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# The TRIPS Agreement and WTO Dispute Settlement: Past, Present and Future

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# The TRIPS Agreement and WTO Dispute Settlement: Past, Present and Future

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## Introduction

In 2020, the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* ('*TRIPS Agreement*') marked its 25<sup>th</sup> anniversary. There was, however, little reason for celebration. The COVID-19 pandemic had plunged the world economy in an unprecedented crisis. In April 2020, the IMF predicted that global GDP would contract by as much as 3 per cent in 2020,<sup>2</sup> and the WTO forecasted that the volume of world trade would decline in 2020 between 13 and 32 per cent depending on the how long the health crisis would last and how governments would respond to the economic impact of the crisis.<sup>3</sup> Even the decline under the best-case '13 per cent' scenario would still be the steepest decline on record.<sup>4</sup> However, global trade and the multilateral trading system, of which the *TRIPS Agreement* is one of the pillars, was in crisis already before any of us had heard of the new corona virus or considered 'social distancing' a civil duty (rather than deviant behavior). Global trade in goods declined in 2019 by 3 per cent in value terms and global trade in commercial services grew by a paltry 2 per cent only.<sup>5</sup> In its latest *Report on Trade and Investment Barriers*, the European Commission found that in 2019 the overall number of trade barriers kept increasing and noted that 'protectionism has become ingrained in trade relations with many partners'.<sup>6</sup> There are multiple causes for this development in international trade but the dramatic shift in the trade policy of the United States since 2017 has arguable been the most important among these causes. The multilateral trading system and its principal institution, the WTO, have been for almost for almost four years now under direct attack from the United States, which under the Trump Administration evolved from the 'champion' of the system to its 'demolisher-in-chief'. Since Donald Trump assumed the US presidency in January 2017, populist economic nationalism and protectionism have become the main features of US trade policy. The benefits for the United States of a rules-based multilateral trading system and of membership of the WTO have been openly and repeatedly questioned by both President Trump and members of the US Congress.<sup>7</sup> Among the most destructive actions taken by the United States against the rules-based multilateral trading system and the WTO is its frontal attack against the WTO dispute settlement system and in particular appellate review under the system by the WTO Appellate Body. As a result of the US obstruction of the appointment of new Appellate Body judges, the Appellate Body is since December 2019 paralysed and the WTO dispute settlement system seriously undermined. In this chapter, we will examine: (1) the core features of the WTO dispute settlement system; (2) the performance of the WTO dispute settlement system in TRIPS disputes; (3) the

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<sup>2</sup> See <https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/>. In May 2020, the World Bank predicted a contraction of global GDP in 2020 of 5.2 per cent. See <https://www.worldbank.org/en/publication/global-economic-prospects>.

<sup>3</sup> See [https://www.wto.org/english/news\\_e/pres20\\_e/pr855\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr855_e.htm).

<sup>4</sup> In June 2020, the WTO estimated that the 2020 decline in global trade was 'unlikely' to reach the worst-case '32 per cent' scenario projected in April 2020. See [https://www.wto.org/english/news\\_e/pres20\\_e/pr858\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr858_e.htm).

<sup>5</sup> See <https://timeseries.wto.org>.

<sup>6</sup> See European Commission, Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers, 1 January 2019 – 31 December 2019, COM(2020) 236 final, dated 15 June 2020.

<sup>7</sup> See e.g. <https://www.cnn.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html> (on President Trump's statement that the US would withdraw from WTO if it 'did not shape up'); and <https://www.hawley.senate.gov/senator-hawley-introduces-joint-resolution-withdraw-wto> (on the joint resolution to withdraw from the WTO introduced by Senator Josh Hawley).

current crisis of WTO dispute settlement; and (4) the impact of that crisis on the application and enforcement of the *TRIPS Agreement*.

## The WTO Dispute Settlement

The establishment of the WTO in January 1995, as a result of the successful conclusion of the Uruguay Round negotiations (1986-1993), has been considered ‘the most dramatic advance in multilateralism since the inspired period of institution building in the late 1940s’.<sup>8</sup> Together with the establishment of the WTO, also new and/or stronger multilateral rules on trade in goods and services and on the protection of intellectual property were adopted. The singular most important achievement of the Uruguay Round negotiations was, however, the creation now a new two-stage system for compulsory and binding dispute settlement, provided for in the *Understanding on Rules and Procedures for the Settlement of Disputes*, commonly referred to as the *Dispute Settlement Understanding* or DSU, attached to the *WTO Agreement* as Annex 2. The DSU is to ensure the compliance and, if necessary, enforce compliance, of WTO Members with their obligations under WTO law, including the obligations under the *TRIPS Agreement*. In fact, the possibility of ensuring compliance with the *TRIPS Agreement* through WTO dispute settlement was considered a major step forward in international intellectual property law and an important reason for making the *TRIPS Agreement* part of WTO law.

The WTO dispute settlement system is based on the dispute settlement system of the 1947 *General Agreement on Tariffs and Trade* (‘GATT 1947’). The latter system evolved between the late 1940s and the early 1990s from a system that was primarily a power-based system of dispute resolution through diplomatic negotiations, into a rules-based system of dispute resolution through adjudication. The WTO dispute settlement system is a further leap forward in the process of progressive ‘judicialisation’ of the resolution of international trade disputes. As discussed below, since January 1995, the WTO dispute settlement system has been widely used and its ‘output’, in terms of the number of dispute settlement reports, has been remarkable. Both developed- and developing-country Members have frequently used the system to resolve their trade disputes, including disputes on politically very sensitive issues.

The jurisdiction of the WTO dispute settlement system is compulsory, exclusive and contentious in nature. Furthermore, it is very broad in scope. It covers disputes arising under all but two WTO agreements, including the *TRIPS Agreement*.<sup>9</sup> In principle, any act or omission attributable to a WTO Member can be a measure that is subject to WTO dispute settlement. Note that measures that can be subject to WTO dispute settlement include action or conduct by private parties attributable to a Member; measures that expired or were withdrawn during the proceedings and are thus no longer in force; legislation as such (as opposed to the actual application of this legislation in specific instances); unwritten norms or rules of Members, including practices or policies which are not set out in law; and measures by regional and local authorities. Access to the WTO dispute settlement system is limited to WTO Members. A WTO Member can have recourse to the system when it claims that a benefit accruing to it under one of the covered agreements is being nullified or impaired (Article 3.1, 26 DSU and Article XXIII of the GATT 1994). A complainant will almost always argue that the respondent violated a provision of WTO law and file a violation complaint. If the violation is shown, there is a presumption of nullification or impairment of a benefit (Article 3.8 DSU). Alternatively, but never done with success to date, a complainant can file a non-violation complaint and claim that a benefit accruing to it is being nullified or impaired as a result of the application by a Member of any measure, whether or not it conflicts with any provision of WTO law. Note, however, that no non-violation complaints can be brought under the *TRIPS Agreement*.<sup>10</sup> Non-governmental organisations, industry associations, companies or individuals have no

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<sup>8</sup> See Report of the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (‘Sutherland Report’) (WTO, 2004), para. 1.

