

**The effect of the WTO dispute settlement crisis
on the development of case law on national security exceptions:
A critical scenario**

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1. *Preliminary remarks*

The WTO dispute settlement system (DSS) is facing the most serious crisis since its inception.

In December 2019 the term of two of the remaining three Appellate Body (AB) members expired. Under Rule 15 of the Working Procedures for Appellate Review, they continue to work on completing the disposition of appeals to which they had been assigned while they were members, but they cannot process new appeals which were introduced following the completion of their term. Meanwhile no new members have been appointed because the United States has sought to block their selection. It is not the first time that a State has opposed the election or re-appointment of certain AB candidates under the veiled threat of using the consensus rule to bar a nomination.¹ But it is the first time that a State has actually blocked the recruitment of any new AB members.

It is public knowledge that the reason for the paralysis of the AB lies in the harsh US criticism of the increasing judicial activism shown by the AB.²

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¹ JL Dunoff, MA Pollack, 'The Judicial Trilemma' (2017) 111 AJIL 26.

² US concerns about the WTO dispute settlement and the approach of the AB were summarized in the President's 2018 Trade Policy Agenda: <<https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf>> 22-28. See also G Adinolfi, 'Procedural Rules in WTO Dispute Settlement in the Face of the Crisis of the Appellate Body' (2019) 61 QIL-Questions Intl L 50-52. US disruption of the functioning of the AB was possible because AB members must be approved by consensus of WTO Members and their term can be extended once following the same procedure (art 17(2) DSU). Theoretically, such a process allows every State to block the



Blocking the ability of the AB to function may lead to a serious risk of disrupting the DSS as a whole.³ As long as the AB is unable to work, an appeal to the AB will prevent the Dispute Settlement Body (DSB) from adopting any panel report.⁴ The latter will remain in limbo: it will exist, but will not be binding on the parties to the dispute.⁵ Some optimistically maintain that the panel stage is still alive and that in the GATT 1947 system vetoed reports had a certain role in the solution of disputes through negotiation.⁶ Nevertheless, this would result in a marginalization of the role of the DSS, which is far from a desirable result.

The risk of panel reports being frozen, coupled with the paralysis in the AB appointment process, occurs at a particularly significant time given the content of some disputes before the WTO dispute settlement bodies. Indeed, for the first time in the history of the WTO, many claims have been filed to challenge the enforcement of national measures which are not in conformity with WTO law and which the respondent States had justified by invoking national security exceptions.

Scarcely invoked since the conclusion of GATT 1947,⁷ GATT Article XXI is at the heart of a wide and never-ending debate on its scope.⁸

establishment of the AB or the re-appointment of an unwelcome member. In reality, the rule of consensus gives veto power mainly to powerful States, because States are not equally able to sustain a veto: T Cottier, S Takenoshita, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response' (2003) 58 *Aussenwirtschaft*, 176; C-D Ehlermann, L Ehring, 'Decision-Making in the World Trade Organization' (2005) 8 *J Intl Economic L* 66; P Low, 'WTO Decision-Making for the Future', WTO Staff Working Paper ERSD-2011-05 (2 May 2011) <www.wto.org/english/res_e/reser_e/ersd201105_e.pdf>; W Guam, 'Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus' (2014) 14 *J Intl Economic L*, 102; M Elsig, M A Pollack, 'Agents, Trustees and International Courts: The Politics of Judicial Appointment at the World Trade Organization' (2014) 20 *Eur J Intl L* 391.

³ This is also the opinion of S Charnovitz, 'A WTO If You Can Keep It' (2019) 63 *QIL-Questions Intl L* 14.

⁴ Art 16(4) of the Dispute Settlement Understanding (DSU).

⁵ For considerations regarding the costs of appealing a panel report at the present time, see J Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?' (2019) <<https://ssrn.com/abstract=3415964>> 10-13.

⁶ M Benitah, 'Does the Present Paralysis of the AB Mean that the WTO is Dead? No, and This Is Why' *International Economic Law and Policy* blog <<https://ielp.worldtradelaw.net/2019/12/does-the-present-paralysis-of-the-ab-means-that-a-wto-panel-report-is-now-worthless.html>>.

⁷ R Alford, 'The Self-Judging WTO Security Exception' (2011) 3 *Utah L Rev* 706 ff.

⁸ See, among many others, MA Reiterer, 'Article XXI GATT: Does the National Security Exception Permit "Anything Under the Sun"?' (1997) 2 *Austrian Rev Intl and*



Nevertheless, no panel reports had taken a stance on its reviewability or on the scope of the exemptions it allows until April 2019.

The preference of States to leave the interpretation of national security exceptions open may be the real rationale behind their unwillingness to bring claims before panels on the legality of measures justified by invoking GATT Article XXI. States would like to be free to evade their trade obligations by defining the measures deemed necessary to defend national security interests.

Assuming that this is the real reason explaining why States have rarely defended national measures invoking security exceptions before the DSS, since 2017 States' attitudes have changed. In fact, more panels have been set up to rule on national measures justified under GATT Article XXI. Moreover, in April 2019 a panel ruled on the legality of measures which the defendant considered to be lawful under this provision in the case of *Russia – Traffic in transit* (see para 2).

