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Senate Committee on Finance
Attn: Editorial and Document Section
Rm. SD-219
Dirksen Senate Office Bldg.
Washington, DC 20510-6200

WTO Reform: Making Global Rules Work for Global Challenges, July 29, 2020

This statement is submitted for the record in the above identified hearing. My name is Terence P. Stewart. I practiced law in Washington, D.C. for roughly forty years, focused on trade remedy and GATT/WTO matters. While I retired last August, I have written extensively on the challenges posed to the United States by the WTO dispute settlement system and currently author a blog entitled, Current Thoughts on Trade. The link to the blog is https://currentthoughtsontrade.com. My address is 5200 Chamberlin Avenue, Chevy Chase, MD 20815.

When the World Trade Organization came into existence in 1995, many in Congress were concerned about potential loss of sovereignty if the WTO dispute settlement system created rights or obligations that were not contained in the WTO agreements. As early as the Trade Act of 2002, Congress insisted on action by the Administration to address problems in trade remedy cases where the WTO Appellate Body was perceived to create obligations that the U.S. had never agreed to.

Blockage of filling vacancies in the WTO Appellate Body by the United States has led to WTO Members, after nearly twenty years of U.S. concerns, finally recognizing the problems of concern to the United States (and some other countries). While proposals have been put forward by other countries at the WTO to address many of the procedural issues raised by the U.S., there has not been agreement by major trading partners that gap filling and eliminating discretion where agreements have ambiguity must be addressed. Similarly, to achieve the rebalancing of rights and obligations that were agreed during the Uruguay Round, countries must come to grip with how to correct prior decisions that resulted in a change of rights and obligations actually negotiated. Finally, on the procedural issues, the U.S. has concerns that fixes proposed won’t actually provide certainty that the Appellate Body will change its practices. Thus, parties need to consider how to make the provisions of the Dispute Settlement Understanding enforceable by the WTO Members.

I have in several blog posts reviewed efforts by the WTO to address U.S. concerns and have provided thoughts on how the proposals could be made enforceable and how the core issues of overreach can be corrected both going forward and in the context of prior decisions. I provide the most recent post below, https://currentthoughtsontrade.com/2020/07/12/wtos-appellate-body-reform-revisiting-thoughts-on-how-to-address-u-s-concerns/.
WTO Appellate Body Reform – Revisiting Thoughts on How to Address U.S. Concerns

In a November 4, 2019 post, I reviewed a draft General Council Decision that had been presented by Amb. David Walker to the General Council on addressing some of the concerns presented over the last several years by the United States with the functioning of the WTO's Appellate Body. The United States has been blocking the process for selecting new Appellate Body members until its longstanding concerns are addressed. See WTO's Appellate Body Reform – The Draft General Council Decision on Functioning of the Appellate Body, https://currentthoughtsontrade.com/2019/11/04/wtos-appellate-body-reform-the-draft-general-council-decision-on-functioning-of-the-appellate-body/.

The Appellate Body ceased to have at least three members on December 11, 2019 at which point it could not hear new appeals. Moreover, only appeals that had gone through hearings were handled after December 10, with the last report released last month.


While a number of WTO Members have joined together in supporting an interim arbitration approach, there has been no apparent ongoing effort to find a resolution to the continuing impasse. Indeed, the interim arbitration approach adopted by the EU, Canada, China and others in the view of the U.S. extends and in some cases exacerbates the longstanding concerns the U.S. has had with the Appellate Body and exceeds the proper role of arbitration.

There have been any number of proposals by academics, former government employees and others on what is needed to reform the Appellate Body to deal with U.S. concerns. The National Foreign Trade Council commissioned a multi-part report on Resolving the WTO Appellate Body Crisis from Bruce Hirsch, a former USTR official with significant responsibilities for dispute settlement matters. See Resolving the WTO Appellate Body Crisis, Proposals on Overreach (December 2019), http://www.nftc.org/default/trade/WTO/Resolving%20the%20WTO%20Appellate%20Body%20Crisis%20Proposals%20on%20Overreach.pdf; Resolving the WTO Appellate Body Crisis Volume
2, Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators (June 2020), http://www.nftc.org/default/Trade%20Policy/WTO_Issues/Resolving%20the%20WTO%20AB%20Crisis%20vol2%2006042020.pdf. His two papers make an important contribution to those interested in finding a forward path on restoring a second stage to the WTO's dispute settlement system.

Specifically, Mr. Hirsch's two papers address a number of important issues with suggestions presented for possible approaches to help move the WTO dispute settlement system back to what was agreed to in the Dispute Settlement Understanding which became operative in 1995 when the WTO was created.

