IMPACT AND EFFECTIVENESS OF DISPUTE SETTLEMENT MECHANISMS OF WORLD TRADE ORGANIZATION*

Abstract

The World Trade Organization was established on 1st January, 1995 at Geneva in Switzerland to reduce tariffs and other related trade barriers and also regulate trade among member states. The dispute settlement Mechanisms created under Article 17 of the Dispute Settlement Understanding have played a pivotal role in dispute settlement of member States of the World Trade Organization. The Dispute Settlement Body is saddled with the duty of deciding the outcome of trade disputes on the recommendation of a dispute panel set up by the World Trade Organization. The Appellate Body was established to hear appeals from the reports issued by the panel in disputes brought by the World Trade Organization members. This work examined the achievements and Impact of World Trade Organization Dispute Settlement Mechanisms. This work also considered the prospects of the World Trade Organization Appellate Body in hearing of appeals, adoption, modification and reversing of panel report. The doctrinal methodology have been used and adopted in this research study with a focus on the Primary and Secondary sources. The primary source is the General Agreement on Trade and Tariffs and Dispute Settlement Understanding. The secondary sources used in this work include textbooks, journals and articles as well as Internet. Flowing from the above, the work found that there have been serious challenges in hearing of appeals and adoption of panel reports. This work concluded that the World Trade Organization Mechanisms have not effectively resolved disputing member States due to procrastination and undue technicalities. Political deceitfulness also hampered dispute settlement. The enforcement mechanisms are often caught up in lack of political will.

Keywords: World Trade Organisation, Dispute Settlement Mechanism, Impact, Effectiveness

1. Introduction

A major risk faced by international economic law is the inability to give consistent answers to actual needs. Coherence, consistency and predictability of international law rules are particularly relevant in a global world and market[1]. The World Trade Organization (WTO) Dispute Settlement Mechanisms (DSM) has marked an important shift in international law and trade adjudication with its aim to provide predictability and stability for the trade system[2] (an important achievement of the Uruguay Round). In discussing the impact of this system, I will evaluate its achievements and examine how impactful the body has operated to date as well what operational, procedural and challenges it has faced in effectively resolving disputes among the member States. From the foregoing, the most significant function of the WTO is dispute settlement using the Dispute Settlement Mechanisms. In determining the credibility, international standing and reputation of the WTO as a functioning international organization essentially depends on ensuring the effectiveness of its dispute settlement function[3] and objectives which serves to preserve the rights and obligations of Members under the covered agreements and clarify the existing provisions of those agreements taking into consideration the functions of Dispute Settlement Body. The Appellate Body consists of seven members who are appointed by consensus of all World Trade Organization members for four years term. They are not full time officials but visit Geneva as necessary to decide disputes. A member can be reappointed only once for another four years. The Dispute Settlement Understanding sets a high standard of independence and impartiality for the Appellate Body; its members shall not be affiliated with any government and may not represent the interests of any specific country,[4] although any WTO member can nominate its candidate to the Appellate Body. According to an unwritten tradition of the WTO, some seats are virtually reserved for major powers, including the United States and the European Union. Appeals must be heard by three members, usually referred to as the 'division'[5] as a result, the Appellate Body can function only as long as it has at least three members. For example, the decision by the Appellate Body in *Canada, Mexico v. United States*[6], explained the function of the body. In this case, the AB reasoned thus: The panel did not err in its consideration of (a) the increased recordkeeping burden entailed by the amended cool measure; and (b) the potential for label inaccuracy under the amended cool measure as being within its analysis of whether the detrimental impact of that measure on imported livestock stemmed exclusively from legitimate regulatory distinctions

In the above case, the AB however reversed the panel's finding that Canada and Mexico did not make a prima facie case that amended cool measure violates Article 22. of Dispute Settlement Understanding. The United States has blocked the appointment of new Appellate Body members during the administration of DONALD TRUMP (immediate past President of US), complicating the task of the understaffed of the Appellate Body to deal with its heavy workload in a timely fashion. In November, 2020, the Appellate Body was left with one member due to non replacement of retired or resigned members. Some appeals may be blocked if any member is rescued for impartiality reasons. The Appellate Body is presently without any member to resolve disputing members.

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[1] Article 3.2 of the DSU

[2] World Trade Organization, informal process on Matters Related to the Functioning of the Appellate Body: Communication from Japan and Australia, WT/GC/W/768 paras 7 and 8>pdf. Accessed April, 18 2019.

