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# **The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?**

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# The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?

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The World Trade Organization (WTO) dispute settlement system, established in 1995, is the youngest of the systems of international adjudication discussed in this book. In spite of its successful functioning over the past 25 years, it is today, however, also a system in crisis, due to the demise of the WTO Appellate Body, its appeals tribunal. While the WTO dispute settlement system has a number of atypical features, including the existence of appellate review, its crisis nevertheless holds useful lessons for the governance of international courts and tribunals in general.

## 1. The WTO dispute settlement system

The multilateral trading system, which aims at bringing a degree of security and predictability to international trade, has a long history of incremental and pragmatic development, which started in 1948 with the provisional entry into force of the General Agreement on Tariffs and Trade (GATT) and only in 1995 cumulated in the establishment of the WTO. One of the most noted features of the WTO is its dispute settlement system, which is to ensure the rule of law in trade relations and to avoid that everyday trade disputes escalate into all-destructive trade wars. While the 1990s saw a proliferation of international courts and tribunals, the WTO dispute settlement system stood out as being highly innovative and, arguably, the most significant advance in state-to-state dispute resolution since the establishment of the Permanent Court of International Justice in 1920.

### 1.1. *The genesis of the WTO dispute settlement system*

The WTO dispute settlement system was negotiated during the Uruguay Round of Multilateral Trade Negotiations (1986-1993) to address the United States' unilateral approach to the settlement of trade disputes, which the latter had increasingly adopted since the early 1980s. The WTO dispute settlement system, set out in the Understanding on Rules and Procedures for the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU, replaced the dispute settlement system of the GATT, the WTO's *de facto* predecessor.<sup>2</sup> The GATT dispute settlement system had become dysfunctional due to the requirement that GATT panel reports ('reports' is GATT/WTO parlance for 'judgments') had to be adopted by consensus among all GATT Contracting Parties in order to become legally binding. As from the early 1980s onwards, more and more GATT panel reports did not become legally binding because the losing party refused to join the consensus to adopt the report. The new WTO dispute settlement system resolved this problem by providing that panel reports are adopted by negative consensus (i.e., a report is adopted unless there is a consensus *not* to adopt the report). This, for all practical purposes, means that the adoption is quasi-automatic. As a safeguard against flawed panel reports, the WTO dispute settlement system provides for the possibility of appellate review of panel reports by a standing Appellate Body, an appeals tribunal composed of 7 judges.

### 1.2. *WTO dispute settlement to date*

The WTO dispute settlement system is, with its compulsory jurisdiction, its mandatory pre-litigation consultations, its appellate review, its strict time frames for proceedings, and its surveillance and enforcement of compliance, in many respects unique among international dispute resolution systems. Since its initiation in 1995, it has also been the most frequently used system for the resolution of state-

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<sup>2</sup> See Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement).

to-state disputes. To date, WTO Members have brought 606 new disputes (and 66 compliance disputes) to the WTO for resolution.<sup>3</sup> In 2018, a near-record number of 39 new disputes (and 6 compliance disputes) were brought to the WTO. On 1 October 2021, there are 32 cases pending before first-instance dispute settlement panels and 21 cases are before the Appellate Body. To date, the WTO dispute settlement system has been used, as a party or third party, by 110 of the 164 WTO Members, and it has been used by developed and developing countries alike.<sup>4</sup> While the United States and the European Union have been the most frequent complainants (as well as the most frequent respondents), the system has often been used by other WTO Members to see legal right prevail over economic and other might. On 1 October 2021, a total of 235 panel reports and 148 Appellate Body reports have been adopted by the WTO Dispute Settlement Body (DSB).<sup>5</sup> When compared with other state-to-state dispute resolution systems, such as the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS), this reveals a very high level of activity. In the period from 1 January 1995 to 1 October 2021, the ICJ rendered 77 judgments and 5 advisory opinions.<sup>6</sup> The ITLOS, an international tribunal with jurisdiction limited to a specific field of international law like the WTO dispute settlement system, rendered 14 judgments and 2 advisory opinions since its inauguration in 1996.<sup>7</sup> While the law applied by WTO panels and the Appellate Body is highly technical, the issues raised in many WTO disputes are often politically sensitive, as they concern the legality under WTO law of national legislation and policies for the protection of core societal values and interests, such as public health, public morals, environmental protection, employment, economic development and national security. The rulings in many WTO disputes have attracted much interest, and have received high praise as well as sharp criticism from WTO Member governments, economic operators and civil society. Finally, but most importantly, it should be noted that the WTO dispute settlement system has not only been used frequently and has ‘produced’ many rulings on politically sensitive issues, but it also has an excellent record of compliance with its rulings. In more than 80 percent of the disputes in which the respondent had to withdraw or amend a WTO-inconsistent measure, it did so.

## 2. From a looming to an existential crisis

For many years, the WTO dispute settlement system was referred to as the ‘jewel in the crown’ of the WTO. It was also admired and coveted by international law scholars and practitioners active in other fields of international law, and it stood as the model for the system of international investment dispute settlement now advocated by the European Union and others. WTO dispute settlement is at present, however, in an existential crisis. Due to the demise of the Appellate Body, it is, as from 11 December 2019, not fully operational anymore and has been withering away since.

### 2.1. A decade-long looming crisis

The current crisis, while unprecedented in its gravity, did not come unexpectedly. While in the early years of the system, WTO Members often expressed their satisfaction with its functioning, there were already a number of crisis moments then (e.g. the *Helms-Burton Act* national security crisis in 1997, the Articles 21.5/22.6 DSU sequencing crisis in 1999, and the *amicus curiae* brief crisis in 2000). Also, note that while expressing satisfaction with the operation of the dispute settlement system, WTO Members made a multitude of DSU reform proposals both before and in the early stages of Doha Round negotiations in the first half of 2000s. More recently, and certainly as from the beginning of 2010s, the WTO dispute settlement came under ever-increasing pressure. A major crisis was looming for several, related reasons. *First*, the workload of panels and the Appellate Body significantly augmented due to the increased size and the complexity of the disputes brought to the WTO for resolution, while the financial and other resources made available for dispute settlement fell short. *Second*, the paralysis of the ‘legislative’

<sup>3</sup> I.e., the number of requests for consultations on 1 October 2021. For up-to-date statistical information on WTO dispute settlement, see <https://www.wto.org/> or <http://worldtradelaw.net>.

<sup>4</sup> See [https://www.wto.org/english/tratop\\_e/dispu\\_e/disputats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm).

<sup>5</sup> See <https://www.worldtradelaw.net/databases/wtopanels.php> and <https://www.worldtradelaw.net/databases/abreports.php>.

<sup>6</sup> See <https://www.icj-cij.org/en/decisions/judgment/1995/2021/desc> and <https://www.icj-cij.org/en/decisions/advisory-opinion/1995/2021/desc>.

<sup>7</sup> See <https://www.itlos.org/en/main/cases/contentious-cases/> and <https://www.itlos.org/en/main/cases/advisory-proceedings/>.

branch of the WTO made Members seek change to WTO law through adjudication, rather than negotiations.<sup>8</sup> The paralysis of the ‘legislative’ branch of the WTO also made it impossible for Members to ‘correct’ alleged errors by the Appellate Body in the interpretation of WTO law. *Third*, some Members, and in particular the United States, increasingly made antagonistic allegations of judicial overreach by the Appellate Body and accused it of unacceptable disregard of procedural rules, in particular the 90-day time frame for appellate review. *Fourth* and finally, the United States took overt as well as covert action affecting the independence and impartiality of Appellate Body members, primarily in the context of the process of reappointment.

