

The Search for Solutions to Save the WTO Appellate Body

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At its November meeting, the WTO Dispute Settlement Body (DSB) failed, on its tenth attempt, to launch a selection process to fill a growing list of vacancies on the Appellate Body. The United States again withheld its agreement to launch the process on the grounds that the DSB must first address its systemic concerns about the practice of Appellate Body Members (ABMs) remaining in place past the end of their terms. If the deadlock continues much into 2018, the tribunal will be reduced from seven to three ABMs, at which point it will no longer be able to perform its functions properly. Consideration of appeals will grind to a halt and the dispute settlement system will be severely weakened, if not completely disabled.

With no obvious signs of progress among WTO members after ten months of discussion, proposals are starting to emerge, from outside the WTO, on ways to keep the dispute settlement system functioning. Among the most prominent are: the Appellate Body amending its own rules to dispose automatically of appeals once filed, allowing panel reports to be adopted as final; launching the selection process by majority (or, preferably, by super-qualified majority) voting in the WTO General Council; negotiating a new plurilateral dispute settlement treaty to replicate the appeal function, to take effect only once and if the Appellate Body becomes dysfunctional; setting up a temporary appeal procedure based on the existing, but largely unused, right to bilateral arbitration; and disputing parties voluntarily foregoing the right to appeal.

Few of these proposals are likely to be pursued seriously by WTO members, and some of them may even risk doing more harm than good. For instance, it seems unwise for the Appellate Body — in response to US concern about it acting beyond the scope of its legal authority — to pursue a course of unilateral action based on dubious legal authority. WTO members are loath in the best of circumstances to set a precedent for voting in the WTO, and these are far from the best circumstances to do so. The challenges of negotiating, agreeing and implementing a parallel binding dispute settlement treaty are too numerous even to contemplate. However pragmatic it might seem, the creation of temporary arbitration procedures for appeals raises a number of practical, legal and political issues that would be difficult to overcome within any timeframe that would be necessary for the initiative to have any real impact. And it would take an exceptional, and likely unprecedented, degree of enlightened self-interest for individual disputing parties to forego the right to appeal in specific disputes.

Beyond the various downsides of each of these proposed initiatives, the one thing they all have in common is that they are either designed to, or have the effect of, avoiding engagement with the US on its systemic concerns. Perhaps reflecting a degree of fatigue and frustration with the disruption caused by Trump administration's early adventures in trade policy, many seem to have concluded that the only hope now of saving the WTO dispute settlement system, and perhaps even the WTO itself, is to find a way to exclude the US from its decision-making and its operations, even if only temporarily. This is the wrong approach for at least two reasons. First, attempting to exclude the US from decision-making might actually hasten US disengagement from the multilateral system, which is not in anyone's interest. And second, despite claims that the US has not indicated what it wants, it has been clear about its concerns, some of which deserve at least a fair hearing.

At the procedural level, the disagreement involves Rule 15 of the Appellate Body's Procedures for Appellate Review, which gives the tribunal the discretion to approve extensions of the final terms of ABMs to complete appeals assigned to them. While it's true that these extensions have been granted numerous times in the past without comment or controversy in the DSB, what has changed is that the time to finalize appeals has lengthened, in some cases considerably so. This is nowhere more evident than in the current appeals in the two US-EU aircraft subsidy disputes, the Appellate Body Divisions for which both include soon-to-depart ABM Van den Bossche. Having ABMs stay on for such extended periods raises a number of legitimate concerns about the de facto size, composition and operation of the Appellate Body, issues on which the US has always had strong views.

The solution proposed by the US that the DSB take consensus decisions on a case-by-case basis to extend the term of ABMs will undoubtedly, and correctly, be rejected by other members. Such an approach would allow any member who is party to a dispute before the Appellate Body to block the extension of an ABM that it considers not sufficiently favourable to its interests in the appeal. But Rule 15 could be amended in a number of ways to address concerns about the expansion of the Appellate Body by stealth and retaining balance in its deliberations. The current discussion among members presumably revolves around these issues.

The history of the US' approach to the Appellate Body, however, suggests that this is not really about Rule 15 and ABM extensions, at least not exclusively. Even the US proposal to give itself (along with others) the opportunity to influence ABMs facing term extensions is reminiscent of how it has attempted to use ABM reappointments in the past to exert some control over the Appellate Body. Many accuse the US of trying to overturn more than a decade of anti-dumping jurisprudence unfavourable to the US, and there is no doubt some truth to this. But the US has also repeatedly expressed concerns about whether some of the approaches taken by the Appellate Body are consistent with what the US thought it was agreeing to in the DSU. It set out some of these concerns when it blocked the reappointment of former ABM Chang, and did so again as recently as the November DSB meeting on the adoption of the Appellate Body report in a US dispute against Indonesia, which it won. Indeed, for more than fifteen years, spanning three different US administrations, the US has advocated changes to the dispute settlement system designed to introduce more "member control" over WTO adjudicators, in particular the Appellate Body.

Longstanding US efforts to strike a different balance between WTO members and adjudicators — in its view, to restore the balance it originally agreed — have been consistently blocked by other members. Freedom from the risk of collective correction and oversight has served to erode slowly the degree of circumspection the Appellate Body demonstrated in its early years and has forced the US increasingly to take unilateral action to achieve such a rebalancing. Fixing Rule 15, without more, won't likely put an end to these efforts. At the same time, growing public dissatisfaction in many countries with globalization, and with it certain aspects of international adjudication, suggest that resistance to deferring too much to international institutions is not restricted to a handful of mischievous trade lawyers and lobbyists in Washington, DC. In this context, it may be time to consider an accommodation on some of the US' systemic concerns, if only to preserve the legitimacy of the WTO and its adjudicative function, and avoid a more damaging retreat from the rules-based international trade order.

Of course, the worst-case scenario is that the current standoff is indeed, as some have argued, just the opening gambit of a Trump/Lighthizer attack on the multilateral trading system in general and binding dispute settlement in particular. After all, the US did begin blocking the process to appoint a replacement for ABM Van den Bossche in February 2017, just weeks after the inauguration of the new administration. On the other hand, the absence of any formal proposal from the US about what it would need to allow the process to proceed may suggest that the end-game of the US has not yet been completely decided in Washington. If the unilateralist agenda ultimately prevails, no amount of tinkering with Rule 15 or parallel dispute settlement mechanisms will be sufficient to preserve the multilateral trading system to the satisfaction of many WTO members. In the meantime, however, members should be wary of pursuing initiatives that only risk making that outcome more likely by continuing to ignore US concerns and attempting to exclude it from multilateral decision-making.