



WTO APPELLATE BODY CRISIS: CAUSES AND POSSIBLE REMEDIES

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Abstract

WTO appellate body (AB) which is considered to be one of the central pillars of International Trading System has been working as one of the most successful dispute settlement body since its inception in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). However, in recent years, AB is facing a severe crisis as there are not enough judges in the forum and United States of America vetoing the appointment of new judges alleging AB is overreaching through procedural discretion and interpreting the texts of the treaties and thus exercising power that was not given to it under the WTO agreement. Since WTO regulates world trade, a paralyzed dispute settlement body is a threat to the existence of the whole organization.

Very likely, it will cause a severe disruption in global trade. As the global pandemic is already upsetting the global trade, if the AB crisis is not fixed urgently, we might see the end of WTO as we know. Appeals are piling up, and no one knows when they are going to get the decisions. This article shows the overall crisis of the AB with its severe deadlock on the dispute settlement task due to the vacant posts. Again, an endeavor shall also be made to show the real causes of such deadlock, including the political and economic factors. Finally, this article focuses on the possible way out as to how the issues can be solved to make the WTO be a true and effective mechanism of world trade dispute settlement.

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Introduction

The Appellate Body (AB) is one of the most important organs of the WTO as envisaged with the task of hearing appeal against the decision of the Dispute Settlement Panels and thus gives the finality of order as regards to the dispute between or among the members of the WTO. Since its inception in 1995, the dispute settlement mechanism of WTO, by resolving a number of international trade disputes³ among the parties, has achieved the reputation of the ‘crown jewel’ of the world trading system.⁴

Today, however, this ‘crown jewel’ is gradually losing its glory and fall in crisis due to the failure of the WTO members to negotiate among themselves regarding the updates to the rulebook, including rules on dispute settlement itself.⁵ Again, total number of members of the AB is ideally seven including the chairman. But on the 10th December, 2019 the AB faced severe crisis as only one member remains in the body where the minimum required number of members to present to hear an appeal is supposed to be three.

The following paper will explore and examine the reasons for current deadlock in the Appellate body through discussing the relevant cases, incidents and opinions of prominent scholars. The third chapter of the present article will put forward some possible solutions to the issues AB currently facing whereas the fourth chapter will critically evaluate the given solutions under WTO provisions and finally the last chapter will conclude with exposing the consequences of the current situation and why we should protect WTO from this curse.

³ The WTO dispute settlement mechanism contributes a lot in settling world trade disputes. For example, as of March, 2019, a sum of over 520 disputes have been submitted to the WTO dispute settlement mechanism since 1995. With the span of period between 1996 and 2017, the AB dealt with 176 appeals out of which the US was a party to 85 disputes where 55 times she initiated the appeal. For more details, please see Andrew Stoler, ‘*Crisis in the WTO Appellate Body and the Need for Wider WTO Reform Negotiations*’ (2019) Institute for International Trade (Policy Brief-1), The University of Adelaide at p 2.

⁴ Xuhui Emma, ‘Review of ‘The Dispute Settlement Crisis in the World Trade Organization’ *WTO Chairs* , 14 Jan 2020. Available at <<http://wtoru.ru/analitika/review-of-the-dispute-settlement-crisis-in-the-world-trade-organization-article/>>. [Accessed on the 15th June 2020]

⁵ *ibid*



Reasons for the Deadlock in the Appellate Body (AB)

Regarding the WTO and more specifically about the AB problems, there is a statement made by the US representative in December 2018 Trade Policy Review⁶. He cited few main areas of concern with the WTO:

- a) problems in regards to the DSU and Appellate Body;
- b) Chinese incompatible approach to the WTO's policy;
- c) failure of the WTO negotiating arm's to address the different challenging situation specifically failure to mitigate a flawed approach to developing Member status and concerns relevant to the 21st century economy; and
- d) few Members' tenacious attitude and lack of behavioral transparency.⁷

Here, the main apparent reasons for the deadlock in the AB are given below:

1- Judicial Activism by the Appellate Body

The first objection raised by the USA regarding the AB is that it overreaches through the judicial activism though the recommendations and rulings of AB 'cannot add to or diminish the rights and obligations provided in the covered agreements'⁸. According to the US, the AB, by overstepping its jurisdiction time and again, is creating new rules, which is unwanted and *ultra vires* to the mandate of the AB. Another claim by the USA is that the Appellate Body disdains the mandate of AB by analyzing and stating *obiter dicta* in their judgments.⁹

⁶ 'Statement of the United States by Ambassador Dennis Shea at the 14th WTO Trade Policy Review of the United States of America' in Geneva, Switzerland [17 December 2018] . Available at: *Office of The United States Trade Representatives*. May be found also at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/december/statement-united-states-ambassador>.

