Would the United States Join the MPIA?

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Abstract

With the Appellate Body appointments crisis dragging on, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) represents a solution for any WTO member that wants to ensure that binding dispute settlement is available. Without US participation in the MPIA, however, WTO dispute settlement loses some of its luster and effectiveness. Would the United States ever consider joining the MPIA? One of the US concerns with the Appellate Body was its "institutional" nature, and the MPIA addresses that to some extent. The chances of the US joining the MPIA may not be high at the moment, as President Donald Trump and his trade policy team are among the biggest skeptics of WTO dispute settlement. Nevertheless, it may be worth laying the foundation now for a future US administration to join a version of the MPIA. A good approach would be to demonstrate the utility of the MPIA over the next several years by using it to help resolve WTO disputes when the opportunity arises. To this end, convincing a few of the holdouts – such as the United Kingdom, South Korea, and India – to join would be of great value, so that the MPIA gets more use. A case could then be made to the next US administration that, if it still objects to having an institution such as the Appellate Body hear appeals of panel reports, there is a version of the MPIA that could serve as an alternative.

Introduction

The WTO Appellate Body appointments crisis has dragged on for a few years now, leaving WTO dispute settlement in a precarious state. The Multi-Party Interim Appeal Arbitration Arrangement (MPIA) has worked for those members who have opted to join it, but it remains only a partial solution, as some members have stayed outside. The most significant of those members is the United States, which is the country responsible for the crisis in the first place. This paper explores the possibility that the US might be able to accept a version of the MPIA, restoring appellate review and making WTO dispute settlement fully functional again. While the chances of such a development might not be high at this particular moment, with President Donald Trump starting a second term, some of the US objections to the Appellate Body are specific to that particular institution, and it is not out of the question that a different version of appellate review, along the lines of the MPIA, might be acceptable to a future US administration.

Appellate Body Appointments Crisis

Early in the life of the Appellate Body, the US praised some of its rulings that other governments considered to be overreach, such as the decision to allow amicus briefs.[1] However, the US also expressed concerns about some of the Appellate Body's jurisprudence, and by the early to mid-2000s it had made a number of reform proposals as part of the review of the WTO's Dispute Settlement Understanding (DSU).[2] Later, the US concerns grew, and it began to object to the reappointment of particular Appellate Body members. After putting forward former US government official Jennifer Hillman in 2007, the US decided not to nominate her for a second term in 2011, and veteran US trade lawyer Thomas Graham took her place.[3] And in 2016, the US government objected to the reappointment of South Korean academic Seung Wha Chang, and another South Korean was appointed to the Appellate Body instead.[4]

The situation got more serious when Trump came into office. The Trump administration began objecting to all Appellate Body appointments until a wide range of its concerns about the Appellate Body were addressed. It set out these objections during various WTO Dispute Settlement Body meetings (in early 2020 it compiled them all in a single report).[5] The objections included the following:

- there was lack of deference to investigating authorities in trade remedy cases, including in relation to the practice of zeroing and the proper interpretation of the term "public body";
- the Appellate Body was offering advisory opinions on matters that did not need to be addressed to resolve the dispute at hand;
- the Appellate Body treated its past rulings as binding precedent, whereas the US considered that these rulings should have only persuasive value; and
- the Appellate Body was taking longer than the mandated 90 days to issue its reports without first receiving permission from the parties to the dispute to extend the timeframe.

Opinions will vary on the merits of each of these concerns, but regardless, the Trump administration used these objections as the

basis for refusing to go forward with appointments to the Appellate Body. As each Appellate Body member's term expired, no replacement was appointed, and eventually the Appellate Body could no longer function.

WTO members attempted to respond to these concerns through an effort led by New Zealand ambassador David Walker (the so-called Walker Process), but the principles they developed were not able to assuage the Trump administration.[6] The Appellate Body crisis continued after Trump left office, as the administration of President Joe Biden maintained the US position. Currently, there is a WTO dispute settlement reform process underway, with appellate review as one of the items on the agenda. At MC13, WTO members adopted a Ministerial Decision that aimed to have a fully functioning dispute settlement system by the end of 2024,[7] but a resolution seems unlikely as of this writing.

The MPIA Emerges

The impact of the US blocking of appointments was that WTO dispute settlement lost some of its certainty. If there is a right of appeal, as there is under the DSU, but no Appellate Body to hear the appeal, a party that loses a complaint brought against it can effectively block a panel report from having legal effect by appealing it into the void.[8] The possibility of panel reports being blocked takes WTO dispute settlement back to the later GATT years, when this kind of blocking of the adoption of panel reports became a problem, and which led to the DSU reforms that, for all practical purposes, eliminated the blocking of adoption.

