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The WTO Dispute Settlement System – Closing Out 2019 and Implications for 2020

[Terence P. Stewart \(https://currentthoughtsontrade.com/author/terencepstewart/\)](https://currentthoughtsontrade.com/author/terencepstewart/) · [December 7, 2019 \(https://currentthoughtsontrade.com/2019/12/07/the-wto-dispute-settlement-system-closing-out-2019-and-implications-for-2020/\)](https://currentthoughtsontrade.com/2019/12/07/the-wto-dispute-settlement-system-closing-out-2019-and-implications-for-2020/) · [Uncategorized \(https://currentthoughtsontrade.com/category/uncategorized/\)](https://currentthoughtsontrade.com/category/uncategorized/) · [Appellate Body \(https://currentthoughtsontrade.com/tag/appellate-body/\)](https://currentthoughtsontrade.com/tag/appellate-body/), [China \(https://currentthoughtsontrade.com/tag/china/\)](https://currentthoughtsontrade.com/tag/china/), [Dispute Settlement \(https://currentthoughtsontrade.com/tag/dispute-settlement/\)](https://currentthoughtsontrade.com/tag/dispute-settlement/), [European Union \(https://currentthoughtsontrade.com/tag/european-union/\)](https://currentthoughtsontrade.com/tag/european-union/), [India \(https://currentthoughtsontrade.com/tag/india/\)](https://currentthoughtsontrade.com/tag/india/), [United States \(https://currentthoughtsontrade.com/tag/united-states/\)](https://currentthoughtsontrade.com/tag/united-states/), [WTO \(https://currentthoughtsontrade.com/tag/wto/\)](https://currentthoughtsontrade.com/tag/wto/), [WTO 2020 Budget \(https://currentthoughtsontrade.com/tag/wto-2020-budget/\)](https://currentthoughtsontrade.com/tag/wto-2020-budget/) · [No Comments \(https://currentthoughtsontrade.com/2019/12/07/the-wto-dispute-settlement-system-closing-out-2019-and-implications-for-2020/#respond\)](https://currentthoughtsontrade.com/2019/12/07/the-wto-dispute-settlement-system-closing-out-2019-and-implications-for-2020/#respond).

The week of December 2, 2019 saw WTO Members engaged in a variety of year end activities including two added meetings – the resumption of the November 22 Dispute Settlement Body (“DSB”) meeting to explore how pending appeals would be handled post December 10 and another Committee on Budget, Finance and Administration meeting to see if Members could agree to a modified

proposed budget to address U.S. concerns on funding for the Appellate Body (“AB”) in light of the imminent reduction of AB members from three to one.

December 3, 2019 DSB Meeting on Pending Appeals

The resumption of the DSB meeting did not result in agreement for how all pending appeals will be addressed with most pending appeals unlikely to be resolved by the current AB members, although it has been reported that the DSB Chair David Walker had indicated that appeals would proceed on four cases (of fourteen pending on December 3) – the two plain paper packaging appeals on Australia’s programs (Honduras (DS435) and the Dominican Republic (DS441), Ukraine’s challenge to various measures in the Russian Federation on the importation of railway equipment (DS499) and the appeal in the case on U.S. countervailing duties on supercalendered paper from Canada (DS505).

The December 3 resumed DSB meeting did show the continued distance between at least certain WTO members in their view of one of the issues raised by the United States — whether the Dispute Settlement Understanding limits who may authorize individuals to serve as Appellate Body members to the WTO Membership through the DSB. For example, the EU statement confirmed that it viewed the Appellate Body, through Rule 15 of the Working Procedures, as qualified to permit members of the AB whose terms have expired to continue working on appeals that started while they were members. See EU statement at the regular DSB meeting on 3 December 2019, https://eeas.europa.eu/delegations/world-trade-organization-wto/71496/eu-statement-regular-dsb-meeting-3-december-2019_en.

