause behind these challenges, is the avoidable "consensus-based decision-making".

Keywords: World Trade Organization, National Security Exception, Appellate Body, Consensus, Decision-Making

Introduction

Since its establishment in 1995, the World Trade Organization (WTO) has played a crucial role in regulating global trade. With almost universal membership, this institution has allowed for rules-guided globalization to flourish and progress. Two of its most important functions, among others, are to facilitate negotiation between its Members on international rules that regulate trade and the enforcement thereof.¹ In other words, it seeks to craft and enforce global norms to regulate foreign trade.

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¹ For more information re WTO functions, see Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter 'WTO Agreement'], Art. 3.

With more than 400 panel and appellate reports, the dispute settlement has become a vital activity of the WTO.² It is the only international adjudicatory mechanism with an appellate review and a binding as well as a compulsory jurisdiction. Yet, this most celebrated function of the WTO may soon collapse. None other than the very designer and the architect of this institution – the United States – is now bent on debilitating it. The Appellate Body (AB) is now dysfunctional with no sitting member, as US continues to block the appointment or reappointment of AB members. This has brought the whole dispute settlement machinery to a standstill as the inability of AB to hear appeals will have a kill-off effect on the binding value of Panel rulings.³

This is an unprecedented situation. The demise of this well-designed rule-based mechanism might take us back to the era of power-based free-for-all trading system where big trade players could once again dictate the terms and conditions of trade. What is the main reason that has allowed a single WTO Member to strangle the WTO's dispute settlement machinery and hence threaten the very existence of the multilateral trading system? There is no simple answer to this question, but one of the main reasons seems to be the rule of consensus-based decision-making.⁴ The AB members are appointed or reappointed by way of positive consensus, which has not been reached in this respect for the past several years due to the US opposition. Since its inception, the WTO dispute settlement mechanism has faced criticism and challenges on various grounds.⁵ But none of these challenges has ever posed such an existential threat to its very existence.

² WTO, 'Dispute Settlement' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 16 Jul, 2021; also, WTO, 'Dispute Settlement Activity – some figures' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm> accessed 16 Jul, 2021.

³ For more details, see Amrita Bahri, 'Appellate Body Held Hostage: Is Judicial Activism at Fair Trial' (2019) 53(2) *Journal of World Trade* 293.

⁴ There is a difference between positive and negative consensus. Positive consensus is achieved if no WTO Member, present at the meeting when the decision is taken, formally objects to the proposed decision. This is the WTO's general rule to take decisions. Any Member, even alone, is able to prevent the decisions. However, when the DSB establishes panels, when it adopts panel and Appellate Body reports and when it authorizes retaliation, the DSB must approve the decision unless there is a consensus against it (Dispute Settlement Rules: Understanding on Rules and Procedures Concerning the Settlement of Disputes, 1869 U.N.T.S. 401 (1994), Art. 6.1, 16.4, 17.14 and 22.6). This decision-making procedure is commonly referred to as "negative" or "reverse" consensus. At these stages, the DSB automatically decides to take the action ahead, unless there is a consensus against that action. This means that one sole Member can avoid the blocking of the decision and hence block the reverse consensus. Hence, negative consensus is largely a theoretical possibility and, to date, it has never occurred.

⁵ Wenwei Guan, 'Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus', (2014) 17(1) *Journal of International Economic Law*, 77; R McDougall, 'Crisis in the WTO Restoring the WTO Dispute Settlement Function' <<https://www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf>> accessed 16 Jul, 2021.

In addition to its stalling dispute settlement machinery, WTO's law-making leg is also dismantled. The WTO is constructed on the foundations of extensive trade negotiations that have led to a significant reduction in tariff and non-tariff barriers to trade. However, no significant progress has been made in multilateral negotiations after the establishment of the WTO. The first post-WTO landmark achieved in this respect was the Telecommunications Services Agreement reached in 1997 between 69 countries.⁶ In the same year, 40 countries agreed to a tariff-free trade in information technology products⁷, followed by 70 countries reaching an agreement on financial services.⁸ However, the very first multilateral agreement signed since 1995 is the Agreement on Trade Facilitation (TFA), which aims to simplify the movement of goods across borders.⁹ Since 1995, this has probably been the first and so far the only multilaterally agreed set of rules. Another potential multilateral agreement that WTO Members are expected to negotiate before the 12th Ministerial Conference is on fisheries subsidies, the discussions for which were launched in 2001 at the Doha Ministerial Conference. After more than 16 years, at the 2017 Buenos Aires Ministerial Conference (MC11), ministers merely agreed to a work program wherein they agreed to conclude the negotiations by the next Ministerial Conference. With a draft legal text on the negotiating table and multiple missed deadlines to achieve a consensus, the Members continue to object to various provisions in the proposed draft agreement.¹⁰ These examples show how the difficulty in achieving positive consensus on new agreements or amendments to the existing ones is the key reason behind this crawling progress in multilateral negotiations.¹¹

⁶ WTO, 'Annex 1, Overview of Results of WTO Basic Telecommunications Negotiations' <https://www.wto.org/english/news_e/pres97_e/tab.pdf> accessed 16 Jul, 2021; World Trade Organization, 'Data on Telecommunications Markets covered by the WTO Negotiations on Basic Telecommunications' (WTO, 17 February 1997) <https://www.wto.org/english/news_e/pres97_e/data3.htm> accessed 16 Jul, 2021.

⁷ World Trade Organization, 'Launching of free trade in computer products to benefit everyday life of consumers and companies, says Ruggiero' (World Trade organization, 27 March 1997) <https://www.wto.org/english/news_e/pres97_e/pr70_e.htm> accessed 16 Jul, 2021.

⁸ World Trade Organization, 'Successful conclusion of the WTO's financial services negotiations' <https://www.wto.org/english/news_e/pres97_e/pr86_e.htm> accessed 16 Jul, 2021.

