



## ANALYSIS

# **The WTO Appellate Body crisis**

A contribution to the ongoing discussions

2023

## Executive summary

Since late 2019, the body that hears appeals in the World Trade Organization's (WTO) dispute settlement system, the Appellate Body, has not been functioning and has been in crisis. In light of the ongoing discussions in the WTO aimed at having a fully functioning dispute settlement system that is accessible to all WTO Members by 2024, this paper discusses some of the concerns raised by Members, most notably the United States (US).

We consider some of the concerns over the functioning of the Appellate Body, that we consider to be of specific interest. These include the 90-day time frame for completing appeals and Rule 15 of the Working Procedures for Appellate Review, according to which the Appellate Body can authorise – and has authorised – outgoing Appellate Body members to complete the disposition of any appeal to which they were assigned before their term in office ended. We also analyse and discuss the Appellate Body's alleged practices of reviewing municipal law, issuing advisory opinions and creating binding precedents. Finally, we also discuss the two-tier system and its rationale.

Without having analysed all the aspects that the US has criticised, our view is that the problem is not in the drafting of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), but rather how it has been interpreted and applied in practice. There are arguably a limited number of areas where the Appellate Body could have shown more self-restraint in its practice. As has been proposed by the US and others, the most effective and quickest way to address the issues may therefore be for the WTO Members to ensure application of the text of the DSU as written and place more emphasis on all new Appellate Body members complying with its various provisions.

To further narrow the scope for interpretation available to the Appellate Body, a number of clarifications and amendments could be made to the DSU. We discuss some changes that could be achieved fairly easily to get the system up and running again as soon as possible.

Other modifications could, for example, be made to the process for selecting Appellate Body members, to the Rules of conduct for the understanding on rules and procedures governing the settlement of disputes and the Working Procedures for Appellate Review.

We also identify a number of areas and improvements that could be investigated further as part of a work program, which could be launched at the same time as the restoration of the Appellate Body. This includes, for example, more efficient remedies for developing countries.

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### Disclaimer

This is a paper by the National Board of Trade Sweden. It contains only publicly available information and is intended as a contribution to the ongoing debate on the reform of the WTO dispute settlement system. It does not reflect or represent the formal position or views of the Swedish Government nor those of the European Union.

# 1 Introduction

Since late 2019, the body that hears appeals in the World Trade Organization's (WTO) dispute settlement system, the Appellate Body, has not been functioning and has been in crisis. In light of the ongoing discussions in the WTO aimed at having a fully and well-functioning dispute settlement system that is accessible to all WTO Members by 2024,<sup>1</sup> the purpose of this paper is to discuss some of the concerns raised by Members, most notably the United States (US), that we consider to be of specific interest. We will mainly use the Report on the Appellate Body issued by the Office of the United States Trade Representative (USTR) in February 2020 to represent the US' position.<sup>2</sup> We look at some of the substantive issues concerning the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raised by the US, taking them at face value with the understanding that the US is acting in good faith. We are at the same time well aware of discussions in trade policy circles on whether the US would like to see a restored two-tier dispute settlement system at all. In this paper, however, we focus on the US' concerns from a legal perspective and from a systemic point of view, as well as from a developing country point of view. We discuss ideas for the way ahead, well aware of, and taking into account, the past and ongoing efforts of others, not least in the process led by Ambassador David Walker.<sup>3</sup> Our paper is intended for trade policy makers already engaged in the discussions and those with a specific interest in the continued survival of the WTO dispute settlement system.

Although the legal order of the WTO is largely a system of its own,<sup>4</sup> it is usually considered to be an integral part of public international law.<sup>5</sup> We will therefore give some consideration to how issues are viewed in other spheres of international law for comparison.

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- <sup>1</sup> Ministerial Conference Twelfth Session Geneva, 12–15 June 2022, *MC12 Outcome Document*, adopted on June 2022, WT/MIN(22)/24, WT/L/1135, 22 June 2022, paras. 3–4.
  - <sup>2</sup> Office of the United States Trade Representative, Ambassador Robert E. Lighthizer, *Report on the Appellate Body of the World Trade Organization*, February 2020 (hereafter 'USTR Report on the Appellate Body').
  - <sup>3</sup> New Zealand's Ambassador David Walker was appointed by the General Council at the beginning of 2019 as a 'facilitator' to try to resolve the differences between the US and other WTO Members regarding the appointment of Appellate Body members. After consultations with Members, Ambassador Walker submitted a report to the General Council proposing a draft decision on the functioning of the Appellate Body. The decision was not, however, adopted.
  - <sup>4</sup> A. Aust, *Handbook of International Law*, Second Edition, Cambridge University Press, 2010, e-book, p. 306.
  - <sup>5</sup> P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization, Text, Cases, and Materials*, Fifth Edition, Cambridge University Press, 2022, p. 69.

## 2 Procedural concerns

### 2.1 The problem

The US has had concerns over the functioning of the Appellate Body for a long time.<sup>6</sup> In essence, the US asserts that the Appellate Body has acted outside the mandate assigned to it, and thus ‘exceeded its authority and breached the limitations explicitly agreed and imposed by the WTO Members.’<sup>7</sup> In the US’ view, this means that the Appellate Body has disregarded, modified or created new obligations through exceeding its mandate or incorrectly interpreting the WTO agreements.<sup>8</sup>

The US criticises the Appellate Body for alleged judicial overreach as well as ‘blatant violations’ of certain procedural rules. As to the latter, one specific critique is the Appellate Body’s disregard of the stipulated 90-day time frame for the appeal process without the explicit consent of the parties, contrary to Article 17.5 of the DSU. The US also asserts that these violations delay the dispute settlement procedures and are contrary to the principle of the prompt settlement of disputes set out in Article 3 of the DSU. However, the US acknowledges that the Appellate Body respected the 90-day rule, or at least obtained the consent of the parties to depart from the rule, in disputes up until 2011 and the case *US –Tyres (China) (2011)*.<sup>9</sup> According to the US, more recently, the Appellate Body has not even provided an estimated time needed or supporting evidence for the late issuance of the reports.<sup>10</sup>

Article 17.5 of the DSU stipulates that the proceedings shall, as a general rule, not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. The provision further provides that when the Appellate Body considers that it cannot provide a report within that time frame, it shall inform the Dispute Settlement Body (DSB) in writing of the reasons and give an estimate of the additional time needed. In no case, the provision states, are the proceedings allowed to exceed the 90 days.

The US has also criticised the Appellate Body for allowing outgoing Appellate Body members to complete the disposition of any appeal to which that person was assigned before his or her term in office ended, pursuant to Rule 15 of the

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<sup>6</sup> The first time that an American administration blocked the appointment of an Appellate Body member was in 2011. However, in Appendix B2 to the USTR Report on the Appellate Body, the USTR enumerates occasions on which the US has expressed concerns regarding the Dispute Settlement Body since 2000.

<sup>7</sup> USTR Report on the Appellate Body, p. 25.

<sup>8</sup> See USTR Report on the Appellate Body, p. 25.

<sup>9</sup> USTR Report on the Appellate Body, pp. 28–29.

<sup>10</sup> USTR Report on the Appellate Body, p. 31.

Working Procedures for Appellate Review<sup>11, 12</sup> First and foremost, the US claims that this is contrary to Article 17.2 of the DSU, which stipulates that ‘[t]he DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once’. The fact that the Appellate Body has the authority to enact its own working procedures in accordance with Article 17.9 of the DSU does not change the US’ standpoint.

According to the US, these practices are violations of the DSU and have diminished the rights of the WTO Members, with the Appellate Body acting as rule-maker instead of the Members, thus intruding on their authority and sovereignty contrary to WTO law. This in turn, is argued to undermine the WTO Members’ confidence in the WTO’s rules-based trading system.<sup>13</sup>

## 2.2 Discussion

Delays in the procedures is one of the major criticisms of the WTO dispute settlement system, and not only by the US. As early as in the DSU review in 1998, WTO Members discussed time-saving.<sup>14</sup> During the GATT era, the parties to the GATT raised concerns regarding delays in the existing dispute settlement system (there were no fixed time frames).<sup>15</sup> The DSU aimed to address the problem, and it was prescribed in Article 3.3 of the DSU that the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

Complying with time frames is important for a number of reasons. As commonly known and famously said by former British Prime Minister William E. Gladstone, ‘*justice delayed is justice denied*’. Moreover, a prompt settlement of disputes is a matter of *due process*, whereby legal matters are required to be resolved according to established rules and principles, as well as fairly. As stated by the Appellate Body itself, with reference to Article 3.3 of the DSU, WTO adjudicators may be required, as a matter of due process and fairness, ‘to take appropriate account of the need to safeguard other interests, such as an aggrieved party’s right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close.’<sup>16</sup>

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<sup>11</sup> Appellate Body, Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

<sup>12</sup> USTR Report on the Appellate Body, pp. 32–33.

<sup>13</sup> USTR Report on the Appellate Body, p. 26.

<sup>14</sup> Special Session of the Dispute Settlement Body 24 October 2005, Minutes of Meeting held in the Centre William Rappard on 24 October 2005, TN/DS/M/29, 20 January 2006.

<sup>15</sup> WTO, Understanding the WTO: Settling Disputes, A Unique Contribution, available at: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

<sup>16</sup> Appellate Body Report, *Thailand — Cigarettes (Philippines)* (2011), para. 150.

Delayed and lengthy proceedings have a number of repercussions. First, delays may render the system less attractive to Member governments and, indirectly, businesses. Particularly businesses with little capital may reflect on whether it might be easier for them to divert business to another country than to challenge a trade barrier through the WTO dispute settlement system.<sup>17</sup> This may affect developing countries more than developed countries. A further consequence of delays in the appeal process is that the longer the resolution of a dispute takes, the longer the infringing party may maintain its disputed measures. There is simply no obligation to implement the recommendations and rulings of a panel or the Appellate Body report until it is adopted by the DSB.<sup>18</sup> Moreover, if the parties disagree on the reasonable period of time for implementation, arbitration under Article 21.3(c) of the DSU for solving the matter may be required. In addition, if the parties disagree on the implementation, compliance proceedings may be necessary, which may include both another panel and Appellate Body procedure.<sup>19</sup> Finally, there is also the possibility of arbitration under Article 22.6 of the DSU to settle the level of suspension.

In terms of remedies, there are no retroactive damages within the WTO dispute settlement system. Any compensation is prospective only, with the aim of inducing the party to comply. The lack of retroactive compensation may aggravate the delay, since the parties do not have any incentive to act more quickly.

