Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

TTLF Working Papers

No. 90

The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO?

Marie Van Luchene

2022

TTLF Working Papers

Editors: Siegfried Fina, Mark Lemley, and Roland Vogl

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Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Marie Van Luchene is an attorney member of the Dutch Brussels Bar in Belgium. Marie works as an international trade lawyer at VVGB Advocaten/Avocats, a tier 1 independent international law firm advising companies, industry associations and governments in various areas of the law.

Prior to joining VVGB, Marie earned her Bachelor Degree in Law (LL.B.) in 2019 and her Master Degree in Law (LL.M.), cum laude, in 2021 both from the University of Ghent, Belgium. Marie pursued an LL.M. in European and International Business Law at the University of Vienna in 2021 with a concentration on European and international trade and economic law. In 2022, Marie eared her Master Degree in Law (LL.M.) from the University of Vienna with distinction. During the LL.M. program, she also attended the International Professional Certificate Summer Program Understanding U.S. Intellectual Property Law at Stanford Law School.

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Suggested Citation

This TTLF Working Paper should be cited as:
Marie Van Luchene, The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO?, Stanford-Vienna TTLF Working Paper No. 90, http://ttlf.stanford.edu.

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Abstract

On 10 December 2019, due to the United States, which for months blocked appointments of members to the Appellate Body, the World Trade Organization's AB fell into a state of paralysis. From that day on, the AB no longer had the required quorum to make appeal decisions. Today, the WTO's dispute settlement system can still work up to the panel stage but as soon as an appeal is filed against a panel report, meaning at the non-operative AB, the appeal ends up in limbo and a solution to the trade dispute remains out of sight. The EU pushed forward first, in cooperation with Canada, an interim solution, specifically the Multi-Party Interim Appeal Arrangement, which will be applied as long as the AB remains inoperative. The MPIA, which now includes 52 WTO Members, is based on Article 25 of the DSU and provides for a reflection of key features of arbitration under the WTO regime. At the same time, the MPIA present some new ideas that came up during the DSB discussions to enhance and innovate the operation of the AB, for example through organizational measures and substantive remedies. How the MPIA performs in practice is unclear so far since there are no fully-fledged practical examples available to date. The MPIA's advantages among others include the fact that it retained the concept of a two-stage dispute settlement system and it tackles some procedural issues raised by WTO Members over the last few years. However, at the same time, there are some adverse aspects such as the few participating members and its not binding legal character.

Foreword

It is with a sense of gratitude that I put the finishing touch on my master's thesis, which is the crowning achievement of an educational and memorable academic journey. A special year of my life is coming to an end and therefore I take this opportunity to thank some people who have surrounded and supported me during this period.

First of all, I owe an extended thank you to the professors and academic staff of the LL.M. European and International Business Law program of the University of Vienna. Their enthusiasm and expertise in various legal fields made studying this year very enjoyable.

Second, I would like to thank my family for their continuous support and involvement in this academic year. Only thanks to them was I able to complete this study and get a taste of life abroad for which I show immeasurable gratitude.

And finally, an extensive thank you is owed to my friends and the people I've met this year, both inside and outside the program, who made my Vienna life a unique experience. I hope to call many of them my friends for a long time to come and wish them every success in the future.

Vienna, July 2022

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ABBREVIATIONS

i.	AB	Appellate Body
ii.	ASCM	Agreement on Subsidies and Countervailing Measures
iii.	Common L. Rev.	Common Law Review
iv.	DSB	Dispute Settlement Body
ix.	EU	European Union
v.	DSM	Dispute Settlement Mechanism
vi.	DSS	Dispute Settlement System
vii.	DSU	Understanding on rules and procedures governing the settlement of disputes
viii.	EJIL	The European Journal of International Law
x.	IAAA	Interim Appeal Arbitration Arrangement
xi.	JWIT	Journal of World Investment and Trade
xii.	MPIA	Multi-Party Interim Appeal Arbitration Arrangement
xiii.	TBT	Agreement on Technical Barriers to Trade
xiv.	TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
xix	SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
xv.	U.S.	United States
xvi.	USTR	United States Trade Representative

xvii.	WTO	World Trade Organization
xviii.	JIEL	Journal of International Economic Law

INTRODUCTION

When the World Trade Organization (*hereafter referred to as* 'WTO') was established in 1995, trade negotiators, international political leaders, policy makers, and international economic law scholars and practitioners welcomed the promising dispute settlement system.[1] Because of these enforceable dispute resolution procedures, the WTO has long been considered a genuine effective institution. The legal procedure is as follows: if the dispute cannot be resolved through consultation between the parties within sixty days, the complaining party may request the establishment of an ad hoc panel.[2] This panel will issue reports on disputes over the compliance with the WTO rights and obligations of its Member States involved in the trade conflict. Any party to a dispute may appeal a panel report to the World Trade Organization's seven-member permanent Appellate Body (*hereafter* referred to as 'AB').[3] The AB has the power to uphold, modify or overturn the legal interpretations adopted by the panel and it consequently issues reports that are final and binding. Since the creation of the WTO, the dispute settlement mechanism (*hereafter referred to as* 'DSM') has resolved a remarkable amount of trade disputes and has developed a reputation as the "crown jewel of the global trading system".[4]

However, in recent years, the United States have obstructed the appointment of new judges to the AB which meant that on 10 December 2019 the Appellate Body lost its quorum to operate.[5] As a

[1] Chang-fa Lo, 'Let the Jewel in the Crown Shine Again' in Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2019) 3-13.
[2] Article 4.7 Dispute Settlement Understanding.
[3] Article 17.4 Dispute Settlement Understanding.
[4] Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) Peterson Institute for International Economics Policy Brief, 1 <https://www.piie.com/system/files/documents/pb18-5.pdf> accessed 19 April 2022.
[5] Bernard M Hoekman and Petros C Mavroidis, 'Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?' (2021) Vol. 32 EJIL 743, 744.

result, appeals against panel reports ended up "in limbo", bringing litigation in several international trade disputes to a standstill. As a response to this deadlock, a subdivision of the WTO Member States has created an interim appeal mechanism, the so-called Multi-Party Interim Appeal Arbitration Arrangement (*hereafter referred to as* 'MPIA'). The ratio behind the MPIA is to commit the signatories that have acted as dispute party in front of a panel to either accept the panel report or to use the MPIA to appeal the panel finding by means of arbitration.[6]

In the first part of this thesis, the reason behind the existence of the MPIA will be discussed, in other words why it arose. To do so, more light will be shed on the actual crisis unfolding in the Appellate Body, more precisely on how exactly the ongoing deadlock came about. Logically, the preeminent motivations of the U.S. blocking practices of nomination of AB members are therefore briefly highlighted in this section.

Once the cause for existence of the MPIA is revealed, the second part of the thesis will elaborate on the creation of this MPIA. Answers will be provided to questions such as: *Which WTO Member States took the lead in creating this interim arrangement? Which Member States are currently signatory of the MPIA? What developments took place during the negotiations? Were there WTO Member States that counterbalanced the proposal, and if yes, which ones? What were the dominant arguments of the opposing Member States?* Put differently, this section of the thesis thus discusses the realization of the Multi-Party Interim Appeal Arbitration Agreement.

The third part of this dissertation reviews in detail the content and scope of the MPIA. The substance of the interim agreement will be assessed in order to verify which elements were adopted from the

[6] ibid 745.

classic Dispute Settlement System (*hereafter referred to as* 'DSS') and which elements were modified.

Having gained insight into the precise operation of the MPIA, the next chapter analyzes the development of the interim agreement in practice by putting the magnifying glass on disputes where the MPIA was used or is currently being used as a resolution system.

As a conclusion to this thesis, a critical analysis will be drawn up on the basis of the observations made throughout the dissertation. In this way, an attempt is made to constitute a comprehensive answer to the central research question: '*Is the MPIA a mere interim solution or the pathway to fixing the WTO?'*.

CHAPTER I Reason behind the Existence of the MPIA

I. Chronological Unfolding of the AB Crisis

Despite the fact that the United States had already expressed its displeasure with the Appellate Body for a long time[7], the starting pistol for the current crisis was fired on 11 May 2016. As a matter of fact, on that day, the U.S. delegation informed the Dispute Settlement Body (*hereafter referred to as* 'DSB') chairman that it would not support the reappointment of AB-member Mr. Chang.[8] This appointment process is subject to the DSB's standard rule of consensus decision-making, meaning that it can be blocked by a Member present who objects to a proposed decision.[9]

At the following meeting of the DSB, the appointment of the members of the Appellate Body was discussed and the U.S. tried to explain to the remaining Members its refusal to reappoint Mr. Chang. First, the United States underscored that the reappointment of members of the Appellate Body is not automatic and that it involves an important responsibility entrusted to the WTO Members.[10] America also recalled that during previous meetings of the DSB, it had expressed its concerns about the not strictly legal approach from the part of the AB in some of the appeal cases involving Mr. Chang.[11] In addition, the U.S. also revealed concerns about the manner in which Mr. Chang had conducted oral hearings.[12] According to the United States, his questions would have spent a significant amount of time on issues that had not been raised on appeal or were not aimed at

[7] Joshua Paine, 'The WTO's Dispute Settlement Body as a Voice Mechanism' (2019) Vol. 20 JWIT 820, 845.
[8] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 23 May 2016' (2016) WT/DSB/M/379 [6.1].
[9] Article 2.4 Dispute Settlement Understanding
[10] Statement from the United States at the Meeting of the WTO Dispute Settlement Body to the WTO Members (23 May 2016).
[11] ibid.
[12] Henry Gao, 'Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body crisis' in Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2019), 216.

resolving the issue between the parties.[13] Not unimportant to mention here, the statement made by the U.S. regarding the refusal for reappointment was by no means supported by the other Member States of the WTO. Brazil, China, Chinese Taipei, Egypt, the European Union, Honduras, India, Indonesia, Iceland, Korea, Oman, Mexico, Switzerland, Thailand and Vietnam shared concerns that the American opposition to Chang's reappointment based on certain appeals in which he was involved could undermine Members' confidence in the Appellate Body and the WTO dispute settlement system.[14] The majority of these same countries also noted that there is no basis for assigning an AB decision to a single member of the Appellate Body.

