

Procedural rules in WTO dispute settlement in the face of the crisis of the Appellate Body

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1. Introduction

In the last years, serious criticisms have paved the way for a profound crisis of the dispute settlement system of the World Trade Organization (WTO).¹ Indeed, the US has been challenging the legitimacy of the Appellate Body case law against the letter and the spirit of the Dispute Settlement Understanding (DSU), at the risk of paralyzing the adjudicatory mechanism. In response, other Members are advancing a variety of reform proposals in order to avoid the stalemate of a system that was described as a 'jewel of the crown'.²

The present contribution delves into the procedures of WTO dispute settlement against the background of this crisis. The analysis will be articulated along three issues. Paragraph 2 will introduce some preliminary considerations as to the nature of the system, looking into the negotiating history of the DSU. The sources of procedural rules will be explored in Paragraph 3, also in order to ascertain whether they have served the purpose of bestowing a clear jurisdictional character to dispute settlement under the WTO. Paragraph 4 will address some of the challenges cur-

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¹ See WTO, *The WTO Agreements. The Marrakesh Agreement Establishing the World Trade Organization and its Annexes* (2nd edn, CUP 2017) 434-460. For a detailed analysis, see P Van den Bossche, W Zdouc, *The Law and Policy of the World Trade Organization. Text, Cases and Materials* (4th edn, CUP 2018) 164-304.

² WTO Press Releases, Press/578 'WTO Disputes Reach 400 Mark' (2009) <www.wto.org/english/news_e/pres09_e/pr578_e.htm> accessed 14 September 2019. All websites cited in the following footnotes have been last accessed the same date.



rently raised by the US and the responses offered to them, with a particular focus on their procedural implications. The overall purpose is to assess whether or not the current crisis demonstrates a desire by the Members to return to the past, ie, to the ethos that had driven the Uruguay Round. Some recapitulatory remarks will be offered in Paragraph 5.

2. *The legal nature of the WTO adjudicatory system*

The WTO dispute settlement procedure involves a two-stage process, where panels of independent individuals assess allegations of non-compliance with WTO law, and the panel findings may be appealed before the Appellate Body by the litigants. In formal terms, this mechanism cannot be deemed as being strictly adjudicatory, since the reports issued by both the panels and the Appellate Body are binding for the disputing parties after being adopted by the Dispute Settlement Body (DSB), composed by all WTO Members. However, since this decision by the DSB is governed by the so-called ‘reverse consensus rule’,³ the rejection of the reports is a merely speculative hypothesis, that is not supported by any element of the practice.

The origin of this peculiar arrangement can be traced back to the purposes of dispute settlement fixed at the beginning of the Uruguay Round. Indeed, the Ministerial Declaration adopted in 1986 at Punta del Este⁴ launching the multilateral trade negotiations that led to the establishment of the WTO did not envision the creation of a ‘World Trade Court’.⁵ The ambitions were much vaguer: ‘to improve and strengthen the rules and procedures of the dispute settlement process’, with a view to make the 1947 General Agreement on Tariffs and Trade (GATT 1947) ‘more effective and enforceable’, and ‘to ensure prompt and effective resolution of disputes’.⁶

³ According to art 16(4) DSU, a panel report is adopted unless the DSB decides by consensus not to adopt it. The same rule is set in art 17(14) for the Appellate Body reports.

⁴ Ministerial Declaration on the Uruguay Round (20 September 1986). GATT and WTO documents are available on the WTO website (<<https://docs.wto.org>>).

⁵ C-D Ehlermann, ‘Six Years on the Bench of the “World Trade Court”. Some Personal Experiences as Member of the Appellate Body of the World Trade Organization’ (2002) 36 *J World Trade* 605.

⁶ Ministerial Declaration (n 4) 7.



During negotiations two strictly interlinked issues were raised, concerning the adoption of panel reports and the establishment of an appellate mechanism.⁷ As to the former, litigation under GATT 1947 occurred only before panels. Their reports were adopted following the positive consensus rule, which *de facto* granted a veto power to each disputant. This practice generated some debate. It was common opinion that consensus fostered the proper implementation of panel findings, since their adoption could only intervene with the concurrence of the losing party. At the same time, precisely in order to get that concurrence panelists could be led to ground their findings not on a strict legal analysis, opening the resolution of disputes also to political considerations. Therefore, the point was made that, in order to strengthen the effectiveness of dispute settlement, some procedural adjustments were needed in view of preventing the exercise of a veto power by the disputants. After lengthy discussions, the solution was found in the reverse consensus rule.

A further worry was raised, concerning the alleged poor quality of panel reports, to be remedied so that they could be accepted and effectively implemented. This demand became crucial when proposals for the reverse consensus rule were put forward, as it would have resulted in the automatic adoption of all reports, even in case they offered an erroneous legal analysis. In this regard, various suggestions were made, and since 1989 negotiations focused on the establishment of an appellate procedure. The European Communities, the US and Canada were among its main supporters,⁸ also on the basis that an appellate procedure would have reduced the risk of flawed resolutions of disputes.⁹ Looking at the *travaux préparatoires*, the view was held that the appeal body should have

⁷ For the different positions expressed during the Uruguay Round on the rules for the adoption of panel reports and on the proposal to establish an appellate mechanism, see GATT doc MTN.TNC/11 (21 April 1989); Note by the Secretariat (13 November 1989) GATT doc MTN.GNG/NG13/16, paras 21-22; Note by the Secretariat (15 December 1989) GATT doc MTN.GNG/NG13/17, paras 7-14; Note by the Secretariat (21 March 1990) GATT doc MTN.GNG/NG13/18, paras 7-10; Note by the Secretariat (28 May 1990) GATT doc MTN.GNG/NG13/19, paras 12-13; Note by the Secretariat (21 September 1990) GATT doc MTN.GNG/NG13/W/45.

