

The stalemate concerning the Appellate Body of the WTO: Any way out?

*Giorgio Sacerdoti**

1. *The functioning of the World Trade Organization in 2018-19: From crisis to paralysis?*

The year 2018 has been momentous for the World Trade Organization (WTO), a turning point in the history of the organisation, with the United States (US) turning its back to a 70-year old support of multilateralism in principle and practice.¹ This change has been evidenced by a multiplicity of statements, from tweets by President Trump to official documents, and by a series of actions. The major features of the ‘trade wars’ launched by the US administration on a multiplicity of fronts have been, firstly, the unilateral increase of US import custom duties on steel and aluminium from all sources – invoking the security exception of Article XXI GATT, with the threat of imposition of extra duties on car imports, also to be based on the same exception. Secondly, the introduction of a 10% surcharge on imports from China worth \$250 billion, with a threatened increase to 25% (which materialised in May 2019) should China not be amenable to a bilateral agreement acceptable to the US concerning investments, protection of industrial property and the role of

* Emeritus Professor, Bocconi University, former member (2001-09) and Chairman (2006-07) of the Appellate Body of the WTO. Paper date: 11 December 2019.

¹ For a specific focus on the dispute settlement system see G Sacerdoti, ‘The WTO Dispute Settlement System and the Challenges to Multilateralism: Consolidating a “Common Global Good”’ in D Prévost, I Alexovicova, JH Pohl (eds), *Restoring Trust in Trade: Liber Amicorum in Honour of Peter van den Bossche* (Hart 2018) 87-103. See also G Vidigal, *Westphalia Strikes Back: The 2018 Trade Wars and Threat to the WTO Regime*, Amsterdam Laws School Studies Research Paper No. 2018-31 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259127>.



State-owned-enterprises (matters in part beyond the purview of WTO rules).²

The stated objectives are the protection of US domestic enterprises, ‘bringing back’ manufacturing jobs in the US and rebalancing the US trade deficit in import-export of goods. Major trading partners are induced to (re)negotiate bilateral ‘deals,’ possibly thereby renouncing to previously agreed conditions, under the threat of unilateral limitations of their products’ access to the US market through ‘punitive tariffs,’ irrespective of existing bilateral, regional and multilateral commitments. Trade relations and negotiations are not viewed as a win-win exercise any more, but as a zero-sum-game where the advantages gained by other countries indicate that, due to previous ‘negative’ agreements, the US has suffered losses that must be redressed.³

The US has shown a similar attitude towards its regional agreements in force: the withdrawal from the not-yet-in force TPP, renegotiation of the FTA with Korea, and replacement of NAFTA by a new agreement (USMCA), not yet in force at the end of 2019, reducing previously agreed preferential market access to the US market for Canada and Mexico, under the threat of the US withdrawing from it.⁴

As a consequence of these tariff increases, and of the additional tariffs on exports from the US introduced as a response by the targeted countries, the growth of trade, a traditional driver of GDP growth, has declined from 4.6% in 2017 to 3% in 2018, with a forecast of just 2.6% for

² Commentators have been mostly highly critical of this approach, see for instance A Beattie, ‘WTO suffers collateral damage from Trump and China’ *Financial Times* (21 October 2018) <www.ft.com/content/45c6967c-d143-11e8-a9f2-7574db66bcd5>; and more recently by Id, ‘US bullying approach to trade deals undermines global rule book’, *Financial Times* (4 March 2019) <www.ft.com/content/79997886-3c44-11e9-b72b-2c7f526ca5d0>.

³ The US 2018 Trade Policy Agenda envisages ‘a new era in American trade policy’ (Office of the United States Trade Representative, ‘2018 Trade Policy Agenda and 2017 Annual Report’ (March 2018) 2 <<https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>>). The Agenda places significant importance on US sovereignty and the leverage that the US market offers in trade negotiations, based on five major pillars: supporting US national security; strengthening the US trade laws; negotiating ‘better’ trade deals; reforming the multilateral trading system; and aggressively enforcing US trade laws.

⁴ In the same period the European Union and Japan concluded on 17 July 2018 an Economic Partnership Agreement (EPA) which entered into force on 1 February 2019.



2019.⁵ Uncertainty as to the opening of existing markets and the stability of the world trade regime has led to disruption of international value chains: offshoring and delocalisation is being replaced by reshoring and decoupling.

US criticisms towards the WTO have been wholesale.⁶ Besides its attacks on the functioning of the dispute settlement system (DSS), specifically the Appellate Body (AB), which are covered hereunder in Section 3, the US has addressed its criticisms to specific shortcomings it perceives in the operation of the WTO and to the inadequacy of existing agreements in covering current issues.

The first item relates to non-compliance by many WTO members with various obligations of transparency, such as promptly notifying subsidies, and the lack of remedies and sanctions to enforce these obligations. In this respect, the US and other WTO members have proposed sanctions to members ‘with notification delays’ in the form of suspension of certain participation rights.⁷ As to the second aspect, the US has especially pointed out the shortcomings in the existing discipline on subsidies

⁵ See the Director-General’s annual report to the Trade Policy Review Body of 11 December 2018: ‘Report shows sharp rise in the coverage of trade-restrictive measures from WTO members’, WTO Press Releases No 249, and No 837 of 2 April 2019. Due to the ‘deluge of tariffs’ introduced by President Trump the US average tariffs have increased by 73%, bringing the average US tariffs to 2.3% (previously 1.5%), see *Inside US Trade* (22 March 2019, No 11) <www.insidetrade.com>, based on the President’s Economic Advisers Report for 2018. The growth of unilateral trade restrictive measures has gone on in 2019 while international trade volumes and value have decreased for the first time since the 1950s. See the latest WTO analysis: at <www.wto.org/english/news_e/news19_e/trdev_21nov19_e.htm19_>.

