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UNIVERSITÄT BERN

# WTO Appellate Review: Reform Proposals and Alternatives

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Programme

The World Trade Institute Workshop on

# WTO Appellate Review: Reform Proposals and Alternatives

Friday, 24 May 2019
at the World Trade Organization, Geneva
Room D

**9:00 – 9:15** Welcome and introduction by **Peter Van den Bossche**, World Trade Institute, University of Bern

**9:15 – 10:45** **Scope of and timeframe for appellate review**
**Please see the annex to this programme for the questions posed to this panel*

Chair: **Giorgio Sacerdoti**, Bocconi University, Milano

Panellists: **Maria Alcover**, Advisory Center on WTO Law, Geneva
**Gitanjali Brandon**, Permanent Mission of India to the WTO, Geneva
**James Flett**, Legal Service, European Commission, Brussels
**Guilherme L. Leivas Leite**, Mission of Brazil to the WTO, Geneva
**Jasper Wauters**, White & Case LLP, Geneva

**10:45 – 11:15** Coffee break

**11:15 – 12:45** **Judicial activism and precedent**
**Please see the annex to this programme for the questions posed to this panel*

Chair: **Gabrielle Marceau**, Associate Professor, UNIGE; Legal Affairs Division, WTO, Geneva

Panellists: **Katherine Connolly**, Sidley Austin LLP, Geneva
**Philippe De Baere**, Van Bael & Bellis, Brussels
**Michael Hahn**, World Trade Institute, University of Bern
**Alana Lanza**, Permanent Mission of Honduras to the WTO, Geneva
**Robert McDougall**, Cadence Global Ltd; Centre for International Governance Innovation
**Niall Meagher**, Advisory Center on WTO Law, Geneva

**12:45 – 14:30** Lunch break

**14:30 – 17:00** **Alternatives for appellate review and WTO dispute settlement** (tea break at 15:30)

**Please see the annex to this programme for the questions posed to this panel*

Chair: **Joost Pauwelyn**, Graduate Institute of International and Development Studies, Geneva

Panellists:
**Natalia Bayurova**, World Trade Institute, University of Bern
**Rambod Behboodi**, King & Spalding, Geneva
**Nicolas Lockhart**, Sidley Austin LLP, Geneva
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**Jan Yves Rémy**, Shridath Ramphal Centre for International Trade Law, Policy & Services, Barbados
**Isabelle Van Damme**, Van Bael & Bellis, Brussels
**Alan Yanovich**, Akin Gump, Geneva

**17:00** Conclusions and closing by **Thomas Cottier**, World Trade Institute, University of Bern

# Annex

**Questions posed to the panel on "Scope of and timeframe for appellate review"**

- Should the objectivity of factual findings of a panel be subject to appellate review?
- Should panel findings on the meaning of municipal law be subject to appellate review? How to separate the meaning of municipal law from assessing the consistency of municipal law with WTO law?
- Should appellate review be limited to only those issues that need to be addressed to resolve the dispute? What is necessary to resolve a dispute? Can a dispute ever be considered 'resolved' when the correct interpretation of the relevant legal provision(s) is still disputed between the parties?
- Should the Appellate Body refrain from modifying legal interpretations developed by panels when it agrees with the panel's conclusion on the WTO consistency of the measure at issue?
- Can the exercise of judicial economy by the Appellate Body be mandatory, and, if so, in which circumstances?
- Is completing the legal analysis within the scope of appellate review *under Article 17.6* of the DSU?
- Is an Appellate Body report circulated after the 90-day period no longer a report to be adopted by reverse consensus?
- Can a *mandatory treaty rule*, such as the 90-day rule of Article 17.5 of the DSU, be set aside by the parties to a dispute (whether by way of prior agreement or by ex-post deeming letters) or by a DSB decision?
- Can there be exceptional or mitigating circumstances under which the Appellate Body would be entitled to exceed the 90-day timeframe, even without the consent of both parties (e.g. the circumstances in *United States – Lead and Bismuth* (DS138))? Who would decide on the exceptional or mitigating nature of the circumstances?
- If the Appellate Body can exceed the 90-day timeframe only with the consent of the parties, what prevents an appellee from undermining or depriving an appellant of the right to appeal in large and complex disputes?
- If the parties do not consent to a 90-day-plus timeframe for appellate review, or do not agree to reduce the number of issues appealed, and the Appellate Body is called upon to limit the scope of the appeal in order to stay within the 90-day timeframe, how and on the basis of which objective criteria should the Appellate Body decide to limit the scope of the appeal?
- Do the parties to a specific dispute have sufficient information on the workload of the Appellate Body *in other disputes* to assess the time needed for the Appellate Body to complete appellate review in their dispute?

- Would parties requesting a DSB decision extending the 60-day period for filing appeals under Article 16.4 contribute to resolving the '90-day-problem'?
- Would a different calculation of the 90-day timeframe (e.g. by counting working days only) or an extension of the timeframe to 120 or 150 days resolve the '90-day problem'?
- Would the imposition of mandatory page-limits on written submissions or limits on the length of oral hearings speed up appellate review in complex disputes?
- Should the random composition of Appellate Body divisions be abandoned, and appeals be assigned to Appellate Body Members with the least workload in order to speed up appellate review?
- Should the Appellate Body no longer exchange views among all its Members in each appeal in order to speed up appellate review?

**Questions posed to the panel on "Judicial activism and precedent"**

- Can the clarification of a legal provision *in accordance with* customary rules of interpretation of public international law amount to judicial activism?
- Are there objective criteria to determine whether the clarification of a legal provision amounts to judicial activism?
- How much importance can and should be given to negotiating history in the interpretation of WTO legal provisions? Is there a common understanding of what constitutes GATT/WTO negotiating history?
- Does the case law of the Appellate Body stand for the proposition that there is binding precedent in WTO dispute settlement?
- What are 'cogent reasons' that justify deviation from established case law?
- Can a panel conclude that there are cogent reasons to deviate from established case law, i.e. that the established case law is not 'persuasive', on the mere basis that it interprets the relevant provision differently?
- What would be the *terms of reference* for the proposed annual meeting between the DSB and the Appellate Body to discuss developments in WTO case law? How to avoid that Members would at such meeting not merely repeat their disagreement with the Appellate Body on legal issues on which the latter ruled against them?
- In deciding whether established case law is not 'persuasive' should a panel consider that WTO dispute settlement aims to bring security and predictability to the multilateral trading system?
- If Appellate Body interpretations of WTO provisions were to be reviewed by the DSB, a DSB committee or any other body composed of representatives of WTO Members, how would decisions on the correctness of the Appellate Body interpretation be taken? By consensus? By (qualified) majority vote?

- On what basis could the DSB, a DSB committee or any other body composed of representatives of WTO Members come to the conclusion that the Appellate Body's interpretation of a WTO provision is incorrect and reflects judicial activism? Would it be on the basis of a wrong application of the customary rules of interpretation of public international law or could there also be another basis?
- If the DSB, a DSB committee or any other body composed of representatives of WTO Members finds that the Appellate Body's interpretation of a WTO provision is incorrect, what are the consequences for the panel and Appellate Body reports at issue?
- If an Appellate Body interpretation of a WTO provision were to be 'upheld' by the DSB, a DSB committee or any other body, would this interpretation be binding on panels and the Appellate Body in all subsequent disputes?

**Questions posed to the panel on "Alternatives for appellate review and WTO dispute settlement"**

- Would a more in-depth and expanded interim review of panel reports replace, at least to some extent, appellate review?
- Apart from the exceptional case, can parties be expected to agree before the initiation of panel proceedings *not* to appeal the panel report? Why would a respondent (who is statistically likely to lose the case) be willing to waive its right of appeal? Would in most cases a respondent not prefer to have a panel report that would not become legally binding as long as there is no Appellate Body to decide on an appeal (which could be forever)?
- Once appellate review under Article 17 of the DSU is no longer available, why would a respondent agree to resort to Article 25 of the DSU to allow for appellate review? Would in most cases a respondent not prefer the panel report never to become legally binding on it?
- Pursuant to Article 16.4 of the DSU, a panel report is to be adopted or not by the DSB within 60 days of its circulation unless it is appealed *pursuant Article 17 of the DSU*. Does recourse to Article 25 of the DSU set aside Article 16.4?
- Is Article 25 of the DSU sufficiently flexible for parties to agree to replicate closely the essential features of appellate review under Article 17 of the DSU? Which features cannot be replicated?
- How could the Appellate Body's exchange of views be replicated or in what other way can predictability and coherence of rulings be ensured?
- Are parties having recourse to Article 25 of the DSU for appellate review of panel reports free to deviate substantially from the features of appellate review under Article 17 of the DSU? In case of substantial deviation would Article 25 be (ab)used to 'circumvent' the DSU (see in this regard Award of Arbitrators *in US – Section 110(5)*, footnote 22)?
- At what time in the process should parties agree to resort to Article 25 arbitration to allow for appellate review of a panel report?

- Can compliance with an agreement to have recourse to appeal-arbitration under Article 25 be ensured/enforced?
- How should the reference in Article 25.4 to Articles 21 and 22 of the DSU be operationalized?
- Are appeal-arbitrators to be appointed *by the parties* in each case in which they agreed to have recourse to appeal-arbitration under Article 25 DSU? Who decides on the appeal-arbitrators if and when the parties cannot agree? In other words, who would be the appointing authority?
- Are appeal-arbitrators not to be to be appointed by the parties but to be *selected randomly* from a roster of potential appeal-arbitrators?
- Who should be included in the roster of potential appeal-arbitrators? How to ensure that the membership of this roster is broadly representative of the WTO membership? Should only current and former Appellate Body members be included in the roster of appeal-arbitrators? If not, who decides on the inclusion of other persons?
- Can a randomly composed division of appeal-arbitrators include arbitrators with the same nationality? Can it include arbitrators with the nationality of the participants/third participants?
- Arbitration awards do not require DSB adoption to become binding, while the non-appealed findings of a panel report do require DSB adoption. When and how should the panel report, as upheld, modified or reversed by the arbitration award be adopted? Can appeal-arbitrators be expected to agree to include in their award, and thus make binding, all non-appealed panel findings?
- Could/should the staff of the Appellate Body Secretariat service the arbitrators hearing and deciding appeals under Article 25 of the DSU?
- When can diplomatic dispute resolution methods, such as good offices by the Director General or others, mediation or conciliation under Article 5 of the DSU, be alternatives for adjudication by panels and the Appellate Body?
- Are the non-binding recommendations or findings of a mediator or conciliator likely to contribute more to the resolution of a dispute than an unadopted panel report?
- Would it be feasible – legally and/or politically – to negotiate among a group of 'willing' WTO Members a plurilateral 'DSU' or a 'DSU minus N' which would ensure among these Members the continuation of dispute settlement as it currently exists under the DSU?
- Would recourse to dispute settlement provided for under RTAs be an effective alternative for WTO dispute settlement?

# Note on Transcription and Editing

This document only contains contributions of the Workshop participants who agreed to publication. The World Trade Institute provided these participants with the original transcribed versions of their contributions, and the participants were then given the opportunity to make appropriate corrections and edits. All texts in this publication have been reviewed by relevant participants and reflect their final edits.

# Welcome and Introduction

**Peter Van den Bossche**

Ladies and gentlemen, current and former colleagues, friends on all sides of the debate, I welcome you to this workshop on *WTO Appellate Review* organized by the World Trade Institute. Today, the sun shines over Geneva and the Lac Leman, but it does not do so on WTO and its dispute settlement system. For the WTO and the dispute settlement system, these are dark days and it is this sad reality that brings us together today. Since November 2018, no less than 22 WTO members have either individually or in groups, tabled proposals for the reform of the WTO appellate review system and these proposals are currently subject to intense discussions. At the same time, there are a lot of discussions about what can and/ or what should be done to avoid the collapse of the whole WTO dispute settlement system if after the 10th of December, and that is in six months and two weeks from now, there would no longer be a functional Appellate Body to hear and decide new appeals. The programme of our workshop refers to the latter discussion as the discussion on the alternatives.

The purpose of this workshop is, first, to seek clarification of the proposals for reform of WTO appellate review currently under consideration; second, to explore the alternatives for WTO appellate review; and, third, to assess the practicability (for lack of a better word) of both the proposals for reform and the alternatives. To avoid that the discussions of today remain too general and thus, less unhelpful, the programme includes in an annex, a large number, probably too large a number, of specific questions on which the discussions in the various panels will focus. I am convinced that to many of these questions, we will hear today some very different answers.

Before giving the floor to the first panel, the panel on the scope of and the time frame for appellate review, I would like to take the opportunity to thank the WTO for making available to us today this meeting room, and all the panelists for having agreed to contribute to this workshop. I would also like to thank the sponsors, in alphabetical order, Akin Gump, King & Spalding, Sidley, Van Bael & Bellis and White & Case, without whose support, there would be no cookies with the morning coffee and afternoon tea as well as a few even more important things. I would finally like to thank the chairs of our three panels today, Giorgio Sacerdoti, Gabrielle Marceau and Joost Pauwelyn, who have already done a great job in organizing their respective panels and will have the thankless task to ensure that you, the participants in this workshop, get an opportunity to speak, should you wish to do so, and, as a second part of this thankless task, to ensure that we stay more or less on schedule.

The proceeding of this workshop are recorded and the WTI hopes to produce, as it is doing for the conference we organized in February last, an e-book with the edited contributions of all the participants who wish to share their views with a wider audience. With all this said, I thank all of you for participating in this workshop in such large numbers and I yield the floor to Giorgio Sacerdoti to chair the first session. Thank you.

# Session 1
# Scope of and timeframe for appellate review

Chair: **Giorgio Sacerdoti**, Bocconi University, Milano

Panellists: **Maria Alcover**, Advisory Center on WTO Law, Geneva
**Gitanjali Brandon**, Permanent Mission of India to the WTO, Geneva
**James Flett**, Legal Service, European Commission, Brussels
**Guilherme L. Leivas Leite**, Mission of Brazil to the WTO, Geneva
**Jasper Wauters**, White & Case LLP, Geneva

**Giorgio Sacerdoti**

Thank you very much. Well, I'm very impressed by the large gathering in this room to day. Even in the Appellate Body (AB) case whose hearing took place in this room, *EC-Preferences*, which I chaired, where there were a very large number of WTO members attending the room, it was not so crowded as it is today. This shows really that the situation which we are addressing is very serious and is viewed as such by everybody involved with WTO dispute settlement and the proper functioning of the multilateral system in general.

I will just make an initial comment. Often it is said that there are three values to be pursued in any adjudicatory system domestic or international in order to render it effective, respected and qualitatively valuable. But that you cannot have together all the three, you can have just two at the same time, with choices having to be made. One is the quality of the adjudication (the outcome), so in our case the completeness of the analysis and quality of the reasoning and interpretation by the AB, and thus the persuasiveness of its reports (this would apply also to the Panels). Then you have the promptness of decision-making. Delayed justice is justice denied sometimes it is said, so you want to have a speedy, prompt, settlement of the disputes, such as ninety days for rendering an Appellate Body's report. And the third is cost efficiency. I think this is relevant also at the WTO, where Members seek no cost increase of the budget, where the AB is made of just seven members who are moreover part-time, with a small staff. So, if you want to give priority to the quality of the decision making, which is fundamental also beyond the litigants and the WTO membership, and you want decisions rendered within a short time frame, then you will have to devote more resources, spending more money for a bigger AB, with a larger staff, more translators and so on. If instead you value more the cost efficiency (as in any case constrained by budgetary limits), and you want to maintain a strict time frame, thus prioritizing cost efficiency and timely justice, then you will have to accept summary, incomplete justice: you will have to opt for annulments rather than review of all legal issues, accept limitations to the right of appeal and the extension of the arguments that parties are allowed to make, summary decisions, renouncing to full appeal in law.. And finally, if you don't want to increase the costs and nor to renounce to the quality of the process and of the outcomes, then you can't have at the same time speedy justice. This is probably what happens now: decisions require more time than envisaged in the

DSU due to the number and complexity of cases submitted to the panels and the AB. I think that keeping these constraints in mind may be a good introduction.

Coming to the organization of this session, Peter has set up for us, or rather for you, an impressive list of issues. I have shared with my colleagues on the panels some ideas as how best to address them. We agreed to sub divide them in three categories. The first one is 'judicial economy'; the second is the issue concerning the ninety days and third is the organization of the proceedings' workload. So the first group would include items such as: should there be restraint by the Appellate Body in addressing issues which are not strictly necessary to decide the case, with a view to speed up the appellate process; not reviewing findings of panels on domestic or municipal law whatever their characterization as factual or legal issues; and then not completing the legal analysis even when this is possible, notwithstanding that the lack of remand powers under the DSU may hamper the 'prompt settlement' of a dispute . This would be the first block. The second would be the ninety days issue. Here, you have the question whether this time limit may be exceeded by the AB for serious reasons (such as multiple cases pending at the same time), or by consent of the parties. To allow more time for the decision could the days be calculated in another way (such as just working days), or could the time required for the translation not be considered within the ninety days because it doesn't depend on the Appellate Body? Could as a consequence the time limit be met by the reports being initially circulated (to the parties only?) in the original language with the translation to follow afterwards? The third group includes the organization of proceedings, workload, dialogue, page limits for submissions, method of appointing AB members on each division.

We also want to have time for questions from the floor. Should we have them all at the end of the three presentations or after each one? Maybe it would be better at the end because the issues overlap in part.

**James Flett**

Okay, thank you Giorgio. So, I have been privileged enough to be frequently involved in WTO dispute settlement over the years. It is my view that there is nothing seriously wrong with the dispute settlement system. That may sound smug or complacent. Certainly, there are always things that can be improved, of course. But as was said very many times during the last decade in the context of DSU review, while one can always look to improve things, one should be very careful to do no harm.

I think, unfortunately, circumstances have allowed the agenda to be set based on the assumption that there is a major problem that needs to be addressed. I think that assumption is false, and I wonder how political scientists will look back on this time. I wonder how people outside this room would look at us and what they would think of what we're actually doing here. I don't want to complicate things but it feels a bit like Brexit, if that makes sense.

So, I want to use my first five minutes to address two points on the basic vocabulary that is currently being used, because, as I think is so often the case, it is in the very choice of words that one finds the value judgments are buried, and I think those value judgments are demonstrably incorrect. And so my first point…my first point is what I have called in discussion with my panelists 'the bridge of reason'. If I could just sit here and say 'bridge of reason' a thousand times to counteract every time somebody has said 'gap filling', I would be a happy man. But I am not going to bore you with that. The bridge of reason is required by 12.7 of the DSU, which provides

that reports must state the basic rationale for the findings and recommendations. This applies to both panels and to the Appellate Body. If you had a report that cut-and-pasted the text of the relevant legal obligation, and cut-and-pasted the text of measure at issue, and then simply stated who had won, that would not be a report. That would not be a report that is consistent with anything agreed by the membership. A report must make a connection between law on the one hand and the facts on the other hand. This is what I would call a bridge of reason. And one of the problems I have with the current discourse is that, under the guise ….sometimes of the terms 'gap filling' or 'activism', people proceed as if there is a problem with the existence of the bridge of reason. But in fact, the bridge of reason must be there in every single case. It is the very essence of the judicial function. If you deny that it should exist, either you're saying there should be no dispute settlement in accordance with the agreed treaties or that it should be entirely arbitrary and therefore inconsistent with the basic objective of security and predictability and the rules against non-discrimination. Neither of those propositions are consistent with the WTO agreement. So we have to get past the idea that there's a problem if the judges explain how they have applied the law to the facts. That is what they are required to do. Bridge of reason, I'd like to say it a thousand times because apparently if you repeat something often enough, it gains currency.

