

THE WTO APPELLATE BODY CRISES: CAN THE CRISIS BE CURED?

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Abstract

The Appellate Body has played a major role in the dispute settlement system at the WTO. The future of it, and as a result, the future of the dispute settlement system remains unknown. That is due to the fact that the USA has been consistently blocking new appointments of the prospective members to the Appellate Body. The USA has been alleging that its strategy consisted in expressing its dissatisfaction with certain alleged irregularities concerning the functioning of the appellate process and the members of the Appellate Body. There has been a lot of discussions on the possibilities to avert the crisis both temporarily, as well as to pursue fundamental changes to the current dispute settlement system in order to address certain concerns that were raised since the beginning of the functioning of the Appellate Body. This paper explores possible scenarios of the cure of the stalemate in the Appellate Body in the WTO dispute settlement system.

Keywords

WTO · Dispute Settlement · Appellate Body · International Trade Law

1. Introduction

Dispute settlement system existing under the World Trade Organization (“WTO”) regime was dubbed a “crown jewel” of the WTO and global trading system as such.¹ The legal framework for settling disputes under WTO auspices was set in the Understanding on Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding” or “DSU”). DSU constitutes a very unique set of rules – after all, the WTO was the first international organization to introduce a binding appeal process in 1995.² The system has been functional up to a certain point when the political tensions started coming into play. Despite the remarkable success of settling disputes among the WTO member states, in recent years we have been witnessing the process of the so-called “killing the WTO from the inside,” as observed by Cecilia Malmstrom, the European Union’s trade diplomat.³ That is due to the fact that the USA has been consistently blocking new appointments of the prospective members to the Appellate Body. The USA has been alleging that it attempted to express its dissatisfaction with the functioning of the appellate process and with certain actions of the Appellate Body members. Even though the USA provided a detailed list of the concerns regarding malfunctioning of the system, it failed to make any proposals as to the Appellate Body amendments. Moreover, the recent proposals circulated by other WTO member states did not meet the United States’ expectations. On 10 December 2019, terms of office of two out of three remaining members expired and the Appellate Body no longer holds the required quorum to operate in a functional manner.

This paper will address the reasons which led to the crises and present solutions which could once again cure the dispute settlement function of the WTO. One must bear in mind that even though December 2019 constituted a peak of the crisis, there has been a significant discontent with the appeal system in the WTO in the last decade.⁴ Therefore, despite any temporary solutions to the stalemate, there is a need of a thorough redesign of the system. We are now witnessing a drift away from the multilateral trade cooperation with the simultaneous rise of the escalating national interests in politics. There is a risk that without maintaining a functioning dispute settlement system, we will be facing trading systems in which big players can once again dictate the rules of trade.⁵

2. The Importance of the Appellate Body in the Dispute Settlement in the WTO

2.1. The Structure and Functions of the Appellate Body

The Appellate Body constitutes one of the three institutions administering the WTO dispute settlement system. It was established in 1995 in DSU. The Dispute Settlement

¹ C. D. Creamer (2019), “From the WTO’s Crown Jewel to Its Crown of Thorns,” *AJIL Unbound*. No. 113.

² J. Waincymer (2002). *WTO Litigation: Procedural Aspects of Formal Dispute Settlement*. London: Cameron May Ltd. p. 693.

³ E. Porter (2017). *Trump’s Trade Endgame Could Be the Undoing of Global Rules*. N.Y. Times. Retrieved from: <https://www.nytimes.com/2017/10/31/business/economy/trump-trade.html>, [https://perma.cc/E85R-KWT4].

⁴ Office of the US Trade Representative. (2018). *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Programme*. pp. 22-28.

⁵ A. Bahri (2019). “‘Appellate Body Held Hostage’: Is Judicial Activism at Fair Trial?”. *J. World Trade*. 53(2). p. 295.

Understanding regulating the operation and proceedings before the Appellate Body is not the only legal act setting forth provisions regarding the appellate process. The Appellate Body is authorized to issue its own working procedures in consultation with the Chairman of the Dispute Settlement Body and the Director-General. Members of the Appellate Body, as the first task after the appointment, drew up Working Procedures for Appellate Review⁶ which have been amended six times since 1995.⁷

