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Crisis at the WTO's Appellate Body (AB): Why the AB is Important for Developing Members

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Introduction

This year marks the 25th anniversary of the signing of the Marrakesh Agreement which established the World Trade Organization (WTO). Instead of celebrating its silver jubilee, the WTO finds itself mired in an existential crisis, with its dispute settlement mechanism and in particular the Appellate Body under assault from the USA.[1]

Creation of the WTO signalled an evolution in the way international trade would be governed at the multilateral level. Two very significant outcomes of the Uruguay Round negotiations were the change in dispute settlement at the WTO, which shifted the decision making from a positive consensus based approach under the GATT Council to a quasi-automatic one based on 'negative' or 'reverse consensus'[2] at a new Dispute Settlement Body (DSB) and the creation of an appellate review mechanism.

This new framework for settling trade disputes provided a stronger legally binding mechanism to enforce the rights and obligations of States under the WTO covered agreements. It has enjoyed a high degree of confidence from the Members, with almost 600 disputes having been filed since its inception[3]. However, as Peter van den Bossche said in his retirement address in May 2019, "There are very difficult times ahead for the WTO dispute settlement system. This system was – and currently still is – a glorious experiment with the rule of law in international relations. In six months and two weeks from now, this unique experiment may start to unravel and gradually come to an end. History will not judge kindly those responsible for the collapse of the WTO dispute settlement system."[4]

Why the Appellate Body Was Set Up

While dispute settlement has been a part of international trade relations since the GATT 1947, it could not produce satisfactory outcomes for many States, given its systemic limitations. This was because decisions were made by consensus and panel reports could remain un-adopted, since the losing party could object. This was overhauled during the Uruguay Round negotiations, with the possibility of adoption of reports through reverse consensus i.e. a panel report which is not appealed is adopted unless all Members oppose its adoption. This created a more legally binding outcome, which was very much supported by the USA. Some countries had expressed reservations on the introduction of reverse consensus (including the European Communities at that time) and so "it was thought necessary to provide some sort of 'safety net' to ensure that reports of 'rogue' panels would not stand as 'law' or have to be implemented by the losing party"[5]. In addition to the possibility of interim review under Article 15 of the Dispute Settlement Understanding (DSU), the creation of an appeals mechanism was seen as an additional safety valve for members, which would protect them against 'bad' panel reports being automatically adopted. According to Prof. van den Bossche, the establishment of a standing AB was to "ensure that the now quasi-automatic adoption of panel reports by the DSB would not have the undesirable side-effect of being without protection against an occasional 'bad' panel report". It was "an inspired *afterthought* rather than the reflection of a grand design to create a strong, new international court"[6]. Thus, as Prof. Steger has observed, "the idea of creating an Appellate Body was the *quid pro quo* for parties losing the political right to block adoption of panel

Abstract

The World Trade Organization (WTO)'s Appellate Body (AB) will be made dysfunctional by 11 December 2019. A disabled AB means that the WTO's dispute settlement system loses its enforcement mechanism. Even though many smaller developing countries are not major users of the dispute settlement system, nevertheless, they are beneficiaries of the rule of law, and a more predictable trading environment. Several stop-gap measures have been suggested. None are satisfactory. The right to appeal is an important right for all Members which was part of the Uruguay Round package. If this right is removed, why should other parts of that package also not be changed? The future is uncertain – between a much weakened multilateral trading system similar to the days of the General Agreement on Tariffs and Trade (GATT); or deep reform of the WTO, in ways that primarily benefit the US and its partners, whilst foreclosing important policy choices for the developing world.

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reports. Negotiators thought that panel reports would be appealed very rarely"[7].