<sup>9</sup> Only disputes arising under the *Trade Policy Review Mechanism* and the plurilateral *Agreement on Trade in Civil Aircraft* do not fall within the jurisdiction of the WTO dispute settlement system. See Appendix 1 DSU.

<sup>10</sup> There was strong resistance from developing countries during the Uruguay Round negotiations against inclusion of non-violation complaints as a cause of action under the *TRIPS Agreement*, as they were concerned that this would create the

direct access to the WTO dispute settlement system. However, disputes, including TRIPS disputes, are usually brought to the WTO for resolution at the instigation of companies and industry associations. They lobby their (or a) government to initiate WTO dispute settlement proceedings and can thus be said to have 'indirect access' to the system.

The prime objectives of the WTO dispute settlement system are to provide security and predictability to the multilateral trading system (Article 3.2 DSU) and to settle disputes between WTO Members promptly (Article 3.3 DSU). WTO dispute settlement has six key features, which in addition to the compulsory and exclusive jurisdiction of the WTO dispute settlement system and the process of WTO dispute settlement contribute to, and explain, the importance and success of WTO dispute settlement to date discussed below. Some of these features set apart the WTO dispute settlement system from other international dispute settlement mechanisms. These features also may offer an explanation for the use made of the WTO dispute settlement system for the resolution of TRIPS disputes. *First*, the WTO dispute settlement system is a single, comprehensive and integrated dispute settlement system. The rules of the DSU apply to all disputes arising under the covered agreements (Article 1.1 DSU). Article 64.1 of the *TRIPS Agreement* explicitly confirms that the DSU applies to any TRIPS dispute. A number of these covered agreements, including the *TRIPS Agreement*, provide, however, for some special and additional rules and procedures 'designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement' (Article 1.2 and Appendix 2 DSU). An example of such special and differential rule is the exclusion, already noted above, of non-violation complaints in TRIPS disputes (Article 64.2 and 3 of the *TRIPS Agreement*). *Second*, the DSU provides for several methods to settle disputes between WTO Members: consultations or negotiations (Article 4 DSU); adjudication by panels and the Appellate Body (Articles 6–20 DSU); arbitration (Articles 21.3(c), 22.6 and 25 DSU); and good offices, conciliation and mediation (Article 5 DSU). Of these methods, arbitration under Article 25 and good offices, conciliation and mediation under Article 5 have only played a marginal role. In all WTO disputes, including TRIPS disputes, Members had recourse to consultations (Article 4 DSU), and, if those were unsuccessful, adjudication (Articles 6 to 19 DSU). As discussed below, however, some WTO Members are currently resorting to arbitration under Article 25 to address the current crisis of WTO dispute settlement. *Third*, pursuant to Article 23 DSU, Members must settle disputes with other Members over compliance with WTO obligations through the *multilateral* procedures DSU, rather than through *unilateral* action. Concerns regarding unilateral action taken by the United States in the late 1980s and early 1990s, also in disputes regarding the protection of intellectual property rights, were the driving force behind the Uruguay Round negotiations on dispute settlement, which eventually resulted in the DSU. The recent return of the United States to unilateral action is at the core of the current crisis of the WTO dispute settlement system. *Fourth*, the WTO dispute settlement system prefers Members to resolve a dispute through consultations, resulting in a mutually acceptable solution, rather than through adjudication (Article 3.7 DSU). In other words, the DSU prefers parties *not* to go to court, but to settle their dispute amicably out of court. As discussed below, a high number of *TRIPS* disputes is resolved through consultations and does not proceed to the adjudication stage of the WTO dispute settlement system. *Fifth*, the WTO dispute settlement system serves not only 'to preserve the rights and obligations of Members under the covered agreements', but also 'to clarify the existing provisions of those agreements' (Article 3.2, second sentence, DSU). The scope and nature of this clarification mandate is, however, explicitly circumscribed. Panels and the Appellate Body are precluded from adding to or diminishing the rights and obligations of Members (Article 3.2, last sentence and 19.2 DSU). The DSU does not condone judicial activism. For panels and the Appellate Body to stay within their mandate to clarify existing provisions and not stray into judicial activism, it is therefore important that they interpret and apply the provisions concerned correctly, i.e. in accordance with customary rules of interpretation of international law, as codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*

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possibility to extend the protection of the *TRIPS Agreement* beyond that specified in its provisions. For this reason, Article 64.2 of the *TRIPS Agreement* provided that, for a period of five years from the entry into force of the *WTO Agreement*, no non-violation complaints could be brought under the *TRIPS Agreement*. This 'moratorium' has been extended multiple times and still applies today, as Members have been unable to agree, pursuant to Article 64.3 of the *TRIPS Agreement*, on the scope and modalities for non-violation complaints.

(Article 3.2, second sentence, DSU).<sup>11</sup> As discussed below, at the very heart of the current crisis of WTO dispute settlement is the criticism of the United States that the WTO Appellate Body engaged in judicial activism and, through erroneous interpretation of the WTO agreements, added obligations to which the United States never agreed. *Sixth*, the DSU provides for three types of remedy for breach of WTO law: one final remedy, namely, the withdrawal (or modification) of the WTO-inconsistent measure; and two temporary remedies which can be applied awaiting the withdrawal (or modification) of the WTO-inconsistent measure, namely, compensation *and* suspension of concessions or other obligations (commonly referred to as ‘retaliation’) (Article 3.7, 21 and 22 DSU). A measure which was found to be WTO-inconsistent must be withdrawn immediately or, if that is impracticable, within a ‘reasonable period of time’. However, when the offending party fails to do so, and the parties are subsequently unable to agree on compensation for the harm that will result from the lack of compliance, the original complaining party may request authorisation from the DSB to retaliate against the offending party by suspending concessions or other obligations with respect to that offending party. Retaliation, often in the form of a drastic increase in the customs duties on strategically selected products, puts economic and political pressure on the offending party to withdraw (or modify) its WTO-inconsistent measure(s). Subject to certain conditions, the retaliation may take the form of the suspension of obligations under agreements other than those with regard to which a violation was found in the underlying dispute (i.e. cross-retaliation). Note that in a number of disputes which did not relate to the *TRIPS Agreement*, the complainant was authorized to retaliate against the non-complaining respondent by suspending obligations under the *TRIPS Agreement*.<sup>12</sup> To date, Members applied retaliation measures in only four cases, while the number of disputes in which the DSB authorised Members to do so was significantly higher. The effectiveness and/or appropriateness of retaliation – which is by definition trade destructive – as a temporary remedy for breach of WTO law is the subject of debate.

