Challenges for the Rule of Law in the WTO

Michael Hahn*

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A. Introduction

The invitation to contribute a piece on the *Rule of Law in the WTO* coincides with an existential crisis of the WTO dispute settlement system: The U.S. currently refuses to agree to any appointment to the Appellate Body. As the terms of the appointed Members have ended or will end soon,[1] the Appellate Body will become dysfunctional by the end of the year 2019, that is, unless the then only Member (who happens to be the Chinese lawyer who leads China's legal team in the *Rare Earth* cases), continues to use Rule 15 of the Appellate Body Working Procedures (*Rule 15*)[2] which permits entrusting cases to former Members if they were present when the case reached the Appellate Body. In that case, a somewhat limping Appellate Body will churn out reports for another two years or so, possibly until the United States 2020 presidential elections.

* Professor Michael Hahn is the Managing Director of the Institute of European and International Economic law and a Director at the World Trade Institute of the University of Bern.

1 After the terms of Appellate Body members *Ramírez Hernández*, *Chong Kim*, *Van den Bossche*, and *Shree Servansingh* expired in 2017 and 2018, there are currently 3 Appellate Body members left. Two of these will have their respective terms on 10 December this year; the last man standing is, not surprisingly a woman, Ms. Zhao whose term will end on 30 November 2020. Pursuant to Article 17.1 DSU, three of the seven ABMs "shall serve on any one case".

2 *WTO*, Appellate Body on the Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010, available at: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (14/06/2019).

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According to the current U.S. administration, one of the main reasons for this is that the rule of law – mandated by the WTO agreement – has been replaced by the rule of lawyers,[3] that is activist, if not rogue and supra-nationally inclined lawyers. According to that narrative, the most vexing parts are the *ultra vires* attempts of the Appellate Body to usurp powers that are reserved to the *Lords of the WTO-Agreement*, its Member States.[4]

This short contribution aims at highlighting the importance of the rule of law for the functioning of the multilateral trading system. It will argue that not only are two of its main components in danger – the recognition by the WTO Member States that they undertake in good faith not to violate WTO law, *and* the workings of the WTO dispute settlement mechanism, pursuant to the WTO Dispute Settlement Understanding (DSU). Rather, what is threatening the WTO at its core is the failure of the membership to preserve the equilibrium between the "political arm" of the organization and its judicial branch, as mandated by the WTO-Agreement.

B. Rule of Law in International Relations

"Rule of Law" means different things to different people: In mainland China, the term seems to be often used as a counterfactual to the deplorable period of the cultural revolution, where everything was imaginable, from the destruction of cultural treasures to extreme violence inflicted on participants of the *Long March* by youth brigades empowered by Chairman *Mao;* other than that it is used in rather formal and technical way, which is unsurprising given the constitutional matrix of this country. In Germany, of course, the *Rechtsstaatsprinzip* plays a central role in both the jurisprudence of the Constitutional Court and in doctrinal writing, and is very much a substantive standard that the legal order and the state have to adhere to. Similarly, the concept of *due process* plays a central role in common law jurisdictions, which often distinguish between procedural and substantive due process.

In the international arena, one of the more recent authoritative pronunciations describes the term *rule of law* as a

> "principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires […] measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness

3 See, e.g. *Howse*, European Journal of International Law 2016/27, pp. 9-77 with further references.

4 Cf *United States Trade Representative*, 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program Office, March 2019, available at: https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf (14/06/2019).

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> in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[5]

Under the heading "Promotion of the *rule of law* at the international level" (emphasis added), the UN Secretary-General has the following to say:

> 2. International law […] is the very foundation of the Organization. Promoting its development and respect for international obligations has always been a core aspect of United Nations activities. Efforts in this sphere include encouraging the progressive development of international law and its codification, support to the growing network of international treaties, international dispute resolution mechanisms, and training and education in international law. These efforts are based on the core values and principles of the United Nations, and contribute significantly to the collective international efforts to maintain international peace and security, promote human rights and foster sustainable development.[6]

It then goes on to discuss both the substantive aspect of the rule of law ("Codification, development and promotion of an international framework of norms and standards") and various procedural enforcement mechanisms, such as "International courts and tribunals, […] International and hybrid criminal courts and tribunals", and, lastly, "Non-judicial and Security Council accountability and support mechanisms".

C. Rule of Law in the WTO: An Introduction

Less authoritative but more pertinent in the context of this paper is the *Declaration on the Rule of Law in International Trade*, passed by the 69th Conference of the International Law Association (ILA). It states:[7]

1. WTO law is part of international treaty law binding on all Members that have ratified the WTO agreements. International law requires Members to perform in good faith their treaty-obligations within their national and regional legal orders.
2. Given its multilateral character the WTO must promote uniform and consistent interpretation of its rules internationally and nationally. This will be furthered by:
   a) Compliance with final rulings under the DSU binding for the parties in the dispute.
   b) Consistent interpretation of domestic trade law by national and regional authorities and courts in conformity with WTO obligations.

5 *Secretary Council of the United Nations*, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN-Doc. S/2004/616, 23 August 2004, para. 6, available at: https://www.un.org/ruleoflaw/files/2004%20report.pdf (14/06/2019).

6 *General Assembly of the United Nations*, Report of the Secretary-General on the Strengthening and coordinating United Nations rule of law activities, UN-Doc A/69/181, 24 July 2014, available at: https://undocs.org/en/A/69/181 (14/06/2019).

