



TRADE, INVESTMENT AND GLOBALIZATION

Reforming the WTO AB: Short-term and Mid-term Options for DSU Reform, and Alternative Approaches in a Worst Case Scenario

Lead authors

Tsuyoshi Kawase (Sophia University, and Research
Institute of Economy, Trade and Industry)

Junji Nakagawa (University of Tokyo)

Hugo Perezcano Diaz (Centre for International
Governance Innovation)

Keith William Cameron Wilson (University of
Adelaide)

Manjiao Chi (University of International Business and
Economics)

Carlos Coelho (BRICS Policy Center)
Peter Draper (University of Adelaide)
Christopher Findlay (Australian Pacific Economic
Cooperation Council)

March 15, 2019

Abstract

WTO Members have failed to agree to replace the members of the WTO Appellate Body (AB) whose terms have expired, due to criticisms from certain WTO Members regarding the procedures and functioning of the AB. This Policy Brief explores possible options to reconcile these criticisms, including both short-term and mid-term options. It also explores a legal course of action for WTO Members if these options were not taken.

Challenge

No one doubts that the WTO dispute settlement mechanism (DSM), which is embodied mainly in Understanding on rules and procedures governing the settlement of disputes (DSU), has provided one of the most successful international dispute settlement fora. WTO Members, however, now doubt this “crown jewel” of the WTO can continue to work as efficiently and effectively as ever, due to serious difficulties it faces currently. These include:

1. Serious delays in appellate review

As its caseload has grown, the AB has increasingly been unable to observe the 90-day deadline to issue its reports (DSU art.17.5). This tendency has been observed since 2011. Out of the 40 completed appellate reviews since then, the AB circulated its report in time only in 5 cases. Appellate review has taken 117.9 days on average,¹ and this figure increases to 180.2 days if cases only after 2011 are taken into account.

Multiple factors cause this delay in addition to the increased caseload. These include increased complexity of certain cases, litigation strategies that have resulted in longer and more complex legal arguments in the appellate review, and an understaffed Secretariat.

2. Legitimacy crisis of the AB

Certain Members have severely criticized the AB for engaging in *ultra vires decision-making* (“overreaching”), adding to or diminishing the rights and obligations of the Members under the WTO Agreement, contrary to its mandate in the DSU (DSU art.3.2). This allegedly amounts to judicial law-making, even though the AB faithfully, in its view, observes customary rules of interpretation

¹ Average days between notice of appeal and AB Report Circulation. Source: WorldTradeLaw.net (<http://worldtradelaw.net/>).

of public international law (DSU art.3.2).²

In one case, the AB was also accused of a lengthy *obiter dictum*, which is allegedly an “advisory opinion” beyond the AB’s mandate.³ The AB also inevitably discusses issues unnecessary for the resolution of a specific dispute, since the DSU art.17.12 requires it to address every issue raised by an appellant and/or an appellee. Another cause of concern for certain WTO members is that these interpretations and judicial opinions are treated as precedent to be generally followed in subsequent cases.⁴

The so-called “Rule 15 issue”⁵ is another reason for the legitimacy crisis of the AB. Certain Members believe outgoing AB members should not, without authorization by the Dispute Settlement Body (DSB), continue to serve on appeals that they were assigned to before the expiration of their term of appointment.⁶

All these concerns have served to undermine the legitimacy of the AB.

3. Impasse over appointment of the AB members

The two sets of concerns above have resulted in a disagreement among WTO Members over filling vacancies on the AB. Mr. Shree Baboo Chekitan Servansing, who completed his first term in September 2018, was the fourth member to have left the AB without a replacement appointment being made.

² 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program 22–24 (2018).

³ DSB, Minutes of Meeting Held in the Centre William Rappard on 23 May 2016, ¶6.4, WT/DSB/M/379 (Aug. 29, 2016). See also AB Report, *Argentina - Measures Relating to Trade in Goods and Services*, ¶¶ 6.85 ff., WT/DS453/AB/R (Apr. 14, 2016).

⁴ 2018 Trade Policy Agenda, *supra* note 2, at 28.

⁵ Rule 15 of Working Procedures for Appellate Review (WT/AB/WP/6, Aug. 16, 2010) provides as following: “A person who ceases to be a Member of the AB may, with the authorization of the AB and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the AB.”

