

# Kluwer Arbitration Blog

## Three Years of the Multi-Party Interim Appeal Arbitration Arrangement: An Interim Evaluation of Arbitration as a Means to Appeal WTO Panel Reports

Bowon Choi (Yulchon LLC) · Friday, August 11th, 2023

In response to the shutdown of the WTO Appellate Body in 2019, a subset of WTO Members entered into the [Multi-Party Interim Appeal Arbitration Arrangement](#) (“MPIA”). The MPIA has been in effect since 30 April 2020. Although it is an “interim” arrangement that will only function as long as the Appellate Body is inoperative, it will help evaluate arbitration’s potential to resolve the current WTO dispute resolution mechanism crisis.

The MPIA is based on [Article 25 of the Understanding on rules and procedures governing the settlement of disputes](#) (“DSU”). Among the three DSU provisions on arbitration, Article 25 is the only provision that enables WTO Members to use arbitration as an independent means of dispute settlement (by contrast, arbitration under Articles 21.3(c) and 22.6 can only be used in conjunction with litigation).

A [prior post on this Blog](#) discussed the differences between the MPIA and appellate proceedings within the DSB. This post assesses the first three years of the use of arbitration to appeal WTO panel reports.

### MPIA Members and Cases Up to Date

#### 1. MPIA Members

Although the founding members included some large economies (such as the EU and China), participation in the new arrangement was originally mediocre: the MPIA had only [19 signatories](#) out of a total of [164 WTO members](#). Since then, eight new members (Benin; Ecuador; Japan; Macao, China; Montenegro; Nicaragua; Peru) have signed the Agreement, including [Japan](#), one of the DSB’s most frequent users. However, progress has yet to be made as other WTO Members, including the United States, have not joined the Agreement.

#### 2. MPIA Cases

The MPIA has led to a greater resort to Article 25 and, thus, to arbitration in WTO dispute settlement.

Before the MPIA, only one case had invoked Article 25 arbitration. At present, parties to five ongoing disputes (*China — AD on Stainless Steel*; *China — Canola Seed*; *China — AD/CVD on Barley*; *China — AD/CVD on Wine*; *Australia — AD/CVD on Certain Products*) have made an Article 25 notification under the MPIA. Therefore, these parties will resort to arbitration should they decide to appeal the panel report.

So far, the MPIA has issued one award (in *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany, and the Netherlands*).

Previously, an award was issued in an ad hoc appeal-arbitration in *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*. Because Turkey is not an MPIA member, this award is not formally an MPIA award. Yet, it is significant because it was the first WTO appellate decision under Article 25 arbitration during the Appellate Body crisis. Furthermore, the arbitration agreement included several elements of the MPIA, such as only addressing issues necessary to resolve the dispute, allowing the arbitrators to take organizational measures to streamline the proceedings, and agreeing to abide by the final award.

This post examines both the Colombia and Turkey WTO arbitrations.

### **Did Article 25 Arbitration Restore the WTO Appellate Mechanism?**

Previously, parties unsatisfied with a WTO panel report could appeal the decision to the Appellate Body (Article 17 DSU). In that case, the report would not be adopted by the DSB (Article 16.4 DSU). The Appellate Body could “uphold, modify or reverse” the legal findings of the panel (Article 17.13 DSU) and the Appellate Body report would “be adopted by the DSB and unconditionally accepted by the parties to the dispute” (Article 17.14 DSU).

However, since the Appellate Body’s demise, a party can deliberately stop a case from concluding by appealing the panel report to the non-functioning Appellate Body, thereby preventing the report’s adoption. This is what happened, for instance, in *India – Measures Concerning Sugar and Sugarcane*.

The MPIA aims to:

“preserve the essential principles and features of the WTO dispute settlement system, which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports.”

The first MPIA award seems to have achieved this goal.

In *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, the panel ruled against Colombia’s imposition of duties on frozen fries from the EU. On appeal, the MPIA arbitrators reversed one of the Panel’s findings and upheld three. The arbitrators noted that although the EU failed to establish that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement, it succeeded in proving that Colombia acted inconsistently with Article 6.5 of the Agreement, that the EU’s claim under Article 2.4 fell within

the Panel's terms of reference, and that Colombia acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the Agreement.