If procedures take too long and do not lead to effective resolution, there is a risk that this may lead to less confidence in the system overall, thereby threatening the entire system. A less well-functioning system is of benefit to larger Members with more influence. The US, as well as other Members, are aware of such consequences.

The general view, which seems to be shared by most other WTO Members, is that there are other factors that have contributed to the delays.<sup>20</sup> These include the lack of capacity of the Appellate Body, contrary to Article 17.7 of the DSU. That provision stipulates that the Appellate Body shall be provided with appropriate administrative and legal support as it requires. Other reasons include the fact disputes have become more complex and lengthier with ever more claims to address, as well as the Appellate Body developing extensive

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<sup>17</sup> H. Nottage, *Developing countries in the WTO Dispute Settlement System*, GEG Working Paper, No. 2009/47, University of Oxford, Global Economic Governance Programme (GEG), Oxford, 2009, p. 13.

<sup>18</sup> Pursuant to Article 21.3 of the DSU, if immediate implementation is impractical, the Member concerned shall have a reasonable period of time to comply with the recommendations and rulings.

<sup>19</sup> Article 21.5 of the DSU.

<sup>20</sup> See WTO Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 22 June 2018*, WT/DSB/M/414, 11 October 2018.

jurisprudence, which has made litigation and adjudication more complex.<sup>21</sup> There may also have been cases in which the Members have deliberately not acted within the time frames, in turn causing delays in order to stall processes.<sup>22</sup>

The US has focused its criticism on the delays in the appeal process and the Appellate Body's practices. At the same time, there are also delays at the panel stage of the WTO dispute settlement system, which undoubtedly have contributed to the overall problem.<sup>23</sup> We will not go into further detail here, but in our view any review of the system may have to include the panel stage as well.

At the same time, there is a legitimate question around the extent to which the Appellate Body has been responsible for the delays and whether it could have done more to comply with the stipulated time frames. As the Appellate Body systematically needed more time, it should perhaps have been compelled to change its approach or to ask the Members for explicit consent as it had done in earlier years or to seek amendments to the DSU. If the stipulated time frames and other provisions of the DSU were simply ignored, this can be fairly criticised. As the Appellate Body has itself said, every term of a provision has to be given meaning in line with *the principle of effective treaty interpretation*.<sup>24</sup>

There also seems to have been a discrepancy between the different perceptions of what role the Appellate Body should have, and difficulties finding the right balance between different obligations. On the one hand, the WTO Members placed great emphasis in the DSU on the prompt settlement of disputes, and included short deadlines for appeal reviews. On the other hand, the panels and the Appellate Body were equally responsible for preserving the rights and obligations of the Members, for clarifying the existing provisions of the covered agreements and for providing security and predictability in the multilateral trading system.<sup>25</sup> The US argues that the latter has led the Appellate Body to believe that it 'was vested with a broad authority to develop

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<sup>21</sup> P. Van den Bossche, *The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?*, WTI Working Paper No. 02/2021.

<sup>22</sup> E.g. US and Canada in Appellate Body Report, *Canada – Continued Suspension* (2008), para. 30, as well as the US in US – Stainless Steel from Mexico, see Appellate Body Report, *US – Stainless Steel (Mexico)* (2008), p. 68.

<sup>23</sup> Pursuant to Article 12.8 and Article 12.9, a panel report shall normally be issued within six months, and exceptionally within nine months. Nevertheless, a number of panels have taken much longer, e.g. panel report, *US – Steel and Aluminium Products (Norway)* (2022) (approximately 4 years), and panel report *US – Tuna II (Mexico)* (2011) (approximately 2.5 years).

<sup>24</sup> Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (2013), para. 5.57.

<sup>25</sup> Article 3.2 of the DSU.



a “coherent and predictable body of jurisprudence” and ‘act like a court’.<sup>26</sup> Others have also noted that the Appellate Body may have unnecessarily clarified, expanded or narrowed the reach of WTO provisions, despite the fact that Articles 3.2 and 19.2 of the DSU stipulate that the dispute settlement findings cannot add to or diminish the rights and obligations of Members.<sup>27</sup>

As regards the US’ criticism of the Appellate Body’s practice under Rule 15, it seems to be based on a difference in how to interpret ‘gaps’ in the WTO agreements. In legal terms, the US seems to favour a strict, narrow, literal reading of the agreements, according to which any extension of the term would not be allowed unless it was expressly permitted by the DSU. The Statutes of both the International Court of Justice (ICJ) and the International Criminal Court (ICC) expressly provide for outgoing judges finishing cases they have begun.<sup>28</sup> The Appellate Body, on the other hand, seems to have adopted a more extensive, flexible and pragmatic approach to the interpretation of the DSU.<sup>29</sup> According to the Appellate Body itself, many other international adjudicative bodies do the same.<sup>30</sup> In addition, in practice, where procedural issues arise that have not been regulated, it is normally within the arbitrators’ competence to make a ruling on the matter at hand. Pursuant to Article 17.9 of the DSU, the Appellate Body has the power to adopt its own working procedures. In any case, Rule 15 may be considered to have been a creative response from the Appellate Body to solve the underlying problem of insufficient capacity.

Regardless, the US’ concerns regarding breaches of the 90-day rule and Rule 15 may not be the central problem, but rather symptoms of other concerns, such as the Appellate Body’s alleged practices of reviewing municipal law, issuing of advisory opinions and creation of binding precedents, matters we will consider in the next chapter.<sup>31</sup>

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<sup>26</sup> D. Shea, *No Quick Fixes for WTO Dispute Settlement Reform*, blog post dated 9 March 2021, available at: [No Quick Fixes for WTO Dispute Settlement Reform \(csis.org\)](https://www.csis.org/analysis/no-quick-fixes-wto-dispute-settlement-reform). See also p. 61 of the USTR Report on the Appellate Body.

<sup>27</sup> See e.g. B. Hirsch, pp. 5–7.

<sup>28</sup> US Congressional Research Service Report, *The World Trade Organization’s (WTO’s) Appellate Body: Key Disputes and Controversies*, R46852, 22 July 2021, p. 10. Cf. Article 13.3 of the Statute of the International Court of Justice, 26 June 1945, 33 U.N.T.S. 933, and Article 36.10 of the Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S.

<sup>29</sup> US Congressional Research Service Report, p. 10.

<sup>30</sup> Communication from the Appellate Body, *Background Note on Rule 15 of the Working Procedures for Appellate Body Review*, 24 November 2017.

<sup>31</sup> USTR Report on the Appellate Body, p. 5, and A. W. Wolff, *WTO 2025: Restoring binding dispute settlement*, Peterson Institute for International Economics, Working Papers 22, 5 April 2022, p. 6, and US Congressional Research Service Report, p. 8.

## 2.3 Possible ways forward

Various proposals have been put forward in a bid to make the dispute settlement system faster and more effective, such as shortening time frames.<sup>32</sup> A number of proposals for increasing the Appellate Body's capacity have also been proposed. Such proposals could prove fruitful, if they were to lead to the Appellate Body having more resources to handle increasing demands. However, increasing the Appellate Body's capacity does not, in reality, seem very likely.

More extensive changes to the DSU could include, for example, awarding the winning party the litigation costs for any appeal.<sup>33</sup> Both during the GATT and the WTO era, developing countries have put forward proposals for introducing compulsory monetary compensation as a remedy, which could act as a deterrent.<sup>34</sup> This may not, however, be realistic in the short term, but could nonetheless, be investigated further.

At the other end of the spectrum of solutions, if the Members do not want to expand the capacity of the Appellate Body, measures could be taken to encourage stricter practice. As Ambassador Walker proposed, the WTO Members could take steps to ensure strict adherence to the provisions of the DSU and on all new Appellate Body members complying with the DSU's 90-day deadline for issuing reports. Furthermore, in line with previous practice, and as also proposed by Ambassador Walker, it could be expressly decided that the parties may agree with the Appellate Body to extend the time frames in cases of unusual complexity or periods of numerous appeals.<sup>35</sup> This type of change would clarify the mandate of the Appellate Body and limit its scope for interpreting DSU provisions. This would in turn increase predictability.

Moreover, to resolve concerns regarding Rule 15, it could be clarified in the DSU or a decision, as proposed by Ambassador Walker, that the Appellate Body is not allowed to assign new cases to the Appellate Body members by a certain point towards the end of their term.<sup>36</sup> Furthermore, as Ambassador Walker proposed, clarifications could, for example, be made to underscore that it is the duty of the WTO Members to appoint members to the Appellate Body and that the DSB has the authority, and responsibility, to determine

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<sup>32</sup> See e.g. J. Bacchus and S. Lester, *Trade Justice Delayed Is Trade Justice Denied – How to Make WTO Dispute Settlement Faster and More Effective*, Free Trade Bulletin, Number 75, Cato Institute, November 2019.

<sup>33</sup> A. W. Wolff, p. 20.

<sup>34</sup> V. Pogoretsky et al., *Is the WTO Losing its Crown Jewel to FTAs and Why Should This Concern Economically Disadvantaged WTO Members?*, 14(1) TRADE L.&DEV.105(2022), p. 139.

<sup>35</sup> General Council 9-11 December 2019, WT/GC/W/791, Draft decision (hereafter 'Ambassador Walker's Draft decision'), paras. 7–8.

<sup>36</sup> Ambassador Walker's Draft decision, paras. 5–6.

membership of the Appellate Body as well as the obligation to fill vacancies.<sup>37</sup> This type of change would also make clearer the mandate of the Appellate Body and limit its scope for interpretation, leaving it with less room to fill any gaps in the DSU. This would in turn increase predictability. This is most likely to be the easiest and fastest way to address the issues ahead of the 2024 deadline.

The first case brought under the Multiparty Interim Appeal Arbitration Arrangement (MPIA) also managed to comply with the 90-day rule,<sup>38</sup> which shows that it is not unfeasible. The new Appellate Body members and any organisation supporting them may, however, have to conduct some self-reflection regarding previous processes and practices and what new processes and organisational measures are necessary for complying with the rules in the future.

One such thing that the Appellate Body could do, in line with the principle of the prompt settlement of disputes, is to show more self-restraint in its work and adopt a stricter or narrower interpretation of its role and the law in order to focus more closely on resolving the dispute at issue. As the US also states, the Appellate Body could exercise – and has exercised many times – judicial economy. *The principle of judicial economy* is a recognised general principle of law, which is part of general international law, and, in principle, binding on all states. It means that an adjudicating body must only deal with issues that are necessary to resolve the dispute in question and other issues should be disregarded. Both panels and the Appellate Body have referred to it in numerous reports.<sup>39</sup> Although it may be difficult to determine exactly what is needed to resolve a dispute,<sup>40</sup> ‘address an issue’ may not necessarily mean that the Appellate Body has to examine and rule on each and every issue raised in an appeal.<sup>41</sup> Indeed, a panel and the Appellate Body are bound by the *terms of*

<sup>37</sup> Ambassador Walker’s Draft decision, paras. 1–2.

