

The WTO Appellate Body Crisis... and the Possible Way Forward

SEAN GEORGE CUTAJAR

In this article, Mr Cutajar takes a look at the mechanisms used by the World Trade Organisation in resolving trade-member disputes, the recent political decisions which have rendered the Appellate Body unable to function, as well as possible changes to address such an anomaly.

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Sean George Cutajar is a third-year law student at the University of Malta, with an interest in trade and company law

1. The Appellate Body Crisis

A central role of the World Trade Organisation (WTO) is to resolve trade disputes between members. When a member believes that another member has violated a WTO agreement, the issue is taken to the Dispute Settlement Body (DSB) of the WTO, wherein a decision is taken. An appeal from such a decision is guaranteed by the establishment of the Appellate Body pursuant to Article 17 of the ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’ (DSU).¹

A panel decision may be appealed by any party involved, on points of law and not any matter of fact pursuant to the case. *“The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel”*.² Once a decision is taken by the Appellate Body, the DSB must accept or reject the decision, and if accepted the litigants must accept and adhere to the decision.³

As per Article 17(3), the Appellate body is composed of seven *“persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements”*.⁴ Each appeal is then heard by three members of the original seven, who are selected randomly.⁵ Currently the Appellate Body is only composed of three judges, *“the bare minimum required”* to allow the body to function.⁶

In recent years, the United States has, under the Trump administration, continuously blocked the appointment of any new persons to the WTO Appellate Body.⁷ The ramifications of such an act will result in the inability of the Appellate Body to function by December 2019, as the minimum threshold of three judges will fall short once two current appointees have completed their mandates in December. These are Ujal Singh Bhatia from India and Thomas R. Graham from the United States, leave only Hong Zhao from China as the only appointee until November

1 DSU, 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) [hereinafter DSU] <https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> accessed 7 August 2019.

2 Ibid, Article 17(1), 364.

3 ‘Appellate Body’, Trade Topics, Dispute Settlement (World Trade Organization) <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> accessed 7 August 2019.

4 DSU (n 1) Article 17(3), 364.

5 ‘Appellate Body Members’, Trade Topics, Dispute Settlement (World Trade Organization) <https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm> accessed 7 August 2019.

6 Sunanta Kangvalkulkij, ‘WTO Dispute Settlement Body — Developments in 2018’ (World Trade Organization, 10 April 2019) <https://www.wto.org/english/tratop_e/dispu_e/sunata_19_e.htm> accessed 8 August 2019.

7 Philip Blenkinsop, ‘WTO chief sees no end in sight to U.S. blockage’ (Reuters, 21 February 2019) <<https://www.reuters.com/article/us-usa-trade-wto/wto-chief-sees-no-end-in-sight-to-us-blockage-idUSKCN1QA21W>> accessed 8 August 2019.

2020.⁸

The US has carried out this attack on the WTO, in retaliation for what President Trump believes to be unfair treatment in past Trade disputes. As a result, several WTO members including the EU have examined various proposals on how to reform the WTO Appellate Body in order to address these unfounded accusations and precarious situation.⁹ However, the US seems intent on bringing the Appellate Body to a halt.

If the US continues down this destructive road, the WTO Appellate Body will cease to function completely in December 2019, possibly resulting in interim solutions that would entirely exclude the US from the WTO dispute settlement structure and increase current trade war tensions being felt globally.

Clearly, if the Appellate Body is halted due to political tensions, while the rule-based trading structure of the WTO will not be entirely decimated, it is plausible to envisage some members taking the opportunity to abuse of the situation. While still to be seen, a weakened dispute settlement system may result in the continuation and increase of market distorting measures and abusive practices, if left unchecked. The approach taken by the US will weaken the “*common procedural mechanisms built on the rule of law*”, initially designed to be “*independent of outside influence*” to create a fair and level playing field.¹⁰

Both the EU and US agree that China tends to abuse WTO rules, while the EU has attempted to tackle this by trying to strengthen and reform the WTO, the US has taken the opposing method of addressing this perceived threat. A key feature of contention in this web of dispute has often been the WTO’s provision of “*special and differential treatment*” (S&D) designed to give “*special rights and which give developed countries the possibility to treat developing countries more favourably than other WTO Members*”.¹¹

Application of this clause is dependent on whether or not a country is considered a developed or developing country. Abuse arises from the fact that the WTO does not define what countries are developed or developing, but rather, this is left up to the members who decide on their own status, and their need to make use of provisions designed for developing countries. Other members may only

8 WTO, (n 5).

9 ‘WTO reform: EU proposes way forward on the functioning of the Appellate Body’ (European Commission, Press Release Database, 26 November 2018) <https://europa.eu/rapid/press-release_IP-18-6529_en.htm> accessed 8 August 2019.

