

# Regulating for Globalization

Trade, Labor and EU Law Perspectives

## Let's go to arbitration! A solution to the WTO Appellate Body Impasse?

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Since December of last year, the WTO Appellate Body has been unable to hear new appeals[1]. Some WTO members have created the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). It offers a path forward, but how does it work and what is its future?

### Who are the MPIA parties?

In April, a group of WTO Members joined together and notified the MPIA[2]. Since then, Ecuador, Nicaragua and Benin have announced their intent to join the MPIA.

Some WTO Members joined the MPIA because they have disputes at the Panel stage to be settled soon. In cases *DS537*, *DS522* and *DS524* MPIA parties have recently notified a joint request to take their disputes to arbitration under article 25 DSU in case any disputing party submits an appeal request to the panel report and the AB is not recomposed yet. The joint request is necessary to activate the MPIA, because the MPIA is not a treaty, and *per se* it is not mandatory. The MPIA is based on consensus of the parties, which also means that the lack of consensus could block its application.

The absence of the US and some other WTO big players, such as India, Japan and South Africa, have different explanations. The views of the USA are well known[3]. In the case of India, some WTO Members brought cases against Indian subsidies, in the sugar industry, and Indian tariffs, on IT products, which probably will lead to unfavorable decisions for India. In this scenario, a request to appeal by India will block the adoption of panel reports[4]. Japan did not express clearly its reasons, it just stated it worries that the MPIA may not serve for the purpose its proponents pursued and South Africa said it was concerned that the success of the MPIA could thwart AB reform[5].

### What impact will MPIA decisions have?

First, there is no formal rule of *stare decisis* (precedent) in the DSU, but in practice, the AB and Panels have relied on prior AB reports in reaching new findings. The MPIA does not solve this, and one of the US criticisms of the now paralyzed system is this very issue. It is too early to tell, but the natural inclination of any judge or arbitrator to treat like cases alike will always exist. Therefore, future decision makers will have to wrestle with this: can an effective appellate system function if there is no consistency of interpretation over time? Will parties accept conflicting interpretations of a provision?

Second, what does will MPIA decisions mean for non-MPIA parties? Technically they only apply to the disputing parties. But if third parties care about an issue or matter before the MPIA, they are permitted, even as non-MPIA parties, to make written submissions and to be heard by the arbitrators. If this route is pursued, over time it will mean that non-parties do care about the MPIA decisions and how they might apply, whether in a reactivated AB or in an expanded MPIA, or generally as the body of international trade law continues to grow during the operation of the MPIA.

Third, a big question for the MPIA is enforcement. The MPIA is based on article 25 of the DSU, which establishes that article 21 and 22 of the DSU apply *mutatis mutandis*. Therefore, MPIA parties could rely on the DSU rules on *Surveillance of Implementation of Recommendations and Rulings* and *Compensation and the Suspension of Concessions* to enforce MPIA decisions. This could be an effective process for MPIA parties.

For non-MPIA parties, however, enforcement remains a challenge. Without a functioning AB, the losing party can block further actions by submitting an appeal request to the now dysfunctional AB. The EU has announced a position that could strengthen the MPIA or promote the adoption of bilateral appeal arbitration agreements – if a losing party tries to block the adoption of a report favorable to the EU, it will apply unilateral measures unless the other party agrees to submit the dispute to arbitration[6]. In this scenario, joining the MPIA might be more beneficial for countries with a lower political power such as developing countries Members.

Fourth, what impact will MPIA decisions have on the work of the AB, when it becomes functional again? Another issue—arguably the most political one—is the role of MPIA decisions for the WTO DSS when WTO Members appoint the new AB members. Paragraph 15 of the MPIA states that MPIA arbitral awards do not have to be adopted by the WTO DSB; perhaps this is a convenient answer for now; only time will tell, if and when the AB becomes functional again, if it will give any practical effect to MPIA arbitral awards.

### **Can the MPIA help during the AB impasse?**

A future without an AB of some sort is unlikely. Either the AB or some other reform will lead to new or different system of dispute resolution. The rule of law and the peaceful resolution of disputes will, we have to count on, prevail. The alternative is just not worthy of consideration. MPIA parties will rely on it to achieve resolution of disputes. Non-MPIA parties will have to decide whether to stay outside of the system, and all, parties and non-parties will face the need for enforcement in the case of non-parties. Unilateralism will necessarily continue to rear its ugly head.

In the meantime, international trade will have to place its hopes in the able hands of MPIA arbitrators to fill the gaps and do what can be done to keep pluralism alive until multilateralism can return. There are some gaps in the full picture of the MPIA, and the burden of filling them will fall on the MPIA arbitrators.

[1] WTO. *Dispute settlement: Members. Appellate Body Members*. [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)

[2] JOB/DSB/1/Add.12

[3] Statements by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, June 29, 2020.

[4] FINANCIAL EXPRESS. Atmanirbharta and WTO: India needs to look at larger picture. <https://www.financialexpress.com/opinion/atmanirbharta-and-wto-india-needs-to-look-at-larger-picture/1963301/>

[5] WTO. Panels established to review Indian tech tariffs, Colombian duties on fries. [https://www.wto.org/english/news\\_e/news20\\_e/dsb\\_29jun20\\_e.htm](https://www.wto.org/english/news_e/news20_e/dsb_29jun20_e.htm)

[6] *COM (2019) 623 final 2019/0273 (COD). Regulation of the European Parliament and of the Council. Amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules.*

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