



Impending Reforms at WTO's Appellate Body

This editorial is based on "[Crown Jewel That Was](#)" which was published in Indian Express on 05/02/2024. The article explores the incapacitation of the WTO's Appellate Body (AB) since late 2019, attributing its dysfunction to the unilateral obstruction by the United States, which has prevented the appointment of new members.

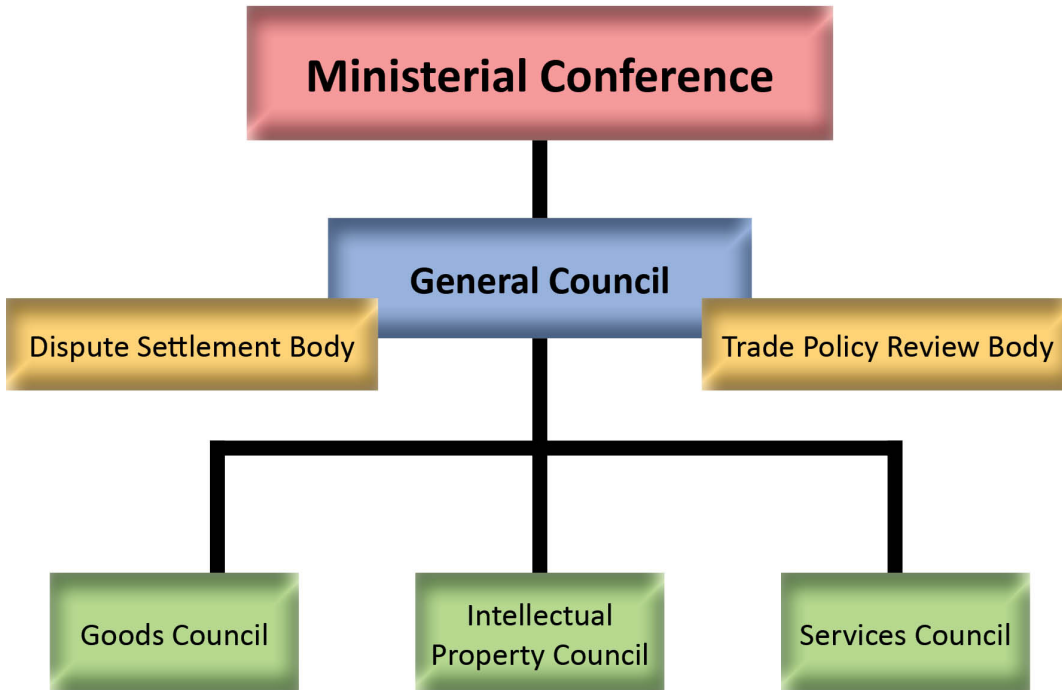
For Prelims: [WTO](#), [General Agreement on Trade and Tariffs \(GATT\)](#), [Subsidy Boxes](#), [Peace Clause](#), [De Minimis Clause](#), [WTO's Agreement on Subsidies and Countervailing Measures](#), [WTO's Agreement on Agriculture](#).

For Mains: WTO reforms and its implication on the developing nations, India's suggestions on WTO reforms.

On the negotiating agenda for the member countries of the [World Trade Organisation \(WTO\)](#), when they meet in Abu Dhabi for the 13th ministerial meeting (to be held in February 2024), is the ongoing crisis in the Dispute Settlement Mechanism (DSM). WTO's DSM comprises a binding two-tiered process with a panel and an appellate body (AB). Since the end of 2019, it stands dysfunctional because the US, which lost several critical disputes before it, has single-handedly blocked the appointment of new members.

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Structures of WTO



What is WTO's Dispute Settlement Mechanism?

▪ Consultations:

- Before initiating a formal dispute, the complaining party must request consultations with the defending party. This is the first step in attempting to resolve the dispute amicably through negotiations.
- Consultations must be held within specific time frames, and the parties involved are encouraged to find a mutually agreeable solution.

▪ Panel Establishment:

- If consultations fail to resolve the dispute, the complaining party can request the establishment of a dispute settlement panel. The **Dispute Settlement Body (DSB)** oversees this process.
- The General Council convenes as the DSB to deal with disputes between WTO members. The DSB has authority to:
 - establish dispute settlement panels,
 - refer matters to arbitration,
 - adopt panel, Appellate Body and arbitration reports,
 - maintain surveillance over the implementation of recommendations and rulings contained in such reports; and
 - authorise suspension of concessions in the event of non-compliance with those recommendations and rulings.
- The panel is composed of independent experts with relevant expertise in trade law and the subject matter of the dispute. The panel examines the case, reviews arguments from both sides, and issues a report.

▪ Panel Report:

- The panel's report includes findings of fact, legal interpretations, and recommendations for a resolution. It is circulated to all WTO members, allowing them to review and provide comments.