⁶ 2018 Trade Policy Agenda, *supra* note 2, at 25–26.

Now the AB has only three members, which is the minimum that the DSU requires to compose a division to review a case. The terms of two of them, Messrs. Thomas Graham and Ujal Singh Bhatia, will expire on December 11, 2019, which means the AB is at the brink of effectively becoming defunct. Outstanding cases are also increasing.

At the same time, we observe that recent trends towards protectionism and unilateralism have resulted in an increasing number of disputes being brought to the WTO. 39 complaints were brought before the DSB in 2018. This number is the 3rd largest since the establishment of the WTO. In addition to these new disputes, 14 appeals were currently pending as of March 1, 2019.

Proposal

The authors appreciate the contribution that the AB has made to promoting a more transparent, predictable and stable world trade order over the past 24 years. The authors believe that it is essential to ensure judicial independence of the AB, and that political interference by WTO Members should be avoided in addressing DSU reforms.

At the same time, the authors believe that it is imperative to strike an appropriate balance between judicial independence of the AB and proper policy space of Members through legitimate reform proposals. While the authors by no means take the package of criticisms of the AB as a given, they are nevertheless sympathetic to a range of concerns expressed, primarily though not exclusively by the US.

The authors urge, as a priority at the forthcoming G20 Summit in Osaka, that G20 leaders take the first step towards the ultimate goal of achieving institutional and procedural reform of the WTO DSM. For this purpose, the authors would like to present several policy options in this Policy Brief in relation to: (1) Institutional and Procedural Reform of the DSU; and (2) Alternative Approaches, if the deadlock remains.

1. Institutional and Procedural Reform of the DSU

Background

Despite cynicism and pessimism regarding prospects for drastic reform of the WTO DSM, it is imperative for WTO Members, including all the G20 economies, to make strenuous and good faith efforts to normalize the system. Indeed, WTO Members may find themselves in a worst case scenario where, faced with measures that have been found by a panel to be in breach of the WTO agreements and unable to pursue an appeal, they feel compelled to counter such measures if they are not withdrawn. However, such a situation would seriously undermine the WTO and its dispute settlement regime. WTO Members should step-up and face the necessity of institutional and procedural reforms of the WTO DSM.

Many WTO specialists have published proposals for possible solutions since the AB crisis emerged.⁷ Some WTO members, including Australia, China, Chinese Taipei, EU, and Honduras also submitted communications regarding potential DSU reforms and solutions to the current AB crisis. The authors believe that these include a number of useful suggestions.

Among these proposals, a communication submitted last December by the EU and eleven co-sponsors including China, India, and four other G20 economies⁸ is a good basis for our discussion. The communication includes; (i) transitional rules for outgoing AB members, (ii) the issue of 90-day deadline, (iii) the meaning of municipal law as an issue of fact, (iv) findings unnecessary for the resolution of the dispute, and (v) the issue of precedent. Items (i) through (iv), in particular, seem sound and relatively feasible due to their technical nature, and fit for “early harvest”.

All these proposed amendments address aspects of the “overreach” concerns, and should generally find broad acceptance among WTO Members including

⁷ See the items in the References.

⁸ Communication from The European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WT/GC/W/752 (Nov. 26, 2018).

G20 economies. The communications by other WTO members largely follow this classification of issues and supplement the proposals by the EU and the co-sponsors, which we will, therefore, review one by one below.

DSU Reforms that are feasible in the short to mid-term

(i) Transitional rules for outgoing AB members

The EU and co-sponsors suggest an amendment to the DSU by inserting a rule that “an outgoing AB member shall complete the disposition of a pending appeal in which a hearing has already taken place during that member's term.” The authors support the basic idea.

Alternatively, the authors would suggest a simpler approach without amendment of the DSU. Rule 15 of the Working Procedure of Appellate Review triggered the controversy, and a serious concern regarding the rule was that an outgoing member continues to serve on a pending appeal without authorization by the DSB. Therefore, the authors propose to replace the phrase “with the authorization of the AB and upon notification to the DSB” in Rule 15 with “with the authorization of the DSB”.