Unfortunately, the coincidence between the crisis of the DSS and the occurrence of many claims on measures adopted under Article XXI may hamper the development (and consolidation) of a jurisprudential stance on the reviewability and scope of GATT Article XXI. Indeed, because of the highly politicized nature of disputes concerning the enforcement of such provisions, it is likely that the adoption of the panel reports will be blocked by the disputing parties providing notice of their decision to appeal. Surprisingly, the crippling effect of the DSS crisis on the development of WTO case law on national security exceptions has not been adequately taken into account.

Eur L, 191-212; R Bhala, 'National Security and International Trade Law: What the GATT Says, and What the United States Does' (1998) 19 *University of Pennsylvania J Intl L* 263-317; HL Schloemann, S Ohlhoff, 'Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 *AJIL* 424-451; D Akande, S Williams-Elegbe, 'International Adjudication on National Security Issues: What Role for the WTO?' 43 (2003) *Virginia J Intl L* 365-404; A Emmerson, 'Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?' (2008) 11 *J Intl Economic L* 135-154; S Schill, R Briese, 'If States Consider: Self-Judging Clauses in International Dispute Settlement' (2009) 13 *Max Planck Yb UN L* 97-110.



2. *An overview of disputes relating to measures justified under national security exceptions*

In the last few years several WTO Members have requested the establishment of WTO panels to rule on the conformity with WTO law of national measures adopted by other Members who justify them by invoking Article XXI of the GATT (or Article 73 of the TRIPS Agreement). The latter allows WTO Members to derogate from WTO law in order to protect national security interests.

In particular, Article XXI provides, *inter alia*, that obligations stemming from the GATT must not be construed '(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests ... (iii) taken in time of war or other emergency in international relations'.

In April 2019, for the first time in the history of the GATT 1947 and 1994, a panel adopted a report concerning a national measure adopted under Article XXI. It focused on a dispute between the Russian Federation and Ukraine on Russian restrictions and bans on the transit of goods from Ukraine to other countries, across Russia.⁹ The issues that arose in the dispute are the result of the overall deterioration in relations between Ukraine and Russia that has been ongoing since 2014. Ukraine claimed a violation of Articles V and X of the GATT and Russia's Accession Protocol. Russia asserted that the measures were among those it considered necessary for the protection of its essential security interests in view of the international relations crisis with Ukraine and justified them under Article XXI(b)(iii) of the GATT. According to Russia, the panel lacked jurisdiction to address any of the issues in dispute because Article XXI was a self-judging provision.¹⁰ The panel concluded, on the contrary, that Article XXI was a justiciable rule¹¹ and clarified the scope of the provision of paragraph (b)(iii). In particular, it took a stance on the notions of 'emergency in international relations' and 'necessity'. Moreover, it clarified whether the identification of States' essential security interests was

⁹ Panel Report, *Russia - Measures Concerning Traffic in Transit (Ukraine)* WTO doc WT/DS512/R (5 April 2019) para 7.1.

¹⁰ *ibid* para 7.22 f.

¹¹ *ibid* paras 7.53-7.104.



of exclusive competence of the States invoking Article XXI, or whether WTO law limited States' freedom to decide over them.¹²

The DSB adopted the panel report a few days after its circulation.¹³ The parties to the dispute informally agreed not to appeal to the AB, making the panel report binding for them, although in April 2019 the starting of an AB procedure (and its conclusion under Rule 15 of the Working Procedures) would still have been possible.

The agreement between the Russian Federation and Ukraine was reached because neither party had an interest in appealing the panel report. The Russian Federation won the dispute, because the panel found that its national measures were permitted under GATT Article XXI.¹⁴ As far as Ukraine is concerned, while it was the loser in the dispute it probably considered the panel report's conclusion to be in its own interest. In fact, Ukraine itself might be interested in invoking GATT Article XXI(b)(iii) before the panel, whose establishment Russia had requested for the purpose of evaluating the WTO consistency of Ukrainian measures adopted in 2016, and which Russia claimed were not in compliance with several covered agreements, as well as Ukraine's WTO Accession Protocol.¹⁵

The informal agreement between Russia and Ukraine not to resort to the AB may not be possible in other disputes where the respondent parties have been invoking security exceptions as justification for national measures not in conformity with WTO law.

Several States¹⁶ and the European Union have requested the establishment of panels to challenge US tariffs on imported aluminium and steel products which are in excess of the rates set forth in the US schedule of concessions.¹⁷ The United States has invoked GATT Article XXI to

¹² *ibid* paras 7.76, 7.122-7.125; 7.130-7.149. For a comment on the Panel report, see V Lapa, 'Note on the Russia-Traffic in Transit Case' (2020) 69 QIL-Questions Intl L 5.

¹³ WTO doc WT/DS512/7 (29 April 2019).

¹⁴ Panel Report, *Russia - Measures Concerning Traffic in Transit* paras 7.122-7.125; 7.130-7.149.

