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## **DECISION MAKING IN WTO: DIFFERENT METHODS OF DISPUTE SETTLEMENT, COMPARATIVE ANALYSIS**

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### **ABSTRACT**

The Dispute Settlement Body is the heart of World Trade Organisation. Any dispute in between the members of WTO is resolved by consultation between the countries. If both or any one of the parties is not satisfied with the consultation result then, they can request the Dispute Settlement Body to set a panel. On further disagreement with the reports from the panel, they can approach the Dispute Settlement Appellate Body which consists of 7 members appointed with the consensus of the Dispute Settlement Body.

There are three different levels at which a dispute can be resolved in WTO. The last resort of settlement is the Appellate Body which now can't function anymore because of absence of required number members needed for hearing any dispute.

Recently, WTO has been going through "Dispute Appellate Body Crisis". Once, known as "the crown jewel of WTO", today is falling apart. There is no member presiding in the Appellate body, following the expiration of term of all previous members. Since 2017, USA has been objecting the appointment of new members due, to which a required consensus has not been yet reached by all the member countries for new appointments.

The Appellate Body in the WTO has been criticised in recent years for exceeding the time limit of 90 days for ruling and departing from its agreed role. The question that lies here is "what led to the fall of once Crown Jewel of WTO to fall apart in such manner". Each of the three methods are equally important for ensuring free trade in the world.

Moreover, in the time as crucial as pandemic, the paralysis of such important part of this institution has caused more damage to the world trade ecosystem.

This research paper does a comparative study of the different modes by which the disputes are resolved in the WTO. Many published papers and data from the WTO have been studied throughout the paper to give a deeper understanding of dispute settlement understanding to the readers. The research methodology used is Secondary Data Analysis.

The reform in the Dispute Settlement body has been in debate for a much longer time. Many review processes and negotiations has been held and yet the organisation has to go through such crisis.

There is a dire need to either appoint the members of the Appellate Body or an adequate alternative for the same. There are a number of disputes occurring in between the members and the non-functioning of the highest body is not going to do any justice. Many members are making No-appeal Agreements which means there will be no further appeal after the reports of panel. The unavailability any higher body will lead to disbelief in between the members in the long run.

This research paper discusses the reasons which has led to the dissenting members causing fall of an important part of the structure of the institution. The main reason here is the conflict between the diplomatic and legal model dispute settlement. Any reform in the organisation will need these two models to work together in order to make the organisation more effective and make the trade ecosystem favourable for both developed and developing nations.

**KEYWORDS:**

Free Trade, Dispute Settlement, Appellate Body, New Members, Reforming

## 1. INTRODUCTION

In an enormous organisation like WTO, whose members, all around the globe enter into various agreements which directly affects the economy and therefore the common people, an efficient dispute settlement mechanism is very important. It is necessary to ensure that the rule of law is being followed.

The General Agreement on Tariff and Trade got presided over by the WTO in 1995. The WTO's objective is to administer and implement the trade agreements and ensure a non-discriminatory, free and smooth flow of trade. It is believed to have a more democratic approach towards the world trade and hence, involvement of its members is being ensured.

In an organisation which is based on agreements of its members, the probability of disagreements is also high. It is necessary to ensure the rights, duties, and obligations of the members and any dispute might arise while dealing with so many members. Therefore, there is a need to have an effective dispute settlement mechanism.

The very first idea of ensuring the rights of the member countries brought in the ITO, which was later incorporated by GATT. The articles XXII and XXIII of GATT consisted of the concept of balancing rights of the members but it was silent of various legal issues and any Tribunal setting.

The WTO dispute settlement mechanism is based on the dispute settlement principles in Articles XXII and XXIII of the GATT, 1947. The present Dispute settlement body in WTO was introduced during the Uruguay Round of Multilateral Trade negotiations. The members came into agreement on the Dispute Settlement Understanding, which is precisely a codification of all the rules followed during the Dispute Settlement Mechanism<sup>1</sup>.