The U.S. statement reviewed their year long effort to get an answer to the question “do Members agree that the Appellate Body does *not* have the authority to ‘deem’ a person who is no longer an Appellate Body member to nonetheless continue to be a member and decide appeals?” From statements by the EU and presumably others, the U.S. concluded that “members are not in agreement on this fundamental question.” As such the U.S. concluded that “there will be no consensus between Members on how to proceed on the Appellate Body by December 10” and that “[i]n the absence of any shared understanding of the underlying causes and of appropriate solutions, it will be for the parties to each dispute to engage with each other to determine an

appropriate way forward.” Statement of the United States at the Meeting of the WTO Dispute Settlement Body (Dec. 3), https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.Reconvene.Item7_.as_.deliv_.fin_.public.pdf (https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.Reconvene.Item7_.as_.deliv_.fin_.public.pdf).

Since the DSB meeting on December 3, Morocco withdrew its appeal of a panel decision, Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey, indicating that its antidumping measure had terminated in September. See WT/DS513/7 (5 December 2019). And on December 6, the European Union filed an appeal from the second compliance panel ruling in the Airbus case where the panel had found the EU had not brought its programs into compliance with WTO obligations (panel report was circulated on December 2, 2019). See https://www.wto.org/english/news_e/news19_e/ds316oth_06dec19_e.htm. Thus, as of December 7, there remain 14 appeals pending before the Appellate Body.

December 5, 2019 Committee on Budget, Finance and Administration Consideration of WTO 2020 Budget

Meanwhile, the Committee on Budget, Finance and Administration meeting of December 5 resulted in approval of the modified budget proposal for the WTO for 2020. The budget will now be before the General Council for approval in its final meeting of 2019 held on December 9-11. See Agenda item 20, WT/GC/W/793. The U.S. had worked with the Director-General to identify changes in the budget to reduce funds available for Appellate Body members in light of the current situation and only agreed to proceed with the budget for 2020, postponing the 2021 budget approval process until next year. A number of WTO Members, including the EU, China, India and Turkey had expressed concerns about the modifications to the budget, but approval at the Committee level was secured.

Reductions in two budget line items were reportedly made, reducing funding from \$2.791 million to \$200,000, presumably sufficient to handle appeals that do go forward through the Appellate Body. What such changes in funding will mean for the Appellate Body Secretariat is not yet clear but logically if there is no functioning Appellate Body, there is no need for an Appellate Body Secretariat until such time as the AB has sufficient members to once again hear appeals.

Other Issues Potentially Affecting the Operation of the Dispute Settlement System

Still unknown is whether current AB members whose term expires on December 10 will agree to continue on appeals after that date even on the four appeals where hearings have been had and that press reports indicated that Amb. Walker, the DSB Chair, had indicated would proceed post December 10. To the extent one of the current AB members opts not to continue on any appeal after the end of his term, that would presumably reduce the number of pending appeals that could be heard as it is likely there would be no continuing AB member who could be substituted (would depend on the composition of the AB Division presently hearing the appeal).

Moreover, as one of the four pending appeals identified in press articles as likely to be completed is a case where the U.S. is a party, it is also not clear what the U.S. position will be on that appeal post December 10. It may have agreed to have those appeals where hearings have been had completed if the current AB members are willing to continue to serve. Press accounts are unclear if that is the case.

There is also the question as to whether the Appellate Body Secretariat is disbanded pending the resumption of a functioning Appellate Body. Press reports have indicated that this is possible/likely with existing staff having the option to leave the WTO or accept positions in other WTO divisions. That would obviously make sense from a budget perspective as well as there is no institutional value in paying people who have no discernible workload.

December 6 Trade Negotiations Committee Heads of Delegation Meeting

There is always a flurry of activity ahead of the last General Council meeting of the year. December 6 saw a meeting of heads of delegation for the Trade Negotiations Committee (“TNC”). The TNC is the Committee that oversees ongoing negotiations within the WTO. While there are very important issues being pursued by various groups within the WTO under the jurisdiction of the TNC, for purposes of this post, the issue of interest will be the extent to which the dispute settlement system is a subject of debate.

As the minutes of the meeting are not publicly available, reference is made to three statements – one by Director-General Azevedo, one by EU Ambassador Joao Aguiar Machado and one by Ambassador Dennis Shea of the United States at the meeting. Other relevant statements were undoubtedly made as well.