## 2.2. *The existential crisis*

The looming crisis became an acute and existential crisis because of the blockage by the Trump administration of the appointment (or reappointment) of Appellate Body members. Because of this blockage, the Appellate Body, ordinarily seven strong, had on 11 December 2019 only one member left, and was, as from that date, no longer able to hear and decide any new appeals filed.<sup>9</sup> The term of the last sitting member expired on 30 November 2020. The Appellate Body is currently a court without judges. The United States has blocked the appointment (or re-appointment) of members because it has fundamental concerns regarding the Appellate Body and its functioning.<sup>10</sup> The most significant concern of the United States is that the Appellate Body added to or diminished the rights and obligations of WTO Members under the WTO agreements. The United States accuses the Appellate Body of ‘judicial activism’ on matters relating to anti-dumping measures, subsidies, countervailing measures, safeguard measures and technical barriers to trade. The United States argues, in particular, that the Appellate Body’s case law limits its ability to counteract the importation of goods, which harm its domestic industry. In addition, according to the United States, the Appellate Body disregarded the rules on WTO dispute settlement by: (1) exceeding the mandatory 90-day time limit for appellate review (without the consent of the parties); (2) allowing outgoing Appellate Body members to complete work on appeals to which they had been assigned before the end of their term; (3) issuing ‘advisory opinions’ on issues not necessary to resolve the dispute; (4) reviewing factual findings of panels and, in particular, panel findings on the meaning of the respondent’s domestic law; and (5) treating its rulings as binding precedent. It should be noted that most of these concerns regarding the functioning of the Appellate Body had already been raised by the United States under the Obama and the George W. Bush administrations. However, only the Trump administration saw fit to plunge the WTO dispute settlement system into an existential crisis over these concerns.

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<sup>8</sup> Apart from dispute settlement, another main function of the WTO is to act as a forum for the negotiation and adoption of new trade rules. This function is referred to as the ‘legislative’ function of the WTO and is performed by the WTO’s political bodies. While there have been a few negotiating successes since 1995 (e.g. the Trade Facilitation Agreement and the decision on the prohibition of agricultural export subsidies), the ‘legislative’ branch of the WTO has been unable to adopt new trade rules and adapt the WTO rulebook to the changing nature of international trade. The ‘legislative’ branch has been paralyzed by the fact that all decisions need to be taken by consensus.

<sup>9</sup> Of the 13 appeals pending before the Appellate Body on 11 December 2019, only three were still decided. The other ten appeals remain pending.

<sup>10</sup> The United States set out its concerns in detail in a February 2020 report by the Office of the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, [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). However, see also US President’s 2018 Trade Policy Agenda, p. 22 ff, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>; Statement by the United States at the Meeting of the WTO Dispute Settlement Body of 22 July 2019 on Transparency in WTO Dispute Settlement, <https://geneva.usmission.gov/2019/07/22/statement-by-the-united-states-on-transparency-in-wto-dispute-settlement/>; Statement by the United States at the Meeting of the WTO Dispute Settlement Body on 22 June 2018 concerning Article 17.5 of the Understanding on Rules and Procedures regarding the Settlement of Disputes (p. 9- 21), [https://ustr.gov/sites/default/files/enforcement/DS/Jun22.DSB.Stmt.\(Item%205\\_90%20days\).\(public\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/Jun22.DSB.Stmt.(Item%205_90%20days).(public).pdf); Statement by the United States at the Meeting of the WTO Dispute Settlement Body on 29 October 2018 concerning the Issuance of Advisory Opinions on Issues not Necessary to Resolve a Dispute (p. 10-26), [https://ustr.gov/sites/default/files/enforcement/DS/Oct29.DSB.Stmt.\(Item%204\\_Advisory%20opinions\).\(public\).pdf](https://ustr.gov/sites/default/files/enforcement/DS/Oct29.DSB.Stmt.(Item%204_Advisory%20opinions).(public).pdf).

Faced with a possible collapse of the WTO dispute settlement system, WTO Members tabled in late 2018 and throughout 2019 a number of proposals for reform of the Appellate Body to address the concerns raised by the United States. On 26 November 2018, the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Korea, Iceland, Singapore and Mexico submitted a communication to the WTO General Council (WT/GC/W/752) setting out proposals for amendments to WTO appellate review. On the same day, the European Union, China and India submitted a second communication to the General Council (WT/GC/W/753) setting out proposals for additional amendments, particularly with regard to institutional issues concerning the Appellate Body. However, at the General Council meeting of 12 December 2018, the United States curtly rejected these proposals as not addressing the concerns it had raised. Subsequently, Honduras (in January and February 2019, WT/GC/W/758, /759, /760 and /761), Chinese Taipei (in February 2019, WT/GC/W/763 and /763/Rev.), Brazil, Paraguay and Uruguay (in March and April 2019, WT/GC/W/767 and /767/Rev.), Japan, Australia and Chile (in April 2019, WT/GC/W/768 and /768/Rev), Thailand (in April 2019, WT/GC/W/769) and the African Group (in June 2019, WT/GC/W/776) submitted communications to the General Council setting out further proposals, varying in detail and approach, for amending WTO appellate review. In parallel with formal discussions on these proposals in the General Council, Members engaged in 2019 in frequent, informal and confidential discussions under the leadership of Ambassador David Walker of New Zealand, the Chair of the WTO Dispute Settlement Body. However, the United States did not actively participate in these discussions and did not put forward any specific proposal for changes to address its concerns regarding the functioning of the Appellate Body. In October 2019, the discussions among the other WTO Members on amending WTO appellate review resulted in a draft General Council Decision on the Functioning of the Appellate Body.<sup>11</sup> As stated by Ambassador Walker, this draft Decision was 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>12</sup> The draft Decision was a carefully constructed compromise, which preserved the core features of WTO appellate review while addressing US concerns. However, the hope that the draft Decision would allow the WTO to avoid the paralysis of the Appellate Body was short-lived. At the General Council meeting of 15 October 2019, the United States rejected off-hand the draft Decision as insufficient to address its concerns. With this, the impasse was complete and the paralysis of the Appellate Body on 11 December 2019 unavoidable. In 2020 and 2021, WTO Members made no new concerted efforts to reform WTO appellate review to address US concerns.<sup>13</sup> Most Members, including the European Union, China, India and Canada, disagree with the United States that the Appellate Body systematically engaged in judicial overreach and demonstrated consistent and malicious disregard for procedural and institutional rules.<sup>14</sup> In the course of 2020 and 2021, 120 and more WTO Members repeatedly tabled a draft decision for the DSB to commence the process for the appointment of Appellate Body members.<sup>15</sup> However, the United States has consistently blocked the adoption of such

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<sup>11</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>12</sup> *Ibid.*, para. 1.22

<sup>13</sup> Note, however, that on 27 March 2020, 16 WTO Members, including Australia Brazil, Canada, China, the European Union and Mexico announced that they had reached an agreement on the *Multi-Party Interim Appeal Arbitration Arrangement under Article 25 of the DSU*, commonly referred to as the ‘MPIA’, which became effective on 30 April 2020, when it was notified to the DSB. See 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, at [https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc\\_158731.pdf](https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf). At the DSB meeting of 28 June 2020, the European Union delivered a statement explaining that the MPIA is an interim arrangement intended: ‘to preserve, in disputes among Members participating in the MPIA, a functioning and two-step dispute settlement process, as envisaged by the DSU’. According to the United States, the MPIA ‘incorporates and exacerbates some of the worst aspects of the Appellate Body’s practices’. The MPIA has currently has 25 parties, representing WTO Members, but to date no appeal of a panel report has been heard and decided under the MPIA.

<sup>14</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*, at [https://eeas.europa.eu/delegations/world-trade-organization-wto/68955/eu-statement-ambassador-joão-aguiar-machado-general-council-meeting-15-and-16-october-2019\\_en](https://eeas.europa.eu/delegations/world-trade-organization-wto/68955/eu-statement-ambassador-joão-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*, at <http://wto2.mofcom.gov.cn/article/chinaviewpoins/201910/20191002905004.shtml>.

<sup>15</sup> See [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm).

decision. To date, the Biden administration has continued the Trump administration's obstruction of the appointment process and has left the Appellate Body paralyzed.