Pursuant to Article 17 of DSU, the Appellate Body was created to rule on disputes heard by panels. It is generally composed (or given the current state of events - rather should be) of seven members – appointed for four year term; however, it sits in division of three members.⁸ The members may be reappointed only once. The members of the Appellate Body are selected taking into account the principles of random selection which has not been shared with the public.⁹ As provided for in Article 17.3 of DSU, the Appellate Body must be comprised of persons of a recognized authority who demonstrate expertise in law, international trade and the subject matter of the dispute. When it comes to membership, “a broad representation of membership in the WTO” is also taken into consideration.¹⁰ There is no rule preventing the nationals from the Member State to sit on an appeal in a dispute concerning that member state, unlike at the panel stage. That is due to the limited number of members of the Appellate Body – since most disputes concern the USA, Japan and the European Union, it could have been virtually impossible to have the same rules as for the panel level.¹¹ The importance of the Appellate Body is even more significant given the number of appealed cases which far exceeds what was expected.¹² As of 2007, it has been estimated that almost 70 percent of cases were appealed.¹³ This number has been increasing year by year and in 2016, the number of reports that were appealed amounted to nearly 90%.¹⁴

Essentially, disputing parties may file an appeal within 60 days after the panel’s report has been circulated.¹⁵ The Appellate Body hears appeals which are limited to the issues of law covered in the panel report and legal interpretation that was developed by the panel in a particular case.¹⁶ Such a limitation has been subject to criticism in legal writing. An appeal can be brought only by the parties in a dispute before the panel, excluding any involved third

⁶ P. Van den Bossche (2005). “The making of the ‘World Trade Court’: the origins and development of the Appellate Body of the World Trade Organization”. Key Issues in WTO Dispute Settlement: The First Ten Years. Cambridge: Cambridge University Press. p. 69.

⁷ WT/AB/WP/1; WT/AB/WP/2; WT/AB/WP/3; WT/AB/WP/4; WT/AB/WP/5; WT/AB/WP/6.

⁸ Article 17.1 DSU.

⁹ Waincymer, *supra* note 2, p. 706.

Rule 6 (2) of the Working Procedures for Appellate Review provides that: “*The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin*”.

¹⁰ Article 17.3 DSU.

¹¹ Waincymer, *supra* note 2, p. 706.

¹² P. van der Bossche (2008). *The Law and Policy of the World Trade Organization*. Cambridge: Cambridge University Press. p. 73-74.

¹³ Van der Bossche, *supra* note 13, p. 288.

¹⁴ E. Fabry and E. Tate (2018). “Saving the WTO Appellate Body or Returning to the Wild West of Trade”. Policy Paper. No25. p. 5.; Bahri, *supra* note 5, p. 294.

¹⁵ Article 16.4 DSU.

¹⁶ Article 17.6 DSU.

parties.¹⁷ There are no limitations as to which party can file an appeal - both the complaining and responding party may wish to do so. Nonetheless, the parties will most likely file an appeal on different grounds.¹⁸ Pursuant to the Working Procedures for Appellate Review, appellants must file a Notice of Appeal with Secretariat simultaneously with submitting a notification in writing to the Dispute Settlement Body.¹⁹ A party to a dispute has 18 days thereafter to respond to the allegations raised in the appellant's submission.²⁰ After the written phase, the oral phase will begin. The procedural rules require the Appellate Body to hold a hearing between 30 and 45 days after the date of the filing of a Notice of Appeal, which means that the hearing is of a mandatory character and its conduct is not subject to the Appellate Body's discretion.²¹ After the hearing, the members adjudicating the case meet with the remaining four members to exchange views on the case in order to ensure consistency in decision making.²² After the exchange of views is completed, the Appellate Body deliberates and prepares a report, which is to be adopted by the Dispute Settlement Body and unconditionally accepted by the parties to the dispute unless there is a "negative" consensus not to adopt it within 30 days following its circulation to the Members.²³

The Appellate Body does not give advisory opinions. Its report has no direct binding quasi-judicial power since its report has to be adopted by the Dispute Settlement Body²⁴ in any case. It can uphold, modify or reverse the legal interpretations adopted by the panel.²⁵ Modification of legal interpretations adopted by panels occurs where the Appellate Body upholds the final recommendations of the panel; however, it does so providing different reasoning.²⁶ Even though the reports do not have the *stare decisis* effect since 1995, the Appellate Body produced a significant international trade law jurisprudence of importance in its own future decisions which constitutes a relevant source of knowledge for legal scholars²⁷ as well.

2.2. *The Law-Making Function of the Appellate Body*

There is a general consensus that the Appellate Body's reports are not binding except between the parties in a dispute. It does not necessarily mean that subsequent panels have the liberty to disregard legal interpretations in the previous reports adopted by the Dispute Settlement Body.²⁸

¹⁷ Article 17.4 DSU.

¹⁸ V. Hughes (2005). "Special Challenges at the Appellate Stage: A Case Study". Key Issues in WTO Dispute Settlement System. p. 80.

¹⁹ Rule 20 (1) Working Procedures for Appellate Review.

²⁰ Rule 22 (1) Working Procedures for Appellate Review.

