

# ***Multi-Party Interim Appeal Arbitration Arrangement : Nature, Dilemmas and Prospects***

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**Abstract:** After the Appellate Body has become dysfunctional, some WTO members reached multi-party interim appeal arbitration arrangement (MPIA) and set up a temporary appellate arbitration mechanism. Based on Article 25 of the DSU, MPIA has characteristics of both its own and WTO rules. Its establishment has profound significance for global politics, economy and even the reform of WTO's dispute settlement mechanism. However, due to its own legal principles, nature and other factors, MPIA may be easily trapped in difficulties of insufficient effectiveness, lack of official funds and support from the secretariat. Therefore, this article discusses the nature, difficulties and development prospects of MPIA to demonstrate the possibility of being a powerful alternative dispute settlement mechanism after the shutdown of the WTO appellate body and analyzes its advantages such as flexible mechanism.

**Keywords:** WTO, MPIA, DSU, dispute settlement mechanism

## **1. Introduction**

The Appellate Body (AB) of the dispute settlement mechanism of the World Trade Organization (WTO), a world forum aimed at reducing barriers to international trade and ensuring a level playing field, has come to a standstill because the United States has obstructed the initiation of the selection process of members of the AB. With the rise of trade protectionism and counter-globalization in recent years, the WTO Appellate Body is faced with a shortage of judges, conflicting DSU regulations and ambiguous procedures for accepting cases, etc. On January 16, 2020, in the case of India v. U.S. Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products in India (DS436), India and the U.S., as parties to both sides of the dispute, jointly appealed to the Dispute Settlement Body (DSB). The Dispute Settlement Body (DSB) sent a letter stating that the Appellate Body had been suspended and looking forward to the Appellate Body to propose a positive and effective solution to the dispute.

In order to maintain the effectiveness of the rules-based trading system and to allow WTO members to continue to have access to an independent appeals process for dispute resolution, 16 WTO members, including China and the EU, established a separate trade dispute appeals system in March 2020, the Multi Party Interim Appeal Arbitration Arrangement (MPIA). The MPIA is an alternative system for resolving WTO disputes with appeal needs among members in the absence of an operational and staffed WTO Appellate Body. In other words, WTO members can apply the MPIA under Article 25 of the WTO Dispute Settlement Understanding (DSU) and use it as an alternative dispute settlement mechanism. However, as a fledgling institution, MPIA still inevitably faces difficulties such as funding problems, lack of support from the Secretariat, and the absence of trade powers. Based on the implementation perspective of MPIA, this paper will explore the impact of the institutional innovation and dilemmas faced by MPIA on the restart of the Appellate Body and WTO dispute settlement mechanism.

## **2. The Nature of the Temporary Appellate Agency**

### **2.1. Background and Legal Status of MPIA**

The WTO dispute settlement mechanism recently has stopped its normal service work because the appointment of new members for the Appellate body was interfered and even hindered by America. As the one of the core functions in WTO, dispute settlement mechanism plays an important role. And therefore, the global society desperately calls for the alternative one to work as an appellate agency, especially that such condition can hardly be predicted its termination. Finally, MPIA was passed by the negotiation of a part of WTO member states in the context of the outbreak of epidemic in 2020.

MPIA is an appellate agency that settled by some members of WTO to tussle with the shutdown time of appellate body in epidemic situation, which means its temporality considerably depends on the duration of the emergency. Both of the recurrence of the epidemic and American political activity are objective and unpredictable, and if it continues for several more years, MPIA will simultaneously keep this occupation as well. In other words, it cannot be viewed to be transient for its temporality. According to that, although MPIA was characterized as the temporary one shows that the recovery of the appellate agency is still on the top of the work list, whether MPIA is able to strongly protect the rights and interests of countries in this stage becomes the key that really affects its status. Specifically, the main influencing factors are as follows:

Firstly, two things can be drawn from the function assignment of its legal instrument. There are a large number of words expressing mandatory legal obligations in the documents stipulating the agreed procedural part of the case. For example, the term ‘shall’ is heavily used in Attachment I, indicating the ability of the MPIA to provide mandatory protection for the rights and interests of the parties to the dispute. However, the text and the document stipulating the selection process for appellate arbitrators more emphasize the political commitment of participating members. And it should be noted that, due to the current volatile international situation, the political status of the MPIA’s members is different, and their binding force on the various members is relatively low. This functional configuration shows that the traditional architecture of the WTO protocol does not apply to the temporary nature of the above institutions that define such innovation.

