



Task Force 7
Towards Reformed Multilateralism: Transforming
Global Institutions and Frameworks



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A FRAMEWORK FOR A REFORMED WTO APPELLATE BODY

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Abstract




Strengthening the World Trade Organization's (WTO) dispute settlement mechanism by re-establishing a more effective Appellate Body (AB) is a priority for many WTO member countries (including members of the G20). Although the AB was established in 1995 to hear appeals on trade disputes between member countries, it has been effectively disbanded following the end of the final member's term in 2020 and the United States (US) has blocked all new appointments since. The inability of a multilaterally accepted AB to hear


appeals, however, severely undermines the goal of providing a predictable, multilateral, non-discriminatory, and transparent international trading system. Several G20 member countries have submitted proposals to reform or remake the AB but none of them have resulted in sufficient consensus for reform. This Policy Brief draws from existing proposals to outline a framework for procedural and substantive reforms suited to changing institutional needs and allowing for regulatory flexibilities to address emerging climate and developmental concerns.



The Challenge



1



The United States (US) has blocked all appointments to the WTO Appellate Body (AB) since 2017, citing certain procedural and substantive issues that need resolution. The US has also rejected various solutions proposed by other member countries and, in some communications, has suggested that it wishes to do away with the AB system of appeals altogether and replace it with a new body with a new mandate and under new rules.¹ Over the years, other WTO member countries have also expressed concerns about the mandate and functioning of the AB, triggering discussions and reform proposals.

The AB is a central element of the WTO Dispute Settlement mechanism, which seeks to provide security and predictability to the multilateral trading

system. In its absence, enforcing trade rules becomes a matter of power-based unilateral trade retaliation, which is not in any country's national interests in the long run. Given how the AB has become virtually defunct, any WTO member could block the enforcement of a panel report simply by filing an appeal. Indeed, the US has explicitly stated that it is doing just that with its appeal in the *U.S. - Steel Tariffs* case² –not hoping for an appellate review of the panel report, but only for a new mechanism that will dismiss or overturn the original panel decision.³

Table 1 illustrates the declining reliance of WTO members on dispute settlement system since 2017, when the terms of the AB members began to expire. Of particular note is that even the number of requests for consultations declined suddenly in 2020.^a

a Not all requests for consultations will turn into individual cases as sometimes the WTO combines complaints that cover the same factual issues into one dispute. See World Trade Organization: Dispute Settlement, n. 4.

Table 1. Dispute Settlement Process Engagement (2017-2023)

Phase of the dispute settlement process	2017	2018	2019	2020	2021	2022	2023	Total
Requests for consultation	17	38	20	5	9	8	1	98
Panels composed	8	11	29	10	5	6	2	71
Panel Reports circulated	9	11	11	5	7	9	0	52
Appellate Body Reports circulated	5	4	5	3	0	0	0	17

Source: World Trade Organization: Dispute Settlement⁴


Although WTO member states have sought to reform the AB and, more generally, the WTO's dispute settlement understanding (DSU), differences of opinion over the AB's appropriate role and interpretive decisions continue to impede solutions. Meanwhile, the EU, together with several other countries, has introduced the Multi-Party Interim

Appeal Arrangement (MPIA), pursuant to Article 25 of the DSU, which allows for ad-hoc arbitration upon agreement by the parties to a dispute.⁵ The MPIA has already begun hearing appeals, though its membership is limited to 53 countries.⁶ Table 2 shows the current activity within the MPIA.

Table 2. MPIA: Summary of Activity

Status of dispute in the MPIA	Number of disputes
Finalised	2
Ongoing	8
Finalized without appeal, Withdrawn or Settled	3

Source: Geneva Trade Platform, "MPIA"⁷




G20 member countries (also members of the WTO) need to work together with the US to resolve the deadlock. This requires a careful examination of all the US's concerns, with clear reform proposals highlighting actionable ways to resolve or accommodate each of them. The recommendations contained in this Policy Brief focus on proposed procedural modifications to the DSU and related Working Procedures. The authors of this brief acknowledge that these procedural modifications

have substantive implications and should occur within a larger set of reform proposals addressing many WTO agreements. Although the latter is beyond the scope of this brief, the authors argue that a reformed AB with a clearer mandate and procedural guardrails will be more suited to the changing nature of trade disputes amidst climate change and geopolitical disruptions, among other challenges that make up the polycrisis that the world is currently facing.



