

Can Article 25 Arbitration Serve as a Temporary Alternative to WTO Dispute Settlement Process?

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The World Trade Organization (**WTO**) was born on January 1, 1995 and its Understanding on Rules and Procedures Governing the Settlement of Disputes (**DSU**) provides a binding means for WTO members to resolve disputes arising under WTO agreements. This post summarizes WTO DSU dispute settlement and considers, whether in light of recent developments, article 25 of the WTO DSU, which provides for binding arbitration, can provide a temporary alternative.

When the WTO was first formed, DSU dispute settlement effectively replaced the weaker dispute settlement process that had existed before under the General Agreement on Tariffs and Trade (**GATT**) 1947, which until then had served as the principal multilateral agreement whereby contracting parties negotiated liberalizing trade by reducing tariffs.

Under the GATT, the Tokyo Round (which lasted from 1973 to 1979, with 102 countries participating) established separate dispute resolution procedures in some of the separate codes negotiated during that period, such as the code on subsidy and anti-dumping. In effect, the GATT consisted of independent agreements with their own dispute settlement mechanism. Moreover, under GATT, dispute panels handed down findings that had to be accepted by both sides and

other GATT Contracting Parties before they were adopted. Refusal by one Contracting Party, such as the losing party, meant that a panel report was simply set aside. Thus, under the GATT dispute settlement mechanism, the losing party in a dispute could block the adoption of a panel ruling.

WTO DSU dispute settlement created a more potent dispute settlement process than had existed previously and was part of the global gradual shift from a diplomatic and power-based approach in the settlement of international disputes to a more legalistic, law-based approach for dispute resolution.

To summarize, the WTO DSU dispute settlement is administered by a Dispute Settlement Body (DSB) which consists of the WTO's General Council. Among its powers, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under WTO agreements.

The WTO DSU provides a dispute resolution forum and its rules establish firm deadlines to file initial submissions, appeals, and enforce rulings (Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 4.4, 4.7). Also, the DSU rules govern notice, consultations, discovery, panel establishment and proceedings, and report circulation. Furthermore, the DSU set up a permanent Appellate Body to review appeals of panel decisions. Throughout its existence, the DSU has proved its efficiency in settling disputes between WTO members covering many WTO agreements.

WTO DSU dispute settlement has now been in effect for nearly twenty-three years and has been described as the "crown jewel" of the WTO legal system. Over the span of its existence, the WTO has decided 350 cases through its dispute settlement process. As a result, the WTO has succeeded in serving as a forum for negotiating international trade agreements and the monitoring and regulating body for enforcing these agreements among member nations.

Yet, today, the WTO dispute settlement process is in a critical stage as the U.S. is preventing filling vacancies in the seven-member Appellate Body. Of the seven-member Appellate Body, right now there are only three seats filled. Two of these vacancies were created at the end of 2018 when the incumbents' terms expired. The U.S. blockade further affects the Appellate Body's ability to function even as

disputes continue to pile up. The lack of full panels put huge pressure on other Appellate Body members who would have to decide many cases and within tight schedules. Under these circumstances, it is worth considering whether article 25 in the WTO DSU, which provides for binding arbitration, can serve as a “temporary alternative”? Theoretically, the answer is in the affirmative.

Article 25.1 of the WTO DSU allows “for expeditious arbitration within the WTO as an alternative means of dispute settlement which can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties”. Recourse to arbitration under the DSU is permitted only as an alternative. Types of disputes that can be resolved under the article 25 mechanism are wide open. However, these types of disputes must concern issues that are defined by the concerned parties to the dispute at hand.

As a procedural matter, all WTO members should be notified of agreements to resort to arbitration sufficiently in advance of the actual commencement of the arbitration process (art. 25.2). The purpose of this language is to ensure transparency and that multilateralism is maintained by informing all members. Parties to article 25 arbitration can agree on the procedures to follow (art. 25.2). In other words, parties to a dispute have the freedom to choose their own procedures in the arbitration process. There are no limitations on procedures for selecting arbitrators, evidence submitted, hearings, and other relevant matters.

Once rendered, the arbitral award is binding on the concerned parties (art. 25.3) and there is no ability to object to or appeal enforcement of an award. WTO members can only raise certain points regarding the award such as the evidence presented or interpretation of the panel. Therefore, the arbitral award under article 25 is final. The award also should be notified to the DSB and other WTO members who can raise any point regarding the award.

Although the use of article 25 arbitration seems attractive especially in the current environment, as a practical matter, article 25 would not serve as a “viable or permanent solution” to the ordinary WTO dispute settlement process. Over the past decades, WTO members have developed a wealth of expertise and knowledge regarding WTO DSU, which they cannot simply forgo. Reports of WTO Appellate Body and panels helped define and shape many treaty provisions. It is hard to envisage that WTO members would put aside such experience and enter into article 25 arbitration, which is essentially uncharted territory.

Throughout the history of the WTO, article 25 has been used only one time, in U.S.-Section 110(5) of the U.S. Copyright Act- Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, Nov. 9, 2001 (**Award**). That arbitration concerned a narrow issue of whether it was reasonable for the European Community (EC) to calculate losses for all potentially realizable income. The arbitrators in US - Section 110(5) Copyright Act observed that recourse to article 25 arbitration is not subject to multilateral control and that, accordingly, “it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system” (Award, para. 2.1). The arbitrators in the case also ruled that international tribunal may consider the issue of its own jurisdiction on its own initiative. The arbitrators decided that the U.S., the defendant in the original panel proceedings, had to provide a prima facie proof that the methodology and estimates proposed by the EC did not accurately reflect the EC benefits being nullified or impaired (Award, para. 4.4). To maintain confidentiality, the arbitrators decided that two versions of the award would be prepared. One, for the parties, which would contain all the information used in support of the determinations of the arbitrators. The other, which would be circulated to all WTO members, would be edited so as not to include sensitive information (Award, para. 1.24). In general, arbitrators in US - *Section 110(5) Copyright Act* determined important issues regarding jurisdiction and procedures so that future article 25 arbitrators can follow suit.

Add to all of this, that article 25 arbitration does not provide any appeal mechanism. As discussed above, arbitral awards under article 25 arbitration are final and there is no appeal process. Nor is there any need for article 25 arbitration award to be adopted by the DSB. This is in contrast with the WTO ordinary dispute settlement mechanism, where appeals are available regarding issues of law covered in the panel report and legal interpretations adopted by the panel (DSU, art. 17.6). The panel’s findings on factual issues thus escape from appellate review. The appellate review process is limited to upholding, modifying or reversing the panel’s legal findings and conclusions. Under WTO ordinary procedures, panel decisions are adopted unless all WTO members present at the meeting of the DSB decide by consensus not to adopt panel decisions (known as inverted consensus).

Conclusion

While theoretically article 25 arbitration seems to be a viable alternative past

practice and wealth of experience and knowledge developed under WTO ordinary dispute settlement mechanism would prevent utilization of such an alternative. However, WTO members should not shy away from utilizing article 25 arbitration. The dispute settlement mechanism as a whole – including article 25 arbitration – is not only about disputes; it is an evolving body of international trade law principles.