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# Analysing the Structural Demise of the Appellate Body of WTO with regards to New Appointments of Judges Blocked by the USA

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## ABSTRACT

*A paradoxical irony lies herewith, in the arena of international law. USA a builder of organisations, a parent body, a birth-giver, turns against its project; the World Trade Organisation, in a way as to stipulate its ruin and downfall by enabling the blockage of judges to its appellate body hereby, inevitably crumbling the institute in itself. Analysing the issue at hand, pivotal criteria are explored bringing the reader to understand the conception of the Dispute Settlement Body, its range and ambit of jurisdiction and decision making, along with the above stated contradictory angle. Alongside, earnest questions regarding the authenticity of the World Trade Organisation, its relevance in today's times pertaining to multi-lateral and bilateral treaties resonates supplementarily with the question being asked. A comparison is brought forward of the different dispute settling bodies of various organisations along with that of the World Trade Organisation, to comprehend the functioning in a seamless manner while simultaneously calibrating the steps taken by USA for its political vendetta. Lastly, suggestions as to how the organisation can reform in its working and dynamically fit into the status-quo has been elaborated in a manner which could resolve its identity crisis and ensuring its easy functioning. While understanding the functioning of the World Trade Organisation, its predecessor The General Agreement on Tariffs and Trade and its deterioration has also been systematically dealt with to provide the reader with an essence of history and showing the blatant juxtaposition between these two situations. These facets intertwined bring forward an analysis befitting the contemporary scenario.*

## I. INTRODUCTION

The advent of globalization has increased international trade even faster than the growth of the world GDP, this has resulted in economic interactions which in turn increase international economic interdependence. Owing to this, nations were unable to regulate trade, which is why effective international governance is needed for rule making and an effective

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enforcement mechanism. The World Trade Organization (WTO) finds itself at the epicentre of flourishing trade relations and disputes arising from it constantly. Not only does it primarily deal with trade Dispute Resolution Processes (DRP) but it strives to achieve a conducive and blooming trade environment for member countries all across the globe. The international trading system has emerged over the years, by enabling rapid cross border trades, a plethora of agreements, eliminating barriers, regulating tariffs and this system with the assistance of the WTO has developed a mechanism to resolve disputes between the parties involved, with an assurance that parties accept the ruling but are also authorized to institute an appeal at the Appellate Body (AB) provided they disagree with its preliminary ruling.

Truth being told, the WTO has not always presented itself to be in a position that pursues its agenda effectively because it has undergone frequent periods of crisis and threatening paralysis, which were noticed in the ministerial conferences of Seattle, Cancun and Geneva. After the Cancun collapse<sup>2</sup>, there were talks about the organizations ineffectiveness and it prompted people to see the WTO being at cross roads<sup>3</sup> or even in the condition which parallels it with the GATT and its failure.

The need for highlighting the identity crisis of the WTO has to do with, how one of the most prominent international organizations is combating with uncertainty in terms of growth, and finds itself in the middle of a mindless power struggle with countries demonstrating their unparalleled hegemony and questioning the authenticity of the WTO. An improbable demise of this trading organization could affect the dynamics of several countries, their regional and multi-lateral trade agreements which in turn could have consequences on the organized system of trade all across the globe. Thus, the maintenance of a proper balance between the rights and obligations of the members is also another prerogative which the WTO needs to pay heed towards.

## **II. THE PROCESS OF DISPUTE SETTLEMENT IN THE WTO**

To highlight this area of crisis, one needs to be familiarized with the dispute resolution mechanism (DSM) of the organization and its method of response during an issue. The WTO works to provide transparent and efficient trades across nations, by stimulating economic growth, employment and ensuring a levelled playing field. The apex decision making body of

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<sup>2</sup> Sungjoon Cho, 'A Bridge too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution', 7 *JIEL* 219, 220 (2004)

<sup>3</sup> Simon J. Evenett, 'Systemic Research Questions Raised by the Failure of the WTO Ministerial Meeting in Cancún', 2004 *LIEI* 1, 2. The 2004 Symposium of the WTO, held in Geneva to foster dialogue with civil society, has also been named 'Multilateralism at a Crossroads'.

the WTO is the ministerial conference which makes decisions on all matters under multi trade agreements or helps in resolving disputes regarding trade between two individual nations. The general provisions under article 3 provide an overview of the rules and regulations to be followed even before and while considering opting for the dispute resolution system.