<sup>38</sup> Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Colombia — Frozen Fries* (2022).

<sup>39</sup> See e.g. Appellate Body Report, *US — Wool Shirts and Blouses* (1997), pp. 17–20, Appellate Body Report, *Australia — Salmon* (1998), paras. 219–26, Appellate Body Report, *US — Tuna II (Mexico)* (2012), para. 403, Appellate Body Report, *Argentina — Import Measures* (2015), paras. 5.185–5.195.

<sup>40</sup> Cf. P. Van den Bossche, section 4.2.2.

<sup>41</sup> For another view, see M. Matsushita, et al., *The World Trade Organization — Law, Practice, and Policy*, 3rd edition, Oxford University Press, 2015, p. 105, who writes that ‘Panels are free to employ judicial economy’, but that the Appellate Body on the other hand, shall, pursuant to Article 17.12 ‘address each of the issues raised during the appellate proceeding. Therefore... the Appellate Body is not free to exercise judicial economy. The reason for this difference comes from the role assigned to the Appellate Body. The Appellate Body is charged with the responsibility not only of resolving disputes but also of establishing interpretations of WTO agreements. Therefore, the Appellate Body must address each legal issue raised in an appellate proceeding regardless of whether it is necessary to resolve the dispute.’

*reference*, which decide the scope of the dispute. Nevertheless, the parties are free to drop certain measures and/or claims within their terms of reference during the course of the proceedings.<sup>42</sup> Of course, issues that are necessary for the resolution of the dispute should be ruled on, but other issues could potentially be disregarded with the consent of the parties, based on the principle of judicial economy.<sup>43</sup> Article 3.4 of the DSU also stipulates that recommendations or rulings shall be aimed at achieving a ‘*satisfactory settlement of the matter*’, thus not an exhaustive all-encompassing settlement. Moreover, if the parties were to agree to it, the deadlines could be extended, as for example Ambassador Walker proposed.<sup>44</sup>

If the parties do not agree to extensions, the Appellate Body could be compelled and provided the legal authority to give more directions in proceedings (in Swedish *processledning* and in German *prozessleitung*) and make the parties reduce their claims and limit their submissions, as can be done under the MPIA.<sup>45</sup> For example, the MPIA provides the arbitrators with both the possibility to take appropriate *organisational measures* (including, for example, setting page limits, time limits and deadlines) as well as *substantive measures* (including, for example, excluding claims based on the lack of an objective assessment of the facts, pursuant to Article 11 of the DSU).<sup>46</sup> These possibilities were used in the first MPIA case, which was completed within the 90-day time frame.<sup>47</sup>

To assist the Appellate Body members in balancing diverse interests, the WTO Members could also clarify the role and main function of the Appellate Body. In particular, the balance between the aim of solving the dispute in a prompt and efficient way and the aim of reviewing and clarifying the meaning of issues of law to provide security and predictability to the multilateral trading system could be made clearer.

In addition, appropriate behaviour or duties of the Appellate Body members could be further emphasised in the Rules of conduct for the understanding on rules and procedures governing the settlement of disputes (Rules of Conduct)<sup>48</sup> or the DSU. For example, the Code of Conduct in Comprehensive and Progressive Agreement for Trans-Pacific Partnership contains a provision

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<sup>42</sup> Van den Bossche and W. Zdouc, p. 237 with reference to Appellate Body Report, *Japan – Apples* (2003), para. 136.

<sup>43</sup> P. Van den Bossche and W. Zdouc, p. 237.

<sup>44</sup> Ambassador Walker’s Draft decision, para. 8.

<sup>45</sup> Paras. 12–13 in Annex I to the Multiparty interim appeal arbitration arrangement pursuant to Article 25 of the DSU.

<sup>46</sup> Paras. 12–13 of Annex 1 to the Multiparty interim appeal arbitration arrangement pursuant to Article 25 of the DSU.

<sup>47</sup> Award of the Arbitrators, *Colombia — Frozen Fries* (2022), para. 4.2.

<sup>48</sup> WT/DSB/RC/1 (96-5267), 11 December 1996.

stipulating, among other things, that '[b]earing in mind that the prompt settlement of disputes is essential to the effective functioning of the Agreement, a candidate who accepts an appointment as a panellist shall be available to perform, and shall perform, a panellist's duties thoroughly and expeditiously throughout the course of the panel proceeding.'<sup>49</sup> In the same way as Ambassador Walker's proposal, it further states that a panellist only shall consider those issues raised in the panel proceeding and necessary to make a decision.<sup>50</sup> The Trade and Cooperation Agreement between the European Union (EU) and the United Kingdom has a similar provision.<sup>51</sup> Incoming members of the Appellate Body could also be asked to sign a declaration during an open ceremony whereby they solemnly consent to this.<sup>52</sup> Such procedures would place further importance on the main objectives of the WTO dispute settlement system and the tasks afforded to it by the Members. While it is not clear how necessary or effective this would be, it could at least be of symbolic value and send a political signal.

Another option could be to extend the 90-day time frame for all cases, or at least for more complex cases. In comparison to other international adjudication systems, the time frames are very short. For example, even if not directly comparable, the ICJ has on average taken four years to adjudicate a dispute.<sup>53</sup>

Finally, other types of alternative dispute settlement mechanisms, such as good offices, conciliation, mediation or arbitration, could be used in order to reduce the pressure on the appeal process, in line with Articles 5 and 25 of the DSU. During the time the Appellate Body was operating, almost 70 per cent of all panel reports were appealed, and it is debatable whether this is conducive to a sustainable system.<sup>54</sup>

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<sup>49</sup> Article 5(a) in Code of Conduct for state-state dispute settlement under Chapter 28 (Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Annex I to CPTPP/COM/2019/D003.

<sup>50</sup> Article 5(f) in Code of Conduct for state-state dispute settlement under Chapter 28 (Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Annex I to CPTPP/COM/2019/D003.

<sup>51</sup> Article 10 and 11 in the Code of Conduct for Arbitrators, Annex 49 to Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10–2539.

<sup>52</sup> Cf. Article 20 of the Statute of the International Court of Justice (1945), which stipulates that every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

<sup>53</sup> WTO, *A Handbook on the WTO Dispute Settlement System, Second Edition*, Cambridge, 2017, p. 3.

<sup>54</sup> P. Van den Bossche and W. Zdouc, p. 172.

### 3 Judicial overreach

#### 3.1 The problem

The most serious problem with regard to the Appellate Body, according to the US, is its alleged judicial activism amounting to judicial overreach. As to judicial overreach, among other things, the US accuses the Appellate Body of (i) viewing prior Appellate Body reports as binding precedents, (ii) issuing ‘advisory opinions’, and (iii) reviewing the factual findings of the panels, in particular the meaning of municipal law.

#### 3.2 The problem of precedents

Regarding precedents, the US claims that the Appellate Body has overstepped its mandate by requiring that its reports are to be treated as binding precedents, *absent ‘cogent reasons’*. According to the US, this is contrary to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), which stipulates that only the WTO Members have the authority to adopt authoritative interpretations. The US is also critical towards the use of the concept ‘absent cogent reasons’ since it has no definition in WTO agreements and there is no provision in the agreements requiring panels to follow prior Appellate Body interpretations. In doing so, the US maintains, the Appellate Body has created obligations that the Members have never agreed to. According to the US, these interpretations also reduce the incentive for WTO Members to negotiate new rules.<sup>55</sup>

In *US – OCTG Sunset Reviews (2004)*, the Appellate Body stated that ‘...following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.’<sup>56</sup> After this case, at least some of the WTO Members started to rely on former reports, until a panel in *US – Stainless Steel (Mexico) (2008)* made an attempt to overturn this practice, stating that panels ‘are not, strictly speaking bound by previous Appellate Body or panel decision that have addressed the same issue’.<sup>57</sup> On appeal, the Appellate Body did not introduce the principle of *stare decisis* into WTO law, i.e. a formal requirement to follow past rulings, as is found in common law legal systems. Instead, the Appellate Body created a presumption of authoritative value of prior reports. The Appellate Body ruled that ensuring security and predictability and upholding ‘legitimate expectations’, as contemplated in Article 3.2 of the DSU, ‘implies that absent cogent reasons, an adjudicating body will resolve the same legal

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<sup>55</sup> USTR Report on the Appellate Body, p. 55.

<sup>56</sup> Appellate Body Report, *US – OCTG Sunset Reviews (2004)*, para. 188

<sup>57</sup> Panel report, *US – Stainless Steel (Mexico) (2007)*, para. 7.102.

question in the same way in a subsequent case'.<sup>58</sup> The Appellate Body also stated that 'the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system'.<sup>59</sup>

At the time the WTO Members reacted in various ways, with some supporting the approach more than others.<sup>60</sup>

### 3.3 Discussion

Article 3.2 of the DSU provides that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. It is further stipulated that the dispute settlement system serves to preserve the rights and obligations of the Members under the covered agreements as well as to clarify those provisions, without adding or diminishing the rights and obligations provided in the WTO agreements, and thus not to make law.<sup>61</sup> It is explicitly provided in the DSU that its provisions are without prejudice to the rights of Members to seek binding authoritative interpretation through decision-making under the WTO Agreement.<sup>62</sup>

In addition, the WTO dispute settlement system mainly aims to resolve a dispute between the parties.<sup>63</sup> Although an adopted panel or Appellate Body report is a binding decision (i.e. 'recommendations' or 'rulings') by the DSB,<sup>64</sup> Panel and Appellate Body reports only bind the parties to the relevant dispute,<sup>65</sup> something that is also common in public international law.

Nevertheless, both panel reports and reports from the Appellate Body have come to play a substantial role. They are widely recognised as 'the most important source of clarifications and interpretations of WTO law'.<sup>66</sup> Even though they are not formally legally binding, it is understandable that they are sometimes viewed as binding and are considered to be *de facto stare decisis*.

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<sup>58</sup> Appellate Body Report, *US – Stainless Steel (Mexico)* (2008), para. 160.

<sup>59</sup> Appellate Body Report, *US – Stainless Steel (Mexico)* (2008), para. 160.