7 *International Law Association (ILA)*, Declaration on the Rule of Law in International Trade adopted as part of ILA Resolution No 2/2000 at the 69th ILA Conference in July 2000; available at: www.ila-hq.org (14/06/2019).

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c) Mutual exchange of information between national, regional and WTO authorities and courts about the application of WTO rules.
d) Scholarly research and teaching of WTO law in order to enhance its understanding by traders, producers, consumers and governments.

This declaration, influenced heavily by the Chairman of the International Trade Law Committee *Ernst-Ulrich Petersmann*, would seem to be a fair restatement of the consensus view with regard to WTO law. In contrast, its proposals *de lege ferenda* seemed ambitious then; today they would meet rejection by an overwhelming majority of the WTO membership.[8]

At its outset, the International Trade Law Committee's ILA Declaration almost literally restates Art. XVI para. 4 of the Agreement establishing the WTO (WTO-Agreement, WTO-A), pursuant to which each WTO-Member "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". It then highlights the importance of a parallelism between international and domestic interpretation of trade rules, and thus, in the light of the heterogeneous membership and its divergent legal cultures, the importance of the Appellate Body jurisprudence not just for the ultimately competent *Dispute Settlement Body* (DSB) and the parties of a given case, but as guidance for the "consistent interpretation of domestic trade law by national and regional authorities and courts in conformity with WTO obligations"). It is this "guidance" by the Appellate Body jurisprudence (and, more specifically, the Appellate Body's request that panels only deviate for "cogent reasons" from its jurisprudence) that is now reproached by the U.S. as an usurpation of competences[9] that are attributed to the Members alone, as per Article IX para. 2 WTO-A:

> The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. […]

8 "RECOMMENDS: "3. WTO members should strengthen the rule of law in international trade by enhancing the legitimacy and acceptance of WTO rules by in particular:
(a) Improving the transparency of the WTO rule making process i.a. by increasing the participation of national representatives of the economic and social activities in the work of the WTO, for instance, by creation of an Advisory Economic and Social Committee or an advisory parliamentary body of the WTO to be consulted regularly by the WTO organs. (b) Opening the WTO dispute settlement system for observers representing legitimate interests in the respective procedures, and promoting full transparency of WTO dispute settlement proceedings.
(c) Allowing individual parties, both natural and corporate, an advisory locus standi in those dispute settlement procedures where their own rights and interests are affected.
(d) Promoting the consistency of WTO rules and general international law.
4. WTO members should be encouraged to strengthen the legal and judicial remedies of their citizens and residents (natural and legal) if the latter are adversely affected by violations of precise and unconditional WTO guarantees of freedom and non-discrimination, especially where such violation of WTO rules has been ascertained in a legally binding manner by rulings of the DSB. […]"

9 Cf. The 114 paragraphs-long Statement by the United States on the precedential value of panel or Appellate Body reports under the WTO agreement and DSU, 18 December 2018, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf (14/06/2019).

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> The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

Like the Secretary-General's report, the ILA declaration recognised that the primary obligations of the Members to honour their commitments is the most important and central demand of the rule of law. The remainder, although of particular interest for lawyers (who tend to have an interest in how courts work (or not)) is only an instrument to ensure that primary obligation.

In substance, the ILA declaration is in line with the vast majority of legal and political science literature on the topic.[10] In a nutshell, the narrative is as follows: before the WTO came into existence the old GATT system left the possibility to any contracting party (read today: Member) to block the adoption of panel reports. As is the case to this day, the panel report *as such* (and also any Appellate Body report *as such*) are interesting (one would hope) legal opinions by experts in the field on whether the complaint of a Member State is legally well-founded. However, only the adoption by the Contracting Parties (then) and the DSB (today) changes water into wine, i.e. a legally binding decision by the WTO membership, acting today through the Dispute Settlement Body. In the old (pre-1994) days, this adoption could be blocked by any GATT contracting party not wanting to consent. While this power was ancillary to being a contracting party to the GATT 1947, it was effectively used mostly by large players, making the system *de facto* unequal and allowing the strong and mighty avoid accountability where the small and medium-sized powers could not.

That changed thanks to two major modifications of the dispute settlement mechanism. *Firstly*, the DSU introduces for a few, enumerated constellations the rule that requests (by parties, e.g. to establish a panel) or proposals (by the panels or the Appellate Body, e.g. to recommend the DSB to resolve a complaint in a certain way) "shall" become the decision of the DSB, "unless […] the DSB decides by consensus not to[11]" (negative consensus rule). Thus, the ordinary veto power that is the consequence of the *de facto* consensus rule in the WTO[12] is not available with regard to two main constellations: 1) With regard to the use of the dispute settlement mechanism, any Member requesting that its complaint will be heard by a panel or wishing to appeal a panel report knows that its request will be granted. 2) With regard to the adoption of both panel and Appellate Body reports, a veto power no longer exists. Rather, they

10 See, pars pro toto *Van den Bossche/Zdouc*, p. 102, with further references.

11 Cf., e.g. Art. 6 para. 2 DSU, emphasis added: "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, *unless at that meeting the DSB decides by consensus not to establish a pane*l.".

12 The WTO-A contains decision making provisions that allow to decide by (qualified) majority. However, they have never been used so far: it is currently being discussed whether they should be used for the appointment of Appellate Body members. Those opposing this possibility highlight that very few members would subject themselves to a qualified majority vote in the WTO and that using what is currently dead letter would lead to the US and members leave the WTO.

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"shall be adopted", unless the DSB decides by consensus not to (quasi-automatic adoption).