⁹ Protocol Amending the Marrakesh Agreement Establishing The World Trade Organization, General Council Decision, WT/L/940 adopted 27 November, 2014.

¹⁰ WTO, 'WTO DG and chair brief NGOs ahead of turning point in fishing subsidies negotiations', (World Trade Organization, 12 Jul 2021), <https://www.wto.org/english/news_e/news21_e/fish_12jul21_e.htm> accessed 16 Jul, 2021.

¹¹ Consensus, literally speaking, means the absence of any formal objection. [WTO Agreement, Art. IX,]; The WTO Agreement clarifies that '[t]he body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.' [WTO Agreement, Footnote 1 to Art. IX,]. Hence, in the WTO's context, consensus means endorsement through non-objection, and hence it should not be confused with unanimity, which means explicit acceptance of decision. [Jaime Tijmes-LHL, 'Consensus and majority voting in the WTO' (2009) 8(3) World Trade Review, 418].

In addition to law-making through trade negotiations, the WTO Members have not been successful in clarifying the existing gaps left in the WTO's legal texts by their drafters. WTO Members have so far been incapable of adopting authoritative interpretations to clarify the ambiguities found in the WTO treaties.¹² Some examples of these ambiguities are the lack of definition for "like products"¹³, "necessity"¹⁴, "public bodies"¹⁵ and "national security interests"¹⁶. WTO Members have not been able to clarify these grey-areas through authoritative interpretations mainly due to their unending search for consensus, even though Article IX.2 of WTO Agreement allows Members to clarify the treaty language by achieving a three-fourths majority.¹⁷ This shows that the growing impossibility to achieve positive consensus has not just dismantled the WTO judicial wing but also its ability to make new laws and change or clarify the existing laws.

These examples show that WTO is failing in discharging two of its most fundamental functions: lawmaking (which includes changing and clarifying current laws) and enforcing norms (through its dispute settlement system due to its paralyzed Appellate Body). The panel reports can still be adopted by reverse consensus, but a party to the dispute can in practice block that report simply by filing an appeal into the void. These failures have resulted in an unprecedented backlash in the form of Members threatening to withdraw altogether from this institution¹⁸, abuse of exceptions such as national security¹⁹, and search for deeper and preferential trade relations beyond the framework of multilateral rules²⁰. The WTO Members today are faced with

¹² So far, the only requests made for an authoritative interpretation are: General Council, *Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, Communication from the European Communities*, WT/GC/W/133, 25 Jan. 1999; General Council, *Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, Communication from the European Communities*, WT/GC/W/143, 5 Feb. 1999.

¹³ See for example United States – Measures affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, adopted 4 April 2012.

¹⁴ See for example Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, DSR 2007:IV, p. 1527 adopted 17 December 2007.

¹⁵ See for example Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011; Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015.

¹⁶ See for example Russia – Measures Concerning Traffic in Transit WT/DS512/R adopted 14 September 2016.

¹⁷ Ehlermann and Ehling, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements', (2005) 8 Journal of International Economic Law 803, at 804–805; Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21(3) European Journal of International Law, 605.

¹⁸ 'Senator Hawley Introduces Joint Resolution to Withdraw from WTO' (Josh Hawley, 7 May 2020), <<https://www.hawley.senate.gov/senator-hawley-introduces-joint-resolution-withdraw-wto>> accessed 16 Jul, 2021.

¹⁹ Alford R, 'The Self-Judging WTO Security Exception' (2011) 3 Utah Law Rev 697.

²⁰ S Trommer, 'The WTO in an Era of Preferential Trade Agreements: Thick and Thin Institutions in Global Trade Governance' (2017) 16 World Trade Review 501.

an existential threat to the survival of the system, which to be established required five long decades.

Is consensus-based decision-making to be blamed for the failure of WTO's legislative and judicial machinery? In the following two sections, the article provides a discussion on the two challenges that are currently paralyzing the functioning and relevance of WTO. The first challenge, i.e., the AB crisis, is discussed to show how it is not merely incapacitating the WTO's judicial functioning but the entire multilateral trading system. The second challenge, i.e., the problem in interpreting national security exception, is discussed to underline the current state of difficulty in clarifying grey areas in WTO rulebook through adoption of authoritative interpretations, let alone the negotiation of a new multilateral agreement. The authors in these discussions show why the root-cause behind these challenges is the WTO's "avoidable" rule of consensus. These sections conclude with reflections on how the problem is not in the design of the system but with its implementation, and why the WTO Members need not wait for another Bretton Woods moment to arrive as the existing provisions in the WTO enables decision-making even in the absence of a positive consensus.

I. "Appellate Body Held Hostage": Could it still be rescued?

Designed preliminarily as a safety valve to review Panel decisions, AB has been used in the majority of cases litigated at WTO DSU. Between 1995 and 2019, more than 60 percent of cases were appealed.²¹ This has allowed AB to create robust international trade law jurisprudence. This widely utilized and fundamental institution is now in peril. The AB is being held as a "hostage" by the very architect and the most frequent user of WTO DSU, the United States of America (US).²²

In the past few years, the US has blocked appointments and reappointments of AB members. As a result, the AB members have reduced from seven to zero. This means that the AB cannot hear appeals anymore, as it falls short of the required three members hence paralyzing the AB. This has brought the whole Dispute Settlement System (DSS) to a standstill as the inability of AB to hear appeals will have a kill-off effect on the binding value of Panel rulings, completely stalling the reversed consensus that may be achieved for adopting such rulings. This is because the parties now lose their rights to get the questionable Panel rulings reviewed. Moreover, with a dysfunctional AB, a Member-facing an unfavorable Panel ruling, in practice, can block its adoption by simply filing an appeal "into the void".²³ This seems to be a race back to the

²¹ WTO, 'WTO Appellate Body Reports', <https://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm> accessed 16 Jul, 2021.

