

G2 HACKATHON CHALLENGE

How to Make the WTO
Fit for Future Trade



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2021 Hackathon Submission

WTO Dispute Settlement System

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Watch the Video



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Question #1

Define the substantive issue that your team is addressing, why it's a problem, and why your team believes the WTO is the right forum to address it.

The substantive issue we identified and address in this proposal is the current WTO dispute settlement system and the recent Appellate Body (AB) paralysis. There is currently no consensus on the reappointment of AB members which has gradually reduced the number of serving appointees since 2016. The AB's operations have effectively been suspended since December 2019 when it lost the quorum of three members required to hear new appeals. This leads to the current situation where member states appeal unfavorable decisions into a legal void with no definitive answer provided by the WTO.

While AB appeals were expected to be rare and limited to questions of law, they have been broadly used and subject to criticisms such as AB exercising judicial activism, the use of the concept of obiter dicta, the working procedures and others. This has undermined the objectives of the establishment of AB which is to work as a safeguard against the potential undesirable side effects of a panel report. This deters the security and predictability intended for the multilateral trading system which gives a high degree of confidence to the member states and continues the WTO functions.

The urge to reform for an operating AB is reflected in the limbo stage of the adoption of panel reports where a party can still appeal against the panel report despite the AB being non-operational. The current situation creates endless waiting on the adoption of panel reports and has a kill-off effect on its binding value. The paralysis of AB does not only affect its function, but it will eventually lead to the collapse of the whole dispute settlement system in the WTO. There is also concern on the risk of increased inconsistency practices and violations that go unchallenged, especially with the issues raised following the current global pandemic.

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WTO is clearly the right forum to resolve the dispute settlement system crisis. One of the objectives of WTO is to resolve disputes between member countries. If member countries start to opt for alternative dispute settlement options outside the WTO framework, the very purpose of the WTO may be defeated. Instead of having a system outside the WTO, a well-functioning AB appears to be more attractive to the member countries. This has been proven by the support of 88 WTO Members (28 EU member states as one) on a proposal of new appointments of AB members in October 2019.

The success of getting AB functioning will be a turning point for the WTO members to address the underlying crisis of breakdown in WTO negotiation function. Since the foundation of WTO operation is based on consensus approach, member countries must be able to negotiate and reach an agreement. A system will not be workable until the membership can agree on a system where rights and obligations are negotiated and enforced through dispute settlement. Indeed, it would be a golden opportunity for the WTO reform in considering the issues critical for the future of the organization and global trading system.

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Question #2

Propose a specific treaty text, or more informal commitment/declaration text, that addresses either the concern or a particular, detailed aspect of it.

Political Declaration

1. This is a proposal for the creation of an entirely independent, Supervisory Body (SB) separate to the Appellate Body (AB). Its purpose is to oversee the AB's compliance with the provisions of the Dispute Settlement Understanding (DSU) in the AB's functioning. The constituent members of the SB shall enjoy a demonstrated understanding of the dispute settlement system envisaged upon its initial establishment together with the DSU. They shall be appointed by the Director-General upon the commencement of each four-year term and must be unaffiliated with any government.
2. It is through the SB that the admissibility of any panel review application is to be ascertained, against pre-set criteria to ensure issues contained therein are purely legal issues as opposed to factual findings. The SB should aim to decide admissibility of a particular panel decision within 15 working days, rather than enabling responding parties to unilaterally appeal unfavorable decisions as per Article 16 of the DSU.
3. The SB would furthermore guarantee that the AB is reviewing the appealed legal issues within the scope originally allocated to it, and that the AB's jurisdiction is upheld as contentious in practice.

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Question #3

Suggest a legal/technical or institutional way to implement your textual proposal within the broader WTO framework (500 words)

The proposed SB differs from the AB itself as it would be responsible for drawing up the pre-set criteria for controlling appeals and would monitor the AB's functioning. This would increase confidence in the AB and eliminate legitimate concerns over its politicisation or blockage. A functioning dispute settlement mechanism is vital, since the WTO law does not provide compensation for measures by litigants found to be in breach of the obligations. Article 3.2 of the DSU provides that the dispute settlement system ensures security and predictability to the multilateral trading system. Although Article 16 emphasises the importance of consensus among WTO members, the formation of the SB itself would be proposed by the WTO secretariat, and not require an explicit and renewed consent of all its members. Rather, this modest reform to the structure of the WTO would be achieved through WTO membership which would ensure that states could not leverage the prospect of a new international treaty for their own self-interest and further disrupt the operations of the WTO.

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The proposed SB can be established through the adoption of a political declaration. This declaration would empower the SB to set up criteria for appeals while being incorporated within the existing structure of the WTO. Such a declaration would become part of a newly streamlined system from which members would reap the benefits of a timely dispute resolution mechanism. This would ensure that appeals were done in good faith and that no individual member state could overwhelm the caseload of the AB. Therefore, the scope for appeals would be limited, and the new SB would monitor conformity within the new limits as well as the provisions of the DSU. A key aspect of the pre-set criteria is that it will streamline the appeals process and in so doing, it will indirectly influence the reappointment process of AB's members so as not to create a bottleneck in the appeals process. The members of this new body could be appointed from the Director-General, once the declaration has been adopted. As this body is supervisory rather than judicial, it is unlikely that member states will contest the authority of the new system on the grounds of state sovereignty.

The incremental nature of the above proposal makes compliance feasible without the need for more radical shifts in WTO operations. Establishing this new pre-set criteria would ensure the substance of the appeal is confined to purely legal matters and not factual disputes or the domestic law of any party to the dispute. Over time the effectiveness of this new system would legitimise these reforms and encourage other member states to participate more constructively with the AB. The more limited scope of appeals would also be seen as more politically palatable than other radical suggestions such as moves toward qualified majority voting.