Of course, the negative consensus rule only applies to the extent that it is prescribed in the DSU; for example, no pertinent determination can be found in the context of the selection and appointment of Appellate Body Members.

Secondly, in addition to providing a dispute settlement mechanism that ensures for each and every Member in essence the right to an independent third-party adjudicator, the DSU establishes an appeals body that has the power to correct errors in law with regard to all panel reports referred to it by (at least) one of the parties to the dispute. While the authority to interpret the WTO-A authoritatively is vested exclusively in the General Council pursuant to Article IX para. 2 WTO-A, the right to supervise the correct application of the law by panels is vested in the Appellate Body pursuant to Article 17 para. 6 DSU. The obvious potential tension between "authoritative interpretation" by the Members, on the one hand, and the role of an appeals body, on the other hand, is resolved by Art. 3 para. 9 DSU which determines unequivocally that the *Lords of the Treaty* shall have the last word:

> "The provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement."

As is normally the case in civil law jurisdictions,[13] the (adopted) reports of the Appellate Body only bind the parties to the dispute. They are not precedents in that they do not technically bind future panels or even the Appellate Body itself. Having said that, no Appeals court will deviate from its own decisions without cogent reasons; nor will said court sustain inferior courts' rulings, if they deviate from its previous interpretation of the law, unless very convincing reasons are given: be it an irrefutable argumentation that convinces the Appeals court to give up its previous interpretation of the law (one is tempted to wish "good luck!" to any inferior court making that attempt), be it the convincing demonstration by a lower court that a general interpretative approach merits modification for specific circumstances not considered when establishing the general rule (a probably more promising route). The drafters were well aware that this would be the unavoidable consequence of introducing an appeals "layer" into the system and moving away from ad-hoc composed panels or tribunals. Any appeals body will establish a body of legal interpretations (a term used specifically in Article 17 para. 6 DSU) that will guide its own future decisions. Because the Appellate Body is the only organ that may determine whether panels erred in law, its past decisions will also guide the decisions of the "street-level" WTO panels, which would not apply the law properly, if they were to repeat a legal interpretation that was determined to be erroneous.[14] In this context, it should be noted that the DSU does not

13 But see para. 31 of the German Law on the Constitutional Court (Bundesverfassungsgerichtsgesetz).

14 See the contributions in *Yerxa/Wilson*; *Davey,* Journal of International Economic Law 2005/8, pp. 17-50.

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limit the competence of the Appellate Body to undo only particularly qualified errors in law, for example, "grave and manifest" errors. Rather, *any* legal error will give occasion for a successful appeal. This being said, it also seems clear that the Appellate Body has developed, occasionally, certain hypertrophic tendencies, that have been rightly criticized.[15]

Before this criticism is addressed, we turn to what is the central tenet of the rule of law: the *rule* of law, i.e. the principled preparedness of the subjects of international law to abide by the rules governing their relationships *inter se* and between them and the organization they have set-up. Certain developments in the WTO seem to point at a somewhat receding willingness to accept the commitments undertaken as binding.

D. Rule of Law in the WTO: The Primary Obligation of the Members

Pursuant to Article 26 of the Vienna Convention on the Law of Treaties (VCLT)),[16] « [e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Pursuant to Article 27 VCLT, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This well-established general rule of international law has its WTO-specific manifestation in Art. XVI:4 WTO-Agreement, and many similar provisions in the attached agreements, such as Article 32.5 Subsidies Agreement: The rule of law means nothing when the sovereign states who have agreed to be bound by a set of rules negotiated between them do not abide by them. In addition to and beyond that general obligation, the Members included the requirement of an additional expression of allegiance to the rule of law in the DSU: Pursuant to Article 21.3 DSU, "the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB" within 30 days after the date of adoption of the panel or Appellate Body report. One may read that as repetitive (and hence sloppy) drafting; another take is that the general commitment to play by the rules may seem like an easy enough commitment to make. But when that general obligation is sharpened through litigation, a renewed specific commitment to faithfully implement a decision which may be based on a reading of the treaty that had not been shared by the Member "losing" the case, is a qualified, more specific and consequential expression of commitment to the WTO-specific rule of law.

Of course, this paper cannot present the whole body of WTO law; it contains far-reaching obligations, from the "classic", but very specific non-discrimination obligations such as Art. III:2 GATT to the various restrictions on standard setting in the TBT and SPS Agreement and to the limitations on both subsidisations and on the permissible (trade) remedies. Most of the legal obligations with regard to which any

15 See *Howse*, European Journal of International Law 2016/27, pp. 9-77.

16 In *US – Gasoline*, p. 17 and *Japan–Alcoholic Beverages II*, p. 10, the Appellate Body correctly restates the general consensus in state practice and legal writing that Articles 31 and 32 VCLT have attained the quality of customary international law.

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Member "shall ensure the conformity of its laws, regulations and administrative procedures" establish *substantive* obligations. Others lay down *procedural* standards and prerequisites, thus going quite far into the inner *sanctum* of how a state organizes itself. For example, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires "objective" examinations by the investigating authorities; when a state's ground-rule is that the Party or the King are always right, *objective assessment* is quite a significant request. Also, judicial review as prescribed, for example, in Art. 23 Subsidies Agreement is not a negligible burden for Members where the Ruler or the Party do not normally allow to formally second-guess the decisions of (state) authority.

