Conférence sur la réforme de l'OMC (Paris 15 Novembre 2018)

Session III – How should we deal with the blockage of the Appellate Body (AB), since it raises questions on its role of « clarifying » different agreements?

Proposals by panel member Prof. Ernst-Ulrich Petersmann[*]

1. Is it currently possible to revive the appointment process for Appellate Body members and, if so, under what conditions and under what procedure?

According to Article 2 WTO Dispute Settlement Understanding (DSU), the Dispute Settlement Body (DSB) is 'established to administer these rules and procedures', and shall take decisions by consensus. The US strategy of unilaterally blocking DSB consensus decisions on the appointment of AB members since 2017 is inconsistent with the legal duty of all WTO members to maintain the AB as legally prescribed in Article 17 DSU (e.g. being 'composed of seven persons', with vacancies being 'filled as they arise'). It is also inconsistent with the democratic mandate given to governments, when parliaments approved the WTO Agreement, incorporated it into domestic legal systems (e.g. in the EU and USA), and requested their governments to implement it.[1] The US explains its unilateral blocking by US concerns with WTO dispute settlement reports and AB practices.[2] Yet, the US has offered *no evidence* that these 'judicial interpretations' of WTO rules and their long-standing acceptance in DSB practices have been inconsistent with the powers of WTO panels and the AB 'to clarify the existing provisions … in accordance with customary rules of interpretation of international law' in their judicial task of 'prompt settlement' of trade disputes (Article 3.3 DSU) aimed at 'providing security and predictability to the multilateral trading system' (Article 3.2 DSU) .

The US criticism is based on its political disagreements with certain AB interpretations regarding (1) WTO trade remedy rules (e.g. on anti-dumping calculations, safeguards, subsidy rules) and regarding AB powers under the DSU relating to (2) the 90 day deadline for appeals (Article 17.5 DSU), (3) 'Rule 15' of the AB Working Procedures (authorization of AB members to complete pending AB proceedings beyond the termination of their mandate), (4) the AB duty to address all issues of law raised in panel reports (Article 17.12 DSU), (5) AB review of facts (Article 17.6 DSU), (6) and precedential value of AB legal findings except for cogent reasons (Article 3.2 DSU). According to WTO law, such political disagreements must be resolved through *political means* like amendments or 'authoritative interpretations' of WTO rules by WTO Members (Arts IX, X WTO), or by DSB consensus on non-adoption of dispute settlement reports (Article 17.14 DSU). 'Hostage-taking' of the AB by persistently 'blocking' and 'linking' the filling of AB vacancies to political DSU reforms is inconsistent with the DSU (e.g. Arts 3.10 and 17), with the democratic mandates given to WTO Members, and with the judicial mandates given to WTO dispute settlement bodies for third-party adjudication of disputes among WTO Members over the interpretation and application of WTO rules.

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[1] For example, neither the 1994 Uruguay Round Agreements Act nor the 2015 US Trade Promotion Authority legislation authorize the US executive to unilaterally destroy the WTO AB system. Article 3 TEU mandates the EU to promote 'strict observance of international law' also in the EU's external relations, without any mandate from parliaments to destroy the WTO AB.

[2] See the US President's 2018 Trade Policy Agenda, March 2018, at pp. 22-28.

Also the DSB mandate is limited 'to administer these rules and procedures' (Article 2 DSU). Neither individual WTO Members nor the DSB have a legal mandate to destroy the AB and, thereby, the WTO legal and dispute settlement system (e.g. because panel reports may no longer be adopted without completion of an appeal, cf. Article 16.4 DSU).[3] The US strategy of unilaterally terminating the existence and jurisdiction of the AB by preventing the appointment of AB judges[4], and its toleration by other WTO Members since 2017 resulting in the illegal reduction of AB membership from seven to currently only three judges, amount to illegal *de facto amendments* of the DSU that go beyond the limited, administrative mandates of the DSB (Article 2 DSU) and of most WTO trade diplomats. These illegal DSB practices justify – and legally require – majority decisions by the WTO Ministerial Conference or WTO General Council pursuant to Article IX WTO in order to maintain the AB as legally prescribed in Article 17 DSU and as democratically mandated, when parliaments approved the WTO agreement for ratification. As clarified in Article XVI.3 WTO, the majoritarian decision-making powers of the WTO Ministerial Conference and of the WTO General Council under Article IX.1 WTO 'prevail' over the DSB powers and DSU rules 'in the event of a conflict', such as the illegal US attempt at unilaterally terminating the AB jurisdiction.[5] Decisions under Article IX.1 based on 'a majority of the votes cast' could initiate and complete the WTO selection procedures for filling AB vacancies and protect the AB as legally defined in Article 17 DSU. Article IX.2 could be used for authoritative interpretations 'taken by a three-fourths majority of the Members' (Article IX.2) confirming the collective duties of WTO members to fill AB vacancies in case of illegal blocking of AB nominations on grounds unrelated to the qualifications of AB candidates. Contrary to the fears of some WTO diplomats, such majority decisions necessary for preventing the illegal destruction of the WTO AB system do *not set a precedent* for future WTO majority voting on discretionary, political issues (rejected as a 'nuclear option' by most WTO diplomats).

