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Lights Go Out at the WTO's Appellate Body Despite Concessions Offered to US

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Introduction

The lights went out on 11 December at the WTO's Appellate Body (AB), which various commentators have called the 'crown jewel' of the global trading system.[1] Yet others have noted that with the AB, 'the WTO was endowed with the best architecture for compliance review and enforcement of any international organization'.[2]

For two years, the US held up selection of AB Members at the WTO. 11 December 2019 marked the day the AB was whittled down to a single Member out of a seven Member panel, and is now non-functional. Without it, the WTO, a supposedly 'rules-based' organisation, has lost its binding enforcement mechanism.[3]

In the General Council meeting of 9 December, the US was offered a draft General Council Decision (the 'Walker' text, found in the Annex) containing concessions to address not just its procedural complaints, but also its substantive objections of 'overreach' by the AB. US rebuffed these offers, repeating again its old arguments as if the Membership had not made concessions. It also brought in new complaints.

This policy brief provides a flavour of the key issues discussed by Members in the 'Walker process' of negotiations in the run-up to 11 December, as they made all efforts to cajole the US to step away from dealing a major, and very possibly irreparable blow to the rules-based trading system.

US' Complaints and Changing Goalposts

At the WTO's final GC meeting (of 9 December) marking the demise of a functional AB, the US's Ambassador noted:

'For nearly a year, in the General Council and the Dispute Settlement Body, we have sought to deepen Members' collective understanding of the concerns raised and asked Members to engage on a fundamental question: why did the Appellate Body feel free to disregard the clear text of the agreements?

'The United States did not pose this question as part of an academic exercise. Rather, this question is critical in the context of any "solution-focused discussion:" Without an accurate diagnosis, we cannot assess the likely effectiveness of any potential solution.

'A fuller understanding of the cause is particularly important here. As the United States has explained, the rules of the DSU are clear. Where ambiguity or uncertainty over the meaning of the treaty text has not caused the problem, then simply re-affirming the rules that have been persistently broken cannot resolve the concern. Remarkably, nearly one year later, we have yet to hear Members engage with the United States on this question.'[4]

The characterisation that the draft text simply reaffirmed the rules contained in the DSU is not accurate. Language was provided which would appear to lend

Abstract

As of 11 December 2019, the Appellate Body (AB) of the World Trade Organization (WTO) has been rendered non-functional. This policy brief provides a summary of the issues discussed amongst WTO Members in the last two years, in their valiant efforts to address the US' concerns regarding the AB. The issues include: the use of AB Members' services to complete an appeal after their term has officially expired; timelines for issuance of AB reports; the meaning of municipal law; advisory opinions; precedence-setting; and overreach by the AB. After much effort by Members in the 'Walker process' of negotiations, concessions have been proposed to the US in the draft General Council Decision of 28 November 2019. Language was provided limiting the scope of appeals to questions of law, even though there are situations where the boundary between issues of law and fact are difficult to draw. The text also provides that 'precedent' is not created through WTO dispute settlement proceedings. In the area of anti-dumping, the language inserted by the US into the anti-dumping agreement to protect their zeroing practices is confirmed. Nevertheless, the US has rebuffed these offered concessions. It seems determined to amplify its leverage by taking the WTO's Appellate Body hostage, to extract still more from other Members, including in terms of far-reaching 'WTO Reforms'.

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weight to US' positions in various areas such as the scope of appeal and the issue of precedent, amongst others.

The US also used shifting goalposts to rebuff Members' offer. The last version of the Walker text included a specific acknowledgement that "the Appellate Body has, in some respects, not been functioning as intended under the Understanding on Rules and Procedures Governing the Settlement of Disputes"[5]. Yet the US demanded the inclusion of "unambiguous language stating that the Appellate Body has gone 'astray' and failed to perform according to the DSU rules".[6]

The other new goalpost that shocked the Membership just before the curtains came down on the AB was US' blocking of the WTO budget for several days on the grounds that the compensation structure for Appellate Body Members 'encourage(d) prolonged appeals at the expense of clear WTO rules'.[7] Eventually, the US managed to get away with blocking the use of the majority of the AB's budget in 2020. The EU decried that such 'attempts to obstruct the functioning of this organization through the budget discussion shattered Member confidence in the WTO'.[8]

