

# Future of WTO Reform: Paths Forward for the Appellate Body

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## I. Introduction

Many politicians, academics, and experts alike view the Appellate Body (“AB”) of the World Trade Organization (“WTO”) as the institution’s “crown jewel.” Founded in 1995, the WTO (or, more specifically, its Dispute Settlement Body) has received 598 requests for consultations as of December 31, 2020. In 174 of these disputes (approximately 29% of total cases, or 68% of cases where a panel report has been issued), parties have filed notifications of appeal with the AB. In other words, the Appellate Body plays a significant role in adjudicating multilateral trade disputes and is asked to weigh in on over a quarter of all cases brought to the WTO.

Case Status <sup>1</sup> (n = 598)	# of Cases	% / Total
Request for Consultations	598	100
Panel Established	356	~60
Panel Report Issued	256	~43
Case Appealed to the AB	174	~29

<sup>1</sup> This chart represents cases handled by the WTO as of December 31, 2020. Figures exclude cases of Panel/AB compliance reviews per Article 21.5 of the DSU.

Despite proving itself to be an exemplary multilateral institution in a multitude of ways, in recent years, WTO Members have expressed unhappiness with the organization’s operations. As critics of the WTO call for both procedural and substantive reforms of the multilateral institution, the AB has found itself at the center of a multitude of these calls. The United States has been one of the AB’s leading critics, and in effect, has brought the body to a standstill. In order to rebuild the AB and allow the WTO to wholly resume its functionalities, WTO Members will have to implement significant reforms to the body, some of which are discussed in this brief.

## II. Background

The AB was established under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), the

body of law that governs the WTO's dispute settlement mechanism. Under this understanding, the AB acts as the second and final tier of the WTO's adjudication system: its Dispute Settlement Body ("DSB"). When a WTO Member brings a dispute to the DSB, and consultations between the parties to a dispute don't lead to a mutually satisfactory outcome, the case is then adjudicated by an ad hoc panel. If either party to a dispute is unhappy with the panel's decision, it may then appeal the case to the AB, which serves as the WTO's highest hierarchical adjudication mechanism.

The Appellate Body is composed of seven members. Each member is appointed to a four-year term, with the possibility of renewing the term once, and approved via consensus of all WTO members. Where a party to a case decides to appeal the panel ruling, it submits an appeal notification to the DSB. The DSB selects three out of the seven Appellate Body Members in rotation to hear such appeals. The AB is supposed to rule on cases and issue a report with its decision within 90 days of formulation, that the DSB then votes to accept or reject.<sup>2</sup> Importantly, Article 17.6 of the DSU states that "[an] appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Thus, parties to a dispute cannot file appeals based on issues of facts, and the AB does not have the power to rule on such issues.

<sup>2</sup> Rejection is only possible through consensus.

<sup>3</sup> It is worth noting that the practice of blocking appointments to the AB did not begin with the Trump administration, but rather with the Obama administration, which blocked the reappointment of United States AB member Jennifer Hillman in 2011, the appointment of James Gathii in 2013-2014 (also from the United

In December 2019, the AB was rendered inoperative because the majority of its members' terms had expired and only two AB members — one less than the three members needed for the formulation of a Division — remained. This was because in 2017,<sup>3</sup> the Trump administration employed the practice of blocking the appointments of AB members, citing frustrations with the AB and alleging it operates inconsistently with the DSU. From November 2017 until May 2018, the Trump administration repeatedly rejected proposals by other WTO Members to fill the three AB seats that were vacant at the time.<sup>4</sup> In September 2018, the United States blocked the reappointment of Mauritius member Shree Baboo Chekitan Servansing and his term lapsed, contributing to the AB's fourth vacancy. In 2019, the United States rejected an additional two proposals to fill two seats of members whose second terms were set to lapse in December of that year (Mr. Ujal Singh Bhatia of India and Mr. Thomas Graham of the United States). With the conclusion of their terms in December 2019, the AB was officially inoperative. By November 30, 2020, with the expiration of the last standing AB member's term (Ms. Hong Zhao of China), all AB seats were officially empty.

Because of the inoperative status of the Appellate Body, it is currently more critical than ever to examine and address the issues within the judicial organ of the WTO. This brief seeks to provide an overview of these issues, and the reforms

States), and the reappointment of South Korea AB member Seung Wha Chang in 2016.

