WTO Dispute Settlement 2020: Ways Forward

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On 11 December 2019, the World Trade Organization's (WTO) Appellate Body stopped functioning, which makes the filing of new appeals impossible. One of the last reports of the Appellate Body was circulated in the dispute *Russia — Railway Equipment*, initiated by Ukraine. In its report, the Appellate Body agreed with Ukraine that Russia's measures restricting the importation of Ukrainian railway equipment into its market were inconsistent with international trade rules.

The reason for this Appellate Body paralysis is well known. Since July 2017, the US has been blocking new appointments due to "a number of long-standing concerns".

In fact, the US has two systemic concerns:

- judicial activism: the US accuses the Appellate Body 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 Appellate Body members continue to serve on cases after the expiration of their term.

The Principal Challenge

Disputes in the WTO are settled through adjudication, involving examination of the case by panels and, if applicable, by the Appellate Body.

Since the effective paralysis of the appellate stage, the key problem is not the absence of the Appellate Body *per se*. The danger is that the "losing" party is now able to "appeal into the void" — to the non-existing Appellate Body and, thus, easily block the adoption of the panel's report. According to Article 16.4 of the *WTO Dispute Settlement Understanding (DSU), "if a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the dispute settlement body (DSB) until after completion of the appeal"*. Thus, by appealing a panel report, the "losing" party may escape from a binding ruling and, as a result, the authorisation to adopt countermeasures against it.

What are the Ways Forward?

At present, it seems rather unlikely that the WTO crisis will be resolved in the near future. Thus, WTO Members are searching for new solutions to maintain effective, secure and predictable international trade dispute settlement.

Option 1 — agreement not to appeal. The first option could be a mutual agreement between the disputing parties, reached before adjudication commences, not to appeal the panel report in the absence of the Appellate Body. This approach was taken already in the case *Indonesia—Iron or Steel Products*, where the parties agreed that *"if, on the date of the circulation of the panel report… the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report"*. In other words, WTO Members can use this example and agree that the panel report will be the final point of their dispute, and they will not appeal it to the non-existing Appellate Body.

Option 2 — interim appeal arrangements. One of the temporary options is recourse to arbitration under Article 25 of *the DSU*. Despite the fact that arbitration has always been an alternative tool to regular dispute settlement in the WTO, the process and form of arbitral proceedings are different. The main distinctive feature is that *"resort to arbitration is subject to mutual agreement of the parties"*. Thus, WTO Members are free to choose the arbitral procedure and are, to a great extent not bound by the DSU.

In this connection, shortly before the Appellate Body stopped functioning, the EU proposed its own draft of the arbitration agreement, including the main appeal arbitration procedure rules. The document replicates as closely as possible existing WTO appellate procedure. Based on this proposal, the EU entered into Interim Appeal Arbitration Arrangements with Canada and Norway, according to which the parties will resort to arbitration if the Appellate Body is not able to hear appeals of panel reports in any future dispute between them due to an insufficient number of members.

As the given documents provide, the EU, Canada and Norway will do their best to preserve within the framework of arbitration the essential principles and features of the existing WTO dispute settlement system — in particular, the substantive and procedural aspects, as well as the practice of appellate review. For instance, the respective agreements envisage that disputes within arbitration will be heard by three former judges of the Appellate Body acting as arbitrators. The arbitrators will be selected by the WTO Director-General based on the principles operating within the appeal procedure (independence and impartiality, rotation, etc.) At the same time, Interim Appeal Arbitration Arrangements will cease to apply as soon as the Appellate Body becomes operational once again.

Following this trend, the EU and other 16 WTO Members (Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, and Uruguay) agreed to develop a multi-party interim appeal arrangement based on the arbitration mechanism outlined above. This arrangement will be applicable until the Appellate Body starts functioning again.

The agreements concluded between the EU, Canada and Norway, as well as the multi-party interim appeal arrangement, are just the first initiatives to preserve the appellate stage along with the automatically binding dispute settlement. They may serve as a model for other WTO

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Members such as Ukraine which are interested in effective dispute settlement.

Option 3 — dispute settlement under preferential trade agreements. The third option is to settle disputes within the procedure envisaged by preferential trade agreements. In particular, Ukraine is a party to six agreements envisaging such procedures (free trade agreements with Israel, Canada, EU, Montenegro), EFTA countries (Norway, Iceland, Switzerland and Liechtenstein), and CIS countries. The dispute settlement procedure under free trade agreements is based on the same principles as the WTO procedure. In the meantime, the course of the dispute may be even faster than in the WTO, since there will be no need to "wait in the queue" to settle the dispute because of the WTO caseload. For instance, at the moment, the EU and Ukraine are resolving a dispute over Ukraine's ban on wood exports within the framework of the EU-Ukraine Association Agreement.

Option 4 — special procedure for adoption of countermeasures. Immediately after the Appellate Body stopped functioning, the EU proposed a legislative amendment to its enforcement regulation. The amendment will permit the European Commission to take countermeasures in cases where a "losing" party prevents the WTO DSB from delivering binding decisions and authorise the "winning" party to adopt countermeasures when the WTO DSB ruling is not implemented. Importantly, this rule will apply to WTO dispute settlement and to disputes handled under EU preferential trade agreements. Thus, in cases when the EU trade partner blocks the dispute settlement resolution under the preferential trade agreement (e.g. by blocking the composition of panels), the EU will adopt countermeasures. The adoption of this proposal is expected by mid-2020.

N.B.

Taking into account the current political discourse at international level, it is likely that some WTO panel reports will be blocked by the "losing" parties (especially in disputes of a political nature). At the same time, vetoing panel reports may carry substantial reputation and retaliation risks for blocking WTO Members. In this connection, the WTO panel stage will still function and most of the panel reports will be adopted and implemented by WTO Members.

At the same time, taking into account the political nature of the recent trade disputes between Ukraine and Russia the Ukrainian government, with the support of the business community, has to elaborate effective instruments to protect the Ukrainian market from the unfair trade practices of other WTO Members. For instance, Ukraine may join the multi-party interim appeal arrangement agreed in Davos between several WTO Members at the beginning of this year. In addition, if there is an intention to preserve the appellate stage, Article 25 appeal arbitration may be used. If the goal is to safeguard automatically binding dispute settlement through the panel stage only, mutual agreements not to appeal may be concluded by Ukraine. Finally, Ukraine may follow EU experience and envisage a special procedure to adopt countermeasures in case the "losing" party blocks WTO rulings. As a parallel or alternative option, Ukraine may resort to a dispute settlement process under preferential trade agreements (as seen in the current dispute under the EU-Ukraine Association Agreement over the wood export ban).