THE WTO REGIME: CRITICAL ANALYSES OF EXISTING HEGEMONY AND RULE-MAKING*

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The World Trade Organization (WTO) regime adheres the principles of liberalization. This feature has been inherited from its predecessor the General Agreement on Tariffs and Trade (GATT). However, it confronts criticisms for maintaining the interests of developed countries. This engenders a hegemonic structure. Moreover, the WTO's decision-making bodies are often characterized by a lack of transparency and democratic participation. The consensus-based decision-making method, although apparently equitable, disadvantages developing countries who lack the resources and bargaining power. The "Green Room" politics further aggravates this issue by restricting participation to a select group of influential members. Furthermore, the dispute settlement system is also favorable towards developed countries. For instance, the composition of the Appellate Body (AB) has included a higher proportion of judges from developed economies. In addition, the interpretation of WTO agreements often maintains neoliberal trade agenda that benefits these nations. There is ongoing reform initiative to address these issues. This initiative is primarily driven by the United States and the EU-Canada coalition. Their proposals aim to address procedural and efficiency concerns within the dispute settlement system. However, these proposals fail to address the fundamental issue of hegemony within the WTO regime, including the ideological bias towards liberalization and the unequal participation of developing countries. To resolve these concerns effectively, more comprehensive reform agenda is essential. This includes rethinking the WTO's objectives to prioritize equitable outcomes for all member states, reforming the voting system to guarantee democratic participation, and reshuffling the dispute settlement mechanism to ensure fairness and impartiality.

Keywords: WTO; Dispute Settlement; Rule-making; Hegemony; Disenfranchisement

1. Introduction

The World Trade Organization (hereinafter the WTO) is founded in 1995 and born out of the General Agreement on Tariffs and Trade (hereinafter GATT) 1947. Both of these organizations are brain-children of the Bretton Woods system. Like all other Bretton Woods organizations, the WTO also runs by neoliberal ideology. Its main architect countries, with colonial past, was influential in shaping the rules and procedures of the WTO. Although, it is claimed as member-driven, however in reality, it is influenced by the big economic powers, especially by developed countries. From its inception, hegemony of the developed countries played the major role in shaping the substantive

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and procedural structure of the WTO. The deadlock of the Doha round is a sign of failure of this system. Scholars opine that the reasons behind this deadlock are i.e. mercantilist approach, the shift in relative bargaining power in favor of the developing countries, the increased bilateral and regional free trade agreements, and the increased advocacy for 'fairness' rather than reciprocity in the WTO (Harbinson 2009). However, the most important reason, which they often fail to mention, is that the system is hegemonic, which tends to uphold the interests of the big economic powers in contrast to the fair and equitable benefits for all.

The Ministerial Conference and the General Council are the highest authorities in the organization with rule-making power. Ordinarily, the decisions are made by consensus, however, for a few circumstances the WTO agreements allow for decisions to be made by voting, usually by a supermajority. In theory, the consensus provision enfranchises all countries, but practically this provision disenfranchises poor and weak countries as it engenders conformity for developed countries.

The negotiation process of the WTO produces disaffection for the developing countries. The decision-making process mostly relies on informality i.e. green room meetings of a few countries became vital to engender basis for a consensus. This means that the big economies in general and developed countries in particular play leading role to produce agreement terms and to influence the consensus.

As the deadlock for new agreements and amendments of the existing agreements has deepened over the years, it created a vacuum to the rule-making process of the WTO. This vacuum has been, sometimes, misused by the Appellate Body[2] (hereinafter AB). Many scholars criticized it for its judicial activism, and for being a promoter of neo-liberal ideology. Some scholars even thinks that some of its interpretations can be called as rule-making in nature. In interpreting the different provisions, the AB tends to follow literal meaning, however, adding its own reasoning might create rules unintended by the member states. Selection of judges, which may be influential in shaping the ideology and outcomes of the WTO, is overrepresented by rich economic countries. Another concern regarding the AB is that it is prone to follow its precedents. There are two dimensions of this approach, e.g. first, there is conformity in interpretation; two, there is scope of influence by the judges. However, AB and panel reports are not binding, which indicates that, on the one hand, the judges are free to choose; on the other hand, the different judges can have different interpretation or opinion on the matter. This openness suggests the possibility of biasness of the judges.

The nomination of the panelists is a function of the Secretariat and the Director-General and the Secretariat provides assistance to the panels. This system might influence the legal development in the dispute settlement process. In some cases, there are differences of opinions in the panel reports. This diversion of reasoning is indicative that there is existence of biasness of panel members or there is vagueness in the texts of the WTO rules.

[2] The Appellate Body is a standing body in the WTO dispute settlement system for hearing appeals from the first instance panel reports. It is established under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Currently, a few countries have proposed their reform plans which also include Dispute Settlement Understanding (DSU). The need for negotiation and its apparent deadlock suggest that the members aren't satisfied with the current system.

In this paper, the author will examine the existence of hegemony in the WTO regime. Afterwards, recommendations to solve this problem will be presented.

2. Literature review

The Western word order has evolved around the colonial legacy. It not only gave the westerners the power and resources to shape the world order, but also influences to keep their hegemony around the world. It can be witnessed in every aspect of international law and affair. In the colonial era the trade was mainly colony-oriented, which was purely mercantilist in nature. However, this did not change too much under the GATT 1947. Colonial exceptions and especial trading relationship also incorporated in the GATT. Under this regulatory framework, the WTO is still struggling to legislate its rules and come out of this discriminatory practice (Bhandari 2010). Many scholars state that a different form of colonialism still exists in the current world. The Western power have hegemony not only on the international stage, but in many cases, they also interfere internal political arena of many countries (Bhambra 2020). Sometimes they offer money to NGOs and create likeable civil society to shape the policy of a given country. Sometimes they help a coup to succeed against a sitting government.

Sometimes, even, attack a country in the name of upholding human rights and peace. Under this constant threat of the Western powers, they believe, the democratic outcome of an international organization is just an illusion (De Sousa Santos 2021). It also delusional to expect that this Western counterpart will think about fair trade and development, and will work for the well-being of developing countries.