⁷ *ibid*

⁸ Article 3.2 Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [herein referred to as DSU]

⁹ US objection concerns that Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements. That's why US made the cogent reasons, as it claims, that the findings and reasoning of the AB in *US-Zeroing (Japan)* and *US-Zeroing (EC)* are seriously flawed.



For example, the US said that in *Argentina – Financial Services*¹⁰, the analysis made by the AB was nothing but *obiter dicta* which overturned the findings of the Panel and needlessly supplemented to their analysis relating to the different other provisions of the General Agreement on Trade in Services (GATS) which were not in issue. The AB's behavior, according to the United States, like academia is out of mandate as 'it is not the role of the panels or the Appellate Body to 'make law' outside of the context of the resolving dispute'¹¹ because it is the duty, mandate and exclusive authority of the Ministerial Conference and the General Council to 'to adopt interpretations'.¹²

2- Allegation regarding the judicial overreach

Another concern raised by the United States is relating to the 'judicial overreach' of the Appellate Body in regards to the interpretation of the WTO law¹³. US alleges that, apart from norm interpretation, AB engage in creating norm as well for which it was not warranted¹⁴. For example, in the *US–Clove Cigarettes*¹⁵, the United States criticized the overreach of the Appellate Body stating that where the issue of different treatment between menthol and clove cigarettes was not raised by the panel¹⁶, the AB unbecomingly discussing the very matter went for 'judicial overreach'.

¹⁰ Appellate Body Report, '*Argentina – Measures Relating to Trade in Goods and Services (Panama vs Argentina)*', WT/DS453/AB/R (AB-2015-8), Panel Report was adopted 30th September 2015 and AB Report adopted on the 9th May 2016.

¹¹ US argument gets supported by the AB in *United States-Measures Affecting Imports of Woven wool Shirts and Blouses from India* Case [WT/DS33/AB/R Adopted in the 15th April, 1997](97-1773) where the AB asserts in p. 19 that "[W]e do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."

¹² The text of Article 3.2 DSU writes, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

¹³ Payosova, Tetyana, Gary Clyde Hufbauer, and Jeffrey J. Schott, '*The dispute settlement crisis in the World Trade Organization: causes and cures*' (2018) 18-5 PIIE (Policy Brief) at p 8

¹⁴ *ibid*

¹⁵ *United States – Measures Affecting the Production and Sale of Clove Cigarettes (Indonesia v US)*, DS 406 (Adopted on 24th April 2012)

¹⁶ DSB, Minutes of the Meeting, June 27, 2012, WT/DSB/M/315, paras 74 to 75.



3- Objection regarding precedence

The US alleges that the reports adopted by the AB do not create any binding precedent on subsequent cases for the future as it is not allowed in WTO DSS.¹⁷ But the AB, while dealing with different cases, followed the previous reports in such a way to have a persuasive value which adds to the DSS to improve the security and predictability of the multilateral trading system under Article 3.2 of the DSU.

The US concerns, in fact, to the Appellate Body's view that a panel must follow a prior Appellate Body interpretation unless the panel has "cogent reasons" for departing from that interpretation.¹⁸ Further, the Appellate Body in *US-Stainless Steel (Mexico)* said that the reports are only binding on the parties between whom the particular dispute is to be resolved. But this does not qualify by DSB to disregard it as being worthless as the panels should follow previously adopted AB reports for the "development of a coherent and predictable body of jurisprudence".

