

The WTO Dispute Settlement Crisis: The Problem is Not as Worse as it Looks

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Abstract

The present analysis is made to address the current crisis faced by the World Trade Organization regarding the judges' appointment at the Appellate level of the WTO's dispute settlement mechanism. The crisis is the consequential outcome that arose after two judges retired from the appellate body, which has left the body understaffed. As a result, the body now ceases to be relevant and in an uncertain position. Furthermore, the problem has worsened by the U.S. logjam by blocking appointments to the body. Considering the vitality and primordial importance of the body in ensuring that the international trade flow is not hampered, the said "crisis" deserves to be acknowledged and addressed at the earliest. Hence, the present analysis sheds light upon the issue and provides for certain suggestions that might help find the solution to the problem faced by the trade organization and help address the consequent delay in dispute settlement.

I. Introduction to the Organization

The World Trade Organization (WTO), located in Geneva, Switzerland, came into being 1st January 1995 due to lengthy deliberations and discussions at the Uruguay round of GATT negotiations (1986-94).² It is established by the Marrakesh Agreement, an agreement signed in Marrakesh by 123 nations in the year 1994. The agreement incontestably and clearly spells out the Organization.³ Furthermore, WTO is said to have extended GATT, 1947,⁴ as it became only one of the various major agreements which later went into the WTO.⁵ There are 164 members associated with the trade organization, which represents 95-98 percent of the world trade.⁶ Set up to reduce tariffs and barriers to trade, it is deemed the only organization engaged in dealing with the "rules of trade" between different nations. These global trade rules are formed as they provide assurance and stability, which leads to a more prosperous, peaceful, and accountable economic world.⁷ For example, WTO agreements limit the tariffs and prevent disease spread by establishing sanitary standards on agricultural products.⁸

II. Insight into the WTO Dispute Settlement Process

Article III of the Marrakesh Agreement states the 'functions of WTO'.⁹ It states that it shall administer the rules and procedures governing the settlement of disputes. This happens through the "Dispute settlement Understanding agreement," which is the main WTO agreement on settling

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² What is the WTO? World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

³ Agreement establishing the World Trade Organization, World Trade Organization (Mar. 18th, 2020), https://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

⁴ The General Agreement on Tariffs and Trade (GATT 1947), World Trade Organization, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

⁵ Rufus Pollock, Basic Facts about WTO (Mar. 19th, 2020), <https://rufuspollock.com/wto/basic-facts-about-the-wto/>.

⁶ What is the WTO? World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

⁷ Id.

⁸ 10 things to know about the World Trade Organization, Institute for Government, U.K., <https://www.instituteforgovernment.org.uk/explainers/10-things-know-about-world-trade-organization-wto>.

⁹ The Agreement Establishing the WTO, WTO, https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf.

disputes.¹⁰ A dispute is said to arise when a member government believes that another member of the agreement is violating any of the terms and commitments they entered into the WTO. It is believed to be one of the most active and effective dispute settlement mechanisms in the world and, since its establishment, has given over 350 rulings from the 594 disputes brought to it.¹¹ Since the crisis pertains to the appointment to the appellate level, it becomes pertinent to understand the Appellate Body's functioning of the Dispute settlement mechanism.

a. Dispute Settlement: Understanding How the Appellate Body Works

The Appellate Body was established in 1995 under Article 17 of the "Dispute Settlement Understanding" agreement. It is composed of seven members having a seat in Geneva, Switzerland.

This body's primordial function is to hear the appeals arising out of the panel's reports in disputes brought by the member countries of the WTO. It has various powers, including the power to uphold, reverse, and modify the panel's decisions and the Appellate body's reports after being accepted by the DSB¹², they have to be accepted by the parties to the dispute, mandatorily.¹³ As stated above, the body comprises 7 members appointed to serve four-year terms with no restrictions or limitations regarding their reappointment to the body. Furthermore, the mere membership to the Appellate Body shall be broadly representative of membership in the WTO.