As the Western countries have sweeping powers over the rest of the world, they can push laws based on their standards. Other countries had to comply with that as they need access to the international market for their economic stability (Ikenberry 2022). The developed countries have innovations in every front which are essential for the industrial growth of developing countries. Not only that, the developed countries have huge number of consumers who have great buying capacity, which is also instrumental to persuade the developing countries to accept their legal model in the international stage. This way the World Bank, the WTO etc. came into existence (Anubhuti 2010). Another motivation was to keep the former colonies under their control, the colonial masters formulated different institutions, and influenced legislation of international laws. The rules of WTO regime are not exceptional.

Power and economic capacity are very influential in the creation and evolution of the regime. The Great Britain and the United States, these two authoritative hegemons shaped the WTO (VanGrasstek 2013). Under the leadership of Britain and USA, an agreement was concluded in Bretton Woods in 1944 (Irwin et al. 2008). The aim of this agreement was to lay down the groundwork for international finance and trade. The Bretton Woods Agreement drawn the blueprint of three vital international economic organizations, i.e. the International Monetary Fund (hereinafter IMF), the World Bank, and the International Trade Organization (hereinafter ITO) (Bossche 2005).

Gradually, the United States gained more and more influence. Its influence came mainly from its military, political and economic superiority (Buterbaugh et al. 2008). All of these things provided the leverage to lead the world stage and structure according to their plan. Buterbaugh et al. also thinks that American policy makers advocated for liberalization of trade in 1943 onwards because it offered economic benefits to the country; although in the preceding decades they imposed higher tariffs, and in the preceding century their economic policy became mercantilist in nature (Buterbaugh et al. 2008). Moreover, the United States used its hegemonic status to spread this system globally for the sake of its interest.

After the end of the World War II, the World Bank and the IMF were established except the ITO (Trebilcock et al. 2017). The United States is to blame for that, because it thought that ITO's provisions may constrain domestic sovereignty (Buterbaugh et al. 2008). Later, in 1947, a provisional agreement called the GATT was enforced by 23 major trading countries (Jackson et al. 1997). Ultimately, it became the foundation for the current trade agreements (VanGrasstek 2013). Overall, the evolution and development of the GATT demonstrate significant influence from the Quad countries, which hold a substantial share of international trade (Buterbaugh et al. 2008). That's why Drache thinks that the current trade regime is captive to the big players and restricted undemocratic legal environment, as well as their political influence (Drache 2011).

The outcomes of the Uruguay round favor rich countries, and developed countries' personnel shaped the rules for intellectual property and industrial tariffs that imposed restrictions on policy-making and human needs. These rules affect the public health and engender inequality around the world. Under the new agreements, anti-dumping measures allowed against developing countries increased significantly afterwards. The European countries are staunch supporters for greater protection for agriculture, and together with other developed countries they asserted and received favorable regulations under the new regime. Many scholars criticized that the special necessities of developing countries were mostly ignored, and in such a way which have repercussions for the years to come. Scholars pointed out that a few things created such imbalance against developing countries e.g. lack of experience in negotiations, lack of knowledge of WTO agreements' effects, and underrepresentation in the negotiation process etc. (Finger et al. 2001).

In the years following the Uruguay Round, dissatisfaction was expressed by developing countries. They claimed that developed countries didn't fully implement their commitments with regard to the provision of special and differential treatment (hereinafter S&DT) and market access. These concerns together with the demonstration of NGOs influenced the ministerial meeting in Seattle to be futile. It wasn't able to find consensus to specify the agenda for launching a new negotiation round.

The Doha Development Agenda was started in 2001, mainly for addressing the developing country's issues. Regardless, after ten years of prolonging discussions, the round failed to provide solutions to the agenda. This scenario proves that the developed countries are not eager to address the developing countries positions, which points out that power equilibrium between developed and developing countries cannot produce effective negotiations. This also indicates the loopholes of the decision-making process (Dube 2012).

The scholars hold different opinions on the question whether trade increases equally under the WTO. Rose, by using bilateral "gravity" model of trade, concluded that current empirical data do not prove that WTO is liable for boosting trade (Rose 2004). Subramanian and others showed that WTO positively boosts trade, though unevenly (Subramanian et al. 2006). This debatable outcome from the multilateral trading system has something to do with its substantive and procedural rules. These aspects also raise questions against the dispute settlement system.

The WTO's dispute settlement system is a quasi-judicial system (Ehlermann 2005). The WTO Agreement requires it to take guidance from GATT 1947's decisions and customary practices of its members (Marrakesh Agreement 1994). The AB considers the adopted panel reports as integrated to the GATT acquis" (Japan - Taxes on Alcoholic Beverages 1998). This position is an indication of GATT countries hegemony in the WTO regime, which was led by a few developed countries.

Currently, the dispute settlement system is at the center of controversy. Not only the developing countries, but the leading members of the developed countries also raised considerable concerns against the dispute settlement mechanism, particularly against the AB. Many scholars claim that developing countries are affected by biases. These biases arises from various aspects e.g. costly legal processes, political pressure from influential WTO members, ambiguous WTO legal provisions, etc. (Khan et al. 2007). There are another actions of the AB which may engender biases. It follows its preceding judgments unless there is good reason for deciding otherwise (Chua 1998). This may be unfavorable to developing countries, because most of the AB members are from big economies, if not from the developed countries. Many scholars think that the content of the agreements is favorable to developed countries (Moon 2006). Pauwelin and his co-authors claim that politics of treaty interpretation exists, as there are variations in explanations (Pauwelin et al. 2011). After examining some of its interpretations, it can be understood that AB is inserting favorable rules for the developed countries or pushing one particular ideology e.g. free-trade, which can be seen as inserting new rules. The United States, a developed country, also claimed that it goes beyond its mandate and by doing this, they add or diminish rights, or affect the sovereignty of members.

Current deadlock regarding the dispute settlement system has started because of staunch US objections and actions. This clearly indicates the power of US in the WTO. Although every group of states point out loopholes of the WTO, nonetheless, US's objections has far-reaching consequences, as other countries have to consider US's objections, otherwise the WTO will be in jeopardy.

The United States raised concerns involving both procedural and substantive issues. It clearly mentioned that the members have to address these issues, otherwise it will not cooperate with the selection of appellate body members. The European Union and Canada put forward their proposals, with support from China, India and others, at General Council meeting in pursuit of satisfying United States concerns, yet the United States remained unsatisfied (WTO 2020).

