



Resolving the WTO Appellate Body Crisis

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Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators

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Executive Summary

Further to the December 2019 paper, “Resolving the WTO Appellate Body Crisis: Proposals on Overreach”,¹ this paper suggests additional approaches to reforming the World Trade Organization Appellate Body in order to restore a consensus in favor of its restoration and ensure ongoing, sustainable support for its operation.²

That task is more essential than ever as a step towards reinvigorating the WTO so that it may serve as an effective forum for addressing the trade fallout from the coronavirus crisis. Members need not await the end of that crisis to make progress towards the goal of agreeing on steps to make the Appellate Body operate as intended in 1995. Should there be agreement on that goal, Members can advance solutions now, whether as part of provisional arrangements or through efforts to achieve a permanent solution.

The suggestions in this paper could be implemented either through decisions, agreed interpretations or amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or DSU). They include:

- 1) Providing clear guidance that Appellate Body reports do not constitute binding precedent, but may, as with panel reports, be cited for their persuasive value;
- 2) Replace the Appellate Body secretariat with clerks seconded from the WTO secretariat;
- 3) Provide guidance on the role of adjudicators and of the Appellate Body that emphasizes their role of assisting WTO Members in resolving disputes rather than making law.

¹ Bruce Hirsh, “Resolving the Appellate Body Crisis: Proposals on Overreach,” National Foreign Trade Council/Tailwind Global Strategies (December 2019) (“Overreach Paper”) (http://www.nftc.org/default/trade/WTO/Resolving%20the%20WTO%20Appellate%20Body%20Crisis_Proposals%20on%20Overreach.pdf).

² This analysis was prepared by Bruce Hirsh, Principal of [Tailwind Global Strategies](#) and was commissioned by the National Foreign Trade Council. Mr. Hirsh served in a variety of roles over an 18-year career in the U.S. government. Most pertinent for this paper, he served as Chief Counsel for Dispute Settlement during the mid-2000s when U.S. reform proposals were developed and introduced as part of the WTO review of dispute settlement rules. He later served as Deputy Assistant USTR for WTO and Multilateral Affairs and lead U.S. negotiator for the WTO Trade Facilitation Agreement from 2007-2011.

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Background

The coronavirus crisis has dramatically exposed the fragility of the international economic order, to a degree far beyond that from the economic and political stresses that have tested and undermined international economic institutions and cooperation over the past several years. Nationalist responses to the crisis have accelerated and become more widespread, reflecting political pressures, failures of leadership, and a loss of faith in the effectiveness of international mechanisms and rules.

At the same time, the crisis has underscored the critical importance of stability to the global economy and the contributions these institutions make in maintaining that stability. For the moment, cooperative efforts including those through the G20 have been focused on arresting the slide towards unrestrained market closing. At some point, however, these efforts are likely to shift towards attempts to reinvigorate these institutions and to reassert the rules and norms they were created to develop and enforce.

Nowhere will this involve a greater challenge than at the World Trade Organization, whose rules and norms were already under strain from unilateralism, innovation mercantilism and a leadership vacuum.

On the one hand, the effort to reinvigorate the institution may be aided by empirical evidence of the harm caused by market closing, as responses to the novel coronavirus create a real-world laboratory for testing and confirming the abstract concerns of economists not seen since the Great Depression. On the other hand, WTO Members will face the challenge of sorting out the consequences of various forms of state involvement in the global economy that the crisis has engendered. Managing the ongoing trade consequences of these actions, reasserting rules and norms, and modifying rules to accommodate those actions deemed in retrospect to have been necessary while reining in those judged otherwise will prove a herculean task.

Viewed from this perspective, resolving the crisis of the deadlock over the Appellate Body no longer appears as challenging as was the case only few short weeks ago. In truth, it has never been as intractable as it seemed. One side identified as its objective making the system operate as Members intended in 1995, and the other appeared to accept this objective, the gap relating only to the two sides questioning the sincerity of the other. This trust gap has had a predictable impact on the negotiating dynamic in Geneva, where one would *never* negotiate with oneself, and where there will never be a shortage of validators for hanging tough and standing pat.

