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Editors

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Editors
Chang-fa Lo
Constitutional Court of Taiwan, ROC
Taipei, Taiwan

Tsai-fang Chen
School of Law
National Chiao Tung University
Hsinchu, Taiwan

Junji Nakagawa
Chuo Gakuin University
Tokyo, Japan

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Preface

The Appellate Body of the World Trade Organization (WTO) is in crisis. This not only affects its operation, but also decides its future existence. The reform of the Appellate Body is critical in ensuring the most important component of the WTO. Considering the critical timing and the importance of the issues, we decided to coordinate this book to comprehensively examine the reform of the Appellate Body in light of the current crisis.

The book covers various aspects of the crisis and its reform. Some of our contributors address certain fundamental questions of WTO's governance of dispute settlement. Some contributors discuss the reform from the perspective of the Appellate Body's functions. Various reform options and wider implications are also proposed by some other contributors.

We thank the contributors for sharing their sense of urgency regarding the Appellate Body crisis and for providing various insights regarding the reform of the Appellate Body. Their efforts make this book unique and timely.

We also like to thank our editorial assistants, led by Ms. Chia-Ying Chien. With dedication and efficiency, Chia-Ying Chien directed a small but devoted group of assistants from National Taiwan University and National Chiao Tung University to check footnotes, references, and format. They are Xin-Wei Huang, Yi-Chen Yang, Saw Angelique, Li-Ching Tzeng, Chia-Yu Yao, Chi-Hsuan Liu, Yung-Han Yang, Yi-Ting Li, Wei-An Hung, and Yun Jou Kuo.

We hope that our works not merely add to the existing discourse of the Appellate Body reform issues, but also provide substantial contributions leading toward the ultimate solution for the crisis.

Taipei, Taiwan — Chang-fa Lo
Tokyo, Japan — Junji Nakagawa
Hsinchu, Taiwan — Tsai-fang Chen
September 2019

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Editors and Contributors

About the Editors

Chang-fa Lo was Justice of the Constitutional Court of the ROC (Taiwan) between October 2011 and September 2019. Prior to his judicial position, he was Chair Professor and Lifetime Distinguished Professor at National Taiwan University (NTU); Dean of NTU College of Law; Founding Director of the Asian Center for WTO and International Health Law and Policy of NTU College of Law (ACWH); Founding Director of the Center for Ethics, Law and Society in Biomedicine and Technology of NTU; Commissioner of Taiwan's Fair Trade Commission; Commissioner of Taiwan's International Trade Commission; and legal advisor for Taiwan's GATT/WTO accession negotiations. In his capacity as Director of the ACWH, Prof. Lo launched two English journals, namely, the Asian Journal of WTO and International Health Law and Policy (AJWH, an SSCI listed journal) and the Contemporary Asia Arbitration Journal (CAA) in 2006 and 2008, respectively. During his tenure as Dean of NTU College of Law, he also launched the English journal, the NTU Law Review. He was appointed by the WTO as a panelist for the case of DS332 Brazil—Measures Affecting Imports of Retreaded Tyre in 2006, and the case of DS468 Ukraine—Definitive Safeguard Measures on Certain Passenger Cars in 2014, and appointed as a member of the Permanent Group of Experts under the SCM Agreement of WTO in 2008. He was Chairman of the Asia WTO Research Network (AWRN) from 2013 to 2019. Prior to his teaching career, he practiced law in Taipei. He received his S.J.D. degree from Harvard University Law School in 1989. He is the author of 13 books (including "Treaty Interpretation under the Vienna Convention on the Law of Treaties—A New Round of Codification" published by Springer) and the editor of eight books (including this book), and he has authored more than 100 journal papers and book

chapters. He was granted the "National Professorship Award" by the Ministry of Education and the "Outstanding Scholarship Chair Professorship Award" by the Foundation for Advancement of Outstanding Scholarship.

Junji Nakagawa is Professor at the Faculty of Liberal Arts, Chuo Gakuin University, and an Advisor at Anderson, Mori & Tomotsune LLP. He is also a Professor Emeritus of the University of Tokyo. He got B.A., M.A., and LL.D from the University of Tokyo. He has over 40 years' experience of teaching/research on international economic law. He is Chairperson of the Asian International Economic Law Network (AIELN) and the Asian WTO Research Network (AWRN). He also worked for the Society of International Economic Law (SIEL) as a Member of its Council (2008 to 2018) and a Co-Treasurer (2015 to 2018). His major publications include: *Commentary on Trans-Pacific Partnership (TPP)*, Japan Tariff Association, 2019; *International Economic Law, 3rd ed.*, Yuhikaku, 2019; *Nationalization, Natural Resources and International Investment Law*, Routledge, 2017; *WTO: Beyond Trade Liberalization*, Iwanami Shoten, 2013; *Transparency in International Trade and Investment Dispute Settlement*, Routledge, 2013; and *International Harmonization of Economic Regulations*, Oxford University Press, 2011.

Tsai-fang Chen is Associate Professor of National Chiao Tung University School of Law. His main areas of research are international economic law, international commercial arbitration, international investment law, and patent law. Tsai-fang Chen has obtained his S.J.D. degree in University of Wisconsin Law School, LLM degree at Columbia University School of Law and National Taiwan University, and LLB degree at National Chengchi University. He has worked in Wisconsin Alumni Research Foundation on patent law issues. Tsai-fang Chen has also practiced law at Wu and Partner, Attorneys-at-law, Taipei, Taiwan on antidumping cases. Tsai-fang Chen has lectured in the intensive Course "IP in Asia" in Advanced Master in Intellectual Property Law and Knowledge Management (LLM/M.Sc.), Maastricht University. He has also worked as a consultant to Office of Trade Negotiations, Ministry of Economic Affairs in Taiwan. Tsai-fang Chen has published articles on international economic law in *Asian Journal of WTO & International Health Law and Policy* and *Contemporary Asia Arbitration Journal*. Tsai-fang Chen has also published an article on patent law in *Wake Forest Intellectual Property Law Journal*. Tsai-fang Chen is a member of the *Asian Center for WTO & International Health Law and Policy*. Tsai-fang Chen is a committee member of the Editorial Committee of the *Contemporary Asia Arbitration Journal* and the *Asian Journal of WTO & International Health Law and Policy*.