In response to the concerns about whether WTO dispute settlement would be functional in a system with appeals into the void, the European Union led an effort to use the general arbitration mechanism in Article 25 of the DSU as the basis for appeals. Inspired by a 2017 paper from a group of experienced WTO lawyers, the EU initiative has now been joined by 26 other WTO members and is known as the Multiparty Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (MPIA).[9] MPIA appeals are only available to parties to the MPIA, but other WTO members may join the MPIA at any time.[10]

The MPIA establishes a standing pool of 10 arbitrators to hear appeals of WTO panel reports. As with the Appellate Body, three arbitrators hear the appeal in a specific case. There is also a parallel to the collegiality that exists at the Appellate Body, under which the three serving arbitrators may discuss each case with the arbitrators not serving on the appeal.[11] All 10 MPIA arbitrators selected have extensive experience working on WTO disputes, with many of them having served as panelists or arbitrators or in the WTO Secretariat divisions that assist panels and the Appellate Body.[12]

The MPIA's reliance on Article 25 of the DSU, which offers little in the way of guidance, to recreate the appellate review process leads to some important differences from the Appellate Body. One of the most noteworthy of these is that with the MPIA, awards will be notified to the WTO's Dispute Settlement Body but not formally adopted by it. (Nevertheless, the awards will be binding on the parties, as the MPIA procedures state: "The parties agree to abide by the arbitration award, which shall be final.")[13] The implications of this for the value of MPIA awards as precedent is uncertain. Presumably, without formal adoption by the WTO membership, there will be some lesser degree of precedential value for these awards, but how much less is unclear.

To date, the MPIA has heard one appeal, in a dispute between the EU and Colombia on Colombian anti-dumping measures. A version of the process was also used for an appeal involving a dispute between the EU and Turkey, which is not a party to the MPIA.

US Objections to "Institutional" Appellate Review

With the MPIA in place, and having had some experience with it, it is worth asking whether the US might be willing to sign on to the MPIA. US statements strongly suggest that it will not agree to restoring the Appellate Body, but perhaps it would be willing to accept a different version of appellate review. In answering this question, the specific US objections to the Appellate Body are important.

The US laid its objections out in detail during a series of DSB meetings under the Trump administration, and summarized them in a report to Congress in February 2020.[14] One of the concerns expressed by the US was that a major part of the problem with the Appellate Body was that it saw itself as an independent institution, and gave itself powers not provided for in the DSU. In this regard, the US said:

> ... we have learned that the Appellate Body thinks it did no wrong. We know this because, despite US action on appointments under both the Obama Administration and the Trump Administration, the Appellate Body did not change its approach. In fact, it expanded and deepened its WTO-inconsistent practices and interpretations. This reflects an institution that came to view itself as more important than the rules – and the Members – that created it.[15]

The US also referred to "unchecked 'institutional creep' by the Appellate Body," and noted that "some WTO Members believe that the Appellate Body is an independent 'international court' and its members are like 'judges' who have more authority to make rules than the focused review provided in the DSU."[16]

Thus, it appears that, based on its experience with the Appellate Body, the US may believe an "institutional" appellate review mechanism is fatally flawed. In the US view, the institutional nature contributed to the Appellate Body grabbing additional power for itself, in various ways. As examples of this abuse of power, the US

pointed to the following:

- "The text of Article 17.5 is clear in its mandatory requirement that the Appellate Body complete appeals 'as a general rule' within 60 days, and that 'in no case shall the proceedings exceed 90 days.' ... Since 2011, however, the Appellate Body has routinely violated Article 17.5 and ignored the deadline mandated by WTO Members, and it has done so without even consulting the parties to an appeal."

- "The Dispute Settlement Understanding is also clear that an individual may be appointed by the Dispute Settlement Body to serve on the Appellate Body for a maximum of two, four-year terms. The Appellate Body acts contrary to this agreement text by arrogating to itself the authority to 'deem' former Appellate Body Members as continuing Appellate Body Members for the purpose of issuing reports in appeals that began before their terms expired."[17]

- "WTO Members decided that panels would make factual findings and legal conclusions, but the Appellate Body would be limited to the latter," but "in violation of this limitation, and contrary to Article 17.6, the Appellate Body routinely reviews panel findings of fact"; and the Appellate Body "has also reviewed the meaning of a Member's domestic law de novo as a legal issue, even though WTO Members have agreed the meaning of domestic law is an issue of fact not subject to appellate review."

- "The Appellate Body has overstepped its role under the Dispute Settlement Understanding by rendering advisory opinions on issues not necessary to assist the Dispute Settlement Body in resolving a dispute."

- "The Appellate Body wrongly claims that its reports are entitled to be treated as binding precedent and must be followed by panels, absent 'cogent reasons'."

- "The Appellate Body has overstepped its authority and opined on matters within the authority of other WTO bodies, including the Ministerial Conference, the General Council, and the Dispute Settlement Body."

