WTO and Multi-Party Interim Appeal Arbitration Arrangement: Searching for Right Medicine

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A group of World Trade Organisation's members recently endorsed the Multi-party interim appeal arbitration arrangement. This arrangement aims to keep a two-tier adjudication system operating as long as the WTO's Appellate Body is stalled. As such, it offers a short term fix to the jurisdictional arm whilst the membership tries to move ahead in its search for the right medicine. This blogpost discusses some of the arrangement's main features.

Background

The World Trade Organisation (***WTO***) provides for a two-tier jurisdictional system where disputes among members can be brought before *ad hoc* panels for a first instance review and

then appealed before a standing Appellate Body (the ***AB***).

In normal times, the AB counts seven members. When a party to a dispute appeals a panel report, a division of three AB members is constituted to hear that appeal. Since 2017, the United States repeatedly blocked the AB members' appointment procedure, thus causing a progressive decrease in the number of AB members. As the mandate of two of the three remaining members came to an end on the 10 December 2019, the WTO's highest jurisdiction was *de facto* put out of order from that day onwards.

While often sympathetic to the United States' complaints vis-à-vis the AB, most of the WTO members do not welcome Washington's obstructive method to get the problems solved. Some of these members have set up a temporary mechanism in order to keep a two-tier jurisdictional system operating: the Multi-party interim appeal arbitration arrangement (the ***MPIA***). The MPIA was notified to the WTO on 30 April 2020. As of 25 May 2020, the MPIA counts 21 Participating Members (***PMs***) – 16 PMs originally negotiated the arrangement: Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, Mexico, New Zealand, Norway, Singapore, Switzerland and Uruguay; 3 PMs endorsed the arrangement when it was notified to the WTO: Iceland, Pakistan and Ukraine; and 2 PMs joined later: Ecuador and Nicaragua.

MPIA's content

The MPIA is divided into three parts: a *communication* to the WTO Dispute Settlement Body (the ***DSB***), the body in charge of following the disputes among WTO members; *annex 1* providing for a template of appeal arbitration agreement; and *annex 2* determining the arbitrators selection procedure. While the details of the rules can be found in the arrangement itself, here are some of its key features:

To begin with, the *communication* to the DSB states that the

arrangement's objectives are "*to put in place contingency measures based on Article 25 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in order 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, and thereby to preserve their rights and obligations under the WTO Agreement*" (*preliminary part*). On this backdrop, the MPIA establishes an interim appeal arbitration procedure lasting as long as the AB is not able to hear appeals of panel reports (*para. 1*). As a general rule, the interim appeal arbitration will apply the substantive and procedural aspects of Appellate Review provided under Article 17 of the DSU (*para. 3*). The hearing of appeals will be conducted by three appeal arbitrators selected from a pool of ten standing appeal arbitrators (*para. 4*). The appeal arbitrators will be provided with the appropriate administrative and legal support which will be entirely separate from the WTO Secretariat staff (*para. 7*). The arrangement will apply to future disputes between any two or more PMs, including the compliance stage of such disputes. It will also apply to any dispute pending on the date of this communication (*i.e.*, 30 April 2020), except if the interim panel report has already been issued on that date (*para. 9*). In order to render the appeal arbitration procedure operational to particular disputes, the PMs must notify the arbitration agreement (whose template is found in annex 1) pursuant to Article 25.2 of the DSU within 60 days after the date of the establishment of the panel. For pending disputes where, on the date of the communication, the panel has already been established but an interim report has not yet been issued, the PMs will enter into the appeal arbitration agreement and notify that agreement pursuant to Article 25.2 of the DSU within 30 days after the date of this communication (*para. 10*). Any WTO Member is welcome to join the MPIA at any time. With respect to disputes to which such WTO Member is a party, the date of that Member's notification to the DSB will

be deemed to be the date of the communication for the purposes of paragraphs 9 and 10 (*para. 12*). A participating Member may decide to cease its participation in the MPIA, by notifying its decision to the DSB. However, the MPIA will continue to apply to disputes pending on the date of such withdrawal (*para. 14*). Finally, the PMs remain committed to resolving the impasse of the AB appointments as a matter of priority (*para. 15*).

Annex 1 provides a template indicating how participating countries intend to pursue an article 25 appeal arbitration among them. In this regard, it includes provisions determining the appeal's terms of reference (*paras. 1-5*); provisions organising the initiation of the appeal (*paras. 5-6*); provisions clarifying the review of the case by the arbitrators (*para. 8*); provisions setting the time-period to issue an award (*paras. 12-14*); provisions pertaining to the notification of the award (*para. 15*); and provisions regulating the participation and withdrawal of parties (*paras. 16-18*).

