



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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The Crisis of the Appellate Body in WTO

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Received 13 April 2024; Accepted 16 May 2024; Published 21 May 2024

The World Trade Organization (WTO) has played an important role in arbitrating international trade disputes between countries. The damaging cycles of tariffs and retaliation were prevented by the WTO's dispute settlement system as it is internationally agreed-upon rules and arbitration. The WTO's dispute settlement function was at risk of collapsing and now the Appellate Body (AB) has collapsed completely. The United States (US) had been blocking the appointment of new judges to the WTO's Appellate Body, as it had few issues with AB which includes judicial activism at the WTO and concerns its sovereignty. Currently, no appeals can be received from the nations as there is no appellate body and the decision taken by the lower body is the final. This Research Paper explores what were the Appellate Body and its crisis affecting the countries that are in dispute. It also covers reasons for the collapse of the appellate body, and the steps taken by the nations to resolve the disputes in the absence of the appellate body. The paper also discusses the allegations made by the US. Finally, this paper suggests an alternative solution to resolve the disputes and adoption of a few principles to reform the AB.

Keywords: *wto, gatt, appellate body, dsu.*

INTRODUCTION

Through the Marrakesh Agreement, the World Trade Organisation was established on 1st January 1995.¹ It liberated trade by creating a platform for negotiations and looking after multilateral trade by creating rules. The WTO dispute settlement system is the significant outcome of the Uruguay Round of trade negotiations.²

The Appellate Body (AB) was created in 1995; it is a standing body, unlike the ad hoc dispute³ It consists of seven members with a four-year term it takes up appeals related to trade disputes, where the judgments are ruled against and it is brought by the members of WTO. According to the settlement panel.⁴ ‘The characteristics such as the right to appeal, a fool-proof mechanism to enforce decisions, and compulsory jurisdiction made it popular as the jewel of the WTO’s crown to Article 17.1 of the DSU, the members in the forum must be at least three out of seven ABMs to address an appeal.

Now the AB is not functional, it is collapsed because it does not meet the minimum required members, so there are no appeals in WTO at present. On 10 December 2019, the body got into a crisis because two of the three members’ terms ended and it had only one member, Hong Zhao from China.⁵ Hong Zhao's term expired in the year 2020, leaving the AB to collapse.⁶

THE IMPORTANCE AND SIGNIFICANCE OF THE APPELLATE BODY (AB)

The Appellate Body had a major role in the settlement of disputes, it used to provide a chance for correction of the false judgments by the panel, and till date, it has corrected many erroneous panel reports. It helped to make the dispute settlement system more predictable by issuing rules

¹ Bhumika Billa, ‘Student Feature – Spotlight on the WTO and its Appellate Body Crisis’ (*E-International Relations*, 08 September 2019) <<https://www.e-ir.info/2019/09/07/student-feature-spotlight-on-the-wto-and-its-appellate-body-crisis/>> accessed 14 March 2024

² ‘WTO Bodies involved in the dispute settlement process - Appellate Body’ (*WTO*) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm> accessed 14 March 2024

³ Billa (n 1)

⁴ Julio Lacarte-Muró, ‘Launching the Appellate Body’ in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015)

⁵ ‘Dispute settlement - Appellate Body Members’ (*WTO*) <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 14 March 2024

⁶ *Ibid*

that aid as standards for future legal disputes involving the same disputes ensuring consistency.

When there was an AB, it always provided an opportunity for WTO members to refuse implementation of the panel report just by appealing against the report to an AB and it freezes the adoption of the report where the agreement was signed between the parties. Under Article 17.13 of the DSU, the AB has the power to review the challenge and may give the judgment accordingly by upholding, reversing, or modifying the panel report.⁷ In the absence of AB, it would get back the power-oriented system of the GATT era from a rule-based dispute system.⁸ In the GATT era, there was no appeal system and whatever judgment the panel used to give was considered the final.

WHY WAS THERE A CRISIS IN THE APPELLATE BODY?

