

Suggestions for Enhancing the Operation of the WTO Panel Process and Appellate Review

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Introduction

Two years ago, I published a short article in the *World Trade Review* where I asserted that the Uruguay Round dispute settlement negotiators got just what they wanted in the DSU even if some of them now seemed to be of the view that not everything was working as it should be. Not only did we get what we wanted but it is also impossible to deny that ten year's of experience has shown us that the system is in fact working really well.

This session is about the lessons we can draw from the operation of the panel process and Appellate review over the first ten years of the WTO. In the light of our experience, I think we can argue that there are areas where the process can be enhanced. However, before going into that discussion, it's worth taking a minute to recall how things used to be. In the Wheat Flour panel of the early 1980's we saw a panel that could not make up its mind on whether a contracting party that had used massive subsidies to grow its share of the world market from 29% to 75% had a "more than equitable" share. In the Pasta dispute, political interference in the process led the panel to split 3 to 1 after a fifth panel member resigned in protest. Later, in the Oilseeds panel, we witnessed a dispute that dragged on unresolved for years and where the arguments in the GATT Council once went on for five uninterrupted days. The point of dispute settlement is after all to settle the dispute and in the days before the Uruguay Round DSU, it was all too common for panel processes to fail both complainants and respondents in that central regard.

I start with those introductory comments just to keep things in perspective. While there is always room for tinkering at the margins, there is no doubt that the panel process has been dramatically improved. It goes without saying that the introduction of Appellate Review has also made a huge contribution to the settlement of disputes mainly by giving Members added political cover to implement the outcome of a dispute settlement proceeding.

In the next few minutes, I'll comment on what I perceive to be the strengths and weaknesses of the process as well as some ideas for its enhancement that I think deserve our endorsement.

Strengths & Weaknesses

An important strength of the panel process and Appellate review is that the system has never failed to produce an outcome. Both panellists and Appellate Body members seem to have accepted that they do not have the option to “punt” when asked by the parties to a dispute to decide which of them is in the right. You might not think this is important, but it is. Why bring a dispute if you risk getting no clear answer? I also think that the process of panel composition and selection of Appellate Body Members must be seen as working very well. I do not know of any case in which losing parties have questioned the integrity of panellists and Appellate Body Members. I am also unaware of any cases where Parties to the dispute have attempted to interfere with the work of the panel.

One weakness has to do with the length of time it takes for a dispute settlement process to run its full course. Overall, the process is taking much longer than was envisaged by the drafters of the DSU. There are some good reasons for this and some not so good reasons. I read somewhere that the average time it takes to select panellists is now 59 days. That’s nearly double the time foreseen in Article 8 and it’s too long.

I also find myself in agreement with the Brazilians when they say it is a shortcoming of the system to require a Member to litigate a case *de novo*, through all of the established phases and time frames even if the same measure nullifying or impairing benefits of this Member has already been found WTO inconsistent in a previous panel or appeal proceeding initiated by another Member.

Preliminary Rulings

I don’t think we need to conclude that the large number of requests for preliminary rulings suggest the need for a new mechanism to decide preliminary issues before making rulings or receiving briefs on the merits. That said, there could be circumstances where the Parties might be concerned that the Panel is headed in the wrong direction and would wish to use some preliminary stage of the process to put a check on the panel’s work.

I recognize that I now risk confusing the notion of preliminary rulings with that of an interim panel report, but I have to say I am sympathetic to the Chilean-American proposal of three years ago. In that proposal, they argued that Parties should have the opportunity to object to the inclusion in a final panel report of findings or basic rationale behind findings that the parties have agreed should not be included. Since the purpose of dispute settlement is to resolve disputes between Members, it is important that Members retain some control over the terms of reference (in other words, they – and not the panel – should determine what is the “matter” referred to the panel). It may well be that this “party control” is best exercised through a type of preliminary ruling to which the Parties are given the chance to react.

Rules on Evidence

It has been suggested that extensive evidentiary submissions made in highly fact-intensive cases might justify the adoption of new rules on evidence. I am not sure that I have an opinion on this one way or the other. What I can say is this: Members have a choice as to the speed and cost at which they want to run the DSU system. If they are going to allow for virtually unlimited submissions of evidence they need to accept that this will inevitably slow the system and add to costs. If we want an expedited process, then we will need to consider some rules on evidence. The discipline associated with such rules would probably do the system some good.

Time Limits

I think we have to admit that a major weaknesses of the DSU panel process and Appellate Review is that things still take too long. The Appellate Body in particular has issued reports within the timeframe of 60 days in less than ten percent of cases. The fact that we somehow forgot to take into account translation times when DSU timelines were established makes things worse as do problems with selecting panellists (recall the average of 59 days to select panellists).

Members seem to be generally understanding when a panel chairperson or the Appellate Body announces that due to the complex nature of the arguments needing to be analysed, more time will be required to produce the panel / AB report. There is not much we can do about that and most Parties would prefer for the panel to spend enough time on the case to get it right.

