

WHO CONTROLS WTO DISPUTE SETTLEMENT?
SOCIO-PROFESSIONAL PRACTICES
AND THE CRISIS OF THE APPELLATE BODY

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Abstract

This article appraises the stalemate surrounding the future of the WTO Appellate Body through the lens of socio-professional practices. In particular, it argues that the ongoing struggle reflects a confrontation between, on the one hand, the “outer circle” of trade diplomats and political stakeholders in the system and, on the other hand, the “inner circle” of legal practitioners that run the adjudicative machinery in its routine operations. Moving from this premise, the paper traces some of the pathways that led to the progressive emergence and rise in power of the inner community of professional trade practitioners, with a particular focus on party counsel, secretariat lawyers, and specialized scholars. The operational closure of this community has caused resentment with some official stakeholders, who are now trying to regain control of a system that they feel has long eluded their scrutiny.

Keywords: WTO; Appellate Body; dispute settlement; backlash; law and social studies.

1. INTRODUCTION

In recent years, it has become commonplace to say that the Appellate Body (AB) of the World Trade Organization (WTO) “is in crisis”. This statement deserves some... well, critical examination. In public parlance, the very utterance of the word “crisis” is seldom value-neutral, but rather reflects the perceptions, the preoccupations, and sometimes the agenda of the utterer. To speak of a crisis is always to speak of a political, social, or normative conflict of some sort, and to characterize that conflict by recourse to a specific discursive device. If it is indeed true that the World Trade Court is facing a critical moment in its lifecycle, then it bears asking: critical for *whom*? Who are the actors involved in the struggle? How do they articulate their claims and pursue their strategies? To what ends? And – crucially – who stands to gain and who to lose from the present impasse?

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This article seeks to appraise the ongoing conflict through the lens of socio-professional practices. In particular, it argues that the stalemate surrounding the future of WTO dispute settlement reflects a confrontation between, on the one hand, the “outer circle” of trade diplomats and political stakeholders in the system and, on the other hand, the “inner circle” of legal practitioners that run the adjudicative machinery in its routine operations. Exploring the interplay between these competing socio-professional factions can contribute to our understanding of the distribution of power within the multilateral trade regime and of the tensions that currently agitate it.

The argument proceeds as follows. Section 2 begins by conceptualizing the multilateral trade regime as a conflictive field marked by competition among its actors, then discusses the widening gap between the internal and the external audiences of WTO adjudication. Section 3 proceeds to trace the pathways that led to the progressive emergence and rise in prominence of the inner community of professional trade practitioners, with a particular focus on the counsel representing member States in court, the secretariat lawyers assisting the bench throughout the adjudicative process, and the specialized scholars acting as the “grammarians” of the field. Section 4 briefly concludes by interrogating possible developments in the near future.

Admittedly, the socio-professional dynamics explored in the pages that follow are not the sole or the most important factor underlying the present situation. Nor are they necessarily a unique feature of the multilateral trade regime – in fact, most international courts and tribunals have witnessed similar developments to varying degrees throughout their institutional histories. Yet, there is some merit in disentangling the maze of interactions that make up a judicial field. For one thing, it enables the observer to overcome the temptation to misrepresent international courts and tribunals as “reified collectives forming separate and self-standing units of analysis”.¹ For another, it sheds light on “the vascularization and numerous connections that allow an institution to breathe”.²

2. OUTER AND INNER CIRCLES: THE WTO AS A CONFLICTIVE SOCIO-PROFESSIONAL FIELD

By the time this article comes out, the Appellate Body might be history book material. The pace of the World Trade Court’s downfall is a constant source of amazement and a cautionary tale for the theorists of institutional resilience in international law.

The situation is well known. Since early 2017, the delegation of the United States (US) to the WTO has refused to join the consensus necessary for the ap-

¹ VAUCHEZ, “Communities of International Litigators”, in ROMANO, ALTER and SHANY (eds.), *The Oxford Handbook of International Adjudication*, Oxford/New York, 2014, p. 655 ff., pp. 655-656.

² LATOUR, *The Making of Law: An Ethnography of the Conseil d’État*, Cambridge, 2010, p. 5.

pointment of new adjudicators to the bench of the AB. This protracted veto is aimed at whittling down the official seven-member complement of the World Trade Court as the mandates of judges progressively expire. On 10 December 2019, the AB found itself with only one member left. As a result, appellate proceedings effectively ground to a halt, given that WTO rules require each appeal to be heard by a chamber – or “division” – of three adjudicators. This paralysis prompted the vehement reaction of numerous other members, who accused the US of holding the WTO appellate system “hostage of its own concerns”.³ The US, for its part, justified the blockade by accusing the AB of “overreaching” in its rulings, unduly relying on “precedent” in a regime with no formal *stare decisis*, and more generally “disregard[ing] the rules set by WTO Members” under the Dispute Settlement Understanding (DSU).⁴ To further complicate matters, in November 2019 the US threatened to freeze the WTO’s annual budget for 2020 unless other member States agree to draconian cuts to the AB’s funding.⁵

Although these facts are established, their *interpretation* varies wildly depending on the vantage point of each interpreter, their positioning within the WTO legal field, and their ingrained assumptions and predispositions. Scholars and commentators tend to appraise the ongoing conflict in either of two ways. Some focus on its normative aspects, and conceive it essentially as a disagreement over the appropriate boundaries of WTO adjudication vis-à-vis the regulatory authority of member States. The recurring themes of this first narrative include the extent of the implicit powers allegedly developed by the AB over time; the weight of past jurisprudence on the interpretation of the WTO treaties; the application of so-called “Rule 15” to outgoing appellate adjudicators;⁶ and the viability of alternatives to the appellate process.⁷ Other observers highlight the diplomatic dimensions of the conflict, and see it as part of a contest for political supremacy against the evolving landscape of international economic relations. The issues typically tackled by this second narrative include US-China trade wars, the breakdown of multilateralism,⁸ and so forth.

To complement these accounts, this article takes a different stance on the nature and the stakes of the ongoing struggle, and appraises it as a confrontation between *socio-professional groups* within the WTO legal field. The multilateral

³ See e.g. WTO Dispute Settlement Body, “Minutes of the meeting of 29 October 2018”, 27 February 2019, WT/DSB/M/420, para. 4.21.

