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The Collapse of the Appellate Body as a Determining Factor of the WTO's Future[1, 2]

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Abstract

The World Trade Organization (WTO) is one of the leading institutions involved in global economic regulation. Its purposes are to ensure multilateral cooperation on the liberalization of international trade, harmonize existing standards and requirements, and peacefully resolve trade disputes between countries. Since 11 December 2019, dispute resolution has been handicapped due to the consistent blocking of the appointment of members to the WTO Appellate Body (AB) by the United States. This has reduced the multilateral trading system's (MTS) predictability and threatens its final decay.

The purpose of this article is to describe the fundamental and formal causes of the collapse and to discuss the circumvention mechanisms and their effectiveness. At the same time, an assessment is given of the possibility to overcome the collapse in 2021, considering the change of the U.S. president and other events. Special attention is paid to Russia's position and its current and potential losses. Finally, the issue of dispute resolution through regional trade agreements is proposed for discussion.

The fundamental reasons for the collapse were the shifting balance of power in the world order and the WTO's inflexibility in adjusting the rulebook and its procedures. There are long-standing, objective reasons for the U.S.' dissatisfaction, but the blockage of the AB is an overreaction. These reasons are now being used to justify the blockage of the AB in order to gain leverage. Moreover, the U.S.' position on this issue has not changed with the new president.

There is abuse of the current situation as WTO members file appeals "into the void." Existing tools to circumvent the collapse are partial and not yet popular among WTO members. Russia needs to resume the AB's work to complete previously started high-profile disputes and to defend its interests in the future.

Keywords: WTO crisis, dispute settlement system, Appellate Body, trade disputes, multilateral trading system

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Introduction

The World Trade Organization (WTO) is in a deep crisis. Until recently, the main manifestations of this crisis were the protracted Doha Round negotiations and non-fulfilment of transparency obligations by a few members. However, at the end of 2019, the collapse of the WTO Appellate Body (AB) was added to this list of problems. It virtually paralyzed the process that

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made it possible for members to challenge the trade policy measures of other members. The blocking of the dispute resolution system creates a critical situation that threatens the existence of the WTO as an influential institution, even if other problems are resolved.

The collapse was caused by the United States, one of the key supporters of the WTO dispute resolution system in its current form. Since 2016, the U.S. has refused to appoint new AB members [WTO, 2016].[3] As a result, the predictability of the multilateral trading system (MTS) is decreasing. Whereas previously any WTO member could challenge measures allegedly inconsistent with WTO norms applied by another member, the AB's collapse makes it possible for any WTO member to freeze a dispute by filing an appeal "into the void."[4]

The purpose of this article is to identify the fundamental causes of the AB's collapse, assess the effectiveness of mechanisms to circumvent it, and determine the likely changes due to the events of the first half of 2021.

The article begins with a description of the place of the AB in the MTS and then identifies the fundamental and formal reasons for the collapse of the AB. Next, it demonstrates how the events of the first half of 2021 affect further development. The current consequences and available methods of circumventing the collapse of the AB are then considered, as is the importance of the resumption of the AB's operation for Russia. It closes with the question of whether regional trade agreements (RTAs) can become the leading platform for resolving trade disputes.

The Place of the Appellate Body in the WTO Dispute Resolution System

One of the features of the creation of the WTO was the transition to a more stringent dispute resolution process. This became possible due to the improvement of the dispute resolution system and the creation of a compliance mechanism [Chorev, 2007]. As a result, a rules-based approach to dispute resolution replaced the outdated "diplomatic" format [Ehlermann, 2003] because the former has many advantages over the latter [Foster, 2000].

The AB is a vital element of the WTO dispute resolution system. It consists of seven members elected for four years by consensus of WTO members, with the possibility of a one-time extension. When appeals are filed a division of three AB members is formed, which must consider the legal aspects of the dispute and the Panel conclusions[5] being challenged by the parties.

Appeals are considered if one of the parties to the dispute is not satisfied with the Panel report and submits an appeal. As of 1 June 2021, approximately 65% of published Panel reports were appealed. At the same time, the AB corrects at least one of the Panel's conclusions in approximately 83% of cases [Pauwelyn, 2019]. This confirms the critical importance of the AB in resolving disputes, and the collapse of its work threatens the stability of the entire MTS.

