U.S. Mission to International Organizations in Geneva

Ambassador Shea: Matters Related to the Functioning of the Appellate Body

Statement as Delivered by
Ambassador Dennis Shea

WTO General Council Meeting, December 9, 2019

5. INFORMAL PROCESS ON MATTERS RELATED TO THE FUNCTIONING OF THE APPELLATE BODY – REPORT BY THE FACILITATOR AND DRAFT DECISION ON THE FUNCTIONING OF THE APPELLATE BODY (WT/GC/W/791)

We thank the Facilitator, Ambassador David Walker, for his considerable efforts to date and for his report to Members. The United States is disappointed that we do not see convergence among Members with respect to an understanding and appreciation of the concerns raised. We do not support adoption of the draft decision.

Reaching this conclusion is not for lack of effort by the United States: No Member has been more constructively and consistently engaged on these substantive issues than the United States.

For more than 16 years and across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members. Over the past two years, the United States has outlined its concerns in exhaustive detail. We have not avoided discussion; rather, we have laid out in the clearest possible terms the U.S. position on the issues raised.

While the DSU text is straightforward and clear, the Appellate Body has ignored that text, and many WTO Members had not focused on just how far the Appellate Body's practice had strayed from that text.

And beyond our detailed DSB statements, we have made clear our willingness to discuss these concerns further with any Member in order to deepen each other's understanding of these substantive issues. Several Members have participated in these dialogues and in many instances we have found the discussions to be frank and productive.

Of course, engagement is a two-way street. For nearly a year, in the General Council and the Dispute Settlement Body, we have sought to deepen Members' collective understanding of the concerns raised and asked Members to engage on a fundamental question: why did the Appellate Body feel free to disregard the clear text of the agreements?

The United States did not pose this question as part of an academic exercise. Rather, this question is critical in the context of any "solution-focused discussion:" Without an accurate diagnosis, we cannot assess the likely effectiveness of any potential solution.

A fuller understanding of the cause is particularly important here. As the United States has explained, the rules of the DSU are clear. Where ambiguity or uncertainty over the meaning of the treaty text has not caused the problem, then simply re-affirming the rules that have been persistently broken cannot resolve the concern. Remarkably, nearly one year later, we have yet to hear Members engage with the United States on this question.

Notwithstanding Members' public silence, at the October meeting of the General Council, the United States offered several potential explanations based on conversations and on our own reflections. For example, one cause could be the ongoing challenges facing the WTO negotiating function and its oversight function, leading to unchecked "institutional creep" by the Appellate Body.

At the same meeting, we suggested that another cause could be that some WTO Members believe that the Appellate Body is an independent "international court" and its members are like "judges" who inherently have more authority to make rules than the focused review provided in the DSU. A related cause could be that some Appellate Body members view themselves as "appellate judges" [1] serving on a "World Trade Court" that is the "centerpiece" of the WTO dispute settlement system,[2] rather than one component of it. Such an expansive vision of the Appellate Body is not reflected in the DSU and was not agreed to by the United States.

We also commented at that meeting that it was possible that some explanations for why the Appellate Body felt free to depart from the clear text of the DSU may be specific to the concerns that have been raised. For example, with regard to the Appellate Body's repeated breach of Article 17.5 of the DSU, we noted that while some WTO Members raised concerns about the Appellate Body's exceeding 90 days, particularly without consulting the parties, a few Members excused the breach of our agreed rules. We asked whether the attitude of those Members contributed to a mindset among the Appellate Body that the WTO's rules and deadlines did not need to be respected.

Similarly, in that statement, with respect to so-called "cogent" reasons, we noted the Facilitator's Report suggests that Members agree that "precedent" is not created through WTO dispute settlement. And so we asked at that meeting why some WTO Members advocate for the Appellate Body to assert that its interpretations must be followed by panels absent unidentified cogent reasons. We also asked why then does the Appellate Body assert a precedential value for its reports like an authoritative interpretation that only WTO Members in the Ministerial Conference or General Council can give.