⁴ See e.g. WTO Dispute Settlement Body, “Minutes of the meeting of 24 June 2019”, 2 August 2019, WT/DSB/M/430, para. 8.4; Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 25 February 2019, available at: <https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb25.DSB_Stmt_as-deliv.fin_public.pdf>, pp. 12-14.

⁵ See “A US Offer to Keep the WTO Alive Comes With Painful Conditions”, Bloomberg, 26 November 2019, available at: <<https://www.bloomberg.com/news/articles/2019-11-26/a-us-offer-to-keep-the-wto-alive-comes-with-painful-conditions>>.

⁶ See e.g. BAHRI, “‘Appellate Body Held Hostage’: Is Judicial Activism at Fair Trial?”, *JWT*, 2019, p. 293 ff.

⁷ See e.g. PAUWELYN, “WTO Dispute Settlement Post 2019: What to Expect?”, *JIEL*, 2019, p. 297 ff.

⁸ See e.g. CHOW, SHELDON and MCGUIRE, “The Revival of Economic Nationalism and the Global Trading System”, *Cardozo Law Review*, 2019, p. 2133 ff.

trade regime is not only a legal or a political construct. It is also the site of a contest among social actors endowed with unequal professional and technical capital, who compete for supremacy in the system.⁹ The battleground extends beyond formal rules and procedures, and encompasses everyday legal practices, the way in which cases are pleaded and deliberated, the self-perception of adjudicators, and the like. To prevail in this struggle is to secure one's authority, to impose one's vision of the law as the dominant paradigm – in one word, to *control* the system.

As will be argued, control may take different forms and be pursued for different ends depending on the class of actors concerned. WTO member States strive to ensure that the system responds to their interests and effectively promotes the policy goals set forth during the Uruguay Round; panels and the AB seek to assert themselves as effective and persuasive international adjudicators; attorneys specialized in WTO litigation reap important financial gains from their expertise and activity; and so on. A full understanding of the tensions that currently agitate WTO dispute settlement requires an exploration of the interplay and power relations among the various socio-professional actors involved in the field. Only by “identify[ing] concentrations of power or interest” and assessing their “influence on how the law is presented and configured”¹⁰ can we really grasp what is going on.

Who, then, are the competing socio-professional factions vying for control? In a nutshell, they are the outer and the inner circle of international trade practitioners.

In one camp, we find the official stakeholders in the system – foreign ministries, government representatives, heads of delegation, etc. – who, having designed the dispute settlement mechanism during the Uruguay round, continue to exercise political oversight over its activities. When the system was first established, many members (including the US) expected the adjudicative process to remain swift, agile, restrained in its interpretive approach, and ultimately “deferential to the express consent of states”.¹¹ Power would remain firmly in the hands of national governments, without “any real transfer [...] to the Geneva secretariat”.¹² Today, trade diplomats engage in complex (if recently fruitless)

⁹ See HOPEWELL, “Multilateral Trade Governance as Social Field: Global Civil Society and the WTO”, *Review of International Political Economy*, 2015, p. 1128 ff., pp. 1131-1133; SOAVE, “European Legal Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva”, *The Law and Practice of International Courts and Tribunals*, 2020, p. 107 ff. As acknowledged there, the characterization of the WTO as a social field draws heavily from BOURDIEU, “The Force of Law: Toward a Sociology of the Juridical Field”, *Hastings Law Journal*, 1987, p. 814 ff.

¹⁰ MESSENGER, “The Practice of Litigation at the ICJ: The Role of Counsel in the Development of International Law”, in HIRSCH and LANG (eds.), *Research Handbook on the Sociology of International Law*, Cheltenham/Northampton, 2018, p. 208 ff., p. 213.

¹¹ GOLDSTEIN and STEINBERG, “Negotiate or Litigate? Effects of WTO Judicial Delegation on US Trade Politics”, *Law and Contemporary Problems*, 2008, p. 257 ff., p. 268. See also SOAVE, *cit. supra* note 9.

¹² BELLO, “The WTO Dispute Settlement Understanding: Less is More”, *AJIL*, 1996, p. 416 ff., p. 418.

negotiations for the appointment of new AB members; comment on the content of panel and AB reports during meetings of the Dispute Settlement Body (DSB); are empowered to issue authoritative interpretations of the rules contained in the covered agreements;¹³ and set the agenda for institutional reform. These forms of control ensure the continued engagement and goodwill of official stakeholders towards WTO adjudication,¹⁴ thus making them the ultimate arbiters of the legitimacy of the system.¹⁵

In practice, however, these actors have a relatively limited say on the day-to-day outcomes of the adjudicative process. On the one hand, the formal decision-making procedures of the WTO make it notoriously difficult to take concerted action and mandate specific legal interpretations of the obligations contained in the covered agreements.¹⁶ On the other hand, the compulsory jurisdiction accorded to panels and the AB under the DSU shields the content of reports from overt political interference. Hence, official stakeholders have traditionally served as the *mediate* or *external* audience of WTO adjudicators – a looming presence that observes the routine unfolding of dispute settlement from a certain distance and intervenes only when the circumstances so required.

In the other camp, we find the small and exclusive club of professional WTO litigators, which constitutes the central focus of this article. The argument is that a tight community of dispute settlement practitioners – comprising panellists and AB members, but also government lawyers, private counsel, secretariat staff, and specialized scholars – has emerged over the years which is in charge of running the WTO judicial machinery in its everyday activity. This inner circle of legal experts has progressively developed a set of disciplinary practices and sensibilities that have profoundly shaped the form, ethos, and role of WTO adjudication. Ostensibly, the various participants in the community occupy distinct and well-defined positions: government litigators and private attorneys present panels and the AB with factual and legal arguments through submissions and pleadings; secretariat officers assist the adjudicators by conducting legal research, circulating internal memoranda, attending deliberations, and drafting the final reports; scholars dissect the minutiae of rulings, identify patterns and inconsistencies in jurisprudence, and suggest solutions going forward.

¹³ This power is expressly contemplated under Art. IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, entered into force 1 January 1995.

¹⁴ Similar dynamics can be observed with respect to most other international courts and tribunals. See e.g. SLAUGHTER and HELFER, “Why States Create International Tribunals: A Response to Professors Posner and Yoo”, *California Law Review*, 2005, p. 899 ff., pp. 946-949; SOAVE, “The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?”, in BAETENS (ed.), *Legitimacy of Unseen Actors in International Adjudication*, Cambridge, 2019, p. 323 ff., pp. 337-338.