Among the institutions involved in WTO dispute settlement one must distinguish between a political institution, the Dispute Settlement Body (DSB), and two independent, judicial-type institutions, the dispute settlement panels and the Appellate Body. The DSB, which is composed of all WTO Members, administers the dispute settlement system (Article 2 DSU). It has the authority to establish panels, adopt panel and Appellate Body reports, and authorise retaliation in case of non-compliance (Article 6.1, 16.4, 17.14 and 22.6 DSU). It takes decisions on these important matters by *reverse consensus*.<sup>13</sup> As a result, the DSB decisions on these matters are quasi-automatic. However, on all other matters, including the (re-)appointment of Appellate Body judges, the DSB takes decisions by consensus and each Member thus has a veto right (Article 2.4 DSU). As explained below, this consensus requirement was resulted on the paralysis of the Appellate Body since December 2019.<sup>14</sup> Notwithstanding its importance in WTO dispute settlement, the actual adjudication of disputes brought to the WTO is not done by the DSB, but done, at the first-instance level, by dispute settlement panels and, at the appellate level, by the Appellate Body. Panels are *ad hoc* bodies established for the purpose of adjudicating a particular dispute and are dissolved once they have accomplished this task. A panel is established by the DSB but the parties decide on the composition of the panel by mutual accord. If they fail to do so within twenty days after the establishment of the panel, either party can ask the Director-General of the WTO to appoint the panellists (Article 8.7 DSU). As a rule, panels are composed of three well-qualified governmental and/or non-governmental individuals, who are not nationals of the parties or third parties to the dispute (Article 8.1 DSU). The *ad*

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<sup>11</sup> Pursuant to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, panels and the Appellate Body interpret provisions of the covered agreements in accordance with the ordinary meaning of the words of the provision in their context and in light of the object and purpose of the agreement involved; and, if necessary and appropriate, they have recourse to supplementary means of interpretation.

<sup>12</sup> See e.g. in *EC – Bananas III*, Ecuador and in *US – Gambling* Antigua and Barbuda were authorized to retaliate by suspending obligations under the *TRIPS Agreement* vis-à-vis the European Union and the United States respectively. Neither country, however, made use of this possibility. In *United States – Upland Cotton*, Brazil was also authorized to retaliate by suspending obligations under the *TRIPS Agreement* vis-à-vis the United States and, in that case, the threat of such suspension, did have a significant impact on the resolution of the dispute. See below, p. ###.

<sup>13</sup> A decision is taken by *reverse consensus* unless there is a consensus among Members not to take the proposed decision. For example, a decision to establish a panel at the request of the complainant is taken by the DSB unless the latter decides by consensus not to establish the panel. It is clear that the complainant requesting the establishment of a panel is very unlikely to join the consensus not to establish the panel.

<sup>14</sup> See below, p. ##.

*hoc* composition of panels allows for the appointment of panelists with specific expertise in the subject matter of the dispute concerned. In panels dealing with TRIPS disputes, some of the panelists thus clearly had extensive expertise in intellectual property law and were undoubtedly appointed for that reason.<sup>15</sup> The task of the panel with regard to the disputed measure is to undertake neither a *de novo* review nor a deferential review, but ‘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’ (Article 11 DSU). As the trier of facts, a panel must base its findings on a sufficient evidentiary basis on the record; must treat evidence in an ‘even-handed’ manner; and should not disregard evidence that is relevant to the case of one of the parties. Panels may exercise judicial economy; they need only address (but at the same time are required to address at least) those claims which must be addressed in order to resolve the matter at issue in the dispute. A panel report must, at a minimum, set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations it makes (Article 12.7 DSU). Where a panel concludes that a Member’s measure is inconsistent with WTO law, it shall recommend that the Member concerned bring that measure into conformity with WTO law (Article 19.1 DSU). The recommendations and rulings of the panel become legally binding when they are adopted – by reverse consensus – by the DSB.

The Appellate Body is a permanent international tribunal of seven judges appointed by the DSB for a term of four years (renewable once) (Article 17. 1 and 2 DSU). The Appellate Body shall comprise ‘persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally’ (Article 17.3 DSU). Note that of all judges who served on the Appellate Body to date, only one, Mr. A.V. Ganesan, had extensive prior expertise in international intellectual property law.<sup>16</sup> Appellate Body members must be independent and impartial, avoid direct and indirect conflicts of interest and respect the confidentiality of proceedings (Article 17.3 DSU and *Rules of Conduct for the DSU*). The Appellate Body hears and decides appeals in divisions of three of its Members (Article 17.1 DSU). Only parties to the dispute can appeal a panel report (Article 17.4 DSU). An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel (Article 17.6 DSU). Issues of fact cannot be appealed. However, the treatment of the facts or evidence by a panel may raise the question of whether the panel has made an objective assessment of the facts as required under Article 11 DSU. This is a legal issue and can therefore be examined by the Appellate Body. As explained below, this is, however, contested by the United States. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel that were appealed (Article 17.13 DSU) On occasion, the Appellate Body has also – in the absence of the authority to remand a case to the panel – felt compelled to ‘complete the legal analysis’ on issues not addressed by the panel. It has done so in order to provide a prompt resolution of the dispute.

The WTO dispute settlement process may – and often does – entail four major steps: (1) consultations; (2) panel proceedings; (3) appellate review proceedings; and (4) implementation and enforcement. The four-step WTO dispute settlement process has six features that are particularly noteworthy, partly because they distinguish WTO dispute settlement – in both positive and negative ways – from other international dispute settlement mechanisms. These six features are: (1) the short time frame for each of the steps in the process; (2) the confidentiality and resulting lack of transparency of the process; (3) the burden of proof in WTO dispute settlement proceedings, which is on the party that asserts the affirmative of a particular claim or defence; (4) the important role of private legal counsel in representing parties in WTO dispute settlement; (5) the acceptance and consideration by panels and the Appellate Body of *amicus curiae* briefs; and (6) the obligation on Members to act in good faith in WTO dispute settlement proceedings, and the obligation on panels and the Appellate Body to ensure due process in these proceedings. Several of these procedural features have given rise to controversy. Most developing countries strongly object to the Appellate Body’s case law on the acceptance and consideration of *amicus curiae* briefs, and, as discussed below, the United States severely criticizes the Appellate Body for exceeding, without the

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<sup>15</sup> Note, however, that, as discussed below, disputes in which claims of inconsistency with the *TRIPS Agreement* were raised, often also concerned claims of inconsistency with other WTO agreements, and thus required panelists with broader expertise.

<sup>16</sup> Mr. A.V. Ganesan served as India’s chief negotiator on the *TRIPS Agreement* during the Uruguay Round.



agreement of the parties, the mandatory, but often totally unrealistic, 90-day timeframe for appellate review.

### **Performance of the WTO Dispute Settlement System in TRIPS Disputes**

Overall, the WTO system for resolving trade disputes between WTO Members has been a remarkable success. In 1996, Director-General Renato Ruggiero referred to the WTO dispute settlement system as the 'jewel in the crown' of the WTO. Such praise was in this second year of the system probably premature, but it would soon, and this for many years, prove to be justified. Between 1995 and 2019, 593 disputes were brought to the WTO for resolution.<sup>17</sup> While the United States and the European Union were the most frequent complainants, developing-country Members made frequent use of the WTO dispute settlement system to challenge the WTO consistency of trade measures of other Members. In a number of years developing-country Members brought more disputes to the WTO than developed-country Members.<sup>18</sup> The United States and the European Union have not only been the most frequent complainants, they were also more than any other Member respondents, albeit that the European Union is in this respect a distant second. The rate of compliance with rulings of WTO dispute settlement panels and the Appellate Body has been consistently very high. Note, however, that the United States has consistently failed to comply with a number of rulings which required it to withdraw or amend WTO-inconsistent measures.