¹⁵ WTO doc WT/DS525/1 (1 June 2017).

¹⁶ Turkey, Switzerland, Russia, Norway, India, China, Mexico and Canada.

¹⁷ WTO doc WT/DS/544/9, WT/DS/547/12, WT/DS/548/15, WT/DS/550/12, WT/DS/551/12, WT/DS/552/11, WT/DS/554/15, WT/DS556/16, WT/DS564/1. All panels were composed on 25 January 2019. In the dispute between the US and, respectively, Canada and Mexico, mutually agreed solutions were reached (WTO doc WT/DS550/13 (27 May 2019); WT/DS/551/R (6 June 2019)) because the US eliminated

justify them. Indeed, according to the US, the internal steel and aluminium market has been suffering from massive excess capacity, which has depressed prices and undermined the profitability of domestic industries and made it impossible for them to remain viable over the long term. From the US point of view, this has consequences for national (and global) security because US military forces rely on the US steel and aluminium industries.¹⁸ The US has also been claiming that Article XXI is a not reviewable provision.¹⁹

Similarly, in the disputes between Qatar, on one hand, and the United Arab Emirates,²⁰ Bahrain²¹ and Saudi Arabia²² on the other, the respondent States defend the lawfulness of their measures by invoking national security interests and refer to Article XXI of the GATT and 73 of the

certain duties on steel and aluminium products from Canada and Mexico, so that both panels were able to conclude their work (WTO doc WT/DS/550/R and WT/DS/551/R (11 July 2017)).

¹⁸ See the debate in the DSB among the claimant and the respondent State representatives in WTO doc WT/DSB/M/420 (29 October 2018) 26-36; WT/DSB/M/422 (3 April 2019) 1-4.

¹⁹ See First Written Submission of Norway (DS552), 1 May 2019, <www.regjeringen.no/contentassets/0f2915693bae4cd8be6010e29ff2c590/2019.05.01-ds552-norways-first-written-submission.pdf>; First Written Submission of the United States of America (DS552) (12 June 2019) <<https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS552%29.fin.%28public%29.pdf>>; First Written Submission of the European Union (DS548) (1 May 2019) <<https://trade.ec.europa.eu/wtodispute/show.cfm?id=772&code=1>>; First Written Submission of the United States of America (DS548) (12 June 2019) <<https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS548%29.fin.%28public%29.pdf>>; First Written Submission of the United States of America (DS544) (12 June 2019) <<https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS544%29.fin.%28public%29.pdf>>.

²⁰ WTO doc WT/DS526/2 (6 October 2017). The panel was established on 28 February 2018 and composed on 3 September 2018.

²¹ WTO doc WT/DS527/1, G/L/1181, S/L/416, IP/D/36 (4 August 2017). The panel has not been established yet.

²² WTO doc WT/DS528/1, G/L/1182, S/L/417, IP/D/37 (4 August 2017). The panel has not been established yet. Another claim has been filed by Qatar against Saudi Arabia to ascertain whether, as Qatar claims, Saudi Arabia has violated the TRIPS Agreement because copyrighted media contents owned by a Qatari company were subject to widespread piracy in Saudi Arabia while the company did not benefit from copyright protection: WTO doc WT/DS567/3 (19 November 2018). The panel was established on 18 December 2018 and composed on 18 February 2019.



TRIPS Agreement.²³ While Qatar contests the lawfulness of the economic embargo its Arab neighbours have imposed on it, they argue that Qatar has been funding international terrorist organizations.²⁴ Moreover, like the US and Russia, the Gulf States maintain that Articles XXI and 73 are self-judging provisions and that panels do not have jurisdiction to hear the cases.

In both the cases above mentioned if panels confirm that GATT Article XXI is justiciable, but rule out that the US as well as the Gulf States' measures fall under it, it may not be excluded that the respondent States (the United States, on one hand, the Gulf States, on the other) will appeal the panel reports before the AB to avoid the adoption of a DSB ruling ordering their withdrawal. On the contrary, if panels rebut the self-judging nature of national security exceptions or conclude that these are reviewable and that the US, as well as the Gulf States' measures are in conformity with the security exceptions, domestic policy reasons may lead the applicants (Norway, the EU and Qatar) to react against such findings. Moreover, the applicants may be interested in seeking to prevent other States from implementing the same measures. In both scenarios, the lack of a functioning appellate review procedure will result in the hindering of the development of WTO case law clarifying the scope of the security exceptions.

3. *Possible scenario*

Considering what has been just said, the most likely scenario is that the parties to the dispute will make an appeal to the AB to prevent the adoption of panel reports because all involved States may have an advantage in exploiting the current crisis of the DSS.

In the near future, those non-adopted panel reports, which nonetheless uphold the panel's conclusion in the case *Russia – Traffic in transit*, might have the effect of preventing States from interpreting Article XXI in a way that differs from that generally accepted by panels. In fact, although no

²³ *ibid.* For an initial comment see J Fahner, 'Qatar under Siege: Chances for an Article XXI Case?' *EJIL:Talk!* (9 January 2018) <www.ejiltalk.org/qatar-under-siege-chances-for-an-article-xxi-case/>.

