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What Kind of Dispute Settlement for the World Trade Organization?

Proceedings of the Conference organized by the World Trade Institute on 4 February 2019 at the World Trade Organization, Geneva

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Programme of the World Trade Institute Conference on

What Kind of Dispute Settlement for the WTO?

Monday, 4 February 2019
at the World Trade Organization, Geneva

Room D

9:20 – 9:30 Welcome by **Prof. Dr. Elisa Fornalé,** SNSF Professor, World Trade Institute, Bern

9:30 – 11:00 **Session 1: How to ensure the independence and impartiality of WTO adjudicators?**

Chair: **H.E. Mr Didier Chambovey**, Ambassador, Permanent Representative of Switzerland to the WTO, Geneva

Panelists: **Mr Daniel Crosby**, Partner, King & Spalding, Geneva
Mr Stephen Fevrier, Head of Mission, Permanent Delegation of Organisation of Eastern Caribbean States to the United Nations, Geneva
Prof. Dr. Petros Mavroidis, Columbia Law School, New York
Mr Niall Meagher, Executive Director, Advisory Center on WTO Law, Geneva

Ms. Sara Nordin, Counsel, White & Case, Geneva

Ms. Maria Pereyra, Senior Counsellor, Legal Affairs Division, WTO.

11:00 – 11:30 Coffee break

11:30 – 13:00 **Session 2: How to balance prompt settlement with adequate settlement of disputes?**

Chair: **H.E. Mr Roberto Zapata Barradas**, Ambassador, Permanent Representative of Mexico to the WTO, Geneva

Panelists: **Mr James Flett**, Deputy to the Director of the WTO Team, Legal Service, European Commission, Brussels
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Ms. Cherise Valles, Deputy Director, Advisory Center on WTO Law, Geneva

Mr Alan Yanovich, Partner, Akin Gump, Geneva.

13:00 – 14:30 Lunch break

14:30 – 16:00 **Session 3: How to ensure that dispute settlement contributes to the security and predictability of the multilateral trading system?**

Chair: **H.E. Mr J.S. Deepak,** Ambassador, Permanent Representative of India to the WTO, Geneva

Panelists: **Mr Philippe De Baere**, Managing Partner, Van Bael & Bellis, Brussels

Prof. Jennifer Hillman (via video call), Georgetown Law Center, Washington D.C.
Prof. Robert Howse, New York University School of Law, New York
Prof. Dr. em. Ernst Ulrich Petersmann, European University Institute, Florence
Mr Frieder Roessler, former Executive Director, Advisory Center on WTO Law, Geneva.

16:00 – 16:30 Coffee break

16:30 – 18:00 **Session 4: Has WTO dispute settlement made a useful contribution to the rule of law and the development of international law?**

Chair: **Dr. Marion Jansen**, Chief Economist, ITC, Geneva

Panelists: **Prof. Dr. em. Georges Abi Saab**, Graduate Institute, Geneva

Prof. Dr. Gabrielle Marceau, Senior Counsellor, Legal Affairs Division, WTO
Mr Nicolas Lockhart, Partner, Sidley, Geneva
Mr Robert McDougall, Senior Fellow, Centre for International Governance Innovation, Canada
Prof. Dr. Joseph Weiler (via video call), New York University School of Law, New York.

18:00 – 18:10 Closing by **Prof. Dr. Michael Hahn**, Director of the Institute for European and International Economic Law of the University of Bern Law School and Director at the World Trade Institute, Bern

Note on Transcription and Editing

This e-book contains the remarks of the Conference participants who agreed to publication. The participants who did not have written remarks were provided by the Conference organizers with the transcription of their interventions and given an opportunity to make appropriate corrections and edits. All texts in this book have been reviewed by relevant participants and reflect their final edits.

Session 1: How to ensure the independence and impartiality of WTO adjudicators?

Chair: H.E. Mr Didier Chambovey, Ambassador, *Permanent Representative of Switzerland to the WTO*, Geneva

Panelists: Mr Daniel Crosby, Partner, *King & Spalding*, Geneva
Mr Stephen Fevrier, Head of Mission, *Permanent Delegation of Organisation of Eastern Caribbean States to the United Nations*, Geneva
Prof. Dr. Petros C. Mavroidis, Professor, *Columbia Law School*, New York
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Mr Daniel Crosby

How to ensure the independence and impartiality of WTO adjudicators seemed like a softball question. We all agree that the answer should be according to the DSU and should work ok, but in practice it hasn't, in my view, always worked out. When Amb. Chambovey started with his quote in the beginning that adjudicators should approach their task with circumspection. I remember reading that as well in the last couple of weeks and months while thinking about this and it struck me why should adjudicators address an issue with circumspection. Is it because they feel pressure, they feel they have to conform to something or because they are using their own brain in the context in which they are working. I would suggest that independence can exist when you still have pressure. I think that is what the first comments were. In a system of checks and balances adjudicators feel a pressure to make sure that what they are doing is consistent with what they are told to do. The problem here, a lot of the time, is what they are told to do is not clear, and then if there is a mistake made there is no way to fix it. Under the rules there are a couple of ways to fix [mistakes], but in practice nothing gets fixed by creating a new rule, so there is no way to let off steam if the judges get it wrong, which is inevitable in every system.

I was interested in Petros's comment […] of which biases we are protecting the system from through this independence. The solution or preference towards institutions struck me as interesting as there is always institutional bias and in an organization like the WTO, where it's job is to move towards freer trade, there are probably going to be biases against instruments that lead to less free trade but what is referred to as fair trade. I think we have seen that bias against a certain

interpretation of those instruments. We should consider whether there is institutional bias in this house and what it leads to in terms of Members' expectations.

I think Maria raised an interesting point of a concern, not [her particular] concern, but a concern that is always hovering about. The panelist, the person that we are looking at, won't listen to us but sticks to their own position and what that means for the result in our case.

Now, I will leave you with two other points and assumptions. I remember Petros' slide with respect to the beginning of the GATT when the Members were a smaller group who had more of a common interest and shared view of things. I submit to you that is not the case today, and it leads to different visions of what independence is and even whether independent judiciary is something we all value or not. I don't think we should take for granted that independent judiciary is something that everybody, and each WTO Member, values or enforces, even though it is black letter law in the basic texts. I am struck by pronouncements by heads of supreme courts of Members where they very openly denounce independent judiciary in some of the biggest Members in the house. I don't think we can proceed on the basis that we have common interests in the economic rationale of the Organization, and I don't think we can rest assured that we all share a commitment to judicial independence at all. I think those two things lead to vastly different results when we are thinking about judicial independence and value when we put on it.

I will stop there, but in answer to the question on how to ensure the independence of WTO adjudicators - right back to the first point, you need to have a legislative rule-making function in order for there to be legitimacy and independence in a balanced way. It is impossible to strike that balance without the other functions of the WTO working. I am not optimistic that we can solve the independence, or maintain the independence, issue and fix the adjudicatory function without fixing the other parts of the machine.

Mr Stephen Fevrier

As a delegate and a non-practitioner, I think it is also important for me to share my own reflections on the need to preserve, if not reinforce, the independence of the system, particularly for small states. Other contributors to this volume have gone into the some of the mechanics of the appointment process for the Appellate Body members, as well as panels, so I will not deal with the mechanics, but share my own reflections. There are two main areas where the WTO dispute settlement system needs to preserve its impartiality and independence. The first being in the selection process for adjudicators at both the panel and appellate review stages of WTO dispute settlement and the second being the approach taken by appointed adjudicators in making their findings.

On the selection process. To ensure that the best persons are appointed to panels, the current process envisages the selection of panellists by the DG, based on the recommendation of the Secretariat, in the event that the parties to the dispute, themselves, are unable to agree on panellists. To my mind this system works well. Of course, this process, while somewhat unique, is not entirely dissimilar to the process through which arbitrators are selected in international arbitration proceedings - the parties have primary responsibility for the selection of arbitrators, but there is a default mechanism for selecting arbitrators in the event that the parties are unable to agree. In the WTO system, if the Secretariat and the DG are to play such a pivotal role in the appointment of adjudicators, it is important that they remain impartial with respect to matters that are taking place both within and outside of the WTO concerning trade measures which some Members may apply. This is particularly important, particularly in instances where those matters which may be opined on may form the core of disputes in the future. Therefore, interventions in the public domain by the Secretariat and the DG may affect adversely the presumption of independence and neutrality when panels are composed. Overall, the current process for the appointment of panels has proved to be useful but the Secretariat and the DG must be, and must be seen to be, impartial in their public pronouncements.

How could this impartiality and independence be preserved, if not strengthened? One of the ways which currently works fairly well is that the WTO employment contracts make staff duty-bound to preserve or adhere to independence and neutrality in the execution of their functions. These functions include, of course, advice provided on the selection of panellists, and also, and I think this is critical, legal advice provided to adjudicators in the context of their execution of the dispute settlement function. This is critical given the influence that legal advice to panels as well as the Appellate Body Members coming from the Secretariat could have on the findings of these adjudicators. Secondly, panellists are required to abide by a code of conduct. To my mind, given the importance of preserving the impartiality of panels the recently issued EU proposal for standardizing the body of potential panellists is a good one. This will offer an additional layer of transparency and scrutiny. It is also important that the Secretariat in its efforts aimed at panel selection should not seek persons who are deemed to be malleable to Secretariat influence, but persons who are willing to offer dissenting views, and are unmoveable in their independence. With respect to the qualifications of adjudicators, and this is also an important component of independence and impartiality, qualification requirements for panellists mandate that panellists must have a familiarity with the matter before them; a sufficient understanding of trade policy and law in order to be able to effectively interrogate and assess the facts presented.

Currently, the typical formulation of panels is one lawyer, one subject matter expert, and typically a diplomat or government official. This is a good balance and, to the extent possible, this should be preserved. This allows for different minds with different expertise to engage with a particular

issue. Unlike in the AB where ABMs have to keep an eye on their re-appointment, panellists are, almost always, selected by the DG with the assistance of the Secretariat, as opposed to WTO Members who can seek to influence re-appointment.

Hence, the appointment of an ABM is subjected more to Member control and oversight given the current re-appointment process. The ABM selection process is completely Member driven and proposed candidates must be perceived as being more, in some instances, amenable to a legal, philosophical, ideological or jurisprudential leaning, in order for them to be considered. In other words, the inherent biases must be exposed in order for them to be considered by certain Members. I think that point was raised early on. To counter this, Members can consider, in the context of WTO reform discussions, having a single term for ABMs, rather than the current two terms; with the second term being subjected to a re-appointment process that can be blocked by Members. Perhaps a six to eight-year appointment without the option of re-appointment. This would reduce the extent to which Appellate Body Members would need to consider how their decisions will be viewed by Members. And parenthetically, while there should be a collective responsibility taken by a division for any report issued, some WTO Members seem intent to make determinations on who may, or may not, have influenced the decision. On the other hand, if Members would like to preserve a four-year term then re-appointment should be automatic failing cogent reasons, which may include manifest impropriety. A recent example of this can be found in the decision of the Dispute Settlement Body (DSB) not to re-appoint ABMs. Automaticity in re-appointment would unshackle the hands of the ABMs and could substantially improve their independence. Also, the Members of the Appellate Body should be increased to at least nine or perhaps eleven. This would not only relieve the strain on the system but would significantly allow ABMs to be drawn from different countries at different levels of development.

Currently, ABMs tend to come from a very narrow range of countries. As I represent a group of small countries, I believe it is really important to ensure that there is an Appellate Body that represents the diversity of the WTO Membership. Overall, the system works as it allows for all Members of the WTO to be treated equally. Indeed, there is an opportunity to strengthen the appointment and re-appointment process for ABMs but the system does not require a fundamental root and branch change. Any change towards Member control could very well compromise the fundamental fairness of the system. Of course, one of the Member States which I am honoured to represent, Antigua and Barbuda, has proven that the system can be fair. In this regard, in the online gambling dispute, Antigua and Barbuda, a small country with miniscule economic size relative to the US, was able to receive a favourable judgement in respect of certain US measures affecting the provision of cross-border gambling and betting services. This was a typical David *vs* Goliath story. However, that is not where the story ends. Not only must the system be fair in terms of the outcomes and application of the rules, but resources should be provided to allow Members at all levels of development to participate effectively. In addition, the system must be reformed in a manner that ensures that small Members can effectively enforce WTO rulings that have been rendered in their favour.

Finally, there must be an approach which ensures the interpretation and application of legal rules and principles by a neutral third party. This is what the system currently has, and this must be preserved while undertaking reforms that render the dispute settlement function more effective. This is particularly important for small states which do not have the economic, financial and political strength to influence decisions. And, if we move from the system which we currently have and to one where power and influence become more important than the application of legal rules and principles, the fundamental equity which is found within the system, in a sense, would not only be compromised but would be disarrayed.

Prof. Dr. Petros C. Mavroidis

I see a paradox: on the one hand the WTO states that it cares about independence, in the DSU, from national governments, and I will show you why I think it is from national governments, and yet practice shows an overwhelming recourse to governmental panellists, who, in my view, are likelier to being influenced by national positions. So, the way I understand the issue is that this outcome is dictated by overlapping preferences between the membership and the WTO Secretariat. To prove my argument, I will start by asking the question, why does the DSU care about independence and impartiality? I will try to explain a little about the two concepts in WTO law, and show that independence should be understood as lack of dependence from government influence, whereas impartiality denotes the lack of influence from parties to a dispute. I will then speak about practice in this area, and then evaluate practice in light of the statutory mandate.

Why do we care about this issue? I will answer in one sentence: because we want to avoid biases. The question, of course, is which biases should we avoid, and the response to this question will be the key of my intervention. Independence and impartiality have nothing to do with expertise. You can be independent and impartial and totally non-expert. Expertise is not an issue when we discuss these concepts.

Let us start with semantics. What do these terms mean? The DSU does not mention impartiality; it is obliquely mentioned in Article 18 (*no ex parte* communications). The context makes me believe that what DSU cares about is impartiality from parties to the dispute. Independence is discussed more in the DSU. It is independence from national governments that DSU cares about. Article 18.3 and 17.3 of DSU state: no citizens of parties to a dispute should adjudicate their case, because, the presumption is they will be influenced by national positions. Article 8.3 is crucial, and independence is crucial, because impartiality in and of itself does not suffice. For example, I could be a New Zealand delegate. My country practices zeroing the way the US does. I am adjudicating a dispute between the US against China on zeroing. Since I am a New Zealander who practices zeroing like the defendant, I might think twice before I decide the issue, since my decision will affect my country's practices. I might be impartial but I am not issue-independent. So, the DSU correctly includes both an impartiality- as well as an independence-requirement. I need to take distance from my national position as well. Of course, in constitutional debate, in domestic constitutional debate, those concepts are slightly different. Essentially, there, we want independence of the adjudicator from both the legislative as well as from the executive. Legislative in the WTO would be the WTO Membership, and executive would be the WTO Secretariat. As I will show you in a moment, this is not the independence the DSU cares about. The DSU wants to avoid judges judging in line with parties' positions, that is clear, and in line with national positions, and that is also clear. There are some contradictions. For example, the DSU cares about geographical considerations. Well, there might be a trade-off between geography and independence. What if in one particular country, for example, constitution mandates that you have to, if you are a government official, follow national positions. Independent Secretariat is not an issue in the

DSU, otherwise why allow Maria Pereyra who is sitting next to me and represents the Secretariat, to decide more or less who will be the panellists? The DG, at the end of the day if Maria's recommendations have not been accepted by the parties, will decide on the composition of the panel. My work with Louise Johanesson, an econometrician from Sweden, suggests that, in 61% of all cases until the end of 2016, the DG appointed at least one Member of the Panel. So, obviously, the DSU does not care about independence from the Secretariat. It presumes it.

There is a DSU preference for independent courts. Personally, I am in favour. I see trade-offs between implementation and intellectual integrity of decisions. There is a study, which I was discussing with Niall Meagher over the weekend, by Eric Posner, and John Yoo, about how dependent courts ease implementation of decisions. What is the idea? The idea is that if we appoint our own judges, the judges, knowing the political economy of the appointor, they will know how much the appointor can take. The judge will come up with decisions which the appointor can implement. And the authors cite a lot of empirical evidence to this effect. Here we see a contradiction in the DSU. Article 3.7 states that the preferred solution is implementation. If DSU cares about implementation why does it privilege independent courts? If it cares about implementation, it should introduce a ISDS-type of dispute settlement. If the ordinal preference is independence, which I share, then the study by Posner & Yoo can be side-stepped.

How can we respond to the question to what extent in practice does WTO avoid biases? I think the starting point should be something like this. You look into the identity of those getting the nod to work as panellists, and their national positions as well. And then you look into the overlap between the panel findings and the national positions. So, when you look essentially into the question of issue-independence, to what extent, in my New Zealand example, am I prepared to go against my national position? Of course, you have to control for a number of other variables, but what I describe so far would be the brass tracks of the framework to decide to what extent WTO *de facto* avoids biases, not just *de jure*. In practice, I observe that the Secretariat's preferences are in favour of governmental panellists. By Secretariat preferences, I mean the identity of the people that end up becoming panellists following recommendation by the Secretariat, Legal Affairs Division or Rules Division, and then eventually completed by the DG. 75% of all panellists, we find in our paper with Louis Johansen, between 1995 and 2016, are actual or former government officials.

Does this number reflect the WTO Membership's preference? No. Members will only approve, and very often not even that (when the DG appoints). Membership's preferences are prevalent when it comes to the composition of the Appellate Body. Over 55% of all appointments until now, from 1995 onwards, are government officials. The slope goes upwards, if you look into recent years. The current Appellate Body has three Members, all former government officials.

So now you will agree with me that it is the moment to announce "Houston, we have a problem". If, on the one hand, we want independence, and on the other hand we keep on appointing governmental officials, then there is a *prima facie* issue of contradiction and inconsistency. Proof of dependence is impossible. Anonymity of dissent makes it impossible. I know many of you that work here might know who drafted what, but outsiders, like myself, will have absolutely no idea about who did what. But furthermore, even if you take it from the horse's mouth, then we are facing a classic prisoner dilemma: judges have absolutely no incentives to explain

what the rationale for their decision is, if the rationale for their decision is that they want to defend home truths. When I look into incentives, quite frankly, you will allow me to think that issue-independence is much, much likelier when you talk to private agents, than when you talk to government officials.

