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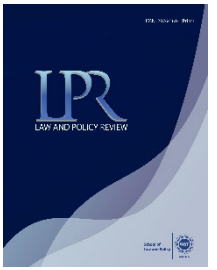

Title: **Learning from the Mistakes: Time to Rebuild the WTO Dispute Settlement Mechanism**

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Learning from Mistakes: Time to Rebuild the WTO Dispute Settlement Mechanism

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Abstract

Hailed as a "the jewel in the crown", the WTO dispute settlement mechanism has been central in ensuring security and predictability to the rules of international trade. The WTO Appellate Body attained a central position in the dispensation of justice during the last two decades of its existence. Unfortunately, it has stopped functioning since December 10, 2019 due to the United States' stance to block the appointment of its members. This stumbling block in the justice delivery system appeared at the worst possible time as the COVID-19 pandemic compelled the member states to adopt various means of trade protectionism in order to shield their domestic industry and to overcome economic losses suffered/sustained during the pandemic. The current trend across the globe leads to the obvious conclusion that the WTO obligations face the danger of subversion. With the increased trade barriers emerging out of the COVID-19 pandemic, more and more disputes are expected to reach the WTO Dispute Settlement Body (DSB). However, in the absence of the Appellate Body, serious questions arise regarding the efficacious dispensation of justice at the WTO level. Due to the lack of faith in WTO dispute settlement, member states may resort to take justice in their own hands and thereby end-up in a vicious circle of retaliatory measures. Such a situation is detrimental to the credibility of the WTO system. Hence, concerted efforts to restore the past glory of the WTO dispute settlement mechanism are indispensable and the current author is of the view that Asian states can take lead in this regard.

Keywords: Asian states**,** detrimental impact, dispute settlement mechanism, mediation, procedural objection, substantive concerns, zeroing

Introduction

The WTO Dispute Settlement Understanding (DSU) marked the beginning of a new era, not just in international trade law but also in international law, by focusing on the need for a strong dispute settlement mechanism to

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enforce the norms. The WTO dispute settlement mechanism has been heavily quoted as an example of a standard mechanism to be made applicable in different fields by numerous scholars. In the absence of this implementation tool, the commitment of trade liberalisation under the World Trade Organisation (WTO) would have had no practical effect. With more than 350 rulings being issued since 1995 (see WTO website), the WTO Dispute Settlement Body (DSB) has been a most vibrant body at the international level. Despite the absence of the doctrine of precedent, it can protect the centrality of WTO by eliminating political factors and by bringing in transparency and predictability to the process of decision-making.

The pressure exerted by developed countries has been carefully handled by WTO DSB for more than two decades without compromising the contours of justice. Unfortunately, the fortress could not be held longer, especially in the aftermath of the United States' objections to the reappointment of a member of the Appellate Body, namely Mr. Seung Wha Chang (World Trade Organization [WTO], 2016a). Although the United States stood alone with its objections and the remaining six members of the Appellate Body condemned the United States' unilateralism (Third World Network [TWN], 2016), it went ahead with the blocking of the decision not only for the concerned reappointment but also for every subsequent appointment/reappointment. Such a unilateralism could trump over the common agreement of the rest of the world, simply due to the veto provided to every member state by the requirement of consensus for DSB's decision under Article 2.4 of DSU. As a consequence, the Appellate Body has stopped functioning since December 10, 2019 in the absence of the minimum requirement of three members to function. The last sitting member of the Appellate Body also retired on November 30, 2020 (WTO, 2016b), drawing a curtain to one of the most celebrated international bodies in the realm of dispute settlement.

This paper starts with the analysis of the strengths of the WTO dispute settlement mechanism to understand its significance. Why the Appellate Body is central in the dispensation of justice at the WTO level would be highlighted here with an objective to appreciate the need for its continued presence. The next part of the paper outlines the position of the United States about blocking the appointment of the Appellate Body members. The penultimate part of this paper focuses on the need for reviving the WTO

dispute settlement mechanism. Also the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and its potential to fill-in the void is looked into. Finally, the role to be played by the Asian States in protecting the centrality of the WTO is probed.