b. The procedure followed by the dispute tribunal

In general, two approaches are usually followed by an appellate tribunal while settling a dispute whose mandate is limited to the "question of law". One is to decide the issue at the appellate level where the case is "ripe" for a decision, and no further fact exploration is required, and the other approach is to send the case back to the lower body, the trier of facts. Such power to send the case back is called the remand authority, however, this does not exist with the WTO, and consequently, the first approach gets a highlight.

c. Power to withdraw an appeal

An appellant is entitled to withdraw the appeal so filed any time by rule 30 (1) of the Working procedures. However, it falls within the discretion of WTO Members regards both, be it to initiate disputes or to terminate them. Furthermore, the possibility of withdrawing an appeal reflects the DSU for the parties to find a mutually agreeable solution to the dispute.¹⁴

d. Deadline for review

The proceedings must be completed within 60 days and cannot, in any case, take more than 90 days from the date of the filing of the notice of the appeal. Also, even in a case where the lower permissible limit of the review of the proceedings is exceeded, this has to be reported to the DSB and the reasons for the delay and an estimation of time within which the report's circulation is to

¹⁰ Id.

¹¹ Dispute Settlement, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

¹² Dispute Settlement Undertaking, WTO, art. 17.13.

¹³ Id.

¹⁴ Id. At art. 3.7.

take place.¹⁵

III. Current Crisis and its Impact

It requires a quorum of 3 judges to hear a case in Appellate Body, as previously stated.¹⁶ And the appointment of new judges cannot be made without the consensus of all the member nations.¹⁷ On 10 December 2019, two judges namely, Uday Singh Bhatia (India) and Thomas R Graham (US), out of the three remaining, retired, leaving only one judge in the Body.¹⁸ With only one judge in the Appellate Body, the dispute resolution has become a great problem for the countries that want to appeal against the Dispute Panel's decision.

Now, the main concern which draws attention is the blocking of the appointments by the U.S. The argument advanced by them for the same is that WTO has always done unjust behaviour towards them through its dispute settlement.¹⁹ Furthermore, it believes that the Appellate Body judges are paid far too much than their performance. The ambassador Dennis Shea has claimed that the WTO Appellate Body has consistently been overstepping its authority by reversing and reviewing the trade arbitration panel's findings and arbitrarily interpreting the member's domestic trade laws nations.²⁰

Summing up all the above-mentioned factors together, the outcome is the consequential blockade. The impact of this blockade can be three-fold and are far-reaching at the same time:

- Now, the global trade is in great uncertainty due to a higher amount of protectionism and the US's trade war.²¹ The rise of protectionism in the US is of great influence on global trade and itself. A tariff hike raises the price of imports, which leads to a rise in the prices paid by the consumer and the companies. This, in turn, adversely impacts the consumption and investment of the protectionist state²² and it is this uncertainty which leads to 'wait and see' attitude in the consumers and the companies which resultantly depresses the economy at large.²³
- The above policies of countries, especially the US, would lead to trade disputes among the

¹⁵ *Id.* At art. 17.5

¹⁶ Members: Appellate Body, World Trade Organization (Mar. 16th, 2020), https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

¹⁷ *Id.*

¹⁸ Tom Miles, World trade's top court close to a breakdown as U.S. blocks another judge, Reuters (Mar. 16th, 2020), <https://www.reuters.com/article/us-usa-trade-wto-judge/world-trades-top-court-close-to-breakdown-as-us-blocks-another-judge-idUSKCN1M621Y>.

¹⁹ James Bacchus, Simon Lester, & Huan Zhu, Disciplining China's Trade practices in WTO: How to make China more market-oriented, CATO Institute (2020), <https://www.cato.org/publications/policy-analysis/disciplining-chinas-trade-practices-wto-how-wto-complaints-can-help>.

²⁰ Agreement establishing the World Trade Organization, World Trade Organization (Mar. 18th, 2020), https://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

²¹ Aarshi Tirkey & Raisina Debates, The WTO's appellate body crisis: Implication for trade rules and multilateralism, Observer Research Foundation (Mar. 17th, 2020), <https://www.orfonline.org/expert-speak/the-wtos-appellate-body-crisis-implication-for-trade-rules-and-multilateralism-60198/>.

