



RESOLVING THE WTO APPELLATE BODY CRISIS

PROPOSALS ON OVERREACH

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Resolving the WTO Appellate Body Crisis: Proposals on Overreach

Executive Summary

This memorandum suggests approaches to addressing the U.S. concern that the World Trade Organization Appellate Body is engaging in overreach, contravening the WTO requirement that it not add to or diminish the rights and obligations of WTO Members.¹

The suggestions, principally in the form of guidance to adjudicators, attempt to take into consideration specific issues that have arisen over the course of the dispute settlement system's 24 years of operation, many of which were not contemplated in 1995 and are therefore not directly addressed in current dispute settlement rules.

They are intended as starting points for further discussion and refinement, both among WTO Members and outside observers of the system.²

In short, building on the work of Ambassador David Walker, means of addressing Appellate Body overreach could include:

- 1) Enforcing the 90-day timeframe for appeals by only allowing the Appellate Body to take longer if it has the agreement of the parties or approval of the DSB, absent which either party may seek adoption of the panel report;
- 2) Prohibiting advisory opinions, including a prohibition on opining on the meaning of provisions not within the terms of reference of the dispute or not necessary to resolve the dispute;
- 3) Clarifying that DSU Article 3.2, including its reference to "security and predictability," does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage;
- 4) Clarifying that customary rules of interpretation of public international law do not justify gap-filling or expanding or narrowing the reach of WTO provisions, in particular by narrowing or expanding the scope of general terms or broadly worded provisions;
- 5) Affirming that Article 17.6(ii) of the Antidumping Agreement, which takes as a given that provisions of that agreement may have more than one meaning, must be given effect;
- 6) Directing the Appellate Body to reject aggressive party arguments seeking to expand or narrow the reach of agreement provisions or fill gaps in agreements.

While item one above might require an amendment to dispute settlement rules, the remainder could be implemented through a decision of the Membership, whether in the form of an agreed interpretation of dispute settlement rules or otherwise.

¹ This analysis was prepared by Bruce Hirsh, Principal of Tailwind Global Strategies and was commissioned by the National Foreign Trade Council. The opinions expressed in this publication are those of the author. This report does not purport to represent the views of the NFTC or its member companies.

² The subject of overreach has been one of the most challenging of several concerns the United States has raised. A solution to the current crisis will necessarily have to address overreach in addition to other concerns, and could also include process and structural reforms to the system.

Background

The WTO is headed for a crisis in December, when the dispute settlement system will likely grind to a halt because of the absence of a quorum at the WTO Appellate Body. The United States has continued to block appointments to the Appellate Body out of its long-standing concern that the Appellate Body has gone beyond its limited mandate of reviewing panel legal findings, instead extending WTO rules beyond the agreed text of the WTO Agreement.

While the U.S. concern has intensified over time, it extends back to the early days of the operation of the system. Successive administrations of both parties have raised those concerns at the WTO and have proposed solutions,³ in particular in connection with the review of dispute settlement rules conducted during the mid-2000s. Other WTO delegations have shared the U.S. concerns and have both entertained and even co-sponsored U.S. proposals. Congress has likewise expressed frustration over the years with the approach taken by the Appellate Body. However, the consensus-based decision-making process of the WTO thwarted previous reform efforts. Thus, while there is little support in Geneva for the U.S. tactic of blocking Appellate Body appointments, other delegations have been receptive to addressing U.S. concerns. They appreciate that the long-term success of the system depends on its operating with the full confidence and support of all of the WTO Membership.

The United States has outlined in detail a number of concerns with the work of the Appellate Body, questioning its adherence to both procedural and substantive requirements WTO Members agreed to in the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or DSU).

However, in the current debates, the United States has not proposed specific solutions to the concerns it has raised. It has taken the position that, without a discussion of why the Appellate Body has adopted its approach to date and agreement among WTO Members that these reasons are not valid, the problem will continue, and any reaffirmation of the guidance that the Members have provided in the DSU, or any additional guidance, will be ignored.

While agreement on the “why question” would no doubt facilitate the search for solutions, it should not be considered a prerequisite for advancing solutions. The system can ill afford an extended conversation on how we got to this point, as the longer the lapse in the system’s operation, the greater the risk of an erosion of respect for the WTO rules it is intended to enforce, and the greater the challenge of restoring the system to full operation, given the WTO’s consensus-based decision-making. For the same reasons, the system can ill afford deferring work on solutions out of dissatisfaction with U.S. tactics.

Solutions in the form of agreed interpretations of, or other forms of guidance on, existing DSU and other provisions can help to address the issues that the U.S. has raised, since those issues have arisen in part because Members did not anticipate them and therefore did not seek to avoid them when drafting the DSU.