<sup>60</sup> Dispute Settlement Body, Minutes of the Meeting held on 20 May 2008, WT/DSB/M/250 (1 July 2008), para. 62.

<sup>61</sup> Article 3.2 of the DSU.

<sup>62</sup> Article 3.9 of the DSU.

<sup>63</sup> Article 3.7 of the DSU.

<sup>64</sup> Article 21.1 of the DSU.

<sup>65</sup> Appellate Body Report, *Japan – Alcoholic Beverages II* (1996), pp. 12–15.

<sup>66</sup> See e.g. P. Van den Bossche and W. Zdouc, p. 57. The Appellate Body has also stated that in *Japan – Alcoholic Beverages II* (1996), p. 14, with regard to prior GATT panel reports '[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute'.

There is neither a definition of ‘cogent reasons’ in the DSU, nor does it seem to exist in international law. On the contrary, the term seems to have first been used by the EU in the *US – Stainless Steel (Mexico) (2008)* case,<sup>67</sup> which may contribute to the controversy it gave rise to. It may have been less controversial if the Appellate Body had used another neutral term. Moreover, the Appellate Body has still not defined what it means by it. The panel in *China – Rare Earths (2014)* held that it ‘may be understood as referring generally to a high threshold’.<sup>68</sup> This means that there is strong argument for it, but that it is not absolute and can be contested. Therefore, the Appellate Body’s doctrine of absent cogent reasons does not seem to exclude the possibility of rebuttal. To rebut it may, however, require very strong reasons.<sup>69</sup> This raises the question as to where the line is to be drawn between *stare decisis* and security and predictability.

Although the US considers that the Appellate Body’s rulings must be followed *de jure*, as is the case in common law tradition, this view is not shared by other WTO Members.<sup>70</sup> The question of binding precedential value was also discussed during the negotiations of the DSU.<sup>71</sup> On the contrary, most WTO Members seem to consider that it only reflects a *de facto* standard, as is the case in civil law tradition,<sup>72</sup> which is not binding interpretation of the WTO agreements and which do not have a legal effect on other WTO Members. In addition, the rights of third parties not involved in a dispute would be prejudiced if such a report were to be considered to have binding precedential value, since they would not have had the opportunity to have their say on the issues.

Relying on the reasoning set out in rulings in preceding cases is not unusual. On the contrary, in most legal systems, domestic as well as international, prior rulings of an adjudicative body play a significant role either as guidance or precedent for subsequent rulings on the same matter.<sup>73</sup> Furthermore, as referred

<sup>67</sup> S. Lester, *The Origins of the "Cogent Reasons" Approach to the Precedential Value of Appellate Body Reports*, International Economic Law and Policy Blog, 24 June 2019, with reference to the European Commission’s third-party submission.

<sup>68</sup> Panel report, *China – Rare Earths (2014)*, para. 7.61.

<sup>69</sup> See e.g. panel report in *US – Countervailing and Anti-Dumping Measures (China) (2014)*, para. 7.317, where the panel mentions a few different things which could be covered by the concept.

<sup>70</sup> Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 18 December 2018, WT/DSB/M/423, 4 April 2019.

<sup>71</sup> T. P. Stewart, *The GATT Uruguay Round: A Negotiating History (1986–1994)*, Volume II: Commentary, Kluwer Law and Taxation Publishers, 1993, pp. 2764–2765.

<sup>72</sup> Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 18 December 2018, WT/DSB/M/423, 4 April 2019, and cf. US Congressional Service Research Report, p. 21.

<sup>73</sup> In common law systems, prior rulings, i.e. *precedents* or *stare decisis*, may even formally bind a court or tribunal in a subsequent dispute regarding a similar matter, in particular if they have been decided by the highest court in that system.



to earlier, in public international law, judicial decisions are not treated as a formal source of law, but a secondary means of interpretation.<sup>74</sup> The principle of *stare decisis* is not followed by most international tribunals.<sup>75</sup> The interpretation provided in judicial decisions may, however, be regarded as evidence of the law.<sup>76</sup> On the other hand, it does not mean that in practice they do not have considerable influence on subsequent rulings. This is, however, likely to be due to the fact that the rulings are the result of careful consideration of specific facts and legal arguments and contain persuasive arguments and reasoning.<sup>77</sup>

During the GATT era, panel reports were also recognised as having persuasive influence on ensuing GATT panels dealing with the same matter.<sup>78</sup> There was, however, no formal requirement to follow rulings of former panel reports.<sup>79</sup> With the creation of the Appellate Body, however, some precedential value of former reports was expected, at least by some.<sup>80</sup> Originally, however, the WTO dispute settlement system was not conceived as an institution that would develop a body of case law in the new system. Rather, it was created as ‘a result of a trade-off in the negotiations’ and an appeal process was introduced to counterbalance the agreement on a mandatory and binding WTO dispute settlement system. Most importantly, the WTO Members wanted safeguards against extraordinary, fundamentally flawed or incomplete decisions or ‘rogue panels’.<sup>81</sup>

Reliance on rulings in preceding cases can also be considered important to ensure uniform and coherent application of the law as well as security and predictability in the multilateral trading system, as stipulated in Article 3.2 of the DSU. Without some kind of system of precedents, there is a risk of more litigation and a likelihood of the same issues being litigated a number of times. There is also a risk of inconsistency in the interpretation of different provisions, which in turn puts at risk the predictability and coherence of the system. On the plus side, relying on former rulings may also help other Members with similar measures or concerns to assess their legality. The importance of adjudication for enhancing predictability and uniformity has also been highlighted for the enforcement of the development dimension in the

<sup>74</sup> Article 38(1)(d) of the Statute of the International Court of Justice (1945).

<sup>75</sup> H. Gao, *Dictum on Dicta: Obiter dicta in WTO Disputes*, forthcoming in *World Trade Review*, 2018, p. 17.

<sup>76</sup> J. Crawford, *Brownlie, Principles of Public International Law*, 9<sup>th</sup> Edition, Oxford University Press, 2019, p. 35.

<sup>77</sup> Cf. A. Aust, p. 70.

<sup>78</sup> P. C. Mavroidis, *Trade in Goods*, Oxford University Press, 2007, p. 425.

<sup>79</sup> P. C. Mavroidis, p. 425 with reference to J. H. Jackson, *World trade and the law of the GATT*, Bobbs-Merril: Indianapolis, IA, 1969, pp. 22 ff.

<sup>80</sup> P. C. Mavroidis, p. 425.

<sup>81</sup> T. P. Stewart, pp. 2767–2768 and J. Kurtz, p. 232.

WTO, which to a large extent relies on a patchwork of derogations and exceptions in the agreements.<sup>82</sup>

At the same time, as many others have pointed out, voicing concerns regarding judicial activism could, at least partially, be a sign of the US' disappointment, as a disputing party, with how the law was interpreted and the inability to change the outcomes, due to the failure of the negotiating function of the WTO. Even though the US has generally won the majority of its offensive disputes and lost its defensive disputes (like most WTO Members), it has had some grievances with regard to certain interpretations (for example in the trade remedies field).<sup>83</sup> It is also commonly acknowledged that the WTO dispute settlement system has had to adjudicate on a number of issues that the negotiating function has not been able to resolve. The shortcomings in the negotiating function of the WTO and most importantly the absence of any correction of wrongful interpretations by the Appellate Body has probably exacerbated this.<sup>84</sup> Much could also have been solved with more precise rules. With a legal system such as the WTO not having particularly detailed rules, a lack of guidance and precedents leaves discretion to the panels and the Appellate Body to balance competing objectives in every single case.<sup>85</sup> In addition, without an enforcement mechanism, the incentive for negotiating new rules may be lower, and without negotiation of new rules correcting and completing what the Members consider to be incorrect interpretations by the Appellate Body, the incentive for an enforcement mechanism may be lower. On the other hand, some experts believe that the Appellate Body has at times gone too far and tried to rule on a number of transactions in advance, taking a maximalist approach where it ought to have adopted a more minimalistic approach.<sup>86</sup>

### 3.4 The problem of advisory opinions

According to the US, the Appellate Body has also gone beyond its role set out in the DSU and made law by issuing what the US calls *advisory opinions* or *obiter dictum* (plural *dicta*) on issues that are not necessary or relevant for the resolution of the particular dispute, contrary to Article 3.7 of the DSU and Article IX:2 of the WTO Agreement. According to the US 'this overreach also

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<sup>82</sup> S. E. Rolland, *Development at the WTO*, Oxford University Press, 2012, pp. 304–305.

<sup>83</sup> R. Farley, *Factcheck posts: Trump Wrong About WTO Record*, 27 October 2017, <https://www.factcheck.org/2017/10/trump-wrong-wto-record/>.

<sup>84</sup> See e.g. P. Van den Bossche and W. Zdouc, pp. 317–318.

<sup>85</sup> Cf. S. E. Rolland, p. 307.

<sup>86</sup> P. C. Mavroidis, p. 426.

raises concerns both with respect to adding to or diminishing WTO Members' rights and obligations', and adds to the delays in the proceedings.<sup>87</sup>

The US cites various means used by the Appellate Body in practice to make such opinions.<sup>88</sup> For example in *Canada – Continued Suspension and US – Continued Suspension (2008)*, the Appellate Body added a 'recommendation' to the disputing parties 'to initiate further dispute settlement proceedings', even though the Appellate Body had not found that any of the measures challenged were contrary to the WTO agreements.<sup>89</sup>

### 3.5 Discussion

Contrary to, for example, the ICJ, the WTO dispute settlement system only has so-called *contentious jurisdiction*, meaning that it only has the authority to clarify WTO law in the context of a dispute between parties.<sup>90</sup> The aim of the dispute settlement mechanism is to secure a positive solution to a dispute,<sup>91</sup> and any appeal shall be limited to issues of law and legal interpretations developed by the panel.<sup>92</sup>

Under international law, an *advisory opinion* is legal advice provided by a tribunal. It is not usually binding, but would normally have influence on the states that are directly concerned by it.<sup>93</sup> Contrary to for example the ICJ<sup>94</sup>, which also has so-called *advisory jurisdiction*, there is no explicit provision in the DSU or the legal framework of the WTO mandating the Appellate Body to issue advisory opinions, nor any provisions stipulating the process for adopting them.<sup>95</sup> Neither are there any provisions allowing the WTO Members to request advisory opinions similarly to the UN's General Assembly and the Security Council.<sup>96</sup> On the other hand, *obiter dictum* is traditionally defined as 'an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court'.<sup>97</sup> Generally the parties to the case have not argued

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<sup>87</sup> USTR Report on the Appellate Body, pp. 47–54.