The next DSB meeting was held on 22 June 2016. There was no consensus on how to proceed with the aforementioned problem. However, WTO Members invariably gave their opinions on what had happened and their views on how to proceed.[15] The United States, however, remained indifferent to these rebuttals. Without mincing its words, the U.S. stressed that its position was clear and referred for further argumentation to its statement of 23 May earlier that year.[16] A month later, at the DSB meeting on 21 July 2016, the Chair informed the WTO Members that he would convene *Dedicated Sessions* starting in September 2016 for a focused discussion by the Members on all issues raised regarding reappointments to the Appellate Body, including whether there should be changes to those

[13] Statement from the United States at the Meeting of the WTO Dispute Settlement Body to the WTO Members (23 May 2016); Elvire Fabry and Erik Tate, 'Saving the WTO Appellate Body or Returning to the Wild West of Trade?' (2018) Jacques Delors Institute Policy Paper 225, 6 <https://institutdelors.eu/wp-content/uploads/2020/08/SavingtheWTOAppellateBody-FabryTate-June2018-1.pdf> accessed 19 April 2022.
[14] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 23 May 2016' (2016) WT/DSB/M/379 [6.25].
[15] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 22 June 2016' (2016) WT/DSB/M/380 [11.3], [11.11].
[16] ibid [11.28].

rules of appointment.[17] Further, there was also an agreement to use this special session to fill the vacancy created by the failure to reappoint Mr. Chang. A mutual understanding on the procedural aspects addressed during the special session was not obtained, but nevertheless a consensus was formed on the new candidates for the AB. At the DSB meeting of 23 November 2016, two new members for the AB were in fact appointed, respectively, to fill the vacancy created by Chang's non-reappointment and to fill the vacancy made by the departure of the Chinese AB-member whose second term had expired in May 2016.[18]

However, the serenity that returned to the Appellate Body in late 2016 was short-lived as the Dispute Settlement Body faced a new challenge in early 2017. Indeed, the AB was confronted with the departure of not only Mexican AB member Ricardo Ramírez, whose second term ended on 30 June 2017 but also Peter Van den Bossche, whose second term expired on 11 December 2017.[19] The majority of the delegations, including the EU, favored a single process to fill both vacancies.[20] A single delegation, the United States, suggested that, for the time being, only a nomination process for Ramírez' vacant seat should begin and that more time should be allowed for the decision on the appointment of Van den Bossche's successor. The dispute over the procedures for filling the two vacancies crystallized into a conflict between the EU, which would only agree to a simultaneous start, and the U.S., which only agreed to start the process for the first vacancy. On top of this, the

[17] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 21 July 2016' (2016) WT/DSB/M/383 [11.1].
[18] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 23 November 2016' (2016) WT/DSB/M/389 [13.1].
[19] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 25 January 2017' (2017) WT/DSB/M/391 [8.1]; Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) Peterson Institute for International Economics Policy Brief, 3 <https://www.piie.com/system/files/documents/pb18-5.pdf> accessed 23 April 2022.
[20] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 20 February 2017' (2017) WT/DSB/M/392 [11.3].

year 2017 became even more turbulent when AB-member Hyon Chong Kim resigned with immediate effect because the Korean government appointed Mr. Kim as Minister of Commerce shortly after his appointment.[21] And as Van den Bossche's term came to an end on 11 December 2017, the AB found itself with no less than three vacant seats in the spring of 2018.[22]

The U.S. officially showed its true colors regarding the DSB for the first time in the President's Trade Policy Agenda in March 2018. The Agenda contained criticism of both substantive WTO law and procedural rules and of interpretative techniques such as, for example, ignoring the 90-day deadline, treating AB reports as precedents ... At the General Council on 8 May 2018 China put the nomination process within the AB on the agenda and urged the U.S., with support from many other Member States, to end the stalemate.[23] For the first time, the U.S. representative could now refer to the broadly outlined critiques in the President's 2018 Trade Policy Agenda as a rebuttal. The core of the crisis was once again highlighted at the next DSB meeting as the agenda included the reappointment of AB member Shree Baboo Chekitan Servansing, from Mauritius, whose term ended on 30 September 2018.[24] The U.S. immediately signaled its lack of support for the reappointment and, in turn, referred back to the Agenda. Not much later, there were as many as four empty seats in the Appellate Body, meaning the minimum number of people left to rule on a case.

[21] Henry Gao, 'Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body crisis' in Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2019), 217; 'Appellate Body member Hyon Chong Kim resign' (*World Trade Organization*, 1 August 2017) < https://www.wto.org/english/news_e/news17_e/ab_01aug17_e.htm> accessed 23 April 2022.
[22] Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) Peterson Institute for International Economics Policy Brief, 3 <https://www.piie.com/system/files/documents/pb18-5.pdf> accessed 23 April 2022.
[23] General Council, 'Minutes of Meeting Held in the Centre William Rappard on 8 May 2018' (2018) WT/GC/M/172 [4.1-4.86].
[24] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 27 August 2018' (2018) WT/DSB/M/417 [12.1].

The President of the General Council launched an informal process on the matters of the Appellate Body in January 2019 as an attempt to find a way out of the impasse. New Zealand's WTO ambassador, David Walker, was appointed as a facilitator to coordinate the discussions.[25] Unfortunately, even this effort to get Washington to change course brought no relief and America held its ground for months.[26] The 28 October 2019 DSB meeting was considered the last chance to initiate appointment processes for the AB. Due to the resignation of two or more members on 10 December 2019, the Appellate Body would lose its quorum to be operational. Also at this crucial meeting, the U.S. held firm and the proposal to start the selection process was rejected by the Americans. Until 10 December 2019, the Appellate Body remained functional but as of the next day, with one member left, it no longer had the required quorum to make decisions. To this day, the Appellate Body is in a state of paralysis.

II. The Underlying Motives of the United States

The previous excerpt from the thesis provided further insight into the chronological development of the crisis. The solution to a problem is inextricably linked to its cause and vice versa. So, in order to analyze the workability of the MPIA, the motives of the United States for blocking the appointments of judges to the Appellate Body need to be evaluated. The U.S. has a long list of complaints regarding the WTO's Appellate Body, one of the biggest objections being the way panelists have come up with their own rules in the absence of clear guidance on numerous

[25] 'General Council Chair appoints facilitator to address disagreement on Appellate Body' (*World Trade Organization,* 18 January 2019) <https://www.wto.org/english/news_e/news19_e/gc_18jan19_e.htm> accessed 23 April 2022.
[26] Elisa Baroncini, 'Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (2020) Vol. 29 The Italian Yearbook of International Law Online 33, 39.

agreements reached when the WTO was established 25 years ago.[27] The United States raised some of these concerns at ministerial conferences and committee meetings. Nevertheless, it was not until 2020 that America came forward with a definitive list of problems it had with the AB in the form of a report by the United States Trade Representative (*hereafter referred to as* 'USTR').[28] This report addresses procedural and interpretative issues of the AB as well as substantive issues of WTO law. This thesis does not elaborate on U.S. substantive law claims such as trade remedies, subsidies, and the TBT Agreement, on account of the fact that the focus of the MPIA lies on the procedural level.

USTR Lighthizer's extensive report allows the reasons and motivations behind U.S. actions to be categorized into four central divisions of grievances against the AB. This section provides interpretation on the U.S. legal arguments, consisting of (1) the 90-day limit being exceeded, (2) the exasperation with the Rule 15, (3) the far-reaching judicial review of facts and domestic law, and (4) the excessive judicial activism.

i. The 90-day Limit of Article 17.5 DSU

The first problem denounced by the U.S. Trade Representative is the fact that AB routinely violates the obligation arising from Article 17.5 of the Dispute Settlement Understanding (*hereafter referred to as* 'DSU'). The text of the aforementioned Article places a clear mandate in the hands of the

[27] Finbarr Bermingham and Adam Behsudi, 'Donald Trump's block on WTO judges creates 'doomsday scenario' for world trade disputes' (*South China Morning Post,* 21 November 2019) <https://www.scmp.com/economy/china-economy/article/3038697/donald-trumps-block-wto-judges-creates-doomsday-scenario > accessed 24 April 2022.
[28] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020.

Appellate Body to complete each appeal within 60 days, and in no case to exceed a 90-day period.[29] The provisions of the Article do not provide for possible grounds for exception. The U.S. criticism in the USTR report regarding the 90-day deadline can be summarized into two central arguments.

First, according to the U.S., the Appellate Body could have avoided the delays if it had limited itself to dealing with the issues necessary to resolve the dispute.[30] In the USTR's view, the AB appears to be asserting that under Article 17.12 of the DSU it must "address every issue raised" in the appeal – as if this means that the report must write an interpretation and rule on each issue on the merits.[31] According to America, the AB can exercise judicial economy by not ruling on every issue raised in an appeal. For example, the AB did so in the *Indonesia – Import Licensing*-case where Article 17.12 of the DSU was literally cited by it as a justification for not dealing with a particular claim.[32]

Second, America's criticism is that the AB should have, in any event, sought the consent of the parties for the issuance of a report beyond the specified period. The U.S. thus argues that an extension of the 90-day deadline should only be possible with consent of the parties. This comment has been supported in the past by several other Members of the WTO, for instance the joint communication by the U.S. together with Argentina and Japan.[33] The European Union, on the other

[29] Article 17.5 Dispute Settlement Understanding.
[30] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 31.
[31] ibid.
[32] *Indonesia – Importation of Horticultural Products, Animals and Animal Products* (9 November 2017) WT/DS477/AB/R [5.63].
[33] Dispute Settlement Body, 'Joint Communication from Argentina, Japan and the United States' (2014) WT/DS455/17.

hand, considered that there was no obligation on the AB to consult the parties or obtain their approval.[34]

ii. Rule 15 of the Working Procedures for Appellate Review

Rule 15 of the AB's Working Procedures states that "*A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body*".[35] This provision thus vindicates a continued participation in pending cases by former members of the AB. The Working Procedures, including Rule 15, are based on Article 17.9 of the DSU which entails the following: "*Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information*".[36]

Prior to the 2017 appointment crisis, Rule 15 had been applied eleven times to a total of nine appeals, without any objection either by the parties to these appeals or by the Member States during the DSB meetings in which the corresponding reports had been adopted.[37] However, suddenly and after all these years, Rule 15 forms a source of frustration for the United States. America believes that the above Rule 15 is not reconcilable with Article 17.2 of the DSU which gives the DSB the exclusive

[34] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 26 January 2015' (2015) WT/DSB/M/356 [5.23].
[35] Article 15 of the Working Procedures for Appellate Review (16 August 2010) WT/AB/WP/6, WTO Online Database <https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm> accessed 25 April 2022.
[36] Article 17.9 Dispute Settlement Understanding.
[37] Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Carl Grossman Verlag 2019) 49.

power to appoint members of the AB for a period of four years, and where each person may be reappointed once.[38] Thus, since the DSU grants the DSB the power to appoint individuals to the Appellate Body, the AB cannot grant itself that same power by simply inserting a rule to that effect into its operating procedures. According to America, the decision on who may and may not sit in new or pending cases belongs solely to the DSB and the Appellate Body cannot rule on it.[39] America claims that the Appellate Body appears to rely merely on policy considerations of efficient operation, which is thus not a legally valid motive for such infringement.[40] The USTR report adds that even if the application of Rule 15 were to be considered a mere extension of the term of office of a current AB member, such a course of action would violate the four-year term established by the DSU and the DSB.[41]

iii. Judicial Review of Facts and Domestic Law

*(i) **Review of Facts***

A third legal argument raised by the U.S. to justify its prevention from appointing AB members, unlike the previous two grievances, is not strictly procedural but concerns the scope of the power the AB grants itself. The DSU reflects the agreement among WTO Members on the functions assigned to the panels and the Appellate Body. In drafting the DSU, Members concurred to limit the AB's authority to reviewing a panel's legal findings, not its factual findings. Article 17.6 of the

[38] Henry Gao, 'Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body crisis' in Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2019), 217.
[39] Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Carl Grossman Verlag 2019) 18.
[40] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 35.
[41] ibid 34.