¹⁵ On the notion of legitimacy, see generally e.g. BODANSKY, “Legitimacy in International Law and International Relations”, in DUNOFF and POLLACK (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge/New York, 2013, p. 321 ff., pp. 326-327.

¹⁶ See VAN DAMME, “Treaty Interpretation by the WTO Appellate Body”, *EJIL*, 2010, p. 605 ff., p. 611.

Yet, the boundaries between these roles are often more porous than they first appear. The members of the club strive to maintain a dense network of first-name personal contacts and friendly professional relationships.¹⁷ A revolving door exists between the bench, the Secretariat, government departments, law firms, and research centres.¹⁸ Throughout their careers, practitioners change roles frequently – and sometimes even don multiple hats at once.¹⁹

Importantly, the participants in the profession are driven by different interests from official stakeholders. The latter, as noted, play the dispute settlement game in pursuit of their perceived national interests (and possibly on behalf of their domestic industries) and strive to ensure that the system responds to their policy preferences. The former, conversely, largely derive their relevance and prestige from the functioning of the dispute settlement mechanism itself. In other words, although trade practitioners may disagree over the substance of this or that case, they all share an enormous self-interest in defending WTO adjudicative bodies, extending the reach and pervasiveness of their powers, and constantly reasserting their “courtiness”.²⁰

Thanks to its cohesiveness and *esprit de corps*, the inner circle has achieved substantial influence and managed to insulate its internal operations from external interference. Indeed, in its routine unfolding, WTO adjudication takes place “at a considerable remove from [...] political and diplomatic institutions”.²¹ The same handful of counsel appear at most hearings alongside their state clients; the Secretariat’s importance as the “guardian of jurisprudence” has steadily grown over time; and scholarly production in the field is densely populated by authors who have direct or indirect stakes in the system. Being an “insider” in the game means being familiar with its rules, formulating legal arguments that resonate with the assumptions and preferences of other players, and ultimately shaping the outcomes of the adjudicative process to an extent that is usually precluded to “outsiders”.

The power of these practices is so pervasive that the community of trade litigators has progressively replaced official stakeholders as the *immediate* or

¹⁷ See WEILER, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement”, JWT, 2001, p. 191 ff., p. 195; HOPEWELL, *cit. supra* note 9, pp. 1142-1143.

¹⁸ See e.g. COSTA, “Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields”, Oñati Socio-Legal Series, 2011, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832382>, pp. 16-18; TERRIS, ROMANO and SWIGART, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases*, New York, 2007, pp. 19-21. Both works highlight that panellists are often recruited among government officials, while AB members are typically selected among academics, negotiators, and private practitioners. Further empirical research is needed to fully map overlaps and interactions among law firms, advisory centres, the Secretariat, and academic circles.

¹⁹ See D’ASPREMONT, “Introduction”, in D’ASPREMONT et al. (eds.), *International Law as a Profession*, Cambridge/New York, 2017, p. 1 ff., p. 8; SOAVE, *cit. supra* note 14, p. 343.

²⁰ SHAPIRO and STONE SWEET, *On Law, Politics and Judicialization*, Oxford/New York, 2002, p. 175.

²¹ HOWSE, “The World Trade Organization 20 Years On: Global Governance by Judiciary”, EJIL, 2016, p. 9 ff., p. 25.

internal audience of WTO adjudicators. When a panel or the AB issues a decision, it “speaks” more directly to the professionals operating in the field than to the broad WTO Membership. Admittedly, the AB has occasionally ruled in ways that gave “purchase to constituencies characteristically critical of [...] the WTO”, thereby privileging “external” over “internal legitimacy”.²² Yet, even when doing so, the AB hardly addressed those constituencies directly, but often used trade expert circles as the conduit to deliver the message.²³

The widening gap between the inner and the outer circle has given rise to tensions within the field. The incessant work of the community of WTO litigators has greatly contributed to the independence and impartiality of the system, strengthened its legal and institutional capacity, and ensured its smooth and efficient functioning in the face of negotiating inertia. Arguably, were it not for this shared commitment, WTO adjudication would have buckled to political pressure long ago. However, for all its virtues, the socio-professional closure of the community has inevitably caused the resentment of a number of official stakeholders, who felt increasingly excluded from the day-to-day business of dispute settlement. The delegates of some members (such as the European Union) have begrudgingly accepted this state of affairs as the price to pay for a robust and effective adjudicative mechanism. By contrast, other delegations (*in primis* the US) have voiced growing concern about the erosion of the member-driven nature of WTO dispute settlement and reacted in far less diplomatic ways.

Before getting into recent developments, however, it is useful to trace the discrete and often invisible pathways through which the inner circle progressively achieved its pervasive influence, as well as the early attempts by the outer circle to confront this “appropriation”.

3. THE RISE OF THE WTO LEGAL COMMUNITY: BETWEEN INTERNAL STRUGGLE AND EXTERNAL AUTONOMY

In some ways, the professionalization and tightening of a legal community are the inevitable by-product of the technical expertise required to handle the

²² *Ibid.*, p. 37.

²³ A recent example is Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, adopted on 16 June 2014, WT/DS400/AB/R, WT/DS401/AB/R. The AB was hailed by many external observers as endorsing the societal and moral values underlying the European Union’s ban on the marketing of seal products. See e.g. HOWSE and LANGILLE, “Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values”, *Yale JIL*, 2012, p. 367 ff. At the same time, however, some noted that the ruling “lack[ed] clear reasoning accessible to the public”, was “crammed with judicial bureaucratise”, and “appear[ed] to have been almost purposefully written to avoid engagement with an audience besides trade insiders in Geneva and a few national capitals, a few academics, and some specialized WTO lawyers”. SHAFFER and PABIAN, “Case Note: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R”, *AJIL*, 2015, p. 154 ff., p. 158.

complexities of international adjudication. At the same time, these social processes are neither fully predetermined nor carved in stone. Indeed, the present configuration of a community and the power dynamics that exist among its members frequently reflect an endless series of discrete and often mundane choices made at some point or another in the past. Reconstructing these “genetic moments” enables us to unearth the struggles that marked the beginnings of the field, to account for change in legal practice over time, and ultimately to retrieve the possibility that “things could have been (and still could be) otherwise”.²⁴