Finally, *annex 2* defines the procedure for the selection of the arbitrators (*paras. 1-4*) as well as the rules to modify, to re-compose and to complement the pool of arbitrators (*paras. 5-6*).

Discussion

In this blogpost, I discuss two elements of the MPIA: (i) some of the innovations brought by the arrangement; and (ii) the arrangement's prospects.

(i) Innovations brought by the arrangement

Paragraph 3 of the *communication* provides that "[the] *appeal arbitration procedure will be based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 of the DSU,* […] *while enhancing the procedural efficiency of appeal proceedings*". More specifically, two main innovations

aim at enhancing the procedural efficiency of appeal proceedings: the creation of a pool of 10 arbitrators and the streamlining of the 90 days period for the submission of an award.

First, the MPIA provides for the establishment of a pool of 10 arbitrators, thus increasing the number of 7 AB members. This augmentation corresponds to a demand raised by the EU and other WTO members to improve "*the efficiency and internal organization of the Appellate Body while also improving the geographical balance on the Appellate Body after numerous accessions to the WTO since 1995*". In this regard, the arrangement states that "[the] *composition of the pool of arbitrators will ensure an appropriate overall balance*" (*communication, para. 4* and *annex 2, para. 4*). While PMs are free to select a candidate regardless of its citizenship, one can reasonably expect that they will present a national of their country (see for instance the selection of Prof. Joost Pauwelyn by the European Union). The PMs have until 30 May 2020 to put forward their candidates (*annex 2, para. 2*). Then, a screening of the different nominees will be organised (*annex 2, para. 3*) and the PMs will decide by consensus on a pool of 10 arbitrators, at the latest by the 31 July 2020 (*annex 2, para. 4*).

Considering the current list of PMs (see above), the pool will most likely include arbitrators from all continents but Africa, and allow for the representation of developed as well as of developing countries. While a gender balance should also figure as a basic feature of such pool, it is not required in the arrangement. Regrettably, one can expect that women will be underrepresented in the pool of arbitrators. On this backdrop, smaller countries wanting to have their nominee join the pool could arguably increase their chance by playing the card of a female candidate; or even better, a female candidate from the African continent…

Second, the streamlining of the 90 days period for the

submission of an award represents another innovation. As such, it offers a response to the complaint that AB procedures regularly exceed (without the parties' explicit consent) the 60/90 days deadline set in art. 17(5) DSU. More specifically, the MPIA establishes a basic period of 90 days following the filing of the notice of appeal for the arbitration panel to deliver its report (*annex 1, para. 12*). In addition to this, it states that "*the arbitrators may take appropriate organizational measures to streamline the proceedings* […]*. Such measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required*" (*annex 1, para. 12*). Then, the arrangement provides that the arbitrators can "*propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU*" (*annex 1, para. 13*). Thus, the MPIA opens a crack in art. 17(12) DSU under which the AB is obliged to address all issues raised in the appeal. Indeed, it allows arbitrators to invite the parties to limit claims grounded in the panel's alleged failure to conduct an "*objective assessment of the facts of the case*". Crucially, the parties keep the final decision as to whether or not they raise such claims. Third, the MPIA sets that "*on a proposal from the arbitrators, the parties may agree to extend the 90 days time-period*" (*annex 1, §14*). Thus, the arrangement includes new mechanisms aimed at the strict respect of the 90 days deadline for the submission of an award by the arbitration panel.

(ii) The arrangement's prospects

Regarding the MPIA prospects, two points are discussed in this blogpost: (i) the breadth of the arrangement's endorsement; and (ii) the case of appeals "*into the void*".

First, countries having endorsed the MPIA include some important users of the WTO jurisdictional arm such as Brazil, Canada, China, the European Union and Mexico. Moreover, after

