

MPIA as Solution to the WTO Appellate Body Dilemma: An Examination of the WTO Innovative Dispute Settlement Mechanism

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Abstract

In December 2019, the WTO Appellate Body, the heart of global trade governance, encountered an unprecedented impasse due to the United States blockade on the appointment of its members. This paper delves into the emergence of the Multiparty Interim Appeal Arbitration Arrangement (MPIA) as a provisional solution to this deadlock. Established by the European Union and trade partners, and now endorsed by 53 WTO members, the MPIA aims to temporarily fill the void left by the paralyzed Appellate Body by utilizing Article 25 of the Dispute Settlement Understanding (DSU). This study critically evaluates the MPIA's role in international trade dispute resolution through a juridical normative methodology complemented by historical and descriptive analysis. It compares the MPIA's innovative mechanism against the traditional WTO dispute settlement mechanisms, illuminating its merits and limitations. The paper argues that while the MPIA represents a creative and necessary stopgap, beyond this, it is not a solution for the challenges facing the WTO's dispute settlement mechanism. The findings emphasize the crucial element for comprehensive reform within the WTO's Dispute Settlement Mechanism to regain its functionality and credibility in international trade dispute settlement.

Keywords: MPIA; WTO; Dispute settlement; Appellate Body

Introduction

The cornerstone of the WTO dispute resolution mechanism is the Appellate Body. This quasi-judicial body plays a pivotal role in ensuring adherence to the rules and principles of the WTO agreements. However, in recent years, the Appellate Body has faced severe challenges threatening its effectiveness, ultimately jeopardizing the WTO's ability to maintain a rules-based international trading system. To address this crisis and uphold the core principles of the WTO, member countries have sought innovative solutions, culminating in the establishment of the MPIA.¹

The Appellate Body faced a crisis that emerged in the late 2019s, Specifically when the United States blocked the appointment of new Appellate Body members, leading to a situation where the body could not

¹ Yining Yang, "Crisis and Reform Direction of WTO Appellate Body", Atlantis Press SARL, (2021).

reach the minimum number of members required for its operation. This paralyzed the Appellate Body, leaving a void in the WTO dispute settlement.²

This crisis necessitated creative solutions to ensure the continued functioning of the WTO dispute settlement mechanism. Recognizing the situation's urgency, a group of committed WTO member countries embarked on a path to establish an alternative dispute resolution mechanism known as the MPIA. This arrangement, informally referred to as the MPIA, aimed to fill the void left by the Appellate Body's paralysis and to provide a temporary solution for resolving trade disputes among willing participants.³

The MPIA, which occurred in 2020, represents a significant departure from the traditional WTO dispute resolution process. Under this arrangement, participating countries agree to follow a two-stage process: first, they engage in arbitration to resolve their dispute at the appellate level, and second, they agree to abide by the arbitration panel's decision. Importantly, this mechanism is meant to be temporary and will remain in operation until a lasting solution to the Appellate Body crisis is found.⁴

The MPIA has garnered both support and criticism within the international community. Supporters argue that it represents a pragmatic response to the Appellate Body's paralysis, allowing countries to continue resolving trade disputes within a rules-based system. On the other hand, critics raise concerns about the potential fragmentation of the WTO's dispute resolution system and its implications for the broader multilateral trading system.

The MPIA represents a novel and innovative response to the challenges facing the WTO's dispute resolution mechanism. As the global economy evolves, international institutions like the WTO must adapt and find creative solutions to ensure their continued relevance. The MPIA, while not a permanent fix, demonstrates the commitment of certain WTO member countries to uphold the principles of international trade and resolve disputes through a rules-based system, even in the face of unprecedented challenges. Its success or failure will have profound implications for the future of the WTO and the international trading system.⁵

I. Emergence of the MPIA as Response to the WTO Appellate Body Impasse

On May 11, 2016, the United States fired the starting pistol for the current crisis, despite its displeasure with the Appellate Body for a long time. The U.S. delegation informed the Dispute Settlement Body chairman that it would not support the reappointment of A.B. member Mr. Chang. The standard rule of consensus decision-making of the DSB governs this appointment process, but any member who objects to a proposed decision may block it. During the next meeting of the DSB, the appointment of the Appellate Body members was discussed, and the U.S. attempted to explain its refusal to reappoint Mr. Chang to the remaining members.⁶ The U.S. stressed that reappointing members of the WTO Appellate Body is not automatic and involves a vital responsibility entrusted to WTO Members. The USA also expressed concerns about some of the appeal cases involving Mr. Chang that were not strictly legal.⁷

The U.S. raised concerns about how Mr. Chang conducted oral hearings, focusing on issues not raised on appeal or central to resolving the dispute between parties. However, other members didn't support this perspective. They worried that singling out Chang based on decisions of the Appellate Body, where he was involved, could damage confidence in the dispute settlement system. These members, including China and

² See USTR, "Report on the Appellate Body of the World Trade Organization", Feb (2020).

³ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

⁴ Marie Van Luchene, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO", Stanford-Vienna TTLF Working Paper No. 90, (2022).

⁵ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

⁶ Henry Gao, "Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis, 1 March, (2019). Chang-fa Lo, Jinji Nakagawa, and Tsai-yu Lin eds, "The Appellate Body of the WTO and Its Reform", (2019). pp. 215-238.

⁷ Gao, Henry S., "Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis, March 1, (2019). Chang-fa Lo, and others," "The Appellate Body of the WTO and Its Reform", (2019), pp. 215-238.

the European Union, emphasized that decisions of the Appellate Body should not be attributed to a single member, reflecting a multilateral concern for the integrity of the WTO's dispute resolution process.⁸

DSB members failed to reach a consensus on handling the problem at the next meeting on June 22 2016. Although the United States remained indifferent to these rebuttals, other WTO members invariably offered their opinions on what had occurred and their views on how to proceed. It stressed its clear position without mincing its words and referred to its 23 May statement earlier that year for further argumentation. On July 21 2016, the Chair of the DSB informed the WTO Members that he would convene dedicated sessions starting in September 2016 to discuss all issues regarding reappointments to the Appellate Body, including whether the appointment rules needed to be changed.⁹

After Mr. Chang was not reappointed, a special session was held to fill the vacancy created by his failure. Although there was no mutual understanding of the procedural aspects discussed during the special session, there was consensus on the candidates for the A.B. On November 23 2016, two new members were appointed to the DSB's A.B. due to Chang's non-rep appointment and the departure of the Chinese AB member whose second term expired in May 2016.

The DSB of the World Trade Organization faced significant challenges in 2017 due to vacancies in the Appellate Body.¹⁰ With the end of Ricardo Ramírez's second term in June and Peter Van den Bossche's in December, most delegations, including the E.U., called for a single process to fill both seats. However, the United States proposed a different approach, advocating for the immediate commencement of the process to replace Ramirez. In addition, it suggested a delay in deciding on Van den Bossche's successor. This difference in approach led to a standoff, with the E.U. insisting on a simultaneous start for both positions and the U.S. insisting on a sequential process.

The situation was further complicated by the unexpected resignation of A.B. member Hyon Chong Kim, who left to become Korea's Minister of Commerce. As a result of these developments, by 2018, the Appellate Body found itself with three vacancies, exacerbating the strain on the WTO dispute resolution mechanism.¹¹

The U.S. presented its DSB agenda for the first time in March 2018 in the President's Trade Policy Agenda. A number of the A.B. reports were treated as precedents and criticized for ignoring the 90-day deadline and interpretative techniques. At the General Council on May 8 2018, China put the A.B. nomination process on the agenda. It urged the U.S., with support from many other Member States, to end the stalemate.¹²

A broad critique was offered in response to the President's 2018 Trade Policy Agenda. The DSB's next meeting highlighted the core of the crisis. A reappointment of A.B. member Shree Babu Chekitan Servansing, whose term ended on September 30 2018, was included in the agenda. The U.S. again referred to the agenda after signalling its disapproval of the reappointment. Several months later, the Appellate Court had four empty seats, which meant only a few people left to rule.

In January 2019, the President of the General Council initiated an informal process to resolve Appellate Body issues. The discussions were facilitated by David Walker, New Zealand's WTO ambassador. Unfortunately, even this attempt to change Washington's course did not bring relief, and America continued to stand its ground.

⁸ Baroncini, E, "Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", *The Italian Yearbook of International Law Online*, vol 29(1), (2020).

⁹ Henry GAO, "A rule-based solution to the Appellate Body crisis and why the MPIA would not work", *Institutional Knowledge at Singapore Management University* (2021).

¹⁰ Jens Lehne, "Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?" (2019). P.3

¹¹ Amrita Bahri, "Appellate Body Held Hostage": Is Judicial Activism at Fair Trial?", *Journal of World Trade*, (2019).

¹² David A. Gantz, James E. Rogers. "An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States" *University of Arizona, Discussion Paper No. 18-26, July* (2018).

