

Student Feature – Spotlight on the WTO and its Appellate Body Crisis

Written by Bhumika Billa

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<https://www.e-ir.info/2019/09/07/student-feature-spotlight-on-the-wto-and-its-appellate-body-crisis/>

BHUMIKA BILLA, SEP 7 2019

May 28, 2019 will always be a crucial day in the history of World Trade Organization (WTO) as it marked the day when the Appellate Body at the WTO stood in the midst of the biggest crisis in its 23 years of existence. It is on this day when Peter Van Dan Bossche, one of the 4 remaining members of the Appellate Body gave his farewell speech– “I stand here before you with a heavy heart but not because this is my farewell. I stand before you with a heavy heart because of the current crisis in the rules-based multilateral trading system”, he said. The world is witnessing a slow piecemeal death of the international trade regime as we know it today and with the sword of December 10, 2019 hanging over our heads, the clock is ticking and it's ticking fast.

Background

The WTO was established on January 1, 1995 through the Marrakesh Agreement Establishing the World Trade Organization of 1994 (Marrakesh Agreement). The agreement is the founding document for WTO law which consists of various institutional and procedural rules including rules on decision making, trade policy review and dispute settlement. A deliberate attempt was made to ensure that WTO remains a 'member-driven' organization by incorporating features such as consensus-based decision-making procedures, an all-inclusive composition of various organs, appointment of an independent Secretariat for administrative functions and establishment of a state-to-state dispute settlement mechanism for all WTO covered agreements.

The organization has largely been viewed in two capacities: first, as an international platform to negotiate multilateral and plurilateral agreements dealing with trade and second, as a dispute settlement system for disputes arising out of negotiated agreements. With the ever-growing complexity of members' interests and ever declining political will to compromise and cave in, the “green room” (where heads of delegations seek consensus under the Chairmanship of Director-General) gradually came to be infamously called a sleepy place. Amidst the negotiation disaster at the WTO, the second major function (i.e. dispute settlement) hence turned out to be more of a saving grace than a cherry on top. With characteristics like right to appeal, compulsory jurisdiction and a fool-proof mechanism to enforce decisions through authorized counter measures, it soon became the 'gold standard' for international adjudication of disputes, popularly known as WTO's “crown jewel”.

There's no mystery behind why most of the success of WTO as an international organization has been attributed to its dispute settlement mechanism. In a span of just two decades, it has remarkably issued more than 200 panel reports and more than 140 appellate body reports. Another major reason for its success can be credited to its inherent 'member-driven' approach that has not only allowed its members flexibility to prioritize their interests, but also largely ensured sovereign equality of states.

With the globalization backlash reflected in major historical events like Brexit and scepticism around phenomena like “American Rejectionism”, the faith in the organization has begun to shake. The impact of these developments is well reflected in the gradual shift from multilateralism to regionalism or bilateralism, the seemingly perpetual US-China trade war and a surge in protectionist policies across the globe. The biggest impact of this backlash on the WTO

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however has probably been on its crown jewel but whether the appellate body crisis is an effect of the backlash or a contributing factor to it- the line is not very clear.

The Crisis

The Appellate Body was established in 1995 under Article 17 of the Rules and Procedures Governing the Settlement of Disputes (DSU). It is a standing body of 7 members that hears appeals from reports issued by panels in disputes brought by WTO members. DSU requires a minimum of 3 members to serve on a case, selected by rotation. US has been blocking appointments and reappointments for over a year and a half and the implications of American challenges have been killing the organization from the inside. Since Bossche's farewell speech, only 3 members are left serving, with 2 of them due to retire from their second term on December 10, 2019. After completing the maximum of a tenure that's possible, Ujal Singh Bhatia and Thomas R. Graham will leave behind just one member serving, Hong Zhao, whose term ends in November 2020. Hence the Appellate Body will be practically rendered incapable of hearing appeals post December this year.

