Centre for International Governance Innovation

Conference Report – Ottawa, Canada, January 2018

The Way Forward for WTO Dispute Settlement after the Eleventh Ministerial Conference

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About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research initiatives focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and have received support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos projets de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques internationales, et le droit international. Nous comptons sur la collaboration de nombreux partenaires stratégiques et avons reçu le soutien des gouvernements du Canada et de 'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

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About International Law

CIGI strives to be a leader on international law research with recognized impact on significant global issues. Using an integrated multidisciplinary research approach, CIGI provides leading academics, government and private sector legal experts, as well as students from Canada and abroad with the opportunity to contribute to advancements in international law. The goal is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future.

About the Report

This report results from a round table discussion of experts convened by the Centre for International Governance Innovation (CIGI) in January 2018. The purpose of the round table was to discuss a way forward to restoring and improving the dispute settlement system in the World Trade Organization. The report was prepared by Hugo Perezcano-Díaz, then deputy director of International Economic Law at CIGI, and Robert McDougall, then CIGI senior fellow. Inquiries about the report should be directed to Oonagh Fitzgerald, director of International Law at CIGI, at ofitzgerald@cigionline.org or 1-519-885-2444, ext. 7207.

Executive Summary

In December 2017, trade ministers met in Buenos Aires, Argentina, for the Eleventh Ministerial Conference of the World Trade Organization (WTO), against the backdrop of crisis in the WTO dispute settlement system. After the meeting achieved only modest outcomes, and none related to dispute settlement, the Centre for International Governance Innovation (CIGI) convened a group of experts in Ottawa for a round table discussion of the way forward to restoring and improving the dispute settlement system.

The round table discussion took place under the CIGI Discussion Rule[1] and addressed three issues:

- ideas for reforming the operation of the WTO dispute settlement system;
- US concerns over the operation of the WTO dispute settlement system and the US decision to block appointments to the Appellate Body; and
- the way forward: solutions to break the deadlock on WTO Appellate Body appointments and what to do if members are unable to reach an agreement.

There was broad agreement that, while the WTO dispute settlement system has made an important contribution to maintaining the security and predictability of the rules-based trading system, there is still room for improvement in its operation. Participants discussed a number of procedural, systemic and substantive issues that could be addressed through reform, some of which might be easily agreed on and implemented, whereas others would require further consideration. It was agreed that the most pressing challenge to the system is the refusal of the United States to allow new appointments to the Appellate Body. While there was sympathy for some of the concerns raised by the United States, participants agreed that the ultimate objectives of the United States remain unclear, and, therefore, participants cautioned against making hasty concessions that might undermine the integrity and independence of the dispute settlement system.

1 When discussions are held under the CIGI Discussion Rule, participants are free to use the information received and the identity and affiliation of participants may be revealed, but no views expressed, or other information received, may be attributed to any participant.

Ideas for Reforming the Operation of the WTO Dispute Settlement System

Participants agreed that the WTO dispute settlement system makes an important contribution to maintaining the security and predictability of the rules-based trading system. They recognized, however, that increasing delays and the failure of the negotiation function to update the rules undermine the system's ability to function well. One consequence has been a political crisis in the Dispute Settlement Body (DSB) in recent years, culminating in the impasse over new appointments to the Appellate Body. Participants discussed the systemic challenges facing the dispute settlement system and considered ideas for reforming its operation to address the following challenges.

Effectiveness and Efficiency

The increasing demand on the system and the complexity of disputes have led to delays that undermine the imperative for prompt resolution of disputes. While participants recognized that WTO dispute settlement remains quick, relative to domestic litigation and other fora, such as the International Court of Justice, they also underlined that prompt resolution is important to the trading system to discourage the use of damaging short-term measures. Examples of steps that might address this concern included limiting input, streamlining fact-finding and developing rules of evidence.