More recently, at the November meeting of the DSB, we sought to discuss with Members systemic concerns regarding the compensation of Appellate Body members. We sought to further Members' understanding of the compensation structure as a general matter, and to consider the possible consequences of that structure. In that statement, we commented that a system that provides a financial reward for violating DSU rules and prolonging the duration of an appeal would appear inconsistent with the objective behind the DSU rule of providing for the prompt resolution of disputes. And we asked Members whether the current structure creates the correct incentive, or a negative one? Does this structure encourage prolonged appeals at the expense of clear WTO rules? Without debate or effective oversight, have WTO Members acquiesced in a compensation structure that may undermine, rather than promote, the prompt resolution of a dispute?

These repeated attempts over many months by the United States to provoke a meaningful conversation among Members in the DSB, in the General Council, and in the Informal Process have proven unsuccessful. Accordingly, we are no closer to an understanding of how we have arrived at this point.

Despite U.S. concerns with Members' failure to discuss this fundamental question, the United States continues to engage in the Informal Process, including through detailed reactions to the Facilitator's Reports and draft decisions. We raised a number of questions at the General Council meetings in July and October. Members have yet to engage and our questions remain relevant. Even Ambassador Walker himself admits that the adjustments to the draft decision from October to today have been "slight."

- With respect to the issue of Appellate Body members whose terms have expired, the draft decision would appear to depart from the DSU and permit Appellate Body members to serve beyond expiration of their terms.
- Regarding the 90-day deadline for Appellate Body reports, the DSU text is already clear, and yet the Appellate Body has failed to respect it. What reason would there be to think this language would ensure a different result?
- With respect to the issue of appellate review of questions of fact, we are concerned that the Appellate Body would say it is already abiding by the text in the Facilitator's Report, especially since the Appellate Body has interpreted DSU Article 11 to convert questions of fact into questions of law. And some WTO Members would even today support the Appellate Body's approach to Article 11,

despite real-world consequences we can all see, such as a current appeal with dozens of Article 11 challenges to panel fact-finding – an appeal that has been going on for 17 months, and for which the Appellate Body has held not one, but two oral hearings lasting weeks.

- With respect to advisory opinions, similarly, the Appellate Body presumably considers that it is already abiding by the text in the Facilitator's Report. What basis is there to consider that this language would have a different result?
- Regarding the issue of precedent, the Appellate Body has relied on the reference in the DSU to security and predictability to justify its "cogent reasons" approach, and we are concerned that the proposed language in the draft decision does not address the issue.
- With respect to the issue of overreach, it is clear that the Appellate Body would say that it already abides by the text of Article 17.6 of the Anti-Dumping Agreement and, in turn, the text in the Facilitator's Report. The problem is that the Appellate Body has adopted an erroneous interpretation of Article 17.6 that renders it inutile. We have not yet seen convergence on how to address this issue, or other instances in which the Appellate Body has departed from the plain text of other covered agreements.

We have heard some Members claim that a regular dialogue between the DSB and the Appellate Body will ensure that the clear rules are respected going forward. We question the utility of such a dialogue when WTO Members hold different views on the issues raised.

For instance, we know that some Members today believe that Appellate Body reports must be followed by panels absent cogent reasons; other Members disagree. A regular dialogue would only allow for further airing of those differences, ultimately to be resolved by the Appellate Body.

But the experience of the past years gives us no reason to believe the Appellate Body would willingly change its invention that AB reports must be treated as precedent when that approach – though contrary to WTO rules – enhances the Appellate Body's role and power in the dispute settlement system.

In sum, we appreciate that as a result of engagement by the United States and other Members, and the efforts of the Facilitator, some progress has been made as more and more Members are willing to admit the Appellate Body has departed from what Members agreed.

Despite that limited progress, some Members refuse to acknowledge a problem even exists, and there has been no discussion of why the Appellate Body has departed from its agreed role. Moreover, we fail to see convergence on how to ensure that the limitations imposed by Members in the DSU are respected going forward, and what are the consequences for continued failure to adhere to those limitations.

To find an appropriate and effective solution, it is imperative for Members to engage in a discussion on how we have come to this point.

[1] Farewell Speech of Appellate Body member Peter Van den Bossche, available at https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

[2] Peter Van den Bossche, From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System (2005).