⁸ P Van den Bossche, 'From afterthought to centerpiece; the WTO Appellate Body and its rise to prominence in the world trading system' in G Sacerdoti, A Yanovich, J Bohanes (eds), *The WTO at Ten. The Contribution of the Dispute Settlement System* (CUP 2006) 292-293.

⁹ PJ Kuijper, 'The New WTO Dispute Settlement System. The Impact on the European Community' (1995) 29 *J World Trade* 49, 52.



been composed by a small number of eminent figures, that it should have adjudicated in very exceptional cases (covering exclusively issues of law and legal interpretations contained in the panel reports) and within a short timeframe, so as not to delay the dispute settlement process.¹⁰ As a result, the Appellate Body was established, primarily with the aim of safeguarding the interest of the parties in a dispute in avoiding the automatic adoption of erroneous panel rulings.¹¹

3. *Procedural rules as a means for affirming the jurisdictional nature of the WTO dispute settlement system*

Notwithstanding this original design, in its case law the Appellate Body has maintained that its role was not merely to act as a defender of the parties' interest in correct judgments, but more generally as a guarantor of the 'consistency and stability in the interpretation of [the WTO members'] rights and obligations'.¹² The legal basis of this development has been found in Article 3 DSU setting the aims of dispute settlement. Indeed, on the one hand this provision takes expressly into consideration the interest of the parties to a dispute to a prompt and satisfactory resolution (paras 3 and 4) and to the maintenance of a proper balance of their respective rights and obligations (para 3). However, on the other hand, Article 3 also acknowledges the systemic importance of dispute settlement 'in providing

¹⁰ An in-depth account of the negotiations that led to the establishment of the Appellate Body is given by B M Hoekman, P Mavoridis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis' (2019) EUI Working Papers RSCAS 2019/56, 2-12.

¹¹ D Steger, 'WTO Dispute Settlement: Revitalization of Multilateralism after the Uruguay Round' (1996) 9 *Leiden J Intl L* 319, 322. See also D Steger, 'The Founding of the Appellate Body' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO. The Development of the Rule of Law in the Multilateral trading System* (CUP 2015). Oppositions to the appellate review procedure highlighted that it 'would result in virtually every case being appealed' (MTN.GNG/NG13/16 (n 7), para 21). During negotiations, the criticism against the reverse consensus rule was also put forward with respect to the adoption of the Appellate Body reports: 'in the case of appeal, the Contracting Parties should be involved ... Any automatic adoption procedure would negate [their role] in deciding on the precedential value of rulings and recommendation' (MTN.GNG/NG13/19 (n 7), para 13).

¹² Appellate Body Report, *US – Stainless Steel (Mexico)* (2008) para 161.



security and predictability to the multilateral trading system', and in clarifying the provisions of the WTO agreements 'in accordance with customary rules of interpretation of public international law' (para 2).

Some observers have inferred from the Appellate Body case law a 'declaration of independence': '[b]y acting like a court and not as part of the enforcement wing of the WTO institution, the Appellate Body created itself as a judicial branch in a distant, even potentially contentious or oppositional, relationship with the WTO institution'.¹³ Against this backdrop, the question that is hereby proposed is to what extent this 'independence' has been gained also by means of the procedural rules governing the dispute settlement mechanism. To answer this question, the following analysis will inquire into the legal sources of these procedural rules and into the legal criteria used for their interpretation.

As to the sources, they are first set in the DSU. However, a distinction has to be made between the panel stage and the appellate review.

Indeed, the panel procedures are set out in Article 12 and further specified in Appendix 3 to the DSU. Hence, States have molded its overarching architecture, basic principles and operational details. Yet, given the specificities of each complaint the panels are granted the power to depart from or add to the disciplines under Appendix 3 (Article 12(1) DSU), after consulting with the parties, so as to 'ensure high-quality' reports without, at the same time, unduly delaying the whole process (Article 12(2) DSU). In the *US – Shrimp* case, the Appellate Body recognized this authority as 'ample and extensive'.¹⁴ However, some substantive constraints to its exercise have been identified. Most importantly, in the *India – Patents (US)* case, the Appellate Body has established that 'nothing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU' other than Appendix 3,¹⁵ with the consequence that, in case a violation of the DSU is ascertained, the ensuing panel findings would be overturned. In the above-mentioned case, the Appellate Body reversed a panel's finding on the ground that it had been adopted according to a procedure at variance with the DSU norms on panels' terms of reference, in

¹³ R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European J Intl L* 9, 31.

¹⁴ Appellate Body Report, *US – Shrimp* (1998) para 106.

¹⁵ Appellate Body Report, *India – Patents (US)* (1997) para 92.



spite of the fact that it had been accepted by the parties.¹⁶ In fact, even though panels are *ad hoc* organs and the appointment of their members is placed also under the authority of the Members concerned (Article 8(6) and (7) DSU), in any case their procedure may not depart from the basic foundations established in the DSU, even where the litigants thereby agree.

