

International Economic Law and Policy Blog

Expert commentary on the law, politics and economics of international trade and investment

[Home](#)

[About](#)

[WorldTradeLaw.net](#)

[DSC Blog](#)

Guest Post: The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?

This is a guest post from [Markus Wagner](#) of the University of Wollongong:

It is very unlikely that the ongoing G-20 summit will resolve the political dispute between China and the US over their [bilateral trade relationship](#) and the dispute over the [future direction](#) of the international trading system. But it at least appears that - while almost everyone pays lip service to WTO reform - there is a growing consensus that the WTO's "rules-based system" (such as it is) is [worth preserving](#) (even if the [G20 Ministerial Statement on Trade and Digital Economy](#) was non-committal on the issue of dispute settlement reform, apparently due to US opposition).

The uncertainty surrounding the future of the WTO Appellate Body has given rise to wide-ranging discussions about reforms among the WTO membership, as well as in academia and civil society. These range from modifying the operation / text of the DSU rules or the Working Procedures for the Appellate Body (see e.g. [here](#) and [here](#)), to a whole-sale outsourcing of appeals to an [extra-WTO mechanism](#).

Some of these suggestions from academia are reflected in more recent reform proposals put forth by various WTO groupings (see e.g. [here](#) and [here](#)). These suggestions were in direct response to US criticism of the operation of the Appellate Body, which had [raised complaints](#) over (1) individuals who are no longer formally members of the AB continuing to adjudicate disputes; (2) non-adherence to the 90-day deadline for issuing AB reports; (3) the use of obiter dicta in AB reports; (4) the AB's misapplication of the standard of review; and (5) the AB taking the view that its reports have precedential effect. The reform proposals were subsequently rebuked by the US, stating [on the record](#) that "[w]ith respect to the proposal advanced by the EU, China, and India, it is hard to see how it in any way responds to the concerns raised by the US, as some have alleged".

Given the far [greater concerns](#) over the future of international trade governance - pitting the market-oriented existing system against a more state-centric system championed by China - the potential disappearance of the AB could well be nothing more than collateral damage in larger fight playing out between the US and China.

This leaves in grave doubt not only the Appellate Body (whose jurisprudence may well live on, at least for some time, through reference in future WTO panel and PTA tribunal decisions), but with it - at least potentially - the WTO's dispute settlement function. In a [forthcoming article](#) (titled "The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?"), I show the developments that have led to the current state of affairs. While the current discussions about reforming WTO dispute settlement are welcome (and reforms are necessary), WTO members willing to preserve a modified version of the current system face two obstacles: (1) the clock is ticking towards 10 December 2019 when two further AB members are stepping down, reducing the number of AB members to less than the number required for an AB division; and (2) a US administration that has sown doubts about its calls for reform having been made in good faith. If they were, there would be more constructive engagement. All indications point in the opposite direction, namely a desire to [return to a power-based system à la GATT](#).

Posted by [Simon Lester](#) on June 27, 2019 at 05:50 AM | [Permalink](#)

Comments

Brett Williams said...

Among the essential elements for this kind of cooperative system are credible threat of retaliation, and retaliation being limited to tit for tat. If the DS system goes, the rest of the system goes with it.

Reply June 27, 2019 at 06:40 PM

Comment below or sign in with [Typepad](#) [Facebook](#) [Twitter](#) and [more...](#)

(You can use HTML tags like <i> and to style your text. URLs automatically linked.)

Email address is not displayed with comment.

POWERED BY  TypePad