And my second point goes to that term 'activism'. Now, I don't want to get into it in isolation, because we are all fed up of that empty debate. But the term 'activism' is used in a pejorative way with respect to something that judges do which the speaker is said to dislike. And the fundamental problem that I have is that there are three words missing from that discourse, which is essentially a political discourse, and not a legal one. We need to find those three words to complete the picture so that we can have a balanced discussion about any of this. And those three words are utterly missing from the debate at the moment. I don't mind what the three words might be, but they do need to be as pejorative as the word 'activism', and the first needs to describe when judges do something that we like, the second needs to describe when judges don't do something that we like, and the third needs to describe when judges don't do something that we dislike. Logically, these three words would complete the set of four words that you need to have this discourse. I don't mind what the words are. I have proposed for a word for what the judges do that we like 'judicial engagement'. So we don't want a judge that is activist but we certainly do need a judge that engages. For a word that describes what judges don't do that we like, I think that's easy enough: 'judicial restraint'. And for a word describing when judges don't do something and we dislike that, I suggest 'judicial default'.

I do not think you can have a meaningful discussion about the relevant issues, that is, enter into a critical assessment of a system of adjudication, unless you have these four analytical tools to hand. So, not just judicial activism, but judicial engagement, judicial restraint and judicial default. I think judicial activism is deciding outside your mandate or deciding issues that are not necessary for resolving the dispute. On the other hand, judicial engagement, the virtue of judicial engagement, requires, and indeed mandates the judge to set out the law, set out the facts and set out the bridge of reason. Without this minimum, the judge is not engaged in the task that they have been mandated to carry out. Judicial restraint would mean not interpreting the context. Context is just a tool to interpret the terms of the treaty where you find the obligation or right. We should not be interpreting context, and refraining from doing so represents the judicial virtue of restraint. Finally, we do want our judges to resolve the dispute. If they fail to do so, they are denying justice to the parties. And that is the judicial error of 'default'. And the judicial error of default is as serious as and probably worse than the judicial error of activism.

So these are my two points. Can we please address ourselves to the fundamentals of the vocabulary that we are using? Can we all please take on board the significance of the bridge of reason? Can we please complete the vocabulary of the discussion with these other three terms, whatever you want to use, I don't mind, so that we can have a balanced discussion. Because I honestly believe that if we look through that lens, we will reach the right conclusion, which is that there is nothing seriously wrong with the system at present, and the proposition that there is, is an illusion that has been created for political reasons.

**Giorgio Sacerdoti**

Thank you very much for this clear explanation and position. I turn now to Ms. Brandon from the Permanent Mission of India. Please.

*(…) (awaiting text approval)*

**Giorgio Sacerdoti**

Thank you. Well, a true story is here appropriate. I remember once in my early days at the Appellate Body, our Secretariat in order to use all the time available had proposed to the parties that the hearing take place on August 10. Upon that, first a representative of the EU Commission came alarmed to our premises saying, 'Look I have reserved a sailing boat with my family in Greece in August, these are the WTO vacations, please postpone the date of the hearing". He was followed by the delegate involved of the other party a Latin American country, also objecting to the date: 'I have home leave and I'm going back to South America'. So when I hear someone saying that the Appellate Body willfully disrespects the 90-day time limit, well I cannot but object having spent often Saturdays in this building, when it was deserted by everybody else be they staff or delegates, except the AB and its staff, instead of going skiing in Chamonix as everybody else, since I had to deal with such a fascinating issue as zeroing. Excuse me for this personal comment and I give the floor to Mr. Leivas Leite of the Brazilian Mission.

**Guilherme L. Leivas Leite**

Thank you Prof. Sacerdoti. First of all I would like to thank the WTI for this invitation and I'd like to say that Gita is also a very hard act to follow. I also have the same disclaimer to say my views are personal and they do not necessarily reflect the views of Brazil. So we have…nevertheless Brazil has tabled a proposal and we'd be happy to discuss this proposal during questions or other issues. But with regards to this issue of judicial economy and scope, I'd like to make some general comments and as a Brazilian I feel compelled to make a football analogy so just bear with me a little. I think one of the most overlooked beauties of football is its subjectivity, differently from Tennis for example, where the rules are very clear and the ball is off the line or inside or out or either you serve and it hits the net or not. Football has this continuous flow of play and the style of play is very much determined by the referee and in this sense and people usually don't notice this because nobody roots for the referee, right? If anyone…that's why you are a great lawyer!

**James Flett**

Whenever there is a football match and my kids ask me who I am supporting, I always say I'm supporting the referee.

**Guilherme L. Leivas Leite**

You ever go to a soccer match, you'd see that people usually don't like the referee or their mother but…and this is something very, very interesting because different countries have referees that set different style of play. For example- Brazilian referees are much more eager to call foul than European referees. That is why for example, you saw Neymar at the World Cup, he's on the floor. That's something…that is how football is played in Brazil. You try to get more fouls because you know the referee would call more fouls and when Brazilian players come to play in Europe, they see that it doesn't really work and they have to adapt…and so, I think with these issues of scope and what is judicial economy or what is…what is issue of law, issue of fact, these are concepts and they are black and white. So, I think much of the idea for reform or the importance of the Appellate Body isn't so much in deciding this or that case and I think that James made an excellent point of the partiality of the parties when they are criticizing the Appellate Body…and so…it's very hard to judge the Appellate Body only on its substance, but, I think much of the issues here with regard have to do with the style of play of the Appellate Body…and just as an example, with regard to Article 11 appeals. Article 11 appeals…the Appellate Body has since the very beginning, they established a very large…strict threshold for Article 11 appeals saying that a challenge under…US Steel safeguards...the challenge under Article 11 of the DSU must not be vague or ambiguous and it is not to be made lightly and with regards to substance, from 2016 up to now I think there were eleven Article 11 appeals and only two were decided favourably to the appellant, but, there seems to be a certain disconnect because…if you think just of incentives, I mean, parties are incentivized for making Article 11 appeals even though their chances are very, very slim of obtaining that appeal and I think that might be an issue of style of play procedurally, with regards to the Appellate Body in the sense that while…in the…decision…in the substance they might not give the appellant the decision, but they still, for lack of a better word, they cater to that appeal which at many times is very ambiguous, is very vague and there are, for example, hearing many, many questions, just trying to ask what the appellant is asking for in its Article 11 appeal. So, in that sense there is a, how can I say… a style of play, let's say, how the game is played even in a different connection than just what the substance is. So…just a final point, I think because parties are so partial in this issue and even though they may say while we need to exercise the restraint and politically, they say that, when it gets to the case they want to win, that's usually what they want and so, they are never going to say 'good job, referee. Thank you very much', they want the goals, but that is why so many times the referee is underrated and I think that is an important point we need to think about when we are talking about…the scope. Thank you.

**Giorgio Sacerdoti**

Thank you very much. As a former referee, coming from Italy, I appreciate a lot your reference to football.

**Maria Alcover**

Thank you to the WTI and Peter Van den Bossche for inviting me here today. We've been given five minutes each, which is quite challenging, but I think we're doing a great job so far. Going to the 'scope and timeframe of Appellate Body review', which is the topic of our session, there's a line of argument I've been hearing that goes like this: the Appellate Body has been doing more than what it should do – addressing issues it shouldn't address because they go beyond what is strictly necessary to resolve the dispute – and this has led to longer reports, which in turn has caused delays in circulation beyond the ninety-day deadline imposed by the DSU. I'm not sure this is an entirely accurate picture. In my view, the Appellate Body has been doing its very best to resolve the issues before it, taking into account that the DSU is not a perfect agreement and it certainly doesn't solve all the questions that may possibly arise in a particular dispute. The Appellate Body has had to find ways to deal with every new challenge posed by every new dispute. And it has done, to the best of its ability. Now, having said that, I agree with James that there's always room for improvement. To the extent that Members feel now that, after more than twenty years of experience with an Appellate Body, it is time to clarify certain rules regarding how the Appellate Body conducts its reviews, it might be a good time to do so. And if by doing so we get to keep the dispute settlement system as we know it – with an Appellate Body in it – that would appear to me to be an ideal outcome. In other words, if by fixing these rather technical issues that we are going to discuss today, we get better chances to save the dispute settlement system, well, it is worth a try. I admit that it's hard to be 100% sure that this is going to be the case, given that, in addition to these rather technical concerns there are also political concerns involved. But let's for now address the technical concerns here, which are 'scope' and 'timeframe' of appellate review. There are two key questions: What should the Appellate Body address? (scope) And when should the Appellate Body stop because it has done enough to resolve the dispute? (judicial economy). With respect to what should the Appellate Body address, there's been much controversy around the treatment of 'municipal law'. We all know that the Appellate Body is supposed to address only issues of law, but, in practice, the line dividing facts and law becomes very thin sometimes. Regarding municipal law, in particular, is it an issue of law? Is it an issue of fact? There has been a lot of debate around it. Among those Members that have submitted reform proposals, the majority has suggested that the meaning of municipal law should be treated as an issue of fact. In this sense, regardless of our personal views on the topic, if we think these proposals help clarifying the scope of appellate review, I don't see why we should not welcome them. Article 11 of the DSU claims are another issue that raises challenges for delimiting the scope of review of the Appellate Body when it comes to examine the Panel's assessment of facts. Some consider that the Appellate Body has gone too far when examining Article 11 of the DSU claims; others consider that it has done a pretty good job. I would be very interested in knowing what my co-panelists and the audience think about it. With respect to judicial economy, I think we all agree that, in general terms, it's efficient for a court to be able to exercise judicial economy. It is efficient for panels and also for the Appellate Body, which has actually exercised it in the past, even though the DSU technically obliges it to address *each and every issue* raised on appeal. So, generally speaking, judicial economy seems to be a very efficient tool for adjudicators. I would like to raise the point, however, that before imposing a *mandatory* judicial economy rule for the Appellate Body – which is contemplated in some of the reform proposals – perhaps we should all agree on the meaning of "what is necessary to resolve a dispute". To me, resolving a dispute means knowing whether the challenged measure is WTO consistent or not. Having a short report that solves this question is, of course, the best outcome. But if we have a short report – thanks to judicial economy – that leaves us with a question mark as to whether the challenged measure is WTO consistent or not, well, that is definitely not ideal

for the parties in the dispute. This would bring us to the issue of completing the legal analysis, but, for the sake of time, I will leave it for the discussion afterwards.

**Giorgio Sacerdoti**

Thank you very much. I welcome Mr. Wauters join us now, so we'll have here a view of the private sector's use of the system on behalf of WTO members, let's say. Thereafter we'll open the floor to questions and then we'll have a second round.

*(…) (contribution removed)*

**Giorgio Sacerdoti**

Thank you very much. I think we have received a lot of food for thought in this first round. I see many requests to speak from the floor; I hope we will have time for everybody. I would like to make just one comment concerning a dialogue between the delegates of WTO members and the Appellate Body. This is included in some reform proposals also with a view of understanding how the Appellate Body organizes its work. I would like to say something as to the first point. I believe that such a dialogue should be encouraged. However there has been a tradition in this house since the time of GATT of much confidentiality, separation of the roles. I remember within the DSU review, only once around 2003, the Australian Mission, when the Australian ambassador was the chair of the DSB, he took the initiative to have a meeting between Appellate Body members and interested delegations at the Australian Mission. Some delegate criticized the initiative saying, 'well, we are the masters of the treaty, why should we listen to the Appellate Body members?' On the other hand, some Appellate Body members said, 'we must be impartial and independent and if we mix with delegations, someone will have suspicions'. In any case at the meeting a very interesting discussion took place in which the Appellate Body members clarified certain practical aspects of the proceedings and vice versa some delegates expressed their impressions and concerns. I think it is a pity that this experience has never been repeated since, as far as I know.

The same issue, I think, of confidentiality or rather excessive confidentiality as to how the work of the Appellate Body is organized in order to meet the ninety days hampers an objective discussion of the issue. Many will have noticed that Panels now regularly publish, disseminate, they working rules and calendar, whereas at the Appellate Body level this is only discussed with the parties and is known only to them. It is not even known who are the three appellate body members on the division, until the report comes out, the original reason for this secrecy being that otherwise there may be attempts by parties to influence the three adjudicators. A calendar is made for each case and I think it should be disseminated more broadly so that everyone may understand the time constrains and how it is addressed. Thus, there are ten days for the appellant and thereafter for the appellee and other appellant to file their briefs. Thereafter another ten days for the third parties. Thereafter you have a hearing, approximately 40 days from the beginning (thus in the middle of the 90-days period), to be followed by short successive periods of time for the Appellate Body's Division in charge for preparing the first draft, then for discussing and reviewing it, thereafter to have a second draft. A very tight frame, I can tell you, especially considering that at times not all AB members involved are together in Geneva.. You may have a second case pending that you have to fit it in, and if there is also a third case and you need to fit

in the various engagements that this overlapping involves, I can assure you that 90 days will not be sufficient, without considering that at least two weeks are needed for translation and review of them by the Ab secretariat. The staff is not enough to follow all the requirements of assisting the Divisions in the drafting, reviews and revisions. Not to speak of the WTO holidays, that someone could be ill and so on. So I think more transparency would also dispel some suspicion by someone that the Appellate Body is not respecting by its own will, and not because of unavoidable constraints, the very strict 90-day timeline. It is not by chance that this is a unique feature of the WTO dispute settlement system which is not found in any other international adjudication mechanism.

**Rambod Behboodi**

Thank you very much, professor Sacerdoti. Rambod Behboodi, King & Spaulding, formerly the Government of Canada.

**Giorgio Sacerdoti**

Also a former student of mine in The Hague!

**Rambod Behboodi**

Indeed and always a personal view rather than any other view attributable to any other organization. Lots of food for thought but let me just…because Article 11 was raised and because the ninety day issue has been branded about, let me just a pose a question, I'll start with James. Let me just pose a question about analytical methodology that goes to the heart of an appellate court or an appellate instance's legitimacy.

You've got Articles 11 and 13 of the DSU; each contains a hortatory "should" that has been interpreted as a concrete legal obligation – "shall". I've written an article about Article 13; I started working on Article 11 but I gave up because I couldn't make heads or tails of what the Appellate Body was doing over the last twenty years. Thank you very much Jasper for identifying some of the issues, but you've got basically short hortatory language, basic, very simple, basic hortatory language in key provisions of the DSU that apply to panels and to Members. And then you've got the multiple 'shalls' in Article 17 that the Appellate Body has decided to be flexible or reasonable about, you know, the ninety days issue, or the confidentiality requirement. So you've got an institution that considers obligations as hortatory when they apply to itself or "flexible" when it applies to itself, but non-obligations as obligations where other instances are concerned. Do you not have a problem of legitimacy? These are not about some obscure provisions in the DSU; more than that, we see the same type of dynamic happening in respect of other obligations, in the other 550 pages of the agreement. So, as I said, I'm really focusing on two words - 'should' and 'shall' - in one agreement in three articles, but I see that as symptomatic of a bigger problem.

**Tom Miles**

Good morning, my name is Tom Miles, I'm a journalist from Reuters. The US says that the ninety day rule has not been obeyed, so I feel all this discussion is about what the ninety day rule means…and you know, we'll talk around it, it seems to be a dialogue of the deaf: they say you haven't stuck to ninety days and presumably, they want the Appellate Body to stick to ninety days in the future, so the only way I can see out of that is if you were to come forward or if the WTO

were to come forward with some serious proposals about how to massively crunch the timeframe to make sure the ninety days' time frame is achieved. Otherwise how can there be any compromise solution or how can there be any meeting of minds between the US and the people trying to solve this problem? Thanks.

**Giorgio Sacerdoti**

Thank you. Yes, Alan Yanovich.

**Alan Yanovich**

The best way to get back to ninety days is to appoint the full Appellate Body and I'm being serious, I would be happy to be quoted on this one. I'm repeating myself; the best way to get back the ninety days is to appoint the Appellate Body members that have not been appointed. In other words, to remove the block.

**Giorgio Sacerdoti**

Yes, but recall my dilemma of the three requirements of which only two can be met at the same time: you can respect the ninety days if you address somehow the other two issues (cost constraints and quality of the decision), otherwise it becomes an impossible task.

**(unknown speaker 1)**

Yes, good morning Giorgio. I think when you discuss these ninety days, but the whole discussion but starting with this point, people forget that Appellate Body members are part-time, they are not full-time, they are paid by the day as experts according to administrative rules, so you have to take that also into consideration that they have other and the argument whether you should have permanent one or not, so that's number one, then you have reality check, how could you have dealt with a case like Boeing in ninety days. It's just impossible if you just see the amount of papers which are there. This brings me to the bigger thing. You speak about 'judicial economy' whether you could put/set limits, you speak about how to deal with municipal law, this business of municipal law has…a fact which dates back from the 20s is completely *de passe* in international law in general, in general international law. How can you decide whether a measure is compatible or not with agreements if you don't interpret internal law, the measure as internal law as if you were dealing with law not facts. When they spoke about municipal law as fact, it meant only one thing that the judges were not supposed to know that law, because you know in general, this is... in Korea that the judge knows the law. Yes, he knows international law but not every internal law. So, that is why it was…the rule was formulated by the permanent court of international justice. All that indicates what? You cannot have an appellate body called Appellate Body, meaning a court of appeal, *court de cassation* which controls the interpretation and the application of the law to facts while reducing completely its autonomy as a tribunal. You either have a tribunal or you have something which is very simply to accommodate parties and these are two different concepts and I think all these small details which we are discussing relate to this. Are we speaking of a real tribunal or are we speaking of the club idea of GATT? If it is club idea of GATT, then of course you can do what you want, but a tribunal has a meaning and has a minimum range of freedom which cannot go beyond a certain point, otherwise it loses its nature as a judicial function. Thank you.

**Giorgio Sacerdoti**

Thank you. The floor is for Gabrielle Marceau.

**Gabrielle Marceau**

Good morning, I am speaking in my personal capacity. I think Prof. Abi-Saab, as always, has put his finger on a fundamental issue, that is the nature of the dispute settlement system. We are well aware of the differences between EU and US on this matter. I would like to get your views or comments on a point of the proposal from Chinese Taipei on this issue of ninety days where it says that the very timeframe, the tight timeframe of 17.5 DSU for 90 days maximum may not be interpreted as simply "outdated or bad piece of legislation", instead it might be viewed as "another element laid down deliberately by negotiators in order to circumscribe the Appellate Body function". I don't like the word circumscribe but the point is that ninety days would not only be a procedural rule, it would have been an explicit choice of governments, like the choice of having only seven judge, seven members of the AB, not fifteen like the ICJ, and only ninety days. So this, maybe…, was purposely negotiated in order to qualify the type of dispute settlement system: not as a full court, maybe more than simple arbitration…, what do you think?

**Giorgio Sacerdoti**

Thank you. When I studied the matter, I was told the ninety days were inserted because in the US Trade Laws section 301 had a similar time frame and the US would accept not to proceed unilaterally with its measures provided that the review in Geneva would be quick. Hence this short term, not because of some idea on the time requirement of the proceedings envisaged.

**Kholofelo Kugler**

Good morning, my name is Kholofelo Kugler from ACWL. Is there scope to turn the mirror around? Because one of the panelists said that this mirror's been shown to us regarding the AB and the dispute settlement system and how it works. What about turning the mirror around to the members themselves? And asking if there's scope really to adopt those authoritative interpretations and move forward? I think Maria may have suggested that there are some things that have agreement - maybe on municipal law as an issue of fact. So, should we really point fingers at the AB? Or should we start thinking about how we can move forward as a membership? As the DSB, in adopting rules that really work. Part of the problem, obviously, is a systemic issue. The negotiating function is just defunct and so maybe we should start accepting the truth and stop point fingers at the AB alone. I'm not an AB apologist but we really need to think about how, as Members, this deadlock can be resolved.