There is a non-government panellist sine-curve. What do I mean by this? Well, the original GATT in the 1940s there was a relational contract. You get 23 like-minded guys around the table. It was like the European Union of six and nine members. You had the top negotiators, people like Dana Wilgress from Canada, acting as frequent panellists in the first five or six years of the GATT. Over time things changed a lot. The GATT started outsourcing expertise, and one of my mentors, if not my most influential mentor, Bob Hudec, always used to say that the apex was the DISC dispute. I tend to agree with Bob. The DISC is the case that changed almost everything. It was the case where they appointed three professors of economics to act as panellists. Ulrich Petersmann, I think, was involved a little bit in this case. Two of the three panelists were finance professors, and they highjacked the panel process. From that moment onwards, everything changed. Of course, the WTO changed as well. Heterogeneity of Membership increased. The GATT Legal Office was strengthened, and extensive use of governmental panellists was encouraged.

What would I do to address the paradox I described so far? I cannot tell you too much in detail in two minutes, of course. But I can tell you that I do not believe in Goldilocks at all. I would not be prepared to make any trade-offs between expertise and anything else. In my view, the prime quality of judges should be expertise. I would strengthen conflict clauses as well. I would make sure these guys are employees only of the WTO and no one else. I would not like to see judges or panellists work for other people. I like permanent judges, for one, non-renewable appointment. Why all of this? Because as Richard Haas, from Council on Foreign Relations, in a 2016 book on International Relations has mentioned "one factor increasing the odds that the world order will survive is that it does not require talented statesmen, the supply which is likely to be insufficient." This is the best statement I know in favour of institutions and against trusting distinct individuals.

Mr Niall Meagher

Ultimately, I agree with the Chair that the discussion actually goes beyond independence and impartiality because, I really think those are a sort of a given. In preparing for this session, I found a nice quote about judicial independence from the US Supreme Court Judge Stephen Breyer who wrote about a cultural expectation of judges to behave independently, to decide cases according to the law, and the facts, despite the pressure of political sponsors or popular opinion. Justice Breyer said that judicial independence is in part a state of mind, a matter of expectation, habit and belief, not just among judges, lawyers and legislators, but also the people. I think that expectation applies also in WTO dispute settlement. That is the culture, the expectation we have, that panels and the Appellate Body Members are going to act independently and with impartiality. I will be coming back in a minute to how panel members and Appellate Body Members are service providers. I think the service that we are hiring them to provide is their expertise and also their independence and impartiality. If we don't want independence and impartiality, we would just have advocates. I suppose some of you might argue that the arbitrators are a lot cheaper than the advocates, so maybe we can get rid of the advocates and just have the arbitrators do everything. But I know that some in the room don't want to go down that road in the discussion!

I think it important to broaden the current discussion beyond the Appellate Body. We are also talking about who the panelists should be and how they should approach their work. We are really hiring them for the purpose of their expertise, independence, and impartiality. The paper by Professors Eric Posner and John Yoo to which Petros Mavroidis referred talks about the difference between "dependent" and "independent" judges or arbitrators, where "dependent" judges would be more like the GATT process or maybe the current WTO panel situation, and "independent" would be more like how we perceive Appellate Body Members. I think that paper is well worth reading.[1] I disagree with its conclusion that dependent arbitrators are better with respect to implementation of decisions, because I think one of the underestimated benefits of the Appellate Body has been the extent to which it further persuades to losing members to comply. The incentives to comply, or at least the political argument about compliance in the losing Member, are very different when the losing Member has lost not once, but twice. And the sheer repetition and additional clarity provided by the Appellate Body as to why the losing Member lost provides a value that I think is not sufficiently not taken into account by the Posner paper, but certainly should be maintained going forward.

I would like to come back to the notion of arbitrators as service providers. This is something we can all relate to, because every single one of us in the room is, in fact, a service provider. When we are talking about hiring service providers, there are two main questions: who are you going to get to provide the service; and secondly what service are they going to provide. With respect to the "who" part of this, I would largely defer to what Petros Mavroidis has just said and the

[1] Eric A. Posner and John C. Yoo, Judicial Independence in International Tribunals, 93 Cal. L. Rev. 1 (2005).

issues he raised. I would simply note that you have an additional complication at the Appellate Body stage, given that because there is a smaller and fixed number of Appellate Body Members than panelists, it would seem to me more important to try to avoid a political selection process. Whether that is feasible going forward, given geographical and other concerns, I am not sure. But the extent to which the selection process could be more merit based, I think that would be certainly an improvement on how, going forward, we decide "who" these service providers are going to be.

We then come to the question of "what" service we are asking the arbitrators to provide. Here, we would all agree that as service providers, what we really want is clear instructions. It is a lot easier to provide the service you are asked to provide when you know exactly what is expected of you. And, here, I think it is worth a discussion because there is at least a perception that perhaps the instructions we are giving panel members and Appellate Body members are not clear enough. One could argue that Article 3.2 of the DSU is perfectly clear. Nevertheless, we have to recognize that it is a little more complicated than that. If the texts were so clear, perhaps we wouldn't even have disputes in the first place. But, the reason why we have disputes and the reasons why we have panels and the Appellate Body is, as you know, because if you have two lawyers in a room, you have at least three or four opinions. That is why we have dispute settlement and that is why we give instructions to arbitrators, and that is why the instructions need to be as clear as they possibly can. I don't think we should be surprised or embarrassed that there should be an ongoing debate as to what exactly are the instructions to arbitrators and how these instructions are to be implemented. This debate has been mission. I think we have to be sensitive also that this debate is not about winning and losing cases, it is about how we go about the exercise of arbitrating these disputes. We come from very many different legal cultures, in many parts of the globe, and we have to be able to discuss in an ongoing and reasonable manner, divorced from the outcome of particular disputes, how we go about this exercise. My own experience as an arbitrator is fairly limited, but those of you who have more experience will know that when you are arbitrating, it is hard not to please 50% of the people involved. These are the winners. However, it is extremely hard to please more than 50%, by also pleasing the losers. And so, the task, as I see it, should be how do we go about giving sufficiently clear instructions to arbitrators, so that they have a decent chance in their work of pleasing, to the extent possible, more than 50% of the people sitting before them by ensuring that the losers respect and accept the outcome.

I would like to finish by coming back to the discussion at the end about accountability. There is a trade-off between independence and accountability. However, I don't really see this as a huge issue in the WTO. In many domestic jurisdictions where judges have life-time terms, accountability becomes a big issue. Here, in the WTO, there is no suggestion that anyone should have anything remotely resembling a life-time term. Thus, the accountability already exists to the extent that the means of just changing the arbitrators is already built in. In any event, I think the best way to ensure that you don't need to exercise accountability is to give arbitrators clear instructions and tell them more clearly what it is we expect from them. Then, their independence, impartiality, and expertise kick in and we should just let them get on with the job.

Ms María J. Pereyra

Article 8 of the DSU requires the Secretariat to assist the parties in appointing the panelists. In other words, the Secretariat proposes names of candidates to the parties because the DSU asks us to do so. We take the names of the candidates from our databases, including the indicative list of panelists. This list includes those names put forward by the WTO Members to the DSB as potential panelists. Even though some delegates have on occasion indicated that the Secretariat does not use the official indicative list when suggesting names, we are very attentive to the names proposed by the Members. I take this opportunity to kindly ask the Members to update their contributions to the indicative list, and if you (the Members) include more women in your list, it would be most welcome!

With respect to how the panel composition process works in practice, after the establishment of a panel in a particular dispute, the Secretariat will contact the parties to ask whether they wish to proceed with the composition of the panel. If the parties are ready to proceed, the Secretariat will meet with the parties to obtain their preferred criteria. As indicated before, it is according to these criteria that we will propose names of candidates.

Over time, parties have asked that the panelists be former or current government officials. They may even ask the Secretariat to propose former Ministers or Ambassadors to the WTO. This is why, when the parties ask for candidates with prior panel experience, those candidates have tended to be former or current government officials.

Parties always ask for people who have prior experience in panel adjudication, making the scope of potential candidates smaller. If we can, we try to put forward what we call "newbies", including female newbies, to be selected so that we may increase the pool of candidates with prior panel experience. We locate new names by going to our databases or other sources, even social media, to try to "fish for fresh blood".

Sometimes the process is very complicated because of conflicting criteria put forward by the parties. For instance, you may have one party telling you "I want someone coming from a landlocked country" and the other party telling you "I don't want anyone from a landlocked country".

Parties often oppose pure academics but would consider academics with prior Secretariat experience, or academics with prior private or government practice. Parties frequently ask for candidates with a legal background, and lately, some Members are asking for gender balance, which is close to my heart. We are trying to get that!

In addition to respecting the criteria submitted by the parties, we try to ensure the independence and impartiality of the candidates that we put forward. But we are the Secretariat: we do not have the means that Members may possess to check the candidates' backgrounds. Lately, because we have had some very controversial cases where the measures at issue are very much in the public eye, we proceeded to check what some of the candidates have said on social media. It is remarkable the enormous amount of time that some of my colleagues and I have spent

reading through social media. For example, I spent at least one day reading through a blog on constitutional law. It was very interesting. And when I was thinking that I had read enough, I nevertheless decided to go through the statements in 2016. The first entry I saw was a very blatant statement about certain representatives of one of the parties. Of course, this person could not be considered independent. So, if you want to be a panelist, beware what you say, beware what you post on social media, because the Secretariat will look at that.

One thing I should say is that, at the stage of selecting candidates to put forward to the parties, we do not contact those potential candidates. At that stage, we ignore whether they may have a conflict of interest further than what we can see on their CVs or social media. For instance, we would look at the list of publications for the academics or published speeches for governmental officials. But sometimes we do not possess enough information. It will only be when the parties have agreed on the three names that we would check with the candidates whether they have a conflict of interest and go back to the parties. We send the candidates the WTO Rules of Conduct, stress the list of items that they should disclose, and ask the candidates to sign a disclosure form. Notably, we will not announce a composition to the parties and to the Membership before we have received the disclosure forms completed and signed by the selected candidates.

The Secretariat's efforts of ensuring the impartiality and independence of panelists has been made harder because, in certain recent disputes, the Secretariat has not been given the opportunity to put forward any names of candidates to the parties. Some Members have decided, after the initial meeting at which they present their criteria to the Secretariat, to go directly to the Director-General to request that he compose the panel. In this situation, it is more difficult for us (the Secretariat) to help in ensuring impartiality and independence of potential panelists because we do not have the means to run a thorough background on those candidates; we do not have a "secret service" to check on what everybody does, apart from what is available in the media.

Once the Director-General receives the request that he compose a particular panel, he will meet with the parties. The parties provide him with their criteria – which tend to be more stringent than the criteria provided at the Secretariat level – and then the Director-General will have to figure out whom to select. The Secretariat assists the Director-General by providing him with names of candidates and researching their backgrounds. The Director-General will then take his own informed decision.

Ensuring the impartiality and independence of potential panelists is difficult at the Director-General stage. The short deadline of 10 days provided in Article 8.7 of the DSU reduces the time available for the Secretariat to research the candidates' backgrounds for possible conflicts. The confidentiality of the process does not allow the Secretariat to inform shortlisted candidates that they are being considered for a given case. Sometimes we may contact prospective shortlisted candidates to ascertain their availability without disclosing the case at hand. It is therefore not possible for us to ascertain whether there is any conflict of interest or any other issue affecting the impartiality or independence of a candidate. Unlike at the Secretariat level, the Secretariat cannot provide the parties with lists of candidates that the Director-General may have shortlisted. It is therefore not possible to benefit from the parties' larger capabilities for researching a candidate's' background.

Perhaps you, the Members, can help us by updating the indicative list, proposing names

or by not always going to the Director-General. It is in the interest of Members and parties to try to keep the process at the Secretariat level, so that the parties have the possibility of checking the background of panelists as the means to ensuring their impartiality and independence.

Comments, Questions and Answers following Session 1

Comment by Prof. Dr. Ulrich Petersmann

We should come back to the question - raised in the beginning and not answered by any of the panel members - regarding the adequate regulation of the relationship between the judicial branch and the political branch of the WTO. This question is important because the current 'WTO Appellate Body crisis' is related to what the United States perceives as legitimacy deficits of the 'judicialization' and inadequate, political control of WTO jurisprudence. The independence and impartiality of WTO adjudicators – i.e. the subject of this panel discussion - are not only about avoiding external influence and related bias; the 'Rules of Conduct' for the DSU, for instance, specify additional judicial duties (like confidentiality and 'integrity' requirements, self-disclosure of conflicts of interests, prohibition of ex parte communications) and judicial responsibilities (e.g. of legal expertise, non-delegation of certain judicial tasks) as defining elements of the separation of political, administrative and judicial functions in WTO law (as prescribed in Article III of the WTO Agreement). These 'institutional choice', legitimacy and accountability constraints of WTO law are important also for the two separate functions of WTO dispute settlement bodies. Their dispute settlement function to apply the existing law - as politically approved by parliaments and governments – independently and impartially to the dispute concerned so as to settle it in conformity with the customary rules of treaty interpretation and of 'due process of law' is different from their systemic rule-clarification function. As trade diplomats designed the WTO Agreement as an 'incomplete agreement' full of indeterminate provisions, the judicial mandate granted by governments and national parliaments to WTO dispute settlement bodies to clarify this deliberate, 'constructive ambiguity' for deciding the dispute and related interpretative disagreements entails 'cognitive challenges' as well as 'institutional choice' problems, to which judicial reasoning may have to respond differently from political reasoning by governments. This prospective, systemic function of the 'WTO dispute settlement system' for 'providing security and predictability to the multilateral trading system' by clarifying 'the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' is explicitly mandated in Article 3 DSU. It has nothing to do with the different, political WTO function of law-making, notwithstanding the legal obligation of WTO panels to take into account established WTO jurisprudence approved by the DSB 'in providing security and predictability to the multilateral trading system'. The legitimacy of this systemic rule-clarification function derives, primarily, from the democratic mandate given by parliaments when they approved WTO law and its quasi-judicial mandate for WTO dispute settlement adjudication. The independence and impartiality of WTO dispute settlement bodies, and the persistent approval of their jurisprudence by the DSB and by the global 'external WTO community', provide additional justification of 'judicial public reason'.

The DSU's institutionalization - in the DSB - of permanent dialogue between the judicial and political branches (e.g. discussing and adopting panel and appellate reports) is unique in the international legal system. Yet, the US criticism of the 'judicialization' of WTO jurisprudence points to the need for further developing this 'institutionalized dialogue', for instance by establishing a permanent, inclusive DSB Legal Committee assisting the DSB in identifying, evaluating and remedying controversial elements in WTO jurisprudence (e.g. so as to correct unconvincing judicial interpretations of

WTO rules on safeguard, antidumping and countervailing measures by agreed 'authoritative interpretations'). Unfortunately, WTO diplomats have never taken up academic proposals to institute such a Legal Committee in the DSB, which should discuss and evaluate all panel, AB and arbitration reports (e.g. by telling the judicial branch: 'This is something we don't find convincing – we disagree with the zeroing methodology'). Such professional advice from a Legal Committee could strengthen the DSB's dialogue with the judicial branch on 'providing security and predictability to the multilateral trading system'. The recent EU proposal for reinforcing this dialogue is a better approach to strengthening the political legitimacy of the WTO dispute settlement system than the illegal US obstruction of the filling of AB vacancies and of the democratic mandates given by parliaments to implement and reform, but not to destroy the WTO dispute settlement system. The persistent violation by the DSB, since 2017, of its legal and democratic mandates (e.g. in Articles 3, 17, 23 DSU) to protect the AB system undermines the legitimacy of the WTO more seriously than the 'judicialization' of the WTO legal system driven by complaints from WTO members and by their collective 'governance failures' to adapt WTO rules to new regulatory challenges.

Question by Mr James Flett

The title of the Session is how to ensure independence. I thought it was interesting that about 80% of the comments were really about why independence is important, which is actually a different question. I do think the panel did a good job of identifying why there are particular features of the WTO that make independence and impartiality so important. I think the panel made four excellent points. The first was, I think, a point made by Ms Nordin, that there is a small number of repeat players. If I had a big red button on my desk which I could press and that would mean the EU would win every dispute from that point onwards, I would not press it, because that would destroy the system. So, we are repeat players and we care about balance in the system. This is very important and it makes the WTO different from other legal systems and other legal contexts. And it makes it particularly important that the adjudicators are independent and impartial.

The second one is, I think, the one that Niall mentioned, the obvious one, which is the significant ambiguity in the WTO treaties. Again, that is what makes it incredibly important that we have confidence in the adjudicators to apply the set of instructions in the Vienna Convention, and to strive for independence and impartiality. Again, this is a particularity of the WTO legal system, because it involves countries that are so different from each other, striving to reach an agreement. With an imperative to reach an agreement. That is what inevitably creates the ambiguities. And that is why we have to trust our judges. And that is why we need them to be independent and impartial. Again, a second particular feature of the WTO system.

The third, which Mr Stephen Fevrier mentioned, is the small states point. We have subjects of the law who are enormously different in terms of the power that they have, the trade power that they have. This is another particular feature of the WTO system that makes it overwhelmingly important that the adjudicators are independent and impartial.

Another, the fourth, is what I think a number of contributors mentioned, namely the absence of an executive, and consequently the nature of the judicial function, which is constitutional in nature, that is, an interpretative function. And so, it is not about deference to an executive, it is about finding the answer that best fits the riddle or the cypher that is the Vienna Convention.

So, four reasons, of which I think that the panel has done an excellent job of reminding us, why independence and

impartiality is important, not only just because it is a legal system, but because of the very particular characteristics of the WTO system. I mention those four that absolutely demand the independence and impartiality of the adjudicators, if the system is to survive and prosper.

And here is my question. Some Members have been discussing and some academic discussions have been going on about using Article 25 of the DSU, so that those Members who wish to continue with dispute settlement based on an independent and impartial set of adjudicators, including at a second level, at an appellate level, can use Article 25 to reach agreements between themselves in order to do that. So, here is my question to the panel: if those Members who are like-minded go down that road and they want to keep accessing what Niall correctly referred to as the 'service', how important is it to maintain independence and impartiality in that context, if we use the model of Article 25? Does it remain as important as it would be if we continue with the existing system? And, if so, what are the critical things that need to be achieved in order to ensure that at the appellate level we continue to have independence and impartiality. Who should those ad hoc adjudicators be? Who should appoint them? And who should provide secretarial support to them? I would suggest former members of the AB appointed according to the existing arrangements and supported by the existing appellate body secretariat. And I would like to hear from the panel whether or not that is how they see the answer to the problem?