China characterised the budget which effectively blocked the use of WTO funds to remunerate the AB and the AB Secretariat beyond a very minimal amount, as 'the worst one I ever worked on. It unfortunately came into being a political tool which has… affected the Appellate Body's functions and undermined the independent administrative authority of the WTO Secretariat'.[9]

The 'Walker' Process to Address the Appellate Body Crisis

WTO Members had worked hard for a year to try to address US' complaints. In the General Council meeting of 12 December 2018, WTO Members agreed to launch an informal process to address the impasse on the selection of Appellate Body members. Ambassador Walker of New Zealand was appointed to assist the Chair of the General Council as Facilitator in this informal process of focused discussions. The meetings began in January 2019 with the intention that "the immediate outcome of the informal process should be the unblocking of the selection process (of Appellate Body Members) and that discussions between members should be solution-oriented, focused and issue specific"[10].

Several progress reports were issued[11]. Walker also produced an initial draft Decision in October 2019[12]. This had been welcomed by the majority, but the US refuted seeing any convergence, stating that "It simply will not work to 'paper over' the problems that have been identified with new language that the Appellate Body and some Members could subsequently argue means the Appellate Body can continue operating the way that it has"[13]. This led to further adjustments with a new text released on 28 November (discussed on 9 December).

Issues and Proposals

The key issues discussed in the 'Walker' process of negotiations included the following:

1. Transition of AB Members (Rule 15)

The issue of transition relates to the practice of an Appellate Body member completing an appeal after their term has expired. In such cases, Rule 15 of the Working Procedures for Appellate Review applies. It states:

"15. 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."[14]

A plain reading of this rule suggests that any AB member who had already commenced hearing an appeal during their term should continue to hear the appeal and complete the dispute. This would require an authorization from the AB and a notification to be sent to the Dispute Settlement Body (DSB). The practical need for having such a rule is understandable since it is more efficient to have a person already hearing an appeal to bring the process to its logical conclusion rather than bringing in a new person and restarting the process from scratch.[15]

The US has concerns arising from the AB's decisions that purport to "deem" as an AB member someone whose term of office has expired and thus is no longer an AB member, pursuant to its Working Procedures. It has recalled that under the Article 17.1 and 17.2 of the Dispute Settlement Understanding (DSU), it is the DSB that has the authority to appoint AB members and to decide when their term in office expires, and so it is up to the DSB to decide whether a person who is no longer an AB member can continue to serve on an appeal.[16]

DSU Article 17.9 explicitly provides that "Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information". The US has expressed concerns that the flexibility given to the AB to decide its Working Procedures has led to a modification in the rules of the DSU itself. However, nowhere does the DSU text require the Working Procedures of the AB to be negotiated by Members, but only to be communicated to them.

In addition to reinforcing that the DSB has the 'explicit authority, and responsibility' to determine Membership of the AB, the Walker draft Decision of 28 November contains the following:

- AB members can only be assigned a new appeal up to 60 days before the expiry of their term.
- Allow an AB member to complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term.

2. Timelines for Issuance of Reports (90 Days)

The timeline followed by the AB for issuing their reports has also been deeply scrutinized. The relevant section, Article 17.5 of the DSU, reads as follows:

5. (…) When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

This therefore requires the AB to issue its reports within 90 days of commencement of the appeal. However, as the cases have been getting longer and more complicated, the AB has frequently overshot this deadline. The concern raised by the US in this regard is how the AB approaches the extension, and whether the disputing States and the DSB are adequately consulted when the AB is unable to meet its deadline.

According to the US, till 2011 the AB had largely managed to stick to the 90 day timeline. Post-2011, there was a change in the practice of the AB, which instead started providing justifications for the delays. The practice was that in case of delays, the parties to the dispute would provide 'deeming letters' for allowing the completion of the dispute and subsequent adoption by the DSB. Thereby, the report by the AB was adopted as deemed to have been delivered within the 90 day timeline.

On their part, AB members have cited the issues of extensive filings by the parties running into hundreds of pages, lengthy oral hearings, and the time required for translation into French and Spanish, as relevant factors for the non-observance of the 90-day timeline. They have further stressed that the obligation imposed by Article 17.12, which requires the AB to "address each of the issues raised", increases the time required to deal with the case, particularly since disputing parties tend to appeal all possible issues.

