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WTO APPELLATE BODY IN CRISIS: THE WAY FORWARD

Anwarul Hoda

Key Highlights

- The WTO Agreement brought about a paradigm change in the dispute settlement procedures of GATT 1947 by making them automatic and binding on WTO members and establishing the Appellate Body.
- Due to dissatisfaction with the functioning of the Appellate Body the US has vetoed appointments against vacancies and caused a crisis by making the Appellate Body non-functional.
- Members have prepared a draft decision for reform in the functioning of the Appellate Body to respond to the US concerns, but the US has not agreed, as it seems to prefer a weak WTO, with non-binding dispute settlement.
- Putting the Appellate Body back in position is the most important challenge for the WTO members because the abeyance of the Appellate Body has seriously affected the automatic and binding nature of dispute settlement, which are crucial for providing security and predictability to the multilateral trading system.
- For the restoration of the Appellate Body the WTO members must pursue reform in its functioning on the basis of the draft decision on the table. They may also agree to simplify the procedures for adoption of authoritative decisions, so as to facilitate correction of the jurisprudence in cases in which a large number of members agree that the Appellate Body has made erroneous recommendations.

EXECUTIVE SUMMARY

EVOLUTION OF THE DISPUTE SETTLEMENT MACHINERY FROM GATT 1947 TO WTO

During the period 1947-1994, , the resolution of trade conflicts among the contracting parties under the General Agreement on Tariffs and Trade (GATT) was mainly an exercise in diplomacy and moral persuasion. From the outset the first step in the procedures was for the aggrieved contracting party to hold consultations with the concerned contracting party on the basis of a written representation. If the matter was not resolved bilaterally, the contracting party concerned could bring up the matter before the Contracting Parties (the full membership). When disputes were brought up, the practice of referring the matter to a working party, consisting of five to 20 delegations including the disputants, developed. Later the practice evolved to appointing ad hoc panels, composed of three to five persons drawn from countries having no direct interest in the matter in dispute.

In the course of time, improvements were made in the procedures. In the special procedures adopted in 1966 for cases in which a dispute was raised by a developing country against a developed country, a provision was made for the use of the good offices of the Director General. The establishment of a panel was made virtually automatic and time limits were placed on the panel to submit the report and the defendant contracting party to report compliance. Similar improvements were made in the mini dispute settlement procedures contained in the plurilateral non-tariff measure agreements that emerged from the Tokyo Round.

Despite these improvements, the mainstream procedures in GATT 1947 remained inadequate. All important

decisions at critical stages of dispute settlement remained a prisoner to the GATT practice of consensus in decision-making, whether for the establishment or composition of a panel, adoption of a panel report or, where necessary, the authorisation of retaliatory suspension of concessions.

The WTO Agreement brought about a paradigm change in these procedures by making them automatic and binding on Members. The Dispute Settlement Understanding (DSU) transformed existing procedures radically. The most important change was that at all key stages of the procedures, a positive decision is taken unless there is a consensus on not doing so. The procedural innovation of reverse consensus makes decision-making at all stages of the process effectively automatic.

A Standing Appellate Body is established to hear appeals on issues of law covered in the panel reports and legal interpretations developed by the panel. The Appellate Body (AB) report is to be adopted by the DSB and unconditionally accepted by the parties, unless there is consensus to the contrary.

APPELLATE BODY- COUNTDOWN TO CRISIS

The Appellate Body has seven members of whom three serve in rotation on any one case. The members are appointed for a term of four years, but each of them is eligible for reappointment for one more term. When they retire, new candidates are proposed on nomination by the WTO Members and selection procedures ensue.

From the time of entry into force of the WTO Agreement until the beginning of 2017, vacancies were filled up as they arose without much ado. However, shortly after the new Administration was took over, the US adopted an attitude of blocking the selection process for the new vacancies that arose, on account of its wide-ranging dissatisfaction with the functioning of the Appellate Body. The most important criticism was 'persistent overreaching', and the US faulted the Appellate Body for adding obligations going beyond the text of the WTO Agreement.

At successive meetings of the DSB, the US repeated its criticism but evinced no interest in discussing solutions proposed by other Members on the points raised. In the meantime, as vacancies were not filled up, the number of members in position kept decreasing until on December 11, 2019 only one was left. Without the minimum number of three members required to take a decision the Appellate Body became non-functional on that day and the position continues to be the same until the time of writing

US criticism of the functioning of Appellate Body and corrections proposed in the draft decision for the General Council