Due to two or more resignations on December 10, 2019, the Appellate Body would no longer have a quorum to operate. The October 28, 2019, DSB meeting was the last opportunity to initiate appointment processes for the A.B. Due to this crucial meeting, the U.S. stood firm and rejected the proposal to begin the selection process. The Appellate Body remained functional until December 10 2019. As of the next day, the Appellate Body was paralyzed without a quorum due to one Member's absence.¹³

II. The Existence of the WTO Appellate Body Crisis

The WTO Appellate Body crisis has been a significant concern in international trade disputes. This crisis has roots in a range of complex issues and has raised questions about the effectiveness and functioning of the World Trade Organization (WTO) dispute settlement mechanism. This discussion will outline the critical aspects of the WTO Appellate Body crisis and explore its implications for international trade.¹⁴

One significant aspect of the WTO Appellate Body crisis is the issue of paralysis and deadlock. The Appellate Body reviews appeals of trade dispute cases brought before the WTO. However, failing to appoint new Appellate Body members has made it increasingly difficult for the body to function effectively. This has resulted in a backlog of cases, leaving countries involved in disputes without a resolution mechanism. This paralysis has eroded confidence in the WTO's dispute settlement system, as it fails to provide timely and efficient solutions to trade conflicts.¹⁵

Another critical dimension of the crisis is the broader concern over the erosion of the rules-based trading system. The WTO was established to ensure that international trade operates under rules and principles, promoting fairness and predictability. The Appellate Body crisis threatens to undermine this system, as countries may resort to unilateral actions and trade disputes without a reliable mechanism for resolution. This could lead to increased trade tensions and a potential breakdown of the multilateral trading system.

The crisis has also raised questions about the effectiveness of the WTO's decision-making processes. Some member countries have raised concerns about the Appellate Body's perceived overreach and judicial activism.¹⁶ They argue that the body has exceeded its mandate and made rulings beyond the text of WTO agreements. This has led to calls for reforms and increased transparency in the appointment and functioning of Appellate Body members.

Furthermore, the WTO Appellate Body crisis has highlighted the organization's broader challenges, including consensus-based decision-making issues and the need for WTO reform. The crisis has underscored the difficulty of achieving consensus among the 164 member countries on crucial matters such as Appellate Body appointments and dispute settlement reforms. This has led to calls for a reevaluation of the WTO's decision-making processes to make them more efficient and responsive to the needs of member countries.

The existence of the WTO Appellate Body crisis is a multifaceted issue that has far-reaching implications for international trade. The paralysis of the Appellate Body concerns over the rules-based trading system, questions about the body's decision-making processes, and the broader challenges facing the WTO all contribute to the crisis. Finding a resolution to these issues is crucial for the continued effectiveness of the WTO and for maintaining a stable and predictable international trading system.¹⁷

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

¹³ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020)

¹⁴ John H. Jackson, Robert E. Hudec and Donald Davis, "The Role and Effectiveness of the WTO Dispute Settlement Mechanism", Brookings Institution Press, (2000), pp. 179-236

¹⁵ GAO, Henry S. "Finding a rule-based solution to the appellate body crisis: Looking beyond the multiparty interim appeal arbitration arrangement", Journal of International Economic Law. Vol. 24/3, (2021).

¹⁶ David A. Gantz, James E. Rogers. "An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States" University of Arizona, Discussion Paper No. 18-26, July (2018).

WTO's appellate body;¹⁸ one of the most significant objections is how panelists have created their own rules without clear guidance on numerous agreements reached when the WTO was established 25 years ago.

The United States addresses procedural and interpretative issues of the A.B. and substantive issues of WTO law. U.S. crises may be divided into four central divisions of grievances against the A.B. consisting of (1) the Procedural approach of A.B., (2) The substantive approach, (3) excessive judicial activism, (4) Failure to meet the 90-day deadline¹⁹

A. Procedural Approach of the WTO Appellate Body's decisions

In the intricate landscape of international trade disputes governed by the WTO, the Procedures for Appellate Review play a crucial role in ensuring the fairness and effectiveness of the dispute settlement process. Rule 15 of these working procedures has garnered significant attention and controversy due to its potential implications for the appointment and authority of the Appellate Body (A.B.) within the WTO's dispute settlement mechanism. This rule allows former members of the Appellate Body to continue participating in the disposition of appeal cases even after their official term has ended, subject to certain conditions. This introduction provides an overview of Rule 15, its connection to Article 17.9 of the Dispute Settlement Understanding (DSU), and the objections raised by the United States regarding its compatibility with Article 17.2 of the DSU, which deals with the appointment of A.B. members.²⁰ The debate surrounding Rule 15 underscores the complex interplay between institutional procedures and the overarching principles governing the WTO's dispute resolution framework.²¹

Rule 15 of the Appellate Body's Working Procedures and its connection to Article 17.9 of the Dispute Settlement Understanding (DSU) within the World Trade Organization (WTO). Let me break down the key points:

Rule 15 of the A.B.'s Working Procedures, this rule allows a former member of the Appellate Body to continue to participate in the disposition of an appeal case that they were assigned to while they were still a member of the Appellate Body. In other words, even after their term as a member has ended, they can still be involved in ongoing cases, but only with the authorization of the Appellate Body and upon notification to the Dispute Settlement Body (DSB).²²

For the specific purpose of completing the disposition of the appeal they were assigned to, the former Member is considered to continue being a Member of the Appellate Body, but only for that particular case.

The Working Procedures of the Appellate Body, including Rule 15, are established based on Article 17.9 of the DSU.²³ Article 17.9 of the DSU requires that the Appellate Body develops its working procedures in consultation with the Chairman of the DSB (Dispute Settlement Body) and the Director-General of the WTO. These procedures are communicated to the WTO Members for their information.

Rule 15 of the Appellate Body's Working Procedures allows former members to continue their involvement in ongoing appeal cases, but only with the approval of the Appellate Body and notification to the DSB. This rule is based on Article 17.9 of the DSU, which outlines the process for developing the Appellate Body's working procedures in consultation with key stakeholders.

¹⁷ Jens Lehne, "Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?" (2019).

¹⁸ The Dispute Settlement Body, "Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding" Communication from the USA, 21 Oct, (2005).

¹⁹ Amrita Bahri, "Appellate Body Held Hostage": Is Judicial Activism at Fair Trial?", *Journal of World Trade*, (2019).

²⁰ See Article 17.9 DSU

²¹ Marie Van Luchenen, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO?", *Stanford-Vienna TTLF Working Paper No. 90*, (2022)

²² Jens Lehne, "Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?" (2019). p.33

²³ See Article 17.9 Dispute Settlement Understanding

The U.S. objections to the application of Rule 15 and its belief that Rule 15 may not be reconcilable with Article 17.2 of the Dispute Settlement Understanding (DSU), which pertains to appointing members to the Appellate Body (A.B.).

Rule 15 is being applied repeatedly in WTO dispute settlement cases, allowing the Appellate Body to continue functioning even if the term of office for its members has technically expired.²⁴ This rule had been applied without objection several times in the past. After many years of use, the United States has raised objections to the application of Rule 15 without issue. The U.S. believes that Rule 15 conflicts with Article 17.2 of the DSU.²⁵ Article 17.2 of the DSU grants the Dispute Settlement Body (DSB) the exclusive power to appoint members of the Appellate Body for a four-year term, with the possibility of reappointment once.²⁶

Appellate Body's Self-Appointment: The United States argues that the Appellate Body cannot grant itself the power to appoint its members by inserting a rule into its operating procedures. It believes that appointing individuals to the Appellate Body should be made solely by the DSB, and the Appellate Body should not have the authority to rule on this matter.

Policy Considerations and Legal Validity: According to the United States, the Appellate Body's reliance on policy considerations, such as efficient operation, is not a valid justification for infringing on the DSB's exclusive power to appoint members.

Violation of Four-Year Term: The U.S. argues that even if the application of Rule 15 were considered an extension of a current A.B. member's term, it would still violate the four-year term established by the DSU and the DSB.

B. The substantive approach of the panels and the Appellate Body

The substantive approach of the WTO Appellate Body refers to its method of interpreting WTO rules broadly and actively to ensure the spirit and objectives of these agreements were upheld.²⁷ This approach led to concerns from the United States about what it perceived as judicial overreach by the World Trade Organization's (WTO) Appellate Body (A.B.). In this context, substantive overreach refers to the U.S.'s concern that the A.B. has exceeded its authority and has been too active in interpreting and shaping WTO rules and decisions.²⁸ The U.S. identifies three main types of substantive actions by the A.B. that it criticizes as follows:

Rulings that create new rules: The U.S. accuses the A.B. of creating new rights and obligations for WTO members by interpreting WTO agreements in its case law. For example, in a dispute between the U.S. and China over state-owned enterprises, the A.B.'s interpretation of the Agreement on Subsidies and Countervailing Measures (ASCM) was seen as expanding on the ASCM's provisions. The U.S. argues that the A.B. should not fill gaps in WTO agreements. This violates the DSU (Dispute Settlement Understanding), which grants exclusive power to adopt interpretations to the Ministerial Conference and the General Council.