DSU is very clear on this: "*An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel*".[42]

The U.S. claims in its USTR report that the AB tried to escape the above restriction from the very beginning by arguing that it was authorized to 'review' the 'finding of the fact' made by the panel.[43] The report cites the *EC – Hormones*-case to illustrate that the AB has been violating the limits of its authority since the earliest days of the World Trade Organization.[44] According to America, the Appellate body erroneously used Article 11 of the DSU as a justification for this expansion of jurisdiction. The AB interpreted the phrase "*should make an objective assessment*" in Article 11 of the DSU as a "mandate" and a "requirement" for panels. In the eyes of the U.S., this interpretation is clearly incorrect, given that the WTO Members' decision to use the word "*should"* makes it obvious that the WTO Member States did not intend to create a legal obligation subject to review.[45] In short, the Appellate body's decision to review the factual findings of the panels has no foundation in the Dispute Settlement Understanding, according to the USTR.

(ii) Review of Domestic Law

On top of the review of the facts, the review of domestic law is also a source of criticism for the United States. According to them, the Appellate Body claims that it has jurisdiction to review the panel's findings on the meaning of a WTO member's challenged domestic law. The USTR report labels this as manifestly false. However, while the question of whether a particular domestic law is

[42] Article 17.6 Dispute Settlement Understanding.
[43] *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (16 January 1998) WT/DS26/AB/R [116].
[44] ibid.
[45] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 39.

in compliance with WTO obligations is a matter of law, in the WTO framework, the meaning of that domestic law is a question of fact.[46] In support of its argument, America uses Article 6.2 of the DSU as one of its illustrations. For example, Article 6.2 of the DSU provides that in its request to establish the panel, the complaining party must set forth the case, consisting of "*identifying the specific measures at issue*" – meaning the factual core of the case – and "*providing a brief summary of the legal basis of the complaint*" – meaning the legal core of the case.[47] The USTR report goes on to say that the proposition that domestic law should be qualified as fact and not law, is not unique to the WTO dispute settlement mechanism. This finding is widely recognized in international law, and is, according to the U.S., incorporated into standard treatises of international law.[48]

The United States argue that the Appellate Body repeatedly treated the meaning of domestic law as a matter of WTO law, which the AB must decide *de novo* in an appeal under Article 17.6 of the DSU. In doing so, the AB provided no interpretational reference to the text of the DSU for its contention that the meaning of domestic law is a question of law in the WTO DSS. Nor did the AB indicate any other source that would explain its approach. The sole grounding the AB gave for its contention that the interpretation of domestic law is a question of law within the meaning of Article 17.6 of the DSU is a reference to its own reports, most notably the AB report of the *India – Patents (U.S.)*-case.[49] At issue in this 1997 appeal were primarily the Indian "mailbox rule", a national law under which patent applications for pharmaceutical and agricultural chemical products could be

[46] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 40.
[47] Article 6.2 Dispute Settlement Understanding.
[48] See e.g., James Crawford and Ian Brownlie, *Brownlie's principles of public international law* (Oxford University Press 2019).
[49] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 42; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (19 December 1997) WT/DS50/AB/R.

filed, and the scheme for granting exclusive marketing rights for such products.[50] More specifically, the legal issue was whether these provisions of Indian law were consistent with Article 70.8(a) of the TRIPS Agreement. India claimed that the panel improperly treated India's domestic law because domestic law is a fact to be determined before an international tribunal by the party invoking it. India held that the panel did not assess Indian law as a fact to be determined by the United States, but rather as a law to be interpreted by the panel. Further, India is convinced that the panel should have solicited the advice of India on questions related to the meaning of Indian law.[51] The AB replied to India by stating that an international tribunal can treat domestic law in various ways. Domestic law, according to the AB, can serve as an evidential basis for both facts and state practice. However, domestic law can also provide evidence of compliance or non-compliance with international obligations.[52] With respect to its own role in reviewing the panel's findings, the Appellate Body stated: "… *just as it was necessary for the Panel in this case to seek a detailed understanding of the operation of the Patents Act as it relates to the "administrative instructions" in order to assess whether India had complied with Article 70.8(a), so, too, is it necessary for us in this appeal to review the Panel's examination of the same Indian domestic law*".[53] In subsequent case law in the years that followed, the AB kept referring to this case to solidify its position. Nonetheless, according to the USTR, the AB must, in light of Article 17.6 of the DSU, take these factual findings as given so, consequently, the AB's view is incorrect.[54]

[50] India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, One-Page Case Summaries – 1995-2016, WTO's Legal Affairs Division, 26.
[51] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (19 December 1997) WT/DS50/AB/R [64].
[52] ibid [65].
[53] ibid [68].
[54] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 42.

iv. Judicial Overreach

The remaining U.S. criticisms can be catalogued together under the same heading, *judicial activism*. This final section of the underlying motives is devoted to the issue of judicial activism, one of the longest-running concerns of the U.S. In one of its earliest proposals for DSM reform in 2005, America warned that in interpreting the WTO agreements, both panels and the AB should exercise reasonable care to avoid expanding or diminishing rights and obligations of Members.[55] The U.S. reiterated this concern in almost all of its official condemnations of the AB, and the USTR report also highlights this as an important issue. Criticism of the AB's overly active role can be broadly categorized into three types: (1) rulings that create rules, (2) rulings that create binding precedents, and (3) decisions that create obiter dicta.

(i) Rulings that create rules

The AB has allegedly created new rights and obligations for the WTO Members through its interpretation of the WTO agreements in its case law. The case that the U.S. cites in the USTR report to illustrate this issue is the dispute between America and China over state-owned enterprises in 2011. The Agreement on Subsidies and Countervailing Measures (*hereafter referred to as* 'ASCM') provides that a "*subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member and a benefit is thereby conferred".*[56] However, nor the term 'governmental entity' nor the concept 'public body' are specified in the ASCM. The AB's attempt in this case to fill the gap in the ASCM represents a major point of disappointment for

[55] Dispute Settlement Body, 'Negotiations on Improvements and Clarifications of The Dispute Settlement Understanding: Communication from the United States of 21 October 2005' (2005) TN/DS/W/82.
[56] Uruguay Round of Multilateral Trade Negotiations [1986- 1994] - Annex 1 - Annex 1A - Agreement on Subsidies and Countervailing Measures [WTO-GATT 1994] OJ L366/156.

the U.S. as the AB appeared to respect the Chinese reasoning that proposed a narrower definition for a public body compared to America.[57] The AB ruled that corporations cannot be considered "governmental entities" merely on the basis that they are majority owned and controlled by the government.[58] One consequence of this ruling is that in order to bring a claim under the ASCM against a public company, the plaintiff will have to show that the company in dispute is vested with governmental authority or performs a governmental function.[59] The U.S. claimed that the narrow definition of "governmental entity" discourages a prospective plaintiff from bringing a claim under the SCM Agreement.[60] Such an attempt by the Appellate Body to fill loopholes in the WTO agreements, according to the U.S., amounts to a violation of Article 3.2 of the DSU that grants "the exclusive power to adopt interpretations" of multilateral trade agreements to the Ministerial Conference and the General Council.[61]

(ii) Rulings that create binding precedents

Another way in which the AB is overstepping its bounds according to the United States is to unlawfully claim precedent for its own reports and decisions.[62] A precedent can be described as a previous case that sets an example for or provides direction for the resolution of future disputes involving similar facts and legal issues. The DSU does not assign precedential value to either panel

[57] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R [305].
[58] ibid [611].
[59] Amrita Bahri, 'Appellate Body Held Hostage: Is Judicial Activism at Fair Trail?' (2019) Vol. 53 Journal of World Trade 293, 303.
[60] Elvire Fabry and Erik Tate, 'Saving the WTO Appellate Body or Returning to the Wild West of Trade?' (2018) Jacques Delors Institute Policy Paper 225, 11 <https://institutdelors.eu/wp-content/uploads/2020/08/SavingtheWTOAppellateBody-FabryTate-June2018-1.pdf> accessed 28 April 2022.
[61] Amrita Bahri, 'Appellate Body Held Hostage: Is Judicial Activism at Fair Trail?' (2019) Vol. 53 Journal of World Trade 293, 303.
[62] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 55.

or AB reports. Such weight is reserved for authoritative interpretations adopted by WTO Members in the Ministerial Conference or the General Council. The DSU hereby expressly notes that the DSS is without prejudice to his interpretative power.[63] The USTR report does not, however, say that an earlier interpretation by the panel or the AB has no merit. For example, if a panel finds a line of reasoning in an earlier report persuasive, that panel may refer to that line of reasoning when making its self-formed ruling. But, the USTR report continues, taking into account an interpretation in an earlier AB report is a long way from handling that interpretation as determinative or 'precedent' in a later case.[64]

*(iii) **Rulings that create obiter dicta***

A final source of criticism on account of the United States that can be framed within judicial overreach is the alleged creation of *obiter dicta* in AB reports. The distinction between *obiter dicta* and *ratio decidendi* is a classic legal concept from common law jurisdictions. *Obiter dicta* can be described as "*something said by the way*", meaning that those statements by the judge are considered superfluous, whereas *ratio decidendi* are statements of law upon which the final judgement is based.[65] However, this does not mean that no effect can be linked to *dicta* in judgements. The reason as to why the concept of *dicta* exists within common law legal systems is because a judgement without a dictum would be integrally binding on later judges.[66] The USTR report emphasizes that issuing opinions on issues that are not necessary to resolve the dispute is contrary to the objective

[63] Article 3.9 Dispute Settlement Understanding.
[64] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 57.
[65] Martin Raz, 'Inside precedents: the ratio decidendi and the obiter dicta' (2002) Vol. 3 Common L. Rev. 21, 21.
[66] Henry Gao, 'Dictum on dicta: obiter dicta in WTO disputes' (2018) Vol. 17 World Trade Review 509, 519.

set forth by the DSS.[67] In the view of the U.S., the purpose of the dispute resolution system is not to produce interpretations or "to make law" *in abstracto*. Again, as cited above, America is angling to achieve an efficient judicial economy in order to ensure expeditious resolution of appeals. The U.S. finally also claims that providing such additional analysis in non-relevant paragraphs, may unfairly influence future dispute resolution.[68] To reinforce its view, the U.S. reproduces some appeals in the USTR report to illustrate the profusion of advisory opinions due to the AB, including, for example, the case *Argentina – Financial Services*.[69]

[67] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 47.
[68] Amrita Bahri, 'Appellate Body Held Hostage: Is Judicial Activism at Fair Trail?' (2019) Vol. 53 Journal of World Trade 293, 306.
[69] *Argentina – Measures Relating to Trade in Goods and Services* (14 April 2016) WT/DS453/AB/R.

CHAPTER II Creation of the MPIA

I. Introduction

By assessing the unfolding of the crisis and its immediate causes, insights have been created into the core of the AB deadlock. As mentioned in Chapter I, the WTO dispute settlement appeal system has been in a state of paralysis since 11 December 2019. This implies in practice that when a disputing party lodges an appeal against a panel report, the appeal disappears into the void. At the level of the global economy, this can jeopardize trade relations between the Member States or even result in a trade war. These plausible, yet undesirable, scenarios did not pass some Member States by, and thus the discussion to create an interim solution was soon on the table. While numerous alternatives to the AB have been debated, the MPIA was the only one to see the light of day. In the following chapter the creation of this interim solution is discussed more in detail. More specifically, which states took the initiative, which debates were held on the formation and which members took a critical stance at an earlier stage.