The G20's Role



2



The G20, as the ‘economic steering committee for the world’, has repeatedly called for and supported WTO reform, including a review of the AB mechanism. The issue has also featured in the statements of the G20 Finance Ministers and Central Bank Governors as well as the Trade Ministers, more so since 2020 when the last AB member’s term expired.⁸

While the G20 accounts for a small percentage of WTO membership, its members are 20 of the world’s largest economies that together account for more than 80 percent of global GDP and 75 percent of global trade, and is home to 60 percent of the world’s population.⁹ Moreover, the WTO is a permanent invitee to the G20 and the two bodies work together to create and maintain a rules-based, non-discriminatory, free, fair, open, inclusive, equitable, sustainable and transparent multilateral trading system. The Director General of the WTO participates in G20 summits and often calls upon the G20 to discuss and provide solutions to issues that will be implemented at the WTO with all 164 members in agreement, not just the G20 countries.

The G20 cannot directly affect reform. It can, however, collaborate with the WTO to further the issue of WTO AB reform through setting benchmarks and guidelines. WTO members can rely on the G20’s recommendations as guardrails towards building consensus. To that effect, the G20 can mandate its Trade and Investment Working Group (G20 T&I WG) to formulate guidelines for fair and rule-based AB reform, along the lines of existing proposals as well as the recommendations contained in this Policy Brief.


Once the G20 countries are in agreement, they can also approach non-G20 countries through diplomatic channels to build coalitions of like-minded countries and present the proposed guidelines at other international forums concerned with economic and trade issues. These include the G15, the G33 and the G77, which have members from developing countries across Latin America, Africa and Asia, but are not a part of the G20.

These guidelines can also be tabled for discussion at the WTO Ministerial Conference (MC13) scheduled in February 2024.



Recommendations to the G20

3



A reformed Appellate Body should be crafted with the following guiding principles:

- The preservation of a fair, inclusive and robust dispute settlement system that allows for regulatory flexibilities given emerging climate issues and geopolitical developments.
- The prompt and positive resolution of disputes between WTO members.
- The preservation of the independence and impartiality of an appellate mechanism.


With these priorities in mind, a series of reforms to the AB's functioning are needed to enhance its legitimacy and improve its effectiveness. The US and others have engaged in closed-door, interest-based discussions to attempt to move the WTO membership past the stalemate of the past several years.¹⁰ These dialogues have facilitated greater understanding of the differing perspectives. G20 countries should continue to engage in these discussions, to the extent possible, with the aim that the US submits a comprehensive proposal for a reformed AB in the near term. Successful reform also requires

a careful examination of outstanding issues raised by other G20 countries, so that the series of proposed solutions can be actionable recommendations for the G20 leaders to consider.

Many WTO members have cited concerns about the mandate and process of the AB. Submissions like the one made by the African Group¹¹ and the EU-led MPIA have attempted to address some of the concerns but have not garnered consensus among all WTO members. This Policy Brief outlines further recommendations that the G20 can consider, through the guidelines of the T&I WG:

1. Disregarding the deadline for issuing a decision

Although the language of the DSU limits the length of time that the AB can spend in appellate review to 90 days, that deadline is rarely observed.¹² This difficulty results in delayed resolution for disputes and a growing backlog of unresolved appeals. The failure to meet deadlines may be a result of a lack of human and financial resources available to the Body, or it may, as some WTO members suspect, result from the AB exceeding their mandate in several ways.¹³



Recommendations 3 to 5, in the succeeding paragraphs, address these possible sources of delay. However, this section begins by suggesting that the G20 recommend clearer timeline constraints for AB members as they decide disputes. The G20 should support a timeline rule that defers to the decisions of the parties, rather than allowing the AB to extend deadlines unilaterally (see proposed amendments to Articles 17.5, 20).

2. Allowing former members to decide cases

A related concern is that of former AB members continuing to serve on their assigned cases until long after they finish their term. Although the DSU provides clear term limits, and the Working Procedures outline mechanisms for the extension of that term to help complete an appellate review, the long timelines and flexible mechanism has resulted in AB members staying long past their tenure. To resolve this problem, the DSU and Working Procedures should be modified to narrow the instances of extending a member's tenure, clarify the scope of that narrower extension, and provide an oversight mechanism by the DSB (see proposed amendments

to Article 17.2 and Working Procedures Rule 15).

3. Lack of independence, professionalism and capacity of the AB

Although the AB has suffered in recent years from a lack of Members who could decide cases on a tight timeline, it had difficulty meeting deadlines in its caseload, even when it was fully staffed. Moreover, by requiring them to be reappointed subject to a unanimous vote by the DSB, the appointment process exposed AB members to implicit political pressure in their decision-making and undermined their supposed political autonomy. The G20 should take a series of actions to address these constraints, such as expanding the number of members of the AB, extending the terms of those Members, not allowing reappointments, and making the appointment a full-time position (rather than part-time) (see proposed amendment to Article 17.2).

