

# LEGALFOXES LAW TIMES

## APPEALING INTO THE LEGAL VOID: FATE OF WTO DISPUTE SETTLEMENT MECHANISM AFTER 2019<sup>1</sup>

By Gourav Kumar

### INTRODUCTION

The year 2019 was the year to celebrate the 25<sup>th</sup> anniversary of the establishment of World Trade Organization, but the scenario was completely different as World Trade Organization found itself stuck into the crisis in the Dispute Settlement Mechanism and speaking more particularly in the Appellate Body under the attack from a United States.<sup>2</sup> When the WTO was established under Marrakesh Agreement, it was thought that this would lead to evolution in the manner of governance of international trade. There were two very crucial outcomes from Uruguay round of negotiation, i.e. firstly focus regarding decision making was shifted from positive consensus under GATT to negative or reverse consensus based approach in DSB and; Secondly, the establishment of Appellate body.

This particular structure for settlement of trade disputes provided a stronger legally binding mechanism to enforce the rights of WTO members. This new framework gained the confidence of all the members, with more than 600 disputes been filed since its inception.<sup>3</sup> But, the status quo is something very different and also is a matter of great concern. This can be more properly understood by referring to the words of Peter Van Den who during his retirement address in May, 2019, said that-

*“There are very difficult times ahead for the WTO dispute settlement system. This system was – and currently still is – a glorious experiment with the rule of law in international relations. In six months and two weeks from now, this unique experiment may start to unravel and gradually*

<sup>1</sup> Gourav Kumar, Student, SOLS, CMR University, Bangalore.

<sup>2</sup> Tom Miles, Trump threats, demands spark 'existential crisis' at WTO, Reuters, (October 24, 2018), <https://www.reuters.com/article/us-usa-trade-wto-insight/trumphreats-demands-spark-existential-crisis-at-wtoidUSKCN1MY12F>.

<sup>3</sup> WTO, Chronological list of disputes cases, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_stat\\_us\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_stat_us_e.htm).

*come to an end. History will not judge kindly those responsible for the collapse of the WTO dispute settlement system.”<sup>4</sup>*

Before proceeding further on the crisis part, first there is need to understand that for what purpose the Appellate Body was set up. Although the dispute settlement thing was present under the GATT mechanism also, but it could not produce such results for the states as was desired, because of its limitations. This was due to the fact that there was system of adopting the Panel report by way of consensus and in this scenario the losing party used to object it and thus rendering the Panel report useless. This particular issue was raised in the Uruguay round negotiation, with the probability of having reverse consensus for the adoption of panel reports, if not appealed. This move was supported by USA. But there were some countries which expressed the point of having reservation on the introduction of negative consensus and therefore it was thought that there should be some sort of safety given to ensure that bad panel reports would not stand as the law. Furthermore, to the probability of interim review under Article 15<sup>5</sup>, the establishment of appeal mechanism was viewed as a method to ensure more safety for members, as this would guard them from rogue panel reports being automatically coming into force. Here the observation made by Prof. Steger<sup>6</sup> becomes important who said that, the idea of the creation of Appellate Body was quid pro quo for the party losing the right to block panel report's adoption.

### **1.1. Crisis in the Appellate Body**

The USA has blocked the appointment of new member since 2017. Earlier there were 7 members, later it decreased to 3 members which is the minimum that is required to hear an appeal. After December 2019, only one member is left as Appellate Body member. This is in contravention to the Article 17.2<sup>7</sup>, according to which vacancies should be filled as they arise. Although most of the member nations proposed to start the selection process, but USA opposed it by stating that concerns USA has identified has not been addressed. This path chosen by USA

---

<sup>4</sup> Farewell speech of Appellate Body member Peter Van den Bossche, [https://www.wto.org/english/tratop\\_e/dispu\\_e/farwellspech\\_peter\\_van\\_den\\_bossche\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/farwellspech_peter_van_den_bossche_e.htm).

<sup>5</sup> Dispute Settlement Understanding, Art. 15.

<sup>6</sup> Debra P. Steger, The Founding of the Appellate Body, in G. Marceau ed., A History of Law and Lawyers in the GATT/WTO, Cambridge 2015.

<sup>7</sup> Dispute Settlement Understanding, Art. 17.2.

has made the Appellate body defunct. It has created a situation of reversal to GATT system where losing party used to block the adoption of panel reports.