Binding precedents: The U.S. objects to the A.B. claiming precedent for its reports and decisions. Precedent, in this context, refers to using previous cases as examples or guidance for resolving future disputes. The DSU does not assign presidential value to A.B. reports, and the U.S. argues that only authoritative

²⁴ See Article 15, Working procedures for appellate review, WT/AB/WP/6, 16 Aug (2010). Available at: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm

²⁵ Jens lehne, *Ibid.*

²⁶ Gao, Henry S., *Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis*, March 1, (2019). Chang-fa Lo, and others, "The Appellate Body of the WTO and Its Reform", (2019), pp. 215-238.

²⁷ Magnuson, William J., "WTO Jurisprudence and its Critiques: The Appellate Body's Anti-Constitutional Resistance", *Harvard International Law Journal Online*, Vol. 51, No. 121, (2010).

²⁸ Marie Van Luchenen, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO?", *Stanford-Vienna TTLF Working Paper No. 90*, (2022)

interpretations adopted by WTO Members in the Ministerial Conference or the General Council should carry such weight.

Obiter dicta: The U.S. also criticizes the A.B. for creating obiter dicta in its reports. Obiter dicta are statements a judge makes that are considered redundant and not essential to the final judgment. The U.S. argues that providing additional analysis on non-relevant issues in A.B. reports goes against the objective of the dispute resolution system, which should focus on efficiently resolving disputes rather than creating new interpretations or "making law."

The U.S. is concerned that the A.B.'s actions have expanded its role beyond what the U.S. believes is appropriate. The U.S. argues for a more limited role for the A.B. and focuses on expeditiously resolving appeals in the WTO's dispute resolution system. These criticisms reflect broader debates and discussions within international trade law and the functioning of international organizations like the WTO.²⁹

In response to the substantive approach of the WTO appellate body, the U.S. blocked the appointment of new Appellate Body members, causing a crisis within the WTO's dispute settlement system. This crisis left the Appellate Body unable to function, raising significant challenges and questions about the future of the WTO and the need for broader reforms to address the concerns of various member countries, particularly the United States.³⁰

C. The Judicial Approach of the WTO Appellate Body

The argument put forward by the United States revolves around the scope of the appellate review conducted by the WTO Appellate Body. The U.S. contends that the Dispute Settlement Understanding, which outlines the functions of the panels and the Appellate Body within the WTO, was designed to restrict the A.B.'s authority solely to reviewing legal findings and not factual findings made by panels. This distinction is emphasized in Article 17.6 of the DSU. However, the U.S. asserts that the Appellate Body has overstepped this limitation. It cites the E.C. – Hormones case as an example where the A.B. expanded its jurisdiction improperly by using Article 11 of the DSU to review factual findings.³¹ Article 11 speaks to the panel's duty to make an objective assessment. Still, the U.S. argues that this was never meant to be a legal obligation enforceable through review by the Appellate Body, especially since the language used is "should" rather than "shall" or "must," which would denote a mandatory requirement.³²

The U.S. further claims that this interpretation and the consequent action by the Appellate Body to review factual findings lack a legal basis in the Dispute Settlement Understanding, as highlighted in a report by the United States Trade Representative (USTR). The implication is that the Appellate Body is acting beyond the powers conferred by the WTO members. This could undermine the intended limitations of the A.B.'s review capabilities as agreed upon in the DSU.

D. The Failure to meet the 90-day deadline

Article 17(5) of the Dispute Settlement Understanding sets forth a clear and vital procedural requirement for the timely issuance of appeal reports. This provision stipulates that the Appellate Body (A.B.), responsible for reviewing appeals of disputes between WTO member countries, must issue its report within 90 days from when one of the parties involved in the dispute formally notifies their decision to appeal. This 90-day deadline is a critical aspect of the dispute resolution process, ensuring that cases are resolved efficiently and promptly. However, in recent years, there have been notable instances where the A.B. has failed to meet this 90-day deadline. This failure to adhere to the prescribed timeframe is a source of concern and dissatisfaction

²⁹ Gao, Henry S., Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis, March 1, (2019). Chang-fa Lo, and others," The Appellate Body of the WTO and Its Reform", (2019), pp. 215-238.

³⁰ Amrita Bahri, "Appellate Body Held Hostage": Is Judicial Activism at Fair Trial?", Journal of World Trade, (2019).

³¹ Jens Lehne, "Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?" (2019). p.66

³² Ibid

among WTO member countries, with the United States being particularly vocal in expressing its discontent.³³

The dissatisfaction expressed by the United States arises from two main issues:

1. Consistent Breach of the 90-Day Deadline: The AB has repeatedly failed to meet the 90-day deadline for issuing appeal reports. This pattern of non-compliance with a fundamental procedural requirement has raised questions about the A.B.'s ability to effectively and efficiently carry out its responsibilities within the WTO's dispute settlement mechanism. Failure to meet this deadline can result in delays in resolving trade disputes, which can have significant economic and trade implications for the parties involved.³⁴

2. Lack of Transparency in Explaining Delays: In addition to breaching the 90-day time limit, the A.B. has also been criticized for not providing adequate transparency in explaining the reasons for these delays. DSU Article 17(5) not only requires the A.B. to issue its report within 90 days but also mandates that it inform the Dispute Settlement Body (DSB) in writing of the reasons for the delay, along with an estimate of the period within which it expects to submit its report. This requirement ensures transparency, accountability, and cooperation in the dispute-resolution process. The lack of transparency in stating reasons for delays, estimating new deadlines, and consulting the parties involved in the dispute has further exacerbated the dissatisfaction among WTO member countries, including the United States.³⁵

The failure of the Appellate Body to meet the 90-day deadline established by Article 17(5) of the DSU, coupled with a lack of transparency in communicating reasons for delays and consulting with the parties involved, has led to concerns about the effectiveness and credibility of the WTO's dispute settlement mechanism. Addressing these issues is crucial for maintaining the integrity of the international trade system and ensuring that trade disputes are resolved fairly and on time.

III. The legal status of the MPIA dispute settlement

The legal status of the MPIA is a matter of debate and interpretation. Some WTO members argued that it was consistent with the WTO's Dispute Settlement Understanding, while others contended that it was a departure from the WTO's established dispute settlement procedures.³⁶

The legal character of the MPIA is a matter of debate. The first element of the MPIA suggests that it serves as a soft law communication, indicating the intention of participants to use arbitration as an interim appeal procedure under Article 25 of the DSU. Instead of calling it an "agreement," they intentionally used the term "arrangement." In essence, the MPIA can be viewed as a political statement of intent to opt for appeal arbitration over the Appellate Body review under Article 17 of the DSU. It is not necessarily a legally binding agreement. Therefore, in theory, a responding party could choose not to enter an arbitration agreement for a trade dispute. In such cases, the DSB would lack the authority to enforce the MPIA.³⁷

The MPIA is generally considered lawful and consistent with the DSU's principles in terms of its legal nature. It is a procedural agreement like "agreements not to appeal. A party can appeal a panel report under Articles 16.4 and 17.4 of the DSU. Still, the Appellate Body recognizes that members may waive their procedural rights under the DSU by following the rules and procedures of the DSU. Ad hoc agreements have

³³ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020)

³⁴ See "Report on the Appellate Body of the World Trade Organization", Office of the United States Trade Representative, Feb (2020).

³⁵ Yining Yang, "Crisis and Reform Direction of WTO Appellate Body", Atlantis Press SARL, (2021).

³⁶ Simon Lester, "Can Interim Appeal Arbitration Preserve the WTO Dispute System?", Free Trade Bulletin Num 77, Sep 1, (2020).

³⁷ See establishment of Multi-Party Interim Appeal Arbitration Arrangement (MPIA), Geneva trade platform, March (2020). available at: https://wtoplurilaterals.info/plural_initiative/the-mpia/

been used by WTO Members to avoid appeals when the Appellate Body is not operational at the beginning of a dispute.³⁸

"Sequencing agreements" are typically signed to resolve the timing inconsistency between Articles 21.5 and 22.2 of the DSU. These agreements address the issue of when a party can engage in retaliation under Article 22 of the DSU if the responding party does not comply with DSB recommendations. While parties usually adhere to these agreements, they may not be legally binding in terms of enforcement since the DSU does not cover disputes related to procedural contracts.