Answer by Mr Fevrier, Mr Meagher and Prof. Dr. Marceau

Mr Fevrier

In the absence of concrete progress and finding a solution for the current impasse, log jam, in the system, there is one that can be considered. However, if you mean a plurilateral application of DSU, it will undermine the efficacy of the rules themselves, how can the multilateral system and the rules which are developed apply and be enforceable by only Members who subject themselves to the process. My fear is that it would fundamentally undermine not only the DS system, but also the rule-making body, legislative function, of the WTO. It is a resort which I think should be avoided at all costs, given the impact it would have not only on the application of the rules, the creation of the rules, but also the way adjudication takes place. Because, in that context some Members would effectively be outside the system of the system of the dispute settlement. If my understanding of the question is correct, I think it is a resort that should be avoided, given the impact it would have not only on the adjudication and adjudicatory function, but also on the terms of rulemaking.

Mr Meagher

With respect to James question on Article 25, I think I would agree with what Stephen has said, but James' question also seems to imply that recourse to a new methodology under Article 25 might not be independent or impartial. I am not quite sure what the basis for that is.of that would be. I suppose it depends on the mechanics of how it would works. But, it seems to me that if independence and impartiality are is an important feature of the current system, then you would also want to value them it any alternative system, because as we know, in life, once we move to alternatives, then the alternatives become the status quo, and become then that would be what you are left with going forward. Just to come back to what Professor Petersmann said briefly, about a legal committee, I think that would be is valuable and is what is I was trying to get at when talking about the need to be able to clarify the instructions, and clarify what it is we expect from panelists and the appellate body. , which I don't think is necessarily a legislative function as such, or an executive function. It is largely a technical issue regarding the operation of

the DS process and is something that's best done away from the heat of individual cases, and, also with all due respect to James, by broadening the discussion out from the regular users, who tend to get caught up in their own disputes. The current mechanism for this is supposed to be the DSB statements by Members on the adoptions of reports. But theose are not very useful, I think. I know that Members of the AB have told me in the past that they pay careful attention to them, but they may not be entirely fruitful because we know what those statements are going to say. The winning party is going to say that the report is a brilliant exercise in a narrow legal judicial interpretation of the textsrms, and the losing party is going to say it is a massive exercise in over-reach, or under-reach, or some other kind of bad reach. I do think that we need to move away from, or have some sort of mechanism where, on a technical level and not based on expectation with respect to particular cases, there can be some sort of discussion and feedback on what it means for panels and the Aappellate Bbody to do a good job.

Comment from Prof. Dr. Gabrielle Marceau

This comment is in my personal capacity. Whether Members use an arbitration system ad hoc, a new one or whatever other adjudication system, I believe that, the Members decided that all adjudicators in the WTO dispute settlement system are subject to the WTO Code of ethics, now called the WTO Rules of conduct, which are, I believe, among the most extensive and comprehensive set of rules on the impartiality, independence, confidentiality and conflict of interest of adjudicators. So, Members could decide to do otherwise, but *a priori* whatever system under Article 25 of the DSU on arbitration, it would bind arbitrators and oblige them to also be independent and impartial and without conflict, etc. because of the Rules on Conduct adopted early on under Article 11 of the DSU.

Session 2: How to balance prompt settlement with adequate settlement of disputes?

Chair: H.E. Mr Roberto Zapata Barradas, Ambassador, *Permanent Representative of Mexico to the WTO*, Geneva

Panelists: Mr James Flett, Deputy to the Director of the WTO Team, Legal Service, *European Commission*, Brussels
Dr. Christian Häberli, Senior Research Fellow, *World Trade Institute*, Bern
Mr Marco Tulio Molina Tejeda, Minister Counsellor, *Mission of Guatemala to the WTO*, Geneva
Ms. Cherise Valles, Deputy Director, *Advisory Center on WTO Law*, Geneva
Mr Alan Yanovich, Partner, *Akin Gump*, Geneva

Mr James Flett

Before I discuss the subject of this panel, I'll just spend a moment commenting on the so-called crisis in dispute settlement.

I'm not sure whether it is a crisis, perhaps that word is a little bit overused. One of the drivers I understand is a perception that more needs to be done with respect to certain Members. I'm not sure personally that I see the logical connection between that observation and rendering the dispute settlement system dysfunctional. It seems to me that the rules-based system provides an opportunity for us all to coexist together, and that includes using the system to constrain Members that one perceives as acting outside the bounds of behaviour that is considered acceptable. So I think there's a *non sequitur* there, I think there's a disconnect.

The other driver, as we all know, I think, the other enabling feature, is a certain concern in trade remedies, especially about so-called judicial overreach. I don't want to get into that. I think it's old-fashioned exceptionalism. You win some, you lose some. I think those judgments are perfectly acceptable and one has to move on.

My final point is, the thing about Article 25 of the DSU is that it does provide an entirely non-aggressive way for the rest of the membership, who wish to continue by benefitting mutually from the services of independent, impartial, and objective dispute settlement, to do so, and why should they not have the opportunity to do that? If we really believe in the mutual benefits of that system, then, over time, that will be demonstrated and there may be room for reconsideration on the part of others.

So, in the words of Tom Hanks, that's all I have to say about that.

To come to the topic of this panel, I was struck when I read, immediately, in the title,

"how to balance prompt settlement and adequate or satisfactory settlement", that there is an assumption that we have to make a choice. I don't want to make a choice because I am greedy, and I like what it says in the DSU. It says in the DSU that we can have both, and I want both. I want prompt settlement, and I want satisfactory settlement, both of which are provided for in the DSU. So, I'm not really interested in balance in that sense. As you can see, I don't have any slides, but I do have a handout, which I've passed around, so that you can have a look at the structure of what I want to say. I do think there are some particularities of the WTO Dispute Settlement System that make me wonder whether or not it was always destined to be a bit of a bottleneck. Perhaps it's just ambitious to think that all of the disputes that can arise in this field of public international economic law, could really be resolved in one place. And I do think the system is suffering from overload, everybody is feeling that overload. And when you think about prompt settlement and satisfactory settlement, and that's point two on the handout, and you think about a whole series of issues that have been played out in the case law, sometimes in considerable detail, often lying behind all of those debates, is an attempt to find a compromise or a balance between prompt settlement on the one hand and satisfactory settlement on the other hand. Now, it just so happens that I think the system has done a pretty reasonable job of finding a balance, but my point is that these are all symptoms. These are all symptoms of overload, actually. It's the overload that is driving people to say, "well, we have to find some sort of compromise between prompt settlement and satisfactory settlement." And that overload, I think, is, in turn, connected with the design and architecture of the system: the proposition that all of these global trade disputes could actually be processed through one place. As you can see in points three and four of the handout, I have some doubts that we can really address this problem through what I call docket control techniques or through changes in practice and how the system runs. I think the problem is a bit more fundamental than that, and a bit more structural. And that brings me to the fifth point, which is an observation about the European Court of Justice. Now of course, that's my, in a sense, my municipal law court, but it's also an international court in its own right. Those familiar with European Union law will know the secret of the success of the European Court of Justice is its decentralization of European law. European law is interpreted and applied by national judges in Member States of the European Union, across the European Union. And this has been absolutely key in it being effective and it being accepted. And so, my question is, if this is the critical aspect of the success of the European Court of Justice, isn't it worth at least thinking about how the continuing success of the WTO dispute settlement system, might or might not also learn some lessons from that? And at least ask ourselves the question about the decentralization of WTO law, by which I mean, quite simply, the question of whether or not judicial authorities all over the world are paying attention to WTO law, to the treaties, to clarifications provided by the Appellate Body, one way or another. Are we interested in this problem at all? Are we just indifferent to it? Do we think it's a good thing? Do we think it's a bad thing? And then, I'm asking the question, what actually are the benefits and risks of decentralization in this sense? And I can see some benefits. I mean, the dissemination of WTO law, the fact that it would be applied very widely. Critically, one of the points I'm making is access to resources. Many of the covered agreements actually refer to judicial processes in the Member States, in the Members of the WTO. Are we really paying attention to these provisions and thinking about what they

might mean? And there are various other bullet points there, you can read them for yourselves. A certain element of trust, some sense of judicial comity. Of course national courts might have a tendency to favour national interests, but are we really saying that we have no faith and trust at all in judicial authorities, in WTO Members? Political authorities, maybe, is one thing. What about judicial authorities? Can we talk to them?

Obviously, there are certain risks. The need to ensure control and coherence, and, obviously those familiar with EU law will immediately say, "well the bit of the mechanism that's not there is the mandatory reference for preliminary rulings for interpreting WTO law." Well, sure, there's nothing in the DSU about that. But is that really an end of the discussion? Are there other ways in which that process could be managed from the bottom up? For example, if litigants in the European Court of Justice, with respect to a particular measure, are exchanging argument about the meaning of WTO law, why couldn't the European Court of Justice ask the EU to bring that case into the WTO using standard or special terms of reference to obtain an interpretation, and then pay some attention to that? I just think that there's a lot of reflection that needs to be done, and perhaps some imagination that needs to be used. And that's the sixth point, what are the existing tools that could be used to achieve some measure of decentralization? And I'm not talking about imposing it. I'm not suggesting that on the basis of XVI:4 of the WTO Agreement, the Appellate Body should have pronounced the unique nature of WTO law, its supremacy, and direct effect throughout the legal orders of the Members of the WTO. I'm not suggesting that, of course. But I am asking the question, are we really completely indifferent to this issue?

Just to give an example, there have been some cases where defendants in WTO law, I'm thinking particularly of Mexico, have argued that, because they give direct effect to WTO law in their jurisdiction, that is something that needs to be taken into account when thinking about whether or not ambiguous national measures should be found, as such, inconsistent with WTO law. And they've been unsuccessful in those arguments. The adjudicators have not been very impressed by them. And so I suppose I'm pressing the pause button and I'm saying maybe we should think about that. Why don't we think it's a good thing that Mexico gives direct effect to WTO law? Is that a good thing? And if it is a good thing, what do we have to say about it? Are there ways in which we can give it credit? Are there ways in which we can incentivize? And you can see there are some other questions there, on the handout, not just about direct effect, but for example, about interpretation in conformity. That is, the proposition that, in a municipal jurisdiction, you should have a rule which says that, to the greatest extent possible, municipal law should be interpreted so as to render it in conformity with WTO law. Some members have such a rule that functions. Other members may not, or may not have the rule functioning in such a clear way. Are we indifferent to that? Do we care? Or do we tend to think that, if members have a functioning interpretation in conformity rule, that's a good thing. And if it's a good thing, what can we do in order to incentivize or encourage it? In short, what I'm inviting us to do is to exercise collectively our imagination and to try and think about how WTO law and municipal law can work together or be made to work together, in order to get to the place that we want to be.

So, I want to be clear, this is a response to overload. And overload itself, isn't it just a function of the way the design and architecture of the system has been understood up to this point? Is it really possible to process all of the future cases through the bottleneck that is here at the WTO? Or do we need to really start thinking about and having a conversation about the benefits and risks of decentralization and how

it might be achieved using the existing tools that we have?

Dr. Christian Häberli

This is a basically an academic conference assembling stakeholders in the triangle relevant for solving the WTO DS crisis i.e. Panelists, Delegates, and Negotiators. I was privileged to wear all these different hats for decades. In my intervention I will argue that the two notions for this Second Session – "prompt" and "adequate" – are simply non-issues, whereas the real challenge is for all adjudicators to avoid what is now called "overreach".

First, what is meant by "prompt" (Art.3.3 DSU)?

My first case was on bananas. "*Bananas III*", actually, and it alone took 16 years to conclude with a mutually agreed solution. Interestingly, the solution was not found pursuant to Article 3.6 of the DSU nor in any of the three banana panels but by the only twice invoked *good offices* available under Article 5 DSU.

So how fast is "prompt"? If this was Chatham House, I could probably provide examples of, shall we say procedural dilly-dallying, for each of the Member delegates present today. The same goes for the many Law Firms present today – except of course those we kicked out of this very room in the first bananas panel. I could not even say that complainants were faster and more hard-working than respondents! But this is not a blame game. Today we are looking for solutions to a crisis.

Let me then simply state this: in each and every case the priorities of the parties between "prompt" and "adequate" settlement were clear. I have never heard a Party or a Third Party offering to work faster, to ask less questions, let alone to accept less "adequacy".

Nonetheless, looking at the deadlines it seems to me that the negotiators forgot that we are all humans. Meaning they forgot the existence of weekends, and of national and religious holidays as a negotiating issue in the first organisational meeting with the parties.

Hence, "prompt" settlement is a non-issue.

Second, the DSU insists, twice, on "adequate opportunity for consultation."[2]

So what is "adequate"?

My last case was *COOL,* and it went through the whole rhapsody of compliance, appeal, and authorisation of suspension of concessions. Our Arbitration Report was circulated 7 years after the Request for Consultations; within a record 10 days the incriminated measure was then repealed by the same respondent's parliament. Nobody said it was un-prompt or inadequate. But some said the US Government was only too happy to abolish its own, poor regulation!

Perhaps this shows, again, that "adequate" (settlement) lies in the eye of the beholder – and that it can be obtained with due time and diligence!

Where is the problem?

I think the main challenge for adjudicators is to interpret WTO disciplines and commitments without what has come to be called "overreach". All adjudicators must learn how to determine for each disputed issue precisely how much text interpretation is necessary without straying into the infamous area of "rule making".

Clearly, there is a grey zone here, especially under extremely tight time constraints. Criticism, albeit self-serving, is often justified – but many critics omit that the adjudicators must find a "positive solution".[3] Now suppose that an adjudicator, after affording everybody "adequate" consultations, cannot reach a "prompt" and "positive" solution without trespassing the rule-making taboo. Could she – or does he have to – decline to issue a finding and refer the specific matter

[2] Articles 4.2 (Parties) and 11 (Panels)

[3] On the one side '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements' (Art.3.2 DSU). On the other side '[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute' (Art.3.7 DSU).

back to the DSB?[4] I think the question of "overreach" would deserve to be clarified.

In the *Biotech* Panel we took 3,5 years to issue what is perhaps the longest Report in WTO DS history. Some of you may remember the scientific expert consultations - by which the proceedings lasted almost one year longer. (And you might have wondered whether this was not a useless exercise risking to turn WTO into a science court!) As an additional detail perhaps of interest here, we also had to read 20 books and articles to outline in a footnote our view on the applicability of the Vienna Convention – a threshold issue for the applicability of the UN Biodiversity Convention and the Cartagena Protocol. Now I ask you: this Panel Report was not appealed (but it was accused by many of "overreaching"). Does this mean that our footnote which hardly anyone noticed is now part of WTO Case Law?

When adopting the *Tuna III* Compliance Report the US said in the last DSB that it was "disappointed that it has taken more than a decade to resolve this matter." The US also complained that this required enormous human resources, which poorer countries could not afford. In the same statement, the US acknowledges that "[T]his thorough and painstaking factual analysis by the Panels was the basis for their correct factual and legal conclusions concerning the dolphin safe labelling measure and for the Appellate Body's upholding all the Panels' findings."

Actually, the US was clearly very happy to find itself in the rare position of a winning respondent – especially after the AB bent over backward and invented the term "calibrated" to find TBT compliance. No "overreach" was alleged here - never mind the fact that the almighty AB virtually closed the door to TBT-Article 2.2 claims!

Finally, I also submit that dispute settlement has become what I would call "over-judicialised". This is not an academic exercise! We have lost the first and preferred leg in the DSU which is to find mutually agreed solutions through "sympathetic consideration", "adequate" consultations and out-of-court settlements. Most parties seem to have forgotten that avenue; some even want to prevent the AB from issuing advisory opinions. And insiders know how difficult it is to make a recommendation which could accelerate settlement and save faces.[5] We all know that today, even with "adequate" rulings many cases are solved in a rather un-orthodox way, not to say through non-transparent, even dirty deals leaving third parties frustrated and the rules system jeopardised. The right to negotiate a way out at all times must be re-established in order to respond to systemic criticism of the present state of affairs. I hope this can be addressed in another session of our meeting today.

Five Suggestions

OK, instead of wasting our time with accusations or "speed ruling" proposals let me make [five] suggestions which could accelerate the procedures and reduce the potential for "overreach". It is high time to re-gain the reputation of what I sometimes jokingly call the "Miracle of Marrakesh", and what I seriously think is the world's fastest and cheapest intergovernmental dispute settlement system – including the ECJ which incidentally declined to rule on bananas and biotech□.

Change "days" into "WTO working days" – as suggested by Honduras and others. How many times have I tried to shift the heavy work away from the Secretariat in order to enjoy a Xmas break or other holiday with my family!?

Ban the terms "jurisprudence" and "case law". The latter is found 13'880 times on the WTO website, even though it does not appear in any WTO Agreement, let alone in the DSU. Besides, it reads differently in common law and in codified law systems; WTO Law belongs to neither. If we keep this in our minds, be they party, adjudicator or academic minds, our jobs will be easier – and faster.

[4] Nothing in the DSU allows a Panel, or the AB, to decline to fulfil their mandate. Nor does the DSU prevent adjudicators from doing so.

[5] Art. 19 DSU

Regardless, everybody must make better efforts to avoid conflicting rulings in parallel cases: tear down the remaining firewalls between the three Secretariat Divisions and synchronise adjudicator work by letting adjudicators interact in substantially comparable cases! And, to the very least, ask adjudicators to describe how far they had to go in terms of rules interpretation in order to arrive at their recommendations to the DSB.

Train all adjudicators before they start working. The focus of such trainings must be on those parts where adjudicator and Secretariat jobs differ. In short, whereas the Secretariat is the guardian of the rules, the adjudicators must find at each gateway the "easy" solutions for the respondent. This includes tackling the dilemma I already referred to: the grey zone between rule-reading and rule-making. I understand that some attempts have been made in this respect. But in order to highlight the different roles of WTO staff and adjudicators, I posit that only a training *extra muros* is adequate. This is the only way to help especially junior and non-lawyer experts to sign off on draft reports without pondering the merits of alternative solutions more palatable to the respondent.

Abolish or reduce the procedures which have come to tarnish the reputation of the DS and the WTO. This implies open hearings with full access to every person registered – except for the so-called "Confidential Business Information" (CBI) – and it should go all the way to *Live Internet Streaming*. Hearings are not a place for negotiations – nor should they turn into wailing walls. I know, and I have always respected the fact that some Members cannot accept public hearings – yet they have to in other international courts. If this is the price for appointing new AB members, perhaps it is worth the effort!

Reduce the public panel hearings to one. Did you ever gain additional insights from the second hearing? I don't think I learned much in the second hearings which could not have been obtained through the Q/A process, including with and between Third Parties which then will no longer need "enhanced" rights.