2. **Can we dissociate this reactivation and possible modification of some of the Appellate Body's operating rules from calls for reform of other WTO instruments, in particular those relating to trade defence measures?**

The WTO Agreement (e.g. Article III) and its DSU separate *political* from *judicial functions*, prescribe 'good faith implementation' of the DSU, and prohibit linking 'complaints and counter-complaints in regard to distinct matters' (Article 3.10 DSU). It is to be welcomed that WTO Members continue making political proposals for amending WTO/DSU rules in order to modernize the incomplete and imperfect WTO/DSU rules and procedures.

Yet, the US has made no effort at demonstrating that the AB has exceeded its interpretative and judicial powers and duties under the DSU, which often justify 'judicial interpretations' different from 'political interpretations' advanced by WTO complainants (e.g. requesting 'dynamic interpretations' as often done by the USA itself) or by WTO defendants (e.g.

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[3] This is confirmed by Article X.8 WTO (amendments of the DSU by the Ministerial Conference) and by the Ministerial Decision adopted by the Trade Negotiations Committee on 15 December 1993 inviting 'the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement…, and to take a decision. … whether to continue, modify or terminate such dispute settlement procedures'.

[4] Cf. E.U.Petersmann, The Crown Jewel of the WTO has been stolen by US Trade Diplomats – and they have no Intention of Giving it Back, in: D.Prevost *et alii* (eds), *Restoring Trust in Trade – Liber Amicorum for Peter Van den Bossche* (Oxford: Hart 2018), 105-118.

[5] Note that this requires convening the General Council in its role as General Council rather than 'as DSB' taking decisions by consensus, as it has been practiced when WTO Members wanted to censure the AB for its handling of *amicus curiae* briefs (cf. WTO doc. WT/GC/M/60); cf. P.J.Kuijper, The US Attack on the WTO Appellate Body, in: *Legal Issues of Economic Integration* 2018, 1, at 10.

denying state consent to dynamic interpretations).[6] The occasional US denials of quasi-judicial functions of WTO panels and the AB for impartial, independent third-party adjudication of WTO disputes are clearly inconsistent with the DSU (e.g. Arts 3, 11, 12, 16, 17, 23, 25) and with WTO dispute settlement practices since 1995.[7] The political nature of the 'US blockage' and US criticism is also illustrated by the fact that the US has - during many years - not challenged these AB interpretations (e.g. based on 'Rule 15', judicial concretization of indeterminate WTO rules, emergence of consistent WTO jurisprudence). As the US Trump administration appears to be determined to unilaterally destroy the AB regardless of any EU offers to support 'modernization' of the WTO, the *political* responses to the US assault on the WTO AB system (e.g. DSU reform negotiations for DSU amendments) must not undermine the *collective legal duties* of WTO Members and of the DSB to maintain and protect the AB as legally prescribed in the DSU. EU trade diplomats should follow the advice from former US congressman and former AB chairman J.Bacchus and denounce the US 'bullying of AB judges' and of DSB members as illegal 'assaults on the rule of law'.[8] WTO Members and WTO institutions must respect and protect WTO law and engage in political WTO negotiations on DSU reforms and on 'modernization' of the WTO.

3. 'Speak truth to power'

As many statements by President Trump about 'terrible multilateral agreements' (like the 2015 Paris Agreement on Climate Change Prevention, the WTO Agreement and its dispute settlement system) amount to 'populist misinformation' of citizens, the failure of democratic institutions to hold politicians and WTO diplomats accountable for their violations of WTO law reveals deeper failures of democratic governance of public goods like the WTO.[9] EU trade diplomats should no longer ignore their limited, legal and democratic mandate to promote 'strict observance of international law' also in the external relations of the EU (Article 3 TEU); they must exercise EU leadership for protecting the WTO legal and dispute settlement system through

a) *WTO majority decisions* (as permitted by Article IX.1 WTO) on filling the AB vacancies;
b) *majoritarian WTO 'authoritative interpretations'* (Article IX.2 WTO) confirming the legal relevance of AB jurisprudence for legal 'predictability and security for the world trading system' (Article 3:2 DSU);
c) *confirmation of the availability of 'arbitration within the WTO as an alternative means of dispute settlement'* (Article 25.1 DSU) also for agreed appellate review; and