Research Methodology

This paper adopts the doctrinal method of research with historical, analytical, and critical tools as the major bases of the analysis. In the context of the historical method, this research outlines the shift from the political process of dispute settlement towards the more authentic legal process at the WTO. The analytical tool used to elaborate the system of dispute settlement has been adopted with a second level check of the WTO Appellate Body. How the Appellate Body functioned as a custodian of the rights of member states is also discussed. The critical approach is used at two levels in this paper. Firstly, United States' position in criticizing the functioning of the Appellate Body is referred to with a view to highlight that the current mechanism is not infallible. Secondly, though the United States' position on some issues is not completely ruled out, it is also criticized for being too self-centered. Both primary and secondary sources are referred to including international treaties, decided cases, WTO reports, governmental reports, text books, journal articles, and online materials.

Research Objectives

The absence of the Appellate Body has posed serious concerns regarding the implementation of international commitments undertaken by the WTO member states. The number of instances of the violation of international trade regime has been increasing, alarmingly. Hence, this paper carries the objective of rebuilding the confidence of member states in the WTO dispute settlement system to ensure the compliance of the WTO commitments. The author also attempts to establish the failure of European Union led Multi-Party Interim Appeal Arbitration Arrangement (MPIA). In light of the above, the two major objectives of this paper are as follows: (i) to outline the role that can be played by the Asian states in rebuilding a dependable system of dispute resolution, and (ii) to showcase the need for strengthening mediation as a long-term solution to the problem of WTO dispute settlement.

WTO Dispute Settlement Mechanism: Journey from Political to Legal

The process of dispute settlement was not focused when the General Agreement on Tariffs and Trade (GATT) was signed for the liberalization of trade in goods in 1947. GATT, being a cooperative arrangement for trade promotion, is void of the term 'dispute' within its ambit. The state parties to the GATT are supposed to cooperate with each other in their mutual interest for trade liberalization and the differences are supposed to be settled through consultations and diplomatic negotiations (Art. XXII & XXIII). In the absence of a satisfactory solution emerging out of consultations and sympathetic consideration, the only other mechanism provided under the GATT is to refer the matter to the CONTRACTING PARTIES (all contracting parties acting jointly) for appropriate action.

Unfortunately, the theory was found to be difficult in practice with the entry into force of the GATT regime. The expected spirit of cooperation in the amicable settlement of differences didn't last long and consultations and diplomatic negotiations were found to be inadequate in several instances. Sympathetic consideration, being a relative term, has been interpreted by the member states in their own way to portray their trade interest. So, the states had to resort to the other mechanism of reference, that is, referring the matter to the CONTRACTING PARTIES, to settle their trade disputes. However, it proved to be a difficult mechanism to use in practical terms as it involved a too big a body for dispute settlement. Although working parties consisting of representatives from the interested contracting parties came into existence, their independent decision-making was always questionable. Since decision-makers had governmental affiliation, their decisions were influenced or at least were suspected to be influenced by their respective government.

In light of the possibility of the heavy influence of political factors in dispute settlement, an ad-hoc group of experts started to offer services to settle international trade disputes by forming panels. Given their expertise in the subject matter coupled with their independence, the said panels started to gain prominence in the settlement of international trade disputes. However, as panel decisions were not binding on the disputing parties, the rulings or the recommendations of the panels were referred to the GATT Council for adoption. The rule of positive consensus operated at the GATT Council level for the adoption of the reports. Once adopted, the reports were binding on the parties to the dispute (WTO, n.d.).

Despite the success of GATT panels, there remained several drawbacks in the GATT dispute settlement mechanism. One of the most significant problems has been political influence in the decision-making process. Although the panelists were independent decision-makers, the rule of positive consensus made it very difficult to get their decisions adopted at the GATT Council, making the entire panel process redundant. Even the panel process was time-consuming in the absence of any timeline. No one was nominated to supervise the implementation of judgements and no effective sanctions came into play against the failure to implement the rulings or recommendations. These limitations of the GATT dispute settlement mechanism gave way for the development of a comprehensive system of dispute settlement in the form of the WTO Dispute Settlement Understanding (DSU).