Mr Marco Tulio Molina Tejeda

I tend to agree that perhaps prompt settlement and adequate settlement of disputes are non-issues, as we see how the system is working. The question implies how to balance two relative concepts indeed. If you ask, for instance, an exporter, what is a prompt settlement, you will receive a completely different response to that than you will receive from a Member or the practitioners. If you are an exporter of tomatoes and you have two containers at the border that cannot enter the export market, a prompt settlement is that that will allow this exporter to sell the tomatoes in that market. If you ask a Member, perhaps other considerations will come into play. And if you ask practitioners, deadlines are too short in this mechanism. Always are too short. So, the thing is, perhaps we can, in a way, look at this from a different perspective. Prompt settlement, in my humble opinion, is calibration of expectations, perceptions, and incentives.

Expectations. You expect something out of this mechanism, and normally you have to consider what the alternatives to the use of the dispute settlement mechanism are. What if we don't have a WTO dispute settlement mechanism? And when you go through the alternatives, you will find that perhaps countermeasures are one of those alternatives. Going to domestic tribunals is another alternative. Or perhaps, if applicable, you have an FTA dispute settlement mechanism available. But what are the costs, the timeframes, the efficiency and efficacy of those alternatives is something that enters into the concept of expectations.

Perceptions. It is taking too long? It could have been resolved more efficiently? This is the kind of question that we all ask ourselves, depending on what role we are playing. And of course, what kind of incentives the system is creating in this regard? For instance, if you have a system that is taking too long in the settlement of disputes, perhaps we are creating an incentive for Members to take inconsistent measures, because we know that before a prospective solution is given, the Parties to the dispute have to wait three or four years of litigation before the DSB tells any Member to put the measure into conformity with the WTO Agreements. So, this is the kind of issues that may surround the concept of prompt settlement.

Adequate settlement. The same goes to adequate settlement of disputes. If you ask the exporters, they don't care about systemic implications or the Vienna Convention. They only want to sell their products abroad. If you ask Members, on the other hand, you will receive different kinds of answers when it comes to an "adequate" settlement. Because, in each dispute we are not just discussing perhaps the measure itself; but we are discussing what are the systemic implications of the panels' and Appellate Body findings and conclusions, what kind of expectations are we creating; we are perhaps defending domestic policies and safeguarding policy space. So, perhaps, it's not necessarily relevant to answer the questions about what prompt settlement is and what adequate settlement is. We may focus in a different way to deal with this issue. Instead of finding a balance between these two concepts, perhaps the question should be how we can make the system more *efficient*. And what we do in this organization, when we want to propose something? We normally go to a dictionary

and check the definition; in this case, the definition of "efficiency". Efficiency implies "being able to accomplish something with the least waste of time and effort". This is perhaps a better way not to have these fundamental and philosophical discussions about how the system should work. Maybe we may be better off if we can find ways in which we can waste less resources and make the system work properly, or better than it is working today.

So, the idea is to find a new equilibrium in Members' expectations, perceptions, and incentives, and, as Mr Häberli did, I would like also to put for your consideration a couple of proposals or examples of how to make the system more efficient.

One idea is to reinforce the disciplines of Article 5 of the DSU, and encourage their use. As a complaining party, if you ask me, why Guatemala, for instance, doesn't use Article 5 mechanisms, it is because we are trying to get prompt settlement of the dispute. We don't want to take the risk of using Article 5, engage in good offices, conciliation and/or meditation, and if we fail in finding a mutually satisfactory solution, we would have just added the time needed for the use of those mechanisms to the time for consultations. So, one simple idea is to have the possibility to choose between going to a formal consultation, or using Article 5 mechanisms, before requesting the establishment of the panel. Informal consultations start earlier in the process, including bringing the issue to a committee, at least for a couple of meetings, then you continue trying to negotiate with the Member, and, then by the time you request consultations, you know that it is just a formality, because you are not going to get a different answer from that that you received during the informal process. So what if we have the possibility to choose mediation or conciliation instead of formal consultations? Perhaps we might solve more disputes, because sometimes, internally, to negotiate with the stakeholders, we need someone else to tell us that the measure is inconsistent, and perhaps it's better to reach an agreement with the other party.

Then, another suggestion, but a little bit more sensitive perhaps, more difficult to sell in this Organization, is reducing incentives for non-compliance. This goes more with the concept of adequate solution. If you see today, the system is designed to provide a prospective solution. And this prospective solution may create incentives for Members to take inconsistent measures for a while. Just, as a kind of safeguard, without a need to give any compensation or initiate any investigation.

Retaliation is a luxury that only a few Members in this organization can afford. For instance, I think that the European Union would not take very seriously Guatemala, if Guatemala were to retaliate with 20 million dollars, for whatever dispute we had. So, the way the system is structured today, is that compensation is negotiated, is voluntary, and is very easy for the defendant Member to say "ok I cannot agree on compensation, so you do whatever you have to do. That is, if you want to retaliate against me, go ahead". And then, retaliation most of the time, might be ineffective. So, it shifts the burden on the complaining party, and especially on those small developing countries that cannot afford retaliation.

So, there are two ideas. What if, for example, we make compensation compulsory? Just not to allow the defendant to get away with this situation of: "I cannot *agree* on any compensation." So at least there is a reputational cost if the defendant Member says, "OK, I cannot *give* compensation, so you proceed with retaliation."

The other option, which is a bit more serious and requires a change in the system, is to incorporate the concept of reparation as we know it in public international law. With a caveat, reparation could be triggered if, only if, compliance comes after the expiration of the RPT, for instance. So that it would create

an incentive to comply within the RPT, the reasonable period of time to comply, and, if not, then, there would be an obligation to repair following the rules of international law.

Then the last. I have many other suggestions but I only have 10 minutes, so I am running out of time. The last couple of suggestions. There might be a need for panels and the Appellate Body to change their policy and the way they deal with disputes and they draft their reports. For instance, when it comes to the Appellate Body, and there are no facts to complete the legal analysis, I personally believe that we need only two sentences: "we don't have enough facts available to complete the legal analysis"; or, if you want to extend a little bit: "we don't have these precise facts to complete the legal analysis" and describe the missing facts. We don't need 30 pages, 40 pages of explanations, what are the facts of the dispute and why it is not possible to complete the legal analysis. I don't think that we need extensive explanations for something that, at the end, will result in not completing the legal analysis.

The same goes when it comes to confirming a panel's findings or conclusions. If there is confirmation of these panel's findings or conclusions, I don't think that it is necessary to explain why the Appellate Body is confirming the decision made by the panel. If there is a disagreement with a panel's reasoning, but the conclusion is the same, perhaps it is easier to say, "while we disagree with several of the panel's interpretations or reasonings, we concur with the outcome of the panel", and that would be sufficient to resolve the dispute. That would not change, in my view, the way the parties would consider the Appellate Body Report. And this is important why? Because today, Members are focusing more on interpreting the panels' and the Appellate Body's reports, rather than the Agreements themselves. And that is why I tend to agree with Christian that perhaps we need to ban this idea of jurisprudence from our vocabulary. The less it is being said, the better, because once we have a finding or conclusion by the Appellate Body, then it's very difficult to change that in the future and every case is different. We cannot foresee what's going to happen in the future when it comes to a decision that we are making for a particular dispute.

Mr Alan Yanovich

I'm going to follow up on some of the comments that Cherise made, with which I agree. But my solution is slightly different than hers, because I don't think that lawyers can control themselves, so as you'll see, my solution is for panels to control lawyers, especially complaining party lawyers, but I'll get to that in a bit.

I found it curious that we keep shifting between prompt and satisfactory, and prompt and adequate. The programme said adequate, I found that interesting. Adequate seems to involve sort of more discretion. James you changed it to satisfactory. I know what you had in mind. But it's quite interesting, and my starting point is, the system does pretty well, and I think we have to recognize that. I think the system does pretty well in terms of promptness, and I think the system does pretty well in terms of balancing promptness and adequateness and promptness and satisfactoriness. I think that should be our starting point.

The second starting point is that the crisis, or the problem we may face in December, goes beyond promptness, it really goes to the functioning of the system. I personally think that, if things are not resolved before December, the system may stop operating. It's not just that it's going to slow down, so I think that's a different problem, a much more serious problem, and one that I do hope gets resolved before then. I think we all hope that, and we all encourage Members to do their utmost to resolve that problem. Then, in terms of the current situation of the Appellate Body, I think it would be very difficult to accuse the Appellate Body of not being prompt, given what is happening right now. I think it's quite remarkable that the Appellate Body is functioning the way it is right now, and I think we need to recognize that. So my comments focus more on panels, and not because I think panels are not doing a good job, I think in general panels are, but I do that that the system can be a little bit uneven between complaining parties and responding parties. I have been responding counsel in several cases recently, and perhaps am more acutely aware of these disadvantages than others, but those are the ones that I would like to address in my brief comments today.

It is surprising, in many ways there seems to be this understanding in the WTO, that settlement and prompt settlement means some kind of finding in favour of the complaining party. I don't think that should be the case. I think a situation where a panel rejects the arguments of the complaining party, and the complaining party does not get the remedy that it thought it deserved, is settlement. And if it's done quickly, it would be a prompt settlement. And if it's done according to the rules, it would be a satisfactory settlement, and sometimes I think we need to be more aware of this: that settlement can mean that the complaining party's case is rejected in its totality, for instance.

Then, it's surprising, for instance, when you read the DSU, you look at the appendix, and the timetable in the model working procedures. And it gives the respondent half the time that it gives the complaining party. I think it talks about the complaining party has three to six weeks to do its first written submission, the responding party gets two to three weeks. Why? What's the logic of that? If anything, the complaining party has all of the time before the request for consultations and all of the time before the request for establishment, and these days will prepare its case maybe a year before it initiates, and then suddenly the responding party is meant to have two to three weeks? That no longer makes sense. And I think panels, generally,

have been good in recognizing this, and panels generally have started to give respondent parties more time, but it is still a struggle in the first organizational meeting to get more time for the responding party. It should be more obvious that the differences are significant, especially when complaining parties start building their case much, much before the panel is even requested. Then, the other one that strikes me is that panels allow the complaining party to make its prima facie case up to the first panel meeting. Why is that? Shouldn't the complaining party be required to make its prima facie case in its first written submission? Why does the complaining party get a second bite at the apple in the first panel meeting? So, the complaining party makes its first written submission, puts up its evidence, the respondent replies and says that this is insufficient, then the complaining party gets another chance to fill in the gaps and provide more evidence to fill in any gaps in its initial case. Why should it be getting that chance? If it didn't make a prima facie case in the first written submission, its case should be rejected. That should have been its opportunity. You might even say it creates incentives for a complaining party to withhold some of its evidence and to present it only at the first panel meeting. Why? Because the other side gets no time at all to respond. It has to respond on the spot. You might say, well, the respondent party gets a chance to reply in the written questions, but as Mr Häberli just said, an experienced panellist, the panellists have formed their first impressions in that first panel meeting, and the respondent party is at a huge disadvantage when the complaining party comes in with new evidence, new facts perhaps, a new expert report, that the responding party has not even had a chance to review. So, why? Why is it that they get that shot? Why not force the complaining party to provide all of its evidence from the very beginning, and then focus the first panel meeting on all of the evidence that has been submitted in its entirety?

I come to the concept of prompt settlement. I recognize that the concept of prompt settlement is in the DSU, and it is one of the objectives of the DSU, that the drafters had in mind. But if you look at how it's been used, more frequently it has been used to the advantage of complaining parties. It's been used to broaden the understanding of the measures that may be challenged. It has been used to broaden the measures that may be challenged under Article 21.5. It has been used to justify the concept of completing the analysis, and that is to the benefit of complaining parties. So, we have to be careful about this concept of prompt settlement. In the end, I would just say, look, I think the system does remarkably well. I think some panellists are more aware of this issue than others. The system, as it is, believe it or not, , I think, gives more advantages to the complaining party, and this has to be considered. The concept of prompt settlement cannot be pushed too far. Prompt settlement cannot undermine the rights of the respondent party. And prompt settlement should mean that if a complaining party does not make its prima facie case in its first written submission, that should be the end of the case. That would be just as prompt. But for some reason, whenever a complaining party doesn't do it in its first written submission, the concept of prompt settlement is used to allow the complaining party to provide more information. Why? Because the notion is, if we don't do it now, then we'll bring another case. So be it! Bring another case! But the concept of prompt settlement should not be used to the disadvantage of the respondent party in that case. If the complaining party did not provide the evidence at the time, then that should be the end of the case, and if it has to start on another case, so be it. But the initial case would have been promptly settled by the rejection of the claims.

And then, finally, I do think it's panels and panellists that must take control. There is no control on the part of the lawyers. And lawyers, unless panels exercise more control,

will not have incentives to exercise more control. I'll give you an example: you have a big case, and then suddenly, because it's a big case with lots of claims on appeal, they get two hearings, two Appellate Body hearings. Why should that be? Why should a lawyer that exceeded him or herself in making a very, very long notice of appeal, and a very, very long appellant's submission, be rewarded with two hearings, when someone who keeps his or submission short, only gets one hearing. That shouldn't be the case, but that's actually what happens today, so the incentive is to raise more and more claims, and have longer and longer submissions. So I think it's panels and the Appellate Body that need to be exercising this control, and that would be my suggestion.

Comments following Session 2

Mr Frieder Roessler

I would like to make a general remark about delays in dispute settlement proceedings. Justice delayed is justice denied and one would therefore expect the complainant to systematically attempt to shorten the proceedings as much as possible. But in my experience, that is not always the case. Most complaints concern a non-tariff measure protecting a particular domestic industry and are won. As the dispute settlement proceedings advance, it usually becomes more and more obvious to that industry that the measure will have to be withdrawn. This gives the industry an incentive to adapt, for instance by ceasing to replace machines or to hire new staff. Ideally, when the responding government has to remove the measures, the industry has already adjusted to the new situation. A shorter proceeding is likely to increase the industry's adjustment cost, which in turn might prompt the responding government to replace the measure found to be inconsistent with WTO law with a protectionist measure permitted under WTO law, such as a safeguard measure or a higher tariff. In that case, nothing would be gained for the export industry whose interests the complainant sought to defend. Given these alternatives of the respondent, it may in certain cases be rational for the complainant to treat the respondent softly and give its industry time to adjust. To be clear: I am not in favour of longer dispute settlement proceedings. I am simply pointing out that the issue of delays and the options of the respondent at the end of the proceedings are sometimes linked.

Alan, you complained about the timetable for panel proceedings set out in Appendix 3 of the DSU. You might be interested to know where this timetable comes from and why the period of time accorded to the respondent to prepare its first submission is so short.

When I joined the legal office of the GATT Secretariat in 1982, I looked at the working procedures of all past panels and I found that each division in the GATT had proposed to panels a different procedure with a different timetable. It seemed strange to me that the treatment of the disputant parties by panels varied with the operational division servicing the panel. So, I drafted a proposal for uniform working procedures with a uniform timetable, allocating to each step in the proceedings the time that past panels had on average allocated to that step. These procedures became the standard procedures used by all panels and these subsequently found their way into the DSU.

Why did the panels give so little time to the respondent to prepare its first submission? In the 1960's and 1970's the dispute settlement procedures were completely voluntary. As a consequence, a case could not reach the panel stage until both parties to the dispute had agreed to submit their differences to a panel. Under these circumstances panels could realistically assume that the respondent knew already before the proceeding which issues and arguments the complainant was going to raise in its first submission and that the respondent therefore needed only little time to react to that submission. Based on this assumption some panels even required both parties to the dispute to provide their first submissions on the same date.

All this explains but does not justify the short time available to the respondent to prepare its first submission. I agree with Alan that the limited time accorded to respondents no longer makes any sense given the complexity of the disputes before WTO panels and the practice of WTO Members not to reveal all their legal arguments during consultations.

Mr James Flett

I hope I'm allowed to react to one of the comments that was made by another panellist.

And so the point that I would like to react to is this concept of overreach, which is perhaps too much discussed, but nevertheless some statements were made about it. I'd just like to offer a couple of thoughts about this based on many, many years of practice, of many cases looking at many interpretive issues. As Niall reminded us in the previous panel, Article 3.2 of the DSU does direct us towards the customary rules of interpretation of public international law, which most people accept are codified, at least at part, in the Vienna Convention, Article 31, well Articles 31 to 33, but especially Article 31. We know what they are. And it is a cipher, and it's not a trivial thing. And we all know what's in there, the various parameters of good faith, intangible, but important, and indispensable. Have you ever smoked dope? No? Oh here is a picture of you smoking dope. I didn't inhale. That's bad faith, right? We all know what good faith is and bad faith is when we see it. Good faith is important. Ordinary meaning, context, object, and purpose. We can also add in the more developed rules on context that you will be familiar with. We can also add in the supplementary means of interpretation, so the so-called negotiating history and the circumstances of conclusion, and we can add in the three different language versions, Article 33. It's actually quite an extensive list.

Now, if somebody were to ask me, how many cases have you seen where there are competing interpretations or things that are advanced as so-called interpretations, and each one of those interpretations ticks all of those boxes. How many? I'm struggling to think of one. When we sit down in my office, and the team where I work, and we look at these issues, and we work systematically through that cipher in order to figure out what we think our position as a third party, for example, is going to be, it is almost always the case that one of the litigants has a glaring hole on one of these criteria. There is something seriously wrong with their position, while the other litigant does a plausible job at ticking all the boxes. So whilst the process of interpretation and applying that cipher to these rules, which are ambiguous and are difficult, is not completely objective, to pretend that it is extraordinarily subjective is, I think, simply not the case. We have been given instructions. The earlier panel talked about instructions. The judges have been given instructions. They are in the Vienna Convention. They apply those instructions. They exercise the responsibility they have to do that. That's not just the mandate that they've been given, but the obligation. We cannot afterwards shoot the messenger with some cheap language about overreach. It's unacceptable. That is the reality of practice. The Vienna Convention is extremely good at identifying what is the most plausible, the best interpretation, in my experience.

And the second thing I want to say is, in an awful lot of disputes, there is no dispute between the two WTO Members. I can sit and have a coffee at the coffee break, during the appeal hearing, talk to a lawyer from the other side whom I know well and whom I trust, and we can discuss what the outcome is going to be, because we both know in our hearts who is wrong and who is right. The real story is that there is a dispute inside one WTO Member, usually the defendant, that has gotten stuck. And that is why the dispute comes to the WTO. And I think Niall is absolutely right when he says that it's a service. WTO Dispute Settlement is actually most often a service for the defendant, most of the time. It's just like going to the dentist. Right? It's maybe a little bit unpleasant, but if you don't do it on a frequent basis, eventually your teeth fall out. So, I think this is something to really understand about WTO Dispute Settlement, the reality of it. It's not really contentious often between the Members themselves. It's a service which is provided to resolve a difficult point that has arisen within one WTO Member. There are many, many cases like that.