<sup>4</sup> Mr. Ricardo Ramírez Hernández's second four-year term of office expired in June 2017, Mr. Hyun Chong Kim resigned from the Appellate Body as of August 2017, and Mr. Peter Van den Bossche's second four-year term of office expired in December 2017.

proposed to address them by WTO Members, experts, and academics. Implementing these reforms will prove essential in paving the way for the appointment of new AB members, and to bringing the AB back to life.

### III. Controversies and Criticisms of the Appellate Body

Though the United States has utilized its criticism of the AB to go as far as to justify the blockage of the appointment of its members, it is not the only entity that has stressed the need for reforms within the mechanism. The AB has been scrutinized by other WTO Members, as well as various international trade law and economics experts.

In a report published by the U.S. Trade Representative's Office ("USTR") in February 2020, "Report on the Appellate Body of the World Trade Organization," the United States outlined some of its main criticisms of the WTO's Appellate Body. These criticisms fell into two main categories: first, that the WTO "chronically violates the rules imposed by WTO members, undermining the dispute settlement system and the WTO generally," and second, that the "Appellate Body errors in interpreting WTO agreements raise substantive concerns and undermine the WTO" (USTR, 2020, p. 25 and p. 81).

In the first group of criticisms, the United States points out that the AB repeatedly disre-

gards the mandatory 90-day deadline for issuing the reports, thereby violating Article 17.5 of the DSU. The United States also alleges that the AB violates Article 17.2 of the DSU by allowing members to rule on cases after the terms of their appointment end. Next, the US states that the AB has violated Article 17.6 of the DSU, writing that the body "routinely reviews panel findings of fact," thereby expanding its scope of review and authority (USTR, 2020, p. 6).

The United States also alleges that the AB has violated Article 3.7 and Article IX:2 of the DSU through its issuance of advisory opinions on issues that are unnecessary to the actual resolution of the disputes they are issued for. Not only does the US claim that this is not permitted under the DSU, the issuance of advisory opinions goes against the purpose of the WTO, which is "to help WTO Members secure a positive solution to a dispute" (USTR, 2020, p.14). These advisory opinions, as well as the AB's prior decisions, form the basis of the United States' next criticism: the AB "wrongly claims that its reports are entitled to be treated as binding precedent and must be followed by panels" (USTR, 2020, p. 7). The US claims that there is no legal basis for the AB's reports to render any sort of legal precedent, and the body's usage of its past decisions (1) affects the rights and obligations of WTO Members without their consent, (2) creates a disincentive to negotiating, because WTO Members can achieve through "binding precedent" what they cannot achieve through negotiation, and (3) creates a disincentive to the creation of new WTO agreements, as

members do not have faith in WTO adjudicators to follow these agreements, since they do not follow the ones already in place.

The United States next alleges that the AB has overstepped its authority by issuing opinions “within the authority of other WTO bodies, including the Ministerial Conference, the General Council, and the Dispute Settlement Body,” and that the AB does not follow AB rules by incorrectly deeming various decisions to be “authoritative interpretations of covered agreements” (USTR, 2020, pp. 8, 74).

Among the second group of criticisms, two stand out: in the first, the US criticizes the AB for its interpretation of the term “public body,” which limits how WTO Members can interact with trade-distorting subsidies implemented by state-owned enterprises (SOEs), thereby “undermining the interests of all market-oriented actors” (USTR, 2020, p. 82). The second criticism that stands out is the United States’ allegation that the WTO’s prohibition of zeroing is not rooted in any sort of agreement. Because this prohibition limits the relief that affected WTO Member countries are able to obtain through the WTO, in this way, the AB diminishes Members’ rights and obligations.

Though the United States has been the most outspoken WTO member to officially come forward with all of the aforementioned criticisms, it is not alone in this thinking. Other WTO Members and experts agree that the United States’ claims merit significant consideration and need to be addressed. Countries including the European Union, China, Canada, and the Republic of

Korea, among others, have come together to submit various proposals to the WTO acknowledging and attempting to address the same issues brought up by the United States.