The proposals made were largely procedural in nature, in order to alleviate the burden of the AB and allow them to comply with the 90 day timeline. The Walker draft Decision contains the following:

- The AB is obligated to issue its report no later than 90 days.
- Parties may agree with the AB in cases of unusual complexity or periods of numerous appeals to extend the time-frame beyond 90 days. Such an agreement will be notified to the DSB.

3. Meaning of Municipal Law – Appellate Review of Facts

This issue revolves around the role of the AB in reviewing Members' domestic laws. Article 11 of the DSU says that a *panel* should make an 'objective assessment of the facts of the case', as well as 'the applicability of and conformity with the relevant covered agreements', i.e. whether or not domestic laws comply with WTO rules.

When the report is given to the AB, its role is limited to issues of law, not issues of fact, as per Article 17.6 of the DSU:

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

What is an issue of law and an issue of fact when the AB is assessing whether a domestic law conforms with WTO rules? The US contends that the meaning of municipal law is an issue of *fact*, while the issue of law in a WTO dispute is whether that fact is consistent or not with WTO obligations. Thus, the position of the US is that according to Art 17.6, the AB has no authority to review the findings of a panel on municipal or domestic laws as it is a factual assessment made by the panel. At the WTO's DSB in August 2019, the US noted that 'the meaning of a Member's domestic law – what a measure means or does – is simply the key fact in a dispute while the issue of law is whether that fact is consistent or inconsistent with WTO obligations'.[17]

This is a very black and white depiction of all situations panels or the AB might need to address. The Oxford Handbook of International Trade Law notes that there are 3 types of findings that panels can make. Those that are 1) purely legal in nature; 2) purely factual; and those that 3) involve the application of the facts to the law.[18]

The Oxford Handbook goes on to note that 'it is often difficult to pin down exactly when a panel is applying the law to the facts and when it is making a purely factual determination. The process of applying the law to facts involves weighing and appreciating the fact, and then characterizing them, in terms of the relevant legal rules. Any given finding may be predominantly factual or predominantly legal, or somewhere in between, depending on the issue and the circumstances of the specific case'.[19]

In such situations of 'mixed questions of law and fact', the Oxford Handbook observes that the AB 'applies a sliding scale in which the degree of discretion varies according to the factual content of the challenged finding.'[20] In *US-Upland Cotton*, the AB addressed this issue, noting that 'We recognize that the boundary between an issue that is purely factual and one that involves mixed issues of law and fact is often difficult to draw.'[21]

The AB has taken the position that "the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations."[22] On another occasion, it noted that "A panel's assessment of municipal law for the purpose of determining its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU. Just as it is necessary for the panel to seek a detailed understanding of the municipal law at issue, so too is it necessary for the Appellate Body to review the panel's examination of that municipal law."[23]

This does not mean that the AB has not been mindful of the fact that the role provided to it has been different from the role provided to panels. In *EC-Sardines* the AB noted: 'We have also said that we will not "interfere lightly" with

the Panel's appreciation of the evidence: we will not intervene solely because we might have reached a different factual finding from the one the panel reached; we will intervene only if we are "satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence".[24] I.e. the AB will intervene in situations where the assessment goes beyond a factual finding.

The Walker draft Decision includes the following on the meaning of municipal law:

- The 'meaning of municipal law' is to be treated as a matter of fact, and therefore is not subject to appeal.
- The AB is not to engage in a '*de novo*' review or to 'complete the analysis' of the facts of a dispute.
- It also requires Members to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal.

The combined meaning in the first two bullet points may constrain the AB's ability to examine domestic laws in situations where there are mixed issues of laws and facts, or as the AB has put it, when there is a need to engage in an 'appreciation of the evidence'.

Yet even with these proposed concessions, the US remained dissatisfied: 'we are concerned that the Appellate Body would say it is already abiding by the text in the Facilitator's Report, especially since the Appellate Body has interpreted DSU Art 11 to convert questions of fact into questions of law...'.[25]

4. Advisory Opinions

The US has also expressed concerns that the AB has made findings on issues beyond those necessary to resolve a dispute. This form of advisory opinions or *obiter dicta* is a standard feature of jurisprudence in common law countries, as it may serve to clarify a point of law, without being directly relevant to the case at hand. This has been claimed by some to be 'judicial activism', while others maintain it to be an essential part of the rules of interpretation.