The current reform initiative is also exhibited hegemony. Without the United States' staunch stance, this initiative might not have materialized. Moreover, if it were a different country with a developing country status, it might not have been taken as seriously.

The United Sates has raised a few objections regarding the dispute settlement system, however, until now, we cannot evaluate the United States' proposals in this regard, as it hasn't been proposed yet. However, they did propose to change the status of developing countries to reduce the number of countries that are eligible for S&DT (Reuters April 2019). It is understandable from its stance, that it does not want to eliminate the hegemonic conditions available in the WTO regime in general, and the dispute settlement system in particular. Because firstly it did not proposed any proposals yet which may ensure democratic and equitable participation from the member states, and secondly, any proposal for changing the status of developing countries will further disempower the developing countries.

The proposals of the EU and Canada may increase the quality of the dispute settlement, however, they will not able to change the status quo of the existing hegemony.

3. Hegemony in the WTO and its decision-making bodies

3.1. Ideological hegemony in the WTO

The WTO is evolved from the GATT 1947, and both have their origins in Bretton Woods (Irwin 2008, 96). Liberalization of the finance and trade sector was the main ideology of Bretton Woods system (Peet 2009, 47). Like GATT, the WTO works to pursue that goal.

Western ideologies, i.e. Western capitalism, liberalism, neoliberalism, colonialism, and imperialism etc. played a dominant role in shaping international trade rules. WTO and other international economic organizations are birth children of those ideologies. These ideologies tend to favor rich countries which gave them the leverage to accumulate more wealth and power or, at least, maintain the current hegemony. The rich countries always champion 'reciprocity' and the developing countries advocate for 'fair trade'. It is worth noting that reciprocity produces wealth gap between countries.

The fundamental economic principles of Western capitalism were first set by Western philosophers and political economists. Early scholars of this Western thoughts are John Locke, Thomas Hobbes, David Hume and Adam Smith (Calvo 2020). These thoughts were written down in the seventeenth-century and eighteenth-century Britain. Later, David Ricardo and others have refined this into a political-economic theory of liberal reform. Ricardo's theory of comparative advantage became a core argument to prove neoliberal trade (Recabarren Silva 2021). However, Ricardo and the aforementioned neoliberals did not consider that this might led to dependency of the countries, which might cost them their sovereignty. The powerful countries might use it as a leverage to gain political interests in poorer countries. Another thing is that following comparative advantage theory may not lead to advantageous outcome or gain for different countries. A country which specializes in agriculture and a country which specializes in industry will get different economic benefits. Agriculture is hugely subsidized in many developed countries and profits of the agriculture is marginal than the profits of the industry.

Many scholars have shown that 'free trade' actually creates imbalance and makes the least developed countries be dominated by economically and politically powerful

countries (Peet 2009, 5-6). Pogge views that the current international economic order is basically unjust. He also opines that these institutions failed to be instrumental to eliminate of severe poverty (Pogge 2010). According to Pogge,

> "The present rules favor the affluent countries by allowing them to continue protecting their markets through quotas, tariffs, anti-dumping duties, export credits and subsidies to domestic producers in ways that poor countries are not permitted, or cannot afford, to match. Other important examples include the WTO regulations on cross-border investment and the intellectual property rights (TRIPs) treaty of 1995." (Pogge 2010)

One of the important criticisms of the neoliberal economic thought is related to its claim that the market is the best mechanism for deciding productions and consumers. This is the core argument of liberal economics and trade. However, the critics view that its foundation is surrounded by greed and exploitation. They argue that unregulated markets create inequality. Free trade is empowering for rich countries which want to create new wealth, on the contrary, not for poor countries which are concerned about distribution of wealth. Environmentalists also express concerns regarding free trade which implicitly assert that more is better, rather than act for sustainable development (Azedi et al. 2023).

Many scholars argue that the current international economic order are decided undemocratically (Peet 2009, 3). They also argue that the world has become more unstable because of financialization. Peet thinks that WTO is a part of 'global governance institutions'. In his view, it is a quasi-state run by unelected personnel who share a common ideology. Scholars pointed out that this common ideology is neoliberalism (Peet 2009).

The WTO Charter makes it clear that the GATT history is significant, prescribing in Art. XVI that it shall take guidance for GATT 1947's decisions and customary practices. Here the developed countries tried to push the agreements of 'rich-men's club' (the GATT is popularly called by this name). It is understandable that they prefer the solutions for themselves, rather than solving the problems of every countries in the world.

The WTO portrays itself as a neutral place for making agreements relating to trade and settling dispute under rule of law. It presents that the governments make the decisions and it only carries them out. However, if we study the WTO documents we can find out that it is against protectionism and its aim is to liberalize the trade, and lowering barriers gradually. These things clearly indicate that the WTO favors one ideology, i.e. liberalization. This is such a system that generally favors some interests while harming another's.

3.2. Hegemony in the Ministerial Conference and General Council

Ministerial Conference is the top body of the WTO that is responsible for making decisions. It usually convenes every two years (WTO 2024a). Moreover, there are three bodies which look after the day-to-day work in between the ministerial conferences, i.e. the General Council, the Dispute Settlement Body and the Trade Policy Review Body.

All the three bodies are considered to be the General Council, they act on behalf of the Ministerial Conference and report to the Ministerial Conference; although they convene under different terms of reference (WTO 2024b). The General Council is normally made up of trade ambassadors or other government officials. They meet several times a year in Geneva.

There are number of criticisms of the Ministerial Conference and the General Council e.g. undemocratic decision-making process, unproductive decision-making process, hegemony in participation, lack of accountability, and lack of transparency.

There are few options available to make a decision in the WTO. Some special procedures require super-majority, and there is the option of majority rule, with "one nation, one vote". There is skepticism about majority voting in the context of the "one nation, one vote" equality principle for nation-state members which varied enormously in population size, economic size, and geography. Because of its skepticism, GATT gradually developed decision making by consensus, which also maintained in the WTO. Consensus is achieved when no party objects to the agreement. Here we can observe that consensus is not the same as unanimity, and absence from a particular voting procedure does not constitute a negative. For this reason, this can lead to disenfranchisement of members in some cases. On the one hand, consensus method offers equal voting rights to the developing countries regardless of trade percentages and economic volumes; on the other hand, there are number of obstacles linked to consensus based method for the developing countries which hamper their participation. From theoretical aspect of consensus rule, we may assume that it provides equal rights and everyone can block any decision; nevertheless, it is evident from the practical aspects, that every member cannot sustain a veto (Cottier et al. 2003). If a poor or weak member country opposes a proposal, it will experience isolation and pressure from influential members. It is evident that this decision-making process is favorable towards rich countries. The process of achieving consensus is also criticized by scholars and developing countries. Green room politics plays a great role to come to a consensus, where mostly the influential members set the agenda.