⁶ Under the heading ‘Reforming the Multilateral Trading System, the summary of the 2018 Trade Policy Agenda recites: ‘Instead of serving as a negotiating forum where countries can develop new and better rules, it has sometimes been dominated by a dispute settlement system where activist “judges” try to impose their own policy preferences on Member States. Instead of constraining market distorting countries like China, the WTO has in some cases given them an unfair advantage over the United States and other market-based economies. Instead of promoting more efficient markets, the WTO has been used by some Members as a bulwark in defense of market access barriers, dumping, subsidies, and other market distorting practices. The United States will not allow the WTO – or any other multilateral organization – to prevent us from taking actions that are essential to the economic well-being of the American people’ (Office of the United States Trade Representative (n 3) 2).

⁷ Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements: Communication from Argentina, Costa Rica, the European Union, Japan, and the United States (2018), JOB/GC/204, JOB/CTG/14; and



in dealing with overcapacity in the steel industry in China and as to the rules of conduct for State-owned-enterprises. The US has also attacked the current practice of self-designation of WTO members as developing countries, entitled as such to a special and differential treatment in various respects. The US has proposed replacing this practice with objective criteria which would exclude any important participant to world trade from this status.⁸ No formal negotiations however have been triggered yet by these mostly informal proposals.

On the other hand, in a number of official statements, within and outside the WTO, the EU and the generality of the other members have restated their confidence in multilateralism as a method and a framework, and in the WTO as a forum of negotiation, implementation and for dispute solving. On 24-25 October 2018, a meeting of a number of WTO members (not including the US and China) was convened in Ottawa by the Canadian Government. In the final communiqué the participants (Australia, Brazil, Canada, the EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland) reaffirmed their ‘clear and strong support for the rules-based multilateral trading system and stress[ed] the indispensable role that the WTO plays in facilitating and safeguarding trade,’ including ‘the dispute settlement system as a central pillar of the WTO.’ The participants undertook to have ‘their officials continue to engage in discussions to advance ideas to safeguard and strengthen the dispute settlement system,’ ‘to reinvigorate the negotiating function of the WTO,’ and to ‘strengthen the monitoring and transparency of members’ trade policies.’⁹

Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements: Communication from the United States (2017) JOB/GC/148, JOB/CTG/10.

⁸ The criteria should be: to be a member of the Organisation for Economic Co-operation and Development or the G-20, to be designated as ‘high income’ by the World Bank, or to account for at least 0.5% of world merchandise trade. As ‘a concession to the US,’ Brazil, Singapore, Taiwan and Korea have declared in 2019 that they agree not to seek special and differential treatment in future negotiations: *Inside US Trade* (1 November 2019) 20 <www.insidetrade.com>.

⁹ ‘Joint Communiqué of the Ottawa Ministerial on WTO Reform’ (25 October 2018) <www.canada.ca/en/global-affairs/news/2018/10/joint-communiqué-of-the-ottawa-ministerial-on-wto-reform.html>. Previously Canada had circulated a Discussion paper on ‘Strengthening and modernizing the WTO’ (21 September 2018) <www.canada.ca/en/global-affairs/news/2019/05/ottawa-group-and-wto-reform.html>.



The EU has accepted to engage in bilateral negotiations with the US aimed at the reduction of tariffs on industrial goods, as agreed in principle in a meeting between the President of the Commission Claude Juncker and President Trump in July 2018, also as a way to avert the Damocle's sword of US extra tariffs on cars. In parallel, the EU has tabled a 'concept paper' with proposals for the 'modernisation' of the WTO, most of which would not require amendments of the WTO Agreements.¹⁰ These proposals focus on 'updating the rule books' on international trade to capture today's global economy (including resorting to plurilateral agreements); strengthening the monitoring role of the WTO; and overcoming the imminent deadlock on the WTO DSS. The latter have been tabled in detailed form to the WTO General Council towards the end of 2018, as reported hereunder.

Towards the end of 2019 the WTO appears to be on the verge of paralysis, risking irrelevance and to be sidestepped by bilateral agreements that are not compatible with the principles of multilateralism. For the time being it appears unlikely that the WTO will be able to regain soon its institutional role as permanent negotiation forum, implementation watchdog and effective adjudicator.

2. The dispute settlement system in 2018-19: Disputes before the panels

Notwithstanding the looming blockage of the AB and the wave of restrictive measures referred to above, or rather, also due to the latter, 2018 has been a very busy year for the DSS especially at the panel level and the trend has gone on in 2019.¹¹

In 2018 the DSB established in respect of distinct disputes 33 panels (the highest number ever), nine of which concerning the US steel and aluminium tariffs.¹² During the same period the DSB adopted a number

¹⁰ Press Release (18 September 2018) <http://europa.eu/rapid/press-release_IP-18-5786_en.htm>.

¹¹ As of 25 November 2018, 61 panel proceedings are pending: 27 panels established but not composed and 34 panels composed. For the full list of pending cases see: <www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm>.

¹² This included five so-called compliance panels under Article 21(5) DSU (DS 456, 371, 436, 316, 475), evidencing the number of protracted controversies on full compliance.



of panel reports, including several that had not been appealed (DS 427 (Article 21(5)), 467, 480, 488 and 491) and others together with the corresponding appellate reports (DS 479, 486, 490, 496) in seven proceedings. At the beginning of December 2019 there are 13 appeals pending before the AB (11 cases).

Some of the panel reports adopted in 2018 concern novel issues of great significance: this is notably the case of the Australian plain packaging cases, which had been pending since 2012, where the panel rejected all the challenges under TRIPS brought against Australia by Honduras, the Dominican Republic, Cuba and Indonesia (Ukraine had withdrawn its claim in 2016).¹³ The panel report has been appealed by the Dominican Republic and Honduras.