The WTO put out a news release on Director-General's statement to the TNC Heads of Delegation Meeting. The long excerpt below provides the Director-General's views on the state of play on both the dispute settlement system and on the 2020 budget:

“In his remarks, the Director-General said that while the effective suspension of appellate review of WTO dispute rulings is a serious challenge to the global trade body's adjudication function, it ‘does not mean the end of the multilateral trading system’.

“Existing WTO rules still apply. WTO disciplines and principles will continue to underpin world trade. And members will continue to use WTO rules to resolve trade conflicts – in regular WTO bodies, through consultations, via dispute settlement panels, and through any other means envisaged in the WTO agreements,’ he said.

“Members have important decisions to make, with implications for the WTO and for their respective economies, DG Azevêdo said.

“Where we go from here is in your hands. What we do – or just as significantly, what we fail to do – will define the trajectory of this organization.

“On rule-making, your choices could contribute to restoring certainty in the global economy, and help governments manage interdependence in a fast-changing world.

“On the implementation of existing commitments, you have scope to make regular committee work an even more effective vehicle for fostering compliance and addressing concerns about each other's trade policies.

“And on dispute settlement, you could restore the impartial, effective, efficient two-step review that most members say they want.

“Alternatively, your choices could open the door to more uncertainty, unconstrained unilateral retaliation – and less investment, less growth, and less job creation.”

‘The DG welcomed a compromise reached in the Committee on Budget, Finance and Administration on the WTO's budget for 2020. The committee's favourable recommendation has been forwarded to the General Council for endorsement during its 9-11 December session.

“The proposed budget compromise is the result of flexibility and cooperation among members, both here in Geneva and in capitals. It represents a pragmatic response that preserves the WTO system amid turbulence in the wider international system – turbulence that we cannot wish away. I am counting on your help with approval in the General Council.”

DG Azevêdo urges WTO members to find ways forward on the dispute settlement system, https://www.wto.org/english/news_e/news19_e/tnc_06dec19_e.htm (https://www.wto.org/english/news_e/news19_e/tnc_06dec19_e.htm).

Ambassador Machado of the EU's statement at the meeting is a good representation of the EU position over time and shows the continued sharp difference in views the EU has with the U.S.

“Since our last meeting, the situation of the WTO has further deteriorated. Not only the discontinuation of the Appellate Body's work has become an evident prospect, but attempts to obstruct the functioning of this Organization through the budget discussion have shattered Members' confidence in the WTO. This has diverted us from progressing our negotiation agenda or from finding ways to resume nominations of the Appellate Body Members, which should be the priority. While the European Union is alarmed about the current state of affairs at the WTO, we remain strongly determined to address the challenges in front of us.

“First, we remain resolute to find ways to restore a two-step dispute settlement system at the the WTO, and resume nomination of Appellate Body's Members as soon as possible. Next week's General Council will be crucial in this respect and we invite all Members to engage constructively in finding solutions.”

https://eeas.europa.eu/delegations/world-trade-organization-wto/71633/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-trade-negotiations-committeeheads-delegation-6_en (https://eeas.europa.eu/delegations/world-trade-organization-wto/71633/eu-statement-ambassador-jo%C3%A3o-aguiar-machado-trade-negotiations-committeeheads-delegation-6_en)

Ambassador Shea's statement, like that of other Ambassadors at the meeting, covered a range of issues deemed important for the TNC and its work going forward. On dispute settlement, Amb. Shea provided the following thoughts:

“Fourth, with respect to dispute settlement, the United States has engaged constructively over the past year, providing detailed statements in the DSB and the General Council outlining clear positions and articulating our longstanding concerns with the functioning of the Appellate Body. Unfortunately, we have yet to see the same level of engagement from other Members. We have

asked repeatedly, if the words of the DSU are already clear, then why have the practices of the Appellate Body strayed so far? This is not an academic question; we will not be able to move forward until we are confident we have addressed the underlying problems and have found real solutions to prevent their recurrence.”