However, a note to be kept in mind that this is more fully relevant for the cases where the issues are similar. Thus, it does not create any legal obligation for the DSS to use that interpretation despite its persuasive value. Thus, this common law trend, though, having a purpose to bring certainty and predictability in WTO dispute settlement regime but created the concern for the US in the name of judicial overreach.

4- Allegations regarding the working procedure/Disregard for appeal time frames

As per the provision of the WTO Working Procedure, persons are appointed as members to the Appellate Body by the DSB shall continue to hold office for a four-year term and a member may be reappointed only once¹⁹. There is nothing in the provision to suggest that this four-year term is to be interpreted as flexible. Neither is there any assurance for any member that once appointed, he will be re-appointed for the second term. Despite this specific provision, certain Appellate Body members have continued to work on appeals even after the expiry of their terms.

¹⁷ The appellate Body itself has stated that its reports are not binding on panels. More details can be found on United States – Final Dumping Determination on Softwood Lumber from Canada [*US – Softwood Lumber Dumping (AB)*], DS-264 para. 111. Also see Gilbert Gagne, 'The Canada-US softwood lumber dispute: a test case for the development of international trade rules' (2003) 58 *International Journal* at 335-368.

¹⁸ The Origins of the "Cogent Reasons" Approach to the Precedential Value of Appellate Body Reports, *International Economic Law and Policy Blog*. Also available at: <https://ielp.worldtradelaw.net/2019/06/the-origins-of-the-cogent-reasons-approach-to-the-precedential-value-of-appellate-body-reports.html> [accessed on the 18th June 2020]

¹⁹ Article 17:2, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [herein referred to as DSU]



The justification lies to the provision of Rule 15 of the Appellate Body Working Procedure which suggests that “[A] person who ceases to be a member of the Appellate Body, may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a member of the Appellate Body.”²⁰ The US logically raises this allegation contending that members continuing to work on appeals after their term’s expiration undercuts the DSB’s authority to decide on Appellate Body appointments²¹.

The working procedures are adopted, according to Article 3.9, by the AB in consultation with the Director General of the WTO and the Chairman of the DSB. The US objection relates to the issue that the members should not take any new cases, on the eve of their retirement, as there might be a backlog which they would have to clear. Under Article 17.5 DSU, Appellate Body proceedings shall not exceed 60 days, “as a general rule” and shall, “in no case...exceed 90 days” but the reality is that, this time frame is rarely respected. The US has rationally argued that cases pending for longer time raise concerns regarding transparency, inconsistency with “prompt settlement of disputes”, and uncertainty regarding reports’ validity.²²

5- Review of facts / treatment of municipal law

Under WTO law, the Appellate Body is only authorized to review the issue of law and legal interpretation as arising out of the panel reports and not the panel’s factual findings.²³ The US has alleges that notwithstanding this clear and unequivocal text, the AB, in many cases, consistently has reviewed and even reversed, the panel’s fact-findings under different legal standards.

²⁰ Rule 15, Appellate Body Working Procedure for Appellate Review, 16 August 2010. A Communication from the Chairman of the Appellate Body to the Chairman of the Dispute Settlement Body was issued originally issued on 10 April 2003 as document memo number being WT/AB/WP/6. Due to technical ground that Communication was re-issued as document memo number being WT/AB/WP/W/7.

Available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=97216,96778,83411,84099,90164,44904,109031&CurrentCatalogueIdIndex=0&FullTextHash=>. [Accessed on the 18th June 2020]

²¹ For example, in 2017, Hyun Chong Kim, an Appellate Body member, while working on an ongoing appeal, was resigned. He having failed to provide the 90-day notice as required by article 14(2) of the Working Procedures, resulted in that appeal being finally decided by just two members of the division. This incidence raises the question as to whether the Appellate Body acted consistently with art. 17:1. See Also Amrita Bahri, “*Appellate Body Held Hostage*”: *Is Judicial Activism at Fair Trial?* [2019] 53 J. World Trade at 4. Also available at: <http://wtochairs.org/sites/default/files/AB%20Article%20%20-%20J%20WT%20.pdf>. Last accessed on the 10th July 2020.

