International Journal of Enhanced Research in Educational Development (IJERED)
ISSN: 2320-8708, Vol. 11 Issue 2, Mar-Apr, 2023, Impact Factor: 7.326

Dispute Settlement at the WTO: the Challenge of re-establishing a functioning Appellate Body

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ABSTRACT

The dispute settlement mechanism which was once described as the crown jewel of the international trade regime, has now ended in a stalemate, paralyzing the adjudicatory mechanism at the World Trade Organization (WTO). Over the past few years, several criticisms have paved the way for the Appellate Body Crisis at the WTO, with the US challenging the legitimacy of Appellate Body case law against the letter and the spirit of the Dispute Settlement Understanding.

Key Words: Appellate, Crown Jewel, Stalemate, Criticisms, Challenging, Dispute.

HISTORY: ORIGINS OF WTO DISPUTE SETTLEMENT AND THE APPELLATE BODY PROCESS

The WTO was a product of all the problems with its predecessor, the General Agreement on Tariffs and Trade ('GATT 1947'). The dispute settlement process at the WTO underwent significant changes from what existed during GATT 1947. Litigation under GATT 1947 occurred only before panels and was subject to the positive consensus rule that essentially granted a veto power to each disputant. A panel report under the GATT could therefore be adopted only with the concurrence of the losing party. Thus, a need was felt to strengthen the effectiveness of the dispute settlement process for trade disputes. This led to the adoption of the reverse consensus rule by the Dispute Settlement Body ('DSB') at the WTO, effectively resulting in an automatic adoption of all panel reports. Concerns regarding the automatic adoption of panel reports with an erroneous legal analysis further led to the establishment of an appellate procedure to reduce the risk of flawed resolutions of disputes.1 The Appellate Body was therefore established, primarily with the aim of safeguarding the interest of the parties in a dispute to avoid the automatic adoption of erroneous panel rulings.

The WTO dispute settlement mechanism thus comprised of a two-stage process with the procedural rules governing the settlement of disputes set out in the Dispute Settlement Understanding (DSU). After a dispute was brought before the WTO, the case was heard before a dispute settlement panel established specifically for that dispute, comprising of independent individuals to assess the non-compliance of WTO law. The findings of the panel were then adopted by the DSB and became binding on the parties to the dispute, unless a disputant appealed the decision before the Appellate Body (a standing body of seven persons appointed for a term of 4 years with the possibility of appointment for a second term)2. The appeal was then allocated to a division consisting of three Appellate Body Members, which were chosen by rotation. Thus, a minimum of three members were required for the functioning of the Appellate Body to hear appeals. With the US blocking appointment of replacements for the members of the WTO Appellate Body whose terms expired in December 2019, the Appellate Body now lacks the quorum to discharge the appeal of a panel report. For as long as it remains non-operational, a panel report can be sent to a legal limbo by simply appealing it, thereby frustrating the entire objecting of the WTO dispute settlement process.

1. Giovanna Adinolfi, 'Procedural rules in WTO dispute settlement in the face of crisis of the Appellate Body', Questions of International Law, September 30, 2019
2. 'The WTO Appellate Body Crisis- A Way Forward', Clifford Chance, November 2019.

THE COUNTDOWN TO THE APPELLATE BODY CRISIS

On December 10, 2019, the WTO's 25-year-old system of resolving disputes came to an end with the United States blocking appointment of new members to the Appellate Body for being guilty of judicial activism and overreach. For many years, the US had been vocally opposed to WTOs dispute settlement mechanism, particularly the Appellate Body. What started with deep resentment over successful challenges to the United States' use of trade remedies (anti-dumping duties, safeguard tariffs and countervailing duties) later developed into complaints about lost national

sovereignty3. Perhaps, most concerning to the United States was the umpteen number of successful challenges to its use of anti-dumping measures and disputes over zeroing4. Almost 20 disputes over its use of zeroing in anti-dumping cases were brought before the WTO between 2002 and 2017.