In addition to acknowledging and addressing the concerns of the United States, other WTO Members have criticized the Appellate Body’s independence, specifically as it relates to the independence of its members and its supporting body — the Appellate Body Secretariat. WTO Members have stated that the AB has acted beyond its mandate by the DSU and beyond the control of WTO Members, who ultimately run the WTO. Members have also claimed that the Appellate Body Secretariat has increasingly taken over the functions of “drafting and refining Appellate Body decisions, as well as participating in Appellate Body decision-making,” rather than simply assisting the Appellate Body members (Hirsch, 2020, p. 7). This is in large part due to the fact that Appellate Body Secretariat members work full-time with no term limit, while AB members are appointed to a maximum of eight years and are not precluded from simultaneously holding other positions. As such, the AB Secretariat often has more experience and knowledge of general AB proceedings and previous AB cases.

The following section highlights some proposed solutions for all of the aforementioned issues.

## IV. Proposed Reforms

The United States, other WTO Members, academics, and experts have all called for changes to the Appellate Body, and proposed changes are all quite diverse in terms of substance and depth. Ironically, though the United States has been one of the AB's biggest critics, it has proposed few reforms specific to the AB. However, other WTO Members have attempted to address the U.S.' concerns by submitting their own proposals for possible DSU reforms. Scholars and organizations have also addressed the country's concerns in various reports and papers.

In February 2019, New Zealand's Ambassador and Permanent Representative to the WTO David Walker was appointed to explore resolutions that would address concerns raised by the United States with respect to the WTO's Appellate Body. His work concluded with the issuance of the Walker Principles in November 2019, which recommended a specific set of AB reforms.<sup>5</sup> As summarized by former WTO AB member and international trade lawyer Jennifer Hillman:

The principles require the Appellate Body to make its decisions in ninety days...to treat facts as facts (not subject to appeal)...to address only issues raised by parties and only to the extent necessary to resolving the dispute at hand so that its opinions are not advisory, to take previous Appellate Body or panel reports into account only to the extent they are relevant and not as precedent, and to ensure that its rulings do not add to the obligations or take away any rights of the parties as contained in the WTO rules. (Hillman, 2020, p. 8)

With respect to transitional rules for outgoing Appellate Body members, the Walker Principles state that “[members] may complete an appeal process in which the oral hearing has been held prior to the normal expiry of their term” (Walker, 2019, p. 5). The Principles also recommend clarifying that municipal law is not subject to appeal, and that the AB should refrain from conducting *de novo* review.

Though the principles addressed a lot of the procedural issues raised, they fail to address what many consider to be the key problem brought up by the United States: the country's claim that the AB oversteps its mandate, especially when it comes to the standard of review embedded in the WTO's Agreement on Anti-dumping. Specifically, the US alleges in its criticism that the AB repeatedly rules contrary to the standard of review on “zeroing,” a practice of inflating dumping margins, commonly utilized by the United States. Additionally, the United States questioned whether the AB would adhere to the principles if they could not adhere to the DSU thus far.

As a result, the Walker Principles were never adopted, and were instead followed by the USTR report a few months later. Commenting on the matter, scholars B. Hoekman and P. Mavroidis stated “The consultative process proved to be too little too late, as by that time the key protagonists were deeply entrenched in their positions” (Hoekman and Mavroidis, 2019, p. 116). They

<sup>5</sup> Walker, D. The Walker Principles (Informal Process on Matters Related to Walker, D. The Walker Principles (Informal Process on Matters Related to the

Functioning of the Appellate Body). GC/222 (2019, November 15).



also acknowledged that re-negotiation on the “zeroing” issue will prove critical to AB reform moving forward.

Two reports by former USTR official Bruce Hirsch, commissioned by the National Foreign Trade Council, build on the Walker Principles and offer further suggestions to clarify the role and reach of the AB (2019 and 2020). Just like the Walker Principles, Hirsch’s reports recommend the enforcement of a 90-day timeframe for decisions, the prohibition of advisory opinions, and clarifying that AB reports do not provide guiding precedent.

Among its novel recommendations, with respect to overreach, Hirsch recommends (1) clarifying that DSU Article 3.2 “does not justify expanding or narrowing the reach of WTO provisions or filling gaps in WTO coverage,” (2) clarifying that “customary rules of interpretation of public international law do not justify gap-filling or expanding or narrowing the reach of WTO provisions,” and (3) directing the AB to reject arguments “seeking to expand or narrow the reach of agreement provisions or fill gaps in agreements” (Hirsch, 2019, p. 1). Hirsch also directly addresses Article 17.6(ii) of the Anti-dumping Agreement, stating that the notion that the article’s provisions may have multiple meanings must be given effect, and thereby directly addressing the United States’ criticism around this issue. This is one of the ways in which Hirsch’s recommendations prove to be more comprehensive than the Walker Principles.