²¹ Rule 27 (1) Working Procedures for Appellate Review.

²² Rule 4 (1) Working Procedures for Appellate Review; see Hughes, 82 (n. 18).

²³ Article 17.14 DSU.

²⁴ Waincymer, 697 (n. 2).

²⁵ Article 17.13 DSU.

²⁶ Waincymer, 703 (n. 2).

²⁷ G. Shaffer, M. Elsig and S. Puig (2016). "The Extensive (but Fragile) Authority of the WTO Appellate Body". *Law & Contemp Probs.* 79(1). p. 244.

²⁸ J. Pauwelyn, A.T. Guzman and Hillman, J. A. (2016). *International Trade Law*. New York: Wolters Kluwer. p. 144.

Even though the Appellate Body does not operate under the *stare decisis*, its decisions have significantly impacted the operations of a dispute settlement system at the WTO.²⁹ As Van Grassek states, “trade law is what the AB members say it is.”³⁰ The Appellate Body constitutes a fundamental aspect of the law-making function at the WTO due to the fact that its decisions are likely to be most influential current interpretations on provisions in question.³¹

As indicated in *Japan – Alcoholic Beverages II*: “adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute.”³² The same view was expressed in the *US Stainless Steel* case: “The Panel’s failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence [...]”³³

Since its existence, the Appellate Body has made significant rulings not only on the substantive issues but also concerning procedural and systematic issues relating to the WTO proceedings. They have had a significant impact on the functioning of the dispute settlement in the WTO – providing security and predictability of the system.³⁴ In general, stability of the line of its decisions was one of the advantages of the WTO dispute settlement system.

With this in mind, it must be underlined that there are certain mechanisms in the WTO dispute settlement system to prevent an excessive amount of “precedents” established by the Appellate Body. There has been some criticism that the Appellate Body expands its reach due to the use of *obiter dicta*, i.e. addressing the non-relevant issues for a resolution of the dispute by which it creates unnecessary precedents for future use. It has been argued by Pelc and Bush that in order to limit that scope, the Appellate Body should exercise its right to judicial economy to disregard the issues ambivalent to the scope of the dispute.³⁵ Judicial economy consists of a notion that the adjudicator does not have to enter into a complex analysis of each particular issue if a dispute has been resolved on other grounds.³⁶ Due to the wording of DSU provisions, it became unclear whether the Appellate Body may utilize judicial economy. Pursuant to Article 17.12 of DSU, the Appellate Body must address each of the issues raised in the appeal, which raised some doubts regarding such a possibility. However, despite the controversies surrounding this mechanism on the appellate level, the Appellate Body has taken advantage of the concept of judicial economy in the proceedings.³⁷ On the one hand, it has been argued that the language of

²⁹ A. Scully-Hill and H. Mahncke (2009). “The Emergence of the Doctrine of *Stare Decisis* in the World Trade Organization Dispute Settlement System”. *Leg. Issues Econ. Integration*. 36(2). p. 143.

³⁰ C. Van Grassek, (2013). *The History and Future of the World Trade Organization*. World Trade Organization. Geneva: World Trade Organization. p. 241.

³¹ Waincymer, *supra* note 2, p. 705.

³² *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996.

³³ *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008.

³⁴ D. Steger & S. Lester (2001). “WTO Dispute Settlement: Emerging Practice and Procedure in Decisions of the Appellate Body”. *Due Process in WTO Dispute Settlement*. London : Cameron May. p. 199.

³⁵ M. Bush and K. Pelc (2010). “The Politics of Judicial Economy at the World Trade Organization”. *International Organization*. 64 (2). p. 263.

³⁶ Waincymer, *supra* note 2, p. 368.

³⁷ R. Alvarez-Jimenez (2009). “The WTO Appellate Body’s Exercise of Judicial Economy”. *J. Int. Econ. Law*. 12 (2). p. 393.

the provisions is clear and leaves no room for interpretation.³⁸ On the other hand, the Appellate Body itself took a more liberal approach to that issue in the United States – Subsidies on Upland Cotton,³⁹ allowing for judicial economy. It has been argued that the ability to use this mechanism by the Appellate Body should be justified under the general principles embodied in Articles 3.4 and 3.7 of DSU.⁴⁰ There have been proposals to include an express provision allowing the Appellate Body to exercise the concept of judicial economy to clarify the ambiguity.⁴¹ The main justification for such a proposal was that it would limit the obiter dicta rulings and ensure that a 90-day limit for deciding on an appeal is complied with.

