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Centre for Economic Policy Research
33 Great Sutton Street, London EC1V 0DX, UK
Tel: +44 (0)20 7183 8801
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Abstract

The WTO dispute settlement system is in crisis, following the decision of the United States to block new appointments to the Appellate Body (AB). The AB went into hibernation in December 2019, not having enough sitting members to be able to operate. What do WTO members think of the performance of WTO dispute settlement? How much do WTO members care about the existence and operation of an appeals mechanism? In this paper, we report on the results of a survey of WTO Members' perceptions of the AB and the role it plays (should play). We complement this with data on Members' revealed preferences in their use of the dispute settlement system, their intervention in WTO debates on the AB crisis and their responses to demise of the AB. The data reveal strong support for the basic design of the dispute settlement system but also that the United States is not alone in perceiving that the AB went beyond its mandate. There are substantive questions that need to be addressed if the Appellate Body impasse is to be resolved.

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Keywords: WTO, Appellate Body, Dispute Settlement, Conflict resolution

Matteo Fiorini - matteo.fiorini@eui.eu
EUI

Bernard Hoekman - bernard.hoekman@eui.eu
European University Institute and CEPR

Petros C Mavroidis - pm2030@columbia.edu
CLS

Maarja Saluste - maarja.saluste@eui.eu
EUI

Robert Wolfe - robert.wolfe@queensu.ca
Queens Unversity

WTO Dispute Settlement and the Appellate Body: Insider perceptions and Members' revealed preferences

Matteo Fiorini, Bernard M. Hoekman, Petros C. Mavroidis,
Maarja Saluste and Robert Wolfe*

21 May 2020

Abstract: The WTO dispute settlement system is in crisis, following the decision of the United States to block new appointments to the Appellate Body (AB). The AB went into hibernation in December 2019, not having enough sitting members to be able to operate. What do WTO members think of the performance of WTO dispute settlement? How much do WTO members care about the existence and operation of an appeals mechanism? In this paper, we report on the results of a survey of WTO Members' perceptions of the AB and the role it plays (should play). We complement this with data on Members' revealed preferences in their use of the dispute settlement system, their intervention in WTO debates on the AB crisis and their responses to demise of the AB. The data reveal strong support for the basic design of the dispute settlement system but also that the United States is not alone in perceiving that the AB went beyond its mandate. There are substantive questions that need to be addressed if the Appellate Body impasse is to be resolved.

Keywords: WTO, Appellate Body, dispute settlement, conflict resolution

* Fiorini: EUI, matteo.fiorini@eui.eu; Hoekman: EUI and CEPR, bernard.hoekman@eui.eu; Mavroidis: Columbia Law School, pm2030@columbia.edu; Saluste: EUI, maarja.saluste@eui.eu; Wolfe: Queens University, robert.wolfe@queensu.ca.

Introduction

The WTO dispute settlement system is in crisis, endangering the future of the organization. The proximate reason for alarm is the hibernation of the Appellate Body (AB) after the United States blocked new appointments as the terms of sitting members expired. As a result, on December 11, 2019 the AB became effectively defunct, as two of the three remaining members reached the end of their term, making it impossible for the AB to consider appeals.

In this paper, we ask how WTO Members regard the AB and the role it plays (should play). More specifically, we ask a series of interconnected questions aiming to illuminate the attitudes of the WTO membership towards the AB. It is not only views on the AB per se that we are interested in. More generally, our aim is to better understand whether, in light of the experience with the AB, the WTO membership believes that an appeals mechanism as established in the DSU (Dispute Settlement Understanding) is necessary for de-politicized resolution of trade conflicts. We ask the following questions:

- Is the AB dispute a self-contained one that centers narrowly on the operation of the AB, as opposed to a reflection of broader dissatisfaction with WTO dispute settlement?
- Is the AB fight a tempest in a small teapot affecting primarily a small group of large countries and major exporters distracting attention from ways to manage conflict in the trading system that are potentially more valuable?
- Does the trade policy community think the AB has delivered on their expectations?
- Do Members regard the importance of dispute settlement in the same way?

Our research suggests that many WTO Members may not consider the AB fight to be one they are directly concerned with. This is not surprising given extensive research in political science and economics on the incentives for countries to use the WTO dispute settlement system. One would expect frequent users of DS (dispute settlement) to be the main protagonists in debates about keeping the AB operational, as the AB demise has direct consequences on the prospects of bringing and winning cases. In this vein, we first consider Members' revealed preferences in their use of the dispute settlement system and their interventions in WTO debates about the AB crisis. We complement the data on participation in the DSB (either as complainants and/or respondents, or in the realm of WTO debates on the AB crisis) with an original survey of practitioners and knowledgeable observers on their perceptions of WTO dispute settlement that we conducted in 2019. This provides new information on the views of governments regarding WTO DS, as well as those of practitioners and stakeholders who are directly involved in or affected by WTO DS. These

data reveal a split among the "frequent flyers." Many of the WTO Members that use dispute settlement most intensely participated actively in DSB discussions on the AB, but some did not, suggesting that not all major users of the DS system were equally concerned to retain the AB "as is."

The plan of the paper is as follows. Section 1 presents our hypotheses and the survey methodology. Section 2 describes the data used. Section 3 discusses patterns of "revealed preferences" as reflected in participation by WTO members in the DS system, in DSB deliberations on the operation of the AB and in activities related to maintaining an appeals mechanism should the AB become defunct – which led to the creation of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in April 2020. Section 4 turns to the survey on insider perceptions and discusses the relationship between participation in the survey and the pattern of engagement by WTO Members in DS, the DSB and the MPIA. In Section 5, we present the main findings of the survey. In Section 6, we recap the key points of this research, and our main conclusions.

1. Hypotheses and Methodology

The deadlock on WTO dispute settlement has several characteristics.

- First, it is AB-centered: the focus is on the operation of the second instance review function. In fact, although some of the issues raised matter for panels as well (e.g., overstepping the mandate; observing statutory deadlines for issuing final reports), neither the US, nor anyone else has tabled this issue;
- Second, the US is the instigator. The US voice has strengthened and intensified over the years, as it built up on its criticism of AB practice to blocking appointments, and eventually leading the AB out of business. The concerns regarding the operation of the AB is not something recent, but the intensity of the US criticism has increased over time;
- Third, most of the time most of the WTO membership has been passive in the sense of not engaging with the US critique, whether in support or in opposition. This attitude changed with the realization that the US is willing to drive the AB out of business.

There are two broad hypotheses regarding possible systemic concerns associated with the operation of the AB.[1] First, that the AB has overstepped its mandate. This is the core element of US criticism and is disaggregated in various elements ranging from the AB's neglect of the deferential standard of review in antidumping litigation to disrespecting the statutory deadlines for issuing reports. Second, that the AB is not doing a good enough job, reflected in inconsistency of rulings and a case law that

[1] Note that criticism of specific rulings in any given case is not evidence of systemic concern (such as claims of overstepping the mandate). We do not focus on case-specific criticism, which clearly is salient for the US, notably AB rulings regarding the use of zeroing in antidumping investigations.

lacks coherence, and thus does not provide the predictability governments and businesses need. This is the critique that academics usually raise (Mavroidis, 2016), but not the US. In fact, the US wishes to downgrade the importance of precedent, the quintessential element for securing predictability.

Insofar as acquiescence can be inferred from the absence of explicit disagreement with the US, this may reflect support for either or both hypotheses. Asking countries to elucidate their views on this matter through a survey is the main motivation for this paper. We ask the question whether we are indeed facing a widely shared concern regarding the performance of the AB, and the WTO dispute settlement system in more general terms, as opposed to the deadlock simply being an expression of the idiosyncratic policy towards trade and the WTO taken by the Trump Administration. If there is little evidence for the former there may not be a need to do much at this stage—Members may be able to wait for a new US Administration.[2] If there is evidence of more widespread concern, there is a need to seriously address the matter as a priority issue.

The question whether the WTO DS, and, more specifically, the operation of the AB has been a real concern to many WTO Members, is largely a black box. Many suggestions on "what to do" assume a large majority is happy with the status quo ante and as a result seek to maintain as much of this as possible. This is the case for most proposals made in the DSB, most clearly the proposal to expeditiously move forward with new appointments to the AB. Throughout much of 2019 the US delegation to the WTO stated it could not join a proposal, eventually joined by 88 WTO Members (counting the then 28 EU member states as one) to fill AB vacancies expeditiously.[3] On this matter, there is an abyss between the US and most of the WTO membership. While some WTO Members might share some of the concerns of the US, they differed on the question how go about addressing them. The overwhelming majority wanted to keep the AB in place while in parallel identifying ways to improve its operation. This is now water under bridge. Following the demise of the AB in December 2019 discussions to reconstitute the AB will need to start from scratch.

