

---

# PARALYSIS OF WTO APPELLATE BODY AND THE WAY FORWARD

---

Vaibhavi Guruprasad Rane, LLM, International Trade and Investment Law Candidate (2020-21), O.P. Jindal Global University

## ABSTRACT

Disagreements leading to disputes between States are inevitable under international law; however, what matters is that, as a civilized society we settle disputes amicably. While Article 33 of Charter of United Nations provides means of peaceful settlement of dispute, there are certain specialized forums, which ensure speedy, expert and dedicated service for international settlement of disputes. One of the notable forums is the World Trade Organization's Dispute Settlement Mechanism, which refers trade disputes between states to arbitration, establishes panels and appellate body, and supervises implementation of panel reports. This forum has been termed as the "single most important development in post-world war II trading regime"<sup>1</sup> However, it hasn't been a smooth path for this dispute settlement mechanism; it has been faced with myriad of challenges in the recent past. Its foremost challenge is the WTO dispute settlement crisis, due to paralysis of the Appellate Body. This paper aims to study the reasons for WTO Appellate Body paralysis in *Part two* and *three*, followed by analyzing the way forward to revive the AB in light of suggestions from scholars, efforts of WTO members and changing world dynamics in *Part four*, concluding with the current likely solutions.

---

<sup>1</sup> John A Ragosta, 'Unmasking The WTO-Access To The DSB System: Can The WTO DSB Live Up To The Moniker World Trade Court' (1999) 31 Law & Pol'y Int'l Bus 697, 739.

## I. INTRODUCTION

The Appellate Body (AB) is a unique feature of the World Trade Organizations, Dispute Settlement Mechanism (WTO DSM), carved out in the Uruguay Round of GATT; it was not seen as a significant institutional transformation then, but today about 70% of the panel reports are appealed for interpretation of complex issues.<sup>2</sup> Previously GATT only provided for panels, and without an appellate mechanism, these panels diverged on core principles of WTO, thus creating uncertainty in the interpretation of WTO laws.<sup>3</sup> The Appellate Body, via its clarifications in the reports, brings consistency, clarity, and foreseeability to the WTO law.<sup>4</sup> However, this mechanism is taken hostage by its architect and frequent user – United States (US). Since 2016, US has been blocked the appointments of AB members on two grounds, first the AB is not functioning according to its mandate, and second the AB is not performing a satisfactory job. Its concerns find supporters, however not staunch enough to paralyze the apex institute of WTO DSM. The AB has been devoid of the three member quorum for one year four months, and despite efforts by WTO members no solution has been reached, this was delayed by the ongoing pandemic which pushed nations in a protectionist cocoon. It is high time that the AB is revived, the administration change in US and new leadership at WTO can be instrumental in reviving the AB.

## II. PARALYSIS OF WTO APPELLATE BODY

Until 11 December, 2019 the AB consisted of members which allowed its functioning, however with the termination of term of two members the AB came to a grinding halt. The term of the last sitting member expired on 30 November 2020.<sup>5</sup> Today the AB is devoid of any quorum.

Article 17 of DSU establishes a ‘standing body of seven persons’ known as the appellate body who serve in rotation for a term of 4 years with one reappointment<sup>6</sup>. The Dispute Settlement Body (DSB), a political body consisting of all WTO members unanimously appoint members to Appellate Body, unless a member “formally objects to the proposed decision”<sup>7</sup>. This has

---

<sup>2</sup> James Bacchus and Simon Lester, ‘The Rule of Precedent and The Role of The Appellate Body’ (2020) 54 *Journal of World Trade* 187 <<https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/54.2/TRAD2020008>> accessed 27 March 2020. [Article on Rule of Precedent hereinafter]

<sup>3</sup> *Ibid.*, 186

<sup>4</sup> *Article on Rule of Precedent*, 187

<sup>5</sup> ‘Dispute Settlement - Appellate Body’ (*wto.org*, 2021) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm)> accessed 26 March 2021.

