Foreword

The WTO dispute settlement system, which was for many years referred to as ‘the jewel in the crown’ of the WTO and which was looked at with envy by those active in other fields of international law, is currently in an existential crisis. Dissatisfied with the functioning of the Appellate Body, the United States has obstructed since 2017 the appointment of Appellate Body judges and, as a result, on 11 December 2019, the number of judges in office fell below the minimum of three. As from that day the Appellate Body could no longer hear any new appeals. Of the 12 appeals pending at that time, it was allowed to complete the disposition of only three. The paralysis of the Appellate Body severely undermines the whole WTO dispute settlement system as it may be expected that parties losing a case at the panel stage will appeal the unfavourable panel report to the paralysed Appellate Body – an action referred to as appealing into the void. Such action will prevent the panel report from being adopted by the DSB and becoming legally binding. For almost 25 years, the WTO dispute settlement system was a glorious experiment with the rule of law in international trade relations. Unless an agreement is reached on how to address the United States’ concerns regarding the functioning of the Appellate Body, this experiment has sadly come to an end. The Multi-Party Interim Appeal Arbitration Arrangement, initially agreed to by 16 WTO Members in March 2020, is a valiant attempt under Article 25 of the DSU to save what can be saved of the WTO dispute settlement system, but it is a poor, temporary substitute for appellate review by the Appellate Body under Article 17 of the DSU.

In this time of crisis Michelle Zang’s book on judicial engagement of international economic courts and tribunals is a very welcome reminder of what we may be losing and what we should try to preserve. Her book covers the engagement between the WTO dispute settlement system (DSS) and the Court of Justice of the European Union (CJEU). I had the privilege of working for both adjudicative systems and this topic is therefore dear to me. The engagement between the WTO DSS and the CJEU is real but in many respects (too) limited. As Michelle Zang observes, while inter-jurisdiction engagement might assist the adjudication process, the ‘cautious approach’ to such engagement ‘reveals the wary attentiveness of the adjudicator to safeguard its own autonomy and independence while engaging with other judiciaries’. This is definitely the case for the engagement between the WTO DSS and the CJEU.

Michelle Zang's book also covers the engagement between the WTO DSS and regional trade adjudicators, and in particular the NAFTA and MERCOSUR adjudicative bodies. On the relationship between the WTO DSS and these regional adjudicative bodies, and more generally on the relationship between WTO law and the law of regional trade agreements, much has already been written, and the Appellate Body has been called upon to clarify this relationship. Michelle Zang correctly notes that the Appellate Body (and WTO panels) 'offered responses to several critical questions yet many remain unsolved'. For regional adjudicative bodies, a major issue that they often face is indeed 'to assess whether, and if so, to what extent, the WTO rules can be applied in the pending dispute'. There are no easy answers to the manifold of questions that arise in this context. Finally, Michelle Zang explores the engagement between the WTO DSS and investment adjudicators, and in particular ICSID tribunals. The discussion of this engagement is undoubtedly of special interest to those former Appellate Body judges who, after retiring from the Appellate Body, became active as investment arbitrators. As Michelle Zang observes, investment tribunals have 'shown significant trust' in WTO dispute settlement on procedural matters or on the meaning of general principles of law, but have been more critical regarding the approach to the interpretation of the treaty and laws at issue. The latter is, however, not surprising given 'the difference in treaty text, distinct focus of domestic regulation and varying contexts inherent to the trading and investing activities'. In her concluding chapter, Michelle Zang notes that 'the often-suspected adjudicatory chaos, associated with the plurality and proliferation of judicial actors, is more perceived than real'. According to Zang, observed contradictions in judicial decisions by international economic courts and tribunals are 'not so problematic as to expose the system to serious legitimacy risks' and may 'arguably constitute a phase of "healthy development" in the overall evolution process'. I cautiously agree with this assessment. I definitely agree with the author where she concludes that the engagement between international economic courts and tribunals is characterized by 'on the one hand, diligent caution on the part of the regime adjudicators regarding the inherent boundaries over their discretion and jurisdiction, and on the other, their efforts in pursuing consistency subject to such boundaries'. As Michelle Zang convincingly shows, the plurality of international economic courts and tribunals is not a pressing problem for international economic adjudication. In this time of crisis in international economic adjudication – as exemplified by the paralysis of the WTO Appellate Body – this is a most welcome conclusion.

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