The ministerial conference is followed by the general council, it forms the main body which carries out every working function of the WTO and simultaneously also matches up as the trade policy review board and the DSB. The DSB has the authority to settle the disputes by instituting a panel of judges, referring matters to any of the peaceful settlement dispute procedures, maintaining a strict surveillance over implementation of agreements and authorizing suspensions in case of non-compliance (Article 2). So once a complaint is filed, two ways can be sought to resolve it, either the parties find a conclusion which would be mutually decided by both of them or they involve themselves in adjudication. The latter stage would obviously be implementation of the reports by the panel.

The first stage of dispute resolution involves consultation which is the most effective settlement procedure and many disputes don't do far beyond consultations. (Article 4). The preferred objective of Dispute Settlement Body (DSB) is that the members settle the dispute in an amicable manner (bilateral consultations). If consultations fail, the parties still have the chance to come to mutually agreed solutions at any stage, but it is important to know that these mutually agreeable solutions distinguish the DRP of the WTO from other typical domestic judicial systems. Moreover, it is essential to understand that many of these systems are steadily moving towards including alternate methods of dispute resolution as a formal prerequisite instead of consultations, so that adjudication at a later stage can be based on that and that solutions can be found with mediators. Article 5 also provides for other forms of alternative dispute settlement which are voluntary like conciliation, good officer etc and these can be used instead of consultations which are non-judicial in application.

Next comes the AB which helps in the second way to resolve disputes. It is a standing body created with 7 persons that hear appeals brought about by members after their panel session fails to deliver an appropriate award. The AB like any other appellate court has the jurisdiction and authority to either amend, modify, uphold or reverse the decisions proclaimed by the panel, but the catch here is that the AB is the top most body to hear an appeal after which the report given by the AB must be accepted by the parties in a dispute. Since the AB acts as a supreme court its decisions are binding and non-appealable.

### **III. THE WTO LOSING ITS RELEVANCE**

There can be multiple reasons as to why the WTO is losing relevance in today's times and it would be a suitable hypothesis to proceed with providing pointers to discuss it systematically. Firstly, the DSM still takes a considerable amount of time during which the party complaining continues to suffer economic harm if the measure that is challenged is inconsistent with the WTO. Whereas in the first place, the WTO should have been in the position to broker meaningful agreements between the parties but instead many countries having ongoing disputes within them. Herein, since no provisional measures are available to protect the economic and trade interests of the complainant which then results in DSM becoming lax. Moreover, even after a prevailing settlement is resolved, it is noticed that the complainant party doesn't receive any compensation for the same, even though he suffered harm during that time, where the opposition was to implement the ruling, and adding to that, neither does the successful party receive any reimbursement from the other side as expenses. In the case of non-implementation, all the members don't have the ability to resort to suspension of obligations which showcases lack of imposition of penalties which eventually leads to the limiting authority of WTO. In some cases, it was also noted that the suspension of concessions was ineffective in ensuring implementation. Understanding this, it becomes easy to comprehend that a DSB needs to address these growing concerns swiftly and effectively, without the passage of an extreme amount of time, which results in the discontentment of the parties and the loss of trust in an organization.