²⁴ WTO doc G/C/M/129 paras 5.8-5-14; WTO doc WT/DSB/M/422 (3 April 2019) para 5.3 f; WTO doc WT/DSB/M/423 paras 7.3-7.5.

DSU provision seems to bind panels to follow the findings of previous panel reports on the same issue, and even though panel reports that will remain in a limbo will not be binding on the disputing parties, because of their existence, they may at least have a moral persuasion effect on States.

If, on the contrary, panels (or at least some of them) came to different conclusions about the reviewability of Article XXI and, possibly, to the interpretation of the scope of the same provision, this fact would introduce an element of uncertainty as to its interpretation and application, even though panel reports could not be adopted by the DSB. In other circumstances such uncertainty could have been resolved by appealing to the AB. The latter could have developed a coherent interpretation of Article XXI, that is not possible at the present time.

Therefore, the emergence of a clear and well-established interpretation of national security exceptions is linked to the resolution of the AB crisis or, at least, to the setting up of an alternative and provisional mechanism of appeal.²⁵ While in general terms, the risks of a single level of adjudication, especially that of contradictory reports on identical national measures, may be overcome by the existence of a well-established interpretation of many WTO provisions, in the case of disputes concerning

²⁵ Some authors have proposed solutions to guarantee the adoption of panel reports when the AB is deadlocked and to provisionally renounce the right of appeal: S Charnovitz, 'How to Save WTO Dispute Settlement from the Trump Administration' International Economic Law and Policy Blog <<https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>>; S Charnovitz, 'The Missed Opportunity to Save WTO Dispute Settlement' International Economic Law Policy Blog <<https://ielp.worldtradelaw.net/2019/12/the-missed-opportunity-to-save-wto-dispute-settlement.html>>; H Gao 'The Resurrection of the Appellate Body: Three Proposals' International Economic Law Policy Blog <<https://ielp.worldtradelaw.net/2019/12/the-resurrection-of-the-appellate-body-three-proposals.html>>; L E Salles, 'Bilateral Agreements as an Option to Living Through the WTO AB Crisis' International Economic Law and Policy blog <<https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-on-bilateral-agreements-as-an-option-to-living-through-the-wto-ab-crisis.html>>. The conclusion of an ad hoc agreement between the disputing parties to refrain from appeal before the start of the panel proceedings has been adopted in two cases concerning a safeguard measure imposed by Indonesia on imports of certain flat-rolled iron or steel products from Vietnam and Chinese Taipei (Panel Report, *Indonesia - Safeguard on Certain Iron or Steel Products*, WT/DS490/R; WT/DS496/R (18 August 2017)): see WTO doc WT/DS496/14 (27 March 2019) and WT/DS490/13 (15 April 2019). Within this framework an ad hoc agreement was concluded to grant the adoption of the panel report established under art 21(5) of the DSU.

provisions that have never been invoked, the likelihood of contradictory reports is high, since there would not be the AB's 'last world' to pave the way to consistent rulings.²⁶

For this reason the analysis that follows will start by assessing the proposals advanced to overcome the US criticism levelled against the AB and those aimed at circumventing the use of consensus in the nomination of AB members. The purpose is to verify whether their adoption might alter (or not) the AB legitimacy and authoritativeness. These requirements are essential for a judicial body that is called to solve disputes having a highly political nature, like those concerning measures adopted for national security reasons. In the second part of this study, the proposals advanced to establish an alternative second level of adjudication, that would take the place of the AB, albeit temporarily, will be also assessed. They will be evaluated on the grounds of their capability to ensure the development of coherent case law on WTO law provisions that have never been interpreted.

4. *How to re-establish a second level of adjudication: Proposals advanced so far*

Many proposals have been advanced to resolve the AB crisis. States have proposed amendments to the Dispute Settlement Understanding (DSU) in order to satisfy the main US concerns about the functioning of the DSS and in order to lead the US to give its consent to the appointment of new AB members.²⁷ As has been aptly observed, State proposals put

²⁶ J Pauwelyn, (n 5) 12.

²⁷ Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, WTO doc WT/GC/W/752/Rev.2 (11 December 2018); Communication from the European Union, China, India and Montenegro to the General Council, WTO doc WT/GC/W/753/Rev.1 (11 December 2018); Fostering a Discussion on the Functioning of the Appellate Body: Communication from Honduras, WTO doc WT/GC/W/758, WT/GC/W/759 (21 January 2019) and WT/GC/W/760 (29 January 2019); Guidelines for the Work of Panels and the Appellate Body: Communication from Brazil, Paraguay and Uruguay, WTO doc WT/GC/W/767/Rev.1 (25 April 2019); Informal Process on Matters Related to the Functioning of the Appellate Body: Communication from Japan, Australia and Chile, WTO doc WT/GC/W/768/Rev.1 (16 April 2019); General Council Decision on the Dispute Settlement System of WTO: Communication from Thailand, WTO doc

forward until now have uncritically upheld the grievances of the United States and are focused on limiting the role of the AB, to ensure greater control of States over it. Moreover, they do not make any assessment of the foundations of the US complaints.²⁸

In October 2019, following extensive consultations, the facilitator appointed by the GC Chair to help States find a solution to the paralysis in the process of the selection of AB members proposed the adoption by the GC of a decision on the functioning of the AB which essentially

WT/GC/W/769 (26 April 2019); Appellate Body Impasse: Communication from the African Group, WTO doc WT/GC/W/776 (26 June 2019).