Given that the MPIA is akin to these procedural agreements, which have uncertain legal status, its legal character remains debatable. If the DSB is required to make a substantive decision to apply such an agreement, such as the MPIA, rather than the DSU, it must be made by consensus, and any WTO Member present can veto it. While WTO Members typically honour the terms of dispute agreements, legal challenges could arise if the matter is brought before the DSB.³⁹

A. General Statement of MPIA Arrangement

The MPIA aims to preserve the substantive and procedural aspects of WTO's appeal arbitration procedure, emphasizing independence and impartiality while enhancing efficiency. Any WTO member can join the MPIA by notifying the Dispute Settlement Body. The MPIA is an interim arrangement open to all WTO members, designed to ensure that a functioning dispute settlement system, including an appeal stage, is available to its parties. When MPIA parties are involved in a dispute, they must submit a joint notification to invoke the MPIA to resolve the conflict at the appellate stage.⁴⁰

The MPIA's arbitration procedure is rooted in the substantive and procedural components of Article 17 of the DSU. However, it aims to improve procedural efficiency. The MPIA participants have emphasized through the legal text that the arbitration will be governed by the DSU's articles and other standards and procedures relevant to Appellate Review. While the panel's report sets the foundation for this new procedure, it requires the parties involved in the dispute to function outside the framework of the WTO. The MPIA participants must maintain an organizational structure distinct from the established WTO procedure to ensure this happens.⁴¹

Furthermore, the MPIA embodies ideas discussed within the WTO to enhance the operation of the Appellate Body. These concepts were extensively deliberated and eagerly awaited. This interim appeal arbitration approach aims to improve the appeal proceedings' procedural efficiency. This section will delve into the content and innovations of the DSU and elucidate the reasons behind the choices made by the MPIA participants.⁴²

1. The MPIA dispute settlement Arbitrators' congregation

The MPIA expands the roster of adjudicators. There should be ten arbitrators who hear appeals, but this can be increased upon unanimous Agreement of all participating Members. This provision underscores the MPIA's adaptive nature. If participants need additional arbitrators, perhaps due to more WTO Members adopting the interim measures, the pool can be swiftly adjusted. Several WTO Member States had previously mooted this idea of increasing the number of individuals handling appeals.⁴³ Specifically, the

³⁸ Marie Van Luchenen, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO?", Stanford-Vienna TFLF Working Paper No. 90, (2022).

³⁹ Gao, Henry S., Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis, March 1, (2019). Chang-fa Lo and others, "The Appellate Body of the WTO and Its Reform", (2019), pp. 215-238.

⁴⁰ B. Hoekman and C.Sabel, "open plurilateral agreements global Spillovers and the multilateral trading system", BertelsmannStiftung Working Paper, Mar 25, (2020).

⁴¹ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

⁴² Frank Altemöller, WTO Appellate Body without Legitimacy? The Criticism of the Dispute Settlement System and the Response of the WTO Member States, Global Trade and Customs Journal, Vol 16, Issue 4 (2021) pp. 139-148.

⁴³ Elisa Baroncini, "Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", federalism.it July (2020).

E.U., China, and India had suggested expanding the Appellate Body's full-time membership from seven to nine.⁴⁴ The aim was to improve the Appellate Body's efficacy and strike a global balance. As more countries have joined the WTO since its inception, it has become increasingly challenging to maintain geographical representation in the appointment of Appellate Body members. Three arbitrators will be chosen from this pool of ten arbitrators for each trade dispute using the DSU's rotation system.

The standing pool of ten arbitrators was constituted as follows: every participating Member could suggest one arbitrator by notifying other members. This nomination period ended 30 days after the MPIA's announcement.⁴⁵

Three months following the publication of the MPIA, the MPIA parties formally announced a pool of 10 standing arbitrators. If the ongoing A.B. crisis persists, the participating Members will re-compose the pool of arbitrators following the procedures outlined in the MPIA, beginning two years after the initial composition.⁴⁶

2. The Organizational measures of MPIA dispute settlement

The Appellate Body (A.B.) faced challenges regarding its adherence to the 60-day and 90-day deadlines set by the DSU. The U.S. had concerns about the frequent delays and urged the Appellate Body to maintain a sense of judicial economy. In light of this, the MPIA has implemented measures to address these issues.⁴⁷

DSU Deadlines: The DSU has set deadlines for settling disputes. The general rule is 60 days, but this was seldom met. The extended limit of 90 days was also problematic, as only six out of 42 reports adhered to this timeline from 2011 to 2018. The U.S. had issues with these delays and pressed the Appellate Body to exercise judiciousness in handling cases. They also wanted the A.B. to get mutual consent from parties when crossing the 90-day limit was possible.

Measures by MPIA: To address the U.S. concerns and the inherent delays, the MPIA has introduced several provisions:

- The 90-day deadline can be extended, but only with the mutual Agreement of the concerned parties.⁴⁸
- The MPIA has seemingly agreed to the U.S.'s suggestions without affecting the parties' procedural rights and due process.
- The arbitrators now have the authority to adopt necessary organizational measures to expedite processes to meet deadlines.
- There's an allowance to decide on page restrictions, drawing inspiration from the "Jara process."

Jara Process: Initiated by Alejandro Jara, this informal consultation process began in 2010, aiming to find ways to make the panel process at the WTO more efficient. The intention was to reduce the strain on Members and the Secretariat. The MPIA has taken significant steps to ensure timeliness and efficiency in the arbitration process while respecting the parties' rights. Adopting measures like the "Jara process" suggests an inclination towards streamlining procedures and ensuring swifter resolutions.⁴⁹

⁴⁴ See the General Council, "Communication from the European Union, China and India", WT/GC/W/753. Nov 23, (2018).

⁴⁵ See "Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU", JOB/ DSB/1/ Add.12. (30 April 2020).

⁴⁶ See Multi-Party Interim Appeal Arbitration Arrangement (MPIA)' (Geneva Trade Platform, 31 July 2020) https://wtoplurilaterals.info/plural_initiative/the-mpia

⁴⁷ Jens Lehne & Carl Grossmann Verlag, "Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?", Berlin/Bern, (2019).

⁴⁸ See USTR, "Report on the Appellate Body of the World Trade Organization", Feb (2020). Available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body>

⁴⁹ DDG Jara reports on consultations to enhance efficiency of panels' (World Trade Organization, 13 March 2012) available at: https://www.wto.org/english/news_e/news12_e/ddg_13mar12_e.htm

3. Substantive measures of MPIA

The MPIA provides substantive measures that arbitrators can suggest but are not binding. The parties involved in the dispute must agree for these measures to be formalized. An example of such a measure is excluding claims based on the alleged lack of objective assessment per DSU's Article 11. Article 11 requires panels to objectively assess the matter, facts, and applicability with the relevant agreements. WTO Members have used Article 11 to challenge panels' fact-finding. Initially, it was for blatant mistakes, but later, it became a tool for appealing factual issues, even though appeals should be restricted to law matters.⁵⁰

The U.S. has criticized the use of Article 11, arguing that the Appellate Body (A.B.) wrongly interprets the phrase "should make an objective assessment" as a mandate, despite the use of the word "should," indicating it's a recommendation and not an obligation.⁵¹ The MPIA considers this criticism and gives arbitrators the power to suggest that parties drop inadequate complaints to prevent bypassing the limitations of appellate review. The MPIA does not prohibit Article 11 claims. It only indicates that arbitrators may exclude such claims to meet the 90-day requirement, but all parties must agree for the claim to be left out.⁵²

B. Activation Process of MPIA

If a party wishes to appeal a panel report using the MPIA, they must initiate the appellate process by requesting the panel to suspend its proceedings. The MPIA interprets any such request for suspension as a collective call for a 12-month hold on the proceedings under Article 12.12 of the DSU.

This DSU provision empowers the complainant to request a pause in the panel's work, but it also safeguards the respondent's right to appeal, thus necessitating a mandatory classification. The MPIA circumvents issues that arise from the wording in Article 12.12 of the DSU by considering any suspension request as a unanimous one.⁵³

The potential appellant must ask for the panel's suspension "after the final panel report is delivered to the parties but no later than ten days before the expected circulation date of the final report to all Members." This allows the panel adequate time to translate the report into the WTO's other official languages, which is usually completed within three weeks after the disputants receive the final report. Furthermore, within 20 days after the panel's proceedings are suspended, as mentioned earlier, an Appeal Notice must be submitted to the WTO Secretariat to initiate the arbitration process. This notice must include the final panel report in all three WTO working languages and be communicated simultaneously to the opposing party and any other panel participants.

In such instances, the MPIA envisions that the parties collectively request the resumption of the panel's work, leading to the formal release of the panel report to the DSB and its adoption by negative consensus, in line with Article 16.4 of the DSU.⁵⁴ Article 12.12 of the DSU limits the suspension of panel proceedings to a maximum of one year, after which the panel's establishment loses its authority. To prevent the invalidation of the initial WTO adjudication if the appeal is withdrawn after this period, the MPIA specifies that "the arbitrators must issue an award that includes the panel's findings and conclusions in full."

⁵⁰ Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (30 April 2020) JOB/DSB/1/Add. 12, 5 fn. 6.

⁵¹ 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).

⁵² Bernard Hoekman & Petros C. Mavroidis, "Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?", European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2020/06 (2020).

⁵³ Article 12/12 Understanding on the rules and procedures governing the dispute settlement, "The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse".

⁵⁴ See Article 16.4 Understanding on the rules and procedures governing the dispute settlement.

Regarding any ongoing disputes where the panel was established but had not issued an interim report when the MPIA took effect, Members must agree to the appeal arbitration within thirty days of the MPIA's effective date, April 30, 2020, and announce this Agreement in accordance with Article 25.2 of the DSU.