²² Xuhui Emma (n 2)

²³ article 17:6



Secondly, the AB asserts that it has authority to review panel findings contending the meaning of the domestic legislation of WTO Member states. The US argues that the meaning of domestic law may be a fact-in-issue; the AB, however, should assert a case based on the WTO obligations. But the Appellate Body, as argued by USA, while deciding an appeal *de novo* interprets the meaning of the municipal law to carry the meaning of the WTO art. 17:6 which is unauthorized and acting like jumping over the jurisdiction.

Thus, it has been argued that the Appellate Body's expansion of the power to review a panel finding is contradictory to the DSU text which ultimately has added complication, duplication and delay in almost all the cases, since a party to the dispute is allowed to bring its case before the AB for challenge on every aspect of the panel's findings.²⁴

On the abovementioned grounds mainly, the AB and the whole WTO regime is in deep crisis. The United States is blamed to foster and perpetuate the deadlock as it is alleged to have blocked the appointment of new members to the AB. The US Ambassador to the WTO Dennis Shea, for example, stated that the US, showing the longstanding concern over the activities of the Appellate Body likely to block the appointment of new persons to the vacant Appellate Body seats.²⁵

However, that the AB is in crisis for the first time is not so; rather different regime of various governments of the USA are said to have fostered and contributed for such crisis. The Obama administration, for example, blocked the appointment of Jennifer Hillman for a second term in 2011, on the allegation, that the WTO has failed to guard the American interests.

Yet again in 2016, the US clogged the reappointment of Seung Wha Chang. The Trump administration, previously in 2018, blocked the reappointment of Shri Baboo Chekitan Servasing also. In bold line, there are some systemic challenges in regards to the WTO AB working procedure that cause the deadlock in WTO system. Moreover, US concern on some issues results the blocking of appointment of AB member.

²⁴ Xuhui Emma (n 2); See also Andrew Stoler (n 1) 2.

²⁵ Allan Beattie, 'WTO to suffer heavy blow as the US stymies appeals body' *Financial Times*, [8 December 2020] available at: <<https://www.ft.com/content/f0f992b8-19c4-11ea-97df-cc63de1d73f4>>[last accessed on 16th June 2020]



POSSIBLE REMEDIES

Deborah Elms, Executive Director at the Asian Trade Centre says, ‘Titanic has hit the iceberg and is now slowly sinking.’²⁶ WTO is in such a critical situation that mere saving of the Appellate Body will not be sufficient; rather it is imperative that the whole DSB to be saved in its entirety. The legitimate concerns of the United States should also be considered so that it gets the confidence and can unblock the appointment process of the members of the AB. The following measures, *inter alia*, may help in solving the WTO dispute settlement crisis:

First, New Zealand’s Ambassador to WTO, David Walker, who is entrusted with the duty to facilitate and improve the task of WTO,²⁷ proposes some recommendations which, *inter alia*, include i) mandating the Appellate Body to make decisions in 90 days; ii) members of the Appellate Body to vacate the office at the end of their term; iii) Appellate Body should address and decide only those issues that have been raised by the parties to the dispute; and iv) to take panel reports in the account as is necessary and not as precedents.²⁸ There are also WTO reform proposals from EU. The European Commission’s proposals include: i) WTO regular work and transparency; ii) rule-making in the WTO, including its approach to development; and 3) the WTO dispute settlement system²⁹. These Walker Principles and the EU proposals are consistent with 1995 WTO mandate and capable of addressing the US concern.

Secondly, the primary task of the AB is to apply the WTO and other relevant laws with the facts presented by the parties. But difficulties may arise when the interpretation of some technical terms like ‘less favorable treatment’ etc are involved. While analyzing and interpreting those terms, it is advisable and accepted that the AB should consider economics and statistics as well.³⁰

²⁶ Dr. Deborah Elms, ‘The Titanic has hit the Iceberg: Global trade in Profound Trouble’ 14 Nov, 2019, *Asian Trade Centre*, Singapore. Available at <<http://asiantradecentre.org/talkingtrade/the-titanic-has-hit-the-iceberg-global-trade-in-profound-trouble>> [Accessed on the 10th June 2020]

²⁷ David Walker was appointed by the General Council Chair in February, 2019. +++ More information

²⁸ Aditya Rathore and Ashutosh Baipai, ‘The WTO Appellate Body Crisis: How we got here and What lies ahead?’ *The Jurists*, 14 April 2020. Also available at <<https://www.jurist.org/commentary/2020/04/rathore-baipai-wto-appellate-body-crisis/>> [Accessed on the 18th June, 2020].