Of the 593 disputes brought to the WTO between 1995 and 2019, i.e. of the disputes in which consultations between the parties were initiated during this period, 41, or 7 per cent, concerned obligations under the *TRIPS Agreement*.<sup>19</sup> The United States was by far the most frequent complainant in TRIPS disputes (18), followed by the European Union (8). The United States initiated almost 50 per cent of all TRIPS dispute proceedings. Other WTO Members were complainant in TRIPS disputes only once or twice. The European Union (7) was more than any other Member the respondent in TRIPS disputes, followed by Australia (5) and the United States (4). Contrary to what developing country Members had feared, there was definitely no tsunami of TRIPS disputes brought to the WTO by developed country Members against developed country Members. In fact, in only 13 of the 41 disputes the respondents were developing country Members.<sup>20</sup> Most TRIPS disputes were initiated in the early years of the WTO, i.e. in the period from 1996 to 2000 (23) but there was a recent peak in the years 2017-2019 (8). The TRIPS provisions most at issue in the disputes in which consultations were initiated concerned (in order of importance) the domestic enforcement of IPRs, patents, trademarks, copyright and the national treatment obligation. Note the relatively low number of TRIPS disputes brought to the WTO (7 per cent of all WTO disputes). It has been suggested that some of the core features of WTO dispute settlement explain this relatively low number of TRIPS disputes brought to the WTO for resolution.<sup>21</sup> As discussed above, only WTO Members, and not the IP holders themselves, can bring a TRIPS dispute to the WTO, and while IP holders may be successful in lobbying a WTO Member to do so, their efforts in this respect are often likely to fail. Also, only measures by a WTO Member (or measures attributable to it) can be challenged in WTO dispute settlement. IP infringements by private operators cannot, whereas these infringements are probably what IP holders are most concerned about. Moreover, the remedies available under the DSU

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<sup>17</sup> See <http://worldtradelaw.net/databases/searchcomplaints.php>. To date, only two disputes were brought to the WTO in 2020. See *ibid*.

<sup>18</sup> See <http://worldtradelaw.net/databases/complaintsclassification.php>.

<sup>19</sup> For data on the consultations initiated between January 1995 and December 2019, see <http://worldtradelaw.net/databases/searchcomplaints.php>. Note that none of the consultations initiated in 2020 concerned TRIPS matters. See *ibid*.

<sup>20</sup> China (3), Indonesia (2), Argentina (2), India (2), Pakistan (1), Turkey (1), Cuba (1), and Brazil (1).

<sup>21</sup> See e.g. J. Pauwelyn, 'The Dog that Barked But Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO' (November 2010), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1708026](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708026).

offer little comfort to the winning complainant, as these remedies are only prospective. Past economic harm caused to the IP holder as a result of a TRIPS-inconsistent measure is not compensated. Future economic harm can be compensated but such compensation is of little interest to IP holders because is normally is in the form of a reduction of trade barriers on other products or services. In only one TRIPS dispute, *US – Section 110(5) Copyright Act*, the United States paid the European Union, the complainant (and thus presumably the EU IP holders) for a period of three years € 1.2 million per year, as compensation for its continuing non-compliance with the ruling in this case. Such award of monetary compensation is, however, very exceptional. As discussed below, also the retaliation measures which a complainant may be authorized to take vis-à-vis a respondent who fails to comply with a ruling, is of little help to the IP holder. Finally, note that in practice WTO dispute settlement proceedings, while short in comparison with the proceedings of other international courts and tribunals, may take too much time for IP holders to be an attractive response to specific instances of breach of TRIPS obligations.

In addition to the relatively low number of TRIPS disputes brought to the WTO for resolution, one should note that in 45 per cent of these disputes, consultations were ‘successful’ in the sense that the dispute did not proceed to the next stage in the WTO dispute settlement process, namely panel proceedings.<sup>22</sup> This may be because the complainant and the respondent reach a mutually agreed solution to the dispute or because the complainant (and/or the IP holders who initially lobbying for proceedings to be initiated) decide not to pursue the case further. Note that this percentage of ‘successful’ consultations (45 per cent) is significantly higher than the overall ‘success’ rate of consultations (20 per cent). In addition of the reasons already mentioned above for the low number for TRIPS disputes, the high rate of successful consultations may also be explained by the fact that in a number of TRIPS disputes the TRIPS obligations were very clear and the TRIPS-inconsistency quite obvious. In those disputes, the initiation of formal consultations by the complainant was all what the respondent needed as ‘encouragement’ to either withdraw or modify the TRIPS-consistent measure.

To date, the TRIPS disputes, which did proceed to the panel stage, resulted in 13 panel reports.<sup>23</sup> In total, WTO disputes resulted between 1995 and 2019 in 258 panel reports. Only 5 per cent of these reports concerns TRIPS disputes. Not surprisingly the United States (6) and the European Union (4) were most frequently the complainants in disputes that resulted in panel reports. The most frequent respondents were the United States and Australia (each 4) and China, India and the European Union (each 2).<sup>24</sup> Most of the 13 panel reports were issued in the period between 1998 and 2000 (7). There are currently 2 TRIPS disputes pending before a panel.<sup>25</sup> The TRIPS provisions most at issue in panel reports concerned (in order of importance) trademarks, the national treatment obligation, geographical indications, and the enforcement of IPRs.

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<sup>22</sup> See <http://worldtradelaw.net/databases/searchcomplaints.php> and <http://worldtradelaw.net/databases/wtopanels.php>.

<sup>23</sup> In reverse chronological order: *Saudi Arabia – IPR* (DS567)(complaint by Qatar); *Australia – Tobacco Plain Packaging* (DS435, DS441) (complaints by Honduras and Dominican Republic); *Australia – Tobacco Plain Packaging* (DS458, DS467) (complaints by Cuba and Indonesia); *China – IP Rights* (DS362) (complaint by the United States); *EC – Trademarks and Geographical Indications* (DS290) (complaint by Australia); *EC – Trademarks and Geographical Indications* (DS174) (complaints by the United States); *US – Section 211 Appropriations Act (‘Havana Club’)* (DS176) (complaint by the European Communities); *US – Section 110(5) Copyright Act* (DS160) (complaint by the European Communities); *Canada – Patent Term* (DS170) (complaint by the United States); *Canada – Pharmaceuticals Patents* (DS114) (complaint by the European Communities); *India – Patents* (DS79) (complaints by the European Communities); *Indonesia – Autos* (DS54, DS55, DS59, DS64) (complaints by European Communities, Japan and the United States); and *India – Patents* (DS50) (complaint by the United States).

<sup>24</sup> Note that the numbers between brackets refer to the number of disputes which resulted in panel reports, not to the number of panel reports.

<sup>25</sup> UAE – Trade in Goods and Services, and IP (DS533) (complaint by Qatar) and China – IP Rights (DS542) (complaint by the United States).



