the WTO and the havoc in the global supreme court of free trade
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About Fundación Solón
Fundación Solón was born in 1994 at the initiative of the social artist Walter Solón Romero (+) to foster the creativity of rebellious spirits in the search for multidimensional alternatives to face the systemic crisis that the Earth community is experiencing.

The Systemic Alternatives initiative is coordinated by Focus on The Global South (Asia), Attac (France) and Fundación Solón (Bolivia).
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Contents

Introduction

Breaking down the Dispute Settlement Mechanism

Bully capitalism versus the Appellate Body

The interim dysfunctional way of settling disputes and the reform proposals

The barely functioning and non-functional pillars of the WTO
Back in 1995, when the World Trade Organization (WTO) had just started, it was the talk of the town. This was a multilateral trade, rules-based organization that had the legal power to ensure that those trade rules were enforced. The WTO prides itself as being rules-based and unique in that they can enforce decisions through their own Dispute Settlement Understanding (DSU) that includes the Dispute Settlement Mechanism (DSM), and also includes the Appellate Body (which is similar to a Supreme Court). The WTO can brag about this mechanism because they are the only multilateral organization that has legally binding agreements and with it, the ability to sanction a Member state if it did not comply. The WTO was the dream come true of the neoliberals and a nightmare for many who were already suffering the impacts of neoliberal policies.

Fast forward to November 30, 2020, and the term of the last sitting Appellate Body member ended. The seven seats of the Appellate Body were all now empty. Truth be told, since the rules state that there should be at least three Appellate Body Members to hear a dispute, the Appellate Body stopped functioning as early as 2018 as it had no quorum.

Even though the WTO insists it is held up by three pillars: 1) monitoring trade agreements 2) providing a platform, space and support for negotiations on new issues and trade deals 3) settling disputes using their legal mechanism; many believe that the ability to settle disputes and with that, enforce rules, through sanctions and other such penalties which can include changing a sovereign state’s laws; therein lies the true power of the DSM and the WTO itself. There are clear cut consequences for Members if they remain non-compliant with WTO rules, the losing Party either has to provide compensation with the agreement of the complainant, or it may face retaliatory measures such as trade sanctions.

The legally binding nature of the WTO trade agreements and the existence of the DSM and Appellate Body cannot be understated. This is power. The climate talks results for example, even if done multilaterally under the United Nations, is nowhere near binding. The United Nations Framework on Climate Change (UNFCCC) cannot enforce it as the promises to save the planet are voluntary. This is the same in various other issues such as the environment, biodiversity, and many more. Free trade above everything else is more than a slogan, it is a reality.

However, fast forward to present and there still is no Appellate Body and each day that goes by without it, so do chips at the credibility and power of the WTO. So, 27 years later, the WTO is again the talk of the town. But not in a favorable light. The numerous predictions by trade analysts that hitting the DSM and having no Appellate Body are going to be the death of the WTO, or at the very least, a significant crippling. Nevermind the fact that in those 27 years, the WTO pillar on negotiations has only had one accomplishment, the Bali Package or more importantly, the Trade Facilitation Agreement. The very first agreement the WTO has produced since transforming from the General Agreement on Tariffs and Trade (GATT) Uruguay Round in 1995.

This ability to enforce losing Parties/Member countries to change a WTO non-compliant national or local rule/law and or pay compensation or suffer retaliatory measures by the winning Party/Member country, is what makes the WTO DSM a very powerful tool and makes the WTO a very powerful organization. Not only does it have legally binding trade agreements but more importantly, it has the power to enforce these agreements upon sovereign states. This power and rulings were bound to gain disgruntled Member states, including the United States, and that is exactly what has caused the WTO Dispute Settlement Mechanism to be currently in a dysfunctional state and for the Appellate Body to have zero jurists.