Ad Hoc Appellate Review as a Solution

This insight about the US position can help us think about a version of the MPIA that the US might be able to agree to: the US cannot accept *institutional* appellate review, but perhaps it might consider an *ad hoc* version of it.

With regard to the current version of the MPIA, there might be some features that would raise the same concerns about institutions for the US as it has with the Appellate Body, and therefore might need to be tweaked in a number of ways.

First, as noted, there is a standing pool of 10 MPIA arbitrators, and it may be that the US cannot accept a standing pool of this sort. Having a named set of adjudicators may feel too much like an institution. By contrast, something that looks more like *ad hoc* arbitration, with the parties selecting the arbitrators in each case without the constraint of a standing pool, might be more acceptable to the US.

Second, once appointed, MPIA arbitrators can meet regularly to discuss the operation of WTO dispute settlement and the arbitration mechanism, which the MPIA arbitrators have done. In this regard, paragraph 5 of the current MPIA rules states:

> ... In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable.

Given US concerns about the institutional nature of the Appellate Body, this provision might not make it into a US-friendly version of the MPIA.

Third, given the experience with the Appellate Body, where there were accusations that the Appellate Body Secretariat played too strong a role in deciding cases, the role of the WTO Secretariat in providing support to any appellate mechanism will be particularly sensitive. The current MPIA rules state:

> 7. The participating Members envisage that appeal arbitrators will be provided with appropriate administrative and legal support, which will offer the necessary guarantees of quality and independence, given the nature of the responsibilities involved. The participating Members envisage that the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work, only to appeal arbitrators. The participating Members request the WTO Director General to ensure the availability of a support structure meeting these criteria.

In the only MPIA case that has been heard so far, two Secretariat officials assisted the arbitrators. The US is unlikely to accept this as part of an appellate review process. It would probably prefer having arbitrators hire assistants on an *ad hoc* basis, with no role for the Secretariat at all beyond administrative tasks such as arranging hearing rooms.

MPIA Extends Olive Branch

It can be hard to get into the minds of adjudicators, but regardless of their intent, in their first decision the MPIA arbitrators appeared to address one of the most prominent US criticisms of the Appellate Body, shifting away from the Appellate Body's approach to the legal standard of review in anti-dumping cases and towards one that the US might be more comfortable with.

In its critique of Appellate Body "overreach," the US had argued that the Appellate Body "failed to give meaning to Article 17.6(ii) of the Antidumping Agreement." Article 17.6(ii) sets forth a special standard of review to be applied by WTO panels when adjudicating antidumping disputes, but, in the view of the US, the Appellate Body

had not applied it properly. In this regard, the US stated: "Article 17.6(ii) requires a panel, and the Appellate Body, to determine whether the interpretation proposed by a Member is permissible. The Appellate Body, however, consistently has failed to take that approach." The US contended that "the very premise underlying Article 17.6(ii) is that two interpretations can be permissible simultaneously," but the Appellate Body had failed to recognize this. It concluded as follows: "The Appellate Body's disregard for the meaning and importance of Article 17.6(ii) – effectively rendering the provision useless – is particularly troubling."[18]

The first appeal heard by the MPIA was in the *Colombia – Frozen Fries* dispute, which involved an anti-dumping action taken by Colombia's trade remedies authority against EU imports. In this case, the MPIA arbitrators were confronted with the issue of how to apply Article 17.6(ii). Rather than follow the Appellate Body's approach, they adopted one that is closer to what the US had been pushing for.

At the outset, the Arbitrators clarified that they would not engage in their own *de novo* interpretation of the terms "where appropriate" so as to arrive at what they would consider to be the "final" or "correct" application of VCLT Articles 31 and 32 to the Antidumping Agreement. Instead, the Arbitrators said that they would "ask whether a treaty interpreter, using the method for treaty interpretation set out in the Vienna Convention – that is, an interpretation 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' and, where appropriate, 'supplementary means of interpretation' – could have reached Colombia's interpretation," even though they, "as *de novo* treaty interpreters, might have reached a different conclusion."

In this way, the Arbitrators said that their approach "assumes, as the second sentence does, that different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the 'correct' interpretation of a treaty provision," and said this may be "particularly true for the Anti-Dumping Agreement, which was drafted with the understanding that investigating authorities employ different methodologies and approaches." They stated, "treaty interpretation is not an exact science and applying the Vienna Convention's method does not magically and inevitably lead to a single result." In most cases, "treaty interpretation involves weighing, balancing, and choice." Thus, they said, "the ultimate question for us when testing a proposed interpretation is to draw a line beyond which an interpretation is no longer 'permissible' under the Vienna Convention method for treaty interpretation," adding that "dictionary meanings support the idea that the search for 'permissible' interpretations differs from an attempt to find one's own – 'final' and 'correct' – interpretation." Rather, "the question is whether someone else's interpretation is 'permitted,' 'allowable,' 'acceptable,' or 'admissible' as an outcome resulting from a proper application of the interpretative process called for under the Vienna Convention."

