

Is the MPIA a Solution to the WTO Appellate Body Crisis?

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In an attempt to overcome the current WTO Appellate Body crisis, a number of WTO Members agreed to participate in the Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the Dispute Settlement Understanding (MPIA). The majority of the WTO Members have not yet agreed to participate in the MPIA have been attempting to assess the effectiveness of the MPIA in meeting their interests. This leads to the question as to whether the MPIA can serve as the temporary solution for the Appellate Body crisis. Is it a practically effective mechanism for dispute resolution, or is it simply a political declaration by MPIA participants that they stick to the two-tier dispute settlement system? To respond to these questions, this article analyses the legal basis of the MPIA and its negotiating history. This article also addresses the differences between the appeal mechanisms provided for in the MPIA and the Dispute Settlement Understanding (DSU) and provides a conceptual discussion with regard to the legal nature of the MPIA. Finally, the article identifies the main advantages and drawbacks of MPIA. It should be taken into account that the effectiveness of the MPIA will only be assessed when any of the disputes submitted for consideration under the MPIA rules is resolved.

Keywords: MPIA, arbitration, Article 25 of the DSU, Appellate Body, WTO crisis, WTO Dispute Settlement, appeal mechanism, Appellate Body crisis, DSU, WTO

1 INTRODUCTION

Since 11 December 2019, the Appellate Body of the World Trade Organization (WTO) has been composed of fewer than three members available to serve on a division and has been unable to hear appeals. The reason for this Appellate Body paralysis was the blockage by the United States (US) of the appointment process of the Appellate Body members. The members of the Appellate Body are to be appointed by the WTO Members by consensus¹; thus, consent from the US is

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¹ Article 17.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

necessary. Some scholars point out that the US ‘wish[es] to deploy the Appellate Body crisis to force a return to a more politicized dispute settlement system’.² The Appellate Body ‘lies at the apex of the WTO dispute settlement system’.³ The Appellate Body’s main function is to review panels’ decisions, which sometimes contain legal errors. Its decisions are final and binding upon WTO Members, which are parties to the dispute. More than 30% of Appellate Body decisions are cross-referenced each other, and panels have recurrently followed the Appellate Body decisions with a few exceptions.⁴ Thus, for WTO Members who stick to the rule-based, rather than power-based, system, the effective functioning of the Appellate Body is crucial.

The WTO Membership hopes that the Administration of newly elected President Biden will be ready to at least discuss the Appellate Body crisis in a constructive manner. Since the appointment of new Appellate Body members was blocked, the US has not shared its views on the approach to a specific reform agenda; instead, the US has pressed discussions around divergent views among delegations. US business groups have urged the US to work with WTO Members to overcome the Appellate Body crisis, stating that preserving the WTO dispute settlement system should be an urgent national priority.⁵ President Biden has emphasized the importance of working with allies and partners as well as through international organizations to achieve US foreign and economic policy objectives.⁶ President Biden signed a letter for the US to re-enter the Paris climate accords several hours after the inauguration and is also reinstating ties with the World Health Organization after the Trump administration chose to withdraw US membership and funding in 2020.⁷ However, at the Dispute Settlement Body (DSB) meeting on 25 January 2021 (after Biden had already assumed the presidency), ninety-two WTO Members requested launching a selection process to replace seven Appellate

² Gerhard Erasmus, *The Appellate Body Crisis*, Tralac (15 Dec. 2017), <https://www.tralac.org/discussions/article/12560-the-appellate-body-crisis.html> (accessed 16 Feb. 2021).

³ Amrita Bahri, ‘Appellate Body Held Hostage’: *Is Judicial Activism at Fair Trial?*, 53 J. World Trade 293, 294 (2019).

⁴ Joost Pauwelyn, *Minority Rules: Precedent and Participation Before the WTO Appellate Body*, in *Judicial Authority in International Economic Law* 141–172 (Joanna Jemielniak, Laura Nielson, Henrik Palmer Olsen eds, Cambridge University Press 2016).

⁵ Brett Fortnam, *Without an Appellate Body, What Next for the WTO?*, Inside US Trade 37, 49 (13 Dec. 2019).

⁶ Wendy Cutler, *First Steps for the Biden Administration on the Global Trade Regime*, East Asia Forum (7 Dec. 2020), <https://www.eastasiaforum.org/2020/12/07/first-steps-for-the-biden-administration-on-the-global-trade-regime/> (accessed 16 Feb. 2021).

⁷ *Letter to His Excellency António Guterres*, White House (20 Jan. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/letter-his-excellency-antonio-guterres/> (accessed 16 Feb. 2021); *Acceptance on Behalf of the United States of America*, White House (20 Jan. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/> (accessed 16 Feb. 2021).

Body members whose terms had expired,⁸ yet the US was in disagreement. It is important to note that longstanding US concerns about the WTO – many of which have historically been held more strongly by Democrats than Republicans – will persist and the need for reform will be no less urgent under President Biden than under President Trump. Indeed, it is worth recalling that it was the Obama Administration, not the Trump Administration, that first blocked the reappointment of Appellate Body members in 2016.⁹

In an attempt to overcome the current crisis and to preserve the two-tier dispute settlement system, a number of WTO Members agreed to participate in the Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the Dispute Settlement Understanding (MPIA).