Before going further into the discussion on the problems and current status of the process of settling disputes in the WTO, it is best to get a good grasp of what and how the DSM works. The legal text establishing the process of settling disputes was agreed, finalized and included in the legal texts that established the WTO. It is in the set of legal texts agreed on at the end of the Uruguay Round that transformed the GATT into the WTO and also decisions taken at the Ministerial Meeting at Marrakesh in April 1994. These texts are called the “Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts” [1]
and includes “The Marrakesh Agreement Establishing the World Trade Organization” as well as all the other legal texts of the 60 plus agreements. The text relevant to the settlement of disputes is called “Understanding on Rules and Procedures Governing the Settlement of Disputes” or what has been referred to as the DSU for short. The text lays out coverage, application, administration, procedure, the panels, the Appellate Body, the dispute settlement body, timeframes, recommendations for rulings, compensation, the suspension of concessions, arbitration, special procedures for least developed countries and the role of the WTO Secretariat. The 60 plus agreements under the WTO is under the jurisprudence of the Dispute Settlement. These legal texts together agreed and adopted facilitated the transition from the GATT into the WTO. Most important to note is that there is a legal text on settling disputes in this package and as such was also adopted and made a legal instrument to ensure that the agreements are enforced and that there is a process to be followed for settling any disputes involving these agreements and modalities.

The WTO has always and continues to pride itself as a rules-based organization. They have rules and the Member countries follow them. This aims to make trade flows run smoothly and predictably. The legal rules for dispute settlement that is the DSU is included in the legal texts of the WTO precisely as a way to demonstrate that the agreements are taken seriously and that breaches to the rules will be met with consequences. A Member country can submit a complaint if another Member country is deemed to be implementing non-WTO compliant ways. To ensure that the process of settling the dispute is trusted to be fair, there is a process laid out.

However, fast forward to present and there still is no Appellate Body and each day that goes by without it, so do chips at the credibility and power of the WTO. So, 27 years later, the WTO is again the talk of the town.

Breaking it down to sections, it can be noted that there are stages to this process: the first is the consultation process, second the review and reporting of the panel body then the Appellate Body from which comes the recommendation and ways on the implementation of the ruling which may include sanctions, countermeasures, retaliatory measures or compensations. In some cases, Arbitrators are involved in the process to negotiate time period, the compliance and the level of retaliation.

First and foremost, consultations are arranged between the Parties who have a dispute, this may involve 1 country per side or more. Member countries are encouraged to meet and find a mutual way to settle the problem without having to go through the rest of the legal process. “As of 31 December 2021, WTO Members referred 607 disputes to the Dispute Settlement Body. Not all of these disputes required formal rulings to resolve them. A mutually agreed solution is always the preferred outcome, and consultations among disputing Members within the framework of WTO dispute settlement can often be sufficient to resolve the matter in dispute.” [2]

Phase 1

Consultations are made – as of December 31, 2021, 607 disputes were reported but not all of these progress into legal proceedings, several of them are resolved in this phase of consultations.

Requests for Consultations 1995-2021

https://www.wto.org/english/tratop_e/dispu_e/dispsustats_e.htm

Phase 2

After consultations, when Parties do not reach an agreement, a request is made to establish a panel – a panel of experts relevant to the case – in which then Parties present their arguments and the Panel hears and considers them.

“As of 31 December 2021, a panel had been established in respect of 365 disputes (that is, in 60% of all disputes initiated). This led to panel reports in 277 of these disputes (not all cases in which a panel is established result in a panel report, as the parties might settle their dispute even after a panel has been established).” [3]

The Panel then issues a report which is presented to the Parties involved and the rest of the WTO Membership. If one of the involved Parties disagrees and files an appeal to the Dispute Settlement Body, then the case is forwarded to the Appellate Body for review.

Note that if no one appeals and the Panel report is accepted, then, this is the moment the Panel may recommend compensation and/or may recommend ways in which this compensation or suspension of concessions is implemented. The losing Party is given a reasonable amount of time to implement this and this may or may not include an Arbitrator if the losing Party requests a longer period of time.

“As of 31 December 2021, arbitrators have determined the period for implementation in 53 disputes.” [4]

Who are in these dispute panels?

“Panels are like tribunals. But unlike in a normal tribunal, the panelists are usually chosen in consultation with the countries in dispute. Only if the two sides cannot agree does the WTO director-general appoint them.