With the understanding that cherishing the dream of trade liberalisation in its truest sense is not possible without settling trade disputes, DSU has provided a detailed procedure for dispute settlement, comprising both negotiation-based and rule-oriented approaches. Negotiation-based settlement is facilitated by mandatory consultations (DSU, Art. 4), voluntary good offices, conciliation, and mediation (DSU, Art. 5). The rule-oriented approach is ably supported by the panels (DSU, Art. 6-16), the Appellate Body (DSU, Art. 17), and the arbitration proceeding (DSU, Art. 25). In order to avoid unnecessary delay in the process of dispute settlement, which would cost the victims of unjustified trade regulations dearly, DSU provides a timeframe for each process. Hence, the delaying tactic that one often sees in many other dispute settlement fora is avoided under DSU. Even though the rulings or recommendations of the panels and the Appellate Body need to be adopted by DSB for making them binding on the parties, a shift from the norm of positive consensus under the GATT Council to negative consensus under the WTO DSB eliminated the influence of political factors in the process of decision-making.

DSU does not stop with rendering decisions; rather, it stretches to deal with the most significant aspect, that is, the implementation of decisions. It provides for a time-bound implementation mechanism consisting of the supervision of implementation by DSB (DSU, Art. 21), coupled with remedies against the failure of a state to implement its decision (DSU, Art. 22). Moreover, the entire process of dispute settlement is tailored in such a manner that amicable settlement between the states can be reached at all

stages of dispute settlement to preserve good trade relations between the disputing parties, while any harsh measure such as retaliation is opted only as a last resort. Thus, DSU stands as/remains a meaningful effort to achieve a balanced regime in settling international trade disputes.

Appellate Body as a Game Changer

With the declining success of consultation and negotiation as the means of settlement of disputes, a rule-oriented approach to dispute settlement has been found essential under the WTO regime. Although the panels have the original jurisdiction to settle the disputes, they are not completely devoid of political influence. This is because they may consist of both governmental and nongovernmental members (DSU, Art. 8). Since governmental members are allowed to be a part of the panel due to their expertise in policy matters, which helps in the better appreciation of facts in many instances, panel decisions are often viewed with suspicion due to the possibility of political influence. However, a second level check in the form of the appellate jurisdiction of the Appellate Body to rectify the mistakes done by the panels is a boon under DSU. Since the members of the Appellate Body are independent experts who are not affiliated with any government, hence the Appellate Body has been the game changer in eliminating political bias in decision-making. This has been instrumental in building the confidence of the member states not only in the WTO dispute settlement mechanism but also in the entire WTO regime.

The members of the Appellate Body are expected to possess demonstrated expertise, especially from the legal point of view, as they are entrusted with the responsibility of interpreting the questions of law. The fact that 67% of all panel reports are appealed to the Appellate Body (Tirkey, 2020) indicates the amount of trust that the member states repose in the Appellate Body and its pivotal role in rendering justice. It is pertinent to note here that the Appellate Body could retain the trust of the member states by not succumbing to the political pressure asserted by developed states in several instances. A classic example to cite in this regard is the ruling of the Appellate Body in the *US – Shrimp* case (WTO, 1998), which was rendered in favour of the complainants despite the pressure asserted by the United States, Canada, and some environmental NGOs (Plus, 1999). Also, the efforts of the United States to recognize its practice of 'zeroing' in anti-dumping cases, as well as its own interpretations in safeguards and subsidies cases, have been thwarted by the Appellate Body in a series of

cases (Howse, 2016). Thus, the Appellate Body has a proven history of not budging to the political pressure exerted by the member states in its efforts to uphold the sanctity of the WTO regime.