The key question that emerges is whether the MPIA can serve as the temporary solution for the Appellate Body crisis; is it an effective mechanism for dispute resolution, or is it simply a political declaration of the MPIA participants that they stick to the two-tier dispute settlement system?

To respond to these questions, this article first analyses the legal basis of the MPIA and its negotiating history. It then addresses the differences between the appeal mechanisms provided for in the MPIA and the Dispute Settlement Understanding (DSU). This article provides a conceptual discussion with regard to the legal nature of the MPIA and concludes by identifying the main advantages and drawbacks of the MPIA.

2 LEGAL BASIS FOR THE MPIA

The MPIA came into effect on 30 April 2020 with the support of nineteen WTO Members.¹⁰ As of the beginning of February 2021, five other WTO Members have joined the MPIA.¹¹ As noted by Joost Pauwelyn, once ‘positive experiences

⁸ Dispute Settlement Body Meeting, Proposed Agenda for 25 Jan. 2021 (21 Jan. 2021) WT/DSB/W/676, para. 8.

⁹ Clete Willems, *Revitalizing the WTO Under a Biden Administration*, WITA (1 Jan. 2021), <https://www.wita.org/blogs/revitalizing-wto-under-biden/> (accessed 16 Feb. 2021).

¹⁰ Communication from 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, *Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO disputes*, JOB/DSB/1/Add.12 (30 Apr. 2020) (‘MPIA’).

¹¹ See e.g., Communication from Benin, JOB/DSB/1/Add.12/Suppl.3 (29 June 2020); Communication from Nicaragua, JOB/DSB/1/Add.14 (20 May 2020); Communication from Ecuador, JOB/DSB/1/Add.13 (19 May 2020); Communication from Montenegro, JOB/DSB/1/Add.12/Suppl.4 (28 July 2020); Communication from Macao, China, JOB/DSB/1/Add.12/Suppl.6 (18 Sept. 2020).

are booked, more Members may sign up'.¹² Thus, if the MPIA shows its effectiveness, we will likely see more Members joining.

The MPIA contains the text of the arrangement itself with the model-agreed procedures for arbitration under Article 25 of the WTO DSU and the procedures for composition of the pool of arbitrators attached thereto. The MPIA participants agreed upon the pool of ten standing arbitrators on 31 July 2020,¹³ which includes citizens of the European Union (EU), China, Mexico, Canada, Switzerland, Colombia, Singapore, New Zealand, Chile and Brazil.

The main goal of the arrangement is to provide participating Members with an independent and impartial appeal stage until the WTO Membership finds a permanent solution to the situation relating to the Appellate Body crisis.

The WTO Members have already agreed to resolve four disputes in accordance with the MPIA rules. The arbitration agreements are based on model-agreed procedures for arbitration under Article 25 of the WTO DSU annexed to the MPIA, while some specifications were made. In *Canada – Measures Governing the Sale of Wine* (Australia)¹⁴ and *Canada – Measures Concerning Trade in Commercial Aircraft* (Brazil),¹⁵ the parties added additional detailed procedures for the treatment of business confidential information. In *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*,¹⁶ the parties specified that 'the arbitrators shall send advance written questions that are set to be raised at the meeting or meetings with the parties. The arbitrators may pose additional questions at the meeting'. Practically speaking, this addition makes appeal hearings akin to panel hearings, since usually at the appeal stage, the parties have no advance knowledge of the questions that the Appellate Body division will pose in the course of the hearings and the parties are expected to respond to them straightaway. During panel proceedings, parties are usually provided with written questions, or at least the topics for discussion, in advance of the hearings. From this perspective, it is easier to prepare and participate in panel proceedings. In

¹² Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. Int'l Econ. L. 297, 314 (2019).

¹³ *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, JOB/DSB/1/Add.12/Suppl.5 (3 Aug. 2020) ('Communication on the pool of arbitrators').

¹⁴ *Canada – Measures Governing the Sale of Wine*, Agreed Procedures for Arbitration under Art. 25 of the DSU, WT/DS537/15 (3 June 2020), paras 4–5, 11.

¹⁵ *Canada – Measures Concerning Trade in Commercial Aircraft*, Agreed Procedures for Arbitration under Art. 25 of the DSU, WT/DS522/20 (3 June 2020), paras 4–5, 11.

¹⁶ *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*, Agreed Procedures for Arbitration under Art. 25 of the DSU, WT/DS524/5 (3 June 2020), para. 11.

Colombia – Anti-dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands, the parties did not add any changes to the model procedures.¹⁷

The MPIA was made pursuant to Article 25 of the DSU, which provides for the possibility that WTO Members subject their disputes that concern issues that are clearly defined by both parties to expeditious arbitration. This provision of the DSU was introduced on 12 April 1989¹⁸ and was originally suggested by the US delegation.¹⁹ According to the US proposal, '[b]inding arbitration should be available whenever both disputing parties agree, as an alternative to the normal dispute settlement process'.²⁰ The European Economic Community commented that 'the categories of disputes that could be handled by this alternative procedure should be factual and not involve questions of interpretation or of conformity with the General Agreement'.²¹ At the same time, it was highlighted that 'arbitration allows the parties themselves ... to define the scope of the "dispute" and of the jurisdiction of the tribunal and to determine the applicable procedures and substantive rules for the settlement of the dispute'.²²

Thus, the arbitration procedure was initially intended to be used as the first and only stage of the dispute settlement process,²³ mostly in disputes of a factual nature. At the same time, nothing precludes resorting to arbitration procedures as an appeal stage, if so mutually agreed by the parties to the dispute, as the text of Article 25 of DSU is 'flexible enough to support an arbitration that replaces, and reproduces the features of, appellate proceedings'.²⁴ The drafting history shows that the negotiating parties intentionally agreed on this flexibility. 'As such, arbitration within the DSU has not been restricted to simple factual disputes only, thus overcoming the initial hesitance of certain Contracting Parties during

¹⁷ *Colombia – Anti-dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, Agreed Procedures for Arbitration under Art. 25 of the DSU, WT/DS591/3 (15 July 2020).