As to new panel proceedings, the cases where the defence of the security exception of Article XXI(b)(iii) GATT has been raised stand out. The first case (DS 512) involving such defence, between Ukraine and Russia concerning restrictions to transit imposed by the latter, had been pending before a panel since February 2017 and went on through 2018. The panel circulated its 'landmark' report on 5 April 2019.¹⁴ The panel, chaired by former AB member Georges Abi-Saab, found that the defence of Article XXI is 'self-judging' only in part, contrary to the position taken by Russia, supported by the US. More specifically, it concluded that the requirement of subparagraph (iii) that the measure at issue be 'taken in time of war or other emergency in international relations' is capable of objective determination by a panel.

The defence of Article XXI (by the US) is also at the heart of the cases against the additional duties imposed by the US on steel and aluminium imports brought separately by China, India, the EU, Canada, Mexico,

¹³ See T Voon, 'Third Strike: The WTO Panel reports Uphold Australia's Tobacco Plain Packaging Scheme' (2019) 20 *The Journal of World Investment and Trade* 146-84; E-U Petersmann, 'How to reconcile human rights, trade law, intellectual property, investment and health law? WTO dispute settlement panel upholds Australia's plain packaging regulations of tobacco products', EUI Working Paper – Law 2018/19, <<https://cadmus.eui.eu/handle/1814/60064>>. Not only may these panel proceedings have been the longest in duration in the history of the WTO, but the report may also be the biggest ever (884 pages).

¹⁴ The panel (whose report was not appealed) held that the existence of a situation 'of war or other emergency in international relations' in art XXI(b)(iii) is capable of, and subject to, an objective evaluation (ie, it is not a self-judging clause) and that it had jurisdiction in the matter, finding for Russia based on the facts of the case.



Norway, Russia, Switzerland and Turkey (DS 544, 547, 548, 550, 551, 552, 554, 556 and 564, respectively). Some of these WTO members have adopted trade restrictions against the US as countermeasures under Article 8 of the Safeguards Agreement, having considered the US measures to be in reality disguised safeguards.¹⁵ The US has in turn challenged these countermeasures as unjustified, claiming that its own measures are bona fide security-based, starting proceedings against Canada, China, the EU, Mexico and Turkey (DS 557, 558, 559, 560 and 561 respectively).¹⁶ The security exception of Article XXI has also been raised as a defence by the UAE against the panel requests of Qatar challenging the trade restrictive measures adopted by the UAE in connection with a political dispute between Qatar and neighbouring countries (DS 526).¹⁷

Another notable case, subject-wise, initiated in 2018 is that brought by the US against China, challenging the protection of intellectual property rights in China under the TRIPS (DS 542).¹⁸ The imposition of additional custom duties by the US against Chinese exports as a response to certain acts, policies and practices of China related to technology transfers, intellectual property and investment requirements, allegedly in breach of WTO agreements, prompted China to request the establishment of a panel in December 2018 (DS 543), besides leading China to impose in response additional duties on \$60-billion-worth of US exports to China.

In 2019, also noteworthy has been the suspension for one year, *ex* Article 12(12) DSU, of the panel's work in the case *EU–Price comparison methodology* (DS 516), concerning the (non)-market economy status of China from the end of 2016, pursuant to a request of China as respondent.

¹⁵ Since the US objected to the establishment of a single panel (art 9(1) DSU) to hear these disputes, the Director-General has composed separate panels but with the same panelists under art 9(3).

¹⁶ In May 2019, Canada and Mexico have withdrawn their requests following the undertaking by the US, within the context of the 'new NAFTA' (USMCA) negotiations, not to impose the extra-duties (and so has the US in respect of its challenges against Canada and Mexico countermeasures).

¹⁷ Qatar has also challenged similar restrictions by Saudi Arabia, where this latter justifies its measures on the basis of the security exception of art 73 TRIPS (DS 528).

¹⁸ A similar challenge against the same Chinese provisions has been brought by the European Union in DS 549, requests for consultations of 1 June 2018.



Even before the recent wave of panel proceedings due to the US restrictive trade measures and the countermeasures adopted by some of the countries affected, panel proceedings were taking much longer than the 270 days envisaged by the DSU.¹⁹ There have been first of all, as in the recent past, delays in the actual composition of the panel, that is between formal establishment of a panel by the DSB under Article 6 DSU and the appointment of panelists under Article 8. This has been due both to the time required to have the parties accept the names proposed by the DG and by a lack of available experienced legal staff in the secretariat to assist the panels, in addition to the time required by panels to perform their task.²⁰ Moreover, the parties themselves have asked sometimes for suspension of the proceedings in view of attempts to negotiate a friendly settlement. This has happened notably, but apparently without success, after the interim report had been issued to the parties in accordance with Article 15 DSU.²¹

A general comment on this increase of the number of panel proceedings, also with regard to the subject matter of the disputes, is that the DSS was surely not meant to cope with so many acrimonious and sensitive disputes involving such a high number of major trading nations.²² This

¹⁹ Considering the situation existing before the recent wave of cases, it has been suggested that the delays were due essentially to the complexity of the issues raised in the disputes and the scarcity of dedicated resources at the WTO and not to the number of cases which had not increased in recent years, see J Pauwelyn, W Zhang, 'Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload' (2018) 21(3) *J Intl Economic L* 461-87.

²⁰ Thus, in DS 516, the panel, established on 3 April 2017 and composed on 10 July 2017, informed the DSB on 27 November 2018 that it expected to issue to the parties its report in the second quarter of 2019, instead than in second half of 2018 as previously announced (WT/DS516/12). On 14 June 2019, the panel informed the DSB of its decision to suspend its work.

²¹ See for instance the postponement of the circulation of the panel report until 12 November 2018 after it had been issued to the parties on 12 March 2018 at the request of the Philippines (WT/DS371/25). Similarly, at the request of both parties 'on several occasions,' circulation of the panel report in DS 505, issued on 15 December 2017 to the parties, was postponed to 5 July 2018.