II. Initiative

Faced with such a massive multilateral challenge, the European Union decided to become a significant international player in the WTO reform process, stating that "*resolving the Appellate Body crisis [is] a priority*" for her.[70] As a result, the EU has devised a well-defined strategy to address the World Trade Organization's blockade, a strategy based on four parts. To begin the EU presented two very interesting institutional proposals at the end of November 2018 to revise the text

[70] Council of the European Union, 'Background Brief of 22 May 2019 for the Foreign Affairs Council – Trade Issues' (*Consilium,* 27 May 2019) <https://www.consilium.europa.eu/media/39454/background-fac-trade_en.pdf> accessed 28 April 2022.

of the DSU and provide a formal and appropriate response to each of the U.S. criticisms of the Appellate Body's activity, as well as to ensure the DSS's independence and impartiality.[71] Second, the EU wanted to ensure rule-based international trade, even in the event of a WTO DSM blockade. So, the Union used the dispute resolution mechanisms in her free trade agreements, filing complaints with South Korea over labor commitments, with Ukraine over the European Eastern country's wood export ban, and with the Southern African Customs Union over safeguard measures affecting poultry trade.[72] Third, in the springtime of 2019, the EU took the lead in Geneva in establishing an interim appeal arbitration capable of ensuring that the DSS maintains a two-level dispute resolution mechanism while preserving WTO case-law and procedures until the severe Appellate Body stalemate is resolved. And fourth, the EU extended the scope of the Enforcement Regulation in order to avoid the Union standing by helplessly when the AB is completely blocked. From 13 February 2021 on, the EU can adopt countermeasures not only when it obtains a favorable ruling from a WTO dispute settlement panel but also in bilateral and regional agreements if the other party fails to cooperate in resolving the dispute.[73]

Shortly after giving notice of these initiatives, the Council of Europe gave a negotiating mandate to the Commission to involve other WTO Members in the creation of an interim solution.[74] On 27 May 2019, the Council endorsed the approach of the European Commission, declaring that "*[a]s regards*

[71] Elisa Baroncini, 'Resorting to Article 25 of the DSU to Overcome the WTO Crisis on the Appellate Body: The EU Proposal for an Interim Appeal Arbitration' (2020) Vol. 41 DPCE Online 2313, 2316.
[72] Elisa Baroncini, 'Resorting to Article 25 of the DSU to Overcome the WTO Crisis on the Appellate Body: The EU Proposal for an Interim Appeal Arbitration' (2020) Vol. 41 DPCE Online 2313, 2317.
[73] Council Regulation (EU) 2021/167 of 10 February 2021 amending Regulation (EU) 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules [2021] OJ L 49/1.
[74] Council of the European Union, 'WTO Appellate Body, 20 May 2019' (2019) 9506/19.

the Appellate Body crisis ... the EU should reach out to other WTO Members to work on an interim solution that preserves the binding character and the two levels of adjudication of the WTO dispute settlement system". [75] The European Commission delivered the draft version of the joint communication, including the WTO interim appeal arbitration agreement, to the EU Trade Policy Committee in early July 2019, and then promptly brought it to the attention of the EU Council, which was requested to authorize it.[76] Finally, also the European Parliament stated to fully support these recent EU initiatives however recalling that a standing Appellate Body continues to be the core aspiration of the EU's strategy.[77]

III. Joining Member States

At the July 17-18, 2019, EU – Canada Bilateral Summit, Donald Tusk, President of the European Council at the time, and Canadian Prime Minister Justin Trudeau issued a joint statement agreeing to work more closely to address global challenges. Blocking appointments to the WTO's AB was also touched on as a global issue that needed to be answered quickly. In this regard, both states expressed that: "*Canada and the EU are finalizing an interim appeal arbitration arrangement based on existing WTO rules which could apply until the WTO Appellate Body is able to hear new appeals again. Such an interim arrangement reflects our commitment to the rules-based trading system and*

[75] Council of the European Union, 'Conclusions, Foreign Affairs: Trade Issues, 27 May 2019' (2019) 9753/19, 3.
[76] Elisa Baroncini, 'The EU Approach to Overcome the WTO Dispute Settlement Vacuum: Article 25 DSU Interim Appeal Arbitration as a Bridge Between Renovation and Innovation' in Meredith Kolsky Lewis, Junji Nakagawa, Rostam J. Neuwirth, Colin B. Picker and Peter-Tobias Stoll (eds), *A Post-WTO International Legal Order* (Springer 2020), 122.
[77] European Parliament, 'European Parliament resolution of 28 November 2019 on the crisis of the WTO Appellate Body' (2019) 2019/2918.

will preserve the essential features of the WTO dispute settlement mechanism".[78] This North American country was thus the first WTO Member to join the EU-proposal and this allowed the European Commission to officially present the Interim Appeal Arbitration Arrangement (*hereafter referred to as* 'IAAA') in Geneva as an agreement with Canada.[79] A few months later, on 21 October 2019, the arrangement between the EU and Canada was also concluded with Norway.[80]

The Appellate Body's closure on 11 December 2019, which means a losing party cannot longer appeal the panel report, has hastened Members' efforts to find a way out of the unfortunate situation, and there has been steady acceptance for this Article 25 appeal arbitration option.[81] For example, on the eve of the deadlock, the Chinese trade representative stated that Beijing was going to actively work to support the EU's vision regarding the appeal arbitration model.[82] At the World Economic Forum in Davos on 24 January 2020, seventeen WTO Members issued a joint statement pledging to work towards the introduction of emergency measures that would allow appeals against reports of WTO panels in mutual disputes in the form of an interim appeal mechanism based on Article 25 of the DSU.[83] On 30 April 2020, at the request of participating Member States, the WTO Secretariat circulated the Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the

[78] Council of the European Union, 'EU – Canada Summit Joint Declaration, Montreal 17-18 July 2019' (*Consilium* 18 July 2019) <https://www.consilium.europa.eu/media/40403/final-2019-joint-declaration-final.pdf> accessed 28 April 2022.
[79] Communication of the Delegations of Canada and the European Union, 'Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in The Conduct of WTO Disputes: Interim Appeal Arbitration Pursuant to Article 25 of the DSU of 25 July 2019' (2019) JOB/DSB/1/Add.11.
[80] Communication of the Delegations of the European Union and Norway, 'Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in The Conduct of WTO Disputes: Interim Appeal Arbitration Pursuant to Article 25 of the DSU of 21 October 2019' (2019) JOB/DSB/1/Add.11/Suppl.1.
[81] Xiaoling Li, 'DSU Article 25 Appeal Arbitration: A Viable Interim Alternative to the WTO Appellate Body?' (2020) Vol. 15 Global Trade and Customs Journal 461, 462.
[82]Elisa Baroncini, 'Resorting to Article 25 of the DSU to Overcome the WTO Crisis on the Appellate Body: The EU Proposal for an Interim Appeal Arbitration' (2020) Vol. 41 DPCE Online 2313, 2326.
[83] European Commission, 'Statement by Ministers, Davos, Switzerland' (*Directorate General for Trade of the European Commission,* 24 January 2020) <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf> accessed 29 April 2022.

DSU and the MPIA has been in effect since that same date.[84] As of today, the participating WTO Members in the MPIA are Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Hong Kong (China), Iceland, Macao (China), Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine and Uruguay.

IV. Opponent Member States

Although 52 Members have accepted the MPIA, the majority of the WTO membership, namely the other 112 Member States, refused to be part in this interim solution. In which follows, the opinions of some reluctant states will be put forward.

Japan's top objective remains reforming the WTO's dispute settlement system in order to find a long-term solution to the Appellate Body issue. Japan recognized "*the need for a stopgap measure to secure a positive and prompt solution to pending disputes. The MPIA was relevant in that context. However, any attempt to adopt measures of a provisional nature had to serve the ultimate purpose of finding a long-lasting solution to the Appellate Body matter*".[85] Thus, Japan had not taken part in the MPIA because it wasn't sure whether it would achieve its ultimate goal.

South-Africa stressed that Members should be aware, however, of the precise terminology employed in Article 25 of the DSU. It permitted Members to assist in the resolution of certain disputes involving concerns that both parties had clearly stated. According to South-Africa the

[84] Xiaoling Li, 'DSU Article 25 Appeal Arbitration: A Viable Interim Alternative to the WTO Appellate Body?' (2020) Vol. 15 Global Trade and Customs Journal 461, 462.
[85] Dispute Settlement Body, 'Minutes of Meeting Held in the Centre William Rappard on 29 June 2020' (2020) WT/DSB/M/442 [13.8].

phrase “some disputes” should have served as a warning to Members that this system was not designed to resolve every type of conflict between them. The aim of Members when crafting this provision could not have been to allow the DSB's dispute appeal function or multilateral oversight role to be replaced by arbitrator rulings. South Africa was concerned that, in the absence of a functional Appellate Body, the MPIA would become the default method for dealing with appeals, and therefore become permanent, contrary to its declared goal. Despite the participating Members' commitment to resolving the Appellate Body deadlock, South Africa was worried that the MPIA would deflect focus away from the multilateral process to resolve the Appellate Body impasse. Fundamentally, South Africa was worried about what this indicated for the joint proposal included in document WT/DSB/W/609/Rev.18, which was backed by the majority of WTO Members, and which sought to start the Appellate Body selection processes as soon as feasible to fill the vacancies. The MPIA, according to South Africa, is another plurilateral agreement that will divide and destabilize bigger multilateral procedures and consensus in the WTO.[86]

The United States stated that if any Member believed that using the arbitration mechanism in Article 25 may help them achieve a beneficial outcome for the deadlock, the United States would support such efforts in principle. The U.S., on the other hand, was opposed to any arrangement that would prolong the Appellate Body's flaws, which America had meticulously documented. The representative of the United States went on saying that “*the arrangement that Members were discussing incorporated and exacerbated some of the worst aspects of the Appellate Body's practices. For example, the arrangement weakened the mandatory deadline for appellate reports;*

[86] Dispute Settlement Body, ‘Minutes of Meeting Held in the Centre William Rappard on 29 June 2020’ (2020) WT/DSB/M/442 [13.9].

contemplated appellate review of panel findings of fact; and failed to reflect the limitation on appellate review to those findings that would assist the DSB in recommending to a Member to bring a WTO inconsistent measure into conformity with WTO rules. The arrangement also promoted the use of precedent by identifying "consistency" (regardless of correctness) as a guiding principle for decisions".[87] As stated by the U.S. the creation of the MPIA revealed that the underlying purpose of this interim solution for some parties was to construct an ersatz AB that would serve as a model for any future WTO Appellate Body, rather than to assist Members in resolving trade disputes. To conclude, America summarized that certain Members redirected the Membership's focus and resources to pursue an arrangement that would, at best, prolong the Appellate Body's failures.[88]

[87] ibid [13.11].
[88] ibid.

