This panel addressed the challenges presented by the Appellate Body crisis, and options for a way forward. While the Appellate Body shall normally be composed of seven persons, we currently only have three in place. The United States has been blocking the appointment and reappointment of judges as their terms expire. This is by no means a new development, but it has intensified in recent years. Starting with broader, geopolitical background on the issue, the panel began with the following questions:

- How broad are the U.S. goals with their objections to the Appellate Body appointments?
- Is the Appellate Body crisis tied to the larger concerns with the institution?
- Can we resolve the Appellate Body crisis without addressing these other issues?
- Is the United States using the Appellate Body as a way to push their vision for a fundamentally different world trading system?

The participants provided a wide range of perspectives on these questions.

It was generally agreed that U.S. concerns are both longstanding and bipartisan. Regardless of current concerns, some pointed out that it’s important to understand US concerns with the current system in context. For example, a number of concerns surrounding the WTO and the dispute settlement system were put forward in 2002 when the U.S. and Chile submitted a paper in the course of the DSU review. They highlighted concerns about overreach and gap filling, for instance. Another participant noted the Obama administration’s blocking of the reappointment of Seung Wha Chang. In addition, many of the current concerns are echoes of the original debate in the United States in 1994 regarding U.S. sovereignty and how much the U.S. would have to give up in entering the WTO.

Some placed greater emphasis on U.S.-China trade tensions as the backdrop that clouds the Appellate Body crisis, suggesting that U.S. concerns surrounding competition with China as the real focus. It was noted that with regard to China, the Trump administration has argued that the existing trade rules do not provide for fair and reciprocal trade. For instance, the United States may feel as if the current
system has narrowed its scope for utilizing trade remedies and made it more difficult to punish violators of the rules, especially in China. In addition, it was noted that the U.S. may want to see the dispute settlement system disabled or suspended until the broader problems with the system can be addressed. But disabling the dispute settlement system also allows the U.S. to proceed with unilateral actions against China, with no effective means to challenge these actions. As a result, some participants noted that the Appellate Body crisis is unlikely to be resolved in isolation from the broader strategic competition between the U.S. and China.

Others noted that the U.S. concern seems centered on having a dispute settlement mechanism focus on the rights and obligation that were negotiated by the members. The main source of concern is to the extent that the U.S. thinks that this has not been accomplished. But in addition to this, there seems to be a general concern about multilateralism (including trade but not confined to it) and binding dispute settlement, with the Appellate Body serving as a potent symbol of multilateralism and binding dispute settlement. There was general agreement that the fundamental problem with binding dispute settlement is difficult to solve because you negotiate a text, and once that text leaves the hands of those who negotiated, it takes on a life of its own. At that stage it has to be implemented in the real world, where disagreements will inevitably arise, but the WTO dispute settlement system was designed to resolve this.

Three abstract ways to resolve disagreements of this nature were elaborated:

First, for the individual members to decide on the scope of their own obligations. This is what we had with GATT where you could veto the adoption of a panel report and prevent the outcome being adopted on a multilateral basis. Up until about 1980 almost all reports were adopted, then it became patchy into the mid to late 1980s, then in the early 1990s more than half went unadopted. This speaks to increasing complexities that have since intensified.

Second, the members can do it collectively through positive consensus. But if you have a disagreement between at least two members on how to apply the rules, it becomes difficult unless you are willing to settle these issues through a vote, which is unlikely at the WTO.

Third, members can hand dispute settlement over to an independent third party, either through a rules-based system that we have, with a way to interpret treaties, facts, and evidence, or a mediation approach like the early GATT days which looked at facts and what was actually written, but also the political landscape and how things are evolving. There was general agreement that an independent third party mechanism is the best solution, even if it means there will be winners and losers.

A common concern highlighted by the participants was the lack of proposals from the United States on how to address the issues it has brought up as problematic. Some argued that this reveals that U.S. concerns are not legal in nature, but rather more to do with geopolitical concerns. A reason for pessimism, however, is that the discussion to date has not really been about how to improve the system, so what is at stake is really a change in the nature of the system as a whole. It was suggested that some have put forth ideas about creating something new, or perhaps going back to the GATT, but that these proposals have not been fully fleshed out. Amidst all this is the bigger question of whether one country has the legal right and justification to block the functioning of the system for everyone?
Others remained more optimistic, pointing out that there were encouraging signs from the U.S. continuing to be a user of the system, with new disputes brought to the WTO even after Trump took office. This suggests that all is not lost for multilateralism and binding dispute settlement.

The panel then turned to the question of the Appellate Body taking longer than 90 days to issue reports. Why has there been a time increase? Is the Appellate Body doing something wrong here? Is DSU article 11 one of the problems?

One participant stated that the issue is not the 90-day deadline, but that the Appellate Body has extended the deadline without talking to the parties. In previous cases, when consulted, they would extend the deadline. Another participant noted that while there was early cooperation, it became more difficult over times as not all parties would agree to an extension. But the Appellate Body went beyond what the treaty said, so it took the time to do what it thought was a good job. Others suggested that if a report can be done in 90 days then it should be, but sometimes you are asking the impossible. One question is what does the DSU say and what should be expected in terms of deadlines?

Another participant made the point that the Appellate Body is not the only body in the DSU that is subject to time limits. Panels are also, and recently panels have never issued a report within the DSU time limit, but people just don’t discuss it. The participant went on to say that it’s unfortunate that we spend a lot of time smashing the Appellate Body without considering other bodies don’t abide by the time limits either.