Regarding this proposal, some might be concerned with a risk that, in some cases, the DSB might not reach “consensus” on continuation of service by an outgoing member. As Honduras proposes, WTO Members need to discuss the applicability of a negative consensus approach, or the consensus minus the parties to the pending appeal(s).⁹

On the other hand, the authors fully understand the concern of certain Members that it is undesirable and inappropriate to authorize unfettered continuation of service after the expiration of the term of an outgoing member. As Honduras proposes, in order to minimize the outgoing member's continued service and avoid last minute assignment of pending appeals, WTO Members

⁹ Fostering a Discussion on the Functioning of the AB: Communication from Honduras, WT/GC/W/759 (Jan. 21, 2019).

could decide, for example, “[a]n AB member shall be able to continue to serve on cases where the oral hearing has occurred or started”, or “[n]o member of the AB shall be assigned to a new appeal later than 60 days before the final date of his/her appointment.”¹⁰

(ii) The issue of 90-day deadline

The essence of the EU and co-sponsors’ proposal on this issue is to allow the AB to exceed the 90-day deadline with consent of the parties to the appeal. If the parties do not reach consensus on the extension, according to the proposal, the AB can exercise moderate discretion to propose to the parties to limit the scope of their appeals, or take appropriate measures to reduce the length of its report. Also, the EU and co-sponsors attempt to limit the burden of translating the report before the 90-day deadline.¹¹

The authors believe that this proposal, together with detailed options presented by Honduras to ensure efficiency of the appellate review,¹² is a useful starter for discussions. DSU art.3.3 provides, “[t]he prompt settlement...is essential to the effective functioning of the WTO”. From this perspective, meeting the 90-day deadline is imperative for the AB. WTO Members should contrive an effective method for the timeline management.

At the same time, we should be careful in imposing limitations on the scope of the appeals, opportunities for disputing parties’ written submissions and oral hearings, and the volume of the report. Dispute settlement in the WTO must not only be “prompt”, but also be “positive” (DSU art.3.7), and the AB reports assist in clarifying the meanings of existing provisions of the WTO Agreement (DSU art.3.2). An excessive stress on brevity might harm these important aims and functions of both the AB and the DSM. The authors believe that it is essential for the WTO Members, in addressing the issue of the 90-day deadline, to strike a proper balance between “prompt settlement” and “positive solution” of

¹⁰ *Id.*

¹¹ WT/GC/W/752, *supra* note 88.

¹² WT/GC/W/759, *supra* note 9.

disputes.

In addition, the authors feel it necessary to address this issue from a broader perspective. The length of each appellate review is a function of the workload of the specific case and resources available in the review. Taking into consideration the number of AB members and the legal officers in the Secretariat, the members' limited availability due to their part-time status, and increasing factual/legal complexity in recent appeal cases, it might not be practical to complete appellate review within the 90-day deadline. Setting a longer deadline, e.g., 120 days,¹³ or increasing human resources in the Secretariat could be more a realistic solution.

(iii) The meaning of municipal law as an issue of fact

The proposal by the EU and co-sponsors inserts in DSU art. 17.6 a new footnote to the effect that “issues of law” does not include the panel findings regarding the meaning of municipal measures of a party, but does include those regarding their legal characterization under the covered agreement, which is subject to the appellate review. This draft footnote codifies the interpretation of DSU art. 17.6 developed by the AB in its precedents.¹⁴ The authors agree with that approach.

(iv) Findings Unnecessary for the Resolution of the Dispute

DSU art.17.12 requires the AB to address “each of the issues” raised before it. It is a common understanding that this paragraph does not allow the AB to exercise so-called “judicial economy”, i.e., abstention from reviewing the issues

¹³ *Id.*

¹⁴ AB Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 177–178, WT/DS363/AB/R (Dec. 21, 2009); AB Reports, *China – Measures Affecting Imports of Automobile Parts*, ¶ 225, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008).

that are unnecessary for the resolution of the dispute. It renders the AB unable to take the minimalist approach with due deference to the policy space of WTO Members. To eliminate the deficiency, the EU and co-sponsors attempt to insert a phrase “to the extent necessary for the resolution of the dispute” into DSU art.17.12. The authors support this approach.