The roots of the community can be traced back to the early years of the General Agreement on Tariffs and Trade (GATT). From a political perspective, the dominant stakeholders of the day were the US and its post-war partners,²⁵ who maintained a firm diplomatic grasp on the project of multilateral trade liberalization. From a socio-professional perspective, however, the picture was more mixed. Since the entry into force of the GATT, a close-knit group of experts took its seat in Geneva to run the newly established machinery.²⁶ The participants in the group were eminently pragmatic individuals with little connection to academia. The GATT Secretariat comprised a few dozen officers “on loan” from the Interim Commission for the International Trade Organization.²⁷ State delegates, for their part, were typically appointed from among the lower ranks of the foreign service. Their marginalization within national diplomacies, coupled with the technical nature of their mandate, largely insulated them from the outside world of “high” international relations²⁸ – while leaving them free to develop the core tenets of the GATT regime away from media attention and political controversy.

As the GATT did not contemplate detailed dispute settlement procedures, the Secretariat resorted first to the practice of “chairman’s ruling[s]”, then to “working party” reports to review the legality of domestic trade regulations. Shortly afterwards, the first panels were established to hear issues of trade law.²⁹ Given the culture prevailing in the community at that time, the tone of early GATT panel reports was more diplomatic than judicial: panellists were typically selected from among incumbents in the club, who preferred “impressionistic brush strokes” over legalistic reasoning.³⁰

Around the mid-1970s, however, the dominant culture slowly started to change, and the early diplomatic style progressively gave way to a more properly legal ethos. The increasing complexity of disputes led litigating States to put forward more sophisticated arguments, which in turn required greater legal expertise to be properly handled and understood. While many States continued to

²⁴ BOURDIEU, “Rethinking the State: Genesis and Structure of the Bureaucratic Field”, *Sociological Theory*, 1994, p. 1 ff., p. 4.

²⁵ HOWSE, *cit. supra* note 21, p. 14.

²⁶ WEILER, *cit. supra* note 17, p. 195.

²⁷ See HUDEC, “The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure”, in BHAGWATI and HIRSCH (eds.), *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, Berlin/Heidelberg, 1998, p. 101 ff., p. 105.

²⁸ WEILER, *cit. supra* note 17, p. 195.

²⁹ See HUDEC, *cit. supra* note 27, pp. 104-107.

³⁰ *Ibid.*, p. 106.

profess their preference for pragmatism in dispute settlement, behind the scenes the GATT Secretariat became more involved in servicing panels and working parties, thereby enhancing their capacity to process cases.³¹ By the end of the decade, a string of “rogue” panel decisions³² had persuaded some GATT members of the necessity of legal “expertise and consistency” in dispute settlement.³³ Around this time, the US warmed to the idea of strengthening GATT rules and procedures and loosened its opposition to the creation of a specialized legal team within the secretariat. In 1981, the GATT’s Director-General established an Office of Legal Affairs to help panellists discharge their duties. More and more often, panellists delegated the drafting of their reports to their assisting lawyers, thereby enhancing the technical quality of decision-making.³⁴

Partly thanks to this enhanced capacity, the late 1980s and early 1990s saw the establishment of an unprecedented number of panels, tasked with addressing controversial issues like the relationship between trade liberalization commitments and the domestic regulatory authority of member States.³⁵ These developments are often described as the signs of a transition from “a power-oriented diplomacy toward a rule-oriented diplomacy” in multilateral trade relations.³⁶ Indeed, by the time the GATT was superseded by the WTO in 1995, the culture was ripe for a full-fledged adjudicative mechanism endowed with compulsory jurisdiction, detailed procedural rules, appellate review, and robust implementation surveillance. These peculiar design features of the WTO regime are well known and need not be restated here.

More interestingly for our purposes, the advent of modern trade institutions marked an important step in the transformation and the rise in power of the inner circle of trade litigators. While yesteryear’s community was a fluid network of diplomatic attachés and young jurists, the new class of professionals that began to walk the halls of the WTO was more numerous, more dense, and more autonomous from the political control of official stakeholders. Long relegated to the margins of international legal practice, trade litigation started to attract increasing numbers of private practitioners, who saw lucrative business and ca-

³¹ MARCEAU, PORGES and BAKER, “Introduction and Overview”, in MARCEAU (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading System*, Cambridge, 2015, p. 1 ff., p. 29.

³² PORGES, “The Legal Affairs Division and Law in the GATT and the Uruguay Round”, in MARCEAU (ed.), *cit. supra* note 31, p. 223 ff., pp. 225-226.

³³ HUDEC, *cit. supra* note 27, p. 112. See also ROESSLER, “The Role of Law in International Trade Relations and the Establishment of the Legal Affairs Division”, in MARCEAU (ed.), *cit. supra* note 31, p. 161 ff., p. 164.

³⁴ MARCEAU, “From the GATT to the WTO: The Expanding Duties of the Legal Affairs Division in Non-Panel Matters”, in MARCEAU (ed.), *cit. supra* note 31, p. 244 ff., p. 252.

³⁵ See e.g. GATT Panel Reports, *US – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, L/6439; *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1989, DS10/R; *US – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, DS23/R.

³⁶ SANTOS, “Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico”, *Virginia Journal of International Law*, 2012, p. 551 ff., p. 556.

reer opportunities in the nascent regime. International law scholars, who used to snub the GATT system as “a paragon of diplomacy masquerading as law”,³⁷ now looked with increased interest, admiration, and even envy at the new adjudicative mechanism.³⁸ Universities around the globe began to offer specialized courses in trade adjudication and to send their students to swell the ranks of the WTO Secretariat. And so forth.

Internally, this emergent professional community was neither homogenous nor free from conflict. Its participants, each from their own specific position, competed with one another for persuasion, relevance, and prestige. Externally, however, the community shared the common goal of declaring its independence and asserting its pre-eminence vis-à-vis competing social sectors – first and foremost the old guard of GATT diplomats. In pursuit of this goal, trade practitioners endeavoured to routinize a well-defined set of judicial practices, secure their control over the everyday operations of the WTO dispute settlement system, and impose their preoccupations, sensibilities, and worldviews as the dominant paradigm within the field.