There is still some uncertainty about the procedure for resolving a dispute using the MPIA; by following the resolution of some cases, there is now some clarity on the structure. The steps are drawn the stages of the MPIA process as follows:

1. The WTO Member decides to join the MPIA

Membership in the MPIA: A WTO Member decides to join the MPIA by expressing a political commitment to enter into an appeal arbitration agreement in future disputes where both parties are MPIA participants. This commitment is generally done in writing, typically through a communication issued in April 2020. In some cases, WTO Members not originally part of the MPIA may decide, on an ad hoc basis, to use the MPIA rules and arbitrators for specific disputes.⁵⁵

The WTO Members should express their intention to become part of the MPIA through formal written communication as a symbolic gesture signifying their commitment. This communication is not merely a bureaucratic formality but a significant diplomatic move. It underscores the Member's recognition of the importance of investor-state dispute settlement in the modern global economy and its dedication to utilizing the MPIA's provisions for settling disputes in the future.⁵⁶

The heart of the MPIA's appeal lies in its commitment to establishing an appeal arbitration mechanism. This mechanism ensures that disputes involving two or more MPIA participants have a structured process for resolving issues that may arise regarding investments and trade. By committing to this process, WTO Members acknowledge the value of a specialized and expert panel of arbitrators who can provide impartial judgments, fostering a fair and predictable investment environment.

However, it is essential to note that some WTO Members, initially not part of the MPIA, may choose to engage with the MPIA on an ad hoc basis. This means that even if they have not formally joined the MPIA, they may decide to use the MPIA's rules and/or arbitrators for specific investment-related disputes. This flexibility allows WTO Members to tailor their engagement with the MPIA according to their individual needs and preferences, ensuring that the MPIA remains a dynamic and adaptable instrument within the international trade framework.

The MPIA signifies a commitment to an innovative approach to resolving investment-related disputes in the context of global trade. It involves a formal written commitment and reflects a member's recognition of the importance of specialized arbitration mechanisms in maintaining a fair and predictable investment environment.

2. The appeal arbitration process takes place

The MPIA process involves the participation of a pool of 10 arbitrators selected through a consensus among all MPIA participants. This selection process ensures that the arbitrators are chosen relatively and their impartiality is maintained throughout the proceedings. Once the MPIA participants have agreed on the pool of arbitrators, the next step is the selection of a panel of three arbitrators from this pool. This selection is typically done randomly, further reinforcing the objectivity of the arbitration process. Having three arbitrators on the panel ensures that diverse perspectives and expertise are brought to bear on the dispute, enhancing the quality of the arbitration.⁵⁷

⁵⁵ See Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, JOB/DSB/1/Add. 12. 30 Apr (2020).

⁵⁶ See establishment of Multi-Party Interim Appeal Arbitration Arrangement (MPIA), Geneva trade platform, March (2020). available at: https://wtoplurilaterals.info/plural_initiative/the-mpia/

⁵⁷ See "Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU", JOB/ DSB/ 1/Add.12. (30 April 2020).

The timeline for the appeal arbitration process under MPIA is structured to ensure a timely resolution. It includes several key stages, such as appellee submissions and, if applicable, third-party submissions. These stages allow all relevant parties to present their arguments and evidence before the panel of arbitrators. The inclusion of third-party submissions recognizes that sometimes, external parties may have pertinent information or interests in the dispute that should be considered in the resolution process.⁵⁸

Additionally, oral hearings may be part of the appeal arbitration process, allowing parties to present their cases directly to the arbitrators and engage in a more interactive and dynamic exchange of information and arguments. This adds a layer of transparency to the proceedings and ensures that all parties can express their views.

A critical aspect of the MPIA process is that the arbitrators must issue their award to the parties within 90 days from the date of the notice of appeal. This timeline is designed to expedite the resolution process, providing parties with a prompt decision while maintaining the quality and fairness of the arbitration. It sets clear expectations for the duration of the process and helps prevent unnecessary delays.

The MPIA appeal arbitration process is a structured and efficient mechanism for resolving disputes among multiple parties.⁵⁹ It emphasizes fairness, impartiality, and timeliness, ensuring that all parties have a voice in the process and receive a timely resolution to their dispute. MPIA aims to provide a robust framework for dispute resolution in complex multiparty situations by involving a pool of arbitrators, random panel selection, and clear timelines.⁶⁰

3. The parties create an appeal arbitration agreement

The MPIA mechanism comes into play when a dispute arises between two WTO Member countries participating in the MPIA. In this arrangement, the traditional role of the WTO Appellate Body, which has been inactive due to various issues, is effectively replaced.

When a trade dispute surfaces between two MPIA participant countries, the first step is typically the initiation of consultations to resolve the matter amicably. If consultations fail to yield a satisfactory resolution within a specified time frame, either party may request the establishment of a WTO Dispute Settlement Panel. This panel comprises experts who assess the dispute and provide a ruling based on the relevant WTO agreements and principles.

Once the panel is established and begins its proceedings, the parties involved must negotiate and conclude a dispute-specific appeal arbitration agreement. This Agreement serves as the foundation for the appeal process in the absence of the Appellate Body. It outlines the procedures, rules, and timelines for the appeal arbitration, ensuring that the dispute can move forward fairly and on time.

The appeal arbitration agreement is a crucial document, as it helps to maintain the integrity and effectiveness of the WTO dispute settlement system. It provides a structured and transparent framework for handling appeals, which is essential for ensuring that trade disputes are resolved consistently with WTO rules. Moreover, the Agreement helps to safeguard the rights and interests of all parties involved in the dispute, promoting trust and confidence in the international trade regime.

By requiring the conclusion of a dispute-specific appeal arbitration agreement, the MPIA participants demonstrate their commitment to upholding the principles of the WTO and ensuring that trade disputes are resolved efficiently and equitably. This innovative approach allows WTO Member countries to continue

⁵⁸ Marie Van Luchene, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO", Stanford-Vienna TFLF Working Paper No. 90, (2022).

⁵⁹ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

⁶⁰ Guillaume Van der Loo, G. "Getting the WTO's dispute settlement and negotiating function back on track: Reform proposals and recent developments". Leuven Centre for Global Governance Studies Working Paper Series, no. 232. (2022).

benefiting from the dispute settlement system, even without a functioning Appellate Body. It underscores the importance of maintaining the rules-based international trading system.

4. Initiate the MPIA appeal with a notice of appeal

MPIA arrangement is a crucial step in the dispute resolution process.⁶¹ Either party involved in the dispute has a window of 20 days to take action by filing a formal notice of appeal. This notice of appeal serves as the trigger for the MPIA process to begin, and it also marks the commencement of a specific timeline: a 90-day countdown within which the MPIA award must be issued.⁶²

Simultaneously with the filing of the notice of appeal, the party initiating the appeal is required to submit its written appeal submission. This written submission is a comprehensive document outlining the grounds for their appeal, supporting evidence, and arguments to persuade the MPIA panel to reconsider the initial decision or ruling that led to the dispute.

Following the notice of appeal and written appeal submission by one party, the other party involved in the dispute has a relatively short period of 5 days to respond by submitting their notice of appeal, if they wish to do so, along with their appeal submission. This process allows both parties to present their respective cases, ensuring that the MPIA panel considers all relevant information and arguments.

Overall, the MPIA process is designed to provide a structured and time-sensitive mechanism for resolving disputes during panel proceedings. Setting specific timeframes for actions and submissions facilitates a timely resolution while allowing both parties to effectively present their appeals and arguments.

5. Suspension of WTO panel proceedings before circulated

The suspension of panel proceedings is a critical condition to facilitate the resolution of disputes through the MPIA. Under the DSU, parties involved in a trade dispute can request the suspension of WTO panel proceedings before the panel's final report is circulated to all WTO Members. This provision temporarily stops the dispute resolution process, allowing parties to explore alternative means of resolving their differences.⁶³

The primary purpose of suspending panel proceedings is to enable the potential for an MPIA appeal. Parties may opt for this suspension if they believe the panel's ruling may not align with their interests or wish to challenge specific aspects of the panel's findings. The appeal process through the MPIA provides an avenue for parties to review further and potentially overturn the panel's decision, thus ensuring a thorough and fair examination of the dispute. During the suspension period, the panel's ruling does not take immediate effect. This means the obligations or sanctions imposed by the panel's decision are temporarily put on hold until the MPIA process has run its course. This ensures that parties have a reasonable opportunity to seek a review of the panel's findings before being subject to any potential adverse consequences.⁶⁴

The suspension of panel proceedings reflects the WTO's commitment to providing a transparent and equitable dispute resolution mechanism. It allows parties to exercise their rights and address concerns regarding the panel's findings. This process contributes to the effectiveness of the WTO's dispute settlement system by promoting fairness and due process in resolving trade disputes among its member countries.⁶⁵

⁶¹ See establishment of Multi-Party Interim Appeal Arbitration Arrangement (MPIA), Geneva trade platform, March (2020). available at: https://wto plurilaterals.info/plural_initiative/the-mpia/

⁶² See "Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU", JOB/ DSB/ 1/Add.12. (30 April 2020).

⁶³ Ibid

⁶⁴ Marie Van Luchene, *The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO*, Stanford-Vienna TTLF Working Paper No. 90, (2022).

⁶⁵ Gao, Henry S., *Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis*, March 1, (2019). Chang-fa Lo, and others, "The Appellate Body of the WTO and Its Reform", (2019), pp. 215-238.