²⁸ G Adinolfi (n 2) 54, 58. It has been proposed to amend the DSU by providing that only Member States are allowed to authorise a person who ceases to be a member of the AB to complete the disposition of any appeal to which that person was assigned while he/she was member of the AB. See WTO doc WT/GC/W/753/Rev.1, 3; WTO doc WT/GC/W/759, 1 f.; WTO doc WT/GC/W/767/Rev.1, Guideline n. 2; WTO doc WT/GC/W/769, 1 f.; WTO doc WT/GC/W/776, 2). At this time the rule is provided in the AB Working Procedure for Appellate Review (Rule 15), which was adopted by the AB. The US argues that it is not in conformity with the provision whereby the DSB has authority to decide on the appointment or re-appointment of AB members: Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, August 31, 2017 <<https://geneva.usmission.gov/2017/08/31/statements-by-the-united-states-at-the-august-31-2017-dsb-meeting/>>. Other proposals might also be implemented on the basis of authoritative interpretations of the DSU adopted by a three-quarters majority of votes (art IX:2 WTO Agreement). In response to US criticism about the AB's tendency to review panel findings with regard to the meaning of domestic law, some States proposed clarifying that the AB's mandate to review 'issues of law covered in the panel report' and 'legal interpretations developed by the panel' (art 17(6) DSU) does not extend to findings on the meaning of municipal law (WTO doc WT/GC/W/752/Rev.1, 4; WTO doc WT/GC/W/760, 3; WTO doc WT/GC/W/768/Rev.1, 2; WTO doc WT/GC/W/769, 2). It has also been proposed to provide that the AB is competent to address the issues raised on appeal by parties to a dispute, but only to the extent necessary for its resolution (art 17(12) DSU). The aim is to curb the AB's tendency to make findings on issues that are not relevant for the purpose of solving a dispute (WTO doc WT/GC/W/752/Rev.1, 4; WTO doc WT/GC/W/760, 2; WTO doc WT/GC/W/767/Rev.1, Guidelines 5; WTO doc WT/GC/W/769, 2 f.). Another proposal concerns the value of AB reports once adopted. It has been suggested that AB reports adopted by the DSB should not be considered definitive interpretations that bind panels or the AB in future disputes (WTO doc WT/GC/W/767/Rev.1, Guideline n. 6; WTO doc WT/GC/W/768/Rev.1, 2). Lastly, it has been proposed to clarify that art 17(5) of the DSU does not grant the AB any discretion to issue reports beyond the 90-day deadline set out therein (WTO doc WT/GC/W/759; WTO doc WT/GC/W/767/Rev.1, Guideline n. 3; WTO doc WT/GC/W/768/Rev.1, 2; WTO doc WT/GC/W/769, 2; WTO doc WT/GC/W/776, 2).



summarizes the proposals advanced by States.²⁹ During its last December meeting, the GC failed to reach the consensus needed to adopt the draft proposal.³⁰

Differently from States, some scholars have advanced proposals to restore the functioning of the AB by justifying the appointment of its members in a way which is different than that provided in Article 2(4) of the DSU, but which would likewise be lawful under WTO law.

In this spirit, Kuijper has recently advanced alternative solutions.³¹ The first one is to interpret Article 2(4) of the DSU – which provides for the DSB to select AB members by consensus – in the light of Article IX:I of the Agreement Establishing the WTO (so-called systemic interpretation). According to that latter provision, the WTO (in general) must continue the practice of decision-making by consensus followed under GATT 1947 as a general rule but, ‘*except when otherwise provided*’, decisions may be adopted by a majority vote if consensus cannot be achieved. According to Kuijper, the systemic interpretation of Article 2(4) would confer on the DSB the authority to appoint AB members using a majority vote when consensus is not reached. Moreover, according to the same author, while Article IX:I precludes a decision by a majority vote when it is ‘otherwise provided’ – as in Article 2(4) – this limit can be overcome by taking Article XVI:3³² of the Agreement Establishing the WTO into account. Indeed, Kuijper interprets the latter provision as creating a hierarchy between the WTO Agreement and the other covered agreements, including the DSU. What this author seems to refer to is an interpretation of the DSU consistent with the Agreement Establishing the WTO, because of the latter’s nature as the constitutive instrument of the organization.