Secondly, the attitude of MPIA towards other members also matters. Although the MPIA is negotiated by some WTO members, not by the joint decision of all members, the MPIA is designed according to the DSU Article 25, which specifies that WTO members have the option to resolve disputes through arbitration. Moreover, MPIA has made it clear that it only applies to members who voluntarily participate it, which respects the interests and wishes of other members. At the same time, the MPIA also accepts these members to join in by informing the DSU of their consent, so as to easily protect their rights through the MPIA. This initiative reflects the openness of MPIA and its inheritance

of multilateralism. Therefore, although the MPIA is not agreed upon by all the members, it still obtains an important position in the WTO dispute settlement mechanism under the current pressing circumstances.

## **2.2. The Legitimacy Basis of the MPIA**

Firstly, the design basis of the MPIA stems from Article 25 of the DSU. It has reached a consensus that solving disputes by arbitration under the multilateral trade framework in the Uruguay Round negotiations and was finally finalized in DSU Article. Article 25, paragraph 1, of the DSU, holds that the parties to a dispute may submit it to arbitration after a clearly defined issue dispute, and that this clause does not require every step of the ordinary proceeding must be replaced by someone. As a temporary appeal agency born in the crisis, the truth that MPIA cannot fully cover the appeal agency all application is objective facts. But DSU article 25 in MPIA can meet the needs of the reality and guarantee that it does not lose legal support because of its limitations at the same time, making its ruling has mandatory force on the basis of the legitimacy of recognition.

Secondly, the rationality of MPIA itself is the premise of its legitimacy. It can serve a wide range of trade disputes despite that it is a temporary emergency response device. For instance, the MPIA may govern disputes that occur in different time stages. It can provide services for such as disputes during enforcement and future trade and disputes that occurred before its entry into force but have not been adjudicated. In addition, although the dispute that has already received an interim report from the appellate body panel is not included in the above classification, however, the party to the dispute will be allowed to continue arbitration through MPIA after getting the consent of the other party to the dispute.

Obviously, MPIA takes into account the scope of application and the choice of individual parties to the dispute, which is reasonable and legal.

## **3. Significance of the WTO Multiparty Interim Appellate Body**

### **3.1. Macro Significance**

In 2016, after repeatedly interfering with the selection of WTO Appellate Body members, the U.S., by its status as a significant power, publicly opposed the re-election of South Korean Appellate Body member Jang Seung-Ho, causing widespread criticism from Appellate Body members. The suspension of the WTO Appellate Body not only leaves trade disputes unresolved but may also lead to vicious competition among countries. The MPIA is a rare opportunity to put the WTO dispute settlement mechanism back on track and to re-establish a stable and average Appellate Body. MPIA effectively saves negotiation costs to maximize members' appeal rights and binding decisions and enhance the efficiency and stability of trade dispute settlement[1]. This is a challenge to unilateralism, populism and U.S.-led trade protectionism, as well as the maintenance of the authority and effectiveness of WTO rules.

### **3.2. Effectively Promote the Reform of WTO Dispute Settlement Mechanism**

Promote the improvement of WTO Appellate Body facilities. The primary manifestation of this is that the MPIA has become more flexible in terms of membership and more respectful of the parties' autonomy to disputes. The "consensus" decision-making mechanism of the WTO is inherently flawed and is explained in the Marrakesh Agreement Establishing the World Trade Organization. The MPIA, by uniting more WTO members with the same intention and essential trading partners, increases the power of the arbitral tribunal to recommend the scope of appeal to the disputing parties, so as to maximize the right of appeal and the binding force of the decision of the members, and effectively

enhance the efficiency and stability of trade dispute settlement[2]. Second, to improve the procedural efficiency of appellate arbitration. The MPIA's provisions for arbitration hearings may serve as a valuable template for future appellate bodies when reopening.