The Crisis of the Last Two Years in the Appellate Body

Since 2017, the US has blocked the appointments of new or the reappointments of existing AB Members. At the time of writing (early December 2019) out of 7 positions, only 3 (the number needed to process an appeal) are filled. By December 11, only one Member would be left – rendering the AB unable to process any new appeals. This is in flagrant contravention of the legal obligation under Article 17.2 of the DSU whereby "vacancies shall be filled as they arise". While over two-thirds of the Membership has jointly proposed to launch the selection process for "filling the vacancies in the Appellate Body, in compliance with the DSU and so that it can carry on its functions properly"[8], the USA has been staunchly opposed to it, claiming that the systemic concerns that it has identified remain unaddressed[9]. The outcome of its actions is well represented by the images below:

WTO AB Members on 31 December 2016

WTO AB Members on 11 December 2019

Many countries have been actively engaged in the discussions to overcome this impasse. Many reform proposals were tabled to consider options for both unblocking appointments to the AB and addressing concerns raised by the USA[10], including through the so-called 'Walker process' which has in fact come up with a draft Decision giving significant concessions to the US[11]. Despite these concessions, the USA itself has been critical of these efforts, and has not met the proposals with counter proposals.[12] The current path adopted by the USA will, by 11 December, result in a non-functioning AB. This is *de facto* a reversal to the dispute settlement of the GATT where losing parties could block consensus on the adoption of panel reports. From 11 December, losing parties can simply make an 'appeal' even if the AB is not functioning. This would prevent panel reports from being adopted, as in the GATT days, which seems in line with the views of the current USTR Robert Lighthizer.[13]

US and the Appellate Body

The USA has raised several concerns with regard to the functioning of the AB, to show that the AB has deviated from the rules that the Members had agreed upon. It cites, *inter alia*, the use of Rule 15 of the Appellate Body Working Procedures[14], the non-observance of the 90 day deadline for issuance of reports; the use of advisory opinions or *obiter dicta*; the use of 'precedent'; and general 'overreach' by the AB in violation of Article 3.2 of the DSU (see Annex).[15] At the bottom of US concerns seems to be the sense that the DSU system they thought they had negotiated in the Uruguay Round has turned out to be a different animal. In this US view, the 'Appellate body is not respecting the current, clear language of the DSU'[16].

Many have speculated that the AB's rulings on anti-dumping against the US' zeroing methodology is behind the US' ire with the AB. US Ambassador Shea said in October 2019 that 'With respect to the issue of overreach, it is clear that the Appellate Body would say that it already abides by the text of Article 17.6 of the Anti-Dumping Agreement[17] ... The problem is that the Appellate Body has adopted an erroneous interpretation of Article 17.6 that renders it inutile. We have not yet seen convergence on how to address this issue, or other instances in which the Appellate Body has departed from the plain text of other covered agreements'.[18] Some commentators have noted that the US was confident during the Uruguay Round negotiations that under a provision like article 17.6 their zeroing methodology would not be overturned by panels or the Appellate Body. Some panels have accepted the US' methodology, but this has been consistently overturned by the AB[19].

The extent of US rancour in relation to the AB and what US views as its 'wrongful' rulings can be seen in Lighthizer's statement on 9 April 2019, after a panel ruled in favour of US' zeroing methodology in *US - Differential Pricing Methodology:*

> *"The WTO rules do not prohibit 'zeroing'…The United States never agreed to any such rule in the WTO negotiations, and never would. WTO Appellate Body reports to the contrary are wrong, and reflect overreaching by that body. The United States commends this panel for doing its own interpretive analysis, and for having the courage to stand up to the undue pressure that the Appellate Body has been putting on panels for many years. Appellate Body reports are not binding precedent, and where the Appellate Body's reasoning is erroneous and unpersuasive, a WTO panel has an obligation not to follow such flawed reasoning."*[20]

However, to date, the 'overreach' of the AB may not even be the issue that is highest on the US' trade agenda.

The rise of China is a major concern. US is now clearly feeling the threat to its economic and technological supremacy. It is supporting a range of new proposals in the WTO under the banner of 'WTO reform' in an attempt to bring in new trade rules that can further discipline China. These range from new rules on 'digital trade' (in the informal plurilateral negotiations) to enhanced enforcement of transparency and notification disciplines, and above all, its wish to dismantle Special and Differential Treatment flexibilities for China and many other developing countries.

In its own domestic deliberations, USTR Lighthizer has cited the blocking of appointments as the *only* leverage it has in pushing for 'reform' of the WTO.[21]

It should be noted that for all its criticisms of the AB, the US has nevertheless continued to appeal the cases it has lost at the panel stage[22]. Further, it has continued to enjoy the benefits it derives from having a functional dispute settlement, such as the recent $7.5 billion award it won in the Airbus subsidies case,[23] which is the largest in WTO history.[24]

Why Developing Countries Need the Appellate Body?