Secondly, the WTO Buenos Aires meet in 2017 exposed the existential crisis of the WTO especially since developed countries had adopted a protectionist attitude. Members failed to reach a consensus on major issues and owing to the divergence of the members, with some members not supporting acknowledgment and the reiteration of key principles guiding the WTO, it led to the conference being unsuccessful. Coming to an important aspect that the Consensus model of the WTO has become a liability. This consensus model leads to deadlock between the member countries and the inability of a member to respond legislatively where it disagrees to the panel or to the interpretation of the AB. Consensus also leads to continuation of the status quo without any meaningful change and problems of disenfranchisement whereas reverse consensus challenges the institutional check-and-balance against AB's judicial finality. Basically, with consensus there comes inequality, as every member does not have the same ability or power to maintain vetoes. Moreover, consensus decision-making fails to take into account the dynamism of consent as decision-making by consensus fails to secure members' consent and as a consequence single undertaking leads to

a fragmentation of WTO's 'general will' thus the WTO decision-making process loses its legitimacy.

It would be incredibly fruitful to use the Rule 33 of the WTO's rules of procedure which would require councils and committees including other bodies of WTO to refer a matter in private when a consensus is unreachable. In reality, substantive divergences are a normal phenomenon and knowing that they exist, it is important for organizations to balance these contradictory interests. The reason there are more plurilateral negotiations which are taking place outside of the ambit of the WTO is because agreements within the WTO need the approval of all members to proceed which is next to impossible. The failure to reach a consensus could explain why the USA – EU (TTIP/TPP/TiSA) have been engaging in bilateral and regional trade agreements to have closed door negotiations on further liberalizations and to introduce new rules for their mutual trade in services. Such reforms could eliminate other members veto powers within the WTO even if they are opposed and would seem that small countries would be forced to conform with the set regulatory standards of other big market players. It is clearly witnessed that here the veto can act as an influence.

Fourthly, WTO does not have a separate body to enact fines and enforce sanctions/penalties on members, thus countries misbehave by raising tariffs, display business hostile actions to discourage imports if they aren't listened to. If there are rules to prevent these mishaps, the body cannot stay alive for long<sup>4</sup>.

#### **IV. BLOCKAGE OF NEW JUDGE APPOINTMENTS**

The American president, Donald Trump has held a negative view of the WTO and even threatened to pull out of the organization a couple of times. He accuses the WTO to have acted as an unfair judge for many multilateral treaties and for conducting judicial activism, including a long duration to wind up appeals. There have been several reports of a new legislation<sup>5</sup> being drafted by Trump that would aid him to abandon key aspects of the WTO like the most favoured nation principle. America has thus targeted the DSM and the AB of the WTO, by blocking specific appointments of members to the AB and this had started under President Obama. In its 2018 trade policy agenda and the 2017 Annual Report, the AB has been called the most significant area of concern.

Illustrations regarding the report have been provided which speak of concerns with the approach of the AB, ranging from procedural matters, such as a "disregard for the 90-day

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<sup>4</sup> Croley et al, 1996

<sup>5</sup> United States Fair and Reciprocal Tariff Act

deadline for appeals<sup>6</sup>” to the “continued service by persons who are no longer AB members,” or to disagreements with AB interpretations that the report claims to, for example, “significantly restrict the ability of WTO members to counteract trade-distorting subsidies provided through state-owned enterprises” or to “undermine the ability of Members to use safeguard measures<sup>7</sup>.” The United States has spelled out these and other concerns in detail to the DSB, most recently in its discussion about the AB’s tendency to review de novo questions of fact in violation of the explicit limitations in Article 17.6 of the Dispute Settlement Understanding<sup>8</sup>, including in particular with respect to the meaning and application of a member state’s domestic law (as opposed to focusing exclusively on a dispute panel’s interpretation of the application of WTO obligations to the facts established by the panel).

Due to this the Trump Administration has continued to block new appointments to the AB which has led to the vacancy of seats which is closing in on being dysfunctional. In 2018 there were 3 judges which have now come down to only 1 by the end of 2019. This has resulted in a crisis of the WTO. This clearly shows the dominance of the US on WTO and owing to this many countries knowing that there is an uncertainty to the future of the WTO have been discussing a plan B to settle disputes. This may lead to the advent of unilateralism and the mitigation of peaceful resolution of disputes but encouraging tariff walls, trade barriers and beggar-thy-neighbour protectionism. Its ironical how the US were pivotal to the building of the WTO but can now become responsible for its demise.

