

The coordinated functioning of a first instance and an appeal mechanism:
Operational challenges, system of remand, and scope of review

[Art. 4.1(b)]¹

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(draft speaking notes, not for citation)

1.1. Thank you. I have been asked to make a short presentation on the topic of "The Coordinated functioning of a first instance and an appeal mechanism: Operational challenges, system of remand, and scope of review." The basic question is, are there some lessons that can be learned from WTO experience?

1.2. In the WTO dispute settlement system, we have adjudicators of first instance, i.e. panels, and also an appeal mechanism, i.e. the Appellate Body. Panels are composed of three individuals. They are selected on an ad hoc basis, on a case-by-case basis. In this regard, a panel is akin to what we currently see in the field of international arbitration. A major difference however is that all three WTO panelists are strictly neutral. In contrast to panels, the WTO Appellate Body is a standing tribunal composed of 7 individuals. Appellate Body members are appointed for a four-year term, subject to renewal for a second four-year term. A division of 3 Appellate Body members is selected for each appeal, on a rotating and random basis.

1.3. Over the past twenty years, over 500 requests for consultations have been filed, leading to 371 panel requests. We have more than 200 panel reports, and 127 AB reports. This case law totals around 75,000 pages.

1.4. In the WTO context, the existence and work of the Appellate Body is the main reason why WTO jurisprudence is more consistent than what we see in the investor-State context. This may be stating the obvious, but one is far more likely to encounter challenges of "coordination" in a dispute settlement system without an appeal mechanism. I think that has to be the starting point of any discussion about challenges of coordination between tribunals in a dispute settlement system with an Appellate Body. Let me just quote from a recent book that touches upon that point:

"WTO adjudicators have developed a body of jurisprudence that is remarkably consistent and coherent. The role and influence of the WTO Appellate Body has been important in this regard. ... The repeated quotation and citation of earlier decisions in standing tribunals will result in a *jurisprudence constante* which, precisely because it is repeated and constant, tends to acquire a certain natural authority and influence that even the most carefully crafted award of an ad hoc tribunal is unlikely to command."

¹ Counsellor, Legal Affairs Division, WTO Secretariat. The views expressed herein are personal, and should not be attributed to the WTO Secretariat.

1.5. There are some technical issues and challenges relating to "coordination" between first instance tribunals and an appeals mechanism. I will identify and introduce some of these, and share some modest ideas about possible lessons learned. However, from the WTO experience over the last 20 years, I would say that the principal lesson learned is that the existence of an appellate mechanism is apt to lead to the development of a consistent body of case law.

1.6. In the light of the discussion this morning regarding the utility of an appeal mechanism in the context of ISDS, where there is diversity in the wording and structure of obligations across different treaties, let me clarify what I mean by "consistency". Diversity in wording and structural context of core legal standards is not unique to the investor-State context. One also encounters significant differences across the provisions of the WTO covered agreements relating to a given legal standard. Take national treatment as the prime example. There is not one WTO national treatment provision. Rather, there are at least five different legal provisions that have generated a substantial body of jurisprudence:

- GATT Article III:2, first sentence, which prohibits taxation of imported products in excess of domestic like products. The wording of this provision does not require a separate demonstration that the measure is applied to afford protection to domestic production. Article XX exceptions are applicable.
- GATT Article III:2, second sentence, which applies to the broader class of "directly competitive or substitutable" products. The wording of this provision does require a separate showing that the measure is applied to afford protection to domestic production. Article XX exceptions are applicable.
- GATT Article III:4, which requires that in respect of all "laws, regulations, and requirements", "treatment no less favourable" be accorded to domestic like products. Article XX exceptions are applicable.
- TBT Article 2.1, which is similar in its wording to Article III:4 of the GATT, but in respect of which there is an important structural difference: no Article XX exceptions are available.
- Article XVII of the GATS, which is generally similar to Article III:4 of the GATT, but which applies to "like services *and* services suppliers". General exceptions are available in Article XIV.