¹⁸ *Improvement to the GATT Dispute Settlement Rules and Procedures*, Decision of 12 Apr. 1989, L/6489 (13 Apr. 1989).

¹⁹ *Improved Dispute Settlement: Elements for Consideration*, Discussion Paper Prepared by the United States Delegation, MNT.GNG/NG13/W/6 (25 June 1987).

²⁰ *Ibid.*, at 2.

²¹ Negotiating Group on Dispute Settlement, Communication from the EEC, MTN.GNG/NG13/W/12 (24 Sept. 1987), at 3. See also Valerie Hughes, *Arbitration Within the WTO*, in *The WTO Dispute Settlement System 1995–2003* 75 (Federico Ortino, Ernst-Ulrich Petersmann eds, Kluwer Law International 2004).

²² *Concept, Forms and Effects of Arbitration*, Note by the Secretariat, MTN.GNG/NG13/W/20, 3 (22 Feb. 1988).

²³ David Jacyk, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future*, 15 Aust. Int'l L.J. 235, 239 (2008). See also Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* 113 (Aei Press 2001); Thomas J. Schoenbaum, *WTO Settlement: Praise and Suggestions for Reform*, 47 ICLQ 647, 649–650 (1998).

²⁴ Geraldo Vidigal, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, 20 J. World Inv. Trade 862, 876 (2019).

the Uruguay Round'.²⁵ Consequently, the procedure provided for in Article 25 of the DSU can serve as the basis for the appeal arbitration.

3 THE NEGOTIATING HISTORY OF THE MPIA

The potential elements of the appeal arbitration mechanism under Article 25 of the DSU were first suggested by Scott Andersen, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy and Iain Sandford.²⁶ The main practical drawback of the suggested mechanism, which currently remains unresolved, is the lack of administrative support for the mechanism. The authors suggested that the support would be provided by the Appellate Body Secretariat.²⁷ Nevertheless, the Appellate Body Secretariat suspended its work after the US blocked its budget.²⁸

The negotiating history of the MPIA begins with the EU draft proposal 'Interim Appeal Arbitration pursuant to Article 25 DSU' dated 16 May 2019.²⁹ On the basis of this proposal, the EU concluded the bilateral interim appeal arbitration arrangements pursuant to Article 25 of the DSU with Canada³⁰ on 25 July 2019 and with Norway³¹ on 21 October 2019 (hereinafter 'the bilateral arrangements'). The texts of these bilateral arrangements are almost identical, forming the basis for the negotiations of the MPIA. It is important to analyse the differences between the bilateral arrangements and the MPIA to better understand the new developments introduced to the MPIA.

First, the bilateral arrangements stipulated that the arbitrators would be selected by the Director General from the pool of available former members of the Appellate Body.³² The MPIA provides for the possibility of nominating not only former Appellate Body members but also any persons of recognized authority and demonstrated experience in law, international trade and the subject matter of the covered agreements generally. In fact, none of the nominated arbitrators is a former Appellate Body member.³³

²⁵ Jacyk, *supra* n. 23, at 250.

²⁶ Scott Andersen et al., *Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals*, CTEI Working Paper 2017-17 (2017), <https://repository.graduateinstitute.ch/record/295745>.

²⁷ *Ibid.*, at 2.

²⁸ Committee on Budget, Finance and Administration, Report of the Meeting Held on 9 Mar. 2020, WT/BFA/185/Rev.1 (14 Apr. 2020).

²⁹ The EU draft proposal (16 May 2019), <https://worldtradelaw.typepad.com/files/eu-ab-proposal.pdf>.

³⁰ *Interim Appeal Arbitration Pursuant to Article 25 of the DSU Between Canada and the European Union*, JOB/DSB/1/Add.11 (25 July 2019).

³¹ *Interim Appeal Arbitration Pursuant to Article 25 of the DSU Between the EU and Norway*, JOB/DSB/1/Add.11/Suppl.1 (21 Oct. 2019).

³² *Ibid.*, para. 3.

³³ Communication on the pool of arbitrators, *supra* n. 13.

Second, the MPIA provides for the principle of collegiality,³⁴ which is discussed in detail below. This principle was not referred to in the bilateral arrangements.

Third, the MPIA specifically indicates that the parties can agree to depart from the ordinary procedure for dispute settlement, providing flexibility in the procedures. For example, the parties may exclude claims under Article 11 of the DSU³⁵ from the arbitral appeal review³⁶ or extend the deadlines for the appeal review.³⁷ Such provisions were not included in the bilateral arrangements.