Contributors

Raj Bhala The University of Kansas School of Law, Dentons U.S. LLP, Bloomberg Quint, Lawrence, KS, USA

Tsai-fang Chen National Chiao Tung University, Hsinchu, Taiwan, ROC

Fernando Dias Simões Faculty of Law, Chinese University of Hong Kong, Sha Tin, Hong Kong

Yuka Fukunaga Waseda University, Tokyo, Japan

Henry Gao School of Law, Singapore Management University, Singapore, Singapore

Tomohiko Kobayashi Otaru University of Commerce, Otaru, Japan

Joanna Lam Faculty of Law, Centre of Excellence for International Courts (iCourts), University of Copenhagen, Copenhagen, Denmark;
Kozminski University, Warsaw, Poland

Jaemin Lee School of Law, Seoul National University, Seoul, Korea

Po-Ching Lee Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Geneva, Switzerland

Chang-fa Lo Constitutional Court, Taipei City, Taiwan, ROC;
Constitutional Court, Taiwan, Republic of China

Mitsuo Matsushita Tokyo University, Tokyo, Japan

Niall Meagher Advisory Centre, WTO Law (ACWL), Geneva, Switzerland

Junji Nakagawa Chuo Gakuin University and Anderson, Mori & Tomotsune LLP, Abiko, Japan

Ernst-Ulrich Petersmann European University Institute, Florence, Italy

Colin B. Picker University of Wollongong, Wollongong, Australia

R. Rajesh Babu Indian Institute of Management Calcutta, Kolkata, India

Rajesh Sharma RMIT University, Melbourne, Australia;
Xiangtan University Law School, Xiangtan, China;
Academy of International Dispute Resolution and Professional Negotiation, Hong Kong, China;
Social and Global Studies Centre, Melbourne, Australia;
Hong Kong WTO Research Institute, Hong Kong, China

Markus Wagner University of Wollongong, Wollongong, NSW, Australia

Part I
The AB in the WTO Governance and Its Reform—Broader Perspectives

Chapter 1
Introduction: Let the Jewel in the Crown Shine Again

Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen

Abstract This chapter explains that the dispute settlement system of the WTO and its Appellate Body (AB) used to be considered as the Jewel in the Crown. But now the AB is encountering a survival crisis. There will not be enough AB members to hear an appeal case after 10 December 2019 if the blockage of the appointment of AB members still continues. There are a lot to be done in order to address the concerns of WTO members. This chapter summarizes various approaches and specific reforms proposed by the contributors in their respective chapters. The ultimate purpose is to ensure that the AB will operate properly and the jewel will shine again.

1 From Being the Jewel in the Crown to Encountering a Survival Crisis

When the World Trade Organization (hereinafter WTO) was established in 1995, trade negotiators, international political leaders, policymakers, international economic law scholars and practitioners were so pleased to have a promising dispute settlement system created. The system is sophisticated but not overly complicated. Hence, although the Understanding on Rules of Procedures for the Settlement of Disputes (hereinafter DSU) includes 27 detailed articles, the core components of the system (including the panel procedure and the appellate procedure) are clear and straightforward.

C. Lo (✉)
Constitutional Court, Taipei City, Taiwan, ROC
e-mail: lochangfa@gmail.com

J. Nakagawa
Chuo Gakuin University and Anderson, Mori & Tomotsune LLP, Abiko, Japan
e-mail: nakagawa@fla.cgu.ac.jp

T. Chen
National Chiao Tung University, Hsinchu, Taiwan, ROC
e-mail: tchen@g2.nctu.edu.tw

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The system emphasizes on the rules, but not merely the rules. Hence, there are a lot of rule-based aspects in the DSU, such as requiring the interpretation of the WTO agreements based on the customary rules of international law (i.e., the Vienna Convention on the Law of Treaties; hereinafter VCLT) as provided in Article 3.2 of the DSU, and requiring not to add to or diminish the rights and obligations under the WTO agreements as provided in Articles 3.2 and 19.2. But there are also non-rule-based features, such as requiring disputing parties to go through the consultation stage in order to ensure both sides understand each other's position and have an opportunity to settle their dispute, and providing the good offices, mediation and conciliation mechanisms as alternatives to facilitate the settlement of the disputes. The combination of rules-based and non-rule-based features in the DSU look like a perfect design.

WTO Members had very high expectation on this very well-crafted dispute settlement system. During the first ten years of the WTO, the system had performed its excellent work. Because of the high expectation on the dispute settlement system under the WTO and because of its efficient performance, the system was usually referred to as the Jewel in the Crown. In particular, the Appellate Body was the shining focal of the jewel, due to its high-quality work and its professional and authoritative interpretation of the WTO agreements as well as its trustworthy decisions. Some other international dispute settlement systems imitated the DSU or referred to the WTO jurisprudence (which is mainly composed of the views stated in Appellate Body's reports) as guidance or for inspiration.

The Appellate Body enjoyed glory for less than two decades. The situation was gradually changed. The United States started complaining about the system (especially the Appellate Body's practice) and taking actions to reflect its dissatisfaction. For instance, the Obama administration decided in 2011 not to reappoint Professor Jennifer Hillman (whose term with the Appellate Body was from 2007 until 2011) to serve her second 4-year term as Appellate Body member, and blocked the reappointment of Professor Seung Wha Chang (whose term was from 2012 until 2016) to continue serving as Appellate Body member. The blockage of new Appellate Body members' appointment continues during the Trump administration. It is approaching to the critical point that after 10 December 2019, there will be fewer than three members to serve on any one appeal case as required by Article 17.1 of the DSU. This would lead to the disruption of the Appellate Body's function. As a result, the whole dispute settlement system will be vastly disturbed. If both disputing parties in a case decide not to appeal, the panel report will be adopted by the Dispute Settlement Body (as provided by Article 16.4) and hence the case is concluded. But if there is any one of the disputing parties decides to appeal, the case could be pending forever because there will not be enough Appellate Body members to hear the case (if the blockage of the appointment continues), and the dispute can never be resolved. This becomes a serious threat to the existence of the Appellate Body and an imminent crisis to the proper function of the WTO's dispute settlement system.

In the meantime, many other issues were raised in relation to the roles and works of the Appellate Body. These issues concern some broader problems (such as whether the member-driven idea has been deviated and whether there is an undesirable practice of judicial activism) as well as some specific/technical issues (such as whether an "outgoing" Appellate Body member should be allowed to complete his/her unfinished cases; how to deal with the systemic failure to meet the requirement of not exceeding 90 days (from the date of notifying an appeal) to submit an Appellate Body report as required by Article 17.5 of the DSU; and how to deal with the increased workload of the Appellate Body, among other things).

Some of the issues are old ones; some others are newly emerged. WTO Members have conducted intensive discussions on various issues. There has not be a promising outcome. We thought that scholars are obliged to offer our neutral views to be added to the discourse to help find a proper solution and to save the Jewel in the Crown.

In this book, we will revisit and elaborate some fundamental aspects of the dispute settlement system of the WTO and, more specifically, the function of the Appellate Body in order to build up the foundation of possible reforms. We will also review some specific issues concerning the operation of the Appellate Body and propose our suggestions from broader perspectives. The ultimate purpose of this book is to help the Jewel in the Crown shine again.