2.3. Critique of the Appellate Body

Despite a remarkable success of the dispute settlement in the WTO, it is not a system without any flaws. As indicated by Pauwelyn, there has been a general satisfaction with the Appellate Body and none of the proposals as to its operation contain fundamental alterations.⁴² Nonetheless, the United States constantly blocking the appointment of the members of the Appellate Body seems not to share that academic view. Moreover, there have been also dissenting voices in legal writing as to the functioning of the appeal process. It has been argued that the Appellate Body frequently oversteps its boundaries and instead of interpreting the law, takes a step further and creates it.⁴³ The criticism towards the Appellate Body revolves around the alleged failure to respect the procedural provisions by its members and progressive self-empowerment.⁴⁴ The so-called judicial activism and “the-law-making function” of the Appellate Body did not go unnoticed. Especially, the United States was negatively referring to the overreach of its rulings by underlining that this WTO body is not responsible for filling the gaps of the WTO agreements and creating new rights and obligations for the WTO members but solely for rectifying legal mistakes made by the panel in their reports.⁴⁵ Other allegations as to the malfunctioning of the Appellate Body concerned violation of the procedures. Examples include lack of a 90-day notice in case of resignation of Hyun Chong Kim who became South Korea’s Trade Minister and violating time limits set forth for appellate proceedings (60 days or 90 days in complex cases).⁴⁶

On the one hand, as described in the preceding paragraph, it has been argued that the Appellate Body has been trespassing its mandate. On the other hand, Pauwelyn points out that there are certain mechanisms the Appellate Body is lacking. One of the so-called “design flaws” of the Appellate Body is the lack of a remand procedure. As already mentioned, the Appellate Body has the power to uphold, modify or reverse the legal interpretations adopted by the panel.⁴⁷

³⁸ Ibid., 394.

³⁹ Ibid.

⁴⁰ Waincymer, 702 (n. 2).

⁴¹ Communication from the EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico to the General Council. Retrieved from: https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf.

⁴² Pauwelyn, Guzman and Hillman, 136 (n. 28).

⁴³ Matsushita, M., Schoenbaum, T. J., Mavroidis, P. C., & Hahn, M. J. (2017). *The World Trade Organization: Law, Practice, and Policy*. Oxford University Press. p. 131.

⁴⁴ Fabry and Tate, 8-9 (n. 14).

⁴⁵ Ibid., 9.

⁴⁶ Bahri, 297 (n. 5).

⁴⁷ Article 17.13 DSU.

Due to the fact that the Appellate Body cannot make new factual findings as the review standard is not *de novo*, deciding on an appeal concerning panel's report may be a difficult task if it is not sufficiently exhaustive.⁴⁸ The review standard set forth in Article 11 of DSU requires an "objective assessment of the facts."⁴⁹ The possible scenarios to resolve that issue would be either to introduce a remand procedure or expand the powers of the Appellate Body to make new factual findings. As for now, the Appellate Body's only option under the current legal framework is to leave certain issues unresolved. In particular cases, not completing the analysis left the entire case unresolved, e.g. EC – LAN Equipment, Canada – Dairy (Article 21.5 – I) and US – Softwood Lumber VI (Article 21.5).⁵⁰

Although there are no provisions that would clearly evaluate the position of the Appellate Body in the WTO system, Howse claims that its rather broad power can be deduced from the very nature of DSU provisions. Between the lines, they do describe the status and authority of the Appellate Body. Drafters demonstrated in a clear manner that it was not their intention to impose limitations on the Appellate Body – by including provisions solely relating to what the Appellate can and must do. That approach would indicate that the issues not specified in DSU would therefore be considered as outside of the scope of its authority. At the end of the day, drafters included a significant share of provisions describing what the Appellate Body cannot do, leaving room for interpretation and empowering that WTO body with a significant scope of possibilities.⁵¹ It seems that these loopholes are exactly that which led to the escalated conflict regarding the operation of the dispute settlement system.

3. Background of the Crisis in the WTO

Despite the general message created by the media, it was not Donald Trump who turned the United States' approach against the WTO. It has been more than a decade since the United States was seeking amendments to the dispute settlement system and has been making detailed complaints regarding its functioning.

The USA has been following the general line of negative views on the Appellate Body. It mainly expressed concerns on the quasi-precedents as well as the Appellate Body's failure to comply with procedural requirements. However, nowadays the USA went into a more detailed critique of the Appellate Body members. In "2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Programme,"⁵² the United States acknowledged that a dispute settlement mechanism is necessary to protect the underlying trading system. It also presented a list of its concerns regarding the operation of that body and the WTO dispute settlement system.

⁴⁸ J. Pauwelyn, (2007). *Appeal without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix It*. ICTSD International Centre for Trade and Sustainable Development.

⁴⁹ Article 11 DSU.