## 1.2. Need of Appellate Body

Although many developing countries haven't been the major users of the dispute settlement mechanism, but the fact is that it is the developing countries who have the most to gain by this particular system. There are various reasons why a non-functioning appellate body is a problematic and frightening development for the countries which are developing in nature:

### 1. Law of the Jungle

The defunct nature of Appellate Body will result in the collapse of Dispute Settlement Mechanism as a whole. The WTO, would lose its authority to enforce rules, as every country in whose favour panel has not given its report would appeal in the void. In this scenario, in DSM, smaller countries will be in vulnerable situation as big players in international market will dominate them and will exert pressure on them to adopt the panel report, but at the same time if the report comes against the powerful country, they will use the immunity of appealing it the void.

### 2. No Right to Appeal

Every member country has a right to appeal the Panel report. The EU has stated that without the presence of Appellate body mechanism, *it may deprive WTO Members of their procedural right to an appeal before the Appellate Body that they otherwise should enjoy under the DSU. The existence of an appeal stage was an important part of the bargain struck in 1995.*<sup>8</sup>

### 3. Bad Panels

The main objective behind having the appellate body was to keep a check on the panel. The appellate body has done the modification in more than 80 percent of all appeals. This indicate that there exists inconsistencies in the panel report. Also there can be influence from powerful countries on Secretariat, as the Secretariat is involved in every stage, right from the initiation to

---

<sup>8</sup> EU Statement at the Regular Dispute Settlement Body (DSU) meeting on 26 April 2019, [https://eeas.europa.eu/delegations/world-trade-organizationwto/61599/eu-statement-regular-dispute-settlement-body-dsumeeting-26-april-2019\\_en](https://eeas.europa.eu/delegations/world-trade-organizationwto/61599/eu-statement-regular-dispute-settlement-body-dsumeeting-26-april-2019_en).

the end. *It has role from selection of panelists, setting timetable for disputes, writing 'Issue papers', drafting questions for adjudicators to ask the parties, and drafting the reports with conclusions*<sup>9</sup>.

In the light of the above stated reasons, it is worth considering that there is a grotesque requirement of Appellate Body.

## CHAPTER 2- BLOCKING THE APPELLATE BODY: THE USA AND THE WTO

### 2.1. Blockage of Appellate Body Appointments by USA

The present administration in U.S. is not satisfied with the World Trade Organization and it has not made any secret regarding this. President Donald Trump has labelled the WTO as being a 'disaster for the United States' in February 2018.<sup>10</sup> US Trade Representative, Robert Lighthizer had made a view few months back that in order to have the World Trade Organization work, the DSM have to change and he also had expressed his preference for GATT<sup>11</sup>, which is a non-binding dispute settlement system.

At the time of negotiating WTO agreements, no one may have foreseen that the sovereign power can be utilized within the System to prevent the appointment. As per the Dispute settlement rules, every member has the power to block the appointment of member in Appellate Body, as the appointments are done by DSB<sup>12</sup>, for which WTO Agreement not only states that its decisions under DSU are to be made by consensus<sup>13</sup> but also define consensus.

The first time a formal block was announced was in 2016 by USA. It was done for blocking the re-appointment of Appellate body member SeungWha Chang for a second 4 year term. The argument that was given by US was that his performance did not reflect the role assigned and this block of appointment is needed to prevent the emergence of a system where adjudicators

---

<sup>9</sup>Pauwelyn&Pelc, Who Writes the Rulings of the WTO? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement, SSRN (2019), <http://dx.doi.org/10.2139/ssrn.3458872>.

<sup>10</sup> Peter S Goodman, *'Trump Just Pushed the World Trade Organization Toward Irrelevance'* N.Y. Times (23 March 2018), <https://www.nytimes.com/2018/03/23/business/trump-world-trade-organization.html>.

<sup>11</sup> General Agreement on Tariffs and Trade (1947).

<sup>12</sup> Dispute Settlement Undertaking, Art. 17.2.

<sup>13</sup> Dispute Settlement Undertaking, Art. 2.4.

would overstep the limits agreed in DSU and WTO Agreement<sup>14</sup>. The crisis was then later resolved by the appointment of Hong Zhao and Hyun Chong Kim, in November 2016.<sup>15</sup>

Further in 2017, there was a disagreement between US and EU. EU requested that the Dispute settlement body conduct a joint procedure to replace Ricardo Ramirez whose term was going to expire on 30<sup>th</sup> June, and Peter van den Bossche, whose term was till end of December. This meant that there was no selection procedure started for replacement of Ramirez<sup>16</sup>. Then Hyun Chong Kim gave his resignation in August 2017, because he had to take position of Trade Minister of Korea.<sup>17</sup> The US criticized the fact that the former member still appears as signatories of reports and expressed its concerns regarding this. Thereafter USA blocked the proposal of Mexico to initiate the selection process for 3 Appellate Body Members.<sup>18</sup>

Thereafter, many negotiations continued but US made it very clear that it would continue to block the appointment until the issue of persistent overreach by AB would be addressed by the Membership.<sup>19</sup>

## 2.2. Objections of USA to Appellate Body's working

USA has the objection to Rule 15 of the Appellate Body Working Procedures,<sup>20</sup> which permits former Appellate body members to continue to work on the appeals which were assigned to them during their term of service. USA argues that this particular Rule is in contravention to Art. 17.9<sup>21</sup> which talks about four-year term of Appellate Body Members.