Accessibility

Although the participation of developing countries has improved in recent years, the number of WTO members that use the dispute settlement system on a regular basis remains small. A better understanding of the constraints facing small economies and smaller-value disputes involving the trade of small and medium-sized enterprises could lead to measures that would make the system more accessible. For example, more simplified procedures or alternative forms of dispute settlement could be made available for certain kinds of disputes.

Frequency of Appeals

While the percentage of panel reports that are appealed has fluctuated over the years, the figure remains considerably higher than was expected when the WTO was established. Contrary to original expectations, in most cases, an appeal has become an automatic step in the process, leading to an average appeal rate that is higher than in most domestic court systems. More discussion of the consequences of the high appeal rate, including whether it has contributed to the political challenges currently facing the system, was suggested.

Standard of Review of Panel Reports

Some participants considered that panels are the principal adjudicators in the dispute settlement system, given their important role as finders of fact. In this light, the participants questioned whether the Appellate Body provides enough deference to panel findings, and whether the Appellate Body overturns the reasoning of panels more frequently than is necessary for the system to remain effective. This tendency was attributed more to the attitude of the Appellate Body than to the design of the system.

Qualifications of Appellate Body Members

The kind of background that makes for the most effective Appellate Body members was debated. Some participants lamented what appeared to be a move away from appointing international law experts, as was the case in the early years, toward appointing more former ambassadors, non-lawyers and academics who lack other experiences. In addition to affecting the Appellate Body's reasoning, itself, the appointment of less qualified and less experienced adjudicators was considered to provide the Secretariat with too much influence over the outcomes.

Tenure of Appellate Body Members

A related point was whether the appointments of Appellate Body members should be made full time. Some participants were concerned about how difficult it is for Appellate Body members to discharge their responsibilities effectively when they are not permanently based in Geneva. Another concern was that the part-time nature of the appointment has forced Appellate Body members to take on other responsibilities, which has complicated the planning of the body's work.

Role of the Secretariat

Other participants felt that the United States should focus less on the appointments of Appellate Body members and instead consider more carefully the risk of hidden activism by the Secretariat. With the growth in size and importance of the Secretariat, more attention should be paid to the qualifications and backgrounds of those who support Appellate Body members.

Member Criticism in the DSB

Concern was expressed that comments in the DSB by WTO members on Appellate Body reports in recent years have taken on a critical tone that is damaging to the system. The concern was that criticism is reported in the press and undermines public trust in the institution. Instead, members should make constructive comments on reports that will help inform the Appellate Body's understanding of what is, in turn, the membership's understanding of certain interpretations.

Justiciability of Certain Issues

Questions were raised about whether certain politically sensitive issues could be addressed effectively through the dispute settlement procedures. For example, adjudicating disputes over the market economy status of China or national security justifications for certain measures will place considerable strain on the trading system without necessarily resolving the underlying disputes. There was no clear answer on the alternative ways to address these kinds of disputes.

Alternative Dispute Resolution

Participants considered whether alternative approaches to dispute resolution might take some strain off the adjudication system, improve accessibility and facilitate resolution of politically sensitive disputes. While the Dispute Settlement Understanding (DSU) already provides for good offices, mediation and arbitration, some considered that the infrequent use suggests there is no demand for these services. However, others questioned whether the availability of more robust mechanisms for these alternatives could change the incentives to use them.

Incremental Reform

It was widely understood that reaching agreement to reform the dispute settlement system through consensus amendments to the DSU will be difficult, as illustrated by almost 20 years of unsuccessful negotiations in the DSU review. As an alternative, a proposal was that WTO members could consider using plurilateral agreements among like-minded members to experiment and bring about incremental reform. For this, members could use the practice mechanism[2] first developed by Canada to facilitate an organic approach to improving the operation of the dispute settlement system.

