

The WTO paradox

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Make domestic laws 'trade-smart' to begin with, and not as an afterthought

THE WTO IS FACING challenges on several fronts, with the most critical under its dispute settlement system—which comprises of a two-level process: a panel of three persons selected by disputing parties who adjudicate on a dispute, and an appellate process under which appeals can be preferred to an appellate body (AB, a standing body of seven persons that hears appeals from reports issued by panels in disputes). Three persons are selected from within the AB to adjudicate on appeals in each dispute. The AB can uphold, modify or reverse legal findings of a panel. Its rulings are binding on the parties to the dispute, and can be rejected only when there is negative consensus among WTO parties—something that hasn't happened in the 24 years of WTO's existence. The contribution of the dispute settlement system to effective enforcement of rules of international trade has been hailed as the 'jewel in the crown' of the WTO.

The current AB crisis has arisen because the US has been blocking appointments of AB members, expressing concern that the AB has been exceeding the scope of appeal and not adhering to timelines as set forth under WTO's Dispute Settlement Understanding. India and many other WTO members have been working on proposals to break the deadlock, with little success. The AB now has only three adjudicators, two of whose terms will end in December 2019. With only one AB member, it will not be able to decide appeals. Parties to a WTO dispute, however, have the right to appeal any panel decision (a panel decision under appeal cannot be enforced). A WTO party losing a dispute, therefore, can simply raise an appeal, even when there is no AB to adjudicate, as a result of which there will be no rulings for enforcement.

It's raining disputes

One would imagine that the logical consequence of uncertainty of the future of WTO's dispute settlement would mean fewer disputes at the WTO. Surprisingly, this is not so. Between January and December 2018, as many as 38 disputes were raised (the highest number of disputes raised in a year was 50 in 1997). Another statistic is with regard to India: Of the 30 disputes raised against India by other members since 1995, five have been filed in the last six months. This includes two disputes by the EU and Japan, respectively, against tariff treatment of IT and communication products, and three disputes on India's subsidies for sugar and sugar cane raised by Australia, Brazil and Guatemala. While these five disputes are at the stage of consultation (pre-panel stage), a sixth dispute raised by the US against India's export subsidies in 2017 is currently at the panel stage. Another one initiated by Japan with respect to India's safeguard duties on steel in 2016 has been appealed by India to the AB.

WTO-proofing our laws

The recent spate of disputes against India raises the question: What makes India's laws vulnerable to a challenge? To address this, developing a dispute prevention and management strategy is key. A compatibility analysis of our laws and regulations, with our international trade obligations, needs to be done at the stage of lawmaking. One must remember that the WTO agreements allow for adequate space for achieving various public policy objectives, including designing of WTO-compatible subsidies and support for the domestic industry. Building-in assessment of such spaces prior to enacting laws, thereby making them resilient to challenges, is crucial.

Equally important is to develop adequate risk analysis of disputes that have been initiated, to carefully consider appropriate strategies for resolution. WTO's dispute settlement mechanism allows for mutually-agreed resolution at any stage of the dispute. The best chance to achieve this is at the stage of 'consultations', i.e. prior to establishment of a panel of adjudicators. This stage is important because it offers a platform for countries to find amicable solutions and prevent disputes from proceeding to the adversarial stage before the panel.

The way forward

Trade rules play a crucial role in whatever shape or form they evolve—the world today is increasingly interdependent. The AB crisis will find a solution, and newer trade agreements will continue to be entered into—India is negotiating the RCEP with the ASEAN, Australia, China, Japan, New Zealand and South Korea. It is party to five other comprehensive trade agreements (with Singapore, Japan, South Korea, Malaysia and the ASEAN), and several other free trade and bilateral investment agreements. Therefore, it is important to ensure that our domestic laws and regulations are made 'trade-smart' to begin with, and not as afterthoughts.