Panels consist of three (possibly five) experts from different countries who examine the evidence and decide who is right and who is wrong. The panel’s report is passed to the Dispute Settlement Body, which can only reject the report by consensus.

Panelists for each case may be chosen from an existing list of well-qualified candidates nominated by WTO Members, although others may be considered as well, including those who have formerly served as panelist. Panelists serve in their individual capacities. They cannot receive instructions from any government. The indicative list is maintained by the Secretariat and periodically revised according to any modifications or additions submitted by Members.”
Phase 3

The appealed Panel report is now sent to the Appellate Body. The Appellate Body then reviews and will hear appeals from the Panel cases. The Appellate Body may or may not have additional or different views from the Panel report and can uphold, modify or reverse the legal findings of the Panel. This Appellate Body ruling is then sent back to the Dispute Settlement Body to be adopted. Upon adoption, this ruling is unconditionally accepted by the Parties to the dispute unless the Dispute Settlement Body decides by consensus not to adopt the Appellate Body report within 30 days following the circulation to the Members as stated in Article 17 number 14 in the DSU. The losing Party is then expected within a set time limit to rectify the situation by changing the WTO non-compliant law or tariff or modality they were using. However, if the losing Party does not implement this, the case may then involve Arbitration to settle the compensation or retaliation measures to be recommended against the non-complying Party.

Who is in the Appellate Body?

“The Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It is a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO Members. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports are adopted by the Dispute Settlement Body (DSB) unless all Members decide not to do so. The Appellate Body has its seat in Geneva, Switzerland.

Currently, the Appellate Body is unable to review appeals given its ongoing vacancies. The term of the last sitting Appellate Body Member expired on 30 November 2020.”

The following phases after the Panel Reports agreed or the Appellate Body report (which is final and does not allow for appeal) involves then procedures for implementation, suspension of concessions, retaliation or cross-retaliation, all within agreed reasonable periods of time. These processes may or may not be implemented immediately, or may or may not need to include an Arbitrator and/or a process to establish panels of compliance.

“As of 31 December 2020, a compliance panel had been established in 51 disputes (that is, in 19 per cent of the disputes that led to the circulation of a panel report). In 33 of these disputes (that is, in almost 65 per cent of cases in which a compliance panel has been established), the compliance panel’s report was appealed.”[5]

At the end though, since the Appellate Body report is deemed final and with no possibility of appeal, the Dispute Settlement Body authorizes the retaliation or cross retaliation until such time that a full implementation by the losing Party is fulfilled. This process may or may not warrant the need for an Arbitration process to negotiate the level of suspension, procedures and principles of retaliation.
In an US election year, then President Obama as represented by the United States Trade Representative (USTR) began a risky precedent. That 2016, the US blocked the reappointment of Appellate Body jurist Seung Wha Chang. Chang was up for a reappointment as the norm is that the jurists serve for four year terms that can be renewed once. The US complained that Chang was responsible for the Appellate Body violating the principle of non ultra petita, resulting in judicial overreach by addressing issues and arguments beyond the scope of the appeal. This resulted in an unprecedented letter by all thirteen former Appellate Body Members to the Dispute Settlement Body warning that "there must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgements in the WTO’s rule-based system of adjudication". [6]

That narrative of judicial overreach or what others would say, judicial activism, is part of the theater that the US has been peddling, saying the Appellate Body has been overreaching on purpose to be duly unfair to the US. As the USTR states, "Specifically, the Appellate Body has added to U.S. obligations and diminished U.S. rights by failing to comply with WTO rules, addressing issues it has no authority to address, taking actions it has no authority to take, and interpreting WTO agreements in ways not envisioned by the WTO Members who entered into those agreements. This persistent overreaching is plainly contrary to the Appellate Body’s limited mandate, as set out in WTO rules.”[7] While all countries who have lost cases may have arguments against the jurists, it has been the US who has been front and center playing the aggrieved, even though they have a high win-loss rate compared to other countries. Furthermore, there always has been an American sitting in the Appellate Body.

This narrative of the aggrieved was taken to a whole new level by then US President Trump who, true to his style of bully capitalism just would not budge on any of the new appointments to the Appellate Body until it reached the state that it is in now, jurist-less. As of a recent count, December 2021, the US had unilaterally blocked 49 times, the selection of any appointees to the Appellate Body.

