



Global Economic Dynamics | 23.03.2020

The Appellate Body Crisis and WTO Dispute Settlement Reform

Bernard Hoekman (EUI) & Petros Mavroidis (CLS)¹

The dispute settlement system of the World Trade Organization (WTO) — long held to be the crown jewel of the multilateral trading system — is in crisis, potentially endangering the future of the WTO. The United States has been blocking new appointments to the Appellate Body (AB), which plays a key role within the WTO's compulsory third-party adjudication process, as the terms of sitting members expired. As a result, there is no longer a multilateral forum to hear new appeals. For the moment, dispute panels continue to be established, suggesting that WTO members retain confidence in WTO dispute settlement. However, there is uncertainty about

how disputes will be resolved if panel recommendations are appealed. Some WTO members are seeking to address the matter by developing alternative appeal mechanisms, notably an EU-led initiative to have panel reports heard by an ad hoc appellate process. While understandable, such stop-gap solutions risk creating a multi-tier system across WTO members. Some will participate, some will not. The result is unlikely to lead to an internally coherent jurisprudence, the *raison d'être* of any appellate process.

¹ This note summarizes the main arguments in the papers entitled "WTO Dispute Settlement and the Appellate Body Crisis: Back to the Future?" at https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/MT_AB_Recommendations_2020_EN.pdf and "Burning Down the House? The Appellate Body in the Centre of the WTO Crisis" at <https://cadmus.eui.eu/handle/1814/63666>. For data collected from a survey of practitioners involved in WTO disputes, see Fiorini, Hoekman, Mavroidis, Saluste and Wolfe, "WTO Dispute Settlement and the Appellate Body Crisis: Insider perceptions and Members' revealed preferences," at https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/MT_WTO_Dispute_Settlement_and_the_Appellate_Body_Crisis_Survey.pdf.

While most WTO members oppose the action of the US, a recent survey of WTO delegations and practitioners (undertaken as part of the Bertelsmann Stiftung-supported research project that this paper contributes to) reveals that the US is not alone in having concerns about the performance of WTO adjudicating bodies (even though, no one is questioning the usefulness of a two-tier system, a matter on which the US has been conspicuously silent). Dispute settlement may be the crown jewel of the WTO, but it has imperfections. This is neither surprising nor contested. The problem is that the WTO membership collectively has been unable—and unwilling—to make timely repairs, and thus allowed the jewel to crack.

Improvement is necessary on various fronts. An extensive academic literature routinely questions aspects of the output of both panels and the AB. WTO members care about the result, not the reasoning. This is in line with the incentive structure of governments, which focus on the next election. A win before the WTO, or a vocal critique of an adverse report (even if sound), is what matters in this respect. Academia has a different outlook. The law and economics literature on the output of WTO adjudicating bodies focuses on the reasoning, the methodology used to reach an outcome. And this is where most of the critique is centred. Adjudicating bodies, in addition to respecting their mandates, must provide legal certainty in the sense that decisions on similar matters are arrived at irrespective of the identity of parties involved at different points in time.

Because the establishment of an appellate function and removing losing parties' ability to block the adoption of ruling was a major innovation for the trading system, Uruguay Round negotiators built in a formal review of the operation of the new Dispute Settlement Understanding (DSU). The DSU Review was duly initiated in 1998 and over several years generated many suggestions to improve the operation of WTO dispute settlement. A core American concern, that the AB has sometimes overreached its mandate, was raised in the DSU Review almost two decades ago and led to a proposal by Chile and the US on "improving flexibility and member control in WTO dispute

settlement" and more generally to create "some form of additional guidance to WTO adjudicative bodies." This as well as other proposals made in the DSU Review, e.g., an EU suggestion to create a standing panel body (a true court of first instance) were rejected by other WTO members, precluding consensus, the WTO's decisionmaking working practice. Although some WTO members sought to discuss matters raised by the United States during the DSU Review, the need for consensus prevented a flexible response to changed circumstances and priorities.

A core US criticism concerns the AB's alleged overstepping of its mandate, exemplified in the haphazard treatment of the idiosyncratic standard of review embedded in the WTO Anti-Dumping Agreement (article 17.6). This provision, introduced at the insistence of the US delegation in the Uruguay Round, was meant to act as a deferential standard in favour of interpretations adopted by investigating authorities, if panels found that more than one permissible interpretation were possible in any given dispute. The AB was required to give meaning to article 17.6. The US critique is that the AB only paid it lip service, a critique that arguably is well founded in that most panels and the AB have not seriously engaged with article 17.6. It is unfortunate that they did not do so. That said, although criticism can be expressed regarding the methodology – or at times the lack thereof – employed by the AB, this does not necessarily extend to the outcomes of cases, as adjudicating bodies should make the resolution of the marginal dispute predictable.

We suggest four priority areas for the WTO membership to address, with a specific focus on organizational aspects of dispute adjudication at the WTO.