**(unknown speaker 2)**

Thank you…sorry…apologies…I want to follow up on what Jasper said and this point about Article 11 and has the Appellate Body gone too far, but then the recognition that often it is the lawyers who raise a lot of Article 11 claims. What do you think the Appellate Body should do? You have a case in which the appellant raises ten-fifteen Article 11 claims, what should it do? What would save the Appellate Body from being criticized for either doing too much or too little in those circumstances?

**Giorgio Sacerdoti**

We come back to our panelists in the same order.

**James Flett**

So the first point I'd like to comment on is the ninety day point. I think this has been raised by a number of questions. I think there is no ninety day problem at all. I think it's just an illusion. And I think you need to make a very strict separation between the law and the politics. If you look at the law, the situation is that 17.14 states clearly that the report is adopted thirty days after circulation. That's it. It doesn't say circulation within the ninety days provided for in 17.5. There are other provisions of the DSU that tie together temporal consequences, but not Articles 17.14 and 17.5. Second, when that ninety-day limit is not respected, the Appellate Body violates an obligation in a treaty, which violation is attributable to the World Trade Organization, as a matter of public international law. If we look at the regulating instrument of public international law, which is the International Law Commission draft Articles on the Responsibility of International Organizations, we will find in its Article 10.2 that it states expressly, and this is an extremely well known problem, that when an international organization breaches an international obligation, including towards its own members, and including as a result of failing to comply with one of the rules of the organization - this is written in the ILC Articles and explained at a great length in the commentaries - the WTO is exposed as a result of that, and an aggrieved Member in theory can seek reparation. Now for various technical reasons that cause of action would be rather unlikely to be successful, but legally…legally there is a consequence to the breach of 17.5 by the Appellate Body and the WTO. Please download that piece of information, because an enormous amount of the subsequent discussion is grounded on the assertion that it can't be that there is no consequence. But there is a consequence, and it's the one I have just described. That is the law, that's what the law says. Now, I hear a number of people offering opinions about why the law is drafted the way it is drafted. That is very interesting. But that is politics, not law.

This is the reality of the situation with respect to the ninety day rule. So, it may be that some members are dissatisfied with the prospect of the remedies that are available to them in public international law generally, and it may be that they want to change the treaties accordingly. That's a political question, it's not a legal question. And in any event, in my opinion, it certainly doesn't justify bringing the entire dispute settlement system to a grinding halt. And I don't think the rest of the membership can accept or should accept that sort of approach. That is on the ninety day rule. Please let's distinguish between what the law says and various political opinions. So there is no problem, it's a politically orchestrated attack on the Appellate Body and the dispute settlement system and on the WTO.

The second thing I would like to say is that I would like have the great temerity to respond to Professor Abi-Saab's eloquent intervention and also the great temerity to agree with it wholeheartedly. And I should of course say, like all the other speakers, I'm speaking in a personal capacity. In particular, on this issue, I'm commenting on the law as it currently stands, and based on Appellate Body case law. I'm not commenting on any of the proposals that have been made for alterations to the text of the treaties. The point to note here is that the bridge of reason can be constructed deductively, from the general to the specific, from the law to the facts. Alternatively, it can be constructed inductively from the specific to the general, that is, from the facts to the law. There are two different ways of constructing the bridge of reason. The bridge of reason consists of inferences which are drawn either from a combination of treaty terms, stated

using the terms actually used by the treaty, or a combination of facts stated using the words of municipal law. Article 17.6 of the DSU states clearly that the Appellate Body is responsible for the deductive bridge of reason, that is, the way in which the law has been interpreted and applied; it's unequivocal, it is in Article 17.6. That is the territory of the Appellate Body. If you say, 'hang on, the appellate body can't touch inductive reasoning engaged in by a panel, departing from the words actually used in municipal law, with a series of inferences to construct a bridge of reason from the other end', then you are saying that the Appellate Body has no control over the bridge of reason, and that is inconsistent with what is stated in Article 17.6 of the DSU. And if at the same time, like Rambod, you say there is nothing in Article 11 but the term "should", which doesn't mean anything, then the Appellate Body has nothing to do at all, unless the panel writes down the treaty obligation using the wrong words, which it is obviously not going to do. I hope that's clear. This is what those who are adopting these kinds of positions are advocating for. No Appellate Body at all, effectively. That is, a dispute settlement system that does not achieve the objective of security and predictability and that will result in discrimination between Members, probably as a function of how much power they have. So thank you Professor Abi-Saab for putting us all straight on what the law is today. One can have different political views on what the laws might look like in the future if we change the words, but today, this is the situation. Thank you Professor Abi-Saab. Could we all please listen to the tremendous wisdom that we hear?

**Giorgio Sacerdoti**

Thank you. Mrs. Brandon, your turn.

*(…) (awaiting text approval)*

**Giorgio Sacerdoti**

Thank you very much. Now, Mr. Leite.

**Guilherme L. Leivas Leite**

Thank you. I think a very important point raised by Gita here is that how do you encompass all these different judicial worldviews? But, I guess that's what an international agreement is and an international agreement has a lot of this constructive ambiguity, so even though there is strong language in some provisions or in others, this is exactly to accommodate these different worldviews and the practice of members is also very important with regards to these provisions… I think that's a great example with regards to the letters because it wasn't a very…initiative blowing out of proportion because of a political reason now but was easily accommodated with the practice of members and other issues, for example, sequencing, it was a very large schism which actually did raise a very significant crisis… I mean, maybe not in the size of this one but after…was in the Banana's dispute where there was a schism, the schism I understand still goes on regarding sequencing, but I mean, parties have now drafted sequencing agreements which are usually done, it takes a little more time, it's a little more work but it's easily accommodated…what you can say a very differing worldviews there so, what I am trying to say is that I agree with James that you can't mix political issues with legal issues, but when we have a political issue here, it's very hard to solve them just by using law. I really like law, I went to law school, I work here, I love this issue but we need to know that law doesn't solve everything and

so when we get very anxious and very…debating the legal issues when we're trying to solve a political issue and it really doesn't get us anywhere.

**Giorgio Sacerdoti**

Thank you very much. I agree. My comment would be: beware of solving political issue by undermining a legal structure. If we devise something that will not work it will take another twenty years to solve it.

**Maria Alcover**

Thank you. I agree with what Guilherme just said; we are discussing technical/legal issues here, but we all know there are broader political issues at stake. Perhaps, however, it is wise to at least try to fix the technical issues and see if, by fixing these technicalities, we can somehow get closer to fixing the bigger problem. I also wanted to make a very brief comment regarding the ninety days issue, which I myself have had trouble understanding in full. Indeed, it is hard to know exactly where the problem lies. Is it that the ninety-day deadline is in itself too short and that's why we need to extend it to 120-150 or 200? Is the problem that an Appellate Body report circulated beyond the ninety-day deadline is no longer an Appellate Body report subject to negative consensus? Like James, this reading puzzles me because the DSU does not expressly say so. Or is the problem that, as Gita mentioned, the Appellate Body stopped consulting with the parties when extending the ninety-day deadline? It seems that we can approach the ninety-day problem from different angles, but we have to identify the specific concern at stake. I would also like to echo what Giorgio said at the beginning, sometimes Members (and lawyers) want to have it all: we want to submit hundreds of pages in an appellant or appellee submission, and we want to include many Article 11 of the DSU claims; but we also expect a high-quality Appellate Body report, one that addresses each of our arguments, gives sound reasoning for each of its conclusions, and, on top of that, is circulated in ninety days. I think, at some point, we have to agree that that's just not possible. So we have to tackle different aspects of the dispute settlement system to really solve the problem in its entirety; perhaps it is necessary to start disciplining the parties in a dispute to some extent. And let me make a final comment with respect to the issue of 'shall' and 'should', which I thought was an interesting point. Again, sometimes, we want it all, but our views and arguments are not entirely consistent. We want to interpret 'shall' in a very strict manner in a specific provision, but we want the term to be laxer in another provision. For instance, we want a strict ninety-day rule, because the DSU states that the report 'shall' be circulated within ninety days. However, when the DSU establishes that the Appellate Body 'shall' address each of the issues raised on appeal, we are ready to read the word 'shall' less strictly because judicial economy might be a good idea in a particular case. We should be aware that we tend to be selective as to the meaning of a particular term, depending on the context in which it appears.

*(…) (contribution removed)*

**Giorgio Sacerdoti**

Thank you very much. We have been very respectful of the clock: we were allotted in this panel not ninety days, but ninety minutes and we still have four minutes left to make use of all the ninety minutes. I can take therefore another question or two. Mr. Do Prado please.

*(…) (contribution removed)*

**Giorgio Sacerdoti**

By way of conclusion, I personally would agree with Victor, but it is also true that the US has in detail set down its concerns or objections to the current application of the DSU rules in AB proceedings and other members have reacted to that. The United States have not articulated their proposals, contrary to what other WTO members have done. These proposals to do not contemplate that the Appellate Body should become just a kind of super panel that in isolation gives opinions on major errors that Panels may occasionally make. If this was the original idea of certain parties it does not correspond to the scheme of the DSU provision. We have used our 90 minutes and therefore we stop. We will resume with the second panel at 11:05. Thank you very much to all for this interesting debate.

**xxxx**

# Session 2
# Judicial activism and precedent

Chair: **Gabrielle Marceau**, Associate Professor, UNIGE; Legal Affairs Division, WTO, Geneva

Panellists: **Katherine Connolly**, Sidley Austin LLP, Geneva
**Philippe De Baere**, Van Bael & Bellis, Brussels
**Michael Hahn**, World Trade Institute, University of Bern
**Alana Lanza**, Permanent Mission of Honduras to the WTO, Geneva
**Robert McDougall**, Cadence Global Ltd; Centre for International Governance Innovation
**Niall Meagher**, Advisory Center on WTO Law, Geneva

**Gabrielle Marceau**

Good morning. This session is somehow like the first one, concentrating on two of the so-called 'US concerns'. I think that what came out clearly from the first session is that some speakers are of the view that the problem of the AB crisis is much more than technical. For those who were here a few months ago, we had another conference by WTI, and some people were asking 'why is it that there's such a focus on the Appellate Body if there are other problems in the WTO? and if the Appellate Body is only part of the bigger problem, the issue is therefore political rather than legal, so why look at it only from a legal and technical perspective?'. Remember, at the time, I referred to the word 'leverage' (between blocking the AB and other WTO problems) and I was bullied by some of my colleagues who were saying "what is this, you are a lawyer?". Today, I still think it's useful to look at possible problems specific to the AB and needs for reforms, even if we reach a conclusion that they are problems with the AB, or that are problems also elsewhere in the WTO. The AB problems we look at today on this panel are allegations of judicial activism, allegations of false rule on precedents and we have divided the themes amongst speakers. Philippe and Niall will talk about judicial activism and respond to some of the questions like 'Is it possible, for instance, to have proper interpretation under customary international rules of interpretation that would nonetheless be judicial activism?' Philippe and Niall will also discuss judicial activism, and then Katherine and Alana will speak about precedents; afterwards Michael will talk about those mechanisms suggested to review what the Appellate Body does. The first speaker will be Robert who will talk about all those issues, focusing on the content of the current reform proposals and their policy environment. Like the previous panel, each speaker will speak about 5 minutes and unless there's an urge to comment on each other, we'll go to the floor. So Robert, what is judicial activism and what is the problem with precedent, if any, what about review mechanisms and what is the essence of those proposals in their context.

**Robert McDougall**

Thanks Gabrielle. Let me start by saying thanks also to the WTI, and Peter in particular, for organizing another very timely conference. I'm just pleased, and perhaps a bit surprised, to be invited back again to participate, especially with such a distinguished group of speakers.

I also just want to say at the outset that I'm pleased that all of you now get to share the tremendous joy that so many of us have had to experience over the years that have been involved in the DSU Review. That includes endless debates and arguments, largely about the same issues and with little hope of progress or convergence. After a while, most participants in DSU review just eventually come to call it a 'dispute settlement debate club'.

I fear though that these discussions, both among the members and on the margins and in conferences like this, have about as much chance of being successful and are starting to take on the same character as the DSU Review. Because as in the DSU Review, the tendency was always, and presumably is still, to try to "litigate" US concerns and to try to resolve the impasse through legal arguments rather than negotiation, a point that was made at the very end of the last panel by Victor. But just as we couldn't argue our way out of the DSU Review, with the tables now turned on the consensus rules – effectively, the US has externalized the DSU Review, with the same issues that have been argued about for the last 15 years – with the consensus rules now reversed, we're not likely going to be able to argue our way out of this impasse.

The allegations the US makes that are related to this panel are that the Appellate Body engages in advisory opinions, that it modifies rights and obligations of members, and that it places too much emphasis on the authority of its previous reports. By the way, I searched over the last couple of days for any reference by the US to "judicial activism" or "judicial over-reach" and it's not the term they use, so I think it's unhelpful to consider the politicization of the terminology. They make very specific arguments about the things they say the Appellate Body engages in, all of which they say are exceeding its mandate.

The reactions so far from others have fallen into three categories:

1) some – in conferences like these and in blog articles – argue that as a matter of law, these things do not happen or if they do, they are either a necessary or an implicit feature of the system or the evolution of the system. And with all due respect to the organizers of this conference, some of the indicative questions were shared foster this kind of debate about the existence of what's happening.
2) In terms of the actual proposals, some WTO members have proposed to explicitly allow these practices or alternatively to protect the Appellate Body from the appraisals if it engages in them.
3) Other members have proposed the adoption of guidelines to remind the Appellate Body that it can't engage in the practices.

So far, the United States seems relatively unmoved and has called instead for focus on the two questions that it set out in the General Council intervention a couple of weeks ago: 1) why the Appellate Body has felt free to depart from what the members agreed; and, 2) why the membership itself has been so reluctant to take corrective action. These are important signals from the United States about what it seeks in the reform exercise and it might be an opportunity to talk about those questions rather than underlying legal questions.

Like it or not, or agree with it or not, the United States doesn't seem too inclined to "litigate" its complaints. These discussions are all very interesting and they may be useful in future with a revived Appellate Body with a new mandate to figure out what the limits and scope of the new mandate is, but the current context there is not much argumentation which seems likely to change US view on the nature of its claims.

It's not likely possible or productive or even necessary to try to settle the question of whether or not, and to what extent, the Appellate Body actually engages in so-called "judicial activism" and "judicial overreach". But it should nonetheless be reasonable or possible to reach an agreement on reasonable modifications to the system, without prejudice to one's position on the nature and scope of the underlying problem.

First, this would certainly need to include a number of the points of clarification of the mandate, possibly even narrowing the mandate. Many of the proposals go in that direction and discussions like these today can help to clarify the proposals. But on their own, they are likely to be insufficient to resolve the impasse. A lot of these issues in any event can be regulated through clarification and still end up with the same kind of problems where they'll still need to be implemented somehow and understood. As the US said in the General Council aa few weeks ago: "there's no reason to believe that simply adopting new or additional language, in whatever form, would be effective in addressing its concerns".

Second, the US suggested, as it has suggested for many years, the need to focus on effective accountability mechanisms or counterbalance to operationalize the existing members' right to collectively interpret their commitments. In the DSU Review, the US has for fifteen years, called this "member control" and while its proposed form of "member control" in the DSU has always been wrongheaded, the nature of its concerns have not been wrong. Any well-functioning domestic system of law that has developed the kind of inverted imbalance between its judicial and political organs as we now see in the WTO, would eventually face a constitutional crisis. There's no reason to expect a different outcome at the international level. None of the current proposals come even close to addressing that particular issue other than the question about a meeting between the DSB and the AB. If we get a second round, I'll have a few comments on that.

And third, the US seems to want to change the culture of the dispute settlement system. A culture based on adjudicator restraint and humility would result in less risk of obiter, less risk of modifying rights, and less risk of strict adherence to past reports.

At this point though members have a choice – a choice that others have referred to. They can continue to insist on a vision of a Dispute Settlement System and an institution that has lost the trust of the one of the original and principle architects, even if it means excluding it from that system. Most of the afternoon is going to be spent on how the US can be excluded from that system. Or members can try to find a way to keep their largest trading partner subject to a binding dispute settlement system, even if it means modifying the system to reflect changing political realities and changing expectations.

My main point today, my closing point, is that this choice cannot be simply made on the basis of technocratic criteria and legal argumentation. It is now, as many referred to this morning, a political choice and a political question, one that has to be decided on the basis of how badly members want to keep the United States subject to a binding dispute settlement system, albeit

that one might have to roll back some of the controversial developments that have occurred over the last 25 years. Thank you.

**Philippe De Baere**

Thank you, first of all for inviting me to this very interesting workshop. Thank you also Gabrielle for sending me two very interesting questions and let me read them out to you before I start. First, can the clarification of a legal provision in accordance with customary rules of interpretation of public international law amount to judicial activism? Second, even more challenging, are there objective criteria to determine whether the clarification of legal provision amounts to judicial activism? Trying to find an answer to both questions, I obviously turned to the Oxford English Dictionary to find 'judicial activism'. Unfortunately, there is no clear definition to be found there.

As pointed out by previous speakers, allegations of judicial activism are often outcome dependant and will be raised by the losing party. In such instances, the parties will allege that the tribunal created new rules or misapplied the applicable interpretative methodology and as a result the tribunal created or imposed obligations on the party that went beyond the sacrosanct common intention of the drafters.

Upon reflection, I came to the conclusion that any practical definition of judicial activism can only be formal, namely the departure from the correct interpretative method by the adjudicator. Whether the result is in line with the original intention of the drafters should be an irrelevant question. It is indeed incorrect to consider that the outcome of the interpretative process should be measured against an abstract yardstick which we would then call the intention of the parties. The intention of the parties is not some kind of ontological entity existing somewhere in outer space waiting to be discovered.

The intention of the parties is precisely the outcome of the interpretative process. If the appropriate legal methodology is applied correctly, the result will correspond with the intention of the parties. Since under the dispute settlement understanding, the interpretative methodology to be followed is that of the Vienna Convention, its correct application cannot result in an outcome beyond the common intention and can therefore not constitute judicial activism. This answers the first question.

This also means that accusations of judicial activism in fact relate either to the choice of an incorrect interpretative framework that would not rely on the Vienna Convention or the incorrect application of the correct interpretative methodology. Let me look a bit further than that. Obviously the choice of an interpretative methodology is not neutral; outcomes will vary between different methodologies. This should be quite obvious because legal text after all is foremost language and language unavoidably allows for multiple meanings. Speaking in Geneva which is the birthplace of Ferdinand de Saussure and the place where Borges is buried, all of us will be aware of the different meanings and uncertainties of legal meaning or meanings of words. We all know many examples. For instance, if we talk about liberal in the US, we mean something else than when we talk about liberal in Europe. Or the word 'chair'. As I am speaking, I have my chair besides me and under me.

The important issue is therefore, how do we define the correct meaning, how do we choose the correct meaning? And more importantly, who makes these choices and how is this done? For

the purpose of today's discussion, I think the core issue here in the debate is really the weight to be given to the perceived intent of the parties at the time they agreed on a certain text. Or more precisely, what is the importance of the negotiating history or the preparatory work of the WTO treaty in the interpretative exercise. The Vienna Convention clearly gives the greatest weight to a text based analysis and relegates preparatory works and surrounding circumstances to a secondary role. This was different under the GATT where the perceived intention of the parties carried much more weight. Now, we all know the history of GATT and WTO, and if we look at who drafted the treaties it is clear that a limited number of countries have played a preponderant role in the drafting of the WTO treaties. It is therefore obvious that the adoption of an interpretative framework that gives less importance to preparatory works will result in a loss of influence over the outcomes by these powers. I believe that we can say that the European Communities, as the EU was called at the time, the US, Canada and a limited number of Western powers played a dominant role in the creation of the WTO treaties. This means that an excessive reliance on preparatory works and perceived intentions is actually playing in favour of these countries. In that sense, and here we come back to the previous panel, also here law meets politics: the choice of an interpretative method is actually a play for power.

