

The Rise (and Demise?) of the WTO Appellate Body

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Thank you, Jennifer, and my thanks to the organizers and sponsors of the Georgetown Law International Trade Update, for inviting me to give this year's John D. Greenwald Memorial Lecture.

This has special meaning for me. John Greenwald and I were best friends, from the time when we -- and a handful of others who were then young and new to Washington -- had the great good luck to be "present at the creation" of modern US, and global, international trade law.

Some of those others are also involved with the Georgetown Trade Update. Alan Wolff was the inaugural Greenwald speaker two years ago. Bob Cassidy's and Chuck Levy's law firm created the Greenwald Lecture, with help from Mike Gadbow, of the Georgetown Institute of International Economic Law.

Those experiences shaped our professional lives, including, certainly, what I have to say today.

I want to speak today about my own observations and conclusions, as they evolved over eight years inside the WTO Appellate Body. Others have analyzed in depth, and debated the politics, of the Appellate Body's work over 25 years, and they will continue to do so. I'm not here to compete with their scholarship, or their political passions.

Instead, I want to describe how things looked to me as seen from the inside, and what I came to think about what I saw. I hope that sharing the experience I was privileged to have may help add another perspective to the discussions that I believe must occur if there is ever to be a successor to the WTO Appellate Body.

I'll begin with a quick review of events at the end of last year, which will be familiar to many of you but may help others to follow what I say later.

Late in the Obama Administration the US government began blocking reappointments, and in subsequent years the US blocked all new appointments, to the WTO Appellate Body. The US did that because of long-standing, fundamental, and often-stated concerns about what the Appellate Body had become and how it was operating, and also, about the unwillingness of WTO members as a group to acknowledge or address those concerns. Through attrition, by late 2019 the Appellate Body was down to three members, the minimum required for appeals. For two of us, my colleague from India, Ujal Bhatia, and me, our second and final terms were set to expire on December 10.

Facing the prospect of an Appellate Body unable to function, the WTO Director General assigned Ambassador David Walker, of New Zealand, the Chair of the WTO Dispute Settlement Body, to consult with member governments and come up with an agreed set of principles on the main points of contention. Ambassador Walker did his best, and did it well. He identified subjects of contention, and articulated broadly-stated principles to which many, but not all, could subscribe. He got as far as it was possible to get.

These "draft convergence principles" may one day be a useful starting point for real negotiations. But what they, and the discussions to arrive at them, *really* showed, was that there are no quick fixes; that the disagreements over what the appellate entity is supposed to be were too deep to be bridged quickly by generalities.

And so, at the end of 2019 the US forced a restriction of the Appellate Body's budget for 2020 in such a way that the AB will be out of funds -- and, thus, out of business -- at the end of March, when we are scheduled to finish writing the decision in an appeal involving Australia's law requiring tobacco products to be sold in plain packages.

Meanwhile, talks are taking place about supposedly interim ways for appeals to be conducted in the absence of a functioning Appellate Body. Most of these interim proposals are based on voluntary arbitration, between parties who wish to appeal a

decision by a WTO panel (the first level, in the dispute-settlement process). And -- maybe, just maybe -- early talks are beginning about more fundamental reforms, which might one day lead to creation of a successor appellate entity, and thus supersede the interim arbitral procedures by rendering them unnecessary.

That's where we are. Now for a disclaimer, and a full disclosure.

The disclaimer:

When I joined the Appellate Body, a little over eight years ago, I said I would not take a position merely because it was a position of my country's government; and conversely, I would not hesitate -- and would not be intimidated out of -- taking a position if it happened to coincide with that of the US government. I repeated that, and lived by it, over my eight years on the Appellate Body, and I still do.

Now the disclosure: of where I am coming from.

When I joined the Appellate Body in 2011, and increasingly as I saw things from the inside, I mostly agreed with what has been -- consistently for 20 years, through Democratic and Republican Administrations, long preceding the current Administration - - the overall view of the United States as to the Appellate Body's proper role as negotiated by governments and written into the WTO Dispute Settlement

Understanding. And, I mostly agreed with the US critique of the Appellate Body's departure from that proper role.

That put me increasingly in opposition to the prevailing ethos of the Appellate Body, as created and maintained over many years by the Appellate Body staff leadership, and a number of Appellate Body Members.

Although some governments -- and many staff persons inside the WTO building - quietly agreed with large parts of the US critique, for many years a common reaction of key WTO members and others was to dismiss US-led critique of the Appellate Body, and to disdain those who agreed with it.

I came to regard that disdain as indicative of an attitude that was deeply troubling:

-- First, an orthodoxy of viewpoint, about the role of the Appellate Body as a self-anointed international court, with much broader authority to over-reach the rules and create judge-made law than I thought was permitted by the WTO agreements, or intended by the negotiators who created them;

-- Second, a mindset that declined to re-examine the premises by which the Appellate Body expanded its role; and

-- Third, a kind of group-think that de-legitimized serious systemic criticisms, and those who espoused them.