In addition to the aforementioned suggestions, Hirsch also recommends directing the AB to

“reject aggressive party arguments seeking to expand or narrow the reach of agreement provisions or fill gaps in agreements” and providing guidance that emphasizes the role of AB as “assisting WTO Members in resolving disputes rather than making law” (Hirsch, 2019, p. 1 and 2020, p. 1). Hirsch also recommends replacing the AB Secretariat “with a system in which each Appellate Body member is assigned one or more clerks acting under the supervision of that member,” potentially hiring these clerks from the WTO Secretariat for one- or two-year periods (Hirsch, 2020, p. 6). This recommendation seeks to address the criticism surrounding the role played by the Appellate Body Secretariat. By clarifying the role that Secretariat members play, in addition to seconding Appellate Body Secretariat members from the WTO Secretariat, Hirsch argues that AB members’ decision-making power would be restored and the advice they receive would be more strongly rooted in trade negotiating experience, making the AB adjudication process more in line with the expectations of WTO Members.

Jennifer Hillman has also called for a multitude of changes to the Appellate Body, in addition to advocating for the adoption of Walker Principles, potentially enhanced with recommendations made by Hirsch in his reports. In addition to the adoption of the principles, Hillman has called for the establishment of an oversight committee to ensure compliance with the Walker Principles. As Hillman describes in her report, the committee would meet once a year and when requested, and could be composed of the chairs of WTO committees, as well as four

independent trade-law experts. The existence of this committee would ease the United States' worry as to whether the Appellate Body would adhere to the Walker Principles, were they to be implemented.

With respect to the criticism surrounding the role played by the Appellate Body Secretariat, Hillman has proposed limiting the term of service of Appellate Body Secretariat members to eight years, similar to the two-term limit imposed on Appellate Body members. Such a change, Hillman argues, would add an element of mobility to the AB, thereby “allow[ing] staff rotations throughout other WTO offices, bring[ing] new perspectives to appeals, reduc[ing] the tendency to treat past decisions as precedent, and help[ing] restore an appropriate balance of power between the Appellate Body members and the Secretariat Staff” (Hillman, 2020, p. 9).

Additional recommendations relating to the Appellate Body's issues of inefficiency and overreach were made by former AB member Zhang Yuejiao, and in a report published by the Peterson Institute of International Economics. Zhang proposes a few procedural improvements to the AB, such as ensuring and recognizing the AB's capability for proper legal analysis by requiring both parties to sign a “statement of facts” at the case panel stage and reconsidering the 90-day time limit for reports entirely. Zhang also proposes providing for one single but longer term for AB members in order to make the body more independent. PIIE proposes several general solutions to the issue of AB overreach, such as allowing the AB to re-

mand cases to respective Committees for discussion and negotiations among WTO Members.

Professors and WTO experts Bernard Hoekman and Petros Mavroidis have also proposed various changes to the DSB, such as implementing a standing body of full-time panelists to adjudicate first-stage WTO disputes (2020b). In a recent paper, they go so far as to say that with the proper reforms to the DSB's first-stage panel process, there is no need for the AB whatsoever. In their paper “To AB or Not to AB? Dispute Settlement in WTO Reform,” Hoekman and Mavroidis promote the increased use of conflict-avoidance strategies. Increased conflict-avoidance, they argue, will lower the number or requests for consultations filed with the WTO. This decrease in cases, coupled with reforms to the first-stage adjudication process — consisting of the appointment of 12-15 full-time panelists with trade law and/or economics expertise to non-renewable eight-year terms, will outright eliminate the need for an AB. Hoekman and Mavroidis argue that “one-instance adjudication will ipso facto remove the US complaint that facts and law are at times mischaracterized by the AB. Panels will have to discuss both facts and law – and have a much stronger incentive to do a serious job on both fronts” (Hoekman and Mavroidis, 2020, p. 13).