2 Polishing the Jewel from Broader Perspectives on Governance and Reform Issues

In Part I of this book, we examine the governance of the WTO, the crisis of the Appellate Body and the overall reform issues. Ernst-Ulrich Petersmann in his Chap. 2 observes that the power-oriented GATT/WTO traditions of "member-driven governance" risk undermining the dispute settlement system of the WTO, its judicial administration of justice and rule of law. Through United States' blockage of the WTO Appellate Body system, Petersmann explains that the "republican imperative" of protecting public goods (res publica) requires respect for democratic governance, rule of law and judicial remedies. He observes that WTO law limits power politics by judicial remedies and by administrative majority decisions for filling vacancies in WTO institutions (like the Appellate Body) if consensus is arbitrarily vetoed. Such administrative decisions and authoritative interpretations of WTO rules preventing illegal de facto amendments of WTO institutions legitimize "member-driven governance" by protecting rule of law as approved by parliaments when they authorized ratification of the WTO Agreement and delegated limited powers for implementing and reforming—rather than destroying—WTO rules for the benefit of citizens, their equal rights and social welfare. He concludes that the "strategic rivalry" between WTO members indicates the political limits of "judicialization" of international economic law and the need for systemic, "ordo-liberal" reforms of the WTO.

Mitsuo Matsushita in his Chap. 3 observed that the Appellate Body has been criticized, on the one hand, for exercising "judicial activism" on the one hand, and, on the other hand, for being too literalistic in its interpretation of the WTO agreements. He suggests that this reflects the question of whether the Appellate Body is an international court of trade. After reviewing the judicial features of the Appellate Body, i.e., automaticity of decision-making and compulsory jurisdiction, He examines the United States concern for Appellate Body's judicial activism and for the Appellate Body's practice that may adversely affect the sovereignty of WTO Members. He argues that the problem lies at the fact that there is no mechanism for checks and balances in regard to the Appellate Body in the WTO. Accordingly, he reviews several potential institutional reforms that may put some discipline on the Appellate Body, including optional Dispute Settlement Body jurisdiction, reduction of the threshold of the exclusive authority of the Ministerial Conference and the General Council to adopt interpretations, and establishment of an informal peer group to review Appellate Body reports.

Colin B. Picker in his Chap. 4 observes that the Appellate Body of the WTO is in crisis as a result of attacks on the Appellate Body's processes, decisions and approaches brought by the United States. He suggests that if the United States approach is not countered or reversed, this will result in the Appellate Body being unable to operate, effectively permitting WTO rule breaking to go unchecked. Therefore, the very rule of law character of the WTO is consequently under threat. He argues that it is not inconceivable that the demise of the Appellate Body could quickly and all too easily lead to the death or death-like stagnation of the WTO. He suggests that the current concerns about the Appellate Body and the WTO more generally reflect deeper fundamental flaws and disconnects within the WTO and therefore suggests that proposed Appellate Body reforms by some WTO members are too superficial and hence likely irrelevant to the real, inevitable and likely fatal challenges to the WTO. He argues that the crisis therefore is not really the fault of the Appellate Body, neither in its structure, function or outputs, but rather a result of deeper fundamental faults within the WTO. He also suggests that Appellate Body's behaviours and approaches are entirely consistent with what one would expect from a rule of law Dispute Settlement Body—be it international or domestic.

Markus Wagner in his Chap. 5 discusses the current crisis engulfing the multilateral trading system that has crystalized in the dispute over the (re-)appointment of the members of the Appellate Body. He observes that while the legislative arm of the organization has never lived up to its potential, its dispute settlement arm with the Appellate Body at its apex was seen as a lodestar for other international courts and tribunals. He further observes that the United States has taken issue not only with individual decisions of the Appellate Body (as well as individual Appellate Body members), but with the institution as such. He recounts the important institutional redesign that has led to the Appellate Body becoming the WTO's institutional "centerpiece". He argues that these very same developments are now destined to lead to the Appellate Body's downfall with potential reverberations for the entire WTO's

dispute settlement process. Moreover, he suggests that it threatens the institution as a whole, unless some last-minute compromise can be found between various competing visions of global economic governance.

R. Rajesh Babu in his Chap. 6 discusses the concern for the Appellate Body overreach from the perspectives of the South. He observes that the WTO Appellate Body is facing an existential crisis that threatens to impair the institutional edifice of the entire multilateral trading system. He suggests that the immediate reason for the crisis is the United States blocking of the appointment and reappointment of the Appellate Body members on the ground that the Appellate Body has exhibited a pattern of "judicial over-reaching" by going beyond the strict bounds of permissible interpretation thereby indulging in judicial law-making. He investigates whether these allegations are founded on facts and whether this could be another effort by the United States to dismantle legitimately established multilateral institutions/processes. He argues that while one may concede the United States blockade as largely motivated by self-interest, an analysis of the WTO jurisprudence is replete with occasions where the panels and the Appellate Body have misused their discretion and improperly engaged in creating new WTO rules and procedures through techniques of "filling legal gaps", "completing the analysis", or "clarifying ambiguity". This trend has been viewed by a large section of the WTO member states and trade scholars as detrimental to organizational legitimacy of the WTO. He concludes that the current crisis, though precipitated by the United States self-interest, offers an opportunity for the WTO member states and the Appellate Body members to introspect and restore democratic deficit and prevent judicial overreach. He also perceives that the current crisis also owes to the inability of WTO political bodies to check and correct actions of other WTO bodies that have undermined the state-centric nature of the WTO law-making.

3 Polishing the Jewel by Addressing the Basic Function of the Appellate Body

In Part II of this book, we address some basic functions of the Appellate Body. Raj Bhala in his Chap. 7 discusses the WTO adjudicatory crisis, namely, the specific blockage over the approval of candidates to fill vacancies on the Appellate Body, and general impasse over changes to the DSU. He suggests that there is a mismatch between the proposals to reform Appellate Body and DSU reform proposals, on the one hand, and central criticisms the United States raises, on the other. He observes that the United States arguments are about the right way to interpret disputed texts in a trade treaty, and about the right weight to give prior decisional rulings. He further argues that none of the reform proposals raised by the European Union or Canada, squarely address the United States' arguments. He explains that the Euro-Canadian

suggestions are about procedures, whereas America challenges foundations of multilateral trade adjudication. Therefore, he concludes that the crisis will not be resolved easily or quickly.