Finally, the MPIA applies to any future dispute between any participating Members, including the compliance stage of such dispute, as well as to any pending dispute, except if the interim panel report³⁸ has already been issued.³⁹ With respect to disputes on which interim panel reports have already been issued, the MPIA participants can agree on an ad hoc basis to conclude an arbitration agreement under the MPIA rules.⁴⁰ The MPIA participants shall notify all WTO Members pursuant to Article 25.2 of the DSU of their intention to subject their specific dispute to the appeal arbitration agreement. Regarding the bilateral arrangements concluded by the EU, there were no pending disputes between the parties, which could have been subject to appeal when the bilateral arrangements were agreed upon; thus, the bilateral arrangements were applicable to future disputes only. However, by its nature, a bilateral arrangement gives the parties the opportunity to agree upon the scope of the arrangement, considering not only future disputes but also pending disputes. From this perspective, if the parties to such arrangements have pending disputes and are interested in their resolution, it may be more efficient to negotiate and agree upon an arrangement on a bilateral basis, rather than on a plurilateral basis.

On the basis of the bilateral arrangements, several WTO Members started to negotiate a plurilateral interim appeal mechanism. On 24 January 2020,

³⁴ MPIA, *supra* n. 10, para. 5.

³⁵ Appeals under Art. 11 of the DSU deal with the issue that the panel failed to make an objective assessment of the matter before it and make such other finding as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Such claims include the analysis of the objective assessment of the facts of the case by the panel.

³⁶ MPIA, *supra* n. 10, Annex 1, para. 13.

³⁷ *Ibid.*, para. 14.

³⁸ This is a confidential version of the panel report, issued to the parties of the dispute only, which includes both the descriptive sections and the panel's findings and conclusions. The parties are given the opportunity to request that the panel review precise aspects of the interim report prior to circulation of the final report to the Members (Art. 15 of the DSU). At this stage of the proceedings, the parties to the dispute become aware of the findings of the panel. This would strongly influence the parties' decision to agree to the appeal mechanism under Art. 25 of the DSU. For this reason, the MPIA provides for its 'automatic' application only with respect to the disputes, the outcome of which is not known to the parties.

³⁹ MPIA, *supra* n. 10, para. 9.

⁴⁰ *Ibid.*, fn. 3.

the Ministers of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the EU, Guatemala, the Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland and Uruguay announced the following:

[they] will work towards putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among [themselves], in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding, and which would be in place only and until a reformed WTO Appellate Body becomes fully operational. This arrangement will be open to any WTO Member willing to join it.⁴¹

Three months later, the MPIA was notified by the DSB. The Republic of Korea and Panama refused to join the arrangement despite their initial intent to join the MPIA.

As the author of the alternative appellate mechanism, the EU initially intended simply to copy the relevant provisions of the DSU. However, after plurilateral negotiations, new provisions were introduced in the MPIA to make the mechanism more flexible.

4 THE DIFFERENCES BETWEEN THE APPEAL MECHANISMS PROVIDED FOR IN THE MPIA AND THE DSU

The MPIA envisages the procedures based on the substantive and procedural aspects of the appellate review set forth in the DSU.⁴² At the same time, it contains certain developments designed to enhance the efficiency of the proceedings and changes with regard to the operation of the dispute settlement system.⁴³

First, the arbitrators are selected from the pool of ten standing appeal arbitrators, composed of the MPIA participants⁴⁴ by consensus.⁴⁵ The DSB provides only seven Appellate Body members.⁴⁶ The EU initially proposed selecting arbitrators from the pool of former Appellate Body members⁴⁷; however, the MPIA participants agreed to nominate a new pool of arbitrators, specifying only that former Appellate Body members would not undergo the pre-selection process.⁴⁸

⁴¹ Statement by Ministers of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, Uruguay, Davos, Switzerland (24 Jan. 2020), https://trade.ec.europa.eu/doclib/docs/2020/January/tradoc_158596.pdf.

⁴² MPIA, *supra* n. 10, para. 3.

⁴³ *Ibid.*, para. 3.

⁴⁴ *Ibid.*, para. 4.

⁴⁵ *Ibid.*, Annex 2, para. 4.

⁴⁶ DSU, Art. 17.

⁴⁷ EU draft proposal, *supra* n. 29, para. 3.

⁴⁸ MPIA, *supra* n. 10, Annex 2, fn. 1. *See also* para. 3 which clarifies that the purpose of the pre-selection process is to ensure that the pool of arbitrators comprises only persons of recognized authority, with

The number of possible arbitrators provided for in the MPIA mechanism would most likely give them an opportunity to consider the cases within the established deadlines, especially taking into account that a very limited number of disputes would be covered by the arrangement. This is because, first, as of now, a very limited number of WTO Members have agreed to join the MPIA. Second, it is probable that the US will not join the MPIA, since its position with regard to the Appellate Body blockage is the reason why WTO Members created an alternative appeal mechanism in the first place.⁴⁹ At the same time, the US is party to a huge number of disputes considered within the WTO.

