

A World Trade Institute Workshop on

WTO Appellate Review: Reform Proposals and Alternatives

Friday, 24 May 2019
at the World Trade Organization, Geneva
Room D

- 9:00 – 9:15** Welcome and introduction by **Peter Van den Bossche**, World Trade Institute, University of Bern
- 9:15 – 10:45** **Scope of and timeframe for appellate review**
**Please see the annex to this programme for the questions posed to this panel*
- Chair: **Giorgio Sacerdoti**, Bocconi University, Milano
- Panellists: **Maria Alcover**, Advisory Center on WTO Law, Geneva
Gitanjali Brandon, Permanent Mission of India to the WTO, Geneva
James Flett, Legal Service, European Commission, Brussels
Guilherme L. Leivas Leite, Mission of Brazil to the WTO, Geneva
Jasper Wauters, White & Case LLP, Geneva
- 10:45 – 11:15** Coffee break
- 11:15 – 12:45** **Judicial activism and precedent**
**Please see the annex to this programme for the questions posed to this panel*
- Chair: **Gabrielle Marceau**, Associate Professor, UNIGE; Legal Affairs Division, WTO, Geneva
- Panellists: **Katherine Connolly**, Sidley Austin LLP, Geneva
Philippe De Baere, Van Bael & Bellis, Brussels
Michael Hahn, World Trade Institute, University of Bern
Alana Lanza, Permanent Mission of Honduras to the WTO, Geneva
Robert McDougall, Cadence Global Ltd; Centre for International Governance Innovation
Niall Meagher, Advisory Center on WTO Law, Geneva
- 12:45 – 14:30** Lunch break

14:30 – 17:00 **Alternatives for appellate review and WTO dispute settlement** (tea break at 15:30)
**Please see the annex to this programme for the questions posed to this panel*

Chair: **Joost Pauwelyn**, Graduate Institute of International and Development Studies, Geneva

Panellists : **Natalia Bayurova**, World Trade Institute, University of Bern
Rambod Behboodi, King & Spalding, Geneva
Nicolas Lockhart, Sidley Austin LLP, Geneva
Martin Lukas, DG Trade, European Commission, Brussels
Ricardo Ramirez, Mexican National University, Mexico City
Leticia Ramirez Aguilar, Permanent Mission of Mexico to the WTO, Geneva
Jan Yves Rémy, Shridath Ramphal Centre for International Trade Law, Policy & Services, Barbados
Isabelle Van Damme, Van Bael & Bellis, Brussels
Alan Yanovich, Akin Gump, Geneva

17:00 Conclusions and closing by **Thomas Cottier**, World Trade Institute, University of Bern

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Annex

Questions posed to the panel on “Scope of and timeframe for appellate review”

- Should the objectivity of factual findings of a panel be subject to appellate review?
- Should panel findings on the meaning of municipal law be subject to appellate review? How to separate the meaning of municipal law from assessing the consistency of municipal law with WTO law?
- Should appellate review be limited to only those issues that need to be addressed to resolve the dispute? What is necessary to resolve a dispute? Can a dispute ever be considered ‘resolved’ when the correct interpretation of the relevant legal provision(s) is still disputed between the parties?
- Should the Appellate Body refrain from modifying legal interpretations developed by panels when it agrees with the panel’s conclusion on the WTO consistency of the measure at issue?
- Can the exercise of judicial economy by the Appellate Body be mandatory, and, if so, in which circumstances?
- Is completing the legal analysis within the scope of appellate review *under Article 17.6* of the DSU?
- Is an Appellate Body report circulated after the 90-day period no longer a report to be adopted by reverse consensus?
- Can a *mandatory treaty rule*, such as the 90-day rule of Article 17.5 of the DSU, be set aside by the parties to a dispute (whether by way of prior agreement or by ex-post deeming letters) or by a DSB decision?
- Can there be exceptional or mitigating circumstances under which the Appellate Body would be entitled to exceed the 90-day timeframe, even without the consent of both parties (e.g. the circumstances in *United States – Lead and Bismuth (DS138)*)? Who would decide on the exceptional or mitigating nature of the circumstances?
- If the Appellate Body can exceed the 90-day timeframe only with the consent of the parties, what prevents an appellee from undermining or depriving an appellant of the right to appeal in large and complex disputes?
- If the parties do not consent to a 90-day-plus timeframe for appellate review, or do not agree to reduce the number of issues appealed, and the Appellate Body is called upon to limit the scope of the appeal in order to stay within the 90-day timeframe, how and on the basis of which objective criteria should the Appellate Body decide to limit the scope of the appeal?
- Do the parties to a specific dispute have sufficient information on the workload of the Appellate Body *in other disputes* to assess the time needed for the Appellate Body to complete appellate review in their dispute?
- Would parties requesting a DSB decision extending the 60-day period for filing appeals under Article 16.4 contribute to resolving the ‘90-day-problem’?
- Would a different calculation of the 90-day timeframe (e.g. by counting working days only) or an extension of the timeframe to 120 or 150 days resolve the ‘90-day problem’?

- Would the imposition of mandatory page-limits on written submissions or limits on the length of oral hearings speed up appellate review in complex disputes?
- Should the random composition of Appellate Body divisions be abandoned, and appeals be assigned to Appellate Body Members with the least workload in order to speed up appellate review?
- Should the Appellate Body no longer exchange views among all its Members in each appeal in order to speed up appellate review?