Chang-fa Lo in his Chap. 8 discusses the issue of Appellate Body's exercise of judicial activism. He stresses that it is a critical issue about whether the Appellate Body is practicing judicial activism and has gone beyond the control of the WTO Members collectively. He discusses this issue from the perspectives of "collective members-driven" design of the WTO and the Appellate Body's role as an adjudicator or as merely holding an assisting role to help WTO Members' decision-making. He suggests that the Appellate Body must be very careful in exercising judicial activism. He argues that only in the situations where it is necessary to maintain important human values, to avoid a major leak or disruption of the WTO's operation or to coordinate with other major international treaties, the Appellate Body should be expected to play an active role as an adjudicator in order to ensure the constitutionalism of international trade norms under the WTO. Whereas in the situations where there involve merely technical issues and commercial interests, he argues that the Appellate Body should avoid practicing judicial activism. Instead, it should play an "assisting role" in order to help the WTO Members as a whole to discharge their decisions-making duties.

Niall Meagher in his Chap. 9 observes that judicial style can be enormously important in achieving credibility and acceptance for a tribunal's decisions. He explains that for the Appellate Body, it is difficult to identify a particular style in their work. He finds that the DSU influences the judicial style of the Appellate Body, but does not mandate a particular stylistic approach. He suggests that the Appellate Body's reliance on the dictionary in its interpretation seems to contribute to lengthy and not always easy to read reports, and to lead to a reliance on multi-factor tests. In addition, he also finds that the Appellate Body has generally eschewed the kind of rhetorical or dramatic flourishes. He therefore suggests that the style of the Appellate Body appears to tend towards the formalistic. He concludes that factors affecting the style of the Appellate Body includes the textualist approach of the VCLT, language, differences in legal tradition, collegiality, and the importance of candour. Ultimately, he suggests that the style of a tribunal like the Appellate Body may depend mostly on the predilections of its members.

Yuka Fukunaga in her Chap 10 observes that the United States has been blocking consensus of the Members of the WTO on the appointment and reappointment of Appellate Body members by raising several concerns with the practice of the Appellate Body. At several recent meetings of the Dispute Settlement Body, the United States has outlined in detail its specific concerns, one of which pertains to the interpretative authority of the Appellate Body. More specifically, the United States criticizes the Appellate Body for treating its previous interpretations as "binding and controlling" and for insisting that they must serve as precedent "absent cogent reasons." She analyzes the criticism and points out seven specific errors in it. She argues that the United States wrongly or deliberately alters what the Appellate Body in fact stated in the past decisions with a view to discrediting the Appellate Body.

Finally, she warns that the Appellate Body impasse would not be broken, as long as the United States maintains its erroneous views.

Tsai-fang Chen in his Chap. 11 observes that the current blockage of the Appellate Body member appointments by the United States has created a crisis for the WTO dispute settlement system. He observes that the United States has raised several issues with regard to the Appellate Body practices. One of the main United States concerns is that the Appellate Body has repeatedly issued findings, from the perspectives of the United States, that were not necessary for the resolution of the dispute. In addition, he also observes that the United States has raised complaint regarding the difficulty of the Appellate Body to observe the 90-day requirement provided for under article 17.5 of the Dispute Settlement Understanding (DSU). He reviews the relationship between article 17.12 DSU and the relevant concerns raised by the United States, and analyzes the limit of the European Union (EU) proposal. He suggests an alternative, narrower, version of the amendment that would further address the concerns over the advisory opinions issued by the Appellate Body.

Tomohiko Kobayashi in his Chap. 12 observes that there is a significant risk of losing the functioning of the Appellate Body of the WTO in the near future. He suggests that the WTO is under a serious threat of being dismantled, not because of external factors, but because of internal ones. He elaborates practical, although unusual, options to save the functioning of the WTO dispute settlement mechanism. With regard to the options to amend the DSU, he addresses three key questions. First, can WTO member states amend the DSU by a simple majority vote where a decision cannot reach consensus? Second, if so, when does the amendment approved by the Ministerial Conference takes effect? Third, if the answer to the first question is negative, can the Members amend the consensus requirement by voting? He finds that amending the DSU without consensus is a high bar and almost impracticable unless the United States notifies the WTO of its intention to withdraw. As an alternative way to save the function of the appeal mechanism, he proposes to transplant the thrust of the appeal function into the panel phase by using expert review groups (ERG) under Article 13.2 and Appendix 4 of the DSU. His proposal intends to strike a thin balance between legitimate concerns from sovereign nations against the power of treaty organs, on the one hand, and maintaining invaluable functions of the panel and Appellate Body stages that have evolved for two decades, on the other hand. He concludes that incorporating a quasi-appeal mechanism into the panel process is not the panacea, but can be a feasible option along with the use of DSU Article 25 arbitration.

4 Identifying Options to Let the Jewel Shine Again

In Part III of this book, we explore some options to address some selected crisis issues in relation to the Appellate Body. We also elaborate the value and importance of the WTO's appellate procedure by showing the Appellate Body as a model for

other international dispute settlement systems. These reconfirm the importance of letting the Jewel in the Crown shine again.

Henry Gao in his Chap. 13 observes that over the past few months, the blockage of the Appellate Body member's appointment process by the United States has emerged as the biggest existential threat to the WTO. In response to the criticisms from other WTO Members, the United States justified its action as a way to raise people's attention on long-standing problems in the Appellate Body. He reviews whether the United States criticisms are valid, and assuming that the United States allegations are correct, he examines whether the specific approach that the United States has taken is legitimate. Drawing from both the treaty text and jurisprudence of WTO law, he argues that the United States criticisms, especially those concerning the systemic issues in WTO dispute settlement, are deeply flawed. Moreover, he also argues that, regardless of the validity of the substantive claims of the United States, the United States has chosen the wrong approach by holding hostage the entire Appellate Body appointment process. He concludes with practical suggestions on how to overcome the Appellate Body crisis and restore its functions.

Rajesh Sharma in his Chap. 14 observes that the crisis of the Appellate Body has been triggered by the United States stalling the process of appointment or reappointment of the Appellate Body members. He examines the United States position and interests behind its complaint, and argues that the real United States interests may prevent a successful outcome of the negotiations regarding the crisis. Therefore, he proposes several options to the Appellate Body crisis, including appointment of at least two members of the Appellate Body, use of FTA dispute resolution forum, use of "Good offices, Conciliation and Mediation" in the WTO and FTA, and interim appeal through arbitration under the WTO. Alternatively, he proposes an alternative to use of a forum outside of the WTO, such as ARMO and APCAM.

Po-Ching Lee in his Chap. 15 provides a detailed narrative of the WTO Appellate Body appointment and reappointment processes. He further depicts the increasing politicization of the selection of Appellate Body members over the past 25 years. He suggests that as Appellate Body gradually established itself as a capable and authoritative adjudicator of sensitive and complex disputes, states kept stepping up their attempts to exert control over ideologies of individual Appellate Body members through the appointment process. He observes that political tensions arising from the process mounted up over time. He observes that in the selection processes in 2013 and 2016, Members' veto or threat of veto became frequent and apparent, pushing the processes into near-deadlock while the Selection Committee could still manage to broker the consensus. He suggests that the United States' rejection to reappointment in 2016 and its prolonged blockage to the launch of selection processes since 2017, however, mark a new peak of the politicization progress. He argues that the politicization of the Appellate Body selection processes would not stop or be reversed even if the present impasse is solved. He concludes that the escalating demand for Appellate Body seats will lead to more reckless and unscrupulous strategy-thinking from Members, in particular when some have demonstrated how fragile the mechanism could be.