This situation represents a wasted opportunity, both to restore to full functionality a central element of the multilateral trading system, but also to restore confidence in the WTO's ability to serve as a forum for addressing the trade concerns that have risen to such prominence during the coronavirus crisis. If there is agreement on making the dispute settlement system operate as Members intended in 1995, the details of how to get there are largely technical. While the United States correctly emphasizes that it is important to understand why the Appellate Body moved in the direction it did, the importance of this consideration lies in informing the discussion over the design of guardrails to prevent future problems. And that conversation can come during the discussion over the guardrails themselves.

At the same time, those awaiting proposals from the United States on these guardrails are missing the opportunity to advance work towards permanent solutions. The United States does not possess a monopoly on ideas for reining in a future incarnation of the Appellate Body. If there is agreement that the only sustainable foundation for reconstructing and maintaining support for appellate review is to ensure that it operates within the bounds Members intended in 1995, then it is in every Member's interest, and not simply that of the United States, that that work be pursued and completed as soon as possible. They are more than capable of developing the details on how to do so. But to the extent they consider that the United States has unique concerns, the United States has laid out its concerns in extraordinary detail in a manner that all but spells out solutions that would be responsive.³

The recent EU-directed effort to develop an interim appeal arrangement includes some reforms. For example, the arrangement provides for the means by which adjudicators can seek to meet a 90-day time limit, authorizing them to impose page limits, time limits, deadlines and limits on the length and number of hearings. The arbitrators can also propose that the parties to a particular dispute agree that Article 11 factual appeals will be barred. The inclusion of these reforms underscores the opportunity this and other conversations among delegations provides to advance work on reform. Those opportunities should be used to the fullest, rather than to freeze reform efforts out of a belief that the United States is the sole actor capable of proposing reforms. And reform efforts should not be viewed as concessions, but as leadership.

Any reform efforts should be undertaken with a reinforced awareness that governments retain the power, if not the right, to act unilaterally, and that convincing them to act otherwise in response to international rules and norms will depend on the common interest of these governments in compliance with rules and norms and their trust in the institutions to carry out – and respect the limits of -- their respective mandates.

The last point has always been of particular importance in the context of the Appellate Body crisis. The United States and others increasingly came to believe that the institution could no longer be trusted to conduct its mission as intended. Rebuilding that trust will require reforms that lay out a clearer mandate and create procedural and other guardrails against exceeding that mandate. At the end of the day, though, that trust will need to be earned, through repeated, ongoing demonstrations in each dispute that the Appellate Body (or whatever its successor may be called) can both perform its mandate and respect the limits of that mandate. Both reforms and their implementation will be essential to reestablishing a firm foundation of political support for the dispute settlement system among the WTO membership going forward.

With respect to the reforms themselves, in a previous paper, I addressed possible approaches to addressing a central element of the U.S. concerns, the issue of Appellate Body overreach. This paper addresses other elements of a likely reform package: the treatment of Appellate Body precedent, staffing support for Appellate Body members, and overall guidance on the role of dispute settlement adjudicators and of the Appellate Body in particular.

³ Report on the Appellate Body of the World Trade Organization (February 2020).
https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf

As with the Overreach Paper, these suggestions are intended as starting points for discussion and refinement. They would form parts of an overall package of reforms that could include other structural and procedural elements. The suggestions in this paper could be implemented either through decisions, agreed interpretations or amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or DSU).