The paralysis of the Appellate Body has not only deprived WTO Members of appellate review of first-instance panel reports. It has also undermined the whole WTO dispute settlement system. Pursuant to Article 16.4 of the DSU, when a panel report is appealed, it can only be adopted by the DSB, and become legally binding, once the Appellate Body has completed its review. As was to be expected, since 11 December 2019 only one panel report has been adopted by the DSB. All other panel reports have been appealed to the paralyzed Appellate Body by the losing party, thus ensuring that an unfavorable panel report would not become legally binding. In such circumstances, complainants have few incentives to have recourse to the WTO dispute settlement system. Not surprisingly, the number of new disputes brought to the WTO for resolution in 2020 and 2021 (as of 1 October) fell to 5 and 8 respectively, while, as mentioned above, in 2018 it was 39.<sup>16</sup> The end of appellate review by the Appellate Body has undermined the whole WTO dispute settlement system. The system, once lauded as the jewel in the crown of the WTO and seen as 'a glorious experiment with the rule of law in international relations'<sup>17</sup> is falling apart and is unlikely to overcome its current state of crisis any time soon.

### 3. Rules and procedures for the governance of WTO appellate review

While the underlying causes of the current crisis of WTO dispute settlement and the demise of the Appellate Body are political in nature and are closely related to the rise of unilateralism and economic nationalism, the crisis was, and is, an immediate result of the rules and procedures for the governance of WTO dispute settlement, and in particular the governance of WTO appellate review. These rules and procedures are set out in the WTO Agreement, the Dispute Settlement Understanding or DSU, the 1995 Decision of the Dispute Settlement Body on the Establishment of the Appellate Body (1995 DSB Decision)<sup>18</sup>, the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct)<sup>19</sup>, and the Working Procedures for Appellate Review (Appellate Body Working Procedures).<sup>20</sup> This section of the paper will address the role of, and the rules applicable to, the different actors in the governance of WTO appellate review. These actors can be divided in four groups: (1) political actors, such as the WTO Dispute Settlement Body and the WTO General Council; (2) executive actors, such as the WTO Director-General; (3) the parties in the disputes; and (4) the Appellate Body and its Secretariat.

#### 3.1. WTO Dispute Settlement Body

According to Article 2 of the DSU, the WTO Dispute Settlement Body (DSB), which is composed of senior representatives of all 164 WTO Members, is established to 'administer' the rules and procedures of WTO dispute settlement. This 'administration' includes: (1) the establishment of the *ad hoc* WTO dispute settlement panels; (2) the adoption of panel and Appellate Body reports (which renders recommendations and rulings of these reports legally binding); and (3) the authorization of retaliation measures in case of non-compliance with the recommendations and rulings of adopted panel and Appellate Body reports.<sup>21</sup> The DSB takes the decisions on these matters by reverse consensus, which means – as explained above – that the decision is taken unless Members decide by consensus not to

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<sup>16</sup> See <https://www.worldtradelaw.net/databases/searchcomplaints.php>.

<sup>17</sup> See P. Van den Bossche, Farewell Speech delivered to the WTO Dispute Settlement Body on 28 May 2019, [https://www.wto.org/english/tratop\\_e/dispu\\_e/farwellspeech\\_peter\\_van\\_den\\_bossche\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm).

<sup>18</sup> Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1, dated 19 June 1995, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=13919&CurrentCatalogueIdIndex=0&FullTextSearch](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=13919&CurrentCatalogueIdIndex=0&FullTextSearch)

<sup>19</sup> Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes adopted by the Dispute Settlement Body, WT/DSB/RC/1, dated 11 December 1996, [https://www.wto.org/english/tratop\\_e/dispu\\_e/rc\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm)

<sup>20</sup> Working Procedures for Appellate Review, WT/AB/WP/6, dated 16 August 2010

<sup>21</sup> Article 2.1 of the DSU. Note that this provision also states that the DSB maintains surveillance of the implementation of the recommendations and rulings, as is further elaborated in Article 21 of the DSU.

take the proposed decision.<sup>22</sup> As there is arguably always at least one Member that wants the decision to be taken (e.g. the Member requesting the establishment of a panel or the Member that is the ‘winning’ party in a dispute) a consensus not to take the decision is highly unlikely. There has never been such an instance to date.

While decisions on the three matters referred to above are taken by reverse consensus, the DSB takes all other decisions by ‘normal’ consensus.<sup>23</sup> As stated in footnote 1 of the DSU, a decision is taken by consensus ‘if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision’. Note that while for other bodies of the WTO (including the General Council), there is – at least in theory – the possibility of recourse to voting if consensus cannot be reached<sup>24</sup>, the DSB can only take decisions by (normal or reverse) consensus, never by voting. Most important among the decisions that the DSB must take by ‘normal’ consensus is, pursuant to Article 17.2 of the DSU, the decision on the appointment of Appellate Body members. In deciding on these appointments, the DSB is to be guided by the relevant requirements set out in Article 17.3 of the DSU, namely that: (1) 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’<sup>25</sup>; (2) Appellate Body members shall be unaffiliated with any government; and (3) the Appellate Body membership shall be broadly representative of membership in the WTO.<sup>26</sup> The 1995 DSB Decision on the Establishment of the Appellate Body explicitly states that ‘the success of the WTO will depend greatly on the proper composition of the Appellate Body’.<sup>27</sup> As regards the procedure for the appointment of Appellate Body members, note that to facilitate the decision-making process, a Selection Committee, composed of the five ambassadors chairing the most important WTO political bodies and the WTO Director-General, make – after intensive consultations with the WTO membership and interviewing the candidates – a proposal to the DSB on whom to appoint.<sup>28</sup> While the appointment process became increasingly acrimonious and ‘politicized’, the work of the Selection Committee allowed the DSB to come to consensus decisions on appointments until and including the appointment of Hyun Chong Kim (Korea) in 2016. Before 2017, only once a WTO Member objected – at least initially – to an appointment proposed by the Selection Committee.<sup>29</sup>

The DSB not only appoints Appellate Body members, but it also decides on their conditions of employment. It did so in the 1995 DSB Decision on the Establishment of the Appellate Body. While Article 17.3, fourth sentence of the DSU requires Appellate Body members ‘to be available at all times and on short notice’, it is important to note that it was the expectation of WTO Members in 1995 that parties would only occasionally have recourse to appellate review and that the Appellate Body would not be very busy.<sup>30</sup> Therefore, the DSB decided not to offer Appellate Body members ‘full-time’ contracts, but contracts based on a monthly retainer and a fee for actual days worked. This expectation of only occasional recourse to appellate review proved to be quite wrong. In the first few years of WTO dispute settlement *all* panel reports were appealed and over the last 25 years more than two out three panel reports were appealed.<sup>31</sup> While the 1995 DSB Decision stated that the employment conditions ‘could be kept under review by the DSB ... to determine whether a move to full-time employment was

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<sup>22</sup> See Article 6.1 of the DSU (on the establishment of a panel), Article 16.4 and 17.14 of the DSU (on the adoption of panel and Appellate Body reports) and Article 22.6 of the DSU (on the authorization to retaliate).

<sup>23</sup> Article 2.4 of the DSU.

<sup>24</sup> Article IX:1 of the WTO Agreement.

<sup>25</sup> As the DSB stated in paragraph 10 of its 1995 Decision on the Establishment of the Appellate Body, Article 17.3, fourth sentence, of the DSU suggests that Appellate Body members have ‘a priority working relationship with the WTO’ but may ‘have other activities’.

<sup>26</sup> Paragraph 6 of the 1995 Decision on the Establishment of the Appellate Body states that while the ‘overriding concern is to provide highly-qualified members for the Appellate Body’, ‘factors such as different geographical areas, levels of development, and legal systems shall be duly taken into account’.

<sup>27</sup> See paragraph 4 of the 1995 Decision on the Establishment of the Appellate Body.

<sup>28</sup> See paragraph 12 of the 1995 Decision on the Establishment of the Appellate Body.

<sup>29</sup> In 2008, Chinese Taipei objected to the proposal of the Selection Committee to appoint Yuejiao Zhang, a national of China, as Appellate Body Member.

<sup>30</sup> Note that the DSB refers to ‘sporadic trips to Geneva’ (emphasis added). See paragraph 12 of the 1995 Decision on the Establishment of the Appellate Body.

<sup>31</sup> See <http://worldtradelaw.net/databases/appealcount.php>.

warranted'<sup>32</sup>, the DSB never amended the conditions of employment of Appellate Body members it adopted in 1995. In view of the heavy workload of the Appellate Body in many of the past 25 years, full-time employment of Appellate Body members would most probably have imposed a lesser financial burden on the WTO than the 'retainer plus daily fee' arrangement.