⁵⁰ Pauwelyn (n. 48).

⁵¹ Howse R. (2003). "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power". *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO*. p. 13.

⁵² Office of the US Trade Representative, 22-28 (n. 5).

The most vital concern was that both the panels as well as the Appellate Body were “adding to or diminishing rights and obligations under the WTO Agreement” instead of simply interpreting the agreements as they were.⁵³ It has been argued that the reach of the findings in the adopted reports went a step too far. Additionally, the main discontent of the United States with the Appellate Body also referred to the failure to comply with the 60-day (and in complex cases 90-day) time period for deciding on appeals.⁵⁴ Pursuant to Article 17.5 of DSU, “[a]s a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report”. Further, it is added: “In no case shall the proceedings exceed 90 days”. As observed by the United States, the Appellate Body has been respecting the imposed time limits in the first years of its establishment. Out of 101 appeals, in 87 it issued its report within the 90-day deadline, in the remaining 14, the Appellate Body consulted with the parties and obtained their consent to go beyond that period.⁵⁵

The change came after six years. Starting in 2011 with the appeal in *US-Tyres*⁵⁶ (China), the Appellate Body departed from complying with the 90-day period providing no explanation and without reaching to the parties in dispute to obtain their consent to go above that limit. Already in 2011, the USA voiced its concerns regarding this situation to the Dispute Settlement Body, however, without any result.⁵⁷ Since then, the Appellate Body has been increasing the needed time for hearing disputes, achieving on average 163 days in 2014. On the one hand, the Appellate Body was arguing that it is not able to meet the prescribed time limits. It was pointed out by the United States that the Appellate Body would be able to issue its reports within the provided deadline if it refrained from addressing issues not necessary to resolve the case and thus limited obiter dicta decisions. Moreover, the USA underlined that even if the Appellate Body was struggling with complying with the timeframes set forth in DSU, it was not up to the Appellate Body’s discretion to disregard or amend the provisions thereof as the prescribed time limits are not discretionary.⁵⁸

Another point that was heavily criticized was the legitimacy of Rule 15 of the Working Procedures for Appellate Review on the participation in appeal proceedings by the Appellate Body members after the expiry of their tenure.⁵⁹ Authorizing a person who is no longer a member of the Appellate Body raised many concerns. Pursuant to the view of the United States, “under the WTO Agreement, it is the Dispute Settlement Body, not the Appellate Body, that has

⁵³ *Ibid*, p. 22.

⁵⁴ Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, June 22, 2018 (2018). Retrieved from: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered_fin_.public.rev_.pdf.

⁵⁵ *Ibid*.

⁵⁶ *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, 5 September 2011.

⁵⁷ Minutes of the DSB Meeting on October 5, 2011 (WT/DSB/B/304), p. 4.

⁵⁸ Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, June 22, 2018’ (2018). Retrieved from: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered_fin_.public.rev_.pdf.

⁵⁹ Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, February 28, 2018 (2018). Retrieved from: <https://geneva.usmission.gov/2018/03/01/statements-by-the-united-states-at-the-february-28-2018-dsb-meeting/>.

the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving.”⁶⁰

The United States have been issuing statements in which it expressly pointed to the cases it considered to be the Appellate Body overstepping. As to the appellate report in the case of Argentina-Financial Services⁶¹, the USA was alleging that more than two-thirds (amounting to 46 pages) of the Appellate Body’s analysis was in the nature of obiter dicta, creating persuasive arguments for future disputes between the WTO member states. Even though the main issue in the dispute was the understanding of likeness requirements, the Appellate Body went further and in a great detail interpreted various provisions of GATS.⁶² Similar concerns were raised concerning India — Measures Concerning the Importation of Certain Agricultural Products.⁶³ In accordance with the United States’ position, the Appellate Body devoted a considerable amount of time on the issues that were not raised by either party in the appeal. The United States discontent with the operation of the Appellate Body escalated to such a point that its entire closing statement was devoted to urging the Appellate Body not to focus on the issues that were not even appealed by the parties.⁶⁴ In United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,⁶⁵ in the United States’ opinion, the Appellate Body exceeded its mandate and created new obligations on its part stating that it must prove that unforeseen developments necessitate the imposition of a safeguard. Moreover, the report was subject to criticism as the Appellate Body resorted to making new factual findings whereas at the appellate stage de novo review is not allowed.⁶⁶

4. What Should Be (and Has Been) Done to Cure the Appellate Body?

On 10 December 2019, the mandates of Amb Ujal Bhatia and Thomas Graham expired, leaving the Appellate Body unable to function due to the lack of a required quorum.⁶⁷ The attempts to bury the Appellate Body did not stop there – the WTO Members pressured by the United States agreed to significant cuts of the budget for 2020.⁶⁸

⁶⁰ Office of the US Trade Representative, 26 (n. 5).