United States' Objections

The statement of the United States at the meeting of the WTO DSB during the discussions on the reappointment of Mr. Seung Wha Chang reflected the beginning of the country' decent on the Appellate Body's functioning. The statement mentions that Mr. Chang's service doesn't reflect the performance of the "role assigned to the Appellate Body by the WTO Members in the WTO agreements" (WTO, 2016b). In its strongly worded decent, the United States overtly criticized the approaches taken by the Appellate Body in several cases where Mr. Chang was a member. By referring to *Argentina – Financial Services* case (WTO, 2016b), the United States criticized the approach of the Appellate Body to use too much of *obiter dicta*, which didn't serve any purpose in resolving the dispute. Quoting *India – Agricultural Products* case (WTO, 2015), the United States expressed its dissatisfaction over the Appellate Body's discussion on irrelevant issues as well as on an issue that was not raised by the parties, which it argued to be a diversion of appeal. The United States criticized the Appellate Body's approach in *US – Countervailing Measures (China)* case (WTO, 2014) by stating that the Appellate Body acted like an independent investigator in reversing the panel report and breached its mandate of the objective assessment of evidences and arguments put forward by the parties to the dispute. Finally, according to the United States, in the *US – Countervailing and Anti-dumping Measures (China)* case (WTO, 2014), the Appellate Body encroached upon domestic jurisdiction to decide what is 'right' under the domestic law of a member state without considering the constitutional principles of the member state's legal system. Thus, the members of the Appellate Body arguably overstepped their boundaries, resulting in the loss of faith in them (WTO, 2014).

Subsequent to the blocking of the reappointment of Mr. Chang, the objections of the United States started to intensify. All objections of the United States are detailed out in the report of the United States Trade Representative released in February 2020 (Lighthizer, 2020). In this report, as many as fourteen issues have been raised under both the procedural and substantive aspects, which according to the United States, undermines the

WTO. Most of the procedural concerns are mentioned under the garb of the persistent breach of rules imposed by the WTO member states.

Disrespect for the Rules Imposed by the WTO Members

Since DSU is an agreement negotiated by the WTO member states, the Appellate Body is governed by the rules imposed by WTO members under DSU. The United States found eight major reasons to argue that the Appellate Body failed to respect the mandate imposed by the member states, which undermined not only the dispute settlement system but also the WTO in general. The United States started with the Appellate Body's failure to adhere to the maximum of the 90-day limit in giving its reports, especially in the cases after 2011. This is against the mandate under Article 17.5 of DSU, which states that "in no case shall the proceedings exceed 90 days". The second procedural objection was on the former members of the Appellate Body continuing to sit on appeal cases and deciding the cases. Although Rule 15 of the Appellate Body's Working Procedure allows such appointments, it is against Article 17.2 of DSU, which fixes the total number of members of the Appellate Body as seven. Thus, the Appellate Body acted beyond its authority and breached the DSU.

Thirdly, the Appellate Body's determinations on the domestic laws of the states in some of the cases were criticized to be in violation of Article 17.6 of DSU. The meaning of a WTO member's domestic law is arguably a question of fact, which is not supposed to be reviewed by the Appellate Body. The fourth contention of the United States was that the Appellate Body was giving advisory opinion on issues not necessary to resolve a dispute, which was beyond its authority. Article 3.7 of DSU stipulates securing "a positive solution to a dispute" as the aim of the WTO dispute settlement, while Article IX:2 of the WTO Agreement (1867 U.N.T.S. 154, 1994) confers the authority to adopt the interpretations of the WTO agreements exclusively to the Ministerial Conference or the General Council. Hence, the advisory opinions of the Appellate Body were unwarranted and in breach of these provisions.

The fifth criticism of the United States was on the Appellate Body's efforts to give a kind of binding precedent status to its reports. In its zeal to bring security and predictability, the Appellate Body asked the panels to follow its legal interpretations in the previous decisions, absent cogent reasons for departing from the earlier decisions (WTO, 2008). Hence, the

United States believed this to be blurring the distinction between the status of decisions being 'persuasive' and 'precedent' (Lester, 2018). Such an introduction of the doctrine of precedent to the WTO dispute settlement system was arguably against the mandate of the Article 3.2 of DSU, which doesn't permit the alteration of the rights and obligations of the parties under the WTO agreements. The sixth objection to the Appellate Body's functioning was in terms of violating the Article 19.1 of DSU by taking a stand that the panel need not make recommendations to resolve the dispute if the law or regulation in question is repealed by the concerned state during the panel proceedings (WTO, 2012). Arguably, this is not only against the mandatory text of DSU but also something that could encourage the gamesmanship of withdrawing the relevant measure during the panel proceeding and reinstating it subsequently.