³ See U.S. Proposals in WTO Dispute Settlement Understanding Negotiations, <https://ustr.gov/issue-areas/enforcement/us-proposals-wto-dispute-settlement-understanding-negotiations>

This paper offers possible approaches to addressing a central U.S. concern, that of Appellate Body overreach. While one suggestion relates to the dispute settlement process, most would take the form of guidance to the Appellate Body, consistent with and building on the approach taken by Ambassador David Walker in his role as facilitator of an informal process at the WTO to consider U.S. concerns.

Addressing the “Overreach” Issue

In the U.S. view, the Appellate Body has disregarded the DSU requirement that it not add to or diminish WTO Member rights and obligations. Instead, the Appellate Body has, according to the United States, misread the DSU explanation that, in the context of resolving the dispute before it, the dispute settlement system serves to clarify WTO Agreement provisions in accordance with customary rules of interpretation of public international law. In the U.S. view, the Appellate Body has treated that explanation as license to fill in gaps in agreement provisions and to provide elaborations of those provisions not intended by negotiators.

Some WTO Members and outside observers have contested the validity of the U.S. concerns. However, debating the validity of the concerns will not resolve the problem of fundamentally differing visions for how the system should operate, nor will it lead to a path forward both to restoring the system to full functionality and to ensuring that it operates with the full confidence and support of every WTO Member. However differently Members have evaluated the operation of the system to date, they need to find common ground on how it will operate in the future. And, given the position of the United States that it will no longer accept the system if it continues to operate as it has, the question becomes whether the vision of the United States for how it should operate is an acceptable one.

The Original Vision of the Appellate Body

On its face, that vision should be unobjectionable. While the United States has not proposed specific solutions to its concerns, it has identified a general objective of making the Appellate Body operate as Members intended when the WTO was established in 1995.

WTO Members expected the Appellate Body to 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.

This is reflected in the text of the Dispute Settlement Understanding, which provides that:

1. The Appellate Body, as a general rule, is to complete its work in 60 days, and never more than 90 days (DSU Article 17.5), and may review only issues of law and legal interpretations in the panel report (DSU Article 17.6) -- consequently it may not engage in fact-finding.
2. As with panels, the findings the Appellate Body submits to the Membership for adoption may not add to or diminish Member rights and obligations (DSU Articles 3.2 and 19.2).

3. Members have the exclusive authority to adopt interpretations of the Agreement or to amend it (Marrakesh Agreement Articles IX:2 and X).

The issue of overreach cannot be fully separated from other issues raised by the United States such as the concern that the Appellate Body is exceeding its mandate in providing advisory opinions on the interpretation of WTO Agreement provisions, or that it is disregarding the 90-day time limit in the DSU for the Appellate Body to complete its work. The solutions to these concerns interact, and can be supportive of one another.

Providing advisory opinions and extending the reach of existing provisions may be viewed as stemming from a similar view of the dispute settlement system's role as being to answer every unanswered question left by negotiators and to provide precision in every instance where negotiators agreed on broad language. Thus, clearly prohibiting advisory opinions can help to prevent overreach. And enforcing the 90-day time limit set forth in the DSU removes opportunities for the Appellate Body to act beyond the limited role of reviewing panel legal findings for error.

In addressing the issue of overreach, it will also be important to address the interpretations of DSU provisions often cited as justifying the Appellate Body's approach. For example, the reference to "security and predictability" in DSU Article 3.2 has been cited as justifying particular interpretations and interpretive approaches. And DSU Article 17.12 has been cited as requiring the Appellate Body to address every issue put before it, notwithstanding its cross-reference to DSU Article 17.6, which limits appeals to issues of law in panel reports and legal interpretation of panels.

Proposals

The following proposals are offered with the forgoing considerations in mind.

1. Enforce the 90-day timeframe for appeals.

Prior to 2011, the Appellate Body requested permission from disputing parties to exceed the DSU's 90-day timeframe, and those parties agreed that they would not contest the outcome of an appeal based on the Appellate Body's exceeding the 90-day limit. Parties did so routinely. That approach should be resumed and mandated. Moreover, to prevent a recurrence of the issue, WTO Members should consider making the 90-day requirement jurisdictional, that is, the Appellate Body would lose jurisdiction to hear an appeal if it exceeds the 90-day timeframe without permission of the parties or a decision of the WTO's Dispute Settlement Body. In that case, the panel report could be adopted as if no appeal had taken place.

2. Prohibit advisory opinions, and further elaborate the circumstances constituting advisory opinions.

Ambassador Walker included in his October 2019 report to the General Council a draft decision providing, with respect to advisory opinions:

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

“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 ruling provided for in the covered agreements in order to resolve the dispute.”