CHAPTER III Scope and content of the MPIA

I. Introduction

The previous section revealed how the MPIA came about, and which states played a crucial role in this process. Although it is already clear what exactly can be understood under the concept MPIA and what its purpose is, this section serves as an in-depth analysis of its scope and legal content. First, the extent to which the EU's initial draft proposal still corresponds to the final agreed upon text of the MPIA, will be assessed. Second, the legal nature of the MPIA is briefly discussed. Third, the structure, the scope and the activation of the interim solution are outlined, meaning the questions *when* and *how* does the MPIA come into play in the context of a trade dispute will be answered. And finally, more clarification is given to the substantive procedural provisions of the MPIA whereby linkages are made to the classic DSS in order to identify the points of difference.

II. Comparison with the EU's initial draft proposal

Before explaining the actual content of the current interim solution, it should be noted that some material distinctions can be made between the IAAA and the MPIA. Despite the fact that the MPIA stems from the European Union's initial proposal to revert to the arbitration model, the EU proposal differs fundamentally from the MPIA in terms of the operation of arbitration.

First, a notable advantage of the proposal to implement an appeal arbitration procedure under Article 25 of the DSU is the preservation of "*both an appellate stage and automatically bindingness of dispute resolution judgements.*"[89] The issue is that Article 25 of the DSU is overly supple, leaving

[89] Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) Vol.22 JIEL 297, 312.

most procedural decisions up to the disputing Members' consent. Without taking into account specifics, it is impossible to determine how an Article 25 appeal arbitration procedure will function. Essentially, there are two options: either appeal arbitration by a standing adjudicatory body or arbitration by ad hoc tribunals.[90] Members who agree to appeal arbitration under the classic Appellate Body model may choose to have a small group of arbitrators rule all appeals in order to ensure that appellate verdicts are consistent. Although the EU has repeatedly emphasized that the IAAA should emulate as closely as possible the DSB's procedural process, it has still initially proposed that arbitration should be conducted by tribunals composed on a case-by-case basis, thus departing from the Appellate Body model.[91] However, in its bilateral agreements with both Canada and Norway, the EU had by then already moved to the concept of a "pool of arbitrators". Also, the final MPIA did not follow the initial EU proposal at this level and does work with a permanent "pool of arbitrators" consisting of ten professional arbitrators. But why was the initial idea of ad hoc arbitration from the EU abandoned by the WTO Member States? Even though this was never explicitly communicated by MPIA Members, after some critical reflection, some negative consequences of ad hoc arbitration can be identified. First, the principle of ad hoc arbitration can be seen as "solving the problem as it arises" so that no long-term structural systematic solution can be found. Ad hoc arbitration does not ask for sustainable cooperation between the WTO Members as each trade dispute is dealt with in a rather isolated manner. This way of proceeding inherently carries the risk that the appeal arbitration will be applied in the long run which destroys the interim aspect. Second, ad hoc arbitration could result in the fragmentation of WTO jurisprudence since there are no systematic treatments of trade disputes by a permanent body. The resulting potential for

[90] Xiaoling Li, 'DSU Article 25 Appeal Arbitration: A Viable Interim Alternative to the WTO Appellate Body?' (2020) Vol. 15 Global Trade and Customs Journal 461, 463.
[91] Xiaoling Li, 'DSU Article 25 Appeal Arbitration: A Viable Interim Alternative to the WTO Appellate Body?' (2020) Vol. 15 Global Trade and Customs Journal 461, 463.

arbitrariness within the WTO could seriously damage the confidence of its Members in the institution. For the above reasons, it may become clear why a pool of arbitrators was opted for in the current legal text of the MPIA.

A second difference between the IAAA and the MPIA has to do with the selection of the arbitrators. The IAAA with both Canada and Norway stated that the Director General would choose the arbitrators from a pool of available former members of the AB.[92] However, the MPIA allows for the nomination of anybody with authority and expertise in law, international commerce, and the broad subject matter of the covered agreements in addition to previous members of the AB. As of today, none of the proposed arbitrators has served on the AB before.[93]

Third, the MPIA makes it clear that the parties may agree to deviate from the customary course of action for resolving disputes, allowing for flexibility in the procedure. For instance, the parties may extend the deadlines for the appeal review[94] or omit claims covered by Article 11 of the DSU from the arbitral appeal review.[95] These types of clauses were absent from the bilateral agreements with Canada and Norway.

[92] Communication of the Delegations of the European Union and Norway, 'Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in The Conduct of WTO Disputes: Interim Appeal Arbitration Pursuant to Article 25 of the DSU of 21 October 2019' (2019) JOB/DSB/1/Add.11/Suppl.1, 1 [3].
[93] Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) Vol. 55 Journal of World Trade 787, 792.
[94] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 6 [14].
[95] ibid 5 [13].

And finally, the MPIA establishes the collegiality principle, which is covered in more detail in the subsection *Legal content of the MPIA – innovation to the DSU*. The bilateral agreements did not include this principle.

III. The legal nature of the MPIA

The first MPIA element's phrasing aims to convey the communication's soft law nature, which the participants have understood as a political declaration "*indicating their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure*".[96] Instead of using the word "*agreement*", the MPIA participants purposefully used the word "*arrangement*". The MPIA can be seen as a political acclamation of the intention to use appeal arbitration rather than the Appellate Body review under Article 17 of the DSU, and thus not as a legally enforceable agreement. So, the responding party may, in theory, decline to join into an arbitration agreement with respect to the particular trade dispute. In such circumstances, the DSB would not be able to enforce the MPIA.[97]

By virtue of their legal nature, the MPIA can be related to "procedural agreements" such as "agreements not to appeal" and "sequencing understandings".[98] In general, if adopted within the context of an existing dispute, "agreements not to appeal or arbitrate" are both lawful and consistent with the spirit of the DSU.[99] Although the Articles 16.4 and 17.4 of the DSU allow parties to appeal

[96] ibid 2 [1]; Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (*Federalismi.it,* 22 July 2020), 13 <https://cris.unibo.it/retrieve/handle/11585/766830/657586/12.pdf> accessed 20 May 2022.
[97] Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) Vol. 55 Journal of World Trade 787, 797.
[98] ibid.
[99] Geraldo Vidigal, 'Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO dispute settlement crisis' (2019) Vol. 20 Journal of World Investment & Trade 862, 876.

a panel report, the AB found in the *Peru – Agricultural Products*-case that Members may waive their procedural rights under de DSU by "*actions taken in relation to, or within the context of the rules and procedures of the DSU.*"[100] These type of ad hoc agreements to not appeal panel reports at the outset of a dispute have been another way in which WTO Members have sought to avoid appeals into the void.[101] Such an ad hoc agreement was made, for example, between Indonesia and Taiwan in the case *Indonesia – Safeguard on Certain Iron or Steel Products*, in which they agreed not to appeal if the AB was not yet operational on the date the panel issued its report. In this regard, their agreement reads as follows: "*The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU*".[102]

When it comes to "sequencing agreements", parties typically sign those for the purpose of resolving the time inconsistency between Articles 21.5 and 22.2 of the DSU.[103] According to Article 21.5 of the DSU, if the parties cannot agree on the presence or consistency of the actions taken to comply with the DSB rulings and recommendations within a reasonable amount of time, they may resort to the DSS.[104] At the same time, Article 22.2 of the DSU gives the option to request permission to

[100] *Peru – Additional Duty on Imports of Certain Agricultural Products* (20 July 2015) WT/DS457/AB/R [5.25].
[101] Jana Titievskaia, 'International trade dispute settlement: WTO Appellate Body crisis and the multiparty interim appeal arrangement' (2021) EPRS: European Parliamentary Research Service, 5 <https://policycommons.net/artifacts/1501583/international-trade-dispute-settlement/2160521/> accessed 24 May 2022.
[102] Communication from the delegation of Indonesia and the delegation of Chinese Taipei, '*Indonesia – Safeguard on Certain Iron or Steel Products:* Understanding between Indonesia and Chinese Taipei regarding procedures under Articles 21 and 22 of the DSU of 15 April 2019' (2019) WT/DS490/13 [7].
[103] Matilda J Brolin, 'Procedural Agreements in the WTO Disputes: Addressing the Sequencing Problem' (2016) Vol. 85 Nordic Journal of International Law 65, 81.
[104] Article 21.5 Dispute Settlement Understanding.

suspend concessions or other obligations if the responding party doesn't put its measure, which the DSB considered to be in conflict with the WTO agreements, into line with its recommendations.[105] However, the DSU does not specify whether it is necessary to first receive a compliance panel report under Article 21.5 of the DSU before engaging in retaliation under Article 22 of the DSU. Although parties typically abide by such agreements in reality, they are likely to not be regarded as legally binding when it comes to enforcement.[106] The DSU does not cover disputes involving "procedural agreements", hence it is uncertain if a party may utilize the DSS to compel another party to abide by such agreement.[107]

Since the MPIA is relatable to the above "procedural agreements", whose legal status is rather uncertain, the legal nature of the MPIA may also be described as debatable. So, if the DSB is compelled to decide in a substantive manner to apply such an agreement, like the MPIA, between the parties rather than the DSU, this decision, like other DSB decisions, must be taken by consensus. Consequently, such a decision is open to a veto by any WTO Member present. While WTO Members generally accept the terms of in-dispute agreements and comply with them, there may be considerable legal obstacles if the issue comes before the DSB.[108]

[105] Article 22.2 Dispute Settlement Understanding.
[106] Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) Vol. 55 Journal of World Trade 787, 798.
[107] Matilda J Brolin, 'Procedural Agreements in the WTO Disputes: Addressing the Sequencing Problem' (2016) Vol. 85 Nordic Journal of International Law 65, 83.
[108] Geraldo Vidigal, 'Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO dispute settlement crisis' (2019) Vol. 20 Journal of World Investment & Trade 862, 878.

IV. The structure, scope, and activation of the MPIA

i. Structural composition

The MPIA is divided into three distinct sections. The first part of the legal document consists of the communication to the DSB outlining the fundamentals of the alternate appeals mechanism, officially titled "*Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*". The following part is the model arbitration agreement to be used by the MPIA parties, known as the "*Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*" which is Annex 1 to the communication section. And the last part can be considered as the body of rules concerning the composition of the pool of arbitrators to be set up under the interim solution, which serves as Annex 2 to the introductory instrument.[109]

ii. Scope

As for the scope of the MPIA, a first key element of the interim solution is already highlighted at the beginning of the document, in particular the sentence "*underlining the interim nature of this arrangement*".[110] The MPIA process is not meant to take the place of current WTO dispute resolution guidelines and standards. The DSS's fundamental elements, such as its binding nature and two levels of adjudication through independent and impartial appellate review of panel findings, can instead be preserved by seeing this agreement as an interim parallel procedure. The participating Members state that they intend to use arbitration under Article 25 of the DSU "*as long as the Appellate Body is not able to hear appeals of panel reports in disputes among them due to an*

[109] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12.
[110] ibid 1.

insufficient number of Appellate Body members"[111] and it will thus "*remain in effect only until the Appellate Body is again fully functional*".[112] However, the MPIA in no way impairs the current functioning of WTO panels and the adoption of its reports by the DSB through negative consensus. Nevertheless, in such circumstances, the participating members can no longer appeal under Articles 16.4 and 17 of the DSU, so, they cannot simultaneously appeal in a vacuum.[113] In other words, the starting limit of the MPIA lies where the classic procedural path of the DSS is being obstructed, namely where the appeal phase commences.