Most developing countries have not been major users of the WTO's dispute settlement mechanism. The biggest users have been the developed Members and a handful of larger developing countries. Indeed, 80 to 90 percent of all disputes involve either at least one high-income country or at least one upper-middle-income country.[25] Many least developed countries (LDCs) have never participated in the dispute settlement system as a complainant or respondent.[26] For Africa, for example, only four countries (Egypt, Morocco, South Africa and Tunisia) have participated in disputes; and only one (Morocco) has been involved in a dispute at the appellate stage.[27] Overall, a total of 109 Members (out of 164) have participated in dispute settlement proceedings as a party or a third party.[28]

Nevertheless, the Appellate Body remains a critical part of the entire WTO rules-based system. Whether they actively use it or not, developing Members have the most to gain by a system where rules can be enforced.

The following are some of the reasons why a collapsed AB is an alarming and problematic development for all developing Members:

(1) The WTO System Loses its Enforcement Mechanism – Back to the Law of the Jungle?

The binding obligations included under the WTO's covered agreements were reinforced by the possibility of Members being able to approach the DSB and avail of the settlement of disputes. The fact that any trade-related measure undertaken by a WTO Member, if disputed, could be brought before an independent body, provided "security and predictability to the multilateral trading system".[29] This served "to preserve the rights and obligations of Members under the covered agreements".[30]

The dismantling of the Appellate Body is likely to result in a systemic collapse of the WTO's dispute settlement mechanism as a whole. The WTO, supposedly a rules-based institution, would lose its capacity to enforce rules: any country could and would be likely to exercise its right to appeal an adverse panel report. Without AB Members to hear the appeals, all disputes will remain in limbo i.e. what some have termed 'appealing into the void'.[31] The WTO's dispute settlement body would not be able to pronounce itself on matters (as panel reports could remain un-adopted). Hence, the challenged measure could be maintained indefinitely by the respondent State.[32] This gives rise to unpredictability in the trading environment – and weaker Members, in particular, may suffer the consequences.

In this situation of paralysis in the dispute settlement mechanism, in effect, smaller Members are more vulnerable to the 'law of the jungle'. Powerful countries may be able to exert pressure to make weaker Members implement panel rulings. However, the powerful themselves are likely to treat those rulings with impunity. As Julio Lacarte-Muró, the first Chair of the AB, had written of a functioning dispute settlement system, "This system works to the advantage of all members, but it especially gives security to the weaker Members who often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests. In the WTO, *right* perseveres over *might*."[33]

(2) Members are deprived of their Right to Appeal - this was an Important Part of the Uruguay Round bargain

It is the legal right of Members under the DSU to be able to appeal panel reports. According to James Bacchus, "WTO member countries have an automatic right to appeal the legal rulings of *ad hoc* WTO panels under the treaty. If there are not three judges to hear an appeal, then the right to appeal will be denied and the WTO will be unable to adopt and enforce panel rulings"[34]. The EU has commented similarly, expressing that without the AB, "It may deprive WTO Members of their procedural right to an appeal before the Appellate Body that they otherwise should enjoy under the DSU. The existence of an appeal stage was an important part of the bargain struck in 1995".[35]

(3) Giving Consistency and Predictability to WTO Law

Without an AB, there is a much higher chance of fragmentation in the application of WTO rules, particularly when panel proceedings are taking place parallel to each other. Panels may come up with different interpretations and outcomes. Such a possibility would run contrary to the aim of Article 3.2 of the DSU, which considers the dispute settlement mechanism as "a central element in providing security and predictability to the multilateral trading system". Having the AB as an umbrella body meant that it could independently review divergent panel outcomes and make its own reasoned decision; without it,

divergent panel reports would remain equally valid.

(4) Keeping 'Rogue' Panels in Check?

The original purpose why the idea of an appellate body was brought up in the Uruguay Round was to keep 'rogue' panels in check. The AB has modified panel reports in as high as 80 percent of all appeals.[36] This can be interpreted as panel reports having flaws in their analysis and conclusions, such as incorrect interpretation of WTO provisions, flawed application of WTO law to the facts of a case, or committed a legal error in its analysis. Alternatively, it can be viewed as panels providing different legitimate legal readings of WTO law.