## **V. REFORMATION OF THE WTO**

These could be certain suggestions to help reform the WTO with the identity crisis it is facing. Firstly, if one ends up measuring improvements, we can see that efficiency and effectiveness are not the only things that one needs to consider but other aspects like participation, transparency and accountability are also important. But it can be noted that promoting these secondary elements, will not suffice in ensuring reformation, either ensure a change in the rules of WTO agreement, or amend/improve the practice, instead of focusing on the rules.

Secondly, the aforementioned text provided reasons as to why the consensus model of the WTO is becoming a liability, but it can be reformed by clearly spelling out when a country would be eligible to utilize their veto power. By understanding the greatest happiness of the

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<sup>6</sup> For a detailed expression of the U.S. concern on the 90-day issue, see U.S. Mission to the WTO, Statements by the United States to the Meeting of the DSB U.S. Mission Geneva, June 22, 2018, pages 9-21.

<sup>7</sup> Office of the United States Trade Representative: 2018 Trade Policy Agenda, op. cit, p. 23f.; see also Ambassador Dennis Shea’s Statement at the WTO General Council, U.S. Mission Geneva, May 8, 2018.

<sup>8</sup> Article 17.6 Scope of Appellate Review

greatest number theory of Jeremy Bentham, it would be appropriate to state that an individual member's interest in holding up needs to be weighed against the interests of all and specially in the light of the WTO mandate. Moreover, in cases where consensus is not possible it should be reflected upon otherwise could lead to paralysis. But moving from consensus to voting would actually disenfranchise the smallest and poorest members, as referred to earlier, dropping the consensus norm would make WTO more efficient. There can be two alternatives to consensus, the principle of variable geometry and qualified majority voting.

Thirdly, plurilateral negotiations need clearer guidelines and there must also be mechanisms clearly specifying how countries can join an existing plurilateral agreement, including the possibility of opt-out clauses which would ensure that the WTO would be more inclusive and would deliver on development.

Fourthly, it would be of pivotal importance to add that EU, Canada and Norway to address this situation have opted for DSM via Article 25, Arbitration and will continue to work with all WTO members on solutions to strengthen the WTO. Thus, an interim appeal arbitration has been agreed upon based on WTO rules and the organization DSB has been notified on the same, to reinforce the countries belief in transparency. Basically, a safety net has been provided to ensure that in case of the AB not been able to function, this mechanism should promote security and maintain stability of trade. This contingency measure maintains a two-tier DSS under the Dispute Settlement Understanding (DSU). Technically recourse to arbitration under the DSU as a temporary alternative is a viable option to parties in a dispute, credits to Art 25 and parties can choose their own procedures in the arbitration process, as long as the award is binding and non-appealable. Arbitration could easily replace the existent body, and this could come as a solution to address the problems of DSB.

## **VI. COMPARATIVE ANALYSIS OF THE DSB OF WTO WITH OTHER BODIES**

1. ASEAN – Article 22 of the ASEAN charter provides for maintenance and establishment of DSM in all fields of ASEAN cooperation. This DSM consists of consultation, panel, appeal review, adoption of report, thus making it similar to that of the WTO. Article 24 of the charter deals with resolving economic disputes with the aid of the Vientiane Protocol. But ASEAN prides itself to resolve the disputes immediately with these methods instead of following the protocol, but an important consideration needs to be taken here that all countries in ASEAN are in similar regions, which is very contrasting as compared to global members of the WTO.