²² Another indication of the existing tensions in the operation of the DSS is the US challenge to China's and other countries' practice to include private lawyers in their delegation in the consultation phase, see DSB meeting of 4 December 2018, under the agenda item (proposed by China) 'Right of a Member to decide the composition of its delegation for consultations', WT/DSB/M/422, s 2.



situation is not an indication of a healthy dispute settlement system.²³ On the contrary, it hints at a looming crisis of the system, and manifests a widespread disrespect of substantive and procedural rules, such as resort to unilateral measures and countermeasures without following the DSU procedures first.²⁴

3. *The blocking of the Appellate Body by the United States*

The critical attitude of the US towards the AB, accused of ‘judicial activism,’ ‘overreaching’ and improperly ‘filling gaps’ in the WTO agreements (whatever these terms may mean), sharpened in 2017 with the intentional paralysis by the Trump administration of the selection process to fill vacancies in the AB, irrespective of the favourable outcome for the US of most disputes.²⁵ The situation has worsened in 2018, starting with

²³ In respect of the challenges against its steel and aluminium additional duties, the US has not only maintained that the exception is self-judging but, even more, that ‘it would undermine the legitimacy of the WTO’s dispute settlement system if a WTO panel were to undertake review of a member invocation of Article XXI GATT and a Member’s assessment of its own essential security interests ... and even *the viability of the WTO as a whole*’ (emphasis added), see eg the US statements at the DSB meetings of 4 December 2018, WT/DSB/M/422, paras 2.3 and 5.5.

²⁴ For a critical legal evaluation of both the US measures (‘black lies’) and of the countermeasures by targeted countries, labelled as a response of dubious legality under the WTO (‘white lies’), see JJ Weiler, ‘Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System’ EJIL:Talk! (25 July 2018) <www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>.

²⁵ In 2017-18, the US has won a series of cases in a row before panels and the AB in high profile disputes, both as claimant and respondent, notably against China, India, Mexico, Indonesia. President Trump has gone so far as to claim that the US is winning more WTO cases because of its administration’s ‘America First’ approach to trade, see ‘Trump claims U.S. winning more WTO cases thanks to his trade politics’ (*Inside US Trade*, 29 March 2019) <<https://insidetrade.com/daily-news/trump-claims-us-winning-more-wto-cases-thanks-his-trade-policies>>, citing an interview of President Trump on 21 March 2019 where he also declared: ‘If they don’t treat us fairly, we get out.’ See also, *ibid*, the editorial comment: ‘In fact, the U.S. has won the vast majority of cases it has brought at the WTO since its inception in 1995 – 86% of them according to the Council of Economic Advisers 2018 economic report, or 91% according to a Cato Institute count. The U.S. also loses at a lower rate than other members when cases are brought against it.’

the opposition of the US to the renewal of AB member Shree Baboo Chekitan Servansing for a second term in September 2018,²⁶ and the opposition to any renewal thereafter. This has left the AB with a composition of three members as of November 2019, the minimum necessary to form a division able to decide on appeals in accordance with Article 17(1) DSU.²⁷

Notwithstanding its isolation in this attitude and the widespread opposition from other members to this linking of criticisms to the obstruction of the normal operation of the dispute settlement system, the US has not retreated from its blocking. One would have rather expected that it would have proposed DSU amendments to resolve the underlying perceived shortcoming of the current text and its application. At almost each DSB meeting in 2018 the US has made long statements complaining of various practices of the AB that would go beyond its mandate, followed by the widespread rejection of all such criticisms by other delegates taking the floor.²⁸ There has been a *crescendo* of criticisms by the country, that include:

- applying Rule 15 of the Working Procedures – though enacted by the AB at the time of its establishment in full conformity with Article 17(9) DSU – which provides that a member of the AB who has concluded his or her mandate can go on completing a case (a provision

²⁶ The US did not even direct any criticism to his service, as had been instead the case when the US opposed the renewal of Seung Wha Chang in 2016.

²⁷ Currently the work of the Appellate Body has obviously slowed down, although it has benefited from outgoing members completing cases in accordance with Rule 15 of its Working Procedures. To give an example of a recurring feature, on 23 October 2018 in a typical communication the Chair of the AB informed the Chair of the DSB in DS 493 (*Ukraine – Anti-dumping Measures on Ammonium Nitrate from Russia*) that the AB would be unable to circulate its report within 90 days due ‘to the size of the Panel record and the complex issues appealed ... the backlog of appeals pending ... the overlap in the composition of divisions resulting in part from the reduced number of Appellate Body Members It will not be possible for the Division to focus on the consideration of this appeal and for it to be fully staffed for some time’ (WT/DS493/7).

²⁸ The US statements are available on the USTR website and in lengthy resumé in the Minutes of the DSB meetings of 28 February 2018 (issue of Rule 15); 22 June 2018 (90-day deadline), 27 August (fact-finding by the AB as to the meaning of domestic law); 29 October 2018 (issues not necessary to resolve a dispute), 18 December 2018 (absence of precedential weight of panel and AB reports), followed by the responses of a number of other WTO members at the same meeting or subsequently (respectively WT/DSB/M 409, 414, 417, 420, 423).



- that had been applied in more than 20 cases since 1995 without raising any objection);²⁹
- proceedings often lasting more than the 90-day time limit stipulated in Article 17(5) DSU (a duration rendered inevitable by the complexity of most cases, not to speak of the current reduced membership of the AB);³⁰
 - the AB deciding issues that, although appealed, are not necessary to resolve a case, which the US labels as ‘advisory opinions’ that the AB is not empowered to render;³¹
 - the AB reviewing the interpretation of domestic measures by panels which would contrast with the limitation of its competence to ‘issues of law’ (Article 17(6) DSB);
 - the AB allegedly treating its previous reports as binding precedents, while only the WTO agreements constitute applicable law and exclusive authority to adopt binding interpretations is reserved to the WTO members under Article IX(2) of the WTO Agreement, as repeatedly acknowledged by the AB itself;³²

²⁹ See AB, ‘Background Note on Rule 15 of the Working Procedures for Appellate Body Review’, Communication of 24 November 2017, republished in AB, *Annual Report for 2017*, 78.