For the US, "such advisory opinions often appear to be an attempt by a panel or the Appellate Body to "make law" rather than resolve a particular dispute."[26] It contends that the role of the WTO adjudicatory bodies is limited to resolving disputes and not to 'make law', which is the function reserved to the member countries. By making observations on issues not directly relevant for resolving the dispute, and by issuing 'clarifications' on certain provisions, the AB has sought to 'make law' and make it binding on all member countries.

In its statements, US also provides instances of cases such as *Argentina – Financial Services* (DS453), where AB looked into issues which were not considered necessary to resolving the dispute, citing that nearly two-thirds of the analysis was in the nature of *obiter dicta*.[27] Similarly, in *Indonesia - Import Licensing* (DS477), US contends that the AB made a finding concerning Article XI GATT which alone would have sufficed to resolve the dispute. However, the AB also discussed the legal standard under Article XX, which while not necessary to resolve the dispute, had been included in the appeal by Indonesia. Thus, for the US, by issuing advisory opinions, the AB adds time to the proceedings, increases the complexity of the report and risks adding or diminishing Members' rights and obligations under the covered agreements.

The proposals put forward under the 'Walker process' reemphasise that the primary objective of the dispute settlement system is the settlement of specific disputed issues, and therefore the AB should limit itself to addressing only those issues which are necessary for such resolution and settlement.

The Walker draft includes the following:

- Issues not raised by either party may not be ruled or decided upon by the AB. The AB shall address issues raised by parties in accordance with DSU Art 17.6 only to the extent necessary to resolving the dispute.

5. Precedent

The question of precedential value of AB reports came up after the decision in *US-Stainless Steel (Mexico)* where the AB came up with a new approach which required all panels to follow prior AB reports "absent cogent reasons"[28]. However, as noted by the AB in the same report, "it is well settled that AB reports are not binding, except with respect to resolving the particular dispute between the parties."

The US concern is whether an AB decision can serve as a binding precedent for future panels. According to the US, certain actions by the Appellate Body "seek to usurp the authority expressly reserved to Members. In claiming the authority to issue authoritative interpretations through its "cogent reasons" approach, the Appellate Body upsets the careful balance of rights and obligations that exist within the WTO agreements."[29]

Apart from the adjudication of disputes, the role of the dispute settlement system also involves "providing security and predictability to the multilateral trading system" as per Article 3.2 of the DSU. The creation of the 'absent cogent reasons' standard could therefore be viewed as fulfilling the aims of this provision. However, the US has strongly attacked it, viewing it as 'diminishing the value of the work of panels', with the result that 'errors will become locked in, and persuasive interpretations are less likely to arise from the dispute settlement system'. By creating a *de facto* system of precedent, the US contends that the AB is engaging in making 'authoritative interpretations', which is a function reserved for the membership.

Generally, any legal system develops its own jurispru-

dence over time, and it is well recognised that as "such [AB] reports create legitimate expectations among WTO Members, they should be taken into account where they are relevant to any dispute, especially if adjudicators find the reasoning in such reports sufficiently persuasive to rely on it in conducting their own assessment of the matter in a dispute."[30]

The Walker draft Decision contains the following:

- Precedent is not created through WTO dispute settlement proceedings.
- Consistency and predictability in the interpretation of rights and obligations 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 for the dispute.

This issue of 'precedent' has ignited some sharp comments from observers. Legal expert Steve Charnovitz notes that 'If the purpose of this normative statement is to say previous cases have to be irrelevant to panels, arbitrators, and appellators, then this clearly would undermine the functioning of the DSU or any legal system. On the other hand, a statement that previous decisions are not *binding* precedent would be consistent with WTO jurisprudence'.[31]

The draft Decision also endorses the idea of dialogue between the DSB and the AB:

- An informal meeting at least once a year between WTO Members and the AB where Members can express their view on issues in a manner unrelated to the adoption of particular reports.
- Clear ground rules will be provided to ensure that at no point should there be 'any discussion of ongoing disputes or any member of the AB.'