My third point on judicial overreach, actually I don't think it's very difficult, really, conceptually, is to trace the line between what it is acceptable for the judge to do, and what it is not acceptable for the judge to do. Again,

the Vienna Convention tells us, because the Vienna Convention uses the phrase, "the terms of the treaty". Please don't use the word text, it's not there, except in the section on context. Article 31(1) of the Vienna Convention talks about the terms of the treaty, and the terms of the treaty are the terms of the treaty that frame, directly, the obligation or the right in question. The shall, or the may, and the connective words. That's it. That is the object of the interpretive process. Those are the words that need to be clarified and applied. Context is everything else. And I think, in my view, a fair statement to make, is that what the judge should not be doing is interpreting context. Context is not the object of the interpretive exercise. It's an analytical tool which is there in order to clarify the terms of the treaty, which again I insist are those which are directly connected to the obligation: the shall, or the right: the may. And as long as judges are only doing that, and applying the law as clarified to the facts, in my view they are not engaging in something called judicial overreach, which is just the language used by a bad loser They are simply executing the responsibility that the entire Membership has placed upon them. And it's improper and unhelpful to suggest otherwise.

Dr. Christian Häberli

Five quick points. I understand and share the idea that there are many good reasons to go slow in a proceeding. Some are less good also, right, Frieder? Second comment, the complainants' interests are not identical, sometimes not at all identical, with the exporters' interests, and that, then, makes government positions sometimes different from what the tomato exporter would really like to see. This is something we have to leave to parties to decide how they defend their case. Third remark, on Biotech, I will certainly not comment on this ruling, but I can say I'm not proud that we had to issue 1,063 just for the rulings. But, I do submit that for implementation, we saw a lot of cooperation and dialogue between the three complainants and the EU. Fourth remark, in the COOL dispute, because I'm a Swiss delegate, and in Switzerland we have mandatory labelling for certain methods of production, I had the solution really in my sleeve. I was not allowed to make a recommendation to the parties, without being asked by the Parties, but I was able to say in a well-hidden footnote that there were solutions fulfilling the consumer information purpose of the measure. In fact, intra-panel difficulties disallowed me from being more explicit there. Finally, for James, of course there are competing interpretations, and I have to disagree that good faith is always evident. Your faith is good by your definition, and the other guy's faith is bad. The same goes for protectionism. Every complainant accuses the other of being a protectionist and there is nowhere in the whole WTO bible where that word is defined, just as is the case with "undue delay". It then is for the adjudicator to come up with what is a non-tariff measure and what is a non-tariff barrier, very simply, and to play the role of a dentist - there I agree with you. We have to sometimes come out and say, look, this is a barrier, and this just a measure. This is the legitimate policy space, which everybody needs, and this is too much because you walked on somebody else's foot. So, these are very simple but not always easy ways forward for adjudicators. Vienna can be of help, but let's not go into that here.

Mr Alan Yanovich

Just 3 points in reaction. Thank you, Frieder, for the clarification on the timetable. I hope that information becomes more widely known, so panels understand that they shouldn't put too much faith in that timetable, otherwise the DSU is as close to perfect as you can get. That's my only complaint. I agree with Professor Howse that the standard review is a way to sort of limit what a complainant can do, and provide for more prompt settlement, and I think Continued Suspension is an exemplary case, unfortunately it has become the exception. The Appellate Body is not applying

Continued Suspension when reviewing claims under the other provisions of the SPS Agreement, and what's happening is, complaining parties are avoiding Article 5.1 and are going to other provisions in order to avoid that stricter standard of review. That shouldn't happen and should be corrected. And, finally, to the point that James made, I agree that many times there is a lot of debate within the responding Member, but I think it's for the responding Member to resolve that debate, not for a panel. So if there are competing interests, if there is internal debate about the level or risk or the level of protection, it is for the respondent Member to resolve tht debate, and not for the panel. So the existence of that debate, to me, doesn't suggest that the panel should side with the complaining party.

Session 3: How to ensure that dispute settlement contributes to the security and predictability of the multilateral trading system?

Chair: H.E. Mr J.S. Deepak, Ambassador, *Permanent Representative of India to the WTO*, Geneva

Panelists: Mr Philippe De Baere, Managing Partner, *Van Bael & Bellis*, Brussels
Prof. Jennifer Hillman (via video call), *Georgetown Law Center*, Washington D.C.
Prof. Robert Howse, *New York University School of Law*, New York
Prof. Dr. em. Ernst Ulrich Petersmann, *European University Institute*, Florence Mr Frieder Roessler, former Executive Director, *Advisory Center on WTO Law*, Geneva

Ambassador J.S. Deepak

So, before I invite the panellists to make their interventions, let me just share a few thoughts with you. I don't think I would be exaggerating if I say that the WTO's dispute settlement system is going through its most difficult and turbulent phase since its inception. Questions are being raised on its very purpose of its existence, the crown jewel of the multilateral trading system appears to have lost its sheen. Albert Einstein once said that in the middle of every difficulty lies opportunity. These challenging circumstances which we see the dispute settlement system facing also present us with an opportunity to inspect and reassess the system and, if possible, even improve it. Therefore, the discussions today are most timely.

As envisaged in the DSU Article 3.2, the dispute settlement system is a central element in providing security and predictability to the multilateral trading system. Hence I'm intrigued by the team of the panel discussion today which states how to ensure that WTO dispute settlement contributes to the security and predictability of the multilateral trading system. Perhaps hinting that the dispute settlement system might have failed to obtain this objective, at least partially in the past, and hence perhaps, going forward, there is a need to ensure that it fulfils the vison envisaged in Article 3.2. While we wait intently to listen to the panellists here who are all veterans in the field of international trade law, I would like briefly to highlight a couple of issues to trigger the discussions.

First is the issue of precedents. Several scholars have long argued that the consistent interpretation of the covered agreements is a key route for obtaining security as well as predictability. To paraphrase David Unterhalter, a former AB Member, there is a deeply entrenched recognition that decisions of the past carry weight and this is to quote "a legacy of authority by reason". This legacy is now under very strong challenge. How can the dispute settlement system address this

without undermining its core objectives of ensuring security and predictability? What is the correct path ahead on this issue?

The second point which I would like to allude to is the issue of rights versus obligations. There have been instances in the past when panels and the Appellate Body have adopted a strict interpretation of what constitutes a conflict between two WTO agreements. This strict interpretational approach is especially evident when the two provisions under the consideration for the purposes of determining a conflict relate to a permission to take an action, or a right, *vis-à-vis* a prohibition from taking an action, that is an obligation. The favoured approach of WTO panels and the Appellate Body seems to have been to rule such provisions as not being in conflict, since it is possible to comply with the obligation by not exercising the related right. Giving primacy to the provisions imposing an obligation or of those conferring a right may skew this balance in favour of obligation. Does this not make the system less secure and less predictable?

Mr Philippe De Baere

Professor Hillman is one of the leading experts on the WTO and the Appellate Body in the room; I will, however, have to disagree with her on a certain number of issues. Looking at the text of Article 3.2 of the DSU, it is correct that the dispute settlement system of the WTO is described as a central element in providing security and predictability to the multilateral trading system. But, as Professor Hillman pointed out in her intervention, in order to do so, the dispute settlement system is called upon to clarify the existing provisions of WTO agreements without affecting the balance between the rights and obligations of WTO Members. This is obviously a very difficult task to perform.

As a litigator, you tend to fully agree with the "correct" interpretation by the court in the cases you win. Conversely, when you lose a case, you are likely to consider that the balance of rights and obligations established by the agreement has been upset and that the interpretation adopted by the adjudicator is unacceptable. We are now confronted with a crisis, mainly because one of the most important Members of the WTO, namely the United States, considers that the balance of rights and obligations in the WTO dispute settlement has been upset and that therefore the system can no longer perform its task in providing security and predictability. The US position, in my view, is merely an expression of the inherent tension expressed in Article 3.2 of the DSU, between the security and predictability, on the one hand, and the requirement, on the other, that the dispute settlement system does not add to or diminish the rights of the Members. The United States has raised a number of concrete examples where it considers that the dispute settlement system has upset this balance. I will not repeat them in detail but I will try to outline some possible solutions.

Inspired by Professor Hillman, I have tried to group possible solutions to restore the balance in three categories. Professor Hillman entitled them, "the good", "the bad", and "the ugly". I have divided them into "the easy", "the difficult", and "the extreme". I did add a fourth category, which copying on professor Hillman's movie theme, I would like to call the "*Brutti, sporchi e cattivi*".

What are the easy solutions? The easy ones, in my view, relate to the operation of the Appellate Body, namely the 90-day time-limit, the rules for outgoing Appellate Body members staying beyond their term, the treatment of *obiter dicta*, the meaning of municipal law. There has been a proposal by a number of WTO Members, including the European Union, in a communication dated 26 November 2018, which addresses these issues by proposing to amend Article 17 of the DSU. I personally believe that this proposal would be adequate to address the concerns of the United States. We also know, however, that the United States is very unlikely to accept this proposal. In the US view, no amendments of the DSU are necessary. Instead, the United States wants everyone to play by the rules, as interpreted by the United States, that were agreed already in 1994. This US obstruction, I believe, could be partially overcome by amending the Appellate Body's Working Procedures or by the

adoption of certain authoritative interpretations on the basis of Article IX:2 of the WTO Agreement. The advantage of this solution is that authoritative interpretations can be adopted by a three-fourths majority, pursuant to the rules agreed in 1994, and no amendment of the text of the agreements would be necessary.

The "difficult" solutions might be necessary to address the objections raised by the US as regards the issue of the so-called "judicial overreach" and the issue of precedent. In my view, the problem here lies not with the dispute settlement system but with the paralysis of the legislative (negotiating) function of the WTO. The Appellate Body is left on its own due to the failure of WTO Members to exercise their political and legislative role. Members could, if they wished so, correct reports which they considered as unacceptable. Members could also adopt new rules that would better fit the current trading environment. Now, in the absence of this role, of this other leg of the WTO, the Appellate Body is in fact called upon to clarify legal provisions which are, by their nature, and sometimes by the intent of the drafters, ambiguous. This difficulty is obviously amplified by the fact that the Appellate Body is operating in a world that is very different from the one the drafters had in mind.

One of the approaches proposed is that, in cases where the WTO Agreements are allegedly intentionally ambiguous or where otherwise different permissible interpretations are possible, the Appellate Body would refrain from overturning a panel report where that panel report followed one of these interpretations. In my view, this solution proposed would just raise a number of new problems. Foremost, isn't it always the function of the adjudicator to make choices between different possible interpretations? Where would the Appellate Body have to draw the line between clarification and judicial overreach, between the multiple meanings inherent in any legal text and so-called "intentional, constructive" ambiguity? By forcing it on the Appellate Body to make these choices, we risk replacing one problem with another. We would basically be kicking the can down the road. Indeed, the decision that, after applying the interpretative rules of the Vienna Convention, multiple interpretations are permissible is likely to be equally controversial. Solving instances of constructive ambiguity, intentional omissions or adapting the rules to the new trading environment is a role which should be played by WTO Members, not the Appellate Body. And the question we are faced with today is: What can we do, when WTO Members do not play this role and somehow refrain from exercising the legislative function?

As an EU lawyer, I have seen how the European Court of Justice (ECJ) has played a role in actually instigating the EU institutions to adopt certain rules. In a sense, there was a comparable situation in the EC before the creation of the single market in 1992. EC Member States were entitled to derogate from the prohibition in Article 28 of the EC Treaty (now Article 34 TFEU), which prohibited quantitative restrictions on measures having equivalent effect between Member States, unless they were somehow justified by legitimate policy objectives, which were listed in Article 30 (now Article 36 TFEU). Since the famous *Cassis de Dijon* judgment, the ECJ consistently ruled that in the absence of common EC rules on approximation or harmonization, each Member State was free to set its own desired level of protection. This led to a fragmentation of the EC market and was clearly seen as a less than perfect outcome. Hence, the ECJ made it clear through its judgements that in those areas where there was insufficient harmonization, legislative action was required. These judgements were therefore seen as a call for action addressed to the EC institutions in

order to agree on common rules. As we know, this eventually led to the adoption of the single market programme in 1992. In other words, following these ECJ judgments, the legislators stepped in to correct what was perceived as an undesirable outcome due to the lack of common rules.

In the same way, the Appellate Body should have the possibility to call upon WTO Members to adopt new rules, or, more likely, to adopt authoritative interpretations of the existing rules, where it feels that such action is necessary. Conversely, WTO Members should be able to correct certain rulings and interpretations of the Appellate Body by means of authoritative interpretations, which would be adopted by a three-fourths special majority pursuant to Article IX:2 of the WTO Agreement. To achieve this, and as suggested by the Peterson Institute for International Economics, a system of legislative remand could be developed, whereby the Appellate Body could include in its report a request or a recommendation to WTO Members for an authoritative interpretation of certain provisions. Under this hypothesis, the Appellate Body would still issue its report and the Dispute Settlement Body would still adopt it under the existing negative consensus rule, however, the Membership would be expressly called upon to take corrective action in case it disagrees with the interpretation of the Appellate Body. The Appellate Body could use legislative remand if a panel (or several panels) depart from a precedent based on cogent reasons. Likewise, legislative remand could be called for by mutual agreement of the parties to the dispute or if the Appellate Body report contains any dissenting opinions. In conclusion, the ultimate solution must reinforce the corrective role of the WTO Membership, instead of weakening the dispute settlement system.

Let me come to the "extreme" solution, which is based on a perception or fear that the United States might have a more fundamental problem with the WTO dispute settlement mechanism - namely, with its compulsory jurisdiction. In other words, the US objections could be merely a pretext to limit or cripple the jurisdiction of the Appellate Body. Indeed, the WTO Dispute Settlement Body is the only remaining international "tribunal" that has compulsory jurisdiction over the United States.

There is a precedent of the US opposition to compulsory jurisdiction of other international courts. For instance, in 1946, the United States accepted the compulsory jurisdiction of the International Court of Justice (ICJ). In 1986, the United States withdrew from the compulsory jurisdiction of the International Court of Justice, however, it continued to appear before the ICJ in some cases based on *ad hoc* jurisdiction. In case we were to apply the ICJ precedent to the current crisis of the WTO, a solution could be to amend the DSU in order to allow the United States to withdraw from the compulsory jurisdiction of the WTO, either completely or partially, and to replace it by an *ad hoc* jurisdiction. Under this model, a party to a particular dispute with the United States would need to agree on the WTO jurisdiction before that dispute is brought to the WTO dispute settlement mechanism. This solution would obviously be conditioned on the United States' approval of the appointment of new Appellate Body members and some of the changes outlined above. The withdrawal would be reversible and the United States at a later stage could still reaccept the compulsory WTO jurisdiction. This could form part of negotiations between the Members.

A withdrawal from the compulsory WTO jurisdiction seems quite radical, and that is

also the reason why I categorize it under the "extreme" solutions. However, the advantage of this solution is that the other WTO Members could maintain and reinforce the Appellate Body. The two main disadvantages of this solution are obvious. First, as the League of Nations example shows, the absence of the world's largest economy from the system would seriously weaken its overall strength. However, the same result could be anticipated if WTO Members were to opt for an arbitration mechanism under Article 25 of the DSU, as was suggested by some commentators. The second disadvantage is that it would no longer be possible, unless the United States agrees, to bring cases against it. However, if the Appellate Body has insufficient members at the end of 2019, the situation will be even worse. Yet another important consideration in favour of this extreme solution is that the United States increasingly tries to rely on Article XXI of the GATT 1994 as a way to escape WTO jurisdiction. In these circumstances, the situation would not be so much worse under a solution that would introduce (a temporary) *ad hoc* WTO jurisdiction, and allow the United States to opt in on an *ad hoc* basis.

Finally, what are the "*Brutti, sporchi e cattivi*", the "ugly, dirty and bad" solutions? In my view, that would be to exclude only certain agreements from the WTO jurisdiction, for instance, the trade defence instruments. An important consideration is that trade defence instruments constitute the overwhelming majority of disputes, and the role of a dispute settlement mechanism would be significantly diminished. Indeed, more than 60-70 per cent of all WTO cases are about trade defence rules. Obviously, there would also be practical difficulties, as many disputes relate to several covered agreements, including but not limited to those dealing with trade defence matters.

A second dangerous solution would be to create a separate tribunal or dispute settlement mechanism for trade defence instruments, this seems to be a solution which is inspired by the separate dispute settlement mechanisms included in the NAFTA agreements. We all know what happened in NAFTA with Chapter 20 dispute settlement which became paralyzed due to the United States blocking panel selection. Why would not the same impasse arise if a separate dispute settlement mechanism were created for trade defence instruments without the introduction of a mechanism preventing Members from blocking appointments? Moreover, as already stated, many disputes crosscut several covered agreements and are not necessarily limited to those dealing with trade defence matters

Another "dangerous" solution would be to move away from the negative consensus rule and return to some kind of GATT panel system. This would also mean a return to all the challenges that existed in the GATT-era and that led WTO Members to accept the compulsory WTO jurisdiction in 1994. Among others, we would clearly have a lack of independence of the panelists and panel decisions would be more likely colored by the political and economic weight of the parties.

To conclude, I see four categories of solutions to the WTO dispute settlement crisis: the "easy", the "difficult" and the "extreme" solutions, and a number of "dangerous" or "ugly" solutions, which, in my view, should be avoided. Ideally, whatever solution is chosen, the outcome should be that the existing dispute settlement system is maintained or even strengthened by restoring the dialogue between the WTO's legislative and judicial functions.

Professor Jennifer Hillman

I want to thank Professor Petersmann for commenting on the proposals I have suggested—loosely titled "The Good, The Bad and The Ugly," with the upfront caveat that beauty is in the eye of the beholder. Professor Petersmann's idea of moving to a voting system is something that I have been attempting to outline as well. I confess that I put it into the category not of "good", "bad", but in the category of "ugly", because I fear that there are a number of risks that would come out of the notion of moving to a vote. But having said that, given that no-one can throw rotten tomatoes at me all the way from Geneva, I am going to take the risk of being somewhat provocative, as I very much applaud the convening of this conference with its title "What Kind of Dispute Settlement for the WTO?". But I fear that the underlying session titles read as though all that needs to change is to do a better job of communicating the virtues of the current system as it is with perhaps a few tweaks here and there, while outside, and particularly not far from where I am sitting in Washington DC, the view is quite different, and it tells me that we are at a very dire point in which the most likely scenario is that as of December 11 of this year, we will no longer have a functioning Appellate Body. And with the demise of the Appellate Body will come all of the negative legal implications that Professor Petersmann has just outlined.