### *3.2. WTO General Council*

The other political actor in the governance of WTO appellate review is the WTO General Council, which is also composed of senior representatives of all WTO Members but which has a much broader ambit than the DSB. In the intervals between the meetings of the WTO Ministerial Conference, the supreme political organ of the WTO, it is the WTO General Council, which has the authority to take decisions on all WTO matters. In the context of the governance of WTO appellate review, the most important decision for the General Council to take is the adoption of the WTO annual budget, including the budget of the Appellate Body.<sup>33</sup> As discussed above, the General Council has also been involved – albeit unsuccessfully – in discussions in 2019 on ways to avoid the impending paralysis of the Appellate Body of a result of the US blockage of the appointment of Appellate Body members.<sup>34</sup> As noted above, the General Council can take decisions by voting if consensus cannot be reached.<sup>35</sup> However, since 1995, only a handful of decisions of the General Council have been taken by voting, and this never regarding matters relating to dispute settlement.

### *3.3. WTO Director-General*

The most important executive actor in the governance of WTO appellate review is the WTO Director-General. Article VI:1 of the WTO Agreement provides that the WTO Secretariat shall be headed by a Director-General. Pursuant to Article VI:3, the Director-General appoints the staff of the WTO Secretariat and determines their duties and conditions. While paragraph 17 of the 1995 DSB Decision on the Establishment of the Appellate Body explicitly states that the staff of the Appellate Body 'should be independent' from the WTO Secretariat and 'answerable to the Appellate Body' only, it is – pursuant to the same paragraph 17 – the Director-General who appoints the Appellate Body staff and determines their employment conditions, including promotions and terminations. Another task of the Director-General relating to the governance of WTO appellate review is the preparation of the annual WTO budget, including the Appellate Body budget.<sup>36</sup> Finally, as already noted, the Director-General is, as a member of the Selection Committee, involved in the appointment process of Appellate Body members.

### *3.4. Parties to the dispute*

In addition to the political actors, such as the DSB and the General Council, and executive actors, such as the Director-General, the parties to a dispute obviously also play an important role in the governance of WTO appellate review. It is one of the parties that initiates an appeal and the other party may follow-up with an 'other appeal' (which is WTO speak for a cross-appeal). The appellant and other appellant are free in deciding the breadth and depth of their appeal of the issues of law covered in a panel report and legal interpretations developed by a panel. Once initiated, the conduct of the appellant(s), appellee(s) and third participant(s) in the appellate proceedings is regulated by the Appellate Body Working Procedures, which are quite detailed and similar for those of other international courts. At the request of the appellant(s), appellee(s) or third participant(s), the Appellate Body may, in the interest of

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<sup>32</sup> Paragraph 11 of the 1995 Decision on the Establishment of the Appellate Body.

<sup>33</sup> See Article VII:3 of the WTO Agreement. Pursuant to the Financial Regulations of the WTO, expenditure specific to the functioning of the Appellate Body and its Secretariat shall be identified and subject to a specific recommendation to the General Council by the Committee on Budget, Finance and Administration. See Regulation 7 of the Financial Regulations of the World Trade Organization, WT/L/156/Rev. 3, dated 27 February 1995.

<sup>34</sup> As discussed above, this involvement resulted in the draft General Council Decision on the Functioning of the Appellate Body of 15 October 2019.

<sup>35</sup> See Article IX:1 of the WTO Agreement.

<sup>36</sup> See Article VII:1 of the WTO Agreement and the Financial Regulations of the World Trade Organization, WT/L/156/Rev. 3, dated 27 February 1995.

fairness and orderly procedure, adopt additional procedural rules for the purpose of a specific appeal or may allow deviation from the standard timetable for appeals.<sup>37</sup> It should be noted, however, that parties have only in few cases requested the Appellate Body to adopt additional procedural rules or allow deviation from the standard timetable. The most common additional procedural rules relate to the protection of business confidential information during the appellate proceedings. Pursuant to Article 17.14, parties must accept ‘unconditionally’ the recommendations and rulings of Appellate Body reports once they are adopted by the DSB. However, this obligation is without prejudice to the right of parties, and all other WTO Members, to express their views on an Appellate Body report.<sup>38</sup> The latter is usually done when the DSB meets to adopt the report concerned. Generally speaking, this is a politically useful feature of WTO dispute settlement, as it allows the losing party to ‘let off steam’ in a procedurally ‘controlled’ context.

### 3.5. Appellate Body

Arguably the most important actor in the governance of WTO appellate review is the Appellate Body itself. Article 17.1 of the DSU provides that a standing Appellate Body shall be established by the DSB, which the latter did in its Decision of 10 February 1995, already referred to above. The overall mandate of the WTO dispute settlement system, and thus of the Appellate Body, is set out in Article 3.2 of the DSU. According to Article 3.2 of the DSU, the WTO dispute settlement system is ‘a central element in providing security and predictability to the multilateral trading system’. As further stated in this core provision, the WTO dispute settlement system serves ‘to preserve the rights and obligations’ of Members under the WTO agreements, *and* ‘to clarify the existing provisions under those agreements’. The latter is to be done ‘in accordance with customary rules of interpretation of public international law’. Note in this regard that the last sentence of Article 3.2. of the DSU explicitly warns against judicial activism when it states that WTO dispute settlement rulings ‘cannot add to or diminish the rights and obligations’ provided in the WTO agreements. This warning is repeated in Article 19.2 of the DSU. Important is also that Article 3.3 of the DSU states that the ‘prompt settlement’ of disputes is ‘essential to the effective functioning of the WTO’. Several DSU provisions therefore provide for exacting time frames.

The more specific mandate of the Appellate Body is set out in paragraphs 1, 6, 12 and 13 of Article 17 of the DSU. Pursuant to paragraph 1, the Appellate Body ‘shall hear appeals from panel cases’, but as stated in paragraph 6, it can only hear appeals concerning ‘issues of law in the panel report and legal interpretations developed by the panel’. Pursuant to paragraph 12, the Appellate Body is required to address all issues raised in according with paragraph 6 during the appellate proceedings. Paragraph 13 stipulates that the Appellate ‘may uphold, modify or reverse’ the legal findings and conclusions of a panel. In practice, the Appellate Body has interpreted its mandate broadly and, as already referred to above, has been strongly criticized for doing so by the United States. It has heard appeals of factual findings which were allegedly inconsistent with the legal obligation of the panel to make an objective assessment of the facts and therefore constituted a legal issue subject to appellate review. Also, the Appellate Body has, in addition to upholding, modifying and reversing panel findings and conclusions, on occasion, and under specific conditions, completed the legal analysis of a panel, and has thus acted as a first-instance adjudicator and not as an appeals tribunal. It did so not to leave a dispute unresolved.

Pursuant to Article 17.1 of the DSU, the Appellate Body shall be composed of seven persons. When compared with other international courts, such as the ICJ (15 judges) or the ITLOS (21 judges), the modest size of the Appellate Body stands out. As to the composition of the Appellate Body, Article 17.3, first sentence, of the DSU further provides, as already discussed above, that ‘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’. Paragraph 5 of the 1995 Decision on the Establishment of the Appellate Body further stipulates that the required expertise of Appellate Body members ‘should be a type that allows [them] to resolve “issues of law covered in the panel report and

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<sup>37</sup> See paragraph 16(1) and 16(2) of the Appellate Body Working Procedures

<sup>38</sup> See Article 17.14, last sentence, of the DSU.

legal interpretations developed by the panel”’. This is a rather self-evident, and therefore not very useful, clarification of who is fit to serve on the Appellate Body. More useful is the requirement set out in Article 17.3, second sentence, that Appellate Body members ‘shall be unaffiliated with any government’. The 1995 DSB Decision on the Establishment of the Appellate Body further elaborates on this requirement by stating that Appellate Body members ‘should not [...] have any attachment to a government that would compromise their independence of judgment’.<sup>39</sup> It is noted that this requirement would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government, such as academic positions at government-funded universities.