²⁹ *WTO – EU’s proposals on WTO modernization* (5 July 2018), WK 8329/2018 INIT. See also Andrew Stoler (n) 4

³⁰ Richard Brunell, ‘Overruling Dr. Miles: The Supreme Trade Commission in Action’ *Antitrust Bulletin*, Vol. 52, Nos. 3-4, 2007. Available at SSRN: <https://ssrn.com/abstract=1132806> . [Accessed on the 15th June 2020]



Thirdly, a compliance committee, consisting of the chairs of all the major WTO committees including General Council, Council for Trade in Goods, and the Dispute Settlement Body, etc., may be established to ensure that it shall audit every year and look after the working of the Appellate Body to the effect that the AB and the WTO mechanisms are functioning properly in accordance with the laws and principles of the WTO so as to put the member states in full confidence and faith³¹

Fourthly, Steve Charnovitz, a Professor of George Washington University Law School, suggested for the *allow of an automatic completion of appeals as a means to solve the problem of blocking the enforcement of DSB rulings*.³² Under article 16.4 of the DSU, a WTO member can appeal against the decision of the panel and panel's decision shall not be enforced until the appeal process is concluded. The relevant text suggests:

*“If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.”*³³

Thus, if there is any inaction or vacuum in the Appellate Body, the enforcement procedure of the DSB ruling will be delayed. For solving this problem, Steve Charnovitz suggested that the Appellate Body by introducing a new provision in its Working Procedures could formulate that an appeal would be considered automatically completed as soon as it was filed unless the Appellate Body decided otherwise.³⁴ The findings of the panel would thus become final. It is to be kept in mind that the AB cannot curtail a WTO member state's right to file an appeal as per Article 16.4 of the DSU; nonetheless, it can amend its own Working Procedures, in line with Article 17.9 of the DSU and formulate convenient rules for appeal.³⁵

³¹ Aditya Rathore and Ashutosh Bajpai (n 26)

³² Steve Charnovitz, 'How WTO Dispute Settlement Succumbed to the Trump Administration' [December 17, 2019], GWU Law School Public Law Research Paper No. 2019-73; GWU Legal Studies Research Paper No. 2019-73. Available at SSRN: <<https://ssrn.com/abstract=3505266>>. Also in Steve Charnovitz, 'How to Save WTO Dispute Settlement from the Trump Administration', *International Economic Law and Policy Blog*, [November 03, 2017] available at- <<https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>> [Both accessed on the 15th June 2020]

³³ Article 16.4 DSU

³⁴ Xuhui Emma (n2) also in Steve Charnovitz (n 30)

³⁵ *ibid*



Fifthly, WTO members, instead of going for regular appeal/review, may resort to as an alternative and *ad-hoc* basis, the arbitration proceedings under Article 25, not inconsistent with the object and purpose of the DSU, to settle their disputes subject to certain conditions³⁶. Ad-hoc arbitration proceeding under Article 25 of the DSU is not dependent on the existence of the Appellate Body; nor does it require any action by WTO members as a whole.

Moreover, arbitration awards of such proceedings are automatically binding for the parties to the dispute. If two parties, however, wish to go for compromise and give consent to, an arbitration instead of an appeal, the parties are required to enter into an agreement for that purpose. For the purpose of multilateral agreement for the aforesaid purpose under art 25, necessary approval from ministerial conference may be had to.³⁷

Sixthly, another ad-hoc solution to face AB crisis and save the parties from the deadlock grid is that they (the parties to the dispute) may mutually agree not to appeal against the decision of the panel. Luiz Eduardo Salles writes,

[P]arties simply agreeing not to appeal would be an even simpler alternative compared to arbitration as a proxy to appeals. While using arbitration would reproduce the current system, dispensing with appeals would simplify the current system on a case-by-case basis. Procedural agreements would share much of the advantages of the arbitration mechanism: avoiding an overburden on the Appellate Body, not requiring any institutional change, being apt for use in any case upon agreement by the parties.³⁸