That said, the authors also believe that it is worth considering an interpretative approach to that effect. The AB once opined, though in the minority view, that it is its legal duty to address each of the issues before it, and in deciding *how* to address the issues, it is guided by the objectives of the “prompt settlement” of a dispute or “positive solution to a dispute”. Thus, according to its view, the AB may decline to make specific findings regarding all issues raised on appeal, and address issues only to the extent necessary to ascertain that there was no need to rule on that particular issue in question.¹⁵

The approach taken by the minority view seems to interpret the duty of the AB under DSU art.17.12 in the light of DSU arts.3.3 and 3.7. In the authors’ view, this is a sound contextual interpretation consistent with the Vienna Convention on the Law of Treaties (VCLT) art.31.1. If this interpretation is acceptable to WTO Members, the authors believe that EU and co-sponsors’ goal in this respect could be achieved without amending the DSU art. 17.12.

More ambitious reforms to be addressed in a longer term

(i) The issue of precedent

While items (i) through (iv) above are rather technical, item (v), *i.e.*, the issue of precedent, is of a different nature.

The US expressed its concern¹⁶ about the AB’s opinion that security and predictability are the centerpiece of the WTO DSM and, therefore, that “absent

¹⁵ AB Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, ¶¶ 5.156–5.153, WT/DS456/AB/R (Sept. 16, 2016).

¹⁶ *U.S.: WTO AB rulings should not be considered precedent*, INSIDE US TRADE, Dec. 25, 2018, at 8.

cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case”.¹⁷

While it is quite clear that there is no *stare decisis* in the WTO dispute settlement rules, a system of influential —albeit non-binding— precedents has evolved since the days of the GATT 1947. Evidently, neither panel nor AB decisions happen in a vacuum. Panels have looked at and considered decisions issued by other panels before them on the same or similar issues since before the advent of the WTO, and the AB has looked not only to its own prior decisions, but, indeed, also to panel decisions in cases other than the one under review. “WTO jurisprudence” has become a term of art that reflects the system of *influential precedents*, which has undoubtedly contributed to the “security and predictability” of the DSM and, in turn, strengthened the world trading system.

A panel has emphasized the importance of the security and predictability of the multilateral trading system to private economic actors in the global market.¹⁸ The authors agree with the opinion. No private economic actors would appreciate inconsistent applications of the WTO Agreement. Thus, departure from prior decisions should not be taken lightly. It should be well thought out, clearly and thoroughly reasoned if it is to be persuasive. Therefore, recognizing the non-binding nature of prior decisions, the authors advise WTO Members to be cautious about any change that might weaken this unique body of precedents.

As Honduras suggests, technically speaking, there may be ways to prohibit or limit the doctrine of precedent.¹⁹ The authors, however, expect WTO Members to weigh the pros and cons of such options, and carefully examine likely consequences of those options.

¹⁷ AB Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 160–161, WT/DS344/AB/R (Apr. 30, 2008).

¹⁸ Panel Report, *United States – Sections 301-310 on the Trade Act of 1974*, ¶¶ 7.73–7.77, WT/DS152/R (Dec. 22, 1999).

¹⁹ Communication from Honduras, *Fostering a Discussion on the Functioning of the AB: Addressing the Issue of Precedent*, WT/GC/W/761 (Feb. 4, 2019).

The EU and co-sponsors' proposal in this regard suggests holding an annual meeting between the AB and WTO Members to discuss “concerns with regard to some AB approaches, systemic issues or trends in the jurisprudence”. The authors support the idea. As a first step, the AB and the WTO Members could discuss the concept of “a cogent reason” including, for example, what reason can be “cogent” and in what situation panels and the AB in subsequent cases are allowed to depart from earlier approaches to comparable issues.

The authors recognize that the proposal is far from fully accommodating the deep concern expressed by the US on judicial lawmaking through the precedent. However, as the authors discussed above, change in this practice could seriously undermine security and predictability in the world trading system. Therefore, the authors recommend WTO Members to establish a framework for regular exchanges of views between WTO Members and the AB.