US Concerns Over the Operation of the WTO Dispute Settlement System and the US Decision to Block Appointments to the Appellate Body

In addition to the issues raised above, which many WTO members also consider to be challenges, round table participants discussed a number of specific concerns raised by the United States about the operation of the dispute settlement system, in particular, the Appellate Body. These concerns, some of them longstanding, have led to the impasse in the DSB over appointments of new members of the Appellate Body. The pretext for the US block on appointments is procedural in nature, but participants acknowledged that the United States is motivated by a number of wider systemic and substantive concerns that may need to be addressed to restore the dispute settlement function. What follows is a discussion of each of these areas of concern.

Procedural Concerns

Extension of Appellate Body

Starting in January 2017, a disagreement between the United States and the European Union prevented the launch of the process to appoint new Appellate Body members. In August 2017, the United States began basing its opposition to new appointments on concern about the legitimacy and legality of the Appellate Body extending the terms of its members to complete appeals that began prior to the expiry of the terms. These extensions were made under Rule 15 of the Working Procedures for Appellate Review, which were drafted by the Appellate Body after consultations with the DSB. While attracting little attention when the average duration of an appeal resulted in extensions of three or four weeks, as disputes have grown in complexity and appeals have grown in length, these extensions could now conceivably last six months to a year.

Citing concerns about the resource implications, the influence of extended members over deliberations in unrelated disputes and Appellate Body reports being signed by a majority of members whose terms had legally expired, the United States blocked new appointments until it was agreed that extensions of the terms of Appellate Body members could only be granted by the DSB. Participants in the round table had mixed views about the legitimacy of the extension of Appellate Body members. They agreed, however, that although the US concerns were genuine and legitimate, these concerns were likely not the United States' true motivation for blocking appointments.

Reappointment of Appellate Body Members

The United States has, on other occasions, questioned the fitness of Appellate Body members. It prevented the reappointment for a second term of Merit E. Janow and Jennifer Hillman, both US nationals. In May 2016, it objected to the reappointment of Seung Wha Chang, a Korean national, explaining that his performance did not conform to what is expected of Appellate Body members and therefore undermined the integrity of, and support for, the dispute settlement system. While the participants in the round table acknowledged that the reappointment of Appellate Body members was not automatic, many were concerned that the increasingly inquisitorial examination by the United States of Appellate Body members seeking reappointment threatens the members' independence.

2 See WTO, "Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO disputes" (2016), WTO Doc JOB/DSB/1, online at: <bit.ly/dsb-statement-mechnism>.

90-day Deadline

A related concern that the United States has raised — and on which it may have more support from other WTO members — is the Appellate Body's increasing tendency to circulate its reports after the 90-day deadline to which it is subject under the DSU. Participants had different views about the response to this concern. Some argued for an extension of the deadline or provision of more staff and resources to the Appellate Body so that it will be able to comply. Others considered that more time, staff and resources will not solve the problem because it will simply give the Appellate Body more opportunity to write more expansive reports, which is what the United States considers to be the real problem. Instead, since US insistence on the deadline has always been about member control over the dispute settlement process and discipline of the Appellate Body, resolving the deadline may require addressing disagreements about the mandate of the Appellate Body.

Systemic Concerns

Appellate Body Activism and Overreach

Participants discussed US concerns that the Appellate Body has engaged in "activism" or "overreach" by adopting interpretations that add to or diminish the rights and obligations of WTO members. Some contested this claim, arguing that it is driven by US industries that have benefited from trade remedies and pointing out that the United States alleges "gap filling" only when it does not like a result. These participants considered that the Appellate Body has a responsibility to use the rules of interpretation, which call for a textual approach and assume that there is a single meaning for all legal obligations. Others considered that the United States "has a point," and while, sometimes, expansive results can be traced to the arguments of the parties, they often result from the Appellate Body considering it more important to clarify the WTO rules than to resolve the disputes. Some participants raised concerns about the implications of the Appellate Body's clarifying every provision on the ability of WTO members to reach agreement on new trade rules.

