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# IRONING OUT THE WRINKLES IN TRADE DISPUTES ADJUDICATION

Relevant for: International Relations | Topic: World Trade, WTO and issues involved

Mark Twain famously quipped that “the reports of my death are greatly exaggerated”. With the retirement of two of the remaining three members of the World Trade Organization (WTO) Appellate Body on December 10, and a veto by the United States on fresh appointments, the “crown jewel” of the WTO been rendered dysfunctional. Although the demise of the Appellate Body has struck a blow to the rule of law, those drawing up the obituary of the WTO in the aftermath of its demise may have greatly exaggerated its consequences.

The consequences of the Appellate Body’s fall are overstated for a number of reasons. First, because this effectively marks a return to the dispute settlement system under the General Agreement on Tariffs and Trade (GATT) which, on the whole, proved surprisingly successful in resolving disputes. Second, most of the disputes at the WTO concern rules that are actually “self-enforcing”, with the Appellate Body only policing its enforcement by domestic authorities. Finally, many States have conceived “alternative” strategies to overcome difficulties arising out of the absence of a functioning Appellate Body.

The Appellate Body was set up in 1995 as a “safety valve” against erroneous panel reports in return for the membership agreeing to adopt reports using the “reverse consensus” rule in lieu of the “positive consensus” rule. Under the erstwhile positive consensus rule, reports issued by panels composed to hear disputes under GATT, could be adopted only if each of the contracting states favoured its adoption. This effectively handed a veto to the losing state.

However under the reverse consensus rule, the report would be automatically adopted, unless each member objected to the adoption of a report. To eliminate the likelihood of erroneous panel reports, the membership proposed the establishment of an Appellate Body, and the adoption of the report was postponed till after such appeal was adjudicated by the Appellate Body.

The fall of the Appellate Body effectively marks a return to the previous system as it hands states an opportunity to appeal an adverse panel ruling and effectively indefinitely delay its adoption. While one would be forgiven to think that states under the GATT regime would almost always veto unfavourable reports, a remarkable 71% of panel reports were adopted using the positive consensus rule. Even where panel reports were not adopted by states they served as a basis for the parties to “bilaterally” resolve their disputes in a mutually satisfactory manner. In a vastly changed global economic landscape, the re-emphasis on diplomatic solutions in lieu of judicialised solutions to resolve inter-state trade disputes may not be an entirely bad outcome.

The majority of the disputes at the WTO concern trade remedy matters. In such matters, if a state violates the rules, for example those concerning dumping of goods or grant of subsidies, affected states can without recourse to the WTO, adopt countermeasures such as imposition of anti-dumping and countervailing duties. The dispute resolution mechanism primarily aims to police the adoption of such countermeasures, namely whether they were warranted and otherwise imposed consistently with the rules. As trade scholar Pauwelyn notes, the mechanism is geared to address “over-enforcement” rather than “under-enforcement” of WTO rules. While the fall of the Appellate Body may see the adoption of more unilateral sanctions by states, possibly leading to increased trade wars, it will not render the WTO rules unenforceable. The threat of reciprocal sanctions may in fact serve to encourage states to remain compliant with the rules even in the absence of a functional Appellate Body at the helm of the dispute mechanism.

Finally, although the membership could not prevent the fall of the Appellate Body as we know it; several states have adopted ad hoc solutions. States such as Indonesia and Vietnam have, through a no appeal pact, agreed in advance not to appeal the ruling of the panel in the dispute between them, effectively waiving their right of appeal. The European Union (EU), Norway and Canada have agreed on an interim appeal system for resolving any disputes through arbitration using Article 25 of the dispute settlement understanding in a process mirroring that of the Appellate Body with former Appellate Body members appointed as arbitrators. The EU has even threatened to launch countermeasures under general international law for countries that lose at the panel stage but refuse recourse to the interim appeal system under Article 25 of the dispute settlement understanding and instead appeal the report “in limbo” with a view to avoid the adoption of the report altogether. Although the overall effectiveness of such alternative strategies to overcome the demise of the WTO Appellate Body is uncertain, they do represent good faith efforts by some members at resolving future trade disputes.

In sum although the fall of the WTO Appellate Body represents a turbulent period in the history of trade disputes adjudication, it by no means spells the end of the WTO. On the contrary it presents an opportunity to the members to rethink and “iron out some of the creases” with the present system. The ongoing negotiations between the United States and India in relation to the Panel report in US-Carbon Steel, where the U.S. has appealled an adverse report to a dysfunctional body, may offer an insight into how the dispute settlement system evolves.

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To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

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