It was clear during the term of President Trump that this was their way of being uncooperative because of some imagined conspiracy that the WTO, particularly the dispute settlement process and the Appellate Body were biased against the US. It is important to note that trade justice activists had always pointed out that the free trade rules imposed by the WTO seemed to only apply to the poorer countries and somehow have loopholes for the richer countries such as the US. A concrete example of that would be the implementation of the Agreement on Agriculture (AoA). Through certain loopholes called boxes, the US and EU have been able to continue providing subsidies to their large farmers and agribusiness while the smaller producer countries such as those in the G33, have had to fight tooth and nail to get a paltry “peace clause” so that they may help their poor farmers and starving constituents. (A peace clause refers to allowing the G33 countries to “break the rules” of the AoA in order to address their countries’ food crises with the assurance that the other WTO Members will not use the rule breaking as basis for filing complaints with the DSB)

Now that the USTR is under the current US President Biden, one would think the vacant Appellate Body would be one of the urgent issues they would address. It seems that some countries, not only the US though, are seeing this as an opportunity to use this presumably as a bargaining chip to push for some of their agenda or perhaps their chance to change the DSM.

this presumably as a bargaining chip to push for some of their agenda or perhaps their chance to change the DSM. “WTO reforms” is on the agenda for the 12th WTO Ministerial Conference along with the discussion on vaccines and Trade Related Intellectual Property Rights, fisheries, agriculture and some other items. It is not clear what these “WTO reforms” will be, but it involves the “reform” of the DSM.

As stated in the WTO General Council (2021) “MC12: Shaping the Package Agenda” JOB/GC/261: “WTO reform: The establishment of a WTO Working Group on the WTO reform is required. The group shall be vested with the authority to discuss issues of relevance to the WTO reform with a focus on improvements of the negotiating, monitoring and dispute settlement functions of the WTO, as well as institutional improvements in its functioning. The group will discuss these matters in an open, transparent and inclusive manner striving for multilateral outcomes, including with a view to establish formal WTO 2030 Vision by the next MC. The General Council shall regularly review the progress of these discussions. This could be reflected in the [Ministerial Decision] [Joint Ministerial Statement] on the WTO reform." [8]

According to a report that cited insider sources, these “WTO reforms” agenda item is a possible controversy as it supposedly presents proposals such as changing the consensus decision making of the WTO and also reportedly the ability for countries to self-designate as a developing country and avail of special and differential treatment. [9] It is quite difficult to imagine that these proposals would have widespread support, especially because when the small producer countries asked for a few changes to the Agreement on Agriculture in order to update it to meet the changing times, prices and realities that were not present when the AoA was written. That proposal was shut down in negotiations and the rationale being that these changes meant going back to the rule book and make those adjustments. It was made excruciatingly clear that even if this meant denying governments to help its starving constituents, and small farmers, no one was to touch the legal texts. To then turn around now and make proposals in the name of "reforms" to items such as decision-making processes and the dispute settlement understanding, reeks of double standard. If adjusting the AoA to support the right to food did not even seem to be a possibility WTO rules-wise, then why do these issues of consensus building rather than voting, the way the DSM works, and other legal texts of the WTO can be changed?

The supposed proposal on changing the decision-making process in the WTO from consensus to voting is one that is highly controversial and quite impossible to imagine happening. Aside from it being written into the legal texts of the WTO, the process for changing this requires the full consensus of all the WTO Members, agreeing that the decision-making process be changed to voting. It also opens the door to vote buying, for example, promising concessions in return for votes, and all other problematic issues that come with deciding by vote. The spirit of the consensus building to reach a decision was to ensure that all countries whether developed, developing or the Least Developed, would be able to equally participate in the discussion and that a decision cannot be forced to move forward without everyone’s consensus.