Of the 13 panel reports in TRIPS disputes circulated to date, 4 were appealed to the Appellate Body and resulted in Appellate Body reports.<sup>26</sup> The appeal rate of 41 per cent is considerably lower than the normal appeal rate of 68 per cent.<sup>27</sup> Only 2 per cent of the 145 Appellate Body reports circulated to date concerned TRIPS disputes.<sup>28</sup> The Appellate Body has had very few occasions to clarify TRIPS provisions pursuant its mandate under Article 3.2 DSU. The TRIPS provisions at issue in these Appellate Body reports concerned trademarks, patents, the enforcement of IPR, and the protection of existing subject matter. It has been suggested that for the low appeal rate of panel reports is that TRIPS panels, more than other panels ‘carefully balanced giving something to each side which neither side was willing to risk on appeal’ and that ‘parties may also be apprehensive of involving the Appellate Body whose rulings ... carry more weight and set a deeper precedent than panels’.<sup>29</sup>

As regards the implementation of, and compliance with, panel and/or Appellate Body rulings, the reasonable period of time for implementation could not be agreed upon by the parties and was set by an arbitrator in three TRIPS disputes.<sup>30</sup> As already discussed above, in one TRIPS dispute, the level of compensation for future harm caused by the TRIPS-inconsistent measure was determined by arbitration under Article 25 DSU, and to date this has been the only use ever made of Article 25 DSU.<sup>31</sup> DSB authorisation to retaliate because the respondent failed to comply, was requested in that same dispute, but this request was subsequently not further pursued in spite of the continued failure to comply. In this and one other TRIPS dispute, there was been long-standing failure to comply with the rulings and recommendations of the panel and the Appellate Body.<sup>32</sup> In both disputes the United States was the respondent failing to comply.

In sum, while some WTO Members have often claimed that other Members systematically act inconsistently with their obligations under the TRIPS Agreement, compared to other WTO agreements, few TRIPS disputes were brought to the WTO and when they were brought, they were more often than other WTO disputes not pursued to the end. More use of the WTO dispute settlement system would have allowed for the rules-based resolution of specific TRIPS disputes between WTO Members, rather than see these disputes fester, be politicized and affect negatively the relations between the Members concerned. More of the WTO dispute settlement system would also have allowed for the clarification of existing TRIPS provisions and this for the development of WTO intellectual property law. While the WTO dispute settlement system definitely made a more significant contribution to the development of the law of WTO agreements other than the *TRIPS Agreement*, this does not mean that the WTO dispute settlement had no impact on the development of WTO IP law over the past 25 years. Among the disputes noteworthy here are *India – Patents* (DS50) (1998), *Canada – Patent Term* (DS170), *US – Section 211 Appropriation Act (‘Havana Club’)* (DS 176), *EC – Trademarks and Geographical Indications*

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<sup>26</sup> In reverse chronological order: *Australia – Tobacco Plain Packaging* (DS435, DS441) (complaints by Honduras and Dominican Republic); *US – Section 211 Appropriations Act (‘Havana Club’)* (DS176) (complaint by the European Communities); *Canada – Patent Term* (DS170) (complaint by the United States); *Canada – Pharmaceuticals Patents* (DS114) (complaint by the European Communities); and *India – Patents* (DS79) (complaints by the European Communities). It is at present unclear whether the panel report in *Saudi Arabia – IPR* (DS567) (complaint by Qatar), which was circulated on 16 June 2020, will be appealed.

<sup>27</sup> See <http://worldtradelaw.net/databases/appealcount.php>.

<sup>28</sup> See <http://worldtradelaw.net/databases/abreports.php>.

<sup>29</sup> J. Pauwelyn, *op.cit.*, p. 44.

<sup>30</sup> In reverse chronological order: *US – Section 110(5) Copyright Act* (DS160) (complaint by the European Communities) (reasonable period of time for implementation: 12 months); *Canada – Patent Term* (DS170) (complaint by the United States) (reasonable period of time for implementation: 10 months); *Canada – Pharmaceuticals Patents* (DS114) (complaint by the European Communities) (reasonable period of time for implementation: 6 months). See <http://worldtradelaw.net/databases/rptawards.php>.

<sup>31</sup> In *US – Section 110(5) Copyright Act* (DS160) (complaint by the European Communities), the arbitrator determined the compensation required to be € 1.2 million per year. As noted above, the United States paid the European Communities this amount for three years and then halted the payments without having complied with the rulings in this case.

<sup>32</sup> *US – Section 211 Appropriations Act (‘Havana Club’)* (DS176) (complaint by the European Communities); and *US – Section 110(5) Copyright Act* (DS160) (complaint by the European Communities).

(DS174, DS290), *China – IP Rights* (DS362), and *Australia – Tobacco Plain Packaging* (DS435, DS441, DS458, DS467).

## The Crisis of WTO Dispute Settlement

As noted above, the WTO dispute settlement system is currently in crisis, but while this crisis is now acute and existential, it has been looming for many years. Even during the early years of WTO dispute settlement, there were a number of crisis moments, for example in 1997 in the context of the *US – Helms Burton* dispute regarding the jurisdiction over disputes in which national security was invoked; in 1999 in the context of the *EC – Bananas III* dispute regarding the sequencing of the Article 21.5 DSU compliance procedure and the Article 22.6 DSU procedure for DSB authorization for retaliation; and in 2001 in the context of the *EC – Asbestos* dispute regarding the acceptance and consideration of *amicus curiae* briefs.<sup>33</sup> Also, in the context of the DSU review (1998-1999) and the DSU reform negotiations in the context of the Doha Round negotiations (2001-), WTO Members, while expressing general satisfaction with the WTO dispute settlement system, tabled dozens of proposals for change.<sup>34</sup> As from 2005 onwards, the WTO dispute settlement system became gradually ever more the victim of its own success. First, the dispute settlement workload grew steadily, in particular due to the increasing number of claims of inconsistency raised in each dispute and the rising complexity of the measures challenged and the legal arguments made. However, the resources made available did not keep track with this growing workload. Second, the institutional imbalance between the successful judicial branch of the WTO and its mostly ineffective legislative branch became ever more apparent and made WTO Member seek changes to WTO law through litigation rather than negotiation. This development brought with it the perception of, if not the danger of, judicial activism by WTO panels and, in particular, the Appellate Body. Third, certainly since 2010, some WTO Members, and in particular the United States, adopted an ever more antagonistic discourse against the Appellate Body whenever the latter's rulings were unfavourable. Fourth, some WTO Members, and again in particular the United States, undermined the independence and impartiality of WTO adjudicators by *inter alia* blocking the reappointment of Appellate Body members who were seen as not having 'served' US interests sufficiently (Jennifer Hillman of the United States in 2012) or were seen as having ruled against the United States (Seung Shang of Korea in 2016). The current crisis of the WTO dispute settlement system was thus already looming for some time.