Fernando Dias Simões in his Chap. 16 observes that while the WTO's Appellate Body is a permanent body, its members are not appointed full-time. He suggests that this regime was based on the assumption that members would be called upon to hear only a small number of cases per year. He argues that the reality, however, is that the workload of the Appellate Body is completely different from what was originally assumed. He argues that there is an evident gap between the expectations of the creators of the Appellate Body, back in the year 1995, and the reality of our time and age. He therefore calls on WTO member states to seriously consider the overall impact of the current arrangement in the effectiveness and credibility of the dispute settlement system. He concludes that appointing members on a full-time regime is a minor yet imperative change to address the challenges facing the Appellate Body.

Jaemin Lee in his Chap. 17 discusses the WTO's appellate mechanism. He suggests that the successful introduction and operation of the mechanism is one of the most important contributions of the WTO regime. He explains that in the past 24 years of operation, the Appellate Body has accumulated important experience in various areas of appellate review. He observes that it has also encountered a variety of practical and legal issues associated with appeal. He further observes that it has clarified critical jurisprudence and found solutions to practical issues. He argues that the Appellate Body's accumulated experience and jurisprudence have provided and will continue to provide useful guidance and benchmark for states and other international organizations for the formulation, administration and operation of appellate proceedings in other international dispute settlement proceedings. He concludes that its trial and error, and success and failure present the international community with a reliable springboard for the discussion of a better and more workable dispute settlement proceedings in the international community.

Joanna Jemielniak in her Chap. 18 discusses the Appellate Body's role for other adjudicatory bodies. She observes that the Appellate Body has over the years served as a point of reference as an efficient institutional design for investor-state dispute resolution. In particular, replacement of arbitration with a judicial institution has been considered as possible remedies to the weakness of the existing ISDS regime, the reform proposals of which have often adopted the Appellate Body as an inspiration. She reviews historical proposals of the reform of investor-state dispute resolution standards in order to identify sources of such inspiration. In particular, she compares the Investment Court System (ICS) and the Appellate Body regarding institutional design and the status of adjudicators. She then discusses the issue of procedural safeguards of transparency, and the status and enforceability of rulings under both regimes. She concludes that this comparison reveals a number of similarities and differences between both regimes, which sheds light on the design of the ICS.

From the discourse of the book, readers can find that critical problems are identified, and wide range of fundamental and technical solutions are proposed. We very much hope that these would help reform the Appellate Body, keep the jewel shine and make the appellate mechanism a model for many more other international dispute settlement systems.

Chang-fa Lo was Justice of the Constitutional Court of the ROC (Taiwan) between October 2011 and September 2019. Prior to his judicial position, he was Chair Professor and Lifetime Distinguished Professor at National Taiwan University (NTU); Dean of NTU College of Law; Founding Director of the Asian Center for WTO and International Health Law and Policy of NTU College of Law (ACWH); Founding Director of the Center for Ethics, Law and Society in Biomedicine and Technology of NTU; Commissioner of Taiwan's Fair Trade Commission; Commissioner of Taiwan's International Trade Commission; and legal advisor for Taiwan's GATT/WTO accession negotiations. In his capacity as Director of the ACWH, Prof. Lo launched two English journals, namely, the Asian Journal of WTO and International Health Law and Policy (AJWH, an SSCI listed journal) and the Contemporary Asia Arbitration Journal (CAA) in 2006 and 2008, respectively. During his tenure as Dean of NTU College of Law, he also launched the English journal, the NTU Law Review. He was appointed by the WTO as a panelist for the case of DS332 Brazil—Measures Affecting Imports of Retreaded Tyre in 2006, and the case of DS468 Ukraine—Definitive Safeguard Measures on Certain Passenger Cars in 2014, and appointed as a member of the Permanent Group of Experts under the SCM Agreement of WTO in 2008. He was Chairman of the Asia WTO Research Network (AWRN) from 2013 to 2019. Prior to his teaching career, he practiced law in Taipei. He received his S.J.D. degree from Harvard University Law School in 1989. He is the author of 13 books (including "Treaty Interpretation under the Vienna Convention on the Law of Treaties—A New Round of Codification" published by Springer) and the editor of eight books (including this book), and he has authored more than 100 journal papers and book chapters. He was granted the "National Professorship Award" by the Ministry of Education and the "Outstanding Scholarship Chair Professorship Award" by the Foundation for Advancement of Outstanding Scholarship.

Junji Nakagawa is professor at the Faculty of Liberal Arts, Chuo Gakuin University, and an Advisor at Anderson, Mori & Tomotsune LLP. He is also a Professor Emeritus of the University of Tokyo. He got B.A., M.A. and LL.D from the University of Tokyo. He has over 40 years' experience of teaching/research of international economic law. He is Chairperson of the Asian International Economic Law Network (AIELN) and the Asian WTO Research Network (AWRN). He also worked for the Society of International Economic Law (SIEL) as a Member of its Council (2008 to 2018) and a Co-Treasurer (2015 to 2018). His major publications include: *Commentary on Trans-Pacific Partnership (TPP)*, Japan Tariff Association, 2019; *International Economic Law, 3rd ed.*, Yuhikaku, 2019; *Nationalization, Natural Resources and International Investment Law*, Routledge, 2017; *WTO: Beyond Trade Liberalization*, Iwanami Shoten, 2013; *Transparency in International Trade and Investment Dispute Settlement*, Routledge, 2013; and *International Harmonization of Economic Regulations*, Oxford University Press, 2011.

Tsai-fang Chen is associate professor of National Chiao Tung University School of Law. His main areas of research are international economic law, international commercial arbitration, international investment law, and patent law. Tsai-fang Chen has obtained his SJD degree in University of Wisconsin Law School, LLM degree at Columbia University School of Law and National Taiwan University, and LLB degree at National Chengchi University. He has worked in Wisconsin Alumni Research Foundation on patent law issues. Tsai-fang Chen has also practiced law at Wu and Partner, Attorneys-at-law, Taipei, Taiwan on antidumping cases. Tsai-fang Chen has lectured in the intensive Course "IP in Asia" in Advanced Master in Intellectual Property Law and Knowledge Management (LLM/MSc), Maastricht University. He has also worked as a consultant to Office of Trade Negotiations, Ministry of Economic Affairs in Taiwan. Tsai-fang Chen has published articles on international economic law in Asian Journal of WTO & International Health Law and Policy and Contemporary Asia Arbitration Journal. Tsai-fang Chen has also published an article on patent law in Wake Forest Intellectual Property Law Journal. He is the editor of two books. He has also authored several articles and book chapters on the issues of international economic

law, international investment law, international commercial arbitration, and patent law. Tsai-fang Chen is a member of the Asian Center for WTO & International Health Law and Policy. He is a committee member of the Editorial Committee of the Contemporary Asia Arbitration Journal and the Asian Journal of WTO & International Health Law and Policy.