[3] Ibid

[4] Article 17.1 of DSU

[5] Ibid

[6] WT/DS543/9 adopted 29th May, 2015.

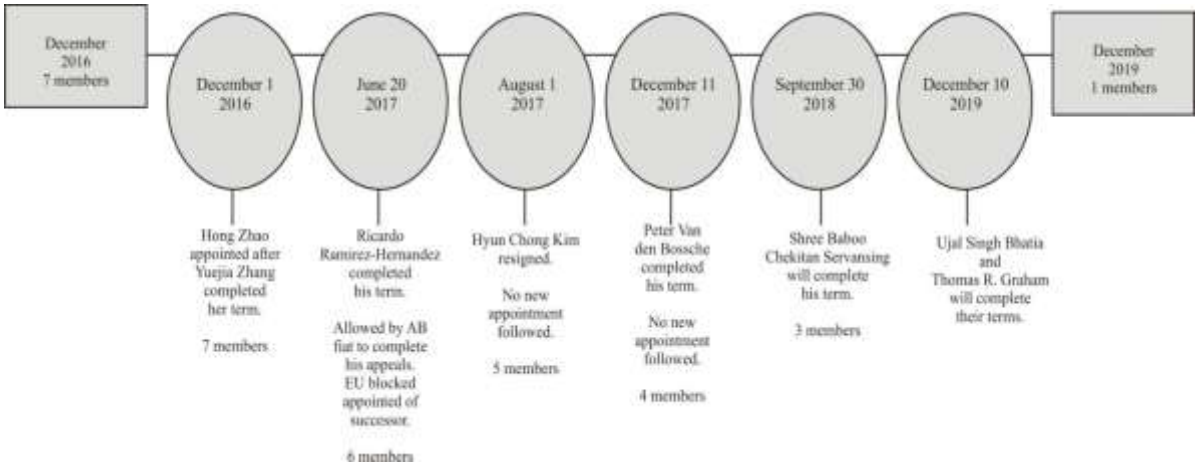
2. Establishment and Duties of WTO Dispute Settlement Body

The Dispute Settlement Body is established to deal with issues or dispute between the World Trade Organization members. The General Council is convened as the Dispute Settlement Body. Such dispute may arise with respect to any agreement contained in the final Act of the Uruguay Round agreement on General Agreement on Trade and Tariffs that is not subject to the Understanding on rules and procedures governing the settlement of dispute. The DSB has the duty to establish panels, refer matters to Arbitration, adopt panel reports, Appellate Body and Arbitration reports, maintain surveillance over the implementation and recommendations and rulings contained in such reports and authorize suspension of concessions in the event of no-compliance with those recommendations and rulings. There are three main stages to the WTO dispute settlement process namely: (i) **C**onsultations between the parties; (ii) Adjudication by panels and if applicable, by the Appellate Body and (iii) Implementation of the ruling which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.

3. Establishment and Duties of WTO Appellate Body

The Appellate Body was established in 1995 under Article 17 of the understanding on rules and procedures governing the settlement of disputes. It is a standing body of seven (7) persons that hears appeals from reports issued by panels in dispute brought by World Trade Organization members. The Appellate Body can uphold, modify or reverse the legal findings and conclusion of a panel and Appellate Body reports are adopted by the Dispute Settlement Body unless all members decides not to do so[7]. The Appellate Body has its seat in Geneva, Switzerland. Currently the Appellate Body is unable to review appeals given its ongoing vacancies. The term of the last Appellate Body member, expired on 30th day of November, 2020. The following is the timeline of the Appellate Body composition[8]:

Fig. 1 Timeline for the Appellate Body composition, December 2016 to December 2019



Source: WTO dispute settlement as at December, 2016 to December, 2019[9]

From the above chart, it is clear that the Appellate Body cannot sit on any appeals due to lack of quorum. This has made the AB not to function from 2018 till date. The AB since this period has From the chart above, it is clear that the Appellate Body of the World Trade Organization can no longer sit to hear appeals among disputing member States for lack of quorum. From November, 2020 till November, 2021, 19 appeals were filed by different member States unattended[10]. The following are some of the appeals pending before the Registry of the Appellate Body:

a) Notification of appeals by the European Union[11] and its member States on certain mea
b) Notification of appeal by[12] measure relating to the importation, textiles, apparel and footwear.
c) Notification of appeal[13] relating to certain measures on imports of Iron and Steel Products
d) Notification of appeal[14] relating to customs and fiscal measures on Cigarette

[7] World Trade Organization. Draft Decision, functioning of the Appellate Body. WT/GC/W/791>PDF. Accessed November, 28 2019

[8] World Trade Organization, General Council, fostering a Discussion on the functioning of the Appellate Body, Addressing the issue of Precedent. WT/GC/W/761. Accessed February 4, 2019.