The crisis occurred in the Appellate Body, as the United States of America under President Trump blocked the appointment of a new member to the AB because the government had a protectionist agenda.⁹

For the longest time, the US had been an appraisal of the Appellate Body. The US withdrew its support from WTO when it received three adverse dispute rulings.¹⁰ Alan Wolff was WTO's Deputy Director-General and Robert Lighthizer was the adviser to Senator Robert Dole, both together complained that the panellists were not adequately prepared, didn't review properly for bias, and were staffed by bureaucrats who pursued to improve their substantive agendas, have meetings secretly and that causes a series of events that would lead to re-order the US laws that would take jurisdiction of the congress, the two houses of congress and the acting president

⁷ WTO Bodies involved in the dispute settlement process - Appellate Body (n 2)

⁸ 'Appellate Body chair calls for "constructive dialogue" on addressing dispute settlement concerns (WTO, 2018) <https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm> accessed 15 March 2024

⁹ Aditya Rathore and Ashutosh Bajpai, 'The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?' *JURIST News* (14 April 2020) <<https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/>> accessed 15 March 2024

¹⁰ Chad P. Bown and Soumaya Keynes, '20-4 Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0' (2020) Peterson Institute for International Economics <<https://www.piie.com/sites/default/files/documents/wp20-4.pdf>> accessed 15 March 2024

after discussion.¹¹ This kind of negativity kept growing in the US against the WTO as it repeatedly gave its judgment against the US' use of trade remedies.

During the Obama administration, the US negotiator John Greenwald stated that DSS in WTO is more active in policy-making than in interpreting the negotiated language of the agreements. In 2006, the US lost in zeroing dispute against the EU and the US expressed its disappointment by saying 'such rulings are highly corrosive to the credibility that DSS has earned over the years'.¹²

The administration of Trump in his tenure blocked the reappointment of Merit Janow (2003-2007) and Jennifer Hillman (2007-2011) who belonged to the US, and were members of the Appellate Body, and they were asked to reject the offer for a second term. As US was not satisfied with them as they failed to defend the interest of the US in trade remedy disputes. The reason given by the US was just opposite to the procedure mentioned in DSU and the Appellate Body working where it said the members should not be affiliated with any government. Later US blocked the appointment of James Gathii from Kenya who was a replacement for ABM David Unterhalter, The US gave a reason that he was biased in the WTO by supporting developed countries against developing countries.

Ten WTO cases were consecutively lost by the US against different WTO members which grew the resentment in the USA against WTO DSS. In 2016, the US blocked the reappointment of ABM Chang who was from Korea by not supporting him and said it would object to the proposal to reappoint him. The US said it would never support someone who restricts trade agreement rights or increases the obligations in the trade agreements. More than 20 countries criticized that the independence and impartiality of the AB would be endangered if there is a refusal of the

¹¹ *Dispute Settlements in the WTO: Hearing Before the Subcommittee on International Trade of the Committee on Finance, United States Senate, One Hundred Sixth Congress, Second Session* (vol 4, U.S. Government Printing Office 2000)

¹² 'United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") - Recourse to Article 22.6 of the DSU by the United States' (*Office of the United States Trade Representative, 2020*) <https://ustr.gov/sites/default/files/uploads/zip/test/WTO%20Dispute/New_Folder/Pending/DS294.US_0p.en.State_.AsDelivered.pdf> accessed 15 March 2024

reappointment because of dissatisfaction with the performance of the member. Hyun Chong Kim was appointed instead of Chang in 2016.¹³

In 2017, the second term of Hernandez and Bossche was going to expire, the US blocked new appointments as one of the two seats was the EU seated, it wanted to move forward with the selection process only for the Latin American seat.

In 2017, the US again refused a replacement for Mr. Ramirez, stating that he was serving on an appeal, despite having ceased to be a member of AB. US criticized saying only the DSB had the authority to extend terms of members where the term had already expired under Article 17.2 of the DSU and used this as a reason to block further appointments. Most of the WTO members criticized the decision of the US where it continuously blocked the appointments and reappointments to AB fearing that it would create a risk where every single trade conflict among the members of WTO would turn into a mini-trade war.¹⁴ This is how the crisis was created in AB.

ALLEGATIONS MADE BY US ON THE APPELLATE BODY

The US said that there is an imbalance between the legislative and judicial wings in the WTO and it has become litigation-centred rather than handling negotiations which was the main focus of the WTO. The US pointed out three concerns about the AB and they are substantive, systemic, and procedural concerns.