The allegation that the Appellate Body exceeded its jurisdiction to give its opinion on some matters which were within the authority of DSB, the General Council, and the Ministerial Conference was the seventh contention of the United States. According to the United States, the Appellate Body's interference with other WTO bodies is not permitted by the member states. It adds to confusion and legal uncertainty along with contradictions between the Appellate Body and other WTO bodies. Finally, the United States was also offended with the fact that the Appellate Body considered some of the decisions not made in accordance with the procedure set under Article IX:2 of the WTO Agreement as 'subsequent agreements', which are tools of interpretation under Article 31 of the Vienna Convention on Law of Treaties. While the authority to adopt the interpretations of the WTO agreements is vested only with the Ministerial Conference and the General Council under Article IX:2, the Appellate Body's approach to give equal status to other decisions arguably violated Article 3.2 of DSU due to its impact on the rights and obligations of the member states.

Substantive Concerns

Apart from the above contentions regarding the failure to follow the rules set by the WTO members, the United States also attacked the Appellate Body on six substantive issues regarding the interpretation of the covered agreements. It was cynical in the approach of the Appellate Body, which in the opinion of the United States amounted to re-writing or indulging in the exercise of impermissible gap-filling in the carefully negotiated text of the WTO agreements. Three of the six substantive

concerns expressed by the United States were under the SCM Agreement (1869 U.N.T.S. 14, 1994). Firstly, the narrow interpretation of the term 'public body' by the Appellate Body under the SCM Agreement was argued to have a serious prejudicial effect on the member states' right to take effective measures to counteract the effect of the subsidies which injure their domestic industries. Secondly, market economies were argued to be the victims of the Appellate Body's use of the out-of-country benchmarks in measuring subsidies and their effects, where the market-determined prices were not available in the subsidizing country. This raised the bar so high that the affected states would not be able to meet this self-created standard of the Appellate Body. The third limb of the United States' arguments under the SCM Agreement was the erroneous interpretation of Article 19.3 of the SCM agreement. The United States asserted that the Appellate Body's approach against 'double remedies' in the form of the concurrent application of anti-dumping duties and countervailing duties is against the effective handling of simultaneous dumping and trade distortive subsidies practiced by non-market economies, such as China.

The remaining three objections of the United States fell under the TBT Agreement (1868 U.N.T.S. 120, 1994), Anti-Dumping Agreement (1868 U.N.T.S. 201, 1994), and Safeguards Agreement (1869 U.N.T.S. 154, 1994), respectively (WTO, 1994). The non-discrimination obligation under the TBT Agreement and GATT was arguably misinterpreted by the Appellate Body by adopting the 'detrimental impact' standard. As the application of 'detrimental impact' standard results in condemning a measure with a legitimate policy objective on the basis of its differential impact on the member states, it takes away the the latter's ability to justify a legitimate public policy measure and thereby curtails their regulatory space. Under the Anti-Dumping Agreement, the main contention of the United States was the Appellate Body's non-acceptance of 'zeroing' methodology in determination of dumping margins. Zeroing is the method by which negative dumping margins are equated to zero and positive dumping margins are added to find the total dumping margin in the determination of dumping, which has been rejected at the WTO level starting from the *EC -Bed-Linen* case (WTO, 2013). Since the United States believes that 'zeroing' is based on a well-accepted standard and is not prohibited by the Anti-Dumping Agreement, the Appellate Body's approach to prohibit it was arguably erroneous. Finally, the United States criticized the Appellate Body's decisions under the Safeguards Agreement.

Upholding the requirement of 'unforeseen developments' and setting a high benchmark for establishing serious injury in safeguard actions were the major concerns of the United States.