The decisions of the Dispute Settlement Body required to be taken by consensus, unless otherwise stated. The "reverse consensus" is required for the decision on the establishment of a panel, the adoption of panel and AB reports, and the authorization of suspension of concessions. This requirement of consensus is troubling, since some drafting problems in the text cannot easily be solved; because sometimes a country can hold up the process, in order to bargain over other matters. Many cases, this process leads to paralysis. This is also behind the failure of certain committees and working parties in the WTO to achieve any meaningful accomplishment in their work.

Tricky part of decision-making by consensus is that only decisions, that have support from the developed countries will be adopted. Here, the developed country's intention is more important than their counterpart. They devised the system in such a way that they can also influence the future outcome of the trade regime. Developing countries are in need to get opportunities from the WTO. However, they are asked to provide reciprocal benefits to the developed countries for getting much needed opportunities. As the current legislations are favorable to the developed countries, they will always be in advantageous position as long as they can get reciprocal commitments from the developing countries.

The requirements for amending the agreement are also quite constrained. Although it is not absolutely equivalent to consensus, they are often perceived to be effectively consensus-driven and therefore to make amendments virtually impossible.

Now, the question is why the WTO does not adopt 'majority voting' rule in every sphere of the WTO? Western countries always push for democracy throughout the world, then why do they not back such principle? The answer lies in the fact that developing countries may push any agenda they want, since they account for 70% of the membership. That's why if decision-making by majority voting is applied, the developed countries may get out of the WTO because of the balance of power. This stance of the Western countries questions their belief on democratic value, and also highlights their colonial mentality, that orientalists are inferior to them.

Overall, the power and influence of big economies are evident in the Ministerial Conference and General Council. They have the greater say and they set the agenda of the WTO. Recently, the United Sates is pushing for a reform agenda in the WTO. Its staunch stand pushed different countries to propose different reform proposals. However, the United States still expresses dissatisfaction. It even put barrier to select new members for the Appellate Body, which might not able to hold seat because of insufficient members.

3.3. The Green Room Politics and its criticisms

The Green-Room is named after the color of the room (next to the DG's office). Although the room is now no longer green, the name is continued to be used. The use of the Green Room process started in the Tokyo Round, it was used heavily during the Uruguay Round. Still today, it is continued to be used. The aim of this process is to increase negotiating power and get particular items onto the Agenda (Ziegler et al. 2007). WTO tries to achieve it by limiting the numbers of negotiators (about 20 countries are invited). Only key players who could influence the negotiating process are invited to the Green Room.

The invitation to the Green Room and its process is maintained by the director general (DG). Normally, influential members with big economies are invited. In recent years, few members are also selected under regional representative criterion. Participating countries do not vary too much in each session. The list of typical participants includes the United States, European Union, Japan, Canada, Australia, New Zealand, Switzerland, Mexico, Norway, China, Argentina, Brazil, India, South Africa, Columbia, Egypt, Singapore, Malaysia, Indonesia, Thailand, Bangladesh, Chile, Costa Rica, and Kenya. Green Room consultations take place not only at the officials' level, but also at the Ministerial Meetings.

The WTO members have diverse interests and objectives. They must have the democratic rights to express views and be part of every negotiations process equally. Nevertheless, they often would criticize it for being left out. During the Seattle Ministerial, the African and Caribbean members expressed that they would reject the outcome of these Green Room sessions. Critics of the Green Room process argued that it offers exclusive negotiating process, which lacks transparency and it is also inefficient. Most of the members of the WTO called for a more inclusive and transparent process. Pascal Lamy, a European Union Trade Commissioner, labelled

WTO processes “medieval”. Even the US acknowledges that more role in decision-making is needed to be given to the smaller countries. However, this acknowledgement is yet to see the reality.

3.4. The Secretariat and its criticisms

The WTO Secretariat is based in Geneva. It has a staff of 550, and is managed by the Director General (hereinafter DG) and a deputy DG. The WTO states that its Secretariat does not have decision-making authority. Its work includes providing technical support for the different bodies and committees, analyzing world trade and explaining WTO activities to the media and public.

It is evident that the WTO secretariat is mostly composed of staff with developed-country nationality. That’s why the developing countries were raising concerns against it. A few years ago, they pushed for a resolution to incorporate a WTO recruitment policy, which called to give preference to developing- country nationals among equally eligible candidates.

Although the scenario has changed significantly, the developed countries still have a great number of staff members or at least they occupied more positions in ratio than developing countries nationals.

3.5. Hegemony in dispute settlement and its role in advancing neoliberal trade ideology

Dispute settlement mechanism is governed under the Dispute Settlement Understanding (DSU) (WTO 1994). There are three organs e.g. the panels, the Appellate Body and the Dispute Settlement Body (DSB). Under the WTO rules, the DSB is part of the General Council which has separate chairman (the Marrakesh Agreement of 1994).

The WTO’s dispute settlement system has been operating since its inception. Its incorporation, certainly, is a positive achievement of international trade regime, yet critics are doubtful whether it can be acclaimed as “the victory of law over politics” (Moon 2006). Many scholars opined that this dispute settlement mechanism would lead WTO towards the rule-based system, and would substitute the power-influenced structure of the GATT. They believe that only the rule-based system could safeguard poor and weak countries from the discriminatory practices of the rich countries.

Some other scholars showed skepticism from the beginning. They expressed concerns that the dispute settlement system may not mitigate power and wealth disparities. They argued that there will be inequitable outcomes from this system. They illustrated that weaker states have lack of legal resources and expertise, and they may also suffer from direct and indirect threat of stronger states. Even, they may experience unfair decisions in favor of stronger states, or face noncompliance by the powerful countries.

Scholars argue that the dispute settlement system of the WTO is not a totally independent judicial branch. They think that it is a quasi-judicial mechanism (Charnovitz 2002). One of the elements that separates it from being an independent judicial branch is the requirement of adoption of its reports by the Dispute Settlement Body.