³⁰ It has been pointed out by Mexico at the DSB of 22 June 2018 that while the AB since 2011 has disposed of cases in an average of 112 days (including the time needed for translation of the reports from English in the other two official languages of the WTO by the secretariat’s staff), panels have taken in average 511 days to complete their proceedings, against the DSU indication of 270 days (not to speak of the time lag between establishment of a panel under art 6(1) DSU and its composition under art 8 DSU). See also the speech by the AB Chair Ujal Singh Bathia on 8 June 2017, AB, *Annual Report* (n 30) 73.

³¹ The US has also labelled these parts of AB reports as *obiter dicta*. In addressing all legal issues raised in appeal the AB has however followed the prescription of art 17(12) DSU that the AB ‘shall address each of the issues raised ... during the appellate proceedings.’ As to the limited applicability of the concept of *obiter dicta* in the WTO see H Gao, ‘*Dictum on Dicta: Obiter Dicta in WTO Dispute*’ (2018) 17 *World Trade Rev* 510 ff, followed by a ‘Comment’ by the present author (535-40).

³² This is a surprising criticism coming from a member which is a frequent user of the DSS and would be expected to praise stability, consistency and predictability of the case law, against erratic decisions depending upon who the adjudicators are, which are the parties, and which is the subject matter (a criticism is addressed on these grounds to arbitration of investment disputes). At the DSB meeting of 18 December 2018, in a statement summarised in 14 pages followed by 10 pages of responses by 12 other WTO members, the US has insisted on its view that the AB would have enacted a ‘doctrine of precedent.’ The US has expounded no less than six distinct errors that the AB would

- having set too high a standard for the review by competent authorities of an importing country of the existence of a subsidisation by an exporting country, thus rendering this task excessively demanding for most WTO members.

If one looks objectively at these complaints – beyond the harsh words addressed by the US to the AB and its work³³ – it is more than dubious that those practices are in any way in conflict with WTO provisions.³⁴ The fact that other WTO members – possibly all, after having discounted diplomatic language’s courtesy – do not share the concerns of the US is an indication, according to more than one commentator, that the US is trying to charge the adjudicators of situations which are rather due to the imprecision of some texts (or the need to apply them flexibly, such as in respect of the 90-days rule), and of the disappointment of some quarters of the US Trade Representative in finding that certain trade remedies provisions agreed in the Uruguay Round have not been given the meaning that the US (alone) believed they had (notably, zeroing in antidumping).³⁵ Finally, it must be observed that the criticism by the US concerns marginal aspects of the functioning of the AB and thus do not justify on

have made in laying down, in the US view, an obligation for panels, ‘absent cogent reasons’ (a concept against which the US directs there most of its criticism), to treat prior interpretations in AB reports as binding, that is as precedent in a common law sense.

³³ One cannot be but astonished in reading in the US statement at the DSB of 18 December 2018 (WT/DS/M/423) opinions such as the AB ‘exceeding its authority and straying from the role agreed for it by the WTO Members;’ that the AB had ‘consistently engaged in review of panel fact-finding including the meaning of a Member’s municipal law, despite lacking the authority to do so;’ that the AB’s ‘issuing advisory opinions by making findings that were not necessary to resolve a dispute was contrary to the DSU;’ the AB’s ‘misguided insistence’ that its reports have to serve as precedents ‘absent cogent reasons;’ that the AB ‘had felt free to depart from the clear rules Members had agreed to;’ that the AB’s approach ‘was fundamentally flawed and at odds with the text of the DSU and WTO Agreement;’ the AB’s ‘misunderstanding (or misstatement);’ the AB’s ‘inappropriate and incomplete analogies to other international adjudicatory fora;’ the ‘flawed interpretation’ by the AB; that the AB’s approach has ‘usurped authority expressly reserved to Members.’

³⁴ Thus, the critical statements of the US at the DSB meeting of 2 August 2018 have been rebuffed by long statements of Brazil and China at the DSB meeting of 26 September 2018.

³⁵ For a vivid journalistic account see P Blustein, ‘China Inc. in the WTO Dock: Tales from a System under Fire’, CIGI Paper No 157, 20 December 2017, <www.cigionline.org/publications/china-inc-wto-dock-tales-system-under-fire>.



any account paralysing its functioning, possibly its very existence, to the detriment of the whole membership. It would be otherwise if the AB and its members had been accused of what would have been indeed serious charges, such as not having acted in an independent and impartial way, not having respected due process principles, or having disregarded the international law principles to be applied in deciding cases (a criticism that has never been heard). WTO members could easily address the above alleged shortcomings in the operation of the system, as far as considered desirable – as some members have indeed proposed. Some of the changes involved would not even require formal amendments of any existing WTO agreement.

The US, however, has gone on undeterred to reject, at each DSB meeting in 2018 and 2019, the repeated proposals by more than 100 WTO members to initiate the selection process to fill the vacancies at the AB.³⁶

This attitude has prompted several commentators and the press to speculate that the US, having detected an instance in decision-making at the DSB which is not subject to the reverse consensus principle that in other respects prevents vetoing the functioning of the system, uses it to pursue its real aim, that of undermining the multilateral trading system

³⁶ Since the end of 2017 to September 2018 the Appellate Body has been operating with four regular members out of seven, due to the non-replacement of Ricardo Ramirez, Peter Van den Bossche and Hyun Chon Kim. The latter, who had replaced Seung Wha Chang (also of Korea) when the US had blocked his reappointment for a second term in 2016, resigned abruptly, effective 31 July 2017, having been appointed foreign trade minister of Korea. Should the paralysis go on, at the end of 2019 two out of three remaining AB members will complete their second term, so that the WTO would be left *de facto* without an AB. The consequence would be that appeals against a panel report would be stayed indefinitely and the panel report could not be adopted. The losing party would thereby be able to avoid any determination of breach and any obligation to comply. A 'Plan B' to make the finalisation of disputes possible among the other members might consist in resorting to arbitration by agreement of the disputing parties, as allowed under art 25 DSU, see *infra* s 6; see also J Bacchus, 'Saving the WTO's Appeals Process' CATO Blog (19 October 2018) <www.cato.org/blog/saving-wtos-appeals-process>, and CD Creamer, 'From the WTO's Crown Jewel to its Crown of Thorns' (2019) 113 AJIL Unbound 51-55.