2. ICC – It offers a wide range of services and administered procedures as an alternative to litigation to resolve disputes to the private sector, states and entities as well. Arbitration and Mediation are the most preferred modes of resolution by the international court of arbitration. Documentary Instruments Dispute Resolution Expertise (DOCDEX) is used for disputes related to trade finance instruments. Permanent panels of dispute boards are set up, MOUs are signed, conferences are established including hearing centres which take on a different approach, as compared to the WTO.

3. CFTA- Most of the procedures under the CFTA are borrowed from GATT. Specifically, chapter 18, which talks about establishing a Binational Trade Commission to oversee implementation. So, there are consultations, and other resolution methods as well like binational reviews and arbitration. What happened when the GATT was existent is that either the CFTA could opt for their own DSM or use GATT's.

4. NAFTA- This body has built on the DSM of the CFTA and GATT which contains mechanisms for multilateral treaties and includes broad horizons. NAFTA covers non traditional areas, and introduces the consensual mechanism as means of resolving contentious trade disputes. The NAFTA model rules of procedure can keep changing case by case to accommodate new disputes but the NAFTA chapter 20<sup>9</sup> mechanism is similar in scope and jurisdiction to the WTO's DSU. The WTO along with NAFTA, in matters of DSM are legal systems, which are composed of a formal adjudicatory decision-making process including effective enforcement mechanisms, as distinct from more pragmatic and flexible models that rely upon diplomatic negotiations between treaty partners-or political power to resolve conflicts over the interpretation and application of international agreements.

## **VII. FAILURE OF GATT**

After the UN replaced the league of nations, the international trading system found itself losing relevance and soon enough General agreement of tariff and trade was shelved.

Under the GATT, the Tokyo Round established a separate DSM which was negotiated during that period, such as different subsidies and anti-dumping. In effect, the GATT consisted of independent agreements with their own DSM. Moreover, under GATT, the panels always sought to give solutions that were mutually accepted by both the parties. Even if one party refused the panel was set aside. Thus, under the GATT DSM, the losing party in a dispute could block the adoption of a panel ruling.

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<sup>9</sup> Chapter 20 of the NAFTA provides a means for resolving disputes among the NAFTA governments over the application and interpretation of the NAFTA

WTO DSU created a more potent DSM than had existed previously and was part of the global gradual shift from a diplomatic and power-based approach in the settlement of international disputes to a more legalistic approach for dispute resolution. The WTO is stricter this time than the GATT and therefore countries must comply with the rules. Also, the mechanisms of dispute resolution are well elaborated in the WTO agreement which weren't the case in the GATT<sup>10</sup>. The GATT DSB was slower, less automatic and susceptible to blockages but unfortunately one does not see a faster, quicker and more suitable approach even in the WTO. The GATT started facing backlash in its years and this was primarily because of its DSM. It was said that the system was inappropriate and not conceived well as it gave judicial solutions to problems that could have been resolved only via negotiations and secondly, the system had become irrelevant because it was not used except only by the USA and had eventually become impractical as its usage couldn't have been expanded. Moreover, the long delays taken for dispute resolution were a massive concern and more so since the GATT couldn't implement its decisions it was considered a failure.

If noted precariously, these reasons also attribute a great deal to the WTO losing its relevance and blindly following the unsuccessful path set up by GATT. After the Tokyo round, the USA had even complained that the system's ineffectiveness prevented the USA from enforcing its rights under GATT, and if we look closely, the reason given by the USA for blocking the appointment of judges is also similar to what was experienced earlier. It was also said that in the middle years of GATT's history, the DSB was more akin towards the consensus and negotiation system which was described as fragile, and if you look at the current times, the Consensus model is being deemed a liability as it results in stagnation.

Another operational criticism received by the GATT was that it discriminated and was extremely biased towards the developed countries and wasn't predisposed towards the developing countries. Even today WTO is being blamed for its biased nature, for example the most favoured nation principle, free trade, high tariffs on agriculture, diversification, ignoring cultural/social factors etc.

