Does Article 25 Arbitration Need Serious Consideration?

By:

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I. Introduction

If the Appellate Body crisis is not resolved by December 2019, it only requires a Member that has lost the dispute at the panel stage to formally file an appeal to avoid compliance. Such a prospect is catastrophic for the WTO dispute settlement system. While the international trade law community could hope that this escalating crisis is resolved sooner than later, several trade law commentators have mooted the idea of using arbitration as provided under Article 25 of the DSU as an interim solution— until the Appellate Body is back to full strength. This short commentary explores the recent European Union (EU) proposal relating to the Interim Appeal Arbitration pursuant to Article 25 of the DSU ("Interim Arbitration Proposal") that has been entered into between the EU and Canada.

II. Analysis

Paragraph 1 of Interim Arbitration Proposal provides that the Proposal applies:

> in the event that the Appellate Body is not able to hear appeals from panel cases in [DS X, DS Y *and] any future dispute between [WTO Member] and the European Union*due to an insufficient number of its members.

The applicability of the Interim Arbitration Proposal depends on a variety of factors. A major consideration is whether acceptance of the procedure is on a per dispute, bilateral basis (which applies to all disputes between two Members) or as a matter of routine. To understand how each of these factors mentioned in paragraph 1 would impact a WTO Member, it is useful to suggest four different categories of disputes:

- Strong Complainant cases ("**SC**"): Where a WTO Members expects to win at the panel stage and at the appellate level. For example, the challenge against US Section 232 tariffs can be considered as an SC where there is a high possibility of the complainants winning.
- Strong Respondent cases ("**SR**"): These cases are few and far between since most WTO complaints are initiated after weighing the possibilities of a win.
- Weak Complainant cases ("**WC**"): These instances are also rare for the same reason mentioned in (b) above.
- Weak Respondent cases ("**WR**"): There are several such cases. In fact, a bulk of WTO disputes fit into this category.

A WTO Member would be most willing to adopt the Interim Arbitration Proposal in SC cases and least willing to adopt the proposal in WR cases. In both SR and WC cases, a WTO Member can wait till the Interim Panel Report to see whether the most significant legal issues have been decided in its favor. There is no immediate benefit in agreeing to the Interim Arbitration Proposal in SR and WC cases. The only compelling reason to adopt the Interim Arbitration Proposal in SR and WC cases would be to recognize the importance of legal certainty and predictability within the multilateral trading system. Therefore, it is impossible to determine whether any agreement on the Interim Arbitration Proposal which applies to all cases between a WTO Member and the EU will have net benefits for that WTO Member.

Authoritative Value of Article 25 Findings

There are suggestions that Article 25 arbitration will not add to the relevant body of legal rulings which panels will have to refer to in the future. However, this is doubtful. As stated by the Appellate Body in *US- Stainless Steel (Mexico):*

> "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, *absent cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case"

There is still a possibility that even the Article 25 tribunal rulings may be referred to in proceedings to influence subsequent a panel's reasoning. However, given their ad hoc nature, it may be preferable that Article 25 proceedings will not have precedential value.

There remain several technical issues that should be addressed in the context of the Interim Arbitration Proposal. Some of the key issues are outlined below:

- *Applicable provisions to be listed*: Currently, paragraph 2 of the Proposal provides that the substantive, procedural and practical aspects of the current appellate review procedure are to be replicated "as closely as possible". However, not all provisions can be replicated directly due to contextual differences. For instance, Rule 20(1) of the Appellate Body's Working Procedures provide that "an appeal shall be commenced by notification in accordance with [DSU] Article 16.4". Similarly, the Interim Arbitration Proposal directs a panel to transmit all records to the Article 25 Tribunal: in contrast, Rule 25 of the Working Procedures requires the Director-General to transmit such records. Therefore, all applicable provisions should be listed for the purposes of clarity.

- *Appropriate mechanism to bind Director General and Secretariat:* It is not clear how the WTO Director-General will be bound to fulfil his or her obligations under the Interim Arbitration Proposal. Similarly, the basis of providing the Appellate Body Secretariat's support needs to be stated explicitly.

- *Former AB members may prove to be a very small pool:* Former AB members who may be available to adjudicate disputes may be very small in number. By December 2019, there will be a multiplicity of disputes to be adjudicated. Therefore, the feasibility of restricting the pool of judges to former AB Members should be reviewed.

- *Timelines to be discussed:* Paragraph 7 of the Annex to the Proposal provides 10 days prior to the date of circulation of panel report to suspend panel proceedings. It should be discussed whether this time period is sufficient or not.

- *Paragraph 13 of the Annex to the Proposal may lead to endless loop of appeals:* Paragraph 13 states that withdrawal from arbitration is deemed to constitute joint request to resume panel proceedings under Article 12.12 of the DSU. However, this provision does not prohibit initiation of appeal after such a withdrawal to a new tribunal. For purposes of clarity, such a prohibition should be provided. Further, the applicability of Article 25 arbitration to compliance panels under Article 21.5 of the DSU should also be explicitly provided for.

The issues highlighted above are only illustrative. Several Members still consider that a serious consideration of the Interim Arbitration Proposal weakens any efforts to strengthen the Appellate Body or the ongoing DSU reforms. In that context, and even if this proposal is only *ad hoc* in nature, several procedural and technical issues need to be addressed before serious deliberations can take place.

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