³⁶ Andersen, ScottFriedbacher, ToddLau, ChristianLockhart, NicolasRemy, Jan YvesSandford, Iain, 'Using arbitration under Article 25 of the DSU to ensure the availability of appeals'[2017] CTEI Working Paper (2017-17), Geneva: The Graduate Institute of International and Development Studies, Centre for Trade and Economic Integration, pp 1-10. Available at <https://repository.graduateinstitute.ch/record/295745?ln=en>. [Accessed on the 10th June 2020]

³⁷ *ibid*

³⁸ Luiz Eduardo Salles, 'Guest Post on Bilateral Agreements as an Option to Living through the WTO AB Crisis' Posted by Simon Lester on November 23, 2017 The Economic Law and Policy Blog. Available at <https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-on-bilateral-agreements-as-an-option-to-living-through-the-wto-ab-crisis.html> [accessed on the 15th June 2020]



Luiz Eduardo Salles also writes,

[M]oreover, procedural agreements would have certain advantages compared to appeals. Firstly, they would significantly reduce costs for parties. Thus, procedural agreements would be suited especially for some developing and least developed countries concerned about the spiraling complexity of WTO litigation. Secondly, procedural agreements drafted at the panel stage could be made contingent on the impairment of the Appellate Body – for instance, an agreement may provide that the waiver only applies if the AB does not have a certain number of members by a given date.³⁹

Some WTO member states have successfully implemented ex ante bilateral procedural agreements.⁴⁰ It is, however unclear and uncertain, as to whether this procedural agreement can be effectively applied in multilateral cases or not.

Seventhly, the general rule for the DSB is to take decision by consensus⁴¹ which suggests that the decision is taken, if no member, present in the meeting, raises any formal objection to the proposed decision.⁴² Some academics urge that the members of the AB be appointed by the decisions of the majority and not by consensus.⁴³ Pieter Jan Kuijper, Professor of Law of the University of Amsterdam, has submitted that the general voting rules as mentioned in the Marrakesh Agreement (Article IX:1) should get precedence over the consensus rule of Article 2.4 of the DSU.⁴⁴

Eighthly, it is also suggested from the legal scholars that the major trading partners, as an alternative method, may form a coalition excluding the USA and replicate the appellate body procedure or the whole WTO dispute settlement mechanism in a separate agreement outside the WTO framework.⁴⁵ Though this is a temporary suggestion but adopting this mechanism officially proves that whole world is like a hostage to the US and the mechanism admits to be the failure of the WTO dispute settlement system.⁴⁶

³⁹ *ibid*

⁴⁰ For instance, in *Automotive Leather (DS 126)*, as part of negotiated arrangements, the US and Australia agreed that both 'will unconditionally accept the review Panel report and there will be no appeal of that report'. Again, US and Ecuador and Thailand also went for procedural agreement. The US, for example, after being defeated applied it in several of the zeroing disputes *namely* DS 335 and DS 383. For more details, Luiz Eduardo Salles (n)

⁴¹ See, Article 2.4, DSU.

⁴² 'WTO Bodies involved in the Dispute Settlement Process' *A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication*, [2017] Cambridge University Press, p 18

⁴³ Xuhui Emma (n 2)

⁴⁴ Pieter Jan Kuijper, "The US Attack on the Appellate Body," *International Economic Law and Policy* blog, November 15, 2017. Available at: <https://worldtradelaw.typepad.com/ielblog/2017/11/guest-post-from-pieter-jan-kuijper-professor-of-the-law-of-international-economic-organizations-at-the-faculty-of-law-of-th.html>. Last accessed on the 15th July 2020.

⁴⁵ *ibid*

⁴⁶ *ibid*



EVALUATION

Though US raise objection as to the interpreting power of the AB, the same may not be proper from jurisprudential perspective. Where there is judicial power, there should have the inherent interpreting power as well. Alexander Hamilton remarks, “[l]aws are a dead letter without courts to expound and define their true meaning and operation”⁴⁷.