With regard to the Appellate Body, its procedural rules are broadly outlined in Article 17 DSU. This provision sets the fundamental features of the appellate review procedure, including the confidentiality of the proceedings (para 10); the maximum length of the procedure, fixed in 90 days (para 5); the scope of review, limited to issues of law and legal interpretations developed by panels (para 6); the obligation upon the Appellate Body to address all issues of law raised before it (para 12); its authority to uphold, reverse or modify the panels' findings (para 13). The detailed discipline of appeals is not defined in the DSU, but they are placed under the rule-making authority of the Appellate Body itself (Article 17(9) DSU).¹⁷ The DSU merely introduces some basic requirements for the exercise of this power of self-regulation, requesting the Appellate Body to undertake prior consultations with both the WTO Director-General and the DSB Chairperson. The Members do not take part in this rule-making process. However, some instruments for a more active participation by them have been introduced. Indeed, the DSB has decided that prior consultations should be held also with the Members (through the DSB Chairperson) and that their observations would be given consideration¹⁸ (as happened in practice).¹⁹

¹⁶ In that case, the panel judged over an allegation that was not in its mandate. The scope of the dispute had been expanded by the panel itself, which allowed the parties to present legal claims until the end of its first substantive meeting (*ibid*). According to the Appellate Body, this ruling was inconsistent with art 7 DSU, whereby the terms of reference of a panel must be identified according to the claims mentioned in the request for its establishment (*ibid* para 88).

¹⁷ During the Uruguay Round, the very first drafts already assumed that the appellate review would be subject to the self-organization power of the Appellate Body: see Draft Text on Dispute Settlement (21 September 1990) GATT doc MTN.GNG/NG13/W/45, p. 3. The current Working Procedures of the Appellate Body are set in WTO doc WT/AB/WP/6 (16 August 2010). See also the 'Guidelines in Respect of Executive Summaries of Written Submissions' WTO doc WT/AB/13 (11 March 2015).

¹⁸ WTO doc WT/DSB/31 (20 December 2002) and WT/AB/WP/W/1 (7 February 1996) 1.

¹⁹ For instance, see WTO doc WT/AB/WP/W/11 (27 July 2010), illustrating the process leading to the latest amendments to the Working Procedures.



Consistency with the DSU has been set as a basic requirement for the Appellate Body's Working Procedures,²⁰ and for the additional procedures that may be defined in a particular case.²¹ It is justified by the self-evident subordination to the DSU of the rule-making authority of the Appellate Body. Furthermore, it ensures adherence to the principle of *due process*, acknowledged as an essential principle of WTO dispute settlement informing that is reflected in the DSU, and whose protection 'is ... a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication'.²²

The critical role of due process in settling procedural matters has been affirmed in the case law with respect to various issues, proving its multifaceted nature. For instance, on its basis the procedures of both the panels and the Appellate Body guarantee the *equality of the disputants* in all stages of the proceedings. Indeed, the litigants are granted equivalent rights to be heard and are 'afforded an adequate opportunity to pursue their claims, make their own defenses, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules'.²³ More in detail, this implies the possibility to present written submissions and rebuttals, to introduce oral pleadings during substantive meetings, or to respond to any new argument.²⁴

Furthermore, as stated by the Appellate Body, due process also underpins Article 12(7) DSU, whereby the panels are required to issue *reasoned decisions*, identifying the relevant facts of the case and the applicable legal norms: this duty 'reflects and conforms to the principles of fundamental fairness and due process which underlie and inform the provisions of the DSU'.²⁵ Indeed, should a Member be found to have acted inconsistently with WTO, it is entitled 'to know the reasons for such finding as a matter of due process'.²⁶ In the case law, the principle of due process has been also applied with respect to the *ne ultra petita rule*: in making 'an objective

²⁰ The communication by the Appellate Body accompanying the issuance of the first version of the Working Procedures expressly recalls 'the need for constant and conscientious compliance with both the letter and the spirit of the DSU': WTO doc WT/AB/WP/W/1 (n 18).

²¹ See Rule 16(1) of the Appellate Body Working Procedures.

²² Appellate Body Report, *Thailand – Cigarettes (Philippines)* (2011) para 147.

²³ *ibid.*

²⁴ Appellate Body Report, *US – Stainless Steel (Mexico)* (n 12) para 164.

²⁵ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5)* (2001) para 107.

²⁶ *ibid.*



assessment of the matter before it ... [a] panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response'.²⁷

In addition to norms included in the DSU or adopted on the basis of a rule-making power expressly conferred upon the adjudicatory bodies, general principles of procedural law before international courts and tribunals have been recognized as proper sources. Fundamentally, they have served the purpose of filling the gaps in the DSU. The following analysis is limited to providing some examples of this practice.

A first reference can be made to the approach taken in the case law on the issue of the 'competence of competence'. Indeed, the first time the matter was referred to the Appellate Body, it was settled also on the basis of 'an accepted rule' of judicial proceedings before international tribunals, on whose basis the panels have the authority to consider issues of jurisdiction during the proceedings to satisfy themselves that they may rule on the case.²⁸ To further support this claim, previous practice by other international courts and tribunals was recalled, including the practice of the Permanent Court of International Justice, the International Court of Justice, the Iran-US Claims Tribunal and the arbitration rules for ICSID tribunals.²⁹ The position that 'panels cannot simply ignore issues which go to the root of their jurisdiction – that is their authority to deal with and dispose of matters'³⁰ has been consistently upheld in the subsequent cases, with respect to the panels' power to deal with issues of jurisdiction at any time³¹ and on their own motion.³²

The principle of competence of competence has also been applied with respect to the Appellate Body's jurisdiction: in *European Communities and*

²⁷ Appellate Body Report, *Chile – Price Band System* (2002) para 176. In that case, the panel ruled over the consistency of the challenged measure against the second sentence of art II(1)(b) GATT 1994, notwithstanding the complainant had neither expressly mentioned it in the request for the establishment of the panel nor articulated any relevant legal claim in its written submissions and during substantive meetings. The Appellate Body reversed the panel finding.