This was also accompanied by US fears that the WTO would constrain its trade remedy use against China5. Under the legal structure of the WTO, US negotiated the right to designate China as a non-market economy at the time of China's accession to the WTO in 2001. This made China subject to more stringent treatment than other countries in calculating anti-dumping duties. With this right having expired on December 11, 2016, the US had resorted to an increased use of countervailing duties. The fear was however exacerbated by the Appellate Body's decision in 20116 which held state owned enterprises to not automatically count as subsidy providers. This decision did not go down well, particularly, with those in the US who wanted to use countervailing duties to defend against imports from China.
These concerns began to shape the US approach towards nominating members to the Appellate Body, with the US vetoing some appointments as early as 2011. In 2016, the Obama administration went further by blocking the re-appointment of the South Korean Appellate Body Member SeungWha Chang followed by a clear mandate of the Trump administration to block all future appointments to the Appellate Body in 2017, effectively bringing the appellate body process to a standstill.

3. US Trade Policy Agenda 2018 (USTR 2018)
4. Chad P. Brown & Thomas J. Prusa, 'Much Ado about Zeroing', Policy Research Working Paper, The World Bank Development Research Group Trade and Integration Team (June 2010)
5. Chad P. Brown and Soumaya Keynes, 'Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0', Working Paper, Ptererson Institute for International Economics (March 2020)
6. Report of the Appellate Bodyon'United States – Definitive Anti- Dumping and Countervailing Duties on Certain Products from China',, WTO Legal document WT/DS379/AB/R, 11 March 2011.

US Concerns about the Appellate Body
In addition to the systemic issues pointed out by the United States, it also raised a number of procedural concerns in furtherance of its claim that the Appellate Body is acting outside the powers granted to it by the Dispute Settlement Body. A brief look at these concerns shall help us establish a causal link and examine the suggested proposals to revive it.

Systemic Issues
1. Precedent: The DSU does not provide for stare decisis i.e. the principle of following previous rulings in similar circumstances. The US believes that this rigid adherence to precedent i.e. the use of precedent without sufficient independent analysis can reinforce what it considers to be erroneous decisions in similar cases.

2. Interpretation of law: Under the DSU, the AB is tasked with a narrow review of the dispute i.e. it is confined to deal with only the legal issues. It does not have to power to examine new evidence or review the factual findings/conclusions of the panel. The US has questioned the broad view7 of the matters taken by the AB and also the AB's faulty interpretive approach to WTO agreements that is prohibited by the DSU.

USA's complaint is two-fold: First, it has complained that the AB interpretations (particularly related to the Agreement on Subsidies and Countervailing Measures) has restricted the ability of the WTO members to counter-act subsidies provided through state enterprises. This, has had the effect of adding to or diminishing the rights and obligations of the member laid out under the WTO, which is expressly prohibited by Article 3.2 of the DSU.

Secondly, it considers that the AB revisiting the panel's findings concerning the meaning of municipal law, i.e. the national law of a WTO member state is an issue of fact and hence is outside the scope of its powers.

Procedural Issues
3. Timelines of reports: Combining its criticism of the AB's failure to comply with the 90-day timeframe with its other complaints, the US pointed out that a clearer focus on issues in the dispute would reduce the time required to produce a report
4. Term Extensions: The US also raised a concern about Rule 15 of the Appellate Body Working Procedures that allowed its members to stick around till completion of their case after their terms had officially expired.
7. Few examples of AB Rulings' that addressed issued not properly before it include: EC-Fasteners AB Report; US-Anti-Dumping and Countervailing Duties AB Report; Canada-Aircraft AB Report; US-Softwood Lumber IV AB Report and Argentina-Footwear Panel Report

POSSIBLE RESPONSES TO THE NON-FUNCTIONING OF THE APPELLATE BODY:

Keeping in mind the concerns raised by the US, it is evident that major improvements are required not just to save the Appellate Body but the DSU in its entirety. The adoption of Walker principles (Draft Decision for the General Council)

8 which aims at addressing all concerns that the US has with the Appellate Body, can be the first of many steps to resolve this paralysis. The draft decision provides for timely completion of dispute settlement procedures, steering clear of advisory opinions and issues of fact and other procedural changes. Improvements can however be made for suggestions made against the issue of precedent to provide that adjudicators must be guided by only covered agreements and customary international law and also simplification of the procedure to adopt an authoritative interpretation by the DSU to facilitate dealing with the issue of overstepping and erroneous decisions by the Appellate Body.