But there are areas in our control where we could change the rules to speed things up. A good example is the Brazilian proposal I made reference to earlier. I think that where a finding of WTO inconsistency has already been made on a particular measure maintained by a Member, a Member not involved in the original dispute should not have to jump through all of the hoops *de novo* and should have access to a fast-track procedure.

Opening up to the Public

It was extremely satisfying to see the mid-September panel proceedings in the hormones retaliation cases opened for observation by the public. Finally, it was possible to demonstrate what many of us have always argued: there is absolutely no reason whatsoever to keep these hearings closed. Opening the panel process (and I would argue the Appellate Review hearings) to observation by Members not involved in the case and the general public gives added legitimacy to the operation of the system. Although the specific reports in the panel process that was opened up are not due for some time now, I am convinced that they will demonstrate that having the hearings open to observers had no negative impact on the case.

This case was seen as an experiment. Because it worked, it should now be applied generally to dispute settlement cases. Opening future hearings will allow the public and interested organizations to see that the procedures are objective and professional. At the same time, transparency will reduce the ability of those who seek to undermine the WTO to argue that the dispute settlement process lacks legitimacy because it is closed.

Amicus Curiae

One of the most unfortunate episodes of WTO history that I witnessed was the reaction by Members in November 2000 to the Appellate Body's adoption of an "additional procedure" for the handling of *amicus curiae* briefs in the dispute between Canada and the EC on asbestos-containing products. It is hard to imagine how so many people could have seriously misunderstood each other's motives and the real impact and intent of what the Appellate Body had done.

All of this transpired in a difficult context. Developed countries were still smarting from the beating they had taken in their efforts to launch a new round in Seattle. Developing countries were not satisfied by the developed countries' reactions to their demands for "implementation"-related flexibilities in the agreements. Transparency was seen as an issue supported by the developed world and the sensitive issue of how *amicus curiae* briefs should be treated was seen as an issue both of transparency and of participation.

Meanwhile, and to some extent acting without a real feel for the broader context, the Appellate Body was genuinely worried that it would be deluged with *amicus curiae* briefs in the asbestos case and its Members came to the conclusion that an orderly approach to dealing with the problem could take the form of a special "additional procedure" for handling the briefs in that case only. I have no doubt that the procedure would probably have drawn criticism from some quarters under any circumstances, but the situation was

aggravated substantially by a WTO Secretariat staffer's misreading of the Appellate Body's intent and this staffer's ill-advised issuance of a bulletin to NGO's in which he characterised the additional procedure as an invitation from the Appellate Body to submit *amicus curiae* briefs in the case.

All hell broke loose in the WTO General Council meeting of 22 November 2000. I commend the minutes (WT/GC/M/60) to you if you are interested in seeing just how badly wrong large numbers of people can be on a topic. By the end of the discussion, the Chairman was forced to conclude: First, that there was a large sentiment that the system would benefit from clear rules on *amici* submissions and second, in the light of the views expressed and in the absence of clear rules, the Appellate Body should exercise extreme caution in future cases.

Well, as you know, the Appellate Body eventually did not find the information in any of the *amicus curiae* briefs submitted in Asbestos to be worth considering in its deliberations. However, the additional procedure adopted in this case is really a well-reasoned position. I would argue that we do need clear rules on *amicus curiae* briefs in the WTO dispute settlement system and that the basis for these clear rules should be the approach circulated by the Appellate Body in document WT/DS135/9.

Adopting an approach like the Appellate Body's additional procedure would establish a first phase where "amici" applied for leave to file a written brief. In this application, applicants would need to disclose: their interest in the appeal; the nature of their activities and sources of financing; the specific issues of law they intended to address; a statement as to how their submission would contribute to the resolution of the dispute and why it would not be repetitive of submissions already made; and a statement with respect to possible conflict of interest issues. But that is just the first set of hoops. Even if an organization passed the leave to file test, the Appellate Body was clear that there was no guarantee that their submission would be taken into account and strictly circumscribed the nature of the brief that could be filed. Finally, the additional procedure made clear that the parties and third parties to the dispute would be given a full opportunity to comment on and respond to any briefs accepted by the Appellate Body.

Far from being an open invitation to make *amicus curiae* submissions – the approach put forward in November 2000 was designed to ensure (a) a restrictive approach to consideration of such briefs and (b) maximum transparency to the parties to the dispute and *amici* in terms of how their arguments would be taken into account – if at all. Applied generally, it would be a very good rule.

Where are we without such a rule? In a totally non-transparent situation where WTO Members – by their own selection – seem to want to be kept in the dark when *amicus curiae* briefs are submitted. As a Member of the Appellate Body told me a long time ago, without rules and transparency, he was free to do whatever he wished with a brief that landed on his desk and nobody but he would know what an impact it had on him. That's not a good situation. I hope WTO Members find the space to eventually achieve a reasonable approach to this issue.

Conclusion

There are other areas that I could comment on but our time today is limited so I need to leave it there. Clearly, I think there are areas where the DSU procedures could be enhanced and I have referred to certain proposals by delegations in the negotiations that would have my support. That said, I think we can look back over the past ten years and be genuinely pleased with the system we created and the way in which it has operated. It's not perfect, but it's a damn sight better than what we had before.

Thank you.