Under article 3.2 of DSU, the DSU and the panels are mandated, as per the customary law of interpretation of the public international law, to clarify the provisions of WTO agreement⁴⁸. Jackson says that the WTO negotiators, in respect of interpreting the DSU provisions, have covertly denoted art 31, art 32 and other relevant provisions of the Vienna Convention on the Law of Treaties (herein referred to as VCLT).⁴⁹

However, for interpreting purpose, the AB should take the ordinary meaning of the term and also consider the object and purposes of that agreement. Appellate Body in *US–Gasoline* affirmed that Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) have attained the status of “customary or general international law” which is recognized under the WTO jurisprudence as well. AB held that

“The general rule of interpretation [as set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other “covered agreements” of the *Marrakesh Agreement Establishing the World Trade Organization* (the “*WTO Agreement*”). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.”⁵⁰

⁴⁷ The Federalist Paper No. 22 of 1787; Thomas J Moyer, ‘State of the Ohio Judiciary’ (1990) 51 *Ohio St. LJ* 269.

⁴⁸ Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott (n 11) at p 8.

⁴⁹ Steven P Croley and John H. Jackson. ‘WTO dispute procedures, standard of review, and deference to national governments’ (1996) 90 *Am J Int’ L* at 193-213.

⁵⁰ *US — Gasoline*, p. 17, DSR 1996:I, p. 3 at 16; [WT/DS2/AB/R](#). Same principle was reiterated in *US — Carbon Steel*, paras. 61–62 ([WT/DS213/AB/R](#), [WT/DS213/AB/R/Corr.1](#)); *US — Continued Zeroing*, para. 268 ([WT/DS350/AB/R](#)).



There is proposal for amendment of the DSU. But the same is not so smooth. That the decision-making process of the WTO is by consensus is known to all. The basis of this practice is Article IX:1 of the Marrakesh Agreement where it is specified that “no Member present at the meeting when the decision is taken formally objects to the proposed decision”. So, this is one of reasons of the WTO deadlock. Though voting procedure is there but is unlikely to be practiced, because recourse to voting on any issue, especially the amendment of DSU, might fate the US, and possibly other Members, departing the WTO.⁵¹

⁵¹ Andrew Stoler (n 1) 3





CONCLUSION

If the crisis persists in the WTO specially the deadlock situation as prevail in the AB is not solved immediately two consequences might happen a) the member states will lose their right to appeal; and b) WTO as an institution will be proved to be a failed Organization. Since the US blocks appointments of members of the AB resulting in the deep crisis of whole WTO mechanism, many individual states and trading blocs also move for regional or multiregional trading mechanism like OBOR, SCO, ASEAN, and CPTPP.

Due to this crisis, the US has also moved away from WTO multilateral trade negotiation and went into bilateral trade deals with some of her trading partners like China, Canada, Mexico. This is surely a bad sign for the future of the WTO because the nation states' failure to co-operate may lead this multilateral trading organization to sink. Thus, the purpose for which the organization was created i.e., with the dream of a free and fair global multilateral trading system and settling the global trade dispute effectively, will go into vain.

For saving WTO as an institution, there requires to take some alternative means to the disputed issues which may include adopting panel reports and appointing another body to resolve their disputes for them. Members, by way of bilateral negotiation, may opt for not to appeal; or they might seek to resolve the dispute by arbitration procedure or by adopting panel reports, similarly to Canada and EU. In addition to the ad-hoc agreement to refrain from appeals, the WTO members may adopt a temporary waiver on appellate review.

This process, however, finds complicated as it is experienced in a very limited ways and it also requires assents of three-fourths majority.⁵² However, if member countries start to look for other methods to resolve their disputes, there will be high probability that it will defeat the very purpose of WTO. Last but not the least, for a rapid solution, there is no alternative to compromise. The DSB and the AB should be prompt in addressing the US concern regarding procedure. The US should also show its compromise mentality relinquishing its principle of 'kicking at the working leg of a limping institution' for the future and survival of the world trade forum⁵³.

⁵² Agreement Establishing the World Trade Organization (Marrakesh Agreement) (1994) 1867 UNTS 154 33 ILM 1144, Article IX:3

⁵³ Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott (n 11) at 11.