²² Of the 176 Rulings that were appealed between 1996 and 2017, 85 involved the US. It is the most frequent complainant and respondent at WTO DSU. (Source: WTO Disputes Database 2018)

²³ In fact, US appeal filed "into a void" in DS533 is an attempt to block the panel decision in United States – Countervailing Measures on Softwood Lumber from Canada, Notification of an Appeal by the United States under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") WT/DS533/529 adopted September 2020.

General Agreement on Tariffs and Trade (GATT) 1947 era, where any Member could block the adoption of Panel rulings (as it happened in almost half of the cases filed in the GATT 1947 era). If the most celebrated Dispute Settlement Mechanism (DSM) collapses, the Members would not be able to enforce their WTO rights. The WTO-inconsistent practices and violations would increase and go unchallenged.

One sigh of relief in this respect is to see several trading nations coming together to circumvent the US obstruction of the appellate review process with the creation of multi-party interim appeal arrangement (MPIA).²⁴ This is created as a contingency mechanism that will serve to exist until the Appellate Body deadlock is resolved. It rescues the two-step dispute settlement system at the WTO for disputes among the participating WTO Members.

Despite this development being an interim arrangement, it is a significant step as this “stop-gap measure” reaffirms the importance the participating WTO Members attach to the two-tier multilateral dispute settlement system.²⁵ This development has a great symbolic force as it makes one point very clear: the point being that WTO’s impartial referee - its judicial wing - is truly the jewel of this crown and hence is important to preserve. This is a welcoming development, but it is important to ensure that this interim system does not replace the WTO’s appellate machinery for years and decades to come.

In an attempt to rescue the AB, scholars have made several proposals.²⁶ Multiple Members have also put on table different solutions to this deadlock.²⁷ The US has dismissed all proposals made so far. It has also refused to join the recently established interim multi-party appeal arrangement.

Another attack by the US against the AB is worth mentioning here. In March 2020, the US refused to accept the most recent AB report, dismissing it as invalid under Article 17 of the DSU. In the case of the *United States – Countervailing Measures on Supercalendered Paper from Canada*, the AB issued its report to DSB on 6 February 2020; the Report was adopted on 5 March 2020.²⁸ The US has refused to accept this ruling on several procedural grounds, further gutting the WTO’s AB. The US argues that none of the three AB members (Mr. Ujal Bhatia, Mr.

²⁴ European Commission, ‘Trade: EU and 16 WTO members agree to work together on an interim appeal arbitration arrangement’ (*European Commission*, 24 January 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113> accessed 16 Jul, 2021.

²⁵ Discussed in Starshinova O. ‘Is the MPIA a Real Practical Solution to Overcome the WTO Appellate Body Crisis?’ 55 *Journal of World Trade* 2021 (forthcoming).

²⁶ Pieter Jan Kuijper, ‘The US Attack on the WTO Appellate Body’, (2017) 45(1) *Legal Issues of Economic Integration*, 12.

²⁷ WTO Dispute Settlement Body: Appointment of Appellate Body Members, Proposal made by the European Union (10 July 2017, WT/DSB/W/597/Rev.2); WTO Dispute Settlement Body: Proposal Regarding the Appellate Body Selection Process, Communication From Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru (13 October 2017, WT/DSB/W/596/Rev.5).

²⁸ Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R and Add 1, adopted 5 March 2020.

Thomas Graham, and Ms. Hong Zhao) that issued the report were valid members of the AB at the time of its issuance and adoption.²⁹

With respect to Mr. Bhatia and Mr. Thomas, the US states that their tenures had already expired when the report was concluded and issued to the Dispute Settlement Body (DSB). Both these Members had written and concluded this report during their extended terms provided under Rule 15, the rule that the US has objected to for quite some time.³⁰ It is an internal rule that allows an AB member (whose term has expired) to complete his/her ongoing works on an appeal at hand with the approval of AB and upon its notification to DSB. Since Rule 15 has been adopted as a Working Procedure by AB without approval from DSB, the US has argued that it encroaches upon the rights of WTO Members to appoint or reappoint the AB member in question.³¹

The US further argued that Ms. Zhao is not a valid member of the AB as she is not eligible for this position due to her affiliation with the Government-managed China's Academy of International Trade and Economic Cooperation (CAITEC).³² Article 17.3 of DSU provides that the AB members cannot simultaneously be affiliated with any government when they are discharging their service at the AB. It remains to be established whether Ms. Zhao was simultaneously occupying the two positions; however, we cannot dispute that she was elected by the positive consensus of WTO Members.³³ Whatever doubts WTO Members may have had about Ms. Zhou's eligibility were supposed to be resolved during the debate that led to her appointment by consensus. Once an international judge gets elected, any attack on that judge by a government can only be viewed as an attack on the judicial independence of that international adjudicatory mechanism. The US claims that the recent AB report is invalid because Zhao is not a valid AB member. According to this logic, every AB report in which Zhao participated would be deemed invalid. Is that what the US intends to argue next? The entire span of DSB practice shows that Appellate Body members have typically been those individuals who have served as government officials before their appointment at AB.³⁴ Prior government service is not a disqualifier from being on the AB. Service as a professor in a public university or being a consultant to a judicial academy is also not a disqualifier.

²⁹ Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, February 28, 2020, Reconvened on March 5, 2020.

³⁰ 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body' (*U.S. Mission in Geneva*, 31 August 2017).

³¹ *Ibid.*

³² CAITEC is an inter-disciplinary and multifunctional social science research institution and a consultative body directly under the Ministry of Commerce (MOFCOM) of China.

³³ 'WTO welcomes two new Appellate Body members' (*World Trade Organization*, 25 January 2017), <https://www.wto.org/english/news_e/news17_e/ab_25jan17_e.htm> accessed 16 Jul, 2021.