Insider reports have also pointed out that the key proposed “reform” that should be looked into is the ability for countries to self-designate their status as a developing country. This supposed “reform” has a particularly obvious target, especially if it is supposedly coming from the US and the EU: which is China, who, with its massive economy, is still self-designated as a developing country and therefore enjoys the exemptions and special treatment afforded to developing countries. To those unfamiliar with the WTO, in the supposed spirit of fairness and a level playing field, rules are implemented fully or with exemptions depending on the status of the Member country. For example, developed countries are expected to implement trade rules fully (loopholes though still exist, that allows them to get away with not following some WTO rules for their own interests), then developing countries have less ways, longer time periods to implement certain rules and have special and differential treatment, then the Least Developed Countries (LDCs) are exempt from most anything and are expected to be assisted by the developed countries and given duty free and quota free and market access privileges. If the insider reports are accurate that this proposed “reform” is only targeting China, then it may possibly gain support from other countries if the trade-off is that the US stops blocking nominations to the Appellate Body and paves the way for the Dispute Settlement Mechanism to fully function once again. There is already a growing list of cases that could not be settled in the current hacked process of the dispute settlement and those countries would probably be more than happy to have a functioning Appellate Body again.

This refers to current cases in which notifications of appeal have been made. As indicated in the opening paragraphs, at the current time the Appellate Body is unable to review any of these notified appeals given the ongoing vacancies.

- 24 December 2021: Notification of Appeal by India in DS581: India — Measures Concerning Sugar and Sugarcane (Guatemala) (WT/DS581/11)
- 24 December 2021: Notification of Appeal by India in DS580: India — Measures Concerning Sugar and Sugarcane (Australia) (WT/DS580/10)
- 24 December 2021: Notification of Appeal by India in DS579: India — Measures Concerning Sugar and Sugarcane (Brazil) (WT/DS579/10)
- 16 September 2021: Notification of Appeal by China in DS562: United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products (WT/DS562/12)
- 28 July 2021: Notification of Appeal by Morocco in DS578: Morocco — Definitive Anti-Dumping Measures on School Exercise Books from Tunisia (WT/DS578/5)
- 22 February 2021: Notification of Appeal by Pakistan in DS538: Pakistan — Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates (WT/DS538/5)
- 22 January 2021: Notification of Appeal by Korea in DS553: Korea — Sunset Review of Anti-Dumping Duties on Stainless Steel Bars (WT/DS553/6)
- 17 December 2020: Notification of Appeal by Indonesia in DS484: Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products (Article 21.5 — Brazil) (WT/DS484/25)
- 26 October 2020: Notification of Appeal by United States in DS543: United States — Tariff Measures on Certain Goods from China (WT/DS543/10)
- 28 August 2020: Notification of Appeal by the European Union in DS494: European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint) (WT/DS494/7)
- 18 December 2019: Notification of Appeal by the United States in DS436: United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (Article 21.5 — India) (WT/DS436/21)
- 6 December 2019: Notification of Appeal by the European Union in DS316: EC and certain member States — Large Civil Aircraft (Article 21.5 — EU) (WT/DS316/43)
- 19 November 2019: Notification of Appeal by India in DS541: India — Export Measures (WT/DS541/7)
- 14 December 2018: Notification of Appeal by India in DS518: India — Certain Measures on Imports of Iron and Steel Products (WT/DS518/8)
- 20 November 2018: Notification of Appeal by Panama in DS461: Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear (Article 21.5 — Colombia) (Article 21.5 — Panama) (WT/DS461/28)

Appellate Body: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#fnt-1
The current dysfunctional process of settling disputes in the WTO stops at the phase of Panel Reports because it cannot go to the phase of Appellate Body for appeals since there are no sitting judges at the Appellate Body. This has been wreaking havoc in the WTO secretariat and membership as the DSM pillar is supposed to be the assurance of trade rules being guaranteed to flow smoothly and predictably. It was reported that one of the main frustrations of former WTO Director General Azevedo had been the adamant refusal of the Trump USTR to even discuss a compromise in order to save the Appellate Body.

There is a growing list of disputes that cannot be resolved at the panel stage and are waiting for the Appellate Body to be re-established. This indicates that the stop gap measure of having the DSB attempt to settle all disputes at the panel stage and avoid the need for an Appellate Body is simply not enough.