<sup>88</sup> USTR Report on the Appellate Body, pp. 52–53.

<sup>89</sup> Cf. USTR Report on the Appellate Body, p. 52.

<sup>90</sup> Article 3.2 of the DSU and Appellate Body Report, *US – Wool Shirts and Blouses (1997)*, p. 19.

<sup>91</sup> Article 3.7 of the DSU.

<sup>92</sup> Article 11.6 of the DSU.

<sup>93</sup> A. Aust, p. 643.

<sup>94</sup> Chapter IV of the Statute of the International Court of Justice (1945).

<sup>95</sup> *Ibid.*

<sup>96</sup> Article 96 of the United Nations Charter provides that the General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question.

<sup>97</sup> H. Gao, p. 7 with reference to H. C. Black, *Handbook on the Law of Judicial Precedents, or, The Science of Case Law* (1912), p. 166.

the issue and it has not been fully deliberated by the court.<sup>98</sup> It is not legally binding, but subsequent adjudicators may still refer to it in future disputes.<sup>99</sup>

*Obiter dicta* exist in both common law and civil law traditions, but are more frequently used in common law systems to differentiate from the findings of the courts that aim to solve the issue and are considered precedent and binding.<sup>100</sup> This may be a reason why the US is more concerned about this issue than other WTO Members. WTO Members seem to be divided on whether the Appellate Body has issued advisory opinions or *obiter dicta*.<sup>101</sup> Nevertheless, experts have also identified cases of *obiter dicta*.<sup>102</sup> Irrespective of how a statement by the Appellate Body should be defined or classified, there might obviously be cases, where different types of recommendations or *obiter dicta* might help the parties to a dispute. This could, in particular, be the case for developing countries, which do not necessarily have specialised legal expertise in the field. It can also be positive for legal clarity and the system as a whole. Indeed, as discussed earlier, Article 3.2 of the DSU also states that the dispute settlement system serves to clarify the existing provisions of those agreements, in addition to preserving the rights and obligations of Members under the covered agreements.

At the same time, in light of the objective of the dispute settlement system being to secure a positive solution to a dispute, it can seem superfluous and redundant for the Appellate Body to spend time on analysing and drafting advisory opinions or *obiter dicta*. The rendering of any advisory opinions or *obiter dicta* could also be contrary to the principles of fairness and due process, if the parties have not had the possibility to give their opinions on the issues.<sup>103</sup> Given that statements of the Appellate Body have had a precedential value, such statements also have consequences for other states, which may have chosen not to participate and make their views clear. Moreover, when the system is under stress and being criticised, it might be more prudent to adopt a

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<sup>98</sup> H. Gao, p. 7 with reference to M. McAlliser, *Dicta Redefined*, 47 *Williamette Law Review* (2011), p. 167.

<sup>99</sup> See [https://www.law.cornell.edu/wex/obiter\\_dictum](https://www.law.cornell.edu/wex/obiter_dictum).

<sup>100</sup> For more information, see e.g. H. Gao.

<sup>101</sup> See Dispute Settlement Body 29 October 2018, Minutes of Meeting held in the Centre William Rappart on 29 October 2018, WT/DSB/M/420, 27 February 2019.

<sup>102</sup> H. Gao, p. 25 and A. Wolff, p. 11.

<sup>103</sup> Cf. Appellate Body Report, *Thailand – Cigarettes (Philippines)* (2011), para. 150 where the Appellate Body stated that ‘As a general rule, due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This was expressly acknowledged by the Appellate Body in *Australia – Salmon* when it stated that “[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it”.

more cautious and ‘minimalist’ course of action.<sup>104</sup> This is probably also the fastest way to adopt a decision and avoid delays in the proceedings.

### 3.6 The problem of reviewing municipal law

The US has also alleged that the Appellate Body has routinely reviewed panel findings of facts, and the meaning of WTO Members’ municipal law, contrary to Article 17.6 of the DSU. The US is very critical in this regard and considers that it is a factual issue. In the US’ view, this practice adds to the length and complexity of appeals.<sup>105</sup>

### 3.7 Discussion

Pursuant to Article 17.6 of the DSU, the Appellate Body’s review function is limited to hearing ‘appeals from panel cases’ and to reviewing ‘issues of law’ and ‘legal interpretations’, that is, *legal findings*. It is the panels’ duty to be the ‘trier of facts’, that is, to establish the facts and evaluate the evidence, meaning that the Appellate Body should not normally review *factual findings*.<sup>106</sup> The reason why there is this division of power is not clear from the DSU, but the reasons could be that panels have more time to review such issues, that the parties have the possibility to comment on the factual aspects and that the panels may seek technical advice, in contrast to the Appellate Body.<sup>107</sup> Another reason could be the wish to limit the scope of appeal. Without such limitation, parties may try to re-litigate the entire case rather than just the limited legal issues before the Appellate Body.

In 1998, the Appellate Body stated that ‘[f]indings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body’.<sup>108</sup> At the same time, the Appellate Body has ruled that ‘[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is... a legal characterization issue. It is a legal question.’<sup>109</sup> Amongst other things, the Appellate Body has also, according to experts, at least in some cases, indicated that the review of the legal characterization of the municipal law includes the meaning of municipal law.<sup>110</sup> The Appellate Body has thus considered the meaning to be an issue of law, or more precisely a question of ‘legal

<sup>104</sup> Cf. P. C. Mavroidis, p. 426.

<sup>105</sup> USTR Report on the Appellate Body, pp. 37–46.

<sup>106</sup> Note, however, that the Appellate Body has ruled that it has the power to review the so-called *Article 11 claims*, which we will not discuss further here.

<sup>107</sup> T. Voon and A. Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, *Journal of World Trade* 40(2): 239–258, 2006, p. 241.

<sup>108</sup> Appellate Body Report, *EC – Hormones (1998)*, para. 132.

<sup>109</sup> Appellate Body Report, *EC – Hormones (1998)*, para. 132.

<sup>110</sup> S. Lester, *The Appellate Body's Review of the Meaning of Domestic Law*, *International Economic Law and Policy Blog*, 4 March 2018.

characterization’, instead of relying on the panel’s assessment as a factual issue.

There is no definition of law or facts in either the DSU or the Working Procedures for Appellate Review. Broadly speaking, there are three different categories of issues: ‘pure legal questions’; ‘pure factual questions’; and ‘mixed legal and factual questions’. The last category could be described as ‘questions of applying the law to the facts’ or ‘the legal characterization of the facts’ (the term used by the Appellate Body).<sup>111</sup> Without any doubt, it can sometimes be difficult to differentiate between a ‘legal interpretation’ and ‘findings of facts’ and a panel’s ‘ascertainment of facts’.<sup>112</sup>

Under international law, municipal laws are treated as ‘facts which express the will and constitute the activities of States’.<sup>113</sup> The reason for this is that states have sovereignty over the laws on their territory.

Although the DSU clearly limited the scope of appeals to the Appellate Body and its mandate for valid reasons, the fact the Appellate Body has viewed the revision of municipal law to be within its competences demonstrates that, in practice, the Appellate Body has not always adhered to its mandate. Instead, it has taken a more extensive view of its role, and reviewed issues beyond its responsibilities.

### 3.8 Possible ways forward

In this chapter we have looked at the substance of concerns raised by the US regarding the alleged judicial overreach, that is, the question of binding precedents, the issuing of advisory opinions and the review of the meaning of municipal law. These are all aspects of the Appellate Body’s practice that the US does not consider it ought to be formally bound to. This may ultimately pertain to the protection of the US’ sovereignty and self-determination, which we will discuss more in the next chapter.

As discussed, the reports of the Appellate Body do not have any formal binding precedential value, even if there is a strong presumption of adherence to them. However, for the security and predictability of the multilateral trading system, it should be considered normal and in the interest of most WTO Members that previous rulings from the Appellate Body are adhered to when relevant, even though they do not have a formal binding precedential effect. As Ambassador Walker proposed, to avoid any doubt, it could be written out that there is no

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<sup>111</sup> S. Lester, *The Appellate Body’s Review of the Meaning of Domestic Law*, International Economic Law and Policy Blog, 4 March 2018.

<sup>112</sup> Appellate Body Report, *EC – Hormones (1998)*, para. 116.

<sup>113</sup> J. Crawford, p. 49, quoting *Certain German Interests in Polish Upper Silesia (1926)*, PCIJ, Series A, No. 7, p. 19.

such thing as precedent, and that previous reports by the Appellate Body as well as panels should only be taken into account in another dispute to the extent they are relevant.<sup>114</sup>

When it comes to issuing advisory opinions or *obiter dicta* and reviewing the meaning of municipal law, some argue that there are cases where the Appellate Body went too far in its adjudication and has ‘made law’, as the US has asserted. For example, it could be argued that the recommendation in *Canada – Continued Suspension and US – Continued Suspension (2008)* did not serve any purpose in assisting the DSB to resolve the dispute before it, as required by Article 19.1. of the DSU. In the *EC – Asbestos (2001)* case the Appellate Body also ruled on the European Communities’ (EC) appeal with respect to Article XXIII:1(b) of the GATT 1994, despite the fact that it did not help resolve the dispute, but rather clarified the meaning of the provision. Neither the EC nor Canada had appealed the panel’s conclusion on the issue.<sup>115</sup> As the Appellate Body itself said of a panel, it should only need to address those claims which must be addressed in order to resolve the matter at issue in the dispute.<sup>116</sup> Other issues could be refrained from, especially when in doubt. Even in cases where the Appellate Body has been asked to rule, it could decline and rule that it is outside its terms of reference or that it does not help resolve the dispute.<sup>117</sup> In this sense, as set out above, the Appellate Body could seek ways to employ more judicial economy.

To emphasise this issue, the WTO Members could, as Ambassador Walker proposed, for example, clarify in the DSU that the Appellate Body may only rule on issues ‘to the extent necessary to assist the DSB in making the recommendations or giving the rulings provided for in the covered agreements in order to resolve the dispute’.<sup>118</sup> This could be a helpful option to streamline the appeals process before the Appellate Body and limit its scope of action. It would also be in line with the objective of the dispute settlement system which seeks to secure a positive solution to a dispute.

In addition, Ambassador Walker’s proposal<sup>119</sup> regarding municipal law could be helpful by bringing further clarifications. It provided that ‘[t]he “meaning of municipal law” is to be treated as a matter of fact and therefore is not subject to appeal’. This clarification would increase predictability and limit the scope of action for the Appellate Body. If further clarifications are needed, inspiration

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<sup>114</sup> Ambassador Walker’s Draft decision, paras. 15 and 17.