Chapter 2
Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System

Ernst-Ulrich Petersmann

Abstract The power-oriented GATT/WTO traditions of member-driven governance risk undermining the dispute settlement system of the WTO, its judicial administration of justice and rule of law. US trade policies, the "Brexit", and non-democratic rulers challenge multilateral treaties and judicial systems by populist protectionism prioritizing "bilateral deals". This contribution uses the example of the illegal US blockage of the WTO Appellate Body system for explaining why the "republican imperative" of protecting public goods (*res publica*) requires respect for democratic governance, rule of law and judicial remedies (Part 1 of this chapter). WTO law limits power politics by judicial remedies and by administrative majority decisions for filling vacancies in WTO institutions (like the Appellate Body) if consensus is arbitrarily vetoed (Part 2 of this chapter). Such administrative decisions and judicial clarifications of WTO rules preventing illegal de facto amendments of WTO institutions legitimize member-driven governance by protecting rule of law as approved by parliaments when they authorized ratification of the WTO Agreement and delegated limited powers for implementing, clarifying and reforming—rather than destroying—WTO rules for the benefit of citizens, their equal rights and social welfare (Part 3 of this chapter). The hegemonic abuses of trade policy powers indicate the political limits of "judicialization" of international economic law and the need for systemic, "ordo-liberal" reforms of the WTO in order to avoid disintegration of the world trading system (Part 4 of this chapter).

Keywords Appellate Body · China · Constitutionalism · Judicialization · Treaty interpretation · Voting in WTO

E.-U. Petersmann (✉)
European University Institute, Florence, Italy
e-mail: Ulrich.Petersmann@eui.eu

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1 Introduction: "Rule of Law" in Transnational Economic Relations?

Law and governance require justification vis-à-vis citizens in order to be socially accepted as legitimate and voluntarily complied with in civil society. Since ancient times, citizens invoke their "social contracts" for challenging abuses of power—in local communities, cities, states, and transnational cooperation—by invoking "moral principles of justice" (e.g. as proposed in Aristotelian and Confucian theories of justice), democratic constitutionalism (e.g. since the ancient Athenian democracy), "republican constitutionalism" (e.g. since the ancient Italian city republics) and other agreed rules and "principles of justice" as restraints on governance powers. Following World War II, all "United Nations" (hereinafter "UN") have accepted multilateral treaties and additional legal instruments recognizing "inalienable" human rights, democracy, rule of law and national Constitutions (written or unwritten) as restraints on multilevel governance of public goods (PGs).[1] This postwar constitutionalism tends to be based on constitutionally agreed rights and rules of a higher legal rank limiting post-constitutional lawmaking by legislative, executive and judicial powers and providing for judicial remedies aimed at protecting rule of law.[2] In contrast to the state-centered focus of the UN Charter on sovereign equality of its 193 UN member states and on optional jurisdiction of the International Court of Justice (hereinafter "ICJ") as the "principal judicial organ of the United Nations" (Article 92 UN Charter), the Agreement establishing the WTO admits also sub- and supra-national members (like Hong Kong, Macau, Taiwan, the European Communities); the compulsory jurisdiction of the multilevel WTO dispute settlement system for legal and judicial protection of transnational rule of law at international and domestic levels of trade governance reflects a historically unique achievement of legal civilization.[3]

International trade and investment agreements have been concluded since ancient times in order to limit "market failures" in private self-regulation (e.g. based on private commercial law, property rights and arbitration) and "governance failures" in state regulation (e.g. the Roman *lex mercatoria* and *praetor peregrinus* protecting transnational trade and rule of law). Democratic and republican constitutionalism limiting monarchical abuses of power and protecting rule of law for the benefit of citizens and their individual rights emerged first in the ancient Greek and Roman city republics. The "rule of law theories" of Greek and Roman philosophers (like Plato, Aristotle and Cicero) contributed to the emergence of transnational republicanism and of multilevel judicial protection of transnational commercial law (e.g. in the "Holy Roman empire" and its transnational "imperial court" with jurisdiction over trade and investment disputes involving many states, cities and citizens). Yet, it is only due to the universal postwar recognition of human and democratic rights that modern international trade and investment law is increasingly founded on "republican

[1] Petersmann (2017).

[2] Cf. Tushnet (2018), Rosas and Armati (2018).

[3] On the often neglected, multilevel nature of the WTO dispute settlement system, see Petersmann (1997, p. 233 ff).

constitutionalism" protecting trading and investor rights against arbitrary abuses of power.[4] The continuing "struggles for justice" lead to progressive "constitutional" and "judicial reforms" and converging developments in both international trade and investment law and adjudication such as:

- The constitutional insight of 'bounded rationality' (e.g. that governments cannot rule legitimately and effectively unless their powers are restrained by constitutional rules of a higher legal rank) promoted progressive limitations of intergovernmental power politics under the General Agreement on Tariffs and Trade (GATT 1947), which had been applied only "provisionally" as an intergovernmental agreement. The 1979 Tokyo Round Agreements and the 1994 WTO Agreement were approved by national parliaments and introduced democratic and judicial reforms of modern trade and investment rules for the benefit of citizens and their legal rights.
- "Principles of justice", as explicitly acknowledged in numerous multilateral treaties, increasingly influence the design of judicial remedies (e.g. of "violation", "non-violation" and "situation-complaints" pursuant to Article XXIII:1 GATT) and the jurisprudence of international trade and investment courts. The reality of "constitutional pluralism" requires judicial deference vis-à-vis competing conceptions of "justice as virtues" (Aristotle), "justice as entitlement" (Nozick), "justice as fairness" (Rawls), "justice as human rights" or as agreed "democratic constitutionalism".[5]
- The convergence of international trade and investment jurisprudence (e.g. protecting sovereign rights and duties to protect PGs and due process of law)[6] and the multilateral treaty commitments to transnational rule of law reflect the emergence of "constitutional" (e.g. judicial and democratic) restraints on power-oriented conceptions of "member-driven governance" of trade and investments. The humanism underlying modern human rights law (hereinafter "HRL"), UN law and international economic law (hereinafter "IEL") leads to legal and democratic protection of ever more individual and democratic rights and judicial remedies in international investment and trade law, as illustrated by the "human rights clauses" and multilevel judicial remedies in the trade and investment agreements inside the European Union (hereinafter "EU"), in the external EU agreements with more than 100 third states, and by the parliamentary approval and civil society support of such agreements. Trade and investment jurisprudence on reconciling trade and investment rights with HRL increasingly acknowledges the need for protecting also "positive freedoms" (like human rights of access to food, clean water, housing, health protection, "access to justice") rather than only "negative freedoms" (e.g. from arbitrary domination, expropriation of property rights). The more democratic and "cosmopolitan" rights are recognized in trade and investment agreements (notably

[4]Cf. Petersmann, *supra* note 1, at p. 174 ff.; Besson and Marti (2009).