Questions posed to the panel on “Judicial activism and precedent”

- Can the clarification of a legal provision *in accordance with* customary rules of interpretation of public international law amount to judicial activism?
- Are there objective criteria to determine whether the clarification of a legal provision amounts to judicial activism?
- How much importance can and should be given to negotiating history in the interpretation of WTO legal provisions? Is there a common understanding of what constitutes GATT/WTO negotiating history?
- Does the case law of the Appellate Body stand for the proposition that there is binding precedent in WTO dispute settlement?
- What are ‘coherent reasons’ that justify deviation from established case law?
- Can a panel conclude that there are coherent reasons to deviate from established case law, i.e. that the established case law is not ‘persuasive’, on the mere basis that it interprets the relevant provision differently?
- What would be the *terms of reference* for the proposed annual meeting between the DSB and the Appellate Body to discuss developments in WTO case law? How to avoid that Members would at such meeting not merely repeat their disagreement with the Appellate Body on legal issues on which the latter ruled against them?
- In deciding whether established case law is not ‘persuasive’ should a panel consider that WTO dispute settlement aims to bring security and predictability to the multilateral trading system?
- If Appellate Body interpretations of WTO provisions were to be reviewed by the DSB, a DSB committee or any other body composed of representatives of WTO Members, how would decisions on the correctness of the Appellate Body interpretation be taken? By consensus? By (qualified) majority vote?
- On what basis could the DSB, a DSB committee or any other body composed of representatives of WTO Members come to the conclusion that the Appellate Body’s interpretation of a WTO provision is incorrect and reflects judicial activism? Would it be on the basis of a wrong application of the customary rules of interpretation of public international law or could there also be another basis?
- If the DSB, a DSB committee or any other body composed of representatives of WTO Members finds that the Appellate Body’s interpretation of a WTO provision is incorrect, what are the consequences for the panel and Appellate Body reports at issue?

- If an Appellate Body interpretation of a WTO provision were to be ‘upheld’ by the DSB, a DSB committee or any other body, would this interpretation be binding on panels and the Appellate Body in all subsequent disputes?

Questions posed to the panel on “Alternatives for appellate review and WTO dispute settlement”

- Would a more in-depth and expanded interim review of panel reports replace, at least to some extent, appellate review?
- Apart from the exceptional case, can parties be expected to agree before the initiation of panel proceedings *not* to appeal the panel report? Why would a respondent (who is statistically likely to lose the case) be willing to waive its right of appeal? Would in most cases a respondent not prefer to have a panel report that would not become legally binding as long as there is no Appellate Body to decide on an appeal (which could be forever)?
- Once appellate review under Article 17 of the DSU is no longer available, why would a respondent agree to resort to Article 25 of the DSU to allow for appellate review? Would in most cases a respondent not prefer the panel report never to become legally binding on it?
- Pursuant to Article 16.4 of the DSU, a panel report is to be adopted or not by the DSB within 60 days of its circulation unless it is appealed *pursuant Article 17 of the DSU*. Does recourse to Article 25 of the DSU set aside Article 16.4?
- Is Article 25 of the DSU sufficiently flexible for parties to agree to replicate closely the essential features of appellate review under Article 17 of the DSU? Which features cannot be replicated?
- How could the Appellate Body's exchange of views be replicated or in what other way can predictability and coherence of rulings be ensured?
- Are parties having recourse to Article 25 of the DSU for appellate review of panel reports free to deviate substantially from the features of appellate review under Article 17 of the DSU? In case of substantial deviation would Article 25 be (ab)used to ‘circumvent’ the DSU (see in this regard Award of Arbitrators *in US – Section 110(5)*, footnote 22)?
- At what time in the process should parties agree to resort to Article 25 arbitration to allow for appellate review of a panel report?
- Can compliance with an agreement to have recourse to appeal-arbitration under Article 25 be ensured/enforced?
- How should the reference in Article 25.4 to Articles 21 and 22 of the DSU be operationalized?
- Are appeal-arbitrators to be appointed *by the parties* in each case in which they agreed to have recourse to appeal-arbitration under Article 25 DSU? Who decides on the appeal-arbitrators if and when the parties cannot agree? In other words, who would be the appointing authority?
- Are appeal-arbitrators not to be appointed by the parties but to be *selected randomly* from a roster of potential appeal-arbitrators?

- Who should be included in the roster of potential appeal-arbitrators? How to ensure that the membership of this roster is broadly representative of the WTO membership? Should only current and former Appellate Body members be included in the roster of appeal-arbitrators? If not, who decides on the inclusion of other persons?
- Can a randomly composed division of appeal-arbitrators include arbitrators with the same nationality? Can it include arbitrators with the nationality of the participants/third participants?
- Arbitration awards do not require DSB adoption to become binding, while the non-appealed findings of a panel report do require DSB adoption. When and how should the panel report, as upheld, modified or reversed by the arbitration award be adopted? Can appeal-arbitrators be expected to agree to include in their award, and thus make binding, all non-appealed panel findings?
- Could/should the staff of the Appellate Body Secretariat service the arbitrators hearing and deciding appeals under Article 25 of the DSU?
- When can diplomatic dispute resolution methods, such as good offices by the Director General or others, mediation or conciliation under Article 5 of the DSU, be alternatives for adjudication by panels and the Appellate Body?
- Are the non-binding recommendations or findings of a mediator or conciliator likely to contribute more to the resolution of a dispute than an unadopted panel report?
- Would it be feasible – legally and/or politically – to negotiate among a group of ‘willing’ WTO Members a plurilateral ‘DSU’ or a ‘DSU minus N’ which would ensure among these Members the continuation of dispute settlement as it currently exists under the DSU?
- Would recourse to dispute settlement provided for under RTAs be an effective alternative for WTO dispute settlement?