3.5.1. Issues regarding the Panel and the Appellate Body members

Table 1. Country-wise members of the Appellate Body

Country	Persons	Serving Terms	Years Served
United States	4	6	24
Japan	3	5	16
Korea	2	2	5
India	2	4	16
China	2	3	12
Egypt	2	4	16
Philippines	2	3	10
Germany	1	2	8
Australia	1	2	5
Italy	1	2	8
Brazil	1	2	8
Mexico	1	2	8
South Africa	1	2	7
New Zealand	1	2	5
Belgium	1	2	8
Uruguay	1	2	6
Mauritius	1	1	4
Total	27	46	-

Source: author's compilation based on the structure of the WTO

Table 2. Special Group-wise Members of the Appellate Body

Countries	Total Persons Served	Total Terms Served
OECD Countries	15	25
Non-OECD Countries	12	21
LDC Countries	None	None

Source: author's compilation based on the structure of the WTO

From *Table 1*, it can be seen that persons from United States always held a position in the appellate body. Japan, India and Egypt held a seat in the appellate body for 16 years each. China held a seat for 12 years. From *Table 2*, we can observe that 15 persons from the OECD member countries hold the position in the appellate body serving 25 terms. On the other hand, 12 persons are from non-OECD countries and they served 21 terms. The shocking revelation is that there is no one from the LDC countries, who held a position in the Appellate Body. It is apparent that, with a few exceptions, only the persons from the big and developed economies hold the seat in the Appellate Body. Persons from the OECD countries hold a large number of seats, although more than two-thirds of the WTO member countries are non-OECD countries.

3.5.2. Issues regarding the text and interpretation of WTO agreements

The WTO is touted as a rule-based system and one of its aims is to bring trade within the rule of law. Although the scope of regulations has extended over the years, the meaning of those regulations has not always been clear. That is because the negotiators left "constructive ambiguity". This is a common practice by negotiators to solve stagnant situations on some points.

This situation creates the scope for litigators to interpret the rules of the WTO. To say it differently, what the negotiators or legislators did not able to do, that have to be resolved by the litigators. This scope is termed as "judicialization" by Davey (2012), and Weiler (2001) called this "juridification". Ultimately by exercising this scope, the Dispute Settlement system add new to the agreements.

In the WTO, the texts of the relevant covered agreements are fundamental sources of law. The AB does not contradict to that. They acknowledge it by saying that a textual interpretation is the appropriate and primary way of interpretation (Japan-Taxes on Alcoholic Beverages 1998). However, the critics find that their approach to interpret the texts creates new obligations.

Many scholars claim that the dispute settlement system shows preference over a specific type of free trade. Different scholars have pointed out different case-specific critics. Tarullo examined cases related to the Anti-Dumping (AD) Agreement brought under Article 17.6 (Tarullo 2002, 112). He found out that the Appellate Body, regarding challenges to AD measures of domestic institutions, requires Chevron-like method of review that is applicable in American jurisprudence. He examined decisions from 1995 to 2001 relating to the matter and concludes that the Appellate Body was unable to exercise the level of deference required by the AD Agreement, with the exception of one case (Tarullo 2002, 147). He later explained the causes of failure. One of the important reasons is Appellate Body's predilection for specific type of free trade that tries to shape the law on international trade (Tarullo 2002, 159).

The study of Ragosta et al. examines the disputes relating to trade remedy, and also critical of WTO dispute settlement (Ragosta et al. 2003, 698). They conclude that the panels and the AB have been creating a WTO "common law" by judicial activism. They opine that the dispute settlement bodies pushed duties into trade disciplines even though such duties do not exist. The authors claim that this scenario takes place because of structural problems within the system. According to them, there are several structural problems e.g. mandatory process of the dispute settlement, ambiguous substantive provisions, and lack of democratic oversight of the DSB (Ragosta et al. 2003, 706).

As a judicial entity, the AB cannot put in or lessen to the WTO rules (WTO 1994, Articles 3.2 and 19.2). The United States demonstrates that the AB formulated interpretations relating to some issues that the AB previously affirmed to have no legal effect (Argentina – Financial Services 2016). For instance, AB announced that the panel's finding on likeness is not correct, then it discussed these rendered-moot concepts in detail. Critics opine that the AB should have applied restraint (Nolan 2016). They also state, that it should not explain issues merely because they can or want to explain it. However, the AB asserted that the rendered-moot issues were put forwarded in appeal by Panama, and involve legal issues relating to GATS provisions – which is precisely the AB's mandate.

According to the Marrakesh Agreement, the members have the exclusive mandate to interpret the WTO rules and regulations, moreover, have to follow the process mentioned in the law i.e. discussing in the Ministerial Conference and General Council. However, negotiations make little or no progress, that's why the interpretations are rarely member-led, and this gap is being filled by the AB, which is in violation of the WTO law.

3.5.3. Disadvantages of the dispute settlement system for developing countries

Many scholars claim that the dispute settlement mechanism is favorable to developed countries. Some think that dispute settlement bodies operate in an unbiased way, though content of law is unfavorable to developing countries. From the data, it is evident that developed countries have filed disputes against developing countries more frequently by using the favorable legal rules of the agreements.

Regarding distributive outcome of the dispute settlement, a number of studies have been written by the scholars. The study of Bush et al. finds that the high costs in the litigation process is a barrier for developing countries to be the claimant or defendant (Bush et al. 2003). Van Der Borght and Michalopoulos points out that deficiency of financial resource, personnel, and information for legal process in effect engenders disadvantageous results for developing countries (Van der Borght 2007, Michalopoulos 2014).

After analyzing the data, it is found out that more than half of all initiated disputes are resolved without establishment of a dispute panel (Reich 2018). It may reflect the parties' desire to avoid high costs of litigation in the WTO. However, disputes that involve larger economies are more likely to result in litigation. A study (Reich 2018) revealed that, under the WTO Dispute Settlement, the developing countries became defendants more often than claimants i.e. developing countries as complainant filed 32% of the total cases and as defendant 39.4% of the total cases. The study also revealed that the developed countries became claimants more often than defendants. Developed countries as complainants filed 68% of the total cases and as defendant 60.6% of the total cases. This study indicates that the status of the countries played a significant role in shaping the participation under the dispute settlement system. The developed countries are more active than the developing countries. The dispute settlement system may be more useful for the developed countries. It may also be said that the level of compliance is lower on their part.