The AB is considered an independent element of the dispute resolution system and has broad freedom. This is due to several features. First, there is no possibility to file an "appeal on appeal," and the negative consensus rule applies.[6] As a result, the AB's report will necessarily be accepted, and the members are obliged to implement its prescribed measures. Second, the AB's freedom is explained by procedural features. Article 17.9 of the Understanding on Rules and

[3] In 2016, the U.S. blocked the extension for a second term of the AB member from Rep. of Korea, Seung Wha Chang, "following a thorough review" of his activities in the first term.

[4] This refers to appeals filed when there is no possibility of their consideration by the AB. Thus, the dispute is frozen for an indefinite time.

[5] The consideration of the dispute by the Panel occurs during the first stage of the dispute, although it can be settled by consultations preceding it. Panels are formed on an ad hoc basis, unlike the AB.

[6] This means that the DSB must approve the decision unless there is a consensus against it.

Procedures Governing the Settlement of Disputes (hereinafter the DSU, Dispute Settlement Understanding)[7] [WTO, n. d., c] allows it to independently develop Working Procedures for Appellate Review (hereinafter Working Procedures) in consultation with the Chairman of the Dispute Settlement Body (DSB) and the Director-General of the WTO [WTO, n. d., d]. That is, there is no provision for the involvement of WTO members in this process as such [Fabri, 2017]. Therefore, the issue of the AB's activity that could lead to the emergence of new rules and obligations was raised from the beginning of its existence [Barfield, 2002].

Thus, the AB plays a crucial role in consideration of disputes. This is evidenced by both the share of appeals filed and the fact that the arbitrators changed at least one conclusion of the Panel reports in most of them. The rule of negative consensus on the adoption of AB reports provided it with certain independence in interpreting WTO agreements and making decisions. In this context, the U.S.' actions to block the appointment of new AB arbitrators was an effective way to overcome this independence. However, in doing so, the U.S. jeopardized the functioning of the entire dispute resolution system and reduced the level of predictability of the MTS. If the WTO negotiation crisis is overcome and new multilateral agreements are adopted, an imperfectly functioning dispute resolution system will not guarantee that WTO members fulfil their obligations under the old and new agreements.

Reasons for the Collapse of the WTO Appellate Body

The General Agreement on Tariffs and Trade (GATT) and the WTO were created during a surge of liberalism in the world order. The former started its work after World War II, and negotiations on the latter occurred at the same time as relations between the USSR and western countries were becoming warmer and as the USSR later collapsed. Both institutions are part of the liberal world order, the destruction of which we have seen in recent years. An increasing number of countries are becoming economically and politically more influential, which has led to an increase in competition between the "old" and "new" leaders. In this context, the fundamental reason for the AB's collapse was a change in the balance of power and a shift in the relative benefits of maintaining the stability of international institutions.

There is no doubt that the U.S. has received, and continues to receive, benefits from the current MTS. Nevertheless, with the development and growth of competitors, and primarily of China, the relative benefits for the U.S. began to decline. The new economic giants continue to question the leadership of the U.S. and other developed countries in the modern world's architecture. This is also evident at the institutional level: for example, the decisions of the G7 summits are of less interest than those of the G20 summits. In the WTO's case, the growing contradictions were already being felt at the beginning of the century and manifested in the lack of progress on the Doha Round agenda.

The same is true for the WTO DSB. The U.S. was one of the key creators of the WTO in its current form and of the more stringent dispute resolution format. Additionally, the U.S. is the most frequent complainant in the WTO.[8] However, many developing countries have joined the WTO since 1995. They have been actively using the dispute settlement system and have gained much experience, which makes it possible for them to effectively challenge developed countries' measures. Although the U.S. and the European Union (EU) remain the leading complainants in WTO trade disputes (Figure 1), developing countries, including China, Brazil, and India, actively use this mechanism to defend their goals, including challenging American measures.

[7] The main document regulating the WTO dispute resolution process.

[8] According to the WTO, out of 600 initiated disputes, the U.S. acted as a plaintiff in more than 20% of cases [2020].