It was, however, only under the Trump Administration that the crisis of WTO dispute settlement became acute. As from the summer of 2017, the United States has obstructed the process of appointment or re-appointment of Appellate Body members because, as it repeatedly stated, it has serious 'concerns' regarding the functioning of the Appellate Body. The United States accuses the Appellate Body of judicial overreach as well as blatant disregard for its procedural and institutional rules.<sup>35</sup> As to the alleged judicial overreach, the United States accuses the Appellate Body, *first*, of judicial activism, i.e. of creating, through erroneous interpretations of WTO provisions, obligations the United States had never agreed to; *second*, of rendering advisory opinions in that the Appellate Body ruled on issues that were not necessary to rule upon to resolve the dispute at hand; *third*, of reviewing factual findings of the panel and

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<sup>33</sup> See P. Van den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization*, 4<sup>th</sup> edition (Cambridge University Press, 2017), pp. 622, 290-1, and 260-4.

<sup>34</sup> See *ibid.*, pp. 294-6.

<sup>35</sup> See US President's 2018 Trade Policy Agenda, p. 22 ff, at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017>; and United States Trade Representative, *Report on the Appellate Body of the World Trade Organization, February 2020*, at [https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf). See also the statement by the United States at the DSB meetings on 22 June 2018 concerning Article 17.5 DSU and the 90-day timeframe for appellate review, on 27 August and 26 September 2018 concerning Article 17.6 DSU and appellate review of panel findings of fact, including on the meaning of domestic law; and on 29 October 2018 concerning the issuance of advisory opinions on issues not necessary to resolve a dispute.

in particular findings on the meaning of domestic law, which fall outside the Appellate Body's mandate under Article 17.6 DSU; and *fourth*, of considering its case law as having binding precedential value. As to the alleged disregard for procedural and institutional rules, the United States objects in particular to the Appellate Body exceeding the mandatory 90-day timeframe for appellate review without the explicit agreement of the parties, and to allowing, pursuant to Rule 15 of the *Working Procedures for Appellate Review*, out-going Appellate Body members to complete the disposition of appeals which were assigned to them before the end of their term in office. With the exception of the last concern, the United States had also under the Obama and George W. Bush Administrations voiced the same or very similar concerns regarding the functioning of the Appellate Body. However, the Trump Administration, by blocking the (re-)appointment of Appellate Body judges, transformed these 'concerns' into an existential crisis of the Appellate Body. On 11 December 2019, the number of Appellate Body judges in office fell below the minimum of three. Of the seven Appellate Body judges in mid-2017, only Ms. ZHAO Hong of China was left, after the terms of Amb. Ujal Bhatia Singh of India and Mr. Thomas Graham of the United States had come to an end. As from 11 December 2019, the Appellate Body could no longer hear any new appeals and of the 12 appeals pending at that time, it was only allowed to complete the disposition in three.<sup>36</sup> The paralysis of the Appellate Body severely undermines the whole WTO dispute settlement system as it may be expected that parties losing a case at the panel stage will appeal the unfavourable panel report to the paralysed Appellate Body – an action referred to as appealing into the void – and will thus prevent the panel report from being adopted by the DSB and becoming legally binding. For almost 25 years, the WTO dispute settlement system was a glorious experiment with the rule of law in international trade relations. Unless an agreement is reached on how to address the United States' concerns regarding the functioning of the Appellate Body, this experiment has sadly come to an end. In search of such agreement, no less than 22 WTO Members and the African Group have, since November 2018, tabled, either individually or jointly, position papers with proposals to address the US concerns regarding the functioning of the Appellate Body.<sup>37</sup> Some of these position papers, such as the Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, the Republic of Korea, Iceland, Singapore, Mexico and Montenegro of 10 December 2019, were rather 'skeptical' about the legitimacy of the concerns raised by the United States and made proposals which safeguarded the key features of WTO appellate review.<sup>38</sup> Other position papers, such as the Communication from Brazil,

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<sup>36</sup> The disposition of these three appeals was completed pursuant Rule 15 of the Working Procedures of Appellate Review. The Appellate Body Report in the last of these three appeals, *Australia — Tobacco Plain Packaging* (DS435 and DS441), was circulated on 9 June 2020. As discussed above, this report addressed *inter alia* a number of TRIPS issues.

<sup>37</sup> See Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico and Montenegro to the General Council, WT/GC/W/752/Rev. 2, dated 11 December 2018; Communication from the European Union, China, India and Montenegro to the General Council, WT/GC/W/753, dated 26 November 2018 and WT/GC/W/753/Rev., dated 11 December 2018; Communications from Honduras to the General Council, , WT/GC/W/758, dated 21 January 2019, WT/GC/W/759, dated 21 January 2019, WT/GC/W/760, dated 29 January 2019, and WT/GC/W/761, dated 4 February 2019; Communication from the Separate, Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the General Council, WT/GC/W/763 Rev., dated 8 April 2019; Communication from Brazil, Paraguay and Uruguay to the General Council, WT/GC/W/767/Rev. dated 25 April 2019; Communication from Japan, Australia and Chile to the General Council, WT/GC/W/768, dated 18 April 2019, and WT/GC/W/768/Rev., dated 26 April 2019; Communication from Thailand to the General Council, WT/GC/W/769, dated 26 April 2019; and Communication from the African Group to the General Council, WT/GC/W/776, dated 26 June 2019. See also, more generally, European Commission, *Concept Paper on WTO Modernisation*, Part 3 on Future EU Proposals on Dispute Settlement, dated 20 September 2018; and Communication from Canada, *Strengthening and Modernizing the WTO: Discussion Paper*, Theme 2: Safeguarding and Strengthening WTO Dispute Settlement, JOB/GC/201, dated 21 September 2018.

<sup>38</sup> On the US reaction to the Communication from the EU, China, Canada, India and others, see Statements by the United States at the Meeting of the WTO General Council on 12 December 2018 (agenda items 7 and 8).

Paraguay and Uruguay of 25 April 2019 was much more sympathetic to the US concerns and altered some key features of WTO appellate review. Almost all WTO Members were, and still are, of the view that whatever legitimate concerns the United States might have regarding the functioning of the Appellate Body, these concerns did not justify the obstruction of the appointment process, which resulted in the paralysis of the Appellate Body and the undermining of the whole WTO dispute settlement system. WTO Members repeatedly, and in growing numbers, called upon the United States to allow for the appointment of new Appellate Body Members. At the meeting of the DSB on 29 June 2020, 122 WTO Members called on the DSB to take immediately the decision to unblock the appointment process.<sup>39</sup>