In addition to this language, it would be useful for Members to clarify that, even if an issue is raised by a party, an adjudicator (whether at the panel or appellate stage) may not opine on that issue if the issue does not relate to a measure or claim within the terms of reference of a dispute. In this connection, Members should clarify that DSU Article 17.12 should not be read to authorize the Appellate Body to consider claims merely because they have been raised on appeal, as has sometimes been suggested. Any such claims must be within the terms of reference of the dispute and, as Ambassador Walker’s draft decision provides, should only be addressed to the extent necessary to assist the DSB in making the recommendations or in giving the ruling provided for in the covered agreements in order to resolve the dispute.

3. Clarify that DSU Article 3.2 does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage.

Despite language in DSU Articles 3.2 and 19.2 that dispute settlement findings cannot add to or diminish Member rights and obligations, language in Article 3.2 on “security and predictability” and on clarifying existing WTO provisions is often held out as pulling in the opposite direction. 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.

In order to clarify that Article 3.2 does not justify expanding or narrowing the reach of WTO provisions or filling gaps, WTO Members should consider providing guidance on the interpretation of this provision. That guidance could note 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.

It provides security and predictability to the multilateral trading system by enforcing agreed upon obligations in accordance with agreed upon rules of interpretation, such that Members reasonably could have known at the time of making commitments how they would be enforced.

In the context of resolving a particular dispute, the dispute settlement system also serves to clarify the rights and obligations of Members with respect to the WTO Agreement provisions raised in the dispute, as they relate to the measures within the terms of reference of the dispute. However, this latter function may not interfere with the exclusive right of Members to adopt interpretations of Agreement provisions, nor may panels or the Appellate Body otherwise add to or diminish the rights and obligations of Members.

The system's role in clarifying agreement provisions does not extend beyond the specific provisions and measures at issue in a dispute, and even then, 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.

4. Clarify that customary rules of interpretation of public international law do not justify gap-filling and expanding or narrowing the reach of WTO provisions.

Discussions of whether the Appellate Body has engaged in overreach often devolve into a debate about whether the Appellate Body should be seeking to read meaning into “ambiguous” WTO provisions, in particular provisions reflecting negotiators’ decisions to employ “constructive ambiguity” in order to reach agreement on controversial issues. The United States has argued that Members did not intend that WTO adjudicators would read meaning into such ambiguous provisions that was not intended. Against this, others have argued that under customary rules of interpretation of public international law, it is the responsibility of treaty interpreters to identify the meaning of even ambiguous provisions.

One possible approach to addressing these diverging perspectives is to recognize that terms and provisions referred to as ambiguous are often simply broadly worded or general in nature, like “public body.” While a treaty interpreter has a responsibility to find the meaning of such terms to the extent necessary to determine whether a particular measure is inconsistent with that WTO obligation, the interpreter may not read a meaning into a provision that is not there, nor read into a general term or provision a specific meaning or test that is in tension with the general nature of the term.

Wholly apart from the fact that WTO Members have the sole authority to expand or narrow agreement obligations in this manner, doing so risks unintended consequences in factual circumstances not before the adjudicator, as the modified scope of the obligation may capture or omit situations clearly proscribed (or not) by the ordinary meaning of the general term. The concept of overreach may thus be viewed as an overly aggressive interpretive approach of modifying the scope of broad or general agreement language as part of an effort to develop definitive elaborations of WTO provisions with more specificity than the Members negotiated, including by developing specific tests supported not by a proper interpretation of agreement language, but by policy judgments and a generalized desire for “security and predictability.”

The United States recently raised an example of the Appellate Body adding a specific test to a more general provision at the October 28, 2019, meeting of the Dispute Settlement Body, in connection with the *Korea – Valves* dispute. DSU Article 6.2, which establishes the terms of reference a dispute, requires that complaining parties “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” This had long been understood as requiring the complaining party to identify the measure at issue and the WTO provisions the measure is alleged to breach.

However, the Appellate Body in *EC – Selected Customs Matters (AB)* interpreted this language as including a specific test, that the complaining party explain “how or why the measure at issue is considered . . . to be violating the WTO obligation in question.” (Para 130.) This has resulted

in additional procedural challenges and panels struggling with how to apply the Appellate Body's test.

In the *Korea – Valves* dispute, the Appellate Body concluded that the panel applied the test too strictly and incorrectly excluded several of the complaining party Japan's claims. But the panel would not have done so had the Appellate Body not created this more specific test in the first place, and simply left panels to apply the actual language of DSU Article 6.2.

In order to clarify that the customary rules of interpretation of public international law do not authorize expanding or narrowing the reach of WTO provisions or gap-filling, WTO Members should consider adopting guidance noting that while panels and the Appellate Body are tasked with finding the meaning of applicable provisions to the extent necessary to determine the consistency of a measure within the terms of reference of a dispute with those provisions, under customary rules of interpretation of public international law, they may not read a meaning into a provision that is not there.