Contact between Members and the AB may be a good idea for releasing tension regarding Members' views of AB rulings. Nevertheless, there could also be some pitfalls in this regular exercise, leading to the independence of the AB being curtailed. Firstly, these occasions can be used by the more powerful Members to denounce the AB's rulings in certain issues, and thereby put pressure on the AB in ongoing or future disputes. Secondly, the DSU currently protects individual Members of the AB. Art 17.11 says that 'Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous'. This anonymity is to protect the integrity and independence of the AB. It would also ensure that WTO Members do not single out AB Members for lobbying or attacks (which the US did regarding a former Korean AB Member in 2016 when they publicly criticised the positions he had taken and refused to endorse his second term[32]). Yet protecting AB Members, as envisaged in Art 17.11 would probably not be easy if there were to be a frank dialogue. How might AB Members safely 'express their views on issues' without giving themselves or their positions away?

6. Additional Amendments

There was of course also discussion about the selection process for AB members. Proposals included an automatic initiation of the selection process to fill an upcoming vacancy in the AB. The process would be launched at a set number of months before the expiry of the term of the sitting member. Under current rules, the launching of this selection process requires consensus at the DSB, which is currently being blocked by the US, despite a proposal by 117 Members.

Key points in the Walker draft Decision contained the following:

- Only WTO Members may appoint members of the AB and the DSB has the explicit authority, and responsibility, to determine membership of the Appellate Body.
- The selection process for replacement of outgoing AB Members shall be automatically launched 180 days before the expiry of their term in office. In case of a vacancy in the Appellate Body for other reasons, the Chair of the DSB shall immediately launch the selection process to fill it as soon as possible.

These are fairly uncontroversial and should be acceptable to all. That Members of the AB are appointed by the DSB is already in the DSU (Art 17.2).

7. Overreach

The US has expressed its concerns 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. Article 3.2 of the DSU has been cited:

2. (…) Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The main criticism being levelled is that by engaging in interpretation of the rules, the AB has added to the obligations of certain members states. The US contends that "appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, anti-dumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices."[33]

In addition to the regular dialogue between the DSB and the AB as mentioned above, the Walker draft Decision addressed US' concern regarding anti-dumping:

- Panels and the AB shall interpret provisions of the Agreement on Implementation of Article VI of the GATT (Anti-dumping Agreement) in accordance with Article 17.6(ii).

As a former US trade negotiator[34] has commented, the US believed that as part of the Uruguay Round negotiations, it had secured a safeguard for its 'Zeroing'[35] practices in anti-dumping investigations in the form of Article 17.6(ii)[36]. This Article effectively says that when a panel finds more than one permissible interpretation in an anti-dumping case, and the authorities implementing the measure in question hold one of these interpretations, the panel shall find the authorities' measure to be in conformity with the Agreement.

The term 'zeroing' is not found in the Anti-dumping agreement and as the practice is not forbidden by the text itself, the US has argued that its zeroing methodology should not be declared illegal by the AB[37]. However, the AB has consistently found that the practice of zeroing "is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence."[38]

This has been an issue of serious concern to the US for many years now. As one US Congressional report from 2012 notes, "Legislation introduced in recent Congresses generally reflected congressional concerns that the WTO Appellate Body had interpreted WTO agreements in an overly broad manner to the detriment of the United States (…) particularly where U.S. trade remedies were involved. Legislation particularly focused on WTO decisions in which the U.S. use of "zeroing" in antidumping proceedings was successfully challenged."[39] Citing an Inside US Trade report, trade analyst Chakravarthi Raghavan commented that, "the US may lift its DSB blockage in filling AB vacancies, in return for an accord in revising the DSU to enable continued use by the US of the practice of 'zeroing'."[40] The Walker text confirms the applicability of article 17.6(ii) in relevant cases perhaps to signal that WTO members do not ignore the US concern on this issue. But it addresses an issue not covered by the DSU and it adds nothing to the existing rules. If finally approved, that text would simply remind panels and the AB that, if and when appropriate, article 17.6(ii) should be taken into account in rulings on anti-dumping cases.