They clarified, "obviously, not just any interpretation put forward by an authority can be accepted as 'permissible'," and "the interpretative process under the Vienna Convention sets out an outer range beyond which meanings cannot be accepted." In this way, "just as permissible interpretations cannot be limited to a single 'final' and 'correct' answer as determined by a given tribunal, not all interpretations have the required degree of solidness or analytical support for them to be given deference as 'permissible' within the bounds of the Vienna Convention method for treaty interpretation."[19]

In setting out its reasoning, the MPIA did not explicitly refer to prior Appellate Body decisions that it was departing from, but the language it used clearly indicates an approach that is more deferential to domestic trade remedies authorities' interpretations of provisions of the AD Agreement.

Sweetening the Pot

There is a logical argument for why the US might accept a modified version of the MPIA as a form of appellate review, as the MPIA has already addressed a few specific concerns expressed by the US, and could be adapted to move even closer to what the US is looking for. However, there is also an important political consideration here: the Biden administration did not appear to care much about this issue, and the incoming Trump administration is likely to care even less. Neither group of trade officials worries much about appeals into the void and the loss of binding dispute settlement. Indeed, they appear to be fine with not enforcing WTO rules through the dispute settlement process, and instead favor unilateral approaches such as Section 301 of the Trade Act of 1974 to address market access barriers, with this statute having been brought back to life after years of dormancy. In fact, as of this writing, the Biden administration has not filed any WTO complaints.

As a result, the US in a good negotiating position here. It may be that the only way it would be willing to join a version of the MPIA, and thus put an end to the WTO dispute settlement crisis, is in exchange for some other concessions that are of importance to it.

So what might the US want in exchange for joining an MPIA? Here are a few possibilities of substantive demands it might make for changes to WTO rules.

First, picking up again the issue of the Anti-Dumping Agreement legal standard of review, the US would like to see greater deference to trade remedy determinations, along the lines of what it hoped for with Article 17.6(ii) when it originally pushed for it during the Uruguay Round. Its demand for the "permissible interpretation" language was part of a concerted effort to ensure an appropriate amount of deference to national authorities on these determinations.[20] It saw the Appellate Body's approach as taking

away a result it achieved as part of the Uruguay Round, and would like to get it back. With the issue reopened by the MPIA arbitrators, it might even want more. For example, it might like to see a more deferential standard applied to the SCM Agreement[21] and the Safeguards Agreement too. In addition, in its critique of the Appellate Body, the US raised a number of specific criticisms of the interpretation of all three agreements (e.g., on the interpretation of "public body" under the SCM Agreement and "unforeseen developments" under the Safeguards Agreement).[22] It might want to see these specific interpretations overturned.

Second, it would also like to see a national security exception that gives total deference to those invoking it. In several recent disputes, the US has been consistent in its arguments about the security exception to this effect,[23] and it feels strongly that the measures it characterizes as being for security should not be reviewed in WTO dispute settlement. In December 2024, the Biden administration made a formal proposal in this regard.[24] As part of a compromise in which the US accepts a version of the MPIA for appellate review, it might also demand that this proposal be accepted.

And third, the US might like to see changes to subsidy rules that either expand their scope as applied to China or narrow their scope as applied to measures with an environmental purpose (the latter would not matter for the Trump administration, but could be relevant for a future Democratic administration).

Conclusion

The Appellate Body appointments crisis has dragged on for years now. The MPIA represents a solution for any WTO member that wants to ensure that binding dispute settlement is available, and many members have taken advantage of it. However, without US participation in the MPIA, WTO dispute settlement loses some of its luster and effectiveness. Trying to glean US intentions and goals from its various public statements is a challenge, but there do seem to be some key elements that can be inferred, with the avoidance of the "institutional" problems it saw in the Appellate Body at the core.

The chances of the US joining a version of the MPIA may not be high at the moment, as Trump and his likely trade policy team are among the biggest skeptics of WTO dispute settlement and will not be interested in making it more effective. Nevertheless, it is worth laying the foundation for a future US administration to join. The best approach may be to demonstrate the utility of the MPIA over the next several years by using it to help resolve WTO disputes when the opportunity arises. To this end, convincing a few of the holdouts – such as the UK, South Korea, and India – to join would be of great value, so that the MPIA gets more use. On the basis of a strong MPIA record, a case could be made to the next US administration that, if it still objects to having an institution such as the Appellate Body hear appeals from panel reports, the MPIA could serve as an alternative.

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This article was written for the Research Group on the International Trading System led by the Japan Economic Foundation (JEF) and also published in the *Japan SPOTLIGHT* January/February 2025 issue published by JEF. JS

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