When it comes to what kind of disputes fall within the scope of the MPIA, two different types can be set out. First, the MPIA applies to any future dispute between any two or more participating Members, including the compliance stage of such disputes. The second type of dispute the MPIA could be used for is any dispute that was pending on the date of the communication, namely 30 April 2020, except if the interim panel report had already been issued.[114] Such an interim panel report includes the descriptive sections as well as the panel's findings and conclusions, which is only given to the disputing parties, meaning this report can be described as confidential. Before circulating the final report to the WTO Members, the parties in dispute are given the chance to ask that the panel reconsiders specific sections of the interim report.[115] The disputing parties are now informed of the panel's conclusions at this point in the proceedings. This would have a significant impact on the parties' choice to accept the appeal process outlined in Article 25 of the DSU. Due to this, the MPIA only allows for its "automatic" application with regards to disputes whose resolution

[111] ibid 2 [1].
[112] ibid 3 [15].
[113] ibid 2 [2].
[114] ibid 2 [9].
[115] Article 15.2 Dispute Settlement Understanding.

the parties are unaware of.[116] The MPIA participants however may decide to arbitrate a trade dispute under the MPIA rules on an ad hoc basis with regard to the disputes for which interim panel reports had already been released.[117] If a dispute should arise between an MPIA Member and a state that has not joined the MPIA, it is important to note that any WTO Member may join the MPIA at any time by notifying the DSB.[118]

iii. Activation

The above paragraphs describe *when* the MPIA can be applied, meaning in what type of disputes. In what follows, it will be explained *how* the MPIA comes into play. In other words, how do MPIA participants trigger the arbitration procedure to a dispute that falls within the scope of the MPIA. A distinction must be made between future disputes that have yet to arise and pending disputes at the publication time of the MPIA.

For future disputes the following applies: within 60 days of the panel's establishment, the MPIA parties must notify the panel of their intent to participate into the appellate arbitration agreement using the template included in Annex 1.[119] Therefore, if a disputant chooses to use the MPIA to appeal a panel report, it must first start the appellate procedure by asking the panel to put its proceedings on hold. According to the MPIA, any party's request for a suspension of panel proceedings must be interpreted as a "*joint request by the parties for a 12-month suspension of the*

[116] Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) Vol. 55 Journal of World Trade 787, 793.
[117] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 3 fn. 3.
[118] ibid 3 [12].
[119] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 3 [10].

panel proceedings pursuant to Article 12.12 of the DSU".[120] The recalled DSU clause simply gives the complaining party the competence to ask the panel to halt its work[121], but the responding party can also choose to appeal and this choice must of course be protected by the MPIA. This is why such binding classification is required. The MPIA gets around problems caused by the language of Article 12.12 of the DSU by agreeing to treat any request for suspension as a joint request.[122] The potential appellant has a limited window of time to request the suspension of the panel's activity, namely "*after the issuance of the final panel report to the parties, but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the Membership*".[123] This is necessary because the panel needs time to translate its report into the other two WTO official languages, in addition to the language of its proceedings, a job that should typically be finished within three weeks of the disputants receiving the final report.[124] And then finally, no later than 20 days after the suspension of the panel proceedings as elaborated above, a Notice of Appeal must be filed with the WTO Secretariat to begin the actual arbitration. The final panel report in the three WTO working languages must be included in the Notice of Appeal. The opposite party or parties and any other participants in the panel proceedings must both get notice of the Notice of Appeal at the same time.[125] The fact that the final panel report is provided in the three official languages carries an important function. Namely, in the event that no MPIA Notice of Appeal is submitted within 20 days of the suspension of panel proceedings or if the appeal is withdrawn, the DSB can move very

[120] ibid 4 [4].
[121] Article 12.12 Dispute Settlement Understanding.
[122] Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (*Federalismi.it,* 22 July 2020), 27 <https://cris.unibo.it/retrieve/handle/11585/766830/657586/12.pdf> accessed 20 May 2022.
[123] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 4 [4].
[124] Appendix 3 [12] to the Dispute Settlement Understanding.
[125] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 4 [5].

quickly to adopt the panel report.[126] In these two situations, the MPIA believes that the parties should jointly ask the panel to restart its proceedings[127], which would result in the panel report's official distribution to the DSB and its acceptance via negative consensus, in accordance with Article 16.4 of the DSU. The DSU's Article 12.12 states that panel proceedings may only be suspended for a maximum of 12 months before "*the authority for the establishment of the panel shall lapse*". The MPIA then states that "*the arbitrators shall issue an award that incorporates the findings and conclusions of the panel in their entirety*"[128] to avoid the possibility of the first level of WTO adjudication being rendered null and void should the appeal be withdrawn after the lapse of that time.

When it comes to any pending dispute where the panel had already been established but an interim report had not yet been issued when the MPIA came into effect, the participating Members would enter into the appeal arbitration agreement and notify that agreement in accordance with Article 25.2 of the DSU within 30 days of the date of the MPIA, which is 30 April 2020.[129]

[126] Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (*Federalismi.it,* 22 July 2020), 28 <https://cris.unibo.it/retrieve/handle/11585/766830/657586/12.pdf> accessed 20 May 2022.
[127] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 5 [6].
[128] ibid 6 fn. 7.
[129] ibid 3 [10].

V. Legal content of the MPIA – innovations to the DSU

i. General observation

The arbitration procedure foreseen in the MPIA is based on the substantive and procedural aspects under Article 17 of the DSU, yet it attempts to address procedural efficiencies. The MPIA participants made many clarifications in the legal text in order to emphasize that "*the arbitration shall be controlled, mutatis mutandis, by the articles of the DSU and other norms and procedures relevant to the Appellate Review*".[130] And although the panel's report is the source of the new procedure in this case, it forces the parties to the dispute to operate outside of the WTO's framework. The participating MPIA parties should make sure that this is accomplished by ensuring an autonomous organizational structure that is separate from the current institutionalized WTO procedure.[131]

At the same time, the MPIA presents some of the ideas that came up during the WTO discussions to enhance and innovate the operation of the Appellate Body, thus putting on paper ideas that have been extensively debated and eagerly anticipated. The purpose of the interim appeal arbitration method is to "*enhance the procedural efficiency of appeal proceedings*".[132] What follows, highlights the content and thus the innovations of the DSU and explains why these renewals were needed or chosen by the MPIA participants.

[130] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 5 [11].
[131] Frank Altemöller, 'WTO Appellate Body without Legitimacy?: The Criticism of the Dispute Settlement System and the Response of the WTO Member States' (2021) Vol.16 Global Trade and Customs Journal 139, 145.
[132] ibid 2 [3].

ii. Pool of arbitrators

First, the MPIA increases the number of adjudicators. The pool of arbitrators hearing Article 25 appeals must consist of ten experts, but this number may increase "*by agreement of all participating Members at any moment*", according to the MPIA.[133] From this provision it becomes clear that the MPIA process has a dynamic nature because the size of the pool may be quickly changed if the participants decide that additional arbitrators are required, possibly because new WTO Members join the contingency measures.[134] Increasing the number of persons responsible for handling appeals was previously suggested by several WTO Member States at a DSB-meeting in 2018. Namely the EU, China and India proposed to increase the number of full-time members of the AB from seven to nine.[135] The underlying objective of that proposal was not only to enhance the effectiveness of the AB but also to create a global balance. Since the creation of the WTO, a large number of new countries have joined the organization, making it increasingly difficult to achieve a geographical balance in the appointment of AB members over the years.[136] From this pool of ten arbitrators three members will be selected in each trade dispute through the DSU rotation system.

The composition of the standing pool of ten arbitrators took place as follows: by alerting the other participating Members, each participating Member could propose one candidate arbitrator. The nomination period closed 30 days from the date of the MPIA.[137] Eventually the pool of arbitrators

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[133] ibid 7 [5].
[134] Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (*Federalismi.it,* 22 July 2020), 15 <https://cris.unibo.it/retrieve/handle/11585/766830/657586/12.pdf> accessed 22 May 2022.
[135] General Council, 'Communication from the European Union, China and India of 23 November 2018' (2018) WT/GC/W/753.
[136] Anna Wróbel, 'India, the European Union and Global Trade Governance' in Rajendra Jain (ed.), *India and the European Union in a Turbulent World* (Palgrave Macmillan 2020), 65.
[137] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 7 [1] – [4].

was composed by consensus within three months after the publication of the MPIA, so on 31 July 2020 the MPIA parties formally announced the pool of 10 standing arbitrators.[138] The participating Members will, commencing two years after the composition and in accordance with the procedures outlined in the MPIA, periodically and partially re-compose the pool of arbitrators should the ongoing AB crisis persist for longer period.[139]

iii. Principle of collegiality

Second, the MPIA contemplates the concept of collegiality, which opens up the potential for all pool members to obtain documents pertaining to the trade dispute and discuss issues of interpretation, practice and procedure, rather than just a division evaluating the individual case.[140] This principle of collegiality can also be found in the Working Procedures for Appellate Review, although the level of cooperation therein is lower compared to the MPIA. The MPIA allows for greater levels of pool members' collaboration. The decisions made by the divisions tasked with deciding on a particular dispute will unavoidably be impacted by the opportunity for all pool members to discuss interpretive problems, case specifics, and express perspectives. Some WTO Members have even argued that it is the promotion of precedent-setting.[141] As mentioned earlier, the U.S. is convinced that the AB is overstepping its bounds by unlawfully claiming precedent for its own reports,[142] so this provision in the MPIA can in no way be described as a lure to make the

[138] 'MPIA Arbitrators' (*Geneva Trade Platform,* 31 July 2020) <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 22 May 2022.
[139] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 7 [5].
[140] ibid 2 [5].
[141] Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) Vol. 55 Journal of World Trade 787, 795.
[142] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 55.

Americans join. However, there is no restriction under the MPIA that stops the arbitrators from departing from previous Appellate Body rulings or those made by arbitrators so the U.S. cannot use this principle of collegiality as an argument for not acceding to the MPIA.

iv. Organizational measures

From the very beginning of the Appellate Body, the 60-day deadline, which the DSU refers to as "the general rule", was almost never met. But also, the maximum limit of 90 days of Article 17.5 of the DSU constituted a stumbling point for the AB according to the U.S. And effectively, after analyzing the AB case law, it appears that throughout the entire period from 2011 to the end of 2018, only six of the 42 reports respected the 90-day deadline.[143] As noted above, the U.S. repeatedly urged the Appellate Body to exercise judicial economy and to seek the consent of the parties when the 90-day deadline would not be met. To address these issues, the MPIA has granted the arbitrators with some useful resources, such as organizational measures on which the adjudicators have the authority to decide.