(ii) Other issues in relation to “Judicial Activism” of the AB

In addition to the issue of precedent, we now face several other problems regarding the legitimate role of the AB. These include;

- appellate review of fact finding by a panel;
- legal interpretation in accordance with the customary international law;
- advisory opinion and abstract discussion regarding the WTO Agreement (*obiter dicta*):

Honduras has submitted a communication regarding these issues. It presents to WTO Members a variety of options designed to constrain the AB's role in the appellate review. These include mandatory judicial economy, a general prohibition on engaging in *obiter dicta*, and instructions on the interpretative

approaches.²⁰

While the authors agree that judicial activism by the AB is not desirable, they are worried that such a ‘no-go zone’ approach might result in excessive interference with, and undue chilling effects on the AB’s review. Besides, it is difficult for WTO Members to successfully draft meaningful guidelines for appellate review regarding the above issues in the short-term, though such approach may potentially be more realistic than achieving agreements on textual amendments to the DSU. For instance, an interpretative approach is contingent upon a specific text before the adjudicator, and such a nuanced and subtle process cannot be codified in a general guideline in a clear-cut manner. The guideline must also be carefully drafted so as to be consistent with “customary rules of interpretation of public international law” (DSU art.3.2) embodied in the VCLT arts. 31 and 32. The authors would not say drafting such guidelines is impossible, but there is no doubt that it is formidable and quite time consuming. A more flexible approach is desired.

The crux of the issue is whether the AB accurately understands the shared view of WTO Members on the reach of the appellate review in a timely manner. For this purpose, the authors believe that a dialogue between WTO Members and the AB members on a regular basis, mentioned in (i) above, would be desirable on these issues as well. Through direct and frequent exchanges of views between the AB and WTO Members, the AB members could tailor the appropriate exercise of judicial discretion to meet the WTO Members’ needs.

The authors’ comments so far are not intended to deny the concerns of the US about judicial activism. The authors would not prejudge the appropriateness of the AB’s manner of interpreting the covered agreements and exercising its judicial discretion. In this regard, Australia and its four co-sponsors proposed the immediate initiation of a solution-focused process allowing for targeted

²⁰ Communication from Honduras, *Fostering a Discussion on the Functioning of the AB: Addressing the Issue of Alleged Judicial Activism by the AB*, WT/GC/W/760 (Feb. 4, 2019).

discussions between interested Members.²¹ The authors support this idea. WTO Members should review and discuss the matter without prejudice.

(iii) Reinforcing Independence of the AB

The other communication submitted by the EU, co-sponsored by China and India, contains more ambitious proposals; (a) independence of AB members, (b) efficiency and capacity to deliver, (c) transitional rules for outgoing AB members, and (d) the launch of the AB selection process.²² All of these are the attempts to reinforce independence and autonomy of the AB.

For certain G20 economies, these proposals would be difficult to accept. While we should be cautious about unduly strengthening political control over the AB in line with the allegations critical of the AB, the authors do not think it appropriate to give the AB more autonomy than it now enjoys. The authors believe that it would not assist in solving the current problems that the DSM faces. To the contrary, it could enlarge discrepancies between WTO Members' positions on this issue. Therefore, the authors do not endorse these proposals.

(iv) Mobilizing Stakeholders

As the authors explained above, the most important contribution of the WTO DSM is to ensure security and predictability in the world trading system. There is no doubt that the ultimate beneficiaries of the contribution are business societies acting in the global market because the WTO DSM sustains the environment for their international business by underpinning the making and implementation of commitments. Therefore, the Authors believe that progress is not possible without mobilizing these stakeholders in the discussion of the

²¹ Communication from Australia, Singapore, Costa Rica, Canada and Switzerland to the General Council, *Adjudicative Bodies: Adding to or Diminishing Rights or Obligation under the WTO Agreement*, WT/GC/W/754/Rev.2 (Dec. 11, 2018).

²² Communication from the European Union, China and India to the General Council, WT/GC/W/753 (Nov. 26, 2018).

WTO DSM and the AB. The technical discussion as has been developed in Geneva is necessary but is not sufficient.