A Game of High Brinkmanship to Achieve Other WTO Reforms?

Why is the US refusing concessions handed to it? According to India, 'It is distressing to note that every effort of almost the whole WTO membership has been rebuffed'.[41]

Perhaps US' actions may have some coherence from their perspective. A bipartisan resolution was presented on 6 December 2019 by the House Committee on Ways and Means, encouraging the Administration to pursue the following:

- 'Improve the speed and predictability of dispute settlement
- Address longstanding concerns with the WTO's Appellate Body
- Increase transparency at the WTO
- Ensure that WTO members invoke special and differential treatment reserved for developing countries only in fair and appropriate circumstances
- Update the WTO rules to address the needs of the United States and other free and open economies in the 21st century'.[42]

Some US institutions have also called on the Administration to 'condition the deal (on the AB) on the commitment by other major trading nations to conclude negotiations to update WTO rules in key areas, starting with ongoing talks covering digital trade and fisheries subsidies. In other words, use the WTO crisis to build up rather than break down the multilateral trading system'.[43]

Needless to say, this is a game of high brinkmanship, relying on the fact that others will succumb to its power tactics. However, eroding the trust, good faith, and the very integrity of rules in a rules-based institution, in order to push through its own agenda, will have ramifications.

At the 9 December General Council meeting, EU's Ambassador Machado noted that 'The actions of one member will deprive other Members of their right to a binding and two-step dispute settlement system even though this right is specifically envisaged in the WTO contract… the very idea of a rules based multilateral trading system is at stake'.[44]

India's Ambassador Deepak commented that 'This kind of brinkmanship apparently originating in pique and prejudice rather than in a desire to reform is leading to a total breakdown of trust within the WTO, and will have a debilitating effect on other pillars as well'.[45]

China's Ambassador Zhang Xiang Chen said that turning off the lights at the AB is 'no doubt the most severe blow to the multilateral trading system since its establishment… For the world trade order, the paralysis of the Appellate Body may bring irreparable damages and unintended consequences'.[46]

Conclusion

The curtains have come down on the WTO's Appellate Body. This is despite the fact that concessions were offered to the US in Ambassador Walker's 28 November draft Decision.

Amongst others, these include the attempt to constrain the AB in its scope of review, so that the more black and white view of the US on issues of fact and issues of law is likely to prevail. This is despite the fact that, as noted by the AB, the boundaries between an issue that is purely factual, and one that involves mixed issues of law and fact 'is often difficult to draw'.[47] The text also provides that 'precedent' is not created through WTO dispute settlement proceedings, and recalls article 17.6(ii) which was introduced into the anti-dumping agreement by the US possibly with the expectation of protecting their practices (such as zeroing) in dealing with anti-dumping cases.

Nevertheless the US has rebuffed these offers. It has chosen to hold out, putting the institution in deep crisis, in

order to leverage for even more concessions – such as new digital rules, its attempt to radically reshape Special and Differential Treatment, thus far an entitlement to all developing Members, amongst other far-reaching reforms.[48]

Endnotes:

[1] Tetyana Payosova (Harvard Law School), Gary Clyde Hufbauer (PIIE) and Jeffrey J. Schott (PIIE), 2018

'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', Policy Brief, 18-5, March 2018.

[2] Charnovitz, S 2019 'The Myth of No WTO Precedent', in International Economic Law and Policy Blog, 9 December.

[3] For more details, see 'Crisis at the WTO's Appellate Body: Why the AB is Important for Developing Members', by Danish and Aileen Kwa, South Centre Policy Brief 2019.

[4] US Statements delivered at the WTO General Council, 9 December 2019, https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/.

[5] General Council Draft Decision on Functioning of the Appellate Body, WT/GC/W/791 28 November 2019.

[6] D. Ravi Kanth, Trade: Facilitator issues draft GC decision addressing US concerns over AB, SUNS 9032, 3 December 2019.

[7] U.S. Statements delivered at the WTO General Council Meeting, December 9, 2019. Available from https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/.

[8] Washington Trade Daily, 2019 'Anguish Over Death of AB', 9 December.

[9] China's Statements delivered at the WTO General Council Meeting, December 9, 2019.