First, the 90-day period for the issuance of an award should not be exceeded but can however be extended only with the agreement of the parties.[144] Here, it does appear that the MPIA parties have tactically opted for the U.S. proposal. Without compromising the parties' procedural rights, duties, and the right to due process, the arbitrators may also adopt the necessary organizational steps to speed up the processes in order to make the 90-day deadline. Decisions on page restrictions of the

[143] Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Carl Grossman Verlag 2019) 41.
[144] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 6 [14].

legal documents sent by the attorneys, time constraints and deadlines during the procedure, as well as the length and number of necessary hearings, are examples of such measures.[145] These procedural limits seem to take their inspiration from the so-called "Jara process". Alejandro Jara, a former Deputy Director-General, started a process of informal consultations with WTO Members, panelists, trade law experts, and Secretariat experts involved in the WTO DSS in 2010 at the request of the former Director-General Pascal Lamy. The goal of the process was to determine whether it was possible to find efficiency gains in the panel process in order to lessen the burden on Members and the Secretariat.[146]

v. Substantive measures

Next to the organizational measures, the MPIA also includes substantive remedies, which the arbitrators may merely suggest because those measures need the agreement of the disputing parties under the MPIA. To be more precise, the suggestion of the arbitrators is not binding on the parties, and thus it is up to them to formally accept the suggested substantive measures. The parties' rights and the case's consideration will not be harmed by the fact that the concerned party disagrees with the substantive measures offered.[147]

As an example of such a substantive measure, the MPIA refers to "*an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU*".[148] Article 11 of the DSU contains three requirements for panels. A panel is to make (1) "*an objective*

[145] ibid 5 [12].
[146] 'DDG Jara reports on consultations to enhance efficiency of panels' (*World Trade Organization,* 13 March 2012) < https://www.wto.org/english/news_e/news12_e/ddg_13mar12_e.htm> accessed 23 May 2022.
[147] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 5 fn. 6.
[148] ibid 5 [13].

assessment of the matter before it," (2) which includes "*an objective assessment of the facts of the case*," and (3) "*an objective assessment of … the applicability of and conformity with the relevant covered agreements*".[149] In practice, WTO Members have often and consistently used Article 11 of the DSU as an appeal tool to challenge the fact-finding of the panel. At first, the plaintiffs restricted Article 11 claims to instances of gross mistakes, but later appellants' practice significantly expanded the grounds for review as parties sought to relitigate the facts of a case before the AB.[150] This appeal tactic by the WTO Members obviously raises doubts because these same Members had agreed to the concept that "*an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel*".[151]

The reason the MPIA takes the Article 11 debate into account in its legal text is because it was one of the spearheads of the U.S. arguments to block the AB appointments. According to America, the AB has interpreted the phrase "*should make an objective assessment*" in Article 11 DSU as a "mandate" and a "requirement" for panels. This, in the view of the U.S., is clearly incorrect, given that the WTO Members' decision to use the word "*should*" makes it clear that the WTO Member States did not intend to create a legal obligation subject to review.[152] The MPIA thus takes this American vexation into consideration and deals with the tricky matter of Article 11 claims, giving the arbitrators the option to advise the parties to withdraw insufficient complaints in order to stop a

[149] Simon Lester, 'DSU Article 11 and Appellate Review: Past, Present, and Future' (*International Economic Law and Policy Blog,* 16 August 2020) < https://ielp.worldtradelaw.net/dsu-article-11/> accessed 23 May 2022.
[150] Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (*Federalismi.it,* 22 July 2020), 16 <https://cris.unibo.it/retrieve/handle/11585/766830/657586/12.pdf> accessed 23 May 2022.
[151] Article 17.6 Dispute Settlement Understanding.
[152] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020, 39.

disputant's attempt to circumvent the appellate review's scope limitations.[153] Consequently this means that the MPIA would not bar Article 11 claims. Quite the opposite: it merely states that the arbitrators may suggest excluding such claims in order to comply with the 90-day requirement, but all parties, including the party bringing the claim, must concur in order for the claim to be excluded.[154]

vi. MPIA awards

In accordance with Article 25 of the DSU, MPIA arbitration decisions will be instantly enforceable, added to the body of WTO case law, and required to be reported to the DSB and all other relevant WTO organizations.[155] Following such notice, any WTO Member, including the plaintiffs and third parties, may add the MPIA award to the agendas of the DSB and other multilateral councils and committees so that all WTO Members may review and discuss it. So, in the end, the arbitrators' reports do not have to be adopted by the DSB, which not only saves time but also reduces the likelihood that precedents will result from them. The participating members of the MPIA only mask these procedural aspects as contributions to procedural efficiency, but somewhere it seems that by doing so the parties are also tacitly answering various U.S. concerns.

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[153] Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (*Federalismi.it,* 22 July 2020), 17 <https://cris.unibo.it/retrieve/handle/11585/766830/657586/12.pdf> accessed 23 May 2022.

[154] Jesse Kreier, 'The new "Multi-Party Interim Appeal Arbitration Arrangement Pursuant To Article 25 of the DSU' (*International Economic Law and Policy Blog,* 27 March 2020) <https://ielp.worldtradelaw.net/2020/03/the-new-multi-party-interim-appeal-arbitration-arrangement-pursuant-to-article-25-of-the-dsu.html> accessed 23 May 2022.

[155] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 6 [15].

CHAPTER IV The MPIA in practice

I. Introduction

The MPIA, which has been in operation since 30 April 2020, has had by now already a little more than two years to prove her ability. In previous parts of the thesis, the development and final content of the MPIA were extensively discussed, which can be seen as the purely theoretical part of this work. In this section, the magnifying glass is put on the actual application of this interim solution in various trade disputes between MPIA participants. In the disputes below, the parties concerned have either filed Article 25 notifications in which they undertake to use the MPIA to arbitrate their trade dispute should either party decide to appeal the findings of the panel or are expected to do so at the panel stage since they are both participating members of the MPIA.[156] First, already completed disputes under the MPIA are analyzed, afterwards the pending MPIA cases are discussed.

II. Completed disputes

i. Canada – Commercial Aircraft[157]

This case concerned a complaint by Brazil against Canada with respect to measures related to trade in commercial aircraft the latter country took. On 8 February 2017, Brazil requested consultations with Canada and a few months later the DSB established a panel at its meeting on 29 September 2017. The panel proceedings in this case suffered serious delays due to, among other things, the complexity of the case, the resignation of the Chair of the panel and the appointment of a new Chair

[156] 'MPIA Cases' (*Geneva Trade Platform,* 31 July 2020) <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 28 May 2022.
[157] *Canada – Measures Concerning Trade in Commercial Aircraft* (18 February 2021) WT/DS522.

and, of course, Covid-19. However, even before the panel could begin its work, the crisis in the Appellate Body arose and this led the disputing parties to inform the DSB that they had decided to submit their matter to arbitration under Article 25 of the DSU. And then finally, the panel's Chair notified the DSB on 26 November 2020, that the panel had begun its work and that due to the length and complexity of the dispute, as well as the suspension of its work, it did not anticipate being able to finish its work until the third quarter of 2021. Nevertheless, on 18 February 2021, Brazil asked the DSB Chair to distribute a communication in which it informed the body of its intention to drop its complaint and asked the panel to put an end to its work in accordance with Article 12.12 of the DSU. After dropping its complaint, the Brazilian minister of foreign affairs stated that "*Brazil remains convinced of the strength of its case. Nevertheless, it has become clear that the dispute could not effectively remedy the impacts of such large-scale subsidies on the commercial aircraft market*".[158] The withdrawal of the complaints also and unfortunately means that the proceedings under the MPIA were never initiated, and thus for this case its effectiveness cannot be measured.

ii. Costa Rica – Avocados[159]

In these proceedings Mexico claimed that the measures imposed by Costa Rica are inconsistent with WTO-law because they restrict or even prohibit the importation of fresh avocados for consumption from Mexico. After consultations, the panel was eventually composed on 16 May 2019. Yet again did the deadlock in the AB of 10 December 2019 lead the disputing parties to take their recourse to the MPIA. On 29 May 2020, Mexico and Costa Rica informed the DSB about their Article 25

[158] Marcelo Rochabrun, Tim Hepher and Andrea Shalal, 'Brazil drops aero spat with Canada, seeks global subsidy pact' (*Reuters,* 18 February 2021) <https://www.reuters.com/article/us-brazil-trade-aircraft-idUSKBN2AI1XN> accessed 28 May 2022.
[159] *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico* (13 April 2022) WT/DS524/R.

notification, and more so, they also mentioned that they had opted for a revised version of the MPIA. This deviation from the standard MPIA procedures is permitted under the legal text of the interim solution as longs as this departure was mutually agreed upon.[160] But unfortunately also in this case no analysis can be made of the MPIA in practice as the parties accepted the panel's decision and no appeal was lodged. The acceptance of the panel report can be explained by the fact that both states were evenly favored, since Mexico was able to proof its claims on discrimination and general conformity with the SPS Agreement whereas Costa Rico could rebut the Mexican claims on trade restrictiveness and the claims on adaptation to regional conditions.

iii. Canada – Wine (Australia)[161]

In this case Australia blamed Canada for "*discrimination, either directly or indirectly, against imported wine through a range of distribution, licensing, and sales measures such as product mark-ups, market access and listing policies, as well as duties and taxes on wine applied at the federal and provincial level*".[162] The panel was eventually established on the DSB meeting of 26 September 2018. However, even before the panel was able to circulate its report, Australia and Canada informed the DSB that they had come to a mutually agreed solution regarding the federal and provincial measures in question. The panel distributed its findings to the WTO Members on 25 May 2021. The panel report was limited under Article 12.7 of the DSU to a summary of the matter and a statement that a resolution had been achieved. The parties may have proceeded with an Article 25

[160] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 3 [11].
[161] *Canada – Measures Governing the Sale of Wine* (12 May 2021) WT/DS537/18.
[162] Request for consultations by Australia in *Canada – Measures Governing the Sale of Wine* (12 May 2021) WT/DS537/1, 1.

notification in this case, but again the appeal stage was never reached and the MPIA was therefore not applied.

III. Pending disputes

When it comes to the pending disputes, a distinction can be made between cases that are still in the consultation phase and cases where the panel has either been established or composed.

i. Consultation stage

In both the case *China – IPRs Enforcement (EU)*[163] and the case *China – Goods and Services (EU)*[164], there has been a request for consultations by the European Union. Although there have been no Article 25 notifications yet, the likelihood of this happening in the future is rather plausible since both the EU and China are participating states in the MPIA. Same for the dispute between the EU and Brazil, the *EU – Poultry Meat Preparations (Brazil)*-case, in which the consultations have commenced.[165]

ii. Panel stage

In the case *Australia – AD/CVD on Certain Products (China)*[166], the panel has been established but not yet composed. Both the complainant and respondent are MPIA parties, so the chance of an Article 25 notification in the upcoming months in this dispute is considerably high. In the following cases, the panels have been composed and in all of them, an Article 25 notification under the MPIA

[163] *China – Enforcement of intellectual property rights* (18 February 2022) WT/DS611/1.
[164] *China – Measures Concerning Trade in Goods and Services* (27 January 2022) WT/DS610/1.
[165] *European Union – Measures Concerning the Importation of Certain Poultry Meat Preparations from Brazil* (8 November 2021) WT/DS607/1.
[166] *Australia – Anti-Dumping and Countervailing Duty Measures on Certain Products from China* (28 February 2022) WT/DSB/M/461.

has been made: *China – AD/CVD on Wine (Australia)*[167], *China – AD/CVD on Barley (Australia)*[168], *Colombia – Frozen Fries*[169] and *China – Canola Seed (Canada)*[170]. So, if one of the panel reports in these cases had to be appealed, the MPIA would be activated for the first time.