by debilitating and blocking its dispute settlement mechanism.³⁷ US officials have candidly admitted as much.³⁸ What transpires is a desire to get rid of the rule-based operation of the WTO, reverting to the power-based system of the GATT, whose panel reports could be blocked by the opposition of the losing party. At a minimum the US seems to aim at a new ‘debilitated’ AB whose autonomy in interpreting and applying the WTO agreements would be curtailed.

4. *Proposals for improving the functioning of the dispute settlement system by other members*

The persistence of the US in this blocking attitude has prompted certain WTO members to make proposals to address at least in part the ‘concerns’ of the US.³⁹ After Honduras,⁴⁰ in December 2018 the EU, jointly with two partially different groups of countries, submitted to the General Council two proposals that derive from the part dealing with dispute settlement of its ‘concept paper’ on the modernisation of the WTO, mentioned above.

The first proposal is meant to resolve the impasse on the filling of vacancies at the AB by addressing some of the concerns raised by the US,

³⁷ For a radical critique in legal terms of the US attitude see E-U Petersmann, ‘How should the EU and other WTO members react to their WTO governance and WTO Appellate Body crises?’ (2019) 18 *World Trade Review*, and Id, ‘The 2018 American and Chinese Trade Wars risk undermining the world trading system and constitutional democracies’, EUI Working Paper – Law 2018/17, <https://cadmus.eui.eu/bitstream/handle/1814/59444/LAW_2018_17.pdf>. Perhaps the most outspoken critic of the US position has been the first US member of the AB, J Bacchus, ‘Might Unmakes Right. The American Assault on the Rule of Law in World Trade’, CIGI Paper No 173, 18 May 2018, <www.cigionline.org/sites/default/files/documents/Paper%20no.173.pdf>.

³⁸ R Lighthizer, ‘Appellate Body block the only way to ensure reform’ (*Inside US Trade*, 12 March 2019) <<https://insidetrade.com/daily-news/lighthizer-appellate-body-blocks-only-way-ensure-reforms>>, quoting the USTR as saying ‘If you are not willing to be bold and use the only leverage you have with the WTO, which is to say we won’t approve the appointment of Appellate Body members without reform, I don’t know any other way to do it.’

³⁹ Independent experts have also addressed the matter: T Payosova, GC Hufbauer, J Schott, ‘The Dispute Settlement Crisis in the WTO: Causes and Cures’, Peterson Institute for International Economics Policy Brief 18-5, March 2018, <www.piie.com/system/files/documents/pb18-5.pdf>.

⁴⁰ DSB of 29 October 2018, item 21.



the aim being that of 'improving the DSU' while 'preserving the essential features of the system and of its Appellate Body.'⁴¹ This Communication, tabled by the EU together with a wide range of diverse WTO members (China, Canada, India, Norway, New Zealand, Switzerland, Australia, Korea, Iceland, Singapore and Mexico), includes proposals as to 'Transitional rules for outgoing AB members,' 'The meaning of municipal law as an issue of fact,' 'Findings unnecessary for the resolution of the dispute' and the 'The issue of precedent.' The document concludes by proposing that in view of the urgency of the matter and so as to allow for the appointments to take place swiftly, these amendments be adopted by the General Council as soon as possible, pursuant to Articles IV(2) and X(8) of the Marrakesh Agreement (therefore by consensus).

The second Communication, tabled by the EU, China and India, proposes 'Additional Amendments' to the DSU, to include one single longer term of office (six to eight years) for AB members with a view to reinforce their independence, increasing their number from seven to nine with full time appointment. Transitional arrangements for outgoing members would enable them to decide cases as long as the hearing takes place within their term in office. There would be an automatic timely launching of the AB selection process to replace outgoing AB members when vacancies are anticipated or arise.⁴² These are clearly more far-reaching proposals on which consensus is currently problematic. Informal negotiations have started within the General Council in January 2019 on the first set of proposals.⁴³

5. Ambassador Walker's proposed General Council Decision of 15 October 2019

The year 2019 has not brought to a solution. At the beginning of 2019, the General Council (GC) has 'appointed' New Zealand's Ambassador David Walker as a 'Facilitator' to try to find a solution between the

⁴¹ Communication to the General Council, WT/GC/W/752 of 26 November 2018.

⁴² Communication to the General Council, WT/GC/W/753 of 26 November 2018.

⁴³ The outlook, however, is not encouraging: at the General Council meeting of 12-13 December 2018, the US ambassador stated that the proposals submitted by the European Union and other members failed to address US concerns. They would rather 'endorse the very practice the US has repeatedly complained of.'

US requests and the other members' proposals. Indeed, following extensive consultations, on 15 October 2019 Ambassador Walker has come forward with a Report to the GC proposing a 'Draft GC Decision on Functioning of the Appellate Body.'⁴⁴ This text, which is officially confidential but is circulating widely, addresses the following issues:

- transitional rules for outgoing AB members (who could complete a case only if the hearing has taken place within their term);
- 90-day deadline (to be extended only with the consent of the litigants or in case of *force majeure*);
- municipal law (to be considered as an issue of fact not reviewable on appeal);
- 'advisory opinions' (the AB shall not address issues not raised by the parties or not necessary to resolve the dispute);
- precedent (dispute settlement proceedings do not create precedent, and previous reports should be taken into account to the extent they are relevant in a subsequent dispute);
- 'overreach' (panels and AB cannot add or diminish WTO members rights as stipulated in Articles 3(2) and 19(2) DSU; panels and the AB shall interpret the Anti-Dumping Agreement in accordance with its Article 17(6)(ii));

Finally, the draft decision calls for a regular dialogue through ad hoc meetings to be held at least once a year, between WTO members and the AB, though not to discuss ongoing disputes.