The guidance could further point out that WTO Members did not intend broadly worded provisions or general terms to serve as license for adjudicators to read into those provisions or terms meanings grounded in the preferred policy outcomes of either the parties to a dispute or the adjudicators, nor is such an approach permitted under customary rules of interpretation of public international law.

Guidance could further emphasize that the rules of interpretation of public international law do not authorize panels or the Appellate Body to expand or narrow the meaning of broadly worded provisions or general terms.

Adjudicators are tasked with determining whether a particular measure is consistent with a given provision. As with advisory opinions, it is impossible for adjudicators to anticipate every factual circumstance relating to measures not before them. They must therefore take care to avoid overly narrow and restrictive readings of broadly worded provisions or general terms, or to read specificity into such terms and provisions that is not there, thereby constricting the meaning of such terms and provisions.

Finally, the guidance could point out that WTO adjudicators must also examine broadly worded provisions and general terms with a view to respecting Member sovereignty. Such provisions and terms are often intended to provide discretion to Members in their implementation, and adjudicators must therefore interpret such provisions and terms in a way that maintains that discretion.

5. Affirm that Article 17.6(ii) of the Antidumping Agreement must be given meaning, by clarifying that the provision reflects the principle just described, that WTO adjudicators may not expand or narrow the meaning of broad provisions and general terms.

The United States views the Appellate Body's findings on antidumping measures to have frequently involved overreach. In his draft decision on the issue of overreach, Ambassador Walker reaffirms that panels and the Appellate Body must apply a rule of interpretation found in the antidumping agreement, Article 17.6(ii).

That provision states that, in examining antidumping determinations of national authorities being challenged in WTO dispute settlement proceedings,

(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 Appellate Body effectively read this provision out of the Antidumping Agreement by concluding in the cases in which it arose that there was only one permissible interpretation of the provisions at issue under customary rules of interpretation of public international law.

However, treaty interpreters are obliged to give effect to all treaty terms. In the second sentence of Article 17.6(ii), WTO Members recognized that there could be more than one permissible interpretation of the Antidumping Agreement under customary rules of interpretation of public international law. Adjudicators should reflect that in their approach.

Further, adjudicators could give effect to Article 17.6(ii) by applying the stricture above, namely that panels and the Appellate Body may not expand or narrow the meaning of broad and general terms.

If the language of an Antidumping Agreement provision provides scope for administering authorities to exercise discretion in how the provision is implemented, WTO adjudicators may not narrow that discretion. This is particularly apt in the context of the Antidumping Agreement, which sets forth obligations intended to discipline, but accommodate, the varying approaches to antidumping proceedings employed by Members, and was not intended to dictate a single approach to the highly detailed, complex methodologies used in these proceedings.

6. Direct the Appellate Body to reject party arguments that expand or narrow the reach of agreement provisions or fill gaps in agreements.

Discussions of how to address U.S. concerns have included the need for Members to exercise restraint in their argumentation in dispute settlement proceedings. While it would of course be positive for Members to consider the systemic implications of their arguments in disputes and exercise restraint with respect to which arguments they present, most if not all of them will be subject to political pressures to be as aggressive as possible in pursuing their claims or in defending their measures.

Ultimately, it is for panels and the Appellate Body to reject arguments not grounded in the text of the WTO Agreement or which seek to expand or narrow the reach of agreement provisions. Yet the record of the Appellate Body has been to accept appellant arguments and to modify panel reasoning or reverse panel outcomes in most disputes. If the Appellate Body is to play the limited role Members anticipated in 1995, it must be willing to reject efforts to overturn panel findings on the basis of aggressive arguments that seek to fill gaps in the agreement or expand or narrow the reach of agreement provisions.

One of the positive contributions of the Appellate Body has been to introduce greater legal rigor into panel reports as compared to those under the General Agreement on Tariffs and Trade. This should have resulted in less intervention by the Appellate Body over time in modifying or reversing panel findings and reasoning, but that has not occurred. The Appellate Body should intervene less, respecting the expertise that panelists bring to their work and declining the invitation of Members to make broad findings regarding interpretation that are not necessary to resolve the dispute before them.

Conclusion

WTO Members should continue their urgent consideration of solutions to resolve the current Appellate Body crisis. Using the recommendations outlined above as a guide, WTO Members could seek to operationalize a path forward by revising and elaborating upon the General Council decision prepared by Ambassador Walker, by deciding upon agreed interpretations of dispute settlement rules, or by amending those rules.

The long-term success of the WTO dispute settlement system depends on its operating with the full confidence and support of all of the WTO Membership, not least that of major players like United States.

The U.S. objective of making the WTO Appellate Body operate as WTO Members intended when the WTO was established in 1995 is a reasonable basis for reestablishing a sustainable consensus on how the system should function. WTO Members in 1995 expected the Appellate Body to 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.