

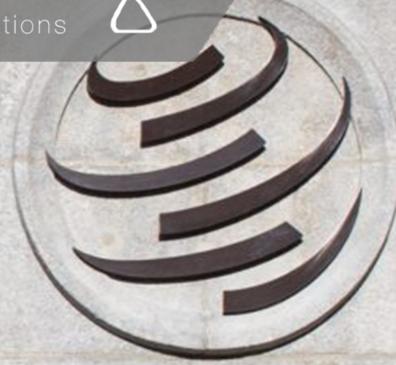


ECOSOC: Economic and Social

Student Officer: Melike Şen

Issue: Exploring alternative measures to settle trade disputes in light of the closure of the Appellate Body (AB) of the World Trade Organization (WTO)

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WTO OMC

WORLD TRADE ORGANIZATION

ORGANISATION MONDIALE DU COMMERCE

ORGANIZACIÓN MUNDIAL DEL COMERCIO



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I. Introduction

The World Trade Organization (WTO) is responsible for controlling the global rules of trade among nations. However, WTO is facing a serious problem in its system about settling disputes among its members. WTO has an appeal court which acts as a final arbiter and is responsible for resolving and ending such disputes. According to the WTO rules, three judges have to listen to each case. On December 10, 2019, solely one judge was left. The reason for this is that the United States of America (U.S) does not allow the recruitment of new judges to the Appellate Body (AB). Even though other WTO members proposed to do a selection over and over, there aren't any new judges selected for the AB. One of the main functions of the WTO has always been settling trade disputes since the first day it was established. Pascal Lamy, a former director-general, called the system "WTO's crown jewel". The system has also been introduced as "the busiest international dispute settlement system in the world"(Walker). The biggest concern of the U.S about the dispute settlement system of WTO is "judicial overreach" (Walker). Judicial overreach means that the WTO controls in a way that forms new obligations for WTO members. The U.S. does not only think that the rulings go too far but also implies that WTO forms new laws according to specific situations. Moreover, this is not the only concern the U.S. has towards the AB. The U.S. also states that the dispute settlement system has procedural issues. The AB does not rule quickly as it used to and it proceeds to hear cases that they have already started working on or the ones that they have concluded. There are other WTO members who are also sharing the same concerns as the U.S. However, none of them believes that disabling the functioning system of the AB is the right thing to do. President Trump has threatened to pull the U.S. out of the WTO because he claims that they lose almost all of the lawsuits and the organization benefits every WTO member except the U.S. This approach also contains action against China such as imposing tariffs on steel and aluminum imports without getting permission from the WTO's dispute settlement system. Even though the U.S. says that they impose tariffs in order to protect their national security, many commentators see this as an eagerness to protect U.S. producers from competition. Managing the AB is not the only responsibility of the WTO and there are other significant responsibilities of the WTO such as assisting developing countries in improving their economy in order for them to benefit from trade and monitoring the



policies and negotiations of WTO members. Therefore, the loss of the AB does not mean WTO will come to an end and lose its purpose entirely.

II. Involved Countries and Organizations

United States of America

The current administration of the U.S. made it pretty clear that they are not pleased with the WTO and especially with its dispute settlement system. President Trump labeled the WTO as a “disaster” after the announcement of tariffs applied to Chinese products in order to pressure China into approving demands for alterations in its economic system. Moreover, the U.S. Trade Representative, Robert Lighthizer, stated that the “dispute settlement system has to change in order for WTO to work properly” (Pauwelyn). Even though the U.S. first pressured for the formation of an applicable dispute settlement system at the Uruguay Round negotiations, it was a risky undertaking due to the fact that an independent adjudicator would be able to control the legality of the U.S. measures. Although the Senate accepted the agreements, John Jackson, a law professor, stated his concerns by saying “Once the United States deems it necessary to take certain measures or actions to safeguard its significant national interests, it is empowered to escape from the binding of international rules and norms, to breach its international obligation undertaken in the light of international treaties, and to go in its own way.” (Pauwelyn).