<sup>115</sup> Appellate Body Report, *EC – Asbestos (2001)*, paras. 43–44.

<sup>116</sup> Appellate Body Report, *US – Wool Shirts and Blouses (1997)*, p. 19.

<sup>117</sup> See S. Lester, “Advisory Opinions” in *WTO Panel/AB Reports*, International Economic Law and Policy Blog, 4 June 2018.

<sup>118</sup> Ambassador Walker’s Draft decision, paras. 13–14.

<sup>119</sup> Ambassador Walker’s Draft decision, para. 10.

could be taken from, for example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA).<sup>120</sup>

If, on the other hand, the WTO Members would like to have the possibility to request advisory opinions from the Appellate Body, this could be inserted into the DSU. This might, in particular, be helpful for developing countries, which do not necessarily have specific expertise and resources in WTO law.

Appellate Body members are not perfect and can make mistakes. As pointed out by many others, it is crucial to have a system that efficiently allows for the correction of mistakes.<sup>121</sup> In theory, the WTO Members could have negotiated new rules when they were not content with the outcomes, or adopted authoritative interpretations of different legal provisions.<sup>122</sup> Efforts to make negotiations easier would therefore likely be crucial also for restoring a fully-functioning dispute settlement system.<sup>123</sup>

Ambassador Walker suggested the DSB, in consultation with the Appellate Body, should hold an annual meeting or a ‘dialogue’ on developments.<sup>124</sup> This could probably deepen the understanding between the Appellate Body members and the WTO Members. It could also be combined with a discussion of procedural matters and if need be, discussions on amendments to the DSU or Working Procedures. In addition, WTO Members could combine this task with a process for the adoption of formal authoritative interpretations of relevant provisions which might have been interpreted in a way that the Members did not foresee.<sup>125</sup>

Another idea could be to introduce a mechanism to address mistakes by the Appellate Body. This could, for example, be used in cases where the WTO Members consider that the Appellate Body has crossed the legal boundaries of

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<sup>120</sup> Para. 2 of Article 8.31 of CETA stipulates that ‘The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.’

<sup>121</sup> See e.g. J. Qin, *DSU Article 25 Arbitration: A Long-Term Solution for the Appellate Body Crisis?*, IELP Blog, 26 September 2022.

<sup>122</sup> Pursuant to Article IX:2 of the WTO Agreement.

<sup>123</sup> Cf. e.g. Inside U.S. Trade’s World Trade Online, *WTO director-general: U.S. initiating discussions on dispute settlement reform*, 26 April 2022, according to which ‘U.S. Trade Representative Katherine Tai in October said WTO reform should be holistic, tying progress on dispute settlement to talks on reforms on the body’s negotiating pillar’.

<sup>124</sup> Ambassador Walker’s Draft decision, paras. 20–22.

<sup>125</sup> Pursuant to Article IX:2 of the WTO Agreement.



its authority or mandate.<sup>126</sup> One suggestion in the debate, tabled by the US and Chile, during the DSU review, is that the DSB may by consensus decide not to adopt a finding in a report or the basic rationale behind a finding, i.e. that there would be partial adoption of reports.<sup>127</sup> This could be one way forward for such a violation.

Another solution could be to have further scrutiny of potential Appellate Body members, focusing on the contentious procedural issues and their views on those issues.<sup>128</sup> Previously a Selection Committee, comprising the chairs of the most important WTO political bodies and the Director-General of the WTO, were responsible for interviewing candidates as well as consulting the rest of the WTO Members and ultimately proposing the candidates.<sup>129</sup>

In addition, appropriate behaviour or duties of the Appellate Body members could be further clarified in the Rules of Conduct or the DSU, as further discussed above in section 2.3. Moreover, incoming members of the Appellate Body could be asked to sign a declaration during an open ceremony where they solemnly consent to this. Such procedures could place further emphasis on the main objectives of the WTO dispute settlement system and the tasks afforded to it by the Members.

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<sup>126</sup> For example, cf. some Members opinions as regards the Appellate Body's recommendation in *Canada – Continued Suspension* (2008), Dispute Settlement Body, Minutes of the Meeting Held on November 14, 2008, WT/DSB/M/258.

<sup>127</sup> WTO, Dispute Settlement Body Special Session, *Negotiations on improvements and clarifications of the Dispute settlement understanding on improving flexibility and member control in WTO dispute settlement – Textual Contribution by Chile and the United States*, TN/DS/W/52, 14 March 2003.

<sup>128</sup> Cf. J. Hillman (2019), *Three Approaches to Fixing the World Trade Organization's Appellate Body: the Good, the Bad and the Ugly?*, Institute of International Economic Law (Georgetown University Law Center), p. 11. For another view, see Georges Abi-Saab, James Bacchus, Luiz Olavo Baptista, Lilia R. Bautista, Claus-Dieter Ehlermann, AV Ganesan, Jennifer Hillman, Merit E. Janow, Mitsuo Matsushita, Shotaro Oshima, Giorgio Sacerdoti, Yasuhei Taniguchi, David Underhalter, letter to Ambassador Xavier Carim of South Africa, Chairman, Dispute Settlement Body, World Trade Organization, Geneva, Switzerland, 31 May 2016, p. 2, in which 13 former Appellate Body members wrote that appointments or reappointments to the Appellate Body should not be based on doctrinal preferences.

<sup>129</sup> Pursuant to para. 13 of the Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1, 19 June 1995.

## 4 The two-tier system

### 4.1 The problem

The critique that the US has raised against the Appellate Body and all the efforts that have been made to restore the Appellate Body pose the inevitable question whether the US genuinely wants to restore the Appellate Body, or even a two-tier system of any kind as part of a well-functioning dispute settlement system.<sup>130</sup> The recent statements made by the US after the panel reports regarding the national security exception were issued further amplify this.<sup>131</sup>

According to the US, one of the reasons that the Appellate Body may have acted outside its mandate could be that some WTO Members consider that the Appellate Body is an ‘international court’ composed of ‘judges’ who have more extensive authority than has actually been provided for in the DSU.<sup>132</sup> The US claims ‘that at least some Members prefer an appellate “court” with expansive powers, instead of the more narrow appellate review envisioned by Members in the DSU.’<sup>133</sup>

### 4.2 Discussion

During the negotiation of the DSU, the US, together with Canada, the EU, and Mexico, were leading advocates for the creation of the two-stage system and the binding nature of it,<sup>134</sup> and the US the strongest proponent.<sup>135</sup> The WTO’s two-tier dispute settlement system was created as a response to a ‘non-functioning GATT system’, where, for example, panel reports could be blocked by the losing party.<sup>136</sup>

The US’ growing criticism towards the Appellate Body needs to be put in a broader context to be understood. First, it is unclear if the US critique is in ‘good faith’ in the sense that it is based on substantive issues related to the DSU rather than a growing political unease in Washington of being bound by

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<sup>130</sup> Cf. e.g. Inside U.S. Trade’s World Trade Online, *In first word on WTO dispute settlement, Pagán seeks ‘true reform discussion’*, 27 April 2022, and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 29 August 2022.

<sup>131</sup> See e.g. Statement from USTR Spokesperson Adam Hodge, 9 December 2022 and Statement from USTR Spokesperson Adam Hodge, 21 December 2022.

<sup>132</sup> Statements Delivered to the General Council by Ambassador Dennis Shea, U.S. Permanent Representative to the World Trade Organization, Geneva, 15 October 2019.

<sup>133</sup> Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 29 June 2020, Multi-Party Interim Appeal Arbitration pursuant to Article 25 of the DSU (JOB/DSB/1/ADD.12), Agenda item 13.

<sup>134</sup> T. P. Stewart, p. 2765 and p. 2767 and USTR Report on the Appellate Body, p. 3.

<sup>135</sup> J. Hillman, *A Reset of the World Trade Organization’s Appellate Body*, Council on Foreign Relations, 14 January 2020.

<sup>136</sup> See e.g. A. W. Wolff, p. 11.

the rules of the multilateral trading system.<sup>137</sup> Thus, ultimately, the critique may revolve around sovereignty, and the perception regarding who decides what laws apply in the US.<sup>138</sup> The US also criticises the Appellate Body for misinterpreting US domestic laws, which have resulted in what the US sees as flawed findings which have pressured the US to withdraw or modify its laws unnecessarily.<sup>139</sup>

Moreover, the US has a long history of opposing international courts and the system of international law more generally. The reluctance can be understood to stem from a fear of handing superior authority to an unelected international institution.<sup>140</sup> The fear may be that such an institution may oblige the US to change laws that the US has enacted.<sup>141</sup> In line with this perspective, some would argue that by not submitting itself to an international court and its rulings, the US ultimately protects its sovereignty. Vague positions from the US regarding the restoration of the Appellate Body and a perceived lack of political will to address the issues at hand would suggest that the US is not interested in restoring the Appellate Body at all.

While some argue that the Appellate Body is a *de facto* court,<sup>142</sup> there is nothing in the DSU to suggest it would be. Furthermore, the Appellate Body is not a judicial institution dealing with sovereignty issues like the ICC, which the US has refrained from joining. First, the Appellate Body is not called a *court*, in contrast, for example, to the ICC. The establishment of the ICC in 2002, a permanent court, was considered a ‘great leap forward for international justice’.<sup>143</sup> Historically, both national and international judicial processes have developed from less formal dispute settlement procedures, including for example negotiation, good offices and mediation.<sup>144</sup> The reason is that states have preferred political means to settle their differences over submitting themselves to international courts and tribunals.<sup>145</sup> Moreover, the ICC has many characteristics that the Appellate Body lacks. For example, it deals with

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<sup>137</sup> Cf. USTR Report on the Appellate Body, introduction,

<sup>138</sup> Note, however, that there is no direct effect of WTO law in the US nor EU. Nevertheless, the WTO-agreement are binding between the WTO Members and a fundamental principle of treaty law is that treaties are binding upon the parties to them and must be performed in good faith (*pacta sunt servanda*).

<sup>139</sup> USTR Report on the Appellate Body, p. 6.

<sup>140</sup> Cf. M. Wind, *Challenging sovereignty? The USA and the establishment of the International Criminal Court*, *Ethics & Global Politics*, 2:2, 83–108, DOI: 10.3402/egp.v2i1.1973, 2009, p. 84.

<sup>141</sup> Pursuant to Article 19.1 of the DSU, where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.

<sup>142</sup> See e.g. A. W. Wolff, pp. 12–13.