[5]On the neglect by most textbooks on international economic law (IEL) to clarify the "principles of justice" underlying IEL, see Petersmann (2012), Chaps. II and III. On Chinese challenges of human rights, see Petersmann (2018a).

[6]Cf. Stoll (2018), Cho and Kurtz (2018).

of European states), the more national and regional courts (notably in Europe) construe IEL no longer only as "international law among states", but also as multilevel governance of PGs deriving its legitimacy from "constitutional contracts" among citizens delegating limited governance powers for "government of the people, by the people and for the people" subject to constitutional rights and judicial remedies of citizens.

- Anglo-Saxon neoliberalism (e.g. prioritizing trade and investment liberalization without adequate regulation of "market failures" and "governance failures") and totalitarian "state capitalism" (e.g. in authoritarian states like China) are increasingly challenged by "ordo-liberal insistence" on constitutional restraints on abuses of public and private economic power (like arbitrary restraints of labor rights, intellectual property rights, data privacy rights, freedom of the internet, anti-competitive practices of state-trading enterprises and other restraints of competition). The more trade and investment law and adjudication evolved in response to business interests prioritizing trading and investor rights, the more investor-state arbitration and GATT/WTO dispute settlements were challenged by adversely affected civil society interests and democratic institutions insisting on legal and judicial reforms, like more inclusive access to justice (e.g. by admitting *amicus curiae* briefs), more transparent procedures, control of "judicialization" by appellate review procedures, extensive interpretation of "annulment procedures" under Articles 51 and 52 of the Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID), and elaboration of "codes of conduct" limiting conflicts of interests of trade and investment adjudicators.
- The incorporation of investment rules and "sustainable development" commitments into trade agreements, judicial cross-references among trade and investment case-law, the emergence of common judicial "balancing methods" and standards of review promote converging trends in trade and investment regulation, adjudication and multilevel conceptions of coherent, non-discriminatory rule of law inside and beyond states.[7]

Compared with the multilevel legal and judicial protection of common market rights and related fundamental rights inside the EU and in the wider European Economic Area (EEA), the multilevel WTO and ICSID dispute settlement and rule of law systems remain less developed in many respects. Examples include

– the limited access to WTO dispute settlement bodies (e.g. excluding non-governmental actors), their limited legal remedies (e.g. excluding the customary international law rules on reparation of injury caused by violations of international law), and their lack of mutual cooperation (judicial comity) with domestic courts; and

[7]Cf. Stoll; Cho and Kurtz, *supra* note 6; Petersmann (2018e) and *supra* note 1, at p. 165 ff.; Van den Bossche, In: de Baere and Wolters (2015).

– the privileged access of only foreign investors to ICSID arbitration procedures (e.g. due to exclusion of other non-state actors), and the only limited review of arbitration awards through ICSID annulment proceedings and national courts enforcing arbitral awards.

Yet, as discussed in Sect. 1, in both WTO law and many other, modern trade and investment agreements, executive regulatory powers have not only become subject to democratic and judicial restraints aimed at protecting transnational rule of law. This separation of powers and multilevel, legal and judicial protection of rule of law (rather than rule of executive powers) have also become embedded into domestic constitutional systems and institutional "checks and balances" aimed at protecting citizens and their constitutional rights against long-standing abuses of discretionary foreign policy powers. The specific mandates of separation of legislative, executive and judicial powers and protection of rule of law in the WTO Agreement (e.g. Articles III, XVI:4) and in its Dispute Settlement Understanding ("DSU")—as democratically approved by parliaments and interpreted and enforced not only by governments, but also by national and international courts of justice—are under threat by intergovernmental power politics.

2 "Member-Driven" WTO Governance and Its Constitutional Limits

> Article IX:1 of the WTO Agreement provides:
>
> 'The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote'…. 'Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreements'.

Paragraphs 2–5 of Article IX prescribe specific majorities and procedures for voting on authoritative interpretations ("three-fourths majority of the Members"), waivers from WTO obligations, and decisions under "plurilateral trade agreements". Decision-making in GATT's Uruguay Round (1987–1994) had been based on the three principles of "member-driven governance", "single undertaking" and consensus: governments dominated the negotiations and rule-making processes and delegated only few powers to the GATT Director-General (e.g. to chair the Trade Negotiations Committee); majority voting was avoided by consensus practices so as to protect "sovereign equality" of states; and the "single undertaking principle" aimed at avoiding legal fragmentation and free-riding, as it had resulted from the Tokyo Round Agreements. These three decision-making principles contributed to the successful conclusion of the Uruguay Round negotiations. Yet, they are widely criticized for impeding the successful conclusion of the Doha Round negotiations

since 2001 and the solution of the WTO Appellate Body crisis since 2017, for instance due to abuses of "veto powers" by some WTO members.

When parliaments in WTO members approved the 1994 WTO Agreement and adopted legislation "to ensure the conformity of (their) laws, regulations and administrative procedures with (their) obligations as provided in the annexed Agreements" (Article XVI:4 WTO Agreement), most parliaments limited the trade policy powers of their respective government executives to implementing and modernizing WTO rules without granting executive powers to destroy the WTO legal, dispute settlement and trading system. For instance, the Lisbon Treaty on European Union requires the EU's external policies to contribute to "the strict observance and development of international law" (Article 3) and "support democracy, the rule of law, human rights and the principles of international law" (Article 21 TEU), without conferring powers on EU institutions to violate treaties approved by parliaments inside the EU. The US Trade Act of 1974 (as extended in 1979 and amended in 1984, 1988, 2002 and 2015) conditions the grant of negotiating authority for non-tariff measures by special objectives, benchmarks and procedural requirements to consult with Congress and private sector committees so that parliamentarians and civil society discuss the trade negotiation issues from the beginning of trade negotiations rather than only during the negotiating process or *ex post* during the approval of draft agreements reached[8]; due to the congressional incorporation of the WTO Agreement into US domestic law and the limited delegation of trade policy powers to the executive, Congress has not granted the President executive powers to unilaterally withdraw from the WTO Agreement or destroy the WTO legal and dispute settlement system.[9] Yet, such constitutional principles of separation and limited delegation of powers have not prevented WTO diplomats from engaging, since 2017, in illegal power politics undermining the functioning of the WTO Appellate Body (hereinafter "AB") in manifest violation of the WTO's "DSU".