In addition to the elimination of the AB process, Hoekman and Mavroidis also call for three complementary changes to the first-stage panel process: (1) expanding the statutory deadlines for panels to issue reports since current deadlines have proven time and time again

to be insufficient; (2) ensuring the right of panels to acknowledge cases of non liquet and allow WTO Members to design law in cases where there is none; and (3) “improving the quality and consistency of the factual analysis undertaken by panels...as appeals often concerned matters of fact as opposed to matters of law, and thus could not be addressed by the AB” (Hoekman and Mavroidis, 2020, p. 10).

Though the United States hasn’t yet officially submitted proposed solutions to the WTO, other members have submitted communications and published reports with proposals trying to address the United States’ (and their own) concerns surrounding the AB. The following are some highlights from the various proposals submitted to the WTO in September 2018 by Canada, December 2018 by the European Union, China, Canada, Republic of Korea, and ten other members (WT/GC/W/752/Rev.2), in December 2018 by the European Union, China, India, and Montenegro (WT/GC/W/753/Rev.1), in January and February 2018 by the Honduras (WT/GC/W/758, WT/GC/W/759, WT/GC/W/760, WT/GC/W/761), in March 2019 by Brazil (WT/GC/W/767), in April 2019 by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (WT/GC/W/763/Rev.1), and in April 2019 by Japan, Australia and Chile (WT/GC/W/768/Rev.1), as well as from a report published by the European Commission in September 2018. Despite exhibiting significant variance in terms of scope of specificity, these proposals overlap a lot in terms of their recommendations. They provide a representative view of the suggestions offered by other WTO Members, including its largest Members and

most frequent users other than the United States (e.g. European Union, China, India).

Members propose providing for the possibility for parties to agree on exceeding the 90-day timeframe for issuing reports on a case-by-case basis, potentially through the development of guidance related to such consultations, similar to the recommendation made by Bruce Hirsch. They also propose increasing the number of AB members, providing that membership of the AB is a full-time job, and increasing the resources of the AB Secretariat, thereby contributing to the body’s efficiency. Members further propose allowing AB members to finish ruling on cases that they were assigned to for a period of up to two years following the expiry of their terms, though Brazil disclaims this amendment in its proposal by requiring authorization from the Ministerial Conference or the DSB in such cases.

On certain issues, such as the issuance of advisory opinions by the AB that are unnecessary to the actual resolution of the dispute they are issued for, Members seem to be in agreement that a strong way to address this is by providing guidance to the contrary, i.e., amending the DSU to provide that the AB shall address each of the issues raised on appeal by the parties to the dispute to the extent that is necessary for the resolution of a dispute. Similarly, all WTO Members who broach the subject of the AB reviewing panel findings of fact, including findings related to members’ domestic law, suggest clarifying that issues of law covered in the panel report and legal interpretations developed by the panel are limited to issues of law and do not include the meaning of the municipal measures themselves.



With respect to the issue of the AB treating reports as binding precedent, most members propose clarifying that AB reports do not constitute binding precedent. Honduras provides some interesting suggestions on the matter, proposing adopting a middle ground between complete *stare decisis* and none. Alternatively, Honduras also proposes adopting a rule of reiteration, in which certain interpretations become precedent once they have been repeated a certain number of times in similar contexts. With respect to the issue of precedent, Members also propose holding annual meetings between the AB and WTO Members, where the latter group could express their concerns relating to AB approaches in a manner unrelated to the adoption of particular reports. In this way, members, as opposed to the AB itself, could determine what they'd like to be considered binding precedent.

For a more comprehensive look at the criticisms of the Appellate Body, and the solutions proposed to address each of these criticisms, please refer to the table included in Appendix A of this brief.

## V. Conclusion and Way Forward

The path forward for the WTO's Appellate Body will consist of some mixture of the aforementioned proposals.

On a larger scale, the combination of Jennifer Hillman's recommendations to adopt an enhanced version of the Walker Principles and establish an oversight committee to ensure the

AB will adhere to these principles, has the potential to greatly improve the AB and solve a lot of the criticisms the body is currently facing. Many of the proposals within the Walker Principles are the same proposals suggested by various members of the WTO, including the EU, China, and India. This makes sense, as the Walker Principles were created with the aim of pleasing all parties to the WTO. Enhanced with the various suggestions from the Hirsch reports and other proposals discussed in this brief, if implemented, they have the power to effectively address the structural and procedural concerns held by the United States. Once the United States' criticisms are properly addressed, the country will hopefully drop its objections to the appointment of future AB members, and the AB can resume its role as the "crown jewel" of the WTO.