<sup>143</sup> M. Wind, p. 83.

<sup>144</sup> J. Crawford, p. 693.

<sup>145</sup> J. Klabbbers, *International Law*, Third Edition, Cambridge University Press, 2021, p. 155.

criminal issues, which is generally a critical component of national sovereignty and a state's fundamental functions.<sup>146</sup> Moreover, it could potentially also have the authority to constrain US military forces and US nationals,<sup>147</sup> and it also has an independent prosecutor who can initiate cases on his or her own initiative.

On the contrary, the WTO's adjudicating function (i.e. panels and the Appellate Body) share many characteristics with international arbitration. Contrary to a judicial process, in international arbitration, the disputing parties generally exercise some influence on the composition of the arbitration panel. Normally, there are national representatives with an independent chair. Arbitration is by definition *ad hoc*. The panel will be dissolved when the award has been rendered. The WTO's two-tier dispute settlement system does not share all these characteristics, but there are many resemblances. The focus is on the *prompt settlement of disputes* between members, as well as providing security and predictability to the multilateral trading system.<sup>148</sup> In addition, mutually acceptable solutions, that is, negotiated solutions, between the disputing parties are *clearly preferred* to a ruling from the Appellate Body, its adjudicating body.<sup>149</sup> International arbitration also has the same less formal political origins as judicial processes, but it has developed into a 'sophisticated procedure similar to judicial settlement',<sup>150</sup> which may explain why the Appellate Body has been said to be a *de facto* court. Despite these historical differences, there may not be any significant differences between arbitration and judicial dispute settlement in today's world. Some permanent institutions have also developed from arbitral systems.<sup>151</sup>

Irrespective of any future changes, it is worthwhile remembering a few key points when considering the future and weighing up the risks of any significant changes.

First, the WTO's two-tier dispute settlement system was created as a response to a 'non-functioning GATT system'. The GATT system is commonly known as having been a more power-based system of dispute settlement than the rules-based system of the WTO, in which 'rights prevail over might'. During the early GATT era, the dispute settlement procedure was more diplomatic, with for example the majority of panellists being diplomats. Neither was there any formal obligation to have legal training or GATT-related legal training in order to adjudicate. The goal was also to agree on a 'mutually acceptable solution',

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<sup>146</sup> Cf. M. Wind, p. 84.

<sup>147</sup> Cf. M. Wind, p. 86.

<sup>148</sup> Article 3 of the DSU.

<sup>149</sup> Article 3.7 of the DSU.

<sup>150</sup> J. Crawford, p. 693.

<sup>151</sup> J. Crawford, pp. 693–694.

rather than a legally sound judgment.<sup>152</sup> It was not until the creation of the WTO that a juridification of the dispute settlement system and a more ‘rule-oriented’ approach to settling disputes came to being.<sup>153</sup>

Secondly, the legal system created by the Appellate Body is said to have brought legal certainty, consistency, and enforceability to WTO law. An important part of the two-tier system is that it focuses on bringing a legal perspective. This, in turn, may be the reason there is great confidence and acceptance of the legal system in the WTO.<sup>154</sup> As mentioned previously, the Appellate Body is tasked with focussing on issues of law.<sup>155</sup> After the DSU was adopted in the Tokyo Round, results have been said to be confusing in number and uncoordinated, as there was no one to review what had been done at the panel stage.<sup>156</sup> This might not be unsurprising when panellists with various backgrounds and without legal background were acting as adjudicators.<sup>157</sup> Without an Appellate Body, another question is whether the WTO Members would like to revert to previous practices.

Thirdly, a rules-based system treats everyone equally and provides fairness and equal access to justice. In particular, the system has been praised as benefitting smaller countries, including developing countries, which seek to ensure their legal rights and development interests against developed countries and more powerful states.<sup>158</sup> This in turn provides legal certainty in their trading relations. Still, most developing countries rarely participate in the WTO dispute settlement system. Since the WTO is a *self-enforcing system* that depends on all its Members proactively monitoring and enforcing their trade rights, this is problematic. Without the developing countries using the system, there is a risk of under-enforcement of their trade rights.<sup>159</sup> According to research, one reason for the lack of participation by developing countries in the WTO dispute settlement system is a lack of legal capacity for developing countries to bring a case to the WTO,<sup>160</sup> and connected to this challenge is the problem of the cost

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<sup>152</sup> P. C. Mavroidis, p. 399.

<sup>153</sup> T. Cottier and M. Oesch, *WTO Law, Precedents and Legal Change*, TLJ Vol. 3 No 1/2001, pp. 27–41, p. 27.

<sup>154</sup> Cf. J. Kurtz, *The WTO and International Investment Law – Converging Systems*, Cambridge University Press, 2016, p. 230.

<sup>155</sup> Article 17.6 of the DSU.

<sup>156</sup> M. Matsushita, et al., p. 86.

<sup>157</sup> A. W. Wolff, p. 11.

<sup>158</sup> H. Nottage, p. 1 and ICTSD, *Dispute Settlement at the WTO: The Developing Country Experience*, Information Note, April 2012, p. 1.

<sup>159</sup> P. X. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25 *Emory Int'l L. Rev.* 151 (2011). pp. 154–155.

<sup>160</sup> H. Nottage, p. 14 and ICTSD, *Dispute Settlement at the WTO: The Developing Country Experience*, p. 1.

and complexities involved in the resource-demanding system.<sup>161</sup> This is so despite the existence of the Advisory Centre on WTO Law (ACWL), which advises and provides free legal advice to its developing country Members and least-developed countries on issues relating to WTO law. The ACWL provides support in WTO dispute settlement proceedings at subsidised rates. In addition, the ACWL may provide support through external legal counsel, for example, if there is a conflict of interest.<sup>162</sup> Moreover, studies have shown that developing countries often refrain from using the dispute settlement system of fear of political consequences or lack of bargaining power when faced by a complaint from a country that has greater economic means to litigate.<sup>163</sup> Another issue that has been raised is the inability of many developing countries to effectively enforce favourable rulings against more powerful non-complying WTO Members.<sup>164</sup>

Among these factors, the major problem seems to be the lack of domestic capacity in many developing countries to identify and communicate trade barriers to WTO lawyers at the national level, rather than an inherent problem with the DSU and the WTO dispute settlement system. Further aid-for-trade and capacity building could be helpful. There are also provisions in the DSU which aims to help developing countries but which have rarely been used.<sup>165</sup> Another reason why developing countries seldom use the WTO dispute settlement system may be that a large proportion of those countries' trade is subject to preferential rules that are not enforceable by WTO law.<sup>166</sup> Even though many developing countries do not currently use the WTO dispute settlement system, they benefit from its existence. It is good for ensuring legal certainty and the rule of law. Having a power-based system would not make it easier for those countries.

Nevertheless, coming to terms with these problems could increase the legitimacy of the WTO's dispute settlement system. Some suggestions have included the introduction of retrospective and mandatory financial compensation instead of suspension of concessions or collective suspension of concessions, simplified procedures and enhanced special and differential treatment.<sup>167</sup> Exactly what could be done is beyond the scope of this paper, but deserves further analysis.

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<sup>161</sup> A. Bahri, *Chapter 1: Developing countries at WTO Dispute Settlement Understanding: strengthening participation*, Monogram chapter, pp. 13–34, 2018, p. 1.

<sup>162</sup> For more information, see <https://www.acwl.ch/external-counsel/>.

<sup>163</sup> ICTSD, *Dispute Settlement at the WTO: The Developing Country Experience*, p. 6.

<sup>164</sup> See H. Nottage, p. 5 ff. for more information.

<sup>165</sup> Such as Article 3.12, 24.2 and 27.2 of the DSU.

<sup>166</sup> H. Nottage, p. 11 ff.

<sup>167</sup> A. Bahri, p. 27 with further references.

### 4.3 Possible ways forward

To conclude, the restoration of the two-tier system is crucial to ensure a rules-based trading system where all parties and WTO Members are treated equally. This restoration is important to be able to review legal issues and to ensure some consistency, security, predictability and equality of treatment in trading relations, which is also important for confidence in the legal system. Without restoration, there is a risk of a return to the more power-based GATT era, with less coherent panel rulings and panel reports being appealed into the void. Developing countries are likely to lose out the most, and we have seen, there is room for improvements in ensuring access to the dispute settlement system for developing countries.

The Appellate Body was not formally designed to be a court, but could be reinforced or turned into a court if the Members would so wish. Some have also argued that further institutionalisation is needed. During the Walker process there were a number of proposals in this regard. Strengthening the Appellate Body may, however, take more time and require more substantial changes than can be achieved by 2024, with the result that this is unlikely to be a realistic alternative.

At the same time, the Appellate Body may at times have acted beyond its mandate and thereby at least indirectly increased its authority and mandate without the consent of WTO Members. A more realistic avenue for reform may therefore be to revert to the original vision of the application of the DSU, with some modifications and clarifications as described earlier to prevent this from happening again. As proposed, a number of measures could be taken to further scrutinise prospective Appellate Body members before selection as well as to control and limit the role of the Appellate Body members.

If the WTO Members are not satisfied with how the Appellate Body has been used, limitations are possible. One idea, based on examples from a number of jurisdictions, could be to require *leave to appeal*, i.e. permission would need to be sought before an appeal can be brought before the Appellate Body. This could entail that the Appellate Body would have to decide whether it would hear the case or not. Such a mechanism could limit appeals to more important questions of legal interpretations, as was initially intended. It might, however, require more significant changes to the DSU, which may not be realistic. The WTO Members could also show more self-restraint when considering appealing, and more effort could be made to find mutually acceptable solutions.

Other types of alternative dispute settlement mechanisms, such as good offices, conciliation, mediation or arbitration, could be used in order to release pressure from the appeal process. Such methods could be investigated further.

Since there is no formal requirement under international law to settle disputes, consent from both or all parties is required and they must accept the system. This applies to the WTO as well. The ICJ's legitimacy relies not only on being impartial and providing legally sound reports, but also on being politically acceptable.<sup>168</sup> To enhance the political acceptance of the Appellate Body, it could be made to sit in plenary for more important cases. This could give more legitimacy to its rulings, as all the members of the Appellate Body, of various backgrounds, would be required to adjudicate the dispute.<sup>169</sup> It is also worth noting that in disputes before the ICJ, the disputing parties are allowed to appoint an *ad hoc* member of their own choosing (if none of the selected members shared nationality with the party).<sup>170</sup> This is something that could be further examined. Allowing *ad hoc* members could also enhance political influence, which is generally important in inter-state disputes.<sup>171</sup> In any case, the Appellate Body members are intended to be independent and impartial.<sup>172</sup>

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<sup>168</sup> Cf. J. Klabbers, p. 161.

