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Multiparty Interim Appeal- Arbitration Arrangement (MPIA)

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Introduction

On April 30 2020, 19 Members¹ of the World Trade Organization (WTO) announced a temporary arrangement on the settlement of trade disputes between them referred to as the Multiparty Interim Appeal-Arbitration Arrangement (MPIA).² The MPIA puts in place a contingency mechanism utilizing Article 25 of the Dispute Settlement Understanding (DSU) on account of the current inability of the WTO Appellate Body (AB) to hear appeals due to the blocking of appointment of AB Members by the United States (US).

The interim appeal arbitration procedure seeks to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports.³

Structure and scope

The MPIA comprises of three (3) parts (i) the communication by the participating Members to the Dispute Settlement Body (DSB) laying down the substantive structure and principles governing MPIA; (ii) Annex I - comprising of a template agreement that will be entered into by the parties wishing to participate in an interim appeal arbitration in a dispute and (iii) Annex II - laying down the procedure for selection of arbitrators for the MPIA process.

The scope of the MPIA extends to *“any future dispute between any two or more participating Members including the compliance stage of such disputes, as well as to any such dispute pending on the date of this communication, except if the interim panel report, in the relevant stage of that dispute, has already been issued on that date”*.⁴ However, the participating Members can also choose to apply the MPIA to more advanced disputes on an *ad hoc* basis including those that are currently pending before the erstwhile AB.⁵ Albeit, no dispute pending before the erstwhile AB involve two or more of the participating Members.

Nonetheless, any WTO Member has the option of joining the MPIA by notifying the DSB that it endorses the April 30, 2020 communication.⁶

Some issues concerning MPIA

The MPIA is based on the substantive and procedural aspects of appellate review process under Article 17 of the DSU and seeks to maintain its core features like independence and impartiality.⁷ In order to maintain such core features, MPIA includes certain provisions. This includes the MPIA following a process of selecting a pool of ten (10) arbitrators in a manner similar to that of AB Members.⁸ Each participating Member is allowed to nominate one candidate, subsequently a pre-selection committee⁹ reviews the candidate and recommends it to the participating Members, who then by consensus decide the pool of arbitrators. It is interesting to note that unlike Article 17.3 of the DSU which, specifies that AB Members should be broadly representative of the WTO Membership, the MPIA only requires ensuring *“an appropriate overall balance”*. It is unclear to what extent the MPIA will be sufficiently representative of developed and developing country arbitrators. However, it is relevant

¹ Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay (hereinafter referred to as **“participating Members”**).

² Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO Disputes, *Addendum*, JOB/DSB/1/Add.12, 30 April 2020 (hereinafter referred to as **“MPIA Communication”**).

³ *Ibid*, Preamble, para. 4

⁴ *Ibid*, para.9

⁵ *Ibid*, footnote 3

⁶ *Ibid*, para. 12.

⁷ *Ibid*, para. 3

⁸ *Ibid*, para 4 and Article 17. 3 of the DSU

⁹ *Ibid*, Annex II, para 3, states that *“...pre-selection committee composed of the WTO Director General, and the Chairperson of the DSB, the Chairpersons of the Goods, Services, TRIPS and General Councils.”*

to note that MPIA also envisages appointing candidates who are from non-participating Members.¹⁰ The pool of arbitrators are also provided administrative and legal support independent of the WTO Secretariat staff and its divisions.¹¹ The manner of structure, employment and funding of such administrative and legal support staff is yet to be clarified.

Interestingly, the MPIA also seeks to enhance the procedural efficiency of appeal proceedings.¹² The provisions of the MPIA that enhance such procedural efficiencies appear to address some of the concerns that the US has with the AB process. These include US concerns regarding the 90-day time limit, ruling only on issues necessary for the resolving the disputes, claims under Article 11 of the DSU and precedential value of previous panel and AB reports. Therefore, the MPIA goes beyond simply replicating the procedure adopted by the AB.