Reflecting the same concern regarding the independence and impartiality of Appellate Body members, Article 17.3, fifth sentence, of the DSU states that Appellate Body members ‘shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest’. To clarify the scope of this requirement, the DSB adopted in 1996 the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct). These Rules apply to everybody involved in WTO dispute settlement but have some specific provisions for the Appellate Body members. The ‘governing principle’ of the Rules is that all those covered by them ‘shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings ..., so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved’.<sup>40</sup> To ensure observance of this governing principle, the Rules require any person subject to them *inter alia*: (1) ‘to disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality’<sup>41</sup>; and (2) to ‘not incur any obligation or accept any benefit that would in any way interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties’.<sup>42</sup> With regard to the disclosure requirement, it should be noted that an Appellate Body member discloses any interest, relationship or matter of the kind referred to above, to his or her fellow Appellate Body members, and not, as others involved in WTO dispute settlement, to the Chair of the DSB. It is the Appellate Body, and not a political WTO entity, which decides whether the disclosure made would justify recusal from an appeal. The Appellate Body is thus protected from political interference. While the Appellate Body never made public a decision to recuse one of its members from an appeal, this has been a more common occurrence than often thought. Parties may request the disqualification of an Appellate Body member on grounds of a material violation of the Rules of Conduct. It is for the Appellate Body, and not for the Chair of the DSB (as is the case for others involved in WTO dispute settlement), to decide on whether such violation has occurred and, if so, to take appropriate action.<sup>43</sup> To date, no WTO Member has ever formally requested the disqualification of an Appellate Body member on grounds of a material violation of the Rules of Conduct.<sup>44</sup>

Appellate Body members serve for a four-year term once renewable.<sup>45</sup> When compared with the term in office of judges in other international courts, such as the ICJ or the ITLOS (nine-year terms), the four-year term of Appellate Body members is short. As ICJ and ITLOS judges, Appellate Body members can be reappointed, albeit only once.

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<sup>39</sup> Paragraph 7 of the 1995 Decision on the Establishment of the Appellate Body.

<sup>40</sup> Paragraph II(1) of the Rules of Conduct.

<sup>41</sup> Paragraph III(1) of the Rules of Conduct. See also paragraph VI of the Rules of Conduct.

<sup>42</sup> Paragraph III(2) of the Rules of Conduct.

<sup>43</sup> See paragraph VIII(14)-(17) of the Rules of Conduct.

<sup>44</sup> Note, however, that in March 2020, the United States contended that Hong Zhao was not ‘a member of the Appellate Body because she has not eligible under the DSU’. According to the United States, Hong Zhao, who had been on the Appellate Body since 2016, was ineligible because of her affiliation with China's Academy of International Trade and Economic Cooperation. See S. Charnovitz, ‘The Trump Administration’s Shameful Attack on Appellator Zhao’, *International Law and Policy Blog*, <https://ielp.worldtradelaw.net/2020/03/the-trump-administrations-shameful-attack-on-appellator-zhao.html>.

<sup>45</sup> See Article 17.2 of the DSU.

Finally, it should be noted that the Appellate Body has detailed working procedures. As provided for in Article 17.9 of the DSU, the Appellate Body draws up its own working procedures and communicates them to the WTO Members for their information. While the Appellate Body is to consult with the Chair of the DSB and the WTO Director-General when drawing up its working procedures, WTO Members gave the Appellate Body a large degree of freedom in this regard. Some Members would now argue that the Appellate Body ‘abused’ this freedom when adopting its Working Procedures in February 1996. These Working Procedures reflect some fundamental choices with regard to the nature of Appellate Body proceedings and the conduct of WTO appellate review. As to the nature of Appellate Body proceedings, the Working Procedures provide for judicial-type proceedings and reveal that the Appellate Body considered itself to be a court, rather than an arbitral tribunal. The Appellate Body made quite clear that it wanted to break with the party-controlled GATT panel proceedings. The Working Procedures describe in detail and with particular concern for due process, the appellate review process. Of particular concern to the Appellate Body was to provide for procedures that would allow to hear and decide appeals in no more than 90 days, as required under Article 17.5 of the DSU. Another notable feature of the Working Procedures is the introduction of the exchange of view. Pursuant to Article 17.1 of the DSU, an appeal is not heard and decided by the Appellate Body *en banc*, but, instead, by a division of three members serving in rotation. It is clear that such an approach to appellate review would make it more difficult for a consistent body of case law to arise. To address this, Rule 4 of the Working Procedures, entitled ‘Collegiality’, requires the division responsible for deciding an appeal ‘to exchange views’ with the four other Appellate Body members, before it finalizes its report. Such an ‘exchange of views’ is quite unique in international (or national) dispute resolution, but has been of significant benefit to the work of the Appellate Body. It has contributed to the quality and authority of its decisions and ensured consistency and coherence in its case law. Some WTO Members, and in particular the United States, have, however, taken the position that consistency and coherence of the case law is not an objective for the WTO dispute settlement system to pursue.

### *3.6. Appellate Body Secretariat*

Pursuant to Article 17.7 of the DSU, the WTO is to provide the Appellate Body ‘with appropriate administrative and legal support as it requires’. On the basis of the expected workload of the Appellate Body, the DSB considered in its 1995 Decision that ‘a reasonable level of support in the initial stages of operation of the Appellate Body would be one registrar, three professional assistants with legal training, and sufficient clerical staff’.<sup>46</sup> In 1997, the Appellate Body Secretariat had one Director, acting as registrar, one senior and two junior legal advisors, as well as two support staff. As from the beginning, it was clear that the Appellate Body Secretariat was considerably understaffed. While over the years the Appellate Body Secretariat grew in size and had in December 2019, in addition to the Director, seven senior and ten junior legal advisors and five support staff, the legal and administrative support given to the Appellate Body was, in most years, less than what was required to handle the workload.

Apart from the administrative and legal support to be given to the Appellate Body, the 1995 DSB Decision also addressed the issue of the independence of the Appellate Body Secretariat. Paragraph 17 of the Decision states that the Appellate Body Secretariat should be independent from the WTO Secretariat.<sup>47</sup> This makes eminent sense since, pursuant Article 27.1 of the DSU, the WTO Secretariat (with the WTO Director-General at its head) assists and gives legal advice to the panels. Therefore, the WTO Secretariat cannot be called up to assist and give legal advice to the Appellate Body, which hears and decides on appeals of panel findings and conclusions. The task of assisting and advising the Appellate Body must be entrusted to an entity which is separate and independent from the entity that assisted and advised the panel of which the findings are appealed. Paragraph 17 of the 1995 DSB Decision recognizes this need, but leaves the decision on the appointment of the staff of the Appellate Body Secretariat, as well as decisions on their promotion and termination, with the WTO Director-General.

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<sup>46</sup> Paragraph 16 of the 1995 Decision on the Establishment of the Appellate Body.

<sup>47</sup> Paragraph 17 of the 1995 Decision on the Establishment of the Appellate Body.

#### 4. Aspects of malgovernance

WTO dispute settlement in general and WTO appellate review in particular undoubtedly have governance features, which contribute to effective adjudication of international disputes. Some of these features are uncommon in international adjudication and the introduction of such features in other international dispute resolution systems might well increase of the effectiveness of the latter. Among these features are the provision of appellate review itself, but also, for example, the ‘exchange of views’ among judges when cases are not heard and decided *en banc*. However, WTO dispute settlement in general and WTO appellate review in particular also have governance features that have resulted in the current Appellate Body crisis and the undermining of the credibility and effectiveness of WTO dispute settlement. This section of the paper focuses on five aspects of the malgovernance of WTO appellate review: (1) the blockage of the appointment of Appellate Body members; (2) persistent and unfounded allegations of ‘overreach’ by the Appellate Body; (3) inadequate protection of the independence and impartiality of the Appellate Body and its Secretariat; (4) unrealistic timeframes for appellate review; and (5) the size of the Appellate Body and its Secretariat.