²⁹ In favour of an authoritative interpretation by the GC concerning the same points is G Sacerdoti, ‘Guest Post: A Consensual “Quick-Fix” for the WTO Appellate Body Is Possible If There Is the Will!’ *International Economic Law and Policy Blog* (17 October 2019) <<https://ielp.worldtradelaw.net/2019/10/guest-post-a-consensual-quick-fix-for-the-wto-appellate-body-ispossible-if-there-is-the-will.html>>.

³⁰ WTO doc JOB/GC/222 (15 October 2019) and WTO doc JOB/GC/225 (9 December 2019). See also WTO doc WT/GC/W/791 (28 November 2019).

³¹ PJ Kuijper, ‘The US Attack on the WTO Appellate Body’ *Amsterdam Law School Legal Studies Research Paper No 2017-44*, 11 f <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076399>.

³² ‘In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict’.

A similar solution has been proposed by Petersmann,³³ who observes that the right (and duty) of the DSB to appoint AB members by a majority vote finds its rationale in the collective obligation of all WTO Members to maintain a functioning AB, as prescribed in Article 17 of the DSU. According to Petersmann, in order to overcome US objections to majority decisions, the WTO Ministerial Conference or GC should adopt an authoritative interpretation confirming the collective duty of Members to fill AB vacancies as they arise through majority decisions.³⁴

The second proposal advanced by Kuijper is that the GC select AB members by a majority vote. In Kuijper's view, although the GC has no formal competence in this respect, when extraordinary circumstances occur 'the law of international organizations' justifies allowing an organ to perform functions that Members have conferred upon other organs. Kuijper refers to the UN General Assembly Resolution *Uniting for Peace*³⁵ as a relevant precedent.

Former AB member Jennifer Hillman has advocated in favour of empowering the GC to select AB members by a majority vote. The legal basis of the proposal is, in her opinion, the Agreement Establishing the WTO. Indeed, she observes that, according to Article III:3 of the Marrakesh Agreement, the WTO administers the DSU and from this she infers that the CG has power to appoint AB members by a majority vote because no provisions of WTO law make the CG's power to do so conditional on the use of a specific majority.³⁶

Other commentators prefer the temporary replacement of the AB with arbitration as per Article 25 of the DSU rather than to justify the AB members' appointment with a majority vote on the ground of an extensive

³³ E-U Petersmann, 'How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crises?' (2018) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/71, 8 fn 25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300738>.

³⁴ *ibid* 8.

³⁵ GA Res 377(V) (3 November 1950).

³⁶ J Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?' Institute of International Economic Law Working Paper (2018) 13 (www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>).



interpretation of some provisions of the DSU or of the Marrakesh Agreement.³⁷

Arbitration pursuant to Article 25 was and is conceived as an alternative to the mainstream dispute settlement process within the DSS and as a means of expeditiously solving disputes concerning issues that are clearly defined by both parties. Among those favouring this solution, there is a widespread belief that Article 25 is drafted in terms that are sufficiently flexible to allow a replication of the essential features of the appellate process under Article 17 of the DSU.

5. Assessment of the advanced proposals

It is time to evaluate whether the proposals discussed above offer theoretically and practically satisfactory solutions for restoring an effective appellate procedure, so as to grant the development of coherent case law on security exceptions.

As far as States' proposals are concerned, they seem to be based on an incorrect premise, namely, that the solution to the WTO dispute settlement crisis lies in increasing the control of political organs over the system and in achieving the right balance of power between the political and judicial wings of the WTO. The premise, as well as the solutions proposed, are far from convincing. Rather, a serious reflection on the practice of relying exclusively on consensus as a decision-making technique seems the only way to overcome the DSS crisis. As a technique for adopting decisions, consensus makes it 'easier to maintain the current legal situation than to achieve change'.³⁸ While deciding by consensus has preserved the *grand bargain* resulting from the Uruguay Round negotiations, using it as the exclusive method for the adoption of decisions by WTO political organs has

³⁷ S Andersen and others, 'Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals' (2017) Centre for Trade and Economic Integration Working Papers paras 3, 12-14 <repository.graduateinstitute.ch/files/CTEI-2017-17>; A Raina, 'Mediation in an Emergency: The Appellate Body Deadlock. What It Is, Why It Is a Problem, and What to Do About It' (2018) 13 Global Trade and Customs J 376-386; J Bacchus, 'Saving the WTO's Appeals Process' (2018) <www.cato.org/blog/saving-wtos-appeals-process>; E Baroncini, *Il funzionamento dell'Organo d'appello dell'OMC: bilancio e prospettive* (Bonomo Editore, 2018) 127 ff.

³⁸ C-D Ehlermann, L Ehring (n 2) 65.



made such decisions difficult to achieve. Thus, the political wing of the WTO has appeared to be losing ground compared with the dynamic WTO dispute settlement bodies. In short, critical thinking about the ongoing use of consensus is warranted also in the light of the current DSS crisis. A review of the cases where consensus applies should also take into account its use in relation to the appointment of AB members.

In any event, a comprehensive rethinking of WTO voting procedures would require an amendment to the Agreement Establishing the WTO, ie not an achievable result in the short term.

The proposals put forward by the aforementioned scholars are open to criticism as well.