With this important caveat, our focus in this paper is on trying to generate information whether the concerns expressed by the US delegation to the WTO are widely shared. We explore if others share the core issues raised by the US, and whether there are distinct, additional matters that concern a broader cross-section of stakeholders. Our null hypotheses are that:

- the way the AB has been functioning is in disrespect of its institutional mandate;

[2] Of course, this may well be wishful thinking given that Obama Administration was also unhappy with the AB as are influential law firms and lobbyists. The problem may persist under a new US administration.

[3] See e.g., WT/DSB/W/609/Rev.14, 20 September.

- this is not (regarded as) very relevant to most WTO members because DS and the AB dispute has been mostly a matter that concerns the biggest players, notably the EU and US; an
- it is mostly a cottage industry that matters to 'insiders' such as lawyers involved in cases and academics who study them.

Our aim is to better understand the attitude of both the Members which are active in dispute settlement and debates, and those who are not. Members who do not engage in debate also do not make much use of the dispute settlement system.[4] Those who do not respond to the survey also do have not used the DSU or engaged in DSB deliberations on the AB. Why they do not do so may reflect various factors – including free riding incentives, capacity constraints and simply lack of interest. Lack of interest may reflect perceptions that the system is of little salience to them (to their exporters) because of the remedies that are on offer, an inability to retaliate (the WTO is self-enforcing), insufficient access to legal expertise, information asymmetries (a lack of knowledge about injurious violations of WTO commitments, inadequate means for talking to their firms), or a view that they have other means of solving trade conflict, either in the WTO (committees) or elsewhere. The extant empirical research literature has shown that that several of these factors are relevant in explaining use of the WTO. The survey aims in part to get a better sense of perceptions of WTO stakeholders/practitioners whether (and which) such factors play a role.

2. Data

We use two sources of data. The first is based on participation by WTO Members in the WTO. We focus on whether Members act as complainants in WTO dispute settlement procedures as one indicator of engagement and "revealed preferences" – a presumption being that those who use the system (more) can be expected to engage (more) in deliberations on reform and efforts to address the AB crisis. We have also collected data regarding the frequency (number) of WTO Members' interventions on matters relating to the operation of the AB, and appointments of AB members, in the regular meetings of the DSB. Our interest here is to identify the "frequent flyers" and to distinguish these WTO Members from those that have not acted as complainants (have not invoked the DSU by submitting disputes), and have not intervened in DSB meetings regarding the performance of the AB. We have obtained information on use of the DSU and participation in the DSB from the minutes of the DSB meetings.[5] We aggregate this data for the period between January

[4] Maybe many of the countries who are silent in the DSB also do not notify, or ask questions in committees, or engage actively in negotiations. Unfortunately, we have no data in these dimensions of participation.
[5] These are available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

2017 and September 2019 by counting how many times a given WTO Member speaks in the DSB on agenda items concerning new appointments to the AB and the operation of the AB.[6]

We complement the data on DSB participation with an on-line, anonymous survey comprising 35 questions ranging from satisfaction with the output of the AB to the intensity of participation in dispute settlement to the capacity to do so. Fiorini et al. (2019) lists all the questions asked and provides descriptive information on responses received. The questionnaire design was informed by consultations and informal testing with several experts and selected WTO delegations, and by our review of the extensive literature on who uses WTO dispute settlement. The on-line survey ran for 3 months (mid-June to mid-September 2019). The link to the online questionnaire was sent to all WTO delegations with an accompanying email explaining the purpose of the exercise, requesting the survey link be forwarded to the relevant team in capitals as well as legal staff and advisors in Geneva. The email and the survey instrument stressed that the software used anonymized responses, making clear that the research team would not ask personal information and would not have access to personal information (such as IP addresses) either. In addition to WTO delegations, the survey was also sent to legal practitioners, the International Chamber of Commerce (ICC), the Pacific Economic Cooperation Council (PECC), and the WEF (World Economic Forum), in all cases with a request to pass on the survey to others engaged in or concerned with WTO dispute settlement.

A total of 168 responses were received. We count as "responses received" all cases where a respondent has answered to at least one question of the survey excluding the ones about the respondent's professional affiliation and the nationality of her organization. Fiorini et al. (2019) reports the number of responses for each question. Overall only 25% of the WTO member countries responded to the survey, defined as a response by a government official based in Geneva or in the capital.[7] Thus, most WTO members did not respond. Some non-responders are large and systemically important. They are active in DS debates and presumably decided not to respond to the survey. Non-responders include the United States, although non-government groups based in the US

[6] In several instances, a WTO Member speaks on behalf of a group of Members, many of which may in turn intervene individually. We only count those Members that intervene. Mexico intervenes most frequently in the 2017-19 period as a "speaker" for other WTO Members. It did so 7 times on behalf of Argentina, Brazil, Colombia, Chile, Guatemala, Peru and itself as a proponent of WT/DSB/W/596 calling for the launch of selection processes to replace departing AB members, and 20 times on behalf of a group of Members supporting immediate new appointments to the AB, which eventually included 88 WTO Members, counting the EU as one (WT/DSB/W/609 and its 14 revisions). Nigeria and South Africa intervened 5 times during this period on behalf of the Africa Group. Chile, Colombia, Costa Rica, Cuba and Ecuador took turns to speak on behalf of the GRULAC group of countries.

[7] We define WTO membership in calculating shares as a total of 136 members: 164 – 28 EU member states. Of the 28 EU member states, only 6 government officials (in Geneva or capitals) responded to the survey.

jointly comprised the largest number of distinct responses from any country.[8] The US is of course a very active user of the DSU and participant in the DSB discussions on AB appointments. This is not the case for most WTO members that did respond to the survey.

Response rates to similar surveys are often low, but in this case, the low level of response is quite surprising. The questionnaire targeted a small group only – governments and professionals directly concerned with the issues addressed in the survey. The subject (the imminent demise of the AB), was a high-profile issue in the Geneva trade community at the time the survey was run. Potential reasons for the low response rate could include a genuine lack of interest; lack of capacity; time constraints; and/or deliberate decisions not to participate. A total of 78 respondents opened the survey but opted not to answer any of the questions.

Time constraints are not a likely factor explaining the low response rate, as the survey was open for 3 months and took about 10 minutes to fill in. Capacity constraints are also not likely to be a factor, given that the survey was sent to delegations that represent their countries at the WTO and the questions were simple yes/no questions. Many of the respondents that did fill in the survey are from developing countries, including LDCs, also suggesting capacity was not a constraint. Lack of interest or a perception that the matter on which views were solicited (the AB, WTO DS) is not regarded to be of sufficient importance seems likely. The potential salience of this hypothesis is strengthened by the analysis of participation in WTO DSB deliberations in Section 3 below.

The sample divides evenly between respondents located in high-income countries as opposed to low- and middle-income nations. About one-third (32%) of respondents are government officials.[9] The geographic/national income distribution of respondents across professional groups is heterogeneous. Almost 60% of the government respondents based in Geneva are from high-income countries, and less than half (8 respondents) represent developing economies. The latter are relatively imbalanced by geography: two-thirds (6 respondents) represent Latin American countries. Only one African and one Asian Geneva-based official completed the questionnaire.

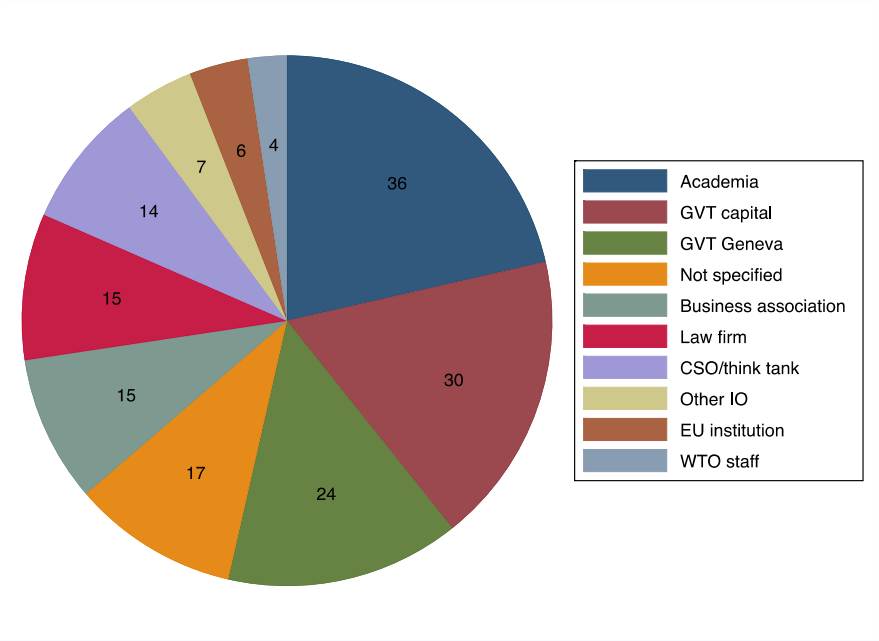
A similar pattern emerges for capital-based government officials. The share located in high-income countries drops to little less than 50%, while those located in developing nations account for almost 50% of responses. Four capital-based government officials did not specify their nationality. Inverting the pattern observed for responses by Geneva-based delegations, developing country officials in capitals are predominately from Africa (all but one of all respondents in this category who indicated

[8] Dominated by law firms, which accounted for 40% of US-based responses.