Another study analyzed success rates at the dispute settlement system. It found out that the Complainants have overall high success rate (Maton et al. 2007). The authors found out that Complainants overall won 80% of all disputes i.e. they won 81.9% of panel rulings and 78.4% of Appellate Body decisions. Moreover, the dominant success rates are possessed by the US and the European countries, they have 92% success rates at the panel level and have higher than average success rates at the Appellate level (Maton et al. 2007, 329).

Some scholars think that disadvantageous position in enforcement capability also plays a great role for unfavorable outcome from the dispute settlement. The WTO doesn't execute the decisions, rather the winning country is supposed to execute it unilaterally. The retaliation options are not feasible for developing countries because of

the lack of enforcement power, and, in many cases, it can be counterproductive for them. Even, it may affect their aid programs or jeopardize security relationships.

Some other scholars opine that the content of the law is favorable to developed countries, and that's why it engenders more distributive discrimination among countries. The biased provisions engender unfavorable results for the developing countries. Some scholars opine that the content of law of the WTO may be favorable towards developed countries, nevertheless, the dispute settlement system upholds 'equality before the law'. However, scholars questioned this opinion (Garrett and Smith 2002; Smith 2004). They debunked the presumption that independent legal bodies do not subject to the influence of power and act without bias. They found out that the Appellate Body makes conciliatory decisions if the defendants are powerful members because of blatant noncompliance.

Some scholars assert that because of the hegemony in decision-making, the dispute settlement does not fully succeed to compel influential powers because it favors stronger states. Steinberg claims that the legislation is favorable for the influential states because they dominated the rule-making process (Steinberg 2002). The analysis of the Uruguay Round agreements shows that stronger states take advantages from the legal provisions, which have been significantly strengthened or newly introduced under the umbrella of the WTO.

Another reason for generating disadvantageous outcomes is the integrated system of the WTO. Before the WTO, during the GATT era, developing countries could join the agreements whenever they wanted, however they were unable to do so in the WTO, which embraced "reciprocity and single undertaking" approach. Under this principle, all agreements are compulsory and enforceable to all. A state has to agree with this, otherwise it cannot be a member. This arrangement is favorable for developed countries as they have the bargaining power and economic capability to influence and enforce the law (Finger et al. 2001; Scott et al. 2021). This is a reason behind the presence of developing countries as defendants at the dispute settlement system.

3.5.4. Issues regarding the functions of the Dispute Settlement Body

After the decision of the case, the DSB usually orders the losing member to amend its laws, regulations or policies up to the standard of the WTO agreements. This is the execution model of the WTO. Unlike civil law of different countries, the WTO does not apply punishment or even restitution. The DSB will allow a reasonable period of time to do this. If the party fails to do so within the given period, it may permit the winning party to carry retaliatory measures against the losing party. In this regard the rich countries have the power and resources to retaliate against a country. Most developing countries are vulnerable to take actions for noncompliance.

Regarding the reverse consensus, this process disenfranchises the members, as their say do not matter unless and until there is any consensus. This cannot be deemed as a democratic process. The powerful countries will benefit under this arrangement as the laws and regulations are in their favor, the Panel and Appellate Body members are mostly from the big influential countries, and the most of the developing countries has less leverage to wage retaliation measures against noncompliance.

This also creates a vacuum, as the Panel and AB reports will be adopted automatically for not having reverse consensus. This emboldens the bodies and gives them clear authoritative stand to decide on the WTO laws and interpret it as they wish.

4. Analysis of recent reform proposals and their role in solving existing hegemony

4.1. US proposals and objections

The current deadlock regarding the dispute settlement system has started because of staunch US objections and actions. This clearly indicates the power of the US in the WTO. Although every group of states point out the loopholes of the WTO, US's objections have far-reaching consequences, as other countries have to consider US's objections otherwise the WTO will be in jeopardy.

The United States raised concerns involving both procedural and substantive issues of the dispute settlement system. It clearly mentioned that the members have to address these issues, otherwise it will not cooperate with the selection of appellate body members. Specifically, the United States argued that the AB has exercised its power beyond its original mandate. The United States also argued that the Appellate Body, through its interpretation of the WTO agreements, adds or diminishes to the rights of WTO members in different areas (WTO 2020).

The United States also points out that the AB reports were not finalized within the time limit mentioned in DSU article 17.5. Moreover, the AB failed to discuss the matter with the parties when the deadline has been exceeded. It argues that, to serve after the end of the term is not permitted by the DSU, and the AB does not have the power to consider someone to be an AB member beyond the law which it practiced. It claims that the AB has a tendency to express advisory opinions beyond the disputed matters. This tendency is beyond their legal rights and obligations. It also argues that the AB considered panel fact-findings as an issue of law that reviewed member's domestic law, and it also considers its own reports effectively as precedent (WTO 2020).

The United States also communicated its concern regarding self-declared development status. It argued that this scope risks institutional irrelevance. Moreover, it argued that because of record development achievements and the decrease in poverty, the WTO's classification of North and South, or developed and developing countries is simplistic and outdated. Therefore, some of the countries should not be allowed to label themselves as developing countries (WTO 2020). Later, in a different paper, they proposed the criteria by which the countries shall be eliminated from having S&D facilities e.g. membership or accession to OECD; membership of G20; high income countries under World Bank classification; or a country with 0.5% or more of global merchandise trade (WTO 2019a). However, the critics opine that some of the criteria have nothing to do with trade (The South Centre 2019). Moreover, China, India, South Africa, Venezuela, Bolivia, South Africa, India and China presented counter argument by saying that despite the impressive economic progress, development divide continues and even widened. Moreover, they claimed that developing members face formidable challenges which necessitate S&D benefits (WTO 2019b).

Furthermore, the European Union and Canada put forward their proposals, with support from China, India and others, at General Council meeting, in pursuit of

satisfying United States concerns. Despite that the United States remained unsatisfied. They commented that proposals for reforming the WTO fail to deal with problems raised by the United States (Reuters 2019). The US stated that amendment of the text will not solve the issues, it only will permit what is now prohibited. Moreover, members need to guarantee that the system follows the WTO rules as written.

