

MPIA for Settling WTO Disputes: Attribute, Impact and Prospect

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Abstract. The Multi-Party Interim Appeal Arbitration Arrangement (MPIA) serves as a temporary alternative to arbitrate trading disputes against the non-functional WTO Appellate Body. The birth of MPIA indicates the indispensable function of WTO to provide a dispute-resolving platform for its members, and the urgent demand for a diversified dispute settlement mechanism against the intensified global trade frictions among increasing engaging parties. This research critically examines the attributes and effectiveness of MPIA in resolving WTO disputes, considering its impact on international trade dispute resolution. Despite its drawbacks, such as the absence of major WTO trading parties and the its temporary nature, the MPIA demonstrates promising performance, offering insights for the future WTO Dispute Settlement Body (DSB) in terms of diversification, high-efficiency, party autonomy, flexibility, and binding effect.

Keywords: MPIA; the Appellate body crisis; WTO dispute settlement; appeal arbitration.

1. Introduction

The World Trade Organization (WTO) appellate body crisis, initiated by the United States' obstruction of new member appointments in October 2018, has resulted in the current paralysis of the WTO appellate body. This crisis has created a significant challenge for the WTO dispute settlement mechanism, as the failure to adopt reports renders them non-binding, leaving member appeals unresolved.

In response to this crisis, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) was established on 30 April, 2020, by 47 WTO members. The MPIA serves as a temporary alternative to arbitrate trading disputes, aiming to provide an in-place, effective and impartial mechanism for resolving trading disputes. This mechanism was devised under Article 25 of the Understanding on Dispute Settlement Rules and Procedures (DSU). Since its inception, the MPIA has been attracting attention from global trading practitioners and researchers, prompting an examination of its role and significance.

This research aspires to draw inspirations from the MPIA as a temporary mechanism to settle WTO disputes through arbitration and explore its consistent effect throughout the volatile global trading context. The focus will be on providing a comprehensive analysis of the MPIA's attributes, procedures, and its influence on international trade dispute resolution. Additionally, the effectiveness of the MPIA will be evaluated through a comparative perspective, considering its divergence from the previous WTO dispute settlement body. The research will conclude by summarizing the advantages and drawbacks of the MPIA and offering insights into the future of the WTO Dispute Settlement Body (DSB).

To accomplish this, this research will commence by providing the necessary background information on the emergence of the MPIA amidst the WTO appellate body crisis. It will then delve into an analysis of the attributes of the MPIA and its procedural framework. Subsequently, the discussion will revolve around the impact of the MPIA on international trade dispute resolution. After that, the efficacy of the MPIA will be assessed by comparing it with the previous appellate body, exploring successful practices, identifying limitations, and examining future prospects. Finally, the research will conclude by summarizing the advantages and drawbacks of the MPIA and offering insights into the future direction of the WTO DSB.

2. The Appellate Body Crisis and Its Causes

The current paralysis of the WTO DSB can be attributed to the actions of the United States, which have had a significant impact on the functionality of the WTO Appellate Body [1]. Specifically, this crisis came as a result of interference to the nomination of the appellate body members by the United States, whose main objections about the system come both substantial and procedural [2].

On the one hand, the United States has expressed dissatisfaction with what it perceives as judicial overreach by the Panel and the Appellate Body, which causes substantial changes as their findings and recommendations were modifying some WTO members' rights or added to the obligations under the existing agreements [3]. On the other hand, the United States has criticized certain procedural aspects of the WTO Appellate Body, arguing that they are inconsistent with the rules-based trading system agreed by all WTO members in 1995.

These complaints by the United States encompass several specific issues [4]. What comes to the first is the objection regarding the Appellate Body's delay in submitting reports and its failure to adhere to the 90-day timeline prescribed by the DSU. Secondly, concerns have been raised over the participation of "retired" appellate body members in deciding appeals, which the United States considers to be a violation of established procedures. Another complaint by the United States is against the issuance of unnecessary advisory opinions by the appellate body on matters related to the recommendations of the DSB. Also, the United States has expressed reservations about the Appellate Body's involvement in factual determinations and its review of domestic laws of member countries. Lastly, the United States has contested the Appellate Body's assertion that its reports have binding precedent effect on subsequent panels.

Although the United States have been blamed for its blockage on the appointment of new appellate body members and turning the WTO appellate body into a mechanism to exist in name only, its criticism and objections with the above-mentioned five reasons, in fact, prove to be a trigger that ignites the current WTO dispute settlement system at risk by unveiling its internal defects against the changing global trading environment.