³⁴ Ricardo Ramirez for instance worked for the Mexican Ministry of Economy or more than a decade prior to this appointment as AB Member. Also, Thomas Graham has served as Deputy General Counsel in the Office of the US Trade Representative. These two are just a few examples out of many others.

Finally, the US alleges that the report is invalid as it was not issued within the required 90 days as stipulated under Article 17.5 of DSU.³⁵ It rests its argument on the mandatory language used in Article 17.5 that in ‘...no case shall the proceedings exceed 90 days.’ Since the expression “proceedings” encompasses the date of its circulation and adoption, and because there was a delay of 528 days from the date when the Notice of Appeal was served and the date when the AB report was circulated, the US argued that this is not a valid “Appellate Body Report”. If we were to accept this argument, then the validity of many other AB reports that were issued beyond the 90-day limit comes under question.³⁶

As of yet, the US has not shown any indications of its willingness to resolve the AB deadlock in the near future. Perhaps we need to change the debate’s focus to resolve this deadlock. Instead of identifying ways to convince the US to release its grip from the AB’s neck, or in place of creating interim arrangements, we need to think about the root cause of this problem. What is the main reason that has allowed a single WTO Member to strangle the WTO dispute settlement system? The answer seems to be the tradition of positive consensus-based decision-making. This is because the WTO Members appoint or reappoint AB members by way of positive consensus, which has not been reached for the past several years due to the US opposition. We need to rethink the rule of consensus for decision-making, because the rules do not prescribe this as the only option for the appointment of AB members.

Article IX.1, read with Article IV.1 of the WTO Agreement, provides Ministerial Conference with an option to appoint AB members by voting. Article IX.1 of the WTO Agreement spells out the rule of decision-making at WTO. It reads as follows:

The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. ...Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.³⁷

³⁵ As a matter of fact, the report was issued after 528 days from the date when the Notice of Appeal was served.

³⁶ Few examples of AB reports delayed for more than 90 days between notice of appeal and report circulation are as follows: 259 days in *European Union — Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/11 adopted on 25 May, 2018; 579 days in *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, DS136, adopted 1 June 2011, Article 21.5; 395 days in *Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R, adopted on 9 April 2018; 265 days in *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R; WT/DS478/R, adopted on 22 November 2017; 207 days in *European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R, adopted 5 September 2017; 262 days in *United States — Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R, adopted 4 September 2017; 174 days in *United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R adopted 22 May 2017.

³⁷ WTO Agreement, Art. IX.1. Consensus is also the rule in WTO dispute settlement (DSU, Art. 2.4 DSU), except for the negative consensus rule (DSU, Art. 6.1, 16.4, 17.14, 22.6, 22.7).

The last sentence of Article IX:1 provides for a rule of majority voting by the Ministerial Conference and the General Council, "unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement". Moreover, the last sentence comes with footnote 3, which states the following: '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 Dispute Settlement Understanding.'³⁸ This takes us to Article 2.4 of DSU Agreement, which states the following: 'Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.'³⁹

Does this mean that the matters pertaining to DSB can only be decided by consensus? Let us go back to Footnote 3 to answer this question. Footnote 3 states that the DSU's consensus rule (i.e., "the relevant Multilateral Trade Agreement" as mentioned in Art IX.1 last sentence) only applies to the General Council when it is convened as the DSB. It does not extend this rule to the Ministerial Council, which therefore has the authority to appoint AB members by majority voting as per Article IX.1.

Article IV.1 of the WTO Agreement lends further support to this interpretation. It reads as follows: 'The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements [which includes the DSU] ... in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.'⁴⁰ The expression "in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement" signifies that the decision-making rules under the Multilateral Trade Agreements (such as the DSU) as well as the decision-making rules under the WTO Agreement shall be taken into account. The phrasing suggests that the WTO Agreement is to be read "holistically" with relevant Multilateral Trade Agreements (i.e., DSU in this particular case).

If Ministerial Conference exercises the functions of the DSB, such as the appointment of AB members, a systemic reading of the WTO Agreement together with the DSU Agreement leads to the conclusion that the consensus rule prescribed in DSU Article 2.4 does not limit the vote-based decision-making authority of the Ministerial Conference; it only and explicitly applies to the General Council when it is convened as the DSB. By limiting the consensus rule under the DSU Agreement to the circumstances in which the General Council is convened as the DSB, footnote 3 leaves the rule of majority voting safely in place for the decisions made by the Ministerial Conference.⁴¹

II. Invoking the Un-Interpretable National Security Exception

³⁸ WTO Agreement, Footnote 3, Art. IX.1.

³⁹ DSU Agreement, Art. 2.4.

⁴⁰ WTO Agreement, Art. IV.1.

⁴¹ Some of these arguments were taken from 'Guest Post: Appointing Appellate Body Members by Majority would Undermine, Not Preserve the Rule of Law', (*Worldtradelaw.net*, 31 July 2020), <<https://ielp.worldtradelaw.net/2020/07/guest-post-appointing-appellate-body-members-by-majority-would-undermine-not-preserve-the-rule-of-la.html>> accessed 16 Jul, 2021.

The impasse in the WTO's dispute settlement system is just one symptom of the crisis multilateral regulation of trade is facing. Another major attack on multilateralism comes from the way Members have and can in the future abuse the ambiguously-drafted provisions and especially the exceptions provided in the WTO agreements. One such exception that has the potential of being misused by WTO Members due to the vagueness with which it is drafted is the national security exception. For a multilateral system to be sustainable, it is important to have several escape clauses that can allow countries to protect their national security concerns. However, when these escape windows are too wide or ambiguous, defining their ambit and scope becomes challenging yet crucial to ensure that they are not open to misuse. WTO Members can only perform this task by amending a given law, or through adoption of authoritative interpretations under Article IX:2 of the WTO Agreement, or by deploying the WTO's judicial wing that can clarify and interpret a legal provision for its effective enforcement. The consensus-based decision-making tradition has paralyzed the WTO Members' power to amend laws or adopt authoritative interpretations. This is why Members to date have not been able to adopt a single authoritative interpretation. The recent Panel Ruling in *Russia — Measures Concerning Traffic in Transit* is an example where the Panel in the absence of a multilaterally-agreed authoritative interpretation made the very first attempt to clarify the scope and ambit of the GATT 1994's National Security Exception.