World Trade Organization (WTO)

WTO members were very aware of the fact that there was a sovereign power among them such as the U.S. However, they have not foreseen the chance that this power could be exercised within the WTO in order to prevent the appointment of AB members. After the U.S. blocked the selection of the new Appellate Body Members (ABMs) in 2016, since mid-2017 they have been blocking the appointment of new ABMs. Some WTO members have taken action on this issue and entered into bilateral agreements. They either stepped back and didn't appeal or created a bilateral mechanism that switched appeals with the arbitration. WTO members may not overrule the U.S.'s blocking appointments but they may form, with an ex-ante agreement, a mechanism to warrant mandatory dispute settlement. Among all of these alternatives, there is DSU (Dispute Settlement Understanding) which can be considered as the best alternative. It allows an arbitrator to hear an appeal if the AB is incapable of functioning such as not having a minimum of three judges to hear an appeal. Although arbitration is not the same thing as an AB, WTO members will be able to proceed with trade agreements, the organization won't become paralyzed for all its members, and an alternative framework will be created for the current binding and compulsory WTO dispute settlement.



III. Focused Overview of the Issue

1. Blocking the Appellate Body: Conflict Between the WTO and the United States of America

Consensus requirement emphasizes that any WTO member can veto Appellate Body member nominees. Even though the U.S. was always dissatisfied with the dispute settlement system, the first formal block was announced in 2016 under the Barack Obama administration. The U.S. was able to block the reappointment of ABM Seung Wha Chang for a second four-year term. They claimed that “his performance did not reflect the role assigned to the Appellate Body by members in the DSU”. However, the crisis was solved with the appointment of Hong Zhao and Hyun Chong Kim in November 2016.

Afterward in early 2017, Dispute Settlement Body (DSB) formed a joint procedure for the replacement of Ricardo Ramirez and Peter Van den Bossche. Mr. Ramirez’s term would end on 30 June which basically meant that there wasn’t any selection process for the replacement of Mr. Ramirez. In August 2017, Hyun Chong Kim resigned from his duty to become the Trade Minister in Korea. The United States accused WTO of still working with former ABMs. An Appellate Body report on 5 September was signed by former ABMs Kim and Ramirez. The United States used this reason and blocked Mexico’s offer to start the selection process of new ABMs.

Negotiations about the issue continued but the U.S. didn’t change its mind. They made it pretty clear that they won’t be allowing any further selections if their concerns are not addressed. In August 2018, as the first term of the ABM Shree Baboo Chekitan Serving ended, the Chairman of the DSB brought up the issue of his re-appointments as an ABM. The United States again blocked this re-appointment not because they had an issue with the ABM in person but because they were displeased with the abusing authority the A.B. gained with the dispute settlement system.

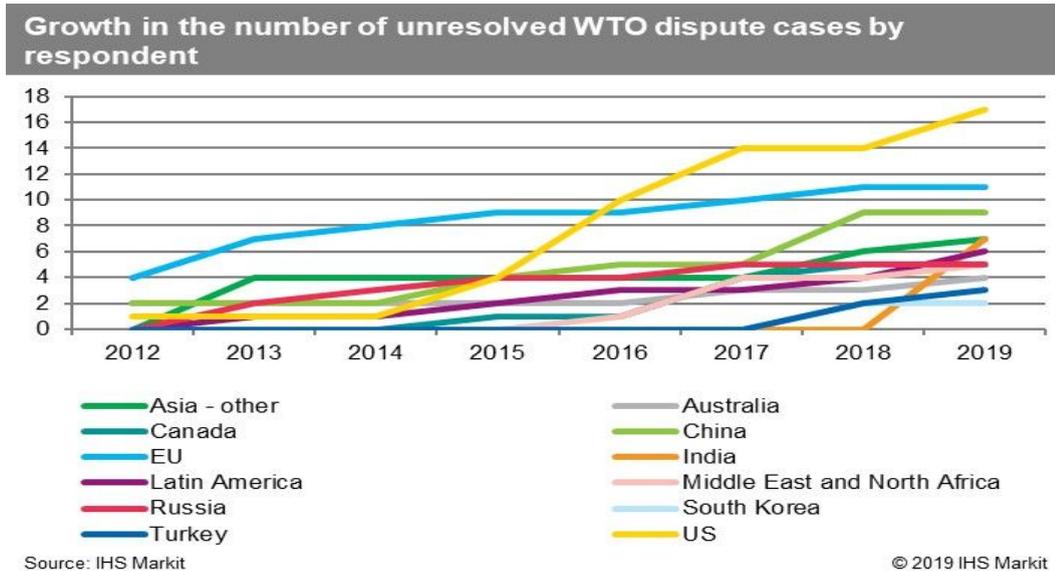
2. The Objections of the United States to the Appellate Body’s Ruling

