

THE WTO'S INTERIM APPEAL ARBITRATION ARRANGEMENT – A BRIDGE OVER TROUBLED WATERS?

On 30 April 2020, the EU and 19 other World Trade Organization ("WTO") members¹ announced the terms of an interim arrangement enabling appeals of WTO panel decisions to be decided in the absence of a functioning WTO Appellate Body. The arrangement, dubbed the Multi-Party Interim Appeal Arbitration Arrangement² ("MPIA"), aims to provide a temporary solution to practical and systemic issues arising as a consequence of the failure by WTO members to reach consensus on the appointment of new Appellate Body members.

BACKGROUND

Since 2018, the United States has blocked the appointment of new members to the Appellate Body, citing a range of perceived shortcomings with the institution and its decisions (see [Briefing: The WTO Appellate Body crisis – A way forward?](#)). In December 2019, despite efforts to resolve the impasse and clear the way for new appointments, the Appellate Body fell below its quorum of three members—effectively paralysing the Appellate Body and rendering it unable to hear appeals of WTO panel decisions.

The Appellate Body's paralysis may also affect the enforceability of WTO dispute settlement decisions. A key aspect of the WTO's dispute settlement system's success in resolving trade disputes is the binding and enforceable status of decisions adopted by the Dispute Settlement Body ("DSB"). The agreement governing dispute settlement among WTO members, the Dispute Settlement Understanding ("DSU"), provides that the rulings of an initial panel must be adopted by the DSB and become binding unless either there is a reverse consensus not to adopt it (i.e. all WTO Members decide not to adopt it) or a disputing party appeals the decision to the Appellate Body. The parties to a dispute must accept the Report of the Appellate Body, once adopted.²

Key issues

- A group of WTO members has developed the MPIA as an interim solution to preserve the WTO's appellate function for disputes among MPIA participants.
- This follows the WTO Appellate Body's effective paralysis, having fallen below its quorum of three members.
- Decisions of the MPIA arbitration panel are binding on the parties to the dispute.
- The MPIA provides a welcome vote of confidence in the WTO's dispute settlement function from a significant cross-section of WTO members.
- However, the effectiveness and influence of the MPIA will depend largely on how often WTO members choose to utilise the mechanism.
- MPIA participants indicate they will utilise the MPIA for as long as the WTO Appellate Body has an insufficient number of members to hear appeals.

¹ The initial MPIA participants are: Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay. Ecuador and Nicaragua joined the group in May 2020.

² Members may agree by consensus not to adopt the findings of the panel or Appellate Body, however this would be an exceptional situation which would require the successful party to the dispute to agree not to adopt the report.

Where appeals cannot be heard without a functioning Appellate Body, a party to a dispute may in principle appeal a panel decision "into the void," thereby precluding the adoption of the report by the DSB and preventing the other party from imposing retaliatory measures in the event of non-compliance. The first appeal "into the void" became a reality in December 2019, when the United States notified the DSB of its intention to appeal a panel report in a dispute with India.³

THE MPIA AND ITS KEY FEATURES

In response to the Appellate Body impasse, a group of WTO members has developed the MPIA as an interim solution to preserve the WTO's appellate function for disputes among MPIA participants. The MPIA has its formal roots in a draft text circulated by the EU in May 2019, by which time it had become clear that WTO members were unlikely to avert the paralysis of the Appellate Body.

The MPIA operates within the framework provided by Article 25 of the DSU, which enables WTO members to agree to settle disputes through arbitration. Article 25 has rarely been utilised by WTO members to date. However, the MPIA members have used its flexible approach to dispute settlement procedures to create a mechanism allowing an arbitration panel to perform an appellate function similar to that traditionally performed by the Appellate Body. A key benefit of the Article 25 mechanism is that the decision of the arbitration panel is binding on the parties to the dispute. Additionally, the DSU's usual compliance and enforcement procedures apply as though the award were an adopted report of the panel or Appellate Body. Accordingly, as between the MPIA participants, the arrangement eliminates the enforceability issues associated with an appeal "into the void."

Some key features of the MPIA include:

- **Selection and rotation of arbitrators:** Arbitrations pursuant to the MPIA will be conducted by a panel of three appeal arbitrators drawn on a rotating basis from a standing pool of ten individuals. MPIA participants may each nominate one individual to serve in the pool, which will then be screened by members of the WTO Secretariat to ensure they satisfy the MPIA's minimum selection criteria, and a final group of ten will be chosen by consensus from the pool of qualified nominees (the process for this final step was not specified in the MPIA).⁴ MPIA participants will periodically assess membership of the pool, starting two years after its composition.
- **Initiation of appeals:** After a panel issues its final report to the parties (but no later than ten days before the report is formally circulated to WTO members), either party may indicate its intention to appeal the report under the MPIA framework. Once an appeal is initiated, the panel will suspend its work and informally transmit its panel report to the parties and third parties to the dispute.⁵
- **Arbitration Procedures:** The arbitration procedure broadly mirrors the Appellate Body appeals procedures (contained in the DSU and the

³ See United States – Countervailing Measures On Certain Hot-Rolled Carbon Steel Flat Products From India (Article 21.5), DS436, 19 December 2019, WT/DS436/21.

