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ABSTRACT

This paper briefly describes the real and purported causes of the current stalemate regarding appointments to the Appellate Body WTO's apex tribunal. It also seeks to examine the implications for India, as a developing country which is an active user of the dispute settlement mechanism and the consequences for the larger multilateral trading system.

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I. INTRODUCTION

Since its inception, the World Trade Organisation's dispute settlement system ("**WTO DSS**") has been hailed as the most "prolific of all the dispute settlement systems in the world" (Bossche and Zdouc 2012). The WTO DSS is unique and has several distinctive features which comparable international tribunals including the International Court of Justice ("**ICJ**") may not possess. The unique features include its appeal mechanism, compulsory jurisdiction and automatic dispute process. Compared to the 176 cases that have been heard by the ICJ (ICJ 2019), the WTO DSS is currently in the process of resolving its 577th dispute. Further, an estimated 90 per cent of the measures that are adjudicated by the WTO DSS result in compliance with WTO legal agreements (Sacerdoti 2017) against the 75 per cent of the contentious disputes heard by the ICJ (Donoghue 2014). The recourse to the WTO DSS by major trading nations and small developing countries alike demonstrates that it is viewed as a "fair, effective and efficient" mechanism to resolve trade disputes (Azevedo 2015).

The WTO and its dispute settlement system had a profound impact on India's macroeconomic policy ever since it came into force in 1995. In the initial decade, India was subject to disputes relating to its quantitative restrictions on imports (WT/DS90/AB/R 1999), its import-substitution policies relating to its automotive sector (WT/DS146/AB/R 2002) and its patents regime (WT/DS50/AB/R 1997). India lost these cases, but also earned certain decisive victories against the United States in connection with US import restrictions on India's shrimp exports purportedly taken for the conservation of sea turtles (WT/DS58/AB/R 1998) and its quota measures on textiles. India also won a landmark case on the European Union against the use of the controversial 'zeroing'[i] methodology in antidumping investigations.

India also invested in developing home-grown legal capacity in international economic law and also for pursuing its development objectives. Currently, India is a complainant in the dispute relating to WTO-consistency of steel tariffs imposed under Section 232 of the Trade Expansion Act, 1962 of the United States (WT/DS547/1 2018). Further, on the heels of India's ambitious Jawaharlal Nehru Solar Mission being declared WTO-inconsistent, India has initiated a similar dispute against US's renewable energy programs (WT/DS510/1 2017). The option to have a recourse to the WTO DSB has ensured that a violation of WTO covered agreements carries serious consequences (beyond purely reputational costs) for WTO members and has contributed to making a rule-based multilateral system a reality.

In this context, the current stalemate regarding appointments to the Appellate Body ("**AB**"), WTO's apex tribunal, merits deeper study. This article seeks to simplify the legal controversy and attempts to chart out the consequences for India and the multilateral trading system.

II. THE WTO DISPUTE SETTLEMENT SYSTEM

The WTO DSS is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**WTO DSU**"). If a complaint is submitted by a WTO member and consultations between the parties fail to reach a mutually agreed solution, an ad-hoc panel can be constituted. The legal findings and interpretations developed by the Panel are subject to review by the AB. The AB is a standing elected body of seven individuals with a demonstrated expertise in international trade law and diplomacy and broadly represents the WTO membership. Each appeal from a panel report is heard by a division of three AB members. Over the years, the AB has played an instrumental role in clarifying the 'constructive ambiguities' in the WTO covered agreements, filling the gaps in the legal text, overturning contestable Panel rulings and consolidating legal principles from discordant and varied panel reports (Sacerdoti 2017).

III. THE US' 'ASPHYXIATION' OF THE APPELLATE BODY

The US has been fairly aggressive in using dispute settlement in order to pursue its market access goals. On the import side, the US has imposed several antidumping and countervailing duty (CVD) investigations against its trading partners, especially China. The impositions of such duties have been successfully challenged by China before WTO Panels in several instances and the US was required to make necessary compliance measures. It is therefore no surprise that the US has been a vocal critic of the AB, especially when it has lost. This criticism has also resulted in the US blocking the appointment of certain American AB members in 2011 and 2013 (Shaffer, Pollack and Elsig 2016). In 2016, the US took the unprecedented step of blocking the re-appointment of an AB member of foreign nationality, specifically, South Korean member on the grounds that his performance did not "reflect the role assigned to the Appellate Body by members in the DSU" (US Statement 2016). Over the past year and a half, the US has been raising concerns, which according to the US, are "systemic concern[s] about the disregard for the proper role of the Appellate Body" (US Statement 2016). The US Statements have criticised the functioning of the AB on the following grounds:

(i) The AB's disregard for the strict 90-day timeline prescribed under the DSU for the issuance of the AB report (US Statement June 2018);
(ii) The AB authorising members whose terms have expired to serve on pending disputes (US Statement November 2017);
(iii) Legal rulings by the AB on issues not necessary to resolve the dispute or the issue of 'advisory opinions' (US Statement October 2017);
(iv) Review of facts by AB and review of a member's domestic law even after the Panel's evaluation (US Statement August 2018);
(v) AB's jurisprudence creating a system of precedents in the WTO DSU system; and
(vi) Judicial overreach by the AB, especially in relation to "gap filling" in treaty provisions.

The AB has been subject to non-partisan criticism on these grounds by scholars over the years (Sutherland Report). However, what makes the US's position problematic is that it has refused to affirm any appointments to the AB during the past two years. Since such appointments can only take place by consensus, the vacancies in the AB remain unfilled. Out of a total strength of seven, the AB currently comprises of three members. This overburdens the entire WTO DSU system and creates a significant backlog with a number of disputes waiting in the queue. Most importantly, once Mr. Ujal Singh Bhatia and Mr Thomas Graham retire in December 2019, the AB will have only one member which will not allow it to form quorum to hear fresh appeals. After December 2019, respondent-states could still formally appeal findings of Panels and pending appeal, such a

report would not be enforceable. There is some possibility of using arbitration as a mechanism to resolve disputes, but it cannot be a substitute for appeals.
In order to resolve the impasse, 13 member-states (including EU, China and India) supported a reform proposal at the General Council meeting held during 12th and 13th of December of 2018. Further, EU, China and India also separately sponsored a proposal which contained additional reforms (collectively, the "**EU DSU Proposal**") (WT/GC/W/752 & 753). The EU DSU Proposal squarely addressed most of the concerns of the US. However, the US responded by merely reiterating that their concerns were not met, without putting forth their own reform proposal (Miles 2018). These developments do not portend well for the AB. Rather than playing a constructive role, it appears that the US is determined to bring the dispute settlement system to a grinding halt. The willingness to engage for a positive resolution of these issues is simply missing. The next section will explore factors which may provide the real reasons underlying the US's opposition to the AB.

IV. PLACING THE AB CRISIS IN THE BROADER CONTEXT OF THE MULTILATERAL TRADING SYSTEM

The members of the WTO meet every 2 years in the Ministerial Conference to negotiate new rules for the multilateral trading system. The Marrakesh Agreement mandates that any modification (or addition) of the WTO covered agreements take place through a consensus between the WTO members. This consensus mechanism has failed to produce any new rules since the inception of the WTO in 1995, except the Agreement on Trade Facilitation which came into force in 2017. This has greatly impacted the WTO's ability to devise new rules to govern 'new' economic order. The paralysis of the "legislative wing" has led to the AB acting in an institutional vacuum.

In view of the failure of the WTO to produce tangible gains in trade liberalizations, several countries are turning to mega-regional trade deals. The recently concluded Comprehensive and Progressive Agreement for the Trans-Pacific Partnership ("**CPTPP**") is one such agreement. Although the US withdrew from this agreement, the US has shifted its focus to negotiations for bilateral trade agreements with its trading partners and on more favourable terms than available in existing FTAs. The revised United States-Mexico-Canada Agreement (or NAFTA 2.0) is indicative of this new trend. Certain news reports suggest that the current US Trade Representative, Robert Lighthizer has brazenly commented that blocking appointments to the Appellate Body was the only way to ensure that Members agree to negotiate new trade rules.