²⁸ Appellate Body Report, *US – 1916 Act* (2000) para 54 and fn 30.

²⁹ *ibid.*

³⁰ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5)* (n 25) para 36.

³¹ Appellate Body Report, *US – Carbon Steel* (2002) para 123 and Appellate Body Report, *European Communities and certain member States – Large Civil Aircraft* (2011) para 791.

³² Appellate Body Report, *Mexico – Soft Drinks* (2006) para 45.



certain member States – Large Civil Aircraft, the Appellate Body declined to consider some of the arguments submitted before it since they referred to a measure that was not mentioned in the request for the establishment of the panel. Even though the respondent party had raised a competence issue neither before the panel nor in its appellee's submission, the Appellate Body considered itself to be entitled to rule on it.³³

This extensive practice supports a determination made recently in a highly contentious case concerning the alleged self-judging nature of the national security exception under Article XXI GATT 1994. The panel hearing the claim acknowledged that, absent any contrary indication in the DSU, adjudicatory bodies possess 'inherent jurisdiction which derives from the exercise of their ... functions. One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction'.³⁴

General principles of procedural law have also been applied to rule over the *burden of proof* in the adjudicatory proceedings. By referring to the jurisprudence of the International Court of Justice and of no better qualified 'various international tribunals',³⁵ the Appellate body has stated that in the WTO 'as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or a defence'.³⁶

However, the Appellate Body went so far as to apply this generally accepted principle also according to the specific features of WTO law. In *EC – Tariff Preferences*, the observation was made that 'WTO objectives may well be pursued through measures taken under provisions characterized as exceptions',³⁷ some of which play a 'fundamental', 'pivotal' role in WTO law.³⁸ As a general rule, it is for the respondent to prove that the challenged measure meets the requirement of the defence provision. However, in disputes where non-'typical' exceptions³⁹ are at stake, the claimant may not

³³ *ibid* and *European Communities and certain member States – Large Civil Aircraft* (n 31) paras 795-796.

³⁴ Panel Report, *Russia – Traffic in Transit* (2019) para 7.53. The report was not appealed.

³⁵ Appellate Body Report, *US – Wool Shirts and Blouses* (1997) 13.

³⁶ Appellate Body Report, *Chile – Price Band (Article 21.5 – Argentina)* (2007) para 134.

³⁷ Appellate Body Report, *EC – Tariff Preferences* (2004) para 94.

³⁸ *ibid* para 106.

³⁹ *ibid*.



merely allege the unlawfulness of the challenged measure under a WTO obligation, but it has also to argue that it does not satisfy the requirements defined in the exception. Otherwise, the claim would not be presented with clarity as required under the DSU, the panel and all interested parties would not be capable of properly understanding it, and they would not be given an adequate opportunity to respond.⁴⁰

One of the most controversial issues approached by the Appellate Body concerns the *submission of evidence* by the parties. As a premise, it is acknowledged that the burden on the disputing parties is to provide through written submissions and oral pleadings factual evidence and legal arguments in support of their assertions.⁴¹ With regard to questions of fact, the ‘determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as a trier of facts’.⁴² Evidence of this is given by Article 13 DSU, that grants to panels the authority to complement the evidence submitted by the parties by consulting experts and seeking information from any relevant source, provided that this authority is exercised not to substitute for the parties in discharging their burden of proof, but in order to understand and evaluate the arguments made by them.⁴³

Conversely, as to questions of law, referring to the principle of *jura novit curia* as articulated by the International Court of Justice, it has been excluded that the disputants have the responsibility of providing the legal interpretation to be given to a WTO rule.⁴⁴ The panels and the Appellate Body are free to develop their own legal reasoning and not to confine themselves to the legal arguments raised by the parties: ‘nothing in the DSU limits the faculty of a panel to freely use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration’.⁴⁵ This statement has been recently confirmed in *Brazil – Taxation*, where the Appellate Body reiterated that ‘the Panel is not bound by the arguments raised by a party and can use those arguments freely to develop its own legal reasoning

⁴⁰ *ibid* paras 110 and 113.

⁴¹ Appellate Body Report, *US – Gambling* (2005) para 140.

⁴² Appellate Body Report, *EC – Hormones* (1998) para 132.

⁴³ Appellate Body Report, *Japan – Agricultural Products II* (1999) para 129.

⁴⁴ Appellate Body Report, *EC – Tariff Preferences* (n 37) para 105.