Second, the MPIA envisages the principle of collegiality that provides for the possibility that all members of the pool (but not only a division considering the specific case) receive documents relating to the dispute and discuss the matters of interpretation, practice and procedure.⁵⁰ Working Procedures for Appellate Review also refer to the principle of collegiality that stipulates that Appellate Body members shall convene on a regular basis to discuss matters of policy, practice and procedure.⁵¹ However, the provisions of the MPIA provide for deeper cooperation among members of the pool, as they are in a position not only to discuss certain general matters but also to receive, and consequently to analyse and discuss, the documents with regard to each specific case. It is worth noting that the first draft of the arrangement under Article 25 of the DSU presented by the EU on 16 May 2019 did not provide for the exchange of views between the arbitrators from the roster of former Appellate Body members.⁵² The MPIA provides for a deeper level of cooperation among members of the pool. Such a possibility to discuss the interpretative issues, the specificities of different cases and share the opinions among all members of the pool will inevitably affect the decisions of the divisions assigned to the settling of a specific case. It can even be claimed by some WTO Members to be the promotion of the use of precedent. The alleged precedential nature of the Appellate Body's decisions is one of the primary concerns of the US, which has claimed that the establishment of the 'absent cogent reasons'⁵³ standard by the Appellate Body, in fact, refers to the precedential nature of the Appellate Body's decisions. According to this standard, ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that,

demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

⁴⁹ Mariana de Andrade, *Procedural Innovations in the MPIA: A Way to Strengthen the WTO Dispute Settlement Mechanism?*, 63 QIL, Zoom-out 121, 147 (2019).

⁵⁰ MPIA, *supra* n. 10, para. 5.

⁵¹ Working procedures for Appellate Review, WT/AB/WP/6 (16 Aug. 2010), para. 1 of Rule 4.

⁵² EU draft proposal, *supra* n. 29.

⁵³ Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (adopted 20 May 2008), para. 160.

absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case. As an alternative, the US suggests applying the standard of ‘persuasiveness’⁵⁴ but fails to explain how this standard is different from the one suggested by the Appellate Body. It seems that the ‘distinctions between the Appellate Body’s approach of “absent cogent reasons” and the United States’ preferred approach of persuasiveness are distinctions without much, if any, real difference apart from the choice of nomenclature’.⁵⁵ However, both standards can be applied under the MPIA. Nothing in the MPIA prevents the arbitrators from diverging from past Appellate Body decisions, or from those issued by the MPIA arbitrators, and ‘this is a way to thread the needle and make everyone, including the US, happy’.⁵⁶

Third, administrative and legal support shall be provided by the structure, answerable only to the appeal arbitrators entirely separate from the WTO Secretariat staff and its divisions supporting the panels.⁵⁷ The Appellate Body’s work was supported by the Appellate Body Secretariat. It is still unclear how, in practice, the WTO Secretariat will organize the legal support of the appeal review under the MPIA. The dispute settlement process in the panel stage is usually supported either by the Legal Division or by the Trade Remedy Division, depending on the subject matter of the dispute. Under the MPIA, these divisions cannot provide support during the appellate review stage. As noted above, the Appellate Body Secretariat suspended its work after the US blocked its budget. The members of the Appellate Body Secretariat have been temporarily reassigned to other divisions.⁵⁸ The WTO Secretariat established a Division responsible for Knowledge and Information Management, Academic Outreach and the WTO Chair’s Programme on 26 June 2020. This division is chaired by the former director of the Appellate Body Secretariat.⁵⁹ However, the competence of the new division does not envisage participation in the dispute settlement process

⁵⁴ Statements by the United States at the Meeting of the WTO Dispute Settlement Body (18 Dec. 2018), para. 36, https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_Stunt_as-deliv_fin_public.pdf.

⁵⁵ James Bacchus & Simon Lester, *The Rule of Precedent and the Role of the Appellate Body*, 54 J. World Trade 183, 197 (2020).

⁵⁶ Bashar H. Malkawi, *Decisions of MPIA Arbitration Panels and Their Jurisprudential Value* (20 June 2020), https://www.researchgate.net/publication/342336523_Bashar_H_Malkawi_Decisions_of_MPIA_Arbitration_Panels_and_their_Jurisprudential_Value/stats.

⁵⁷ MPIA, *supra* n. 10, para. 7.

⁵⁸ Meeting of the Committee on Budget, Finance and Administration, *supra* n. 28.

⁵⁹ Terence P. Stewart, *WTO Dispute Settlement – With Appellate Body Currently Non-Operational, AB Secretariat Personnel Have Been Shifted to Other Divisions*, Current Thoughts on Trade (29 June 2020), <https://currentthoughtsontrade.com/2020/06/29/wto-dispute-settlement-with-appellate-body-currently-non-operational-ab-secretariat-personnel-have-been-shifted-to-other-divisions/> (accessed 16 Feb. 2021).

under the MPIA.⁶⁰ '[T]he situation that the same pool of staff assists both the appeal arbitration and panel proceedings would reduce the value of appeal arbitration in providing a second review of panel reports'.⁶¹

The comparison of the relevant provisions of the DSU and the MPIA shows that the arrangement is indeed based on the appeal mechanism of the DSU. At the same time, the comparison also reveals that the arrangement provides for a larger number of arbitrators who reinforce the principle of collegiality, which is not established in the DSU itself. The MPIA incorporates a more flexible approach with regard to some procedural matters described above. The MPIA does not clearly resolve the problem of administrative and legal support.