[9] Ibid

[10] Ibid

[11] European Union WT/DS476/6 dated 21/9/2018

[12] *Panama v. Colombia* WT/DS461/28 dated 20/11/2018.

[13] *India case* WT/DS518/8 dated 14/12, 2018.

[14] *Thailand v. Philippines* WT/DS371/27 dated 9/1/2019.

e) Notification of appeal[15] relating to countervailing duty measures on certain Pipe and Tube Products.
f) Notification of appeal[16] relating to anti-dumping measures applying differential pricing methodology to softwood lumber.
g) Notification of appeal[17] regarding anti-dumping and countervailing duties on certain products and the use of facts
h) Notification of appeal[18] regarding sunset review of ant-dumping duties on stainless steel bars.
i) Notification of appeal[19] in respect of anti-dumping measures on biaxial oriented polypropylene film.
j) Notification of appeal[20] relating to anti-dumping and countervailing duties on certain products and the use of facts available.

4. Guiding Principles for Dispute Settlement Mechanisms

Guiding Principles for the Dispute Settlement System is the future rules-based multilateral trade cooperation which depends on achieving an accommodation of the various interests in the operation of a dispute settlement system. Arriving at such an accommodation might be facilitated by consideration of a number of guiding principles by which dispute settlement should operate. The following are the considered guiding principles:

1. A compulsory and binding dispute settlement system, including automatic initiation of disputes and adoption of results, is an essential feature of the rules-based trading system. For example, the Appellate Body in *United States v. China*[21] found that*;* 'The Ministry of Commence (MOFCOM's) redetermination was inconsistent with Art.2.2 because it failed to (a) explain why it relied upon a weight-based cost allocation which excluded non-consumable part of a live broiler and rejected an exporter's alternative weight-based cost allocation which accounted for these non-consumable parts and (b) address the Panel's original findings relating to another exporter'.
2. WTO members have the responsibility to administer, collectively, the dispute settlement system, including the right to modify the mandate of adjudication and to override any interpretation advanced by adjudicators.
3. The primary objective of the dispute settlement mechanism is to resolve disputes between members in a prompt and positive manner, and all other objectives are incidental and subordinate to this task.
4. Retaining trust in the system requires that adjudicators remain independent and impartial, and that members refrain from any action that might undermine this impartiality.
5. To preserve the delicate political balancing act that multilateral trade agreements represent, adjudicators should exercise 'extraordinary circumspection and care[22]' in interpreting WTO obligations.
6. The purpose of appellate review is to protect against erroneous panel results and incoherence between panel reports, and is not meant to be an opportunity for re-evaluation of the facts or for expansive advisory analysis of legal provisions.
7. To retain the legitimacy of the system and the overall balance of rights and concessions, an effective mechanism of political counterbalance is both necessary and appropriate.
8. Not every trade dispute can be or should be resolved through adjudication, so there should be effective opportunities, and the will to use them, for alternative and conciliatory dispute settlement. With these principles in mind, a number of possible changes could be made to restore and update the dispute settlement function and enhance its legitimacy

As already indicated, all legal systems have some mechanism for political control. Legitimacy is difficult to sustain in its absence. It is a question of achieving the right balance. Under the General Agreement on Trade and Tariffs (GATT), individual countries could block the dispute settlement process, which improved its legitimacy but undermined its effectiveness. By removing this right completely, which addressed the effectiveness problem, the WTO has perhaps gone too far the other way, which has undermined its legitimacy. This institutional