<sup>6</sup> Article 17, DSU

<sup>7</sup> Jean Galbraith, ‘United States Continues To Block New Appellate Body Members For The World Trade Organization, Risking The Collapse Of The Appellate Process’ (2019) 113 *American Journal of International Law*.

been used by the US for an appointment blocking spree. In 2016 US blocked appointment of Seung Wha Chang on the grounds that he deviated from AB responsibility.<sup>8</sup> Again in 2018, it rejected joint proposal by WTO members only because of the AB members had continued to serve on the panel despite 5 months of expiry of his term,<sup>9</sup> however this practice is enshrined in Rule 15 of the Working Procedures for Appellate Review, which enables members to serve until they have disposed the appeal pending.<sup>10</sup> However US refuse to recognize this Rule and once again refused to support the reappointment of a retiring member Shree Baboo Chekitan Servansing on the same ground. This treatment is not restricted to members of nations, in 2011 US refused reappointment of Jennifer Hillman for contradicting the interests of US.<sup>11</sup>

### III. REASONS FOR BLOCKING APPOINTMENT

In 2018, former US President Trump, threatened to withdraw from WTO as he believed that it did not benefit US and only allowed other nations to take advantage of US markets<sup>12</sup>, this is amusing because US has won “85.7% of the cases it has initiated before the WTO since 1995, compared with a global average of 84.4%”<sup>13</sup>. This sends a confusing signal as to the intent of US blocking reappointments. One can only assume that it is to enforce its criticisms against WTO, because for it to exist from the WTO would require The US dissatisfaction against the WTO DSM has been simmering since a decade, and has time and again raised its concerns. Even since starting to block appoints in 2016, it has filled 12 cases since January 2017<sup>14</sup>. While these concerns can be divided into 2 have explicitly stated and imply evident the paper divides it into following:

#### ➤ Procedural Issues

These are technical procedural issue raised by US. *First*, Rule 15, of the Working procedures allows the AB member whose tenure expires to continue the pending appeals at hand upon approval of AB and after notification to DSB. This Rule saves time that would have been taken

<sup>8</sup> *Statement By The United States At WTO Dispute Settlement Body Meeting* (WTO 2016) 1 <[https://www.wto.org/english/news\\_e/news16\\_e/us\\_statment\\_dsbmay16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf)> accessed 29 March 2021.

<sup>9</sup> *Statements By The United States Of The WTO Dispute Settlement Body Meeting* (WTO 2017) 13 <[https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB\\_.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.pdf)> accessed 29 March 2021.

<sup>10</sup> Appellate Body, *Working Procedures for Appellate Review*, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010).

<sup>11</sup> ‘Appellate Body Annual Report For 2011’ (June 2012, WT/AB/18)

<sup>12</sup> Gregory Korte, ‘Trump Escalates His Threats To Blow Up Trade Deals’ *USA TODAY* (2018) <<https://www.usatoday.com/story/news/politics/2018/08/30/wto-trump-threatens-pull-out-world-trade-organization/1149421002/>> accessed 30 March 2021.

<sup>13</sup> Amrita Bahri, ‘Appellate Body Held Hostage’: Is Judicial Activism At Fair Trial?’ (2019) 53 *Journal of World Trade* 8 <<https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/53.2/TRAD2019014>> accessed 1 April 2021. [Amrita Bahri hereinafter]

<sup>14</sup> ‘WTO | Dispute Settlement - Disputes By Country/Territory’ (*wto.org*) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)> accessed 1 April 2021.

to replace the retired member and from the new member to acquaint with the case. The US criticizes this rule as it encroaches upon DSB's right to reappoint.<sup>15</sup> *Second* is the issue of resignation with 90 days' notice under Rule 14(2) which was not followed by a member in 2017 and sets a bad precedent<sup>16</sup>. The third issue is relation to reappointment under Article 17.2 DSU, which according to US is a performance review and must not be treated into the tradition of "quasi-automatic reappointment"<sup>17</sup>. Yet another issue is related to the unrealistic time limit of 60-90 days disposition of appeals, which has become an exception then a norm, with appeals being disposed in a year on average.<sup>18</sup>

### ➤ Judicial Activism

US have raised objections on AB's defiance of the principles of the Marrakesh Agreement, by introducing new principles and encroaching the legislative power of the WTO DSB via judicial activism. This issue can be divided into, decisions creating precedent doctrine, and decisions creating obiter dicta<sup>19</sup>.