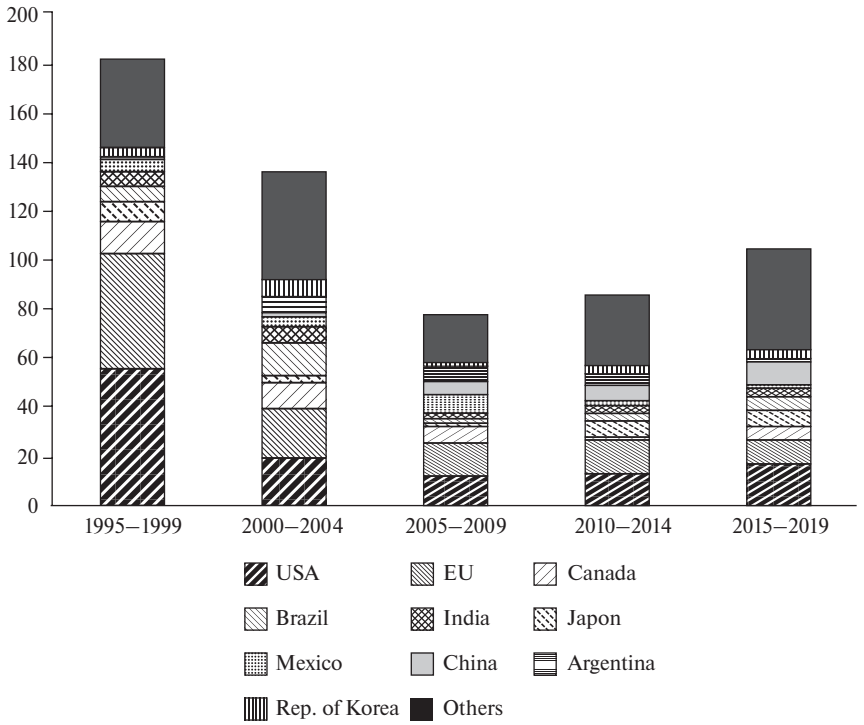

Fig. 1. The Number of Disputes Initiated by Individual Countries in 1995–2019

Source: Compiled by the author on the basis of WTO [2020].

In this context, special attention should be paid to the U.S.' practice of using trade remedies – anti-dumping, special protective, and countervailing measures. As noted by Bown and Keynes (2020), the U.S. made several compromises when creating the WTO, one of the consequences of which was the prohibition of voluntary export restrictions. The U.S. did so because trade remedies remained legal, and they are actively used by the U.S. even now. However, other countries began to actively challenge U.S. trade remedies between 1 January 1995 and 19 January 2017, and about two thirds of the 141 disputes against the U.S. relate to these issues.

From the U.S.' point of view, the MTS has begun to provide China and other developing countries with relatively more benefits and does not correspond to American interests. Blocking the AB is one of the steps it has taken to maintain its dominance in the MTS and impose its priorities. Thus, the fundamental shift in the balance of power in the global economy explains the emergence of the legal reasons for AB blockage by the United States.

Grigoryev and Kurdin (2013) note that one of the main problems when creating an effective mechanism for global regulation is the difficulty of adjusting it and providing feedback. As a result, the institution ceases to meet modern challenges and passes into a stage of institutional inertia: it does not disappear but creates additional risks for the world community.

This problem can be observed in the practices of the WTO and the AB. The main reason may be the current rule of consensus, which is extremely difficult given the growing number of WTO members. During the existence of the WTO, none of the multilateral agreements has been supplemented by authoritative interpretations [Boklan, Bahri, 2022]. This means that, despite significant changes in the nature of world trade since the establishment of the organization and the discovery of numerous ambiguous provisions and grey areas in the WTO rulebook,

rules have remained the same. According to Article 17.2 of the DSU, AB members must be appointed by WTO members by consensus, making it possible for the U.S. to block the process. At the same time, the need to correct the DSU was stated in 1994 – even before the WTO began functioning as such. The deadline for this process has been postponed several times,[9] and it is currently continuing without a set deadline [WTO, n. d., b]. Thus, another fundamental reason for the AB's collapse is that the WTO got into an institutional trap due to the inability to update the rulebook, the DSU, and the Working Procedures.

The lack of flexibility of the WTO in the formation and adjustment of rules led to the Appellate Body's abuse of powers and non-compliance with the specified time frame. It is precisely these shortcomings in the work of the AB that are addressed in a report by the U.S. Trade Representative [Office of the United States Trade Representative, 2020]. The report provides convincing legal arguments about actions by the AB that are inconsistent with WTO rules, including the consolidation of case law, the interpretation of the domestic legislation of the parties to the dispute and the creation of "new rules," and consideration of issues that are not related to the essence of the dispute, as well as exceeding the fixed time frame for considering an appeal and the terms of office of the members of the AB.