For that purpose, the Authors urge the G20 leaders to actively listen to voices from these stakeholders, and closely cooperate with B20 to tackle the problem. It is also recommendable for the leaders to have a dialogue with other fora composed by business leaders, for example, APEC Business Advisory Council (ABAC), which recently emphasized that the integrity of the rule-based WTO trading system including the WTO DSM must be respected.²³

2. Alternative Approaches: What if the deadlock remains?

Background

So far, we have discussed policy options to reform the WTO DSM, focusing on the AB procedures. If WTO Members were to agree on them, the current AB crisis would be resolved. But we should also think of a worst case scenario, where WTO Members cannot reach agreement on how to reform the WTO DSM, or at least not in a timely manner that averts the AB ceasing to function.

Art. 25 Arbitration

One option under this worst case scenario is to resort to ADR under DSU article 25 in lieu of appeal.²⁴ WTO Members may have recourse to arbitration in accordance with DSU article 25, and arbitration awards may be enforced. However, arbitration is only an alternative means of dispute resolution. The disputing WTO Members may choose to submit to arbitration certain issues raised in a panel report when one (or all) of them disagree on how the panel resolved them. However, this would not constitute an appeal under the terms of the DSU. This is not mere semantics. In legal proceedings, obviously legal

²³ See PECC (2018), p.16.

²⁴ See, for instance, Foltea (2018), p.2.

issues matter. Disputing parties in a WTO case may choose to submit to arbitration issues that one of them would have otherwise wanted to appeal, and thereby decline to appeal them. But agreeing to submit those issues to arbitration does not transform arbitration into an appeal process and an arbitration tribunal into an appellate body.

Therefore, if WTO Members are unable to agree to appoint new AB members, that impasse will effectively block the operation of the dispute settlement system for some disputes, and, more likely, for many. Indeed, there will be some Members who will decide not to participate in any alternative solution, whether it is having recourse to DSU article 25 arbitration or any other. It is also quite likely that some Members may accept an alternative solution for some disputes, but they may deem the issues involved too important to their respective interests to waive their right to appeal in other disputes.

The absence of a functioning AB will give some WTO Members the ability to block the adoption of dispute settlement reports, which may not necessarily be unreasonable or amount to obstruction. Indeed, the underlying motives may be quite legitimate.

In any event, DSU article 16.4 provides that panel reports shall be adopted by the DSB “unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report”. It then adds that “[i]f a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal”. Thus, in the absence of a functioning AB, if a disputing party in a WTO case declines to participate in an alternative solution and files a notice of appeal with the DSB, those proceedings would be blocked.

Does this mean, therefore, that a WTO Member that alleges that another Member has breached its obligations under the WTO would not get redress?

Countermeasures under general international law

If the DSM were to cease to operate, the WTO Agreements do not provide other

means of ensuring that the balance of rights and obligations of WTO Members can be preserved. General international law, however, provides a means of redress if that were to be the case, through the use of countermeasures.

Countermeasures are measures that a State that has been injured by the wrongful act of another State (the responsible State) may take to vindicate its “rights and to restore the legal relationship with the responsible State which has been ruptured by that internationally wrongful act”.²⁵ Countermeasures may be taken by an injured State against the responsible State, in order to induce the latter to comply with its international obligations or otherwise reach a mutually acceptable solution. They are temporary because they must be withdrawn once the internationally wrongful act has ceased, and they must be commensurate to the injury suffered. The ILC Articles on State Responsibility provide:

Article 49. Object and limits of countermeasures

- 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.*
- 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.*
- 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.*

[...]

²⁵ ILC Articles on State Responsibility, Commentary to Part Three, Chapter II, para.(1), p. 324

Article 51. Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Countermeasures are not foreign to the WTO. Indeed, the provisions on suspension of concessions regulate the use of countermeasures in the WTO framework. Under the DSU, concessions cannot be suspended unless the DSB has authorized it, and that can only happen after: (a) a panel or an AB report has been adopted; (b) the WTO Member that adopted the offending measures (i.e. the “responsible State”) has been given an opportunity to conform those measures to the recommendations of the DSB; and (c) it has failed to do so. However, where that cannot be achieved because a report cannot be adopted due to the AB being unable to function (or there being no AB at all), public international law would not preclude resort to countermeasures in order to restore the balance between Members’ rights and obligations.²⁶ In other words, a WTO Member would not be free to breach its WTO obligations without consequence simply because the dispute settlement system is not fully functional.