In the recent decision referred to earlier, *US - Differential Pricing Methodology* on softwood lumber products, Canada challenged US' zeroing methodology. The panel ruled in favour of US' zeroing methodology. It acknowledged that its conclusions differed from those of earlier decisions by panels and the AB in similar cases, but justified it on the basis of its "objective assessment of the facts of this case, and the applicability of, and conformity with, the relevant covered agreements", claiming that it "found convincing or cogent reasons to arrive at conclusions different from those of the Appellate Body…". However, it did not actually explain what those reasons were.[37]

In its notification of appeal, Canada requested "that the AB find that the Panel acted inconsistently with the function of panels under Article 11[38] of the DSU".[39]

In addition, the outsized role of the WTO secretariat in panel proceedings has also come under scrutiny. As a recent paper shows, the secretariat is involved in dispute proceedings from their initiation to the very end, and can therefore have an impact even larger than that of the panel adjudicators. It starts from their role in selection of the panellists, setting the timetable for the disputes, writing 'Issue Papers', drafting questions for the adjudicators to ask the Parties, and finally, drafting the reports with conclusions.[40] In light of this and the concerns expressed about biases in the WTO against developing countries,[41] it is worth considering the ramifications if the mechanism to keep 'rogue panels' in check might itself be subverted.

(5) Unpredictable Trading Environment and the Rise of Even More Unilateral Actions?

When panel reports remain un-adopted, Members are likely to see more unpredictability in the trading environment. A very possible scenario is the proliferation of unilateral action – where Members go ahead to act upon panel report findings, or simply take action without any attempt to use the broken down dispute settlement mechanism.

Already the current unilateral imposition of tariffs by the USA has caused a massive dip in confidence in the global trading community. Such actions could multiply beyond the United States. Developing countries who are economically and politically more vulnerable have most to lose in such a situation.

Looking Ahead

In light of the impending impasse at the AB, various ideas and 'stop-gap' measures have been put forward as an alternative to the intervention of the AB. These suggestions include: (1) having appellate review via arbitration under Article 25 DSU[42] (which is being promoted at the bilateral level by the EU); (2) Non-appeal pacts being signed between disputing parties before a panel ruling, essentially agreeing *ex ante* to not appeal the outcome; (3) Members agree to adopt panel reports by negative consensus in the absence of a functioning AB;[43] and (4) strengthening the interim review mechanism under Article 15.2 DSU, and using it as the basis for finding a solution that is mutually acceptable to the disputing parties.

However, none are very satisfactory for various reasons. The Article 25 solution relies on mutual agreement by both sides before it can be triggered; it falls short of having a standing an appellate panel which could provide consistency to rulings, and as Prof. Hillman, former AB Member notes, 'would always sit somewhat outside the binding dispute settlement system'.[44] Non-appeal pacts mean that Members give up their right to appeal *a priori*. The same is true for the suggestion for Members to agree to always adopt panel reports. Why would a country do that? The suggested strengthened interim review mechanism would seem to bring parties back into bilateral negotiations, where the rule of power could prevail.

Most importantly, why would Members settle for something which falls short of their rights under the WTO Agreement? And if, as one commentator asked, the US can flagrantly contravene WTO rules such as its binding obligation to maintain a standing AB under Articles 17.1 and 17.2 of the Dispute Settlement Understanding, and by doing so, hold the entire dispute settlement mechanism hostage, "What is there to stop developing countries from ripping out the TRIPS Agreement from the rulebook"[45]?

Whilst joining the WTO, it would seem as though the US believed it would be the complainant more often than not, and would be able to enforce its will with the legitimacy of a multilateral framework. However, it ended up being challenged nearly as often as it brought complaints. This has led to a belief that the USA is somehow being 'cheated' at the WTO by other countries.[46] As James Bacchus says: "Seemingly, in the current view of the United States, all members of the WTO are equal, except for the United States, which is more equal than others. This is not the rule of law. This is the rule of power."[47]

Conclusion

By all indications so far, the AB will be made dysfunctional by 11 December. This is despite WTO Members' extraordinary efforts to concede to US' concerns through the 'Walker' process of negotiations.