The NFTC press releases on the two papers provides the following summary of proposals in each paper. From the December 17, 2019 press release:

1. Enforce the 90-day time frame for appeals;
2. Prohibit advisory opinions, and further elaborate the circumstances constituting advisory opinions;
3. Clarify that DSU Article 3.2 does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage;
4. Clarify that customary rules of interpretation of public international law do not justify gap-filling and expanding or narrowing the reach of WTO provisions;
5. Affirm that Article 17.6(ii) of the Antidumping Agreement must be given meaning, by clarifying that the provision reflects the principle just described, that WTO adjudicators may not expand or narrow the meaning of broad provisions and general terms; and
6. Direct the Appellate Body to reject party arguments that expand or narrow the reach of agreement provisions or fill gaps in agreements.

From the June 5, 2020 press release:

Specifically, the paper outlines 3 proposals that will help "reflect the goal of making the Appellate Body operate as Members expected in 1995:"

1. Clarify that Appellate Body reports do not create binding precedent;
2. Replace the Appellate Body secretariat with clerks seconded from the WTO secretariat; and

The two papers are an effort to help WTO Members focus on moving forward on bringing the Appellate Body's role in the Dispute Settlement system back to its intended limited function.
The first paper which deals with the critical issue of overreach also takes in issues such as advisory opinions and adherence to the timeline for completing appeals (absent party consent) which Mr. Hirsch views as often interrelated. If there is a problem with the first paper it is in not addressing how to restore balance to WTO Members by correcting prior cases where overreach occurred. This has been an issue of some importance to the United States and is critical in a number of agreements where there has been a pattern of decisions changing rights and obligations.

In a prior post from November 12, I reviewed the large number of WTO Members who have expressed concern about the Appellate Body creating rights or obligations not contained in the WTO Agreements. See Background Materials on WTO Appellate Body Reform Challenges – The Critical Issue of “Overreach,” https://currentthoughtsontrade.com/2019/11/12/background-materials-on-wto-appellate-body-reform-challenges-the-critical-issue-of-overreach/.

The second paper by Mr. Hirsch addresses a number of important issues although only the issue of precedent is on the list of concerns raised by the United States. However, Mr. Hirsch makes a strong case that the structure of the Appellate Body Secretariat has likely contributed to the development of problematic issues such as precedent, and his recommendations make a lot of sense and would return control of the Appellate Body process to Appellate Body members.

Mr. Hirsch notes that there is a lack of trust amongst WTO Members, which certainly reflects the current environment. His proposals are all focused on what he perceives to be a view with which all Members should be able to agree -- reform the Appellate Body to ensure it performs the limited role articulated in the Dispute Settlement Understanding. I agree with both his observation on the lack of trust (and the need to develop trust through actions) and what the objective of reform can and should be. I differ only in what type of actions Members can take to ensure compliance by the Appellate Body with the limited role it is to play in dispute settlement.

His two papers do not suggest that all issues raised by the U.S. have been addressed in his papers (not clear if there are additional papers yet to be released). Nor is it the intention of his papers to suggest language amendments to the draft General Council Decision put forward by the then facilitator to the General Council, Amb. David Walker (NZ).

As an aid to readers, I have copied my November 4, 2019 recommended modifications to the draft General Council Decision below. The intention of my edits to the draft Decision was to provide changes reflecting the underlying purpose of the DSU that would be enforceable by the parties to disputes and to suggest an approach to deal with overreach that would deal with the past cases and not simply the future disputes. As one of the objectives of the U.S. is restoring the balance that was agreed to in the negotiated texts, I believe any resolution of the Appellate Body impasse has to identify a path forward on past decisions. The next paragraph and the modified draft General Council Decision are copied verbatim from my November 4th post. There are
obviously many excellent ideas in papers from experts like Mr. Hirsch. My suggestions may add some flavor or different options on a number of issues that need to be addressed.

Excerpt from November 4, 2019 Post

What follows is my personal effort to identify some consequences of actions that have long concerned the United States. Obviously, only the U.S. can determine what will address its concerns. But possibly some of the following suggestions, if part of any final package, could address some of the ongoing and longstanding U.S. concerns. The text, other than what is both in bold and underlined, is the draft General Council Decision that is contained as an Annex to Amb. Walker’s October 15, 2019 report to the General Council. Job/GC/222. Only one number has been deleted – “6” (60 days has been changed to 90 days under the first topic).