[6] This often opportunistic character of 'political interpretations' of WTO rules by complainants and defendants is illustrated by many examples of 'creative interpretations' of indeterminate procedural WTO rules (e.g. on admission of *amicus curiae* briefs, making panel and AB meetings open to the public) as well as of substantive WTO rules (e.g. on recognizing living organisms as 'exhaustible natural resources' in terms of Article XX(g) GATT, interpreting a GATS prohibition of 'anti-competitive practices' as prohibiting price-fixing cartel agreements) advocated, obtained and celebrated by the US as a complainant and criticized by WTO defendants losing the dispute. On the numerous examples of 'bad lawyering' by US trade negotiators ignoring the customary rules of treaty interpretation in their power-oriented attempts at imposing protectionist interpretations of WTO rules (e.g. Article 17:6 Anti-dumping Agreement) see Kuijper (note 5).

[7] This quasi-judicial mandate of the AB has been emphasized by AB members since 1995; cf. E.U.Petersmann, Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement, in: *JIEL* 21 (2018), 103-122.

[8] Cf. See J.Bacchus, Might Unmakes Right. The American Assault on the Rule of Law in World Trade, Centre for International Governance Innovation CIGI Papers No. 173 (May 2018).

[9] Cf. E.U.Petersmann, *WTO Diplomats: stand up to US power politics*, Financial Times October 16, 2018, p. 8.

d) respect by WTO diplomats for the democratically approved allocation and separation of limited legislative, executive and judicial powers of WTO institutions.[10]

Protecting the multilaterally agreed WTO legal and dispute settlement system as a global public good of systemic importance far beyond trade (e.g. for 'sustainable development', rule of law, and 'democratic peace') requires institutionalizing 'public reason' enabling citizens and their democratic institutions to support WTO law and voluntarily comply with WTO rules. Even if other WTO Members cannot prevent the US Trump administration from violating WTO law, they must protect their common self-interests in using the DSU among themselves by preventing the WTO legal and judicial system from being unilaterally dismantled by US power politics aimed at terminating the AB capacity of exercising its jurisdiction. As AB judicial interpretations and dispute settlement reports have been consistently adopted by WTO members (including the US) in DSB and DSU legal practices since 1996, they have become part of the *acquis* of *WTO law*, without prejudice to the *political powers* of WTO Members to amend and further develop the incomplete and imperfect WTO legal and dispute settlement system. Yet, many of the US proposals for DSU reforms reflect governance failures inside the US rather than WTO governance failures.[11] As US trade diplomats are unwilling to strengthen the WTO AB system and WTO trade diplomats fail to assume their legal responsibilities for protecting the AB system, the US strategy of terminating the AB jurisdiction is likely to be successfully realized in December 2019, when the terms of two of the currently three AB members expire. This risks further undermining the whole WTO legal and dispute settlement system, democratic constitutionalism and multilevel governance of public goods to the detriment of citizens all over the world.[12]-

[10] Obviously, such WTO majority decisions need to be carefully prepared in consultations with other WTO Members and with the democratic majority in the US House of Representatives, which is unlikely to support President Trump's threat of a US withdrawal from the WTO.

[11] The domination of the development of GATT/WTO law by the USA since 1948 entailed that many problems of American democracy and interest group politics have increasingly undermined also GATT/WTO law and practices, such as (1) protectionist abuses of trade remedy rules, (2) excessively vast interpretations of 'national security' in US trade laws (e.g. Section 232), (3) hegemonic recourse to 'aggressive unilateralism' (e.g. Section 301), (4) disregard for the customary rules of treaty interpretation, (5) politicization of appointments of judges, (6) political interferences into third party adjudication disregarding the democratically defined separation of executive and judicial powers (e.g. of the AB), (7) abusive 'blocking' of the nomination of judges or (8) of the adoption of impartial dispute settlement rulings, and (9) non-implementation of legally binding dispute settlement rulings. The less US governments succeed in limiting these 'domestic governance failures', the more 'populist protectionists' inside the US (e.g. US steel lobbies and their former advocates like Lighthizer) call for adjusting WTO rules to US protectionism, for instance in the US Trade Policy Agenda of March 2018 signed by USTR Lighthizer (see note 2).

[12] Cf. E.U.Petersmann, The 2018 American and Chinese Trade Wars Risk Undermining the World Trading System and Constitutional Democracies, in: *EUI Working Paper Law* 2018/17.