

Multilateralism in decline? The Appellate Body crisis in the WTO

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Since December 2019, the Appellate Body (AB) of the WTO has been practically defunct as the number of Appellate Body members (ABMs) has fallen below three, the minimum quorum necessary for the AB to hear appeals. The WTO has a two-tiered dispute settlement system (DSS). First, an ad hoc panel of experts passes a verdict after reviewing the facts and legalities of the case. Then, the losing party may appeal to the AB, whose decision is binding. The current crisis was precipitated due to the US blocking new appointments of ABMs over allegations of ‘judicial overreach’ by the AB (Melin & Kim, 2020).

According to several commentators, the AB crisis is symptomatic of a bigger crisis in multilateralism (Bhatia, 2019; Pauwelyn, 2019: 300), as was noted even in the 12th session of the WTO Ministerial Conference (WTO MC12, 2022). With the emergence of new trading powers and extension of trade agreements beyond tariffs to policy areas such as intellectual property, capital mobility, and environmental regulations, multilateralism is no longer benefitting US interests (Rodrik, 2018: 75). Thus, blocking ABM appointments can be seen as part of a larger US push for more ‘substantive reforms in the WTO’ to move from a rules-based multilateral system to a more political, diplomacy-based one (Pauwelyn, 2019: 301).

Pauwelyn (2019) outlines four scenarios that are likely to arise in the current crisis. First, appeals ‘into the void’, i.e., to the defunct AB, may occur. This enables the losing party to block the dispute settlement procedure because pursuant to Article 16.4 of the Dispute Settlement Understanding (DSU), panel reports that have been appealed cannot be adopted until the appeal is resolved. To resolve the block, members may opt to have panel reports adopted through positive consensus, effectively recreating a GATT-like system that gives veto power to the losing party. While appeals into the void are unlikely to become the norm due to reasons such as fear of retaliation, the possibility of ‘threats of retaliation’ can make dispute settlement more political and power-oriented and less judicial, risking trade wars (ibid: 305-309).

Second, panel reports may be automatically accepted without appeal both *ex post*, i.e., adoption by negative consensus without appeal, or *ex ante*, i.e., parties sign a no-appeal agreement (NAP) *before* a dispute arises. Statistically, when the AB was functional, panel reports were accepted without appeal only 32% of times. However, due to the previously discussed costs of appealing ‘into the void’, some reports will surely be accepted without appeal in the future. Nonetheless, because an *ex-ante* NAP will block the defendant’s right to ‘appeal into the void’ if it loses; most countries may be unwilling to sign NAPs *ex ante* lest it hurt them in cases filed against them. Thus, it is unclear overall whether this scenario will become the norm (ibid: 310-312).

Third, an interim appeals system may be set up based on Article 25 of the DSU. A draft for such an arrangement was floated by the EU in May 2019 (ibid: 313), based on which the Multiparty Interim Appeal Arbitration Arrangement (MPIA) was formalized in March 2020 (Melin & Kim, 2020). As of writing, 25 countries, notably including China, have signed up to be parties to the MPIA (MPIA homepage). The MPIA is intended to replicate the workings of the AB as far as possible under the provisions of Article 25.

From an institutional perspective, this option has the advantage of preserving both the *appeals* stage and *bindingness* of the previous AB-based dispute settlement process. However, the MPIA differs from the AB in two respects: appeals must be strictly resolved within 90 days, using measures such as imposing page and time limits on hearings if necessary. Further, only issues that are directly relevant to the dispute and have been raised by the parties may be

addressed. These measures were introduced by the EU to address some of the US's concerns and may thus have long-term institutional implications for the WTO DSS (Melin & Kim, 2020).

There are also concerns that the interim arrangement may become a 'permanent solution' and replace the AB (Pauwelyn, 2019: 313). Moreover, the EU is empowered to enforce unilateral retaliation against WTO members who refuse to join the MPIA (Melin & Kim, 2020). Thus, the MPIA may further undermine multilateralism. Finally, any arrangement that does not involve the US is unlikely to be a lasting solution as the US was a main party in nearly half of all WTO disputes in 2019. It is improbable that the US will join the MPIA as it is pushing for more extensive reforms in the WTO through the ABM deadlock (Pauwelyn, 2019: 301).

Fourth, panel reports may get neither adopted nor appealed but simply function as 'expert reports' that may be used in further negotiations between the disputing parties. This may be particularly common in cases where the claimant loses and wants to block procedures by requesting the panel to suspend proceedings. In cases where the claimant wins, depending on the power balance between the parties, the claimant may still benefit from requesting a suspension of proceedings to avoid the defendant 'appealing into the void' (ibid: 315).

Pauwelyn (2019) also outlines two 'unlikely scenarios': (i) the US lifts its veto and unblocks the impasse and (ii) a WTO organ initiates changes to overrule the US veto, such as by appointing ABMs through majority vote. Neither of these have yet happened and are unlikely to happen in the future for political reasons (Pauwelyn, 2019). Thus, currently, the plurilateral MPIA seems to be the most popular option, and the multilateralism crisis has been well recognized. It remains to be seen how the stalemate will play out in the coming years, in particular, how attractive plurilateral dispute settlement is and whether the changing power dynamics with major trading powers joining the MPIA influences US decisions and wider institutional changes in the operation of the WTO.

References

Ambassador Ujal Singh Bhatia, 'Launch of the WTO Appellate Body's Annual Report for 2018', Address 28 May 2019

Twelfth Ministerial Conference Outcome Document, WTO, 22 June 2022

Yves Melin & Jin Woo Kim, 'The Carrot and the stick: a tale of how the EU is using multilateral negotiations and threats of unilateral retaliation to buttress the multilateral, rule-based trade system, and protect its markets', Reed Smith Client Alert 2020-274, 28 April 2020

Multi-Party Interim Appeal Arbitration Arrangement (MPIA). Retrieved November 23, 2022. https://wtoplurilaterals.info/plural_initiative/the-mpia/

Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?', 22 Journal of International Economic Law 2019, 297-321

Dani Rodrik, 'What Do Trade Agreements Really Do?', 32 Journal of Economic Perspectives 2018, 73-90