

Blueprint for a Plurilateral
WTO Arbitration Agreement under
Article 25 of the Dispute Settlement
Understanding

Jens Hillebrand Pohl

WTO Dispute Settlement

- Multilateral dispute settlement
 - Art 23 DSU [*US – Certain EC Products (2001)*]
 - Unilateral enforcement banned
- Basic Structure
 - Consultation
 - Adjudication
 - Panel procedure
 - Appellate procedure
 - Implementation [*authorised* retaliation last resort]

Crisis (I)

- Prelude
 - In 2016, the US took the unprecedented step of blocking the reappointment of an AB member (Seung Wha Chang) *explicitly* on the basis of his judicial track record
 - The move was severely criticized for seeking to undermine the integrity of the AB

Crisis (II)

- On 30/6, AB member Ricardo Ramirez Hernandez' term expired
- On 1/8, AB member Kim Hyun-Chong resigned
- The US has refused to approve the start of the selection procedure for their replacements
- The proximate reason relates to AB members continued post-term service on pending cases
- But wider issues are involved
- Exploiting AB appointments as a powerful negotiation lever to unilaterally 'force' changes upon the WTO may continue, also by other members

Crisis (II)

- U.S. Statements, DSB Meeting, 31/08 2017

- The United States thanks Members for their interventions. We have been listening carefully.
- A number of Members have raised questions on the logic of linking the concerns the United States has raised under Item 6 with the selection of Appellate Body members. There also seems to be some confusion regarding the U.S. position. We further hear the concern that the DSB has the responsibility to address the systemic concerns raised.
- As Members are aware, the United States has a number of long-standing concerns frequently expressed in the DSB regarding the critical necessity of the DSB asserting the authority assigned to it under the DSU.
- The issue the United States raised earlier concerning the continued service of former Appellate Body members is an important example of these concerns that we have been raising for some time.
- In our view, simply moving forward with filling vacancies risks perpetuating and leaving unaddressed the concerns we believe require the urgent attention of the DSB.

Deadlock (I)

- Unless new AB members are soon appointed, the AB will face severe delays, struggling with an already heavy caseload
- This comes at a particularly critical time
 - 2017 US trade agenda: To intensify national trade remedy enforcement (allegedly unfair trade)
 - Likely to result in a flood of new WTO cases
- Each case requires at least three AB members
 - AB could dip to three members as early as 2018
 - By 2019 the members may drip below three

Deadlock (II)

- DSS litigation cannot operate without the AB
 - Art 16.4 DSU: Right to appeal Panel rulings
 - Art 16.4/17.14 DSU: Once appealed, the Panel ruling cannot be implemented until the DSB adopts the Panel report as modified by the AB,
 - Art 23.2(a) DSU: Without DSB adoption of an AB report, in case of appeal, the WTO obligations cannot be enforced

Arbitration?

- Article 25 DSU provides for “expeditious arbitration within the WTO”
- Art 25.1 DSU: Alternative means of dispute settlement
 - “[C]an facilitate the solution of certain disputes that concern issues that are clearly defined by both parties”
- Different from timeframe arbitration (Art 21.3 DSU) or concessions arbitration (Art 22.6 DSU)

How could arbitration help?

- Article 25 arbitration awards are binding without need for DSB adoption
- Art 21 and 22 DSU on implementation, compensation and suspension of concessions apply mutatis mutandis to arbitral awards
- Art 23.2(a) DSU: Members may determine violations on the basis of arbitration awards
- -> AB deadlock can be circumvented

Article 25 DSU basic principles

- Resort to arbitration subject to the mutual agreement of the parties to the dispute
- Parties to the arbitration must agree on the procedures to be followed
- Agreements to arbitrate must be notified to the WTO
- Parties to the arbitration must agree to abide by the arbitration award

Arbitration in caselaw

- US – Section 110(5) Copyright Act (Article 25) (2001)
 - Arbitration between the US and the EC (EU)
 - Case concerned the level of nullification or impairment of benefits of the EC following a previous finding of US TRIPS violation
 - *“Article 25 should be understood as an arbitration mechanism to which Members may have recourse whenever necessary within the WTO framework”*
 - *“No decision is required from the DSB for a matter to be referred to arbitration under Article 25 In the absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system”*
- Banana tariffs arbitrations (2005) under the Doha Waiver

How to activate Article 25

- Agreements to arbitrate
 - Arbitration agreements (*clause compromissoire*)
 - Submission agreements (*compromis*)
- If DSS litigation is unavailable, respondents will have no incentive to arbitrate after a dispute has arisen
 - Better to have the complaints delayed indefinitely
 - Different from normal IL arbitration incentives [to avoid unilateral retaliation]

Plurilateral arbitration agreement (I)

- Arbitration agreement
 - Between all WTO Members who choose to adhere
 - All or certain categories of future disputes arising out of or relating to the WTO agreements
 - All disputes preferable
 - Mandatory or optional referral to arbitration
 - Optional at either party's request preferable
 - Conditions for submission
 - *E.g.* if a dispute in DSS litigation is not settled within a defined timeframe
 - No conditions preferable

Plurilateral arbitration agreement (II)

- Procedure
 - Established arbitration rules, e.g. UNCITRAL
 - Bespoke system
- Blueprint
 - Modeled on Article 93-95 Havana Charter
 - Consultation
 - Arbitration
 - Reference to a investigative review board
 - Reference to DSB

AB has the final word

- Art 3.5 DSU: *“All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.”*
- Operates as a setting-aside provision pursuant to Art V(1)(e) New York Arbitration Convention