##### 4.1. Blockage of the appointment of Appellate Body members

As explained above, the immediate cause of the current crisis of the Appellate Body is the blockage by the United States of the appointment of Appellate Body members. The appointment of members requires a consensus decision by the DSB and the United States has made clear that it will veto such decision as long as its ‘concerns’ regarding the Appellate Body and its functioning have not been addressed. More, the United States made clear that it would not agree to the appointment of members as long as broader reforms of the WTO and its law were not agreed on. As the then United States Trade Representative Robert Lighthizer said to the US Senate Finance Committee in March 2019, the Appellate Body crisis was ‘leverage’ for such broader reforms.<sup>48</sup> Hence, the process for the appointment (or reappointment) of Appellate Body members has been blocked since 2017. The appointment of judges is often a contentious matter in many international courts or tribunals. The appointment of ICJ judges is a good example in this regard. However, while it may be cumbersome, the appointment process of judges in other international courts cannot be blocked by one or a few countries. The appointment of ICJ judges, for example, ‘only’ requires majority support in the Security Council and the General Assembly.<sup>49</sup>

It has been suggested that the WTO should break the blockage of the appointment of Appellate Body members by referring this matter to the WTO General Council, which can take decisions by majority vote. As noted above, dispute settlement matters have on occasion been discussed in the General Council. In 2018 and 2019, the Appellate Body crisis was on the agenda of many meetings of the General Council. However, it is questionable whether – formally speaking – the General Council could take a decision on the appointment of Appellate Body members, i.e., a matter explicitly entrusted, pursuant to Article 17.2 of the DSU, to the DSB. Article IV:3 of the WTO Agreement states: ‘The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding’. This means that whenever the General Council discusses dispute settlement matters it convenes as the DSB (and not as the General Council) and decisions can only be taken by consensus. To overcome the current blockage, the decision on the appointment of Appellate Body members could be referred to the Ministerial Conference, the WTO’s supreme body, which, pursuant to Article IX:1 of the WTO Agreement, can take all its decisions by majority vote. It is, however, highly unlikely that the Ministerial Conference will adopt any important decision by majority vote, certainly in the face of strong US opposition. The blockage of the appointment of Appellate Body members, and the failure to address this blockage, is a first aspect of the malgovernance of the WTO appellate review.

##### 4.2. Persistent and unfounded allegations of ‘overreach’ by the Appellate Body

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<sup>48</sup> See <https://www.finance.senate.gov/hearings/approaching-25-the-road-ahead-for-the-world-trade-organization>.

<sup>49</sup> Note that the Permanent Members of the UN Security Council have no veto power regarding decisions on the appointment of ICJ judges.

As noted above, the blockage by the United States of the appointment of Appellate Body members is motivated by its concerns regarding the functioning of the Appellate Body. The United States considers *inter alia* that the Appellate Body ‘overreached’, i.e., exceeded, its mandate under the DSU in several ways.

#### 4.2.1. Judicial activism

According to the United States, the Appellate Body has, through its interpretation of WTO provisions, created obligations to which the United States never agreed. In other words, the United States accuses the Appellate Body of judicial activism. In this context the United States refers in particular to the Appellate Body case law on ‘zeroing’, on ‘public body’, on ‘unforeseen developments’ and on ‘legitimate regulatory distinctions’. Whether this case law does indeed reflect judicial activism is contested by many other WTO Members. As one of the Appellate Body members in *US – Continued Zeroing (2009)* stated in a concurring opinion: ‘a treaty bears the imprint of many hands. And what is left behind is a text, sometimes negotiated to a point where an agreement to regulate a matter could only be reached on the basis of constructive ambiguity, carrying both the hopes and fears of the parties’.<sup>50</sup> This is definitely so for the WTO agreements, which are a masterpiece of ‘constructive ambiguity’ with many provisions that Members understand differently and which thus give rise to disputes. As a result, there is much need for ‘clarification’, a task which Article 3.2, second sentence, of the DSU explicitly assigns to the WTO dispute settlement system, and thus ultimately to the Appellate Body. As already noted above, the scope of this mandate to clarify is circumscribed by Articles 3.2, third sentence, and 19.2 of the DSU, which state that the WTO dispute settlement system, and thus the Appellate Body, ‘cannot add to or diminishes the rights and obligations provided in the covered agreements’.<sup>51</sup> The DSU thus clearly does not condone judicial activism. The Appellate Body is definitely not to take on the role of ‘legislator’. The line that divides ‘clarification of WTO provisions’ from ‘adding to or diminishing the rights and obligations of Members’ is, however, not always easy to draw. For panels and the Appellate Body to stay within their mandate to clarify existing provisions, it is important that they clarify as instructed by Article 3.2, second sentence, of the DSU, namely ‘in accordance with the customary rules of interpretation of public international law’. As the Appellate Body already noted in 1996, the rules of interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (VCLT) are such customary rules of interpretation.<sup>52</sup> To avoid adding to or diminishing the rights and obligations of Members, i.e., to avoid judicial activism, the clarification of WTO provisions requires rigorous adherence to the rules of interpretation of Articles 31 and 32 of the VCLT. As the Appellate Body stated in *Chile – Alcoholic Beverages (2000)*: ‘[w]e have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements’.<sup>53</sup> Article 31 of the VCLT provides that the words of the treaty form the foundation for the interpretative process.<sup>54</sup> The results of an interpretative approach, which gives primary importance to the wording actually used, are more easily accepted by the parties to the treaty than the often ‘surprising’ results of interpretative approaches that, for example, give more importance to the object and purpose of the treaty. If most WTO Members hold the Appellate Body in high esteem, this is to a large extent due to the Appellate Body’s choice for, and near-consistent application of, a ‘text first’ approach to interpretation.<sup>55</sup>

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<sup>50</sup> Appellate Body Report, *US – Continued Zeroing (2009)*, para. 306.

<sup>51</sup> Note that the constituent instruments of other international courts and tribunals seldom have provisions prohibiting judicial activism, although it is obviously disallowed.

<sup>52</sup> See Appellate Body Report, *US – Gasoline (1996)*, 15–16; and Appellate Body Report, *Japan – Alcoholic Beverages II (1996)*, 104.

<sup>53</sup> Appellate Body Report, *Chile – Alcoholic Beverages (2000)*, para. 79.

<sup>54</sup> See Appellate Body Report, *Japan – Alcoholic Beverages (1996)*, 11.

<sup>55</sup> See P. Van den Bossche, ‘The Making of the “World Trade Court”: The Origins and Development of the Appellate Body of the World Trade Organization’, in R. Yerxa and B. Wilson, *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press, 2005), 72.

While it is not uncommon for a WTO Member in the immediate aftermath of an unfavorable ruling to accuse the Appellate Body of having added to or diminished that Member's WTO rights and obligations, in most instances this accusation is primarily for domestic consumption and short-lived. The latter is not the case for the United States, which has, with regard to case law with which it does not agree, maintained strongly-worded accusations of judicial activism. As noted earlier, for the United States, the alleged judicial activism of the Appellate Body is the main reason for its obstruction of the appointment of Appellate Body members and thus undermining the whole WTO dispute settlement system. To be clear, if the Appellate Body was indeed systematically engaged in judicial activism, it would be acting inconsistently with its mandate and the United States' action would be justified. However, while the United States makes antagonistic allegations of judicial activism regarding Appellate Body case law it does not agree with, it has not convincingly demonstrated that the Appellate Body's interpretation in these instances is not in accordance with Articles 31 and 32 of the VCLT.<sup>56</sup>

To address the United States' concern regarding judicial activism, it has been suggested to institute an annual 'dialogue' between the Appellate Body and the WTO Dispute Settlement Body (DSB) on developments in the case law. It should be noted that Article 17.14, second sentence, of the DSU already provides for 'the right of Members to express their view on an Appellate Body report'. The parties to a dispute, and to a lesser degree also other WTO Members, make use of this right at the DSB meeting at which the report is adopted. At this meeting, the winning party usually limits itself to thanking the Appellate Body for 'a job well done' and the losing party seldom does more than repeating in detail the arguments it unsuccessfully made during the appellate proceedings. These statements seldom shed new light on the matter at issue. Whether an annual meeting between the Appellate Body and the DSB will be any different in character is doubtful. However, an additional opportunity for Members to vent their disagreement with developments in the Appellate Body's case law may be useful, especially if the discussion on these developments could be at a general, non-case-specific level (if that is at all possible).