I fear that focusing on stability and predictability, or balancing promptness vs adequate settlement may be a bit of rearranging the deck chairs on the Titanic, so with all due respect to this session, I want to suggest that should at least consider the possibility that there has been too much predictability and stability in the system, and that by highlighting the notion of stability and predictability, we may be diminishing the system's ability to preserve the rights and obligations of the Members. We may need much bolder action if we are to save the Appellate Body and with it the binding dispute settlement system.

As Ambassador Deepak made very clear in his opening remarks, the DSU asserts upfront that the dispute settlement system as a whole is a central element in providing stability and predictability to the multilateral trading system, but Article 3.2 goes on, very clearly, to set out two principle roles for the dispute settlement system: first, to preserve the rights and obligations of the members, and secondly to clarify existing provisions of the WTO Agreements. It's not clear to me whether we've gotten the balance between those things exactly right. For me, when I step back and think about what the risks were at the very beginning to set up a binding dispute settlement system, it was clear that such a system could have a number of downsides.

First, there was a risk that the system could act as a break on change and on the development of new rules. If a Member believes that it is advantaged by the rules as they now stand compared to a new set of rules that might impose greater disciplines on its own behaviour, that Member has very little incentive to agree to new rules. And if the old

rules can be strictly enforced to one Member's advantage, there is even less incentive to agree to a new set of rules. And I think you see a corollary of this in the statement that Ambassador Lighthizer made at Ministerial Conference (MC11) in Argentina last December, in which he stated: "Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table."

The second risk that has been there from the beginning is that the judicialization of the dispute settlement process may complicate trade negotiations by limiting the ability of negotiators to rely on deliberative ambiguity to resolve their negotiating differences. If every agreement has to dot every "i" and cross every "t", in order to make sure that it can be applied in a strictly adjudicatory system, the risk arises that you are you making it too hard to reach new agreements that can meet such an exacting drafting standard requiring agreement on detailed texts.

And third there was always a risk that, to the extent that the dispute settlement system is seen as overly-limiting of countries' ability to take discreet WTO legal measures to address either political opposition or to address particular economic stress, and here I would say particularly through the use of trade-remedies (anti-dumping, countervailing duties, or safeguards), the system can harm the overall support for the WTO and the rules-based system. And I fear that the very strong emphasis on stability and predictability may have allowed some or all of those down-sides to come to fruition to at least some degree.

So, for me, it is worth questioning at this point of crisis whether there has been such a strong emphasis on stability and predictability that there are too few opportunities for course correction within the dispute settlement system itself. Whether, within, or across disputes, over a given provision of WTO text, or across the system as a whole, we need to ask ourselves: Do we have enough room for the decisions of the Appellate Body to be in ways re-shaped or re-examined or moved in any way? Has the notion of stability and predictability become so strongly enshrined that there is not sufficient room to make changes where they might be needed and might make an important contribution to the balance between protecting the rights and obligations of Members with the need for stability.

It is very clear that the decisions of the Appellate Body have become virtually enshrined as the applicable law of the WTO. Just consider how many hours are spent during hearings of the Appellate Body debating and interpreting the text, not of the WTO Agreements themselves, but of prior Appellate Body reports, where much emphasis is placed on understanding exactly what the Appellate Body has said, raising Appellate Reports up close to equal footing with the treaty text itself. With so much time and effort focused on the text of prior decisions, there appears to be little time or space to reconsider the text and its implications from decisions of the past. And the standard for what constitutes cogent reasons to depart from past decisions may need to be examined at least in the context of this discussion. Has that bar been set in the right place or are we making it too hard to show that one case can be distinguished from another, that there are in fact cogent reasons to at least consider going down a slightly different path?

So in the course of this discussion about whether reforms to the dispute settlement system are necessary or desirable, I believe we need to have an honest conversation about when, where, and how, can, or should, the Appellate Body be told that it has gotten it wrong, at least to some degree. Can we think about whether there is a mechanism to do

that, whether it within the DSB system itself, or whether it is in some more regularised annual or semi-annual process where there can be serious consideration about whether course correction is in order to provide a re-balancing between stability and predictability and ensuring the rights and obligations of the Members? When and how and where can the Appellate Body signal that it is hearing, that it is listening, that it is understanding these concerns, without compromising the independence of the Appellate Body, which is, to me, of paramount concern and interest?

I'm not sure that we have ended up at the right balance. I do think that many of the ideas underlying a system like the WTO's dispute settlement system requires an Appellate Body that on the one hand can remain independent and not subject to undue pressure, but on the other hand has to remain part of the system, able to hear and think about the concerns and the issues that are being raised by the Members. And that, to me, must be part of the way forward. We have to find some way in which there can be honest conversations about the shortcomings of the WTO's dispute settlement. We have to find a way to acknowledge that there is merit to some of the concerns that have been raised by the United States (and others) over many years. While there can be complete condemnation of the tactic that the United States has chosen to block any process for reappointing Appellate Body members and agreement with Professor Petersmann's analysis that such blocking illegally deprives Members of the ability to carry out their duty to appoint Appellate Body Members under Article 17.2 of the DSU ("The DSB shall appoint . . .") I am concerned that the elevation of the notion of stability and predictability to the high place it now occupies has made it harder to make necessary reforms to the dispute settlement system. The limited flexibility left in the system pushes down on or crowds out the ability for the kind of course correction that I think we absolutely may need if we're going to try to come to some kind of a compromise that we leave us with a full and functioning Appellate Body and an improved dispute settlement system.

I stand by my sense that the WTO dispute settlement system must be preserved and protected and that reforms must come before the Appellate Body is destroyed. If we allow the Appellate Body to disintegrate and the binding dispute settlement system to fail, I believe getting it back again will be far harder than making needed and helpful reforms now. I regret that I cannot be in Geneva with you, but hope that all who are gathered there can open your minds and think creatively about the changes that can and should be made to improve the system for everyone--to address the real concerns that have been raised and to prove that we can have a system that is flexible enough to restore the balance between stability and predictability on the one hand, and preserving the rights and obligations of the Members on the other.

Professor Robert Howse

Sometimes it might seem to be just an indulgence of academics to talk philosophically about urgent policy issues, but I do think that the issues before us today are sufficiently deep that it requires some stepping back and some more philosophical or big-picture thinking about what dispute settlement is, what its basis is, what the nature of the rules are, before we can really evaluate some of the more immediate and practical options for going forward.

So I want to start with Alexandre Kojève, and those of you who may have read the fine book by Petros Mavroidis and Doug Irwin "The Genesis of the GATT" may know, Kojève was the Chair of the Legal Drafting Group for the GATT. And he was one of the most thoughtful thinkers about the meaning of law and the relationship of law to adjudication. So in a book that Kojève wrote a few years before getting involved in the drafting of the GATT, "Esquisse d'une phénoménologie du droit", Kojève defines "droit" (or "law") in the normative sense as requiring or supposing that there is an impartial and disinterested third. According to Kojève, you can have arrangements based on power, arrangements based on economic convenience, but in order to have "droit", you have to have or at least be able to suppose you have, an impartial and disinterested third.
Now, how do we know that a third, the adjudicator, is impartial and disinterested? Kojève takes a Kantian turn and says, "well, we can't look into the mind of the adjudicator, we can't know the heart, and we can't know whether someone is acting or deciding purely out of a motivation of duty or on other kinds of more interested or partial motivations". So the reason we can indeed think the possibility of this independent and as he says impartial and disinterested judge is that we have a concept of justice. And if, roughly speaking, the decision of the judge corresponds to the relevant "community's" conception of justice, which can include within it agreements but also disagreements on specific rules and norms, then phenomenologically, i.e. in appearance the judge will appear to be disinterested and impartial in the sense that their decision can be seen, broadly speaking, even though there is a winner and loser, as corresponding to the application conception of justice. Thus, as a decision based on considerations of justice alone.. Now let's look at whether we have a conception of justice in the WTO. And here, we have to I think distinguish between, these are my categories, they are out for debate or argument, perhaps four kinds of rules.

First kind is the rules that sustain what one would call the liberalization contract. Bargained and bound concessions. All of the apparatus surrounding interpretation of concessions, interpretation of schedules, customs formalities and so on. There, I think there is a conception of justice that is very analogous to default rules for contract in private law and the underlying conception of justice is really *pacta sunt servanda*, that we really need to have a background set of norms to make sure that collective expectations, are actually met through the implementation of the contract. (Petros Mavroidis has often conceived of the GATT or WTO as a "contract"-while I disagree that all the norms can be understood in such terms those related to bargained concession surely can be).

Second kind of rules: non-discrimination (National Treatment/MFN) and related norms, subject to public order, public policy

(the specific and General Exceptions). Here, I think there is also a conception of justice, and again there will be disagreements about the balance, and Kojève had this idea of his concept of justice being a balance between the logic of the market, and the logic of social justice or government intervention for social goals, and this balance he thought would never be perfect or stable, but the conception of justice behind national treatment, MFN applied in tandem with the General Exceptions, subject to public policy, is something like that balance. And that balance is struck in almost every system where there are rules about the regulation of commerce that bind or constrain one or more levels of government. Whether the US constitution's dormant commerce clause, or the EU, or other federal or regional systems. They all have some kind of balance of this sort. So there, there is a conception of justice, which permits the balance to be struck in somewhat different ways in different economic, social and political systems. Concepts such as necessity, proportionality, "fit" define through the jurisprudence the outer limits of difference in the ways each Member can strike the balance; what might be called a "thin" concept of justice is thus articulated; here in the US-Cloves case the Appellate Body cited the preamble of the TBT Agreement as articulating the notion of a balance between the right to regulate and trade liberalization, or market freedom. This thin concept of justice, non-discrimination permissive of different approaches to the relationship of social regulation to market freedom, underpins the central notion of pluralism in the WTO, which Professor Joanna Langille and I have developed in our joint scholarship

A third set of rules exists where one group of countries, based upon its power or leverage, has managed to impose its conception of justice in a certain way through the power politics of trade. TRIPs is the clearest example. Now here you have a problem because, in implementing the rules, the disinterested and impartial third really impartial or disinterested, or are they, in fact, giving effect to a power move of a set of countries that other countries have only agreed to under extreme pressure, or perhaps the expectation of benefits that might never have come to them through linkage of IP to other kinds of concessions. Here, in a long article that I recently published in the European Journal for International Law, I proposed a theory of how the Appellate Body has managed this problem, which is to be very emphatic about the importance of provisions, even in these power-based rules, like IP rules, that suggest some balances or limitations, and to avoid teleological interpretations of the rules, which might reinforce the overall perspective of the powerful in pushing for these rules, namely maximization of intellectual property protection that it is necessarily a good thing.

Now then we have rules in areas that were dealt with largely through self-help of the GATT, and here I think there was a greater wisdom of the GATT. This refers to anti-dumping rules, subsidies rules, and so on, , and this is why I broadly agree with Jennifer Hillman that these should probably be removed from the Appellate Body, here there is no concept of justice, I will argue controversially. Either one can look at these rules, as Sue Esserman and I did in a piece for Foreign Affairs a number of years ago, as just bargained political compromises of some sort. Or, one can look at them as an effort to create something that's impossible.

The SCM Agreement benchmarks for what are legitimate or illegitimate subsidies without a competition policy. The EU has a competition policy. The WTO emphatically

does not, and that goes to there being no common concept of justice upon which to premise dispute rulings concerning trade remedies.. Without a common concept of justice, and these rules don't make sense. What does makes sense is self-help, because different countries have different views of fairness. You need some flexibility for individual countries to act unilaterally because we are in a realm where the common concept of justice is not agreed, even in its basic outlines. Because we don't have a global competition charter, but because we don't have a global competition charter, the Appellate Body in deciding "rules cases" doesn't have a common theory of justice or an underlying concept of justice, so, at its best, it merely resorts to proceduralism, checking that the underlying domestic procedures are not corrupt, irrational, arbitrary, and so on. That's reasonable, because that's a minimum sense of administrative justice, that's almost implied in the idea of the rule of law itself. But once you get into the substantive norms and benchmarks, without the underpinning of a competition policy, which obviously takes a view of justice of the relationship between equivalence, the logic of market outcomes vs other norms, you don't have the basis for the judge being able to, be shown to, be an impartial and disinterested third, and that puts the judge in an impossible position, because without that common idea of justice against which to check the ruling, the judge will always be regarded by the party that loses as perhaps not entirely impartial and disinterested.

So here I think we have to leave room, especially for some role for self-help, and at least not to micro-manage the substantive standards, to give some play to the checking or verification that administrative justice is happening, but to acknowledge that there cannot be a real juridical decision often using benchmarks that are economically incoherent and simply paper-over different conceptions of political and economic systems.

That brings me to the fourth situation, which is the situation in a way that underlies the dispute settlement crisis, and here I agree with Robert McDougall who is going to talk later, that we cannot really divorce the issue of the broader crisis from the issue of the dispute settlement crisis, because, in fact, what we have is a situation where the WTO rules have become entangled in geopolitical conflict.

We were lucky with the GATT because we had the cold war and the eastern countries weren't in the system, so the kind of open-ended geopolitical conflict that we now see between the US and China, that kind of problem did not exist in the GATT-era. The GATT system was sheltered from it, geopolitical conflict was elsewhere in the United Nations, in the arms control regime, There were some cases where it spilled over, on Nicaragua for instance, but in general fairly isolated and protected against that. But now we have it entangled, and the EU and some others try and suggest, ok let's have some more rules, lets try and nail down rules that are more precise or detailed, or adequate about subsidies or state enterprises. This is a hopeless venture and it will lead to less legitimacy for the dispute settlement authorities, because the rules cannot be underpinned by a concept of justice. That concept of justice stems from each social and political system, which views the meaning of the market, the meaning of private and public, in fundamentally different ways, and the differences are just exacerbated by geopolitical conflicts that aren't even trade conflicts. So there I agree fully with Frieder Roessler's suggestion that we have to look at the flexibilities of the initial GATT system where you can't really have dispute settlement that appears impartial and disinterested, you solve the problem by some kind of political arrangement or deal between the conflicting

parties, which preserves the integrity of the rest of the system against this kind of conflict filtering into it, contaminating it, and making the adjudicative function not to seem, any longer, fully disinterested and impartial. And as I recall WTO Director General Roberto Azevedo has actually said that it makes sense that the US and China would work out their geopolitically-related trade conflict, the national security dimension and so on, through bilateral deal-making. And, in so, I would finally say, that if we understand the problems of the last two kinds of sets of rules posed, that we should be asking for less, not for more, from the system. Less is more, because less here means avoiding the adjudicator being put down the path where they are in fact choosing between the use of justice or between different social and political and economic approaches. And I think that that is the root to true delegitimization. I am actually more worried about that than I am worried about no compulsory jurisdiction, because Kojève distinguished between "enforcement", between making, as he put it, "irresistible" the decision of the impartial and disinterested third, and the necessity of the impartial and disinterested third for purposes of having a true "droit" or justice. Sure, you may not have full compulsory jurisdiction, it is very hard to come by in international law, but the many actors who rely on the rules and set their expectations and behaviour according to them. Ruti Teitel and I have explored this in our essay "Beyond Compliance" and related writing. If there is an impartial and disinterested third, even if some countries don't enforce, even if some countries can't be dragged into court all of the time, you have a sense of order that is underpinned by what Kojève called "droit" in real law. .And the "raison d'être" for me in doing this kind of research and being in this field for almost 30 years is in fact it is real law.

Professor Ernst-Ulrich Petersmann

The WTO Appellate Body (AB) crisis caused by the illegal 'blocking' of the filling of AB vacancies risks leading to a breakdown of the WTO legal and dispute settlement system by the end of 2019. This is due to the fact that - if the Appellate Body becomes dysfunctional as of December 2019 - then also panel reports risk no longer being adopted pursuant to Article 16.4 DSU; if appealed and without an Appellate Body report, also panel reports risk never being adopted. I shall briefly discuss the four basic policy options, which WTO diplomats have in responding to the illegal 'blocking' of AB vacancies, which violates not only the legal obligations (e.g. under Articles 3, 17, 23 DSU) to protect the AB system, but also the democratic mandates given by parliaments when they approved the WTO Agreement and gave limited mandates to WTO institutions and WTO diplomats to implement and modernize, but not to destroy the WTO dispute settlement system. Resolving this political threat to 'security and predictability of the multilateral trading system' (Article 3 DSU) should be based on the following four principles underlying WTO law and the universal recognition of human rights by UN and WTO members.

1. The first principle is: *Respect the limited, democratic mandates given to WTO institutions and to WTO diplomats* when parliaments approved the WTO Agreements and mandated their governments to 'ensure the conformity of … laws, regulations and administrative procedures with … obligations as provided in the annexed Agreements' (Article XVI:4 WTO Agreement). In contrast to GATT 1947, parliaments approved WTO law and incorporated it (e.g. in the EU and USA) into domestic legal systems. Also the US trade promotion legislation of 2015 has given neither a legal nor a democratic mandate to trade diplomats to destroy the WTO legal and dispute settlement system. The WTO Agreement not only implements (e.g. in Article III) this limited delegation of separate legislative, administrative and judicial powers. It also limits the 'practice of decision-making by consensus followed under GATT 1947' by prescribing majority voting in Article IX:1, notably for administrative and judicial decision-making as acknowledged, *inter alia*, in the 2003 WTO procedures for the appointment of the Director-General and in the working procedures for WTO dispute settlement panels and the AB. The WTO rules for compulsory, international and national jurisdictions for judicial settlement of WTO disputes based on rule of law limit executive trade policy powers; they are 'a central element in providing security and predictability to the multilateral trading system' (Article 3:2 DSU). WTO dispute settlement bodies and their members have acknowledged these judicial constraints since 1995. Trade agreements without legal enforcement mechanisms risk not only becoming ineffective, as emphasized by USTR Lighthizer. The illegal obstruction by the DSB of the AB system undermines also the limited, democratic mandate given to WTO diplomats and to WTO institutions.