Most of these AB "abuses" are explained by the unelaborated DSU and the WTO multilateral agreements. For example, considering the problem of creating new rules, the AB cannot always give an unambiguous interpretation of specific provisions of multilateral agreements [Ehlermann, 2003]. However, the DSU and Working Procedures do not explain how the AB should act in such a situation. Moreover, the issue cannot be postponed until interpretations are received because interpretations can only be adopted by the WTO Ministerial Conference or the General Council. At the same time, Dennis Shea, while U.S. ambassador to the WTO, stated that the problem is not the existing rules but the AB's non-compliance [Pauwelyn, 2019]. As a result, the AB finds itself in an impasse: the existing rules do not answer critical procedural questions, but the U.S. does not see the point in changing them.

Separately, it is worth considering the issue of non-compliance of the AB's activities with the regulations. According to Article 17.5 of the DSU, appeals must be considered within no more than 90 days. However, this requirement was not always fulfilled even in the first years of the WTO (Figure 2). Most of the appeals were considered within 90 days before 2009, but then the situation changed. Moreover, consideration of all 25 appeals filed in 2015–19 took more than 90 days – on average, 286 days passed between the filing of an appeal and the publication of the AB's report. This is more than three times longer than allowed by the DSU.

The U.S. insists that non-compliance with the deadlines is primarily due to the abuse of power mentioned above, which causes a more extended consideration of appeals. At the same time, it should be borne in mind that disputes and appeals of WTO members have become more extensive and include an increasing number of requests for consideration by a Panel and the AB. The arbitrators must consider all of them, which causes delays. Thus, the AB needs a mechanism for filtering requests from WTO members to optimize the process.

The U.S. is not the only member that sees the need to reform the AB and the WTO as a whole. However, publicly, none of the other WTO members supported the idea of blocking. Moreover, the issue of AB reform was raised long before its collapse – some members submitted proposals to adjust the DSU in 2018 but these were rejected by the U.S. [Baschuk, 2018]. Therefore, the question about the ultimate goal of blocking the AB remains open.

[9] At first, the DSB reform process was due to be completed by 1998. Then, within the framework of the Doha Round, the countries agreed to continue working on it (outside the main agenda) and complete the reform by May 2003; this deadline also passed without a resolution of the issue.

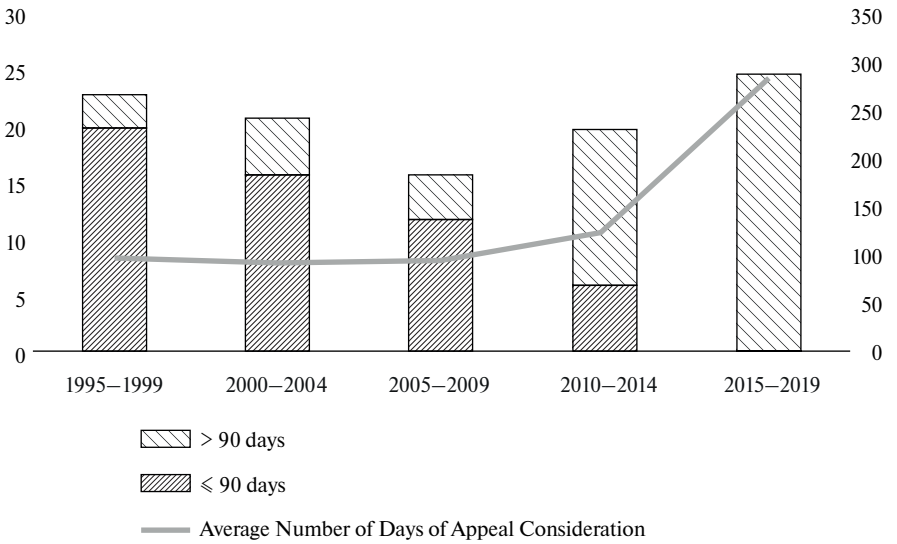

Fig. 2. The Number of Appeals Considered Within 90 Days or More, and the Average Number of Days of Appeal Consideration in 1995–2019

Notes: (a) The left scale is the number of appeals; the right scale is the number of days; (b) The appeal relates to the year in which it was filed

Source: Compiled by the author based on data from the WTO [2020].

Thus, the growing confrontation between developed and developing countries and the WTO falling into an institutional trap are the fundamental reasons for the AB's collapse. The relative benefits of the U.S. from maintaining the MTS in its current configuration began to fall rapidly. Therefore, it used legal justifications to stop the activities of the AB. Most of these are based on imperfections in the DSU and WTO rulebook and the expansion of the range of issues raised within each dispute and appeal. In light of the U.S.' refusal to consider proposals for reforming the system in previous years, it can be argued that the ultimate goal of blocking the AB was not to launch the reform of the AB or the WTO, but rather to bring about its ultimate destruction. However, this goal could be adjusted with the change of the U.S. president.