Obiter Dicta

Participants discussed complaints by the United States about the expanding use of *obiter dicta* in Appellate Body reports. They considered US claims that some Appellate Body reports contain substantial analyses that do not contribute to resolving the disputes or lengthy abstract discussions of provisions not raised by any party and unrelated to the issues on appeal. The participants discussed the authority of the Appellate Body to engage in this kind of advisory activity, and the consequences of doing so.

Appellate Review of Factual Findings

The United States has raised concerns that the Appellate Body, in particular through an expansive interpretation of article 11 of the DSU, has given itself the authority to overturn a panel's factual findings or its determinations of whether there is a sufficient factual basis to support the legal findings and conclusions. Participants also considered complaints that the Appellate Body sometimes adopts an interpretation of the domestic law of a WTO member that departs from that member's own interpretation of the law.

Precedent

Participants debated the US claim that the Appellate Body grants its previous reports a legal authority that is not foreseen in the DSU. The objective of the dispute settlement system, as set out in the DSU, is to resolve disputes while promoting security and predictability in the trading system. While some members insist that there is no *stare decisis* (i.e., precedent), the Appellate Body has sought to ensure consistency between the interpretations adopted by different Appellate Body divisions. The result is that it is rare for the Appellate Body not to follow its own past decisions. Participants agreed that the system needed to balance between a de facto authority of precedent, adopted in the name of consistency, and the need to address each dispute promptly and on its own merits.

Nature of the System

Participants generally agreed that at the heart of the concerns expressed by the United States was a foundational disagreement about the nature of the dispute settlement system and, in particular, the mandate of the Appellate Body. Whereas some WTO members, and perhaps even the Appellate Body, itself, consider the dispute settlement system to be constitutional in nature, the United States considers it to be contractual only. The references in the DSU to an "appellate body" instead of "court," and "members" instead of "judges," confirm that

the intention was not to create a judicialized (i.e., constitutionalized) system. The intended nature of the system has implications for its operation. For example, a constitutionalized system would allow adjudicator interpretations to resolve ambiguity, whereas a contractual system would involve more member control over such questions. Others considered the distinction flawed and unhelpful, as it reflected only differences of degree and not of principle.

Some participants pointed out that it was the United States that designed the system, insisting on reverse consensus over the objections of other members, such as the European Union, that wanted more flexibility. The United States also resisted the development of detailed rules or standards of review for the Appellate Body, preferring instead to allow the Appellate Body to figure them out as they go. But the United States no longer likes the way the system has evolved. Frustrations that may have started in the trade-remedies context are no longer limited to that area, but now reflect broader concerns about the scope of appellate review. With the arrival of the United States Trade Representative (USTR) Robert Lighthizer — whose concerns about a binding dispute settlement system have been consistent for 30 years — the United States now wants to restore the dispute settlement system to a narrower conception. Participants in the round table were divided on whether the system really has been transformed and whether the judicialization of WTO dispute settlement is sustainable in the current environment.

Substantive Concerns

Trade Remedies

Many participants considered that the dissatisfaction of the United States with the Appellate Body is in response to the outcomes of a small number of disputes in the areas of industrial subsidies (for example, aircraft disputes), anti-dumping (for example, zeroing) and countervailing duties (for example, public bodies). Some argued that while there is a perception that the WTO is for the benefit of exporters, domestic producers subject to import competition also need to have confidence that the rules provide for fair trade. The perception of unfairness to these producers has motivated them to seek changes to the Appellate Body. Therefore, rather than making substantial changes to the operation of the system, the solution might be simply to contain the damage by allowing the United States to apply trade remedies in the disputed cases. Others considered this might not contain that damage as much as is thought, due to trade now being structured through global value chains. There was a discussion of whether fixing the Anti-Dumping Agreement would be a way forward, but most considered it neither likely to happen nor to be sufficient.

Understanding the US Endgame

Round table participants agreed that the endgame of the United States remains uncertain and considered that solutions cannot be contemplated until the United States is more forthcoming with its demands for reform. The absence of a US ambassador to the WTO made clarification unlikely in the near term. Participants debated whether the concerns were genuinely about the operation of the DSU, dissatisfaction with the way the substantive rules have been interpreted or part of a new mercantilist effort to use tariffs to open markets or protect domestic producers. More likely the concerns are some combination of these.