Proposals

1. Clarify that Appellate Body reports do not create binding precedent.

The Appellate Body has since 2008 enforced a rule that panels are to follow prior Appellate Body reports absent “cogent reasons.” This position broke with the Appellate Body’s early acknowledgement that its findings and conclusions did not create precedent.⁴ The United States and others criticized this change in position at the time, with the United States arguing since then that the “cogent reasons” standard has no basis in the language of the DSU or of the WTO Agreement more generally, nor in the interpretive rules applicable in WTO disputes. To the contrary, the Appellate Body’s approach to precedent conflicts with WTO provisions reserving to Members the exclusive authority to adopt authoritative interpretations – again, a point the Appellate Body previously recognized.⁵ The “cogent reasons” approach can also be directly contrary to the DSU requirement that WTO adjudicators are to examine agreement provisions in accordance with customary rules of interpretation of public international law – at least to the extent that the precedents in question do not correctly apply this requirement.

In the U.S. view, one of the consequences of the Appellate Body’s approach to precedent has been to lock in its errors and put them beyond correction, given the challenge that Members face when legislating new agreements and amendments to, or agreed interpretations of, existing agreements.

The Appellate Body justified its “cogent reasons” approach on the importance of ensuring security and predictability in the dispute settlement system. However, as discussed in the Overreach Paper, the DSU’s reference to security and predictability should not be read as justifying an interpretative approach not solidly grounded in the text of the WTO Agreement – including the text laying out the responsibility of adjudicators to examine agreement provisions in accordance with customary rules of interpretation of public international law, without being bound by the Appellate Body’s previous conclusions.

The precedent issue has two elements, both of which WTO Members should consider addressing in guidance to adjudicators. The first is the “cogent reasons” requirement itself, described above.

The second is the status of language found in Appellate Body reports. According to the DSU, WTO Member rights and obligations are found in the text of the “covered agreements” – that is, the WTO Agreement -- and adjudicators may only look to that language in assessing whether a measure within the terms of reference of a dispute is consistent with a Member’s WTO

⁴ *Japan – Alcoholic Beverages II (AB) (1996)*, at 13.

⁵ *Id.*

obligations. However, the Appellate Body has at times interpreted the language of its previous reports or referred to conclusions from these reports as if they are themselves covered agreements, sometimes even applying customary rules of interpretation of public international law to that language.

With respect to the first element of the precedent issue, Ambassador David Walker has in his draft General Counsel decision⁶ proposed the following:

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.

In addition to this language, Members should consider guidance stating that adjudicators are charged with assisting the DSB by considering claims against a defending party's measure by assessing the measure's conformity with the relevant provisions of the covered agreements. The WTO obligations adjudicators must apply are found only in the covered agreements, and the rules of interpretation they must apply are the customary rules of interpretation of public international law. The DSU does not include a requirement that there be "cogent reasons" for not following the reasoning in previous Appellate Body reports, and panels and subsequent Appellate Body divisions are not bound by such a requirement.

At the same time, WTO adjudicators are free to consider the reasoning found in prior panel and Appellate Body reports and to use the same reasoning if the adjudicators consider that it reflects a correct interpretation of the WTO provision in question or a correct application of the interpretation to similar facts. When adjudicators choose to do so, they must include that reasoning in their report, and not simply refer to the prior report that set out the reasoning. Any application or elaboration of the reasoning adopted from prior Appellate Body reports must be undertaken by reference to, and include an analysis of, the WTO provisions at issue – the sole source of Member rights and obligations.

Members should also consider guidance that panel and Appellate Body reports are not themselves covered agreements. While that may seem obvious, it is worthwhile to spell this out explicitly. Therefore, an adjudicator may not interpret the language of those reports as if they are covered agreements, nor may the adjudicator treat statements from those reports as dispositive of an issue -- or even relevant to the adjudicator's task -- if the statements do not involve a correct application of the customary rules of interpretation of public international law to the text of the covered agreements. Statements and conclusions from Appellate Body reports that are untethered from the WTO text are not covered agreements themselves, nor do they constitute a proper legal analysis of the covered agreements. Such statements and conclusions create no rights and obligations for WTO Members, nor may subsequent adjudicators refer to them as if they do. Moreover, any analysis of a covered agreement not in accordance with customary rules of

⁶ Functioning of the Appellate Body – Draft Decision, WT/GC/W/791 (28 November 2019).

interpretation of public international law -- that is to say, based on an examination of the text, in its context, and in light of the object and purpose of the WTO Agreement -- is inconsistent with the DSU, and subsequent adjudicators are neither bound by such an analysis nor may they apply it.