The so-called WTO "Security Exception Articles" that stipulate the legal grounds of possible justification for WTO-inconsistent measures are Articles XXI of the GATT, XIV bis of the GATS and 73 of the TRIPS Agreement.⁴² However, none of these agreements has come even close to defining "national security." We find varied attempts at defining it in the existing literature.⁴³ Yet it falls short of a universally accepted definition; this makes the exception dangerously ambiguous as – unlike other exceptions – it lacks precise requirements and specifications. It explains why the WTO Members have remained relatively cautious about the invocation of national security exception since the very creation of the multilateral trading system.⁴⁴ They perhaps realized that this escape window is too wide – and once opened – it can allow Members to escape the obligations they have undertaken as the WTO Members.⁴⁵ However, some Members have recently opened this "Pandora box" as they have invoked this exception to justify various retreats from free trade and liberalization.

⁴² General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 U.N.T.S. 187; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299; General Agreement on Trade in Services (GATS), 1869 U.N.T.S. 183. Other provisions are: Agreement on Trade Related Investment Measures, 1868 U.N.T.S. 186, Art. 3.; Article 24.7, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, (27 November 2014) WT/L/940; Art. 1.10, Agreement on Import Licensing Procedures, 1868 U.N.T.S. 436.

⁴³ Emma Rothschild, 'What is Security', (1995) 124(3) *Daedalus*, 61; R. H. Campbell and A. S. Skinner (eds), *Adam Smith, The Theory of Moral Sentiments* (Oxford: Clarendon Press, 1976) 156, 290.

⁴⁴ Tania Voon, 'Can International Trade Law Recover? The Security Exception in WTO Law Entering a New Era' (2019) 45 *American Journal of International Law*, 113.

⁴⁵ Alford, see note 19.

In *Russia – Traffic in Transit*⁴⁶, Ukraine challenged Russia’s imposition of restrictions and ban on the transit of goods by road and rail from Ukraine to Kazakhstan (and subsequently, to Kyrgyz Republic). Invoking Article XXI (b), Russia responded by arguing that there is an emergency in international relations that arose in 2014, evolved between 2014 and 2018, and continues to exist and pose a serious threat to Russia’s essential security interests.⁴⁷ The Panel in this case was faced with the problem of interpreting the national security exception, which is perhaps the most controversial and ambiguously-drafted provision in WTO law. On the one hand, Ukraine (the complainant) and the EU (the third party) argued that this exception is justiciable and should be interpreted objectively.⁴⁸ On the other hand, Russia (the respondent) and the US (the third party) submitted that national security exception is self-judging, meaning that it should be interpreted subjectively by the invoking Member and therefore it is non-justiciable.⁴⁹ The main argument of WTO Members supporting subjective approach is that national security issues are purely political in nature and thus not appropriate to be considered by the WTO dispute settlement system.⁵⁰

The Panel found that the actions taken under Article XXI (b) of the GATT can be reviewed by WTO DSM. The Panel also found that the three subparagraphs of Section (b) – which outline the circumstances in which a Member can invoke national security exception - can be examined objectively. Consequently, the Panel established that notions such as ‘war’, ‘other emergency in international relations’ and ‘taken in time of’ must be interpreted in an objective manner.⁵¹ However, “essential security interests” and the element of “necessity” were regarded by the Panel as subjective in nature.⁵² This would mean that Members can define their own security interests and they do not have to establish whether the alleged measure is necessary to achieve that security interest. The only limitation imposed on the Members in this respect is to adhere to the obligation of good faith as a general principle of law and a principle of general international law.⁵³ In this manner, the Panel employed a combination of objective and subjective approach to interpret this exception. The subsequent ruling in *Saudi Arabia – Protection of IPR* seems to have reaffirmed this interpretation.⁵⁴ In addition, the Ruling clarifies that the notion of “emergency in international relations” could include a situation where a Member has severed all diplomatic and economic ties it had with another WTO Member.⁵⁵

⁴⁶ *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted on 26 April 2019. This Panel decision was not appealed and hence adopted as such.

⁴⁷ *Ibid*, §7.27.

⁴⁸ *Ibid*, §7.34.

⁴⁹ *Ibid*, §7.28.

⁵⁰ *Ibid* §7.52 (United States' response to Panel question 1, at 18 and 22).

⁵¹ *Ibid* §7.62-7.82; 7.70-71.

⁵² For more details see: Daria Boklan and Amrita Bahri, ‘The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?’ (2020) 19 World Trade Review 135.

⁵³ Panel Report, § 7.132-7.138.

⁵⁴ *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R Adopted June 16, 2020, para 7.246. The case invoked Article 73 (b) (iii) of the TRIPS Agreement, the wording of which are similar to Article XXI (b) (iii) of the GATT.

⁵⁵ *Ibid*, para 7.259.

These decisions undercut the US position in the tariff war it started with the imposition of steel and aluminum tariffs under Section 232 of the US Trade Expansion Act of 1962.⁵⁶ This has led to a series of cases filed against the US at WTO DSM, followed by five further disputes launched by the US against retaliatory tariffs imposed by Canada, Mexico, EU, China, and Turkey.⁵⁷ These Rulings can be seen as double-edged swords that indicate how future WTO panels could deal with the ongoing disputes involving Article XXI exception. If future panelists employ a purely subjective approach, these decisions could encourage other countries to impose protectionist measures in the name of national security without having to justify how legitimate their concern is or whether the means they are adopting are necessary to meet the end. It could also encourage the economically powerful and developed Members to use tariffs as a tool against economically weaker and developing countries in situations of political conflict as they could justify these actions under Article XXI exception. If the panels in the future do not side with a purely subjective approach and issue a ruling that limits a country's ability to use this exception, it could tie the hands of the US in justifying its tariffs on steel and aluminum imports (and of any other country) from abusing this provision. Such an approach could therefore lead the US to continue paralyzing the WTO's DSM or withdraw from the WTO altogether. Either of these results could cripple the multilateral trading system.