2. The second principle is: *Respect rule of law as defined in WTO law.* Since 2017, the DSB violates its collective legal duties under Article 17 DSU that the AB 'shall be composed of seven persons', and vacancies 'shall be filled as they arise', so that 'the Appellate Body membership (is) broadly representative of membership in the WTO'. The US blocking of the appointment of AB candidates on grounds unrelated to their personal

qualifications – and without providing any evidence that AB reports have not complied with their legal and judicial mandates (e.g. to clarify WTO rules in conformity with the customary rules of treaty interpretation) - violates the US legal obligations under the DSU (e.g. Articles 3, 17 and 23). The US Trump administration's denial of 'judicial functions' of WTO dispute settlement bodies, like its insistence on alleged 'historical US interpretations' of WTO rules disregarding the customary rules of treaty interpretation, reflect hegemonic power politics aimed at increasing US leverage for renegotiating what President Trump describes as 'the terrible WTO Agreement'. Even if other WTO members cannot prevent US power politics disregarding multilateral treaties, they should respect their democratic and legal mandates to protect the WTO legal, dispute settlement and trading system as one of the most important 'global public goods' for promoting 'sustainable development' and poverty reduction for the benefit of citizens all over the world.

3. *Respect for the separation of legislative, administrative and judicial powers in WTO law* requires all WTO Members to proceed as prescribed in Article IX:1 of the WTO Agreement, i.e. to complete the filling of AB vacancies by 'a majority of the votes cast' so as to terminate the illegal blockage of AB appointments. Article IX:1 was designed to limit illegal abuses of veto powers in administrative decision-making procedures. The explicit WTO requirements for majority decisions - if consensus cannot be reached - in *administrative decision-making* (e.g. on the appointment of WTO Directors-General, the completion of the composition of WTO panels by decisions of the DG) as well as in *judicial decisions* (e.g. of WTO panels and AB divisions) do not affect 'the practice of consensus followed under GATT 1947' and under the WTO for *political* and *legislative decision-making procedures* (as prescribed in Article IX:1 WTO Agreement). As long as the DSU reform negotiations since 1998 do not lead to agreed DSU amendments, implementing the existing rules and protecting the existing institutions (like the AB) is even more necessary. Contrary to the political US claims, there is no evidence that the AB has violated its mandate to review 'issues of law covered in the panel report and legal interpretations developed by the panel' (Article 17:6 DSU), for instance by disregarding the customary rules of treaty interpretations or the quasi-judicial AB mandate for 'prompt settlement' of WTO disputes as prescribed in Articles 3 and 17 DSU. This judicial function requires the AB not only to clarify WTO rules, which trade negotiators left incomplete and often indeterminate; it also justifies exceeding the 90 day deadline inserted into Article 17:5 DSU (at the request of US negotiators back in 1993) if political WTO practices (e.g. the illegal diminution of the number of AB members) make it impossible for the AB to meet such unreasonable, unprecedented deadlines imposed on complex judicial proceedings by US trade diplomats. The 'legitimacy challenges' of the 'AB crisis' result from political governance failures and WTO power politics rather than from 'judicial failures', especially if WTO governments persistently adopt AB legal findings without proposing 'authoritative interpretations' (Article IX:2 WTO Agreement) preventing precedential effects of judicial interpretations that governments consider to be politically inadequate. The fact that the US has neither proposed such 'authoritative interpretations', nor attempted to have them adopted by the 'three-fourths majority of the Members' prescribed in Article IX:2, reflects the hegemonic power politics pursued by the Trump administration. Just as, in 2003, the

WTO Ministerial Conference adopted procedures for the appointment of the Director-General providing for majority decisions (as prescribed in Article IX:1 WTO Agreement) if consensus cannot be reached, it is time for the WTO members to adopt a majoritarian 'authoritative interpretation' confirming that AB vacancies 'shall be filled as they arise' (Article 17:2 DSU), if necessary by majority voting in conformity with Article IX WTO.

4. Finally, the WTO remains a pragmatic institution, as illustrated by the mandate given to Ambassador Walker to facilitate an agreed political resolution of the AB crisis. Yet, the political proposals made by Prof. Jennifer Hillman – i.e. to take away the AB jurisdiction for safeguard measures and anti-dumping measures, or to establish a special AB division dealing with these issues – would require amendments of the DSU, which are – for good reasons – not supported by most WTO members, for instance in view of the lack of any coherent economic or legal justification of this proposed amendment of WTO law. The fact that many WTO members adversely affected by the US imposition, in 2018, of discriminatory tariffs on steel and aluminium have challenged these illegal invocations of Article XXI GATT through WTO dispute settlement proceedings rather suggests an increasing willingness to defend the rule of law among WTO members against hegemonic power politics undermining the global public good of the rules-based WTO legal, dispute settlement and trading system.

My answer to the question posed to this Panel is: The WTO dispute settlement system continues to better protect the WTO objective of 'providing security and predictability to the multilateral trading system' than intergovernmental power politics. The four policy options to respond to the WTO governance and AB crises – i.e. (1) member-driven governance (e.g. aimed at agreed DSU reforms); (2) administrative majority decisions filling the AB vacancies; (3) judicial remedies against illegal power politics (as illustrated by the 9 WTO panel proceedings reviewing the US import restrictions on steel and aluminium); and (4) WTO pragmatism (e.g. using agreed panel and arbitration proceedings as a substitute if AB procedures may no longer be available) – offer WTO members adequate, political and legal means for resolving the current WTO governance and AB crises in conformity with the four 'constitutional principles' underlying the WTO legal, dispute settlement and trading system, as discussed above. Unfortunately, the 'pragmatic, collective DSU violations' by WTO members since 2017 have failed to protect 'public reason' and rule-of-law in the WTO. The more 'aggressive US unilateralism' and Chinese 'state capitalism' and 'bilateralism' (e.g. in the context of China's 'Belt and Road agreements' with more than 70 WTO members) challenge the multilateral WTO legal and economic paradigms of a non-discriminatory, rules-based world trading system, the more necessary becomes 'WTO leadership' for defending the rule of law as defined by democratic parliaments when they approved the WTO Agreement. Both Anglo-Saxon neo-liberalism and Chinese state-capitalism neglect 'market failures' as well as 'governance failures' to the detriment of citizens demanding transnational rule of law and promotion of inclusive consumer welfare through undistorted, citizen-driven economic markets as well as 'democratic political markets'. From this democratic citizen perspective interpreting WTO governance as a 'principal-agent relationship' between citizens (as 'constituent powers' of legitimate legal systems and 'democratic principals') and governance institutions with limited, delegated powers, WTO reforms are obviously necessary (e.g. for limiting market distortions by state-owned enterprises, subsidies, discriminatory government procurement, abuses or theft of intellectual property rights).

Even if judicial interpretations underlying *ad hoc dispute settlement rulings* may need to be corrected through democratic legislation, the WTO dispute settlement system continues to deserve legal and democratic protection against illegal, intergovernmental power politics. The WTO objective of 'sustainable development' cannot be realized unless citizens, democratic institutions and WTO diplomats defend transnational rule of law in conformity with the 'constitutional principles' underlying UN and WTO law, at least among the 163 WTO Members willing to comply with their DSU obligations so as to protect the reasonable interests of their citizens in a rules-based world trading system. The justified US demands for reforming the WTO legal system in order to better discipline authoritarian market distortions (e.g. by China), trade protectionism (e.g. by India) and violations of WTO law (e.g. notification requirements) by other WTO members do not justify destroying the WTO AB system.

Mr Frieder Roessler

Appointing Appellate Body Members by Majority Vote?

My co-panelists Professor Jennifer Hillman and Professor Ernst-Ulrich Petersmann agree that the WTO Ministerial Conference has the power to appoint new members of the Appellate Body by vote if no consensus could be reached in the DSB. While Professor Petersmann considers that the Members of the WTO are legally obliged to resort to voting if this is the only means to avoid an existential crisis of the WTO dispute settlement system,[6] Professor Hillman considers voting even under those circumstances to be problematic. In her view,

> Going to voting - even for the limited purpose of appointing Appellate Body members - puts Members in the difficult position of choosing between abandoning the preferred consensus approach versus the obligation to fill seats on the Appellate Body and potentially raises the concern that other more substantive issues will soon follow as matters subject to voting.[7]

Professor Hillman's concern is probably shared by many WTO Members. There is a widespread fear that any departure from the hitherto strictly observed consensus practice would open the door to voting on any matter, that decision-making in the WTO would then be dominated by the formation of coalitions rather than efforts to negotiate a common position and that Members might have to assume new obligations they had not accepted.

I would like to examine whether that fear is justified.

According to Article IX of the WTO Agreement, the WTO „shall continue the practice of decision-making by consensus followed under the GATT". This provision implies that the drafters of the WTO Agreement were satisfied with the way decisions were adopted under the GATT and that they expected the WTO to follow the example of the GATT. What precisely was the consensus-making practice of the GATT? And did the WTO continue that practice?

I observed for the first time how consensus-making worked in the GATT at meeting of the GATT Council of Representatives in 1975. Australia proposed at that meeting that a consultative group on trade in meat be established. Its proposal had already been discussed on previous occasions and the Chairman of the Council, Mr Sahlgren from Finland, therefore did not expect to hear anything new. He leaned comfortably back in his chair and lit a cigar. Sure enough, the EC and Japan once again said that the Australian proposal was interesting but needed to be further examined. Then something completely unexpected happened. The Australian representative raised his flag and said: „Mr Chairman, I have been instructed to ask for a vote on our proposal". Mr Sahlgren almost lost his cigar, hesitated a moment and then

[6] E.U. Petersmann „How should the EU and other WTO Members react to their WTO governance and WTO Appellate Body crises?" Published by the European University Institute as EUI Working Paper RSCAS 2018/71.

[7] J. Hillman „Three Approaches to Fixing the WTO's Appellate Body: The Good, the Bad and the Ugly?" Institute of International Economic Law, Georgetown University Law Center, December 2018.

said calmly: „Well, I suggest that we have a tea on this matter." That tea lasted four days. Then the Council meeting resumed and the Consultative Group on meat was established - by consensus.[8]

This was not the only instance in which a formal request to adopt a decision by vote was made. In 1985 Brazil, India and other developing countries objected to the convening of a special session of the CONTRACTING PARTIES to discuss the modalities of a new round of trade negotiations. When it became clear that no consensus on the matter could be reached, the United States formally requested the Chairman of the CONTRACTING PARTIES to convene the special session. The Chairman, pointing out that this request needed to be concurred in by the majority of the contracting parties, invited the contracting parties which concur with that request to so inform him not later than 31 August 1985.[9] This prompted Brazil, India and the other developing countries to withdraw their objections and the Session was convened without a prior vote.

Consensus was thus achieved under the GATT against the background of a possible vote. Of course, consensus was always the goal and long, often night-long, informal meetings were dedicated to the discovery of solutions acceptable to all. Some meetings went on until the delegations with flexible instructions had gone home to sleep and the matter could be discussed among representatives of contracting parties with a significant stake in the matter. At one of these meetings at four o'clock in the morning, thinking friendly of my bed, I reached the conclusion that decision-making by consensus really meant decision-making by exhaustion and that this method distributed the influence in decision-making in accordance with the real importance each contracting party attached to the matter to be decided. That was the reason why consensus-making was far superior to the formal one-contracting party-one-vote system set out in the General Agreement. Given the wide variety of issues before the GATT a formal voting system reflecting each contracting party's stake in each of the matters to be decided could not have been devised. However, the consensus-making practice of the GATT generally operated in a manner that came fairly close to such a system.

Majority decisions were never proposed or considered for the purpose of imposing new trade policy obligations on unwilling contracting parties. A Secretariat note on the launching and organisation of trade negotiations circulated in 1985 made clear that „while the CONTRACTING PARTIES may, with a simple majority, decide to conduct, sponsor or support multilateral negotiations, they do not have the power to oblige individual contracting parties to accept new substantive obligations as a result of such negotiations."[10] *While majority votes to impose new trade policy obligations on a minority of contracting parties were thus legally excluded, majority votes on institutional matters were a possibility each negotiator had to take into account.*

This GATT practice is reflected in WTO law. Amendments of the WTO agreements take effect in principle only for the Members that

[8] It is interesting to note that the minutes of the Council do not mention Australia's request for a vote. They merely note that the meeting was suspended to permit an informal drafting group to discuss the terms of reference of the proposed group (GATT document C/M/103, 18 February 1975, page 8).

[9] GATT document GATT/AIR/2180, 26 July 1985.

[10] GATT document Spec (85) 46, 26 September 1985, page 1

have accepted them;[11] however, amendments that are „of a nature that would not alter the rights and obligations of the Member, shall take effect for all Members upon acceptance by two thirds of the Members".[12] Members are thus not obliged to accept new trade policy obligations against their will, but individual Members cannot prevent an amendment of a provision that regulates such matters as the administration of the WTO, the activity of its organs or the use of its resources. The GATT practice is also reflected in the procedures for the appointment of the Director-General, adopted by the WTO. They make clear that, if it has not been possible for the General Council to take a decision by consensus by the deadline for the appointment, Members should consider the possibility of recourse to a vote as a last resort.[13]

I think that a wise compromise was found in the decision-making practices of the GATT and the WTO law reflecting those practices: A Member of the WTO cannot be forced to accept new policy obligations but it may also not prevent other Members from assuming new obligations in the framework of the WTO. A Member need not use the WTO for the realisation of its policy objectives but it may also not prevent the WTO from performing its functions for other Members. If voting is *a priori* excluded under all circumstances the benefits of that compromise are lost. Each Member is then effectively given the right to extract policy concessions from other Members by threatening to bring some or all the operations of the WTO to a halt for all Members, for instance by vetoing amendments acceptable to other Members, blocking decisions launching a trade negotiation or refusing to approve the WTO budget, to appoint the Director General or the members of the Appellate Body. The very existence of the WTO would then be at risk.

To conclude: The Members of the WTO overwhelmingly favour consensus-making; I therefore do not believe that an appointment of Appellate Body members by majority vote would provoke an avalanche of requests for votes on other matters and spell the end of the consensus approach. The WTO does not have the power to oblige individual Members to accept new policy obligations through majority decisions, and this has never been attempted. I therefore see no basis for the concern that, if Appellate Body members were appointed by majority vote, other more substantive issues would follow as matters subject to voting.

If consensus-making remains an objective, the WTO will benefit; however, if consensus-making is understood to require unanimity, it invites abuse and the WTO will suffer. Recourse to voting must therefore remain a possibility. Members agreed that, in the process of appointing the Director-General, their overriding objective shall be to reach decisions by consensus but at the same time provided for the possibility of recourse to a vote.[14] This approach should in my view also govern the appointment of Appellate Body members.

[11] Article X:3 of the WTO Agreement

[12] Article X:4 of the WTO Agreement

[13] WTO document WT/L/509, 20 January 2003, paragraph 20

[14] WTO document WT/L/509, 20 January 2003, paragraphs 3 and 20

Session 4: Has WTO dispute settlement made a useful contribution to the rule of law and the development of international law?

Chair: Dr. Marion Jansen, *Chief Economist*, ITC, Geneva

Panelists: Prof. Dr. em. Georges Abi Saab, Graduate Institute, Geneva
Prof. Dr. Gabrielle Marceau, Senior Counsellor, Legal Affairs Division, WTO
Mr Nicolas Lockhart, Partner, Sidley, Geneva
Mr Robert McDougall, Senior Fellow, Centre for International Governance Innovation, Canada
Prof. Dr. Joseph Weiler (via video call), New York University School of Law, New York.

Prof Georges Abi-Saab

Jo, dear friends I feel here like a student sitting for an exam, because the subject that was put to us: "Has the WTO Dispute Settlement made a useful contribution to the rule of law and the development of international law ?", sounds like a good exam question, and when I read it on my way in, I thought I'll answer it in the same way as the good student I used to be. But the chairman says we have to look to the future, rather than backward. I'll try to put some projection into my answer. But I have first to answer the question as it stands, which is in two parts. First part, "Has the WTO Dispute Settlement contributed to the rule of law?" And my answer is definitely yes. And the reason is not legal; the reason is simply because for a long time it was the only major regulatory system which included the main powers, particularly the United States, with compulsory jurisdiction for the settlement of disputes. It was the only one, and it was an acceptance of jurisdiction covering the whole field, not only over a special issue here or there. And this is of course a great contribution to ingraining the rule of law in practice. You ingrain it here you ingrain it there and the total effect is that the rule of law becomes the rule rather than the exception.

But what do we have now? We are facing, and here I speak about the future, we are facing, an effort to undo that system, to undo this part which really locked the system on to progress. When I was in the Appellate Body and asked to speak about the system, I usually used my favourite analogy in the development of the law, which is the movement along the Darwinian institutional evolutionary curve. This curve started with GATT which didn't manage to go beyond the stage of an open-ended system of settlement of disputes; in spite of the change of denominations from "study group" to "working group" to "panel". But what did these panels do? They did reports which had to be accepted by consensus including the two disputing parties. So it was not really arbitration. It didn't have the genes of judiciality. It was, at best,

technically, from the point of view of general international law, a system of conciliation. True, conciliation panels, unlike mediation, take a little bit of distance from the parties, and make recommendation after that, which are in many cases inspired by law, but not only. However their decision is not obligatory, it is not what we call technically, res judicata, and if is not res judicata the process is not arbitration, it's a different animal. We should not confuse fish with fowl.

At one point, in this movement along the Darwinian curve, occurs what is called a "quantum leap", and the quantum leap in the Marrakesh Agreements is a change of one word which is an adjective, from "positive" to "negative" consensus. Because this locked up the system and made its decisions final, and thus ingrained the DNA of judiciality in the system. To continue with the same analogy, suddenly the system transmuted from an invertebrate animal to a vertebrate one. Now what is happening is that the American assault on the system tries to reverse the movement along the Darwinian curve and bring it back to the invertebrate stage, by blowing up the lock on top of the institutional system and making it open-ended again.

I heard one of the speakers before me, I think it's Mr Philippe De Baere, discussing the different the arguments about arbitration, under Article 25. That is really Darwinian regression, from the point of view of the rule of law; by making the acceptance of the final outcome of the process dependent on the prior consent, i.e. agreement, of both parties to submit to arbitration any particular case.

So we are facing here really a Gordian knot, a cruel choice, which is, either to save the legal integrity of the system at the expense of excluding the US; not necessarily by getting formally out of the system, but even by its staying in, but playing the persistance objector, putting obstacles and making it really unworkable; or in the alternative, to accommodate the US and thus regress into a system which is really a reflection of pure power politics. So that is my answer to the first part of the question.