Some considered that the United States might be trying to disable the WTO dispute settlement system — or at least to revert to how dispute settlement operated under the General Agreement on Tariffs and Trades (GATT) — so that it can use unilateral measures with impunity. US proposals in the North American Free Trade Agreement (NAFTA) negotiations seemed to provide evidence of USTR Lighthizer's preference for GATT-like dispute settlement. However, in the days of GATT, the United States may have been justified in taking unilateral action because the GATT order was fragmented, characterized by widespread violation of the rules and hampered by the right to block disputes. By contrast, the WTO is a rules-based system with an effective dispute settlement mechanism, so there can be no comparison and no justification for reverting to a system that relies on self-help.

Others countered that it is not clear that the US administration has a definitive strategy to revert to GATT dispute settlement. They pointed out that US concerns with the operation of the system did not start with the Donald Trump administration but have been brewing for more than a decade. And it was the Barack Obama administration that first started to ratchet up the pressure in support of US reform efforts. Blocking the appointment process is only the latest in a long line of US actions designed to give it leverage to force reform that cannot be achieved by other means.

While some participants were not optimistic for a negotiated outcome, others found reason for

optimism in the fact that if the US wants to blow up the system, it could have done so already. Instead, the United States continues to participate in the WTO and in the dispute settlement system. Since it is acknowledged that the system can be improved, the focus should turn to finding ways to improve it without caving completely to US pressure. The hope was that US actions would galvanize other WTO members into defending the system and coming up with solutions to save it, and also that the United States would soon propose solutions to which other members could respond.

The Way Forward: Solutions to Break the Deadlock on WTO Appellate Body Appointments and What to Do if Members Are Unable to Reach an Agreement

Participants acknowledged that the crisis is close to posing an existential threat to the dispute settlement system. By September 2018, the Appellate Body will be reduced to only three members: from China, India and the United States. As the crisis continues without signs of a compromise outcome, WTO members need to start considering their options, perhaps even prepare to take some kind of dramatic action. Participants discussed various options, including both interim measures and long-term, permanent solutions. These included the following.

Wait out the United States

Some argued that no concessions should be made until after the Trump administration has left office, on the grounds that the problem may eventually just go away. Others considered that outcome unlikely, given that the concerns have been present in previous administrations and will likely persist in future administrations unless they are addressed.

Participants disagreed on whether the challenge to the WTO from the Trump administration represents a difference of degree or a difference of kind, compared to other US administrations. They agreed that diagnosing the nature of the challenge will be important to addressing it correctly.

Election of Appellate Body Members

Some participants supported appointing new Appellate Body members through a vote, noting that voting is included in the WTO Agreement precisely to overcome this kind of crisis. A proposal to move forward with appointments, expected by 58 members at the February 2018 meeting of the DSB, might provide an opportunity to consider voting. While there was some debate about the legality of voting in these circumstances, proponents argued that its effect would be political by forcing a consensus to emerge. Others countered that the general adherence to consensus makes it hard to take away the US leverage, and that forcing a vote would only further alienate the United States and might provoke it to take more damaging action. They wondered whether compromise would be a better option than resorting to dramatic actions.

DSU Article 25 Arbitration

Participants discussed the proposals to create an alternative "appeal-arbitration" mechanism through article 25 of the DSU, which would preserve access by other members to an appeal mechanism while excluding the United States. Supporters of this option argued that it would take leverage away from the United States or, alternatively, demonstrate what the United States has to lose. Others considered that since the United States is the most frequent responding party, a system that did not apply to it would provide limited benefit for many members. Instead, rather than eliminating US leverage, an ad hoc, parallel system might simply give the United States exactly what it seeks.