▪ Adoption or Appeal:

- The DSB adopts the panel report unless there is a consensus against doing so. If a consensus is not reached, the matter can be appealed to the **Appellate Body**.

- **WTO's 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 members of Appellate body serve for a four-year term.
 - It can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports, once adopted by the DSB, must be accepted by the parties to the dispute.
 - The Appellate Body has its **seat in Geneva, Switzerland.**
- **Implementation of Recommendations:**
 - If a WTO member is found to be in violation of its obligations, it is expected to bring its measures into compliance with WTO agreements.
 - If the member fails to do so, the complainant may seek authorization to retaliate through the suspension of concessions or other measures.

What are the Unilateral Challenges Posed by the US to WTO?

- **WTO Ministerial Conference (MC11), 2017:**
 - Conference held at Buenos Aires ended without any substantial outcome as consensus failed the 164-member body.
 - The **USA blocked a permanent solution** on government stockholding for food security purposes, resulting in India's toughened stand on new issues including e-commerce and investment facilitation.
- **E-Commerce Negotiations:**
 - Developed countries led by the US and the **European Union (EU)** sought to find a way out of the deadlock at the WTO talks by forming large pressure groups on e-commerce, investment facilitation and MSMEs within the WTO with more than 70 members in each formulation.
 - Though WTO is driven by consensus and even a plurilateral agreement needs approval of all members, the formation of these groups attempts to steer WTO away from its focus on multilateralism because these reforms were largely not supported by the developing countries such as G-77 etc.
- **Defending TRIPS's Contentious Provisions:**
 - The US' unrestricted defence of '**Trade Related Intellectual Property' rights (TRIPs)**—patents, copyrights and trademarks—comes at the expense of health and human lives.
 - WTO has protected **pharmaceutical companies' 'right to profit'** against governments seeking to protect their people's health by providing lifesaving medicines in countries in areas like sub-saharan Africa, where thousands die every day from HIV/AIDS.
- **Issues in Doha Round of Trade Negotiations:**
 - The US has consciously manipulated the Doha round of trade negotiations process in formulating excessive demands that no country was prepared to meet.
 - The priority of the US administration was not to revive a dying WTO negotiation, but to concentrate on its newly created alternative, the **TPP (Trans-Pacific Partnership)**, to contain its competitors: Europe and China.
- **Blocking Appointment of Appellate Body Members:**
 - For years now, the multilateral system for the settlement of trade disputes has been under intense scrutiny and constant criticism.
 - The US has systematically blocked the appointment of new Appellate Body members and judges and de facto impeded the work of the WTO appeal mechanism.
 - Despite the resolve to create a fully functioning DSM by 2024, the US' inclination to de-judicialise international trade relations poses a significant challenge to resurrecting the dispute settlement mechanism as it existed before 2019.
- **Aggressive Use of Unilateral Tariff Measures:**
 - USA's aggressive use of unilateral tariff measures, Chinese mercantilism, and the inability of WTO members to reach consensus on expanding its disciplines to important new sectors in the modern economy reinforce the critique of the WTO.
- **Lack of Consensus in Defining Countries:**
 - There is a problem in WTO negotiations as there is no agreed definition of what constitutes

a developed or developing country at the WTO.

- Members can currently self-designate as developing countries to receive 'special and differential treatment' – a practice that is the subject of much contention.
 - For instance, China and India got the 'developing country' status at the WTO which became a contentious issue with the US and EU raising concerns against the decision.
- **USA Obstructing India's Initiatives:**
 - The disputes where India is a complaining party are countervailing duty by the US on Indian steel products; measures by the US concerning non-immigrant visas, renewable energy programmes of the US, and import duties imposed on steel and aluminium products by America.
 - WTO disputes where India is a responding party include prohibition by India on import of poultry and poultry products filed by the US, and import duties on certain information and communication technology goods filed by the EU, Japan and Taiwan.

What are the Solutions to Reform the WTO?