Kuijpers' first proposal, namely that the DSB be allowed to appoint AB members by a majority vote, is based on disputable grounds.³⁹

Firstly, the idea of interpreting Article 2(4) of the DSU in the light of Article IX:1 of the Agreement Establishing the WTO presupposes using a provision related to GC voting methods (Article XI:1) to interpret a provision (Article 2(4)) concerning the voting methods of a different organ (DSB). While all WTO Members are members of both the GC and the DSB, the latter has a different mandate and – above all – the Members' representatives that sit in the DSB are frequently different (usually dispute settlement specialists).⁴⁰ But even if one may assume such an interpretation to be legally founded, other perplexities remain. The proposal is based on the ground that Article XVI:3⁴¹ of the WTO Agreement creates a hierarchy between the latter and the other covered agreements, including the DSU. That is, in view of such a hierarchy, in the event of a conflict between the provisions of the Marrakesh Agreement and those of the other WTO agreements, the latter should be interpreted in a manner that is consistent with the Agreement Establishing the WTO.

The solution advanced is not persuasive. Indeed, it is hard to find an apparent conflict between Article 2(4) of the DSU and Article IX:I of the Agreement Establishing the WTO that – according to Article XVI:3 – would justify an interpretation of the former in conformity with the WTO Agreement. The expression 'except as otherwise provided' in Article IX:I

³⁹ J Pauwelyn (n 5) 6.

⁴⁰ J Hillman (n 36) 13.

⁴¹ 'In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict'.



is intended precisely to avoid a potential conflict between Article IX:I and other provisions of WTO law which provide for different rules for the adoption of decisions by WTO organs.

In addition, and from a more general point of view, it is reasonable to ask whether States, in implementing Article IX:1 of the Marrakesh Agreement, have actually given rise to a custom within the Organization which partially repeals Article IX:1, and which establishes consensus as the only rule for the adoption of decisions by the GC and the Ministerial Conference. In fact, in WTO practice, organs always take decisions by consensus and when conditions are not favourable to the reaching of a consensus, they prefer to forgo the adoption of a decision, rather than to resort to a qualified majority.

Nor is the second proposal advanced by Kujipers fully convincing; in this case he suggests that the GC could select AB members because, in extraordinary circumstances, under the law of international organizations, an organ of an organization would be justified in performing functions that members had conferred on other organs. It is far from clear what the author of the proposal means when he speaks about 'the law of international organizations'. He seems to be referring to a customary rule applied to international organizations and authorizing the conduct previously mentioned. But the existence of such a rule is highly questionable. First, it is doubtful that the occasional implementation of Resolution 377(V) that has occurred since 1950⁴² has brought into existence a customary rule authorizing the General Assembly to act when the Security Council fails to exercise its primary responsibility for maintaining international peace and security because of the lack of unanimity among the permanent Members. This practice was severely criticized by the socialist States and even some States that endorsed it changed their mind when they lost control of the General Assembly.⁴³ Moreover, even if the practice were more frequent, but limited to the conduct of UN organs, this would not be sufficient to support the conclusion that a general customary rule has come into being and is binding upon every international organization.

⁴² To date, ten special emergency sessions of the General Assembly have been convened: see C Tomuschat, 'Uniting for Peace: Introductory Note' <<http://legal.un.org/avl/ha/ufp/ufp.html>>.

⁴³ In relation to this, see B Conforti, C Focarelli, *The Law and Practice of the United Nations* (3rd edn, CEDAM 2004) 225.



The proposal whereby the GC's power to select the AB members by a majority vote could be derived from Article III:3 of the Marrakesh Agreement stretches the meaning of the latter provision far beyond its textual meaning. Indeed, when the provision refers to the WTO's responsibility to administer the DSU it clearly intends to express an obligation of the organization to establish and manage the DSS as a whole.

The proposal to make use of the arbitration provided for under Article 25 of the DSU as an alternative to the WTO Appellate Body in appeals related to panel reports has been followed by some States. The European Union has concluded, respectively, with Canada and Norway, two bilateral agreements under which the parties have committed, in the event of future disputes arising between them, to waive the right to appeal before the AB and to enter into ad hoc agreements to resort to arbitration pursuant to Article 25.⁴⁴ Therefore, parties have assumed a *pactum de contrahendo* to reduce the risk that they may lose interest in appealing. While from a practical point of view this may be a way to prevent an appeal submitted to the AB from blocking the adoption of a panel report, from a theoretical point of view it is not fully satisfactory.

Arbitration pursuant to Article 25 was and is conceived as an alternative to the normal dispute settlement process within the DSS, and, specifically, a means of expeditiously solving disputes concerning issues that are clearly defined by both parties.⁴⁵ However, the suggestion that arbitration be resorted to as a substitute for the appellate review distorts the arguments behind the decision to provide for an alternative method of dispute settlement in the DSU.

Moreover, the only dispute where arbitration under Article 25 was triggered does not prove that it can replace the appeal proceeding and become an integral part of the mainstream dispute settlement process.