#### 4.2.2. Rendering advisory opinions

The United States also argues that the Appellate Body 'overreaches' its mandate by 'rendering advisory opinions' by ruling on issues which need not to be addressed to resolve the dispute. As noted above, Article 17.12 of the DSU, however, explicitly requires that the Appellate Body addresses 'each of the issues raised ... during the appellate proceedings'. To address the United States' objection regarding what it considers to be advisory opinions, other WTO Members have proposed to amend Article 17.12 by including language explicitly instructing the Appellate Body not to address issues that need not be addressed to resolve the dispute. However, it should be noted that parties may disagree on what is needed to resolve the dispute and that there may be merit in giving both parties their 'day in court' by addressing all issues raised and related arguments made. While an international adjudicator should be cautious not to rule on more than is needed, there is virtue in considering all issues and arguments and explaining a ruling carefully.

#### 4.2.3. Appellate review of factual findings

Another 'concern' raised by the United States regarding the alleged 'overreach' of the Appellate Body relates to the scope of appellate review. The United States alleges that the Appellate Body erroneously and *ultra vires* reviewed factual findings of the panel, and in particular findings on the meaning of municipal law. As noted above, Article 17.6 of the DSU limits appellate review to 'issues of law covered in the panel report and legal interpretations developed by the panel'. Factual issues are therefore clearly beyond the scope of appellate review. As the Appellate Body stated in *EC – Hormones (1998)*, 'findings of fact, as distinguished from legal interpretations and legal conclusions, by a panel are, *in principle*, not subject to review by the Appellate Body'.<sup>57</sup> However, the panel's discretion in the determination of the facts is *not* unlimited. A panel's determination of the facts must be consistent with Article 11 of the

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<sup>56</sup> Disagreeing with the Appellate Body's interpretations is something else than demonstrating that the Appellate Body erred in its application of Articles 31 and 32 of the VCLT when making these interpretations.

<sup>57</sup> Appellate Body Report, *EC – Hormones (1998)*, para. 132. Emphasis added.

DSU. Under Article 11, the panel is under the legal obligation ‘to make an objective assessment of the matter before it, including an objective assessment of the fact of the case ...’. As the Appellate Body ruled in *EC – Hormones (1998)*, ‘whether or not a panel made an objective assessment of the facts before it ... is ... a legal question, which, if properly raised on appeal, would fall within the scope of appellate review’.<sup>58</sup> The standard applied by the Appellate Body for finding that a panel failed to make an objective assessment of the facts is quite high. Not every error of the panel in the determination of the facts amounts to a violation of Article 11. In fact, under the current case law, the error must be such that it casts doubt on the objectivity of the panel’s factual assessment.<sup>59</sup> While the United States expresses concern regarding the Appellate Body’s review of factual findings, one wonders whether the United States would object to the review of factual findings which raise questions regarding the objectivity of the panel’s assessment of the facts, for example because the findings by the panel were made in blatant violation of due process. Limiting appellate review of such findings would significantly undermine the credibility of WTO dispute settlement. Note that the US concern regarding the review of factual findings often focusses on panel findings on the meaning of US municipal law. Such panel findings are factual findings and – if they are not alleged to be inconsistent with Article 11 – should, indeed, not be subject to appellate review. To the extent that the Appellate Body has reviewed such findings, it did so in error.

#### 4.2.4. Giving precedential value to case law

Finally, the United States contends that the Appellate Body has ‘overreached’ its mandate by giving precedential value to its case law. The United States objects to any obligation on panels to consider prior Appellate Body rulings as precedent, i.e., as binding on them. The Appellate Body has consistently held that there is no binding precedent (*stare decisis*) in WTO dispute settlement. However, it has noted that Article 3.2 of the DSU states that WTO dispute settlement is a central element in providing security and predictability to the multilateral trading system, and that WTO Members have a legitimate expectation that the same legal issue is decided in the same way in later disputes. Therefore, panels cannot be free to deviate from established case law absent ‘cogent reasons’.

#### 4.2.5. Impact of persistent and unfounded allegations of judicial overreach

Persistent and unfounded allegations of judicial activism and other forms of overreach undermine the effective operation of the court or tribunal concerned. Such allegations are therefore a second aspect of the malgovernance of WTO appellate review.

### 4.3. *Inadequate protection of the independence and impartiality of the Appellate Body and its Secretariat*

As regards the independence and impartiality of the Appellate Body, two issues – one relating to its members and the other to its staff – give cause for apprehension. As noted above, Appellate Body members are appointed for a four-year term, once renewable. As the first term is short, many Appellate Body members may be expected to seek a second term. It is this possibility of re-appointment which may cast doubt on the independence and impartiality of those Appellate Body members wishing to secure a second term. Like the initial appointment, re-appointment requires a consensus decision of the DSB. This gives any WTO Member the power to deny an Appellate Body member reappointment because of its ‘displeasure’ with rulings by the Appellate Body in which that member was involved. The United States twice prevented the reappointment of Appellate Body members for this reason. In 2011, it did not nominate for reappointment of Jennifer Hillman, a US national, allegedly because she had not been sufficiently proactive and/or successful in defending US positions.<sup>60</sup> In 2016, the United

<sup>58</sup> Ibid.

<sup>59</sup> See Appellate Body Report, *US – COOL (2012)*, para. 300.

<sup>60</sup> See G. Hufbauer, ‘WTO Judicial Appointments: Bad Omen for the Trading System’, Realtime Economic Issues Watch, Peterson Institute for International Economics, 13 June 2011, <https://www.piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system>. Note that in 2007 also Merit E. Janow, the Appellate Body member from the United States (2003-2007) and a professor of law at Columbia University, was not reappointed, although

States blocked the reappointment of Seung Wha Chang, a Korean national, primarily because of Chang's involvement in four Appellate Body rulings, which the United States considered erroneous.<sup>61</sup> The US decision to block the reappointment of Chang, and in particular the reason given for this decision, was strongly criticized by other WTO Members.<sup>62</sup> While Article 17.2 makes it clear that reappointment requires consensus in the DSB, there was no procedure for reappointment set out in either the DSU or the 1995 DSB Decision. However, in 2013 for the first time and then again in 2015 and 2016, WTO Members agreed on an *ad hoc* procedure which involved submitting the member nominated for reappointment to questioning by a group of ambassadors of frequent users of the dispute settlement system (2013) or by the DSB (2015 and 2016).<sup>63</sup> In the context of the discussion on the reform of WTO appellate review, China, the European Union, India and Montenegro proposed to amend Article 17.2 of the DSU and appoint Appellate Body members for a single, non-renewable 6 or 8-year term.<sup>64</sup> This proposal was motivated by the perceived need to better ensure the independence and impartiality of Appellate Body members. The United States rejected this proposal arguing that it would make Appellate Body members less accountable.<sup>65</sup>

A second issue regarding the independence and impartiality of the Appellate Body concerns the staff of the Appellate Body. As discussed above, paragraph 17 of the 1995 DSB Decision on the Establishment of the Appellate Body states, for good reason, that the support staff of the Appellate Body 'should be independent from the [WTO] Secretariat'.<sup>66</sup> However, while paragraph 17 explicitly states that the staff of the Appellate Body is 'answerable to the Appellate Body' (and not to the WTO Director-General), the staff is to be appointed (and can presumably also be dismissed) by the WTO Director-General (and not by the Appellate Body).<sup>67</sup> The Director-General also decides on the conditions of employment of the staff, including promotions in rank. Successive Directors-General have, to different degrees, sought to influence the operation of the Appellate Body Secretariat by requiring the Director of the Appellate Body Secretariat to report to them. The 'hold' of the WTO Director-General over the Appellate Body staff is difficult to reconcile with the intended independence of the Appellate Body Secretariat.

The inadequate protection of the independence and impartiality of the Appellate Body and its Secretariat is a third aspect of the malgovernance of WTO appellate review.

#### *4.4. Unrealistic time frame for appellate review*

Article 17.5 of the DSU stipulates regarding appellate review that 'in no case shall the proceedings exceed 90 days'. No other international court or tribunal works with a time frame of a similar nature and severity. Until 2011 the Appellate Body was able to keep to this very demanding time frame in most cases. However, over the last decade, the vastly increased complexity and size of many appeals

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she did, after some initial hesitation, seek reappointment. She was replaced by Jennifer Hillman, who as a former USTR General Counsel and member of the US International Trade Commission, was seen as more of an insider.