The second objection that USA has is related to Art. 17.5<sup>22</sup>, which states that in no case appellate proceedings should exceed 90 days, and this is counted from the date a party gives the notification regarding the appeal of panel report to the day the Appellate Body circulates its report. But in practice, due to heavy workload, complexity in cases, etc. reports get delayed beyond 90 days. In this situation, US has an argument that if AB exceeds the time-limit of 90

<sup>14</sup> WTO, 'Minutes of DSB Meeting of 23 May 2016' WT/DSB/M/379, ¶ 6.7.

<sup>15</sup> WTO, 'Minutes of DSB Meeting of 23 November 2016' WT/DSB/M/389, ¶ 13.3.

<sup>16</sup> WTO, 'Minutes of DSB Meeting of 22 May 2017', ¶ 10.3–10.4, 11.3.

<sup>17</sup> WTO, 'Resignation of Appellate Body Member, Communication from the Appellate Body, WT/DSB/73.

<sup>18</sup> WTO, 'Minutes of DSB Meeting of 29 September 2017', WT/DSB/M/402, ¶ 5.11, 6.2, 8.2, 8.6.

<sup>19</sup> WTO, 'Minutes of DSB Meeting of 27 August 2018', WT/DSB/M/417, ¶ 12.2.

<sup>20</sup> WTO, 'Working Procedures for Appellate Review', WT/AB/WP/6, Rule 15.

<sup>21</sup> Dispute Settlement Understanding, Art. 17.9.

<sup>22</sup> Dispute Settlement Understanding, Art. 17.5.

days, its report would be adopted by positive consensus<sup>23</sup> and not by negative consensus. This would lead to blockage of adoption of the report by the losing party in the dispute and dispute will remain unresolved.

### CHAPTER 3: 'CHOOSE WISELY': LIKELY SCENARIOS

#### Scenario I: Appeal in the 'Legal Void'

Since the Appellate Body has become defunct, the obvious risk that lies is that the losing party will appeal the Panel Report in the legal void and thereby block the adoption of it. Now, the point that whether this kind of thing will become normal or will remain as an exception is unpredictable. According to Article 16.4<sup>24</sup>, if any party has notified its decision by Panel to appeal, the panel report will not be considered until the appeal gets completed. Therefore, if there will be no Appellate Body, the case in appeal would be in limbo. Now to solve this either Appellate Body should be restored or a positive consensus of all the members will be required so that the effect of Article 16.4<sup>25</sup> can be neutralized. The latter would take us back to system like of GATT.

#### *Costs of Appeal in void*

There are costs attached to it. The first cost is of *emulation*, which means that if a particular member appeals in the void, the risk that other members will also do the same increases. Second Cost attached to it is of *reputation*, which means that whenever any member will block the Panel report by appealing it in the legal void, it can be seen as a bad move and may damage the reputation of that particular member at international level. Third cost attached is of *retaliation*; there can be scenarios where weaker member may be forced to accept the adverse panel report for the fear of retaliation.

<sup>23</sup> WTO, 'Minutes of DSB Meeting of 22 June 2018', WT/DSB/M/414, ¶ 5.10.

<sup>24</sup> Dispute Settlement Understanding, Art. 16.4.

<sup>25</sup>id.

*Option to Appeal and Trade war*

The option to appeal in void may lead to escalate trade wars. This is due to the fact that when weaker member will win at Panel stage, the adoption will be blocked by appealing it; similarly if any powerful member wins at panel stage, again it can be stopped from adoption by the way of appeal. This will create chaos and a sense of hatred among members.

*Panel and Legal Void*

Lastly, it will make the Panel irresponsible at some point of time. Since there will be no one above the Panel, the report of Panel will be the final word. There can be cases where panel will feel no need to explain the reasoning and also Panel can have contradictory rulings. But, another situation can also prevail that is Panel will be more aware and responsible for their findings as they were in the era of GATT.