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[11] See Informal Process on Matters Related to the Functioning of the Appellate Body - Report by the Facilitator, H.E. Dr. David Walker (New Zealand), in JOB/GC/215 (1 March 2019); JOB/GC/217 (8 May 2019); JOB/GC/220 (25 July 2019).

[12] Informal Process on Matters Related to the Functioning of the Appellate Body - Report by the Facilitator, JOB/GC/222 (15 October 2019).

[13] U.S. 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/.

[14] WT/AB/WP/6 2010 'Working Procedures for Appellate Review', 16 August.

[15] Background Note on Rule 15 of the Working Procedures for Appellate Body Review, Appellate Body, Annual Report for 2017, WT/AB/28, p. 74 - 75.

[16] U.S. Statements at the April 27, 2018, DSB Meeting. Available from https://geneva.usmission.gov/wp-content/uploads/sites/290/Apr27.DSB_.Stmt_.as-deliv.fin_.public.pdf.

[17] US Statement at the August 27, 2018 DSB Meeting.

[18] Bohanes and Lockart 2009 'Standard of Review in WTO Law', The Oxford Handbook of International Trade Law, p. 40.

[19] Bohanes and Lockhart 2009 ibid, p. 46.

[20] Bohanes and Lockhart 2009, ibid, p. 51.

[21] Appellate Body Report, US-Upland Cotton, WT/DS267/AB/RW, 2 June 2008, para 385.

[22] Appellate Body Report *India- Patents, para 65*.

[23] European Union - Anti-Dumping Measures on Biodiesel from Argentina - AB-2016-4 - Report of the Appellate Body, WT/DS473/AB/R.

[24] *EC-Trade Description of Sardines*, WT/DS231/AB/R, para 299, 26 September 2002. The Appellate Body then footnoted *US – Wheat Gluten*, supra, footnote 225, para. 151.

[25] U.S. Statements delivered at the WTO General Council Meeting, December 9, 2019. Available from https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/.

[26] U.S. Statements at the October 29, 2018, DSB Meeting.

[27] U.S. Statements at the June 22, 2018, DSB Meeting.

[28] DS 344, AB Report, para. 160.

[29] U.S. Statements at the December 18, 2018, DSB Meeting.

[30] Brazil, Paraguay and Uruguay (WT/GC/W/767/Rev.1, 25 April 2019).

[31] Charnovitz S 2019 'The Attack on the Appellate Body – Events of 6 December 2019', International Economic Law and Policy Blog, https://ielp.worldtradelaw.net/2019/12/the-attack-on-the-appellate-body-events-of-6-december-2019.html.

[32] Manfred Elsig, Mark Pollack and Gregory Shaffer, The U.S. is causing a major controversy in the World Trade Organization. Here's what's happening. Washington Post, 6 June 2016. Available from https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/.

[33] U.S. Statements at the January 28, 2019, DSB Meeting.

[34] Scott Andersen from the law firm Sidley Austin and former USTR lawyer.

[35] Zeroing refers to the practice where a country's investigating authority chooses to disregard or put a value of zero on instances when the export price is higher than the home market price, which can artificially inflate the dumping margins. See WTO Glossary, https://www.wto.org/english/thewto_e/glossary_e/zeroing_e.htm.

[36] CIDS Conference: Can we save the WTO Appellate Body (and Dispute Settlement) from a shipwreck, and how? Geneva, Switzerland - 20 November 2019.

[37] 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.

[38] Appellate Body Report, *US –Continued Zeroing*, para. 317.

[39] World Trade Organization (WTO) Decisions and Their Effect in U.S. Law, EveryCRSReport.com, 26 November 2012. Available from https://www.everycrsreport.com/reports/RS22154.html.

[40] Chakravarthi Raghavan, Dispute panels, AB must abide by principles of natural justice, SUNS #8898, 2 May 2019.

[41] Washington Trade Daily 2019 'Anguish over Death of AB', 9 December.

[42] US House of Representatives, 2019 'Press Release: Reps. Kind and Schweikert Lead Bipartisan Resolution Reaffirming United States' Commitment to the World Trade Organization' 6 December

https://beyer.house.gov/news/documentsingle.aspx?DocumentID=4659.

[43] Schott J and Jung E 2019 'The WTO's Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes', December, Peterson Institute for International Economics.