2021: What Has Changed?

The beginning of the third decade of the 21st century can be called a turning point in many aspects: countries have started vaccination against coronavirus, and their economies are beginning to recover from the pandemic. For many reasons, the change of the U.S. president was quite promising for the world community and the WTO in particular.

The change of the U.S. president gave many people hope that there would be a return to the former pattern of interaction in the WTO, without dubious unilateral measures and the blocking of the AB as an instrument of pressure. President Biden assured the world, in his speech at the Munich Security Conference, that "America is back" [New York Times, 2021]. However, in the case of the WTO, this is not very noticeable. Apart from the fact that the process of appointing a new WTO Director-General has been unblocked, unilateral measures on steel and aluminum have not been cancelled; the U.S. continues to block the appointment of new AB arbitrators and file appeals "into the void".

The U.S. is linking the unblocking of the AB with a full-fledged WTO reform. However, the question remains open as to how much other WTO members are ready to accept American requests. In this context, the recent change of the EU's rhetoric on the issue is essential. In 2019, the EU did not share the U.S.' position [Behsudi, 2019], but the situation has changed in 2021. The EU now publicly declares the validity of the U.S.' claims and its desire to come to a mutually acceptable solution [EC, 2021].

For the reform of the AB, an agreement between the U.S. and the EU alone is not enough. However, the fact of such a convergence of positions indicates the possibility of resolving the current situation. At the same time, it is necessary to take into account the requirements of other WTO members, for example, China, India, Japan, Brazil and Russia. There may be problems with this. Before his European tour in June 2021, Biden said that market democracies should write the rules of trade of the 21st century, and "not...China or anyone else" [Washington Post, 2021]. If the U.S.' position on the reform of the WTO and the AB is equally confrontational in relation to the interests of individual members, normalizing the WTO's activities will be almost unattainable. It will be possible to objectively assess how valid this assumption is by the end of 2021, following Geneva's WTO Ministerial Conference results. If a "rescue plan" for the WTO and the AB is not presented at that Ministerial Conference (30 November–3 December 2021), it is not likely ever to be seen.

Thus, in the first half of 2021, there were no fundamental shifts in the U.S.' position on the AB, despite the change of president. At the same time, the Biden administration's focus on cooperation and overcoming differences with its allies led to a change in the position of the EU concerning U.S. claims. However, this is not enough, because the consensus rule and the need to consider the interests of other countries will make it difficult to find a compromise.

Current Consequences and Methods Used to Circumvent the Collapse of the AB

Several remarkable events have occurred in the year and a half since the formal collapse of the AB. First, the work of the AB was completed in June 2020 by inertia,[10] when the last AB report on the DS435[11] dispute was released. None of the arbitrators whose term has ended has continued working on the remaining disputes, appeals for which were filed before 11 December 2019 [WTO, n. d., a].

Second, as of 1 June 2021, nine appeals were filed "into the void," that is, at a time when the AB could not consider them. This is equivalent to freezing disputes indefinitely. This has two types of consequences: it removes incentives to make any changes by respondents, whose measures the Panel found inconsistent with WTO rules, and it demotivates WTO members to continue playing by the rules.

Third, in 2020, the minimum number of disputes in the history of the WTO was started – five.[12] As of 1 June 2021, two of them are still at the consultation stage. This means that WTO members do not see the expediency of applying to the DSB or moving from consultations to the next step since there are no guarantees that the dispute process will be completed.

[10] According to Rule 15 of the Working Procedures, members of the AB may continue their activities after the expiration of their term to complete work on unfinished appeals. That is, formally, after 11 December 2019, it was possible to complete work on all appeals filed before that date.

[11] DS435 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.

[12] The previous record was in 2011, when only eight disputes were started. As of the beginning of May, two disputes had been initiated in 2021, and consultations were initiated on both of them in January.

Fourth, in 2020, Panel reports on disputes launched after Trump's unilateral measures began to be published. For example, as part of the DS543[13] dispute between the U.S. and China, the Panel recognized the U.S. measures as non-compliant with WTO rules. The U.S. filed an appeal "into the void," thereby protecting itself from the need to take any actions to defend its position or to cancel the measures.