The substantive concerns pointed out by the US regarding the judicial overreach are some substantive interpretations related to the Subsidies and Countervailing Measures Agreement that was given by WTO adjudicative bodies that have significantly hampered the ability of WTO members to counteract trade altering subsidies which are given by State-owned enterprises according to the US. In some situations, ABMs have been modified by adding or diminishing the rights and obligations of WTO members under the given covered agreement. The US had lost many cases in the past few years; in a few cases, the ABMs had interpretations based on

¹³ *Ibid*

¹⁴ Rathore (n 9)

vague obligations of incomplete negotiations, and in a few, they simply provided the wrong answer where it needed a serious concern.

The US accused the judicial activism of the AB which comes under systemic concerns where the ABMs expanded their orders and created laws with the help of legal rulings. The US says that in a few situations, ABMs have given interpretations that were obiter dicta or advisory opinions which means they weren't related to things that would help to resolve the disputes. The AB has unauthorizedly granted precedential value to past reports and orders and it has reviewed the facts and reviewed the member's domestic law *de novo*¹⁵. The AB is the top body in the hierarchy of the WTO DSS, so there won't be any other body to challenge the reports; the US states that there would be an erroneous interpretation of the law if it is rigid adherence to the precedents.

Firstly, there are a few procedural actions of AB that which US feels it is beyond AB's authority and these come under procedural concerns. Article 17.5 of DSU clearly said that the deadline for appeals is 90 days and the proceedings shouldn't exceed the time limit, but then the AB ignored the rule and this was found in AB practice. Secondly, the US points out that the members of AB had been serving beyond their restricted terms that were approved by the AB according to Rule 15 of AB's working procedures to complete the pending disputes. Rule 15 states the time limit to be four years on the ABMs. The US is trying to show the authorization of DSB which allowed ABMs to take up appeals and DSB has the power to remove the mentioned obligations of the Appellate Body.

ANALYSIS OF THE ALLEGATIONS MADE BY THE US ON WTO DSB

The US had pointed out many problems in the AB and didn't even suggest a single solution to the problems and it didn't even include any of the members who belonged to WTO so that they would bring up few suggestions or solutions. The behaviour of the US has made other WTO members worry because it clearly shows that powerful countries can easily dominate over the weaker and make them suffer. The US had ill intentions to make AB collapse because it received a lot of reports against it during the past few years.

¹⁵ Muro (n 4)

The dysfunction of the Appellate Body has created trade wars. Because of the lack of quorum, we could witness that the panel reports were appealed by the WTO members where Article 16.4 of DSU clearly stated that the panel reports would be adopted only if there is no objection from the members and if any member appeals on the report then only after the completion of appeal the reports gets adopted and due to lack of quorum the report would never get adopted by the members. Now there isn't an AB where there are no appeals and the panel report is considered the final report.

POSSIBLE SOLUTIONS TO REFORM THE APPELLATE BODY

David Walker from New Zealand had put forward his principles which helped to address all the problems that the US had with the AB.¹⁶ The principle included mandating the AB to give its decision within 90 days, members must resign at the end of their second term, AB is responsible only for taking up appeals where it is related only to the parties in dispute (no third party can appeal behalf of the aggrieved party) and must necessarily take panel report into account but then not as precedents. These were the things that the Walker principle explained and it would help to reform the AB.

When there is a dispute between the parties the AB must rely more on economics and statistics data to decide upon the dispute. We know that AB's work is limited to seeing the matters of law and the facts produced by the parties. However, the interpretation of the technical terms the AB has the power to interpret according to it and terms are not defined anywhere properly. If AB uses economics and statistics data it would be easy to make parties understand.

A committee to look after the functioning and audit of the AB has to be established. To show transparency to the members of the WTO and make them believe in the functioning of AB. The committee must include all the departments of the WTO and everyone must be assigned the task to maintain the well-functioning of AB, if there is any problem found then the committee

¹⁶ Rathore (n 9)

must decide the course of action to overcome the problem.¹⁷ These were a few suggestions that would help the AB to function well and reform it again.

CONCLUSION

The problem is not only with the DSU of the WTO, but then it is inside the WTO. Now if the reformation of the AB doesn't take place, the members of WTO will never have a chance to appeal the WTO panel reports in the future. The US was not at all ready to allow the appointment of the members, but now many countries have found alternative means such as the signing of multilateral agreements. The members can accept the panel report and can seek to resolve the issue just like Canada and the EU. But if member countries start adopting new means then the whole purpose of WTO would fail because the main aim of the WTO was to resolve the disputes between members' countries and ease trade. It would always be better to reform the AB completely and get a new structure to it so that in the future it might not through the crisis again.

¹⁷ *Ibid*