DRAFT GENERAL COUNCIL DECISION ON FUNCTIONING OF THE APPELLATE BODY

The General Council,

Conducting the function of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement");

Having regard to paragraph 1 of Article IX of the WTO Agreement;

Mindful of the work undertaken in the Informal Process of Solution-Focused Discussion on Matters Related to the Functioning of the Appellate Body, under the auspices of the General Council;

Recognizing the central importance of a properly functioning dispute settlement system in the rules-based multilateral trading system, which serves to preserve the rights and obligations of Members under the WTO Agreement and ensures that rules are enforceable;

Desiring to enhance the functioning of that system consistent with the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU");

Decides as follows:

Transitional rules for outgoing Appellate Body members
Only WTO Members may appoint members of the Appellate Body.

The Dispute Settlement Body (the "DSB") has the explicit authority, and responsibility, to determine membership of the Appellate Body and is obligated to fill vacancies as they arise.

To assist Members in discharging this responsibility, the selection process to replace outgoing Appellate Body members shall be automatically launched 180 days before the expiry of their term in office. Such selection process shall follow past practice.

If a vacancy arises before the regular expiry of an Appellate Body member's mandate, or as a result of any other situation, the Chair of the DSB shall immediately launch the selection process with a view to filling that vacancy as soon as possible.

Appellate Body members nearing the end of their terms may be assigned to a new division up until 90 days before the expiry of their term.

An Appellate Body member so assigned may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term if completing such appeal is consistent with Article 17.5 of the DSU or any mutually agreed extension by the parties.

90 Days

Consistent with Article 17.5 of the DSU, the Appellate Body is obligated to issue its report no later than 90 days from the date a party to the dispute notifies its intention to appeal.

In cases of unusual complexity or periods of numerous appeals, the parties may agree with the Appellate Body to extend the time-frame for issuance of the Appellate Body report beyond 90 days. Any such agreement will be notified to the DSB by the parties and the Chair of the Appellate Body.

Failure to complete the appeal within 90 days of the notification of intent to appeal, or such other time as the parties agree to, shall result in the appeal terminating with no decision. In such situations the Dispute Settlement Body will consider adoption of the panel report but rights of the complaining party under Articles 21.6 and 22 of the DSU shall not apply.

The Appellate Body will supply the Dispute Settlement Body with a description of steps taken by the Division to complete any such appeal within 90 days and any modifications to
Appellate Body procedures and practice that will be pursued by the Appellate Body to ensure such failure to comply with the 90 day rule is not repeated.

Such agreement may also be made in instances of force majeure.

Municipal Law

The 'meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal. Where the Appellate Body nonetheless addresses the meaning of municipal law in an Appellate Body report, either party may request that the paragraphs of the Appellate Body report dealing with such issue or issues and any conclusions drawn therefrom be stricken, and the Appellate Body will reissue the decision without such paragraphs forthwith. Compliance with the 90 day requirement will be measured from the date of the revised decision.

The DSU does not permit the Appellate Body to engage in a 'de novo' review or to 'complete the analysis' of the facts of a dispute.

Consistent with Article 17.6 of the DSU, it is incumbent upon Members engaged in appellate proceedings to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a de facto 'de novo' review. Where Article 11 is invoked by a Member seeking review on appeal of whether the panel failed to make an objective assessment, any other party may file an objection. The Appellate Body will consider the claim only in extraordinary circumstances of facial bias in the assessment by the panel. A Member raising such a claim that is dismissed will be assessed costs to the Member who filed an objection.

Advisory Opinions and Appellate Body Economy in Decisions

Issues that have not been raised by either party may not be ruled or decided upon by the Appellate Body. Where issues not raised by either party are addressed in the Appellate Body report, the addressing of such issues constitutes the provision of an advisory opinion and is inconsistent with DSU Article 17.12. Either party may request that the paragraphs of the Appellate Body report dealing with such issue or issues and any conclusion based thereon be stricken, and the Appellate Body will reissue the decision without such paragraphs forthwith. Compliance with the 90 day requirement will be measured from the date of the revised decision.

Consistent with Article 3.4 of the DSU, the Appellate Body shall address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to assist the DSB in making
the recommendations or in giving the ruling provided for in the covered agreements in order to resolve the dispute. The Appellate Body’s indicating that other issues raised need not be addressed to resolve the dispute satisfies the requirements of DSU Article 17.12.

Precedent

Precedent is not created through WTO dispute settlement proceedings.

Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.

Panels and the Appellate Body should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them. The Appellate Body shall not reverse a panel decision on any issue solely on the basis of the panel not conforming to a prior Appellate Body report where the panel has identified different factual and/or legal issues.