The doctrine of precedent is unique to common law, which can be persuasive or binding, WTO has adopted the former. In US-Shrimp<sup>20</sup> while upholding panel's decision to rely on previous decided AB report, AB explicitly stated the future panels must follow the reasoning in AB reports<sup>21</sup>. US-Stainless Steel (Mexico)<sup>22</sup> laid the "absent cogent reasons" to tackle the a controversial anti-dumping duty calculation method termed as "zeroing method" used by US. There have been 16 cases<sup>23</sup> before the Appellate Body on the "zeroing method" of anti-dumping calculations, this case allowed the cases with same legal issues to be resolved in similar manner.<sup>24</sup> Obiter dicta is prevalent in common law jurisprudence, it is the observation made by the adjudicator in relation to the principle of law, not necessarily in determination of case in

<sup>15</sup> *Statements By The United States At The Meeting Of The WTO Dispute Settlement Body* (WTO 2017) 13 <[Aug31.DSB .Stmt .as-delivered.fin .public.pdf \(usmission.gov\)](#)> accessed 29 March 2021.

<sup>16</sup> Amrita Bahri, 4

<sup>17</sup> *Ibid.*,

<sup>18</sup> Amrita Bahri, 5 (For example, in United States — Conditional Tax Incentives for Large Civil Aircraft DS487, it was after 9 months AB circulated the report to its members on 4 September 2017)

<sup>19</sup> Amrita Bahri, 9

<sup>20</sup> Appellate Body Report, United States - Import Prohibition of Certain Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001), ¶107

<sup>21</sup> *Ibid.* ¶109

<sup>22</sup> Appellate Body Report, United States - Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter, **US- Stainless Steel (Mexico)**]

<sup>23</sup> For the sake of brevity: DS179; DS264; DS322; DS335, DS343; DS344, DS350; DS382, DS383, DS402, DS404, DS420, DS424, DS429 and DS471.

<sup>24</sup> US- Stainless Steel (Mexico) ¶161

court.<sup>25</sup> US alleged that AB reports state opinion on issues not raised by parties. In *Canada-Periodicals* AB recognized parts of panel report as obiter dicta<sup>26</sup> and in *Argentina-Financial Services* AB discussed mooted concepts in great depth<sup>27</sup>. This according to the AB hinders prompt settlement of dispute.<sup>28</sup> US remarked that the AB is not an academic body hence must restrain itself from making unnecessary observation, simply because it interests them.<sup>29</sup>

#### IV. THE WAY FORWARD

As the paralysis of the apex body of WTO continues, global community suggests alternatives such as entering into multilateral agreements to employing parallel DSM. At WTO General Council Meeting in 2018, 23 WTO members expressing concern on viability of WTO DSM in absence of consensus on AB appointments<sup>30</sup> proposed amendments to DSU taking into consideration the US concerns. These included permitting Rule 15, Working Procedures to be incorporated into DSU, allowing parties to opt for enhancement of 90 days appeal period, and clarified that AB interpretation does not include interpretation of municipal measures, it also direct the AB to address only issues raised by parties to extent necessary for dispute resolution and finally a major reform proposed was hosting annual meetings between the AB and the DSB to provide a channel of communication to address issues. These reforms although rejected by US,<sup>31</sup> show case the global efforts to revive the WTO AB.

The academic scholarship propose drastic solutions of moving away from the AB, *Pieter Jan Kuijper* proposes a new appellate tribunal established via a multilateral agreement, where appointment of members would be based on ‘super-majority’ and not consensus<sup>32</sup>. *Steve Charnovitz* proposes that members should adopt panel report as final, thus getting rid of appeal via AB<sup>33</sup>. *William Reinsch* proposes employing a parallel DSM under Article 25, DSU

<sup>25</sup> Henry Campbell Black, *Handbook On The Law Of Judicial Precedents, Or The Science Of Case Law* (West Publishing Company, 1912 2018) 166

<sup>26</sup> Appellate Body report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R, (July 30, 1997) ¶33

<sup>27</sup> Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, (May, 9 2016)

<sup>28</sup> ‘Statements by the United States at the WTO DSB Meetings’ (Geneva, 9 May 2016, 23 May 2016, 14 October 2017 and 29 September 2017)

<sup>29</sup> Amrita Bahri, 12

<sup>30</sup> WT/GC/W/752' ([docs.wto.org](https://docs.wto.org), 2018) <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=249918&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249918&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)> accessed 9 April 2021.