²² *Id.*

²³ Claudia Canals, The Threat of Protectionism in the Global Economy, Caixa Bank Research, <https://www.caixabankresearch.com/en/threat-protectionism-global-economy>.

countries, and a non-functional Appellate mechanism would disrupt Global Trade.

- **Most importantly**, recently, the dispute panel has ruled against India and ordered it to take back the export incentive schemes initiated by the Indian Government to boost exports, as they are alleged to be violative of the fair-trade principle. Consequently, India wanted to seek an appeal against the same. Hence, it is being stated that if the dispute settlement mechanism becomes defunct, then it would put India in a disadvantageous position when negotiating with other developed countries.²⁴

The non-functional Appellate Body has created many problems and uncertainty in the global market as India refuses to comply with the dispute panel's decision as it prefers an appeal, on the other hand, the US prefers to respect the judgment of the dispute panel. Hence, it is being stated that if the dispute settlement mechanism becomes defunct, then it would put India in a disadvantageous position when negotiating with other developed countries.²⁵ Therefore, several economists claimed that the World Trade Organization is facing an existential crisis because of these ill-effects.

IV. The problem is not as worse as it looks.

Economists have argued that the Appellate Body of WTO's demise may not have such large scale adverse impacts. At the same time, they believe that the fall of the WTO Appellate Body should rather be seen as an opportunity to address the flaws present in the dispute settlement mechanism. Hence, in this part, we would explain how this WTO crisis would not interfere with its future functioning, and the fall of the Appellate Body would not impact the dispute resolution mechanism of WTO.

Firstly, we must return to a much better dispute resolution mechanism of GATT. Under the WTO, the decisions of dispute panel can be rejected only by consensus, i.e. member nation has to agree with the idea of rejection. This is known as Reverse Consensus Rule.²⁶ While in erstwhile GATT, the rule that was adopted was called Positive Consensus Rule.²⁷ Under this rule, the Dispute Panel decisions can be accepted only by a consensus.²⁸ Therefore, it enables a member country to reject an adverse decision. For example, if any decision of the dispute panel goes against the US's policies, then under WTO rule, it would be tough for the US to gather consensus to reject the decision, it would have to prefer an appeal. But if this is the case with the GATT rule, then the US can reject the dispute panel's decision and ensure that its ruling is not accepted. So, on a way, GATT provided for a virtual veto to each member nation against the dispute panel's decisions. And, pertinent to note, more than 70% of the decisions of the dispute panel in GATT were accepted through consensus, and the member nations didn't use its veto.²⁹ Therefore, in a way, the GATT

²⁴ Simi TB, India at Dispute Settlement Understanding, Trade Law Brief (Mar. 17th, 2020), https://www.cuts-citee.org/pdf/Trade_law_Brief10-India_at_Dispute_Settlement_Understanding.pdf.

²⁵ Simi TB, India at Dispute Settlement Understanding, Trade Law Brief (Mar. 17th, 2020), https://www.cuts-citee.org/pdf/Trade_law_Brief10-India_at_Dispute_Settlement_Understanding.pdf.

²⁶ Dispute Settlement System Training Module, WTO, (Mar. 18th, 2020), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm.

²⁷ Mary E. Footer, The Role of Consensus in GATT/WTO Decision-making, 17 Nw. J. Int'l L. & Bus. 653 (1996-1997).

²⁸ Ibid.

²⁹ Joost Pauwelyn, The Transformation of World Trade, Berkeley Journal,

mechanism for dispute resolution was more efficient than that of WTO.

Secondly, we have to realize that WTO's appellate body comes into the picture only during the 3rd stage of the dispute settlement process, and not all cases reach the dispute settlement body.³⁰

As previously mentioned, the first stage in dispute resolution is the prior consultation between the parties where they can amicably resolve the issues between them within 60 days. Similarly, most of the trade agreements among the members enable each country to initiate action independently without approaching the dispute settlement body.³¹ For instance, suppose country A starts dumping its goods in country B, then, in that case, country B can impose anti-dumping duty on its own, without taking recourse of WTO dispute settlement body. And finally, if any country is found to be violating the WTO norms, then any member nation can use the threat of imposing sanctions to force that country to comply with the norms.³² For instance, suppose that if India finds out that the US is violating any WTO rules, then India can use the threat of imposing reciprocal sanctions against the US.