After much modifications made in the existing GATT procedures, today's WTO Dispute Settlement Body is said to be of the most effective mechanism. The DSB is still evolving and its role only gets more important with time. It is one of the most active bodies in the international regime.

The DSB works around 2 types of disputes raised by its member<sup>2</sup>-

- (i) When any one party of to the agreement has any reason to believe that the other party is not abiding with their agreement and its obligations.

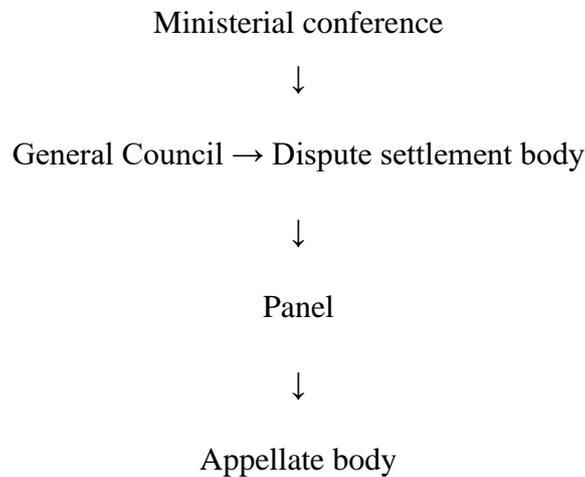
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<sup>1</sup> (Reich, 2017)

<sup>2</sup> (Narayanan, 2003)

(ii) When a third part, who is not involved in the said agreement but is affected by it. The task of the DSB is to determine the role and obligations of the parties that are involved.

The following is a flow chart of the hierarchy in the Dispute settlement mechanism<sup>3</sup>;



## 2. The DSB

The DSB was established under Article 2, of the Dispute Settlement Understanding. The DSB is basically the general council functioning as a dispute settlement body. It consists of representatives of all the members of the WTO. It has the authority to administer and oversee the procedure followed in the dispute settlement process. It is the top most body in the whole dispute settlement mechanism. The DSB is presided over by its chairman and follows a different procedure with that of the General Council. The current DSB chairman is Hong Zhao who took her office in December 2016.<sup>4</sup>

It is responsible for establishment of panels and appellate body and check through the reports given these subordinate bodies and supervise their implementation in the disputes. Its job is to oversee the whole dispute settlement process. The DSB has the power to establish a panel which gives reports on the dispute after a failed round of consultation between the parties. The panel system has been adopted from the previous GATT 1947. Further it has the power to establish an Appellate Body, which either party can approach to in case of unsatisfaction to the panel reports.

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<sup>3</sup> (WTO | Understanding the WTO - organization chart, n.d.)

<sup>4</sup> (WTO | Dispute settlement - Appellate Body Members, 2016)

The DSB controls the appointment of the members in the Panel and as well as the Appellate Body. The panel is presided with well qualified governmental or non-governmental persons who are suggested by the WTO members and chosen with the agreement of its members. The panel members are however not supposed to serve in the as representatives of the WTO members but in their individual capacity.

The Appellate Body is established under Article 17 of the DSU and consists of seven members who are also appointed by the DSB for a term of 4 years and are eligible for re appointment. They hear the cases in division of and all the matters are about the dispute settlement activities in the WTO. Now there is only one member left in the appellate body because the DSB hasn't yet reached to consensus for election of new members. This has paralysed the whole dispute settlement mechanism.<sup>5</sup>

### **3. Modes of Dispute settlements**

Article 3 has the provisions regarding the general provisions of the DSB

#### **3.1 Consultation**

There is a significance of bilateral consultations ever since GATT. Article XIII specified about other members giving considerate opportunity regarding consultation. It covered matters regarding the failure of carrying out its obligations, conflicts or other situations.<sup>6</sup>

In the present DSU system, Article 4 consists of all the rules and procedures the parties shall follow for adequate consultation and about other parties giving opportunities for consultation.