<sup>61</sup> See Statement by the United States at the meeting of the WTO Dispute Settlement Body of 23 May 2016, item 7, [https://www.wto.org/english/news\\_e/news16\\_e/us\\_statment\\_dsbmay16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf). Seung Wha Chang, a professor of law at Seoul National University, was subsequently replaced by Hyun Chong Kim, who was a former trade minister for Korea. The latter resigned in August 2017, when he was again appointed trade minister for Korea.

<sup>62</sup> See [https://www.wto.org/english/news\\_e/news16\\_e/dsb\\_23may16\\_e.htm](https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm).

<sup>63</sup> The Appellate Body members seeking reappointment were in 2013 Peter Van den Bossche of the European Union; in 2015, Ujal Singh Bhatia of India and Thomas Graham of the United States, and in 2016, Seung Wha Chang of Korea.

<sup>64</sup> See Communication from the European Union, China, India, and Montenegro to the General Council, WT/GC/W/753, dated 26 November 2018, WT/GC/W/753/Rev. 1, dated 11 December 2018.

<sup>65</sup> See L. von Daniels, S. Dröge and A. Bögner, 'Ways Out of the WTO's December Crisis', Stiftung Wissenschaft und Politik, <https://www.swp-berlin.org/10.18449/2019C46/>.

<sup>66</sup> Paragraph 17 of the 1995 Decision on the Establishment of the Appellate Body.

<sup>67</sup> The WTO Director-General takes decisions on staff appointments on the advice of a selection committee. The selection committees for Appellate Body staff have always included a majority of WTO Secretariat staff and only in selection committees for the Director or (in recent years) senior legal advisors, the Appellate Body would be represented by one of its members.

have made this time frame unrealistic.<sup>68</sup> While the length of Appellate Body proceedings is still short when compared with the length of the proceedings of other international courts and tribunals, the Appellate Body's failure to complete its proceedings within 90 days has been criticized harshly by some WTO Members. According to the United States, the Appellate Body may only exceed the 90-day time frame if and when the parties have agreed to an extension of the time frame. Before 2010 the Appellate Body invited the parties to a dispute to communicate to the Appellate Body that they would deem a report circulated after 90 days to be a report circulated within that period (the so-called 'deeming letters'). However, as from 2010 onwards the Appellate Body stopped this practice of inviting deeming letters. Such practice could be seen as a recognition by the Appellate Body that the 90-day time frame could only be exceeded with the agreement of the parties. This cannot be so because it would allow an appellee to frustrate proper appellate review in appeals which – due to the complexity or size of the appeal or due to the number of appeals before the Appellate Body at a given time – could not possibly be dealt with in 90 days. The Appellate Body refused to interpret and apply Article 17.5 of the DSU in a manner that would effectively deny an appellant its right to proper appellate review by compromising the quality and thoroughness of such review. The United States and others have taken the position that Appellate Body reports circulated after 90 days, without the agreement of the parties, are no longer reports which the DSB could adopt by reverse consensus. Such reports would, according to the United States, require adoption by 'normal' consensus in the DSB, which would give any Member, and in particular the losing party, the possibility of blocking the adoption of the report (and thus prevent it from becoming legally binding). Other WTO Members, and foremost the European Union, disagreed with the United States' position on the consequences of exceeding the 90-day time frame. The uncompromising insistence on an unrealistic time frame, and allowing the resolution of a dispute to be frustrated if and when the timeframe is exceeded, is a fourth aspect of the malgovernance of WTO appellate review.

#### *4.5. Size of the Appellate Body and its Secretariat*

As noted above, the Appellate Body is composed of seven members, which is a small number compared with other international courts or tribunals, especially when one considers that the workload and output of the Appellate Body far exceeded that of these other international courts and tribunals. The small number Appellate Body members is a reflection of the initial expectation that parties would only occasionally have recourse to appellate review. However, as discussed above, this expectation very soon turned out to be quite wrong. Nevertheless, the number of Appellate Body members was not adjusted. In the context of the discussion on the reform of WTO appellate review, China, the European Union, India and Montenegro proposed to increase the number of Appellate Body members from seven to nine in order to 'improve the efficiency and internal organization of the Appellate Body' as well as to improve the 'geographical balance on the Appellate Body'.<sup>69</sup> These WTO Members also suggested to provide that 'membership of the Appellate Body is the exclusive occupation of Appellate Body members' and replace the current part-time with full-time employment conditions. While the proposed enlargement of the Appellate Body from seven to nine members would indeed allow it to handle a somewhat larger workload, the proposed change in the employment conditions will not have the same effect. As required by Article 17.2 of the DSU, Appellate Body members 'shall be available at all times and on short notice'. In view of this obligation regarding 'availability', Appellate Body membership was in the past 10 years, due to the high workload, often more than a full-time job, regardless the part-time employment conditions. Anyway, any proposal to amend Appellate Body members' part-time employment conditions has in the past met with fierce resistance from WTO Members, such as the United States, that object to, and challenge, the court-like nature of the Appellate Body.

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<sup>68</sup> To date, Appellate Body proceedings have taken on average 141 days. See <http://worldtradelaw.net/databases/abtiming.php>. However, if the appeals in three very large cases, namely *EU and Certain member States – Large Civil Aircraft (2010, 2018)*, *US – Large Civil Aircraft (2012, 2019)* and *Australia – Tobacco Plain Packaging (2020)* are not included in the calculation, the average time for Appellate Body proceedings exceeds the 90-day limit by less.

<sup>69</sup> General Council - Communication from the European Union, China, India, and Montenegro to the General Council, WT/GC/W/753, dated 26 November 2018, WT/GC/W/753/Rev. 1, dated 11 December 2018.

Not only the Appellate Body is undersized, its Secretariat is too. As discussed above, Article 17.7 of the DSU states: ‘The Appellate Body shall be provided with appropriate administrative and legal support as it requires’. While the Secretariat grew considerably in size over the years, it always had less staff than the workload required. Constraints on the growth of the WTO budget was the most important but not the only explanation for the understaffing. In recent years, some WTO Members, and in particular the United States, objected to any increase in the staff of the Appellate Body Secretariat and it did so to give expression to its dissatisfaction with the Appellate Body, its functioning and part of its case law. According to the United States, an Appellate Body with an understaffed Secretariat would be less likely/able to engage in judicial activism or other forms of judicial overreach.

The undersized Appellate Body and its understaffed Secretariat are a fifth and final aspect of the malgovernance of WTO appellate review.

## **5. Lessons for the governance of international adjudication**

An international adjudicative body, court or tribunal can only function effectively as an adjudicator when three essential conditions are met, namely:

- it acts, and is allowed to act, within its mandate as an adjudicator;
- it is independent and impartial and its independence and impartiality is respected; and
- it settles disputes in a timely manner, consistent with the requirements of due process, and is endowed with the financial and human resources to do so.

For the WTO Appellate Body, these conditions have not been met for some time or have never been met. The rules and procedures for the governance of WTO appellate review and the manner in which these rules and procedures have been (ab)used, have resulted in the current crisis of WTO appellate review and the undermining of the credibility and effectiveness of the whole WTO dispute settlement system. While appellate review is an unusual feature in international adjudication, the crisis of WTO appellate review nevertheless holds some lessons for the governance of international adjudication. These lessons, which concern all actors in international adjudication, relate to the need: (1) to ensure that the appointment of judges cannot be blocked *sine die*; (2) to ensure that the term in office of adjudicators as well as the legal position and terms of employment of their support staff do not adversely affect the adjudicators’ independence and impartiality; (3) to provide for the time frame for adjudication that is realistic and allows for a proper consideration of all the issues raised in a dispute; (4) to give the adjudicative body sufficient human and financial resources to perform its task well; and (5) for losing parties to avoid making persistently unfounded allegations of judicial overreach aimed at undermining the authority and credibility of the adjudicative body. The demise of the WTO Appellate Body is a sad example of what may happen if these lessons are not adhered to.