[44] Washington Trade Daily 2019 'AB Impasse Continues', 10 December.

[45] Ibid.

[46] China's statement.

[47] US-Upland Cotton, ibid.

[48] See CSIS, U.S. 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.

Annex: Walker text (WT/GC/W/791, 28 November 2019)

DRAFT DECISION

FUNCTIONING OF THE APPELLATE BODY

Decision of …

The *General Council,*

Conducting the function of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement");

Having regard to paragraph 1 of Article IX of the WTO Agreement;

Mindful of the work undertaken in the Informal Process of Solution-Focused Discussion on Matters Related to the Functioning of the Appellate Body, under the auspices of the General Council;

Acknowledging that the Appellate Body has, in some respects, not been functioning as intended under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU");

Recognizing the central importance of a properly functioning dispute settlement system in the rules-based multilateral trading system, which serves to preserve the rights and obligations of Members under the WTO Agreement and ensures that rules are enforceable;

Desiring to enhance the functioning of that system consistent with the DSU;

Decides as follows:

Transitional rules for outgoing Appellate Body members

1. Only WTO Members may appoint members of the Appellate Body.

2. The Dispute Settlement Body (the "DSB") has the explicit authority, and responsibility, to determine membership of the Appellate Body and is obligated to fill vacancies as they arise.

3. To assist Members in discharging this responsibility, the selection process to replace outgoing Appellate Body members shall be automatically launched 180 days before the expiry of their term in office. Such selection process shall follow past practice.

4. If a vacancy arises before the regular expiry of an Appellate Body member's mandate, or as a result of any other situation, the Chair of the DSB shall immediately launch the selection process with a view to filling that vacancy as soon as possible.

5. Appellate Body members nearing the end of their terms may be assigned to a new division up until 60 days before the expiry of their term.

6. An Appellate Body member so assigned may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term.

90 Days

7. Consistent with Article 17.5 of the DSU, the Appellate Body is obligated to issue its report no later than 90 days from the date a party to the dispute notifies its intention to appeal.

8. In cases of unusual complexity or periods of numerous appeals, the parties may agree with the Appellate Body to extend the time-frame for issuance of the Appellate Body report beyond 90 days.[1] Any such agreement will be notified to the DSB by the parties and the Chair of the Appellate Body.

Scope of Appeal

9. Article 17.6 of the DSU restricts matters that can be raised on appeal to issues of law covered in the relevant panel report and legal interpretations developed by that panel.

10. The 'meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal.

11. The DSU does not permit the Appellate Body to engage in a 'de novo' review or to 'complete the analysis' of the facts of a dispute.

12. Consistent with Article 17.6 of the DSU, it is incumbent upon Members engaged in appellate proceedings to refrain from advancing extensive and unnecessary argu-

ments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a de facto 'de novo review'.

Advisory Opinions

13. Issues that have not been raised by either party may not be ruled or decided upon by the Appellate Body.

14. Consistent with Article 3.4 of the DSU, the Appellate Body shall address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements in order to resolve the dispute.

Precedent

15. Precedent is not created through WTO dispute settlement proceedings.

16. Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.

17. Panels and the Appellate Body should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them.

'Overreach'

18. As provided in Articles 3.2 and 19.2 of the DSU, findings and recommendations of Panels and the Appellate Body and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

19. Panels and the Appellate Body shall interpret provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 in accordance with Article 17.6(ii) of that Agreement.

Regular dialogue between the DSB and the Appellate Body

20. The DSB, in consultation with the Appellate Body, will establish a mechanism for regular dialogue between WTO Members and the Appellate Body where Members can express their views on issues, including in relation to implementation of this Decision, in a manner unrelated to the adoption of particular reports.

21. Such mechanism will be in the form of an informal meeting, at least once a year, hosted by the Chair of the DSB.

22. To safeguard the independence and impartiality of the Appellate Body, clear ground rules will be provided to ensure that at no point should there be any discussion of ongoing disputes or any member of the Appellate Body.

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[1] Such agreement may also be made in instances of *force majeure*.

The South Centre is the intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. The South Centre was established by an Intergovernmental Agreement which came into force on 31 July 1995. Its headquarters is in Geneva, Switzerland.

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