

Kluwer Arbitration Blog

Arbitration in the WTO: Changing Regimes Under the New Multi-party Interim Appeal Arbitration Arrangement

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Since 2017, the appointment of members of the Appellate Body ('AB') of the Dispute settlement system of the World Trade Organisation ('WTO') has been blocked by the United States ('US'). This has disrupted the functioning of the WTO dispute settlement system. The US claims that it has blocked the appointment for serious reasons: the AB is guilty of judicial overreach, interpreting WTO agreements in a manner which they were never intended to apply; the AB creates new rights and provides decisions on issues not raised by the parties; and, due to the nature of the consensus requirement, there is no check on the adoption of AB's decisions.

To resolve this situation, the European Union ('EU') and 15 other Members of the WTO have reached an arrangement to arbitrate as between themselves trade disputes under *Article 25 Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU' are the governing rules and procedure for dispute settlement). This particular arrangement, called a 'Multi-party interim appeal arbitration arrangement' ('MPIA'), functions as a stop-gap measure to replace the AB for the time being as it remains inoperative.

The first official step towards MPIA dates back to May 2019, when the EU circulated a draft text for an interim appeal arbitration process. In July 2019, the EU and Canada agreed on such an arrangement in the event the AB is unable to hear cases. At the time of writing, 20 WTO Members have taken up the opportunity to join MPIA. However, the participation in MPIA remains open for other WTO Members to join (*para 12*). As per the procedure mentioned in MPIA, the participating members of MPIA shall notify the Dispute Settlement Body of the WTO of their intention to join MPIA. (*para 12*).

The dispute settlement mechanism in the WTO

Under the DSU, a WTO Member can seek consultation with another WTO Member in relation to WTO trade disputes. When consultation fails, the complainant can request the *Dispute Settlement Body* (DSB) to establish an *ad hoc* Panel (i.e., First Instance body) consisting of three members to hear the dispute. The DSB is responsible for overseeing the entire dispute settlement process. If parties decide to appeal the Panel report to the AB, the report is not adopted by the DSB (*Article 16.4 DSU* and *Article 17 DSU*). Normally, the dispute at appellate stage is heard by three members. However, in December 2019, the terms of two of the three remaining members of the

AB had expired and in the absence of appointment of members, there is **no existing AB to hear the appeals**. Due to this, a party to the dispute can now appeal and prevent the adoption of, and compliance with, the report. For example, the US appealed in a dispute between *the US and India* (DS436), and because at the time there was no AB to hear the appeal, this procedural move prevented the adoption of the Panel report by the DSB.

What kind of a mechanism is expected under Article 25 DSU?

The arbitration mechanism under **Article 25.1 DSU** is an ‘expeditious’ alternative mechanism that *“can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.”* This particular provision can be interpreted in two ways. A narrow interpretation of ‘certain disputes’ in Article 25.1 DSU would restrict arbitration of all the disputes that could actually be raised before the Panel or the AB. On the other hand, a broader interpretation of Article 25.1 DSU would allow all trade disputes to be arbitrated that are ‘clearly’ defined by the parties. The latter interpretation is the one that has gained support in by the DSB. In *US-Section 301 Trade Act (2000)*, for example, the panel ruled that

“all Members [are required] to ‘have recourse to’ the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations.”

The reason can also be that Article 23.1 DSU allows WTO Members to have recourse to all of the WTO dispute settlement mechanism, including arbitration under Article 25 DSU. Therefore, an arbitration mechanism, as seen under MPIA, is permitted under the DSU.

Article 25.4 DSU states that Articles 21 and 22 DSU are applied *“mutatis mutandis”* to arbitration awards, while the same is mentioned in MPIA (Annex 1, para 17). **Article 21 DSU** provides for a surveillance mechanism ensuring a prompt compliance with the recommendations and rulings in Panel or AB reports. When the recommendations and rulings are not implemented within a reasonable period of time, under **Article 22 DSU**, the complainant can seek compensation from the respondent or suspension of concessions to the respondent. Similarly, the arbitration awards under Article 25 DSU are subject to all the procedures and rules of the DSU such as surveillance and monitoring of implementation and compensation and suspension of concession. This means that when the parties choose arbitration as a recourse, they would not lose any of the benefits that are afforded through the DSB; the MPIA notes that appeal arbitration procedure will be based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 DSU (*para 3*).

To date, there has been only one dispute, *United States- Section 110(5) of US Copyright Act*, in which the parties resorted to arbitration under Article 25 DSU. The procedure was not used as an alternative to the panel and AB procedure, but at the stage of implementation, when the panel report had already been adopted.

How the MPIA is different from appellate proceedings within the DSB

The MPIA differs in scope to appellate proceedings within the DSB. MPIA applies to all future disputes between participating members including the compliance stage of such disputes as well as disputes pending on the date of the communication, except if the interim panel report (see [Article 15 DSU](#)) has already been issued on that date (*para 9*). An appeal shall be limited to issues of law and legal interpretations covered in the panel report (*Annex 1, para 9*). The parties to the dispute when mutually agree are free to deviate from the procedure prescribed in the appeal arbitration agreement annexed as Annex 1 in MPIA.

The MPIA also differs in objective. Participating members of MPIA will resort to arbitration as an appeal procedure, as long as the AB is not able to hear the appeals of panel reports (*para 1*). This means that it is a temporary arrangement and will cease to apply once the AB is operational again. While MPIA exists, the participating members of MPIA cannot file appeals for any trade disputes as between themselves under Articles 16.4 and 17 DSU (*para 2*).

The structure of these mechanisms also differs. For MPIA, appeals will be heard by three arbitrators selected from a pool of ten standing arbitrators composed by the participating members (*para 4*). Arbitrators may come from non-participating members but can be removed at the request of the party at dispute (*footnote 2*). The selection of arbitrators will be according to the same principles and methods applied to form the AB under Article 17.1 DSU, Rules 6(2) of Working Procedures for Appellate Review and procedure mentioned in the Annex 2 of MPIA (*para 6*). Further, participating members are responsible to provide the arbitrators with appropriate administrative and legal support which will be separate from the WTO Secretariat staff and its division (*para 7*).

Finally, the procedures also differs. In order to initiate an arbitration under MPIA, a 'Notice of Appeal' is filed with the WTO Secretariat no later than 20 days by the parties to the dispute after suspension of the panel proceedings (*Annex 1, para 5*). This Notice is also issued to other parties and to third parties. MPIA requires the arbitrators to issue an award within an ambitious time limit of 90 days from the date of filing of the Notice of Appeal (*Annex 1, para 12*). On a proposal from arbitrators, parties to the dispute may agree to extend the 90-day time limit (*Annex 1, para 14*). However, the arbitrators are allowed to adapt the timetable for appeals provided in the Working Procedures for Appellate Review after consulting the parties to the dispute (*Annex 1, para 11*).

Future outcome

MPIA shows commitments of the WTO Members to uphold the rule-based system under WTO agreements, but not all the Members are ready to bind themselves to the arbitration agreement and give up their right to appeal at the AB. For example, India [has refused to join MPIA](#) as joining MPIA means giving up its right to appeal in the AB. Interestingly, MPIA will now create a separate category of appellate reports since the arbitration awards are not required to be adopted by the DSB. This is an unresolved issue since the WTO has not expressed its support or otherwise to MPIA till date.

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