⁴⁵ Appellate Body Report, *EC – Hormones* (n 42) para 156.



to support its findings and conclusions in the matter under consideration',⁴⁶

With respect to the collection of evidence during proceedings, the WTO members have voiced a dissatisfaction with the decision taken by some panels and by the Appellate Body to accept and give consideration to unsolicited *amicus curiae* briefs and, for the Appellate Body, to seek information from experts.⁴⁷ The legitimacy of this approach has been affirmed on the basis of Article 11 DSU, establishing that the panels' mandate is to make an objective assessment of the matter before them, and on the power of the Appellate Body to adopt additional procedural rules on issues not covered by its Working Procedures. As a further development, in the *EC – Asbestos* case, in the interest of fairness and orderly procedure in the appeal, the Appellate Body adopted an additional procedure under Rule 16(1) of its Working Procedures on the submission of written briefs from persons other than the parties or the third-parties to the case at hand.⁴⁸ The reaction by most Members has been strongly critical, suggesting that the Appellate Body had broadly interpreted the DSU and that in seeking or accepting unsolicited briefs it was overstepping its authority.⁴⁹

A final remark pertains to the interpretation of rules of procedure. The issue arose with respect to the decision taken by the Appellate Body in the *Australia – Apples* case, to open the oral hearing to the public.⁵⁰ This development in terms of transparency finds a legal obstacle in Article 17(10) DSU, whereby the appellate proceedings 'shall be confidential'. However, according to the Appellate Body, this provision must be read 'in the light of its context', in particular Article 18(12) DSU which does not preclude a disputant from foregoing confidentiality and disclosing its statements: 'this

⁴⁶ Appellate Body Report, *Brazil – Taxation* (2018) para 5.171.

⁴⁷ Appellate Body Report, *US – Shrimp* (1998) para 104 (for panels) and Appellate Body Report, *US – Lead and Bismuth II* (2000) para 39 (for the Appellate Body).

⁴⁸ WTO doc WT/DS135/9 (8 November 2000). This practice has been abandoned in all following cases: for a critique under the principles of fairness and due process, see D Steger, 'The founding of the Appellate Body' (n 11) 462.

⁴⁹ See WTO doc WT/GC/M/60 (23 January 2001) in particular the claims raised by the representatives of Brazil, Egypt, India, and Mexico.

⁵⁰ Appellate Body Report, *Australia – Apples* (2010) Annex III. The legal argumentation proposed by the Appellate Body (illustrated below in the text) had been previously followed in *Canada – Continued Suspension*, where the hearings before a panel were opened for the first time to the general public: see paras 7.43-7.51 of the Panel Report (where reference is made also to the relevant procedures followed by the International Court of Justice).



provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings, and thus suggests that the confidentiality rule in Article 17.10 has limits'.⁵¹ To further support this understanding, the Appellate Body recalled Rule 27 of its Working Procedures on oral hearings, interpreted as granting it 'the power to control over the conduct of the oral hearing including authorizing the lifting of confidentiality at the request of the participants provided that this does not adversely affect the rights and obligations of the third participants or the integrity of the appellate process'.⁵²

The legal basis of the approach followed by the Appellate Body is to be found in Article 31 of the 1969 Vienna Convention on the law of Treaties.⁵³ At the same time, an implicit reference is made also to the principle of effectiveness in the interpretation of the DSU, in particular of Article 18(12) in the case at hand.

4. *The procedural implications of the Appellate Body crisis*

The rulings over the sources and the interpretation of procedural rules for dispute settlement have contributed to the establishment of the Appellate Body as a WTO organ whose role goes beyond the settlement of trade disputes between Members or the correction of panel reports deemed to be erroneous by the litigants. Rather, the Appellate Body has steadily affirmed its systemic importance within the multilateral trading system as an impartial adjudicatory organ with the mandate of guaranteeing the stability and predictability of WTO law for the benefit of the whole membership. On a number of occasions, those rulings were inspired by, or expressly aligned with, the disciplines and the practice followed by other international courts and tribunals.

However, in the last years this case law has been subject to strong criticisms by the US.⁵⁴ Some allegations cover critical systemic matters: the ju-

⁵¹ Appellate Body Report, *Australia – Apples* (n 50) para 4(a).

⁵² *ibid* para 4(c).

⁵³ Panel Report, *US – Section 301* (1999) para 7.22.

⁵⁴ Office of the US Trade Representative, '2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Programme' (March 2018) 22-28.



dicial activism shown by the Appellate Body, in some cases allegedly resulting in the creation of new law;⁵⁵ the practice of including in the Appellate Body reports *obiter dicta* not necessary to solve the dispute (ostensibly disregarding the implicit mandate under Article 17(12) DSU to address only the issues of law raised in a notice of appeal);⁵⁶ the review of matters of facts in the appellate proceedings, at variance with the mandate of the Appellate Body to rule on the points of law included in the panel reports;⁵⁷ the assertion that, absent cogent reasons, the panels will resolve the claims posed to them in accordance with previous Appellate Body reports dealing with the same legal matter (claimed to conflict with the DSU provisions whereby the Appellate Body rulings are binding exclusively upon the disputants, and with the exclusive authority of the WTO political organs to adopt 'authoritative interpretations' under Article IX(2) of the Marrakesh Agreement).⁵⁸

The US gives particular weight also to some procedural shortcomings of appellate review, ie the disregard by the Appellate Body of the 90-day deadline set in Article 17(5) DSU for the circulation of its reports,⁵⁹ and the legitimacy of Rule 15 of the Working Procedures on the participation in appeal proceedings by Appellate Body members after the expiry of their tenure.⁶⁰ Even though limited in their scope, these two concerns provide additional evidence of the US discontent with the independence claimed and exercised by the Appellate Body during appeal reviews, in this case with regard to the administration of the proceedings. The failure to observe the 90-day deadline and the authorization by the Appellate Body to its expired members to continue to serve an appeal are deemed to be contrary to the DSU.

⁵⁵ For instance, see 'Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, January 11, 2019' (2019) 3-17. All US statements cited in the following footnotes are available at <<https://geneva.usmission.gov>>.