Another reason for the US to pursue a brinkmanship policy in relation to WTO DSS is the rise of China and its economic policies. The US is concerned with the contested characterization of China as a 'market economy', specifically in the context of anti-dumping and countervailing duties investigations. In the negotiations on China's accession to the WTO in 2001, China was bound to transition its centrally planned economy to a market-economy. This was critical because the WTO covered agreement assume that domestic economies are working on free-market forces of demand and supply. Sixteen years later, there is still no clarity (either in fact or law) on China's status as a market-economy (Nedumpara and Zhou 2018). The US contends that markets in China are under considerable economic and political influence of the state – on this ground, goods from China have been continuously subject to anti-dumping duties and countervailing measures based on surrogate country prices and costs (Hillman 2018). China has challenged the WTO-consistency of the EU regulation on trade remedies which specifically names China as a 'non-market economy' (WT/DS516/1 2016). If the WTO Panel rules in China's favour, then this would mean that Chinese imports into the US can no longer be subject to high anti-dumping and countervailing duties which are a result of controversial accounting and statistical methodologies used by the US and the EU relating to non-market economies. This panel finding will also have implications for the

investigations conducted by other national trade remedy investigation agencies in their actions against China.
The imposition of steel tariffs under Section 232 by the United States is sought to be justified on "national security" grounds. The matter is currently before the WTO panels. Predictably, several WTO members (including India and the EU) have filed disputes against the US. The US, in its statements at the DSB, has been opposing the constitution of the Panel on the grounds that the "security exception" is "self-judging" and not amenable for judicial decision. However, in a dispute between Russia and Ukraine (WT/DS512/R 2019), a WTO Panel has held that Panels can review whether the "national security" measures are permissible under the relevant exception provisions. If this ruling is not overturned by the AB, it will be persuasive for future disputes, including the ongoing dispute between various countries and the US regarding steel tariffs. Therefore, the US has an incentive to make the WTO DSS dysfunctional before enforceable rulings are pronounced on the non-market economy and security exception issue.

Lastly, the interpretation of the AB of the concept 'public body' in CVD investigations has greatly impaired the ability of US trade regulators to impose protective duties on incoming Chinese goods. The US agencies applied the 'ownership and control' test for a while; however, this test was not considered to be enough. The AB in some of the recent cases ruled that vesting of 'governmental function' is also important in determining—especially in the context of China— whether some of the state-owned enterprises are brought within the of the WTO's disciplines on subsidies and countervailing measures.

V. IMPLICATIONS FOR INDIA'S POSITION IN THE MULTILATERAL TRADING SYSTEM

India as a developing country and an active user of the WTO DSS has a strategic interest in the existence of the AB. India has utilised the WTO DSS to challenge trade-restrictive measures implemented by the EU and the US. In this respect, the WTO DSS has always been a tempering force on the ability of nations to resort to virtue-signalling in trade policy. From a trade perspective, India is particularly keen to retain flexibilities for safeguarding the interests of the farming sector as well as in accessing the global markets for its exports. With the WTO DSS heading towards an uncertain future, automatic and compulsory dispute settlement recourse is no more a guarantee. In addition, the risk of morally imperialistic measures and protectionist policies is certainly imminent. The breakdown of WTO's dispute settlement system could potentially take the multilateral trading regime back to the pre-WTO days where dispute settlement system was based on power politics and economic 'gunboat diplomacy'.

For instance, key trading members such as the EU and the US could condition imports on labour and environmental standards which would exponentially increase the cost of business for Indian exporters. Even if a successful complaint is instituted by India, an appeal of the Panel report would make it un-enforceable. If the American unilateralism currently on display is a sign of things to come, American steel and agricultural markets will be increasingly inaccessible for Indian exporters.

One innovation of the WTO DSS is that the DSB reports are adopted unless there is a consensus of all WTO members not to adopt the report, popularly known as 'reverse consensus' principle. Automatic adoption and enforcement of all such reports was the consequence. However, with the breakdown of the WTO DSS, all trade disputes would ultimately be politicized and be influenced by the dictates of domestic industrial lobbies such as BigTech and BigPharma. India's economic and political interests in a rules-based multilateral trading system will have to be preserved at all

cost. India's joint proposal with the EU, China and other 11 Members will have to be seen in that light.

New Delhi has been pro-active in suggesting reforms, analysing implications of the 20-plus proposals tabled in the WTO and in generating consensus amongst developing countries. On 13-14 May 2019, India organised the New Delhi Mini-Ministerial to facilitate a free and frank discussion between developing countries on critical issues of the multilateral trading regime, including the crisis in the AB. While 17 developing countries re-affirmed their resolve of filling the vacancies at the AB as soon as possible, it is unlikely that the ongoing crisis will be resolved before December 2019.

[i] Zeroing refers to a practice of setting to zero negative dumping margin in anti-dumping investigations. In practice, zeroing may yield dumping where none exists or makes it more acute than what it is seen.

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