The majority of proposals discussed in this paper seeking to address more specific issues within the AB would satisfactorily address the criticisms expressed by other WTO Members, such as those relating to the independence of the AB and the role played by the AB Secretariat. These proposed changes would be relatively easy to implement. For example, providing for one single but longer term for AB members would reduce politicization of AB appointments, and limiting the service of AB Secretariat members would eliminate the vast majority of concerns surrounding the Secretariat. However, initial efforts to reform the AB should be focused on addressing the structural and procedural issues identified by the United States, as solving these will be integral to bringing the AB back to operational status.

Though the Trump administration had signaled that it does not believe in the need for an AB to begin with, the Biden administration has promised to make multilateralism a core tenet of its foreign policy (Kentikelenis, 2020). Therefore, it may prove difficult to completely eliminate the AB, an integral part of one of the largest multilateral institutions in the world. The AB can still, however, benefit from changes to the first-stage dispute resolution process, such as implementing a standing body of full-time panelists to adjudicate first-stage WTO disputes, as suggested by Hoekman and Mavroidis (2020).

Such changes, in combination with the adoption of an enhanced version of the Walker Principles and an oversight committee to enforce the adoption, will render the AB more just and efficient, and address a large amount of the concerns expressed by the US. In turn, the United States will likely stop blocking the appointments of members and as such, restore the functionality of the AB. And in light of the broader impasse currently faced by the WTO, as B. Hoekman and P. Mavroidis so poignantly summarize, “the WTO should concentrate on the narrower, and easier to solve crisis: the AB crisis” (Hoekman and Mavroidis, 2019, p. 114). Regardless of the way in which the AB is reformed in the upcoming years, one thing is clear: the AB is one of the most integral parts of the WTO, but as it stands today, it is also one of the main obstacles to the continued success of the largest multilateral trading institution in the world. As such, it must be reformed. [KIEP](#)

Appendix. Table with Appellate Body Criticisms and Proposed Solutions

Criticism	Proposed Recommendation(s)	Recommender(s)*
General – Structural	Adopt an amended version of the Walker Principles	Jennifer Hillman
	Establish an oversight committee and audit to ensure compliance with adopted principles	Jennifer Hillman
	Ensure that rulings do not add to the obligations or take away any rights of the parties as contained in the WTO rules	Walker Principles, WT/GC/W/768/Rev.1
	Modify or provide legal interpretations to certain procedural provisions that are currently unclear	Zhang Yuejiao, Bruce Hirsch (1)
	Eliminate the AB and enhance first-stage adjudication process by appointing full-time experts with law and economics expertise	Hoekman and Mavroidis (1)
General - Procedural	Ensure and recognize AB's capability for proper legal analysis by requiring both parties to sign "statement of facts" at panel stage	Zhang Yuejiao
	Provide for the AB selection process to replace outgoing members to begin no later than a certain number of months before the expiry of their term of office	WT/GC/W/753/Rev.1
	Ensure that documents issued by the AB and written submissions are user-friendly	Zhang Yuejiao
General concerns about independence of AB members	Provide for one single but longer (6-8 years) term for AB members	EC Concept Paper, Zhang Yuejiao
	Reduce politicization of member appointments by creating committee of experts to scrutinize AB nominations	Hoekman and Mavroidis (2)
General concerns about AB overreach	Clarify that adjudicators must examine broadly worded provisions and general terms with a view to respecting Member sovereignty	Bruce Hirsch (1)
	Encourage AB to voluntarily adapt practice of refraining on ruling in cases of "constructive ambiguity"	PIIE Report