A disabled AB means that panel reports could remain unadopted and appeals are made 'into the void'. The

WTO's dispute settlement system therefore would lose its enforcement mechanism. Weaker developing countries are the losers in this scenario since they may not have the capacity to enforce their rights, whilst developed countries can still do so by exercising their higher political and economic power. This will be a 'regression from a rules-based system into power-based strategies'.[48]

Several proposals including giving up the right to appeal are being put forward in an attempt to retain the enforcement mechanism of the dispute settlement system. Nevertheless, these are highly unsatisfactory. Developing countries should not give up their right to appeal, which was an important part of the Uruguay Round bargain. If this part of the bargain is changed, why should other parts of the bargain not be changed?

Needless to say, the scenarios ahead are unclear. We are either saddled with a much weakened multilateral trade system, similar to the days of the GATT; or the US and its many partners are successful in their concerted push for a deep reform of the WTO, with new trade rules to discipline China, but along with China, all other developing countries as well, in ways which would seriously foreclose their policy choices for development.

Endnotes:

[1] Tom Miles, Trump threats, demands spark 'existential crisis' at WTO, Reuters, October 24, 2018. Available from https://www.reuters.com/article/us-usa-trade-wto-insight/trump-threats-demands-spark-existential-crisis-at-wto-idUSKCN1MY12F

[2] Reverse or Negative consensus refers to the practice established under the WTO DSU (Articles 6.1, 16.4, 17.14 and 22.6) according to which the DSB must automatically approve the action at the stage of adoption of panel and Appellate Body reports or authorize retaliation unless there is a consensus against it. See https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm

[3] WTO, Chronological list of disputes cases. Available from https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

[4] Farewell speech of Appellate Body member Peter Van den Bossche, Available from https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm

[5] Valerie Hughes, 'Initiating Proceedings to ensure implementation', in Sacerdoti, Yanovich and Bohanes ed., The WTO at Ten: The Contribution of the Dispute Settlement System, Cambridge, 2006

[6] Peter van den Bossche, The WTO Appellate Body and its rise to prominence, in Sacerdoti, Yanovich and Bohanes ed., The WTO at Ten: The Contribution of the Dispute Settlement System, Cambridge, 2006, p. 294

[7] Debra P. Steger, The Founding of the Appellate Body, in G. Marceau ed., A History of Law and Lawyers in the GATT/WTO, Cambridge 2015.

[8] Proposal on Appellate Body Appointments, Dispute Settlement Body, WT/DSB/W/609/Rev.14, 20 Sept 2019

[9] US Statements at the October 28, 2019, DSB Meeting, Available from https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct28.DSB_.Stmt_.as-deliv.fin_.public.pdf

[10] These include proposals by European Union, China, India and others (WT/GC/W/752/Rev.2), Australia, Singapore, Costa Rica, Canada and Switzerland (WT/GC/W/754/Rev2), Honduras (WT/GC/W/758, WT/GC/W/759, WT/GC/W/760, WT/GC/W/761), Customs Territory of Taiwan, Penghu, Kinmen and Matsu (WT/GC/W/763/Rev.1), Brazil, Paraguay and Uruguay (WT/GC/W/767/Rev.1), Japan & Australia (WT/GC/W/768), Thailand (WT/GC/W/769), China (WT/GC/W/773) and the African Group (WT/GC/W/776) among others.

[11] New Zealand Ambassador David Walker was appointed as an informal facilitator to resolve differences on the functioning of the Appellate Body. On 28 November 2019, after months of negotiations, Walker issued a Draft Decision on the 'Functioning of the Appellate Body'. Amongst others, a key concession for the US was reinforcing US' interpretation of how panels and the AB should act in the area of Anti-dumping cases.

[12] US Statements delivered at the WTO General Council Meeting, October 15, 2019. Available from https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/)

[13] See CSIS, US Trade Policy Priorities: Robert Lighthizer, United States Trade Representative, 18 September 2017. Available from https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative

[14] Rule 15 says 'A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body', in 'Working Procedures for Appellate Review', WT/AG/WP/6, 16 August 2010.

[15] See also Danish and Aileen Kwa, "Major WTO Appellate Body Reform Concessions Rebuffed by US", South Centre Policy Brief 70 (December 2019).

