INTA Public Hearing on

"Can we save the WTO Appellate Body?"

Tuesday 3 December 2019, 15:00-17:00

European Parliament: Room ASP 1G-3

Initial intervention by Prof. Dr. Peter Van den Bossche, Director of Studies, World Trade Institute, University of Bern and member of the WTO Appellate Body 2009-2019

Mr. Chairman, ladies and gentlemen, allow me, first of all, to thank your Committee for this much appreciated opportunity to participate in today's public hearing. I am honoured to appear before you, although I wish that it would have been under happier circumstances.

The WTO dispute settlement system is, with its compulsory jurisdiction, its time frames, its appellate review, its surveillance of compliance and its compliance enforcement, in many respects unique among international dispute resolution mechanisms. While it has many shortcomings and there is therefore much room for improvement, WTO dispute settlement has been – over the past 25 years – a glorious experiment with the rule of law in international relations.

The WTO dispute settlement system is currently busier than it has ever been before, with 13 appeals pending before the Appellate Body, 35 ongoing first-instance panel proceedings, and 26 disputes in the consultation phase. However, as you know, as from 11 December 2019 onwards, the Appellate Body will no longer be able to hear and decide new appeals and it is currently unclear whether it will complete any of the many appeals still pending on that day. As has often been stated, and I think correctly so, the collapse of the Appellate Body may well result in the collapse of the whole WTO dispute settlement system. While the title of this public hearing is 'Can we save the WTO Appellate Body?', we are in fact asking ourselves whether we can save WTO dispute settlement.

The current crisis is the immediate result of the blockage by the United States of the appointment of Appellate Body judges. The United States demands that *first* its concerns regarding the functioning of the Appellate Body are addressed. These concerns relate *in particular* to the Appellate Body's alleged judicial overreach, its disregard for the 90-day timeframe for appellate review and the fact that outgoing Appellate Body judges have completed the disposition of appeals they were assigned to before the end of their term. WTO Members, including the European Union, have tabled since November 2018 no less than 11 proposals to address the concerns raised by the United States, none of which the United States considered to be an adequate response to its concerns. Nine months of intensive

consultations by Amb. David Walker, the Facilitator appointed by the WTO General Council, resulted on 15 October 2019 in a Draft General Council Decision on the Functioning of the Appellate Body, addressing the concerns of the United States, while at the same time safeguarding the essential elements of an effective, independent, impartial, two-tier, rules-based dispute settlement system. This Draft Decision has also been rejected by the United States as insufficient to address its concerns. While it is unclear what would satisfy the United States –- it has never made itself any concrete proposals for change to the current system but keeps repeating that the system should function as originally intended –- it appears that the United States has a fundamentally different view, certainly different from the European Union's view, on the role of WTO dispute settlement. Arguably, the very idea of resolution of state-to-state disputes by independent international adjudicators is alien to the current US Administration. It could also be that the United States is – as USTR Robert Lighthizer implied in comments made to the Senate Finance Committee in March 2019 – using the Appellate Body crisis as 'leverage' for much broader changes to the WTO and its law. In any case, there is no end to the current crisis in sight. Worse, the United States has most recently further deepened the crisis by making the adoption of the whole WTO budget for 2020 dependent on other WTO Members agreeing to deny the Appellate Body any meaningful funding necessary for its functioning. Last Friday, the *Wall Street Journal* carried an article with the title 'Will the US Bring Down the WTO'?

So what is next? In addition to trade disputes with the United States, the European Union is currently engaged in trade disputes with China, Colombia, India, Indonesia, Russia and Turkey, and in the years to come it will undoubtedly be involved in many more disputes with countries other than the United States. How can the European Union ensure that in 2020 and beyond there will be an effective, independent, impartial, two-tier, rules-based dispute settlement system available for the resolution of these disputes, i.e. disputes not involving the United States?

Leaving aside, dispute settlement under regional trade agreements, I see – at least in theory – three possible ways to ensure the availability of effective, rules-based dispute settlement, two of which have the advantage of staying within the currently existing WTO system.

First, the WTO dispute settlement system in its entirety, including appellate review by the Appellate Body, could be preserved if the Ministerial Conference, or the General Council, would break the current deadlock by deciding on the appointment of Appellate Body judges by majority voting. However, many would argue that decision-making by voting is not in the DNA of the WTO and, when this would be done, it would trigger the United States to leave the WTO.

Second, the WTO dispute settlement system, *minus* appellate review by the Appellate Body, could be preserved, by making creative use of arbitration under Article 25 of the WTO Dispute Settlement Understanding (DSU). The Article 25 Interim Appeal Arbitration Arrangements between the European Union and Canada and between the European Union and Norway are an excellent example of such creative and constructive use of Article 25. Albeit clearly only a temporary solution, this may well be the best one can realistically hope for at present. These arrangements would allow many of the essential features of WTO appellate review to be preserved. However, at present there seems to be little enthusiasm among WTO Members for this solution, and any kind of 'softer', more 'US-friendly' use of Article 25 would not result in credible, independent and impartial appellate review. I was

heartened in this respect by paragraph 5 of the European Parliament's Resolution on the crisis of the WTO Appellate Body, dated 28 November 2019.

Third, while not preserving the current WTO dispute settlement system as such, the availability of effective, two-tier, rules-based dispute settlement system for trade disputes could be ensured if a coalition of willing WTO Members would agree to a new, plurilateral system for the resolution of trade disputes among them. This new system would essentially by a copy of the existing, but dysfunctional, WTO dispute settlement system. At present there is no serious consideration yet of this third way of preserving effective, rules-based dispute settlement.

However, it should be clear that without some action along the lines discussed above, it is the law of the jungle, i.e. the law of the strongest, which will in 2020 and beyond prevail in international trade relations … and that will hurt us all.