5 THE LEGAL NATURE OF THE MPIA

An interesting point to be considered is the legal nature of the MPIA, which remains uncertain. As was noted by Gerlado Vidigal:

[i]f the DSB is required to make a substantive decision to apply the agreement between the parties rather than the DSU, this decision (like all DSB decisions) must be made by consensus, and is therefore subject to a block by any WTO Member present at the meeting. While in principle WTO Members comply with in-dispute agreements, the lack of enforceability may produce significant legal hurdles if the question arises before the DSB.⁶²

The MPIA participants intentionally referred to the 'arrangement' rather than to the 'agreement'. The MPIA is not a legally binding treaty but rather a political declaration of the intention to resort to appeal arbitration instead of the Appellate Body review under Article 17 of the DSU. Theoretically, the respondent may reject entering an arbitration agreement with respect to the specific dispute. In such situations, the DSB would not be in the position to enforce the MPIA.

By its legal nature, the MPIA can be compared with 'procedural agreements', such as 'agreements not to appeal'⁶³ and 'sequencing understandings'.

'Agreements not to appeal' were agreed upon in a few disputes due to the inability of the Appellate Body to hear the appeals. For example, in the *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods From Korea*, the US and Korea confirmed that if, on the date of the circulation of the Panel report under Article 21.5 of the DSU (which confirms whether the respondent

⁶⁰ 'Divisions', https://www.wto.org/english/thewto_e/secret_e/div_e.htm.

⁶¹ Xiaoling Li, *DSU Article 25 Appeal Arbitration: A Viable Interim Alternative to the WTO Appellate Body?*, 15 *Glob. Trade Cust. J.* 461, 474 (2020).

⁶² Vidigal, *supra* n. 24, at 878.

⁶³ The MPIA also contains the agreement by the participating Members not to pursue appeals under Arts 16.4 and 17 of the DSU, para. 2.

complied with the recommendations and rulings of the DSB in the initial dispute), the Appellate Body was composed of fewer than three members available to serve on a division in an appeal in these proceedings, they would not appeal that report under Articles 16.4 and 17 of the DSU.⁶⁴

‘Sequencing understandings’ are agreed upon by the WTO Members more frequently to establish the order of two procedural stages.⁶⁵ Under Article 21.5 of the DSU, the parties to the dispute have recourse to the dispute settlement procedures to resolve a disagreement as to the existence or consistency of the measures taken to comply with the DSB rulings and recommendations within a reasonable period of time. At the same time, Article 22.2 of the DSU provides for the right to request authorization to suspend concessions or other obligations if the respondent fails to bring its measure found to be inconsistent with the WTO agreements in compliance with the DSB recommendations. It is not specified in the DSU, whether it is necessary to receive the confirmation from the DSB that the measure found to be inconsistent with the WTO agreements was not brought into compliance before requesting the authorization to suspend concessions, i.e., whether it is necessary to first receive a compliance panel report under Article 21.5 of the DSU before resorting to retaliation under Article 22 of the DSU.

In practice, parties usually comply with such agreements; however, in regard to enforcement, such agreements/understandings will most likely not be considered legally binding. Disputes concerning the procedural agreements are not covered by the DSU, and ‘it is, therefore, doubtful if a party may use the DSU dispute settlement procedures to force another party to comply with such agreement’.⁶⁶

issue of validity of a procedural agreement was put before the arbitrators in *Brazil – Aircraft*.⁶⁷ The matter at issue was whether the term ‘report under Article 21.5 of the DSU’ of the sequencing understanding between Canada and Brazil

⁶⁴ Understanding between the Republic of Korea and the United States regarding Procedures under Arts 21 and 22 of the DSU, WT/DS488/16 (10 Feb. 2020), para. 4; See also Understanding between Indonesia and Viet Nam regarding Procedures under Arts 21 and 22 of the DSU, WT/DS496/14 (27 Mar. 2019), para. 7.

⁶⁵ See e.g., *Brazil – Export Financing Programme for Aircraft*, Recourse by Canada to Art. 21.5 of the DSU, WT/DS46/13 (26 Nov. 1999), Annex; *Canada – Measures Affecting the Export of Civilian Aircraft*, Recourse by Brazil to Art. 21.5 of the DSU, WT/DS70/9 (23 Nov. 1999) Annex; *United States – Subsidies on Upland Cotton*, Understanding between Brazil and the United States Regarding Procedures under Arts 21 and 22 of the DSU and Art. 4 of the SCM Agreement, WT/DS267/22 (8 July 2005); *Brazil – Certain Measures Concerning Taxation and Charges*, Understanding Between Brazil and Japan Regarding Procedures under Arts 21 and 22 of the DSU WT/DS497/15 (9 Jan. 2020).

⁶⁶ Matilda J. Brolin, *Procedural Agreements in WTO Disputes: Addressing the Sequencing Problem*, 85 Nord. J. Int’l L. 65, 83 (2016).