[16] US Statements delivered at the WTO General Council Meeting, October 15, 2019. Available from https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/

[17] Article 17.6(ii) of the Anti-dumping Agreement says that where it is possible to have more than one permissible interpretation of a provision, the interpretation of the authorities applying the anti-dumping measure shall be accepted. It says (ii) 'the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations'.

The US has disagreed with the AB leaning more towards using the DSU's Art 11 as the standard of review, rather than the Anti-dumping Agreement's 17.6(ii). DSU Art 11 says that "the panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the

applicability of and conformity with the relevant covered agreements…".

[18] US Statements delivered at the WTO General Council Meeting, October 15, 2019, ibid.

[19] See Tania Voon, The End of Zeroing? Reflections Following the WTO Appellate Body's Latest Missive, Legal Issues of Economic Integration 34(3): 211–230, 2007.

[20] USTR, 'United States Prevails on "Zeroing" Again: WTO Panel Rejects Flawed Appellate Body Findings', 9 April 2019. Available from https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/united-states-prevails-%E2%80%9Czeroing%E2%80%9D

[21] Lighthizer: Appellate Body blocks the only way to ensure reforms, Inside US Trade, March 12, 2019. Available from https://insidetrade.com/daily-news/lighthizer-appellate-body-blocks-only-way-ensure-reforms

[22] For instance DS 505 *US - Supercalendered Paper*; DS 510 *US - Renewable Energy*; and DS 523 *US - Pipe and Tube Products*, all of which were appealed within the last year.

[23] WTO, Arbitrator issues decision in Airbus subsidy dispute. Available from https://www.wto.org/english/news_e/news19_e/316arb_e.htm

[24] USTR, US Wins $7.5 Billion Award in Airbus Subsidies Case. Available from https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/us-wins-75-billion-award-airbus

[25] Bouët, A. & Métivier, J. Rev World Econ (2019). https://doi.org/10.1007/s10290-019-00359-w

[26] WTO, Map of disputes between WTO Members. Available from https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm

[27] Morocco as appellant in *Morocco - Anti-dumping Measures on Certain Hot-rolled Steel from Turkey,* DS 513.

[28] WTO, Dispute settlement activity – some figures. Available from https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm

[29] Article 3.2 of the DSU.

[30] ibid

[31] See Joost Pauwelyn, WTO Dispute Settlement Post 2019: What to Expect?, Journal of International Economic Law, Volume 22, Issue 3, September 2019, Pages 297–321, https://doi.org/10.1093/jiel/jgz024

[32] Bhatia 2018 'Address of Mr. Ujal Singh Bhatia, Chair of the Appellate Body at the 11th Annual Update on WTO Dispute Settlement', 8 May. Available from https://graduateinstitute.ch//sites/default/files/2018-11/Ujal%20Singh%20Bhatia%20(AB%20Chair)%20Graduate%20Institute%20Speech%20-3%20May%202018.pdf

[33] Julio Lacarte-Muró and Petina Gappah, Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench, Journal of International Economic Law (2000) 395-401, Oxford

[34] James Bacchus, Saving the WTO's Appeals Process, Cato Institute, October 12, 2018. Available from https://www.cato.org/blog/saving-wtos-appeals-process

[35] EU Statement at the Regular Dispute Settlement Body (DSU) meeting on 26 April 2019. Available from https://eeas.europa.eu/delegations/world-trade-organization-wto/61599/eu-statement-regular-dispute-settlement-body-dsu-meeting-26-april-2019_en

[36] Tania Voon, To Uphold, Modify or Reverse? How the WTO Appellate Body Treats Panel Reports, 2006) 7(4) Journal of World Investment and Trade 507-518

[37] United States - Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada - Report of the Panel, para. 7.107, WT/DS534/R

[38] See Footnote 17 on Article 11.

[39] Notification of an appeal by Canada in *US — Differential Pricing Methodology*, WT/DS534/5, 5 June 2019

[40] Pauwelyn & Pelc, Who Writes the Rulings of the WTO? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement, Draft Paper, 26 September 2019. Available from http://dx.doi.org/10.2139/ssrn.3458872.

[41] Chakravarthi Raghavan, The WTO, its secretariat and bias against the South, TWN Info Service on WTO and Trade Issues, Published in SUNS #8894 dated 25 April 2019. Available from https://www.twn.my/title2/wto.info/2019/ti190420.htm

[42] This option is promoted by the EU. In their proposal, the EU wants to 'replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review'.