## 4. the Dilemma of MPIA

### 4.1. Cause of the Dilemma

First of all, as for basic jurisprudence, MPIA is based on Article 25 of the Understanding Agreement on Dispute Settlement (DSU)[3]. Since Article 21 and 22 of the DSU talk about executive effectiveness of the WTO dispute settlement mechanism, their reference of arbitration is also vital for MPIA. Some scholars believe that the provisions on arbitration in the DSU are specifically stipulated for the situation arising in the WTO dispute settlement. For example, in DSU Article 22, Paragraph 7, "The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement." These are the issues of procedure, but not substantive law. This is different from the ordinary commercial arbitration practice in which both parties can independently negotiate the arbitration matters[4]. In addition, although DSU doesn't prohibit both parties from choosing arbitration as the initial way of reviewing the dispute, it doesn't have a corresponding supporting system. In a nutshell, the so-called "arbitration" in the DSU article is more of the "panel", rather than of the ordinary "arbitration". Therefore, if MPIA acts as an arbitration institution, there will be contradictions on the legal basis. To eliminate this conflict, DSU needs modification after WTO members have unanimously agreed, which, based on WTO members' current attitudes towards MPIA, is undoubtedly unrealistic.

Secondly, as for the nature of the MPIA, from one aspect, the MPIA wording embodies nature of the "political commitment arrangement". European Union Trade Commissioner Hogan (Phil Hogan) noted that the MPIA is implementing the political commitment of some members to the Davos Ministerial Meeting in January 2020. This view is recognized by many scholars in China. The wording only uses the word "shall" for compulsory legal obligations in Annex I, but the more negotiated word "envisage" are heavily used in the text and Annex II. Therefore, it can be considered that the text of MPIA and Annex II reflect the political commitment of the participating members, which is similar to the soft law mechanism under the WTO framework in nature[5], and it itself does not have the ability of legal constraints.

From the other aspect, MPIA is not a "plurilateral agreement". MPIA is still located within the framework of WTO, and the conditions of the plurilateral agreement are mentioned in Annex IV. For the members who join the agreement, the provisions of their rights and obligations belonging to the substantive law rules are stable. This is the point that the temporary effectiveness of MPIA can't compare with. Moreover, according to WTO Article 10, Paragraph 9, addition of a new agreement to the "plurilateral agreement" in Annex IV requires the consensus of the WTO Ministers. Neither has MPIA already in the annex nor applied to WTO Ministers to join the plurilateral agreement. As a result, MPIA cannot be regarded as an integral part of the WTO Agreement, thus invoking the dispute settlement mechanism.

### 4.2. Functioning Crisis

Since the establishment of MPIA, 12 cases have entered into appellate arbitration proceedings. A total of three cases were completed, including one withdrawal of the appealing party and one reaching

settlement[6]. According to Article 12 of Annex I of MPIA, an arbitrator is generally required to issue the award within 90 days following the filing of the Notice of Appeal. However, under the current facts, few cases have been finally decided within this period. In addition to factors like COVID-19 pandemic, substantive and procedural complexity of the controversy that mentioned in official notice, the gap between ideal and reality in MPIA's effectiveness has also had to be taken into account.

### 4.3. Institutional Difficulties

First, the operation problems. The funds needed for the operation of MPIA institutions can generally distinguished into two aspects, namely, the cost required for the arbitrators to hear the case directly and the cost in daily work. Currently, MPIA official hasn't specified the source of funding for the operation of institutions. However, if the WTO rules are used to include the expenses into the normal expenditure budget of the WTO Secretariat, it will not be appropriate since most members of WTO do not join the MPIA[7]. In addition, the original exclusive secretariat of the appellate agency was dissolved because of the dysfunction of the body. There is no regulation whether MPIA can require the restoration of the previously dissolved appellate agency secretariat, or whether it can hire on its own.

On 5 June 2020, the US Ambassador sent a letter to the WTO Director-General, stating that the MPIA should not use the WTO resources and funding, including preselected arbitrators and providing secretariat support[8]. As the main culprit of putting the WTO's appellate body in deadlock, the US opposition to the MPIA was not unexpected. But it also sounded the alarm that MPIA, which lacks official stable funding sources and support from the WTO Secretariat, may end in trouble[15].