A last category of Members' obligations is to be mentioned – the obligation to allow the proper functioning of the shared organization and its institutions. Commitments regarding the functioning of the organization – e.g. electing the Director-General, pursuant to Art. VI para. 2 WTO-A, or, for that matter, the Appellate Body members pursuant to Art. 17.2. DSU – are legal obligations that must be honored in good faith.

Only if abiding by these obligations – which have been categorized as substantive obligations with regard to state measures, as procedural obligations with regard to state measures and as obligations vis-à-vis the common organization –one would speak of an organization which is characterized and shaped by the rule of law. If, however, one of those boxes could not be ticked, "rule of law" may quickly be devoid of meaning other than reminding of a better past.

To demand the recognition, not just in words but indeed of such norms as Art. XVI para. 4 WTO-A, 17.2. DSU and 21.3. DSU does not constitute an overly demanding standard or an unrealistic expectation. Sovereign states that happen to be WTO Members will, of course, interpret certain provisions with their self-interest in mind, and may choose legal interpretations that may be at the outer limit of what is viewed as tenable amongst lawyers. If that methodology is within the generous parameters of tenability and if the acting state is prepared to accept that its views may not find the support of the adjudicatory bodies that make up the WTO-DSM, such behavior does not endanger the rule of law. In a certain way, the opposite is the case. Disputes about the correct legal interpretation and "cases and controversies" about the proper application of the law are not a negation of the rule of law, but rather a confirmation: the determination by the competent WTO body that a certain view was legally erroneous, that another one is the appropriate one and the acceptance of that authoritative decision to assert and confirm the rule of law, rather than weaken it. Things are different, however, when the law of the organization is systematically disregarded, and its enforcement mechanism delegitimized, either by not abiding by its rulings or otherwise. Without a genuine commitment that the standard operating procedure is lawfulness, the rule of law is replaced by the factors that are only ironically referred to as law, such as the "law of the jungle".

It is, therefore, a frontal assault on the rule of law, when a Member is taking measures that are outside the generous corridor of "possible tenable legal positions". Raising, for example, tariffs beyond the level committed to, pursuant to Article II:6 GATT, in order to motivate the targeted state to take certain non-trade measures (such as buying

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new fighter-jets from the state that exercises pressure, or strengthening its anti-immigration policies) is, absent any specific circumstances to the contrary, not compatible with WTO law. In a similar fashion, the invocation of Art. XXI GATT for the purpose of protecting certain industries such as textile manufacturing or steel production from competition by industries located in countries with which the acting state has not only defense alliances but which are so close geographically that blockades would be impossible, is so obviously WTO-incompatible that doing so amounts to an *a priori* negation of the rule of law. While this article will not delve in detail into the question whether the U.S. measures regarding steel and aluminum products from NATO-allies, in particular, Canada or announced tariff measures in violation of tariff bindings to motivate Mexico to reduce the migratory pressure on the Southern border of the US would fall into those categories, a preliminary analysis would seem to indicate that the legal arguments advanced are beyond what may be called a tenable position. Similarly, the threat to impose tariffs on Chinese products in order to ensure facetime with a Chinese leader at the fringes of a G20 meeting would seem to be so far off-field as to appear as a negation of the binding nature of WTO obligations.

While it is almost too easy to point out the legal problems associated with the current U.S. administration's attitude, it should be pointed out that others who now are presenting themselves as champions of the multilateral trading systems may have also contributed to an erosion of the rule of law. China has been praised in the past, and rightly so, for its engagement in and with the dispute settlement mechanism. However, these positive contributions and many corrections of certain laws and practices, most notably in certain areas of intellectual property protection are not giving the full picture. Certain aggressive policies that would seem quite obviously not compatible with the letter and the spirit of the WTO-A have been maintained or even started have been difficult to address in the past, and not the least because of draconian consequences for those who step forward. The EU's track record is also far from perfect: in several high-profile cases, it has either refused to this day to implement the necessary corrections or has taken an inappropriately long time to do so. Thus, while the current U.S. policy is not a "speck of sawdust" but a rather full-blown "plank" [17] in the eye of the WTO's rule of law commitment, some of the tears shed publicly these days would appear to be crocodile tears.

E. The Protection of the Rule of Law through the WTO Dispute Settlement Mechanism and the Crisis of the Appellate Body

I. State of Play: The perspective of a Zombie Appellate Body

At the time of writing, it seems more likely than not that the Appellate Body will not be in a position to function properly as of 10 December 2019, the end of the term of two of the three remaining Appellate Body Members *Tom Graham* and *Ujal Singh Bhatia*. This will leave Ms. *Hong Zhao* as the only Appellate Body Member until her

17 *Matthew*, 7:3-5.

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term concludes on 30 November 2020. Pursuant to Article 17.1 DSU, a quorum of three Appellate Body Members is required in order to perform the functions of the Appellate Body. It seems likely that Ms. Zhao will appoint, on the basis of *Rule 15*, the two mentioned Members to sit on appeals that have been lodged by 10 December 2019. *Rule 15* reads as follows:

> A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.[18]

Thus, while not alive, the Appellate Body will be undead, still churning out reports that may then become decisions of the DSB. The reason for this difficult situation is the refusal of the U.S. to agree to the appointment of the Appellate Body Members. Ironically, the US had initially based its stance almost exclusively on the continuing service of former Appellate Body Members pursuant to *Rule 15*.[19]