Criticism	Proposed Recommendation(s)	Recommender(s)*
	Provide authoritative interpretations in cases of “constructive ambiguity” so the AB has law to base rulings on	Bruce Hirsch (1), PIIE Report
	Allow for remand of AB cases to respective Committees for discussion and negotiations among WTO Members	PIIE Report, WT/GC/W/758
	Provide guidance on the role of adjudicators and of the AB that emphasizes their role of assisting WTO Members in resolving disputes rather than making law	Bruce Hirsch (2)
General concerns about role played by AB Secretariat	Limit the service of AB Secretariat members to eight years	Jennifer Hillman
	Replace the AB Secretariat with clerks seconded from the WTO secretariat	Bruce Hirsch (2)
	Allow AB members to bring their own clerks	Hoekman and Mavroidis (2)
AB repeatedly disregards the mandatory 90-day deadline for issuing reports	Provide for the possibility for parties to agree exceeding the 90-day timeframe on a case-by-case basis. If parties are unable to agree, mechanisms can be adapted to ensure meeting of the 90-day time frame (e.g. AB could propose to the parties to voluntarily focus the scope of the appeal, set a page limit on submissions)	WT/GC/W/752/Rev.2, WT/GC/W/758, WT/GC/W/763/Rev.1, WT/GC/W/767, EC Concept Paper, Bruce Hirsch (1)
	Increase the number of AB members, thereby increasing resources	WT/GC/W/753/Rev.1, EC Concept Paper
	Provide that the membership of the AB is a full-time job	WT/GC/W/753/Rev.1, EC Concept Paper
	Expand the resources of the AB Secretariat	WT/GC/W/753/Rev.1, EC Concept Paper
	Develop guidance related to consultations with parties when the AB is unable to meet its deadline	JOB/GC/201
	Reconsider 90-day time limit for appeals entirely	Zhang Yuejiao, WT/GC/W/758

Criticism	Proposed Recommendation(s)	Recommender(s)*
	Clarify that the 90-day limit refers to working days	Zhang Yuejiao, WT/GC/W/758
	Clarify that the 90-day limit excludes the time required for translation of AB reports	WT/GC/W/758
	Allow AB to set itself a time limit for each case depending on estimate time it will require to consider it	WT/GC/W/758
AB allows members to rule on cases after the terms of their appointment end	Provide that an outgoing AB member shall complete the disposition of a pending appeal in which a hearing already took place during the member's term, possibly with a limit of up to two years following the expiry of term of office	Walker Principles, WT/GC/W/752/Rev.2, WT/GC/W/753/Rev.1, WT/GC/W/759, WT/GC/W/763/Rev.1, EC Concept Paper, Zhang Yuejiao
	Allow AB members to continue ruling on cases past the completion of their term only with the authorization of the Ministerial Conference or the DSB	WT/GC/W/767
	Ensure that AB members are assigned to appeals no later than 60 days before the final date of their appointments	PIIE Brief, WT/GC/W/759
AB routinely reviews panel findings of fact, including findings related to members' domestic law, thereby expanding its own scope of review and authority	Clarify that issues of law covered in the panel report and legal interpretations developed by the panel are limited to issues of law and do not include the meaning of the municipal measures themselves	JOB/GC/201, Walker Principles, WT/GC/W/752/Rev.2, WT/GC/W/763/Rev.1, WT/GC/W/768/Rev.1, EC Concept Paper, Zhang Yuejiao
AB issues advisory opinions on issues that are unnecessary to the actual resolution of the disputes they are issued for	Provide that the AB shall address each of the issues raised on appeal by the parties to the dispute to the extent that is necessary for the resolution of a dispute	Walker Principles, JOB/GC/201, WT/GC/W/752/Rev.2, WT/GC/W/760, WT/GC/W/763/Rev.1, EC Concept Paper, PIIE, Bruce Hirsch (1)
AB claims that its reports are entitled to be treated as binding precedent and must be followed by future panels	Provide clear guidance that AB reports do not constitute binding precedent, but may be cited for their persuasive value	Walker Principles, Bruce Hirsch (2), WT/GC/W/761, WT/GC/W/768/Rev.1