<https://geneva.usmission.gov/2019/12/06/ambassador-sheas-statement-at-the-wto-trade-negotiating-committee-heads-of-delegation-meeting/> (<https://geneva.usmission.gov/2019/12/06/ambassador-sheas-statement-at-the-wto-trade-negotiating-committee-heads-of-delegation-meeting/>)

General Council Meeting, December 9-11, 2019

When the General Council meets starting on Monday, December 11th, among its twenty-four agenda items are two that deal with either dispute settlement (Agenda Item 5) or the 2020 budget (Agenda Item 20). Both agenda items will likely generate a great deal of discussion.

Presumably on December 9th, the General Council will get to agenda item 5, “Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator and Draft Decision on the Functioning of the Appellate Body.” The original draft Decision and the revised draft have been discussed in earlier posts and reflects efforts by Amb. Walker (serving as Facilitator to the General Council) to identify possible solutions to the concerns raised by the United States over the last several years on the functioning of the Appellate Body. There will be many WTO Members – undoubtedly including the EU, China, India and others – who will support the draft Decision and urge its adoption. In their view adoption of the Decision would clear the path for the Dispute Settlement Body to start the process for finding replacements for the six Appellate Body seats that either are currently or will be empty after December 10.

The United States has made it clear that the draft Decision does not resolve its concerns, most importantly because there is no understanding of why the Appellate Body has felt free to disregard the limits on its activities.

So expect Agenda item 5 to be contentious but result in no agreed decision being adopted.

On agenda item 20, “Committee on Budget, Finance and Administration – Reports on Meetings of April, June, September, October and November”, this item will likely be taken up on the 10th or 11th (assume the 11th). While again there will likely be a large number of statements and concerns raised about the process, it is expected that the 2020 budget for the WTO will be approved by the General Council.

Regular DSB Meeting of December 18, 2019

The agenda for the upcoming last regular DSB meeting of 2019 is contained in WTO/AIR/DSB/90 dated 6 December 2019. The relevant item for this post, is agenda item 6 which takes up the latest iteration of the proposal to have the DSB make a decision to launch a selection process to fill the six Appellate Body member slots that are or will be open. The proposal is essentially identical to earlier versions and is supported by 117 of the 164 WTO Members. *See WT/DSB/W/609/Rev.15, 6 December 2019.*

As it has in the past, the United States will not support the proposal, and the year 2019 will end with the Appellate Body unable to hear new appeals, unable to proceed with many of the pending appeals and with WTO Members exploring different options for how they will handle disputes going forward.

Implications for 2020

The 2020 budget reflects the contraction in activity by the Appellate Body even assuming the four pending appeals are completed in 2020. So 2020 will be a year of no or limited Appellate Body activity.

Major players such as the EU, China, India and others are far removed from acknowledging the deep concerns that have been expressed by the United States on the functioning of the Appellate Body, and in many cases disagree that there is even a problem. This impasse suggests that progress on reestablishing a two-step dispute settlement system will be slow if it occurs at all in 2020.

For some, there may be a hope that U.S. elections in late 2020 could lead to a different Administration in 2021 and a different posture on the WTO dispute settlement system. Change may or may not occur regardless of which Administration is in place in 2021. But there is little doubt that 2020 will be a year in which WTO members will need to consider other approaches to resolving

disputes. One obvious alternative could be through arbitration under Article 25 of the Dispute Settlement Understanding (the EU has a model it has adopted with Canada and separately with Norway; other approaches could obviously be pursued). Members could also agree to not appeal from panel decisions. Negotiations can also provide ways to address matters of concern to trading partners, as can greater transparency and increased activity in WTO Committees permitting Members to understand and comment on practices of trading partners.

Change inevitably brings discomfort and uncertainty. December 10 and the inability to appeal new panel decisions after that date is the bookmark date for change. 2020 will undoubtedly be a year of discomfort and uncertainty. Let us hope that the WTO Members can find a path to addressing U.S. concerns in a meaningful manner and that an improved dispute settlement system is the result.

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◀ Additional Meetings of the WTO Dispute Settlement Body and Budget, Finance and Administration Committee set for December 3 and 5 in search of Resolution of Outstanding Issues.

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