Those attitudes led, I believe, more than any other cause, to the downfall of the Appellate Body: more than the blocking of new appointments, because that -- blocking of appointments -- was a reaction to the unwillingness of others to listen -- a last-ditch effort to force a dialogue that others were refusing to have.

That is my full disclosure of where I am coming from.

The title of my lecture is: "The Rise (and Demise?) of the WTO Appellate Body." The organizers and I chose that title last Fall -- when there still *was* a question mark.

Now we know.

Let's be candid. The question mark is gone. After March, when the report for the Tobacco Plain Packaging appeal is scheduled to be completed, there will no longer be a WTO Appellate Body, except on paper.

And it's not coming back any time soon or in the form it had before. If there is still any talk of re-starting selections for new Appellate Body members, it is a pipe dream that begs a question: selections for what? The Appellate Body, as we have known it, is gone and is not returning.

And the view I have come to -- as the chaos and fog of last December cleared away -- is that it is better this way.

Instead of limping along trying to pretend all was well when clearly it was not, it is better to wipe the slate clean and clear the way for an honest and constructive discussion of what is possible, considering:

-- First, differences over what the Appellate Body was supposed to be, and what any future successor is to be;

-- Second, the inability of WTO member governments either to be an effective check on the Appellate Body, or to update the rules;

-- And third, how rules designed essentially for market competition should apply to trade with WTO members having extensive government involvement in their economies, such as China.

So, I believe that rather than trying to patch together quickly something called the Appellate Body, it would be better if WTO members take a deep breath, step back, give themselves time, and reconsider the whole picture of reform and modernization of the WTO overall, including dispute-settlement, no matter how long that takes, and even if it requires interim means of dealing with appeals for an extended period.

And I believe that exercise -- dealing with the whole picture, including dispute settlement -- can only *begin* if participants are willing to listen and engage with open minds to all views, and especially to the critiques articulated by the United States (with support of others) that have been consistent for many years, and that have been explained extensively over the past 12 months.

Those are my views. How were they influenced by my eight years on the inside?

Soon after I joined the Appellate Body I was struck by several things:

First, the degree of control by the Appellate Body staff leadership, compared with the control that one would think should have been coming from Appellate Body Members;

Second, an over-emphasis on "collegiality" that shaded into peer pressure to conform, together with

Third, an excessive striving for consensus decisions coupled with a discouragement of dissents. This led to excessively long and unclear compromise reports. It also encouraged over-reach, gap filling, and advisory opinions, as way of accommodating conflicting views.



Fourth, a sense of infallibility -- "it's right because we say it" -- and of entitlement, to stretch the words of agreed texts, and to stretch decisions beyond merely resolving a particular disputes, so as to create a body of jurisprudence, or to head off future disputes, matters that were beyond the Appellate Body's mandate, I believed.

Fifth, an undue adherence to precedent -- and don't let anyone tell you that was not the case -- precedent not only as to outcomes, but also as to reasoning, definitions, and obiter dicta. What this did was to bake in mistakes. And it made it more important to know the past than to think anew. It empowered those who best knew the past, such as staffs, and it incentivized litigators to argue the past, at the expense to all of openly considering whether the past should be reconsidered.

Together, these characteristics amounted to the Appellate Body acting like a court that was not accountable to anyone.

Not accountable to WTO member governments, because they had no means of correcting appellate decisions, and they could not agree on amendments to the rules.

Not accountable to the Dispute Settlement Body, the committee-of-the-whole WTO membership, because Appellate Body decisions are automatically accepted unless a majority opposes them, and that turned the Dispute Settlement Body into a rubber stamp for Appellate Body decisions.

These flaws are not fixable by ticking boxes, by coaxing critics to "just tell us what you want," as if it were merely a matter of horse-trading over a few procedural items. They grew over decades and they became an integral part of what the appellate system was, and of the US-led critique.

And the failure to respect that critique, or to engage genuinely with it, is, I believe, what led the US to bring down the Appellate Body.

Why do I think that?

First, there is the history, intentions, structure, and rules of the Appellate Body.

The *negotiating history* strongly indicates that it was intended not as an international court, but as a check on occasional egregious mistakes by panels. It was intentionally not called a court. Members of the Appellate Body were not called "judges." It was not authorized to instruct losing governments to comply; it was to make recommendations so as to assist the Dispute Settlement Body to resolve disputes.

The *structure* of the Appellate Body supports this view: members were to be part time, were not required or encouraged to live in Geneva, and were to come to town only for occasional appeals. The Appellate Body was expected to resolve appeals in 60 days, and was *required* to do so within 90 days. The 90-day deadline, by itself -- far

from being merely procedural -- says a lot about the nature of decisions and reports that were expected by the drafters of the WTO Dispute Settlement Understanding.

The *rules* governing the Appellate Body also support the narrower view of the Appellate Body's role: The AB was directed -- in two different places in the Dispute Settlement Understanding -- not to add to or diminish the rights and obligations of member governments set forth in the WTO Agreements. The AB was to consider only "legal" issues. And, the AB was only to "uphold, reverse, or modify" panel reports.

