Op-Ed

Holger Hestermeyer

“Saving Appeals in WTO Dispute Settlement: The Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU”

www.eulawlive.com

Suggested citation: Holger Hestermeyer, “Saving Appeals in WTO Dispute Settlement: The Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU”, EU Law Live, 2 April 2020

“Saving Appeals in WTO Dispute Settlement: The Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU”

Holger Hestermeyer

On 27 March the EU and 15 other members of the World Trade Organization (WTO) announced that they had reached agreement on an arrangement that allows them to bring appeals in trade disputes amongst them that they settle under the WTO dispute settlement mechanism. The new multi-party interim appeal arbitration arrangement (‘MPIA’) is supposed to function as a stop-gap measure replacing the WTO Appellate Body (‘AB’) for the time it is inoperative. This contribution sets out the background of the new mechanism, explains how it works and discusses what it is likely to achieve. The agreement is expected to be officially notified to the WTO in the coming weeks after the participating members have completed their internal procedures where applicable. Only then will it become operational.

Background

The MPIA is the latest development in the largest crisis the WTO has had to face since it was set up in 1995: the demise of the AB, the WTO’s standing body of seven international trade lawyers, which rules – in divisions of three members – on appeals in the WTO’s dispute settlement process. The crisis threatens the effectiveness of the WTO’s dispute settlement procedure, which has become a reference point for dispute settlement in public international law.

The AB became unable to hear new cases on 11 December 2019, when its membership dropped below the three members necessary to rule on a case. The members of the AB are appointed for four-year terms by the Dispute Settlement Body (‘DSB’), a political organ consisting of representatives of all members of the WTO. The DSB decides by consensus. Since 2017, however, the United States of America has blocked all appointments to the AB.

The demise of the AB raises significant concerns for dispute settlement in the WTO, one of the core functions of the institution. It does not, however, spell the end of the dispute settlement process. That process can be summarised as follows: A WTO member commences the procedure by seeking consultation with another WTO member (usually) for breach of a WTO Agreement. After attempting and failing to settle a dispute through consultations, the complaining member can request the establishment of a ‘panel’ to settle the dispute. Panels usually consist of three panelists and are established *ad hoc* for each dispute. The panel issues a report that can be

appealed to the AB. The report by the AB or a panel report that is not appealed is formally adopted by the DSB, which can reject a report by consensus. The WTO's Dispute Settlement Understanding ('DSU') sets tight deadlines for the various procedural steps.

With the AB defunct, a party to a dispute can now appeal that report 'into the void', preventing the adoption of the report. The first appeal into the void was filed on 18 December 2019 by the US in a dispute with India.

While the possibility of an appeal into the void disrupts the current dispute settlement system, it does not destroy it. A system in which the losing party can prevent a ruling against it from becoming effective seems counterintuitive, but is neither necessarily inefficient, nor unprecedented. De facto, the current state of affairs resembles in some aspects the dispute settlement process under the old GATT system, the predecessor to the WTO.

The United States' disruption of the AB is motivated by a number of concerns. Many of these go back years and while the tone and strategy of the Trump administration differs from that of previous administrations, much of the criticism raised does not.

Firstly, the US voices technical criticism: for example, that the AB does not rule on appeals within the deadlines of the DSU (90 days) without asking for the parties' agreement, that it addresses matters not strictly necessary to rule on the case or that it has adopted rule 15 of its working procedures. Secondly, the US accuses the AB of assuming it is a court though it is not, for example wrongly demanding its rulings to be treated as precedent. Underlying these more procedural concerns is a pressing substantive issue: The US demands more flexibility in the area of trade defence instruments, arguing that the case law unduly limits its freedom of action. The current rules in the area were written long before the accession of China to the WTO and are poorly suited for the circumstances of the Chinese economy, the structure of which differs significantly from that of other WTO members. Finally, there is also a personal component to the current conflict. Many of the actors have known each other for years and their personalities and philosophies indubitably have an impact on the current drama.

This is not the place to discuss the US criticism in detail. WTO members have made significant efforts to accommodate that criticism. But neither the proposals of Members, nor the work of the specially appointed facilitator managed to unblock the appointment process.

The MPIA

The first official steps towards the MPIA date 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 for disputes between themselves in the event the AB is unable to hear cases. A similar agreement was reached between the EU and Norway. The MPIA, which will become operational after it has been officially notified to the WTO, has attracted a number of new members, including Australia, Brazil and China.

