# The MPIA: A Viable Temporary Alternative

**By:**

Kholofelo Kugler
Gaone Morgan

October 4, 2023

It is hard to believe that on 11 December 2023, it will be four years since the World Trade Organization's (WTO) Appellate Body (AB) was fully functional. Indeed, on 11 December 2019, the terms of two Appellate Body Members (ABMs), Amb. Ujal Singh Bhatia and Mr. Thomas R. Graham, expired. This left Dr. Hong Zhao as the sole ABM in a paralysed AB until 30 November 2020 when her term ended. With this, came the fall of a unique institution in international dispute settlement and the weakening of the WTO's dispute settlement system (DSM), which has been termed the WTO's "crown jewel". The AB's demise was triggered by the United States' (US) refusal to permit the appointment of ABMs. The US has very vocally and consistently stated that the AB had, essentially, become a law unto itself and overstepped its legal mandates set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and as a subordinate institution of the Dispute Settlement Body.

Despite many efforts by the WTO leadership and its Members to avert the crisis, including through the ill-fated Walker Process, the US did not and has still not budged. With few options left, a group of 19 WTO Members, led by the European Union (EU), notified the establishment of the Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the MPIA (MPIA) on 30 April 2020 to preserve the functioning of WTO's two-tiered DSM.

**The MPIA or similar models cannot replace the WTO's two-tiered DSM**

From its inception, as evident in the use of "interim" in its name, the MPIA participating members recognized that the system was a stop-gap measure in the absence of a functioning AB. The MPIA was never meant to replace the AB and all efforts have been taken to ensure that this mechanism replicated the AB as closely as possible and that it remained within the institutional cocoon of the WTO. Nevertheless, the MPIA fulfils an important function. It provides those WTO Members that so desire a functioning appellate review mechanism. While the interim system is not perfect, it has been subject to criticism, it has achieved some success since its establishment.

The MPIA's first arbitral award, *Colombia-Frozen Fries*, was issued in December 2022. Currently, there are seven ongoing disputes in which an MPIA notification was submitted and three cases that were notified but were subsequently finalised, withdrawn, or settled. The authors note that a DSU Article 25 arbitral award in *Turkey – Pharmaceutical Products (EU)* was circulated in July 2022.

However, this is not an MPIA award. Nevertheless, the parties (the EU and Türkiye) entered into an appeal-arbitration agreement under DSU Article 25 that respects the principles of the MPIA. Moreover, two of the three arbitrators appointed for this appeal arbitration were drawn from the MPIA Pool of Arbitrators.

However laudable, the MPIA, or similar models, could not succeed the AB for the following reasons. First, these models are voluntary. Although the MPIA's original membership has increased to 26, it still has not drawn a critical mass of WTO Members. Notably, it has been eschewed by some of the DSM's most frequent users like Argentina, India, Indonesia, Korea, Russia, Turkey, and, of course, the US. It has, admittedly, attracted other active users like Brazil, Canada, China, the EU, Japan, and Mexico. However, the absence of powerful

WTO Members like the US and India from the MPIA poses a legitimacy challenge because those countries keep appealing their disputes into the void, which weakens the effectiveness of both the MPIA and DSM.

*Second*, and as a consequence of the voluntary nature of the MPIA, its rulings will likely have a limited impact on WTO Members, especially those who are not participants. Notwithstanding the brilliant individuals that have been appointed as MPIA arbitrators, it is unlikely that its rulings will achieve universal acceptance like the AB's – notwithstanding the disagreement with some rulings. Legal status of MPIA rulings aside, it would be politically difficult for countries that deliberately rejected the MPIA to recognise its rulings. That said, the US's praise of the MPIA's arbitrators' ruling under Article 17.6(ii) of the *Anti-Dumping Agreement* (ADA) in Colombia-Frozen Fries indicates that WTO Members are paying attention. Some have alluded that non-participants might strategically cite MPIA awards that support their position in future disputes.

*Finally*, the current shift in geopolitics from the multilateral trading system to regional groups and friend-shoring could result in WTO Members not changing the status quo. The US has little incentive to cooperate in reinstating the AB because it is resolving its trade disputes by alternative means, including through unilateral *domestic instruments*, initiating disputes at the USMCA (including on topics, like labour, that are not adjudicated at the WTO), or creating partnerships, like the Indo-Pacific Economic Framework for Prosperity, with Asian countries, except China, in which it wishes to extend its influence. Interestingly, the last request for consultations notified by the US was in July 2019. It therefore appears that the DSM, much less interim solutions like the MPIA are, at least for now, a frivolity.