Criticism	Proposed Recommendation(s)	Recommender(s)*
	Adopt a middle path between strict <i>stare decisis</i> and none at all	WT/GC/W/761
	Adopt approach in which legal interpretations made by AB take the form of precedent only once they have been repeated a certain number of times in similar contexts	WT/GC/W/761
	Instruct AB, in cases of consensus among AB members, to refer AB interpretations of specific agreements for discussion to DSB as a precedent	WT/GC/W/761
	Hold annual meetings between the AB and WTO Members, where the latter could express their concerns relating to AB approaches in a manner unrelated to the adoption of particular reports	JOB/GC/201, WT/GC/W/752/Rev.2, WT/GC/W/768/Rev.1, EC Concept Paper
	Require AB to publish a report for WTO Members, responding to views and concerns of WTO Members, and explaining how it has adapted its practices accordingly	WT/GC/W/763/Rev.1
AB's assertion that the WTO prohibits zeroing is not rooted in any agreement, therefore diminishing members' rights and obligations	Affirm that Article 17.6(ii) of the Anti-dumping Agreement, which takes as a given that provisions of that agreement may have more than one meaning, must be given effect	Bruce Hirsch (1), WT/GC/W/768/Rev.1
AB rules by incorrectly deeming various decisions to be "authoritative interpretations of covered agreements"	Direct the AB to reject party arguments that expand or narrow the reach of agreement provisions or fill gaps in agreements	Bruce Hirsch (1)
AB wrongly interprets various terms, such as "public body," which limits how WTO Members can interact with trade-distorting subsidies implemented by state-owned enterprises (SOEs)	Clarify that customary rules of interpretation of public international law do not justify gap-filling and expanding or narrowing the reach of WTO provisions	Bruce Hirsch (1)
AB has overstepped its authority by issuing opinions within the authority of other WTO bodies, including the Ministerial Conference, the General Council, and the Dispute Settlement Body	N/A	N/A

\*The following table serves as a key for the references to Recommenders used above.

Reference	Full Document Name	Description	Publication Date
EC Concept Paper	WTO Modernization: Introduction to Future EU Proposals	Paper commissioned by the EC	09/18/2018
Jennifer Hillman	The United States Needs a Reformed WTO Now	Independent report	07/29/2020
Bruce Hirsch (1)	Resolving the WTO Appellate Body Crisis: Proposals on Overreach	Report commissioned by the NFTC	12/2019
Bruce Hirsch (2)	Resolving the WTO Appellate Body Crisis: Proposals on Precedent, AB Secretariat, and the Role of Adjudicators	Report commissioned by the NFTC	06/2020
Hoekman and Mavroidis	To AB or Not to AB? Dispute Settlement in WTO Reform	Academic journal publication	05/2020
Hoekman and Mavroidis (2)	Party like it's 1995: Necessary but not sufficient to resolve WTO Appellate Body crisis	Academic journal publication	08/26/2019
JOB/GC/201	Strengthening and Modernizing the WTO: Discussion Paper – Communication from Canada	Submission to the WTO	09/21/2018
PIIE Report	The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures	Independent report	03/2018
Walker Principles	Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker	Submission to the WTO	10/15/2019
WT/GC/W/752/Rev.2	Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council	Submission to the WTO	12/10/2018
WT/GC/W/753/Rev.1	Communication from the European Union, China, India, and Montenegro to the General Council	Submission to the WTO	12/11/2018
WT/GC/W/758	Fostering A Discussion on The Functioning of the Appellate Body: Communication from Honduras	Submission to the WTO	01/18/2019

WT/GC/W/759	Fostering A Discussion on The Functioning of the Appellate Body: Communication from Honduras	Submission to the WTO	01/18/2019
WT/GC/W/760	Fostering A Discussion on The Functioning of the Appellate Body: Addressing the Issue of Alleged Judicial Activism by the Appellate Body, Communication from Honduras	Submission to the WTO	01/28/2019
WT/GC/W/761	Fostering A Discussion on The Functioning of the Appellate Body: Addressing the Issue of Precedent, Communication from Honduras	Submission to the WTO	02/01/2019
WT/GC/W/763/Rev.1	Guideline Development Discussion: Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the General Council	Submission to the WTO	04/05/2019
WT/GC/W/767	Guidelines for the Work of Panels and the Appellate Body: Communication from Brazil	Submission to the WTO	03/28/2019
WT/GC/W/768/Rev.1	Informal Process on Matters Related to the Functioning of the Appellate Body Communication from Japan, Australia and Chile	Submission to the WTO	04/25/2019
Zhang Yuejiao	Protecting the WTO's crown jewel: Appellate Body reform proposals	UN Publication	07/2019

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- Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico to the General Council WT/GC/W/752/Rev.2 (2018, December 10), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/wt/gc/w752r2.pdf>.
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