These points clearly deal with the major 'concerns' raised by the US, trying to address them in a constructive way, taking into account proposals tabled by other members. The adoption of the proposal 'should be accompanied by an instruction from the GC to the DSB to launch the selection process to fill vacant positions' in the AB. At the same time the Report recognises that it is now too late to avoid a 'technical dip' on 11 December 2019, that is an interruption of the operation of the AB, except

⁴⁴ General Council, 'Agenda item 4 – Informal process on matters related to the functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)', 15 October 2019, JOB/GC/222.



(possibly and hopefully) for the completion of the 12 or so appeals pending.⁴⁵

The US has however immediately questioned the usefulness of the proposed solutions, doubting that, by themselves, they would ensure that the AB will stick to these interpretations or guidance, as we might call them.⁴⁶

I conclude recalling that also academia has engaged in the issue.⁴⁷ I would like to point out my own proposal (appearing here as an Annex), published in mid-October 2019 in the *International Economic Law and Policy Blog* (but circulating among ‘key actors’ since July 2019) for a Decision of the GC acting under Article IX(2) of the WTO Agreement, that is, in the form of an ‘Authoritative Interpretation’ which as such would be binding on WTO members, bodies, panels and the AB.⁴⁸

6. *The post-December 2019 outlook for the Appellate Body: Is Article 25 appeal arbitration a way forward?*

On 11 December 2019, the AB has been left with just one member, making for it impossible to deal with new appeals. Notwithstanding the urgency of the matter, stressed by several WTO members at the DSB meeting of 22 November, no solution has emerged. There are also doubts whether the AB would be able and willing under Rule 15 to go on examining the 13 pending appeals for another year. At the abovementioned meeting, the proposal was discussed to have the DSB invite the AB to go on dealing with pending appeals, but no decision was made. Indeed, according to press reports the AB members – not without internal quarrelling and an unprecedented attack by Thomas Graham (the US AB member who concluded his second and final term on 10 December) against

⁴⁵ *ibid* paras 1.23 and 1.28.

⁴⁶ See *Inside US Trade* (18 October 2019) <www.insidetrade.com>.

⁴⁷ See the paper by G Vidigal, ‘Addressing the Appellate Body Crisis: A Plurilateral Solution?’ (2019), Amsterdam Law School Legal Studies Research Paper No 2019-14, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359555##>.

⁴⁸ For the text of the proposal and comments thereto, see G Sacerdoti, ‘Guest Post: A consensual “Quick-Fix” for the WTO Appellate Body is possible if there is the will!’ (*International Economic Law and Policy Blog*, 17 October 2019) <<https://ielp.worldtradelaw.net/2019/10/guest-post-a-consensual-quick-fix-for-the-wto-appellate-body-is-possible-if-there-is-the-will.html>>.



the secretary of the AB, Werner Zdouc – were in agreement only to complete, at most, just the three appeals cases in which the hearing had already taken place, thus leaving the other ten pending appeals (as of early December) in a limbo.⁴⁹ A non-happy end after a glaring successful story of resolving disputes stretching over almost a quarter of a century.

The WTO is now left without a fundamental leg. It must be hoped that most members will go on respecting the rules even if such respect will not be fully ensured by the DSS anymore. The result might be a return to a GATT-type of DSS, with *de facto* veto by the losing party in sensitive cases. Whether such situation would be temporary or not, it cannot be said at this point.⁵⁰

In order to by-pass the US blockage ('stranglehold') of the AB and maintain appellate review for the rest of the membership, the EU has proposed to resort, as an interim solution, to the alternative of arbitration as allowed by Article 25 DSU. Indeed, it has submitted a detailed text of a model agreement, which interested WTO members could subscribe on a bilateral or plurilateral basis, preferably irrespective of the existence of a dispute or when a dispute arises before the start of panel proceedings. For the time being only Canada and Norway have agreed on such idea.⁵¹

The proposal represents an effective way out to circumvent the US blockage, but has some unavoidable shortcomings, such as the following ones:

- the reports of these 'ad hoc' arbitral panels would not become part of a consistent body of case law due to the lack of an institutional position in the system such as that of the AB;

⁴⁹ See B Baschuk, 'WTO Infighting Grows as Appellate Panel Nears Disfunction' *Bloomberg* (3 December 2019) <www.bloomberg.com/news/articles/2019-12-03/wto-infighting-escalates-as-appellate-panel-nears-disfunction>.

⁵⁰ For an analysis see J Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22(3) *J Int'l Economic L* 297-321.

⁵¹ See the 'Joint Statement by the EU and Canada on Interim Appeal Arbitration Arrangement', 25 July 2019, <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2053&title=Joint-Statement-by-the-European-Union-and-Canada-on-an-Interim-Appeal-Arbitration-Arrangement>> (the arrangement is attached), as well as the Arrangement between the EU and Norway, 21 October 2019, <https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf>.



- it does not appear that many countries are eager to renounce *ex ante* to the possibility of blocking the enforcement of a negative panel report by filing an appeal in the void;⁵²
- if on the contrary the proposal were largely adopted in the practice, what was proposed as an interim solution could well become a permanent second-best alternative to institutional appellate review by the AB;
- finally, and in any case, this would allow the US to enjoy a unique status at the WTO: to be on the one hand a member of the WTO, bound by its rules and enjoying all rights, but on the other hand not to be subject to the DSS that ensures respect of these rights and obligations.