3. MPIA: a Possible Way out

Created by 47 WTO members on 30 April 2020, MPIA is a temporary arbitration alternative to cope with the standstill confronting the WTO appellate body. It was founded with the objectives to maintain and duplicate its previous well-functioning mechanism, both substantive and procedurally, so as to largely ensure its independence, impartiality and efficiency [5].

3.1. The attribute of MPIA

It is essential to clarify the attribute of MPIA before delving deeper into its functions and dynamics to evaluate its effectiveness in resolving WTO disputes. The birth of MPIA and its legal foundation provide insights into its attributes.

The MPIA operates within the framework of the DSU Article 25, which provides WTO members with a flexible approach to settle disputes through arbitration based on political agreement. The Article 25 itself manifests that MPIA was born as a temporary solution to the impasse. In other words, it is an alternative mechanism for settling disputes via arbitration that would otherwise be submitted to the non-functioning WTO Appellate Body. Its establishment goes with the goal to safeguard a rule-governing platform for its members to trade in a fair, effective and efficient atmosphere by maintaining an independent appeal channel to settle disputes among the members.

The attributes of MPIA also attract the attention from Chinese scholar Liu Ying, who makes clear that MPIA is "not a plurilateral agreement added to current WTO agreements" [6] for this statement has not been submitted to the WTO Ministerial Meeting for approval of being added as an appendix as WTO Agreement required in the Article 10(9). Nor is MPIA an international treaty. It is more of a joint arrangement that agreed on an alternative mechanism for it is not of legal force under the WTO framework [7]. It should be highlighted that MPIA is not a replacement to current WTO appellate

body, either. This was made clear in the statement foreshadowing the formation of the MPIA by ministers from the European Union and 15 other signatories in early 2020.

To sum up, MPIA can be defined as a political agreement or initiative under the current WTO DSU framework and temporary alternative to arbitrate rather than appeal WTO disputes against the WTO appellate body crisis.

3.2. The MPIA dispute-settling procedures and its features

The MPIA mechanism shows an amicable and flexible settlement to WTO dispute on a “party autonomy basis”, with key procedures as Figure 1:

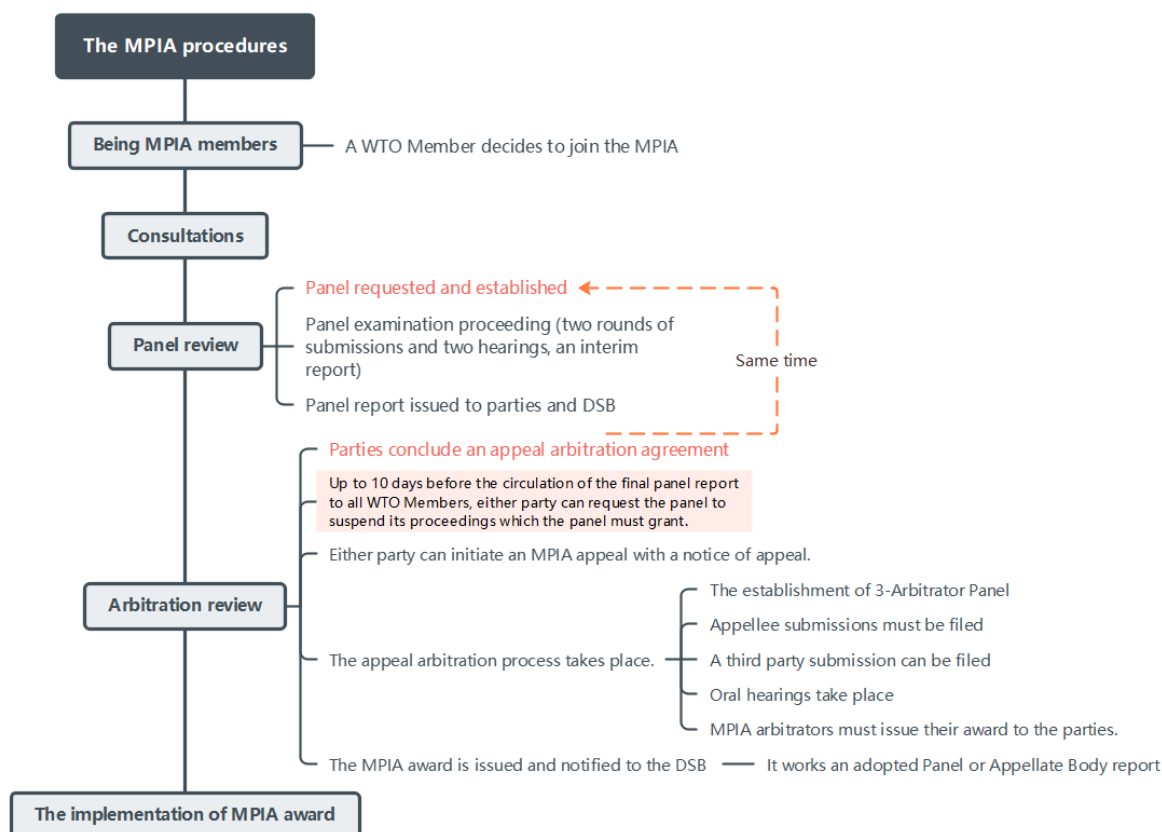


Fig 1. Key procedures for settling WTO disputes via MPIA

The primary feature is MPIA’s preservation of WTO DSB’s “binding character and two levels of adjudication”. Both these two systems are binding on the parties, with identical procedures to follow and same award effect. However, the DSU Article 25 endows MPIA award with a self-confirmed agreement among the members to MPIA disputes since the arbitration award is, in essence, an adopted Panel or Appellate Body report that related parties agree to abide by at the initial stage. This largely ensures the final solution of dispute throughout this process and minimizes the void appeals.

Another feature lies in MPIA’s creative attempt by providing an appeal arbitration mechanism to current impasse. What MPIA offers is a creative “appeal arbitration” mechanism, which involves a set of dispute-resolving procedures to enable an arbitration panel to perform a similar appeal duty to the previous appellate body with binding on both parties at issue. The birth of MPIA makes up for the non-functioning appellate body by providing an arbitration alternative. The MPIA arbitrators play a counterpart role in reviewing and awarding the dispute at issue and facilitating its settlement. This also largely preserves the dispute parties’ right to appeal.

4. Impact of MPIA on International Trade Dispute Resolution

In spite of a limited number of participating members and a relatively small number of cases resorting to MPIA, parties of four disputes (DS537, DS522, DS524 and DS591) have reached appeal

arbitration arrangement since its birth [8]. The smooth completion of settling these disputes prove that the MPIA works and imposing positive impact on international trade dispute resolution.

4.1. Enhancing efficiency and feasibility of dispute resolution mechanisms

In addition to the inherence of previous DSB experience in resolving WTO disputes, MPIA also works as a water-testing alternative to innovate the appeal proceedings with higher procedural efficiency. Specifically speaking, its novelties can be seen from the following performances:

A strict 90-day deadline or shorter arbitration duration. The previous AB's failure to meet the 90-day deadline as is required in Article 17(5) of the DSU for issuing reports is a key objection declared by the United States against the WTO DSB. The US claims its dissatisfaction that AB consistently breached the 90-day time limit and the obligation, and also criticizing its "lack of transparency in stating reasons, estimating the deadline and consulting the parties to the dispute regarding the delay" [9]. MPIA provides a targeted solution to this problem by setting a strict 90-day deadline for the appeal arbitration. Meanwhile, its practice indicates the feasibility of this proceeding.

Word limits on appeal documents and time limits on hearing statements. A consensus has been reached among the MPIA members to follow a word limit when drafting written documents and the time limits for the hearing and oral statements. Specifically speaking, a maximum of 2000 words is made for Notices of Appeal, a maximum of 27,000 words or 40% of the word count of the appealed panel report for Appellant/Other Appellant/Appellee submissions, a maximum of 9,000 words for Third Parties' submissions, a 30-35 minutes' opening statements for Appellant/Appellee and five minutes limit to the closing statements. These limits set are effective for condensing the range of dispute to resolve and key points to state, thus largely improve the dispute-resolving efficiency [10].

Pre-hearing conference to highlight issues at dispute and minimize the irrelevant. When solving the EU-Colombia frozen fries dispute, a pre-hearing was convened by the arbitrators to inform the parties of what are to be explored or focused on at the hearing and help the parties to identify and state key issues in their submissions. This is a novel step in this appeal arbitration process to refrain from issues beyond mandate or those that are not required for settling disputes concerned and are contested by the parties [11]. The successful practice of the pre-hearing gives a possible way out of what the United States has been complaining about AB's unnecessary advisory opinions on issues for DSB's recommendation making.

4.2. Strengthening the legal binding and enforcement of dispute resolution mechanisms

The enforcement of arbitration award is the last but the most crucial phase of trading dispute settlement, whose effective implementation determines whether the dispute-resolving process comes to a successful completion or "appeals into the void".