1.7. What the WTO case law under these diverse WTO national treatment provisions shows is that an appeal body can and must respect differences in the underlying provisions and agreements, in particular differences in wording and structure. "Consistency" in jurisprudence does not mean imposing a single, uniform legal standard that reads out those textual and structural differences. Perhaps the lesson here is that an appeal body can simultaneously develop a consistent and coherent body of jurisprudence while simultaneously respecting differences in the underlying provisions and agreements, in particular differences in wording and structure. There is no inherent contradiction.

1.8. What then are some of the operational "challenges" that we have encountered in the WTO context that arise in relation to "coordination" between first instance tribunals and an Appellate Body? In the limited time that I have, I will confine myself to three points.

1.9. I will begin with the technical issue of remand authority. In the WTO context, Article 17.6 of the DSU provides that the scope of review by the Appellate Body is "limited to issues of law covered in the panel report and legal interpretations developed by the panel". In addition, the Appellate Body does not have the authority to remand issues back to the Panel.

1.10. Because the scope of appellate review is confined to issues of law and legal interpretations, and because the Appellate Body cannot remand cases back to the original panel, it is possible for issues in a dispute to be left answered. Specifically, where the Appellate Body modifies or reverses a panel's legal interpretation, there is the possibility that the Appellate Body may be unable to complete the analysis insofar as this would call for the Appellate Body to make new factual findings.

1.11. Panels and the Appellate Body have sought to partially deal with this issue in several ways, while remaining within the parameters set by the DSU. For its part, the Appellate Body has attempted to complete the analysis, where possible, based on undisputed facts on record, or based on the existing factual findings reflected in the underlying panel report. In many cases, the Appellate Body has been able to complete the analysis. But in some cases, it has not been able to do so. For their part, panels sometimes make alternative findings in the event that their legal interpretation is reversed or modified on appeal. This could take the form, for example, of a panel finding that a threshold element of a claim or defence has not been met, but proceeding with the analysis on an *arguendo* basis in order to give the Appellate Body the factual findings necessary to complete the analysis.

1.12. In the context of the ongoing DSU negotiations, Members are discussing the possibility of granting the Appellate Body remand authority. These discussions have been ongoing for well over a decade, and are potentially instructive as to the kinds of issues that need to be considered and resolved in the context of devising any remand procedure in the context of an appellate mechanism in the ISDS context. For example, who may initiate remand – the appellate tribunal, or only the parties? Could it be either party, or only the complainant? What kinds of issues can be remanded – only questions of fact, or also any ancillary questions of law? And so forth.

1.13. The fact that discussion among WTO Members regarding the general desirability and specific design of a remand procedure in the WTO context suggests that careful consideration needs to be paid to such matters. A look at the issues that have been considered in that context could be useful in informing any discussion in the context of a multilateral investment court system with remand authority.

1.14. A fundamental issue related to the coordinated function of panels and the Appellate Body has now been touched upon, and that is the distinction between

questions of fact and questions of law. Recall that the scope of review by the Appellate Body is "limited to issues of law covered in the panel report and legal interpretations developed by the panel". From what I see in the CETA, there is something similar in terms of approach. In fact, CETA goes further in attempting to elaborate the distinction, and provides, in the text of the treaty, that issues relating to the meaning of domestic law are to be regarded as questions of fact. It explicitly provides that *"the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact."*

1.15. Those who follow Appellate Body jurisprudence will be aware that the distinction between a question of law and a question of fact may not always be straightforward in its application. The WTO case law does not necessarily approach questions of law and questions of fact in a purely "binary" way. Take the meaning of domestic law as an example. Early on in its case law, the Appellate Body established quite clearly that the meaning of domestic law is a question of fact from the point of view of an international tribunal. The Appellate Body has also stated that *"a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU."* The Appellate Body has also stated that *"there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements"*. That could suggest more of a continuum between law and facts, the more we move out of merely reading the text of the domestic statute, the more we move into factual territory. In other words, the distinction between questions of law and questions of fact is nuanced.