4. Reviewing panel findings of fact

One concern that arises when an appellate review is excessively delayed



is that the AB has exceeded the narrow mandate for which it was created— i.e., to review issues of law and legal interpretations analysed and developed by the Panel (DSU Article 17.6). A significant concern has been whether interpretations of domestic laws of the WTO member countries constitute “issues of law” or “issues of fact”. To keep the appellate review narrow and given that their expertise does not lie in domestic legal interpretations, the G20 should support the drafting of new rules that clarify that narrow scope and give due deference to WTO member countries in the understanding of their own laws (see proposed amendment to Articles 17.6 and 17.6*bis*).

5. Beyond dispute resolution: Issuing advisory opinions and advising WTO bodies

WTO members have complained that the AB reports sometimes wade into issues not immediately necessary for the resolution of the dispute, either by making interpretive statements outside of what relates to the active dispute, or by giving direction to other WTO bodies as to what actions they should take on the heels of the dispute. The G20 should support efforts to clarify guardrails

so that these extraneous analyses and unnecessary instructions are less frequent (see proposed amendment to Article 3.2).

Together with clearer guidelines around timelines (Recommendation 1), increased financial and human resources (Recommendation 3), and deference to respondent states about their own laws (Recommendation 4), clarifying that only legal interpretation “necessary for the resolution to the dispute” is permitted in AB Reports, will further strengthen the structural reliability of the AB. To the extent that an individual WTO member desires an authoritative interpretation, they can go through the relevant Council to request it.¹⁴

In order to increase accountability further, the G20 countries may wish to propose a new mechanism that provides space for the DSB to give feedback to the AB’s work on an annual basis. In establishing that mechanism, the members will have to consider the type of feedback that can be provided, the interpretive authority which that feedback will hold for future AB decisions, and any procedures for submitting, adopting, accepting, and utilising the given feedback.

6. Treating prior decisions as binding precedent

Some WTO members have felt that certain AB interpretations are inconsistent with the members' intentions and thus exceed what the member has consented to under international law.¹⁵ Still, those decisions have, in certain circumstances been treated as binding precedent, thus "adding to or diminishing the rights and obligations" of the parties.¹⁶ While in certain instances, prior cases may be instructive in determining the outcome, it is important that the role of interpretation of WTO agreements ultimately lies with the WTO members themselves.

To address these concerns, the G20 should consider supporting a revised DSU text to further clarify that prior cases are meant to provide guidance and are not to be treated as binding precedent. The G20 should also recommend that WTO countries provide guidance for the AB in determining how and when to apply prior case outcomes as instructive by providing criteria for comparing cases that span time, geography and economic sectors (see proposed new Article 17.15).

7. Lack of institutional support for countries to access the WTO mechanisms

Individual G20 countries should also work toward creating increased institutional support domestically, as well as, where possible, provide support for neighbouring least developed countries and countries considering WTO membership to increase equitable access to the WTO dispute settlement mechanism. This might include public investments in human resources to understand and interpret WTO rules, as well as understanding the implications of trade agreements on domestic policy-making.

Due to these outstanding issues and the resultant backlog of cases pending AB review, the G20 should consider various proposals to clear out this backlog. Proposals include: (1) introducing a temporary waiver on appellate review by submitting existing pending cases to the DSB for adoption; or (2) appointing a larger AB for a temporary time to decide backlogged cases more quickly. In the meantime, the G20 countries should make the best use of the MPIA in order to facilitate clearing the backlog of cases and moving

existing disputes through the system prior to the completion of AB reform negotiations.

8. A Note on Substantive Reform Proposals

The above procedural issues can be resolved in the short term. Consensus on procedural issues can also make countries more open to discussing substantive reform proposals once the former is resolved. However, this will not be sufficient on its own. Consensus on substantive issues will be a prerequisite for the reform of the dispute settlement process and the re-establishment of the AB.

WTO members have raised concerns that the WTO agreements as they currently stand do not provide sufficient flexibility for policymaking, especially factoring in the changing needs of the world, its institutions and the climate and development goals of individual members. In an effort to address these

concerns, the G20 countries should urge WTO Members to consider interpretive statements on the points of most importance to its members, such as the scope and review of national security measures, the expansive reach of non-discrimination rules, and interpretations of provisions in key agreements such as the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing.


Perhaps the most important obstacle to AB reform, and to overall WTO reform, is the misalignment between countries (including major G20 countries) about the importance of “special and differential treatment”, and what countries qualify to receive such treatment (“developing countries”). This is a crucial problem that will not be resolved by minor modifications to the DSU. To address this, the G20 countries should genuinely engage with one another in good faith, steering discussions and reiterating their commitment to finding resolutions.



Conclusion

4





Resolving the impasse in the AB appointments requires a detailed analysis of how well the current system has served the interests of WTO members. The call for reform has not just come from the United States, but from various other WTO member countries (also members of the G20), making the need for reform more necessary than ever.