Critically evaluating the MPIA in terms of its effectiveness is almost impossible since there are no fully-fledged practical examples available to date. However, more generally commenters raised practical questions that may affect the efficiency of the MPIA, including the budget, the degree of authority compared to the AB, how much deference the MPIA will give to panel reports, and whether the appeals process will be used often.[171] On these questions, however, only the future will be able to provide clarity.

[167] *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia* (4 March 2022) WT/DS602/4.
[168] *China – Anti-Dumping and Countervailing Duty Measures on barley from Australia* (3 September 2021) WT/DS598/6.
[169] *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany, and the Netherlands* (24 August 2020) WT/DS591/4.
[170] *China – Measures Concerning the Importation of Canola Seed from Canada* (10 November 2021) WT/DS589/6.
[171] Jana Titievskaia, 'International trade dispute settlement: WTO Appellate Body crisis and the multiparty interim appeal arrangement' (2021) EPRS: European Parliamentary Research Service, 5 <https://policycommons.net/artifacts/1501583/international-trade-dispute-settlement/2160521/> accessed 28 May 2022.

CHAPTER V Critical evaluation

I. Benefits

The previous sections of this thesis have provided a comprehensive picture of the MPIA, its creation and the reasons behind it, its legal content, its differences from the text of the DSU, and its application in practice. Through this thorough analysis, the possibility was created of assessing the MPIA with a critical mind. First, the advantages associated with this interim solution are discussed, and in the following section, some of the negative aspects are highlighted.

First and foremost, it should be emphasized that the MPIA retained the concept of a two-stage dispute settlement system which is self-evidently a great advantage.[172] An added benefit that is directly related to this is the fact that the MPIA offers the option to examine WTO panel rulings, which occasionally contain legal mistakes.[173] For instance, the Appellate Body overturned most of the panel's conclusions in *Korea – Radionuclides (Japan).*[174] Given that some of the allegations fell beyond the panel's purview, the AB came to the conclusion that the panel had not done its job. In addition, the Appellate Body discovered a number of legal errors, which led to the decision that, contrary to what the panel had determined, the majority of the measures alleged to be in conflict with WTO requirements were really in accordance with them. By giving arbitrators under the MPIA the same authority as the AB on this level, the proper application of WTO law is encouraged.

[172] Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) Vol.22 JIEL 297, 312.
[173] Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) Vol. 55 Journal of World Trade 787, 800.
[174] *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides* (11 April 2019) WT/DS495/AB/R.

Another benefit can be found in the fact that the MPIA tackles a few issues raised by WTO Members over the last few years regarding the working of the AB. The interim solution enables the arbitrators to establish page restrictions for submissions, time constraints and deadlines during the proceedings, among other organizational measures, in order to streamline the procedure and to respect the 90-day period.[175] In addition, the MPIA allows for the extension of the 90-day window provided all parties agree to it.[176] Even though the U.S. is not convinced by these concessions, one can certainly speak of procedural progress in this respect.

And finally, this stop-gap solution can be seen as a positive way to bridge the time span of AB paralysis. With its pool of arbitrators, the MPIA improves the predictability and efficiency of international trade by preventing parties from enacting protectionist measures, which are harmful to the growth of the global trading system. The 52 MPIA Members sent a strong message to the international community and to the U.S. in particular that the illegal blocking of AB-members indeed drove them to action in order to find a solution collectively.

II. Disadvantages

A first drawback of the MPIA has to do with its legal nature, which is, as analyzed above, a source of discussion. The MPIA cannot be enforced since it is not a binding international agreement. This means that the participating parties of the MPIA may at any moment act in bad faith and decline to resolve disputes using the procedures set out therein. This MPIA trait is not only bad for the effective

[175] Dispute Settlement Body, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 5 [12].
[176] ibid 6 [14].

functioning of the interim solution, but also detracts from the motivation of other WTO Members to join.

A second impediment associated with the MPIA is the number of its members, 52 out of the 164 WTO Members, one can speak of a meager catch.[177] Many lobbying attempts over the past years to bring global economic player Japan into the MPIA's voluntary group have so far been fruitless.[178] It should also not be forgotten that for many WTO Members, the United States represents one of their largest trading partners to this day, so a dispute settlement mechanism that does not involve this major power could sway the intention of many WTO Members to remain members of the MPIA.[179] Also the number of trade disputes among MPIA participants is negligible since they make up for around 25% of the overall number of DSU cases.[180]

Third, the MPIA does not address the majority of the issues the United States raised in their USTR report on the AB.[181] For example, the vehicle of reviewing domestic law is not even cited but also the argument of judicial overreach is almost completely ignored in the legal text of the MPIA. Leaving all these concerns unsettled may perhaps begin to avenge itself in the future especially when you take into account that the U.S. has already threatened to leave the WTO altogether.

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[177] 'Parties to the MPIA' (*Geneva Trade Platform,* 31 July 2020) <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 4 July 2022.
[178] Andrew Tillet, 'Push for Japan, Korea to join breakaway trade disputes' (*Financial Review,* 16 June 2020) <https://www.afr.com/politics/federal/push-for-japan-korea-to-join-breakaway-trade-disputes-body-20200615-p552qw> accessed 4 July 2022.
[179] Robert McDougall, 'The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance' (2018) Vol. 6 Journal of World Trade 867, 886.
[180] Matteo Fiorini, Bernard Hoekman, Petros Mavroidis, Maarja Saluste and Robert Wolfe, 'WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences' (2020) Vol. 5 Journal of World Trade 667, 680.
[181] Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization', The USTR Archives 2007-2021 Reports and Publications, 11 February 2020.

And finally, the MPIA can be perceived as a distraction from the real Appellate Body crisis. It is likely that the current situation in the AB will, at best, continue. The MPIA will offer some solace in situations involving those who approved of the work of the Appellate Body. Unfortunately, to the degree it is successful, it could postpone the real crisis' resolution.[182]

[182] William J. Davey, 'WTO Dispute Settlement: Crown Jewel or Costume Jewelry?' (2022) Vol. 21 World Trade Review 291, 299.

CONCLUSION

This thesis put the Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU under the magnifying glass, identifying the reasons behind its existence, its negotiation and creation process and the scope and content of the interim solution. Knowing these elements provides an opportunity to answer the central research question: "*Is the MPIA a mere interim solution or the pathway to fixing the WTO?".*

Due to months of U.S. blockages in appointing Appellate Body members, the World Trade Organization's AB fell into a comatose state. As a result, the WTO's dispute settlement system is still operating today up until the panel stage, but as soon as an appeal is filed against a panel report, meaning at the non-operative AB, the appeal ends up in limbo and a solution to the trade dispute remains out of sight. The motivations of the U.S. for blocking appointments of judges to the Appellate Body were examined and could be brought together in four central arguments. First, the United States criticizes the periodic exceeding of the 90-day deadline for completing the AB report and claims that these delays could have been avoided if the AB had limited itself to dealing with the issues necessary to resolve the dispute. Second, America takes issue with Rule 15, an internal operating rule that allows an AB member whose term has expired to complete his or her ongoing work in a pending appeal. According to the U.S., this decision belongs exclusively to the DSB, and the AB should keep its hands off it. Also, in the American opinion, the appellate review of facts and national law is too far-reaching. Finally, the other vexations of the United States were catalogued under a similar rubric, notably excessive judicial activism in which there were alleged rulings creating rules, setting binding precedents and establishing *obiter dicta.* The U.S. blocking practices, and its underlying motives are the direct raison d'être of the MPIA.

As the WTO was faced with such a massive multilateral challenge, it was the EU, in cooperation with Canada, to put forward an interim solution based on Article 25 of the DSU which provides for a reflection of the main features of arbitration under the WTO regime. The AB crisis, meaning a losing party can no longer appeal the panel report, has hastened the Member's efforts to find a way out of the unfortunate situation. As a result, the MPIA currently has membership of 52 states. Unfortunately, world players such as America and Japan could not be convinced to join to this day. By virtue of their legal nature, it was analyzed that the MPIA can be related to "procedural agreements" under the WTO. As the legal standing of those procedural agreements is questionable, the MPIA's legal nature might likewise be characterized as debatable. And although WTO Members generally accept the terms of such in-dispute agreements, like the MPIA, and comply with them, there may be considerable legal obstacles if the issue comes before the DSB.

The scope of the MPIA is clearly delineated by its interim nature, which is highlighted several times in its legal text. Two types of trade disputes are covered by the MPIA, namely any future dispute between any two or more MPIA participants and any dispute that was pending on the date of the communication of the MPIA, namely 30 April 2020, as long as the interim panel report had not been issued. As for the content, the MPIA presents some of the ideas that came up during the DSB discussions to enhance and innovate the operation of the Appellate Body. First, the MPIA increases the number of adjudicators to a total of ten and it allows for greater levels of pool members' collaboration thus strengthening the principle of collegiality among the arbitrators. The MPIA introduces some organizational measures on which the adjudicators have the authority to decide such as decisions on page restrictions of the legal documents sent by the attorneys, time constraints and deadlines during the procedure, as well as the length and number of necessary hearings. Finally,

the MPIA also includes substantive remedies, which the arbitrators may merely suggest because those measures need the agreement of the disputing parties. An example of such a substantive measure is the exclusion of the Article 11 of the DSU claims.

After a critical evaluation of the MPIA, both favorable and detrimental features can be brought forward. As for the advantages it should be noted that the MPIA retained the concept of a two-stage dispute settlement system which is self-evidently a great benefit since it offers the option to examine WTO panel rulings, which occasionally contain legal mistakes. Another advantage can be found in the fact that the MPIA tackles a few procedural issues raised by WTO Members over the last few years by streamlining the procedure in a more efficient manner. And of course, this stop-gap solution improves the predictability and efficiency of international trade since the appeal system has been partially restored. However, the MPIA is not a legally binding international agreement so it cannot be enforced. This implies that the MPIA's participating parties may at any time act in bad faith and refuse to resolve disputes in accordance with its specified processes. Also, the amount of MPIA members in light of the WTO as a whole is rather low and also the number of trade disputes among MPIA participants is negligible. Finally, a lot of blocking motives from the part of the U.S. remain unaddressed which might be detrimental for the incentive to join the MPIA.

"*Is the MPIA a mere interim solution or the pathway to fixing the WTO?"* We have to collectively believe it is the second. The MPIA is much more than a mere interim solution since it tackles some core procedural issues of the Appellate Body which will undoubtedly have a great impact on the future of the WTO. The practical application of the MPIA in the coming months will hopefully provide a source of inspiration for the WTO Members, prompting them to show political courage to fix the WTO. The best way to predict the future, is to create it.

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