[43] This would seem to be the intent behind an informal proposal floating around Geneva: 'We reaffirm our strong commitment to the fundamental principles of the WTO dispute settlement system, notably the adoption of reports by negative consensus and the two-tier nature of the system'.

[44] Hillman J 2018 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?', Available from https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf

[45] Comments by Alan Yanovich who formerly worked at the AB secretariat, at an event on 'WTO Dispute Settlement at the Crossroads', Centre for Trade and Economic Integration, The Graduate Institute Geneva, 06 November 2019.

[46] Jeff Cox, Trump says China cheated America on trade, but he blames US leaders for letting it happen, CNBC, 12 November 2019. Available from https://www.cnbc.com/2019/11/12/trump-says-china-cheated-america-on-trade-but-he-blames-us-leaders-for-letting-it-happen.html

[47] James Bacchus, Might Unmakes Right: The American Assault on the Rule of Law in World Trade, CIGI Papers No. 173 – May 2018.

[48] The Elders, 'Attacks on Multilateral System Threaten Global Peace and Security', available from https://www.theelders.org/news/attacks-multilateral-system-threaten-global-peace-and-security.

Annex – Issues

#	Issue	Description	US Concern	Facilitator's Points of Convergence
1	Transitional rules	This relates to the practice of an AB member continuing to serve on an appeal even after their term has expired under Rule 15 of the AB Working Procedures.	The flexibility given to the AB to decide its working procedures has led to a modification in the rules of the DSU itself, due to AB decisions that purport to "deem" as an AB member someone whose term of office has expired.	Only Members may appoint AB members, and the DSB has the explicit authority and responsibility to determine membership of the AB; and is obligated to fill vacancies as they arise. The selection process to replace outgoing AB members shall be automatically launched 180 days before the expiry of their term in office. In case of exceptional vacancies, the Chair of the DSB shall immediately launch the selection process to fill it as soon as possible. AB members nearing the end of their terms may be assigned to a new division up until 60 days before the expiry of their term, and once so assigned may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term.
2	90 Days Timeline	This relates to the AB's obligation to issue its reports within 90 days from the date the decision to appeal is notified.	The AB has not been following its obligation under Art. 17.5	AB reports need to be issued no later than 90 days from the date a party to the dispute notifies its intention to appeal. In cases of unusual complexity or during periods of numerous appeals, the parties may agree with the AB to extend the time-frame for issuance of the Appellate Body report, with notification to the DSB.
3	Municipal Law	While making an objective assessment as per Art.11 DSU, the AB has also reviewed the panel's examination of the municipal law at issue.	The AB has consistently reviewed and even reversed panel fact-findings, under different legal standards that it has had to invent, and has reached conclusions that are not based on panel factual findings.	The 'meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal. The AB cannot engage in a '*de novo*' review or to 'complete the analysis' of the facts of a dispute. It is also incumbent upon Members to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal.
4	Advisory Opinions	Claims that the AB has made findings on issues beyond those necessary to resolve a dispute.	Such advisory opinions often appear to be an attempt by the AB to "make law" rather than resolve a particular dispute.	Issues that have not been raised by either party should not be ruled or decided upon by the Appellate Body, and it shall address issues raised only to the extent necessary to resolve the dispute.
5	Precedent	This follows the AB report in *US-Stainless Steel* where the AB came up with a new approach which required all panels to follow prior AB reports "absent cogent reasons".	This creates a *de facto* system of precedent, and through this the AB is engaging in making 'authoritative interpretations', which is a function reserved to the Membership.	Precedent is not created through WTO dispute settlement proceedings. Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members. Panels and the AB should take previous Panel/AB reports into account to the extent they find them relevant in the dispute they have before them.
6	'Overreach'	This is based on claims that the AB has gone beyond its mandate in interpreting the legal agreements and created binding obligations which were not negotiated or agreed to by the Member States.	By engaging in interpretation of the rules and creating new standards, the AB has added to the obligations of certain Members, going far beyond the text setting out WTO rules in varied areas.	Findings and recommendations of Panels and the AB and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Panels and the Appellate Body shall interpret provisions of the Anti-Dumping Agreement in accordance with its Article 17.6(ii).

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