10 Frank Maxwell, ‘Only a Strong WTO can Keep China in Line’ (International Policy Digest, 27 March 2019) <<https://intpolicydigest.org/2019/03/27/only-a-strong-wto-can-keep-china-in-line/>> accessed 8 August 2019.

11 ‘Special and differential treatment provisions’, Trade Topics, Development, Committees (World Trade Organization)<https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm> accessed 7 August 2019.

challenge the status of another member.¹²

The US has greatly lobbied the WTO to amend this method of status designation, targeting China as an example of how abuse of this status has resulted in unfair preferential treatment. Rather than banding with the EU to reform the WTO, the US has instead seemingly held the Appellate Body hostage until its demands are met. The resulting indifferences in trade policies and opinions of the WTO has created an *“increasingly tense standoff with the U.S. and Europe”* that now *“threatens to undermine the WTO’s authority as an arbiter of global trade”*, and has allowed China a seemingly unchecked passage *“to flood the world with cheap exports while limiting foreign access to its own market”*¹³.

The European Communities, as a WTO member, has, as a result of this unrest, proposed an interim solution that would allow WTO members to form an interim Appellate Body with judges appointed in an *ad hoc* manner for specific cases¹⁴.

2. A Possible Way Forward

While the situation continues to deteriorate, the complex system of legislative constructions surrounding trade negotiations worldwide will seemingly maintain current international obligations and the stability required for trade at a global level. A possible solution to the crisis may already exist within the DSU. The same DSU that has created the Appellate Body may, in fact, itself provide an unlikely solution in maintaining the enforcement of trade disputes.

An alternative legal mechanism is found in Article 25 of the DSU, and once further explored, may be implemented to mitigate this modern crisis. Article 25 of the DSU relates to a seemingly alternative method of arbitration available within the WTO.

Article 25 (1) explains that *‘expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties’*¹⁵.

12 ‘Who are the developing countries in the WTO?’, Trade Topics, Development, Definition (World Trade Organization) <https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm#top> accessed 8 August 2019.

13 Jacob M. Schlesinger, ‘How China Swallowed the WTO’ (The Wall Street Journal, 1 November 2017) <<https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308>> accessed 8 August 2019.

14 Michael Nienaber, Tom Miles, ‘EU to propose workaround to avoid U.S. block on WTO judges: document’ (Reuters, 6 June 2019)<<https://www.reuters.com/article/us-usa-trade-wto-eu/eu-to-propose-workaround-to-avoid-u-s-block-on-wto-judges-document-idUSKCNIT71YQ>> accessed 8 August 2019.

15 DSU (n 1) Article 25(1), 371 Article 25, 1, 371.

The wording of Article 25 seems to have been purposely presented in a very general manner, allowing for the possible use of an alternative means of dispute settlement that would still guarantee the weight of the law required to empower decisions and maintain fair market control.

Sub-article 2 of Article 25 explains that, upon implementation, it would in fact be the parties involved themselves that would, through “*mutual agreement*”, decide on the manner in which the settlement of a dispute would occur.¹⁶ This would, in effect, allow disputing parties to move away from the currently deteriorating Appellate Body and existing procedures, and together agree on a legally sound way forward.

Article 25 explains that when such an action would be implemented, all WTO members would be notified “*sufficiently in advance*”¹⁷ prior to the start of arbitration and even allow other WTO members to take part in the arbitration if the initiating parties agree.

Through this method the parties involved would become their own arbitrators, and are given the freedom to implement any method of procedure to a case, with seemingly no limitations other than their own agreement. Once a decision is reached through the system applied, such decision is considered final and no party may appeal or object the decision. “*The parties to the proceeding shall agree to abide by the arbitration award*”.¹⁸ In essence, this would conclude a trade dispute without the need of the Appellate Body. The results achieved through the application of an Article 25 procedure would then be notified to the WTO DSB and considered final.