Finally, what must be understood as an incorrect application of the rules of the Vienna Convention? Does the Appellate Body make errors while applying the Vienna Conventions? It's not because I will probably have to appear before the Appellate Body again but I consider it appropriate to take a formalistic approach and respond in the negative. This therefore means that the Appellate Body does not make errors. Obviously, applying the rules of the Vienna Convention, the Appellate Body has to make choices and we all know these choices: ordinary meaning, do we use the Oxford English Dictionary or Wikipedia? Which edition of the Oxford English Dictionary do we look at? If we see the word 'comprise' in the Vienna Convention, is this exhaustive or not? What kind of context do we take? What are the relevant rules of international law? One may agree or disagree with these choices but as long as they find a basis or hook in the Vienna Convention and follow judicial reasoning, one should consider them as correct. Indeed any legal system ultimately depends on the fiction that the highest court must always be right.

The question therefore should not be so much whether the Appellate Body is correct but whether its decisions are considered as legitimate by stakeholders and this question brings us back to the balance between the legislative and the judicial branch in the WTO system and as Robert said, a solution must be found in re-calibrating these roles. I disagree with Robert in that I think that the change has to be preferably done to the legislative role of the WTO. The US disagrees with that but, in fact, if we look at the examples raised by the US on judicial activism or where the Appellate Body went outside its mandate, we see that often the examples cited spring from the concern by the Appellate Body to preserve the legitimacy and relevance of the WTO Agreements in the absence of a working legislative function. I will stop here and wait for your questions.

**Gabrielle Marceau**

Thank you very much. So, there is no real technical or legal problem with judicial activism if I hear you well, but there is an issue of legitimacy for some Members if the AB goes too far in its interpretation. Niall, what is judicial activism and do we have a problem? Judicial activism. What is it for you?

*(…) (awaiting text approval)*

**Gabrielle Marceau**

Thank you, Niall. So judicial activism is invoked by a party when it loses but also and maybe more importantly, one's views on the legal nature of the dispute settlement system and on the method of interpretation will affect whether one believes there is judicial activism or not. Very good. Now we are going to discuss the issue of precedents which is another allegation or US concern, that there is new AB imposed rule of precedent - because of the AB use of this new term, 'cogent reasons' which for the USA is flawed. What is it this "cogent reason" business? Where does it come from? Who invented it? How does it link with the written principle of the DSU on the need to maintain "security and predictability"? Does it add to the DSU or is it just a confirmation?

**Katherine Connolly**

Thank you. I'll just repeat what I said. In starting off the discussion on precedent, I'd be talking about what 'cogent reason' means, the origins, the context and more importantly whether I think it's a helpful analytical tool to deal with the criticisms from the US we've had so far. So, of course cogent reason comes from the Appellate Body statement in Mexico Stainless Steel, sorry in US Stainless Steel that the panel made cogent reasons to depart from Appellate Body precedents and it's has really become both particular term, cogent reasons have really become the focus of a lot of the discussions that have arisen out of the US criticism. We see that particularly in the DSB statement of the US last year where they talked repeatedly and very critically about what they called a cogent reasons approach. I think to understand what that means, what it means and if it is useful, you need to really put the statement in context in which it was made. And as most people in this room will know that came… US Stainless Steel came out of the zeroing disputes. For those of you that don't know, I think we can all spare everybody a discussion on the technicalities of the anti-dumping margins, I may say that you come back to the next panel. Basically what happened is you had effectively a schism between the membership as in the content and the substance of the rules in the anti-dumping agreement and that schism played out and was reflected in the institutional bodies of WTO. So you had the US which adopted the methodology of zeroing that it said was WTO consistent. You had a number of WTO members that said it wasn't WTO consistent and then you had a series of disputes where you had Panels adopting a pro-US position saying it was consistent that were overturned by the Appellate Body and then another dispute would come along and the Panel would adopt the same original position and the Appellate Body would overturn it and so on and so forth. So, you respectively got to a position by the time the Appellate Body's report and the US Stainless Steel came along where you had a standoff between two institutional limbs of the WTO and that's a very unusual situation that we haven't seen since and it's really important context from understanding why it was that the Appellate Body made that statement and used the language that they did. So, the Appellate Body was effectively in a position where it was trying to settle an institutional standoff and that's the context in which you see language which is relatively strong from the Appellate Body about the hierarchical relationship between Panels and the Appellate Body, the consequences that it has for the roles of the respective bodies and of course security and predictability of the system and in that context, the Appellate Body said Panels need cogent reasons to depart from Appellate Body jurisprudence.

So I think in light of that context, there a couple of points that you can draw. The first is that even in that relatively extreme situation, the Appellate Body is very careful not to say that the Panel is legally bound to follow its decisions. The Appellate Body was asked to make a finding that in departing from its jurisprudence, the Panel had violated Article 11 and it declined to do so. So, it's evident from what the Appellate Body said that this isn't a legal requirement as such, and so I think the best way to understand it is that it's treated effectively as a norm. So, it's something that Panels should bear in mind for the sake of the institutional health of the system, that it's a useful approach to follow the Appellate Body jurisprudence unless they have 'cogent reasons' otherwise, and I think that recognizes the fact that if you take a purely legalistic view of this issue, so if you look strictly at the DSU and you try to force a legal answer to this question, there is a tension in the DSU between on the one hand the existence of the Appellate Body review and the fact that, you know, as the DSU says the Appellate Body can overturn the decisions of the Panels on the one hand and on the other hand the fact that the Panels have the obligation to make an objective assessment of the matter themselves. So that tension exists legally in the DSU and the approach of, I think as the Appellate Body described it 'cogent reasons' is a way of resolving that dispute in a comfortable way that allows the system to function effectively taking into account the institutional policy health concerns about the functioning of the system. The second thing that I think the context of the Appellate Body statement tells us is that the zeroing disputes puts a stress and a pressure on that norm that had not existed before and hasn't existed since. So, the Appellate Body was effectively put in a position of having to force the issue and to define as a legal matter exactly where the boundary lies in the Panel's discretionary assessment of when it should and shouldn't follow the Appellate Body's precedent. That's obviously a difficult question because there's a gray area and that's not one I think the DSU gives us a legalistic answer to. So, on the one hand you have a mechanistic, automatic approval of the Appellate Body's decisions which I don't think anybody thinks is a good idea, on the other hand you could have wanton and frequent disregarding of Panels, of bye Panels of Appellate Body jurisprudence which I also think that nobody thinks is a good idea.

The appropriate boundary of what Panels should do lies somewhere in that gray area, and so 90% of the disputes I think practitioners, members and Panels find that Panels are able fairly effectively to navigate that gray area boundary without necessarily having to find a strictly defined legal line of when they can and can't overturn an Appellate Body jurisprudence. I think much of the debate on dispute settlement that we start to see, most of the time, it functions quite effectively. So as a matter of routine if you're drafting a written submission, you fell to time to Appellate Body jurisprudence on things that have horizontal significant issues like burden of proof, like standard of review down to specific meaning of individual treaty terms, and that functions and it works as a practical matter the day to day functioning of dispute settlement, it's effective without having to necessarily pin down exactly where that boundary lies and I think what you see in the controversy we're finding in this laser focus on this term 'cogent reasons' and what do cogent reasons mean and where is that boundary? If you take that statement as a reflection of an accepted norm in which Panels will, for the most part, follow the Appellate Body jurisprudence because it's sensible and it's predictable and it's useful for the system, I think that statement is useful. If on the other hand you're looking at it in a context of where there is a really significant, substantive stress of on that norm where really what's going on is not so much an issue of legal standard of when and when not to follow precedent, it's really about a fundamental disagreement in the membership about the content and substance of the rules, I think that it starts to become a not particularly useful framework in which to understand it, because having to really to pin down that line as a matter of law, I don't think we have the legal tools in the DSU

that fully allow us to do that and I think that this kind of harkens to some of the things that my fellow panelists have been talking about in the sense of it's as much about the culture and acceptability and legitimacy as it is about necessarily trying to force this as a litigation issue and legal issue looking for bright-line distinctions, looking for legal tests on matters like this because this is the WTO, we have a different legal framework than we do, for example, in Common law system. So, with that kind of big caveat, basically I'm not certain that the idea of 'cogent reasons' is even necessarily useful and desirable analytical tool. I have been asked to explain what 'cogent reasons' are and it hasn't been something that's been like particularly extensively addressed in the jurisprudence but I think you can perceive two broad approaches which even in and of itself I think play up the limitations of the idea. Third, we've got China-Rare Earth which along with US -Countervailing & Anti-dumping Duties against China, which basically took a high threshold to this issue and I think particularly importantly took an approach which is cogent reason is something in addition to some extra ingredient, other than do disagreeing with the Panel's interpretation. Third, the kinds of things that have been thrown out, some of them come from ICJ Jurisprudence, (35.34-35.36) the kinds of things thrown out are that the adjudicator was ill-informed on the law. I'm not sure as a practitioner how you would demonstrate that, there's been an alternative interpretation under Article 9 of the WTO Agreement, that the Appellate Body's interpretation is unworkable in a particular set of circumstances. So, I was thinking about what that could mean and what that could be and I think it would be an example of where there's circumvention for instance.

The second approach, again unsurprisingly came of a zeroing case and I think this concerns my original point which is the Panel in a recent dispute on zeroing departed from the Appellate Body's jurisprudence and I think kind of amusingly said that there cogent reasons for doing so was their objective assessment of the matter warranted an alternative interpretation. So, we've come full circle around to back to where we were, which I think demonstrates that this is ultimately probably not an issue that can be hashed out legally in dispute settlement but it is one that comes down to the substantive rules and it's up to the members.

**Gabrielle Marceau**

Thank you very much. Still I'm not sure I understand the distinction between 'cogent reason' of the AB and "security and predictability" principle of the DSU. The next panelist, Alana will continue our discussion about precedents and she will discuss some of the experiences with precedents in Latin American countries.

**Alana Lanza**

Good morning everyone. Thanks Gabrielle, thanks Peter for the invitation. So, as we all know there is no binding precedent in WTO dispute settlement system, as the Appellate Body has indicated that adopted Panel reports are only binding between parties. At the same time the Appellate Body has said that such reports create legitimate expectations and that Panels are thus expected to follow the interpretation offered by the Appellate Body in particular issues that are the same. So for those of you familiar with the proposals made by Honduras, you all know that they all include a series of options- options that originate from both extremes of the problem or the issue. With respect to the issue of precedent, we consider that there may be lessons to be learnt from legal systems of other countries. In our document on precedent, we suggested an approach inspired by Latin American legal system. Several Latin American countries adopt the method of creation of precedents wherein only legal issues decided are given way a certain

number of times are considered to have precedential value. In our proposal we suggest various ways of operationalizing this rule of reiteration and we took inspiration from examples like in Colombia, the Supreme Court uses the *doctrina probable* or probable doctrine as a flexible method to unify its jurisprudence and therefore create effective precedent. Three uniform decisions of the Supreme Court (38.45), as a cassation tribunal, on the same point constitute the *doctrina probable*. In Mexico, consistent rulings that have precedential weight are known as "*jurisprudencia obligatoria*". The precedent established by "*jurisprudencia*" is accepted once there are five consecutive and consistent decisions on a point of law by the Supreme Federal Court. But one case that is particularly interesting and draws much of our attention is the Brazilian example. In 2006, Brazil underwent an important legal reform in court procedure responding to a long debate on how to address court congestion, the heavy workload of the Brazilian Supreme Court and the role of higher courts in establishing case law. Sounds familiar, right? Yes. So, as creative as Brazilians can be, they came up with this legal figure called "*súmula vinculante*" which means literally binding pronouncement, and basically endows Supreme Court with the power of pronouncements with a binding effect. Such pronouncements have binding effect not only on the lower courts, but also on federal, states and municipal administrations. As a result, once a *súmula* is enacted, there is no need for cases to go all the way to Supreme Court to decide the issue, because lower courts are required to automatically apply the Supreme Court ruling. The Brazilian "*súmula vinculante*" confers binding effect on certain issues that have multiple law suits on the same question and only after reiterated decisions of the Brazilian Supreme Court. Due to the exceptional character of binding effect of judicial decisions in traditional civil law jurisdictions, the Brazilian Constitution requires two-thirds majority of the Supreme Court Justices to approve, modify or annul a "*súmula vinculante*" through a special proceeding. These are all examples that we thought are worth considering our current discussions in the Appellate Body process because they all include an interesting mix of both common law and civil law system. With regards to the question "In deciding whether established case law is not 'persuasive' should a panel consider that WTO dispute settlement aims to bring security and predictability to the multilateral trading system, we all know that the prime object and purpose of the WTO dispute settlement system is the prompt settlement of disputes between the WTO members, and to provide a security and predictability to the multilateral trading system as it is enshrined in Article 3.2 of the DSU. As Katherine mentioned, in fact there is a degree of tension, undeniable tension, between those two principles and the tension arises if one postulates the freedom of Panels and the Appellate Body to depart from prior interpretations, because this could be seen as undermining the goals of security and predictability. On the other hand, if you take the principles of security and predictability to the extreme, this would require that prior interpretations could never be changed or departed from. This would then mean that Appellate Body reports would essentially have the same status as treaty obligations and provisions of the covered agreements themselves. So I believe the system needs to find a balance between these two propositions and I think this Appellate Body reform process is a good unique opportunity for members to strike this balance. Thank you.

**Gabrielle Marceau**

Thank you very much. Many Members in their proposals have referred to the possibility of having some sort of review mechanism of the Appellate Body decisions. And Michael will address two questions: should the Appellate Body's interpretations and decisions be reviewed by the DSB or by another body composed of representatives of WTO Members or of other international dignitaries? One of the original members of the Appellate Body, Prof Matsushita, years ago recommended the establishment of a committee of wise people to review the Appellate

Body reports. How could this work in real life and what could you tell us, Michael, about how to deal with the conclusions of such a wise men committee? Would this mechanism be considered inappropriate?

**Michael Hahn**

Thank you very much Gabrielle, and, speaking for the WTI and myself, thank you very much Peter for organizing all of this. This is a tremendous event.

As an aside, and in response to our colleague Guilherme: the Brazilian players of Liverpool FC do not fall easily and therefore, on the 1st of June, we will be Champions of Europe….

Before I turn to answering Peter's guiding questions, allow me the following remark: Both Jasper and Robert brought a very important point to our discussion by highlighting that we should make an effort to take on a political perspective more often than we do in the framework of WTO law workshops. I think it is also very important to realize that the law, as important as it is, will not save us, as we can see when taking note of current developments. Only the *adherence* to certain (legal or extra-legal) norms and the ensuing behaviors will save us: reminding us of the importance of what actually happens in the real world is super-important and I salute my colleagues for doing that. Secondly, I would like to say that, nevertheless, discussing issues that seem very technical, very procedural and therefore as l'*art pour l'art* and (at first glance) only interesting for lawyers would overlook the fact that in a system which is as diverse culturally as the WTO system – with its 164 members and 20 *plus* observers –these kinds of technical issues and these kinds of technical discussions are the preconditions for giving legitimacy to both to the rules and to the adjudicatory process. This in turn makes (or made) them acceptable both to the US but also to China, to India but also to Brunei and so forth.

The first question put to me reads:

*If Appellate Body interpretations of WTO provisions were to be reviewed by the DSB, a DSB committee or any other body composed of representatives of WTO Members, how would decisions on the correctness of the Appellate Body interpretation be taken? By consensus? By (qualified) majority vote?*

If I am not mistaken, nobody suggests a third instance, a super Appellate Body having the power to correct Panels and/or the Appellate Body. Rather, Philippe highlighted that when the highest body in that adjudicatory chain has spoken, we can safely assume (given the careful selection of the members of the Appellate Body) that methodologically the work product is correct, in the sense of legally and methodologically tenable. That doesn't mean that decisions are viewed as being rightly decided: If I lost a case, I may be inclined to think that the decision is wrong. It does mean however, that the vast majority of users should have the sense that the report tackles all relevant aspects, in a proper juridical manner, brought up by the parties. We all have those cases, in our domestic jurisprudence and with regard to international case law, where we recognize the validity of the approach but are, nevertheless, of the opinion that the decision produces the wrong outcome.

The question that has evaded an answer so far is: how members feed their unhappiness about the outcome (and sometimes the approach) back into the loop. Even under current WTO and DSU rules, the Dispute Settlement Body could have done and could do much more than what has been taking place up to now. We have heard from the Australian Ambassador's efforts some 15

years ago to bring Appellate Body Members and Member states together. Obviously, it would be perfectly within the parameters established by present-day WTO law to set up a mechanism reminiscent of the 6th Committee to allow in-depth discussions of certain jurisprudential trends; these discussions could take place in private, so as to not endanger the independence, or, rather in public, in order to ensure maximum transparency.

These and other possibilities have not been used. The feed-back given by Members consisted largely in public statements within the DSB, whereas no mechanism has evolved which would have allowed to condensate some concerns the membership has.

As the US has correctly emphasized, we have already a tool in the toolbox of the DSU, namely the authoritative interpretation, Article 9 (2) DSU that would allow to correct Appellate Body report "outcomes". Its last sentence is important, as it reminds us that the possibilities under that provision should not be replacing the provision on treaty amendment. Of course, if the Ministerial Conference or the General Council decide *by consensus* in a certain fashion, one could say that if everybody is on board, Members can determine whatever they want their agreement to say. While such an approach would be not revolutionary from the standpoint of the legal text, it would be revolutionary as a practical matter. I would submit, therefore, that for practical purposes, the bandwidth within which the General Council could operate would be somewhat more limited. But the Ministerial Conference could follow the example of the infamous German ordinance on the implementation of the Law on Chocolates, pursuant to which Easter Bunnies may be Santa Clauses for the purpose of this law.

While almost everything seems possible if the contracting parties to the WTO agreement agree – if one wants, however, to keep an independent and binding dispute settlement mechanism, what is already on the books may be the best-suited options: the power of the DSB, on one hand, and Article 9 of the DSU, on the other hand.

The second question which was put to me reads:

*On what basis could the DSB, a DSB committee or any other body composed of representatives of WTO Members come to the conclusion that the Appellate Body's interpretation of a WTO provision is incorrect and reflects judicial activism? Would it be on the basis of a wrong application of the customary rules of interpretation of public international law or could there also be another basis?*

As I already stated at the beginning: under current WTO law, an authoritative interpretation of a provision does not, in principle, question the methodological correctness of the Appellate Body's *Prior Art*, but rather changes the outcome to align it with the preferences of the Membership. Therefore, nothing prevents the Members to come to a completely different conclusion than the Appellate Body, regardless of whether or not a majority of (or the whole) membership question the Appellate Body report's methodological quality or whether it viewed as being convincing, tenable and logical. If the Members are of the opinion that there are systemic repercussions that may motivate them to treat *Santa Clauses* as *Easter Bunnies* for the purposes of the WTO Agreement or for the TBT Agreement, they can decide so.

Again, I would submit that there would be more bandwidth, so to speak, if the decision was taken by consensus than rather if the decision was taken by three quarters. The three quarters decision making would be in any case crossing a frontier which so far has not been crossed and I leave that aside for the moment. Thank you very much and back to you, chair.

**Gabrielle Marceau**

Thank you. Initially, we had plans to give another series of comments to the panelists but let's go back to the floor and in that context, panelists when they respond can add comments on each other. So the lady there at the very end, speak in the microphone.