[9] The coverage of government views may be greater than this as some respondents who did not identify a professional affiliation are likely to be retired officials. The majority of respondents in this "not specified" group indicated that they are based in a high-income country.

their nationality). No Geneva-based official from India completed the survey, but one capital-based official from that country did. No government official representing the United States or China responded. We do not know the location of EU Commission respondents (Geneva or Brussels).[10] Twelve of the 15 respondents affiliated with law firms are based in high-income countries, with the majority located in North America and Brussels; one is based in India. Conversely, almost half of all business-affiliated respondents are based in developing countries. 35% of academic and CSO respondents are based in developing economies.

Figure 1: Professional Affiliation of Survey Respondents



3. Revealed preferences: Participation in the WTO

The main players in world trade are China, the EU and the US. One expects these large trade powers to figure prominently in the total number of trade disputes and therefore also to engage actively in deliberations on the operation of the DSU and the AB. In this Section we briefly characterize participation by WTO members on these different dimensions of DS.

Participation in trade disputes

The three major trading powers – the US, China, and the EU – accounted for one-third of the total number of DS cases launched in the 2017-19 period, which is our reference period as it coincides with the apex of the crisis at the AB (Table 1). Most complaints were brought by large WTO members —two thirds of the total involved countries (blocs) with a GDP exceeding US$ 1 trillion.

[10] We arbitrarily count all respondents indicating they work for an EU institution to the category of capital-based government officials for some of the analysis that follows but report this group separately as well.

Overall, only 25 of 136 WTO members (counting the EU28 as one) brought at least one complaint, of which 17 launched more than one. Thus, almost 20% of the membership brought a dispute in a 3-year period; some 80% of the membership did not.[11]

Table 1: Use of WTO Dispute Settlement Procedures: Complainants, 2017-19

	Complaints 2017-2019	GDP (current US$ bn)	Globalization Index	GDP per capita (current US$, thousand)	Share of world exports (%)
USA	12	20,494	82	62.6	9.9
China	6	13,608	64	9.8	18.6
EU	5	18,749	n.a.	36.5	15.7
Canada	5	1,709	84	46.2	3.0
South Korea	4	1,619	79	31.4	4.5
Russia	4	1,658	72	11.3	2.7
Ukraine	4	131	74	3.1	0.4
Qatar	4	192	73	69.0	0.4
Japan	3	4,971	78	39.3	5.2
Brazil	3	1.869	59	8.9	1.7
Mexico	2	1,224	71	9.7	3.2
Vietnam	2	245	64	2.6	1.7
UAE	2	414	74	43.0	1.1
Australia	2	1,432	82	57.3	1.9
Turkey	2	767	71	9.3	1.3
Tunisia	2	40	67	3.4	0.1
Venezuela	2	482	54	16.1	0.2
Chinese Taipei	1	589	n.a.	24.0	2.7
India	1	2,726	61	2.0	2.3
Switzerland	1	706	91	82.8	2.3
Thailand	1	505	71	7.3	1.7
Indonesia	1	1,042	63	3.9	1.5
Norway	1	435	86	81.8	0.9
Argentina	1	519	66	11.7	0.5
Guatemala	1	79	63	4.5	0.1
		Average GDP (current US$ bn)	Globalization Index	Average p.c. GDP (current US$ '000)	Share of world exports
Complainants		3048	72	27.1	83.5
Non-complainants		70	58	8.6	14.3

Note: Shares of world exports are computed considering the EU as a single entity and therefore accounting only for extra-EU trade. *Source*: WTO and World Development Indicators. Trade data are from CEPII BACI data and WTO TPR 2018 Trade Profiles of Chinese Taipei, Botswana, Eswatini, Lesotho and Namibia for which bilateral trade is not reported in the BACI data.

This observation is not specific to the period considered. Johannesson and Mavroidis (2016) and Leitner and Lester (2017) report data on use of WTO dispute settlement starting in 1995 and document that the large trading powers bring a disproportionate number of complaints. Updating the Johannesson and Mavroidis dataset to the end of October 2019, the US and the EU acted as complainants in 129 and 102 of the total 590 complaints, and were defendants in 155 and 85 cases,

[11] Countries engaged in foreign policy conflicts that have generated trade policy disputes – Russia, Ukraine and Qatar are examples – account for one-sixth of disputes in 2017-19.

respectively. This observation ties well with the finding in Horn et al. (2005) that the volume of export trade is the best predictor of the number of DS complaints brought by WTO Members. In general, complainants tend to be bigger, more open, and more integrated in trade (as measured by the Globalization Index) and richer than non-complainants.[12]

Deliberations on the AB in the DSB

Turning to participation in discussions on AB appointments and DS reform in the DSB, we observe a less concentrated picture. Table 2 reports the number of times Members intervened in the DSB on the need for AB appointments and the procedures linked to appointing a new AB member during 2017-2019. Thirty-seven WTO Members (27%) intervened 5 or more times in the DSB on these agenda items during 2017-19 – the period in which the US blocked new appointments. Eighty-two (60%) did not intervene at all – a percentage that is less than the share of WTO Members that did not launch DS cases during this period. Virtually all WTO Members that brought a DS case during 2017-19, also participated in DSB debates during this time – the only exceptions are Tunisia and the United Arab Emirates. As is the case with users of the DSU, participants in DSB discussions on AB appointments are larger, more open and richer than non-participants, but we also observe more engagement by smaller and poorer countries. As noted previously, in some instances a country spoke on behalf of a group. This is the case in particular for Mexico, who intervened regularly in DSB meetings on behalf of the proposal by a large group on Members to launch the process for new AB appointments. Although more than a dozen countries with trade shares below 0.1% of world trade, including several African LDCs,[13] participated in DSB deliberations, the general pattern is one of countries in Africa and the Middle East engaging less than developing countries in other regions.

There is a marked difference between the period of the negotiation of the Uruguay round, and today. The bulk of the negotiation in the Uruguay Round on the DSU involved an EU-US back and forth, although several other members played a role, and on occasion a decisive one. Canada, for example, was instrumental in bringing about the AB as discussed in Hoekman and Mavroidis (2019). Nevertheless, only the EU and the US voiced their claims with respect to every provision that ultimately found its way into the DSU. Conversely, today numerous WTO members have expressed their views, often on more than one occasion, regarding the workings of the DSU.

[12] We use the overall index for 2016 of the KOF Globalization Index, a composite index measuring globalization for every country in the world along the economic, social and political dimension. See Gygli et al. (2019).
[13] Neither of the two LDCs with the largest export shares (Bangladesh and Cambodia) spoke in the DSB.

Table 2: WTO Members with five or more DSB interventions on the AB

	Total interventions 2017-2019	GDP (current US$ bn)	Globalization Index	GDP per capita (current US$, '000)	Share of world exports (%)
Mexico	66	1,224	71	9.7	3.2
USA	52	20,494	82	62.6	9.9
EU	48	18,749	n.a.	36.5	15.7
China	43	13,608	64	9.8	18.6
Canada	43	1,709	84	46.2	3.0
Australia	39	1,432	82	57.3	1.9
Japan	37	4,971	78	39.3	5.2
Brazil	35	1,869	59	8.9	1.7
New Zealand	33	205	78	42.0	0.3
Norway	31	435	86	81.8	0.9
Singapore	30	364	83	64.6	1.7
Switzerland	29	706	91	82.8	2.3
South Korea	28	1,620	79	31.4	4.5
Chinese Taipei	28	589	n.a.	24.0	2.7
India	26	2,726	61	2.0	2.3
Hong Kong	23	363	68	48.7	1.0
Chile	23	298	77	15.9	0.6
Turkey	20	767	71	9.3	1.3
Russia	19	1,658	72	11.3	2.7
Thailand	16	505	71	7.3	1.7
Pakistan	13	313	54	1.5	0.2
Uruguay	13	60	73	17.3	0.1
Colombia	12	330	64	6.7	0.3
Costa Rica	12	60	72	12.0	0.1
Honduras	12	24	63	2.5	0.1
Ecuador	11	108	60	6.3	0.1
Guatemala	11	79	63	4.5	0.1
Venezuela	11	482	54	16.1	0.2
South Africa	9	366	70	6.4	0.7
Indonesia	7	1,042	63	3.9	1.5
Philippines	7	331	67	3.1	0.7
Panama	7	65	72	15.6	<0.1
Ukraine	6	131	74	3.1	0.4
Peru	6	222	69	6.9	0.4
Argentina	5	519	66	11.7	0.5
Egypt	5	251	63	2.5	0.2
Cuba	5	97	59	8.5	<0.1
		Average GDP (current US$ bn)	Globalization Index	Average p.c. GDP (current US$ '000)	Share of world exports
All participating WTO Members (N ≥ 1)		1,492	67	18.2	90.3
Non-participating Members (N = 0)		41.7	56	7.9	7.5

Note: Mexico is the most frequent participant due to its role as sponsor of a proposal that over time came to be supported by 88 WTO members (counting the EU as one) calling for new appointments to the AB. Shares of world exports are computed considering the EU as a single entity and therefore account only for extra-EU trade. N denotes number of interventions.