⁶¹ *Argentina — Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, 14 April 2016.

⁶² Statement by the United States at the Meeting of the WTO Dispute Settlement Body of 23 May 2016. Retrieved from: https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf.

⁶³ *India — Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, 4 June 2015.

⁶⁴ Closing Statement of the United States of America at the Oral Hearing. Retrieved from: https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Oral.Stmt.Closing.pdf.

⁶⁵ *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001.

⁶⁶ *U.S. Slams WTO Lamb Ruling over Appellate Body Mandate*. Retrieved from: <https://www.iatp.org/news/us-slams-wto-lamb-ruling-over-appellate-body-mandate>, [https://perma.cc/C4SZ-KCR7], see also: Sykes A.O. (2003). “The Safeguards Mess: A Critique of WTO Jurisprudence”. *SSRN Electronic Journal*, p. 15.

⁶⁷ Farewell Speech of Appellate Body Member Thomas R. Graham. Retrieved from: https://www.wto.org/english/tratop_e/dispu_e/farwellspeechtgaham_e.htm.

⁶⁸ B. Baschuk. WTO Members Agree on a 2020 Budget, Averting Jan. 1 Shutdown. Retrieved from: <https://www.bloomberg.com/news/articles/2019-12-05/wto-members-agree-on-a-2020-budget-averting-jan-1-shutdown>.

In order to resolve this situation, on 27 March 2020, the EU and 15 other WTO member states reached a “Multiparty interim appeal arbitration agreement”⁶⁹ (“Multiparty agreement”). This mechanism goes back to 2019 when the EU and Canada agreed on an interim appeal arbitration based on Art. 25 of DSU. It provides for expeditious arbitration within the WTO in order to resolve the issues clearly defined by both parties. Under the agreement, the appeal arbitration procedure will be based on the substantive and procedural aspects of the Appellate Review under Art. 17 of DSU.⁷⁰ In other words, the appellate mechanism under Art. 25 of DSU aims at replicating the same procedure existing in the WTO framework.

The main advantage of resorting to *ad hoc* arbitration is that this mechanism already exists and does not need any amendments of DSU or even Working Procedures for Appellate Review. This solution is not devoid of shortcomings. Resorting to arbitration proceedings can serve as a temporary cure for the settlement process. Unfortunately, it seems that in the long run the *ad hoc* arbitration proceedings within the WTO will not be sufficiently effective as they do not constitute a cure to the structure and operation of the organization. Despite the fact that the arbitral awards would be subject to surveillance of the Dispute Settlement Body under Article 25 of DSU, not much can be said at this point about the possibility to enforce unadopted panel report further amended in the arbitral proceedings. The Multiparty agreement does create however, a parallel arbitration mechanism and a separate category of appellate reports since the arbitration awards are not required to be adopted by the DSB.⁷¹

Even if the Appellate Body continues to operate thanks to temporary solutions, or the other way round, even if the appellate process becomes temporarily suspended, the WTO demands structural and fundamental changes with regard to dispute settlement system. Simply securing the appellate proceedings as it is, is not sufficient to cure it. The malfunctioning of the Appellate Body has been a subject of discussion for at least a decade when the United States started making complaints. We are now experiencing a peak of the problem and it seems that the issues concerning the Appellate Body have been neglected for too long. Even though some of the countries started coming up with initiatives to make changes, some say bitterly that it is too little, too late,⁷² and that there are no quick fixes.⁷³ Despite the deadlock in the Appellate Body, it is essential to take a look at a bigger picture and start with negotiating amendments to the dispute settlement system in the long run as: “[p]reserving the WTO by strengthening its two essential legs: negotiation as well as litigation – will be crucial for the future of the world economy.”⁷⁴ As of 1 March 2021, Ngozi Okonjo-Iweala took office of the seventh Director-General of the WTO as the first woman to hold this position. She is facing a daunting task of reforming the

⁶⁹ EU and 15 World Trade Organization Members Establish Contingency Appeal Arrangement for Trade Disputes. Retrieved from: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2127>.

⁷⁰ Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes. p. 2, para. 3. Retrieved from: https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf.

⁷¹ Jaswant S.S. Arbitration in the WTO: Changing Regimes Under the New Multi-party Interim Appeal Arbitration Arrangement. Retrieved from: <http://arbitrationblog.kluwerarbitration.com/2020/05/14/arbitration-in-the-wto-changing-regimes-under-the-new-multi-party-interim-appeal-arbitration-arrangement/>.

⁷² Wagner M. (2019). “The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?”. SSRN Electronic Journal. p. 17.