The US, for instance, has advocated this position, albeit in the framework of the 1947 GATT and the Tokyo Round Codes, where the GATT Contracting Parties were able to block the operation of the dispute settlement process through the positive consensus rule. In 1985, the US increased import duties on certain products from the then European Economic Communities (EEC) in response to

²⁶ Mavroidis argues that “Article 23(2) DSU imposes an unambiguous obligation on all WTO members to submit their disputes to WTO panels; as a consequence, countermeasures remain an option in the WTO only to the extent that they are multilaterally authorized by the WTO” (footnote omitted). He assumes, though, that the dispute settlement mechanism is fully functional. Mavroidis admits that the WTO agreements are not a self-contained regime that is isolated from general international law, and that “[t]o the extent, consequently, that the WTO regime does not provide for specific remedies, the ILC codification [i.e. the ILC Articles on State Responsibility] is relevant.” Mavroidis (2000), pp. 765–766. That would be the case if the AB were to cease to operate: there would no longer be a specific remedy and recourse to countermeasures would not be precluded.

discriminatory tariffs granted by the EEC to certain Mediterranean countries that affected US citrus exports and, the US claimed, were illegal under the GATT 1947. Upon proclamation of the increased duties, the US declared: “This action has been necessitated by the unwillingness of the EEC to negotiate a mutually acceptable resolution of this issue”.²⁷

Moreover, at a GATT Council meeting in 1989, the US insisted on its right to take such action when another GATT Contracting Party impeded the operation of the GATT dispute settlement mechanism:

Wherever it could, the United States would challenge unfair practices under the dispute settlement provisions of the General Agreement or the Tokyo Round Codes, but where other contracting parties prevented or impeded that process or blocked efforts to ensure that their practices were covered by multilateral disciplines, the United States would act to protect its interests. If such action was considered unilateral, it should be nevertheless recognized as perfectly justifiable, responsive action necessitated by the failure of bilateral or multilateral efforts to address a problem.

(GATT document C/163, March 16, 1989, p.4.)

Countermeasures, however, should be used sparingly, judiciously and with restraint. As the Air Services Tribunal put it, countermeasures should be a wager on the wisdom, not on the weakness of the other Party:

It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a

²⁷ Memorandum of June 20, 1985, Determination under Section 301 of the Trade Act of 1974, Proclamation 5354, 50 Fed. Reg. 26, 143 (1985).

genuine effort at resolving the dispute...

(Air Services Agreement Arbitration Award, 1978, p. 445, ¶ 91).

Thus, WTO Members should be mindful of not provoking an escalation of the dispute or to increasing trade tensions by resorting to countermeasures.

The right to resort to countermeasures cannot serve as an excuse to circumvent the dispute settlement procedure. For instance, if the AB ceases to be able to operate, and it is clear that there would be no possibility of appeal in a given case, this would not excuse a Member from submitting to dispute settlement nor justify resorting directly to countermeasures instead. The Air Services Tribunal noted that “[u]nder the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanism created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States” (Id., p. 443, ¶ 81).

Article 23 of the DSU precludes any WTO Member from making a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of the DSU. It requires, as well, that any such determination be consistent with the findings contained in the panel or AB report adopted by the DSB or an arbitration award rendered under the DSU. However, while the DSU regulates countermeasures within the WTO framework, WTO Members have not waived their right to resort to such measures.

By the same token, the right to use countermeasures under international law does not render the provisions of the DSU inapplicable or even irrelevant. First, while general international law provides a remedy to WTO Members through the use of countermeasures if the AB were to become unavailable, it would not otherwise affect WTO Members’ rights and obligations under the WTO Agreements, including the DSU, which would remain in force. Indeed, Article 50(2) of the ILC Articles on State Responsibility specifically provides that a

State taking countermeasures is not relieved from fulfilling its obligations under any dispute settlement procedure applicable between it and the responsible State, and the DSM would still be available and largely functional. The Commentary to the ILC Articles of State Responsibility makes this very point: “It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged”.²⁸

Of course, securing a positive solution to the dispute could still be achieved (DSU Article 3.7). In fact, the DSU gives preference to a mutually acceptable solution that is consistent with the covered agreements over any other solution, including compliance with adopted reports (Id.). That solution may be found at any time during the dispute settlement proceedings. The disputing parties may be satisfied with the panel report and decide not to appeal. Of course, dispute settlement procedures take time and the appointments may be resolved before the dispute gets to the appeal stage. Thus, an injured WTO Member would be under a continued obligation to submit to dispute settlement under the DSU, and to advance the process as far as possible before imposing countermeasures.