Source: Dispute Settlement Body – minutes of meetings (WT/DSB/M/*) and World Bank World Development Indicators. Trade data are from CEPII BACI data and WTO TPR 2018 Trade Profiles of Chinese Taipei, Botswana, Eswatini, Lesotho and Namibia for which bilateral trade is not reported in the BACI data.

The Multi-Party Interim Appeal Arbitration Arrangement (MPIA)

In the course of 2019, as it became more evident that efforts to induce the United States to cease blocking new appointments to the AB would not be successful, several WTO Members, led by the European Union, began work on a "plan B" centered around putting in place a substitute mechanism that could be used on a voluntary basis by those WTO Members desiring to be able to continue to appeal the findings of panels. This resulted in the establishment of the MPIA in April 2020.[14] The MPIA was the fruit of a negotiation between the EU and several other heavy users of the WTO dispute settlement system and is intended to operate as an interim appeals board until the AB crisis is definitively resolved, one way or another. Para 1 of the MPIA makes clear it will remain in place as long as the AB remains defunct. The key features of the MPIA are that it replaces Articles 16.4 and 17 of the DSU (MPIA §2) and retains the core elements of Article 17 of the DSU (MPIA §3). The value of the arrangement rests on decisions by signatories to appeal a panel report. If no party appeals a panel report addressing a dispute between MPIA signatories, the parties agree to adopt it at the DSB by negative consensus (MPIA §8). Any WTO member may participate in the arrangement (MPIA §12).

As of 21 May 2020, twenty one WTO members had signed on to the MPIA: Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador, the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay. By signing on the MPIA these WTO members reveal a strong preference for maintaining an appeals option as part of WTO DS. Signatories span the two largest global traders – China and the EU – as well as several frequent users of WTO DS. Jointly the signatories represent 14 percent of the membership, counting the EU as one. Disputes between MPIA signatories accounted for about a quarter of the total DSU case load during 1995-2019. While this is significant, as noteworthy is that it is nonetheless a relatively low number. Argentina, India, Indonesia, Malaysia, Philippines, Russia, the United Kingdom, all WTO members with significant experience in WTO dispute settlement, did not join the club. At the time of writing no case had yet been submitted to the MPIA and it not possible to assess how it will be used and whether other WTO members will join.

4. Insider perceptions: The Survey

Turning to the survey results, of the 136 WTO members (counting the EU as one), a key feature is that only 25 governments responded, i.e., at least one official – whether Geneva- or capital-based –

[14] The MPIA builds on Article 25 of the DSU, which makes provision for arbitration of disputes among WTO members if all parties agree and notify their decision to pursue arbitration to the WTO. The DSB circulated the text of the MPIA as WTO Doc. JOB/DSB/1/Add.12 (April 30, 2020).

filed in the questionnaire (Table 3).[15] Across all professional groupings and including instances where no professional affiliation was provided (i.e., not specified), the responses span 48 countries.[16] For 13 of these countries responses where received from business representatives or law firms.

Table 3: WTO members with at least one Government official responding to the survey)

	GDP (current US$ bn)	Globalization Index	GDP per capita (current US$, thousands)	Share of world exports
EU	18,749	n.a.	36.5	15.7
France	2,778	87	41.5	NA
Canada	1,709	84	46.2	3.0
South Korea	1,619	79	31.4	4.5
Belgium	532	91	46.6	NA
Chinese Taipei	589	n.a.	24.0	2.7
India	2,726	61	2.0	2.3
Switzerland	706	91	82.8	2.3
Vietnam	245	64	2.6	1.7
UAE	414	74	43.0	1.1
Australia	1,432	82	57.3	1.9
Austria	456	89	51.5	NA
Brazil	1,869	59	8.9	1.7
Czech Rep.	244	85	23.1	NA
Sweden	551	90	54.1	NA
Hungary	156	85	15.9	NA
Norway	435	86	81.8	0.9
Israel	370	77	41.6	0.4
Chile	298	77	15.9	0.6
New Zealand	205	78	42.0	0.3
Guatemala	79	63	4.5	0.1
Kenya	88	55	1.7	<0.1
Costa Rica	60	72	12.0	<0.1
Paraguay	41	63	5.9	0.1
Venezuela	482	54	16.1	0.2
Tanzania	57	51	1.1	<0.1
Cote d'Ivoire	43	53	1.7	0.1
Zimbabwe	31	51	2.1	<0.1
Uganda	28	53	0.6	<0.1
Burkina Faso	14	52	0.7	<0.1
Malawi	7	49	0.4	<0.1
	Average GDP (current US$ bn)	Globalization Index	Average p.c. GDP (current US$ '000)	Share of world exports
Responding govts	1,194	71	25.7	39.7
Nonresponding govts	494	63	13.9	58.1

Note: EU member states in italics. Shares of world exports are computed considering the EU as a single entity and therefore accounting only for extra-EU trade. Because of this the shares of world exports for EU member states are not applicable (NA). The export shares in the last two rows do not account for EU member states.
Source: Survey and World Development Indicators. Trade data are from CEPII BACI data and WTO TPR 2018 Trade Profiles of Chinese Taipei, Botswana, Eswatini, Lesotho and Namibia for which bilateral trade is not reported in the BACI data.

[15] We count the EU as one here and disregard responses by EU member state officials.

[16] This total includes individual EU member states.

Focusing on government responses and comparing the WTO members that participated with those that did not, we once again observe that the relatively larger, more open (integrated) and richer countries participated more on average. However, compared with DSU and DSB participation, the differences between the two categories are less. More small countries are represented, and fewer large economies, reflecting the absence of responses from government officials from China, Japan and the United States. Large emerging economies such as Mexico, Russia, Indonesia, and Argentina that are active in the DSU and DSB did not participate in the survey at all.

A commonality across the three sources of data is that, most countries in Africa and the Middle East did not engage.[17] Asian countries, on the other hand, participated less frequently in the survey than in the DSB/DSU. Only 13 of the 25 WTO Members that were DSU complainants in 2017-19 had government officials fill in the questionnaire. Of the 37 WTO members that intervened at least 5 times in DSB discussions on AB appointments and DS reform, only 14 had government officials that responded to the survey.

In order to further investigate the relationship between participation in the system and survey participation, we have estimated the simple correlation between the country-level binary indicator, taking value 1 if at least one government official of the country took the survey (*GVT_respondent_dummy*), and two dummy variables taking value one respectively if the country acted as complainant at least once between 2017 and 2019 (*Complainant_dummy*), and if it intervened at least once during the same period in the formal discussions on AB appointment, DSB reform and related policy issues (*Intervention_dummy*). The correlation between *GVT_respondent_dummy* and *Complainant_dummy* is equal to 0.3585, while the correlation between *GVT_respondent_dummy* and *Intervention_dummy* is 0.2914. These correlations are both relatively low, indicating that responses by governments to the survey are not dominated by WTO members that are active participants in the DSU and DSB discussions.

5. Survey Findings

In a nutshell, the survey responses suggest two main conclusions:

- First, the WTO Membership as such, seems quite happy with the current design of WTO DS. There are no major qualms regarding the basic features of the DSU.

[17] We again have 7 African countries participating, although the composition of this group changes relative to the DSB sample: the largest African economies that do participate in the DSB (South Africa and Nigeria) did not respond to the survey.

- Second, some of the WTO Membership is quite concerned with the manner in which the AB has exercised discretion within the current DS design. With respect to practice, the best way to describe the reactions of the Membership is 'polarization': some Members signal concerns, while many others do not see much wrong with the output of the AB.

This suggests practice rather than design is at issue. The purpose of this paper is not to analyze the drivers or the rationale for the different views let alone whether they make sense or not. On the other hand, we do observe that the US is in a minority of one when it comes to deciding on the optimal course of action to address its concerns. While some WTO Members are ready to acknowledge that some of the issues raised are worth debating, none is prepared to support the US in its decision to prevent new appointments to the AB. The proposal by 88 members to complete the AB by electing new members, and the total isolation of the US in this regard, clearly illustrates this divide.