One of the reasons the U.S. is displeased with the ruling of the AB is its objection to Rule 15 of the Appellate Body Working Procedures. It allows former AB members to take place on appeals to which they are given during their terms. The U.S. claims that Rule 15 juxtaposes with the four-year term limit and attendance of former ABMs should need authorization from the DSB.

The U.S. has another significant concern on the issue. DSU Article 17.5 says that “in no case shall appellate proceedings exceed 90 days”. However, due to the workload, complex cases, and long translations cases take longer time and Appellate Body reports are currently emitted more than 90 days



after the appeal. Consequently, as can be seen in Graph 1 below unresolved WTO dispute cases increased as years passed by.



Graph 1: "Growth in the Number of Unresolved WTO dispute Cases by Respondent"(WTO Dysfunction)

Alternative Choices

According to Article 17.1 DSU, The AB must contain 7 members, "three of whom shall serve in any case". Bilaterally, parties may accept not to appeal panel reports and look for arbitration under DSU Article 25. However, if a member insists to keep the compulsory dispute settlement system this may not be the right choice.

They could enter into an ex-ante agreement if they prefer to preserve the compulsory dispute settlement system. Each member of WTO won't accept the ex-ante agreement immediately. However, if an adequate number of signatories are collected to guarantee the subsistence of the dispute settlement system, this will not solely settle their disputes but also improve WTO rules and procedures. An arbitration system can have a major influence on WTO rules if it is approved by a majority of the Membership. If members that prefer to stay outside of this organization and prefer to preserve their freedom in order to make separate pronouncements notice that the trade regime of WTO has improved and developed in a different direction they may change their policies and start working to restore the AB.



IV. Key Vocabulary

Arbitration: Arbitration may be a strategy in which a dispute is submitted, by an understanding of the parties, to one or more mediators who make an authoritative decision on the dispute.

Appellate Body: The AB is composed of seven individuals who are designated by the Dispute Settlement Body (DSU). Each individual from the AB must be a part of a recognized authority, with illustrated ability in law and international trade.

Bilateral: Including two parties, particularly nations.

Dispute Settlement: Dispute settlement is the method of settling disputes between two parties. By becoming a part of WTO, if countries believe that their fellow members are in infringement of trade rules, they will utilize the multilateral system of settling disputes rather than taking action individually.

Plurilateral: In economic jargon, a plurilateral agreement means that it is a multinational agreement among two or more countries but not a great many.

Adjudicator: The adjudicator is an individual who acts as an arbitrator to resolve cases.

Ex-ante: Ex ante means relies on prediction. It also means beforehand or before the occasion.

Compulsory Dispute Settlement System: This system is established in order to settle the trade disputes between WTO members consistent with the WTO agreement.

V. Important Events & Chronology

Please write a timeline concerning the agenda item. Make sure that it is detailed and includes all of the essential dates.

Date	Event
November 2016	In 2016 for the first time, the U.S. blocks the appointment of the new ABMs. However, it was solved in November 2016 with the appointment of new ABMs, Hong Zhao and Hyun Chong Kim.
August 2017-2018	After the resignation of Hyung Chong Kim and after the terms of ABMs such as Ricardo Ramirez and Shree Baboo Chekitan Srvansing ended the U.S. continued to block the appointments of new ABMs.