**Antigoni Matthaiou**

Student from the Graduate Institute. Thank you very much for this interesting presentation. I would like to focus on the reform proposal Robert referred to, mainly the adoption of guidelines. So, Robert when you referred to this proposal, you said that the most effective solution would be to focus on accountability mechanisms. My question to you is, whether using the adoption of guidelines as a means of clarifying the delegation contract between the WTO Members and the Appellate Body could maybe serve as an instrument for increasing accountability and legitimacy of the AB. Then, again focusing on this issue of guidelines, Niall at the end of his speech referred to the use of a group of experts in the GATT era. I would like to ask whether the panel thinks that the use of a group of experts would be more effective in trying to reach the adoption of such guidelines in the sense that the discussion leading to the adoption of said guidelines would not be attached to the interest of specific litigants. And finally, I would like to refer to Katherine's discussion on cogent reasons: Would you think that maybe because now cogent reasons are formulated in a negative fashion - in the sense that the doctrine stipulates when we should not follow prior reports - maybe a positive formulation of this doctrine could help balance the two competing interests you referred to, namely that of consistency and that of not putting pressure to the Panel in a more effective manner? Thank you very much.

**Gabrielle Marceau**

Other questions or comments? James?

**James Flett**

I thought all of the presentations were so brilliant, I couldn't think of a question I wanted to ask. That is to say, I haven't understood what the problem is, so well done. That is a great conclusion., I don't think there is a problem. Unless somebody would like to tell me what the problem is supposed to be. Then I might have a question.

**(unknown speaker)**

Hello, my name is (…) from the Canadian Mission. I would like to invite views from the members of the panel with regard to some of the proposed solutions which are currently under the table with regard to the issues that we've been discussing that pertain to meetings between the members and the Appellate Body and also the idea of having the secretariat identify some of the concerns that have been voiced by the membership and the way that the Appellate Body has responded to it in its annual reports.

**Gabrielle Marceau**

Thank you and I saw another person who has a question.

**Giorgio Sacerdoti**

Thank you. I wanted to add a comment on "cogent reasons". I chaired that Appellate Body division which used that expression in its report. I think we have to recall that how the issue arose, Mexico was appellant and complained under Article 11 DSU that the Panel, by not having followed the case law on zeroing of the Appellate Body, had breached Article 11. And in that context, the Appellate Body said that Panels are expected for reasons of stability and predictability and respect of the expectations of the membership, to follow, previous case law, except for cogent reasons (without defining or listing them). The AB distinguished the authority of previously adopted AB report which is guidance for panels from General Council's interpretations under Article IX (2) of the WTO Agreement which represent authentic interpretation. Accordingly while indicating that as a rule panels are expected to respect previous holdings of the AB, the AB rejected the claim of Mexico that article 11 DSU had been breached by the panel because of it not having followed the interpretation previously laid down by the AB. So, the AB did not elevate the principle to a legal obligation that in case of breach would represent a breach of the requirement to make an objective examination of the matter. This is very important because it underlines that the AB has not laid down "precedent" as a principle of WTO law in the sense of US common law, on the contrary. For instance, I read what the US said recently in a DSB meeting on this point. The US picked up this point but misunderstood the statement of the AB. The US considered that the AB had contradicted itself by stating that panels must follow the precedents of the AB while at the same time not finding a breach of Art. 11. What the AB did is just the contrary. Not having found a breach of Art. 11 by the panel because the panel had not followed the AB previous case law, and by restating that only interpretations by the membership under Art. IX.2 of the WTO Agreement are binding "erga omnes", the AB has rejected any doctrine of precedent, while restating the importance of the principles of predictability and stability which underpins the conclusion that panels are expected to follow the previous interpretations of the AB, absent cogent reasons not to do so. Where do the words 'cogent reason' come from? They were used by the appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTFY), which referred to the fact that the tribunal had not followed in the instance under consideration the case law of the Appeal Chamber. Referring to the approach of the ICTFY was appropriate because that is the only international tribunal which has an appellate mechanism. Thank to you all for a lively a productive session.

**Gabrielle Marceau**

Thank you, so I'll ask the panelists to respond in the order of where you are sitting. Niall and then Robert, etc. please comment on or respond to the questions you like or offer other comments you may have.

*(…) (awaiting text approval)*

**Gabrielle Marceau**

But on the question of this review mechanism, maybe for the other panelists or yourself Niall, one of the difficulties is how should the Appellate Body deal with recommendations of this reviewing committee (or from the DSB itself in its reviewing mode) commenting on the AB's

interpretations, conclusions and rulings? What should the AB do with the suggestions by this reviewing committee? Would the AB members be expected to discuss or refer to the conclusions or comments by this reviewing committee/DSB in their future report? What's the nature of this sort of mechanism? If this reviewing committee only states that the AB is asking too many questions, how is the AB expected to react or respond? Michael or Niall, how can the AB deal with that? Is it worth it?

*(…) (awaiting text approval)*

**Robert McDougall**

On the question of "guidelines" of the first questioner, there are two kinds of guidelines at play here. The first are the ones that are being discussed in the current negotiations, guidelines that are adopted, that are meant to be directed to the Appellate Body on how to interpret certain provisions of the DSU, covering things like the scope of the appeal and the mandate, and limiting obiter, etc. I know that's useful and that's likely the first thing that is going to come out of this discussion, but it is still left to the Appellate Body to figure out they mean. The risk is that its ultimately going to be interpreted and applied in a way that was not meant by the members that adopted them. My point in saying that it was insufficient was there needs to be more on the accountability side.

The second element of "guidelines" is related to substance and this is what the question was getting at. This is where I think the solution is that the members themselves need to have a better mechanism. In that case, it would not necessarily be guidelines as much as it would be interpretation, authoritative interpretations. Those are not directed, at least not directly in the first instance, at the Appellate Body; they are directed towards the rules, the meaning of the rules, and that's a better way to get at the question of how controversies, political controversies over the meaning of ambiguous rules, can be resolved. Not by trying to tinker on the edges of how you understand the meaning of the DSU when it comes to the Appellate Body pursuing its mandate. So the first set of guidelines might be helpful, but I don't think they will be sufficient and certainly, as the US said in the General Council that they are not sufficient: it is not because we are going to add more words, that we are going to make it more likely that the Appellate Body is going to act in the way we, and hopefully others agree, expect of them.

On the second point of the first questioner about "cogent reasons": I agree with that last point (and I leave this to one of the other panelist to talk about what this is). Perhaps the burden is the wrong way on the "cogent reasons" standard. By saying that you have to demonstrate why it does not apply, it pushes a past report to the center of the argumentation rather than flipping it around and saying you have to demonstrate persuasively why previous reports need to be followed. That's probably only a subtle change that is going to affect only the tone, maybe the order of the analysis in the report, but from the point of view of the procedural legitimacy among certain members, these kind of subtle changes of tone can make a difference to how at least some members react to the way reports seem to give authority to the Appellate Body, and the prior reports that it does not agree.

On what is the problem with the dispute settlement system, I think the problem is not on the adjudicative side, the problem is on the legislative side. Both on having members decide on their

own, separately from what the Appellate Body does, on what the rules mean, advancing those discussions and in certain cases, over-ruling what the Appellate Body decided. That's not a second level of appeal, that is a political override of a judicial outcome and that's legitimate exercise, and that's an exercise that happens routinely and effectively and helpfully in constitutional settings. It surprises me that we don't recognize this as much as the problem here, as it would be recognized in domestic settings. There is not an obvious fix to that and the fact that we are only taking about meetings between the DSB and the AB reveals how hard that question actually is.

Personally, I don't think those meetings with the DSB are going to be of much use. They certainly might be ineffective for their stated purpose. They might even be inappropriate because it starts to mix the judicial and the political and blurs the borders between them. Ultimately, for practical purposes, they will be insufficient to resolve this particular crisis. The US is not going to consider them as sufficient level of accountability mechanism. They may be inappropriate because it tends to then -- and this might also be the reason why it may insufficient for the US -- elevate the Appellate Body to the equal of the DSB, and the only thing that's missing is more information, more feedback from members and this is going to be a different format for it. I agree that the feedback the adjudicators currently get in the DSB are not representative or sufficient but there is no guarantee that this meeting with the Appellate Body is going to arrive at more representative feedback; it does not give the Appellate Body any mechanism to determine which part of what it hears is more appropriate. We can talk about "majoritarian activism", whatever it is, but the mechanism itself is not going to make it any clearer what the Appellate Body should do.

**Philippe De Baere**

I think that many of the discussions on the interplay between the legislative and the judicial functions of the WTO were already addressed in the previous conference. Reflecting back on what was said then, I think that several solutions were proposed and I refer in particular to the possibility of introducing a process of legislatively remand in the Appellate Body system. This would mean that the Appellate Body can ask a question for an authoritative interpretation to the membership. We could also have a system whereby the Appellate Body issues its report but points out in its report where it considers that, for the future, further clarification would be welcome. This was an approach which was followed by the European Court of Justice in a number of instances and could work. In contrast, I don't believe very much that informal meetings would be effective. At the most, it may help the Appellate Body members in identifying where certain lacunae exist or problems with legitimacy are being felt by the membership. As for precedent, when the Brazilian system was described, I was reminded of a theory we have in Europe where the European Court of Justice may actually say that a certain problem, a certain legal question that may be referred by a national court has in fact already been decided upon in the past and therefore constitutes an 'acte éclairé' so that no further judgment by or no reference to the European Court of Justice is necessary.

**Gabrielle Marceau**

If I may, isn't there a fundamental difference in such review mechanism if it is done by a committee composed of WTO Members, including WTO Members - parties that won or lost the case? isn't it different if the mechanism was in the hand of third entities, other than the parties and the WTO Members? Even if for many Members this proposal is not realistic at all, do you

have any view on this, Alana, do you want to answer this immediately and other comments you may have.

**Alana Lanza**

Thanks Gabrielle, yes I do. I do agree with Robert and my fellow panelists in that the interacting meeting with the DSB would be useful, but won't be as effective. In my opinion, it is not the best way to address the problems that we face nowadays. That's why in our view, we need a stronger approach and in of our proposals we suggest a possible external review in which members should contemplate introducing an external review and consider whether the Appellate Body has overstepped its mandate. We also suggest that a possible authority responsible for such review could be either the Director General or the Dispute Settlement Body itself or group of three chairpersons like we do in various selection processes, which could be the General Council Chair, Dispute Settlement Body chair and the TBRP chair. Or a small committee of the General Council or the DSB members. And obviously the possible consequences of the findings of this external review need to be considered by Members. We believe it's a good way or at least a possible approach to consider in facing this problem. Thank you.

**Michael Hahn**

Thank you very much. I would like to take up the last remark of my learned colleague: a very important demarcation line will be: is the feed-back of the members binding or consultative? Is it technically a correction of previous DSB decisions – or, rather, just a very authoritative expression of opinion by the membership. If it is the latter, its super-important, it will be influential, as the Appellate Body would be ill-advised to not take its reasoning on board when the question arises another time. But it is of course a very different quality from actually having a decision which is binding upon the Appellate Body.

Maybe this intermediate solution to have a very authoritative but non-binding clarification, is the way to go: It seems to me that such a feed-back by the *Lords of the Treaties* can be reconciled with the independence of the adjudicative organs. Similar cases before and after a Membership statement receive divergent treatment, but these are technical issues one could find solutions for.

I wanted to make a remark with regard to accountability. Appellate Body members are engaged in conferences, workshops, so they do get a feedback of experts, of people they consider their peers or at least they consider as people who are able to make a legal argument. So, I think while it might be useful to install a mechanism of *wise men* and give *their* feed-back extra authority, it would not be a game changer for the current (and endangered) dispute settlement mechanism. If accountability means that the Appellate Body has to explain to the interested public or to the wider public what they have said and what they mean, I'm all for accountability. If one means by accountability that you have once per year – the week before Christmas or the week after Christmas – to visit your masters to get instructions, then that cannot be reconciled with an independent adjudicatory system. While such a departure from an independent third-party arbitral dispute settlement mechanism is in itself not the end of the world, it is far away from the current status quo; in my opinion, such a development would not in the best interest of membership. The main reason is the following: we pay a lot of attention to the big players, particular to the one member who has brought up this useful discussion on technicalities, but of course, there are around 160 other members out there which do not do belong to the category of economic superpowers. They expect that not only the big players are listened to, but subscribed

to a system in which they can expect equal treatment. That requires, in my opinion, a system in which justice is not only done but seems to be done and that requires independence. All proposals for reform should have the preservation of judicial independence in in mind. Thank you.

**Gabrielle Marceau**

Katherine?

**Katherine Connolly**

I just want to briefly touch on the idea of positive formulation of the cogent reasons standard because I think it's an interesting idea and the way I see it working in practice would be that panels would effectively have an obligation to affirmatively state what their cogent reasons were for following particular Appellate Body jurisprudence and I think there are three kind of points to bear in mind from that. The first is the…I think it will have to be a selective obligation, you can't have a standard of every instance in which the Panel wants to rely on the body of Appellate Body jurisprudence to affirmatively state the reasons why. It would depend on the extent of that obligation if they just need to say 'we have cogent reasons for doing so' versus actually reasoning those out, but I think there would have to be instances in which the Panels aren't obliged to do that. The second is, as a matter of form, I agree that I think it could be helpful in that in a lot of ways the US has formulated its criticisms is that Panels are not performing an objective assessment of the matter before them and if you have even a lightly reasoned approach to explaining the cogent reasons for applying the jurisprudence, that is the performance of the Panel's function to perform its objective assessment. So in that sense as a matter of process, it could be helpful, but, and I think this is the ultimate way we end up with this approach, as a matter of effect, I don't think it will change Panel's decisions, I think if the panels are minded to rule in one way or another, they are going to do so and this obligation would change the nature of the reasoning a little bit but to the extent that these concerns are about results and outcome, I'm not sure if they would necessarily address those concerns.

**Gabrielle Marceau**

Thank you, and I think another difficult issue that may come up is how to deal with past AB reports once, or if, the Appellate Body disappears. Let's assume that Panels decide that they have to stop citing and quoting prior Appellate Body reports as such, and panels are ready to make their analysis of the relevant provisions based on the text and not on the prior AB rulings. In my view panels could reach the same result without citing prior AB reports. But one difficulty is that the parties may very well continue to cite prior AB reports, if they believe that prior AB reports are to their favour, and the lawyers and the law firms may continue to cite prior AB reports – so how should future panels deal with such citations of prior AB reports if the AB does not exist anymore? It is not that simple. We have the time for another set of questions or comments from the floor, it's close to lunch but if people had comments or questions, the panelists will let you have other things to say. Yes, James?

**James Flett**

I was really interested in Robert's response. Actually, I think it is the first time I've heard you say, Robert, that the problem does not lie with the dispute settlement system. So, I'm really interested

to hear you say that. Wow! The problem does not lie with the dispute settlement system. That's interesting and I agree.

**Gabrielle Marceau**

Other comments or questions….yes, of course, go ahead.

**Michael Hahn**

I would like to make one remark with regards to Robert and the possibility to overrule Supreme Court decisions in domestic legal systems. What you describe is indeed desirable and that would be the optimum solution; however, many legal systems render the overruling of the respective Supreme Court *de facto*, impossible. In the US, for example, we haven't seen a constitutional modification for ages due to the very high thresholds for doing so, and in many other countries the situation is similarly complicated: what is legally possible appears very difficult to achieve in practice. In such situations of de facto insulation from any immediate pushbacks, the respective High courts are well advised to show some humility and not overstay their welcome and overreach. The law does not show how to do that: the pertinent self-limitations follow mostly from cultural norms and political insights. Once overreach takes place or is perceived, a loss of confidence in the highest court of the land may ensue and destabilize the constitutional set-up. The Member currently attacking the Appellate Body experiences a loss of trust in its High court as a consequence of the openly partisan judicial appointments and decisions which make it easy to perceive the judges as facilitators of the political wishes of those appointing them. Thus, I concur with Robert's insistence on the importance of political and extralegal elements.

**Gabrielle Marceau**

Thank you, I think…ah yes! The gentleman there, please.

**Christian Pauletto**

I would like to come back to the question by James as to "whether there is a problem or not" or "what the problem is supposed to be" and the link to the issue of cogent reasons. What if we put it in a different way, in the following very simple way? During a case, a party may always bring forward a precedent in its argumentation. Whenever a party does so, the party obviously needs to explain why it believes that precedent has to be followed. Then, all what the panel needs to do is to determine whether the explanations brought by that party are compelling, or not compelling. In any case, the party that invokes the precedent has the burden of proof, and this remains a burden of proving the positive. It's not a big deal and sometimes I wonder if very technical problems are not made more acute just by the perspective and words you put on them. The bottom-line is to simply expect the adjudicator to explain his reasoning whatever the choice made. In that sense I agree with Bob [McDougall], and whether you call it negative or positive as some speakers did, you can go around this problem in a very elegant manner.

**Gabrielle Marceau**

Thank you. So, I think we'll finish. Allow me…you wanted to say something…ah okay, go on.

**Robert McDougall**

To come back to James' comment, just to clarify: it's not to say that there are not problems in the dispute settlement system, it's that the problems in the dispute settlement system are caused by, and allowed by, the absence of an accountability mechanism. You can go all the way back to *Ehlermann* in 2002 when he said that you have to have "extraordinary circumspection" because of the absence of an ability of the political side to correct. This is another way of saying humility is required. Unless we can figure out how to improve that oversight, the Appellate Body, panels, the entire system on its own would gradually erode this idea that there are restraints because there is nothing you can do to bring it back. So it's not that there aren't problems on both sides, it's just that the real problem is that we have no way in a consensus-based organization to make political decisions.

**Gabrielle Marceau**

Yes, Ricardo.

**Ricardo Ramirez**

Sorry, I could not resist. Just to react to Robert. Are you thinking of a system where you will engage in correcting each and every decision by the Appellate Body? So are you going to correct the public body interpretation? Other Members may be may also want to correct the amicus interpretation. There may be other members who might want to correct our interpretation of the protocol of Accession of China. So, is that really a solution? if you are going to correct each and every one of the decisions, there would be a long line of members who would want to correct our rulings. So, taking into consideration the consensus rule, how would you do it?

**Gabrielle Marceau**

You want to respond?

**Robert McDougall**

No, I don't envision that… I don't draw a straight line between every single report and then go for some political decision that tries to get in there and micro-manage the wording or micro-manage the ruling. The US has proposed, and has been rightfully resisted over the years, that there be an ability on the part of the parties to delete parts of the report before it gets adopted. That would amount to giving more powerful parties the ability to tailor-make the jurisprudence. My point is slightly more removed from that…and relates to the second US proposal, which is partial adoption, where on consensus the membership could only partially adopt the report. So then you still have consensus and some parts that could be eliminated. That is also somewhat controversial.

I would take it one step farther and say that once a report is adopted as is, there may be elements of the report that create a certain amount of concern. They could be subject to a follow-on discussion, maybe some mechanism where there is a right of petition for an authoritative interpretation that takes an excerpt from a report and goes through a time-limited process of discussion. This would replace the DSB-AB meeting because this is a discussion between the membership that says on this issue that we've highlighted as being a problematic area of

jurisprudence, you might be able to get an agreement that we want this corrected because it's separate from the dispute. It's not going to affect the report other than indirectly because it's going to create an authoritative interpretation that would supersede the report, but it's not going to interfere with the wording of the report or partially adopt or partially delete it. It's going to be a mechanism that stimulates a debate that will be more representative, hopefully more representative than a DSB meeting, because there will be consequences, there will be an instrument on the books that will have a time-limited adoption date. Even if the rules of adoption are on consensus, 99% of the time it's not going to get adopted, but the process itself will provide a more representative result of what members think than DSB statements. In the one or two or three or five percent of the times it actually gets adopted, then you've actually got proactive political decision-making that tailors the interpretation with some political accountability, and takes all the pressure off the Appellate Body to always get it right.

**Gabrielle Marceau**

And we know that this "member control proposal" has been, sort of, refused by the membership, this proposal to some extent in the DSU review, for years.