Crucially, the crystallization of modern WTO judicial practices should not be attributed to trade adjudicators alone. Although panellists and AB members are the foreground actors officially tasked with deciding cases, they are never alone in their daily work. Instead, their operations are immersed in a collectively held fabric of socio-professional relations.³⁹ Indeed, many background actors contributed to the “communification”⁴⁰ of the multilateral trade regime in discreet and often invisible ways. Among these, it bears mentioning the legal counsel representing member States in court; the secretariat lawyers assisting WTO adjudicators; and the specialized scholars commenting on and systematizing the burgeoning corpus of WTO jurisprudence. A full understanding of the current configuration of WTO dispute settlement requires a brief overview of how these background forces shape community practices.

3.1. Counsel

Private counsel made a relatively late debut in the multilateral trade arena. During the Uruguay Round, some delegates had expressed scepticism about the participation of law firms in WTO proceedings. Accustomed to the diplomatic ethos of the GATT, those negotiators feared that private attorneys might be too

³⁷ WEILER, “Epilogue: Towards a Common Law of International Trade”, in WEILER (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?*, Oxford, 2001, p. 201 ff., p. 202.

³⁸ HOWSE, *cit. supra* note 21, p. 11.

³⁹ TRUBEK and ESSER, “‘Critical Empiricism’ in American Legal Studies: Paradox, Program, or Pandora’s Box?”, *Law and Social Inquiry*, 1989, p. 3 ff., p. 17.

⁴⁰ The expression is borrowed from D’ASPREMONT, “The Professionalisation of International Law”, in D’ASPREMONT et al. (eds.), *cit. supra* note 19, p. 19 ff., p. 26.

aggressive and unamenable to compromise and partial victory.⁴¹ As a result, in early disputes, member States usually appointed their own government officials as their representatives in court.

Things changed in 1998, when the AB ruled that nothing in the WTO agreements or in general international law prevented litigating States from determining themselves the composition of their delegations in proceedings.⁴² This opening of WTO adjudication to private practitioners encouraged some multinational law firms – including Sidley, AUSTIN LLP & Johnson, White & Case, King & Spalding, and more recently Akin Gump – to establish their presence in Geneva and in other trade capitals such as Brussels and Washington. At the same time, the Advisory Centre on WTO Law (ACWL) was established to assist developing and least developed country members at reduced rates. Soon enough, numerous member States began to resort to external counsel to manage their disputes, often requesting them to draft their written submissions and enlisting them in their delegations to hearings. This trend was particularly pronounced among emerging players (e.g. Brazil, Korea, and Mexico), which lacked the expertise necessary to engage in the burgeoning WTO forum.⁴³ By contrast, incumbent players (e.g. the US, the European Union, Canada, and Australia) continued to rely mostly on in-house litigators, who increasingly became more specialized and long-tenured than their GATT-era predecessors.

The initiative of these early legal entrepreneurs paid off, as they gained a significant edge over their competitors and secured a *de facto* oligopoly on WTO litigation. As years went by, litigation practice at the WTO became increasingly concentrated in the hands of a few dozen attorneys affiliated with government departments, law firms, and the ACWL. The steady expansion of the WTO docket, which continues almost unabated despite the current stalemate, provided opportunities for business and career progression in the field. The number of States having regular recourse to the system also expanded, with the accessions of juggernauts like China and Russia dramatically broadening the pool of potential litigants. While marginal gains may be diminishing, the trade world continues to feed its legal profession with alluring growth prospects.

Competent counsel derive their reputation not only from technical prowess, but also from their knowledge of “how things work out in practice”, and their understanding of “the difficulties, pitfalls and tricks of the trade”.⁴⁴ Thanks to their repeated appearances in court, top-tier trade lawyers have progressively become familiar with panellists and AB members, and are thus well-positioned to

⁴¹ See EHRENHAFT, “The Role of Lawyers in the World Trade Organization”, *Vanderbilt Journal of Transnational Law*, 2001, p. 963 ff., p. 964.

⁴² Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R, para. 10.

⁴³ However, some developing countries that initially relied on the assistance of private attorneys have later developed their in-house capacity to handle cases, thereby reducing costs and becoming more effective players in the game. See SANTOS, *cit. supra* note 36, pp. 608-612.

⁴⁴ HIGHER, “A Personal Memoir of Eduardo Jiménez de Aréchaga”, *Proceedings of the American Society of International Law*, 1994, p. 577 ff., p. 579.

formulate legal arguments that resonate with their preferences and assumptions. Compared to “one-shotters”, consummate trade attorneys have better chances to discern which claims are likely to stick, how to make a tangible difference, and when to take calculated risks to test new lines of argument.⁴⁵ Indeed, direct experience shows that when adjudicators recognize a friendly face appearing before them, they are more likely to pay attention to her pleadings and readier to forgive momentary stumbles. Unsurprisingly, law firms carefully cultivate their ties with the bench by routinely hiring former secretariat officials, panellists, and sometimes even AB members.⁴⁶

As predicted, the rise of professional attorneys has profoundly affected the form and substance of WTO litigation. Their mastery of the relevant rules and case law has enhanced the sophistication of the parties’ positions and the length and assertiveness of their submissions. Modern counsel typically present multiple cumulative claims concerning the disputed issues, expertly rely on jurisprudence, and dissect the factual and legal minutiae of each case. This forces the adjudicators to grapple more thoroughly with the parties’ arguments and to produce articulate legal reasoning in response.⁴⁷ In turn, the increasing complexity of judgments feeds case law with precedents that shape subsequent interpretations and require even greater creativity from future litigants. Over time, the interplay and mutual adaptiveness between counsel and adjudicators reinforce the length, technicality, and occasional opacity of WTO decisions.

Moreover, the interests of private attorneys do not always align perfectly with those of their state clients. While the latter simply want to win the case, the former *also* seek to consolidate their standing among their peers, develop a cordial relationship with the bench, and secure future hiring opportunities. In other words, the “underlying source of capital” of counsel “is the recognition of judges, not clients (who are merely proximate sources of capital)”.⁴⁸ This ambiguous allegiance may at times have a subtle impact on the way arguments are presented. When forced to make patently untenable points, counsel will secretly hope that the court rejects them; when the position of one client is at variance with that of another, counsel will tread carefully to avoid jeopardizing the coherence of their argumentation across multiple cases, etc.