⁶⁷ Decision by the arbitrators, *Brazil – Aircraft*, WT/DS46/ARB (28 Aug. 2000), paras 3.6–3.10.

covers only the panel report or the Appellate Body report. In their bilateral agreement, the parties set forth 'that the deadline for DSB action under the first sentence of Article 22.6 of the DSU shall be 15 days after the circulation of the report under Article 21.5 of the DSU'.⁶⁸ This provision means that the complainant can request authorization to suspend concessions only fifteen days after it was established that the measures taken to comply do not implement the recommendations and rulings of the DSB. The interpretation issue put before the arbitrators was whether this provision implied that authorization to suspend concessions can be requested fifteen days after the circulation of the panel report or the Appellate Body report. Canada stated that arbitrators are not authorized to interpret such a bilateral procedural agreement. The arbitrators intentionally avoided responding to this issue, stating that at the DSB meeting of 22 May 2000, it was agreed not to seek countermeasures 'pending the Appellate Body report and until after the arbitration report in the present case'.

The limited jurisdiction of the DSU thus shows the weak legal status of the procedural agreements in WTO law. 'They cannot be applied and enforced in a panel procedure and the alternative ways of giving them legal effect are at least uncertain'.⁶⁹

The MPIA is a procedural arrangement between the limited number of WTO Members highly unlikely to be enforced or even considered by the DSB. The rules and procedures of the DSB apply only to the disputes brought pursuant to the covered agreements.⁷⁰ The MPIA, similar to agreements not to appeal and sequencing understandings, is not a covered agreement within the meaning of Article 1 of the DSU; consequently, the DSB will have very limited authority to consider it.

6 ADVANTAGES AND DRAWBACKS OF THE MPIA

Whether the MPIA is truly a practical solution to the Appellate Body crisis is a very controversial issue. Each WTO Member is invited to join the MPIA by its participants. The reasons for participation can include the following.

First, from the systemic perspective, the MPIA preserves the two-stage dispute settlement system and prevents the blockage of unresolved disputes in the non-functioning Appellate Body. The US, Saudi Arabia, Korea and the EU have

⁶⁸ Procedural agreements in *Brazil – Export Financing Programme for Aircraft (Brazil – Aircraft)*, WT/DS46/13 (23 Nov. 1999), para. 5.

⁶⁹ Brolin, *supra* n. 66, at 83.

⁷⁰ The covered agreements include Agreement Establishing the WTO, Multilateral Trade Agreements, Agreement on Trade in Civil Aircraft and Agreement on Government Procurement.

already appealed seven disputes ‘into the void’.⁷¹ These disputes are ‘frozen’ until either the parties reach a mutually acceptable solution (to submit the dispute to arbitration or with regard to the substance of the dispute) or the Appellate Body becomes operational.

A second systemic consideration is that the working mechanism of the dispute settlement makes international trade more predictable and effective, preventing parties from imposing protectionist measures, which negatively affects the development of international trade.

Third, the MPIA provides for the possibility to review panels’ decisions, which sometimes contain legal errors. For example, in *Korea – Radionuclides (Japan)*, the Appellate Body reversed most of the panel’s findings. The Appellate Body concluded that the panel failed to fulfil its mandate, considering that a number of claims were outside the panel’s terms of reference. Moreover, the Appellate Body found several legal mistakes, which led to the conclusion that most of the measures claimed to be inconsistent with the WTO provisions were found to be in compliance with them, contrary to what had been found by the panel.

Fourth, the MPIA addresses some of the problems identified by the WTO Members with respect to the Appellate Body.⁷² For instance, with regard to the binding ninety-day period to consider the appeals provided for in the DSU,⁷³ which was not followed by the Appellate Body, the MPIA provides for the same period, allowing the arbitrators to take the necessary organizational measures to streamline procedures, such as page limits for submissions, time limits and deadlines.⁷⁴ At the same time, the MPIA provides for the possibility of extending the ninety-day period if the parties so agree.⁷⁵

⁷¹ *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, Notification of Appeal by the Republic of Korea under Arts 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS484/25 (18 Dec. 2020); *United States – Tariff Measures on Certain Goods from China*, Notification of an Appeal by the United States, WT/DS543/5 (27 Oct. 2020); *United States – Countervailing Measures on Softwood Lumber from Canada*, Notification of an Appeal by the United States, WT/DS533/5 (29 Sept. 2020); *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)*, Notification of an Appeal by the European Union, WT/DS494/7 (1 Sept. 2020); *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, Notification of an Appeal by the Kingdom of Saudi Arabia, WT/DS567/7 (30 July 2020); *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Joint Communication from India and the United States, WT/DS436/22 (16 Jan. 2020); *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, Notification of Appeal by the Republic of Korea under Arts 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS553/6 (1 Feb. 2021).

⁷² See e.g., United States Trade Representative (USTR), *Report on the Appellate Body of the World Trade Organization* (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

⁷³ Article 17.5 of the DSU.

⁷⁴ MPIA, *supra* n. 10, para. 12.

⁷⁵ *Ibid.*, para. 14.

Finally, from the strategic perspective, some WTO Members could promote the MPIA to counteract the policy of the US.

At the same time, there are a number of significant unresolved issues that make participation in the MPIA impracticable and may lead to unpredictable consequences.

First, very few WTO Members have agreed to join the MPIA. The number of disputes among MPIA participants is insignificant; there are only four pending disputes, which have been notified to be further considered under the MPIA rules, if necessary. In general, disputes among MPIA participants account for approximately a quarter of the total DSU case load.⁷⁶

Second, MPIA is not a legally binding treaty and cannot be enforced. MPIA participants can act in bad faith and refuse to resolve disputes through the mechanism contained therein at any time.