[15] *United States v. Turkey* WT/DS523/5 dated 25/1/2019
[16] *Canada v. United States* WT/DS534/5 dated 4/6/2019
[17] *Korea v. United States WT/DS539/9* dated 19/3/2021
[18] *Korea v. Indonesia* WT/DS553/6 dated 22/1/2021
[19] *Pakistan v. United Arab Emirates WT/DS543/9* dated 22/1/2021
[20] *United States v. Canada* WT/DS539/9 dated 19/3/2021
[21] *WT/DS427/RW and Add1, adopted on 28th February, 2018*
[22] Ehlermann, *supra* note 46. See also John Jackson, 'Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT' (1987) 13:1 J World Trade 1 ('Internationally, a case can be made that in order to encourage nations to be willing to submit themselves to an adjudicatory system, it will be necessary for that system to be cautious in interjecting the judges' choices of policy goals into previously agreed rules. Therefore, the rules should be cautiously and restrictively interpreted or applied' at 10).

imbalance was recognized early in the life of the WTO[23], and over the years there have been proposals to strike a different balance between political control and adjudicator independence. But nothing has been done to correct the situation.

5. Impact and Achievements of WTO Dispute settlement Mechanisms

How successful one considers the dispute settlement system depends on the benchmark and its application. If one compares the WTO dispute settlement system with the previous dispute settlement system of the General Agreement on Tariffs and Trade (GATT) 1947, the current system has been far more effective because its quasi-judicial and quasi-automatic character enables it to handle more difficult cases. These features also provide greater guarantees for Members that wish to defend their rights compared with other multilateral systems of dispute resolution in international law. The compulsory nature and the enforcement mechanisms of the WTO dispute settlement system certainly stand out and has been a success without a doubt. The large number of cases in which parties invoked the dispute settlement system in the first eight and a half years of the WTO is significantly larger than the number of disputes brought under GATT 1947 during a period of nearly 50 years[24]. This suggests that Members have faith in the WTO system as it have fulfilled and achieved its main function. Moreover, the reports of panels and the Appellate Body have served to provide clarification of the rights and obligations contained in the covered agreements[25]. The general perception of the WTO dispute settlement process is that it works well for most developed countries[26]. Its compulsory nature and automatic implementation portrays it as the most powerful Dispute Settlement Mechanisms ever seen in international law. It's standing body, the Appellate Body (AB), strong rule of law, consistent core of practice by the WTO Panels and AB reports, rules of practice and working procedures are all evidence of its impact and achievements

Another major advantage of the WTO framework over its predecessor, the GATT, is that its implementation mechanisms are much stronger. The AB finding in *China v. European Union*[27] portrayed this point above where Body found that: The European Union had acted inconsistently with Art. 2.4. by failing to provide Chinese producers with information relating to the characteristics of products used for purpose of constructing normal value.

However, are these factors real indicators of effectiveness? A Japanese political scientist[28], pointed out that any measure of the effectiveness of WTO dispute settlement has to be multidimensional[29]. While the system has been praised by many, some of the specific cases that the system has dealt with have been quite controversial and this has resulted in a considerable interest in modifying a number of the Dispute Settlement Understanding (DSU) procedural rules, which has led to discussions regarding the DSU reforms for most part[30] of the member States. Notwithstanding, some of the reasons why the dispute settlement is a success story is outlined[31] as follows:

1. The Appellate Body by virtue of the appeals brought before it and rulings delivered, is suggestive it is the Apex Body compare to was in operation under GATT.
2. The non-judicial step by way of consultation has worked well in settlement of various disputes among member states. By this, The Appellate Body has been a notable success of the new WTO dispute settlement system as it has produced a rich, unified jurisprudence interpreting a broad range of obligations under a wide variety of WTO agreements. Largely due to Appellate Body decisions, those fears have lessened over time but has not disappeared with inexhaustible supply of potentially controversial cases[32] and challenges facing the Appellate Body.
3. Large volume of cases: There are a lot of cases handled by the Appellate Body which indicates that states are using the WTO system in resolution of disputes. The quality of the analysis by panels and the Appellate Body and the approach of the Appellate Body to the interpretation of the covered agreements suggest that the system has made an important intellectual contribution to the development of international trade law. In adjudication of WTO rules, legal decisions affect specific economic outcomes

[23] Hudec, 'Comment', *supra* note 26; Ehlermann, *supra* note 46; Barfield, *supra* note 47; Stoler, *supra* note 54. 14 CIGI Papers No. 194 — October 2018 •

[24] Ibid

[25] *Davey W.J, The WTO Dispute Settlement System: The First Ten Years, 8 J. INT'L ECON. L*