**Scenario II: Automatic Adoption of Panel Reports**

The other scenario that can prevail is that no one appeal the panel report which will follow the automatic adoption of it. This can happen by way of signing of ex ante NAP by the parties either before a dispute arises or, before the interim report of Panel. At a time when neither of the parties know that whether it is going to win or lose, foregoing the right to appeal is easy. In the case of Indonesia- Iron or Steel Products, the parties signed such NAP<sup>26</sup>, in the context of Article 21.5.<sup>27</sup>

This particular NAP ensured that the other side would not have the option to appeal in case of event where a compliance procedure was needed.

But it is hard to imagine that any party would agree for this kind of ex ante NAP. In reality the concept of en ante NAP is attractive only from claimant's point of view. Also, if we look from political view it will be very tough call for any Government to opt for ex ante NAP. Therefore it will not be any wrong in stating that the practice of no appeal followed by automatic adoption is far from reality and certainty.

---

<sup>26</sup> Indonesia—Safeguard on Certain Iron or Steel Products, Understanding Between Indonesia and Chinese Taipei Regarding Procedures Under Articles 21 and 22 of the DSU, WT/DS490/13 and Indonesia Safeguard on Certain Iron or Steel Products, Understanding Between Indonesia and VietNam Regarding Procedures Under Articles 21 and 22 of the DSU, WT/DS496/14.

<sup>27</sup> Dispute Settlement Understanding, Art. 21.5.

### Scenario III: Appeal Arbitration

Apart from Scenario II, there exists another scenario i.e. of Article 25<sup>28</sup> appeal arbitration. This is the only option that prevents both i.e. the appeal in legal void and the automatic adoption of Panel Report.

European Union on 16 May 2019 circulated a draft consisting of the text that provides for an interim appeal arbitration under Article 25<sup>29</sup>. This can act as bilateral or plurilateral solution for any future disputes between the parties. If any member subjects itself to Article 25's interim solution, the parties agree that they will not appeal in the legal void (Scenario I), and in case of no arbitration appeal, ensures the adoption of panel report (Scenario II). Three arbitrators would be selected by the World Trade Organization Director General in random manner from the list of former Appellate Body Members.

It is however very much clear that not all cases can be covered by it, because of the fact that it is very hard even to imagine that US is going to sign this draft of EU. For WTO dispute settlement system, there are following elements: 1. Two-stage process i.e. panel and appeal; 2. Independence of adjudicators and 3. Binding dispute settlement.

The best thing about Article 25 appeal arbitration is that it meets all three elements, which no other Scenario stated before meet. But, the fact can never be ignored, that USA has been a main and large player which just cannot be excluded or ignored before making any mechanism. If we look at the Statistics<sup>30</sup>, in approx. 47 percent of all WTO consultations request filed, USA has been the main party; of all the Appellate Body reports issued, USA was a main party in approximately 68 percent of appeals, etc.

Basically, this scenario will also not cover all the disputes, and how many members and in which kind of disputes, parties' will sign is still a matter to watch.

## CHAPTER 4: CONCLUSION

---

<sup>28</sup> Dispute Settlement Undertaking, Art. 25.

<sup>29</sup> The EU draft proposal, <https://worldtradelaw.typepad.com/files/eu-ab-proposal.pdf>.

<sup>30</sup> Statistics, <http://worldtradelaw.net/databases/abreports.php>.

The crisis that is existing in the Dispute Settlement System of WTO is troublesome. In the short term, there is less probability that USA will lift its block on the appointment of appellate Body Members. There are three keys that can make an influence on if and when USA may lift its veto. First key is to find a solution to the concerns of USA regarding the issue of overreach by Appellate Body. Second key is negotiation to substantiate trade concerns, more particularly, rebalancing of USA-China relationship. And the third key or can say challenge is that how in the interim period Dispute settlement body can unfold.

Another solution can be the General Council, Dispute Settlement Body coming forward to save binding dispute settlement, by either majority voting or changing the entire working procedures.

The threat to appeal in the legal void will move the system between rule oriented system and power oriented system, which will gradually be closer to power oriented. It can lead to escalate trade wars also in worst situation as discussed above. Weaker countries will be at disadvantage as they will not be able to ensure their rights, while powerful members to WTO can do so by using its political and economic power. This will lead to the shift from rule based mechanism to power based mechanism as stated before also.

It is pointless to state, the situations and scenarios ahead are not clear. Two scenarios are prevailing in status quo, i.e. either all members are saddled with weakened multilateral system; or the USA is successful in its motive for reform in the WTO system.

To conclude my paper I can only state that what will happen is volatile and what is the appropriate solution to it is also questionable in nature. The only thing left is to see how the debate continues at the global stage concerning this issue and what will be the proper solutions to this problem of 'LEGAL VOID'.