In this EU-Colombia frozen fries dispute, the EU, at the initial stage, demanded that a first level panel be founded and composed. The evidences of this stage disclosed that Colombia had breached certain provisions of the WTO Anti-Dumping Agreement when performing its anti-dumping duties [12]. Therefore, Colombia could preserve its right to appeal the panel report, but actually not did so. In the arbitration section, the Panel's findings were most confirmed with one reserved by the MPIA appeal arbitrators. So far, the MPIA award was automatically adopted according to DSU Article 25, paragraph 3. At the DSB meeting, Colombia agreed to enforce the arbitrators' award and abide by its obligations under WTO agreements [13]. What comes as follows was the award implementation, which was also under the amicable compliance and retaliation among parties. The MPIA award can be understood as an adopted Panel or Appellate Body report with binding effect to its participating parties based on their previous agreement.

5. Prospects of MPIA and Directions for Improvement

As the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) gains momentum and attracts a growing number of WTO members, it holds the promise of transforming the landscape of global

trade governance. The success of MPIA in resolving disputes and its notable achievements in preserving members' rights to appeal demonstrate its potential as a viable alternative to the non-functional WTO Appellate Body.

5.1. Successful cases and lessons learned

So far, the MPIA has attracted 53 WTO members, despite an absence of such major global trading parties as the United States and Japan. Meanwhile, as an arbitration alternative to resolve trading disputes, a qualified arbitrator pool is the guarantee of effective and high-level arbitration. To this end, on 31 July 2020, the participating parties to MPIA made a formal announcement on an initial pool of 10 standing arbitrators, including some former WTO officials of international law experts from the academic community.

The MPIA's actual performance in resolving disputes has been notable since its inception. The chart [14], below provides an overview of the diverse range of trading disputes, including those related to goods, services and intellectual property, that have been successfully addressed through the MPIA (Figure 2).

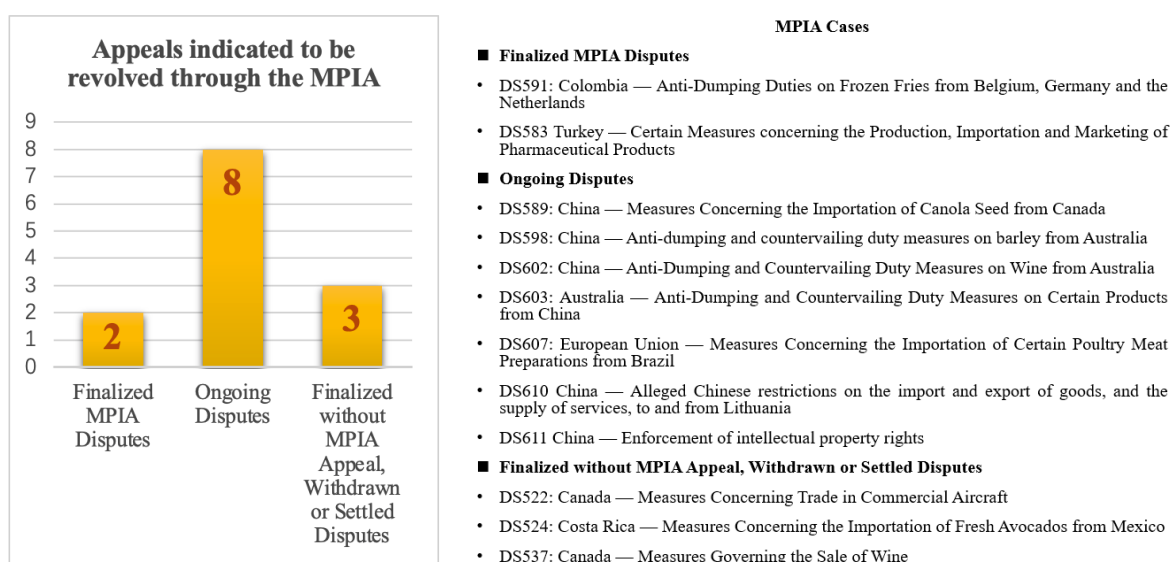


Fig 2. The number of MPIA cases and the specific case names

The successful settlement of disputes, such as EU-Colombia frozen fries dispute (DS591), underscores the value of the MPIA in preserving WTO Members' right to appeal and highlights the necessity of a well-functioning DSB and a diversified dispute settlement mechanism. Apart from appellate, the MPIA incorporates elements of alternative dispute resolutions (ADR) commonly employed by private commercial parties, such as arbitration and mediation. These ADR practices bring flexibility and amicability to the table, enhancing the efficacy of WTO dispute settlement. The creative attempt of an "appeal arbitration" mechanism integrates appeal and arbitration, which supplement each other in settling disputes.