⁴ On 13 May 2020, the EU nominated Joost Pauwelyn, a Belgian trade lawyer and academic, as the first nominee for the pool of arbitrators.

⁵ This mechanism ensures that a panel report subject to an appeal under the MPIA cannot be adopted or "appealed into the void," and that DSU timeframes (including with respect to a compliance and enforcement) are not triggered pending the resolution of the appeal.

Working Procedures for Appellate Review), but with the flexibility for parties to agree to modify some of these procedures in a particular dispute. In addition, the MPIA introduces innovations to facilitate the timely resolution of disputes, such as allowing page limits on submissions and permitting arbitration panels to make non-binding substantive proposals to the parties (e.g. proposing that an appellant exclude a claim that the panel failed to make an objective assessment of the facts under Article 11 of the DSU—a ground of appeal which has increasingly been used by parties to challenge determinations of fact by panels, and which has proved both controversial and time consuming).

- **Third Parties:** Consistent with the DSU, third parties at the panel stage of a dispute may make written submissions, and have the opportunity to be heard by the arbitrators in an appeal under the MPIA. This includes third parties to a dispute that are not participants under the MPIA.
- **MPIA Term:** MPIA participants indicate their intention to utilise the MPIA procedures for so long as the Appellate Body has an insufficient number of members to hear appeals, and "envisage that the MPIA will remain in effect only until the Appellate Body is again fully functional."
- **Openness:** The MPIA is designed to allow other WTO members to join whenever they choose (although if they join after the window for arbitrator nominations closes, they will miss the opportunity to have a say in appointing the final pool, which will remain in place for the next two years).

COMMENTARY

The MPIA provides a relatively simple and effective mechanism for enabling the WTO's appellate function to continue, in a modified form, while the Appellate Body cannot act. Parties to the MPIA have emphasised that the arrangement is intended to be temporary, with the MPIA stating that participants "*remain committed to resolving the impasse of the Appellate Body appointments as a matter of priority*". The EU confirms in a statement that the MPIA is "*not intended to supplant the WTO's Appellate Body. This is a stopgap measure. As soon as the Appellate Body is again able to operate, appeals will be brought before the Appellate Body.*"

The effectiveness and influence of the MPIA will depend largely on how often WTO members choose to utilise the mechanism. While MPIA participants comprise a significant cross-section of WTO members—including the EU, China, Brazil and Canada—a majority of the WTO's 164 members (including the US, India and Japan) have not as yet agreed to participate.

The WTO is in the midst of what is perhaps the most tumultuous period in its 25 year history. At a time when trade tensions are at their highest level in years, the Appellate Body is not working, the institution is searching for a new Director-General, and its rule-making function is stymied, in part due to Covid-19, which has led to the Twelfth Ministerial Conference being deferred until 2021. The paralysis of the Appellate Body strikes a blow to the credibility of the WTO as a forum for resolving trade disputes. Against this backdrop, the MPIA provides a welcome vote of confidence in the WTO's dispute settlement function from a significant cross-section of WTO members. However while the MPIA provides a temporary bridge for the WTO's appeal function at this critical time, it remains to be seen whether—and in what form—the Appellate Body re-emerges from the storm.

CONTACTS

Jessica Gladstone
Partner

T +44 207006 5953
E jessica.gladstone
@cliffordchance.com

Audley Sheppard
Partner

T +44 207006 8723
E audley.sheppard
@cliffordchance.com

Gail Orton
Head, EU Public Policy

T +33 1 4405 2429
E gail.orton
@cliffordchance.com

Fraser Eccles
Trainee Solicitor

T +44 207006 1906
E fraser.eccles
@cliffordchance.com

Janet Whittaker
Senior Counsel

T +1 202 912 5444
E janet.whittaker
@cliffordchance.com

Jeremy Stewart
Foreign Law Clerk

T +1 212 878 4938
E jeremy.Stewart
@cliffordchance.com

Oliver Carroll
Lawyer

T +44 207006 2146
E oliver.carroll
@cliffordchance.com

Michel Petite
Avocat of Counsel

T +44 207006 8723
E michel.petite
@cliffordchance.com

Phillip Souta
Head, UK Public Policy

T +44 207006 1097
E phillip.souta
@cliffordchance.com

Roland Scarlett
Lawyer

T +44 207006 2191
E roland.scarlett
@cliffordchance.com

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London, E14 5JJ

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