Thirdly, recently, a new type of pacts is prevalent among countries with a clause of 'no appeal'.³³ According to this, the contracting countries agree that they would not appeal against the dispute panel's decision. Recently, Indonesia and Vietnam had signed such a pact. And since they have decided so, the non-functional appellate body does not impact their trade. Further, some countries like the EU, Norway, and Canada have established an interim appeal system, an arbitration mechanism for dealing with appeals relating to trade disputes.

Fourthly, there are remedies available in the Public International Law, also. The provisions provided in the Draft on State Responsibility prepared by the International Law Commission (ILC)³⁴, namely, Article 41 and 42 of the ILC Draft, which imposes an obligation on the wrongdoer state to (i) stop the illegal act (cessation), and (ii) provide the injured state with reparations.³⁵ In addition, the draft also mandates the parties to refer the matter to third-party adjudication. Therefore, if the nations seek redressal of their dispute other than WTO, these provisions can help these nations.³⁶

V. Conclusion

International Trade has now become a significant part of each country globally, without which

https://www.law.berkeley.edu/files/spring05_Pauwelyn.pdf.

³⁰ Joost Pauwelyn, WTO Dispute Settlement Post 2019: What to Expect?, 22 J. Int. Econ. Law 297, 297 (2019), <https://doi.org/10.1093/jiel/jgz024>.

³¹ Henrik Horn and Petros C. Mavroidis, Remedies in the WTO Dispute Settlement System and Developing Country Interests, (Mar. 18th, 2020),

https://www.iatp.org/sites/default/files/Remedies_in_the_WTO_Dispute_Settlement_System_.htm.

³² Steve Charnovitz, The WTO's Problematic "Last Resort" Against Noncompliance (Dec. 2002), https://www.peacepalacelibrary.nl/ebooks/files/Charnovitz_Last-Resort.pdf.

³³ Simon Lester, Planning for Life without the Appellate Body, International Economic and Policy Blog, (Mar. 23rd, 2020), <https://worldtradelaw.typepad.com/ielpblog/2019/03/planning-for-life-without-the-appellate-body.html>.

³⁴ UNGA Doc A/CN.4/L.528/Add. 2 (Jul. 16, 1996).

³⁵ Responsibility of States for Internationally Wrongful Acts, 2 Yearbook of the International Law Commission, (2001).

³⁶ Henrik Horn and Petros C. Mavroidis, Remedies in the WTO Dispute Settlement System and Developing Country Interests, Mar. 18th, 2020.

survival is unimaginable. No nation can be self-sufficient in terms of every resource; therefore, international trade helps in satisfying the demands of the population. The exchange of goods and services between countries also promotes bonhomie among them, resulting in international peace. But any type of transaction is bound to have disputes, and settlement of those disputes in a speedy manner ensures the flow of goods and services uninterrupted and peacefully. The whole article gives insight into the formation, functioning, and dispute settlement procedures of the World Trade Organization. Certain loopholes could be pointed out during the dispute settlement procedure, which has led to the current crisis. Various economists see this problem of Appellate Body of WTO as an existential crisis for the organization, which could lead to a lot of uncertainty and maybe disruption of trade among nations. But as mentioned previously in the article, certain options are still available with the aggrieved countries that enable them not to depend upon the non-functional appellate body and settle on other methods to solve the dispute. Further, various other suggestions can certainly improve the organization's dispute settlement procedure and ensure that such an 'existential crisis' does not arise in the future. Those may not be the exhaustive options available, but they are certainly not the ones that can also be ignored. Therefore, to improve the functioning of WTO in the future and dodge such type impediments, these suggestions should be inculcated by the organization and the aggrieved nations.