

Weakening WTO's Dispute Settlement System

What is the issue?

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- Over the years, the results obtained by the World Trade Organisation (WTO) in dispute settlement have largely been reassuring.

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- But even this aspect is facing challenges in the recent days, which need attention, especially in the context of the US's role.

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What was the US's role in WTO's origin?

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- It was the US that pressed for WTO's judicialisation.

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- It also argued for the rule of negative consensus and strongly supported the introduction of the appellate review stage.

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- Under the negative consensus rule, members' requests are approved unless the Dispute Settlement Body (DSB) decides by consensus not to do so.

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- These may apply for accepting the establishment of a panel or adopting the report of a panel or of the Appellate Body (AB).

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- Thus, the procedures were freed from blockages that had earlier made the dispute settlement mechanism dependent on negotiations.

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- It was the US, again, that had put forward the proposal for stipulating time limits for each stage of the procedure.

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What is US's current stance?

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- Worryingly, the dispute settlement system of the WTO is now under attack, being led by the United States itself.

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- The US's attempts to weaken the dispute settlement procedures began in the pre-Trump era.

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- The US has been stalling reappointments to the AB on the expiry of the initial term of four years.

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- E.g. in 2011, Jennifer Hillman, a US nominee was denied a second term, Seung Wha Chang from South Korea was opposed a second term in 2016

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- Denial of automatic reappointment for a second term was clearly aimed at curtailing the independence of AB members.

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- Since President Trump assumed office, the US has been blocking even fresh appointments to WTO's Appellate Body.

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- On a number of occasions, he has even threatened that the US would leave the WTO.

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- **Demands** - The US is insisting to find solutions on issues relating to AB's functioning, before the selection procedures for filling up vacancies can proceed.

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- Some of the questions in debate include -

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- i. having the name of a member in the report, who had participated in the decision but had demitted office before its submission
- ii. the legal status of an AB report that has not been concluded within the stipulated period of 90 days
- iii. examining a member's domestic law as a matter of law rather than treating it as a matter of fact
- iv. treating AB rulings as a precedent to be followed in future cases

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Is US's stance justified?

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- None of the issues raised by the US is unreasonable, although some of them have less weight than others.

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- But what is unreasonable is the linkage of these with the filling up of the vacancies in the AB.

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- Further, the US has not made any definitive proposal on the solutions, which raises doubts over its genuine interests.

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What is the possible intention then?

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- US is aiming to weaken the dispute settlement machinery that it had sought to strengthen a little over 23 years ago.

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- Its expectation at the time of negotiations was that its laws would be consistent with the WTO Agreement.

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- So US would be a complainant rather than a defendant in future disputes and it thus wanted a strong dispute settlement machinery.

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- This was to ensure that other members, mainly the developing countries, carried out their obligations.

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- But the reality now is that the US, too, is a defendant in a number of cases.

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- In fact, the US has been repeatedly bruised in anti-dumping disputes.

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- In effect, these go against the US's objectives two decades back and are even creating for it some amount of discomfort now.

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How does the future look?

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 - The AB has already been reduced to three members, the minimum number necessary to keep it working.
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 - In December 2019, two more members will retire and the AB will cease to function.
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 - A panel report must be adopted by the DSB within 60 days of its circulation unless a party to the dispute formally notifies its decision to appeal.
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 - After the AB has become non-functional, a decision by the losing party to appeal will imply that a dead-end has been reached.
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 - In that situation, the dispute settlement system of the WTO, as a whole, will stand substantially dismantled.
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 - It will, of course, remain open for the parties to try to negotiate further based on the findings and recommendations in the panel report.
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 - This would essentially take the process back to the GATT (General Agreement on Tariffs and Trade - replaced by WTO) 1947 days when the dispute settlement was a matter of negotiations.
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 - But it is not to be forgotten that a strong dispute settlement machinery underpins the rules-based multilateral trading system embodied in the WTO Agreement.
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Source: Financial Express

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