What has the system contributed to the development of international law?" And my answer is equally in the affirmative; but the contribution is limited and somewhat oblique; not so much in substantive law, rather in the field of procedure. The Appellate Body has been quite innovative, and developed patterns which are being referred to as "best practices", inspiring other fora; a very important contribution in the present era of proliferation of international courts and tribunals. I'll just mention two examples. One is the practise invented by the Appellate Body, of "exchange of views", associating members not sitting in a division with the case under consideration, which is very good for the coherence of the jurisprudence of large tribunals functioning through smaller chambers, panels or divisions. The other example is in the marshalling and administration of proof, particularly in scientific matters. Here again, much good work was done and best practices developed; to the point that, in a case before the International Court of Justice, the Paper pulp mill case, where the question was about the scientific proof of the degree of pollution of water by the paper industry, a field in which there is a lack of experience in international judicial practice, two judges, Bruno Simma and Al-Khasawneh, wrote a dissenting opinion saying that the court had to be more activist in marshalling scientific proof and to be inspired by the practice of the AB of the WTO.

As concerns the contribution, to substantive law, the system has been very good in precising and refining the new problem (it's not really new, but gaining in importance) of the modes of interaction between special regimes and general international law. For example, in Hormones, the handling of the precautionary principle, and whether it is applicable in WTO law, the Appellate Body said very clearly, `We cannot judge on a

principle which does not belong to our field; if the organizations, which are specialised in that field decide that this is a general principle of international law, then we may take it into consideration." But even then if you have a special rule, a lex specialis , it will derogate a general rule unless it is jus cogens . But it is not for the trade regime to recognize or decide on the customary character or the jus cogens character of a rule which does not belong to trade law. Thus, the AB refined a little bit further the analysis; and this was later almost the same argument that was made by the International Court of Justice in analysing the relationship between itself and the ICTY as concerns the interpretation of general international law and international criminal law.

Prof Gabrielle Marceau

I'm speaking to you in my personal capacity. You've asked me to talk about the past and the future. With respect to the past, the expert before me made a number of interesting and valuable comments.

A few years ago, I researched how often the Appellate Body (AB) reports had been cited by other tribunals and; it's quite impressive, at the time close to 150 disputes referred to AB reports. For example, those judgments from other tribunals referred to WTO case law on "like products", or on "sustainable development", which is mentioned in the WTO preamble. I decided to entitle my published article (about the AB jurisprudence) "The Boat light in the international fragmentation" – it says it all. Other tribunals also referred to the Appellate Body's reasoning when it allowed *amicus curiae* submissions and open hearings. The ICJ talked about the way WTO panels handle experts, as a good model to follow. In the *Japan - Whales* case, the ICJ made use of the WTO standard of review in the *Hormones suspension* dispute. A couple of years ago UNCTAD invited me to a meeting with delegates who wanted to know how to change investment arbitration, so their arbitrators can work in the same way as the panels and the AB do in making use of the rules and principles of the Vienna Convention on Treaties (VCLT) and the general principle of sustainable development. I explained that is not so simple because we have an explicit reference to sustainable development in the WTO preamble and to the VCLT in the DSU. Other tribunals have often referred to the WTO panelist selection process as a model to follow as there is no possibility for a party to block the nomination process because there either party can ask the Director General to compose the panel to get the process moving.

Finally, you all remember that for the last two years the EU has been recommending the creation of a world court on investment matters, based on the model of the WTO AB system. It speaks for itself. There are also many areas where the WTO substantive rules are models for other regimes. For example, the WTO system of rules on international standards is also an amazing model: indeed, under the WTO, the TBT and SPS agreements give legal value to international standards negotiated outside the WTO by international standardising bodies: that is when a domestic standard complies with an international standard, it is presumed to be WTO-consistent and justified, even if it restricts trade. This is a beautiful and even outstanding example of international coherence. To me it is clear that the WTO system and its dispute settlement system can be quoted as an impressive model.

Now the future: what will happen in December if there are no incoming members to replace the Appellate Body members whose term of office finishes? To answer this question properly, I think it is important to remember the multiple dimensions of the WTO dispute settlement. We have to think if the Appellate Body goes, what is going or not going with it? Will we lose this impressive reverse consensus or negative consensus or automaticity? Second, my favourite, the DSB and the multilateral surveillance of implementation and monitored retaliation – will we also lose them? There is no other international dispute system where after a judgement of a tribunal, the membership continues to survey or supervise the implementation process. The way the DSB covers several stages of the DS process is also unique, as is the system whereby the retaliation level is monitored by the membership and where the level of sanctions

in response to a violation of rules is controlled by arbitration. So in the WTO the international law system of countermeasures that is always beneficial to powerful countries does not apply in the circumstances regulated through the Article 22 arbitration process. In addition, we have cross-retaliation.

My young colleagues seem often to think that other international tribunals work like the WTO dispute settlement system. If Members cannot settle this AB selection process issue, are we going to lose all that? Because it's not just the Appellate Body that we will lose. And of course, the Appellate Body itself is an impressive creation.

Finally, is it possible to solve the problem? Well who am I to say yes or no? I personally think that there may be issues in the Appellate Body, but the problem, as said by Philippe De Baere, Freider Roessler and others, is much broader. The problem is geopolitics, and solving this bigger and broader problem involves the need for, inter alia, new rules on subsidies, and you know the issue of "public body" is not just an issue of interpretation of the SCM, it is a broader issue which the OECD refers to as "competitive neutrality", there is also the issue of E-commerce, investment, the status of developing countries and all that.

So I think that, contrary to what others have said, it's necessary to deal with all those other issues, or at least part of that, in order to deal with the stalled AB selection process. Or at least those concerns appear to be relevant to the position of a main player.

My last point is that if there is one issue that could be dealt with in dispute settlement, it's that of the "standard of review"; because as Rob Howse said, if the *Hormones* standard of review - requiring that the WTO panel ensures that the national authorities had adopted an articulated rigorous decision that could be based on minority views - was followed in all areas of the WTO, with shorter reports. I think his point was that if the *Hormones* standard of review had been followed in the zeroing cases, or under article 2.2 of TBT where now panels seem to be asked to review the actual degree of contribution of the challenged measure the outcomes may be different. I'm not sure, maybe I misunderstood.

I will end by saying that I as wrote that a few years ago, the WTO dispute settlement system and its AB phase are a model and have been a model in international law - it's difficult to deny this. There is a crisis now in the WTO with its dispute settlement system, and this crisis is more than procedural. I just hope that people take the right decisions, and of course it's not the Secretariat that takes those decisions. I hope that those in power to decide realize that the WTO Dispute Settlement System has a lot of extraordinary dimensions in addition to the Appellate Body, such as the reversed consensus, the multilateral surveillance mechanism of the DSB during the implementation period and the institutional control over retaliation, which we could lose in addition to losing the Appellate Body if a solution is not found.

Mr Robert McDougall

On the question that is before us -- about whether it's made a useful contribution on the rule of law and the development of international law -- I agree with the positive assessment of others. I was going to enumerate a number of different positive contributions, but for the sake of time and not being cut off by a strict Chair, I'll just say that I agree with all of those positive assessments and focus more on the "dark side of the moon" as a previous speaker has said. The positive contribution is not going to interfere with my discussion anyway. We have regular anniversary events, celebrating what has been done, and obviously in the current environment we need to think about the future, as the Chair has said, and think about some of the constraints on the dispute settlement system. I think that probably at this point it is more important to do so, so I'm going to raise 4 issues following the lines of constraints.

The first is the question whether or not there is a contribution to the development of international law and the rule of law. I wonder whether that is even the right question in the current environment? Are these ends in themselves and are they the ultimate objectives of the dispute settlement mechanism? Would the evaluation of the dispute settlement mechanism be different if we asked broader question, such as "does the dispute settlement mechanism operate effectively in the service of trade cooperation"? On that -- and Professor Hillman raised this point earlier and I would agree with her -- the judicialization of dispute settlement of the WTO has generally and correctly been celebrated as a positive development in trade relations.

But perhaps judicialized dispute settlement has taken on too much importance in the WTO. Too much importance both relative to other forms of dispute settlement such as mediation and conciliation, which was more prominent under GATT and it's all that's been extinguished under the WTO in formal terms. – In informal terms, obviously there is always some dispute settlement that takes place out of the limelight – but also relative to other functions of the WTO, such as the negotiating branch and deliberative activities. Other speakers have already mentioned some of the difficulties there, but I wonder whether the crown jewel, as it's called, has overshadowed these functions to the detriment of advances in trade cooperation overall. I think this is the point that Jennifer was trying to make.

There is a complex set of explanations as to why this imbalance has arisen: 1) It starts with the point that others have made, about the weaknesses, and ultimately the failure, with few minor exceptions, of the rulemaking function. 2) What James Flett identified as certain characteristics of the substantive rules that lead to excess demand and ultimately overload. 3) Some structural and systemic biases in the DSU itself in favor of win-lose adjudication, which has become the only form of dispute settlement.

4) And the unchecked actions and incentives of the various participants in the dispute settlement system, on the part of both governments and adjudicators themselves.

Now as a result we celebrate the contribution of the Dispute Settlement Mechanism to coherence, to security and predictability. But as Jennifer was suggesting, perhaps we neglect or at least, at best, we downplay the consequences of seeking to clarify every ambiguity, to fill every gap, and to clarify every provision and resolve every ambiguity. We downplay the consequence of that for the capacity and the willingness of parties and of members to negotiate new rules.

I recall as an advisor in the Canadian mission, to the Canadian negotiators on the TFA agreement, the number of times a negotiator would come back and say "What will the Appellate Body say about this provision?" if they were to agree to something. From one perspective that's evidence of the success of the Appellate Body in establishing its authority. But effectively, it has meant that negotiators are stuck with having to make sure they can fine-tune every single provision to the point where they can reasonably predict how it's going to be determined in the end.

The Dispute Settlement Mechanism doesn't exist in "clinical isolation" of the broader political environment, so we need to have a better understanding of whether or not our current judicialised form of dispute settlement affects members' incentives in ways that are not always positive. In other words, not all judicial clarifications contribute unambiguously to improving the prospects of trade cooperation. To the extent that the Dispute Settlement Mechanism and its outcomes actually impede the development of new rules, it actually then impedes the development of international law and does not make a useful contribution.

Second, I'm not entirely convinced that using the term "rule of law" in reference to the rules-based trading system is appropriate. At least not in the way that that term is generally understood in domestic constitutional legal systems. This isn't just a semantic quibble. Our attempts to conceptualize the trading system according to these kinds of terms that are imported from constitutional legal systems are, I believe, partly responsible for the imbalances that we talked about several times today. Given the weakness in the rulemaking functions, the focus on concepts of rule of law contributes to an exaggerated emphasis on the adjudicative function. It demands respect for judicial independence above all other considerations in establishing the legitimacy of interpretations of the rules. I'm not arguing against judicial independence, I am just arguing against that the idea that it becomes the sole mechanism by which we allow for the legitimation of interpretations.

The rule of law is ultimately about more than just the "rule of lawyers" and it's about more than the "rule of judges". In the case of the WTO, as others have said, the absence of an effective rulemaking function that can act as a check and balance on the adjudicative function – either by correcting adjudicative outcomes or by keeping the rules up to date just as a normal course of business – deprives the adjudicative function of a legitimizing mechanism. In that case, for the adjudicative function to assume more authority to compensate for the weak and ineffective rulemaking function, or for States, for that matter, to be expected to acquiesce to all adjudicated outcomes, without any recourse to corrective mechanisms, indeed, I would argue, undermines the rule of law rather than strengthens it, because it erodes the legitimacy of the rules themselves.

Therefore, in a system that depends on the consent of states and depends on consensus decision making, can we truly speak of the "rule of law" in trade relations in the same way we speak about that in domestic constitutional context. The rules-based trading system, on the other hand, requires a different kind of separation of powers between rulemaking and adjudicative functions. That separation of powers is already differently conceived in and reflected in the current DSU. It's just not effective in the way it was originally designed.

Third, the legitimacy challenges facing the Dispute Settlement Mechanism are already hard enough to deal with in the context of the existing rules, and are magnified by the changing balance of economic power. Trade agreements, as we've discussed already, embody negotiated balances (balances of concessions, balances of rights and obligations) – a single undertaking that captures these delicate negotiated outcomes.

One of the roles of the Dispute Settlement Mechanism is to maintain that balance (DSU Article 3.3). What happens when the previously negotiated balances are no longer politically optimal or politically acceptable to some countries? The balance that's contained in the existing rules, to witness current events, seems to be eroding, in part, due to:

- The center of gravity of the global economy shifting eastward, to economies that are less market-oriented. The resulting emergence of geopolitical rivalry is making normal approaches to dispute settlement take a second place;
- The structural changes that are brought by the change in the global economy, and as a result of the fourth Industrial Revolution. These changes are only going to be become even greater;
- Changes in the domestic political economy of some members in response to the consequences of previous rounds of liberalization;
- And, as some would argue, certainly the United States would argue, the results of previous disputes themselves have changed the balance of concessions and the balance of rights and obligations.

The Dispute Settlement Mechanism can't really do much to address most of these emerging imbalances, other than do no more harm. Until they are addressed, presumably through negotiations, I suspect that adjudication – that is efforts to have win-lose adjudication provide outcomes seen as legitimate by all parties – will only get harder before it gets easier.

Fourth, a related point, is about whether or not the Dispute Settlement Mechanism is representative. We already heard earlier this morning reference to an early controversy about a lack of gender balance in a preliminary version of the program for this Conference. The organizers are commended for doing their best to rectify the issue, but we can't really hold them completely responsible for that outcome. The challenge of achieving gender balance in the Conference reflects a lack of balance in the trade law community itself.

But that's not the only systemic imbalance: this conference and the trade law community itself is also massively Eurocentric. It's Western, even Atlantic. Adding two women from North America and three from Europe responds somewhat to the original gender imbalance, but where are the panelists from China? Where are the academics and trade lawyers from China or from other Asian members, or even African members for that matter? In the context of the previous point about the shift in the center of gravity to the east and the south, the Dispute Settlement Mechanism is going to have to do a much better job reflecting these perspectives, not only in the rules and procedures, but even in the activities such as this, to understand really the shift towards an Asian or Eurasian center of gravity. This will also go to the legitimacy of the rules.

Finally, in conclusion, the question addressed to this particular panel about whether or not the Dispute Settlement Mechanism contributed to international law and the rule of law is a backward-looking evaluation of the dispute settlement system. The answer to the question of the Conference, "What kind of dispute settlement for the WTO?" is a forward-looking assessment about what we need to do to preserve trade cooperation in the future and in the current fairly complicated environment.

I'm going to close with just four quick ideas, most of which have already been raised by one or the other: First, adjudicators have to pay closer attention to the warnings about exercising "extraordinary circumspection". Second, there is going to have to be a better effort and better opportunities to exercise collective oversight, and there's a couple of proposals about having members strengthening the rulemaking section. Third, there needs to be more opportunities for

mediation, a favorite point of mine. And finally, there will need to be some safety valves, so that some issues are completely diverted from adjudication, either through waivers, as Rob has pointed out, or by moratorium.

Confronted with the current headwinds, there are a lot of calls, and we've heard them again today, for stiffening the resolve of other Members in defending the current operation of the Dispute Settlement Mechanism. I just want to refer, as a closing point, to a fable or proverb that's common in a lot of cultures: "a mighty oak tree breaks in a storm, while the willow bends with the wind and survives."

So the question for us now is what kind of dispute settlement system does the WTO need now: a broken oak tree or a surviving willow? To put that in the perspective of George's Darwinism, it's not the "strongest" version of the Dispute Settlement system that will survive, but the "fittest".

Comments, Questions and Answers following Session 4

James Flett

A really quick couple of questions. We've had a huge amount of information given to us during the course of this Conference. Extremely interesting. This discussion would be very interesting in normal times, but we're not in normal times, we're facing a very particular fact in December - that we won't have an Appellate Body anymore. My question is to the panel - if you want to offer to the audience the one single item to take away from this Conference, what is it, and would you agree with me that that item is that the US blocking of the Appellate Body appointments is completely unacceptable? The second question is, if nothing changes, what is the one item you would give the audience to take away, if nothing changes in the US behavior? What should the rest of us do: should we abandon the system, or should we use Article 25 to keep it going?

Georges Abi-Saab

I am against breaking the system to satisfy a member as a matter of principle. Now this does not mean that we can't find ways to face up to the situation within the system. As Nicolas Lockhart suggested, I think the best way is simply to dilly dally in order to gain time, without touching the institution. Part of the institution may be paralyzed for example because the AB does not have sufficient members, etc. But we can use other palliatives available within the system, be they contrived or less efficient, while thinking of other solutions that may dispose of the paralysis. But don't play with the structure itself, because if you brake or reduce it, it will be, in my view, impossible to reproduce it or its equivalent later on.

Robert McDougall

Quick comment on mediation. I don't think there's a lack of demand for it. I think there's a structural disincentive to it. There's 26 provisions in the DSU about adjudication, one for mediation and one for arbitration. It's obvious why when clients come to their lawyers and seek a solution, they're going to go to the one that has the most well-developed process. If we provide an opportunity to make them more certain, it would be more widely used. On James's question, I'd agree that the US position is unacceptable, but I don't agree that it's completely unacceptable. In part that comes from my own experience of being with the United States in the DSU review for five years, and maybe understanding their concerns a little bit more closely than others, and and I think they have tried I think they've tried almost from the beginning, they've tried to have their concerns, and others have abused consensus in the reverse way to prevent them from having any outcome. Finally, don't let it get to that: don't let it get to December, when the system is completely dysfunctional. There are lots of potential solutions here, everybody just has to have a little more open mind.

Gabrielle Marceau

In response to the question that was raised "Is it outrageous what the US does? Some media reports have suggested the US may also be seeking leverage on other issues. I don't know, but these reports suggest that ultimately the goal is to modify substantive rules, more than just the Dispute Settlement Body or the AB process. When all this started, I told some colleagues that Julio Lacarte, who has now passed away, explained to me that when the Havana Charter failed (the US had initiated the process and

pushed it ahead before they decided not to ratify and to withdrew) only the GATT was there, and that was initially only on a provisional basis and it had no institution to support it. Then the UN loaned a table, a couple of chairs and two-three staff, and the GATT started its long road and managed to survive and to make it through until the birth of the WTO. So I'm optimistic on this front that the WTO will ultimately survive. Should the Article 25 Appeal arbitration be used? I can understand why Members are considering this option. It may not be as institutionalized as the EU would like it to be, but it would confirm the benefits of and provide for a review process within the WTO dispute system. The scheme may be closer to a set of bilateral agreements more than a plurilateral deal.

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