The EU and a number of other countries have presented an interim solution to the Appellate Body crisis. It is the multiparty interim appeal arbitration arrangement (MPIA). It is open to all WTO Members and can be used as the alternative venue for Parties to present disputes and come to a resolution through arbitration. The proponents have pointed out that this proposal is not at all antagonistic to the WTO, citing that the DSU text itself allows for such arbitration. In Article 25 of the DSU: "1) 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" [10] It continues to three more points that all indicate that arbitration amongst Parties can indeed move forward for so long as it is agreed on by all participating Parties. This seems like a viable solution except that this MPIA will not have the authority to enforce rulings. The arbitration may solve disputes but if the dispute is not one that can be solved and needs a ruling to implement compensation or retaliation to the offending Party, the MPIA does not have the legal mandate like the DSM does.

[10] Article 25 of the Understanding on Rules and Procedures governing the settlement of disputes
The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts
https://www.wto.org/english/res_e/publications_e/legal_texts_e.htm
As mentioned earlier, the WTO has three pillars to keep it running, to monitoring trade policies globally, provide a forum for negotiations on new issues, and to enforce the 60 plus agreements under the WTO and settle disputes between Member states. The functioning of these three pillars is crucial, and although it may sound simple: negotiations for new trade rules, monitoring and resolving disputes, none of these are actually quite easy. The WTO has been facing problems in these pillars and most recently, the pillar on settling disputes has had the most issues but problems in the negotiations pillar comes a close second to the dispute crisis.

The WTO is facing a make or break it situation because in reality two out of the three core pillars are in serious danger and if these two fall, the WTO will lose what matters most to it, their power and their credibility, if they haven’t already lost it completely. The pillar on negotiations has nothing to be proud of except for the Bali package which contained a consolation prize for developing countries in the form of a peace clause on agriculture, promises (yet to be fulfilled) to the Least Developed Countries (LDCs) and the main goal of developed countries and their transnational corporations, the Trade Facilitation Agreement. One agreement has been produced in 27 years of negotiations. Even if you count from 2001 when the Doha Round was launched instead of 1995 when the WTO was established, it is still not a great negotiation feat.

This Doha Round quagmire is a making of neoliberal hubris. It is incredibly vast and covers issues that should not even be under trade rules. (The current WTO covers at least 60 agreements and a number of them would also be better placed elsewhere instead of a free trade body.) To complicate things further, the Doha Round has a single undertaking rule, nothing is agreed until all is agreed. Former WTO Director General Azevedo had to do some acrobatic logic of an early harvest at the 9th WTO Ministerial to get the Bali Package without breaking the single undertaking rule. The new Director General Okonjo-Iweala, the first Black woman to ever hold the position has big plans and a lot is expected of her, especially from the developing countries who had supported her. She has already had a rough start including the postponement of the 12th Ministerial Conference for fear of the new variant of the pandemic spreading and endangering lives. Her early statements and actions though have raised questions on whether she does have the developing and least developed countries interests on her mind or not. The issue of the vaccines and TRIPS for example, is still being negotiated and the DG’s promises to respond to the pandemic seem hollow if she does not follow this up soon by pushing for the decision that could save millions of the most vulnerable. An insider source has said that informal complaints from developing countries are showing the disappointment as they see that the DG seems to be on the side of the developed countries.

Furthermore, on the negotiations front, curiously, the unspoken rule seems to be to not mention the Doha Round. The working groups are negotiating issues from the Doha Round but not mentioning it. This seems like a tactic to try and move forward without the deadweight that the Doha Round had become over the years. And probably since it will be too much of an admission of failure to state that they are dropping the Doha Round and instead just continuing with issues where negotiations had already started and starting negotiations on the new issues, it would be easier to just not say anything and hope no one raises the issue of the missing Doha Round.

The postponed and yet to be re-scheduled 12th Ministerial Conference are supposed to cover negotiations on fisheries, agriculture, e-commerce and the controversial and vague WTO reforms. Presumably the crisis of the DSM and Appellate Body will be addressed under this umbrella. One of the reportedly included reform is that of changing the decision-making process from consensus building to voting. As mentioned earlier though, this requires changing earlier untouchable legal texts. It is also
a clear departure from the WTO narrative that consensus building was supposedly showing the kindred spirit of negotiating amongst trade partners in a multilateral setting. To paraphrase the WTO, it is the cornerstone of rules based multilateral trade between nations and its goal is to make sure that trade flows freely and predictably. Interestingly, it does not guarantee that these flows would be fair.