5.1 Consensus on Many Dimensions

Large majorities of respondents have, through their responses to survey questions,[18] stressed that the AB, as such, and the WTO DS in more general terms, is of critical importance to the functioning of the world trading system. For political economy reasons, governments may have the incentive to renege on negotiated commitments. Enforcement is necessary because the GATT (and the other agreements coming under the aegis of the WTO, which largely emulate the GATT approach to trade liberalization), is an incomplete contract. Since re-negotiation is very onerous (in light of the number of participants, their heterogeneity, the consensus working practice, etc.), adjudication may be perceived as the only feasible option to "complete" the contract and allow it to produce its intended results.[19] The persuasion that the DSU is of utmost importance to the trading community is underscored by many responses to survey questions. Here we highlight the most salient ones where there is broad agreement (see Figure 2):

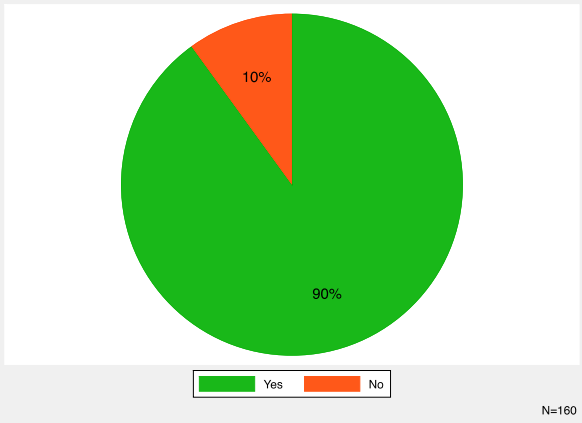
- The AB impasse is of systemic importance, and it is not simply a tiff between EU and US (Q1);
- WTO DS is not just a matter of power, but serves important functions of interest to the world community irrespective of size of litigants (Q19);
- Alternatives to the current DS are not a substitute to the existing regime (Q21);

[18] The question numbers in parentheses (Q*x*) refer to the survey instrument and are reported to facilitate cross-referencing with the detailed descriptions of the questions asked and responses received provided in Fiorini et al. (2019).

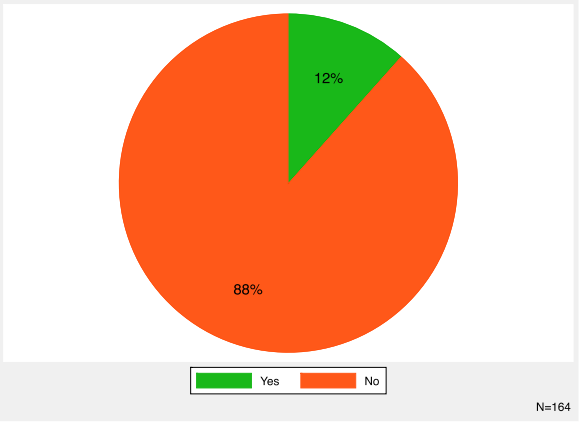
[19] This arguably is too narrow a view given that other forms of dispute resolution are available to WTO Members, such as raising specific trade concerns in Committees. Bolstering the use of such alternative mechanisms to defuse conflicts and resolve concerns is arguably one important dimension of WTO reform.

- Panelist appointments have been objective and unbiased (Q9);
- Panel reports should be binding. The world community thus, continues to support negative consensus, the most important highlight reform agreed during the Uruguay round (Q10; Q15);
- WTO adjudicators should be very circumspect in interpreting the WTO rules (Q3);
- DS/AB is valuable for legal clarification, creating precedent, ensuring predictability, enforcement of commitments (Q14s1; Q14s3; Q14s4); and
- The AB must provide coherent case law (Q11).

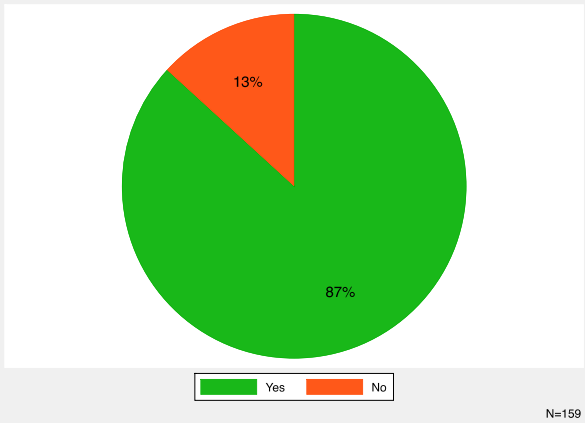
Figure 2: Virtual consensus on key dimensions of the DSU



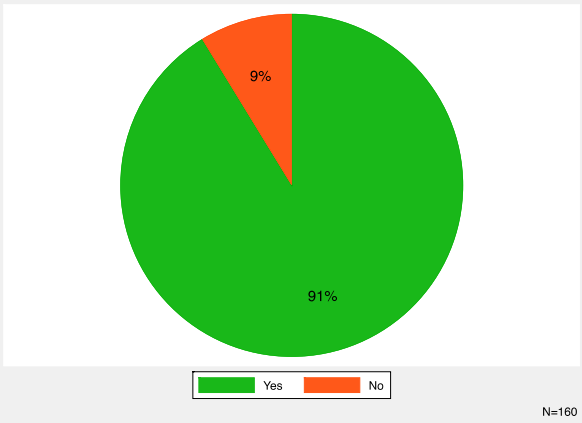
Panel A: [Question 15] A compulsory and binding dispute settlement system and automatic adoption of reports is a necessary feature of the trade system



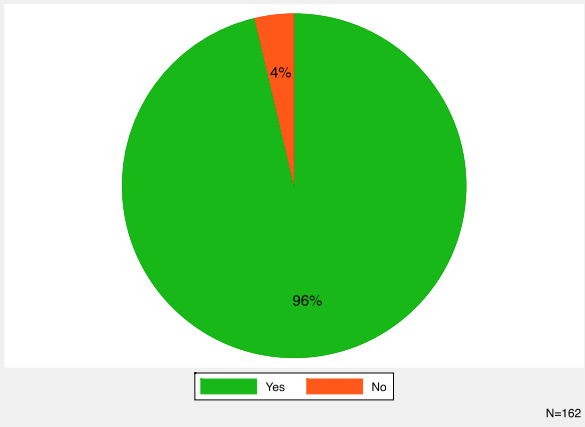
Panel B: [Question 1] The Appellate Body impasse largely concerns the EU and the US, so we are staying out of it.



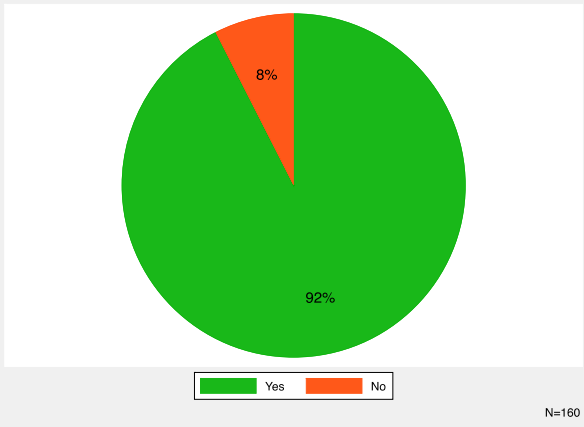
Panel C: [Question 14(1)] DS is valuable for legal clarification; to create a precedent



Panel D: [Question 14(3)] DS is valuable for ensuring predictability



Panel E: [Question 14 (4)] DS is valuable for enforcing commitments



Panel F: [Question 11] Does the WTO need the Appellate Body to ensure coherent case law?

There is an important qualification to make with respect interpreting revealed preferences as reflected in responses to the survey as it does tell us anything about the views of the countries that did not respond to the survey. Those who decided not to fill in the questionnaire and countries that do not use the system may have different assumptions on these issues. The many non-respondents may be at the opposite end from those actively engaged in the system.

We turn next to a discussion of reactions to questions regarding practice of the AB.

5.2 Disagreements and Polarization

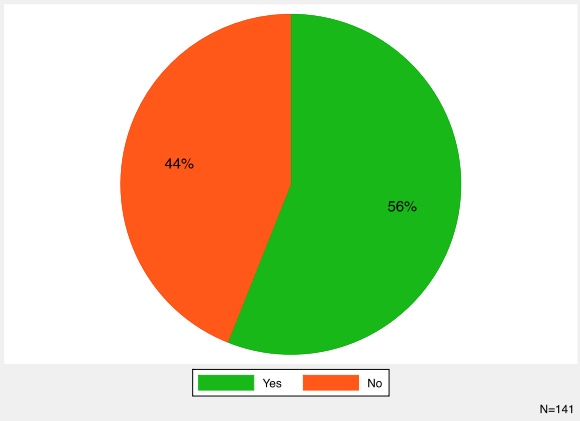
A substantial number of respondents believe DS is not doing what it should be doing, and/or is not consistently delivering high quality output (Figure 3). Notwithstanding a large majority view that panelists are appointed through an objective process (Q9), 55% of respondents (77 out of 139 who answered this question) believe that panel reports are sometimes biased. 70% of Geneva based officials who are involved in DS take this view, as do over 50% of officials based in capitals (Q30).[20] Overall, 42% of respondents believe the AB has gone beyond its mandate, violating the quintessential obligation established in the DSU (Article 3.2) to not undo the balance of rights and obligations as struck by the Membership.