**Robert McDougall**

The US proposals on partial adoption and partial deletion have been refused, but there's never been a proposal that talks about how to revitalize the distinct right of authoritative interpretations, partly because the only time it has been tried, by the European Union, they abandoned it because, like I said, 99% of the time it is not going to get through. But we're looking for ways to get political accountability, so we need to figure out how to do that better.

**Gabrielle Marceau**

I think you want to add, Philippe.

**Philippe De Baere**

Yes, I would like to add that I agree with what Robert has said. I would also like to come back to what Michael said about the use of the word 'accountability'. We have to be very careful in using this term because it obviously can be seen as an attempt to interfere in the independence of the Appellate Body. Also, we should be aware of the risk described by Ricardo of a system whereby the Appellate Body members could somehow be censured for having said something or not having said something in their reports. This, in my view, would be unacceptable in light of the necessary independence of the judicial function. If we want to increase accountability, again, it has to be on the legislative level and a system of authoritative interpretations or calls for authoritative interpretation should allow the membership to correct what they perceive as erroneous interpretations. I think this would be a more appropriate way of addressing the concerns with certain jurisprudence developed by the Appellate Body.

**Gabrielle Marceau**

So, if you allow me before we separate for lunch, my personal view again is that to some extent, the Appellate Body creation, the Appellate Body itself and the DSB/DSU automaticity is a miracle. Yesterday, I was asked to talk to the LDCs who wanted to understand what to do in all

this debate and I repeated the same: the AB and the DSB reversed consensus are historical, something extraordinary. I said it at the previous WTI conference. A few years ago I did a research with young colleagues about whether and how often the Appellate Body reports are cited by other international tribunals. There is no other international tribunal or quasi-judicial body, however you label them, that are cited as often as the AB is cited. In 2012, it was over…reaching 150 times, so, there's something there that we cannot deny: the world is looking and considering what the AB does and writes. Indeed, I entitled my paper "the AB: a Boat-Light in the international Fragmentation". My goal with this panel was for us to understand that maybe the problem of the current crisis is not only or mainly with the Appellate Body, and to some extent it is a question of perception and background and about one's conception on the nature of the WTO dispute settlement system. There is also a need for a reality check and it's a political reality. This is why the sessions of this afternoon are important. There's an important player among WTO Members that says it has concerns – those concerns so far listed are procedural to some extent (although I don't like to limit the concerns expressed to their procedural nature), but in my view even the concerns of that Members are not limited to procedural issues and practices of the AB. This player has also been complaining about the way the WTO dispute settlement system and the AB deal with trade remedies and this for almost twenty years. So then how do you deal with this reality, this is a problem, no? So, I'll let you have a good lunch, and this afternoon hopefully a solution will be suggested. Thank you.

**xxxx**

# Session 3
# Alternatives for appellate review and WTO dispute settlement

Chair: **Joost Pauwelyn**, Graduate Institute of International and Development Studies, Geneva

Panellists: **Natalia Bayurova**, World Trade Institute, University of Bern
**Rambod Behboodi**, King & Spalding, Geneva
**Nicolas Lockhart**, Sidley Austin LLP, Geneva
**Martin Lukas**, DG Trade, European Commission, Brussels
**Ricardo Ramirez**, Mexican National University, Mexico City
**Leticia Ramirez Aguilar**, Permanent Mission of Mexico to the WTO, Geneva
**Jan Yves Rémy**, Shridath Ramphal Centre for International Trade Law, Policy & Services, Barbados
**Isabelle Van Damme**, Van Bael & Bellis, Brussels
**Alan Yanovich**, Akin Gump, Geneva

*(…) (contribution removed)*

**Jan Yves Rémy**

Thank you very much Joost, and thank you to the WTI for the invitation to sit on this very illustrious panel, especially having been outside of the fold for effectively a year, and I'm going to use my one minute to kind of provide a little bit of a perspective, I know Joost is running a very tight ship and getting us into the very technicalities of the issues, but I know I'm not going to have an opportunity to say this again, because of the people I'm surrounded by, literally, who I suspect will be using their jokers very generously. I do believe that there is a very important point here that needs to be raised, and it needs to be presented, and I had students here coming from the Caribbean after the first session this morning, and they said to me, "we don't hear our voice, we don't hear any perspective of ours being represented here." And it would literally be remiss of me to not say something about that, which is that, when you have the benefit of a little bit of a perspective, you know, hanging out in the Caribbean, the world of WTO dispute settlement and reform, in particular, takes on a very particular hue, which is one where it is very much a remix of the players of the system, and those who do not have their names fixed to any of the reform proposals currently banding around, where do their voices sort of get integrated into the process? And that's something that I want us to focus on just a little bit. As I see it, there are sort of three boxes of proposals currently on the table to deal with what has been dubbed the "AB Crisis". And I think there are amber box issues, there are red box issues, and there are green box issues. The amber box issues seek to try to get work-arounds. Deal with the issues that have been raised, and try to come up with some solutions to the immediate problems that have been voiced by some of the more influential parties and why we are here today, really, is to try and get past this "crisis". The second one really relating to the AB is, well, if this isn't working anymore, let's just

have a requiem, let's just call it quits, and let's just revert to panels and let's deal with the issues down there. And then the third sort of issues which I've realized are a little bit off the table now, is, let's fix the AB, let's keep it in its current iteration, but let's just work through it already, and I put that to the green box. Let's fix, let's try and fix what's already there. Let me just declare my bias that, in fact, none of these boxes really addresses the underlying issues for smaller states, or non-participating states, because, to the extent that the Appellate Body reform issues are on the table, they are symptomatic, and they have to be dealt with, but they certainly don't go to the underlying core issues that the Dispute Settlement Body negotiations for the last 20 years have been concerned with. Our concern is, from these regions, is, whilst the bigger players will haggle out the issues and try to seek the solutions to the immediate problems, the underlying participation and forcibility issues, access to the system issues, will not be addressed, and whilst this is an opportune time because the focus of everybody is on these issues of crisis, whilst this is an opportune time to put them on the table and try to get a wider sort of consensus to dealing with the issues, our concern is these little tweaks will be made to the system, but the underlying, fundamental issues of access will not be addressed. And so, let me just declare my hand immediately that, to the extent that we do have the limelight on these issues, that the rule of law is still very much the mast upon which the smaller participating Members want to affix their hands, and that at the end of the day, the rule of law should prevail and should be the correct prism, and I've heard other speakers say so, the correct prism through which the reform process should be engaged. And I have much more to say but I know Joost will get me back on target. So, to the precise question of what is the Appellate Body, what is the secretariat, what are persons who are very much integral to the system, what can they do? What are the self-help options available to them? And again, just to go back to my traffic light boxes, this I would say is one of the amber boxes. It's not a complete fix, but certainly it would serve as a work-around until the membership can actually engage on the deeper-seeded issues. So, the issue here that has been highlighted by Professor Steve Charnovitz, as one option, which is that the Appellate Body would effectively decide, through its Working Procedures, this is one option that has been canvassed, through its Working Procedures the Appellate Body would try to declare that this is a current state of emergency and that it cannot accept any new appeals. So, to the extent that an appeal is lodged with the Appellate Body Secretariat, there is no longer an existing Membership to decide the appeal, and so it won't accept them anymore, and then for purposes of the DSU Article 16.4, which only allows the adoption of panel reports once an appeal is completed, that for these purposes, you would then be able to carry through to the implementation stage because the completed language under Article 16.4 would have been addressed. Now, obviously there are some very fundamental problems I can see with that. The first one being that, well, part of the whole problem is the Appellate Body's speaking to fix problems itself. I don't see how the Membership generally would want this issue to be resolved by the Appellate Body deeming a report to be completed without it actually doing anything. And it's a more even fundamental question of how you square that sort of deeming completion language with what's in the text of 16.4, completion obviously assumes that something has actually been done with the report, so I don't see that really as an option that is viable for the Appellate Body to do. Obviously, by December, I think the scope of the question is limited to what happens with new cases. Obviously, after December 10th I don't think there will be so much of an issue, because by virtue of Rule 15, you will have some cases still in the pipeline, but these would be cases that are already in existence and so I think the solution here is that the Appellate Body secretariat and Membership do not try to impose themselves in the process, because of the risk of inflating the issues even more.

*(…) (contribution removed)*

**Isabelle Van Damme**

I don't pretend to have the solution, but I should like to add to the points raised by Jan Yves. In our discussion this afternoon, it's important to distinguish between the availability of alternatives for appellate review, on the one hand, and the lack of compulsory jurisdiction, on the other hand. They are two separate elements, but because of the design of the system, they are intertwined. That distinction explains why it is important that Professor Van den Bossche has invited us to look at the solutions that WTO Members could encourage, and the solutions that could come from the WTO as an institution. In essence, the solutions that could come from the institution would preserve compulsory jurisdiction. All the other solutions require the consent of WTO Members, which means that we step away from compulsory jurisdiction. Referring to compulsory jurisdiction, I mean that, by acceding to the WTO, a WTO Member has consented to adjudication without the need to consent again for each individual dispute. However, for all other types of WTO dispute resolution, *ad hoc* consent is additionally required. That's why it's necessary that we distinguish between solutions that can be put forward by the institution itself, and solutions initiated the WTO Members, because what's really at stake here is the concept of compulsory jurisdiction, which makes the WTO system so unique.

*(…) (contribution removed)*

**Leticia Ramirez Aguilar**

Thank you, Joost, and good evening everybody. I would like to thank the invitation by WTI, especially Professor Van den Bossche, it's a great honour to be sharing this panel with such well-known and experienced personalities, it's a little bit intimidating, if I may say. Just before starting, I would like to frame that my interventions here, will be done in my own personal capacity. Let's begin. How likely it is that Members will agree not to appeal? Well, every WTO Member has the right to appeal a panel report pursuant to the DSU, and these rights cannot be easily dropped. Members would always like to at least keep an option of appeal alive, which might not be the case if we are heading into December with no new AB Members on the list. Members or parties can make modifications to the DSU proceedings, through specific disputes, including modifications to wave or forego their right to appeal, the question of foregoing or having an agreement not to appeal, is on how to do it. This could be on a case-by-case basis, or it could be done as well I think as an agreement among parties. On a case-by-case basis, well, there is a strong incentive for respondents not to agree to forego or to agree on not to appeal, even in advance of the panel report issuance or after. What would be the particular circumstances here? We have an absence of a complete Division in the Appellate Body, so which would be the evaluations that Members could do? Well, maybe evaluate the substance of a measure, that a measure might not have a strong defence, and the Member might just need time to report back, or to convince back to capital or to their own authorities, to put the measures into compliance with WTO agreements, maybe there would be limited to cases where both Members may see an equal chance of winning at the panel stage. Sometimes a small budget not to pursue a long defence, including an appeal stage, or sometimes sensitive disputes where just a panel report might be enough. These would be some considerations, including, of course, a particularity of understanding the *status quo* where

we are. We have the examples, as you mentioned, of agreements among parties, before the issuance of a panel report. We have the example of Indonesia – Viet Nam and Chinese Taipei, that specifically addresses an agreement where, if the panel report is not circulated and the Appellate Body is composed of less than three Members, then the parties will not appeal under 16.4 and 17 of the DSU. So, this is a very specific agreement, and an example of Members addressing or having alternatives not to appeal or an agreement not to appeal under these particular circumstances. Yet, we need to take a look on the particularities as well on this case. It's a 21.5 proceeding, and the party withdrew the measure presented before the panel report was issued. This is the only case that we have that addresses the particular situation and this is an example of Members discussing this. After the issuance, you raised as well, the case of Russia – Ukraine, but this is not an example of an agreement among parties or not one that we could see, in a written agreement, so this happened but it is not a reflection of the *status quo*, *per se*. What are the key elements for me, to agree not to appeal? Well, it's legally feasible, it doesn't need a DSU modification, but it needs political will. It's a negotiation, an agreement among parties, and maybe you would need equivalent interests to understand, again, the *status quo*. Nonetheless, there are opinions that say that a case-by-case renunciation could have a chance.

The second is one more systemic or general approach: agreements as a group, or agreements based on reciprocity, which is different to a plurilateral agreement. This could be a potential way to neutralize the incentive of respondents not to agree to waive or to have access to an appeal. It's a systemic agreement, by a group of Members, that could be done through a single agreement that applies to all future disputes. So, this way, Members would have to weigh the pros and the cons, but in all future disputes where they could be claimants, or they could be respondents in any future disputes. There is no formal mechanism to do this, but it could be done on a group basis, on a Member-by-Member basis, and, as I mentioned, maybe as a principle of reciprocity, open or closed to future Members to join after. All these criteria will need to be considered by Members.

To your following question: Are there other steps that Members (all or some) could take to address the possibility of the losing party of appealing into the void? Well, I can think of the alternative of arbitration under Article 25. This 25 arbitration is as well established under the DSU. It's another option under the WTO that could be agreed among parties to resolve a dispute. It could be from the beginning, or it could be a sub-part of an agreement not to appeal. I'm not entering into the details, yet this is, for me, another possibility, but there might be others. Finally: What happens if the exercising the right to appeal is maintained? Well, some panel reports might be adopted, and others will remain in the limbo or into the void as we have mentioned. The absence of a functioning Appellate Body will give some Members the ability to block the adoption of dispute settlement reports from the panel, yes. The question is, could this be not necessarily unreasonable or legitimate, and not just an intention to obstruct, but could then some disputes exceptionally have the motive to be legitimated to foresee an appeal and not wish to waive their right not to do so? And could these might be only isolated cases and not a regular basis? Well, this is a possibility of Members not wanting alternative solutions, and just having their alternative to appeal. It is also likely that some Members may accept an alternative solution for some disputes, but those cases where there may be involved too important issues to their respective interests, it might be difficult to waive their right to appeal as much as the system is in their own interest. So, I have more comments, but I'll stop here. Thank you.

*(…) (contribution removed)*

**Natalia Bayurova**

Thank you Joost, and thank you for inviting me to speak on this panel, and I'll be speaking primarily from my experience as a former diplomat, having worked for a Member who was quite active and is still quite active in the dispute settlement system, upon its accession, and I'm very happy to see some of my former colleagues in the audience and on the panel as well. And I really appreciate what Leticia highlighted about the examples that were picked up quite actively right after being released into the public domain, as examples of those rare and first agreements not to appeal, and, in particular, with the example that actually I think highlights the importance of treating these examples with care. And I'm thinking about if I were a diplomat in a mission, and I go to my Ambassador, and I say, "look, this is what these Members are doing." So if I say A, I have to say everything, all the letters in the alphabet, A to Z, to the extent that is available within my knowledge. So, I wouldn't like to decrease the importance of these examples. They are absolutely valuable, especially in this time, but, in any particular case, as Leticia mentioned, there can be different circumstances, and can we call a decision by two parties to a dispute not to appeal for their own reasons, that have very little or most likely nothing to do with the current crisis, an agreement not to file an appeal. Can we call that an agreement? So, I would just like to caution against maybe a not very careful use of such examples, and talking again about our experience, I wish we had a clear recipe once we head into these times, or a clear list of all the options. And I wish, if I were still working for my mission, at any given time or moment, I could come to my Ambassador or supervisor and tell him, precisely, what is happening right now in this house. What Members are doing, what different precedents we are having, what agreements, be they written or oral understandings between the parties, what the organization is doing, what are the proposals discussed at any given time, what is happening. But I'm afraid that probably no one will have that clear picture of everything that is going on, and things will develop as they go. So, it is very hard to overestimate the importance of these discussions and sharing the information that we have. And I would like to explore what you suggested, to look in the direction of, because now we are looking at different sources of potential solutions, or even sources of any potential help to all of us. We will have to live in this reality. And one of the potential directions are the panels, and again I'm speaking in my own capacity, in my experience I found both the panels and the secretariat to be extremely responsive to particular sensitivities, or the needs of the parties to the dispute. Here I would like to maybe take a step back and say that the panels do enjoy a certain degree of flexibility when adopting the procedures, and of course they do that upon consultation with the parties, but as we all know, panels have adopted different procedures that vary from the standard ones, irrespective of strong objections, at least by one of the parties to the dispute. And so they have this flexibility, but it's not unlimited. And I would like to take a look at the situations when two parties to a dispute, they don't have a possibility to appeal, either thanks to an agreement that they concluded before initiating the dispute, or due to other reasons. How this can affect, in a real case scenario, the procedures, the process, the air in the room, the way the parties will argue their cases, the arguments they will put forward, and I think that, my feeling is that it will also be happening as we go. Some commentators already put more focus on the panels, if we know that we're going to have just one shot at this, maybe the Members will be more careful in the panel composition process. Deciding on whom to put in these chairs. Maybe there will be a call to include more lawyers, but in that case, lawyers will have nobody else to blame for the result but themselves. So, some say that the panels will be more careful, doing what they're doing, or quite the opposite. So, that remains to be seen, how this will affect. But, I think that, having no opportunity to appeal, the parties, either directly or indirectly, will appeal to the panel. And one of the examples of potential use of flexibilities giving more

lenient, maybe, approach to some procedural requests from the parties, or in relation to timelines, one of the particular examples is the interim review stage. I would like to first of all say that, I would like to bring that example not as a *per se* positive usable feature of the system, but as a possible way to mitigate the burden on the parties that will enter into a non-appeal reality quite soon. And of course no interim review stage can replace, even partially, an appeal review because you're going to end up with the same people looking at these questions. But, I think that some degree of flexibility and help to the parties, they can come from here. And I don't know if I used up most of my time. Thank you.

*(…) (contribution removed)*

**Rambod Behboodi**

Thank you very much, I think I would just make three observations. The first one is, Leticia talked about case-by-case non-appeal, and I think I take what Natalia said about the limits of existing examples very seriously. I think case-by-case scenarios, especially in the middle of a case, are going to be challenging, at best. So, what that will simply result in, is a power play, in the middle of a case, between the parties. And whichever party has the stronger hand, politically and economically, is going to prevail on the question of appeal or non-appeal. Leticia mentioned collective agreements. I'd like to, as a footnote to that, and to pick up on Natalia's comments about flexibility, say that you could also have bilateral agreements. That is, a pre-appeal bilateral agreement on the basis of, for example, a statement in the DSB that any Member, not knowing if they're going to be on the defending side or the complaining side, where any other Member wants to enter into a bilateral agreement with us not to appeal cases so that panel reports could be adopted, we can enter into a bilateral agreement. Now, one of the positive aspects of a bilateral as opposed to collective agreements, as we know in this house, is that collective agreements require collective decision making, require negotiations, require proposals and counter-proposals and agreements and so on. And you end up with, again, another round of negotiations over process, as opposed to bilateral agreements where Members can sit down, in advance of any possible dispute between them, sit down and agree on things like panels. Panel composition, why not have a bigger number of panels? Why not, for example, seek the services of Ricardo and Giorgio and Peter, to serve on expanded panels? You could, in fact, reconceptualise and reimagine the interim review through bilateral agreements. Again, I wouldn't do this in the middle of a case, but you can see that there is a great deal of flexibility possible in the context of these bilateral agreements. I'll leave my comments on that, but just, I think it's important to bear in mind that a lot of the things that we think right now would be novel, were novel in 1995. Interim review was imported from the NAFTA, right? It is possible, at least, to reconceive of existing mechanisms because the times demand it. Thank you.

**Ricardo Ramirez**

Very brief. In just taking more, I mean, the options have been explored, but let me tell you my concern, and that goes to Victor's point, that we need a political solution. The moment Members agree ex ante not to have an appeal, the moment the game is over. For me, the moment that you agree not to have an appeal, I understand that you may not want to appeal, for x and y reasons, on a case by case basis, which is very valid. But the moment you agree that you're not going to

have a second instance, the moment you waive that right, is the moment one of the WTO members at the table has won the game. And I will leave it at that.