Second, there are still some big trading powers not joining in. At present, the number of MPIA members is still small compared with WTO. Although it includes large international trade entities such as China and the EU, the attitude of the trading powers that have not joined to MPIA is unclear, and even some of them have clearly expressed their opposition to it[15].

The United States has repeatedly publicly opposed to MPIA, and in 2020, the United States Ambassador's letter to the WTO Director-General claimed that "the nature of the MPIA appellate agency repeats the mistakes of the appellate agency." [15] In the same year, the WTO dispute settlement body regular meeting was again opposed. Japan made it clear at the WTO dispute settlement mechanism regular meeting in June 2020 that it would not participate in the MPIA because it is uncertain whether the mechanism will achieve the ultimate goal claimed by its supporters. Japan did not respond when the EU ambassador to the WTO invited Japan to join it again and called the EU and Japan like-minded partners. Although in the recently released "the WTO appeal agency dysfunction policy countermeasures research institute and interim" report Japanese scholars think: Japan "has been emphasized to the WTO as the center of the multilateral trading system in the rule of law", but "in recent years because the unilateralism and the WTO appeal agency dysfunction, Japan feels worried", so suggest countries "to join MPIA centering on the EU", and discusses the possibility of "establish a system of air claims counteraction to ensure the effectiveness of the MPIA". However, the Japanese government has not made it clear to join MPIA.

Up to now, the United States, Japan, Russia and other major international trading countries have not joined the MPIA. The author believes that this is because many WTO members still doubt the effectiveness of MPIA. At the 2020 WTO dispute settlement body meeting, about 20 members spoke, reiterated the importance of breaking the deadlock over the appointment of new members to the appellate body as soon as possible, and hoped to rebuild a well-functioning appellate body. It remains to be considered whether countries will join in the future or promote the appellate body recovery. But what is certain is that due to the limited number of member trade, the MPIA is difficult to fully operate and guarantee its effectiveness.



#### 4.4. Dilemma Extension

First, how can the appeal of the WTO members not joining the MPIA be resolved. Although MPIA does not require both parties to be its members, and there was a precedent that the disputed party, although not an MPIA member, in fact reached an appellate arbitration agreement that respects MPIA principles and transferred MPIA arbitrators to participate in case arbitration. However, it is unrealistic to expect the WTO members who do not join the MPIA to agree to actually submit the appeal to the MPIA for arbitration based on their recognition and respect for the MPIA principles. At the same time, some members insist on submitting appeal cases to the appellate body of WTO despite its dysfunction. For example, in 2020, the United States decided to appeal the DS543 ("US - China Goods tariff measures)" report and informed the DSB. However, the case has been suspended because the appellate body is deadlocked. Therefore, the WTO member who does not join the MPIA may get stuck once the case is submitted to the appeal process.

Second, the appellate agency is reinstated after the disposition of the MPIA pending cases. According to Article 15 of the MPIA, it is only effective when the WTO's appellate body is suspended, and its temporary makes most countries hope to soon resume their appellate bodies. Hong Zhao, a former justice of the WTO's appeal body, said: "If global trade rules are not effectively implemented, the world economy going back to the 'law of the jungle'." As far as it stands, how to smoothly transition from the MPIA case to the appellate agency will become a matter of debate.

#### 5. The Development Prospect of WTO Multi Party Interim Appeal Arbitration Institution

MPIA, as an alternative product during the suspension of the Appellate Body, has played an extremely important role in coordinating international trade disputes. At the same time, in the foreword of the text, it was also pointed out that the participating members would regard the continuous improvement of the status of the Appellate Body as a priority, reflecting the close relationship between MPIA and the Appellate Body.

##### 5.1. Although MPIA is a Temporary Institution, It Will Exist for a Long Time in the Future

Article 15 of the MPIA stipulates that participants continue to commit themselves to resolving the appointment of members of the Appellate Body as a priority issue. The MPIA will operate until the Appellate Body returns to normal. This clause indicates that the purpose of MPIA is not to replace the Appellate Body, but as a transitional tool, to retain the overall framework of WTO as much as possible and solve a series of problems caused by the paralysis of Appellate Body. While emphasizing the temporary characteristics of MPIA, it also expressed its expectation for the appeal body to resume normal operation. Moreover, it is worth noting that in the past WTO dispute settlement, nearly 70% of cases were finally appealed to the appeal arbitration institution. It can be seen that members have recognized and trusted the Appellate Body. In addition, the existence of the Appellate Body restricts and supervises the investigation report of the Panel to a considerable extent. Due to the restriction of the Appellate Body, the quality of the Panel's report is guaranteed and the authoritative position of WTO in the settlement of international trade disputes is established.