<sup>169</sup> It should, however, be noted that already under the current system the division responsible for deciding each appeal is required to exchange views with the other Appellate Body members before the division finalises the appellate report, pursuant to Rule 4(3) of the Working Procedures.

<sup>170</sup> Article 31 of the Statute of the International Court of Justice.

<sup>171</sup> Cf. M. N. Shaw, *International law*, Ninth Edition, Cambridge University Press, 2021, p. 881.

<sup>172</sup> Rules of Conduct, para. 1.



## 5 Concluding remarks

The WTO dispute settlement system, as we used to know it, brought juridification to the multilateral trading system and was hailed as the crown jewel of the WTO. The appeal function tasked with reviewing issues of law, also brought some consistency, predictability and fairness into the system. Restoring the Appellate Body is crucial in order to correct errors of law, to uphold the rule of law and the rules-based multilateral trading system, and to ensure all Members are treated equally in their trading relationships.

If the WTO Members fail to restore the dispute settlement system, developed countries may have other options to solve their disputes, such as the MPIA and bilateral and regional dispute settlement mechanisms. For many developing countries this may not, however, be an option.

In most cases, the Appellate Body seems to have been functioning in the way that was intended and expected. In this paper we have considered some of the concerns raised by the US, as well as a number of connected issues. Without having analysed all the aspects that the US has criticised, we consider that the problem is not the wording of the DSU, but rather how it has been interpreted and applied in practice. There are arguably a limited number of areas where the Appellate Body could have shown more self-restraint. As proposed by the US and others, the easiest and fastest way to address the issues could therefore be for the WTO Members to go back to the original text of the DSU and put more emphasis on the new Appellate Body members complying with the various DSU provisions.

We have also discussed possible clarifications and amendments to the DSU to limit the scope of interpretation for the Appellate Body and which could be achieved fairly easily in order to get the system up and running by 2024. These include, in particular, the proposals by Ambassador Walker, but also a number of additional clarifications and amendments. Moreover, the Appellate Body could be provided with additional tools including, for example, the option of taking appropriate organisational and substantive measures as is permitted under the MPIA. We have also discussed some additional changes to the process for selecting Appellate Body members as well as the Rules of Conduct for the Appellate Body members and the Working Procedures for Appellate Review.

It may also be important that new Appellate Body members and any organisation supporting them, conduct some self-reflection regarding previous processes and practices and what new processes and organisational measures are necessary for complying with the rules in the future.

In addition, appropriate behaviour or duties of the Appellate Body members could be further clarified in the Rules of Conduct or the DSU. Incoming members of the Appellate Body could be asked to sign declaration during an open ceremony where they solemnly consent to abide by these. Such procedures could place greater emphasis on the main objectives of the WTO dispute settlement system, and the tasks afforded to it by the Members.

We have also identified a number of areas and improvements to the dispute settlement system that would require more extensive changes, such as introducing compulsory monetary compensation as a remedy. Undoubtedly, there are also changes to be made to the panel stage. These suggestions and others could be investigated further in a work program, which could be launched at the same time as the restoration of the Appellate Body.

Other types of alternative dispute settlement mechanisms, such as good offices, conciliation, mediation or arbitration, could be used in order to take pressure off the appeal process.

As long as the Appellate Body and the WTO dispute settlement system remain dysfunctional, we will see more political considerations and power dynamics play a role in the dispute settlement and increased legal uncertainty in the international trade field. In the meantime, the MPIA is a good alternative that more countries should consider joining.

## 6 Table of WTO cases

| Short title                                                               | Full case title and citation                                                                                                                                                                                                            |
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| <i>Argentina – Import Measures (2015)</i>                                 | Appellate Body Report, <i>Argentina — Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, 15 January 2015 (adopted on 26 January 2015).                                                      |
| <i>Australia – Salmon (1998)</i>                                          | Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, 20 October 1998 (adopted on 6 November 1998).                                                                                        |
| <i>Canada – Continued Suspension (2008)</i>                               | Appellate Body Report, <i>Canada — Continued Suspension of Obligations in the EC — Hormones Dispute</i> , WT/DS321/AB/R, 16 October 2008 (adopted on 14 November 2008).                                                                 |
| <i>Canada — Renewable Energy / Canada — Feed-in Tariff Program (2013)</i> | Appellate Body Report, <i>Canada - Certain Measures Affecting the Renewable Energy Generation Sector - Canada - Measures Relating to the Feed-In Tariff Program</i> , WT/DS412/AB/R/WT/DS426/AB/R, 6 May 2013 (adopted on 24 May 2013). |
| <i>China – Rare Earths (2014)</i>                                         | Panel Report, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> , WT/DS431/R, WT/DS432/R, WT/DS433/R, 26 March 2014 (adopted on 29 August 2014).                                               |
| <i>Colombia — Frozen Fries (2022)</i>                                     | Award of the Arbitrators, Arbitration under Article 25 of the DSU, <i>Colombia – Anti-dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands</i> , WT/DS591/ARB25, 21 December 2022.                                  |
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| <i>EC – Hormones (Canada) (1998)</i>                                      | Appellate Body Report, <i>European Communities — EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R; WT/DS48/AB/R, 16 January 1998 (adopted on 13 February 1998).                                              |
| <i>India – Patents (US) (1998)</i>                                        | Appellate Body Report, <i>India — Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, 19 December 1997 (adopted on 16 January 1998).                                                            |
| <i>Japan – Alcoholic Beverages II (1996)</i>                              | Appellate Body Report, <i>Japan – Japan — Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996 (adopted on 1 November 1996).                                                                      |

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| <i>Japan – Apples (2003)</i>                                        | Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, 26 November 2003 (adopted on 10 December 2003).                                                   |
| <i>Thailand — Cigarettes (Philippines) (2011)</i>                   | Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, 17 June 2011 (adopted on 15 July 2011).                                      |
| <i>US – Countervailing and Anti-Dumping Measures (China) (2014)</i> | Panel Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/R, 27 March 2014 (adopted on 22 July 2014).                                   |
| <i>US – OCTG Sunset Reviews (2004)</i>                              | Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, 29 November 2004 (adopted on 17 December 2004).    |
| <i>US – Section 211 Appropriations Act (2002)</i>                   | Appellate Body Report, <i>United States — Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, 2 January 2002 (adopted on 1 February 2002).                                            |
| <i>US – Stainless Steel (Mexico) (2007)</i>                         | Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, 20 December 2007 (adopted on 20 May 2008).                                              |
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| <i>US – Steel and Aluminium Products (Norway) (2022)</i>            | Panel report, <i>United States — Certain Measures on Steel and Aluminium Products</i> , WT/DS552/R, 9 December 2022.                                                                                  |
| <i>US – Tuna II (Mexico) (2012)</i>                                 | Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, 16 May 2012 (adopted on 13 June 2012).               |
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## Sammanfattning på svenska

### *Summary in Swedish*

Sedan slutet av 2019 har Världshandelsorganisationens (WTO) tvistlösningssystemets överklagandefunktion, WTO:s överprövningsorgan, inte fungerat och varit i kris. Det har saknats medlemmar i överprövningsorganet, som därför inte har kunnat bedriva sin verksamhet.

WTO:s medlemmar har enats om målet att ha ett fullt fungerande tvistlösningssystem tillgängligt för alla WTO-medlemmar senast 2024. I denna promemoria diskuterar vi en del av kritiken mot överprövningsorganet som har förts fram av medlemmarna, framför allt USA.

Vi diskuterar bland annat tidsfristen på 90 dagar inom vilken överklaganden måste slutföras. Även arbetsrutinerna för överklagandeprövningen (regel 15) som föreskriver att de avgående medlemmarna i överprövningsorganet får slutföra en påbörjad handläggning även efter det att medlemmens mandatperiod har gått ut diskuteras. Vi analyserar och diskuterar också kritiken som gör gällande att överprövningsorganet prövar nationell rätt, utfärdar rådgivande yttranden och skapar bindande prejudikat – åtgärder som påstås gå utöver organets mandat. Slutligen diskuterar vi också tvistlösningssystemets två steg och deras syfte.

Utan att ha analyserat alla aspekter som USA har kritiserat, anser vi att problemet inte är hur överenskommelsen om regler och förfaranden för tvistlösning (DSU) är skriven, utan snarare hur reglerna har tolkats och tillämpats i praktiken. Utan tvekan finns det ett begränsat antal områden där överprövningsorganet kunde ha visat mer återhållsamhet vid tillämpningen. Det enklaste och snabbaste sättet att lösa problemen kan därför vara att WTO-medlemmarna säkerställer tillämpningen av DSU, så som den är skriven, och lägger större vikt på att framtida medlemmar i överprövningsorganet följer reglerna.

För att ytterligare begränsa tolkningsutrymmet för överprövningsorganet skulle ett antal förtydliganden och ändringar kunna göras i DSU. Vi diskuterar några enkla och snabba förändringar som skulle kunna göras för att få i gång systemet så snart som möjligt.

Andra ändringar skulle till exempel kunna göras i urvalsprocessen av överprövningsorganets medlemmar, uppförandekoden för överprövningsorganets medlemmar och arbetsrutinerna för överklagandeprövningen.

Vi identifierar också ett antal förslag till förbättringar som skulle kunna utredas vidare i ett arbetsprogram, och med fördel lanseras samtidigt som överprövningsorganet återupprättas. Detta inkluderar till exempel effektivare rättsmedel för utvecklingsländer.

**The National Board of Trade Sweden** is the government agency for international trade, the EU internal market and trade policy. Our mission is to facilitate free and open trade with transparent rules as well as free movement in the EU internal market.

Our goal is a well-functioning internal market, an external EU trade policy based on free trade and an open and strong multilateral trading system.

We provide the Swedish Government with analyses, reports and policy recommendations. We also participate in international meetings and negotiations.

The National Board of Trade, via SOLVIT, helps businesses and citizens encountering obstacles to free movement. We also host several networks with business organisations and authorities which aim to facilitate trade.

As an expert agency in trade policy issues, we also provide assistance to developing countries through trade-related development cooperation. One example is Open Trade Gate Sweden, a one-stop information centre assisting exporters from developing countries in their trade with Sweden and the EU.

Our analyses and reports aim to increase the knowledge on the importance of trade for the international economy and for the global sustainable development. Publications issued by the National Board of Trade only reflect the views of the Board.

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