it was first agreed by a group of 16 PMs, five other WTO members have joined the arrangement (see above), thus setting a positive dynamic for this instrument. However, other big users of the WTO dispute settlement mechanisms such as India, Indonesia, Japan, South Korea and the United States have not endorsed the MPIA (yet). Some of them, like India and the United States, have expressed concerns regarding this type of interim solution. Several incentives exist for countries to join the arrangement however. For example, a few WTO members are currently upgrading their retaliatory system to respond to the AB paralysis more efficiently. It is for instance the case of the European Union who is revamping its Trade Enforcement Regulation 654/2014 so as to allow for unilateral retaliatory measures when "*after* [having] *succeeded in obtaining a favourable ruling from a WTO dispute settlement panel, the process is blocked because the other party appeals a WTO panel report* 'into the void' *and has not agreed to interim appeal arbitration under Article 25* [DSU]". On this backdrop, while one can reasonably expect the number of PMs to keep raising in the future, some among the WTO AB biggest users are likely to stay away. Finally, it is important to remain aware that the MPIA is not a treaty but an arrangement and that it does not create legal obligations but expresses political commitments. As a matter of consequence, the mere fact that a panel procedure has been launched between two or more PMs is not sufficient for an appeal under the MPIA to take place. In order to be formally bound to the arrangement's procedure, the parties must indeed conclude an appeal arbitration agreement (see, *Communication, para. 10*). Thus, the endorsement of the MPIA by a WTO member does not deprive it of its right not to engage in the proceedings established by the arrangement.

Second, Article 16(4) DSU provides that "[if] *a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal*". In other words, the blockage of the AB combined with a party's appeal "*into the void*" prevent the

adoption of the report by the DSB. As Prof. Van den Bossche argued in his farewell speech as a WTO AB Member in May 2019, "[one] *can predict with confidence that, once the Appellate Body is paralyzed, the losing party will in most cases appeal the panel report and thus prevent it from becoming legally binding. Why would WTO members still engage in panel proceedings if panel reports are likely to remain unadopted and thus not legally binding?*" Thus, in a system with no appeal, members losing at the panel level may not do much to come into compliance with the panel report. In turn, members winning at the panel level are left with three options: (1) decide not to enforce their rights; (2) opt for the adoption of unilateral measures; (3) search for another way out, such as further consultations with the appealing party; good offices, conciliation and mediation (*art. 5 DSU*); or arbitration (*art. 25 DSU*).

An appeal "*into the void*" happened for the first time just one week after the AB cessation of activities in the case *DS436: United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*. The WTO website conveys in this regard that "[in] *its communication, the United States indicated that,* [on the 18 December 2020]*, no Division of the Appellate Body could be established to hear this appeal in accordance with Article 17.1 of the DSU, and that it would confer with India so the parties might determine the way forward in this dispute, including whether the matters at issue might be resolved at that stage or alternatives to the appellate process could be considered. On 14 January 2020, India and the United States sent a joint communication to the DSB indicating that they continued to engage in good faith discussions to seek a positive solution to the dispute. The communication noted that although the United States had not yet filed a notice of appeal or appellant submission, the United States would do so once a Division could be established. The parties also noted that India might file its own appeal at that point of time. Moreover, the parties*

recognized their right to request the adoption of the compliance panel report and an Appellate Body report after an Appellate Body Division could complete any appeal".

Consequently, the United States chose for the third option, namely to search for a way out through further consultations with India. This approach, also called "*bargaining under the shadow of law*", which is likely to be favoured by powerful economies, appears less advantageous to smaller and weaker countries. As recalled by Prof. Van den Bossche, "*ambassador Julio Lacarte Muro, the first Chair of the Appellate Body, wrote in 2000 that the WTO dispute settlement system gives security to those WTO members that 'have often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests'. Most WTO members do not want international trade without rules, or to be more precise, international trade with rules that are whatever the strongest party to a dispute says the rules are. They have a strong interest in an effective rules-based dispute settlement system*". Thus, appeals "*into the void*" run the risk of being instrumentalised and of turning the rules-based system into a system where might is right.

Conclusion

The MPIA preserves the two-tier binding dispute settlement system and protects the members' rights and obligations. If the solutions offered by the arrangement appear successful, some of the innovations it contains – such as the creation of a pool of 10 arbitrators and the streamlining of the 90 days period for the submission of an award – may well be part of a future reform of the WTO jurisdictional arm. However, several uncertainties still exist – such as the breadth of the arrangement's endorsement and the outcomes of appeals "*into the void*" – and the upcoming months may expose some of the MPIA limitations.

Moreover, as of the 30 April 2020, figures show that there

have been only two requests for consultations since the beginning of the year and that no panel has been established by the DSB, despite rough predictions indicating that around 10 such panels are expected over the whole 2020. This highlights a relative slowdown in WTO jurisdictional activities. To be sure, the dispute settlement system has not been left unaffected by the current sanitary crisis. The WTO jurisdictional arm, once the crown jewel of the organisation, is under respiratory assistance whilst the membership tries to move ahead in its search for the right medicine.
