

## Multilateral Trade in Crisis: The WTO's Appellate Body and the Risk of Paralysis

by Chiara Giuliani

The Trump administration has been particularly resolute in pursuing its "America first" policy, carrying out a frontal assault on the principles of multilateralism and the rules based international order which the US itself had promoted in the wake of World War II. In this context, Washington is realising a protectionist turn by introducing significant trade barriers, criticising multilateral norms and withdrawing from international agreements such as the Iran nuclear deal and the Paris Agreement on climate change.

Also worrying are the US administration's ongoing efforts to undermine the international trading system, particularly the oversight and enforcement role of the World Trade Organization (WTO). Such actions are threatening the very foundations of the multilateral system of trade rules and regulations, potentially leading WTO members to sidestep the organisation and revert to prioritising bilateral or

regional trade agreements.

The WTO's Appellate Body, in particular, is coming under increasing strain. The Body consists of seven members appointed by consensus among all WTO members for four-year terms. The Appellate Body is an essential part of the WTO's dispute settlement mechanism which, since its establishment in 1995, has played a central role in resolving trade disputes between states.

The Dispute Settlement Body (DSB) – which takes decisions on trade disputes – consists of all the representatives of WTO member governments and has the authority to establish panels of experts to resolve disputes in case of failed consultations between the parties. Yet, the final panel report is binding only if no disputing party appeals the ruling.<sup>1</sup> If a losing party

<sup>1</sup> For a more detailed description of the dispute settlement procedure within the WTO, see the WTO website: *Dispute Settlement*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

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decides to appeal, WTO panel reports remain unbinding until the review is completed by the appeal judges. Once filed, each review is conducted by three members of the Appellate Body, usually referred to as the "division".<sup>2</sup> The role of the Appellate Body is therefore crucial for the functioning of the WTO but the body cannot operate if it lacks the necessary judges to carry out an appeal review.

Since June 2017, no new appointment to the WTO's Appellate Body has taken place due to a lack of consensus among members. In this period, the terms of three judges have expired and another judge has resigned. In December 2019, two more judges will complete their terms, thus leading to a potential paralysis of the WTO's dispute settlement mechanism.<sup>3</sup> Indeed, by early 2020 the Appellate Body would lack the minimum quorum required for its functioning and, even if this is not the case, the body could become paralysed before that date if any judge needs to recuse himself from a case due to potential conflict of interest.

This situation is mainly caused by the Trump administration's blocking of new appointments to the Appellate Body.<sup>4</sup> Such obstructionism is justified

<sup>2</sup> See Article 17.1 of the Dispute Settlement Understanding (DSU): [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#17](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17).

<sup>3</sup> For a schematic timeline of the Appellate Body composition, see Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J. Schott, "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures", in *PIIE Policy Briefs*, No. 18-5 (March 2018), p. 3, Figure 1, <https://www.piie.com/node/13175>.

<sup>4</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva,

as a means of putting pressure on other WTO member states to accept a reform of the WTO dispute settlement system, which Washington considers inefficient and disadvantageous for the US.<sup>5</sup> This reckless strategy, however, may lead to a paralysis of the Appellate Body, in turn undermining the functioning of the WTO itself. The collapse of a centralised system of multilateral trade rules and regulations would entail a return to power-based economic relations, a scenario that may sit well with Trump and his view of the world but may ultimately spell trouble for the international system, including the US.

The WTO's dispute settlement system has not been free from criticism and President Trump is by no means the first US president to call for fundamental reforms.<sup>6</sup> The main US concern revolves around the Appellate Body's powers and wide margin of discretion. Indeed, appeal judges can "uphold, modify or reverse the legal findings and conclusions" of panel reports,<sup>7</sup> thereby at times angering

22 November 2017, <https://geneva.usmission.gov/?p=41581>.

<sup>5</sup> See Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J. Schott, "The Dispute Settlement Crisis in the World Trade Organization", cit., p. 3-4.

