

**Policy Analysis Focus 19-3**  
**The Crisis of the WTO:**  
**The Crux of the “Appellate Body Problem” and Potential Solutions<sup>1</sup>**

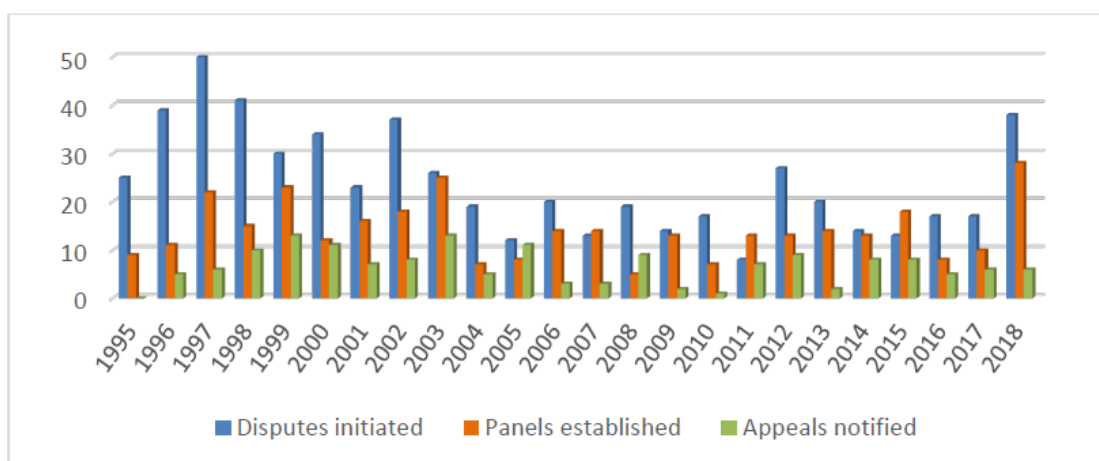
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**I. Introduction**

The WTO dispute settlement system, which was established in 1995, has been described as the organization’s most successful function. Since the inauguration of the WTO, nearly 600 consultation requests have been made; in about 60% of the cases, panels have been established (first trial), and about half of them have been brought before the Appellate Body (second trial), where decisions are made.<sup>2</sup> The WTO members have responded to these decisions with a compliance rate of about 90%.<sup>3</sup> One can say this is the most successful example of an international dispute settlement system.

**Table 1. Changes in the number of requests for consultation, the number of panels, and the number of appeals at the WTO (from the WTO website).**



The terms of two members of the seven-member Appellate Body expired on

<sup>1</sup> The views expressed in this article are the author’s own and do not represent those of GRIPS Alliance or other organizations to which the author belongs.

<sup>2</sup> Figures are from the WTO website.

<sup>3</sup> WTO figures as of November 2015.

December 10, 2019, and the number of remaining members fell to one. This is below the minimum required number of three members, so the Appellate Body has stopped functioning. Since mid-2017, the United States has refused to appoint new members as a statement of dissatisfaction with the Appellate Body, and the matter has not been resolved. This paper examines the crux of this problem and offers directions for its solution.

## II. The crux of the appellate body problem

From the perspective of the US, it should be noted that the problem of the Appellate Body is not a concern only of the Trump administration but also one that has been asserted by past administrations, regardless of party. In the language of the US, the Appellate Body is attempting to resolve ambiguous provisions by providing interpretations that would change the obligations or rights of WTO members, a practice decried as “judicial activism.”

Historically, the transition from GATT to the WTO after the Uruguay Round has greatly enhanced the capabilities of the dispute settlement system. The WTO has established a two-tier system, and a permanent Appellate Body has been introduced. WTO members have automatically adopted the reports of the Appellate Body except in cases of unanimous opposition (negative consensus), and the binding power has increased dramatically.