2. Replace the Appellate Body secretariat with clerks seconded from the WTO secretariat.

Among the reasons the United States has identified for the Appellate Body's going beyond its limited mandate and its unwillingness to acknowledge errors has been the influential role of the Appellate Body secretariat. Over time, the Appellate Body secretariat has increasingly assumed responsibility for drafting and refining Appellate Body decisions, as well as participating in Appellate Body decision-making, rather than simply assisting Appellate Body members in these efforts. The secretariat's enhanced influence in Appellate Body decision-making has been facilitated by the fact that, unlike the Appellate Body members themselves, secretariat staff serve on a full-time basis and are not subject to term limits; indeed, many have been serving for longer than the eight-year limit prescribed in the DSU for Appellate Body members. For the critics, the prominent role of the Appellate Body secretariat has further reinforced the consequences of the absence of effective Member oversight of the Appellate Body and of the Appellate Body's lack of accountability to the WTO Membership it was established to assist.

Another criticism of the Appellate Body is that its members have in many cases not come from a background in trade negotiations, including the negotiation of the WTO Agreement itself. By contrast, panelists often are selected from the ranks of current and former WTO delegates. In addition, panels are supported by WTO secretariat officials who also provide support for the negotiation function of the WTO. They carry institutional knowledge of, and in many cases were involved in, the negotiation of the WTO Agreement itself. Just as importantly, WTO secretariat officials and delegates are steeped in a core element of the institutional culture of the WTO and of the GATT before it -- that it is a Member-driven organization, in which rule-making and other decisions are taken by consensus of the Members, including decisions as to the activities of the secretariat.

Some observers, including former Appellate Body member Jennifer Hillman, have suggested that Appellate Body reform include term limits for members of the Appellate Body secretariat. Hillman notes that this would help to restore the balance of expertise and power between the Appellate Body members and the Secretariat staff.⁷

Another approach WTO Members may wish to consider is replacing the Appellate Body secretariat, which has served the Appellate Body as a whole, with a system in which each Appellate Body member is assigned one or more clerks acting under the supervision of that member. In order to ground the Appellate Body more firmly in the culture of the WTO,⁸ these clerks could be seconded from the WTO secretariat for one or two-year periods. They could be

⁷ Jennifer A. Hillman, "A Reset of the World Trade Organization's Appellate Body," Council on Foreign Relations Policy Innovation Memorandum (January 2020) (<https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>)

⁸ A more direct approach of doing this would be to stipulate a preference in the Appellate Body selection process for individuals who have served as WTO delegates or panelists.

selected either by senior secretariat officials or chosen by the Appellate Body member him or herself from pools made available by senior secretariat officials. In this way, the decision-making balance would be restored in favor of the Appellate Body members themselves while at the same time ensuring that the advice the members receive is firmly grounded in an appreciation of how agreement provisions are negotiated and the expectations of Members on the role of adjudicators.

3. Guidance on the Role of Adjudicators

In addition to providing guidance on specific aspects of the dispute settlement system such as the role of precedent, avoidance of advisory opinions, and compliance with DSU process requirements, WTO Members should also consider providing more general guidance for how adjudicators should be performing their roles. There has been other relevant work on this topic, including in the Overreach Paper. WTO Members should consider drawing from these suggestions to provide guidance to adjudicators, as well as provide guidance specifically on the role of the Appellate Body.

The Overreach Paper attempted to address one element of this guidance, namely the proper interpretation of DSU Article 3.2.⁹ The Appellate Body has cited the language of this provision relating to “security and predictability” as justifying its expansive approach both to its role and to its interpretations of agreement text. The Overreach Paper suggested guidance from Members on the proper meaning and significance of Article 3.2 in order to prevent the Appellate Body from engaging in overreach in its interpretations, but this guidance would be equally helpful to establish limits more generally on the role of the Appellate Body and other WTO adjudicators. That guidance emphasizes that Article 3.2 states that the dispute settlement system itself provides security and predictability, not that it is intended to add security and predictability.