⁷³ Farewell speech of Appellate Body member Thomas R. Graham. Retrieved from: https://www.wto.org/english/tratop_e/dispu_e/farwellspeechtgaham_e.htm.

⁷⁴ Fabry/Erik Tate, 19 (n. 15).

WTO dispute settlement system, especially in the face of the global pandemic. Okonjo-Iweala shares her view that the resolution of trade disputes “needs to be taken care of and reformed to a point where all members, big and small, believe and trust in the system and can use it.”⁷⁵ We are yet to witness what those steps will be.

4.1. Institutional Changes

The first proposal of amendments to the dispute settlement system at the WTO concerns the improvements of selection of panelists and Appellate Body members. Firstly, it has been argued that the WTO member states require a team of exceptional specialists in the field to resolve their disputes. In order to provide the much-desired stability and high quality of the reports, panelists should also serve on permanent basis.⁷⁶ Moreover, the process of their selection should be improved in order to detach it from the political influences. It is essential to at least include a more transparent and clear eligibility requirements to serve the role of adjudicator at the WTO. Possibly, providing for a neutralized appointment process would diminish the pressures of sensitive political issues and their resolution.⁷⁷

Additionally, it is evident now that the number of members of the Appellate Body is not sufficient to effectively tackle the increased workload within the time limits imposed by the provisions of DSU.⁷⁸ It is advisable to increase that number unless the member states decide to agree on prolongation of the time limits on deciding the dispute.

4.2. Amendments to Rule 15 Working Procedures for Appellate Review

One of the most frequently raised concerns by the United States on the self-empowerment of the Appellate Body concerned the scope of Rule 15 Working Procedures for Appellate Review to complete an appellate process despite the expiry of their mandate. Several proposals were made to address this issue:

- (i) allowing the members of the Appellate Body to hear disputes even after their mandate expired only if a key stage of appeal is triggered;
- (ii) prohibiting members from hearing disputes 3 months before expiry of their terms of office;
- (iii) extending the term of office of the members until there is a consensus of the appointment of a new member.⁷⁹

These proposals still do not address the core of the problem. The most attractive solution from the United States perspective would be to prohibit the members whose mandates are

⁷⁵ Worland J. Okonjo-Iweala Believes the WTO Can Change the World. But First It Needs Reform. Retrieved from: < <https://time.com/5938816/ngozi-okonjo-iweala-wto-climate-change/> > [<https://perma.cc/AT6U-Q9XK>].

⁷⁶ Party like it's 1995: Resolving the WTO Appellate Body crisis | VOX, CEPR Policy Portal. Retrieved from: <https://voxeu.org/article/party-it-s-1995-resolving-wto-appellate-body-crisis>.

⁷⁷ McDougall R. (2018). “The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance” J. World Trade. 52(6). p. 891.

⁷⁸ R. McDougall (2018). Crisis in the WTO: Restoring the WTO Dispute Settlement Function. CIGI Papers No. 194. p. 16.

⁷⁹ Fabry and Tate, 12 (n. 15).

expiring from sitting on the cases. Thus, it would be advisable to create a mechanism where such a practice would not be possible.

4.3. Addressing Procedural Irregularities

Certain procedural irregularities that have been pointed out by the United States in the last decade definitely contributed to the current state of affairs at the WTO. Several countries undertook the possibility to make proposals regarding changes to the Dispute Settlement Understanding, taking into consideration the concerns the United States has been raising in the last couple of years. On 26 November 2018, two documents were circulated to WTO members with regard to the proposed amendments to the dispute settlement system: the first one was prepared by the European Union together with other WTO member states - Australia, Canada, China, Iceland, India, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, the other one was prepared by the European Union together with China and India.⁸⁰ The member states expressed the willingness to work on new solutions as to the impasse in the Appellate Body with preserving its main functions. The group of countries called on remaining members to fill vacancies on the Appellate Body and simultaneously amend certain provisions of DSU, concerning, for instance, inclusion of a set of provisions dealing with the potential failure of the Appellate Body to comply with a 90-day timeframe, providing expressly the possibility of the Appellate Body to exercise the judicial economy.⁸¹

The proposals were not accepted enthusiastically by the United States nor the scholars monitoring the crisis at the Appellate Body. It is a difficult task to reconcile the needs and proposals of all the members of the WTO.⁸² The United States raised doubts whether the proposal made by the EU together with China and India addressed any of the concerns it raised.⁸³ Actually, in accordance with the United States, the proposed changes would “make the Appellate Body even less accountable, and more susceptible to overreaching, by extending the terms of Appellate Body members, removing the opportunity of Members to decide on any possible reappointment, making Appellate Body membership a full-time position, and increasing resources for the Appellate Body Secretariat.”⁸⁴ Given the position of the USA and lack of any concrete proposals on its part, it will be an extremely difficult task to identify what the issues are and reevaluate the position of the Appellate Body in the dispute settlement system.