1.16. The distinction that exists between question of fact and questions of law is fundamental to delineating the role of a tribunal of first instance and an appellate mechanism, and in that sense, to the topic of "functional coordination". A possible lesson learned from the WTO experience is that one should anticipate that the distinction will not always be straightforward. The significance is that there may be complications in practice as to what may and may not be appealed, and the standard of review that should be applied on appeal in respect of certain issues.

1.17. Thirdly, a broader lesson to be drawn from the WTO experience is that coordination and consistency does not happen automatically with the creation of an appeal mechanism. It requires a "cultural" mindset that values coherence and consistency as an overarching value, and also requires human resources in the form of a Secretariat.

1.18. Beginning with the Appellate Body, coordination is more straightforward than in the case of panels because we are talking about a body of only 7 individuals that are appointed for terms that last 4 to 8 years. In the WTO context, they are supported by their own Secretariat, i.e. the Appellate Body Secretariat. The Appellate Body Secretariat is formally separate from the WTO Secretariat. The practice of "collegiality" is central to what we might call "coordination" within the Appellate Body. Each appeal is heard by a division of

three AB Members. However, following the oral hearing in a case, there is an exchange of views with the other 4 Appellate Body members. This exchange of views and the notion of collegiality may be a factor in explaining why there are relatively few dissenting or separate opinions in Appellate Body reports, and why the case law has developed in a consistent and coherent manner over time. In addition, as one would expect, the Appellate Body has developed a standard set of Working Procedures to govern appeals.

1.19. Matters are a bit more complicated at the panel stage, particularly due to the fact that WTO panels are selected on an ad hoc basis. In that context, each panel develops its own Working Procedures. These WPs address the types of issues that arbitral tribunals address through procedural orders. Unlike the Appellate Body, panelists cannot talk to one another directly to coordinate their work. This raises a challenge of developing consistent practices across different disputes, particularly in respect of procedural issues.

1.20. The challenge is made acute because the Appellate Body early on confirmed that panels have a margin of discretion to deal with specific situations that may arise in a particular case and that are not explicitly regulated by the DSU. This is an important point worth repeating: the existence of an Appellate mechanism does not automatically lead to consistency in all matters. Rather, the experience in the WTO context is that many procedural matters are left to the discretion of panels to resolve on a case-by-case basis. Taken together, these ingredients create the potential for widespread inconsistency on procedural issues at the panel stage. This does not happen though, we hope, because panels are supported in all aspects of their work by the WTO Secretariat.

1.21. The lesson is that creating an appellate mechanism in the context of investor-State dispute settlement is not going to automatically translate into a coordinated approach across tribunals of first instance on key procedural matters that arise in the context of ISDS, for example document discovery. As Colin said earlier today, that "One needs some form of Secretariat". And I would add that it requires a "cultural" mindset that values coherence and consistency as an overarching value.

1.22. To recap, perhaps we can take away the following lessons from the WTO experience when it comes to "The Coordinated functioning of a first instance and an appeal mechanism":

- An appeal mechanism is apt to lead to the development a consistent and coherent body of jurisprudence. That is true even where there are textual and structural differences between underlying provisions and treaties that come before it (as in the example of national treatment provisions). In other words, "consistency" in jurisprudence does not mean imposing a single legal standard that ignores textual and structural differences between different provisions. WTO Appellate Body jurisprudence is instructive in this regard.
- As to the scope of review for an appeal mechanism and the delineating of the roles of first instance tribunals and such a mechanism, careful consideration should be given to technical issues that arise from the

distinction between questions of fact and law. That includes consideration of the specific design of any remand system in an appellate mechanism. In addition, the distinction between questions of fact and law is not always easy to apply, for example with respect to the determination of domestic law, and thus consideration needs to be given to this reality when attempting to craft treaty text aimed at delineating and coordinating the respective roles of tribunals of first instance and an appeal mechanism.

- Finally, to ensure coordination, especially across tribunals of first instance that will have a considerable margin of discretion in respect of how they handle procedural issues, one needs some form of Secretariat.

1.23. And on that highly self-serving note, I will conclude. Thank you.