⁵⁶ 'Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, October 29, 2018' (2018) 11-26.

⁵⁷ 'Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, August 27, 2018' (2018) 10-31.

⁵⁸ 'Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, December 18, 2018' (2018) 9-35.

⁵⁹ 'Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, June 22, 2018' (2018) 9-21.

⁶⁰ 'Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, February 28, 2018' (2018) 10-14.



Each of these grievances can be interpreted as an indication of a general critique to the ‘declaration of independence’ made by the Appellate Body and to its focus on securing the stability and predictability of the multilateral trading system, rather than on maintaining the balance of concessions enshrined in the rights and obligations of Members under WTO law. The core issue in the US censures would lie in the alleged disequilibrium between the legislative function of the WTO political organs (governed by a positive consensus rule, pursuant to Article IX(1) of the Marrakesh Agreement) and the judicial function of the Appellate Body (whose reports are adopted according to the reverse consensus rule). The US is affirming the centrality of the DSU and other WTO agreements, regarded as expression of the common will of Members as to their substantive obligations, the scope and procedures of the appeal review, and the control that political organs are empowered to exercise over the adjudicatory bodies.⁶¹ Overall, the evolution of a compulsory and binding dispute settlement system into a fully-fledged judicial power⁶² is perceived as inconsistent with the original intentions of the drafters.

This criticism was reflected in the proposals submitted in the early 2000s by the US for some amendments to the DSU aiming at strengthening control by both the litigants and member States over the settlement of claims.⁶³ Due to the stalemate in multilateral trade negotiations and to the lukewarm reaction of other members States,⁶⁴ the tactic has been changed, evolving since 2007 into the exercise of a veto over the appointment or re-appointments of the Appellate Body members.⁶⁵ As a result, today the Appellate Body is composed only by three out of seven members as required

⁶¹ On the relationship between law and politics within the WTO, see A von Bogdandy, ‘Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship’ (2001) 5 *Max Planck YB United Nations L* 609; JHH Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (2001) 35 *J World Trade* 191; L Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’ (2004) 53 *ICLQ* 861; J Pauwelyn, ‘The Transformation of World Trade’ (2005) 104 *Michigan L Rev* 1.

⁶² H Ruiz Fabri, ‘The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story’ (2016) 27 *European J Intl L* 1075, 1080.

⁶³ See WTO doc TN/DS/W/82 (24 October 2005) and its first addendum.

⁶⁴ R Mc Dougall, ‘The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance’ (2018) 52 *J World Trade* 867, 882.

⁶⁵ For an account, see G Sacerdoti, ‘The Future of the WTO Dispute Settlement System: Consolidating a Success Story’ in CAP Braga, B Hoekman (eds), *Future of the*



by Article 17(1) DSU, and by December 2019 the term of two of them will expire. Since under Article 17(1) DSU each appeal is to be heard by three members, it is clear that, unless the US lifts its veto, the appellate review will be paralyzed in the very near future.⁶⁶ Indeed, a disputant could block the dispute settlement process by simply notifying the DSB of its decision to appeal, and without an operating Appellate Body the appeal review would enter in a limbo. Notwithstanding this potential collapse of the judicial function, the US has been affirming that it will not allow to fill vacancies until its concerns would be properly addressed.⁶⁷

According to some observers, this could imply a return to the GATT-era: disputants might exercise a *de facto* veto power by filing a notice of appeal, and panels could be led to formulate their rulings so as to avoid they are appealed.⁶⁸ While the position of the US seems to be that the Appellate Body has merely to follow the DSU as agreed in 1995,⁶⁹ it cannot be excluded that some 'nostalgic' memory of the past turns into reality. Indeed, in September 2017 the current US Trade Representative stated: '... there was a system, it was before 1995, before the WTO, under the GATT, ... a system where you would bring panels and then you would have a negotiation. ...[T]rade grew and we resolved issues eventually. ...[I]t's a system that ... was successful for a long period of time'.⁷⁰

Global Trade Order (2nd edn, EUI 2017) 124-125 and 'From the Board: The US Attack of the WTO Appellate Body' (2018) 45 J World Trade 1.

⁶⁶ According to a combined reading of arts 2(4) and 17(2) DSU, persons serving in the Appellate Body are appointed by the DSB by consensus.

⁶⁷ See the statement made by the US at the last meeting of the DSB, at the time of writing, on 15 August 2019 (n 56).

⁶⁸ See J Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?' (2019) 7-13 <<https://ssrn.com/abstract=3415964>>.

⁶⁹ J Hillman, 'Three Approaches To Fixing The World Trade Organization's Appellate Body: The Good, The Bad And The Ugly?' (2018) Institute of International Economic Law Georgetown University Law Center fn 10. See also the remarks by Philippe De Baere in 'What Kind of Dispute Settlement for the World Trade Organization?', Proceedings for the Conference organized by the World Trade Institute on 4 February 2019 at the World Trade Organization, Geneva (WTI 2019) 36.

⁷⁰ 'U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative' (18 September 2017) <www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative>.