The above issues, according to the United States, were of grave and longstanding concerns. While there is an unnecessary delay in decision-making, effective enforcement of rights negotiated under the WTO agreements was arguably taken away by judicial overreach. Moreover, a high rate of reversal or modification of the panel findings by the Appellate Body encouraged more and more appeals and thereby foreclosed the chances of early settlements. The United States also alleged that all these put a chilling effect on new negotiations as the member states remained skeptical about the Appellate Body's respect for their agreed commitments (Lighthizer, 2020). In light of these contestations, the United States opted for the stance of blocking the renewal or the nomination of the new members of the Appellate Body.

Need for Revival

The question remains to be decided whether the United States is right in its allegations against the functioning of the Appellate Body? Whether the Appellate Body actually committed blunders? If so, when and where? These are not the questions to be pondered upon in this paper. What is more significant is to find where the balance lies — Is it towards a functioning Appellate Body or towards a WTO dispute settlement mechanism without an Appellate Body? To the understanding of the current author, the balance is heavily tilted towards the former. The Appellate Body was instrumental in taking away political influence in decision-making and thereby the rule-oriented approach could steadily take roots in the WTO system. Although the Appellate Body played an activist role in some of the cases; however, in many instances it was found to be in furtherance of justice and needed to fill the gap in the legal regime (Howse, 2002). Such filling of gaps in the WTO regime cannot be considered as unwarranted or against the political willingness of the WTO member states, as leaving them unattended would cause more harm than the current scenario. Although the WTO agreements are the result of political negotiations, the settlement of disputes cannot be left to the political process in the interest of justice. More significantly, no other member state has protested against the functioning of the Appellate Body, which indicates their satisfaction with its work.

The absence of the Appellate Body makes it impossible for the WTO dispute settlement system to function effectively. DSB cannot adopt the panel report if a party goes on appeal to the Appellate Body (DSU, Art. 16.4), hence invoking appellate jurisdiction at present results in stopping the case "dead in its tracks" (Charnovitz, 2017). Already the member states have started "appealing into the void" to prevent the adoption and implementation of the panel report (De Andrade, 2019). Currently, there are nineteen pending appeal cases; out of which, nine were filed after the Appellate Body became dysfunctional (see WTO website). With the passage of time, this tactic is expected to be adopted increasingly by the member states receiving the panel reports adversely. Thus, the disputes wouldn't find a final binding conclusion and resorting to the WTO dispute settlement mechanism would thereby become a futile exercise for the member states. Each of these unresolved disputes, as rightly pointed out by Alan Wm Wolff, has the potentiality of turning into a mini trade war, with a vicious circle of retaliations and counter-retaliations.

Recognizing the need for an independent and impartial appeal system, the European Union led the establishment of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) to use the Article 25 of DSU for appeal against the panel reports (see WTO website). It was proposed to be a temporary arrangement effective until the Appellate Body resumes its functioning . The MPIA suggests a pool of 10 arbitrators and each case of appeal would be heard by three appeal arbitrators. It also stipulates the use of substantive and procedural aspects of appellate review provided under the Article 17 of DSU. Although MPIA is an exciting prospect, it is surrounded by a lot of unanswered questions. These include what approach would be taken by the arbitrators while interpreting the core WTO principles? do they adhere to previous Appellate Body or panel reports? who will pay the cost of appeal under MPIA? and what kind of legal culture would develop around MPIA? (Lester, 2020). Moreover, with its marked similarities with the Appellate Body, it is difficult to say how differently the arbitrators working under it can perform and become successful in negotiating/minimizing the political factors. With only 22 states joining hands with the European Union, MPIA has enjoyed only very limited success in resolving the crisis.