Colombia informed the DSB that while it disagreed with some of the findings, it intended to comply with the arbitrators' award and agreed to implement their recommendations by 5 November 2023. Thus, the MPIA succeeded in preserving the WTO dispute settlement system's binding character and two levels of adjudication in this dispute between MPIA members.

It is worth noting that the ad hoc *Turkey appellate arbitration* also resulted in a final arbitral award. The case involved Turkey's Universal Health Insurance Scheme. The Scheme imposed a "localization requirement" on foreign producers, which the Panel found to be inconsistent with Turkey's national treatment obligation. Upon appeal, the arbitrators confirmed the Panel's findings, ruling that Turkey failed to establish that the localization requirement was justified under Articles III:8(a), XX(b), and XX(d) of the GATT. On 25 April 2023, Turkey informed the DSB that it had "taken appropriate steps to implement the recommendations and rulings in the dispute".

## Does Article 25 Arbitration Resolve the Problems of the WTO Appellate Body?

Going a step further, could appellate arbitrations under Article 25 be a durable solution to the Appellate Body crisis?

### 1. Overreach

One major criticism of the Appellate Body was that it frequently "overreached" its mandate by including *obiter dicta* in its decisions. For example, in *Argentina – Financial Services*, the Appellate Body undertook a 46-page analysis of GATS provisions that were allegedly irrelevant to resolving the threshold issue in the dispute.

In response to this criticism, the MPIA explicitly states in paragraph 10 of Annex 1 that the parties "shall only address those issues that are necessary for the resolution of the dispute".

Accordingly, the arbitrators in the *Turkey appeal* repeatedly and explicitly refrained from reviewing issues that they did "not consider necessary" to resolve the dispute. However, the *Colombia award* is more ambiguous. As observed by one commentator, the arbitrators in that case extensively discussed Article 17(6)(ii) of the Anti-Dumping Agreement, although Colombia did not argue that the panel erred in its interpretation of that article. Further, considering that the arbitrators ultimately saw "no reason to disturb to disturb the panel", it could have been unnecessary for the arbitrators to address this issue.

### 2. Legal precedents

The United States has objected to the Appellate Body's view that a panel must follow a prior Appellate Body interpretation unless the panel has "cogent reasons" for departing from that interpretation.

Interestingly, the MPIA affirms that "consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members". This affirmation could imply that the MPIA will again treat previous MPIA decisions as legal

precedents. So far, there have not been enough MPIA cases to determine the extent to which this will happen. However, the arbitrators in both the Turkey and Colombia cases referred to prior Appellate Body reports to interpret the DSU and GATT provisions. Indeed, considering the vagueness of international agreements, it is difficult to conceive an award that does not refer to former international decisions.

### 3. Broken deadlines

A traditional advantage of arbitration over litigation is said to be its timeliness and efficiency. Like the Appellate Body, MPIA arbitrators must issue their award within 90 days of filing the notice of appeal. The difference, however, is that the MPIA allows the arbitrators to take “*appropriate organizational measures to streamline the proceedings*”. Accordingly, the arbitrators in the Colombia case set word limits for written submissions and time limits for oral statements at the hearing. This new provision demonstrates another advantage of arbitration over the Appellate Body – flexibility of the proceedings. Consequently, the Colombia award (like the Turkey award) was rendered within the 90-day deadline.

### Conclusion

The first awards rendered under Article 25 of the DSU are encouraging. Both the Colombia and Turkey appeals resulted in final awards, which the losing party agreed to implement. Moreover, the flexibility of arbitral proceedings enabled the arbitrators to render their awards efficiently and timely. However, arbitration under Article 25 is not intended to—and does not seem to be—a permanent solution to the Appellate Body crisis. Appellate arbitration does not fully address the concerns raised by WTO Members regarding the Appellate Body, including overreach and legal precedents. Further, to truly restore the two levels of WTO adjudication during the paralysis of the Appellate Body, the MPIA has yet to convince the remaining WTO Members to join the Agreement.

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