Rule 15 of the Working Procedures for Appellate Review entered into force in 1996,[20] adopted on the basis of Article 17.9 DSU and after having been screened and found agreeable by both the WTO Director-General and the DSB chair. No discontent or grievance was voiced in the DSB or elsewhere until the U.S. administration started in recent years to decry this provision as a usurpation of Members' powers by a rogue Appellate Body. As a consequence, the U.S. started to block any appointment or reappointment to the Appellate Body. Instead of reducing its workload (and output), the Appellate Body tried to fulfil its mandate under the DSU and attempted to operate "as if" the U.S. blockade was not in place. Ironically, the main tool to achieve this outcome was an increased use of *Rule 15*: Due to the initial three vacancies caused by the U.S. blockade, several major cases (DS316/RW, DS353/RW, DS486, DS490/496, DS472/497) were assigned to the outgoing Member Van den Bossche, 'to deal with the unprecedented workload of appeals, and to preserve the rights of participants and third participants in pending appeals.[21]

It would seem, however, that the new-found concerns about *Rule 15* are just a pretext for the U.S. stance. The real reason for the U.S.' discontent seems to be a

18 See *WTO,* (fn. 2).

19 US Statements at the 22 November 2017 DSB Meeting regarding Appellate Body Appointments: Proposal By Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, European Union, Guatemala, Honduras, Hong Kong, China; Mexico, Nicaragua, Norway, Pakistan, Peru, Russian Federation, Singapore, Switzerland, Separate Customs Territory Of Taiwan, Penghu, Kinmen And Matsu;, Turkey, Uruguay and Viet Nam (WT/DSB/W/609), available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov 22.DSB_.pdf (04/06/2019). '… the United States has continued to convene meetings to discuss this issue informally with a number of delegations… we have heard a general recognition that the DSB has the authority to set the term of an AB member under DSU Article 17.2; it follows that the DSB has a responsibility to decide whether a person should continue serving beyond that term … Rule 15 raises difficult legal questions that the DSB should address'.

20 *WTO*, Working Procedures for Appellate Review, WT/AB/WP/1, 15 February 1996.

21 Letter of the Appellate Body Chair to the Chair of the DSB, Ref.: usb/ih (AB-2), 24 November 2017.

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frustration with the Appellate Body's jurisprudence over the last decade or so. From the current U.S. administration's perspective, the Appellate Body has usurped powers not attributed to it. The Appellate Body, it is claimed, is operating without a proper mandate. The pertinent accusations include, but are not limited to, 'disregard of the 90-day deadline for appeals', 'issuing advisory opinions on issues not necessary to resolve a dispute', 'Appellate Body review of fact and review of a Member's law *de novo*' and, last but not least, that 'the Appellate Body claims its reports are entitled to be treated as precedent'.[22]

Particularly harsh criticism is reserved for the Appellate Body's jurisprudence regarding trade remedy measures. The USTR voiced "systemic concerns with what it sees as an overly judicially activist Appellate Body that seeks to fill gaps in WTO agreements, which in turn creates new obligations for members and reinterprets what has already been agreed to … the Appellate Body opines on issues not raised in the appeal and creates jurisprudence with no input from members – largely abandoning deference to members in the context of trade remedy investigations."[23] Maybe the major frustration is the complete rejection of the U.S. policy of zeroing that allows to move against dumping, although there is none, as "negative" dumping (i.e. selling *above* the home market price cannot mitigate cases of "positive" dumping, due to the former counting the value of "zero").[24] It would not seem a far-fetched assumption that the main reason for the U.S. behavior is indeed the sense that some of the Appellate Body's interpretations of WTO law and particularly on trade remedies law are not compatible with U.S. domestic law[25] and policy.[26]

22 All quotes from Office of the *United States Trade Representative*, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program Office, March 2018, available at: https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017 (14/06/2019), pp. 22–28.

23 Inside US Trade's World Trade Online, Appellate Body, China NME Fights to Dominate WTO Dispute Settlement Debate in 2018, 26 December 2017, available at: https://insidetrade.com/daily-news/appellate-body-china-nme-fights-dominate-wto-dispute-settlement-debate-2018 (14/06/2019).

24 See, e.g., *Matsushita/Schoenbaum/Mavroidis/Hahn*, pp. 390 ff.

25 The main frustration with that jurisprudence is rooted in the interpretation of Art 17:6 Anti-Dumping Agreement and the Appellate Body's stance on "zeroing". See, e.g., Greenwald, Tulane Journal of International and Comparative Law 2013/21, pp. 261-272*; Davey*, in: Bethlehem/Mc Rae/Neufeld/Van Damme (eds.), pp. 460–80, 469 f.

26 See the statement of the US representative in the WTO voicing "systemic concerns with what it sees as an overly judicially activist Appellate Body that seeks to fill gaps in WTO agreements, which in turn creates new obligations for members and reinterprets what has already been agreed to … [T]he Appellate Body opines on issues not raised in the appeal and creates jurisprudence with no input from members – largely abandoning deference to members in the context of trade remedy investigations: Inside US Trade's World Trade Online, Appellate Body, China NME Fights to Dominate WTO Dispute Settlement Debate in 2018, 26 December 2017, available at: https://insidetrade.com/daily-news/appellate-body-china-nme-fights-dominate-wto-dispute-settlement-debate-2018 (14/06/2019); *Matsushita/Schoenbaum/Mavroidis/Hahn*, p. 43 f.