ANNEX

Project of a GENERAL COUNCIL'S 'INTERPRETATION' OF CERTAIN DSU PROVISIONS UNDER ARTICLE IX(2) OF THE WTO AGREEMENT

The GENERAL COUNCIL

- *Mindful* of its responsibilities under the Marrakesh Agreement Establishing the World Trade Organization [the WTO Agreement]
- *Acknowledging* the importance of the WTO dispute settlement system for the security and predictability of the multilateral trading system in the interest of all WTO Members
- *Recognizing* that after more than 20 years of successful operation reforms are necessary in order to enable the dispute settlement system to go on

⁵² Of course, the US could not reciprocally obtain a final report adopted by the DSB in case it initiated a dispute and won at the panel stage, should the respondent appeal the panel's report 'in the void.' The current US administration seems however to rely more on the threat of unilateral measures in order to enforce its rights and interests.



performing its functions in accordance with the provisions agreed in the Uruguay Round Agreement

- *Noting* the concerns expressed by some Members in this respect and the various proposals tabled by a number of WTO Members, individually and jointly, to address them

- *Concerned* that the protracted lack of consensus among WTO Members as to the filling of vacancies on the Appellate Body and the consequent looming inability of same to operate may deprive parties to a dispute of the right to appeal panel reports, paralyze the operation in accordance with the rules of the DSU of the dispute settlement function, prevent the prompt settlement of disputes, and compliance by WTO Members with recommendations or rulings of the DSB which is essential in order to ensure effective resolution of disputes to the benefit of all Members [Article 21(1) DSU]

- *Determined* to exercise its responsibilities and powers to resolve as a matter of urgency the above situation

- *Being aware* that under Article IV(2) and IX(2) of the WTO Agreement in the intervals between meetings of the Ministerial Conference it has the exclusive authority to adopt interpretations of the WTO Agreement and of the Multilateral Trade Agreements

- *Considering* that the adoption of an appropriate authoritative interpretation of the relevant provisions of the DSU is capable of resolving the most pressing difficulties that are currently and in the near future preventing the dispute settlement system from carrying out its functions, without prejudice for a more extensive review of relevant dispute settlement provisions of the DSU in conformity with the Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU review]

- *Mindful* of the WTO practice and requirements for decision-making by consensus [Article IX(1) and footnote 3, Article X(3) of the WTO Agreement]

ADOPTS

by consensus the following authoritative interpretation of the DSU provisions referred to hereinafter, to enter into force and become applicable as soon as the DSB shall have filled all vacancies at the Appellate Body in accordance with Article 17(1)(2) DSU

1. *Expiration of the term in office of AB members – Article 17(1) DSU*



The provision of Article 17(2) DSU that Appellate Body members serve for a four-year term shall be interpreted as not preventing an Appellate Body member, whose term is expiring while serving on a case, from completing its service in that case until the issuing of the Appellate Body report in such case, provided that the hearing in that case is scheduled to take place before the date of the expiration of that Appellate Body member term in office.

2. *90 days duration of appellate proceedings – Article 17(5) DSU. Confidentiality of Appellate Body proceedings – Article 17(10) DSU*

In order to strive to meet the deadline of 90 days provided in the last sentence of Article 17(5) DSU, notwithstanding the increase in the number of the WTO Members and the number and complexity of panel reports being appealed as compared to the situation existing and envisaged at the time of the drafting of the DSU, Article 17(10) DSU on confidentiality of appellate proceedings shall be interpreted as not preventing the time table of any appeal, to be drafted by the Appellate Body in consultation with the parties thereof, being made public through the Appellate Body Secretariat to the DSB.

When concomitant, partly simultaneous or successive appeals make it impossible for the Appellate Body to issue the relevant reports within 90 days, the time table of such appeals, to be drafted by the Appellate Body in consultation with the parties thereof, shall strive to minimize any unavoidable delay, and an appropriate explanation shall be provided to the DSB.

In such a situation, Article 17(5) DSU does not prevent the Appellate Body, in consultation with the parties to an appeal, to meet the 90-day deadline, when practicable, by issuing within that deadline its report to the parties in the language in which the proceedings were conducted, pending subsequent translation by the WTO Secretariat in the other official WTO languages for circulation of the report to Members.

3. *Authority of previous adopted reports – Articles 11 and 17(4) DSU*

The statement in Article 2(3) DSU that “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system” does not imply that reports of panels or of the Appellate Body, once adopted by the DSB, constitute binding precedents for future cases. Accordingly, the duty for a panel in accordance with Article 11 to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements” shall be interpreted as requiring a panel to do so also when



previously adopted panel or Appellate Body reports have ruled upon the same matter or the interpretation of the same provisions of the covered agreements at issue in the case before it. Such obligation in Article 11 shall be interpreted as not precluding a panel from ruling otherwise if the panel concludes objectively that not following the ruling in previous adopted reports is legally justified “in accordance with customary rules of interpretation of public international law” referred to in Article 2(3) DSU, while duly taking into account the reference to stability and predictability in the same article.

Similarly, Article 17(14) DSU, according to which “The Appellate Body may uphold, modify or reverse the legal finding and conclusion of the panel” whose report has been appealed, does not preclude the Appellate Body from deciding on the legal findings appealed differently than in previous reports if the Appellate Body considers that this is legally justified.

4. *Rulings not necessary to resolve a dispute – Article 17(12) DSU*

The provision of Article 17(12) DSU that “The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate process”, namely “issues of law covered in the panel report and legal interpretations developed by the panel” shall be interpreted as not obliging the Appellate Body to address issues raised in appeal, whose resolution in light of its findings on other issues raised is not necessary to resolve the dispute “and achieving a satisfactory settlement of the matter in accordance with the rights and obligations” of the parties under the DSU and the covered agreements [Article 3(4) DSU]

5. *Domestic law issues before the Appellate Body – Article 17(6) DSU*

“Issues of law” in Article 17(6) DSU (“An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel”) shall be interpreted as excluding issues of interpretation of domestic law, to be considered as issues of fact not subject to appellate review.