No-appeal Agreements

Some considered that a more feasible solution to the temporary incapacitation of the Appellate Body would be to adopt *ex ante* plurilateral agreements not to appeal. These would preserve the benefits of the existing system while avoiding the risks posed by voting or the development of an alternative system.

Rule 15

Most considered that the concerns related to Rule 15 could be addressed by prescribing more precisely the circumstances in which Appellate Body members' terms could be extended. There was some doubt about whether updates to Rule 15 would be sufficient for the United States to unblock the appointment process. While some considered that other members should call the United States' bluff, most felt the United States would retain its block because it provides leverage for broader reform.

Reappointment

Some participants called for reform to end the controversies around reappointment, either by disposing with reappointment altogether or by prohibiting private interviews and instead regularizing a WTO-wide review process based on clear rules of engagement.

Tenure of Appellate Body Members

Some supported making the appointments of Appellate Body members full time. These participants suggested it would actually be less expensive for the WTO if members resided permanently in Geneva and devoted themselves full time to WTO work. A full-time tenure might also affect who would be willing to become an Appellate Body member.

Appellate Body Overreach and Activism

To the extent that the Appellate Body is exceeding its mandate, one proposal to address this was to have WTO members express views on a case-by-case basis. To some extent, this happens already in the DSB on the adoption of reports, but there could be a more robust mechanism for exchanges between members and the Appellate Body. Another way to reduce the scope of appeal might be to clarify that the Appellate Body has the discretion not to address issues that are not relevant to resolution of a dispute. This could be accomplished through either clarification or amendment of article 17.12 of the DSU, which currently provides that the Appellate Body "shall address each of the issues raised."

Nature of the Solution

Since the United States is likely blocking appointments to obtain leverage over other members, the crisis is unlikely to be resolved soon. Some participants expected that that the system may need to crash first, before it can be restored. While there was uncertainty about what would be required for an eventual solution, some considered an amendment to the DSU would be necessary, whereas others considered that an amendment would not be sufficient. Most agreed that tinkering with the dispute settlement rules alone or creating alternative systems would not resolve the issues, and some even expressed concern that tinkering might create problems in a system that otherwise works well. Many considered that fixing the underlying problems requires allowing for greater flexibility in the use of trade remedies.

Exclude or Engage the United States?

Round table participants were ultimately divided on how best to approach the United States. Some did not see any solution other than the exclusion of the United States from the WTO or, at least, from the dispute settlement system, either on its own initiative or as a result of steps taken by other members. These participants argued that the WTO is too important to cave to US pressure for significant changes and that, instead, the WTO might be better off without the United States as a member, proceeding in the same way that 11 parties to the Trans-Pacific Partnership proceeded without the United States. Others doubted that the WTO would survive without the United States; and, even if it did, it was not clear that a WTO dominated by China and India in the absence of the United States would be as appealing. The consequences for Canada of a US absence would be particularly significant, given the simultaneous threat to NAFTA.

On the other end of the spectrum were those who considered the best response would be to engage with the United States to identify its real concerns and objectives and to address them through acceptable compromises. This engagement might even result in improvements to the system for the benefit of everyone. If the United States provides more clarity about the reforms it seeks, other members should be ready for compromise outcomes. The sustainability of the rules-based trading system depends on re-establishing the legitimacy of its rules and institutions. The WTO will not succeed unless it has the support of the United States, and the United States will not support the organization unless it is satisfied with the operation of the WTO dispute settlement system.

Agenda

January 17, 2018
Westin Hotel, 11 Colonel By Drive, Ottawa, Ontario

12:45–1:00 p.m.	Registration and Welcome
1:00–2:15 p.m.	The current operation of the WTO dispute settlement system. Is there a pressing need for reform, and what if members are unable to reach an agreement?
2:30–3:45 p.m.	US concerns over the operation of the WTO dispute settlement system and its decision to block appointments to the Appellate Body. Bluff or candour?
4:00–5:30 p.m.	Overview of proposed solutions for breaking the deadlock on WTO Appellate Body appointments. The road to 2019.

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