The major reasons for blocking appellate body appointments root back to the dissatisfaction of US with the way the body had been functioning for the last decade or so. The causes of US discontent include both procedural and systematic concerns. One of the procedural concerns for instance includes some Appellate Body members deciding appeals after the expiration of their 4-year term. Another is an unwritten tradition of the quasi-automatic reappointment of an Appellate Body member for a second term. US has challenged this practice several times since 2011 in many ways, one of which was blocking the reappointment of its own nominee, Jennifer Hillman. A systematic concern at the core of the current crisis relates to the alleged "judicial overreach". The basis of this criticism lies in Articles 3.2 and 19.2 of the DSU that obligate the Appellate Body to refrain from creating or abolishing rights and obligations of WTO members (in line with the member-driven approach embedded in all WTO mechanisms). However, the instances of allegations of the Appellate Body having overstepped its authority that was supposed to be limited to correcting legal errors in panel reports are not few. From *US-FSC* to *Zeroing*, there are enough case laws to legitimize these concerns.

The most obvious implication of the Appellate Body crisis will be an immediate break-down of the two-tier dispute settlement mechanism at the WTO. Firstly, because without a functioning appellate body, it will be impossible to retain the sanctity and accountability of the system, with no one to maintain the checks and balances and rectify or look into legal inconsistencies in panel reports. Secondly, the break-down of the second leg might also thrash a blow to the first one, essentially because any WTO member can practically block adoption of a panel report by filing an appeal that will probably never be heard. In fact, the latest appeal filed by US against a panel report that held America's domestic content requirements and subsidies in the solar sector as violative of global trade norms in a case filed by India, is the perfect example of how a member can leverage the crisis in its favour by blocking reports that obligate it to comply with WTO rules. Needless to say, this doesn't only threaten the functioning of the "crown jewel" of the WTO, but threatens global faith in the organization itself. The latter because there is no point of having agreements that obligate members to trade fairly if they don't have a reliable system in place to enforce those agreements.

Prospective Solutions

A situation demanding the dead to be brought back to life is bound to seem hopeless, but it's important to remember that WTO is still breathing. Many WTO members have tabled proposals in an attempt to save the organization from the shackles of an untimely death, that include short term solutions ranging from launching fresh selection process for vacancies and bringing those appointments into immediate effect, to extending the terms from a period of 4 years to 6 or 8 (which also means removal of the reappointment alternative ensuring more independent functioning without political pressure). More permanent long term solutions based on a reformative approach include having a transitional rule for the outgoing members allowing them to completely dispose pending appeals even after the expiry of their terms, limiting the Appellate body's interpretation to the meaning of contested national laws without stepping over policy space (to preserve national sovereignty), regular meetings of the WTO members with the Appellate body to ensure effective communication and immediate redressal of concerns and so on.

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Innumerable, reliable, well thought out and effective alternatives and solutions have been tabled at the WTO, however none agreed upon. While scholars are beginning to look at Article 25 of the DSU that provides space for arbitration, an alternative dispute resolution mechanism that may successfully circumvent the blockade in the appellate body for the time being, it is still to be seen how members respond in cases of reports that are currently being appealed. Regardless of arbitration as a legally viable option, reaching consensus in establishing rules about the arbitration procedures is another growing elephant in the room, especially if the first one is not addressed soon enough. No wonder the future of trade seems to lie outside the WTO.

Further Reading

https://www.wto.org/english/thewto_e/history_e/history_e.htm – [History of the multi-lateral trading system]

http://legal.un.org/avl/ls/VandenBossche_IEL_video_1.html – [Peter Van Dan Bossche lecture on WTO Dispute Settlement System.]

<https://www.economist.com/buttonwoods-notebook/2016/07/27/globalisation-backlash-20> – [The Economist article on globalization backlash]

<https://www.frontier-economics.com/media/3254/ebb-tide-trade.pdf> – [Article which explains in detail about the governance of world trade and the backlash against globalization]

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216633– [This Article discusses in detail United States' Dissatisfaction with the Appellate Body]

About the author:

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