This provision encapsulates the idea that panels and the AB are agents not principals, and they must abide by the agency contract, which they have adhered to. Nevertheless, because of the "incompleteness" of the original contract, this emerges as probably the hardest discipline to observe. In case of egregious violations, it might be easy to pronounce in favor of disrespect of the mandate. But most issues raised are borderline cases. This is precisely what might explain why,

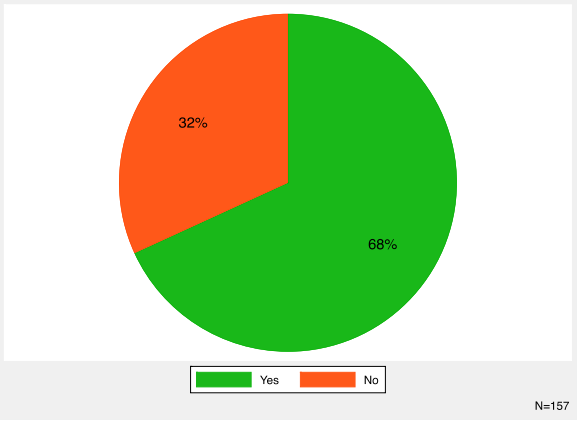
[20] Some potential implications of views by a non-negligible share of insiders/stakeholders that there is a quality/competence problem are addressed in Hoekman and Mavroidis (2019; 2020b).

notwithstanding the agreement of some with the US on this score, there is disagreement of all with the US on the appropriate course of action to address the situation.[21]

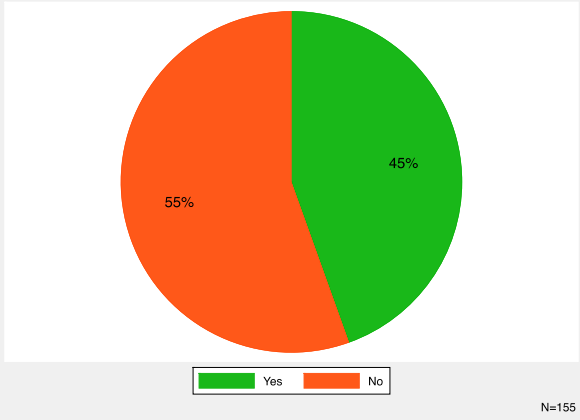
Figure 3: Polarization



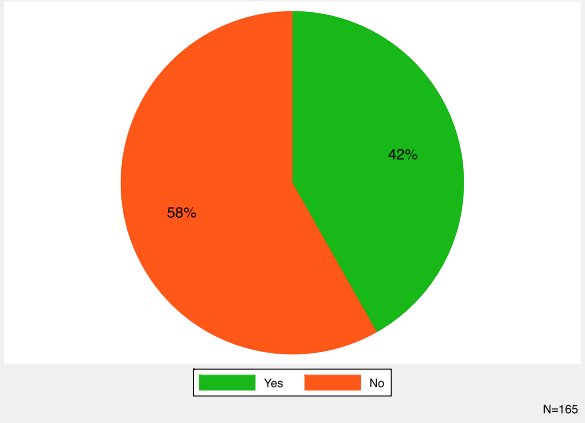
Panel A: [Question 30] Are panel reports sometimes biased?



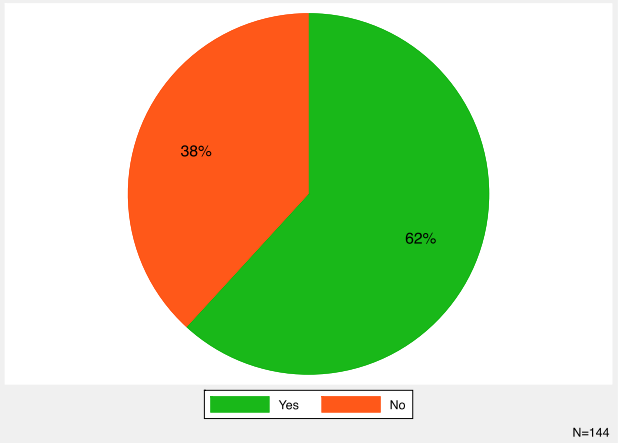
Panel B: [Question 12] Has the Appellate Body in fact provided coherent case law?



Panel C: [Question 13] Has the AB always acted consistently with the DSU?



Panel D: [Question 2] Has the AB gone beyond its boundaries?



Panel E: [Question 31] Do you think that AB reports are written by the Secretariat?

[21] An equally tantalizing question is whether the Membership should focus on ex post or ex ante remedies to redress the current situation, We did not include questions to this effect in the survey, since this is the bridge we should be crossing assuming consensus to sit down and talk. For now, there is none.

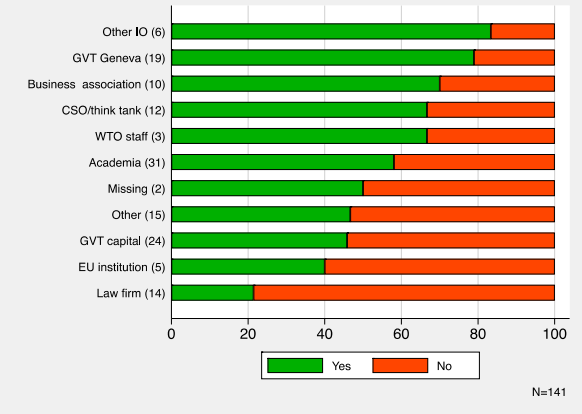
Unpacking Agreement and Disagreement

With regard to the professional affiliations of those who took the survey, it is notable that government officials based in Geneva involved in DS, and practitioners in law firms, have expressed the view that the AB has gone beyond its mandate (50% and 60%, respectively) (Q2) (Figure 4).

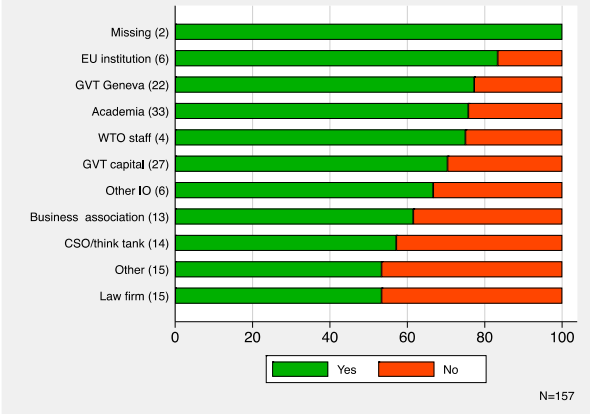
Many business respondents and legal practitioners believe that the AB has not provided coherent case law (40% and 50%, respectively). 30% of officials in capitals dealing with DS think the AB has not provided coherent case law either (Q12). Finally, 44% of respondents believe the AB has always acted consistently with the DSU (Q13). The two issues (consistency with the DSU, coherence) are not necessarily mutually exclusive: one can imagine a consistent with the DSU incoherent case law, as the AB could be adopting for example a more or less deferential standard of review when dealing with say consumer protection cases.

More than three-quarters of delegation officials based in Geneva who are directly involved in DS, agree that the AB has at times acted inconsistently with the DSU. Insiders (those involved in DS and thus presumably better informed) are less positive than others (Q13). In part, this critique implicates the Secretariat as well. 61% of all respondents (87 out of 142) think that AB reports are written by the Secretariat. This share is higher for respondents who work on DS, as 80% of law firm respondents and officials based in Geneva adhere to this view. Capital based officials are the outlier here: 'only' 40% agree with the statement (Q31).

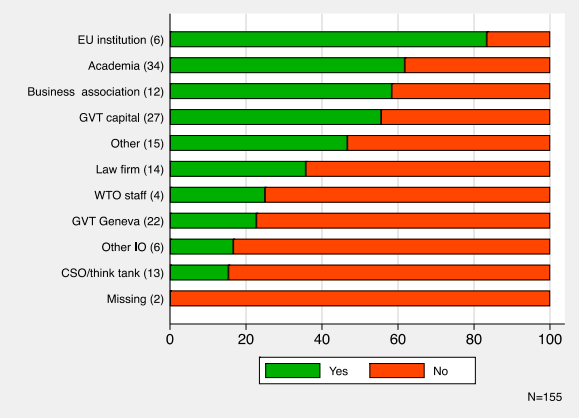
Figure 4: Unpacking polarization



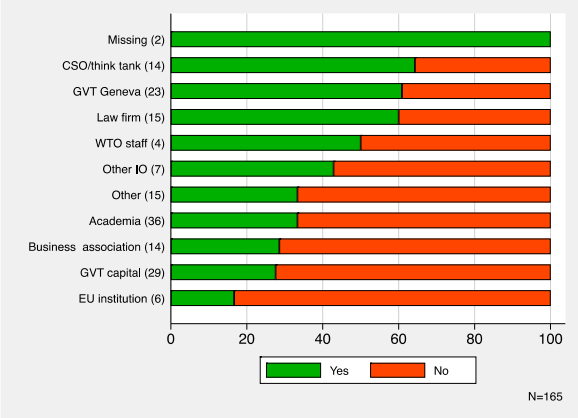
Panel A: [Question 30] Are panel reports sometimes biased?