Application of Article 25 as opined above still remains to be seen, as it has only yet been applied once before in relation to *Section 110 of the US Copyright Act*. In this regard, in 2001, the WTO DSB was notified by the European Communities and the United States of their intention to ‘*determine the level of nullification or impairment of benefits to the European Communities as a result of the operation of Section 110(5)(B) of the US Copyright Act*’,¹⁹ through arbitration pursuant to Article 25 DSU.

Unlike what is being suggested above, rather than being applied as an alternative to the Appellate Body procedure, the parties involved, “*resorted to this arbitration*

16 DSU – Article 25 (Jurisprudence), WTO Analytical Index, (December 2018), 2, <https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art25_jur.pdf>, accessed 8 August 2019

17 DSU (n 1) Article 25(2), 371 Article 25, 1, 371.

18 Ibid, Article 25(3).

19 ‘United States - Section 110(5) of the US Copyright Act - Recourse to Arbitration under Article 25 of the DSU - Award of the Arbitrator’ (World Trade Organization, 9 November 2001) <[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20wt/dsl60/arb25*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#>](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20wt/dsl60/arb25*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#>) accessed 8 August 2019.

further to the adoption by the DSB of the report of the panel which, at the request of the European Communities, reviewed the compatibility of Section 110(5) of the US Copyright Act, as amended by the Fairness in Music Licensing Act of 1998, with the Agreement on Trade-Related Aspects of Intellectual Property Rights”²⁰.

The *US Copyright Act* case remains our only source of jurisprudence pertaining to the application of Article 25 DSU. As such application of Article 25 as an alternative to the Appellate Body procedure remains to be seen, it is however clear that this is a plausible alternative to the current dispute settlement structure. The case clarified that “*No decision is required from the DSB for a matter to be referred to arbitration under Article 25*”,²¹ and that “*absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system*”.²²

This method would entirely circumvent the panel and Appellate Body, only limited by the agreements of the involved parties and their duty to respect the final decision. Still, as this is clearly dependent on the actions of the WTO members, it is my opinion that this as a long-term solution. This is rather a plausible interim solution to be used as a reaction to the current stance of the US.

3. Concluding Remarks

Further consideration of the application of this Article must also be had within the context of possible political ramifications that may ensue. While application of Article 25 would prevent the collapse of the WTO’s dispute settlement system, this still does not address the existing underlying issues surrounding the WTO and the current system of dispute settlement.

The current proposals to maintain the Appellate Body, without the involvement of the US as a key player, while seemingly an obvious outcome, may in fact result in further damaging current trade relations and exasperating existing trade tensions. On the other hand, the use of Article 25 as a possible solution remains heavily dependent on the willingness of members to apply this legislative mechanism and their ability to jointly agree on a way forward.

Referring to a statistical analysis on the effectiveness of the WTO Dispute

20 Ibid.

21 Ibid 6.

22 Ibid.

Settlement System²³ carried out in 2017, it was revealed that there has been “a significant decrease in the number of cases dealt with by the system over the years”.²⁴ This may in fact be an indication that the importance of the appellate body is in fact being overestimated. The current failures of the system have seemingly been brought about by deep issues, trade related tensions and rash political decisions brought on by an anti-trade agenda of the current US government.

Unfortunately, when dealing with politicians such as Donald Trump, a show of force directed against him such as proposing to simply ignore him would not produce positive effects - and as such, the US may in fact cause a worse backlash in the long-run. It is my opinion that focus must be placed on improving cooperation through dialogue, addressing the failures of the current trade legislation that have given rise to the current outcome and then attempting to restructure and reform the dispute mechanism, or even considering building a new mechanism on the basis of lessons learnt from our own current mistakes. Application of Article 25 would ensure the continuation of a legally-backed conflict resolution system, but this will not resolve the issues that have arisen within the WTO and its relationship with a major player such as the US, leaving all other WTO members uncertain and confused, a trait not desired within the global market.

23 Arie Reich, ‘The effectiveness of the WTO dispute settlement system: A statistical analysis’ (European University Institute, Department of Law, 2017)<https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1> accessed 8 August 2019.

24 Ibid 30.