**Alan Yanovich**

Thanks Joost, and thank you Peter and the WTI for the invitation. I'll make a few, short remarks. The first one is that, as we consider alternatives let's not forget the best alternative, which is to compose the Appellate Body fully. That has to be one of the alternatives we consider. I hope you haven't given up on it. I still think that is the best alternative. Now, James said earlier today that he doesn't see a problem in the record of the Appellate Body, I agree with him. I am not persuaded that there is a problem. That is not to say that we do not have a problem now. We have a huge problem. The blocking of the Appellate Body is a huge, pressing, and immediate problem that needs to be resolved. And to me, that should be the main focus of all discussions, rather than speculative alternatives. I see a lot of contradiction in some of the discussion. For instance, we're told by the United States that the Appellate Body doesn't work properly, and yet there are three appeals filed by the United States currently pending. So if the Appellate Body is that bad, why is the US appealing? I don't understand this, because if the Appellate Body has such a bad record, then I certainly would not be appealing those cases to the Appellate Body. So, to me, I'm still not convinced by the accusation that the Appellate Body has exceeded its mandate, and I'm not optimistic that a system in which there is no appeal would survive. To me, such a system would be quite unstable, and I see several problems. One is, panels are not infallible. We know that. The Appellate Body can make mistakes and the panel can make mistakes. We need a mechanism to correct that. What is going to be the mechanism when a Member doesn't like a panel report? The weaker Members will have to accept it. The stronger Members will probably not comply with it. That is what is going to happen in my view. There will be contradictions between panels. That is going to happen. To me, uniformity is a value. Uniformity was a value for the United States as well when the DSU was created. If you look at the U.S. Statement of Administrative Action for the Uruguay Round Agreements Act, it says that "Article 17 creates another new procedure, appellate review of panel decisions, *which should help ensure uniform interpretation of Uruguay Round Agreements*". This was a value that Members sought to reflect in the DSU through the Appellate Body, including the United States. Losing that, to me, will be problematic. But, to me, the main problem is the right to appeal exists today in the treaty. It is a right of all other Members. To take away that right is to take away a concession of the other Members, and it is to take away a concession without giving anything in exchange. I wouldn't accept that. But, more importantly, my concern is, if we accept that with respect to the Appellate Body, who is to say we're not going to be asked for the same thing with respect to something else? Who is to say that, in the future, when panels start giving unfavourable rulings against a particular Member, that Member will say, well, I don't like panels anymore. Or I don't want panels to be issuing decisions on agricultural subsidies. Let's take out agricultural subsidies from compulsory jurisdiction. Who is to say that's not going to happen? And, to me, that is the question that I would pose. I mean, the United States has been good at asking questions about other Members, but I think the question I would pose, if I were a Member, to the United States would be that, what is it that would guarantee that the United States would respect panel reports in the future and would implement those reports fully? How do we know that's going to happen? I certainly don't know. And the example of the Appellate Body, to me, suggests that it won't happen, if those findings are unfavourable.

*(…) (contribution removed)*

*(…) (awaiting text approval)*

**Rambod Behboodi**

Well, I think, and I'm going to be very brief on this one, because Alan set out the central argument about this whole thing when he talked about each Member having a right to appeal. So, once you start from that perspective, whether or not there is a functioning Appellate Body, if you have a right to appeal, you will exercise that right, and if it means that that will force the panel reports into limbo until such time as the Appellate Body is structured, well, so be it. But that is precisely why, as Nic pointed out, why we need to think about alternatives. I don't think there is going to be an allegation of bad faith, because that is a right and, to the extent that the organization isn't functioning, well, it's not functioning.

*(…) (contribution removed)*

**Alan Yanovich**

To me, the main problem is to the extent there is any way of choosing whether you implement or you do not implement, before the appeal, the advantage will be with those who are more powerful. That to me is clear. I don't see how it would work any other way. Now, as I said before, the appeal is an integral part of the DSU as it was agreed by Members during the Uruguay Round. It's an integral part of the package. It is as much part of the package as any of the other disciplines. It's as much part of the package as the prohibition on export subsidies. It's as much part of the package as the disciplines in the TRIPS Agreement. Why is it that we can be selective about this, and not about the other obligations? I have trouble understanding that. They're both international obligations, they're part of the same international treaty, but somehow we've come to a point in the discussion where we think this obligation is optional and all the others are mandatory. I don't see that. It's the same treaty, and if you don't trust another Member, or another partner, to comply with one obligation, on what basis are you going to trust them to comply with the rest of the obligations? I just don't see it.

*(…) (contributions removed)*

**James Flett**

So, could the panellists please say something about the idea of alternatives through the lens of the MFN principle, at least by analogy or from a more political perspective? Whatever the alternative might be, whether it's a non-appeal agreement, or an Article 25 DSU agreement, if one Member agrees with another Member that they will allow access to an appellate level through Article 25 DSU, do they have to extend that to anyone else who is interested in playing? Because of the MFN principle? And is that interesting because, would that suggest the possibility of a rapid process by which Members would coalesce around, ultimately, an interim solution? And, relatedly, is it possible for the two alternatives to coexist? Can you have non-appeal agreements

and Article 25 DSU agreements, in light of the MFN principle, or ultimately would a Member have to choose in which camp it wished to live? And if it chose to live in the Article 25 DSU camp, would it have to do that with all of its potential litigants?

And finally, isn't there an incredibly important audience that needs to be reached and communicated with, which is, investors? Global investors. Isn't it the case that global investors need to know which Members still believe in binding and mandatory dispute settlement and security and predictability, because you need to get the money in play? Will investors not be highly inclined to invest in those Members who still believe that value chains need to be protected by enforcing WTO obligations, and be much less inclined to invest in a Member that chooses to be an outlaw? And doesn't the money ultimately drive the process? So we need to communicate that. We need to be transparent. All those Members who are agreeing to this kind of alternative arrangement, they have a huge interest in communicating that to the market, to investors.

*(…) (contributions removed)*

**Rambod Behboodi**

Look, I think we, let's take a step back. We've heard a lot about the right of appeal and so on, and it's important, obviously, in the context of the scheme of the DSU. And I'll have a couple of things to say about that when we talk about Article 25. But, here's a, in the presence of former Appellate Body Members, in front of one of whom I've actually argued, two of them, actually, let me posit the following: we heard about, earlier, about compulsory jurisdiction. And we've heard about negative consensus here and there. The central benefit, the revolutionary aspect of the WTO, was, in fact, compulsory jurisdiction and negative consensus. Bear in mind, go back to 1947-48, the ITO died on that issue. And so, the Appellate Body - now there is in Canada the lore that it was a Canadian proposal, whether or not that's the case, at any rate - the Appellate Body was a response, was an attempt, at addressing the problems of panels that parties had experienced under the GATT. But the real revolution that basically started with 1989 and then the ink dried on it in 1994-95, was compulsory jurisdiction and negative consensus. And my own sense of it is that those are values that we can right now maintain, even if, for a period, whether it be a few years or a few months, the Appellate Body is not functioning. And that, to me, is one of the key issues that we need to bear in mind as we reflect on reform. On what these next steps are, and so on. The second point, James is really good at identifying, in almost, and I don't mean this as an insult, but take it as you will, but in almost Jesuitical precision, with surgical legal precision, issues that may arise. Legal issues that may arise if we follow one path rather than the other. And the MFN argument is another one of those. Now, it is, I'm sure…

*(…) (contribution removed)*

**Rambod Behboodi**

No, this is about James' point.

*(…) (contribution removed)*

**Rambod Behboodi**

No, it's about the non-appeal agreements.

*(…) (contribution removed)*

**Rambod Behboodi**

No, it's about a non-appeal agreement.

*(…) (contribution removed)*

**Rambod Behboodi**

No, but it has to do with whether a non-appeal agreement will result in an MFN concern, and I mean, it is possible that you could somehow shoehorn a diplomatic agreement between two Members into Article I and Article III as measures somehow affecting the internal sale of like products, but I mean who would want to do that? Members that would enter into a non-appeal agreement are trying to save the organization. And by raising, anybody who would raise a challenge to that and launch a case against that other Member for inclusion in a non-appeal agreement that it hasn't negotiated, would basically result in the collapse of the regime. I just want to know which country would want to do that.

*(…) (contributions removed)*

**Michael Hahn**

Thank you very much Joost. Just two very quick questions. Firstly: if it is correct that compulsory jurisdiction and negative consensus is to be preserved, why, then, is it not being discussed currently, whether that could or should be achieved through a decision by the Membership – be it through an authoritative interpretation or a waiver – that appeals are only possible to a working Appellate Body. Could you share your views on the lack of that discussion? My second question is addressed to the panel: Why is it that you seem to be confident that appealing without a working Appellate Body in place is not an abuse of rights? And why is it that you think that a winning party, which then requests a panel report to be considered at the next DSB meeting, would have no chance of getting actually a DSB decision based on the panel despite the pending appeal, given that there is the possibility of abuse. Thank you very much.

*(…) (contributions removed)*

**(unknown speaker)**

This is approaching the bias of the Chinese Taipei mission to the WTO. Because of the non-appeal clause between Indonesia and Viet Nam has been mentioned several times by the panellists, so I think I should say something. Of course I cannot go much into the detail. I think, I just want to highlight one fact. That is, in this case, Indonesia terminated the measure in question. At the end of the RPT. And the second agreements were agreed, were negotiated and created and circulated around the same time. So I just want to highlight these facts so, if anybody wants to make the argument, so or to make any arguments based on these cases, I hope that we can take a look at these facts. So, actually this non-appeal clause does not serve any actual functions because actually, the three parties agree that the responding party complied with the DSB ruling. And turning to the third scenario, I do not think that this a very reasonable expectation that we can say Members will use self-restraint not to appeal, because we have established that each appeal is not just relevant to legal arguments. It's relevant to real money. There are hundreds of companies over there, billions of dollars there, so a losing party, I think they will always be a political pressure for a losing party to find a way to remedy a losing case. So, that is what I wanted to say. Thank you.

*(…) (contributions removed)*

*(session paused for tea break) (session resumed)*

*(…) (awaiting text approval)*

**Martin Lukas**

Thanks very much Nic and Joost and good afternoon.

I was quiet up to now but I just kept my powder dry.

Now on the political landscape of things, it's important to recall where we are and Peter already mentioned it briefly in his presentation at the beginning of the conference, that we currently focus on unblocking the appointment procedures. Members are doing this by putting forward proposals to address the known US concerns and that is the process now led by Ambassador Walker. That is a very important process and that process, in our view, needs to continue, because, as Jan said, the best option to move out of this impasse is to reinstate the Appellate Body. To unblock the appointments, that stays our prime objective, continues to be our prime objective and the European Union continues to be highly invested in that process. Now, this being said, and while they are continuing to be invested in this process, it is only natural that WTO Members look into scenarios of what will happen if certain events do not occur. That's only sound administration. And that also includes the European Union, and so therefore the reporting in the media of this week shouldn't come as a surprise to anyone. What we are doing in looking at scenarios how to deal with our own cases, how to protect our own legal interests in particular proceedings and how to protect them, we call it the interim solution. So it's a solution

to deal with particular problems, in particular cases, in a way which allows us to deal with the situation when the Appellate Body is defunct, until the Appellate Body rises again. So this is why we call this interim solution, it's not plan B, we don't like this name at all, it sounds too definitive, too broad, too complex, it's the interim solution that we are looking at.

Now, in doing that, you looked at various concepts and Article 25 appeal arbitration is by far the least unattractive option. All other options are vastly more unattractive, including the new appeal option because, the feature of a no appeal option is that there is no appeal, to put it bluntly. So we don't have quality control of Panel Reports and we don't have coherence which is being assured by the second instance. Now, we would want to be able to point to these features when we have to explain to our citizens the results of adjudication of highly sensitive issues in the WTO, and where we have to explain to our economic operators about the results of WTO cases when billions of Euros of trade are at stake. So it is extremely important for us to keep that feature of dispute settlement two stage process. This is in fact one of our three red lines that we have when we look at these scenarios, but also when we look at the proposals on unblocking the appointments. It's very simple – three red lines: two stage process, independence of the adjudicators, and binding dispute settlement. And if we look at those three red lines, Article 25 appeal arbitration squarely fits the bill.

Now we'll go into more detail on how Article 25 appeal arbitration would work now with Nic, but there are three types of vehicles that we would be in theory looking at, when implementing Article 25 Appeal Arbitration. The first one would be a horizontal solution, where we would have a number of WTO Members signing up to an arrangement where they agree that in their disputes they will resort to that mechanism. The second category would be a reciprocal approach. We have two WTO Members who agree that in pending and future disputes, they would resort to that mechanism, a bilateral, reciprocal arrangement in all the disputes that they have with each other. And the third category would be an ad hoc agreement in a particular case. And because of this general political landscape, for the European Union, the focus is now on the last two categories. Either reciprocal approach or an ad hoc approach to appeal arbitration. Over to you Nic.

*(…) (awaiting text approval)*

**Martin Lukas**

Yes, perhaps to start with the question for which cases would this appeal arbitration be available. And here we have two temporal dimensions. The first one would be that it should only be available for cases when the Appellate Body cannot hear the appeal to that case. So we would not want to build here an alternative system to the Appellate Body but it is something which is there for the interim when the Appellate Body is not able to hear appeals.

The second temporal element would be that, Members should only agree to this application of the system to a particular case if the interim panel report has not yet been issued in that dispute. And the simple reason for that is, is that we want to avoid to put Members in the impossible position to decide what is more important. The particular litigation tactical decisions for whether it is actually a good idea to have an appeal, yes or no? And possible systemic reasons for agreeing to it. So it would only be available for cases where the interim report has not yet been issued.

Now, to a brief description of the process, how we would see it on the basis of an actual case, where this system would apply, you will have regular consultations, panel proceedings, parties would decide early on in the panel proceedings, let's say 60 days after panel establishment, to actually file the arbitration agreement for that particular case. That arbitration agreement would then set out all the various steps that would now follow.

The first step that would happen is that the working procedures for the panel would be amended as necessary and that would include for the next step, that let's say 45 days before the expected circulation of the final report, the panel would give notice to the parties that this is coming up.

*(…) (awaiting text approval))*

**Martin Lukas**

So that happens, the panel proceedings are suspended, and on the basis of the notice of appeal, the appeal arbitration would start. Now in practice, the notice of appeal would have attached the panel report in all WTO languages and the notice of appeal would be sent to the WTO Secretariat. One could then imagine that this notice of appeal with the panel report is then published on the WTO website. So we have full transparency with regards to that particular step. After this notice is being sent to the WTO Secretariat and is being published, the appeal arbitration would start with the selection of the arbitrators and we'll come to that particular point a little bit later when we focus more on procedural issues. Also third parties, and it is the third parties that have been part to the panel proceedings, would be able to participate in the appeal arbitration, and then after the appointment of the arbitrators, the appeal arbitration would be followed through exactly *mutatis mutandis* as is currently happening in an appeal.

At the end of the arbitration, the appeal arbitration award would be circulated, it would contain the findings and possible recommendations of the appeal arbitrator on the appealed findings, and would also contain as an attachment the panel report, which would therefore incorporate the non-appealed unmodified findings of the panel. So you basically have the entire package moved from the panel phase into the arbitration phase.

*(…) (awaiting text approval)*

**Martin Lukas**

So, we can now move to some more specific institutional and procedural issues that we want to focus on and that would be the selection of arbitrators, exchange of views, and participation of third parties.

On selection of arbitrators, here we are dealing with arbitration, so it is useful to have a roster of arbitrators. That roster would be comprised of available former Appellate Body Members. This is the idea that we have. With that, we would ensure that the arbitration is staffed with individuals of the highest quality. The selection from the roster to a particular appeal arbitration and here

again, the arbitrator would be comprised of three individuals, would happen like it is currently being applied in the selection of Members of the Appellate Body for a particular division hearing an appeal. So it would be random and it would be done in the same way that it is currently being done by the Appellate Body Secretariat. Now the difference here is that we see that for institutional reasons this would require that the Director-General of the WTO would need to formally appoint the arbitrators for this particular appeal arbitration because the this is what Article 25 says.

*(…) (awaiting text approval)*

**Martin Lukas**

Yes, as Nic has foreshadowed, I beg to disagree on this point, we think that for two main reasons it would not be appropriate to have an exchange of views for appeal arbitration. The first one would be that there is the important practical difficulties in actually ensuring that an exchange of views can happen in practical terms if you have a roster of individuals which is a different situation than if you have seven individuals being put in the particular institution. Second, there are certain confidentiality requirements which you have when it comes to the arbitration for a particular case. And that issue would need to be addressed if you really wanted to allow exchange of views and we find this quite difficult and cumbersome.

*(…) (awaiting text approval)*

**Martin Lukas**

Yes, and here I agree fully with Nic, and this ends our presentation.

*(…) (contribution removed)*
*(…) (awaiting text approval)*

**Martin Lukas**

For the purpose of our discussion also, in the coming weeks, can we agree on a terminology that the horizontal approach - so several Members sign up to the system, then there is the reciprocal approach - the bilateral arrangement for current and future respective disputes against each other, and the ad hoc approach - for individual cases.

*(…) (contribution removed)*

**Jan Yves Rémy**

Very quickly, if I may, so, just go back a little bit to the solutions on the table, the options on the table, again, looking at this as a tangible workable sort of work around in the interim, I think when I first made my intervention, it's all premised on what do those who are not big players in the system, through which prism do they appraise the options on the table, and I'm happy to say, being one of the authors of the proposal in the first place, that it aligns with that interest, it aligns with that interest why? Because I think as Martin outlined, the Article 25 process as conceived would retain the two stage review, it would ensure independence and safeguard the independence and it would be binding. The one thing, which again, from the perspective of those who are not constantly as in the system, are the hallmarks of the system, which make it a viable dispute settlement system for those who are less powerful and not able to engage in the power play. So we're good with that.

I wonder however, whether the current proponents of the proposal wouldn't consider using the solution as an opportunity in a sense to test some of the discussions and the reform orientated proposals that are on the table. So, what do I mean? Or even to use it as a way of legitimating and legitimising bringing in more features of the rule of law. What do I mean? I mean one of the issues that has come up is access to the system and participation in the system by more. More Members, the Appellate Body Members, so the solution of retaining the old Appellate Body Members or using them for a roster, could we envisage maybe widening the number of arbitrators to not just those, and with all respect to the former Appellate Body Members, of whom I have the greatest respect, wouldn't this be a way of maybe choosing not Appellate Body, non-Appellate Body Members, but persons of recognised authority in the field of international trade that may hail from different regions, very differential geographical scopes that under the current appointment procedure have very little chance of actually being part of the system because of the occupation of seats on the Appellate Body, so we could think of using that as an opportunity to legitimise the process by having more Appellate Body Members or more arbitrators from different regions.

The second one would be to think about third participants who may not have been parties at the panel stage but may have acquired an interest in the system and would they maybe be allowed also to sit in on the arbitration appeals option. And then more to the softer issues that are being discussed currently, like, could we, through this process, allow for a certain types of approaches to the 90 day rule? So for instance, you inscribe into the agreement that appeals shall last for 90 days and no longer or you work in the municipal law as a matter of fact as opposed to a matter of law. So, some of the things that are actually gaining ground in terms of building a consensus amongst some of the persons putting forward proposals for reform, or ways that we could address the concerns of some of the bigger players, we could use this as an opportunity to test their viabilities so that when this work around is no longer needed, that you could actually see if they had any chance of success and then they could be then built into the new Appellate Body, once the immediacy of the problem is resolved.

Thank you.

*(…) (contribution removed)*

**Natalia Bayurova**

Just maybe a short question. I'm just very curious to know what Nic and Martin [Lukas] would like to say about any tendency or danger of this interim solution becoming a permanent one, if there is anything that can be done in that respect, except for our good will to rely [inaudible]. Thank you.