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Despite efforts by the rest of the world to prevent the U.S.-induced coma of the Appellate Body, the US has recently reiterated its position:[27]

> Through persistent overreaching, the WTO Appellate Body has been adding obligations that were never agreed by the United States and other WTO Members [referring to the 2018 U.S. Trade Policy Agenda passages quoted above]. The United States has raised repeated concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.
>
> And as we explained in recent meetings of the DSB, the Appellate Body has issued advisory opinions on issues not necessary to resolve a dispute and reviewed panel fact-finding despite appeals being limited to legal issues. Furthermore, the Appellate Body has asserted that panels must follow its reports although Members have not agreed to a system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules.
>
> And for more than a year, the United States has been calling for WTO Members to correct the situation where the Appellate Body acts as if it has the power to permit ex-Appellate Body Members to continue to decide appeals even after their term of office – as set by the WTO Members – has expired. This so-called "Rule 15" is, on its face, another example of the Appellate Body's disregard for the WTO's rules.

At first glance, the criticism of the Appellate Body concerns rather technical points. For example, the 90-days deadline has not been met by the Appellate Body in cases where it seemed impossible not just to the Appellate Body to meet those deadlines. However, the real offense was in all likelihood not the exceptional delayed Appellate Body report, but a change of policy in 2010. Until then, the Appellate Body had routinely requested the approval of the parties of the dispute when it felt that adherence to the mandatory deadline was not feasible; there seems to have been not a single case when this approval had not been granted by the parties. It is certainly true that not leaving the prolongation up to the parties was a manifestation of a self-perception that was irritating not just to the U.S. but to many other Members also.

With regard to the U.S.' reproach that the Appellate Body was issuing advisory opinions without a pertinent mandate, many would concur that the Appellate Body may have occasionally been too chatty (some would say too professorial), disregarding the judicial maxim to only express an opinion insofar as it is *necessary* for bringing a conclusion to a pending case. In the fighting language of the current U.S. administration that practice is now being presented as the usurpation of a non-existing power to issue "advisory opinions".

In substance, however, the following paragraph reveals that the blockade is not a reaction to debatable procedural choices made by the Appellate Body, but rather about its disagreement with certain aspects of the jurisprudence; certain Members and certain

27 Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 28 May 2019, available at: https://geneva.usmission.gov/2019/05/08/ambassador-sheas-statement-at-the-wto-general-council-meeting-agenda-items-4-6-7/ (14/06/2019).

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observers concur with that criticism.[28] There is no question that the Appellate Body's jurisprudence with regard to "zeroing"[29] or state-owned enterprises[30] or with regard to the acceptable level of risk under the SPS agreement[31] can be attacked as a sub-optimal exercise of judicial activity. However, an adjudicatory body always getting it right is a dream of first-year law students (if at all). Courts do get it wrong sometimes, and tone-deafness is the ugly sibling of judicial independence. It goes without saying that no "losing party" agrees with the Appellate Body; if it did, it would have won. Having voiced its disagreement with certain substantive issues (in contrast with *Rule 15* which never met any opposition by the U.S.) in the DSB, the U.S. complains that its

> concerns have not been addressed. When the Appellate Body overreaches and abuses the authority, it was given within the dispute settlement system, it undermines the legitimacy of the system and damages the interests of all WTO Members who care about having the agreements respected as they were negotiated and agreed.
> The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system, and will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.
> The United States appreciates that certain Members are now, in recent weeks, beginning to engage on the substantive issues raised by recognizing that the DSU does provide for rules, and those rules have been broken with impunity by the Appellate Body.
> On the other hand, it is striking that a few Members appear to be taking the view that the DSU does not provide for these rules. They will not acknowledge that the Appellate Body has been acting contrary to the unambiguous text of the DSU. In fact, my colleague from the European Union just said that the EU generally does not share our concerns. We would like to understand how it is Members can supposedly understand the same, clear words in such disparate ways.
> As we have previously explained, it is vital that Members understand how it is that we have come to this point where the Appellate Body, a body established by Members to serve the Members, is disregarding the clear rules that were set by those same Members.
> In other words, Members need to engage in a deeper discussion of *why* the Appellate Body has felt free to depart from what Members agreed to.
> Equally important is the need to understand why the Membership itself has been so reluctant over the course of so many years to take corrective action in response to Appellate Body rule-breaking.
> We must first have these understandings in order to determine *how* we can find appropriate and effective solutions to prevent this from happening in the future.

28 See e.g. *Hahn*, in: Elsig/Hahn/Spilker (eds.), pp.121-154.

29 *Greenwald*, Journal of International Economic Law 2003/6, pp. 113-124, available at: https://doi.org/10.1093/jiel/6.1.113 (14/06/2019).

30 Appellate Body, DS379, *US — Anti-Dumping and Countervailing Duties (China)*; see with further references *Prusa/Vermulst*, World Trade Review 2013/12, pp. 197–234.

31 *Mavroidis.* E15 Task Force on Regulatory Systems Coherence – Policy Options Paper. E15Initiative. International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, Geneva: 2016; *Howse/Mavroidis*, Fordham Int'l L.J. 2000/24(2), pp. 317 – 370.

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> Without these understandings, there is no reason to believe that simply adopting new or additional language, in whatever form, will be effective in addressing the concerns that the United States and other Members have raised.
> The United States has made its views on these issues very clear: we will not negotiate a weakening of the rules or a further lack of accountability for the Appellate Body.[32]

The preceding quote is remarkable: less so for the fighting language (e.g. "rules have been broken with impunity by the Appellate Body") but for the clear statement that the U.S. views its blocking measures as a consequence of "[o]ur concerns not [having] been addressed". It expects, almost as a matter of course, that its views have to influence the Appellate Body's future decisions, despite the DSU's guarantee of independence and impartiality, and despite the fact that the membership, including the U.S., has enough confidence in the Appellate Body to appeal almost 70 % of all panel reports.[33] While it is clear that tactical considerations would be the main driver for appeals, a lack of trust in the Appellate Body's jurisprudential quality would surely have led to a more restrained use of that avenue. To this day, the U.S. appeals to a body that it describes elsewhere as a rogue judicial juggernaut.