6. The MPIA appeal award

The MPIA arrangement plays a crucial role, particularly when it comes to the issuance of awards. This arrangement allows WTO members to appeal disputes when the regular WTO Appellate Body is not functioning, ensuring that disputes are resolved effectively and within a reasonable timeframe. And several key elements make up the MPIA awards:

The MPIA appeal award includes the panel's unappealed findings. This means that any issues or findings from the initial panel report that the parties did not contest during the appeal process are included in the award. These findings are considered final and binding on the parties.

In addition to unappealed findings, the MPIA appeal award also incorporates any decisions made by the arbitrators during the appeal proceedings. These decisions are crucial in clarifying or modifying aspects of the original dispute settlement report and can significantly impact the parties involved.⁶⁶

To ensure accessibility and transparency, the MPIA appeal award must be translated into the WTO's three official languages: English, French, and Spanish. This translation facilitates the understanding and disseminating of the award among WTO members and the broader international community.

After issuing the MPIA appeal award, it is formally notified to DSB. This notification process is a critical step in the overall dispute settlement procedure. It allows all WTO members to become aware of the award and its implications.

Binding Effect and Enforcement: The binding effect of MPIA awards is confirmed by both the Dispute Settlement Understanding (DSU) and the MPIA itself. DSU Article 25, paragraph 4, explicitly states that DSU Articles 21 and 22, which deal with implementing and enforcing WTO panel and Appellate Body rulings, "apply to arbitration awards." This means that MPIA awards are on par with panel and Appellate Body reports regarding their finality and enforceability.

IV. The advantages perspective of MPIA dispute settlement

MPIA offers a unique and innovative approach to dispute settlement in international trade and investment. These arrangements bring together multiple parties to resolve disputes through arbitration, providing several advantages and significant value.⁶⁷ Initially, MPIAs offer a more efficient and streamlined dispute resolution process than traditional methods. When multiple parties are involved in a dispute, pursuing individual arbitration cases can lead to duplication of efforts, increased costs, and prolonged proceedings. MPIAs consolidate these disputes into a single process, reducing redundancy and promoting efficiency. This results in a faster resolution timeline, crucial in international trade and investment, where timely dispute settlement can substantially impact businesses and economies.⁶⁸

Another critical advantage of MPIAs is their ability to promote consistency and coherence in international dispute resolution. In traditional arbitration, decisions made in separate cases may not always align, leading to conflicting interpretations of global trade and investment agreements. MPIAs create a unified platform where arbitrators can develop coherent jurisprudence and establish precedents that guide future cases. This consistency contributes to legal certainty, enhancing predictability for businesses and investors and reducing the risk of cross-border transactions.

MPIAs offer several advantages and significant value in international trade and investment dispute settlement. They enhance efficiency, coherence, inclusivity, adaptability, and cooperation in resolving

⁶⁶ See "Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU", JOB/ DSB/ 1/Add.12. (30 April 2020).

⁶⁷ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

⁶⁸ Henry Gao, "Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement", *Journal of International Economic Law*, Vol 24/3, Sep (2021), Pp. 534–550

complex disputes involving multiple parties.⁶⁹ By doing so, MPIAs contribute to a more stable and predictable international trading and investment environment, ultimately benefiting businesses, economies, and the global community. The advantages of MPIA can be summarized in the following context.

1. MPIA retained the concept of a two-stage dispute settlement system

One of the critical features of the MPIA is that it retains the two-stage dispute settlement system of the WTO; this system consists of two main stages:⁷⁰

In the first stage, a panel of experts is established to examine a trade dispute's legal and factual aspects. The panel reviews the arguments presented by the parties involved and issues a report with its findings and recommendations. This stage is crucial for assessing whether a WTO member's trade measures comply with WTO rules. If any parties involved in the dispute choose to appeal the panel's report, the case proceeds to the second stage, the appellate review.⁷¹ In the context of the WTO, the Appellate Body is responsible for conducting this review. It assesses the legal aspects of the panel's report and determines whether the panel's findings are consistent with WTO agreements. The Appellate Body's decisions are final and binding, and they help ensure the consistency and predictability of WTO dispute settlement.⁷²

The significance of retaining this two-stage dispute settlement system within the MPIA lies in its ability to ensure fairness and accuracy in resolving trade disputes. With an appellate review stage, parties can challenge and clarify the panel's legal interpretations. This process enhances transparency and consistency in applying WTO rules and helps maintain the integrity of the global trading system.

MPIA was designed as a temporary solution to address the Appellate Body crisis, and discussions continue within the WTO to reform and strengthen the dispute settlement system for the long term. The two-stage dispute settlement process remains a fundamental component of the WTO's dispute resolution mechanism, and efforts are being made to address the challenges it has faced in recent years.

2. Adherence deadline for the MPIA decisions

The MPIA addresses particular concerns of WTO Members regarding the A.B. It allows arbitrators to establish page restrictions for submissions, time constraints, and deadlines during proceedings. These organizational measures aim to streamline the dispute settlement procedure and ensure adherence to the 90 days. Additionally, the possibility of extending the 90-day window if all parties agree is a step toward procedural progress. The development of the dispute settlement deadline of MPIA can be summarized as follows:

Pages limitation: The MPIA allows arbitrators to establish page restrictions for submissions. This means that parties involved in a dispute at the WTO can only submit a certain number of pages for their arguments and evidence. Page restrictions are often imposed to prevent parties from overwhelming the process with excessive documentation.⁷³

Time Constraints and Deadlines: The MPIA also permits arbitrators to impose time constraints and deadlines during proceedings. This is intended to ensure that the dispute settlement process progresses efficiently and is not delayed unnecessarily. Timely resolution of disputes is crucial to the functioning of the WTO.⁷⁴

⁶⁹ Arata Kuno, "Japan's joining MPIA an outside chance to boost momentum for WTO reform", Asia University, 14 May (2023).

⁷⁰ Van der Loo, G. "Getting the WTO dispute settlement and negotiating function back on track: Reform proposals and recent developments". Leuven Centre for Global Governance Studies Working Paper Series, no. 232. (2022).

⁷¹ Marie Van Luchene, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO", Stanford-Vienna TTLF Working Paper No. 90, (2022).

⁷² Loo, "Getting the WTO dispute settlement and negotiating function back on track: Reform proposals and recent developments".

⁷³ See establishment of Multi-Party Interim Appeal Arbitration Arrangement (MPIA), Geneva trade platform, March (2020). available at: https://wtoplurilaterals.info/plural_initiative/the-mpia/

⁷⁴ Baroncini, E, "Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", The Italian Yearbook of International Law Online, vol 29(1), (2020).

Adherence to the 90 days: The reference to the "90-day period" likely pertains to the WTO's Dispute Settlement Understanding (DSU), which sets a goal for completing dispute settlement proceedings within 90 days. While this timeframe is often not met in practice, efforts to adhere to it are crucial for efficiently resolving trade disputes. The MPIA likely includes measures to encourage parties to work towards this goal. However, the MPIA allows for extending the 90-day window if all parties agree. This flexibility can be beneficial in cases where parties believe that more time is needed to resolve the dispute fairly. It allows for procedural adjustments based on the specific circumstances of each case.⁷⁵

The MPIA addressed concerns related to the functioning and efficiency of the WTO's Appellate Body and dispute settlement process. It introduces measures such as page restrictions, time constraints, and the possibility of extending the 90-day period to streamline the process and ensure that disputes are resolved promptly and effectively. These measures can help improve the overall functioning of the WTO's dispute settlement system.⁷⁶

3. Enhance Flexibility and Inclusiveness

The MPIA is available to any WTO member willing to join, which allows for greater inclusiveness and flexibility. This multilateral approach provides a platform for like-minded members to work together to uphold the dispute settlement system's integrity until a more permanent solution is found.

The flexibility and inclusiveness of the MPIA come from its open invitation to all WTO members, suggesting that any member country that wishes to participate can join. This design ensures that the system can adapt to the needs and interests of a wide range of countries rather than being restricted to a predefined group. It is structured to be a collaborative effort where like-minded members can unite to maintain the principles and functionality of the WTO's dispute resolution process without a fully operational Appellate Body.⁷⁷

The MPIA is intended as a stopgap solution, providing a functioning appeal mechanism for trade disputes until the WTO can agree on a more permanent resolution to the Appellate Body deadlock. It signifies a multilateral effort to safeguard the rules-based trade system that the WTO upholds and ensures that members still have a path to resolve disputes in a legally binding manner.

4. Prevents Protectionist Measures

The MPIA is a positive measure to bridge the period of A.B. paralysis. Providing a pool of arbitrators enhances the predictability and efficiency of international trade. This prevents parties from enacting protectionist measures that can harm the growth of the global trading system. In doing so, it sends a strong message to the international community, particularly the U.S., that collective action is necessary to find a solution to blocking A.B. members.

The efficiency and predictability offered by the MPIA can deter WTO members from resorting to protectionist measures that could destabilize global trade. Protectionist policies often lead to retaliatory measures, trade wars, and the erosion of rules-based trade, which can ultimately harm economic growth and development. By ensuring that members have access to a reliable dispute settlement mechanism, the MPIA supports the smooth functioning of the global trading system.⁷⁸

Moreover, the MPIA sends a political message to the international community, signaling the commitment of participating members to uphold the multilateral trading system despite the challenges posed by the A.B.