[26] *Iida K, Is WTO Dispute Settlement Effective? 10 Global Governance, 207 (2004). Pg.6*

[27] *WT/DS673/16 adopted 12th February, 2016.*

[28] *Ibid*

[29] *Op cit 2 & US Clove Cigarettes case (DS406)*

[30] *Such cases as US Gasoline case (DS2), US Shrimp case(DS58), EC Hormones (DS26) and Brazil Tyres (DS332)*

[31] *John Greenwald, WTO Dispute Settlement: An Exercise in Trade Law Legislation? 6 J. INT'L ECON. L. 113 (2003). Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints, 98 AM. J. INT'L L. 247, 247 (2004).*

[32] Shaffer G., *Defending Interests: Public-Private Partnerships in WTO Litigation*, Washington, DC: The Brookings Institution Press

and have exhibited full or partial concessions by the defendants which have matter economically. The WTO rules can affect domestic and bilateral political bargaining in the shadow of a potential case without any formal complaint being filed[33]. It is also based on concerns about the political implications of bringing another WTO Member to dispute settlement which has always been a concern in international dispute settlement, and often seen as an unfriendly act[34]. Thus, the WTO rules are settlement of disputes between countries and downplay the diplomatic importance of the dispute and provide a practical means of resolving it due to the informal nature of the WTO process[35].

4. The effectiveness of Consultation. Studies have shown that close to one-half of the cases are disposed of appropriately at the consultation stage[36]. For the cases that result in a panel and/or Appellate Body report, the DSB recommendations in the vast majority of cases are implemented. The fact that many cases do not go through all stages of the process as one move forward in the dispute settlement procedure from consultations to panels and the Appellate Body to compliance reviews and finally to the authorization of suspension is to some extent a positive sign
5. Endorsement of the WTO dispute settlement system. The pattern of usage among WTO members though varied over time and as such, the overwhelmingly dominant users of the system have been the United States, China and the European Union[37]. Starting from the year 2000, there has been a significant expansion of use by developing countries to date as well[38].There has been a drop in annual consultations requests and an upsurge in dispute settlement activity most probably because of better case selection by the parties making the system more effective and acceptable.
6. The Efficiency of the Dispute Settlement Process. The panel is established to make an objective assessment of the matter before it, of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements is also a great achievement of the body[39]. The adoption of the report is a significant change from procedures under GATT as the Appellate Body performs 'a general function of guaranteeing the proper application and interpretation of the law in case of disputes within the organization in the interest of all members.[40]'. The priority at this stage is for the losing defendant to bring its legislation in line with the rulings or recommendations of the panel. Negative sanctions often require a stronger central authority while positive sanctions require less authority but more resources and are difficult to mobilize. Often times, the panel process itself is regarded as functioning well as the function of the panel is to assess the facts and then determine how the provisions of the relevant agreements are to be applied[41].' The hitch there is that the WTO dispute settlement lacks the criteria for assessing facts as there are no rules on admissibility of evidence but rules and presumptions relating to the burden of proof[42]. This in turn makes the WTO no different than many other international courts or tribunals where evidence is received largely on the basis of affirmation of the parties with few or no witnesses to subject such evidence to formal examination or cross-examination. Thus the capacity of panels to assess both factual and expert evidence is an open question when considering the effectiveness of WTO dispute settlement[43].

[33] Art.. 3.10 of the DSU ('requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.').

[34] The use of email for the exchange of pleadings, the use of conference rooms as courtrooms and the relative informality of panel and even Appellate Body hearings, all contribute to making the dispute settlement process a standard or routine way of conducting relations between states. One can contrast this with the process of the International Court of Justice, which is a much more formalized process, with appointment of Agents with ambassadorial status to represent states before the court.

[35] Davey W.J, WTO Dispute Settlement: Promise Fulfilled? in Inge Govaere, Reinhard Quick & Marco Bronckers (eds.), Trade and Competition Law in the EU and Beyond (Edward Elgar 2011) 194, 197-199. 15

[36] Op. cit 4

[37] Davey. W.J, The WTO Dispute Settlement System at 18: Effective at Controlling the Major Players?, EUI Working Paper RSCAS (2013) /29, at 5.

56 DSU Art. 11.

[39] Petersmann. E., ed, Arbitration and Adjudication: The Case of the WTO Appellate Review, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (1997) 245.