It further specifies that a request for consultation has to submitted in writing and the same shall be notified to the concerned DSB committees with respect to the subject of such dispute.

It is the first and an important level of dispute settlement each member has to be sympathetic towards this opposite member regarding the representations made affecting the operation of the agreements they took. They have to consult together reach to a solution which is favourable for both of the parties.

The complaining party has to give the reasons for identification of legal basis of the complaint. The party should also ensure that the complaint has a broad legal scope which further terms the reference to the panel. Panels only evaluate the measures under the provisions of the agreements in question. The member also has to prove that the conclusion of the consultation was not

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<sup>5</sup> (Narayanan, 2003)

<sup>6</sup> (Gomula, 2021)

suitable for it. Any non-identification of measures and legal issues may prove fatal in further mechanism of dispute settlement.

Article 4 also provides the deadline for communication about the agreement of the other party, to conduct such consultation rounds which is thirty days from the day of request receipt from the complaining party or in any time frame agreed upon by the parties. In case, if the member fails to respond in the time frame, then the requesting member can proceed to the DSB to establish a panel. If after the consultation, both the parties believe that the consultation has failed then, they can also request for a panel even before the expiry of the sixty days timeline.

Consultations are bilateral in nature and does not involve the DSB or any other secretariate in these rounds of consultation. Since, the consultation is kept confidential, and no records being kept, the failed discussion are kept of no future reference. The parties have to start from square one in the panel round too. Adding to this, the requirement of identification of scope of law in the consultation round doesn't prove to be helpful for the next procedures. The set of complains and issues have to be redone. There have been cases when, the complaining party finds that the claims from the consultation rounds are not put forth, then it can ask the panel to attach additional findings.

After the consultation rounds fails, the parties have two ways to go- Mediation and Panels.

### **3.2 Mediations**

Article 5 of the DSU, provides with the parties to avail for conciliation and mediation services. The parties have to voluntarily request for it and it can be terminated any time by them. This can be approached within sixty days from the request of consultation and before moving to the panel. If the parties feel that the mediation services have also failed then they can further move towards the panel.

Choosing for mediation is not a mandatory step after failing consultation, the parties can directly move to the panel or try the mediations first and panels, after disagreement with the mediation. Mediation is less time consuming and it reserves the confidentiality of the parties but parties which have already failed consultation might have hard time to agree with the mediation results.

The next step after unsatisfied mediation rounds is establishing panels.

### **3.3 Panels**

If the other party responds to the consultation proposal within 10 days and further agrees to consult within 30 days from the proposal, then the complaining party has to wait for a period of 60 days to approach the DSB for a panel. In other case, if both the parties agree to approach for panel before the completion of the 60 days period, then it is allowable.

The panels are quasi-judicial bodies and like tribunals of the WTO. The DSB is responsible for establishing the panel on request from the parties in dispute. Article 8 consists of provisions regarding the working of the panels and the qualifications of the panellists. The panellists serve on an individual capacity and are not representative of any government or organisation.

For each dispute a new panel is set up. All the functions, standards, terms and references are cleared with 20 days from its establishment. The panel is responsible to examine the relevant provisions, factual and legal aspects in the said agreement of the parties in dispute. The examination report is then served to the DSB which then makes recommendations or gives rulings. The DSB gives 20 days to the members before adopting the report. Within ten days, the members can raise objections to the panel reports. Within 60 days of the report, the DSB adopts the report in a meeting. If one of the parties notifies the DSB about his intentions to move further to the appellate body then such meeting and adoption will not be held.

### **3.4 Appellate Body**

Article 17 of the DSU empowers the DSB to establish a standing appellate body. It consists of seven members who are chosen in full consensus with all the members of the DSB. For presiding over a matter, a minimum of three members are required. These members shall be well qualified and an expertise in law, international trade and the subject matters that are usually covered.