Legal scholars⁷¹ and other Members⁷² have put forward a number of proposals aiming at avoiding the risk of a breakdown of WTO adjudication. Some tackle the US concerns by suggesting the involvement of the WTO political organs (under their authority to issue authoritative interpretations, or to adopt amendments, to the WTO agreements, respectively pursuant to Article IX(2) and Article X of the Marrakesh Agreement) or of the Appellate Body itself (through a revision of its Working Procedures). It is commonly accepted that the procedural cures are easier to address, but also that a previous agreement on the more general systemic issues would facilitate any decision in their regard.⁷³ Other proposals suggest opening a tough confrontation within the membership, filling the vacancies in the Appellate Body by a majority decision⁷⁴ or establishing an alternative appellate procedure operating without the US.⁷⁵

As already noted, all ‘US-inclusive’ proposals coming from other Members accept the allegations raised by the US, without questioning their underlining legal rationale and accuracy.⁷⁶ Moreover, they suggest the adop-

⁷¹ See eg S Charnovitz, ‘How to Save WTO Dispute Settlement from the Trump Administration’ (3 November 2017) <<https://ielp.worldtradelaw.net/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>>; G Sacerdoti, ‘The Future of the WTO’ (n 66); P J Kuijper, ‘The U.S. Attack on the WTO Appellate Body’ (2018) 45 *L Issues of Economic Integration* 1; R McDougall, ‘The Crisis in WTO’ (n 64); T Payosova, G C Hufbauer, JJ Schott, ‘The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures’ (2018) Peterson Institute for International Economics Policy Brief 2018-5; ‘What Kind of Dispute Settlement’ (n 70); ‘WTO Appellate Review: Reform Proposals and Alternatives’, Proceedings of the 24 May 2019 World Trade Institute held at the World Trade Organization, Geneva (WTI 2019); W Zhou, HS Gao, ‘“Overreaching” or “Overreacting”? Reflections on the Judicial Function and Approaches of WTO Appellate Body’ (2019) UNSW Law Research Paper No 19-49 <<https://ssrn.com/abstract=3418737>>.

⁷² Members’ proposals are illustrated in WTO doc JOB/GC/220 (25 July 2019) submitted to the WTO General Council by the ‘facilitator’ of the informal process of consultations launched in December 2018 on the impasse on the Appellate Body vacancies.

⁷³ R McDougall, ‘The Crisis in WTO’ (n 64) 885.

⁷⁴ J Hillman, ‘Three Approaches’ (n 69) 11-14; E-U Petersmann, ‘How Should WTO Members React to their WTO Crises?’ (2019) 18 *World Trade Rev* 503, 514-515.

⁷⁵ S Andersen and others, ‘Using arbitration under Article 25 of the DSU to ensure the availability of appeals’ (2017) CTEI Working Paper No 2017-17 <<https://repository.graduateinstitute.ch/record/295745>>; J Bacchus, ‘Saving the WTO’s Appeals Process’ (2018) <www.cato.org/blog/saving-wtos-appeals-process>.

⁷⁶ W Zhou, H S Gao, ‘“Overreaching” or “Overreacting”?’ (n 71) 2.



tion of decisions by the WTO political organs or the creation of new procedures that would place the judicial rulings under the scrutiny of the membership, strengthening the role of Members as ‘masters of the treaty’ also within the framework of dispute settlement. In any case, their concrete implementation would face a serious obstacle in the positive consensus rule provided for in Article IX(1) of the Marrakesh Agreement. While decision-making by qualified majority is not excluded, it would mean a rupture within the membership.

Besides these proposals, in more recent months WTO Members have undertaken concrete steps in order to cope with the possibility of a non-functioning Appellate Body. These remedial actions are guided by the need to have an operating dispute settlement system for the enforcement of Members rights and obligations in their mutual relationships, overshadowing the collective interest in WTO adjudication as a means for the security and predictability of WTO law. Furthermore, these arrangements evidence a particular understanding as to the nature of WTO, deemed as binding upon Members, but setting rights and obligations that are ‘disposable in nature’.⁷⁷

For instance, in a recent case, the disputing parties have agreed not to appeal the panel reports if on the date of their circulation less than three persons will seat in the Appellate Body. Accordingly, the panel findings will be subject to the approval by the DSB pursuant to the negative consensus rule.⁷⁸ Made possible by the specific circumstances of the case,⁷⁹ this solution is consistent with the acknowledgment by the Appellate Body that Members may relinquish their right under the DSU, provided that this intention is revealed by clear language.⁸⁰ Nevertheless, it can also be interpreted as an indication of a Members’ pragmatic approach, focused on the concrete and effective solution of disputes to the deliberate detriment of their procedural rights (ie the right to appeal) under the DSU.

⁷⁷ A Tancredi, ‘EC Practice in the WTO: How Wide is the ‘Scope for Manoeuvre’? (2004) 15 Eur J Intl L 933, 955-959 and 961. See also J Norpoth, ‘The Mutually Agreed Solution Between Indonesia and the United States in *US – Clove Cigarettes*: A Case of Efficient Breach (or Power Politics)?’ in G Adinolfi, F Baetens, J Caiado, A Lupone, AG Micara (eds), *International Economic Law. Contemporary Issues* (Springer 2017).

⁷⁸ WTO doc WT/DS496/14 (27 March 2019) and WT/DS490/13 (15 April 2019).

⁷⁹ J Pauwelyn, ‘WTO Dispute Settlement Post 2019’ (n 68) 15.

⁸⁰ Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II/Article 21.5 – US)* (2008) para 217; Appellate Body Report, *Peru – Agricultural Products* (2015) para 5.25.