It also seems untenable to claim that the Appellate Body has been "acting contrary to the unambiguous text of the DSU." This statement would only not be a disloyal (and hence arguably illegal) act if the Appellate Body would have acted in ways that would be outside the spectrum of "normal" judicial behavior. That is clearly not the case: The Appellate Body proceeds, sometimes almost irritatingly so, according to the rules of treaty interpretation as enshrined in Art. 31, 32 Vienna Convention; if mistakes happen *en route*, this is not acting contrary to the unambiguous text. Ironically, the U.S. statement suffers from the same deficiency as the Appellate Body's statement on the obligation of adjudicatory bodies to follow its "interpretations absent cogent reasons." The latter may be correct, but it is not for the Appellate Body to say that: their mandate is defined by the DSU which does not use those terms. That the Appellate Body may have gotten it wrong may also be true; but it is not for a state which is, for the time being, subject to the jurisdiction of the WTO dispute settlement mechanism to insult and pressure the Appellate Body, thus violating its independence and the independence of all future WTO adjudicators.

The statement that the Appellate Body "is disregarding the clear rules that were set by … Members" is not reflective of the membership view which quasi-unanimously, with one notable exception, supports an end to the blockade and the continuation of the Appellate Body's work. Also, the success of the Appellate Body and the respect it enjoys in the membership despite the occasional unhappiness about certain aspects of its work seem to indicate that overall the degree of acceptance and thus legitimacy of the Appellate Body is rather high. Thus, statements that accuse the Appellate Body

32 U.S. Statements Delivered by Ambassador *Dennis Shea*, WTO General Council Meeting, 7 May 2019, available at: https://geneva.usmission.gov/2019/05/08/ambassador-sheas-statement-at-the-wto-general-council-meeting-agenda-items-4-6-7/ (14/06/2019).

33 In 2016, almost 90 % of panel reports were appealed; see the address of the Appellate Body member *Bhatia.*

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of contravening WTO rules in ways that would be manifestly abusive and erroneous are outside of the realm beyond serious legal and political science analysis.[34]

Rather, if one would think that the Appellate Body has gotten it wrong too often in the last 10 years, the shortcomings would have to be attributed also to the membership: Members elect the Appellate Body members and have all tools at their disposal to correct legal interpretations of the WTO-A which they deem unfit for purpose. The obvious avenue insofar would be the *authoritative interpretation* pursuant to Art. IX para. 2 WTO-A discussed earlier. Not a single use of this provision has occurred. But of course, other possibilities would also have been at the membership's disposal and remain so in the future: For example, there is no reason to not have a more structured dialogue between the membership and the Appellate Body. Members can take guidance from the UN's Sixth Committee or opt for more informal reunions of the legal services of the Members' ministries or agencies in charge. Apart from one joint dinner between ambassadors and the Appellate Body members some 10 years ago, nothing of that kind has been attempted in the last 20 years.

What the current dispute is showing though, is that a functional dispute settlement mechanism and a dysfunctional law-making function in an International Organization is only tenable for so long – it is true that initially the working (but ancillary) dispute resolution mechanism takes center stage as no guidance is exercised by the *Lords of the Treaties*. That was clearly the case with regard to the Appellate Body: it was praised as the only working part of the WTO, whereas the membership was chided for its inability to even recognize when a negotiation round had failed.

The pushback that is observable now was only a question of time; some may wonder why it took so long. In this context it is interesting to observe that similar mechanisms play out at the domestic level: the hyper-politization of the U.S. federal court judicial appointments is a function of the ever-increasing power of the U.S. courts in the light of the mutual blockades of the political process. Chief Justice *Roberts* is said to be aware of the dangers this brings to the legitimacy of the court and has acted publicly on it.[35]

The U.S.' blocking of the functioning of the treaty-based dispute settlement system (possibly in violation of its obligations under the DSU)[36] because it is of the opinion that the Appellate Body has wrongly interpreted substantial provisions of the WTO-

34 See e.g. *van Damme*.

35 Washington Post, 15 June 2019, Chief justice assures the Supreme Court is apolitical. He's facing his next big test, available at: https://www.washingtonpost.com/politics/courts_law/chief-justice-assures-the-supreme-court-is-apolitical-hes-facing-his-next-big-test/2019/06/16/8603bac6-8def-11e9-8f69-a2795fca3343_story.html?utm_term=.500bcdef5159 (14/06/2019).

36 This would seem to be a tenable position given that Art. 17 DSU does not leave to members the choice whether they wish to install a functional Appellate Body or not. Rather it establishes a clear-cut obligation of the DSB to fill the Appellate Body with seven members. It would seem that currently only the U.S. is standing on the way of implementing this obligation. The opposing view would argue be that it cannot be a suitable legal argument for oblige the U.S. to leave the Organisation, as they easily could pursuant to Art. XV WTO-A; in that light, the hijacking of the Appellate Body appointment process would be the lesser evil.