Under the DSU's stipulation that all parties have the right to appeal the report of the expert group, the suspension of the appellate body will undoubtedly lead to a large number of dispute cases in the pending state. In this case, MPIA has become the best choice to save this crisis situation. To a large extent, it has reduced the negative impact of the suspension of the Appellate Body on international trade. However, the restoration of the Appellate Body is not a simple procedural problem, but a complex and interwoven game of international politics, international economy and national sovereignty. Under the interference of the United States in the election of the judges of the Appellate

Body by repeatedly using the veto power, the restoration of the Appellate Body still has a long way to go. In other words, in the future, MPIA will exist as the "second and final instance" of trade disputes

## **5.2. MPIA Will Attract More Members in the Future Due to Its Flexible Mechanism**

Even though some countries are still holding a wait-and-see attitude on whether to join the MPIA, Articles 12 and 14 of the MPIA clearly stipulate that members can join and withdraw at any time, but the relevant arbitration decisions are still valid for them, giving them the greatest freedom. The convenient way of accession provides a system guarantee for WTO members to safeguard their legitimate trade rights and interests under the WTO through the MPIA mechanism. It reserves the right of the participants to withdraw at any time without constraining the participating members and hindering new arrangements that may be reached among the participating members. It is particularly attractive to small and medium-sized members[12].

In addition, for non MPIA members, interim appeal arbitration can also be adopted. As MPIA is based on Article 25 of DSU, theoretically, all WTO members can appeal their dispute reports to the Provisional Appellate Body. This flexible mechanism gives these nonmember countries the opportunity to wait and see, so that they can first experience the temporary appeal mechanism through individual cases before deciding whether to join. With the above advantages of MPIA, such as convenience and flexibility in the mechanism, we have reason to believe that some WTO members may choose to join after MPIA successfully conducts appeal arbitration[13].

## **5.3. The Healthy Development of MPIA Still Needs to Overcome Many Difficulties**

At present, there are still quite a few countries in the world that have not joined the MPIA, including some big trading countries such as Japan and South Korea, and the United States has repeatedly rejected the Provisional Appeals Body, making it difficult for the Provisional Appeals Body to play its relevant role and attract new members[14]. In addition, since MPIA is only an initiative document, and its binding force on countries is relatively weak, strengthening its referee effectiveness is undoubtedly an important issue that MPIA needs to face in the future. Of course, as a temporary institution, its related funds and support from relevant parties are also difficult problems to be solved. Obviously, it will take a long time to prove whether MPIA can give full play to its role as a temporary substitute for the Appellate Body, and whether it can provide new ideas for WTO dispute settlement and establish a more reasonable arbitration mechanism also requires the active contributions of MPIA members.

## **6. Conclusion**

Up to now, the WTO Appellate Body has been suspended for nearly three years. During this period, MPIA, as a transitional bridge for the restoration of the appellate body, fully demonstrated its characteristics of appeal substitution, and gave play to its advantages in appeal arbitration procedure, decision-making mechanism and law application. Although MPIA is only temporary, its construction of globalization and multilateral system, the maintenance of global trade and the improvement of WTO dispute settlement mechanism undoubtedly bring some confidence to all parties involved. From the current point of view, MPIA is still facing the dilemma of financial constraints, lack of political support and not accession of some major trading countries[15]. However, in the long run, MPIA will still play an important role as the "second and final judge" of international trade disputes for a long time to come. Moreover, with the flexibility of its own mechanism, it will also attract more countries to join. In a word, the Appellate Body is an indispensable part of international trade. At present, MPIA should be taken as an opportunity to promote the standardization and legalization of international trade dispute settlement and strive for the early recovery of the Appellate Body.

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