[40] Ahrne G. & Brunsson N, *Organizing the World, in TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION, 74, 90*-91 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., (2006). [Vol. 28:1

[41] Art. 11. 16 of the DSU.

[42] AB Report, United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R (Apr. 25, 1997).

[43] Attention has to be directed to a number of aspects of that process. Does the current panel selection process ensure that the members of the panel will have sufficient expertise to analyze and weigh economic or scientific evidence? What should the role be of the secretariat in assisting panels in this respect? And what does the appointment of a panel of experts do in such a case – pass the effective decision-making on to that panel of experts? All of these questions deserve further study and analysis

7. The WTO jurisprudence has so far helped to shape the interpretation, application, and social perceptions of the law. The outcome of an individual WTO case affects the framing of cases, which affects judicial interpretation and also affects what the law means over time. This helps to fill in the gaps of trade agreements and is indeed a great achievement as it helps to define that meaning through case law.
8. Imposition of Trade Sanctions: This usually has become the ultimate tool to ensure proper enforcement as the WTO dispute settlement process which has channeled the behavior of states into an orderly way of resolving her differences on trade matters and ensuring that provisions of the covered agreements are properly applied. In this respect, WTO dispute settlement can be seen as effective. However it has been argued that because of the WTO judicial system's weak enforcement powers, a judicial decision simply serves to help the parties resolve their dispute[44]. If the losing member fails to act within the period, it has to enter into negotiations with the complaining country to determine some mutually acceptable compensation[45] but if it involves non-violation complaints, the Member is not required to withdraw the measure. Any compensation that is agreed upon must conform to the requirements of the covered agreements, which includes most-favored-nation requirements. The suspension of trade concessions or obligations may be more detrimental to a developing country than the non-complying member. This implies that there is little purpose in developing countries bringing WTO dispute settlement proceedings as they lack capacity to enforce rulings. The situation of dispute settlement among member States succinctly exemplifies this scenario[46]. The significantly weaker injured member may not be able to hurt the defaulting party. The sanctions may actually harm the injured member more than the defaulting party

6. Conclusion

it could be concluded that the primary objectives of the dispute settlement system are the prompt, satisfactory and positive settlement of disputes and the maintenance of the balance of concessions, that adjudicators need only clarify existing provisions when necessary to achieve these primary objectives, that the function of adjudicators is to assist the DSB in making recommendations and that it is the achievement of these primary objectives that provides security and predictability to the trading system. A prioritization of the objectives in this way would provide guidance to adjudicators about when and how to elaborate findings related to certain provisions. The standard of review to be employed by adjudicators when reviewing national measures could be further elaborated. A more prescriptive and deferential standard of review could be adopted to supplement the current requirement to make an objective assessment of the facts, especially in cases where obligations are ambiguous or cases involving national measures that result from quasi-judicial proceedings. This might include reviving the issue of whether the standard of review set out in Article 17.6 of the Anti-Dumping Agreement, broadly interpreted, is capable of general application. The mandate of the Appellate Body could be clarified to introduce a higher standard of deference toward panel findings. At a minimum, this might include a higher standard of review of panel factual findings than that employed under Article 11, as well as explicit exclusion from appellate review of panel findings related to the operation of national laws. To minimize the risk of advisory opinions and *obiter dicta*, the Appellate Body could be instructed to address each of the issues only in a manner necessary to resolve the dispute before it. More ambitiously, the Appellate Body could be given the authority to decide which appeals, or which parts of appeals to hear based on broadly defined circumstances such as when panel reports risk creating inconsistency, demonstrate evidence of manifest legal error, involve matters of significant public interest or of systemic interest to the trading system, or disputes over imprecise obligations.. Changes could be made in five areas, including to: improve institutional balance; redirect some issues away from adjudication; clarify the mandate and approach of adjudication; improve the institutional support for adjudication; and address a number of procedural issues and improve Institutional Balance.

[44] Accordingly, following WTO legal rulings in the U.S.–Canadian lumber dispute over alleged Canadian subsidies, Canada's former ambassador to the WTO (working for a U.S. law firm on WTO matters) did not focus on compliance but focused on how the rulings can help ''clear the way towards common ground on reaching an agreement.'

[45] Art. 19 of the DSU.

[46] World Trade Organization Dispute Settlement: Dispute DS285 'United States Measures Affecting the Cross-Border Supply of Gambling andBetting Services' http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm accessed 2 August 2018.