2.1 Illegal US Blocking of the Filling of AB Vacancies in Violation of the DSU

US President Trump has repeatedly threatened to withdraw from what he perceives as "the terrible WTO Agreements", *inter alia* based on his erroneous belief that the US loses most WTO disputes—notwithstanding the fact that the US has won more than 75% of its WTO dispute settlement complaints and, also as a defendant, has been more successful than other WTO members.[10] US Trade Representative (hereinafter

[8]On the "Congressional Trade Priorities and Accountability Act" of June 2015 (H.R. 2146) and related US trade legislation, see VanGrasstek (2019).

[9]Cf. Trachtman (2017). US Presidents have, however, claimed inherent foreign policy powers to withdraw from international agreements.

[10]Cf. Shaffer et al. (2017), refuting television statements by US President Trump ("The WTO … was set up for the benefit of everybody but us. They have taken advantage of this country like you

"USTR") Lighthizer and other members of the US government (like Security Adviser Bolton) are declared opponents of restraining the use of US hegemonic power by international courts.[11] US trade diplomats explain their vetoing of the appointment of WTO AB members in deliberately ambiguous ways:

- the reappointment of AB members from the US (like Merit Janow 2003–2007, Jennifer Hillman 2007–2011) was opposed by the USTR because their participation in AB rulings against US legal positions was criticized as "unpatriotic"[12];
- trade law professors proposed by other WTO members (like Kenya in 2013) were ruled out almost immediately by the USTR, even if they had taught at US universities;
- in 2016, the reappointment of the Korean AB member Chang Seung Wang was blocked by the USTR on grounds of alleged judicial "over-reach";
- in the beginning of 2017, the US blocked the consensus in the WTO Dispute Settlement Body (hereinafter "DSB") for filling WTO AB vacancies for reasons related to the ongoing transition in the US political leadership;
- subsequently, the replacement of AB members Kim, Ramirez and van den Bossche in 2017, and of AB member Servansing in 2018, was vetoed by the USTR on grounds of "systemic" legal USTR concerns about, *inter alia*, "Rule 15" of the AB Working Procedures as elaborated by the AB in conformity with Article 17.9 DSU and practiced in WTO dispute settlement practices since 1996.[13]

Such blocking of the filling of AB vacancies on grounds *not* related to the personal qualifications of proposed AB candidates violates the WTO legal obligations to comply with DSU rules in good faith (cf. Articles 3.10, 23 DSU) and protect the AB as legally prescribed in Article 17 DSU (e.g. as being "composed of seven persons", with vacancies being "filled as they arise" so that AB membership remains "representative of membership in the WTO").[14] As US trade diplomats have not

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wouldn't believe… As an example, we lose the lawsuits, almost all of the lawsuits in the WTO … Because we have fewer judges than other countries. It's set up as you can't win. In other words, the panels are set up so that we don't have majorities. It was set up for the benefit of taking advantage of the United States") as "fake news".

[11] For references to various speeches by USTR Lighthizer, see Slobodian (2018a), Bacchus (2018a), Petersmann (2018b).

[12] Statement by J. Hillman; cf. also Dunoff and Pollack (2017, pp. 225, 267 ff).

[13] Cf. Kuijper (2018). Rule 15 authorizes the AB to permit its outgoing members to complete the disposition of pending appeals similar to the working procedures for many other international courts.

[14] Understanding on Rules and Procedures Governing the Settlement of Dispute art. 17.2, 15 Apr 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. The text of Article 17:2 ("The DSB shall"…), numerous other DSU provisions (like Article 3:10) and the customary law requirement of interpreting treaty rights and obligations in good faith make clear that obligations addressed to the DSB entail legal good faith obligations for each DSB member. According to the AB jurisprudence, an "abusive exercise by a Member of its own treaty right … results in the breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting". See Appellate Body Report, *United States—Import Prohibition of certain shrimp and shrimp products*, para 158, WT/DS58/AB/R (12 Oct 1998) [hereinafter US-Shrimp Appellate Body Report].

revealed the final objective of their blocking strategy, many observers of US trade policies interpret the US blocking of AB vacancies as being aimed at unilaterally terminating the functioning of the AB and the related "judicial restraints" on US trade protectionism, a strategy which previous US governments had already used in order to prevent NAFTA chapter 20 panel proceedings against the US.

2.2 US Failure to Legally Justify Its "Blocking Strategy"

In 2019, the US continued to state in DSB meetings that it is not in a position to support the launching of the selection processes for new AB members; it considers that the first priority is for the DSB to discuss and decide how to deal with reports being issued by persons "who are no longer members of the AB".[15] Even though the AB Working Procedures had been adopted in 1996 in conformity with Article 17 DSU and had been applied in WTO practice for more than 20 years, the US reiterates that Members need to resolve the AB's use of "Rule 15" in the AB Working Procedures as a priority. In some DSB meetings, the US also voiced other "systemic concerns" relating to the functioning of the AB, such as criticism of a Korean AB member for having raised issues ("*obiter dicta*") that, in the view of the USA, had not been necessary for the resolution of the dispute.[16] These "US concerns with WTO dispute settlement" and with "the approach by the AB" have been summarized in the President's 2018 Trade Policy Agenda[17] by focusing on the following cross-cutting issues:

- *Disregard for the 90-day deadline for appeals*: The US criticises the AB for not respecting Article 17.5 of the DSU, according to which "(i)n no case shall the proceedings exceed 90 days." In the US view, this raises concerns of transparency, inconsistency with "prompt settlement of disputes", and uncertainty regarding the validity of the report issued after 90 days.
- *Continued service by persons who are no longer AB members*: The US claims that, notwithstanding "Rule 15" of the AB Working Procedures and its consistent application in WTO dispute settlement practices to date, the AB "does not have the authority to deem someone who is not an Appellate Body member to be a member". In the view of the US, only the DSB—not the AB—has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving.
- *Issuing advisory opinions on issues not necessary to resolve a dispute*: The US criticizes "the tendency of WTO reports to make findings unnecessary to resolve a dispute or on issues not presented in the dispute".
- *Appellate Body review of facts and review of a member's domestic law de novo*: The US criticises the AB's approach to reviewing facts. Under Article 17.6 of the

[15] Cf. Hillman (2018), (listing the concerns expressed by the US in DSB meetings since 2017).

[16] On the legal inconsistency of this US criticism, see Gao (2018), Sacerdoti (2018).

[17] The President's Trade Policy Agenda (2019).