Any negotiated outcome at this point will need to balance a range of legitimate perspectives on how the reformed AB should function. Such a revision must include modifications to the procedural rules, providing guardrails like clarifications to the timeline, the

scope of decisions to be reviewed and the role of prior case decisions for a forward-looking AB. Once those procedural hurdles are overcome, substantive reform will be made more possible through negotiations among parties done in good faith.

In today's uncertain times, reaching an agreement on a dispute settlement system that is compulsory, impartial and enforceable, can help preserve, and even enhance, multilateral cooperation on trade. Focused and serious discussions on this reform process can begin at the G20, under the Indian presidency of 2023, followed in the next two years by Brazil and South Africa.

Attribution: Purvaja Modak and Rachel Thrasher, "A Framework for a Reformed WTO Appellate Body," *T20 Policy Brief*, May 2023.



Annexure

ANNEXURE

Proposed Textual Changes To the Dispute Settlement Understanding and The Working Procedures for Appellate Review^b

Dispute Settlement Understanding¹⁷ “DSU,” Article 20

DSU Article 3: General Provisions

Article 3.2: Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. **For greater clarity, this article does not allow WTO panels or the Appellate Body to clarify the provisions of any agreement not at issue in the dispute at hand, as indicated by the parties in their submissions** (Recommendation 5).

DSU Article 17: Appellate Review: Standing Appellate Body


Article 17.1: A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of **nine [twelve]** persons, three of

whom shall serve on any one case (Recommendation 2)

Article 17.2: The DSB shall appoint persons to serve on the Appellate Body for **one eight-year term, which is not subject to re-appointment.** (Recommendation 3)

Article 17.5: As a general rule, the proceedings shall not exceed **90** days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report, **unless the parties agree otherwise at the initiation of the appeal agreement.** In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. **In the case of an alternative deadline established by the parties, that deadline should be fixed and not indefinite. In the case that the Appellate Body cannot produce a report within 90 days,**

^b All revised language to the DSU and Working Procedures for Appellate Review is indicated in **bold**.



in the absence of an agreement by the parties, the panel report will be automatically submitted for adoption to the DSB. (Recommendation 1)

Article 17.6: An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. **For greater clarity, issues of law covered in the panel report and legal interpretations developed by the panel do not include the meaning of municipal measures at issue in the case.** (Recommendation 4)

Article 17.6 *bis*. [or as a footnote]: **In the case where the interpretation of a municipal measure is at issue in a case, the Appellate Body must rely primarily on the respondent state's submission in the interpretation of their own laws, rules and regulations. If the interpretation is not clear, the Appellate Body may ask for further clarification from the respondent state if necessary.** (Recommendation 4)

DSU Article 17: Procedures for Appellate Review

Article 17.12: The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding **to the extent necessary for the resolution of the dispute.**^c (Recommendation 5)

Add a New Article 17.15. Prior Appellate Body reports may be instructive for future cases but in no case should they be treated as binding precedent, unless an interpretive note has been adopted by the WTO Member states that requires such an interpretation. For greater clarity, when determining whether a prior case is instructive in an active dispute, Appellate Body members may consider:

- **The time difference between the cases;**
- **Particular sectors involved;**
- **Economic and political characteristics of the countries;**

c For greater clarity, this article does not allow WTO panels or the Appellate Body to clarify the provisions of any agreement not directly relevant to the dispute at hand.

- **Treaty provisions at issue and/or**
- **The nature of the situation.**
(Recommendation 6)

DSU Article 19: Panel and Appellate Body Recommendations

Article 19.1: In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. **In no instance may the Appellate Body opine on or make recommendations to other WTO bodies** (Recommendation 6).

DSU Article 20: Time frame from DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where the panel has acted pursuant to paragraph 9 of Article 12 **or the parties have agreed at the initiation of the appeal agreement pursuant to paragraph 5 of Article 17**, to extend the time for providing its report, the additional time

shall be added to the above periods.
(Recommendation 1)

Working Procedures for Appellate Review¹⁸

Rule 15: A person who ceases to be a Member of the Appellate Body may **request the extension of their term for the limited purpose of completing an appeal, which the DSB may, at its discretion, authorize. Under those circumstances**, that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body, **subject the following conditions:**

- **Such an extension may not exceed 90 days beyond the end of an Appellate Body Member's term.**
- **In the last 90 days of a member's tenure, Appellate Body members may not be placed on any new cases.**
- **Appellate Body members must provide 90 days' notice prior to their resignation in order to wrap up any final appeals to which they are assigned and, where that is not possible, provide their professional opinion and pass the case on to another Member to conclude** (Recommendation 1).

Endnotes

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