In the meanwhile, the WTO ruling and recommendations shall continue to be binding on the WTO Members where the panel reports have not been appealed. In cases of an appeal, interim alternatives can be worked out to fill the void created by the Appellate Body that has been put out of business and keep the WTO dispute settlement going. Some of the recently introduced alternatives include:

No Appeal Arrangement: The disputing parties can enter into an arrangement to not appeal against a panel report before receiving it. While it is unlikely for such arrangements to be used because of lack of incentives for the defending party, it cannot be completely ruled out as an option. Examples9 include arrangements entered between Indonesia and Chinese Taipei (Indonesia–Safeguard on Certain Iron or Steel Products) and Indonesia and Vietnam (for their compliance dispute in Indonesia–Safeguard on Certain Iron or Steel Products).

Multi-Party Interim Appeal Arbitration Agreement (MIPA): Leveraging Section 25 of the DSU, 16 Members of the WTO have entered into the MIPA to channel appeals through an interim arbitration process provided under the DSU10. The appeals under the MIPA shall be heard by three arbitrators (independent from Members) assisted by an ad-hoc secretariat. It is yet to be seen how this mechanism handles appeals differently from the Appellate Body, both in terms of procedure and substance.

Revised EU Trade Enforcement Regulations: On February 12, 2021, revisions to the Trade Enforcement Regulation EU No. 654/2014 were published in the EU's Official Journal11. The revised regulations enable the EU to unilaterally suspend concessions and other obligations against Members who appeal a panel report. While this can act as a deterrent for WTO Members from sending a panel report into legal limbo, allowing such unilateral retaliations by the EU, would imply returning to the pre-WTO era by accepting one of the Uruguay Rounds grand bargains- renunciation of unilateral action as a means to deal with trade disputes.

Dispute Settlement Mechanisms under the Free Trade Agreements (FTAs): Another possible interim fix is to avoid the WTO dispute settlement process altogether and instead utilize the FTA dispute settlement mechanisms. No FTA dispute mechanism comes close to the features offered by the WTO system (participation as a third party, higher compliance level and experienced personnel assisting disputing parties and adjudicators). It can however be used as a temporary fix alongside escalating steps to revive the WTO appellatory process.

8. WT/GC/W/791
9. Valerie Hughes, 'Approaches to Modernizing the Dispute Settlement Understanding', Centre for International Governance Innovation Essay Series (2020)
10. 'EU and 15 World Trade Organisation Members establish contingency appeal arrangement for trade disputes', press release by the European Commission, 27 March 2020.
11. Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules.

The Way Forward:
Shortly after the WTO framework becoming operational and the WTO agreements came into force, recourse to the dispute settlement mechanism became a massive success. Contrary to the expectations of the drafters who thought that appeals against the panel reports would not be made very often, about two-thirds of the panel reports came to be appealed during the tenure of the Appellate Body. This indicates the sheer success of the two part dispute settlement process at the WTO and the urgency to revive the same.

Doing away with the two-stage dispute settlement system of the WTO will clearly be a retrograde step as it would reintroduce negotiations as the basis of settlement of disputes. Thus, putting the Appellate Body back in position is the most important task at hand. At present, there appears to be no alternative for other Members but to keep persuading the US to agree to enter into discussion and negotiations on the draft decision that has been prepared for the General Council. The Members must press for the restoration of the Appellate Body and for reform in its functioning. Consideration could be given to possible amplification of the draft regarding substantive issues concerning the dilution the value of precedents in WTO law and measures to deal with judicial activism and overreach by the Appellate Body.

CONCLUSION

With indications of a change in approach towards the crisis by the new administration voted to power in the US election in November 2020, withdrawal of the US blockage of appointments to the Appellate Body has entered the realm of possibility. Thus, a strong reform package addressing the US criticisms of the Appellate Body can set the wheels of a solution to the on-going crisis in motion.

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