Conclusion: Possible Asian Lead

The current crisis throws/provides opportunities for the Asian States to do a balancing act. As of now, the major trading countries of Asia have neither acceded to MPIA nor provided any concrete solution to overcome this crisis. Although their response to the current crisis is eagerly awaited, it seems to be quite delayed due to the lack of collectivism amongst the Asian states. Furthermore, although there have been suggestions with respect to shifting from consensus to qualified majority/super qualified majority vote in selecting the Appellate Body members or to move away from the Appellate Body, either by dispensing with the appeal process or by going for arbitration, these would not provide any long term solution (McDougall, 2017). The attempts to build bilateral or plurilateral acceptance of any model would fail as a mechanism for resolving the disputes arising out of multilateral agreements is required. Hence, an inclusive approach, rather than avoiding engagement with the United States through a bilateral or plurilateral approach, is the need of the hour.

There are two possible approaches that the Asian states can collectively advocate for. The first approach is to make concerted efforts to bring back the Appellate Body. Obviously, this cannot be done without some compromises to accommodate the United States. However, it shouldn't end up in budging to the political pressure exerted by the United States. Some of the procedural concerns including unnecessary lengthy deliberations in the Appellate Body's reports, exceeding the time limit in preparing reports, extending the term of the members beyond the specified time, and addressing the issues not raised by the parties in appeal can be set right to prevent judicial overreach by the Appellate Body. The total number of the members of the Appellate Body can also be increased, depending upon the inflow of the appeal cases, to reduce the burden of the members. Also, a separate group of experts or chambers of the Appellate Body may be established to deal with the cases related to trade remedies, as the substantive concerns of the United States are entirely regarding the Appellate Body's decisions in trade remedy cases.

Added to above-mentioned procedural corrections in the Appellate Body's functioning, a system of checks and balances should be brought in place to rectify the mistakes regularly and to avoid them from growing into systemic problems. A major step in this direction should be to have annual meetings of the Appellate Body with the representatives of the member

states. Such meetings can become a platform for expressing the concerns of the member states over different Appellate Body reports. Similarly, establishing peer groups to deliberate on the Appellate Body reports would also go a long way in identifying the mistakes committed in decision-making. Deliberations in the proposed annual meetings and suggestions by the peer group would eliminate the possibility of the mistakes committed by the Appellate Body, operating as precedents in practical terms for an indefinite period of time. Thus, addressing the genuine concerns of the member states through checks and balances would help in preventing the aggravation of grievances, which at present has grown exponentially to pose an existential threat to the WTO.

The second approach that can be advocated by the Asian states is to go for a comprehensive system of mediation. Although Article 5 of DSU mentions mediation as one of the available mechanisms to settle WTO disputes, not much significance is accorded to it. Understandably, mediation as a dispute settlement mechanism did not attain a prominent status at the time when DSU was negotiated. However, the current scenario is entirely different and there has been a global shift from adversarial dispute settlement mechanisms such as court litigation and arbitration to non-adversarial mechanisms. Mediation has a proven track record of settling the disputes amicably and helping the parties to restore their good relations even after their disputes. This is of tremendous significance in resolving trade disputes as the process of trade liberalization and requisite cooperation between the states cannot be compromised in the zeal to settle trade disputes.

Despite the growing significance of mediation, WTO had showed an attitude of indifference to it over the years. Article 5 of DSU remained a dead letter law as the WTO members didn't take the responsibility of developing expertise for mediation. In the absence of established expertise, the member states never showed confidence in mediation for settling their trade disputes. This has been one of the major reasons why a fallback mechanism was not found after the void created by the absence of the Appellate Body.

The developments in the settlement of disputes through mediation in Singapore can lead the Asian response to advocate for the suitability of mediation at the WTO level. The accomplishments of the Singapore Mediation Centre in a relatively short span of time of its existence is a

classic example of how mediation works. The success of mediation in international dispute resolution is evident in the areas of commercial disputes, domain name-trademark conflicts, and even in the field of trade disputes. This is why the International Chamber of Commerce, World Intellectual Property Rights Organization, and United Nations Commission on International Trade Law (UNCITRAL) have all embraced mediation as a process for settling disputes. UNCITRAL's Model Law on Mediation and United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 (United Nations, 2018) can be used as examples to develop a holistic regime of mediation for the settlement of WTO disputes. Thus, Asian states have a pivotal role to play in upholding the sanctity of not just the dispute settlement mechanism but also the WTO commitments.

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