In December 2018, the WTO General Council appointed Amb. David Walker of New Zealand as ‘Facilitator’ to resolve the differences among WTO Members on the functioning of the Appellate Body in order to allow for the unblocking of the appointment process.<sup>40</sup> Over the next 10 months, Amb. Walker, who was also elected as DSB Chair in early 2019, met with WTO Members, in small groups and in open-ended informal meetings to discuss the proposals for reform tabled and seek a way out of this crisis. The United States, however, did not table any reform proposal and, reportedly, did not even engaged in the discussions but only sent a junior diplomat to take notes. Based on the proposals made by Members and the extensive discussions on these proposals, Amb. Walker submitted on 15 October 2019 to the General Council a Draft Decision on the Functioning of the Appellate Body.<sup>41</sup> This Draft Decision aimed at ‘seeking workable and agreeable solutions to improve the functioning of the Appellate Body’, in the hope to avoid the paralysis of the Appellate Body as from December 2019.<sup>42</sup> The Draft Decision *inter alia* addressed: (1) the US concern regarding judicial activism, by stating that pursuant to Articles 3.2 and 19.2 DSU, Appellate Body rulings ‘cannot add to or diminish the rights and obligations provided in the covered agreements; (2) the US concern regarding binding precedent, by stating that precedent is ‘not created through WTO dispute settlement proceedings’, but that consistency and predictability in the interpretation of WTO law is ‘of significant value to Members’; (3) the US concern regarding advisory opinions rendered by the Appellate Body, by stating that the latter may only address issues raised by the parties to the extent necessary to resolve the dispute; (4) the US concern regarding appellate review of findings on the meaning of municipal law, by stating that the meaning of municipal law is to be treated as a matter of fact and therefore, pursuant to Article 17.6 DSU, not subject to appellate review; (5) the US concern regarding the 90-day timeframe for appellate review, by stating that, pursuant to Article 17.5 DSU, the Appellate Body is obligated to issue its report within 90 days of the notice of appeal and that this timeframe can only be extended with the agreement of the parties; and (6) the US concern regarding the Rule 15 of the *Working Procedures for Appellate Review*, by deciding that only the DSB can authorize outgoing Appellate Body members to complete the disposition of an appeal after the expiry of their term in office, if and when the oral hearing in the appeal took place prior to the expiry. The Draft Decision was a carefully constructed compromise between the Members engaged in the discussions on the functioning of the Appellate Body, which preserved the core features of the WTO appellate review. However, the hope that the Draft Decision would allow the WTO to avoid the paralysis of the Appellate Body as from 11 December 2019 was very short-lived. On the same day as the Draft Decision was submitted, the United States rejected most of the ‘solutions’ reflected in the Draft Decision. According to the United States, there was no agreement on how to ensure that the limitations imposed by the DSU on

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<https://geneva.usmission.gov/2018/12/12/statements-items-7-and-8-by-the-united-states-at-the-meeting-of-the-wto-general-council/>.

<sup>39</sup> See Proposal on Appellate Body Appointments, WT/DSB/W/609/Rev. 18, dated 19 June 2020.

<sup>40</sup> See [https://www.wto.org/english/news\\_e/news19\\_e/gc\\_18jan19\\_e.htm](https://www.wto.org/english/news_e/news19_e/gc_18jan19_e.htm).

<sup>41</sup> General Council, Informal Process on Matters related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand), JOB/GC/222, dated 15 October 2019, Annex.

<sup>42</sup> *Ibid.*, para. 1.22



the Appellate Body are respected in the future and what the consequences are for continued failure to adhere to these limitations.<sup>43</sup> Subsequently, the impasse was complete and the paralysis of the Appellate Body on 11 December 2019 unavoidable. At the meeting of the General Council on 3 March 2020, Amb. Dennis Shea of the United States declared that by failing repeatedly to interpret the WTO agreements consistent with the text of those agreements, ‘the Appellate Body has undermined a rules-based trading system by persistently breaking those rules’.<sup>44</sup> Amb. Shea emphasized again that the United States has been raising its concerns regarding the functioning of the Appellate Body for many years, but that the problem ‘has only worsened as too many WTO Members have remained unwilling to do anything to rein in’ the Appellate Body’s disregard for WTO rules.<sup>45</sup> According to the United States, the current crisis can only be overcome and reform of the WTO dispute settlement system achieved, if WTO Members recognize and ‘come to terms with the failings of the Appellate Body’.<sup>46</sup> The United States insists that WTO Members ‘engage in a deeper discussion of the why the Appellate Body has felt free to depart from the role Members assigned to it’.<sup>47</sup> However, many other Members, including the European Union, China, India and Canada, disagree that the Appellate Body systematically engaged in judicial overreach and demonstrated intentional disregard for procedural and institutional rules.<sup>48</sup> At the General Council meeting of 9 December 2019, two days before the Appellate Body became paralyzed, Amb. Joao Aguiar Machado of the European Union stated that ‘the EU wishes to emphasise that [the Appellate Body] has served well all Members in an independent, highly professional and, given the circumstances, very efficient manner. The European Union, therefore, would like to commend all the present and past members of the Appellate Body on their work, as well as the staff working on the Appellate Body’s secretariat’.<sup>49</sup> The United States’ position on the functioning of the Appellate Body reflects: (1) its strong and ideologically-charged disagreement with Appellate Body case law which restricts the ability of the United States to protect its domestic industry from import competition; and (2) its wish to return to a pre-WTO situation in which it could use its economic and other power to ‘resolve’ trade disputes with trading partners. On 17 June 2020, during briefings to the US House Ways and Means Committee and Senate Finance Committee, Amb. Robert Lighthizer, the United States Trade Representative, reportedly said that ‘he would be content if the AB is never restored, arguing that the WTO members need to talk about a new

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<sup>43</sup> Statement by Amb. Dennis Shea (United States) at the WTO General Council meeting on 15 and 16 October 2019 on *Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator* <https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/>.

<sup>44</sup> Statement by Amb. Dennis Shea (United States) at the WTO General Council meeting on 3 March 2020 on the USTR Report on the Appellate Body of the World Trade Organization (item 11), <https://geneva.usmission.gov/2020/03/03/statements-by-ambassador-dennis-shea-at-the-march-3-2020-general-council-meeting/>.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> See e.g. Statement by Amb. Joao Aguiar Machado (European Union) at the WTO General Council meeting on 15 and 16 October 2019 on *Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator*

[https://eeas.europa.eu/delegations/world-trade-organization-wto/68955/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-general-council-meeting-15-and-16-october-2019\\_en](https://eeas.europa.eu/delegations/world-trade-organization-wto/68955/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-general-council-meeting-15-and-16-october-2019_en); and Statement by Amb. ZHANG Xiangchen (China) at the WTO General Council meeting on 15 & 16 October 2019 on *Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator*

<http://wto2.mofcom.gov.cn/article/chinaviewpoin/201910/20191002905004.shtml>.

<sup>49</sup> Statement by Amb. Joao Aguiar Machado (European Union) at the WTO General Council meeting on 9 December 2019 on *Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator and Draft Decision on the Functioning of the Appellate Body*, WT/GC/W/791, item 11, [https://eeas.europa.eu/delegations/world-trade-organization-wto/71695/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-general-council-meeting-9-december-2019\\_en?utm\\_source=dlvr.it&utm\\_medium=twitter](https://eeas.europa.eu/delegations/world-trade-organization-wto/71695/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-general-council-meeting-9-december-2019_en?utm_source=dlvr.it&utm_medium=twitter)

dispute settlement system’ and that ‘he believes the original (GATT) non-binding system that encouraged countries to work out their disputes was better’.<sup>50</sup> Amb. Lighthizer seems unwilling to recognize that the WTO dispute settlement system was established because the GATT dispute settlement system no longer worked as from the late 80s and that the United States’ recourse at that time to unilateral, power-based ‘resolution’ of trade disputes was already, when the United States was in all respects still a much more powerful nation, unacceptable to its trading partners and detrimental to international trade relations.