Case in point, just after all the platitudes of transparency and inclusivity, a draft of a Ministerial text with hardly any consultation was produced before the Ministerial even began. “Without proper consultations, Ambassador Walker produced a draft text of a Ministerial Declaration on the WTO response to the pandemic with almost no brackets and proposed it as a basis for deliberations among a very small group of selected countries. Such processes are designed to put pressure on the rest of the WTO membership, who are not in the room to negotiate…” [11]

If this is any indication of how the DG and negotiation Chairs work, then it does not bode well for the poor countries who are never included in these green room meetings where negotiations that impact them will not even take them into consideration. They did not seem to be important enough to be consulted on a Ministerial text regarding the pandemic, even though many of the developing and least developed countries are the ones in dire need of vaccines, the TRIPS waiver and tools to help them prevent their growing number of sick and dead.

The 12th Ministerial will be a good indicator of how transparent or non-transparent the negotiations will be and if bulldozing the rest of the membership is considered moving forward by the new DG and her Chairs. Whether or not the negotiations with or without secrecy and bullying succeed is definitely yet to be seen. If this Ministerial fails it would be a big blow to the new DG and her team but also it will be an addition to the already crisis ridden pillar of negotiations of the WTO. It is ironic that people are reminded at every opportune moment that the WTO is a rules-based organization and beyond reproach. This platitude is repeated even as secret meetings are held, many left out and are expected to just accept what has decided for them. The emphasis placed on rules is supposed to assure Members as the neoliberals assure the negotiations are done on a level playing field, leaving out the part that many of the trade rules are they by itself are neither fair nor level. The trade rules of the WTO are meant to favor the bigger and richer.

As mentioned earlier, it has now been at least two years since the WTO Appellate body, has been able to function since the body needed at least three Appellate Body Members. That was in December 11, 2019. There was a cacophony of appeals to the US to stop blocking the nominations to the Appellate Body. To no avail, the Trump brand of bullying and refusing to budge on this issue, has set up in the first time in WTO history, that there were no more Appellate Body Members as the last one ended their term on November 30, 2020. It was also mentioned earlier that even though President Biden assured that America is back and immediately unblocked the deadlock on the DG election results. The USTR was also, to the great surprise of many, was supportive of working towards a TRIPS waiver and have been donating vaccines and other tools to fight COVID to developing countries. It just now seemed odd that the US can very easily unblock the process of nominations and the selection process of jurists to fill the very empty seven seats of the Appellate Body. However, it


has not done so, and instead is talking about making some WTO reforms, including the DSM, which includes the Appellate Body. The US, EU and Brazil are all reportedly part of this new working group on “WTO Reforms” and will have proposals to present at the 12th Ministerial Conference.

One obvious question though is how is the WTO still standing with all these problems? A few possible answers are: there is no other organization like the WTO – it is still the only multilateral trade organization that has 60 plus legally binding agreements that Member countries are legally bound to follow and implement; then almost all the Free Trade Agreements – bilateral and regional are based and modeled after the WTO rules and agreements. The crises though on not making great progress on negotiations on new issues and trade agreements and the very deep crisis of settling disputes including a glaringly empty Appellate Body will most likely push the WTO to its limits, how far that goes is yet to be seen.

A lot of the attention though at the moment is focused on the dispute settlement pillar crisis and continues to get more attention and dire predictions from the media to trade analysts. The New York Times called it as the WTO having a mid-life crisis. [12] As mentioned earlier, the ability to settle disputes and issue trade sanctions or retaliatory measures against a sovereign State’s non-conforming rules until it changes it to WTO conforming rules, is a key source of power of the WTO. If this core pillar of the WTO were to crack and collapse, there is no telling if the WTO would be able to keep its power and credibility.

References and recommended readings


aren’t those the rules for disputes?

eating the rules and everything in its path