'Overreach'

As provided in Articles 3.2 and 19.2 of the DSU, findings and recommendations of Panels and the Appellate Body and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. In a large number of Panel and Appellate Body reports, one or more parties and/or third parties have raised concerns about the Panel or Appellate Body adding to or diminishing the rights and obligations contrary to Articles 3.2 or 19.2 of the DSU.

To clarify situations where rights and obligations are being added to or diminished, Panels and the Appellate Body will not fill gaps in agreements, construe silence to indicate obligations or construe ambiguities in language of existing agreements to require a particular construction. Any such actions by a Panel or by the Appellate Body is inconsistent with Articles 3.2 and 19.2 of the DSU.

Any party to an Appellate Body report that raised at the DSB meeting considering adoption of the Appellate Body report concerns about the creation of rights or obligations inconsistent with Articles 3.2 or 19.2, will have 90 days from the adoption of this General Council decision to request a review of the Appellate Body decision. Such request will be for the limited purpose of having the Appellate Body determine whether on the specific issues raised where the party complained of creating rights or obligations the clarification of meaning provided in this General Council decision would result in a changed decision on the particular issue. The Appellate Body will render decisions on all such requests within
90 days and will accept no additional briefing or argument from parties. Where the report would have been different on one or more particular issues, it is sufficient for the Appellate Body to so indicate. Where the same decision on an issue would have been made, the Appellate Body shall provide a detailed explanation.

Panels and the Appellate Body shall interpret provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("antidumping agreement") in accordance with Article 17.6(ii) of that Agreement. Any party to an Appellate Body report that raised at the DSB meeting considering adoption of the Appellate Body report that Article 17.6(ii) was not applied in interpreting the antidumping agreement, will have 90 days from the adoption of this General Council decision to request a review of the Appellate Body decision. Such a request will be for the limited purpose of having the Appellate Body determine whether a different outcome on one or more issues would have resulted had the Appellate Body applied Article 17.6(ii) of the antidumping agreement. The Appellate Body will render decisions on all such requests within 90 days and will accept no additional briefing or argument from parties. Where the report would have been different on one or more particular issues, it is sufficient for the Appellate Body to so indicate. Where the same decision on an issue would have been made, the Appellate Body shall provide a detailed explanation.

Regular dialogue between the DSB and the Appellate Body

The DSB, in consultation with the Appellate Body, will establish a mechanism for regular dialogue between WTO Members and the Appellate Body where Members can express their views on issues, including in relation to implementation of this Decision, in a manner unrelated to the adoption of particular reports. Such mechanism will be in the form of an informal meeting, at least once a year, hosted by the Chair of the DSB.

The Appellate Body Secretariat will prepare and circulate to the DSB at least 60 days in advance of such a meeting a document which reviews:

(a) for any Appellate Body member whose term is or has expired in the last 12 months, assignments to appeals within 90 days of the end of the term and any appeals on which the AB member continued to work after his term expired and whether such continuation was authorized by the parties to the appeal;

(b) the time from notification of intent to file an appeal to the AB decision in each case filed in the last twelve months (and for the first such report and any subsequent reports where appeals are not current with the 90 day requirement) to an AB report (or revised report where paragraphs are requested to be deleted as addressing issues not raised by any party) and copies of any write-ups filed where reports were not filed within 90 days;
(c) a list of AB reports where paragraphs were requested striken and time from request to rerelease of AB report;

(d) a list of requests for review in appeals pursuant to Article 11 of the DSU of panel decisions as not being an objective assessment, how each request was resolved, and for such claims that were not properly filed whether costs were paid by the party raising the issue;

(e) the number of AB reports where parties requested review based on statements made at prior DSB meetings that rights or obligations were being added to or diminished and/or that Article 17.6(ii) of the antidumping agreement was not applied or was applied inappropriately, timing of resolution by the Appellate Body and the number of issues where a different decision was rendered.

Where the Appellate Body has been unable to comply with the requirements of the DSU as clarified by this General Council Decision, it is expected that the Appellate Body Chairman will present at the informal meeting the action plan being pursued by the Appellate Body to achieve full compliance with the terms of the DSU and this Decision.

To safeguard the independence and impartiality of the Appellate Body, clear ground rules will be provided to ensure that at no point should there be any discussion of ongoing disputes or any member of the Appellate Body other than as it relates to compliance with this General Council Decision.

Conclusion

There are many reforms needed to bring the WTO into the 21st century and permit the organization’s rules to address the trade distorting practices of all Members. The dysfunction of the dispute settlement system is but one area where reform is urgently needed.

Sincerely,

Terence P. Stewart