If the US's justification under Article XXI is accepted in the disputes pending against its steel and aluminum tariffs, it could unleash a wave of protectionism worldwide where the countries invoking trade-restrictive measures would be able to extend the security exception to justify their barriers to trade. One such wave of protectionism could come during or in the post-COVID-19 world. As a response to the COVID-19 pandemic, several countries have imposed trade restrictions on multiple products including drugs, medical equipments, agricultural products, and cereals.⁵⁸ These export restrictions have disrupted the consumption patterns and supply chains for various industries worldwide.⁵⁹ Even though no such claims have come to the forefront so far, what remains to be seen is whether countries will invoke the security exception to justify the trade restrictions they are imposing as a reaction to COVID-19. The key question here is whether the interpretation of national security exception could include concerns related to human health, human life, food safety, and self-sufficiency in this

⁵⁶ For Steel, 'Presidential Proclamation on Adjusting Imports of Steel into the United States' (*White House Proclamation*, 8 March 2018) <<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/>> accessed 16 Jul, 2021; For Aluminum, 'Presidential Proclamation on Adjusting Imports of Aluminum into the United States' (*White House Proclamation*, 8 March 2018) <<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/>> accessed 16 Jul, 2021.

⁵⁷ *United States — Certain Measures on Steel and Aluminium Products*, WT/DS544, WT/DS 548, WT/DS550, WT/DS551, WT/DS552, WT/DS554, WT/D564. [DS551 (filed by Mexico) and DS550 (filed by Canada) are withdrawn as the parties have reported a mutually agreed solution on the matter. All other complaints are still awaiting a panel ruling.]

⁵⁸ For a complete list of temporary trade restrictions imposed in relation to COVID-19 pandemic, see International Trade Centre, 'Market Access Map', <<https://www.macmap.org/covid19>> accessed 16 Jul, 2021.

⁵⁹ UNCTAD, *Impact of the COVID 19 Pandemic on Trade and Development: Transitioning to a New Normal*, (2020), UNCTAD/OSG/2020/1, p29.

exceptional situation. Such an interpretation will tremendously expand the scope of this exception.

If one country invokes this exception to justify COVID-19 related trade restrictions, the other countries could follow the suit. Invoking Article XXI seems to be a natural choice as unlike Art XX (b) for example; Article XXI does not require an explanation on how a responding country satisfies the test of “necessity” as well as the requirements for the “chapeau”. *First*, the countries could satisfy the chronological criterion as they could argue that the measure was taken in the particular period of the pandemic. The Member invoking Article XXI with respect to the pandemic may argue that the situation of emergency here refers to the combination of health pandemic, economic crisis, and a massive increase in unemployment and food insecurity. A Panel may not limit itself to a specific time-frame and consider a chain of several events to constitute the situation of “emergency”. However, the Member invoking Article XXI will have the burden to show a close and genuine connection between these events. In the pandemic’s case, satisfying this burden may be a walk in the park.

Second, countries could fit this justification within the meaning of the phrase ‘emergence in international relations’ as it includes maintenance of law and public order interests. The Panel in *Russia – Traffic in Transit* expressly excluded political and economic interests from the scope of ‘essential security interests, however the emergency caused by a global pandemic is neither economic nor political. It is a kind of emergency that could lead to problems in public order or maintenance of law. Clarifying the meaning of the phrase “emergencies in international relations”, the Panel stated that that ‘political or economic conflicts will not amount to “emergencies in international relations” within the meaning of subparagraph (iii) unless they give rise to maintenance of law and public order interests’.⁶⁰ However, it did not provide any explanation as to when a political or economic crisis during peaceful times could give rise to the maintenance of law and public order interests, leaving its interpretation to future disputes.

The derogation from obligations justified by public emergency may be found in international instruments on human rights such as the European Convention on Human Rights (Article 15),⁶¹ the International Covenant on Civil and Political Rights (Article 4),⁶² and the American Convention on Human Rights (Article 27 (1))⁶³. For instance, the American Convention on Human Rights specifically stipulates that states are entitled to derogate “in time of war, public danger, or other emergency that threatens the independence or security” of the contracting parties.⁶⁴ The approach reflected in the European Convention on Human Rights and the

⁶⁰ Panel report, § 7.75.

⁶¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, <https://www.refworld.org/docid/3ae6b3b04.html>.

⁶² UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, P. 171, <https://www.refworld.org/docid/3ae6b3aa0.html>

⁶³ Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, <https://www.refworld.org/docid/3ae6b36510.html>.

⁶⁴ Organization of American States (see note 63)

International Covenant on Civil and Political Rights is slightly different as it indicates that States might derogate in times of public emergency threatening “the life of the nation”.⁶⁵ Hence, we could deduce from the wording of these provisions that “other emergency” reaches the gravity of war if and when it threatens human life. In addition, the jurisprudence of the European Court of Human Rights and European Commission of Human Rights provides extensive guidance on what can be regarded as an “emergency” within the meaning of the European Convention. In the *Greek Case*, the European Commission of Human Rights identified several requirements with which any public emergency must comply; these requirements are as follows: (i) actual or imminent crisis; (ii) which affects the whole population; (iii) threatens organized life in the community; (iv) and the crisis is exceptional in nature in the sense that normal measures permitted by the European Convention are “plainly inadequate”.⁶⁶ A measure triggered by COVID-19 can logically and evidentially satisfy all these requirements.