As a result, the dispute settlement function of the WTO was greatly strengthened. At the root of the United States’ dissatisfaction is the belief that trade rules are not being negotiated but rather established by precedents of the Appellate Body, and concern has arisen that US sovereignty and domestic law are being violated. At the 11th WTO Ministerial Meeting (MC11) in Buenos Aires in December 2017, US Trade Representative Robert Lighthizer said, “The WTO is losing its essential focus on negotiation and becoming a litigation-centered organization. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table.”<sup>4</sup>

The US, in particular, acknowledged that it had accepted the establishment of the Appellate Body as a result of the Uruguay Round negotiations on the premise that the US could maintain politically important trade remedy laws (such as the anti-dumping system). The US has criticized the Appellate Body’s numerous decisions that identify

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<sup>4</sup> “Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference, 12/11/2017,” USTR homepage.

violations of the WTO Agreements by the United States' trade remedy practices as de facto legislation that diminishes WTO members' rights.

The most symbolic case brought a practice of the US anti-dumping law before the Appellate Body: the matter of how to calculate the dumping margin (zeroing). Despite the fact that the second sentence of Article 17.6 (ii) of the Anti-Dumping Agreement (ADA) clearly concedes that cases may arise in which “a relevant provision of the Agreement admits of more than one permissible interpretation,” the Appellate Body conducted a thorough interpretation of the law under the Vienna Convention and concluded that “in matters of adjudication, there must be an end to every great debate. ... The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail.”<sup>5</sup> This, in effect and in substance, denies the significance of the second sentence of Article 17.6 (ii) of the ADA and denies US practice.

In the US, this Appellate Body ruling was taken as a typical example of the Appellate Body's narrowing, through its interpretation, the meaning of the second sentence of Article 17.6 (ii) of the ADA, which the US had won in the Uruguay Round to continue its anti-dumping practices. Therefore, the US believes that the decision violates a sentence in DSU 19.2, which says that “the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements” and which was inserted into the WTO Agreements by the US. This is the crux of the Appellate Body problem.

### III. A way forward

A number of proposals have been made in the WTO, including one by the EU and others, but they have not resolved the problem. In April 2019, Japan, together with Australia and Chile, submitted a proposal (WT/GC/W/768) that includes elements (1) confirming that the decisions of the Appellate Body set no precedent and (2) stating that the Appellate Body shall not add to or diminish the rights and obligations of WTO members through interpretation. To ensure the implementation of these resolutions, it also proposes (3) setting up regular meetings of the WTO members and the Appellate Body.

In October 2019, a resolution was proposed by the chair of the WTO Dispute Settlement Body (DSB); its content is similar to the joint proposal by Japan, Australia,

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<sup>5</sup> Appellate Body Report, US – Continued Zeroing, para. 312.

and Chile. The US concedes that some progress has been made in the chair's proposal but claims that it has yet to ensure compliance with what the WTO Agreements stipulates regarding the Appellate Body.

If the WTO hopes to maintain a dispute settlement system in which the US continues to participate, a further step is required, as seen in the discussions of the Appellate Body on the ADA, Article 17.6 (ii). If a conflict exists between the legislative, negotiated will of WTO members and the interpretation of the WTO Agreements by thoroughly applying the interpretation rules by the Vienna Convention on the Law of Treaties, it is essential to consider how to balance these concerns. Specifically, it may be necessary to provide some mechanism of resolution in cases in which the two values collide. For example, when the terms of the Agreements are found to be ambiguous as a result of past negotiations, the Appellate Body could point this out and "remand" the matter for discussion and negotiation by WTO members.<sup>6</sup> Such a mechanism could work as a safeguard and preserve the WTO dispute settlement system.

#### IV. Concluding remarks

The Appellate Body is not explicitly defined as a judicial body under the WTO Agreements (rather, it is intended to assist WTO members [DSU 11]). In addition, the WTO itself is an institution with dual characteristics, having both negotiating functions and dispute-resolution functions. Accepting this duality and providing a mechanism in the system to safeguard the collision of these two functions may enable the WTO's dispute settlement mechanism to continue to play a role as an international public good. It is hoped that the relevant discussions will be deepened and that this crisis will be overcome.

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<sup>6</sup> Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott also point out the need for "legislative remand." Payosova, Hufbauer, and Schott, "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures," Peterson Institute for International Economics, March 2018