The cornerstone of the MPIA is that in a future dispute between two participating members a party wishing to appeal a panel report pursues an arbitration procedure that mirrors, as closely as possible, traditional AB review, albeit with some modifications to enhance the procedural efficiency of appeal proceedings.

Legally, the approach resorts to Article 25 DSU, which permits arbitration as an alternative means of dispute settlement between WTO members. Parties to the MPIA commit not to pursue traditional appeals. Instead, a party wishing to appeal a panel report requests the suspension of the panel proceedings. That wish is deemed to constitute a joint request by the parties. Arbitration is then initiated by filing a notice of appeal with the WTO Secretariat. The arbitration procedure is modelled after the AB procedure and, like that procedure, is 'limited to issues of law covered by the panel report and legal interpretations developed by the panel'. Much like the AB, the arbitrators may 'uphold, modify or reverse the legal findings and conclusions of the panel' and issue recommendations. The parties agree to abide by the arbitration award, which is final. That award, which is deemed to include any panel findings not appealed, is, under Article 25.3 of the DSU, notified to – but not adopted by – the DSB and to the Council or Committee of any relevant agreement.

As to the selection of the arbitrators, the MPIA envisages that cases are heard by panels of three arbitrators. They are selected from a pool of 10 arbitrators on the basis of the same principles that apply to the formation of a division of the AB. The pool of arbitrators is composed by consensus of the participating members. Each participating WTO member may nominate one candidate. Unless the candidate is a current or former AB member, (s)he will have to undergo a pre-selection process, which the Members envisage to be carried out by a committee composed of the WTO Director General and chairpersons of various WTO bodies.

The parties to the MPIA took great care to make it clear that the procedure is only meant as a stop-gap measure, emphasising that it will only be used 'as long as the AB is not able to hear appeals of panel reports in disputes among them due to an insufficient number of AB members'.

Prospects of the MPIA

The MPIA is a well-constructed process relying on a legal mechanism established in the DSU that tries to replicate AB proceedings. Two issues will be of particular importance for its fate: the reaction of the US and its relevance for the reality of dispute settlement.

The US is not likely to look fondly on the mechanism, even though members seem to have taken some US concerns, such as the need for the parties to agree to a deviation from the 90 day deadline and the ban on obiter dicta on board. According to reports the US has already expressed concerns about the diversion of funds to an alternative dispute settlement system – and raised the possibility of blocking the WTO budget. Participating members of the MPIA, however, expect arbitrators to be provided with appropriate administrative and legal support and expect that structure to be entirely separate from the WTO Secretariat staff and its divisions supporting the panels, answerable as to the substance of their

work only to the appeal arbitrators. The WTO Director General is asked to ensure the availability of that structure. There are good arguments to defend this approach of the MPIA, as the agreement uses an existing DSU provision and should therefore arguably be treated like other DSU proceedings.

The relevance of the MPIA for dispute settlement in the WTO depends on how many cases will actually be conducted under the new procedure. According to its terms the MPIA applies to 'any future dispute between any two or more participating Members, including the compliance stage of such disputes, as well as to any such dispute pending on the date of this communication, except if the interim panel report, in the relevant stage of that dispute, has already been issued on that date'. A glance at disputes filed in the WTO shows that the MPIA might, for now, remain of limited relevance. Of the 19 disputes filed in 2019, for example, only two involve both a complainant and a respondent party to the MPIA. However, given the members now committed to this approach, it is likely to attract additional members in the future. The MPIA is open to any WTO Member wishing to join.

Even if the MPIA remains limited in its reach, however, it is a worthwhile instrument: it shows the commitment of members to uphold the rules-based WTO dispute settlement system and it keeps the hope alive that the AB might one day return.

MHolger Hestermeyer is the Shell Reader in International Dispute Resolution at King's College London and co-convenor of the Interest Group in International Economic Law of the European Society of International Law. His most recent publications are Eigenständigkeit und Homogenität in föderalen Systemen, Mohr Siebeck 2019, The Autonomy of EU Law Meets Investment Arbitration, in: Sarmiento et al. (eds.), Yearbook on Procedural Law of the Court of Justice of the European Union, 77 (2019) and International Human Rights Law in WTO Dispute Settlement, in Scheinin & Ulfstein (eds.), Human Rights and International Courts, 199 (2019).

EU Law Live is an online publication, focused on European Union law and legal developments related to the process of European integration. It publishes News on a daily basis, along with Analyses, Op-Eds, and Weekend Long Reads.

Subscription prices are available upon request. Please contact our sales department for further information at

subscriptions@eulawlive.com