Finally, some WTO members launch initiatives that allow the introduction of countermeasures against countries that prevent the conclusion of WTO disputes. For example, the EU adopted Regulation (EU) 2021/167 [European Parliament, 2021], which provides for the possibility of introducing retaliatory measures against those WTO members who freeze a dispute by filing an appeal "into the void." Their form is the suspension of obligations toward specific partners under the WTO's multilateral agreements.[14] It is noted that countermeasures will be introduced only after the publication of a Panel report and in case of refusal of the second party to accept it or to consider the appeal through arbitration. Furthermore, the Regulation determines that countermeasures will be proportionate to the damage suffered and that they will be announced in advance with another proposal to reach a mutually acceptable solution. This is a new direction of development of the MTS crisis, as there is a transition to unilateral measures caused by the AB's collapse. Soon, we may witness a kind of domino effect in the form of the development of similar legislation by other WTO members, the consequences of which are difficult to predict.

Several proposals have been made on what measures can be taken to circumvent or overcome the AB's collapse. The range is quite broad: from the creation of a DSB alternative without the U.S. [McDougall, 2018] to the use of specific provisions of the Marrakesh Agreement to use the WTO Ministerial Conference to appoint AB members without consensus [Boklan, Bahri, 2022]. Several provisions have already been used; of course, these measures cannot overcome the collapse, but they can partially maintain the predictability of the multilateral trading system.

Bilateral Agreements on Non-Appeal. At the initial stages of the dispute, the parties may agree that, regardless of the decisions of the Panel, they will not file an appeal and will comply with all measures prescribed in the Panel's report. This mechanism prevents the filing of an appeal "into the void" and the freezing of disputes. As of 1 June 2021, the parties to four ongoing disputes (DS488, DS490, DS496 and DS529[15]) came to such agreements. It is worth noting that in all these cases, the non-appeal agreements related to disputes where the AB considers the issue of the sufficiency of the changes made by defendants to their measures.[16]

During the existence of the DSB, there were many cases of incorrect interpretation of WTO agreements by Panels, which were then corrected at the appeals stage. Therefore, the closure of a dispute after the publication of the Panel's report may neutralize the expediency of using this system for individual members, which, in turn, increases the incentives to use unilateral protectionist measures.

Multilateral Interim Appellate Arbitration Agreement. Article 25 of the DSU allows WTO members to use arbitration as an alternative method of dispute settlement. It is also possible to

[13] DS543 United States – Tariff Measures on Certain Goods From China.

[14] The changes also apply to regional trade agreements with the participation of the EU, but this aspect does not relate to the topic of the article. Further, only aspects related to the settlement of WTO disputes are considered.

[15] DS488 United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods From Korea; DS490, DS496 Indonesia – Safeguard on Certain Iron or Steel Products; DS529 Australia – Anti-Dumping Measures on A4 Copy Paper

[16] That is, this is the next stage of the dispute, which can be launched if the plaintiff considers that the defendant did not fully perform the actions prescribed to it based on the results of the report of the arbitration group and/or the AB.

transfer certain stages of the dispute, including the consideration of appeals. Thus, arbitration may support a two-stage dispute resolution process (which cannot be achieved by the non-appeal agreements discussed above).

In April 2020, the EU, China, and several other countries launched a Multi-party interim appeal arbitration arrangement (MPIA) to circumvent the collapse of the AB [EC, 2020]. As of 1 September 2021, 24 WTO[17] members are members of the MPIA, and the parties agreed to its use in five disputes (DS522, DS524, DS537, DS591, DS598[18]) if an appeal is necessary.[19]

The MPIA provides for maximum compliance of arbitration with the appeals process. MPIA arbitrators are 10 recognized experts in the field of international law and international trade, who are elected by consensus for a two-year term.[20] Three arbitrators consider each appeal by analogy with the AB. The MPIA is open to all WTO members. MPIA participants can withdraw from the agreement on the condition that the appeals with their participation are completed.

MPIA also includes separate improvements compared to the AB. In particular, arbitrators can take measures to streamline the process, for example, by limiting the number of pages of the report and excluding from consideration issues on which there are not enough facts for an objective assessment.[21]

There are MPIA critics. The most critical issues are MPIA legitimacy and a secretariat. From the point of view of legitimacy, it is worth noting that the DSB will not consider MPIA decisions. According to paragraph 15 of Annex 1, the MPIA provides only for notification of WTO members about the arbitration results, without the need for their approval. With this in mind, there is no clear understanding of what legal force the MPIA reports will have, unlike the reports of Panels or the AB, which the DSB approves. Another critical issue is the MPIA secretariat. The AB had a separate secretariat, which was engaged in supporting all appeals. The MPIA assumes that its secretariat will be independent of the WTO secretariat, but the funding will be from its budget. However, to date, the WTO budget is not designed to support the MPIA secretariat.[22]