Third, countries are free to determine their ‘essential security interests’ and whether the measure is necessary to achieve the essential security interests, and hence a future Panel on this issue may not even get into the determination of this issue. This means that as long as the invoking Members will be able to satisfy the good faith requirement and the plausibility criterion, and if the interpretation employed by the Panel in *Russia – Traffic in Transit* is employed in the possible future disputes, the invoking Members could invoke this exception to justify trade restrictions they might impose due to this or future health pandemics.

Although the Ruling in *Russia-Transit* provides persuasive guidance to future panelists on the issues of interpreting the national security exception,⁶⁷ the WTO legal system is based on a “case by case approach” and hence this decision is not binding on future disputes. The future panelists may therefore employ a completely different approach to decide future disputes. This case shows how the absence of authoritative and mutually agreed interpretation of a vague provision (such as the security exception) could influence several pending cases that are invoking the national security exception,⁶⁸ making their determination significantly arduous and their outcomes unpredictable. In addition, this example shows that the continued use of national security exception could lead to more trade wars between WTO Members, a scenario that Members wanted to avoid after the end of the Second World War.

The discussion in this section manifests the risks of having grey-areas in law and the institution’s inability to clarify them. The WTO Agreements are drafted with a certain level of ambiguity and hence several provisions of these agreements can be interpreted in different ways. ‘One cannot forget that the people who wrote the WTO agreements were predominantly diplomats. It is of the essence of diplomacy that expressions are used that cater to a large

⁶⁵ Council of Europe (see note 61)

⁶⁶ Council of Europe Staff, *Yearbook of the European Convention on Human Rights: The Greek Case* (Vol. 12, Martinus Nijhoff 1969), 153 .

⁶⁷ Bahri, ‘Appellate Body Held Hostage’ (see note 3)

⁶⁸ These ongoing litigations include the following: United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, DS526, adopted 31 July 2017; Qatar — Certain measures concerning goods from the United Arab Emirates, DS576, adopted 28 January 2019.

number of people so that agreement can be reached. Consequently, the WTO agreements contain provisions that are not always the best example of lawyerly rigour and accuracy.⁶⁹ These gaps can only effectively be filled by WTO's legislative wing through the adoption of authoritative interpretations.⁷⁰

Article IX:2 of WTO Agreement clearly provides that only a three-fourths majority is required to adopt authoritative interpretations, but WTO Members have followed the GATT tradition of taking decisions only by positive consensus. The text of this provision provides for voting, however, many WTO Members consider voting as politically undesirable.⁷¹ On one occasion, the European Communities proposed an authoritative interpretation regarding the "sequencing" of procedures under Articles 21.5 and 22 of the DSU. However, the General Council did not adopt the proposal because a consensus could not be arrived at.⁷² This example once again shows that the WTO's tradition to decide by consensus is the root cause for its currently crippled state of crisis.

Article IX.1 of the WTO Agreement clearly provides two different options for decision-making to WTO Member in the following order. The first default option is decision-making by consensus. If a decision cannot be made by consensus, the Members are allowed to make that decision by way of voting. However in practice, the decisions at WTO are almost always made by way of consensus.⁷³ The GATT 1947 was adopted by unanimity, but several decisions in the GATT 1947 were taken by majority voting.⁷⁴ However, majority voting has fallen out of use mainly since the Uruguay Round negotiations. Currently, any Member in the WTO can defeat consensus as long as the Member concerned formally objects to the decision. Therefore, the rule of positive consensus gives every WTO Member implicit veto power in decision-making.

⁶⁹ Luis Olavo Baptista, 'A Country Boy Goes to Geneva', in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, 2015) 559, 566.

⁷⁰ Art. IX:2 of the WTO Agreement provides Ministerial Conference and General Council 'the exclusive authority to adopt interpretations' of WTO agreements.

⁷¹ '18-5 The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (*Peterson Institute of International Economics*, March 2018), 9 <<https://www.piie.com/system/files/documents/pb18-5.pdf>> accessed 16 Jul, 2021.

⁷² General Council, Minutes of Meeting held on February 15 and 16, 1999, WT/GC/W/143, at 32; General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement establishing the World Trade Organization, Communication from the United States, WT/ GC/W/144.

⁷³ John H. Jackson, 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects', in Anne O. Krueger (ed.), *The WTO as an International Organization* (The University of Chicago Press 1998) 176–177; Ehlermann, Claus-Dieter and Lothar Ehring, 'Decision-making in the World Trade Organization', (2005) 8(1) *Journal of International Economic Law*, 51, at 60–66; Joost Pauwelyn, 'The Transformation of World Trade' (2005) 104(1) *Michigan Law Review* 1, 20–22, 43–45; Peter Sutherland et al. (2004), 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium' (*The Sutherland Report*), 61–68. Only relevant exception to consensus is the negative consensus rule in WTO dispute settlement (Art. 6.1, 16.4, 17.14, 22.6, 22.7 DSU).

⁷⁴ Richard H. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO' (2002) 56(2) *International Organization*, at 344.

Previous scholarship has tabled the option of voting if no decision can be arrived at by positive consensus.⁷⁵ The vote-based decision-making can rescue the paralyzed multilateral trading system. It could work on a one-vote one Member basis and could take the shape of a simple majority or a qualified majority. A drastic shift might be required if voting is employed for amending the substantive laws and regulations that might result in changing the rights and obligations of WTO Members. Without consensus, the sovereign WTO Members will likely not be willing to give up their veto power they currently enjoy in WTO's decision-making process. However, voting could more readily be accepted in decisions that do not directly affect the Member's rights and obligations. These decisions could include, for example, the appointment and/or reappointment of Appellate Body members.⁷⁶ This proposal does not require any change in law; the voting rule is explicitly provided in the WTO rulebook. In cases where consensus is difficult to arrive at, voting can help Members to reach decisions in a timely manner.