In the case *United States - Section 110(5) of US Copyright Act*, the arbitrator established pursuant to Article 25 was asked to perform an activity

⁴⁴ Interim Appeal Arbitration Pursuant to Article 25 of the DSU between the European Union and Canada (25 July 2019) <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf>; Interim Appeal Arbitration Pursuant to Article 25 of the DSU between the European Union and Norway (21 October 2001) <https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf>.

⁴⁵ See the text of art XXV:I. See also 'Improved Dispute Settlement: Elements for Consideration. Discussion Paper Prepared by United States Delegation' GATT doc No MTN.GNG/NG13/W/6 (25 June 1987).



that was not regulated in the DSU, namely, to define the amount of nullification or impairment the European Communities had suffered as a result of the implementation of US legislation. Such an appraisal served as a benchmark intended to help States in dispute to reach an agreement on compensation. Therefore, it seems that the arbitration pursuant to Article 25, although used in the course of the ordinary procedure for dispute settlement, was intended as a means to fill a gap – that is, there was a need to estimate the damage incurred in order to help the parties to the dispute to reach a compensation agreement – and was not meant to take the place of the arbitration pursuant to Article 22(6).⁴⁶ For this reason, using this single case to assert that arbitration under Article 25 could replace the AB since it has already been resorted to in the framework of the mainstream dispute settlement proceeding instead of arbitration under Article 22(6) does not result in a fully convincing argument.⁴⁷ As admitted by the same Arbitrator in the proceedings established pursuant to Article 25, recourse to the same should not circumvent the DSU.⁴⁸

6. *The development of coherent case law on provisions never interpreted to date: A critical scenario*

The considerations set forth in the previous paragraph lead the present author to conclude that the proposals advanced to ensure the appointment of new AB members, albeit having the merit of re-establishing the functioning of an organ which can ensure the development of consistent case law on security exceptions, are not technically satisfactory. Therefore, they risk jeopardizing the legitimacy of the AB.

Arbitration under Article 25, whose limits have been illustrated above, would offer an alternative means of appealing a panel report. But what

⁴⁶ Art 22(6) of the DSU provides that an arbitration proceeding other than that under art 25 has the task of defining the amount of nullification or impairment the injured party has suffered. It is intended not to help States to reach an agreement as to compensation, but rather to intervene in the following stage of the proceeding, specifically when the wrongdoer objects to the level of suspension of concessions or other obligations proposed by the injured State.

⁴⁷ This is the opinion of E Baroncini (n 37) 136 ff.

⁴⁸ Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act (Article 25)* fn 22 to para 2.1 and para 2.5.

about its effect on the development of coherent and well-established WTO case law on national security exceptions?

On one hand it does not appear to be a good tool in terms of the contribution it can make to the development of WTO case law on provisions never before interpreted. Indeed, in so far as the institution of arbitral tribunals will be the result of bilateral agreements between WTO Members, their reports cannot 'become part of a consistent body of case law due to [their] lack of an institutional position in the system'.⁴⁹ This negative outcome might be overcome if an authoritative interpretation was adopted by the GC providing for arbitration as a substitute for appellate review as long as the appointment of AB members remains blocked, as suggested by Petersmann.⁵⁰ However, the supporters of Article 25 arbitration also advocate that it should replicate the essential features of the AB process. Therefore, the question arises as to whether there would ultimately be any difference from the AB.

On the other hand, it is not completely to say that criticism concerning the lack of a formal institutional stance of arbitrations under Article 25 agreements could not be overcome through the expertise and authoritativeness of the arbitrators. If, as provided in the agreements already concluded,⁵¹ former AB members will be selected as arbitrators, they should surely be aware of the importance of adopting non-contradictory decisions, especially in cases requiring the interpretation of politically sensitive provisions, like GATT Article XXI. Their expertise may help in consolidating an interpretation of security exceptions, although not formally part of the WTO case law as intended until now.

All that remains for us to say is to bitterly conclude that among the proposals advanced to cope with the risk of DSS paralysis, only the establishment of an arbitral tribunal under Article 25 might, under certain conditions, guarantee a certain degree of consistency on the of interpretation of provisions such as GATT Article XXI, which, if applied as a blank cheque in the hands of States, may hamper the functioning of the international trade system. The problem remains the low probability that States

⁴⁹ G Sacerdoti, 'The Stalemate Concerning the Appellate Body of the WTO: Any Way Out?' (2019) 63 *QIL-Questions Intl L* 54.

⁵⁰ E-U Petersmann, 'Between "Member-Driven" WTO Governance and "Constitutional Justice": Judicial Dilemmas in GATT/WTO Dispute Settlement' (2018) 21 *J Intl Economic L* 116.

⁵¹ See (n 44).



which have been invoking the non self-judging nature of Article XXI are ready to conclude Article 25 agreements and commit to making use of arbitral tribunals as an appellate mechanism even in cases where the claims concern the alleged unlawful use of security exceptions.

This conclusion highlights once again the urgency of restoring an institutional mechanism for appellate review in a system where huge economic interests may easily tempt States to limit the predictability of dispute settlement processes.