*(…) (contribution removed)*

**Leticia Ramirez Aguilar**

Thank you Joost, I have some brief comments on this idea and maybe it will serve as a closing, as I know we still have more panellists to come. This exercise is very important as Members will need to start looking for alternatives to have a possible DSM working in the WTO, and for that it would be important to understand where we are and the *status quo* we are facing. This does not mean that we don't want as a primary option to have a complete Appellate Body as some have mentioned, but as well we would need to think on other possibilities, therefore it might be worth to take a look at this option of Article 25, as an alternative for sure, but as Natalia mentioned, I think it needs to be temporary and we need to be careful that this does not build into a permanent solution that could be stabled for more than we want to. And, as well, we need to think if is it viable to all Members and for all disputes, so we need to have an entire picture of the alternative, and think about it, but of course, this exercise is very useful for Members to start thinking from here on what would be needed. Maybe we will be learning throughout the path.
Thank you.

*(…) (contribution removed)*

**Gabrielle Marceau**

I just want to add two or three questions and comments. First, am I correct that the original panel report would never be circulated before the Appellate Body Report? Because for a document to be circulated it needs to be translated into the other two official languages, and only after translation, under the2002 Derestriction decision, will it have a symbol. Then once circulated a panel report needs to be adopted unless it is appealed (or reversed by consensus) – you will want to avoid this if you want to avoid an appeal in the void. Therefore, your process will need to stop this automaticity. And I'm not sure that the parties alone can stop it, you will need to protect the rights of third parties and the institutional rights of WTO Members.

Second, Arbitration reports are usually not adopted by the DSB, they are only on the agenda and then would the DSB somehow "take note" of the Arbitration Appeal report and its annexed panel report? But what about the conclusions and recommendations of the panel report that are not appealed to the Arbitration Appeal process? In the DSB you'll need to have both sets of panel report's conclusions - the appealed conclusions and the not-appealed panel conclusions/recommendations - noted by the DSB, I think.

Third, if you have an informal exchange of view between 7 arbitrators, if you add more people than the three arbitrators, isn't there a risk of breaching confidentiality? Such three Arbitrators would be bound by the WTO Rules of Conduct that include confidentiality rules.

Fourth, on the issue of using only Appellate Body Members as arbitrators. Are you sure you have enough people?

And to finish, there's an issue of who would be serving or assisting those arbitrators? Who would be in the Secretariat serving this?

These are just random comments.

*(…) (contribution removed)*

**(unknown speaker)**

Well, thanks for the intro Mr Pauwelyn. Can you hear me? No? Yes? Ok, thank you.
Yes, I'm [Inaudible]. I'm a delegate for dispute settlement at the Peruvian Mission. I think most of the comments I wanted to make have already [been made], but just to underscore where would be the function of the Appellate Body Secretariat in both of the [proponents'] mind, I mean, would it be kept, to what extent, you know, to what extent would there be modifications? I noticed that in the paper that's in behind there's reference of course that the parties would likely compose the roster in consultation with the Appellate Body Secretariat to ensure the availability of the individuals and the representatives of the roster, so, what exactly does that mean and in what order parts of the proceedings would Appellate Body Secretariat have been, particularly taking into account the reports are not written by themselves, so, that's the question that I want to make.

*(…) (contribution removed)*

**James Flett**

Congratulations, I think it's a great idea, I don't think that's a big surprise.

Jan Yves, I am not sure that it's a great idea for everybody to come with their shopping list of improvements because it will get stuck. I think I agree with the proposition that the principle that should guide this entire exercise is that it should be absolutely as simple as possible, as absolutely as close as possible to the existing arrangements, and only depart from the existing arrangements to the extent that is absolutely necessary from an operational point of view to get to the place that you need to get to. But I don't think that it should be an opportunity for everybody to come with their particular theories about DSU review, because I think that would drag it down, so, I would beg you, please not to do that.

On permanence, we did have fifty years of the provisional application of the GATT. I'm not suggesting we should have fifty years of the provisional application of the interim solution under

Article 25, but, at the end of the day, as Members, and this was the point that Viktor was making earlier, the WTO is a win-win and by extension litigation is actually a win-win. Those Members who believe in security and predictability, I made this point before, have an ace in their hand when it comes to explaining to investors why they should invest on their territory, because the investment and the value chain is secure, because we are dealing with law abiding rules-based Members, and that is something that can be communicated, that is something that can be sold. And ultimately, there is a price for those who are not part of that system, which perhaps ultimately might persuade them to reconsider the calculus of their own interests.

*(…) (contribution removed)*

**Gabrielle Marceau**

What are the views of others on the financing and administrative arrangements for this new arbitration Appeal process?

*(…) (contribution removed)*

**Rambod Behboodi**

There are a number of systemic issues that arise as a result of going offline to a separate Appellate Body, to a separate appellate instance.

To start with, we heard about the roster, we heard about former Appellate Body Members, and then Jan Yves raised a very serious concern about, well, if you are starting a whole new system, should we not actually pay attention to the excluded countries, and of course, you know, we had the other perspective, oh don't come in with your other issues, let's just like, let's deal with the bit that we can have and then, you know, we'll take care of your concerns later on. But the problem of Appellate Body selection, as we have seen, is a critical problem.

Now, when you have Appellate Body members selected by the Membership, you've got legitimacy. When you have a roster appointed by who knows, you know, the first session, ok, we have, we draw from the former Appellate Body Members, but what about the rest? Where do they get their legitimacy? It would be, you're talking about basically *ad hoc* appointments, potentially, or potentially some people on the roster who may or may not have any demonstrated or necessary adherence to the system itself. We heard about continuity and coherence. Continuity and coherence are functions of the permanence of the body and when you have *ad hoc* Article 25 appeals, you don't have that, you don't have that permanence.

Now, you could say well, what about the roster? Well then we then come back to the question of the legitimacy of selection. Gabrielle raised the issue of "confidentiality" with respect to collegiality. Gabrielle also raised the issue of "noted" - when you have Article 25 decisions, they are binding on the Members just like other Panel reports, but they are only "noted" and not adopted by the DSB. That - adoption by the DSB - if it doesn't mean anything, ok, that's one thing, but it should, and in fact we know from the early cases of the Appellate Body, that the

Appellate Body itself, in the *Japan Alcohol* case, said that it makes a difference when you have a report adopted. So you have the bizarre scenario of a panel report that will be adopted by the DSB, because at some point it has to be, whereas there's the Article 25 arbitration reversing an *adopted* panel report that will be "noted" by the DSB and then enforced through the DSB.

From an institution-building perspective, this creates a crisis of legitimacy inside the Organization itself. The Appellate Body has referred to the hierarchical nature of the structure of Dispute Settlement, and ok, fine, we don't have that, we're creating a hierarchy, Members are entitled to create that hierarchy. But that hierarchy, again, is not part of the, that hierarchy created by some Members through Article 25 appeals, that hierarchical structure is not part of the scheme of the DSU. Members can, between themselves, arrange themselves to create that, but I think for future, that is - this is on the question of the legitimacy of decisions and the receptibility of decisions of - for future cases, you will have that hierarchical issue come up.

And finally, I think the, unless you've got a plurilateral agreement, the non-automaticity of these sorts of appeals, whether they're *ad hoc* or bilateral causes concern because they reintroduce yet again power dynamics. And I think we need to be aware of that. There's nothing wrong - we've got a system that necessarily runs a bit on power dynamics – but I think the challenge is, if we say that we want a second instance in order to fix the problems of the first instance, if there are any, we should not inject additional power dynamic problems into the regime by having a system that runs on *ad hoc* appeals or that runs on bilateral appeals.

*(…) (contribution removed)*

**Martin Lukas**

Yes, well, we'll try. Thanks very much for these questions and comments.

On Jan Yves question on, you know, the ideas to widen the roster to have certain improvements implemented, I agree with James that we have to be careful not to overload the boat here. What we're trying to achieve here is an interim solution to a serious problem and we feel that this would make things overly complicated.

Now, many of the ideas that you have mentioned are in fact proposals that the EU has put forward in 753 for example, but we have to be focused, we think, in looking and designing this interim solution. Definitely Natalia, we have to be careful that this is not being considered as something permanent. Now the documents that we envisage, the reciprocal one or the ad hoc one, they will have health warnings all over the place that this is only interim, that this is not happening when the Appellate Body is able to hear an appeal and will not be available anymore when the Appellate Body is able to hear appeals. A technical footnote here, we would foresee, however, that appeal arbitrations which are ongoing when the Appellate Body can continue to hear appeals again would stay within the appeal arbitration track.

On the question of circulation and translations, Gabrielle's question, now the arbitration agreement would explicitly say that the parties confirm that this is not the intention that the panel report be circulated within the meaning of Article 16 of the DSU, so this is being catered for, but the panel report needs to be transmitted somehow to parties and third parties and eventually also

to the WTO Secretariat for technical reasons to allow the appeal arbitration to commence in orderly fashion.

Now who will pay? Well, there will be at least two WTO Members who will ask the WTO Secretariat to service this appeal arbitration, arbitration which is seen under Article 25 of the DSU, so we have the right that this is being serviced properly as this is done for Article 21.3.c arbitrations when former Appellate Body Members are assisted by the Appellate Body Secretariat. And with that, I'd like to hand over to Nic please.

*(…) (awaiting text approval)*

**Martin Lukas**

Thank you Nic. Yes, one last question from Gabrielle. Do we have the numbers? Are there enough former Appellate Body Members willing to …

*(…) (awaiting text approval)*

**Martin Lukas**

Well, we hope so, we think so, this is the indication that we have. Of course, this would need to be ascertained by the Appellate Body Secretariat I suppose, but we are honoured by the presence of four former Appellate Body Members. I think this is already a good sign.

*(…) (contribution removed)*

**Ricardo Ramirez**

No, no, you start.

**Isabelle Van Damme**

Thank you Mr Chair. I might need more than a minute.

I would like to start with three remarks on questions that have been raised but were not yet addressed by the panel. First, on the issue of multilateralizing a no appeal agreement or an Article 25 agreement, under WTO law, there is no umbrella clause similar to what we find in certain investment agreements. I don't think that such an agreement would be a measure that falls within the scope of, for example, Article 1 of the GATT.

Second, Michael mentioned that we all assume that everyone is on board with compulsory jurisdiction. I put a question mark next to that assumption because it seems to me that the

current government of at least one WTO Member wants control over the outcome of the process in terms of possibly the content of a report, or whether or not it's bound by a report. It seems to me that therefore not everyone is on board.

Third, on Article 25, I do think that an interim solution is necessary and we've heard a lot about the mechanics of this type of model. However, we should not forget that Article 25 envisages arbitration, it's not adjudication. The DSU itself distinguishes between those forms of dispute settlement. So I ask the question, can we really assume that the judicial function will be exercised by these arbitrators in exactly the same manner as the Appellate Body currently does and that, for example, they will exercise in the same way certain inherent powers? As we just heard, everything would each time be based on the agreement of the two disputants.

Turning now the question of whether RTA's are currently alternatives to appellate review. I think the answer is clearly no. For many of the disputes that are pending, there is simply no bilateral regional trade agreement in place between the disputants. If there is one, it does not provide for general jurisdiction of the dispute settlement system, so certain matters are clearly excluded from dispute settlement under RTAs. Also, if there is such an agreement, it doesn't provide for appellate review. Moreover, one could say that using today a bilateral regional trade agreement for litigating certain cases is in fact recognition of the acceptance of a one tier review model as being sufficient for resolving certain of these disputes. Currently, the RTA's, the bilateral agreements, they also lack a proper institutional context, even if that feature is gradually changing. The assumption is also that dispute settlement under an RTA does not result in the same reputational damage and the same collective pressure for compliance. Whilst there are many disputes between just two parties, such disputes have often a very important multilateral dimension. It is therefore important that these disputes can be brought to the WTO, where all other WTO Members can then participate as third parties, or at least, be part of the review as Members of the Dispute Settlement Body.

Putting those observations aside, I do think it's useful to look at bilateral agreements and regional agreements. First of all, for some of the long term reform solutions being discussed, relating to, for example, the processes for appointment and the question of municipal law as a question of fact, useful models are available in certain RTAs. Many bilateral regional agreements build on different parts of the DSU and attempt to improve the DSU rules. So, in RTAs, we find concrete treaty language addressing some of the problems being discussed in the WTO.

Next, it is not sufficient to consider only bilateral and regional trade agreements as they exist today. We also need to take into account more long-term developments visible in international economic law but outside the context of the WTO. What we see is that in international economic law, there are proposals for creating a new type of court system taking the WTO model, improving the DSU and copying it in possibly a new plurilateral agreement to which States have the option of becoming a party. What's important is that the proposals do not envisage a body such as the DSB, meaning that such an agreement might create an agreement with strong compulsory jurisdiction and appellate review but without the fragility, I would say, that we see in the WTO. So if those negotiations move forward, the establishment of potentially a very strong judicial institution with competence in the area of international economic law. I appreciate that our panel was supposed to look at alternatives for what will happen at the end of the year but I do think that we sometimes need to look outside of the context of the WTO.

Thank you.

*(…) (contribution removed)*

**Ricardo Ramirez**

Ok, let me be quick. On alternative dispute resolution medication conciliation, I think this is an Organization that is very proud to try to solve disputes through not adjudicative means. Before this crisis, the numbers show that disputes were solved through consultations. I think that the problem is that once the crisis started, then there was an incentive by Members to go through litigation. I think the problem with the current crisis is that it also affects mediation and conciliation because there won't be any incentive for Members to seek other forms of dispute settlement. So, it's kind of pervasive, but that's the way I see it. Moreover, I don't think Japan and Korea could have solved their differences through conciliation or mediation nor the Airbus or Boeing cases could have been solved through conciliation or mediation.

I wanted to make two points. I think that the dispute settlement system has been kidnapped and I think we are now living the Stockholm syndrome, where we are thinking now about our kidnapper and we are trying to please our kidnapper. I do believe that this no appeal *ex ante* is not an option because a seven Members fully functioning Appellate Body was clearly part of the bargain. Even if Members come up with a solution to zeroing or public body interpretation (assuming something is wrong with such interpretation), the problem would not be solved. The signals come from RTA's, if you look at the US proposal when they started the negotiations of the new NAFTA (or USMCA), I think it is quite telling. The US didn't want Chapter 19 [dispute settlement related to trade remedies disputes], for a general dispute mechanism the US wanted a set aside system where the losing party could choose whether you accept or not a decision and finally the US wanted nothing on investor-state dispute settlement. That is a clear signal, that is the ransom. And that is the ransom that the kidnappers could be asking now in the WTO. My point is you have to keep the negotiating leverage. At the end if the Membership agrees on one instance, it's fine, but it has to be result of a negotiation. You can't give it from the start, it would be pleasing the kidnapper without knowing exactly what the ransom is. I will leave it there.

*(…) (contribution removed)*

**xxxx**

# Conclusions and Closing

**Thomas Cottier**

Good afternoon. Peter van den Bossche said that three hours is a very long time and another 20 minutes is perhaps too much for closing remarks. But I am intrigued trying to wrap up this truly interesting day. We started off with the question whether there is a problem at all with WTO dispute settlement. Some people found that there is no particular problem at hand. My own take away is that there is a problem on two levels. The first one is very specific. This is essentially the US concern with ADA Article 17.6 and the doctrine of permissible interpretation. That's in my view where the clinical surgery should take place in remedying a particular issue, but the problem is more broadly framed, and that was mentioned today. The fact is that 70% of all cases are appealed. Can you indicate to me any domestic system where 70% of lower courts' decisions are being appealed, and go all the way up to the highest court? Clearly, the situation in the WTO is not sustainable in the long run. I think the whole debate on 90 days for AB review is just a symbol for that situation. This is a systemic issue which has nothing to do with the complaints of the particular parties. It needs to be addressed.

Can you identify incentives not to appeal? There is no financial incentive not to appeal, there is no time incentive not to appeal, there is absolutely no risk to appeal, since you can always withdraw if things go wrong. So how do we handle this? That's where it comes to the issue of what today was called judicial engagement. I think both on the particular issue with the antidumping and the broader issue with these excessive appeals, it is mainly a question of margins of appreciation. What is the proper margin of appreciation panels should have in assessing facts and the law? This is a question not only in the context of the ADA in relation to national authorities in anti-dumping determination and countervailing duty. It is also an issue which comes up between the AB and Panels. What is the appropriate margin of appreciation? How do we calibrate the relationship between Panels and the Appellate Body within the system? That goes to the fundamental question, and we had a very interesting discussion on it. "What is the role of the Appellate Body within the system?" We still tend to discuss the Appellate Body in splendid isolation. We look at it as an institution on its own. We sometimes forget that it is a part of a system which starts off with political discussions and includes the Panel level and the Secretariat, which is never mentioned, but the grey eminence in the room. It includes the Appellate Body and it includes also the DSB. We need to calibrate the role of the Appellate Body in these terms. And we need to achieve greater clarity as to who is at the center of the system. Is it the Appellate Body or the many panels who are doing the ground work in the system? You can go both ways, but I think it has an impact on how we calibrate the relationship of Panels and the Appellate Body. It is a relationship of hierarchy where the teacher tells the school boy what to do, or is it a system of vertical checks and balances? These are the questions we need to take home.

On interpretation: Again that depends on how you see the system. If you develop a hierarchical view then of course you may tend to say there is an inherent system of precedent and even stare decisis, while if you just apply the rules of public international law, it's a civil law system of precedent where you have to take into account the case law but may also deviate from it for good reason. Again, it depends on how you see that relationship. That is also true for the second item we discussed in the second panel, i.e. the problem of legislative response.

It is here that we see why the dispute settlement system has been so successful. It no longer operates on consensus. The losing party cannot object. If people tell us that you cannot deviate from consensus in the WTO, I tend to say we have already done so in the dispute settlement system which has been the more successful part in the system than the other branch. Yet as long as we have the current relationship between the dispute settlement system and the legislative negotiating branch, it will remain messy. We had a number of interesting approaches to how this could be addressed in the debate today, but the fundamental question remains whether we should aim towards separation of powers. It is inherent to the rule of law that the courts are essentially independent, however you call them, from the executive branch again, these are issues one should clarify in order to know which directions we would like to take. I think the consensus question also leads me to panel number 3. It is because of consensus that we have this problem that the Appellate Body cannot be repleted here.

My question to you is how would Members deal with the situation if the position of the DG cannot be filled. Would you just wait and see? How would you deal with the matter if some other power would block the process, for example a small country seeking to extract some concessions? I am confident that we would not be sitting in this room. I can understand the psychology of the current situation, but I would continue to propose to send the matter of appointing AB members back to the council and vote on it because it's a personnel issue, it's not a substantive issue. If this organization is not able to move forward on personnel issues, it may be hijacked by anybody anytime and randomly paralyzed. Voting is the prime option one should pursue, and I was very glad to see that the option of a plurilateral appeal's arbitration on the basis of Article 25 DSU could actually work as a leverage to bring about the kind of decision on appointing appellate body members in time. I find it important, after today's discussions, to think harder about the abusive right doctrine. It is recognized in public international law. It is recognized in WTO law, but we haven't really fleshed it out in procedural terms.

So that's just a few remarks, but I would really like to conclude by thanking Peter, who is, I think, in these days a great example for 'optimism' and for 'moving on'. It is wonderful that he organized this conference and we had the opportunity to exchange views and to create mutual encouragement and support for further work on the multilateral system. Thank you very much.

**Peter Van den Bossche**

With this being said, the only thing that I will still do is to close this workshop. You have not heard much from me today but for my introduction. And that is because I, in the first place wanted to hear from you, and I will have the opportunity to say much more next Tuesday when I will give my farewell speech to the DSB. So, thank you very much for your participation. I thought it was a very interesting workshop and I was glad to have heard that also from others. There is, however, still is an awful lot of work to be done if WTO appellate review and the dispute settlement system is to be saved.

**xxxx**