**Potential challenges to permanently adopting the MPIA or MPIA-like systems**

There are some challenges that arise from maintaining the MPIA or similar ad hoc WTO appeals mechanism. These include budgetary considerations. Some WTO Members have already criticised the use of the WTO budget to finance what is essentially a private club dispute settlement mechanism. Although WTO Members have agreed to fund the MPIA from the WTO's budget, the Members who were against it could change their minds and deprive it of funding.

Consequently, accessing appeal procedures could become a large financial burden for developing countries participating in the MPIA.

Another concern is the possible fragmentation of WTO law. This implies that, while adopted panel reports would continue to form part of the “WTO acquis”, MPIA awards might not – or, at least, not for all WTO Members anyway. Some ordinary panels, particularly in disputes between non-participating WTO Members who are opposed to the MPIA, may shy away from relying on the legal interpretations developed under the MPIA. This could result in a DSM where different interpretations of WTO law are adopted for the rights and obligations of different WTO Members, resulting a body of case law that does not provide security and predictability to the world trading system. The continued splintering of WTO law will ultimately raise questions about the efficacy of the DSM in the first place. Alternatively, awards arising from the MPIA and similar mechanisms would be ignored or referred to very seldomly by ordinary WTO panels.

**Take-aways from Colombia-Frozen Fries**

The key takeaway from the first decision handed down by the MPIA is that the system works. Including as a system that WTO Members use as a procedural basis for their ad hoc DSU Article 25 arbitrations or merely for the convenience of appointing its pre-vetted, highly qualified arbitrators.

However, the award is the arbitrators' interpretation of the standard of review in ADA Article 17.6(ii)) is noteworthy. Pursuant to this provision's two sentences, a panel must interpret the relevant provisions of the ADA (i) in accordance with customary rules of interpretation in the Vienna Convention on the Law of Treaties (VCLT) and (ii) if an ADA provision permits more than one interpretation, the panel must find the investigating authorities' measure consistent if it is based on one of those possible interpretations.

Previous WTO rulings have formulated the order of analysis under Article 17.6(ii) in this manner. The AB (despite opposition from panels) has applied this legal standard to find that "zeroing" is inconsistent with WTO law in disputes like US-Zeroing (Japan), US- Continued Zeroing (EC), and, more recently, US – Orange Juice (Brazil). The AB's stance on zeroing has angered the US. Some argue that the AB's demise was partly fueled by its insistence on outlawing this

US anti-dumping practice.

The arbitrators in *Colombia – Frozen Fries* essentially turned Article 17.6(ii) on its head. They considered that the "sequential analysis" does not pay sufficient regard to ADA Articles 17.6(i) and 17.6(ii) second sentence. The arbitrators proposed the alternative of drawing a line guided by Article 17.6(ii) second sentence beyond which an interpretation is no longer permissible under the VCLT and then conducting an analysis using this outer limit as a guide. If the outcome of the analysis stretches beyond the red line, the investigating authority's measure must be found inconsistent with the ADA. Notwithstanding the adoption of a new legal standard, the arbitrators still found the Colombian authority's interpretation of ADA Articles 5.2(iii) and 5.3 read together impermissible. Hence, the panel's rulings remained undisturbed.

This ruling has sparked some legal discourse about the arbitrators' approach to Article 17.6(ii). However, we do not consider the arbitrators' approach unreasonable because they still followed the prescripts of the provision, even if they inverted the established legal standard. The arbitrator's approach is more deferential to the investigating authority because it assesses those findings first and not last. This might not be so terrible because the very raison d'être of Article 17.6(ii) is to grant investigating authority's methodologies the benefit of the doubt.

**Conclusion**

The AB's demise threatened the existence of the DSM. However, it is still standing, thanks, in part, to the MPIA. While the MPIA fulfils a vital function, WTO Members, especially developing countries, should continue to advocate for a reformed DSM that maintains its independence while remaining responsive and accountable to the WTO membership. Access to a reformed DSM ensures that its benefits are democratised and not limited to the few who can opt for other solutions.

View online: The MPIA: A Viable Temporary Alternative

Provided by Afronomicslaw