Considering these factors, it would be appropriate to infer that one of the main reasons for the decay of the GATT is due to its DSM and a further inference into the world of WTO would lead to saying that the same fate of GATT will be showered onto WTO if its mechanisms don't see a change soon enough.

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<sup>10</sup> (Schott, 1994.pg 125-129).

## **VIII. CONCLUSION**

The WTO in all its glory is still one of the most respected international organizations in the world, but with them slipping into choppy waters, they could end up disregarded in a couple of years by their own member countries, the same fate suffered as the GATT. To mitigate these concerns, a systematic approach needs to be adhered to which could lead to a reformation of the WTO. But considering the hegemony asserted by the USA on WTO, it would be a chaotic situation to step out of. Even though the DSM is unable to deal with global order and trade, it is a fine method to resolve disputes arising regionally, as displayed above. Unfortunately, the upcoming time will reveal what holds in store for the WTO and determine its future.

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## IX. REFERENCES

1. ASEAN Dispute Settlement, [https://asean.org/?static\\_post=asean-protocol-on-enhanced-dispute-settlement-mechanism](https://asean.org/?static_post=asean-protocol-on-enhanced-dispute-settlement-mechanism).
2. Bown, Chad (2019), The 2018 trade war and the end of dispute settlement as we knew it, <https://voxeu.org/article/2018-trade-war-and-end-dispute-settlement-we-knew-it>.
3. Carl Tannenbaum, r. b. (november 2018), is the WTO losing relevance? *Northern Trust*, <https://www.northerntrust.com/united-states/insights-research/2018/market-economic-commentary/wec/is-wto-losing-relevance>.
4. Davey, William (1987), Dispute Settlement in GATT, *Fordham International Law Journal*
5. Decision making in the WTO: is the consensus practice of the WTO adequate for making, revising and implementing rules on international trade? (2005), [https://www.wilmerhale.com/en/insights/publications/decision-making-in-the-world-trade-organization-is-the-consensus-practice-of-the-world-trade-organization-adequate-for-making-revising-and-implementing-rules-on-international-trade-autumn-2005#\\_ftn7](https://www.wilmerhale.com/en/insights/publications/decision-making-in-the-world-trade-organization-is-the-consensus-practice-of-the-world-trade-organization-adequate-for-making-revising-and-implementing-rules-on-international-trade-autumn-2005#_ftn7).
6. Gantz, David A. (1999), "Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties." *American University International Law Review* 14, no. 4: 1025-1106.
7. Jones, e. (2014). how should the wto reform itself? *world economic forum*. <https://www.weforum.org/agenda/2014/10/wto-trade-reform-veto-consensus/>.
8. Levy, Philip (2010), Alternatives to consensus at the WTO, <https://voxeu.org/article/alternatives-consensus-wto>.
9. Malkawi, Bashar (2019), Can Article 25 Arbitration Serve as a Temporary Alternative to WTO Dispute Settlement Process? <http://arbitrationblog.kluwerarbitration.com/2019/01/05/can-article-25-arbitration-serve-as-a-temporary-alternative-to-wto-dispute-settlement-process>.
10. Proposals to reform the WTO Appellate Body, Communication from countries to the general council, (2018), [https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157514.pdf](https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf).
11. Pettinger, Tejvan (2019), <https://www.economicshelp.org/blog/4/trade/criticisms-of-wto/>.

12. Schott, Jeffrey and Watal, Jayashree (2000), Decision Making in the WTO, <https://www.piie.com/publications/policy-briefs/decision-making-wto>.
13. The Dispute Resolution Services ICC, see at <https://iccwbo.org/dispute-resolution-services/>
14. The DSU WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) 30.
15. The WTO Covered Agreements, [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/dsu\\_09\\_e.htm#app\\_1](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_09_e.htm#app_1) 31.
16. The failure of GATT- Analysis, (2017), <https://www.ukessays.com/essays/economics/the-failure-of-gatt-and-wto-agreements-economics-essay.php>. Decision Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on Internation

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