Panel B: [Question 12] Has the Appellate Body in fact provided coherent case law?



Panel C: [Question 13] Has the AB always acted consistently with the DSU?



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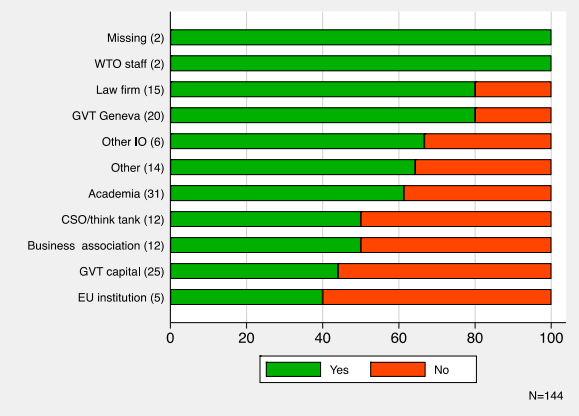

Panel E: [Question 31] Do you think that AB reports are written by the Secretariat?

Table 4 offers a graphical representation of agreement/disagreement patterns among responses to questions across types of respondents (i.e., different professional affiliations).[22] The rows of the table report the main questions with a Yes/No answer structure. Columns report professional affiliations. For a combination of question and professional affiliation, if the group-specific average response is statistically higher (lower) than the average response of all other respondents, the respective cell in the table is colored green (red). If the group-specific average response is not statistically different from the average response of all other respondents, then the cell is colored orange. For each row (question), the same color for two or more columns reflects agreement among the respective groups of respondents.

[22] Fiorini et al. (2019) provides granular information on responses to questions across professional categories.

Table 4: Agreement/Disagreement Within and Across Questions

Note: all questions are Yes/No. If a group-specific average response is statistically higher (lower) than the average response of all other respondents the respective cell is colored green (red). If a group-specific average response is not statistically different from the average response it is orange. For each row (question), the same color for two or more columns reflects agreement among the respective groups of respondents.	GVT Geneva	GVT capital	Law firm	Business Ass.	CSO / T. tank	Academia	EU Inst.	Other Intl Org.	Not specified
Q1: The AB impasse largely concerns the EU and US, so we are staying out of it									
Q2: Has the Appellate Body gone beyond its boundaries?									
Q3: WTO adjudicators should exercise great circumspection in interpreting the WTO									
Q4: We prefer bilateral consultations to using a "court" for inter-governmental agreements									
Q5: Free trade agreements offer a better forum to resolve disputes									
Q6: Has your country considered arbitration instead of WTO DS procedures?									
Q7: Does the WTO need a mediation mechanism?									
Q8: My country does not launch disputes if others have larger interests at stake than us									
Q9: Panelists appointed to dispute settlement panels are objective and unbiased									
Q10: Should WTO panel reports be binding?									
Q11: Does the WTO need the Appellate Body to ensure coherent case law?									
Q12: Do you think that the Appellate Body has in fact provided coherent case law?									
Q13: Has the Appellate Body always acted consistently with the DSU?									
Q14(1): Dispute settlement is valuable for legal clarification; to create a precedent									
Q14(2): Dispute settlement is valuable for being alternative to negotiations									
Q14(3): Dispute settlement is valuable for ensuring predictability									
Q14(4): Dispute settlement is valuable for enforcement of commitments									
Q14(5): Dispute settlement is valuable for punishing cheaters									
Q14(6): Dispute settlement is valuable for securing a mutually acceptable solution									
Q15: Compulsory & binding DS with automatic adoption of reports is necessary									
Q16: When officials in capitals assess if a new policy is consistent with WTO rules, do they pay attention to Appellate Body rulings?									
Q17: Does your delegation/ministry use WTO monitoring or Global Trade Alert data to identify trade barriers that could give rise to a dispute or a specific trade concern?									
Q18: Does your government analyze other Members' trade policy notifications that could lead to a question in a WTO committee?									
Q19: Disputes are irrelevant as conflicts are settled by the power of the bigger market									
Q20: Dispute settlement is too expensive for my country									
Q21: Dispute settlement is not relevant because we use alternative mechanisms									
Q23: Our businesses are well-informed about foreign market access barriers									
Q24: Our businesses complain to the trade ministry about foreign market access barriers									
Q25: Our businesses don't know if market access problems are due to foreign policies									
Q26: Do your WTO representatives intervene in DSB meetings?									
Q28: Does your country only intervene in the DSB if direct export interests are affected?									
Q29: Do your country's DSB interventions address broad systemic issues?									
Q30: Are panel reports sometimes biased?									
Q31: Are Appellate Body reports written by the Secretariat?									
Q32: Should there be a page limit for Appellate Body reports?									
Q33: Should there be page limits on appeals by WTO Members?									
Q34: Would monetary damages enforceable in domestic courts boost interest in WTO dispute settlement?									

The analysis comprises the following steps. First, responses to the questions with a Yes/No answer structure are recoded to take the numeric value 0 if "No" and 1 if "Yes". Second, for each group of respondents (defined based on professional affiliation) we compute (i) the group-specific average response, taking the average of individual numerical responses within the group; and (ii) the average response of all other respondents excluding respondents from that group. Third, we test the relationship between (i) and (ii). If, for a given group and a given question, (i) is statistically higher (lower) that (ii), that group will be on average more (less) in favor to the statement expressed in the question than all other respondents. Thus, "agreement" is defined as instances where two or more groups have group-specific average responses that demonstrate the same relationship with the average response of all other respondents. The nature of these relationships is estimated using mean difference analysis with a statistical significance of 95%.

Some suggestive patterns emerge from Table 4. On the question whether the AB has gone beyond its mandate (Q2), government officials in Geneva and law firms tend to agree which each other and with this proposition more than other groups, differing in particular with capital-based officials (including the EU) who are more inclined to answer no to this question. This pattern repeats for the question whether panelists are objective and panel reports are unbiased ((Q9; Q30) and whether the WTO Secretariat writes AB reports (Q31): Geneva-based officials tend to be more skeptical than capital-based officials are. Geneva delegates also less inclined than other groups to agree that the AB has always acted consistently with the DSU (Q13) and that DS is valuable for legal clarification and to create precedent (Q14:1). The latter suggests that Geneva officials may be more inclined to regard the role of DS procedures as resolving disputes than other groups – e.g., business respondents and law firms who tend to take the view that DS should punish "cheaters" (viz. Q14:15).

Business representatives tend to be more negative than average on whether panelists are objective and unbiased (Q9), on whether their governments use WTO monitoring and notification information: a majority of business respondents believe their governments do not analyze other countries trade policies with a view to raising a question in a WTO body (Q18). In other work, Wolfe (2020a) comments on the propensity of Members to raise a "specific trade concern" or ask a question about another Member's notification. What we find in the survey suggests that the business perception is not wrong: countries with sophisticated alert systems and good internal coordination receive more comments from industry and other ministries hence launch more disputes, raise more STCs and ask more questions than other Members.

Business representatives are also more skeptical about the value of the DSU in delivering outcomes: they are more inclined to believe that power determines outcomes (Q19), that the DS is too expensive (Q20), and that alternative mechanisms, including consultations and PTA fora are better

or preferable (Q4, Q5, Q21). Business is an outlier in that a significant share of respondents agreeing that DS is irrelevant because conflict resolution reflects power relationships (Q19). We are not surprised by the results, as large businesses have the means to raise their concerns directly with a government without waiting for a WTO dispute settlement process to conclude.

Some 60% of business respondents prefer bilateral consultations over the WTO 'court' (40% in the case of associations in high-income nations; 100% of those based in developing countries) (Q4). Consistent with this is that business is somewhat more positive about PTAs as a forum to address disputes than other stakeholders, especially associations based in developing countries (Q5). Some business respondents are an outlier in stating that WTO DS is not relevant because alternative mechanisms are used (Q21). 50%-60% of business respondents think DS is a valuable alternative to negotiations, vs. 30% of government officials in capitals expressing this view (Q14s2). Business is the only group consistently taking the view that one role of DS is to punish 'cheaters' (Q14s5).

