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**Dismantling of the world trade system**

The global system for trade is in a state of crisis. The World Trade Organization (WTO) has been systematically dismantled and attacked from within by the US over the last many years.

Unlike other inter-state dispute settlement mechanisms, the WTO dispute settlement system provides a compulsory, exclusive and contentious form of jurisdiction. Under Article 23.1 of the Dispute Settlement Understanding (DSU): “When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding”.

This ensures exclusion of other systems and protection of the multilateral trading system from unilateral conduct. This is further explained in Article 23.2(a) of the DSU, which provides that members are prohibited from making determinations on whether a violation has occurred, or whether benefits have been nullified or impaired, except through recourse to dispute settlement, in accordance with the rules and procedures of the DSU.

Between 1995 and 2014, around 67 percent of panel reports were appealed before the Appellate Body. Under Article 17.6 of the DSU, appeals to the Appellate Body are limited to issues of law covered in the panel report and legal interpretations developed by the panel. The US has consistently asserted that the Appellate Body has treated the US in an unfair manner, and overstepped vis-a-vis its mandate. Not only is this factually incorrect but that even if it were true, the entire global mechanism for resolving disputes relating to trade cannot, and should not, be torn apart because of the feeling of “unfair” treatment on the part of one state.

Unfortunately, since December 2019, the WTO’s Appellate Body has ceased to function following the US’ decision to block appointments to the forum. This is part of the US’s unofficial policy aimed at weakening multilateral forums, as it pushes for unilateralism in the international community.

Due to the Trump Administration’s efforts, the dispute settlement mechanism of the WTO, which has been in operation for over twenty years, has been crippled (although panel proceedings in the dispute settlement mechanism continue). It merits mention, however, that the sense of entitlement and blatant bullying is not a novel strategy for the US.

Under the Obama Administration, the US blocked two appointments to the Appellate Body: first, in 2011, when it blocked the appointment of Jennifer Hillman for a second term; and second, in 2016, when it blocked the reappointment of Seung Wha Chang. What the US has done with the Appellate Body is intentionally dismantle the same from within, while continuing to enjoy the benefits of WTO membership. If the US were to withdraw from the WTO, it would likely have an adverse impact on US trade, in general, and tariffs on US goods, in particular. This explains why the US only threatens to leave while actively tearing down WTO structures.

In November 2019, the Trump Administration threatened to block the WTO’s 2020 budget. As a result of US bullying, WTO members were effectively coerced into signing off on limiting Appellate Body funding for members to not more than 100,000 francs – an 87 percent reduction from the original budget allotment. Similarly, the US ensured that spending by the Appellate Body’s operating fund also be limited to 100,000 francs – a 95 percent reduction from the original budget allotment.

What does the US’s dismantling of the Appellate Body mean for the rest of the WTO’s Members and for global trade in general? First, that since panel proceedings continue, those members which file appeals before the Appellate Body are left without an answer or remedy.

The entire purpose of the dispute settlement mechanism is “the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member” (Article 3.3, DSU). This is “essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members” (Article 3.3, DSU). The aim of the dispute settlement mechanism is “to secure a positive solution to a dispute” (Article 3.7, DSU).

Second, that where decisions are appealed but left unheard, there is a greater likelihood of WTO members moving towards unilateralism, defeating the entire purpose of the WTO system. There is a genuine threat to the global trading system at this time; if the Appellate Body remains crippled, there is a real threat that states to those disputes will adopt unilateral measures which will eventually spiral into trade wars.

It becomes clear that WTO members need to think outside the box. In January this year, seventeen members of the WTO, including the EU, Brazil and China, announced setting up a parallel WTO court, without the US. This remains a possibility to be explored. Although the impact of this may be moving away from the WTO system due to incapacitation of the Appellate Body, the obvious advantage is that disputes can be resolved and potential trade wars, resulting from unilateralism, avoided.

There is also an avenue available through the General Council of the WTO. Ordinarily, selections for the Appellate Body are made by WTO members through consensus, as in no member objects to the appointment. The Dispute Settlement Body (DSB) takes decisions by consensus (Article 2.4, DSU), except where negative consensus applies, for example when the DSB is adopting an Appellate Body report.

Under Article 17.2 of the DSU, it is expressly stipulated that “vacancies shall be filled as they arise” with respect to the Appellate Body. The vacancies for the Appellate Body have not been filled and thus there is a compliance issue vis-a-vis Article 17.2 of the DSU. Instead of pushing for consensus, it may be more fruitful for WTO members to act in fulfillment of Article 17.2 of the DSU by selecting Appellate Body members through voting in the General Council.

Under Article IX.1 of the WTO Agreement, “where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting”. Moreover, under Article IV.3 of the WTO Agreement: “The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding”.

As Director-General of the WTO Robert Azevedo himself stated: “Each impasse is an impasse. You have to find a solution; there is no recipe that fits each one of them”. The US cannot be allowed to singlehandedly dismantle the global trading system – solutions must be sought without the US.

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