As a result, the MPIA seems to be an adequate temporary substitute for the AB, taking into account certain shortcomings of the latter's work. However, it will be possible to judge its work more objectively after considering the first appeals – the first of them may be filed in the second half of 2021 on the DS524 dispute.[23]

Based on all the above, it can be concluded that, since the collapse of the AB, many events have occurred that signal both the abuse of the current situation by WTO members and the prospect that the situation will be aggravated. At the same time, there are several ways to bypass the collapse of the AB, but not everyone is ready to use them. Moreover, it is premature to conclude their effectiveness – there were no completed disputes in which they were used at the time of writing. Each of the mechanisms only curbs the problem, which indicates the need for rapid

[17] Russia is not among them.

[18] DS522 Canada – Measures Concerning Trade in Commercial Aircraft; DS524 Costa Rica – Measures Concerning the Importation of Fresh Avocados From Mexico; DS537 Canada – Measures Governing the Sale of Wine; DS591 Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and the Netherlands; DS598 China – Anti-Dumping and Countervailing Duty Measures on Barley From Australia.

[19] Of these five disputes, the parties to the DS537 dispute (Canada and Australia) have reached a partial agreement, so it is likely that the report of the arbitration panel on this dispute will not be published.

[20] It is worth noting that among the first 10 arbitrators chosen by the participants of the initiative, there are no ex-members of the WTO AB.

[21] According to paragraphs 13 and 14 of Annex 1 of the MPIA.

[22] The WTO budget is also adopted by consensus and if the MPIA costs were included in it, the U.S. would block it.

[23] DS524 Costa Rica – Measures Concerning the Importation of Fresh Avocados From Mexico

reform of the WTO dispute resolution system. Finally, the current situation is complicated by the ambiguous position of some members. For instance, the EU is simultaneously the initiator of the MPIA, has developed a mechanism for forcing disputes to end, and files appeals "into the void."

Russia's Position and Interests

In this context, it is essential to note the position and interests of the Russian Federation. One of the reasons for its accession to the WTO was to gain access to the WTO DSB to defend its interests. Almost 10 years after joining, the goal has justified itself: despite the first "lost" disputes, the Russian Federation has sought solutions in its favour in recent years. Among the key disputes are the DS512[24] dispute against Ukraine, in which Russia was the defendant, and two disputes against the EU, involving "energy adjustments" and the third energy package.

The dispute over "energy adjustments" (DS494[25]) confirms the importance of the dispute resolution system for Russia. The Panel report indicates violations by the EU. According to the Ministry of Economic Development of the Russian Federation, "[t]he arbitration group has put an end to the three-decade-long dispute with the EU regarding the allegedly non-market nature of the Russian economy" [2020]. Based on the method of "energy adjustments," the introduction of specific anti-dumping measures was argued, which reduced the competitiveness of Russian products in the EU market and the profits of Russian companies. Russia was close to cancelling such long-term discriminatory measures, but the EU filed an appeal "into the void," thereby freezing the dispute.

Another critical dispute, DS476,[26] affects the interests of the Russian Federation in the context of the "Third Energy Package." The Panel also supported Russia's position on many important aspects, such as the illegality of the EU's actions regarding the supply of Russian gas through the OPAL pipeline. An appeal was filed in September 2018, but the report was not published due to the AB's blockage. As a result, Russia is losing hundreds of millions of euros [Interfax, 2019].

Hypothetically, Russia has the opportunity to complete both of the disputes mentioned above without unblocking the AB. To do this, it needs to join the MPIA and get the consent of the EU to consider appeals in arbitration. Russia has not publicly expressed its position on joining the MPIA, so there is no way to assess how possible this is. In the framework of the dispute over "energy adjustments", the EU offered to consider appeals through arbitration, but the Russian Federation refused. The procedural features of the MPIA make it possible to consider a dispute on the third energy package. However, in the future, this may lead to an ambiguous situation. The appeal on this dispute has already been taken up by the AB. If it is unblocked, the parties may request the continuation of the process, even if the MPIA report has already been released.

In addition to the existing disputes, Russia needs to take into account potential ones. Currently, much attention is focused on the EU's carbon border adjustment mechanism (CBAM). Its entry into force carries high potential costs for many large Russian companies. According to the Institute of Problems of Natural Monopolies, the additional annual costs to Russian exporters could range from $700 million to $1.8 billion [IPEM, 2021]. At the moment, it is impossible to say unequivocally whether these measures can be challenged on the grounds of

[24] DS512 Russia – Measures Concerning Traffic in Transit.