These successful cases and the lessons learned from the MPIA's implementation demonstrate its potential to address the evolving needs of WTO members and their commitment to a robust and efficient dispute resolution mechanism. By further refining its processes, expanding its participant base, and strengthening its legal foundations, the MPIA can contribute to the continued development of a sustainable and effective WTO dispute settlement system.

5.2. Potential challenges and legal issues

While the successful cases prove the value of the MPIA, it is essential to acknowledge the existence of certain drawbacks and challenges associated with this mechanism.

The most prominent challenge is the absence of such major WTO trading parties as the United States and Japan. Professor Shi Jingxia claims in her research that the United States' resistance

imposes the biggest obstacle to the MPIA as it sticks to its declaration that the MPIA fails to get rid of the previous AB's defects [15]. However, it should be made clear that what the United States is rejecting is an appellate body with binding effect to awards not with its side [16]. Although its objections indeed stand in the way to the re-functioning of the WTO DSB, the value of the MPIA to ensure Members' rights to appeal and its future feasibility should not be denied.

Another challenge comes from the temporary nature of the MPIA. This was made clear in the statement foreshadowing the formation of the MPIA by ministers from the European Union and 15 other signatories in early 2020.

Addressing these challenges requires proactive measures to overcome the resistance from major trading parties and to establish a more permanent and widely accepted framework for MPIA. It necessitates engaging in constructive dialogue, addressing concerns, and seeking consensus among WTO members to ensure the long-term stability and efficiency of dispute settlement mechanisms within the WTO framework. By effectively addressing these challenges, MPIA can contribute significantly to the future of the WTO DSB and the resolution of international trade disputes.

5.3. Future trends of MPIA and possible approaches to improvement

The future of MPIA and the WTO's dispute settlement mechanism will be shaped by several key factors.

First, there is a need for diversified means of dispute settlement to ensure members' right to appeal. The current success in resolving private commercial disputes through a combination of appeal, arbitration, mediation and other alternative dispute resolution methods can be drawn upon for settling WTO disputes via a diversified and therefore robust mechanism by involving consultations, appeal and arbitration. This provides not only a relatively stable platform to prevent "appeal into void", but also an attractive solution for those major trading parties with a flexible mechanism to solve specific solutions.

Second, streamlining proceedings is essential to enhance the efficiency of dispute settlement. Implementing measures such as strict time limits and word limits on submissions can expedite the arbitration process, making it more agile and responsive to fast-paced and ever-changing global trade environment.

Third, party autonomy should be emphasized to foster sustainable partnerships. Allowing parties to determine the most suitable means of resolution and actively participate in the process will lead to more mutually acceptable outcomes, reducing disputes and promoting cooperation.

Finally, effective implementation of awards is crucial. Strengthening enforcement mechanisms and promoting compliance with awarded decisions will not only reinforce the binding nature of the MPIA but also encourage parties to abide by the rulings, making the entire dispute resolution process more effective and meaningful.

By proactively addressing these key factors, the MPIA and the WTO's dispute settlement mechanism can adapt and evolve to meet the challenges of the evolving global trade landscape and continue to play a crucial role in promoting international trade and resolving disputes amicably and effectively.

6. Conclusion

In conclusion, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) has emerged as a significant temporary alternative for resolving trade disputes in the absence of a functioning WTO Appellate Body. It offers an innovative appeal arbitration mechanism that enhances efficiency and flexibility in resolving disputes. The MPIA's successful cases and lessons learned have demonstrated its potential as a viable option for preserving WTO members' right to appeal and highlighting the necessity of a well-functioning DSB with a diversified dispute settlement mechanism.

Despite its successes, the MPIA also faces challenges that need to be addressed for its long-term effectiveness. The absence of major WTO trading parties, such as the United States and Japan, and

the temporary nature of the MPIA are significant obstacles that require proactive measures for resolution. Emphasizing party autonomy, streamlining proceedings, and enhancing the enforcement of awards are key approaches for improvement.

Looking ahead, the future of the MPIA and the WTO DSB will be shaped by the adoption of diversified means of dispute settlement, efficient procedural frameworks, and sustainable partnerships. By addressing challenges and implementing proactive measures, the MPIA can play a vital role in the future of the WTO's dispute resolution mechanism, promoting international trade, and ensuring a rules-based global trading environment. Continued efforts to adapt and improve the dispute settlement mechanism will be essential to maintain the WTO's relevance and effectiveness in the ever-changing landscape of international trade dispute resolution.

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