The GATT 1994 and, more specifically, the DSU are also relevant to the question of proportionality. Building on GATT 1994 Article XXIII:2, DSU art. 22.3 establishes the principles and procedures to be followed in determining what concessions or other obligations a WTO Member may suspend.²⁹ These principles and procedures would continue to apply pursuant to Article 50(2) of the ILC Articles on State Responsibility.

A question arises as to whether a dispute settlement panel would accept recourse to international countermeasures as valid in the WTO framework in the circumstances described in this Policy Brief, if the country whose measures were originally found by a WTO panel to be inconsistent with the covered

²⁸ ILC Articles on State Responsibility, Commentary to Article 50, para. (13), p.338.

²⁹ “Suspension of concessions or other obligations” is the language used by the DSU to refer to international countermeasures, in their regulated form within the WTO framework.

agreements were to challenge, in turn, the countermeasures before another WTO panel. That international countermeasures are a legitimate defense under general international law is well established. The difficult question for a WTO panel to decide is whether a WTO panel is confined to the four corners of the WTO Agreements and cannot consider other questions of general international law beyond the customary rules of interpretation of public international law (DSU art. 3.2).

In the authors' view, it would not be so constrained. WTO law is, of course, not isolated from the rest of public international law. The AB has recognized that "WTO panels have certain powers that are inherent in their adjudicative function" and "that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated"". ³⁰ However, if it were to find that international countermeasures are WTO inconsistent, even in the circumstances where a breach of the WTO Agreements has been found, the offending measures remain in effect and the dispute settlement mechanism has been blocked, the WTO Member that imposed countermeasures notify to the DSB its decision to appeal the report and the proceeding would be equally blocked. Hopefully, as noted above, both Members concerned would act judiciously and with restraint, and there would be no further escalation of the matter, especially since a new balance – albeit not nearly an ideal one - would have been struck. It is to be noted that a similar situation could have been brought before a GATT 1947 panel, but it was not. Where the GATT Contracting Parties resorted to these types of measures during the GATT 1947 days, the matters were ultimately resolved and did not escalate further. If it comes to that in future, hopefully the outcome would be no different.

³⁰ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Report of the AB, WT/DS308/AB/R, 6 March 2006, para. 45.

References

- APEC Business Advisory Council (2018), “Digitization and Innovation: Advanced Social Harmony.” Report to the APEC Leaders, Papua New Guinea, 2018.
- A Fabry, Elvire (2018), “Saving the WTO AB or Returning to the Wild West of Trade?” Jacques Delors Institute Policy Paper No.225,
- Foltea, Mariana (2018), “Options for breaking the WTO AB deadlock”, International Centre for Trade and Sustainable Development, Opinoin.
- Hillman, Jennifer (2018) “Three Approaches to Fixing the World Trade Organization’s AB: The Good, the Bad and the Ugly?” Institute of International Economic Law, Georgetown University Law Center
- Mavroidis, Petros C. (2000), “Remedies in the WTO Legal System: Between a Rock and a Hard Place”, European Journal of International Law, Vol.11, No.4, pp.763-813.
- McDougall, Robert (2018) “Crisis in the WTO Restoring the WTO Dispute Settlement Function”, CIGI Papers No. 194.
- Payosova, Tetyana, Gary Clyde Hufbauer, and Jeffrey J. Schott (2018) “The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures”, Peterson Institute for International Economics Policy Brief no.18-5.
- PECC (Pacific Economic Cooperation Council) (2018), “State of the Region 2018-2019”.
- Wolff, Alan Wm. (2018) The Future of the WTO and the Multilateral Trading System (Remarks at the Peterson Institute for International Economics).
<https://www.wto.org/english/news_e/news18_e/ddgra_18dec18_e.htm>