For instance, the MPIA requires a stricter adherence to the 90 day timeline for appeals and goes as far as to suggest certain organizational measures in which the timeline can be maintained through “*page limits, time limits and deadlines as well as on the length and number of hearings required*”. These organizational measures are subject to procedural rights and obligations of the parties as well as due process.

In order to comply with the 90-day timeline, the MPIA also allows arbitrators to exclude claims based on Article 11 of the DSU regarding the alleged lack of an objective assessment of the facts by the panel.¹³ Further, the MPIA expressly specifies that “*arbitrators shall only address those issues that are necessary for the resolution of the dispute*”¹⁴. These provisions encourage the arbitrators to exercise judicial economy in MPIA. However, such flexibility deviates from procedure followed by the AB pursuant to Article 17.12 of the DSU mandating that the AB “*address each of the issues raised*” in an appeal.

In terms of practical application, the MPIA would apply to very few ongoing disputes¹⁵. However, it is interesting to note that third parties that are non-participating Members also have the opportunity to participate in the MPIA, in the event they were third parties in panel proceedings. Therefore, it would seem that the participating Members envisage that more WTO Members will join the MPIA process.

ELP Comments

The MPIA seeks to be a stop-gap arrangement that will only be used “as long as the AB is not able to hear appeals of panel reports in disputes among them due to an insufficient number of AB members”.¹⁶ In this regard, the MPIA also envisages that the participating Members will review the arrangement after one year subsequent to the date of the MPIA Communication.¹⁷

In the event, the MPIA lasts longer due to the inability of the WTO Members to resolve the AB impasse, it is difficult to assess whether a significant number of the WTO Memberships will join the MPIA. Although, it is interesting to note that some participating Members like the EU have proposed amending their domestic laws allowing the EU to impose unilateral retaliatory tariffs, in a circumstance, where a party to a dispute is a non-participating Member of the MPIA and appeals the panel report into the void.¹⁸ While the legality of

¹⁰ *Ibid*, Annex II, footnote 1 specifies “For greater certainty, current or former Appellate Body members may be nominated as candidates. If nominated as candidates, they will not undergo the pre-selection process set out in paragraph 3 of this Annex.” Former Appellate Body members also include candidates from non-participating Members.

¹¹ *Ibid*, para. 3

¹² *Ibid*, para. 3

¹³ *Ibid*, Annex 1, para. 13.

¹⁴ *Ibid*, Annex 1, para. 10, “The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.”

¹⁵ See *Costa Rica - Avocados* (complaint by Mexico) where the Panel expects to issue its final report to the parties by the second half of 2020 (WT/DS524/4) and *Canada - Sale of Wine* (complaint by Australia) but interim panel report is scheduled to be issued on April 2 (WT/DS537/11/Add.3).

¹⁶ MPIA Communication, para. 1.

¹⁷ *Ibid*, para.13

¹⁸ Proposal for a 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, COM(2019) 623 final, European Commission, Brussels, 12 December 2019

such unilateral measures if adopted is itself questionable, it is likely that some WTO members may join the MPIA in the presence of a threat of unilateral measures from large economies like the EU.

Notably, key users of the WTO dispute settlement system like the US and India have not joined the MPIA. With respect to the US, the discontent against the AB is evident and it is unlikely that the US will join the MPIA in view of the current US administrations' narrative against the WTO. India has also refrained from joining the MPIA, perhaps it is still considering whether the MPIA is the best available option in the absence of the AB.

It remains to be seen whether other non-participating Members will consider adopting other alternate approaches different from the MPIA to address the absence of the AB. Only time will tell whether the MPIA proves to be a successful interim arrangement or a lasting alternative to the AB.



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

Mumbai

109 A, 1st Floor, Dalamal Towers
Free Press Journal Road, Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

Ahmedabad

801, 8th Floor, Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8

Bengaluru

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

Chennai

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

New Delhi

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400

Pune

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

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 elplaw@elp-in.com

 elplaw.in

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