4.2. EU-Canada proposals

A series of initiative have been taken by EU and Canada to come to a formal proposal. In September 2018, Canada issued a white paper mentioning dialogue points for the meeting to be held in October. The points are broad in nature, which express a few objectives i.e. improving monitoring efficiency of the WTO, improving the dispute settlement mechanism, and modernizing trade rules (CSIS 2018). In September 2018, the European Union also issued a concept paper which is more specific in nature.

After the two initial papers from EU and Canada, two proposals were put forward with support of few other important actors of the WTO. The first proposal (WTO 2018b) aims to solve the issues raised by the United States regarding the dispute settlement. One of the issues is not discussed in the proposal e.g. the problem associated with AB's arbitrariness.

Regarding serving after the end of the term, transitional rules are proposed for outgoing Appellate Body members. It proposes allowing the judgment of ongoing cases in which a hearing has already been conducted under his authority. Regarding the completion of the appeal within 90 days, it proposes to allow the parties to decide on exceeding the deadline. Regarding the issue of reviewing the municipal law as an issue of fact, it recommends to include a footnote to DSU 17.6. It states that it does not review or interpret uniquely, however it illustrates legal characterization under the WTO laws. Regarding the findings unnecessary to resolve the dispute, it recommends an amendment that requires the AB to not to discuss the matters which are unnecessary to resolve the dispute. Regarding the issue of precedent, it proposes to allow the WTO members to put forward their objections on adopted AB reports in the annual meetings of the General Council and the DSB.

The US opines that these amendments do not resolve the concerned issues. It thinks that the existing DSU is rather clear on these matters, and the AB shall follow it. They argue that during the first fifteen years of the WTO, 95% of appeals were resolved within 90 days. The problems because of change of approach by AB members and giving opinions on issues are not relevant to the resolution.

The second proposal (WTO 2018a) attempts to strengthen the independence of the AB, to improve efficiency and orderly transition. Regarding the independence of AB members, it recommends to extend the term of an AB member from 4 years to 6 or 8 years, and to increase the number of AB members from 7 to 9. Regarding impartiality of the AB members, it recommends to require AB members to not to engage in any other occupation. Regarding the transitional rules for outgoing AB members, it recommends to allow an outgoing AB member to act on his or her duties until he or she has been replaced but up to two years.

In addition to these two proposals, on 25th September 2018, the US, the EU and Japan delivered a trilateral statement calling for rules governing self-classification of

developing country status. The statement also expressed concerns relating to forced technology transfers, SOE subsidies, and other non-market related rules.

4.3. Developing countries' proposals and positions

Many developing countries, especially China and India, oppose calls to narrow the parameters of developing country status. Some of the concerns of the developed countries mainly target China. However, it has already dismissed proposed reforms by the United States. It released a paper claiming to be a market economy, a status rejected by developed countries. It also claimed that it has abided by its WTO obligations.

During the ministerial meeting in Buenos Aires, developed countries refused the proposals of the Group of 90[3]. Their proposals included developing countries demand regarding S&DT provisions. The S&DT rules allow compliance delays to the developing countries (IATP 2019). Moreover, developing countries want a deep reform in the Agreement on Agriculture (AoA). They want stricter rules, like those that already apply to industrial goods, on the dumping of agricultural goods.

4.4. Can the reform proposals solve existing hegemony?

Now let's evaluate the United States objections and the propositions which have been proposed so far. The United Sates has raised some objections, a few are related to substantive matter e.g. the United States argued that the AB has exercised its power beyond its original mandate. It also argued that the Appellate Body, through its interpretations, adds or diminishes to the rights of WTO members in different areas. The United States argues that to serve after the end of the term is not permitted by the DSU. It also claims that the AB considers its previous reports effectively as precedent.

Few objections are related to procedural matter, e.g. the United States demanded that the members shall accept its proposals for mandatory notifications and penalties for failure to notify. It also points out that a couple of AB reports were not finalized within the time limit. Moreover, the AB expresses advisory opinions beyond the disputed matters.

The proposal of the United States does not include any suggestion related to the AB. However, it recommends changing the status of developing countries that are eligible for S&DT, which would reduce eligible countries. Moreover, it is understandable from its stance that it does not want to eliminate the hegemonic conditions available in the WTO regime. Because, its proposal does not include any recommendations which may ensure democratic and equitable participation from the member states.

Now let's look at the EU-Canada proposals. Regarding serving after the end of the term, transitional rules are proposed for outgoing AB members that will allow to judge in the ongoing cases, in which a hearing has already taken under his or her authority. Regarding the completion of the appeal within 90 days, the amendment will allow the parties to decide to exceed the deadline. Regarding the issue of reviewing the municipal law as an issue of fact, the recommendation states that the AB just expressed panel

[3] The Group of 90 (G90) is an alliance comprising the world's poorest and smallest developing nations. It is the largest trading bloc within the WTO.

findings which illustrated legal characterization under the WTO laws. Regarding the findings being unnecessary to resolve the dispute, the recommendation requires the AB not to discuss unraised matters beyond the dispute. The recommendation also allows WTO members to raise their concerns in the annual meetings of the General Council and the DSB.

Regarding the efficiency and independence of AB members, the paper recommended to extend the term of an AB members, and to increase the number of AB members from 7 to 9. It is also required that the AB members work in other positions. Regarding the transitional rules for outgoing AB members, up to two years they may continue to perform their job until being replaced.

The issues raised by this paper will not be solved by the EU-Canada reform proposals. One of the main problems of the WTO regime is its working ideology e.g. liberalization. This is not affected by the proposal. The United States did not raise any objections regarding this, and reform proposals proposed by different countries ignored this issue. Another problem is the unequal participation of developing countries in every stage of the WTO. The WTO agreements are developed under the direct and indirect hegemony of developed countries. However, reform proposals of the main players of the WTO do not try to solve this issue. Moreover, the proposals put forward by the EU-Canada which are supported by various countries will not solve the problems regarding the dispute settlement system, which is highlighted by this paper.

5. Concluding remarks and recommendations to solve existing hegemony?

Colonialism has empowered the western countries and provided them the economic and political influence. This leverage, which continues until today, gave them the power to formulate international law in general, and international economic law in specific. The hegemony of the western countries is imbedded in the world trade regime.

