

# Regulating for Globalization

Trade, Labor and EU Law Perspectives

## Born out of Necessity: MPIA Arbitration and WTO

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Between a rock (trade wars) and a hard place (U.S. critiques), the WTO Appellate Body has been passing through some turbulent times. Due to the [paralysis of the Appellate Body](#), the European Union (EU) and some other twenty countries have agreed on an arrangement, known as the [Multiparty Interim Appeal Arbitration Arrangement \(MPIA\)](#), which allows them to bring appeals and solve trade disputes among them. The MPIA is open for any WTO member, and enters into effect upon completion of domestic procedures by participating members and [notification of MPIA to the WTO's Dispute Settlement Body \(DSB\)](#), something expected in the early summer of 2020.

It is important to note that the MPIA is not a treaty rather it is an arrangement. The MPIA has three separate parts. First, there is the communication to DSB which expresses commitments by the parties to the MPIA and sets out procedures for the appeal mechanism. Second, there is Annex 1 which sets out the arbitration rules under article 25 of the Dispute Settlement Understanding (DSU). The last part of the MPIA appears in Annex 2 which sets out the procedures for selecting the arbitrators from a pool of ten arbitrators. .

Annex 2 of the MPIA provides that each participating country can nominate a person who will be vetted through pre-selection process. Arbitrators will be selected based on the highest expertise, objectivity, and impartiality. [The WTO Appellate Body Working Procedures and the DSU Code of Conduct](#) provides complex rules on these values. After the vetting process is completed, participating countries will appoint the arbitrators by consensus. Three arbitrators will hear an appeal. The three arbitrator panel will be selected using the same methods applied by the WTO; they will be selected randomly using computer algorithm and on the basis of rotation. In paragraph 8 of Annex 1, MPIA incorporates the principle of collegiality where the [three arbitrators hearing the appeal may consult the other seven arbitrators](#). The principle of collegiality ensures consistency and predictability by balancing the different opinions of arbitrators, avoiding personal preferences, and providing healthy debate among themselves.

According to paragraph 7 of the MPIA, there is Secretariat-style assistance whereby appeal arbitrators will be provided with appropriate administrative and legal support. However, participating members envisage that the administrative and legal structure to be entirely separate from the WTO Secretariat staff. This means there can be a new Secretariat, a new sub-division of the current WTO Secretariat staff, or individual staff will provide support to specific arbitrator.

The MPIA, in paragraph 9, covers [any dispute between participating countries whether ongoing or new dispute](#), including the compliance stage of such disputes. To initiate arbitration under MPIA,

first – in the light of paragraph 5 of Annex 1, parties must suspend panel proceedings under article 12 of the DSU and then file a “Notice of Appeal” with the WTO Secretariat no later than 20 days after suspension of the panel proceedings.

The MPIA seeks to offer reform models that respond to critiques of the Appellate Body. To the effect, MPIA participating members opted for no dicta opinions, a 90 days time limit with no extension without agreement of the parties, and no adoption of arbitrators’ report by the DSB. In paragraph 5 of Annex 1, the MPIA parties can request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal. To meet the 90 days deadline, the arbitrators can take measures on page limits, time limits and deadlines as well as on the length and number of hearings required. In addition, the arbitrators –according to paragraph 11 of Annex 1 of the MPIA– will only address those issues that are necessary for the resolution of the dispute. Thus, the arbitrators will have to exercise judicial economy where appropriate by not ruling on every single issue raised in an appeal. This practice saves time and resources for MPIA arbitrators whereby finding in one issue is satisfactory to resolve the dispute.

According to paragraph 15 of Annex 1 of the MPIA, the participating WTO members agree to abide by the arbitration award, which shall be final. The award will be notified to, *but not adopted* by, the DSB. This language could cast doubt on the persuasive authority of these awards on future WTO disputes. Arbitrators under the MPIA are obliged to follow WTO agreements but not previous Appellate Body jurisprudence. However, in practice, MPIA arbitrators will look at previous Appellate Body decisions and MPIA cases. Reports of the MPIA themselves no matter how important they are will not have greater precedential value because they were not adopted by the DSB. I expect that it will be understood that MPIA arbitration awards will have served a particular need at a particular point in time.

The MPIA could spell the end of the WTO Appellate Body as participating countries could become complacent about the Appellate Body impasse. Those countries – such as the U.S. and India – that do not join the MPIA will be left out. Other countries, especially developing countries, will be torn in choosing between MPIA participation or not. From a different angle, the MPIA offers a window of opportunity to test the different reform proposals in settling trade disputes and then carry them into the WTO Appellate Body, if it becomes operational again.

There are still many uncertainties about the MPIA. How will parties and arbitrators react? How will the meaning of the wording in the MPIA agreement be developed? Will it have any impact on AB? Creative legal minds will tackle these and other questions. No matter what the future holds, maintaining efficiency and objectivity in settling trade disputes will further the goal of free trade, guide members in laws that do so, and continue to develop a group of experts supporting the growth of jurisprudence. This is a lot to put on the shoulders of the MPIA, but do we have a choice?

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