US concern	Draft Decision	Comment
Breach of mandatory 90-day limit for submission of report on appeal.	Emphasises strict adherence to the time limit but allows extension with agreement of parties in complex cases or in case there is crowding of cases.	While the US attaches importance to delays by the AB it makes no mention of longer delays by the panels.
The AB allows retiring members to continue serving even after expiry of term, although only the DSB can appoint members.	Allows temporary extension of retiring members but provides that (1) they may be assigned to a new division only up to 60 days before the end of their term and (2) they may complete the process in cases in which oral hearing has been held before the normal expiry of their term.	
The AB has made findings on issues relating to facts although the DSU limits their role to only legal issues.	Stresses the limitation imposed on the AB by the DSU; also clarifies that the meaning of domestic law is a legal issue and not an issue of fact.	
The AB has issued advisory opinions not necessary for discharging its main responsibility to assist the DSB in resolving the dispute.	The AB may not rule on any issue not raised by parties; the AB may address the points raised by the parties only to the extent necessary to resolve the dispute.	
The AB has insisted that panels treat its rulings as a binding precedent.	Precedent is not created through dispute settlement proceedings, but panels and AB should take previous panel/AB reports into account to the extent they find them relevant in the dispute.	The draft decision embodies a balanced approach on this point in emphasising that precedent is not created through dispute settlement proceedings but at the same time stipulating that the panels and AB should take previous reports into account.
The AB has been overreaching and adding to or subtracting from the rights and obligations embodied in the covered agreements.	Reiterates what is provided in Articles 3.2 and 19.2 of the DSU that panels, the AB and the DSB cannot add to or diminish the rights and obligations under the covered agreements.	A bald restatement of the provisions falls short in dealing adequately with this point which is the most serious US criticism.

Source: DSU and WTO Document WT/GC/W/791

Source: wto.org

(January 6, 2021). The dispute settlement system can still work up to the panel stage, and if a panel report is not appealed, it would be adopted by negative consensus and the dispute would be resolved. But if the losing party appeals, the case will go into the void and will remain unresolved indefinitely in the absence of the Appellate Body. Of course, the parties may still negotiate a conclusion, which will be guided by power play rather than by rules. Without the Appellate Body the dispute settlement system of the WTO will be gravely weakened as it will remain neither automatic nor binding. Effectively dispute settlement has returned to the non-binding system of GATT 1947.

The most important motivating factor for the US to put the dispute settlement position into such a diminished position is dissatisfaction with the Appellate Body findings on US measures under its trade remedy legislation. The change in the US Administration's world view on international co-operation in trade could be another reason. From the time it was elected to office, the present leadership has expressed preference for bilateralism and abhorrence for multilateralism.

RESPONSES TO THE NON-FUNCTIONING OF THE APPELLATE BODY

There have been two main responses.

First, a number of Members, acting under the leadership of the European Union, notified the establishment of the Multiparty Interim Appeal Arbitration Arrangement (MPIA), which will remain operational only as long as the Appellate Body remains in abeyance. The main objective of the participating Members is to preserve the essential features of WTO dispute settlement procedure, including its binding character and the two-level adjudication, which are both put in jeopardy in the absence of an Appellate Body that is able to hear appeals.

The MPIA is an important initiative as it has sent a signal to the US that a significant segment of the membership is determined to keep alive the binding two-step adjudication of the WTO Agreement.

Second, a larger number of Members have worked hard to deal with the criticism of the working of the Appellate Body. The Chairman of the DSB has consulted with Members and prepared a draft decision for the General Council, which seeks to address US concerns. The Table below gives the details.

DEALING WITH OVERREACHING AND ERRONEOUS DECISIONS

Some of the AB decisions raise serious questions of appropriateness from the legal perspective or from the trade policy point of view. On complex and highly controversial matters such as zeroing, renegotiation of the provision is the only way forward. However, for other matters in which there is convergence among an overwhelming majority that the AB findings have gone in the wrong direction, the alternative route of

authoritative interpretations under Article IX.2 is also worth considering. However, the customary practice in the WTO of decision-making by consensus can become a hurdle in adopting such interpretations.

Since a three-fourths majority in the General Council for the interpretation to be adopted is already a tough requirement, there is a case for simplifying the procedures for obtaining the decision under Article IX.2 by resorting to voting straightaway after the initial attempt at consensus has not succeeded. A decision could be taken by the Ministerial Conference or the General Council that, when a request is received for an interpretation, the Goods, Services or TRIPS Council would forward their recommendations after one round of discussion. Further, the Ministerial Conference or the General Council would make an attempt to obtain consensus the first time the matter appears on the agenda but would put it to vote at the next session.

THE WAY FORWARD

Putting the Appellate Body back in position is the most important challenge facing the WTO Members today. It is important because the abeyance of the Appellate Body has seriously affected the automatic and binding nature of the dispute settlement machinery of the WTO that was its hallmark. There appears no alternative for Members other than the US but to keep pressing for the restoration of the Appellate Body and to pursue reform in its functioning on the basis of the draft decision that has been prepared for the General Council. Consideration could be given to the possible amplification of the draft with the proposal on simplifying the procedure to adopt an authoritative interpretation to correct the jurisprudence in cases in which a large number of Members agree that the AB recommendation has gone in the wrong direction.

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ABOUT AUTHOR

Anwarul Hoda is Honorary Chair Professor at Indian Council for Research on International Economic Relations (ICRIER).
Email: ahoda@icrier.res.in

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