Law firms tend to agree more strongly with the statements that the AB has gone beyond its mandate (Q2), that panel reports should be binding and adopted automatically (Q10; Q15), that governments use WTO notifications to raise issues in WTO meetings (Q18), intervene in DSB meetings (Q26), and do so to address matters of systemic concern (Q29). Not surprisingly, law firm respondents are among the most supportive of WTO DS as opposed to alternatives, a perspective that is reflected in their active engagement in support of the creation of the MPIA. Several major law firms hosted dozens of meetings and conferences on the MPIA in and outside Geneva during 2019 and early 2020.

Respondents working in academia are neutral on key questions such as AB overreach (Q2), whether the AB should show great circumspection (Q3), on the use (utility) of PTAs and bilateral consultations to resolve disputes (Q4, Q5) or whether the AB should and does provide coherent case law (Q11, Q12). They tend to agree more strongly that panel reports should be binding (Q10), that the AB has tended to act consistently with its mandate (Q13), and that a role of the AB is to clarify the rules (Q14(1)). They also believe that businesses are not well informed about market access barriers and do not complain to trade ministries (Q23; Q24) – two questions where governments take a relatively strong opposing view. Finally, academics are an outlier in being the only group to take a relatively positive view of the prospect that introducing monetary damages (remedies) would bolster interest in using the DSU (Q34).

5.3 Determinants of DS Utilization and Engagement

Fiorini et al. (2019) reports other cuts of the data that are salient to our hypotheses. One is to distinguish between respondents based on their location – developing vs. high-income countries.

Another is to distinguish between respondents based on whether they are (have been) involved in WTO DS or not.

Poor vs. rich countries: Respondents in poor countries

- Are more inclined to agree that DS is too expensive (Q20);
- prefer bilateral consultations over the WTO court (Q4), perceive that PTAs (preferential trade agreements) are better forum to resolve disputes (Q5);
- believe that making available monetary damages as a remedy in DS cases would be desirable (Q34); and that
- their country tends to free ride, wherever and whenever it is possible to do so (Q8).

There are also clear splits across the rich-poor divide regarding:

- the question whether businesses are well-informed on foreign market access barriers (rich: yes; poor; no) (Q23);
- whether they are aware if policy is a cause of market access problems (rich: yes; poor: no) (Q25);
- whether their delegations intervene in the DSB (rich: yes; poor: many say no) (Q26); and,
- if so only do so to protect export interests (rich: no; poor: >50% say yes)

Distinguishing between developing country and high-income countries is thus informative in revealing differences of view. Much of what the data reveal is consistent with theory and past empirical research. 70% of government officials in capitals of developing countries, for instance, agree that their country does not launch disputes if other parties have larger interests at stake. This compares with less than 20% for government respondents in capitals of high-income countries (Q8). Moreover, 60% of Capital-based officials and all business respondents agree their country free rides in DSB meetings.[23]

Differences in views depending on involvement in DS: Many of the views expressed by respondent groups are not sensitive to the question whether a respondent has (had) direct involvement in the WTO DS. But on some questions, there are differences, and on occasion, pronounced differences. In part, this finding presumably reflects differences in knowledge of how the process works, but differences may also reflect differences in preferences. Questions where there are differences in views include preference for bilateral consultations and PTA mechanisms to deal with trade disputes

[23] The questions regarding freeriding are not included in Table 4 given the low response rates.

(Q4; Q5), where those involved in WTO DS are somewhat less inclined to agree that these alternatives offer a better forum than those who are not. Insiders are also less likely to agree that their country will tend to free ride on others (Q8) and more likely to agree that panelist appointments are sometimes biased (Q9). Particularly striking is the difference on Q20 (is DS too expensive), where those involved in DS tend to say No and those not involved are more likely to agree (which may help explain why they are not users). This difference may reflect better knowledge of insiders but may also reflect self-interest. Similarly, on Q26 (does your country intervene in DSB meetings), insiders are much more inclined to agree than those not involved in DS. Finally, insiders are much less supportive of adoption of monetary damages as a remedy.

6. Concluding Remarks

The main takeaway from the stylized facts regarding the use of the DSU and participation in DSB deliberations, as well as the survey response rates is that WTO DS is primarily of significant interest to the major trade powers, more open and richer countries. Most WTO members are missing in action, even when that taking action would have an opportunity close to zero – i.e., filling in a survey that takes about 10 minutes to complete. We interpret this as reflecting limited interest in – and concern about – the continued operation of the AB. We are skeptical that the high survey non-response rate and limited participation in the DSB reflects capacity constraints. More likely is that the limited engagement is reflects small stakes; free riding; and/or perceptions that WTO DS is of limited utility.

The survey results suggest that when it comes to fundamental questions regarding the role, scope, and design of WTO DS procedures there is a virtual consensus across WTO Members and stakeholders (of course, conditional on the self-selection associated with those who responded). There is agreement that the two-stage process that was negotiated in the Uruguay Round is what is needed and that an appeals body is desirable. Although we refrained from asking about specific issues that have been raised by the United States and that are the focus of the Walker process – in order to allow the questionnaire to be filled in by trade officials and stakeholders who are not inside the "DS kitchen" but do deal with the WTO – the survey responses also suggest that the US is not alone in considering that the AB has at times gone beyond its mandate. Moreover, many stakeholders have concerns that go beyond the AB and pertain to WTO DS more broadly, including the first (panel) stage, the preconditions that need to be satisfied in order to participate/use the DSU, and the salience of other dispute resolution processes, both within the WTO (committees; STCs) and outside the WTO (bilateral consultations; use of PTAs).

The data suggest close to consensus on the basic design of the DSU as crafted in the Uruguay Round, but significant polarization in perceptions on the performance of the AB. Although as of October 2019 a total of 88 WTO members (counting the EU as one) had signed on to the proposal to appoint new AB members expeditiously, this leaves 47 WTO members that have not expressed such a view. Most of these countries are small or poor, but there are a few outliers, notably Japan.[24] The differential participation in the MPIA also suggests polarization and differences in perceptions and revealed preferences across the membership: many frequent users of DS did not sign on and it remains to be seen whether they will do so.

It is not the purpose of this paper to propose solutions to the AB deadlock. Responses to our questionnaire do not suggest a solution (respondents were not asked to do so) but is seems clear that there are substantive questions that need to be addressed if the Appellate Body impasse is to be resolved. The survey responses suggest that efforts to do so need to involve greater willingness by WTO Members to identify and discuss substantive concerns about the operation of the system. It bears repetition, that the purpose of this paper is to reveal the preferences of the stakeholders in an effort to clear the air as to who thinks what about the working of the WTO dispute settlement.

Members need to reflect on the current institutional design of DS processes and the operation of the DSU, including the quality of panelists/AB members, the support they are given, and putting in place meaningful performance review procedures. Some of these matters have been the subject of discussion in the long-standing review of the DSU. The state of play in efforts to review and update DS procedures were summarized by Ambassador Coly Seck (Senegal) in June 2019 in a 123-page document (TN/DS/31) providing his overall assessment of the ongoing negotiations on DS reform. The need for consensus has impeded a resolution on the matters raised. Some of the more fundamental issues that emerge from the survey are not even on the table in these long-running negotiations.[25]

As argued elsewhere, internal working practices are a core part of any WTO reform agenda (Hoekman, 2019; Wolfe 2020a,b). When it comes to the DSU, it is also important is to consider whether there is a need to address the factors that underlie the lack of interest by most WTO members in the DSU. Insofar as the majority do not see DS as being useful to them, this reduces the

[24] In DSB meetings Japan has supported the proposal – e.g., the DSB meeting of 28.01.2019 – but Japan has not formally joined the proposal. Instead it has stressed that DSB is tasked with achieving a satisfactory settlement of disputes and urged Members to further discuss this matter in the DSB as well as "other issues with regard to the proper functioning of the dispute settlement mechanism in due course" (WTO JOB/DSB/3, 18 April 2019).
[25] The subjects of focus in these deliberations included (1) Mutually agreed solutions, (2) Third-party rights, (3) Strictly confidential information, (4) Sequencing, (5) Post-retaliation, (6) Transparency and amicus curiae briefs, (7) Timeframes, (8) Remand, (9) Panel composition, (10) Effective compliance, (11) Developing country interests, and (12) Flexibility and Member control. See WTO TN/DS/31.

value of membership and the benefits of a rules-based trading system. In separate work we raise similar concerns about participation in the alternative form of managing conflict in the WTO, by raising a specific trade concern (Wolfe, 2020a). The survey data and the revealed preferences discussed in this paper suggest there is strong support for de-politicized trade dispute settlement. This suggests WTO members should determine whether an appeals function is necessary to attain this objective. Hoekman and Mavroidis (2020a, 2020b) note there are options that require little in the way of reform to the DSU that would allow the system to fulfill its purpose without an AB.

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