⁷⁵ Simon Lester, "Can Interim Appeal Arbitration Preserve the WTO Dispute System?", Free Trade Bulletin Num 77, Sep 1, (2020).

⁷⁶ Giorgio Sacerdoti, "The WTO and its Dispute Settlement System in 2021 and the outlook after MC12 in June 2022", Bocconi University, (2022).

⁷⁷ Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

⁷⁸ Guillaume Van der Loo, G. "Getting the WTO's dispute settlement and negotiating function back on track: Reform proposals and recent developments". Leuven Centre for Global Governance Studies Working Paper Series, no. 232. (2022).

impasse.⁷⁹ Specifically, it demonstrates a collective resolve to counteract any attempts, including those by major players like the U.S., to block the appointment of A.B. members, which is the crux of the current deadlock.

Collective action through the MPIA underscores the importance of collaboration and shared responsibility in addressing systemic issues within WTO. It highlights the necessity for all members of incredibly influential economies to constructively find lasting solutions to restore the full functionality of the WTO dispute settlement system.

5. Protection of the rules-based multilateral trading system by the MPIA

The rules-based multilateral trading system is a framework where international trade is governed by established rules rather than being subject to powerful countries' whims or unilateral decisions. This system is embodied in international agreements such as those overseen by the WTO, where member countries agree to abide by standard rules to ensure fair competition and the smooth flow of goods and services across borders.⁸⁰

The rules-based multilateral trading system is critical for smaller countries because it provides a predictable and stable environment in which to conduct trade. It allows them to understand, anticipate, and respond to the trade measures of other countries based on a set of agreed rules. This predictability is essential for smaller countries to compete effectively in the global market. Without it, they might be subject to the economic and political pressures of larger countries, which could use their power to implement measures that are beneficial to them but detrimental to smaller or less powerful nations.⁸¹

The rules-based multilateral trading system also provides a formal mechanism for resolving disputes that is supposed to be fair and impartial. When trade disputes arise, smaller countries can take their grievances to an international body like the WTO, where disputes are settled not by power or coercion but by legal argumentation and evidence. This levels the playing field and ensures that even the smallest countries can have their voices heard and their interests protected.⁸²

The MPIA maintains these principles by ensuring a functioning appeal mechanism for trade disputes among its participants, even while the official WTO Appellate Body cannot operate. It is a stopgap measure to preserve the integrity and functionality of the global trading system until a more permanent solution for the Appellate Body's issues can be found.

The MPIA underlines the commitment of its participants to a rule-based trading system, which is particularly vital for smaller countries. It assures them that trade disputes will be handled fairly and according to established rules rather than being dictated by the power of more influential countries.

V. Innovative Approach of MPIA: Resolving the Appellate Body Dilemma

The MPIA addresses specific concerns WTO Members raised regarding the A.B.'s functioning. It allows arbitrators to use the Flexible Approach of MPIA and establish page restrictions for submissions, time constraints, and deadlines during proceedings. These organizational measures aim to streamline the dispute settlement procedure and ensure adherence to the 90 days. Additionally, the possibility of extending the 90-day window if all parties agree is a step toward procedural progress. This addresses concerns about the efficiency and functioning of the dispute settlement process.

⁷⁹ Henry GAO, "A rule-based solution to the Appellate Body crisis and why the MPIA would not work", Institutional Knowledge at Singapore Management University (2021).

⁸⁰ Guillaume Van der Loo, G. "Getting the WTO's dispute settlement and negotiating function back on track: Reform proposals and recent developments". Leuven Centre for Global Governance Studies Working Paper Series, no. 232. (2022).

⁸¹ H. Scholz, "Rebalancing the Rules of the Multilateral Trading System in Favor of the Poor," Annual 2011 Session of the Parliamentary Conference on the WTO Geneva, PC-WTO/2011/2(b)-R.2, March 21, 2011. Available at: https://www.europarl.europa.eu/cmsdata/217130/2011_PCWTO_Scholz_EN.pdf

⁸² Kanungo, Anil Kumar, "Experience of Recently Acceded Member Countries to the WTO", 11 Sep, (2012).

1. Flexible Approach of MPIA

The Appellate Body of the WTO and the MPIA have different approaches to limiting arbitrators' role in WTO disputes. These differences can be observed in several key aspects.

To begin with, the scope of review in the A.B.'s approach has often been controversial. The AB has been criticized for its "ultra petita" approach,⁸³ which occasionally goes beyond the specific issues initially raised by the parties in a dispute. This means that the A.B. may delve into the consistency of domestic laws or regulations with WTO rules, even when such issues were not initially part of the appeal. While this approach aims to ensure a more comprehensive assessment of cases, it has faced scrutiny for potentially overstepping its jurisdiction. In contrast, the MPIA strongly emphasizes that arbitrators address only those issues necessary to resolve the particular dispute at hand and issues explicitly raised by the parties involved.⁸⁴ While it does not expressly prevent arbitrators from reviewing panel findings on municipal law, it allows them some discretion when dealing with such issues. This approach is designed to keep the dispute resolution process focused and limit arbitrators' authority to expand the scope of their review.

Furthermore, flexibility versus binding precedent is another crucial distinction between the two approaches. The AB exercises a degree of flexibility in its decision-making, which can lead to comprehensive analysis but also opens the door to potential overreach. It does not treat A.B. reports as binding precedents, giving it more discretion to adapt to specific cases.⁸⁵ In contrast, the MPIA endorses that A.B. reports should be treated as binding precedents. This means that arbitrators operating under the MPIA have limited ability to deviate from established interpretations or exceed procedural timelines set by the A.B. This emphasis on binding precedents ensures greater consistency in WTO dispute resolution, reducing the potential for divergent interpretations of WTO rules.⁸⁶

Another significant difference lies in the balance between sovereignty and consistency. The AB's "ultra petita" approach has faced criticism for potentially encroaching on the sovereignty of WTO member states.⁸⁷ This approach involves making judgments on aspects of domestic laws that were not initially disputed, which may be seen as overly interventionist and could undermine confidence in the dispute settlement process.⁸⁸ On the other hand, the MPIA reflects a broader effort within the WTO to streamline the dispute resolution process and provide a more controlled and predictable approach. It seeks to balance respecting the sovereignty of WTO member states with the need for consistent and efficient dispute resolution. This balance is achieved by endorsing binding A.B. precedents, which aim to provide a more predictable and consistent framework for resolving trade disputes while acknowledging member states' sovereignty.

Additionally, the evolution of these approaches is worth noting. The AB's approach to "ultra petita" has been a subject of ongoing debate and criticism, leading to various WTO members' proposed amendments to the DSU.⁸⁹ In contrast, the MPIA represents a relatively new and alternative approach to dispute resolution. It is

⁸³ Ultra petita is the principle that an adjudicative body may not decide on issues other than those submitted. Art 7 DSU and the panel's terms of reference embody the maxim of non-ultra petita. Panels only have the authority to adjudicate upon claims relating to the provisions cited by the parties.

⁸⁴ See WTO, Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (30 April 2020), WTO Doc JOB/DSB/1/Add.12 (while this provision's further statement that arbitrators "shall address only those issues that the parties have raised" does nothing to clarify this point, its final clause rightly asserts that any such discretion exercised by the arbitrators is "without prejudice to their obligation to rule on jurisdictional issues").

⁸⁵ Guzman, Andrew T. "Determining the Appropriate Standard of Review in WTO Disputes," *Cornell International Law Journal*: Vol 42, Article 3. (2009).

⁸⁶ Baroncini, E, "Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", *The Italian Yearbook of International Law Online*, vol 29(1), (2020).

⁸⁷ See the WTO Appellate Body Report, in *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R. The Appellate Body held in *Chile - Price Band* such panel acts 'ultra petita'.

⁸⁸ Oesch, Matthias, 'Domestic Law', *Standards of Review in WTO Dispute Resolution*, International Economic Law Series (Oxford, 2003; online edn, Oxford Academic, 22 Mar (2012)

⁸⁹ Bartels, Lorand, "Jurisdiction and Applicable Law in the WTO". Society of International Economic Law (SIEL), Fifth Biennial Global Conference Working Paper No.18, Jun 29, (2016).

a response to concerns about A.B.'s practices and aims to address some of the shortcomings of the previous dispute settlement system by introducing binding A.B. precedents. This reflects the WTO's ongoing efforts to adapt and improve the efficiency and effectiveness of international trade dispute settlement mechanisms.

The AB and MPIA approaches differ significantly in limiting arbitrators' roles in WTO disputes. The AB's approach is more flexible but controversial, potentially infringing on sovereignty and lacking binding precedents. In contrast, the MPIA seeks to balance flexibility and consistency by endorsing binding A.B. precedents, aiming for a more predictable and controlled dispute resolution process while respecting member states' sovereignty. Both approaches reflect the evolving nature of international trade dispute settlement mechanisms and the ongoing efforts to balance various considerations, including flexibility, consistency, and sovereignty.

