

WTO and appellate body

March 27, 2020

Source: ET

Manifest pedagogy: WTO and disputes related to them will be at crossroads as there is shift in the way of appointment of new judges, growing appetite for protectionism and non-rule based trade.

In news: WTO appellate body has become dysfunctional.

Placing it in syllabus: World Trade Organization (WTO)

Static dimensions: Dispute settlement in WTO

Current dimensions:

- **Structure of body**
- **Role of USA**
- India bilateral negotiations for disputes
- Impact

Content: With the retirement of two of the remaining three members of the World Trade Organization (WTO) Appellate Body in December, 2019 and the Office of the United States Trade Representative blocking any re-appointments, the appellate body has been rendered dysfunctional.

As of now, WTO members are unable to reach consensus on a proposal to address concerns regarding the functioning of the appellate body.

Dispute settlement in WTO:

- The majority of the **disputes at the WTO concern trade remedy matters.**
- If a state violates the rules, affected states can without recourse to the WTO, adopt countermeasures such as imposition of anti-dumping and countervailing

duties.

- The WTO dispute resolution mechanism primarily aims to police the adoption of such countermeasures, namely whether they were warranted and otherwise imposed consistently with the rules.
- **Dispute Settlement Board (DSB)**, the WTO organ is responsible for adjudication of such disputes.
- It has the **sole authority to establish “panels” of experts** to consider the case and to accept or reject the panels’ findings or the results of an appeal.
- It **monitors the implementation of the rulings and recommendations** and has the power to authorize retaliation when a country does not comply with a ruling.
- **First stage is consultation (up to 60 days)**: Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.
- **Second stage: (up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude)**: If consultations fail, the complaining country can ask for a panel to be appointed. Officially, the panel helps the Dispute Settlement Body make rulings or recommendations.
- The panel’s findings have to be based on the agreements cited and as the **panel’s report can only be rejected by consensus in the DSB**, its conclusions are difficult to overturn.
- Rulings issued by the panels can be appealed at the Appellate Body (AB).
- The AB can uphold, modify or reverse the legal findings and conclusions of a panel.
- Hence **its decisions are final and adopted within 30 days by the dispute settlement body.**
- Sanctions can be imposed on a member in case of its failure to comply with the AB’s rulings.

Structure of body:

- The WTO Appellate Body was first **established in 1995.**
- The Appellate Body is composed of **seven members** who are appointed by the DSB to **serve for four-year terms.**
- Each person **may be reappointed** for another four-year term.



- Each member of the Appellate Body is required to be a person with demonstrated **expertise in law, international trade and the subject-matter of the covered agreements generally.**
- They are also required to be unaffiliated with any government and are to be broadly representative of the membership of the WTO.
- A **Chairman is elected among the Members to serve a one-year term,** which can be extended for an additional period of one year.
- He is responsible for the overall direction of Appellate Body business.
- The current Chairperson is Hong Zhao of China.
- A **Division of three Members is selected to hear each appeal** and each division elects a Presiding Member.

((Ujal Singh Bhatia was a member from India who got retired in December, 2019)).

Role of USA:

- Several U.S. provisions for imposing countervailing and anti-dumping measures are found to be inconsistent with core provisions of the WTO agreements.
- But the US administrations have long been unhappy with the so-called **judicial overreach of the AB.**
- **It has repeatedly accused the AB of allegedly straying away from the dispute settlement understanding** (DSU) in several disputes involving the U.S.' measures.

- It has even blamed that the **AB has failed to issue rulings within the 90-day deadline.**
- Now the **U.S. has chosen to starve the AB of funds** for its functioning as well as blocking the selection process for filling six vacancies.
- After December, 2019, AB is left with only one member, who will not be able to deliver any rulings on the pending trade disputes.
- However **many other WTO members have opposed the move of the US** and haven't agreed with the U.S. about the functioning of the AB.
- In early 2019, a **facilitator was appointed by WTO** members at a general council meeting to address the specific concerns raised by the U.S. about the Appellate Body.
- The facilitator finalised a **draft decision** on unblocking the crisis at the AB which **included a package of reforms** to improve the functioning of the AB.
- It also had **suggestions for launching of the selection process** for filling six vacancies to ensure that the AB remained functional after December 11, 2019.
- But the **U.S. trade envoy, Ambassador Dennis Shea rejected the facilitator's draft decision** on grounds that it failed to address the issues raised by Washington about the AB's overall functioning.

India bilateral negotiations for disputes:

- India had **contentions with the US regarding solar subsidies.**
- India had claimed that subsidies and **mandatory local content requirements in 11 renewable energy programmes in eight American states** are inconsistent with global trade rules.
- These states were offering incentives such as renewable energy credits through direct and indirect payments and rebates, tax credits and tax refunds for the purchase of

renewable energy systems manufactured in the states, to produce renewable energy equipment and systems.

- Though **India held consultations with the US on the matter in November 2016**, the talks failed.
- **India requested the establishment of a panel to rule on its claims.**
- It cited the measures to be inconsistent with the US' obligations under the General Agreement on Tariffs and Trade (**GATT**), Trade-Related Investment Measures (**TRIMs**) Agreement, and the Agreement on Subsidies and Countervailing Measures.
- **In June, 2019 the WTO dispute resolution panel ruled in favour of New Delhi.**
- The **panel found that all the US state measures provided an advantage for the use of domestic products, which amounts to less favourable treatment for imported products** and hence inconsistent with GATT 1994.
- However, New Delhi has challenged certain issues of law and legal interpretation covered in the panel's report.
- It has notified the dispute settlement body of its decision to appeal to the appellate body certain issues of law and legal interpretation covered in the panel report.

Impact:

- The fall of the Appellate Body may see the **adoption of more unilateral sanctions by states**, thus increasing the possibility of trade wars.
- However this would not render the WTO rules unenforceable.
- Experts opined that due to the threat of reciprocal sanctions, **states would remain compliant with the rules even in the absence of a functional Appellate Body** for dispute resolution.
- During the GATT regime, a remarkable 71% of panel reports were adopted using the positive consensus rule.

- Even where panel reports were not adopted by states they served as a basis for the parties to “bilaterally” resolve their disputes in a mutually satisfactory manner.
- Now the **fall of the Appellate Body effectively marks a return to the previous system as it hands states an opportunity to appeal an adverse panel ruling and effectively indefinitely delay its adoption.**