Yet the Appellate Body developed largely in a different direction. And repeated, thoughtful critiques of the Appellate Body's direction, by some of the WTO's main architects, were brushed aside and ignored until it was too late. And, I believe, is what the breaking point that was reached last December was all about.

I don't believe this is fixable any time soon. It is not fixable by tweaking the draft convergence principles and restarting selections. The problems go to the basic question of whether there can be universal agreement on a WTO appellate entity.

What can I suggest? Only a few thoughts.

First, make sure the persons tasked with making the decisions -- the arbitrators, the deciders, the successors to Appellate Body Members -- control the consideration of appeals from beginning to end. Prohibit anyone other than the team -- deciders, and

staff working directly on a case -- from discussing the case, either in meetings, or in unofficial side-bar chats, unless authorized by the deciders to do so. In others words, no partisan participation in team discussions, and no private lobbying of individual deciders, by staff leadership not part of the team on the case.

Second, stop believing that following the steps for interpretation in the Vienna Convention on the Law of Treaties leads to a single truth through reason. I heard the thought expressed many times, many ways: There will rarely, if ever, be two permissible interpretations: If we haven't arrived at a single, correct interpretation, we haven't taken our analysis far enough.

In a word: nonsense.

Each of the initial steps for treaty interpretation set out in Article 31 of the Vienna Convention -- plain meaning, in context, in light of object and purpose -- usually calls for a choice: which "plain meaning?" What context? and what object and purpose: the line? the subparagraph? the agreement? the WTO Agreements?

Belief in a single, correct interpretation, and seeking it through extended analyses, encouraged gap filling and overreach. It made the Appellate body strain to look for that "one correct" interpretation instead of asking whether the panel made a serious error, whether the challenged measure was prohibited by the rules as written.

Third, banish most Article 11 claims on appeal. Article 11 says panels should objectively assess the facts. In recent years appellate litigators almost routinely attacked fact-finding by panels as "not objective," and too often the Appellate Body indulged them by spending many pages analyzing panels' fact-finding. Except possibly in egregious circumstances, panels' fact finding is outside the role of the Appellate Body

Fourth, explicitly recognize that the question before the dispute settlement system is whether a challenged measure is prohibited by the rules as written -- not whether a different outcome might be preferable to the deciders, or whether the deciders think the respondent government should be required to tweak the challenged measure to improve it. I heard it said many times, as a justification for finding fault with a challenged domestic law, "we're only making a narrow finding." There is no such thing as a narrow finding when a domestic authority is being required to change its law.

Fifth, carve out separate treatment for trade remedies -- especially appeals of national actions to address dumped or unfairly subsidized imports. They deal with the nitty-gritty of trade competition: fairness of prices. They usually have a direct impact -- one way or the other -- on manufacturing jobs and thus on families, communities, and their political representatives. Unlike almost all other subjects that come before the WTO dispute-settlement system, most national trade remedy decisions have resulted from extensive, transparent administrative litigation, including the possibility of judicial review, in the home country long before they get to the WTO. And, procedures for

maintaining confidence in the fairness of import competition are essential to maintaining open international trade policies.

By some accounts trade remedy cases have comprised 45 percent of all WTO cases. In more than half of those the US has been the respondent. And in more than 90 percent of those the decisions, usually by Appellate Body, often overruling panels, the decisions have gone against the US trade remedy actions. In doing so the Appellate Body has, essentially, read out of the Anti-Dumping Agreement an explicit rule that says if there are two permissible interpretations -- the one by the respondent, which is under challenge, and another one being argued by the complainant (or perceived by the Appellate Body) -- the AB is required to defer to one chosen the national authority.

In other words, the question is not what is the ideal interpretation, it is whether the challenged action is permissible, that is, is not prohibited.

These things happened, I believe, in part because many Appellate Body Members -- and the staff leadership -- lacked practical familiarity with trade remedies or appreciation for their role in the WTO rules and system.

So, I endorse suggestions that have been made by others to carve out trade remedy cases for special treatment, perhaps by a panel or committee comprised of persons having relevant experience.

This list could go on, but it's time to close.

Whatever else may be said, the Appellate Body was a historic and well-intentioned innovation: an experiment with the enforceable settlement of disputes between sovereign governments, involving the immediately practical and politically sensitive matter of international economic competition, under a system of agreed rules.

That was quite an achievement, by any standard. But it should not be surprising that this experiment had flaws, became controversial, and ultimately could not be sustained without a thorough reconsideration -- which it never received. Now, whether such a system is repeatable, in a different form, remains to be seen.

In the meantime, I hope progress will keep going on interim appellate arbitrations, whether ad hoc or under agreed rules. They may have to last a long time. They may even be the future of the WTO appellate system.

And so, I hope the negotiators don't rush to replicate the Appellate Body, or they will risk repeating the flaws that doomed it.

Thank you again for inviting me to be your speaker.