More extensively, in July 2019 Canada and the European Union have notified the DSB their agreement to resort to Article 25 DSU in order to establish an interim arbitration mechanism for appeals in the disputes arising in their mutual relationships.⁸¹ This mechanism would be made operational upon the notification to the DSB, after the establishment of a panel, of an ‘arbitration agreement’ setting the sequencing between the panel and the arbitration procedures, the modalities for the appointment of the arbitrators, and the procedures to be followed by them. Article 25(2) DSU places no limits on the arbitration procedural rules that may be agreed by the parties concerned. In the exercise of this autonomy, the EU and Canada have adopted a two-fold approach. On the one hand, they have agreed that the interim appeal procedure would replicate as closely as possible the language of Article 17 DSU and its implementing practice (including the Appellate Body Working Procedures). On the other hand, they have defined new procedural steps that panels will be requested to follow in order to facilitate the starting and smooth functioning of the appeal review. Moreover, they have conferred upon the WTO Director-General the authority to appoint the three members serving in the arbitration body to be composed for each notice of appeal.

Justified by the need to preserve an appellate stage, this initiative bears witness to the role of the Members’ will in the determination of the dispute procedures. Nothing in the DSU prevents the parties from agreeing on the application of existing procedures to arbitration proceedings.⁸² But in the case at hand, the EU and Canada have gone further, envisaging that under the interim appeal mechanism existing WTO organs and bodies (the Director-General and the panels established under the DSU) will be demanded to adopt procedural decisions that are not envisaged in the DSU. Since no obligation arises to conform with these requests, it remains to be seen whether they will be satisfied. A spirit of comity and cooperation in view of the final settlement of disputes may persuade panels to assume a positive stance.

Lastly, it is also worth mentioning the recent practice of bringing claims over the violation of WTO law before dispute settlement bodies other than

⁸¹ WTO doc JOB/DSB/1/Add. 11 (25 July 2019).

⁸² In the only dispute where art 25 DSU has been applied, the parties agreed that the arbitrators would follow the relevant procedures already set in the DSU and the legal principles that had already been developed on their basis: see the annex to WTO doc WT/DS160/15 (3 August 2001) para 2.



the DSB. In June 2019, the European Union has requested Ukraine the establishment of an arbitration panel under the 2014 Association Agreement to rule over the alleged violation by Ukraine of the prohibition on export restrictions set in that same Agreement through the incorporation of the pertinent WTO law.⁸³ The institution of this proceeding does not preclude that the same claim be raised before the DSB. However, the decision by the EU could be explained by the desire to arrive at a settlement of the matter. Indeed, under the Association Agreement with Ukraine the reports by the arbitration panels are final and binding upon the parties since no appeal review is envisaged. This case does not simply raise the issue of the application of procedural rules other than those established in the DSU. Rather, it puts into question the prominence of the WTO for the settlement of trade disputes among its Members, and its systemic role in the governance of international trade relations.⁸⁴

5. *Concluding remarks*

At the end of the Uruguay Round, the Appellate Body was established with the purpose of safeguarding the interest of each WTO Member that disputes where it would be involved were settled on the basis of a sound legal analysis. However, the ambiguity of the DSU purposes as enshrined in its Article 3 has opened up the possibility for the Appellate Body to emphasizing the systemic importance of appeal review and to upholding its role as an impartial body with the mandate of guaranteeing the stability and predictability of WTO law for the benefit of the whole membership. Its rulings over the sources and the interpretation of procedural rules applying to the panel and the appeal proceedings have contributed to this

⁸³ See the note verbal by the EU delegation to Ukraine, Ref Ares(2019)3929269 (20 June 2019). GM Ruotolo, 'Knock on wood. Il contenzioso UE/Ucraina sul divieto di esportazione di legnami tra tutela ambientale e libera circolazione delle merci' SIDIBlog (23 July 2019) <www.sidiblog.org/2019/07/23/knock-on-wood-il-contenzioso-ueucraina-sul-divieto-di-esportazione-di-legname-tra-tutela-ambientale-e-libera-circolazione-delle-merci>.

⁸⁴ See G Vidigal, 'Living Without the Appellate Body: Hegemonic, Fragmented and Network Authority in International Trade' (2019) Amsterdam Center for International Law No 2019-04 <<https://ssrn.com/abstract=3343327>>.



development. The reference to the case law of international courts and tribunals, in particular to the International Court of Justice, has served the purpose of affirming the existence within the WTO of a fully-fledged judicial power, with the Appellate Body acting as a 'World Trade Court'.

However, this case law has provoked strong criticism, with the US firmly asserting that the Appellate Body has exceeded its authority, also in respect of procedural issues, by encroaching into the prerogatives of the WTO political organs. According to the US, the appeal procedure must follow the letter of the DSU and WTO law, avoiding the exercise by the Appellate Body of a rule-making authority it lacks. Until the raised concerns are not properly settled, the US tactic of blocking the filling of the current vacancies in the Appellate Body carries with it the concrete risk of paralyzing adjudication in the WTO.

The responses by other Members suggest possible solutions without ultimately questioning the legal merits of US censures. In parallel, the procedural remedies adopted so far in order to cope with a non-functioning Appellate Body seem to be explained more by the interest in securing the settlement of disputes than by a desire to preserve the systemic importance of the Appellate Body and of adjudication by the WTO.

Overall, this practice gives evidence of an attitude by Members running counter to the 'declaration of independence' made by the Appellate Body, showing a return to the momentum that had driven the Uruguay Round for the prompt settlement of claims. Different motivations seem to explain these developments. For the US, the opposition to a compulsory adjudicatory system that is not *de facto* counterbalanced by the decision-making activity of the political organs. Among the other Members, the objective prevails of maintaining a functioning dispute settlement mechanism, even though more coherent with an arbitration model than with a judicial model.