⁴⁵ GALANTER, “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change”, *Law and Society Review*, 1974, p. 95 ff., p. 100.

⁴⁶ For instance, over the years, Sidley’s international trade team has comprised at least eight former secretariat lawyers, one former panellist, and one former AB member as of counsel. White & Case features at least four former secretariat officers (including an acting Director-General of the GATT) and one former panellist among its ranks. Akin Gump’s Geneva team has two former secretariat lawyers. Finally, the ACWL currently comprises five former secretariat lawyers. These indicative figures are based on the professional biographies available on the websites of the relevant offices.

⁴⁷ Indeed, no international adjudicator would rule without carefully considering the litigants’ positions. See WELLS, “Situating Decisionmaking”, *Southern California Law Review*, 1990, p. 1727 ff., p. 1734; MESSENGER, *cit. supra* note 10, p. 223.

⁴⁸ MESSENGER, *cit. supra* note 10, p. 220.

Government lawyers, too, sometimes take positions during proceedings that contradict those taken by their state delegates in other fora. In 2018, for instance, the US' in-house counsel asked the AB to review the panel's reading of the terms contained in a domestic memorandum⁴⁹ – a request that sits at odds with the US' recent insistence at the DSB that the AB is precluded from interpreting municipal law. This “double game” testifies to the gap between the outer circle of political stakeholders – *in casu*, the diplomats squabbling over the scope of appellate review – and the inner circle of WTO practitioners – who keep pleading business-as-usual.

3.2. *The Secretariat*

In addition to the parties' attorneys, WTO adjudicators have routine interactions with the secretariat officers tasked with assisting them in resolving disputes. Panels are serviced by either the Legal Affairs or the Rules division depending on the subject matter of the dispute at hand, whereas the AB relies on a separate secretariat (ABS). Unlike panellists and AB members, secretariat staff are proper bureaucrats. They are recruited through public competitions, are employed on a long-term basis, and can be fired only by the WTO Director-General on narrowly specified grounds. Member States exercise no political oversight over their appointment, especially as concerns the rank and file. Thus, the tenure of secretariat staff often outlasts the terms of office of the adjudicators they are called upon to serve.

Every time a new case is filed, a team of secretariat lawyers is assigned to handle it. Once the dispute is over, the team is disbanded and its members are reshuffled for the next case. This way, each lawyer gets to work with virtually all of her colleagues over time, thus fostering “collegiality among the members of the institution”.⁵⁰ The division of labour within the WTO legal bureaucracy was not always meant to look like this. In the early days of the ABS, it was suggested that every AB member have a personal clerk, similar to the International Court of Justice.⁵¹ This configuration would have entailed a one-to-one working relationship between each adjudicator and her assistant. Ultimately, the proposal was scrapped in favour of secretariat divisions responding collectively to the whole bench. Moreover, senior ABS officials played a crucial role in the preparation of the Working Procedures for Appellate Review, i.e. the internal guidelines governing each step of the appellate process.⁵² These seemingly innocuous organi-

⁴⁹ United States' appellant's submission in *United States – Countervailing Duty Measures on Certain Products from China (Recourse to Article 21.5 of the DSU by China)*, 27 April 2018, DS437, available at: <<https://ustr.gov/sites/default/files/enforcement/DS/US.Appellant.Sub.fin.%28public%29.pdf>>, paras. 36-79.

⁵⁰ EHLERMANN, “Revisiting the Appellate Body: The First Six Years”, in MARCEAU (ed.), *cit. supra* note 31, p. 482 ff., p. 494.

⁵¹ See STEGER, “The Founding of the Appellate Body”, in MARCEAU (ed.), *cit. supra* note 31, p. 447 ff., p. 452.

⁵² *Ibid.*, p. 449.

zational choices have, in fact, profoundly altered the practices, the professional allegiances, and the power relationships in force in the WTO judiciary.

Long surrounded by the deafening silence of scholars and commentators,⁵³ the extensive role of the Secretariat in the preparation and deliberation of cases has recently come to the fore.⁵⁴ Besides providing logistical support, secretariat lawyers meaningfully contribute to the various steps of the judicial process. During the preparatory phase, they conduct legal research and draft internal memoranda, called “issues papers”,⁵⁵ where they summarize the parties’ positions, compile the relevant jurisprudence, and provide the adjudicators with options for the solution of the issues at stake. Later, they assist in the preparation of the questions to be asked of the parties during hearings. During the deliberation phase, secretariat lawyers engage in extensive discussions with the adjudicators, provide their views on the merits of the case and, where asked to do so, broker compromises between the different views on the table. Finally, based on the adjudicators’ instructions, the secretariat team drafts the actual report, which then undergoes several rounds of revision before being translated and circulated.⁵⁶

These activities make the Secretariat a key, albeit invisible, player in WTO dispute settlement. Ostensibly, judicial bureaucrats play a subservient role and defer to the authority of panellists and AB members. Yet, their tireless background work has a profound impact on the adjudicators’ decisional horizon. Firstly, by distilling the voluminous case files into digestible, ready-to-use memoranda, secretariat lawyers “shape how problems are defined and narrow the range of solutions considered”.⁵⁷ Secondly, their mastery of case law is brought to bear in discussions with the adjudicators, whose familiarity with WTO jurisprudence is sometimes less than encyclopaedic. This arguably encourages reliance on precedent and invites a more thorough assessment of the parties’ arguments. Thirdly, by holding the pen of the court, secretariat staff enjoy wide latitude to shape the tone and content of reports and exert considerable influence over the final outcome. After all, “[l]aw is a matter of words”, such that “the choice of words to convey a legal point is in itself the decision of [...] that point”.⁵⁸ Fourthly, and perhaps most importantly, the routine practices developed by the Secretariat and their daily interplay with the adjudicators quickly became the new *doxa* – that

⁵³ SOAVE, *cit. supra* note 14.

⁵⁴ See PAUWELYN and PELC, “Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement”, 2019, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872>; BAKER and MARCEAU, “The World Trade Organization”, in BAETENS (ed.), *cit. supra* note 14, p. 70 ff.

⁵⁵ BAKER and MARCEAU, *cit. supra* note 54, p. 83.