December 10, 2019	The terms of two of the three Appellate Body members expired and the dispute settlement body became incapable of functioning.
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VI. Past Resolutions and Treaties

Dispute Settlement Understanding (DSU) is the main agreement about settling disputes in WTO. The appellate Body must act according to the DSU articles and WTO members can't violate them. It is true that DSU was sufficient enough to settle the disputes among the nations, however, the U.S. being in the first place, countries such as Canada and Norway had complaints about implementing those WTO rules. They claimed that WTO members are not adhering to WTO rules as written. They claimed that WTO gained such power that they are not following the DSU anymore and forming new obligations for the WTO members. According to the DSU, Appellate Body must have seven members and "three of whom shall serve in any case". Even though the United States' dissatisfaction with the dispute settlement system is not directly about the DSU, because they don't believe that the AB or the WTO members won't follow the DSU, they are blocking the appointment of new AB members. On 10 December 2019, there was solely one Appellate Body member left causing the AB to become incapable of functioning.

VII. Failed Solution Attempts

Negotiated solutions on this issue have repeatedly failed due to the fact that it requires the recomposition of the Appellate Body. In 2018 the U.S. claimed that they support a multinational dispute settlement system; however, they said that international diplomats always create new obligations for the U.S. and its selected officials that they never approved. Later in 2018, WTO members offered a WTO reform in order to review the powers of the AB and put a time limit for the AB reports. The U.S. rejected this offer at the General Council and stated that they don't want to permit anything that is prohibited on the current Dispute Settlement Understanding. They want to "ensure that the system adheres to WTO rules as written".

There are three options for member countries until a negotiated solution is found. Primarily, they may try to overcome the U.S. block by a "procedural maneuver" in order to allow the appointment of new AB members or proceed to issue reports without the adequate number of ABMs to hear an appeal. Secondly, they may prefer to do bilateral ad-hoc agreements and permit the disputes to be adjudicated without an AB. Finally, there is a plurilateral solution to this issue which will allow this dispute settlement system to continue working among the willing WTO members.

VIII. Possible Solutions



Members may agree to arbitrate under Article 25 DSU. These appeal arbitration agreements entered into between Canada and the EU and between the EU and Norway. However, WTO members can go beyond the bilateral agreements and agree upon a plurilateral agreement among the willing members such as an ex-ante agreement. This can be done under an appeal arbitration agreement under Article 25. However, the agreement not to appeal can cause enforceability problems and ex-ante agreement to arbitrate contradicts the aim of Article 25. However, a proper appeal Arbitrator can guarantee binding compulsory dispute settlement while following the WTO commitments. An ordinary arbitrator wouldn't be able to do these things. As well as there are questions about the enforceability of the agreement, there are also questions whether any such agreements are permissible. Article 17 of the DSU says that "parties to the dispute... may appeal a panel report". Once there is a decision to appeal according to article 16.4 of DSU, the DSB (Dispute Settlement Body) is prohibited from implementing the panel report until the appeal is completely done. For this reason, ex-ante agreements not to appeal are juridically questionable and hard to enforce against a stubborn defendant.

IX. Useful Links

- This link is about the fundamentals of the dispute settlement system and elaborates upon the US veto about new ABM's being selected to the Appellate Body:
<https://academic.oup.com/jiel/article/22/3/297/5609188>
- This link focuses on the United States' point of view about the current AB crisis and talks about how President Trump feels about the situation: <https://www.bbc.com/news/business-50681431>
- It is a beneficial link for delegates to get an overview of the issue:
[.www.bakermckenzie.com/en/insight/publications/2019/12/deadlock-at-wto-appellate-body](http://www.bakermckenzie.com/en/insight/publications/2019/12/deadlock-at-wto-appellate-body)
- This link also discusses the objections of the U.S. and highlights what reforms are required to improve the AB: <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>
- It contains some examples of the objections and the oppositions of the U.S.:
<https://www.finance.senate.gov/imo/media/doc/052208wmttest.pdf>
- These two links provide information about past solution attempts. Moreover, past attempts may provide an initial basis that delegates can elaborate upon:
https://www.wto.org/english/news_e/news20_e/minis_24jan20_e.htm
https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf



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