- **Support Proposal to get New Members:**
 - Usually, new appointments to the Appellate Body are made by a consensus of WTO members, but there is also a provision for voting where a consensus is not possible.
 - The group of 17 least developed and developing countries, including India, that have committed to working together to end the impasse at the Appellate Body can submit or support a proposal to this effect, and try to get new members on the Appellate Body by a majority vote.
 - But this may come with repercussions, as all countries fear unilateral measures by the US as a consequence of directly opposing its veto.
- **Suitable Punishment if Law is Broken:**
 - If a country has done something wrong, it should swiftly correct its faults. And if it continues to break an agreement, it should offer compensation or face a suitable response that has some remedy — although this is not actually a punishment: it's a "remedy", the ultimate goal being for the country to comply with the ruling.
 - Such countries can be mandated to submit mandatorily a particular amount to **Green Climate Fund**, if found on the wrong side.
- **Reformative Approach:**
 - The permanent long-term solutions based on reformative approach include having a transitional rule for the outgoing members, allowing them to completely dispose the pending appeals even after the expiry of their terms and limiting the Appellate body's interpretation to the meaning of consented national laws without stepping over the policy space, so as to preserve sovereignty of the nations.
- **Regular Meeting of the Members:**
 - The other long-term solutions include regular meetings of the WTO members with the Appellate body to ensure effective communication and immediate redressal mechanism.
 - Thus, all the nations must come together to bring in a common ground to address the crisis so as to not be faced with the worst-case scenario.
- **Developing Countries' Call for DSM Restoration:**
 - Developing countries, including India, advocate for the restoration of the WTO's dispute settlement mechanism (DSM) to its previous functional state, emphasising the importance of the checks and balances provided by the appellate body.
- **Options for Developing Countries:**
 - Developing countries face three options to maintain a two-tiered DSM at the WTO: (a) joining the European Union-led Interim Appeal Arbitration Arrangement (MPIA), (b) accepting a diluted appellate body, or (c) resurrecting the original appellate body with an opt-out provision.
 - **MPIA as an Interim Solution:** The first option for developing countries is to join the European Union-led MPIA, a multi-party Interim Appeal Arbitration Arrangement that formalises the arbitration mechanism but has downsides such as its voluntary nature and lack of universal adoption.
 - **Diluted Appellate Body:** The second option involves considering a diluted

appellate body (AB), where the powers of the AB would be limited, potentially hindering its ability to provide security and predictability to the multilateral trading regime, contrary to WTO law expectations.

- **Opt-Out Provision for AB as an Interim Solution:** A third interim option suggests resurrecting the AB with a crucial change—an opt-out provision. While this may alter the nature of a two-tier binding DSM, it could be a compromise to safeguard the AB's current form and involve the US on a voluntary basis.

Conclusion

The 13th ministerial meeting of the WTO grapples with the critical issue of the crippled dispute settlement mechanism (DSM), a consequence of the US blocking new members to the appellate body since 2019. The quest to restore a fully functional DSM faces challenges due to the US's reluctance to judicialize international trade relations. While the ideal solution remains the restoration of the appellate body as it existed till 2019, the compromise of an AB for willing countries may be a pragmatic choice to safeguard its essential role in the WTO.

Drishti Mains Question:

Discuss the reforms needed for the World Trade Organisation (WTO) to address challenges, especially focusing on the dispute settlement mechanism, and its impact on global trade governance.

UPSC Civil Services Examination, Previous Year Questions (PYQs)

Prelims:

Q1. India enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999 in order to comply with the obligations to (2018)

- (a) ILO
- (b) IMF
- (c) UNCTAD
- (d) WTO

Ans: (d)

Q2. The terms 'Agreement on Agriculture', 'Agreement on the Application of Sanitary and Phytosanitary Measures' and 'Peace Clause' appear in the news frequently in the context of the affairs of the (2015)

- (a) Food and Agriculture Organization
- (b) United Nations Framework Conference on Climate Change
- (c) World Trade Organization
- (d) United Nations Environment Programme

Ans: (c)

Q3. In the context of which of the following do you sometimes find the terms 'amber box, blue box and green box' in the news? (2016)

- (a) WTO affairs
- (b) SAARC affairs
- (c) UNFCCC affairs
- (d) India-EU negotiations on FTA

Ans: (a)

Q4. Consider the following statements: (2017)

1. India has ratified the Trade Facilitation Agreement (TFA) of WTO.
2. TFA is a part of WTO's Bali Ministerial Package of 2013.
3. TFA came into force in January 2016.

Which of the statements given above is/are correct?

- (a) 1 and 2 only
- (b) 1 and 3 only
- (c) 2 and 3 only
- (d) 1, 2 and 3

Ans: (a)

Q5. With reference to Trade-Related Investment Measures (TRIMS), which of the following statements is/are correct? (2020)

1. Quantitative restrictions on imports by foreign investors are prohibited.
2. They apply to investment measures related to trade in both goods and services.
3. They are not concerned with the regulation of foreign investment.

Select the correct answer using the code given below:

- (a) 1 and 2 only
- (b) 2 only
- (c) 1 and 3 only
- (d) 1, 2 and 3 only

Ans: (c)

Mains

Q1. WTO is an important international institution where decisions taken affect countries in a profound manner. What is the mandate of WTO and how binding are their decisions? Critically analyse India's stand on the latest round of talks on Food security. **(2014)**

Q2. "The broader aims and objectives of WTO are to manage and promote international trade in the era of globalization. But the Doha round of negotiations seem doomed due to differences between the developed and the developing countries." Discuss in the Indian perspective. **(2016)**

Q3. What are the key areas of reform if the WTO has to survive in the present context of 'Trade War', especially keeping in mind the interest of India? **(2018)**