⁵⁶ PAUWELYN and PELC, *cit. supra* note 54, p. 10.

⁵⁷ KENNEDY, “Challenging Expert Rule: The Politics of Global Governance”, *Sidney Law Review*, 2005, p. 1 ff., p. 13.

⁵⁸ THIRLWAY, “The Drafting of ICJ Decisions: Some Personal Recollections and Observations”, *Chinese Journal of International Law*, 2006, p. 15 ff., p. 21.

which is “beyond question”.⁵⁹ Each dispute is internally handled according to a predetermined sequence of steps, and adjudicators may be frowned upon if they “go their own way”.

To be sure, there are good reasons to welcome the role of the Secretariat in dispute settlement. Thanks to their help, panellists and AB members are relieved of the burdens of going through every page of the parties’ submissions, memorizing the entirety of existing case law, or worrying about certain turns of phrase in their written judgments.⁶⁰ Moreover, by serving the WTO in a bureaucratic capacity rather than through member state appointment, secretariat lawyers contribute to the impartiality of the process and can rein in occasional biases. Finally, their technical skills and extensive knowledge of case law make them the “institutional memory” of the WTO adjudicative branch,⁶¹ thereby ensuring the consistency of rulings with prior jurisprudence.

Yet, one can readily understand why some political stakeholders look at the Secretariat with suspicion, if not downright hostility. The secrecy that surrounds judicial assistants in WTO dispute settlement epitomizes the segregation between the inner and the outer circles of the profession – between those in the know and those in the dark. The role of the Secretariat, while zealously kept secret from the general public, is no mystery to the community insiders – especially those who, having served as judicial assistants, later join national governments, private law firms, or academia.⁶² Taken to an extreme, this may give delegates the impression that WTO adjudicators, whose appointments are so carefully negotiated, abdicate their responsibilities in favour of faceless bureaucrats of no direct investiture and limited accountability.

Moreover, it has been suggested that the involvement of secretariat staff in the drafting of reports may in fact have an *adverse* impact on their quality. They may, for instance, indulge in bureaucratise and/or write more convolutedly than adjudicators;⁶³ feel compelled to dissect every issue and argument to the fullest extent; venture opinions on matters that need not be decided in the dispute at hand; and push back against dissents even when this comes to the detriment of clarity.⁶⁴ Whether or not these criticisms are justified, one thing is certain: while secretariat lawyers do not themselves decide cases, they *do* form part and parcel of the WTO legal community whose social interactions and expert knowledge incessantly shape the interpretation of international trade law.

⁵⁹ BOURDIEU, “Structures, Habitus, Power: Basis for a Theory of Symbolic”, in DIRKS, ELEY and ORTNER (eds.), *Culture/Power/History: A Reader in Contemporary Social Theory*, Princeton, 1994, p. 155 ff., p. 164.

⁶⁰ See SOAVE, *cit. supra* note 14, p. 325.

⁶¹ CARTIER and HOSS, “The Role of Registries and Legal Secretariats in International Judicial Institutions”, in ROMANO, ALTER and SHANY (eds.), *cit. supra* note 1, p. 712 ff., p. 722.

⁶² See SOAVE, *cit. supra* note 14, pp. 335-336.

⁶³ EHLERMANN, *cit. supra* note 50, p. 498.

⁶⁴ PAUWELYN and PELC, *cit. supra* note 54, pp. 32-36.

3.3. *Academics*

Finally, the role of specialized scholars in the communification of the inner circle should not be underestimated. While, as noted, the early GATT community consisted mostly of pragmatic professionals with little academic inclination, a number of prominent intellectuals soon began to turn their attention to the intricacies of world trade. Leading American scholars such as John Jackson and Robert Hudec can largely be credited for the elaboration of the first legal doctrines in the field, the systematization of the relevant sources, and the consolidation of international trade law as an autonomous academic discipline.⁶⁵ Through their pioneering work, those authors introduced readers across the globe to the important “operational functions” rules can have in governing economic behaviour, as well as the advantages that flow from “predictability or stability” in multilateral trade relations.⁶⁶ Arguably, it was also thanks to their impulse that certain key States – chiefly the US – progressively embraced the prospect of greater legalization in the world trade regime.

Back then, continental European scholars focused mostly on the emerging law of the European Communities and typically professed to a “great ignorance” of the GATT,⁶⁷ which they saw as “essentially a negotiating forum for the reduction of tariffs” and not a separate source of legal obligations.⁶⁸ However, the structural similarities between the project of European economic integration and that of global trade liberalization soon became apparent. Both projects raised phenomenally important questions about the architecture of international markets, such as the relationship between the liberalizing impetus and domestic regulatory authority. During the 1970s, the continental academic community celebrated a series of landmark rulings by the European Court of Justice, which *de facto* laid down the structural and economic “constitution” of the Communities. European constitutional liberalism had a profound influence on many young scholars, some of whom ended up working in the GATT secretariat. For instance, Frieder Roessler and Ernst-Ulrich Petersmann, who ranked among the first GATT legal officers, saw European integration as an example of “the potential contribution of [international economic law] to rule of law and democratic peace”.⁶⁹ Animated

⁶⁵ See BROUDE, “A Field of his Own: John Jackson and the Consolidation of International Economic Law as a Scholarly Domain”, *JIEL*, 2016, p. 329 ff.

⁶⁶ JACKSON, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge, 1989, p. 24. For an earlier formulation of the argument, see e.g. JACKSON, “The Puzzle of GATT: Legal Aspects of a Surprising Institution”, *Journal of World Trade Law*, 1967, p. 131 ff.

⁶⁷ WEILER, “Cain and Abel – Convergence and Divergence in International Trade Law”, in WEILER (ed.), *cit. supra* note 37, p. 1 ff.

⁶⁸ LINDÉN, “The First Years of the GATT Legal Service”, in MARCEAU (ed.), *cit. supra* note 31, p. 135 ff., p. 137.