4.4. Introducing a Remand Procedure

One of the shortcomings of the WTO dispute settlement system and the powers of the Appellate Body is the lack of remand procedure. Under the current legal framework, pursuant to Article 17.6 of DSU, the Appellate Body has no possibility to send back the case to the panel

⁸⁰ Communication from the EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico to the General Council. Retrieved from: https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf.

⁸¹ McDougall, 16 (n. 78).

⁸² Wagner, 19 (n. 72).

⁸³ Statement by the United States at the Meeting of the WTO General Council of 12 December 2018. Retrieved from: https://geneva.usmission.gov/wpcontent/uploads/sites/290/Dec12.GC_.Stmt_.items_.7.and_.8.as_.delivered.clean_.pdf.

⁸⁴ Ibid.

stage which can certainly make adjudicating more difficult as the Appellate Body cannot make new factual findings and at the same time the panel may wish to exercise its right to resort to judicial economy and conduct legal analysis only of the issues it deems are necessary to resolve the dispute.⁸⁵ It has been argued that the drafters of the DSU: “imposed a division of labour between Panels and the Appellate Body, based on a distinction between fact and law.”⁸⁶ It has not been explained exactly what motivated the drafters to include such a specific division as panels may conduct both factual and legal analysis whilst the Appellate Body’s adjudication is limited to the issues of law covered in the panel report as well as legal interpretations developed thereof.⁸⁷ The reason may be that the drafters intended for the Appellate Body to be able to comply with the 90-day time limit to decide on the case.⁸⁸ In case the panel report is lacking a proper assessment of the facts of the case, the Appellate Body is left with a difficult task to tackle and there is a risk that the case will not be adjudicated in the exhaustive manner. The Appellate Body will attempt to assess the issues based on the factual findings gathered by the panel, however, there may be a time when it will not be sufficient and the Appellate Body will not be able to actually proceed with a case and successfully resolve a dispute.⁸⁹ Therefore, the amendments to DSU should be made either allowing for a remand procedure, which would remove the temptation of the Appellate Body to cross the procedural lines it has to operate within, or to allow for a *de novo review*.

5. Closing Remarks

“Let us try to fix the problems that can be fixed. Let us not consider the alternatives of AB at this stage. Considering its alternatives indicates that we are already giving up on this institution. It will be very unfair to let the AB die in this manner.”⁹⁰

The Appellate Body has been playing a major role of the adjudicating function of the WTO. Letting it “die from the inside” does seem indeed unfair. Instead of looking for solutions in advance, the conflict has escalated to such an extent that looking for possible cures became doomed to failure. It is not the policy that was adopted by the United States, especially in recent years that led to this point. Blocking the appointments of prospective members of the Appellate Body was a symptom of the disease but not its cause.

As of now, the Multiparty agreement aims at maintaining a mechanism in place that would preserve their rights in WTO dispute resolution system. The main advantage of this mechanism is that Article 25 of DSU is already in place and does not require any changes to the existing legal framework. What is also appealing about this solution is the fact that the structure of the proceedings will remain largely identical to what the member states are familiar with under the current regime. Therefore, there will be no need for the readjustment period and the member states will have the ability to focus on the long-term amendments to the dispute settlement system. At this stage of the conflict, it is necessary to preserve the rights under the

⁸⁵ Pauwelyn, (n. 48).

⁸⁶ T. Voon and A. Yanovich (2006). “The Facts Aside: The Limitation of WTO Appeals to Issues of Law.” *Journal of World Trade*, 40 (2), p. 240.

⁸⁷ Article 17.6 DSU.

⁸⁸ Voon and Yanovich, 241 (n. 86).

⁸⁹ Waincymer, 372 (n. 2).

⁹⁰ Bahri, 315 (n. 5).

WTO Agreement and ensure that there is a mechanism allowing to maintain the multilateral trading system. At the same time, the member states have to further negotiate long-term changes to the dispute settlement system, reevaluate the position of the Appellate Body and the powers it should possess.

The strong turn to anti-globalization trend worldview is worrisome. There is a risk that we will be facing once again a situation where big trade players can simply dictate the rules of trade.⁹¹ However, as we learnt in the past, that system did not work out. The present solution may not be ideal and definitely has many flaws; however, instead of giving up on it, the WTO member states should further cooperate and find a meaningful solution that would satisfy all members at the “negotiating table”.

⁹¹ Bahri, 295 (n. 5).

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