1. Where they are not clear, rules should be clarified by the WTO membership. One way to encourage such clarification would be for the WTO membership to stipulate – as a procedural matter – that the AB should request the relevant WTO bodies to clarify the pertinent disciplines, if rulings hinge on the interpretation of the invoked provisions of a

WTO agreement in instances where there are gaps or where rules are unclear. At the end of the day, if WTO members are concerned that the AB is exceeding its mandate, they must address this by renegotiating the substantive provisions of specific agreements. This applies to areas where claims of disrespect have been raised and the issue has not been addressed head on (e.g., zeroing).

2. Improve the quality of panel reports by better utilizing available WTO resources. The AB is limited to matters of law. Panels are tasked with establishing the facts. Often the facts are complex and technical know-how is called for. Effective adjudication requires informed judgement and often would benefit from more economic input. Complicated matters such as determining causality, e.g., the apportionment of injury caused by increased imports, the existence of price suppression and the incidence of subsidies are now dealt with in a haphazard manner. Institutionalizing the use of economics expertise as an input into the dispute settlement processes would enhance the quality of panel reports. This is a standard feature of competition law and policy; trade law should follow that example. Impartiality from parties to the dispute, independence from the WTO Secretariat (by authorizing - hopefully permanent- panelists and AB members to appoint their own clerks), and expertise in trade law and economics should be core elements in this context.
3. Improve the quality of panelists and AB members. The WTO membership needs to have an “A Team” addressing disputes. With some notable exceptions, the majority of those selected to settle disputes are not deeply knowledgeable about trade and WTO law. Very few have had exposure to economics. This calls for revisiting the politicization of appointments and associated horse-trading by stakeholders.
4. Panels and the AB unavoidably have substantial discretion, as they are called on to interpret the provisions of an incomplete contract (the WTO). Given that it is impossible to write a complete contract, any reconstituted appeals function should do more than include provisions calling for claims based on vague or unclear language to be sent back to the

WTO membership to clarify. Members should also pay more attention to the organizational aspects of adjudication, including procedures used to select adjudicators. Procedural changes in the implementation of the DSU lie at the heart of any resolution of the AB crisis. Here as in other areas of the operation of the WTO, revisiting working practices is part of the solution.

Elements that could usefully find their way into a future negotiation on reforming WTO dispute settlement procedures include creation of a roster of 15–20 permanent panelists and expanding the number of AB members to nine, all serving one term of 8 to 10 years; agreeing that cases be heard by divisions of adjudicators, with decisions taken by simple majority and dissenting opinions published. Particularly important are measures to improve the quality of appointments. This can be achieved by creating a commission of eminent experts well-versed in trade dispute settlement who are entrusted with the task to screen both proposed panelists and AB appointments put forward by the members of the WTO. Moreover, WTO adjudicators should have the right to appoint their clerks, reducing their reliance on the WTO Secretariat.

These suggestions complement the so-called “Walker Principles” put forward by Ambassador David Walker in 2019 to address US concerns with the operation of the AB and to ensure that: (i) appeals are completed within 90 days; (ii) AB members do not serve beyond their terms; (iii) precedent (case law) is not binding; (iv) facts cannot be the subject of appeals; (v) the AB be prohibited from issuing advisory opinions; and (vi) dispute settlement findings cannot change obligations or rights provided by the WTO Agreements. The Walker principles are fully consistent with — and indeed often echo — what is already in the DSU. For this reason, they should be amenable to all WTO members and serve as the basis for the substantive agreement needed to address the core US concern: credible measures to ensure the AB will stick to its mandate.

Such changes require deliberations and decisions by the membership to implement

specific reforms to improve the operation of the DSU. If necessary, such process-related changes should be subject to a vote, as envisaged by Art. IX WTO. Doing so is not in the DNA of the organization, for good reason. We strongly support the principle of consensus-based decision making when it comes to substantive rules and negotiated rights and obligations. But we are also of the view that voting on procedural reforms that improve the operation of the institution without affecting the rights and obligations of WTO members should not give rise to concerns this is a slippery slope. If procedural reform proposals are well prepared – informed by consultations and supported by the good offices of the Director-General – voting may not be needed in any event. If the membership is bold enough to adopt proposals along the lines indicated here, we might start seeing some light at the end of the dispute settlement tunnel.

This is important not only from the perspective of enforcing agreements. It is also important for the prospects of negotiating new rules of the game. Even if the latter are more likely than in the past to be plurilateral in nature, they will need to be enforceable by signatories. An effective DSU is a core reasons for concluding new agreements under auspices of the WTO as opposed to pursuing cooperation in the context of trade agreements negotiated outside the WTO.

Cover: nicknick_co – stock.adobe.com

Address | Contact

Christian Bluth
Project Manager
Global Economic Dynamics
Bertelsmann Stiftung
Telephone +49 5241 81-81329
christian.bluth@bertelsmann-stiftung.de
www.bertelsmann-stiftung.de