Members should also consider adopting additional general guidance on the role of WTO adjudicators, emphasizing the limits on adjudicators within the Member-driven WTO system. Previous commentators on Appellate Body reform have developed such guidance, including in an October 2018 study from the Centre for International Governance Innovation.¹⁰ It states:

[I]t could be clarified that the primary objectives of the dispute settlement system are the “prompt, satisfactory and positive settlement of disputes” and the “maintenance of the balance of concessions,” that adjudicators need only “clarify existing provisions” when necessary to achieve these primary objectives, that the function of adjudicators is to

⁹ See Overreach Paper at 5. Article 3.2 states,

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

¹⁰ Robert McDougall, “Crisis in the WTO: Restoring the WTO Dispute Settlement Function,” Centre for International Governance Innovation, CIGI Papers No. 194 (October 2018) (<https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>).

“assist the DSB in making recommendations,” and that it is the achievement of these primary objectives that provides “security and predictability” to the trading system.¹¹

Finally, Members should consider adopting guidance on the role of the Appellate Body more specifically. Members could consider directing that the role of the Appellate Body is a limited one, to correct a Panel’s errors of law and legal interpretation with respect to specific measures/disputes, and to do so in an expeditious manner within the prescribed timeframes set forth in the DSU, in furtherance of the objective of assisting the DSB in helping parties resolve their dispute. In doing so, their findings may provide the incidental benefit of helping to clarify the specific rights and obligations of Members relating to the agreement provisions at issue as they relate to measures and specific circumstances like those at issue. But this benefit is strictly incidental to the objective of assisting the parties in resolving the dispute before them – the Appellate Body shall limit its legal analysis to correcting the specific legal errors it finds in the panel report, and shall neither opine on unrelated agreement provisions nor engage in lengthy exposition on the provisions at issue in a manner that goes beyond that necessary to assist in answering the question of whether the measure at issue is inconsistent with the WTO provisions at issue. Further, the Appellate Body shall exercise judicial economy with respect to those claims not necessary to resolve the dispute, appreciating both that the exercise of judicial economy implies no judgment on the validity of those claims and that the absence of binding precedent in WTO proceedings means that it need not address minor errors of legal interpretation that have no impact on the outcome of the specific dispute.¹²

Conclusion

WTO Members should not pause efforts to resolve the Appellate Body crisis. Agreeing on reforms would be important not only for restoring a critical pillar of the WTO, it would also be an important step in restoring confidence in the ability of the WTO to take collective action as it prepares for the challenging task of addressing trade-related fallout from the coronavirus crisis. Using the recommendations outlined above as a guide, Members should advance work on reform through work on both provisional arrangements and permanent solutions.

Any solutions should reflect the goal of making the Appellate Body operate as Members expected in 1995 -- that it would play a limited role in the dispute settlement system, seeking only to help resolve the dispute before it, intervening only to correct panel legal errors, not revisiting panel fact-finding, and not seeking to develop definitive interpretations of agreement provisions. Member guidance to adjudicators on the role of precedent, and of WTO adjudicators more broadly, as well as restructuring staff support for the Appellate Body, would be helpful in achieving this goal.

¹¹ Id. at 15.

¹² Should Members choose to amend the DSU as part of their reform efforts, they should consider a suggestion from Simon Lester to amend DSU Article 17.13 to add the phrase, ‘without further comment’: “The Appellate Body may uphold *without further comment*, modify or reverse the legal findings and conclusions of the panel.” Simon Lester, WTO Dispute Settlement Misunderstanding: How to Bridge the Gap Between the United States and the Rest of the World, International Economic Law and Policy Blog (April 19, 2020). As with the above guidance, this amendment can help to emphasize that the Appellate Body need not revisit a panel’s reasoning in every case.