Another alternative could be the negotiation of Joint Statement Initiatives (JSIs) between like minded countries, which certain WTO Members have attempted to employ to navigate this decision-making deadlock.⁷⁷ However, this new approach remains controversial and there are doubts as to whether these negotiating instruments can form a part of WTO system and if they conflict with the WTO's core values such as principles of non-discrimination and evolution of multilateralism through consensus-based decision-making.⁷⁸ Even though a departure from consensus would not require any change in laws, it would surely invoke a deep change in the WTO's political process.⁷⁹ It would contradict the fundamental condition of multilateralism, namely that decisions can only be taken when all Members agree and that no-one's objections can be ignored in decision-making process.

⁷⁵ Pauwelyn (see note 73), 37. Ehlermann and Ehling, 'Decision-Making in the World Trade Organization' (see note 73). Alternatively, it is also possible to consider constructive abstention. Article 31.1 of the Treaty on European Union allows member-states to employ constructive abstention when a decision has to be taken by unanimity regarding the EU's Common Foreign and Security Policy. [CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, 26.10.2012, Official Journal of the European Union C 326/13, Official Journal of the European Union, C 326/15]. Constructive abstention means that a member state can announce its abstention from voting which would not impede the decision-making process. The abstaining member must accept the decision taken by other members. [Similar practice can be found in Art. 6.2 of the OECD Convention. For more information, see Jaime Tijmes-LHL, 'Consensus and majority voting in the WTO' (2009) 8(3) World Trade Review, 418, at 428.

⁷⁶ WTO's DG Roberto Azevêdo on 14 May 2020 has announced his departure from WTO in August. This might put the entire institution in a limbo as appointing a new DG will require consensus amongst all members.

⁷⁷ JSIs can be broadly defined as a plurilateral negotiating tool initiated by a group of WTO Members who start negotiations on certain issues without adhering to the rule of consensus decision-making. These negotiations are primarily driven by like-minded developed country Members, although there is also some participation from developing countries. ['Are Joint Statement Initiatives the World Trade Organization's Future?', (*Trade Experettes*, 22 Feb, 2021), <<https://www.tradeexperettes.org/blog/articles/are-joint-statement-initiatives-the-world-trade-organizations-future>> accessed 16 Jul, 2021; WTO, 'Progress on the JSIs: Communication by the Co-coordinators of the JSIs', <https://www.wto.org/english/news_e/news20_e/jsec_18dec20_e.pdf> accessed 16 Jul, 2021.

⁷⁸ Angeles, Fiama, Roy, Riya and Yarina, Yulia, 'Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges' WTO Capstone Project (December 2020).

⁷⁹ Tijmes-LHL (see note 75), 424.

The use of vote-based decision-making and policy instruments such as JSIs can attack the WTO's legitimacy and credibility as a member-driven institution. John Jackson takes pro-consensus argument a step further, by observing that consensus 'forces the membership to achieve as wide acceptance of new measures as possible', and hence it lends democratic legitimacy to measures that are finally adopted.⁸⁰ Consensus in this manner is democratic and legitimate for a member-driven organization as it takes into account the needs and opinions of all WTO Members; however, the current existential crisis is no longer about a tussle between the need for legitimacy on the one hand and the need for timely decision-making on the other; this crisis is about the WTO's survival.

The WTO legal system is based on the will of the states. The states' will evolves with time. With changing requirements and conditions, Members have demanded changes in the WTO law. More so, the WTO judicial wing has identified many gaps and grey areas in the WTO rulebook, which requires Members to adopt authoritative interpretations for vaguely-drafted or unclear provisions. In the absence of such authoritative interpretations, the common intentions of the Members have sometimes been reduced to individual intentions and understanding, thereby affecting the rights and obligations of the Members without their consent. Gaa rightly argues that the 'general will is no longer general, the common intentions are no longer common, and any consensus reached thus has not been fully consented'.⁸¹ Members consent is not static; it is by nature evolutionary, so the consent they gave back in 1995 cannot continue to be their consent forever.⁸² Hence, decision-making by consensus has in effect failed to achieve its key institutional objectives, namely democratic legitimacy, credibility, and reflection of will.

Conclusion

No institution can stay static. All institutions have to evolve and adapt to changing circumstances and requirements. The nature of international trade has changed; the power dynamic among WTO Members has changed; several Members are now employing populist and nationalist measures that go against their WTO obligations; dysfunctional AB poses an unprecedented threat to the existence of the multilateral trading system. These exceptional times require exceptional measures. The WTO legal system and its decision-making process have to evolve accordingly. John Jackson in 2001 predicted that 'if the WTO fails to keep abreast of the changes in the world and to evolve as an institution, some of the major users of the institution... may begin to turn elsewhere to solve their problems'.⁸³ This prediction has now become a reality. The WTO Members have swayed towards regional and bilateral trade arrangements. Regional trade agreements and mega-regional agreements are providing an alternative to multilaterally-agreed trade agreements.

⁸⁰ John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (UK: Cambridge University Press, 2006; hereafter, *Sovereignty*), at 114.

⁸¹ *Ibid*, 102

⁸² This argument is developed in Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', (2001) 95 *The American Journal of International Law* 545, at 546.

⁸³ John H. Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited' (2001) 4(1) *Journal of International Economic Law*, 67, 71.

To rescue multilateral regulation of trade, Members need to revisit and rethink how decisions are currently being taken at WTO. The confidence in the multilateral trading system is at all times low. The key reason seems to be the failure in arriving at decisions by consensus, which in turn has damaged the two significant functions WTO was established to perform. Rule-making requires consensus; updating existing laws or clarifying them by adopting authoritative interpretations requires consensus; and appointment of AB members requires consensus. It is time WTO Members end their wait for another “Bretton Woods moment” and turn back to the WTO Agreement to employ other decision-making options provided in the rulebook. A departure from consensus does not require any change in law; it only requires a change in the institutional culture.