

Kluwer Arbitration Blog

Arbitrating WTO Disputes

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In light of the tariffs on steel imposed by the United States of America (“USA”), the Europe Union (“EU”) has threatened to impose tariffs of its own on American goods. Additionally, the EU has also filed a claim against USA at the World Trade Organisation (“WTO”). However, as discussed below, it may be that this procedure may be ineffective due to a lack of members at the Appellate Body. Arbitration can serve to resolve disputes effectively until the larger issue at the Appellate Body is addressed by the States at the WTO.

Dispute resolution in the WTO

Under the Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement (“DSU”), a Dispute Settlement Body (“DSB”) is established for the settlement of disputes. When a dispute arises between the members of the WTO, it is first sought to be resolved through a consultation process (Article 4.2 DSU). Failing such consultation, a panel is appointed to assist the DSB in making rulings or recommendations (Article 4.3 DSU). The panel’s report can only be rejected by consensus within the DSB (Article 16.4 DSU). Each party to the dispute has 60 days from the date of the report to notify the DSB of its intention to file an appeal against the panel report to the “Appellate Body” (Article 16.4 DSU). Once such intention is notified, the DSB cannot consider the panel report for implementation until the appeal is heard (Article 16.4 DSU). Each appeal has to be heard by three members of the Appellate Body (Article 17.1 DSU). On the conclusion of the appeal, the Appellate Body report has to be adopted by the DSB and unconditionally accepted by the parties unless the DSB decides by consensus to not adopt the Appellate Body report within 30 days (Article 17.14 DSU).

Constitution of the Appellate Body and the current crisis

The Appellate Body consists of seven members, who are experts in the field of law and international trade. The DSU requires them to be unaffiliated to any government. Each Appellate Body member is appointed for a four-year term, which may be renewed for a second term. However, in practice, each member’s term is automatically renewed by the DSB for a second time. The appointment and re-appointment of members of the Appellate Body has to be by consensus within the DSB. Therefore, a country can oppose any appointment, or even re-appointment.

Currently, however, there are only four members on the Appellate Body. No new Appellate Body members have been appointed to replace these members who resigned or whose terms ended in 2018. This is due to the opposition of the USA to any new appointments. The USA claims that the Appellate Body members are guilty of judicial overreach, interpreting WTO agreements in a

manner which they were never intended to apply and therefore, refused to consent to the appointment of new members. In the past, it has blocked the appointment of certain members who it alleges have indulged in judicial activism. USA argues that the Appellate Body creates new rights and provides decisions on issues not raised by the parties. However, due to the nature of the consensus requirement, there is no check on the adoption of its decisions. It has therefore refused to appoint members to positions vacated recently.

The status of the Appellate Body as a functioning arm of the WTO is under threat due to USA's stance. By the end of 2019, only one member, Ms Zhao of China would remain on the panel. A panel report cannot be adopted by the DSB if an appeal is filed until it is decided by the Appellate Body. Given that three members are required to hear an appeal (Article 17.1 DSU), it is imperative to consider solutions to this impasse. Otherwise, the WTO dispute resolution procedure will grind to a halt as the DSB will not be able to adopt any panel report under appeal.

Commentators have offered a number of solutions such as agreements between states not to appeal the panel report and appointments to the Appellate Body by majority and not consensus in the DSB. One solution which should be widely considered is arbitrating WTO disputes.

Arbitrating WTO disputes

WTO disputes can be resolved through the arbitration process under Article 25 DSU. An Article 25 DSU arbitration can be initiated at any stage of a dispute, including on appeal from a panel decision. It produces decisions that are binding on the parties and are enforceable in the same way as panel and Appellate Body decisions adopted by the DSB. In the past, USA and EU have used the Article 25 DSU arbitration provision in *United States – s 110(5) of the US Copyright Act* (the "US Copyright case"). This case concerned an exemption in USA which permitted the playing of radio and television music in public without licenses in certain conditions which the EU argued was in contravention of the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"). USA agreed to implement the panel report, within a reasonable period of time to be determined by arbitration under Article 21.3 DSU. However, the parties could not agree on the level of nullification or impairment of benefits to the EU as a result of section 110(5) of the US Copyright Act. Therefore, they resorted to arbitration under Article 25 DSU. The arbitrator determined that the level of benefits nullified or impaired were EUR1,219,900 per year. Therefore, arbitration was used to resolve a specific aspect of the dispute in that case.

Article 25 arbitration could function as an alternative to a panel procedure or the Appellate Body procedure. Additionally, the procedure for the arbitration is subject to the agreement of the parties (Article 25(2) DSU). However, in practice and as mentioned in the US Copyright case, it is likely the procedures would be similar to those used in Appellate Body hearings. Thus, arbitration could be the most appropriate solution to the current crisis facing the WTO in respect of Appellate Body decisions.

Conclusion

Thus, until a more permanent solution is evolved, arbitration can be a practical solution to ensure that WTO disputes are not stuck in limbo and can be resolved successfully. There are however, practical barriers to such an approach. The success of this solution depends on States agreeing to it as a solution. Particularly, States who have lost in panel report might be reluctant to agree to arbitration instead of an Appellate Body hearing. Therefore, an agreement should be reached at the

earliest possible stage of the dispute to arbitrate the appeal, or the entire dispute. This approach should be promoted by States in order to ensure that the WTO mechanism for the settlement of disputes remains effective and is not rendered defunct.

The views expressed in this article are those of the authors. The authors would like to thank Reyna Ge for her assistance with the article.


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This entry was posted on Tuesday, July 3rd, 2018 at 3:20 pm and is filed under [Appellate Body](#), [Arbitration](#), [European Union](#), [Trade](#), [United States](#), [WTO](#)

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