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A, in particular in the field of trade remedies law (and allegedly purposefully so, as the choice of language ["disregard of clear rules"] would indicate), shows that the non-use of the balanced organizational structure of the WTO institutional law is one of the main drivers of U.S. frustration. Only if both avenues for developing the law – the political and the judicial – are operating according to plan, i.e., according to the rules laid down in the WTO-A, can it be ensured that not only the law is being applied equally and impartially, but also in ways that are acceptable to those who have agreed, *pro tempore*, to be bound by these rules. If this is not possible in the present day's WTO, the rules have to change to allow a functioning decision-making process.

However, to eliminate the judicial mechanism, given that the political mechanism has remained a theoretical option that has never been used successfully, is not a solution. It endangers not only legal predictability and security but rather the very existence of the WTO: a real concern exists amongst the membership that in the absence of an operational Appellate Body the already now visible diminished adherence to WTO rules will increase.

II. Bridging the Gap: Finding a Geneva Backstop

Under the rules of the DSU, any party to a dispute has the right to appeal. As a consequence of that appeal, the appealed panel report cannot be the basis for a DSB decision until the appeal is completed. If the current set-up remains unchanged, and if the number of Appellate Body Members drops below the threshold of three Members, the Appellate Body becomes incapable of taking new appeals (old ones may possibly be addressed pursuant to *Rule 15* procedures). Because that seems such an undesirable outcome, Members are looking for ways to avoid that any losing party, by appealing to a non-existing Appellate Body, can prevent the resolution of a dispute. [37] As no appetite exists at all, it would seem, to proceed to a majority vote for appointing Appellate Body members, and as efforts continue to prevent the U.S. from leaving the WTO (as the current President has threatened both as a candidate and after taking office) a temporary solution can be injected at two different junctions of the current dispute settlement process.

The first would be to terminate the process after the panel has spoken. That could happen through a waiver pursuant to Article IX para 3, 4 WTO-A. The obligation waived would be the obligation to be subjected to the appeals process upon the demand of the appealing party. So far, that proposed solution seems to have received few endorsements and even fewer rejections, which would seem to indicate that it is far from impossible that it may become relevant. Of course, in practice, that would require the U.S. to consent to that solution, as voting seems to not be an option, contrary to the treaty language, but in line with longstanding practice.

37 For an excellent overview of possible solutions discussed (including some that seem to have lost any chance of political viability) see *Payosova/Hufbauer/Schott*, PIIE Policy Brief 18-5, March 2018, available at: https://piie.com/system/files/documents/pb18-5.pdf (20/05/2019).

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As an alternative – or as a complementary – measure, a proposal aims at using Art. 25 DSU arbitration as a temporary substitute.[38] Originally suggested by six attorneys associated with Sidley Austin's Geneva office,[39] it has received the endorsement of the EU Commission, amongst others.[40] Art. 25 DSU reads as follows:

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

Arbitration under Article 25 DSU is, pursuant to Article 1.1 part of the "dispute settlement provisions" that are subject to DSU rules and procedures. However, it does not depend on any action by the DSB, thus eliminating possibilities of unwilling Members (such as the U.S) parties to veto its use. Rather, it is initiated by the agreement of the parties.[41] Pursuant to Article 25.4 DSU, awards are subject to the regular DSU mechanisms enshrined in Articles 21 and 22 DSU.

The aim of the proposal is to

> "to replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU including an appropriate administrative and legal support to the arbitrators by the Appellate Body Secretariat.
> 3. In particular, [WTO Member] and the European Union envisage that, under the interim appeal arbitration procedure, appeals will be heard by former members of the Appellate Body, serving as arbitrators pursuant to Article 25 of the DSU. Three persons will serve

38 See generally *Boisson de Chazournes*, in: Charnovitz/Steger/Van Den Bossche (eds.), pp. 181 f.

39 *Anderson/Friedbacher/Lau/Lockhart/Remy/Sandford*, CTEI Working Paper CTEI-2017-17.

40 Cf. JOB/DSB/1/Add. 1, available at: https://worldtradelaw.typepad.com/files/eu-ab-proposal.pdf (10/06/2019).

41 See the EU proposal JOB/DSB/1/Add.11 (Annex): "Agreed procedures for arbitration under Article 25 of the DSU in the dispute... DS X
l. [In order to give effect to communication JOB/DSB/l/Add.II in this dispute,] [WTO Member] and the European Union (hereafter the "parties") mutually agree pursuant to Article 25.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties in dispute DSX initiated by any party to the dispute in accordance with these agreed procedures […]".

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> on any one case. They will be selected by the Director-General from the pool of available former members of the Appellate Body, based on the same principles and methods that apply to constitute a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review. However, two nationals of the same Member may not serve on the same case."[42]

Not just the procedures are to be replicated. Rather, the arbitrators shall be the current and former members of the Appellate Body that are prepared to serve.

D. Conclusions

The efforts to save the appeals process shows the appreciation for the role the WTO dispute settlement mechanism has played in the last 20 years. In light of the massive attack by the onetime mentor of the system, this is good news. However, the rule of law and the rule by law in the multilateral trading system depends not just on preserving the endangered species "Appellate Body" but also rendering the political arm of the organization operational. For this, major reforms will be necessary if the WTO is not to disappear like The Picture of Dorian Gray.

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42 See the EU proposal JOB/DSB/1/Add.11, which is in poarts verbatim identical with the proposal by *Anderson/Friedbacher/Lau/Lockhart/Remy/Sandford*, CTEI Working Paper CTEI-2017-17, para. 14 f.

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