The function of the Appellate body is precisely to consider the issues of law in the disputes between the members. The time limit for the appellate body is to dispose a matter in 60 days and at maximum 90 days. For such extension, the Appellate Body has to take permission from the DSB in writing. The adoption of the reports of the Appellate Body is same as of the panel. The only difference is that there is no further higher authority than the appellate body in the Dispute Settlement Mechanism. The report shall be adopted by the DSB and unconditionally by the members of the dispute. In case, if the DSB in consensus decides to not adopt to the reports of panel or the appellate body then the DSB has to find an alternative which is in conformism with the Multilateral trade agreement.

The DSB has a strict rule of confidentiality and the panel and the appellate body are prohibited of *ex parte* communications with regards to the matter in consideration<sup>7</sup>. Only the members to the dispute are allowed to access the documents and reports related to their dispute.

As a whole, the total time frame of the DSB to resolve a dispute is nine months if there is no appeal and twelve months when there is an appeal made to the Appellate Body.

### **3.5 Implementation**

Once, the report from either the Appellate body or the Panel is accepted, under article 21, DSB is empowered to further keep an eye on the process of implementation of the given reports. Measures by the parties shall be taken with thirty days from the day of adoption of reports by the DSB<sup>8</sup>. If the party is not capable of complying with the report then, the party is granted reasonable time, mutually agreed upon which can be maximum forty-five days. After this, ninety days from the date of adoption. On further failure, a binding arbitration is done which shall be implemented in fifteen months. The DSB is further empowered to overlook the whole process.

Any member is free to raise issue during implementation of the recommendations and rulings. On inconsistency, the appellate body or panel can bring the members into conformity with the agreement and suggest ways to implement their suggestions.

## **4. Appellate Body Crisis**

The appellate body was considered to one of the powerful authorities in the world. It was referred as crown jewel of the Dispute Settlement Mechanism in WTO. In the above paper, it has been explained how the appellate body is supposed to consist of seven members and for presiding over any matter, there is a requirement of at least three members. These members are appointed for a tenure of four years. The DSB is responsible for appointment of these members.

On this date, only one member is presiding over the Appellate Body. The DSB has not yet reached to consensus for new appointment of members in this body. As there is a need for agreement of all the members of DSB for appointment of the members. This process made the

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<sup>7</sup> WTO dispute settlement system; Guide to WTO and GATT; Autar Krishen Koul; 6<sup>th</sup> Edition; 2018

<sup>8</sup> (WTO: The Multilateral Trade Order in Danger, 2021)

working of the whole Dispute Settlement Mechanism democratic and unbiased. This important feature of the system has been used as a loop hole by other members who have been accusing the Appellate Body to be over reaching.

The US has accused the body to go beyond the said power and area of jurisdiction given by the DSU. This has now led to the paralysis of the dispute settlement mechanism as there is no working appellate body present any more.<sup>9</sup>

All the parts of the system are important and disabling a body without any substantial alternate is harmful for the trade system.

## **5. Conclusion**

The policy of the DSB to conceal all the proceedings in the panel and the appellate body has been highly criticised of being non transparent. This is one of the reasons why today the countries are unwilling to re appoint the vacant positions.

Another criticism faced is about the non-existence of integration between the panel and the appellate body. In general, the appellate body presides over the findings and overlooks the recommendations of the previous subordinate, but in this mechanism, both the bodies work individually.

On one hand there has been suggestions of broadening the role of the Appellate Body and on the other hand there is a demise of such body. If the appellate body is given power to as much as interpret the laws then, it would have made it more independent and there would have been no question of involvement of the private parties.

There is also requirement of public understanding of the rulings of the WTO. The general public has the right to know the basis on which the recommendations and rulings are made. This will make the system more trustworthy and more approachable. If a remarkable change is made in such institution, then, it will motivate other international organisations to follow the path to transparency and global democracy.

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<sup>9</sup> (U.S. Views on the Functioning of the WTO Dispute Settlement System | United States Trade Representative, n.d.)

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