Third, the MPIA does not resolve most of the problems announced by the US with regard to the Appellate Body.⁷⁷ For instance, the MPIA repeats the provision of Article 17.6 of the DSU, stipulating that appeals shall be limited to issues of law covered by panel reports and legal interpretations contained therein.⁷⁸ However, this provision does not address the situation that arises when the arbitrators do not comply with this restriction, leaving this concern unsettled.

In its preamble, the MPIA refers to the principles of 'consistency and predictability'. In contrast, the DSU does not contain a reference to 'consistency', referring instead to the principles of 'security and predictability'.⁷⁹ The usage of the term 'consistency' was not accidental and seems to promote the idea of a coherent case law. Moreover, the MPIA contains the provisions allowing all members of the pool of arbitrators to receive documents relating to a dispute and to discuss matters of interpretation, practice and procedure.⁸⁰ This infers that the arbitrators in new disputes would be governed by the same principles and ideas developed by those of previous disputes and most likely would come to similar conclusions. These provisions promote the precedential nature of awards strongly criticized by the US.

Fourth, the legitimacy of an award issued on the basis of the MPIA rules is weaker than that of an Appellate Body report. '[A]n arbitral award lacks the legitimacy to be treated as an Appellate Body report or acquire de facto precedential value unless they are rendered by arbitrators jointly selected by all or at least

⁷⁶ Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences*, 54 J. World Trade 667, 680 (2020).

⁷⁷ USTR, *supra* n. 72.

⁷⁸ MPIA, *supra* n. 10, Annex 2, para. 9.

⁷⁹ Article 3.2 of the DSU.

⁸⁰ MPIA, *supra* n. 10, para. 5.

most Members'.⁸¹ The arbitral award under the MPIA would be issued by the arbitrators selected by only a few WTO Members. The MPIA provides that '[t]he parties agree to abide by the arbitration award, which shall be final. Pursuant to Article 25.3 of the DSU, the award shall be notified to, but not adopted by, the DSB and the Council or Committee of any relevant agreement'.⁸² The Appellate Body reports were to be adopted by the DSB pursuant to Article 17.4 of the DSU. This provision is applied on the basis of 'negative consensus', meaning that the report would not be adopted only if the WTO Members agreed not to adopt the report. However, at the same time, formal approval of the report by the WTO Membership made the report more legitimate.

Fifth, it is very unclear how the MPIA appeal mechanism will operate in practice, especially taking into account a lack of clear understanding with regard to the administrative support of the mechanism.

Finally, some WTO Members do not want to exacerbate their relations with the US.

7 CONCLUSION

The main goal of the MPIA is to provide participating Members with an independent and impartial appeal stage until the WTO Membership finds a permanent solution for the Appellate Body crisis. Some WTO Members have already agreed to resolve four disputes in accordance with the MPIA rules.

Despite the fact that negotiating history shows that the initial arbitration procedure under Article 25 of the DSU was intended to be used as the first and only stage of the dispute settlement process in disputes of a factual nature, this provision is flexible enough to be used as an interim mechanism to replace and reproduce the features of the Appellate Body proceedings.

The MPIA provides certain changes in the procedure established under the DSU. First, the arbitrators are selected from the standing pool of ten appeal arbitrators; second, the MPIA promotes the principle of collegiality, providing deeper cooperation among the arbitrators; and third, it gives the parties more flexibility, allowing them, for instance, to refuse to appeal to the panel report on the basis of Article 11 of the DSU.

From the systemic perspective, the MPIA preserves the two-stage dispute settlement system and prevents the blockage of unresolved disputes in the non-functioning Appellate Body. It also retains the working mechanism of the dispute settlement that makes international trade more predictable and effective,

⁸¹ Li, *supra* n. 61, at 468.

⁸² MPIA, *supra* n. 10, Annex 1, para. 15.

preventing parties from imposing protectionist measures. The MPIA provides for the possibility of reviewing panels' decisions, which sometimes contain legal errors and address some of the problems indicated by the WTO Members with respect to the Appellate Body. From a political perspective, some WTO Members could promote the MPIA to counteract the policy of the US.

At the same time, the practical effectiveness of MPIA is doubtful. One of the main drawbacks of the MPIA is that it is a procedural arrangement between a limited number of WTO Members, which is highly unlikely to be enforced or even considered by the DSB. The MPIA, similar to the agreements not to appeal and sequencing understandings, is not a covered agreement within the meaning of Article 1 of the DSU; thus, the DSB will have very limited authority to consider it. Consequently, the MPIA participants may refuse to use the mechanism when it would be beneficial to them without any legal consequences.

Moreover, very few WTO Members have agreed to join MPIA. The number of disputes among the MPIA participants has been insignificant. The legitimacy of an award issued on the basis of the MPIA rules is weaker than that of an Appellate Body report. The MPIA does not resolve most of the concerns of the WTO Members with regard to the Appellate Body.

Finally, it is unclear how the MPIA will work in practice, especially taking into account a lack of clear understanding with regard to the administrative support of the mechanism.

Thus, the MPIA is more appropriate to be regarded as a political declaration of its participants to stick to the two-tier dispute settlement system. It will only be possible to assess the practical effectiveness of the MPIA when any of the disputes submitted for consideration under the MPIA rules are, in fact, resolved. Meanwhile, participation in this mechanism continues to raise serious concerns.