The objections raised by the United States has logical basis, some of these are the deep-rooted problems of the WTO. For example, they raised concern about the Appellate Body's overreach. Nevertheless, they did not suggest any solution to the matter. It also did not raise any concern regarding the hegemony and lack of participation of developing countries. From its policy agenda, we can understand that the United Sates is acting to upheld 'America first' policy. Scholars opine that they want big changes to the WTO, otherwise they may withheld from it, and can create bilateral agreements based trade regime. These implications will not be able to solve the deep-rooted problems which rest in the WTO regime.

The proposals put forwarded by EU-Canada, with the support of other important actors also may not able to solve the hegemonic nature of the WTO. They did not put forward any proposals to change the negotiations and decision-making process. Although the stalemate deepened in the regime, no practical solutions were offered by them.

In the following, the author will propose and analyze possible solutions to the problems identified in the Article.

5.1. Rethinking and resetting the objectives of the WTO

Trade is for the humanity. The well-being of every human individual should be the concern of every international organizations including the WTO. It should strive for equitable outcomes for the member states. Recently, there is a significant concern regarding the wealth gap between countries. Even in developed countries, different studies revealed that the wealth gap between the rich and poor is increasing very fast. That's why, nowadays, we often hear the arguments of taxing the rich more, so that the money can be spent for the welfare of the poor people. This is also the case in the international arena. Few countries are getting richer and the least developed countries' are becoming poorer in general. This is the duty of the humankind to take care of the need for every single one of them so that everybody can lead a dignified life. There is an idea of minimum wage that is being implemented by different countries. I think there should be a similar idea on the international level, which will focus on ensuring minimum income per capita by all countries.

Concessions should be given to least developed countries, which they claim under so-called S&DT. WTO's countenance for liberalization should not be the same for everybody. The reciprocity should be based on the situation and needs of different countries. Moreover, the countries which earned greatly from their exports of goods and services needs to be charged more tariffs on them. The tariffs should be proportionally higher based on a country's GDP per capita. Low-income countries should impose proportionally higher tariffs on lower-middle, upper-middle, and high-income countries, based on the World Bank classifications. The lower-middle income countries shall impose tariffs proportionally higher for upper-middle and high income countries. The upper-middle countries shall impose tariffs at a higher level for high income countries. Moreover, tariffs should be increased proportionally based on their exports. If a low and lower-middle income countries have trade deficit, then they can ask for tariff-free access for their products to minimize their trade gap. This arrangement is to ensure the balance of distribution of wealth among the countries. Otherwise this may affect the welfare of their citizens.

5.2. Reforming the voting system

The WTO's decision-making in general, and rule-making in particular are influenced and patronized by the developed countries. Later, although some of the big economies from developing countries gained more bargaining power, still no big changes were made because of lack of cooperation from the developed countries. That's why, until today, the WTO is running in the framework created during the Uruguay round, where the developed countries had sweeping powers to control the outcomes of the round. The developing countries in general have less say in the WTO regime. They cannot make a real change in the system unless and until the developed countries and other big actors agree with it. Disenfranchisement is evident in the WTO regime which has been shown by scholars and voiced by the developing countries. The consensus provision became ineffective, and it has become one of the ways to disenfranchise the developing countries. If both developed and developing countries agree to a matter, only then it can be incorporated into the WTO regulations, however, it becames obvious that both of the

sections' interest are quite different. That's why the change to the agreements of the WTO almost became very difficult to achieve, if not impossible.

There are loopholes in the text of WTO agreements which are kept as ambiguous because of the stalemate of negotiations. These loopholes, together with lack of consensus and undemocratic elements in decision-making, gave the scope to the dispute settlement body to interpret it quite often which leads to pushing liberal agenda into the WTO regime. The disenfranchisement of the developing countries leads to these outcomes.

All the decisions of the WTO should be taken by two-third majority. Requiring Three-fourth majority can be more time-consuming, and may even continue the existing stalemate situation. Overall, the two-third majority would be more effective and democratic than the consensus-based system. The author is of the view that this recommendation is likely to be implemented in near future.

5.3. Reforming the Dispute Settlement Mechanism

The recommendations proposed by different countries may not be sufficient to solve the existing problems. To strengthen the independence of the AB, to improve efficiency and orderly transition, they proposed to extend the term of an AB member from 4 years to 6 or 8 years, and for one term only. They also proposed to increase the number of AB members from 7 to 9. This may give more freedom to the AB members, nonetheless, will not able to solve the problem relating to disproportionate participation from developing countries. To ensure impartiality of the AB members, they proposed to not engage in any other occupation. Here, also an important matter is that they should also not be connected with any government activities in the past. They also proposed to allow an outgoing AB member to act on his or her duties until he or she has been replaced but up to two years (WTO 2018a). This is also related to increase the efficiency of the dispute settlement process. To practice restrain by the AB members, they proposed to amend DSU 17.12 where the AB shall address all issues raised but shall not go beyond what is not necessary to resolve the dispute. It did not provide any effective solution to solve the problem, for instance, if they go beyond what was mandated, then what action will be taken. They also proposed to add DSU 17.15 that allows WTO members to express their views on adopted AB reports in the annual meetings of General Council and DSB (WTO 2018b). It may not able to solve the problems as just raising the issue to the DSB may not sustain the weak countries perspectives.

To solve the issues regarding the disputes settlement system, firstly, the selection process of the judges should be democratic. The Representation of every region shall be ensured, and it shall represent proportionality of countries based on incomes. For hearing a complaint, minimum 5 members shall be required and decision shall be taken by 4-1. For the efficiency of the dispute settlement, 15-20 members shall be elected for 5 years each. If a judge discusses matters beyond the scope of the case, a formal complaint can be filed against them in the DSB. The DSB may decide to remove the judge if requested by a group of members (20%), with the decision being made through the proposed voting method. Secondly, the disputes regarding interpretation of law shall be raised in the general council and the council needs to decide on it through a

democratic voting process. The Appellate Body can give advisory opinion, however, it shall be ultimately decided by the general council. In this case, the number of opinions regarding the text shall be presented to the General council and they need to argue and counter-argue on these for a period of time, and then, they shall take voting to decide on it. Thirdly, to solve the hegemony of execution power, the General Council of the WTO shall control all the process centrally and execute all the decisions of the Appellate Body.

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