<sup>6</sup> See Robert McDougall, "Crisis in the WTO: Restoring the WTO Dispute Settlement Function", in *CIGI Papers*, No. 194 (October 2018), p. 2 ss, <https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>.

<sup>7</sup> WTO website: Appellate Body, [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm). See also Arie Reich, "The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis", in *EUI Working Papers LAW*, No. 2017/11 (2017), <http://hdl.handle.net/1814/47045>.

member states. Other, more general criticisms have centred on timing, as the Appellate Body frequently does not respect the 90-day deadline to submit reports.

Despite a general agreement on the need to reform the WTO's dispute resolution mechanism, WTO members have so far failed to reach consensus on how to address these issues. Concrete proposals include an increase in the number of Appellate Body members – from 7 to 9 – and longer terms in office – from the present 4 years to 6 or 8 year-long terms. In order to set a limit on the judges' discretion, the Dispute Settlement Understanding (DSU)'s reform proposals also entail a prohibition to make findings on issues not necessary to resolve a dispute and a restriction in interpreting WTO member states' domestic legislation. Lastly, by enhancing transparency and consultation mechanisms within the Appellate Body, the 90-day term limit to submit appeal rulings may be prolonged.<sup>8</sup>

Independently from these reform proposals, the Trump administration seems to be turning the US's reform drive into an existential threat to the WTO system as a whole. This attitude is in line with the US's protectionist turn and growing antagonism with China. It seems the US is more concerned with taking advantage of its position

of supremacy than reforming the multilateral trading system and the WTO. Indeed, the WTO's judicial mechanisms are a major obstacle to the US's policy of imposing new trade barriers, as these risk running into DSB's rulings and legal criticisms.

Against this backdrop, it is increasingly necessary to start thinking about alternative mechanisms to settle disputes within the WTO. One option is offered by Article 25 of the DSU which allows for arbitration as an alternative means of dispute settlement. Such arbitration, however, is limited in its scope and presents some shortcomings since it can only facilitate the resolution of disputes that concern legal issues clearly defined ex post by both parties and not every possible future conflict.

Moreover, any decision to resort to arbitration is subject to the mutual agreement of the parties, which need to agree on the procedures to follow. States are unlikely to submit to arbitration if they foresee a negative outcome, however. On the other hand, even if WTO member states succeed in concluding a plurilateral arbitration agreement, it is very likely that the US will not be part of it.<sup>9</sup>

The multilateral trading system is therefore facing daunting challenges. A collapse or paralysis in the system would translate into a 20-year step backwards

<sup>8</sup> See, for example: *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council (WT/GC/W/752)*, 26 November 2018, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/249918/q/WT/GC/W752.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/249918/q/WT/GC/W752.pdf).

<sup>9</sup> Jens Hillebrand Pohl, "Blueprint for a Plurilateral WTO Arbitration Agreement Under Article 25 of the Dispute Settlement Understanding", in Denise Prévost, Iveta Alexovičová and Jens Hillebrand Pohl (eds), *Restoring Trust in Trade. Liber Amicorum in Honour of Peter van den Bossche*, Oxford, Hart Publishing, 2019, p. 139-155.

for global economic governance, undermining the predictability, relative stability and fairness of multilateral trade relations. This represents a serious, and perhaps even existential, threat for those economic systems which are deeply integrated into global value chains, such as the European Union. Indeed, while European strategic interests are still safeguarded by the Atlantic alliance, trade tensions with the Trump administration are pushing Europe into a corner. Europe is in dire need of multilateralism and the rule based international system for its survival, in both economic and security terms.

Considering that there are no winners in retaliatory trade wars, the right path to global economic growth and prosperity cannot be protectionist barriers, bilateralism or regionalism. Rather, what is needed are new forms of regulation and legitimate oversight powers tailored for this new phase of globalisation. This can only come about through a reformed and renovated WTO. Yet, if the US refuses to cooperate in implementing one of the many reform proposals advanced by WTO members, including close US allies, two highly destabilising outcomes could ensue: a WTO without the US or a global economy without the WTO.

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