⁶⁹ PETERSMANN, “The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public Reason’ in the GATT/WTO Dispute Settlement System”, in MARCEAU (ed.), *cit. supra* note 31, p. 182 ff., p. 183.

by these ideals, they used their tenures to contribute, staunchly and discreetly, to the emergence of a proper judicial culture in the GATT.⁷⁰

The dialogue – and competition – between American and European legal traditions provided a fecund environment for the advent of the WTO and the progressive consolidation of its core tenets. More importantly, however, it catalysed the emergence of sensibilities, preoccupations, and epistemic categories that were endogenous to the trade community. By the late 1990s, international trade law had become a full-fledged scholarly discipline that attracted specialists from both sides of the Atlantic. A new generation of academics was ready to appraise the emergent jurisprudence of panels and the AB, systematize the underlying principles, and develop the common “grammar” for a shared understanding of the new regime.⁷¹

Among other things, the scholarly community reinforced the perception of WTO dispute settlement as a judicial, court-like system striving for independence from the control of member States. A number of prominent authors, some of whom would later be appointed to the WTO bench, saw the AB as a “World Trade Court”⁷² vested with “a kind of supreme court jurisdiction to control the interpretation and application” of WTO rules and obligations.⁷³ Rather than merely resolving disputes between litigants, the “Court” should strive to preserve the “completeness, coherence, and internal consistency of WTO law”⁷⁴ against any attempt at political interference.

Besides their theoretical engagement, many academics focusing on WTO dispute settlement have direct or indirect stakes in the judicial mechanism itself. For example, it is common for panellists and AB members to be appointed from among the ranks of trade law professors; for secretariat officers to moonlight as well-recognized authors; and, sometimes, for litigators to have a teaching pedigree. Scholarly production in the field is dominated by commentators “structurally geared towards the expansion and consolidation” of international trade law as an autonomous legal domain.⁷⁵ Sometimes, this proximity between scholars and practitioners gives rise to issues of independent positioning. While it helpfully provides a common vernacular and argumentative toolbox to the community of

⁷⁰ *Ibid.*, p. 184. See also SLOBODIAN, *Globalists: The End of Empire and the Birth of Neoliberalism*, Cambridge, 2018, pp. 256-257; SOAVE, *cit. supra* note 9.

⁷¹ On the notion of scholars as grammarians, see HERNÁNDEZ, “The Responsibility of the International Legal Academic: Situating the Grammarian Within the ‘Invisible College’”, in D’ASPREMONT et al. (eds.), *cit. supra* note 19, p. 160 ff.

⁷² VAN DEN BOSSCHE, “The Making of the ‘World Trade Court’: The Origins and Development of the Appellate Body of the World Trade Organization”, in YERXA and WILSON (eds.), *Key Issues in WTO Dispute Settlement: The First Ten Years*, Cambridge/New York, 2005, p. 63 ff., p. 64. See also EHLERMANN, “Six Years on the Bench of the ‘World Trade Court’: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization”, *JWT*, 2002, p. 605 ff.

⁷³ ABI-SAAB, “The WTO Dispute Settlement and General International Law”, in YERXA and WILSON (eds.), *cit. supra* note 72, p. 7 ff., p. 10.

⁷⁴ GOLDSTEIN and STEINBERG, *cit. supra* note 11, p. 268.

⁷⁵ SCHEPEL and WESSELING, “The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe”, *European Law Journal*, 1997, p. 165 ff., p. 171.

WTO experts, it also perpetuates the dominant modes of thinking, disciplinary biases, and power structures within the field, thereby closing the door to alternative approaches and undermining attempts at reforming the system.

4. CONCLUSION: WHEN CIRCLES COLLIDE...

This article has sought to explore how the inner circle of professional WTO litigators – broadly understood as the community of panellists, AB members, government lawyers, private counsel, secretariat officials, and specialized scholars – has progressively acquired control of international trade adjudication. As argued, the socio-professional closure of the community has caused some resentment from those who feel marginalized in the day-to-day business of WTO dispute settlement. Seen from this angle, the offensive against the AB does not merely reflect a normative disagreement with its judicial posture, nor is it only a raw assertion of political and economic might. Instead, it constitutes a radical attempt by some official stakeholders to regain control of a process that they believe has long eluded their scrutiny. In turn, this backlash poses a formidable threat to the club of trade practitioners, who are mobilizing to anticipate future developments and mitigate their impact on their career prospects.

That the ongoing struggle is not limited to law and diplomacy, but rather cuts deep into the socio-professional fabric of the community, has become apparent in recent months. It is telling, for example, that behind its formal objections to the tone and content of AB reports, the US is also seeking to persuade the WTO Director-General to sack the director of the ABS,⁷⁶ thereby weakening the bureaucracy that provides support to appellate adjudicators. It is equally unsurprising that the new Multi-Party Interim Appeal Arbitration Arrangement (MPIA), i.e. the most tangible proposal for the reform of appellate proceedings, was developed jointly by a member state delegation and a preeminent law firm.⁷⁷

Only time will tell how this socio-professional struggle will unfold. The battle is already sending shockwaves across the field, reshuffling alliances, and causing feuds both inside and outside the WTO.⁷⁸ The question for the actors involved is not so much whether to side with the US or with the member States that have sworn continued allegiance to the institution. Rather, it is whether to preserve community practices as they have developed over the last two decades or engage

⁷⁶ See CHARNOVITZ, “The Attack on the Appellate Body: Events of 5 December 2019”, *International Economic Law and Policy Blog*, 5 December 2019, available at: <<https://ielp.worldtradelaw.net/2019/12/the-attack-on-the-appellate-body-events-of-5-december-2019.html>>.

⁷⁷ ANDERSEN et al., “Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals”, *CTEI Working Paper 2017-17*, 2017, available at: <<https://repository.graduateinstitute.ch/record/295745?ln=en>>. More research will be required to assess the viability and functioning of the MPIA in future cases.

⁷⁸ See “WTO Faces Cliff-Edge Crisis Next Week as Mediator Eyes Departure”, *Bloomberg*, 2 December 2019, available at: <<https://www.bloomberg.com/news/articles/2019-12-02/wto-faces-cliff-edge-crisis-next-week-as-mediator-eyes-departure>>.

in a radical rethinking of the way cases are litigated, prepared, and deliberated. One thing seems certain: neither faction will be able to control the system alone, without some support from the other side. Official stakeholders will continue to need legal experts to handle the technical complexities of trade adjudication; experts will continue to need some political accountability to maintain their legitimacy in the long haul. Hence, unless the inner and the outer circle of trade professionals engage in a frank and constructive exchange, it is highly unlikely that the WTO will come out of its – okay, let us use the word – crisis.