<sup>31</sup> Amrita Bahri, 17

<sup>32</sup> Pieter Jan Kuijper, 'The US Attack On The WTO Appellate Body' (2017) 45 Forthcoming Amsterdam Center for International Law <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3076399](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076399)> accessed 6 April 2021.

<sup>33</sup> Steve Charnovitz, 'How WTO Dispute Settlement Succumbed To The Trump Administration' [2019] SSRN Electronic Journal.

channelizing arbitration for entire DSM or appellate procedure; this would require a multilateral agreement to ensure binding effect on awards<sup>34</sup>.

Article 25, DSU currently is the best bet for members, as this keeps trade DSM thriving without moving away from the WTO, this would enable setting up of arbitral tribunal similar to the AB, however in the current case the parties shall be free to appoint the arbitrators, thus moving away from interference by US. However Article 25 can only be an interim measure, unless parties agree to enter a multilateral arbitration agreement establishing the scope and procedure of such tribunals, thus at the same time rendering the awards binding.<sup>35</sup> Although Article 25 seems like the right way forward, it will lead to a fragmented WTO DSM, and affect claims against the global economic giant – US. Thus only side stepping the issue and not providing a permanent solution to the WTO AB paralysis.

Extinction of the AB would be descent into the DSM of the GATT regime which posed issues of certainty, predictability and coherence. Thus all efforts must be employed to revive the paralyzed AB.

## V. CONCLUSION

The year 2021 brought new administration in US and WTO, while Biden administration has continued the policy of its predecessor regarding the WTO AB<sup>36</sup>, the appointment of the new WTO Director General, Ngozi Okonjo-Iweala is a glimmer of hope. She made it clear that “*consensus [will] not stand in the way*” and intends to use majority voting to resolve the WTO crisis<sup>37</sup>. During the WTO DSB meeting on 22 February 2021, as more nations joined to convince US, who rejected the proposal,<sup>38</sup> at the same time on 19 March, 2021 US sought to appeal panel report in US –Anti Dumping (Korea)<sup>39</sup>. Thus the stance of US in relation to the appellate mechanism is that of love-hate, and while “*WTO needs US and the US needs WTO*”<sup>40</sup>,

---

<sup>34</sup> William Alan Reinsch, 'Article 25: An Effective Way To Avert The WTO Crisis?' (*Csis.org*, 2019) <<https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis>> accessed 9 April 2021.

<sup>35</sup> *Ibid.*,

<sup>36</sup> Bryce Baschuk, 'Biden Picks Up Where Trump Left Off In Hard-Line Stances At WTO' *Bloomberg* (2021) <<https://www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto>> accessed 9 April 2021.

<sup>37</sup> Eleanor Wragg, 'Ngozi Okonjo-Iweala Inherits A WTO In Disarray' *Global Trade Review* (2021) <<https://www.gtreview.com/news/global/ngozi-okonjo-iweala-inherits-a-wto-in-disarray/>> accessed 9 April 2021.

<sup>38</sup> 'Items Proposed For Consideration At The Next Meeting Of Dispute Settlement Body' (*wto.org*, 2021) <[https://www.wto.org/english/news\\_e/news21\\_e/dsb\\_22feb21\\_e.htm](https://www.wto.org/english/news_e/news21_e/dsb_22feb21_e.htm)> accessed 11 April 2021.

<sup>39</sup> United States – Anti-Dumping And Countervailing Duties On Certain Products And The Use Of Facts Available, WT/DS539/10 (March 19, 2021)

<sup>40</sup> **Amrita Bahri**, 19

the time has come to proceed without consensus. The efforts WTO members to revive the AB showcases that they aren't ready to give up on system and this process of majority voting while solving the current WTO AB paralysis will also avoid future crisis. However, it is essential to act quick as the paralysis combined with the pandemic, as nations are already opting for protectionist regime the goal of a free and fair global multilateral trade would be crushed and descend into the ancient GATT DSM. Until this solution is attained, it is unfortunate that the 'crown jewel' of WTO DSM, - AB shall remain paralysed and alternative remedies will have to be sought.