On 24 January 2020, in the margin of the 2020 World Economic Forum in Davos, Switzerland, the ministers of 17 WTO Members announced that, while they remain committed to finding a solution to the Appellate Body crisis, they would work together ‘towards putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among themselves’.<sup>51</sup> They instructed their officials to ‘expeditiously finalise work’ on a multi-party arrangement for appeal arbitration under Article 25 DSU. In 2019, the European Union had already made bilateral arrangements for appeal arbitration under Article 25 DSU with Canada and Norway, under which former Appellate Body members would act as appellate arbitrators.<sup>52</sup> Article 25 DSU provides for ‘expeditious arbitration within the WTO as an alternative means of dispute settlement’ and had been resorted to but once since 1995.<sup>53</sup> Probably faster than anyone had expected, but clearly reflecting the desire to preserve a credible WTO dispute settlement system, 16 WTO Members announced on 27 March 2020 that they had reached an agreement on the *Multi-Party Interim Appeal Arbitration Arrangement under Article 25 of the DSU* (MPIA), which became effective on 30 April 2020, when it was notified to the DSB.<sup>54</sup> The MPIA is a valiant attempt to save what can be saved of the WTO dispute settlement system. However, it is but, and should not be more than, a temporary substitute for appellate review by the Appellate Body. At present, 21 WTO Members are a party to the MPIA, including Brazil, Canada, China, the European Union and Mexico, i.e. five of the ten most frequent users of the WTO dispute settlement system. The number of parties to the MPIA is expected to increase further and it should be noted that also WTO Members who are not MPIA parties may resort on an *ad hoc* basis to appeal arbitration under the MPIA. Parties to the MPIA agree not to appeal panel reports to the paralyzed Appellate Body (i.e., agree not to appeal panel reports into the void), but will resort to appellate arbitration under Article 25 DSU. The MPIA appeals will be heard by three arbitrators randomly selected from a fixed pool of 10 arbitrators. To the extent that the procedures followed under the MPIA will mimic appellate review by the Appellate Body – and that is the stated intention – the MPIA may serve the parties thereto well as long as the Appellate Body is paralyzed. The nominations made for the pool of MPIA arbitrators justify this hope. However, it remains to be seen how the MPIA will work in practice. On 3 June 2020, Australia and Canada in *Canada – Sale of Wine* (DS 537), Mexico and Costa Rica in *Costa Rica – Advogados* (DS524), and Brazil and Canada in *Canada – Aircraft* (DS522) notified the DSB that they have agreed – under the MPIA – to Procedures for Arbitration under Article 25 DSU.<sup>55</sup> However, on 5 June 2020, the United States reportedly wrote to DG Acevêdo objecting to the MPIA, which was referred to as a ‘China-EU arrangement’ and was said to create an ‘ersatz’ Appellate Body ‘exacerbating the erroneous WTO appellate practice rather than

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<sup>50</sup> See Washington Trade Daily, 18 June 2020, [www.washingtontradedaily.net](http://www.washingtontradedaily.net).

<sup>51</sup> See [https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158596.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf).

<sup>52</sup> See for the EU/Canada Arrangement, [https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc\\_158273.pdf](https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf), and for the EU/Norway Arrangement, [https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc\\_158394.pdf](https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf)

<sup>53</sup> See Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*, circulated 9 November 2001, referred to above.

<sup>54</sup> Statement on a Mechanism for Developing, documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, JOB/DSB/1/Add. 12, dated 30 April 2020, [https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc\\_158731.pdf](https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf). Note that the 17 WTO Members which in January 2020 committed themselves to working towards an appeal arbitration arrangement, only Korea did not, and still is not, a party to the MPIA.

<sup>55</sup> See e.g. WT/DS537/15, dated 3 June 2020.



reforming it'. According to the United States, the WTO Members that are parties to the MPIA have no right to use any WTO financial or staff resources on arbitration under the MPIA or instruct the Director-General to do so.<sup>56</sup>

### **Impact of WTO Dispute Settlement Crisis on the *TRIPS Agreement***

To date, the United States has not raised any of its concerns regarding the Appellate Body, whether regarding the latter's judicial overreach or its disregard for procedural and institutional rules, in the context of Appellate Body reports which dealt with TRIPS issues.<sup>57</sup> As noted above, the Appellate Body has circulated since 1995, reports dealing with TRIPS issues in a mere four disputes. In two of these disputes, the United States was the complainant: *India – Patents (1998)* and *Canada – Patent Terms (2000)*. In both cases, the Appellate Body found in favour of the United States and the latter therefore obviously did consider the Appellate Body to be guilty of any form of judicial overreach. The Appellate Body was also able to complete the appellate review proceedings in these relatively small appeals within the mandatory 90-day timeframe.<sup>58</sup> In a third dispute, the United States was the respondent: *US – Section 211 Appropriation Act ('Havana Club') (2002)*, and while the Appellate Body ruled on a number of claims against the United States, the latter has not included these rulings in its list of examples of judicial overreach.<sup>59</sup> This report was circulated on day 90. In the fourth dispute in which the Appellate Body circulated a report dealing with TRIPS issues, *Australia – Tobacco Plain Packaging*, circulated on 9 June 2020, the United States was not a party, but, as one might expect an active third party. As this Appellate Body report has not yet been discussed in the DSB, it remains to be seen how the United States will respond to this report and whether it will raise any of its concerns regarding the functioning of the Appellate Body. The appellate review proceedings in that case took 691 days, rather than 90 days, and the parties were not asked for their agreement to exceed the mandatory 90-day timeframe.

The fact that the United States has, to date, not explicitly raised concerns regarding Appellate Body reports addressing TRIPS issues is, however, of little importance to TRIPS dispute resolution. In the absence of a fully functional WTO dispute settlement system, TRIPS disputes may remain unresolved, may fester, and may trigger unilateral retaliation of WTO Members adversely affected by the alleged TRIPS-inconsistent measures. Also, in the absence of a fully functional dispute settlement system and, in particular, in the absence of an active Appellate Body, there will be no further clarification of TRIPS provision, and thus no further development of WTO IP law, through adjudication. The long-term impact of the crisis of the WTO settlement system will be for the WTO IP law no less harmful than for other fields of WTO law.

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<sup>56</sup> See also Bryce Baschuk, *U.S. Pledges to Block Funding for EU's WTO Appellate Body Proxy*, Bloomberg Law, 12 June 2020, <https://news.bloomberglaw.com/international-trade/u-s-pledges-to-block-funding-for-eus-wto-appellate-body-proxy>

<sup>57</sup> It may still do so with regard to the Appellate Body report in *Australia – Tobacco Plain Packaging*, which was circulated on 9 June 2020.

<sup>58</sup> Note that the Appellate Body report in *India – Patents (1998)* was circulated 65 days after the notice of appeal.

<sup>59</sup> See [United States Trade Representative, Report on the Appellate Body of the World Trade Organization, February 2020, at https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf).