On 22 June 2018, the WTO Appellate Body’s latest Annual Report (Report) was presented summarizing the key trends of the WTO dispute settlement system of 2017. It is worth emphasizing that the WTO dispute settlement system is recognized as the “crown jewel” of the WTO because of its efficiency, predictability and expeditious resolution of disputes. The above features are achieved by the following two issues: the whole procedure is set out in details (stage-by-stage) with all relevant deadlines as well as prompt compliance with the recommendations or rulings of the WTO Dispute Settlement Body are highly effective.

It goes without saying that these features are especially crucial today in the course of the mounting “trade war” between key WTO Members (USA, EU, China, Japan, Canada, etc.) that has already resulted in an increase of different protectionist measures around the world of questionable legality under WTO rules.

Our aim in this article is to provide a brief overview of the benchmark developments of the WTO dispute settlement system in 2017.

**Basic statistics**

According to the statistics posted on the official site of the WTO, during the period of 1995-2017, WTO Members initiated 535 disputes in the WTO, while 230 panel reports and 136 reports of the Appellate Body (AB) were circulated: appeals were brought against 70% of all panel reports.

More than 65% of WTO Members have engaged in dispute settlement as a complainant, respondent, or third party. The following WTO Members have participated in appeal proceedings more frequently (in different procedural status i.e. as an appellant, other appellant, appellee or third party participants): US — 191 times, EU — 170 times, Japan — 99 times, China — 86 times, Canada — 83 times. Moreover, developed countries have acted mostly as appellants, other appellants and appellees, while developing countries have tended to act as third participants of appeal proceedings.
The following WTO agreements have been addressed mostly in AB reports: Dispute Settlement Understanding (DSU) (119 times), GATT 1994 (99 times), Anti-Dumping Agreement (36 times), Agreement on Subsidies and Countervailing Measures (35 times).

**Key findings and conclusions made by the AB in 2017**

**EU vs Russia — Pigs (DS475):** in this case both the panel and the AB recognized the Russian practices of sanitary and phytosanitary measures (SPS) application to the EU as incompliant with WTO requirements. For instance, it was established that the principle of regionalization was not duly implemented in the Russian measure: there were areas within the EU territory which were free from African Swine Fever, however, Russia has not allowed the import of live pigs, pork and other pig products from unaffected parts of the EU. Furthermore, the applied measures were more trade restrictive than necessary to achieve Russia’s appropriate level of protection, did not conform to corresponding international standards and were not adapted to the relevant evolving conditions. Russia had not evaluated all evidence submitted by EU producers, and so forth. Needless to say, this is a particularly crucial case for Ukraine, where many producers have suffered from unjustified application of SPS and TBT measures applied by Russia (e.g. producers of cheese, milk products, chocolate, wallpaper, etc.).

**China vs US — Anti-Dumping Methodologies (DS471):** this case is interesting for Ukrainian producers which are subject to US anti-dumping cases (e.g. for steel and pipe producers) because both the panel and the AB have addressed in detail the peculiarities of application by the American investigative authorities of the weighted average-to-transaction methodology in dumping margin calculations. Specifically, both the panel and the AB reports contain detailed descriptions of applicable tests and substantiation and, of course, illegality of application of zeroing under the WTO rules while calculating the dumping margin.

**EU vs US — Tax Incentives (DS487):** this case may be of interest to the Ukrainian Government in the context of elaboration of different domestic support programs because both the panel and the AB have analyzed in detail which tax privileges may be potentially treated as prohibited or actionable subsidies. This may result in negative consequences for Ukrainian producers enjoying such advantages on export markets (e.g. initiation of anti-subsidy or anti-dumping investigations against Ukrainian producers or even a WTO case against Ukraine).

**Indonesia vs EU — Fatty Alcohol (DS442):** this case is very important for Ukrainian producers subject to anti-dumping cases in the EU (e.g. steel and pipe producers and potentially fertilizer producers). Both the panel and the AB have analyzed in detail the application of mark-up adjustments paid between related entities and interpreted the “single entity concept” as well as separate related parties in this context. The conclusions of on-the-spot verification reports were of particular interest. Even though the EU’s approach to anti-dumping cases looks very transparent and substantiated at first sight, the panel and the AB have declared its on-the-spot verification reports as insufficient to protect the rights of Indonesian producers because they have not provided detailed explanations as to which information was confirmed in the course of verification and which was not.
New Zealand and US vs Indonesia — Import Licensing Regime (DS477 and DS478): these cases are important for the Ukrainian Government because they shed additional light on the peculiarities of the application of restrictive measures covered by Article XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture as well as on application of Article XX of the GATT 1994 setting out exceptions to justify measure that would otherwise be inconsistent with WTO obligations, especially in view of bans on wood export and the application of duties on scrap metal exports.

“Unprecedented challenges” confront the AB (the AB chair, Ujal Singh Bhatia)

Even though this Report looks very optimistic and impressive, Mr. Ujal Singh Bhatia, the AB chair, while presenting it in the WTO, highlighted the following key problems that need to be solved immediately by WTO Members.

Firstly, the dispute settlement system is overloaded because of the following reasons: (a) WTO Members are initiating more and more disputes against each other. US import tariffs applied to steel and aluminum alone have already resulted in seven disputes initiated by China, EU, Norway, Mexico, Canada and Russia; (b) increasing complexity of disputes; (c) doubling of compliance disputes compared to the previous five-year period and (d) US blocking of the appointment of new AB members.

Secondly, the way the DSU should be used to resolve disputes i.e. how and whether in principle the AB has the powers to fill the “loopholes“ of international treaties.

Taking into account that the non-appointment of new AB members is currently the hottest topic, we will address this issue below.

How does the AB function?

The DSU stipulates that the AB has to be composed of seven persons appointed by the Dispute Settlement Body by consensus of all WTO Members. That is, any WTO Member has the power of veto to block an appointment.

Three members, selected on the basis of rotation, serve on each case. It follows that at least four members of the AB are needed in order to satisfy this requirement and avoid any conflicts of interest.

What are the problems in non-appointment of new AB members?

At present, there are four acting AB members with valid terms:

— Mr. Shree Baboo Chekitan Servansing, whose first term will expire on 30 September 2018;
— Mr. Ujal Singh Bhatia and Mr. Thomas R. Graham, whose second terms will expire on 10 December 2019;

— Ms. Hong Zhao, whose first term will expire on 30 November 2020.

Moreover, Rule 15 of the AB Working Procedures stipulates that “a person who ceases to be a Member of the AB may, with the authorization of the AB and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the AB.” The mandate of Mr. Ricardo Ramírez-Hernández expired on 30 June 2017, and the second term of Mr. Peter Van den Bossche expired on 11 December 2017. No consensus regarding the replacement of these AB members has yet been reached. In the meantime, both continue to resolve pending cases that were assigned prior to the expiration of their mandates.

For which faults does the AB get punished?

In fact, the US has two systemic concerns:

— judicial activism: the US accuses the AB of creating law through legal rulings and imposing new obligations on WTO Members; in particular, the US is concerned about the prohibition of “zeroing” in anti-dumping calculations, the definition of “public body”, and China’s market economy status;

— the practice when AB members continue to serve on cases after the expiration of their term.

What are the main concerns of the international community?

In his speech of 8 June 2018 (Annex 1 to the Report), the AB chair mentioned many significant issues. However, we regard the following to be the most crucial:

— delays in handling appeals have implications not only for the dispute settlement process of the WTO, but also for the WTO itself;

— interest groups seeking protection should pressure WTO Members to adopt these measures, rightly insisting that they would not be subject to review by the WTO for years.

Therefore, dispute settlement shall be reformed to comply with the rapidly changing global trade environment.

Are there solutions?

Option 1

One of the solutions could be recourse to majority voting, as envisaged by Article IX:1 of the WTO Agreement and stating that “except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting”. In this case, each WTO Member has one vote and the number of EU votes is equal to the number of its Member States.
The question arises, however, of what “except as otherwise provided” means. On the one hand, Article 2.4 of the DSU provides that DSB decisions are taken by consensus. On the other hand, Article XVI:3 of the WTO Agreement stipulates that “in the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict”. Therefore, the provisions of the WTO Agreement take priority in this case. The major concern in this regard is whether WTO Members are determined to shift from consensus-based decision-making to majority voting, as this situation will definitely have repercussions for other matters.

Option 2
Another potential solution could be the concept described as “variable geometry”. The WTO could serve as an umbrella for trade agreements not necessarily including all WTO Members. This option would require the negotiation of a new treaty. This could be either for appellate review only. Alternatively, it could be for a complete dispute settlement procedure based on existing provisions of the DSU with the fewest changes possible (otherwise too much time would be spent on drafting and negotiations). Such an agreement would only be binding on particular WTO Members who signed and ratified it. This scheme, however, would contradict Article 23.1 of the DSU stating that Members seeking “the redress of a violation of obligations … under the covered agreements… shall have recourse to, and abide by, the rules and procedures of this Understanding”.

Option 3
As an alternative means to regular dispute settlement, Members may always engage in arbitration under Article 25 of the DSU. However, the process and form of arbitration proceedings are different. Firstly, resorting to arbitration is subject to mutual agreement of the parties and is not dependent on DSB actions, so the parties are free to choose the procedures to follow during arbitration proceedings. Secondly, the parties to proceedings shall agree to abide by the arbitration award. Therefore, the awards are automatically binding on parties. Thirdly, third parties may join the arbitration proceeding only upon the agreement of the parties. Fourth, Articles 21 and 22 of the DSU apply mutatis mutandis to arbitration awards. Therefore, the latter are enforced in the same way as the reports of the panels and Appellate Body. Furthermore, the initiation of Article 25 arbitration with the aim to appeal against the panel report would not suspend its adoption by the DSB. Although recourse to Article 25 arbitration was made only once, this option might be an effective temporary solution in order to preserve the security and predictability of the WTO dispute settlement system.

Option 4
WTO Members will try to find other dispute settlement systems. For example, as set out by bilateral treaties.

N.B.
The WTO dispute settlement system is widely recognized as highly successful, probably the most efficient and productive compared to other international judicial mechanisms. While the current challenges will definitely test the system, they also provide a viable opportunity to rethink the
functioning of the WTO in order to move forward, and to continue to assist businesses and governments facing trade challenges.

1 Available at: https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm
3 Available at: https://ideas.repec.org/p/unc/dis pap/171.html
5 Scott Andersen, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy, Iain Sandford. Using Arbitration under Article 25 of the DSU to ensure the availability of appeals, p. 2.
6 Ibid.
7 United States — Section 110(5) of US Copyright Act (DS160).

Anzhela Makhinova, partner at Sayenko Kharenko

Victoria Mykuliak, associate at Sayenko Kharenko