2. Differences in Methodologies between MPIA and WTO Appellate Body

The MPIA and the WTO Appellate Body represent two distinct methodologies for resolving international trade disputes. The core difference between these approaches is evident in their report length and citation practices. While the first MPIA award is notably concise, spanning just 39 pages, with the arbitrators' core analysis taking up 28 pages, this is a significant departure from the trend observed in recent Appellate Body reports, which are notably lengthier. The last 10 Appellate Body reports average approximately 112 pages, indicating a more detailed and extensive approach to analysis and documentation.⁹⁰

A. MPIA Length and Citation Practices

The first MPIA report showcases restraint in referencing prior decisions, referring to only ten previous Appellate Body reports and counting multiple references to the same report only once. This figure is less than half the average number of references in Appellate Body reports, around 22. On a per-page basis, the MPIA award averages two Appellate Body references every three pages. This rate is considerably lower than that observed in the last five years of the Appellate Body's operation, where the norm was approximately six references to prior reports every three pages or about two references per page.⁹¹

B. Interpretation of the Differences

The contrasting length and citation frequency between MPIA awards and Appellate Body reports can be attributed to different procedural norms, objectives, and the complexity of cases handled. The MPIA's more concise approach may be seen as an effort to streamline dispute resolution processes, focusing on efficiency and directness. This starkly contrasts with the Appellate Body's method, where more extended reports and frequent citations prove thoroughness. The Appellate Body's approach reflects a deep engagement with precedents and a detailed exploration of legal arguments. Both methods offer distinct merits and cater to different aspects of international trade dispute resolution, demonstrating the varied approaches within international trade law.⁹²

C. The MPIA Standard of Review

The significance of the MPIA lies in its ability to maintain the continuity of the dispute resolution process while adhering to the established principles and procedures of the WTO system, particularly in terms of the standard of review. Understanding the standard of review within the MPIA is essential to appreciate its role and effectiveness in resolving trade disputes. This standard, primarily sourced from the WTO's Dispute Settlement Understanding (DSU), advocates a deferential approach towards the factual findings and legal interpretations of the panels established under WTO agreements. Essentially, the MPIA is not designed to

⁹⁰ See Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS591/ARB25, 21 December (2022). Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm

⁹¹ See Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS591/ARB25, 21 December (2022).

⁹² Marie Van Luchene, *The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO*, Stanford-Vienna TTLF Working Paper No. 90, (2022).

re-examine or question the facts as determined by the original panel. Instead, it ensures that the panel's legal interpretations and applications align with the relevant WTO agreements.⁹³

A critical aspect of the MPIA is its limitation on appellate review to issues of law included in the panel report and the legal interpretations formulated by the panel. This approach mirrors the practice of the Appellate Body, where the arbitrators are not permitted to introduce or consider new evidence or issues that were not previously raised and examined by the original panel. The primary role of the MPIA arbitrators is to identify and correct legal errors in the panel's application of WTO agreements, thereby ensuring the consistency and coherence of the legal reasoning. Furthermore, the MPIA integrates the principle of judicial economy, a cornerstone of the WTO dispute settlement process.⁹⁴ This principle encourages panels and MPIA arbitrators to avoid making unnecessary findings, thereby ensuring that the resolution is focused solely on the key issues crucial for determining the matter at hand. This approach aids in streamlining the dispute resolution process, making it more efficient and focused.⁹⁵

The MPIA's approach to the standard of review reflects a significant commitment to the principles and practices of the WTO dispute settlement system. It demonstrates a respect for the original panel's findings, limiting its scope to correcting legal interpretations and applications. The MPIA, therefore, plays a vital role in contributing to the stability and predictability of the international trade system at a time when the traditional mechanisms of the WTO are experiencing challenges.⁹⁶ By adhering to these established standards, the MPIA not only upholds the integrity of the dispute resolution process but also ensures that it remains an effective tool for addressing international trade disputes.⁹⁷

The standard of review outlined in Article 17.6(ii) of the Anti-Dumping Agreement, as applied in the first MPIA appeal, is a significant aspect of international trade law. This provision mandates that panels interpret the Agreement's provisions in accordance with the customary rules of interpretation of public international law. It adds a nuanced layer when it states that if a provision of the Agreement allows for more than one permissible interpretation, the authorities' measure will be considered in conformity with the Agreement if it aligns with one of these interpretations.

In the context of the MPIA appeal involving Colombia, the arbitrators were tasked with evaluating the panel's interpretation under Article 17.6(ii) in light of Colombia's appeals under Articles 3 and 5 of the Anti-Dumping Agreement. Colombia did not directly appeal under Article 17.6(ii) but requested the arbitrators adopt a different approach to this provision than the panels.⁹⁸

As the arbitrators summarised, the panel's approach emphasized that the permissibility of an interpretation under Article 17.6(ii) is contingent on the interpretation emerging from applying customary rules of public international law. This suggests the panel prioritized a methodical interpretation process rooted in established international law principles.

However, the arbitrators diverged from the panel's approach in assessing Article 5 of the Anti-Dumping Agreement. They introduced a novel interpretation methodology for Article 17.6(ii), focusing on the

⁹³ Pauwelyn, J, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", *World Trade Review*, (2023).

⁹⁴ Simon Lester, "Can Interim Appeal Arbitration Preserve the WTO Dispute System?", *Free Trade Bulletin* Num 77, Sep 1, (2020).

⁹⁵ Henry Gao, "Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement", *Journal of International Economic Law*, Vol 24/ 3, Sep (2021).

⁹⁶ Alan Yanovich, "WTO Issues First Award Under MPIA and Tackles Standard of Review in Anti-Dumping Disputes", Jan 17, (2023). Available at: <https://www.akingump.com/en/insights/blogs/ag-trade-law/wto-issues-first-award-under-mpia-and-tackles-standard-of-review-in-anti-dumping-disputes>

⁹⁷ Henry GAO, "A rule-based solution to the Appellate Body crisis and why the MPIA would not work", *Institutional Knowledge at Singapore Management University* (2021).

⁹⁸ See Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands, *Agreed Procedures for Arbitration under Article 25 of the DSU, Revision, WT/DS591/3/Rev.1*, 22 April (2022).

permissibility of Colombia's proposed interpretation of specific phrases within the Agreement. Rather than conducting a de novo interpretation to determine the 'correct' application of the Vienna Convention, they aimed to assess whether a treaty interpreter could reasonably reach Colombia's interpretation using the Vienna Convention's interpretative method. This approach signifies a shift from finding the 'correct' interpretation to assessing the range of 'permissible' interpretations.

This nuanced approach highlights a critical aspect of international law interpretation: the recognition that multiple interpretations can be valid if they are grounded in established methods of treaty interpretation. The arbitrators embraced a broader, more inclusive understanding of treaty interpretation by focusing on whether an interpretation is permitted or admissible.

In essence, the arbitrators' stance reflects a pragmatic and flexible approach to treaty interpretation, emphasizing the legitimacy of diverse interpretations within the bounds of established international law principles. This approach can be instrumental in addressing complex issues in international trade law, where rigid interpretations might not adequately capture the nuances of different legal and cultural contexts.

Conclusion

The Multiparty Interim Appeal Arbitration Arrangement (MPIA) serves as a crucial temporary mechanism designed to maintain appellate functions in the WTO dispute settlement system, especially in the face of the paralysis of the WTO's Appellate Body, primarily due to the blocking of appointments by the United States. The MPIA's flexibility is a key feature, allowing any WTO member to join or withdraw at will, which enhances its appeal to a diverse group of countries, including those still evaluating their long-term commitment to this mechanism.

Inspired by the Walker Principles, the MPIA also introduces procedural efficiencies that simplify and expedite dispute resolutions, making the system more accessible, particularly to developing countries with limited resources. Additionally, the voluntary nature of the MPIA is seen as advantageous, as it allows countries to participate based on their assessments of the benefits relative to their trade and legal strategies. Moreover, the existence of the MPIA, albeit interim, puts continuous pressure on WTO members to consider necessary reforms within the broader dispute settlement mechanism, thus maintaining momentum toward a more robust and responsive system.

However, the MPIA also faces significant disadvantages. Its lack of universality and legitimacy, highlighted by the non-participation of key WTO players like the United States and Korea, undermines its effectiveness and questions its potential as a long-term solution to replace the Appellate Body. Voluntary participation means that decisions made under the MPIA may not be recognized or accepted by non-participants, leading to inconsistencies in the application and interpretation of WTO rules and potentially undermining the uniformity that the WTO aims to maintain across global trade rules. This situation could lead to the fragmentation of international trade law, where all WTO members do not recognize interpretations and rulings under the MPIA, resulting in a splintered legal framework and reducing the predictability and security that the WTO's dispute settlement system should provide.

The MPIA offers significant advantages in maintaining an appellate function. However, its effectiveness is tempered by substantial disadvantages. Its voluntary nature, potential for legal fragmentation, and financial sustainability issues, coupled with shifting global trade dynamics, pose challenges to its viability as a permanent solution. The ongoing debate underscores the complexity of reforming international trade dispute resolution and highlights the need for a more inclusive, universally accepted solution within the WTO framework.

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