[25] DS494 European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports From Russia – (Second complaint).

[26] DS476 European Union and its Member States – Certain Measures Relating to the Energy Sector.

inconsistency with WTO rules. However, this is not so important in the case of an incomplete dispute resolution system since there are no guarantees that the dispute will not be frozen by an appeal "into the void."

Thus, the resumption of the AB's work is important for Russia, both to complete the launched disputes and to defend its interests in the future without resorting to retaliatory measures.

Can RTAs Become a Platform for Dispute Resolution?

Given the high uncertainty of the AB's unblocking, countries are looking for ways to circumvent this problem. As mentioned earlier, the practices of not filing an appeal and joining the MPIA are currently the main options. However, it is possible to use another mechanism – regional trade agreements (RTAs).

The conclusion of RTAs was intensified against the background of the WTO's inability to make progress on the Doha Round agenda and further trade liberalization. As of 1 June 2021, there are about 350 active RTAs, most of which are free trade area agreements. In most of these agreements, the parties provide for the possibility of challenging each other's trade measures, which makes them a potential dispute resolution tool. However, despite the fact that RTAs were able to partially satisfy the countries' need for further liberalization and improvement of trade relations with partners, the issue of dispute resolution is debatable. They may be helpful in some cases, but they will not achieve the results of this scale. This statement has several arguments.

First, there are no existing RTAs between the primary "opponents" within the framework of the WTO dispute resolution system. These pairs include the U.S.-EU, U.S.-China, China-EU, Brazil-EU,[27] Brazil-U.S., Japan-U.S., Japan-Korea, and Russia-EU. Second, in RTAs some provisions or articles are excluded from challenge. Third, the experience of NAFTA (now USMCA) shows that countries prefer to apply to the WTO DSB to resolve their differences: out of 600 WTO disputes, 45 were launched by its members against each other. Thus, RTAs are unlikely to be effective in resolving disputes to the same extent as eliminating tariff and non-tariff restrictions.

Similarly, Russia is unlikely to be able to use the RTA format to resolve its trade disputes. The main reason is the lack of these agreements. At the same time, the primary opponents in the WTO disputes are the EU, Ukraine and the U.S. – the level of political relations excludes the possibility of concluding an RTA in the long term.

Conclusion

This article has highlighted the key causes of the collapse of the WTO AB and identified possible consequences for the entire MTS. Due to its procedural features, the AB performs the role of the last instance in resolving WTO disputes. Therefore, its blocking jeopardizes the completion of all current disputes and thereby violates the predictability of the system.

The current collapse of the AB has several causes, both fundamental and formal. The former are the shifting balance of power and the WTO having fallen into an institutional trap. Therefore, the arbitrators' exceeding their powers and violating the rules are only formal reasons for blocking the AB. Many WTO members support the need to reform the AB, but no one agrees with the measures taken by the U.S. for this.

[27] Disputes between them can be resolved on the basis of the EU-MERCOSUR FTA, but it has not yet entered into force.

The first half of 2021 has not shown whether it is possible to overcome the AB's collapse. The key aspect is linking the AB's reform with a full-fledged WTO reform and the willingness of countries to make compromises. The next WTO Ministerial Conference will clarify this situation. If the WTO members do not move from confrontation to compromise on this issue, this will signal the final degradation of the predictable MTS represented by the WTO.

The AB's collapse has already led to abuses: countries file appeals "into the void," which automatically frees the parties from the need to change the applied measures and undermines the system's integrity. Against this background, it is necessary to highlight the tendency of countries to introduce legislation that allows introducing countermeasures against appeals "into the void." If this practice becomes widespread, we may witness dozens of targeted trade wars that will contribute to the decline of the MTS.

At the same time, there are two mechanisms to circumvent this problem: bilateral agreements on the non-filing of appeals and the transfer of appeals to arbitration. Each is currently unable to replace the AB fully. However, the latter method seems to be more effective since it allows for a two-stage dispute resolution procedure. However, questions remain about its effectiveness from the point of view of legitimacy. The format of dispute resolution through RTAs deserves a separate discussion. In our opinion, it is currently hopeless for the majority of WTO members.

Russia needs to resume the work of the WTO AB. Again, the reasons are disputes, which represent years of disagreements about the nature of the Russian economy and may cancel multi-million dollar discriminatory measures for Russian companies. At the same time, with the development of new foreign trade initiatives, for example, the CBAM, it is important for Russia to have a platform for defending its interests following WTO norms.

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