It was also pointed out that the procedural controversies aren’t necessarily controversial for what they are about. The participant elaborated that on the 90 day issue, it’s not about 90 days, but rather a proxy for systemic U.S. concerns with what it thinks the Appellate Body has done with its mandate and that it has given itself authority not granted in the DSU. The U.S. reaction, therefore, is an attempt to discipline, not an attempt to say the Appellate Body has a strict 90 days, but that the reports should be completed in a way that is generally consistent with the DSU.

Also, it’s not the cases becoming more complex is that is making it take longer. The Appellate Body was able to deal with Brazil & Canada aircraft, which are some of the more complicated cases between 1995-2010. But nowadays, noncomplicated cases can take longer than the deadline.

One of the participants noted that while the Appellate Body reports used to be short, it was criticized in the DSB for doing so, because some members argued that the Appellate Body didn’t necessarily address all of the arguments in the appeals, so they would question the legitimacy of its reports. So essentially, the Appellate Body was damned if it did, and damned if it didn’t. The inflation of claims over time is something worth noting. But the issue then is addressing too many issues, so it’s about finding a balance.

Others also disagreed that the cases are not becoming more complex, noting that the nature of the obligations invoked has become more complex. For example, in U.S.—Cotton, the case was close to the wire, but there was a boatload of evidence. What the complainants would take away from this case is that they need a lot of evidence, so you get a number of cases where the parties bring a lot of evidence now because they think that is necessary. Is this bad? Not necessarily. But there is a valid criticism here of systemic overload.
Another related challenge is the workload of the Appellate Body. When the Appellate Body was conceived, it was thought that there would be infrequent recourse to it, but now there is about a 95% rate of appeal.

On Article 11, it was noted that it has created a problem because it is the only vehicle where parties can get some sort of review about how the panel approached its task. If there is no error of law, you are by definition required to appeal on Article 11 in that the panel did not make an objective assessment. However, parties really aren’t abusing Article 11, the issue, rather, is how it is set out in the DSU. One participant suggested that the Appellate Body could do better on Article 11, not because of the standard they adopted, but because sometimes the line between what constitutes an appeal of factual finding under Article 11 and what constitutes an appeal of application is not clearly drawn. One option going forward would be to look at municipal law as a fact as they do any other facts, but if there is an appellate level, there needs to be a safety net in case they go off the reservation.

The panel then turned to the issue of zeroing and trade remedies. The following questions were put forward: Should we reconsider the cases where the Appellate Body undermined the U.S. ability to engage in zeroing and trade remedy practices? Was there overreach and gap filling? Should we consider reworking the legal standard of review?

The discussion began with one participant noting that this is another case of deciding what the treaty means after it has taken on a life of its own. However, the participants were in agreement that there should not be a single party deciding what it ought to mean when there is more than one interpretation as it could unravel the treaty-based system. Another participant noted that 160 members agree that zeroing is unfair because it inflates the margin of dumping, and that this cannot simply be ignored because one member disagrees.

Another participant stated that the whole crisis today is traceable to the debate over Article 17.6(ii), describing it as a walkaway issue for the United States. The participant explained that U.S. wanted the Chevron doctrine applied and others objected. There is a disconnect between sentence 1 and sentence 2, first saying it should be interpreted according to the principles of customary international law and the second saying if there are two permissible interpretations to defer to the authority. The Appellate Body has focused more on the first sentence, whereas the U.S. wanted more emphasis to be placed on the second sentence. Essentially, the U.S. wants to go back to a system of deference, member control, and diplomatic resolution of the problem. The system was designed to adhere to customary international law, but still be subject to the members.

The participants agreed that some sort of dialogue needs to take among the membership to make headway on this issue.

The last question posed to the panel was what should we do if we get to the point where there are not enough Appellate Body members to hear an appeal?

One participant highlighted three options that have currently been floated: the first is to simply forgo an appeal, which seems unlikely; the second is to have an appeal sit until more Appellate Body members are appointed, which is the wait and see scenario; the third is that members could agree to have some appeals addressed under Article 25. Article 25 allows the members to arbitrate a dispute under the
covered agreements following the principles of the DSU without a decision of DSB. It is binding and states that surveillance and implementation in Article 21 and 22 apply to arbitration decisions under Article 25. Essentially, members could replicate the substance of the appeal through a different form.

Some participants disagreed with the Article 25 option, suggesting that it may just be the solution the United States is looking for, which could permanently normalize an ad hoc make dispute settlement system. Another participant agreed and said that the Article 25 route is neither feasible or desirable, adding that we should not underestimate the legal, political, and administrative hurdles to getting this system set up, and that it may actually do more harm than good to anybody that thinks that the ultimate goal is to have a functioning 2-level system. If the U.S. doesn’t join, then you would be in situation where you have an alternate dispute settlement system that applied to everybody except the United States. The other option, one participant suggested, is to let the system grind to a halt and let the U.S. partake in the pain, because at the end of the day, the U.S. needs the system as much as everybody else does, and this might force a resolution to the crisis.

One participant noted that if you decide to forgo the appeals process, what we need is a very strong panel process to address the gap, suggesting that one option would be to seek more permanent panelists. Others agreed that improving the quality of the panels would take pressure off of the Appellate Body.

Ideally, however, the participants agreed that the best scenario is engagement amongst members to find a solution to the problems being discussed, as no system can function without good will and good faith.