

# The Multi-Party Interim Appeal Arbitration Arrangement (MPIA): A Legal Analysis of Its Disadvantages and Implications for WTO Dispute Settlement Mechanism

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## Abstract

The Multi-Party Interim Appeal Arbitration Arrangement (MPIA) was introduced as a temporary solution to the paralysis of the World Trade Organization (WTO) Appellate Body. This paper examines the MPIA's structure, legal framework, and effectiveness within the WTO dispute settlement system. It highlights the MPIA's voluntary nature, limited participation, and procedural innovations while assessing its impact on international trade governance. Despite maintaining a two-stage dispute resolution process, the MPIA faces critical challenges, including its non-binding status, the exclusion of major economies such as the United States, and concerns over enforceability. Additionally, its provisions lack legal precedent-setting power, limiting its broader applicability within WTO jurisprudence. The paper argues that while the MPIA offers a temporary alternative, it cannot fully replace the WTO's Dispute Settlement Mechanism (DSM). Instead, it underscores the need for a comprehensive reform of the WTO dispute resolution system to ensure inclusivity, enforceability, and long-term stability. The paper concludes that the MPIA represents both an interim measure and a potential pathway toward future WTO dispute settlement reform, but its long-term viability depends on broader institutional and political developments within global trade governance.

**Keywords:** MPIA ; WTO; Appellate Body; Dispute Settlement; Burden of proof

## Introduction

The Multi-Party Interim Appeal Arbitration Arrangement (MPIA) represents an alternative mechanism for resolving trade disputes among participating World Trade Organization (WTO) members following the paralysis of the WTO Appellate Body. Established as a temporary solution, the MPIA aims to provide a functional appellate system for trade disputes, particularly for members committed to maintaining a two-tiered dispute resolution framework. However, despite its intended role in preserving the WTO's dispute settlement function, the MPIA faces significant disadvantages and operational restrictions that limit its effectiveness and long-term viability within the global trade system.

Another major constraint stems from U.S. opposition to the MPIA, which has been rooted in criticisms of the WTO's dispute settlement system. The U.S. perceives the MPIA as merely replicating the Appellate Body's flaws, including judicial overreach and delays in rulings. Additionally, concerns over resource allocation, procedural inefficiencies, and the potential for the MPIA to undermine broader WTO reforms have contributed to the U.S.'s reluctance to support the arrangement. The lack of an enforceable appellate structure under the MPIA exacerbates these concerns, as decisions made under this framework do not carry the same legal weight as those issued by the WTO's traditional dispute settlement system.

Moreover, the MPIA's status as a non-binding international agreement raises constitutional and procedural concerns. Unlike the WTO's Dispute Settlement Understanding (DSU), MPIA awards are not formally adopted by the WTO's Dispute Settlement Body (DSB), nor do they set legal precedents for future disputes. This absence of a precedent-setting mechanism leads to inconsistencies in legal interpretation and reduces the predictability of dispute resolution within the WTO framework. Additionally, procedural ambiguities within the MPIA, such as the lack of clarity regarding the burden of proof and enforcement mechanisms, further limit its credibility as a robust dispute settlement alternative.

Despite its attempt to fill the void left by the Appellate Body crisis, the MPIA remains a temporary and incomplete solution to the broader WTO dispute settlement challenges. Its voluntary nature, limited membership, lack of legal enforceability, and the inability to replace the WTO's binding dispute resolution mechanism undermine its long-term effectiveness. This paper critically examines the disadvantages and restrictions of the MPIA, highlighting its structural weaknesses and assessing its implications for the future of global trade governance. Through an in-depth analysis, this study seeks to demonstrate why the MPIA, while valuable in the short term, cannot serve as a permanent substitute for the WTO's dispute settlement system and why comprehensive reform is necessary to ensure the stability and predictability of international trade dispute resolution.

### **The Disadvantages and Restrictions of MPIA disputes settlement Mechanism**

There are key limitations to the MPIA dispute settlement mechanism, including the limited number of WTO members who are participants in the arrangement. As a result of the absence of major economies such as the United States and South Korea, the MPIA is unable to address global trade disputes comprehensively, weakening its influence in international trade governance. Furthermore, as a plurilateral and voluntary arrangement, the MPIA lacks universal applicability, making it ineffective for disputes involving non-participating WTO members. Its non-binding nature under international law further restricts its ability to enforce dispute resolution outcomes, raising concerns about the consistency and predictability of its rulings.

### **Limited Participation in the MPIA Dispute Settlement Mechanism**

The MPIA represents a significant development in the realm of international trade dispute resolution. To fully grasp its scope and limitations, it's essential to understand its context, membership, and the implications of the notable absences among its participants.

As of now, 53 WTO members have joined the MPIA. This represents a significant portion but not a majority of the WTO's membership. This arrangement includes prominent WTO members like Australia, Brazil, Canada, China, the European Union, Mexico, Japan and others.<sup>1</sup> Their participation ensures that a substantial portion of global trade is covered under this interim system. These members account for roughly a quarter of the total DSU caseload, highlighting the arrangement's substantial but limited reach. The U.S. has not joined the MPIA. Given its significant role in global trade and as a frequent party in trade disputes, its absence limits the MPIA's scope in addressing some major trade issues. Moreover, Korea's absence is notable, considering its status as a major global trading nation.<sup>2</sup>

The MPIA's scope is restricted to its members, MPIA cannot settling disputes involving non-member countries. This limitation particularly becomes prominent in cases involving major economies like the U.S. or Korea. Moreover, it's a temporary solution, pending the Appellate Body's impasse resolution. Its future depends on broader WTO reforms and the resolution of political issues, primarily involving the U.S.

The arrangement still covers a significant portion of global trade due to the economic size of its participants. However, its effectiveness is somewhat diminished without the involvement of all major trading nations. Furthermore, the MPIA reflects broader political and diplomatic dynamics within the WTO, particularly the challenges in multilateral negotiations and the need for reform in the organization.

The MPIA represents necessary step in preserving the WTO's dispute resolution mechanism, its limited membership and the exclusion of key players like the United States and Korea highlight the challenges faced in the current global trade environment.<sup>3</sup>

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<sup>1</sup> Arata Kuno, "Japan's joining MPIA an outside chance to boost momentum for WTO reform", Asia University, 14 May (2023).

<sup>2</sup> Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

<sup>3</sup> 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).

## **U.S. Opposition to the MPIA Administration: Concerns and Critiques**

The opposition of the United States to the MPIA during the Trump administration was anchored in several critical concerns, reflecting a broader critique of the WTO dispute settlement mechanisms. The U.S. perceived the MPIA as a mere replication of the WTO's Appellate Body, an entity it had previously criticized. The Trump administration had raised issues with the functioning of the AB, particularly its decision-making processes and interpretations of trade rules. Consequently, the MPIA was viewed not as a reformative step but rather as an extension of existing problems in the WTO system.<sup>4</sup>

There was also apprehension regarding the allocation of WTO resources towards the MPIA. The U.S. argument centered on the belief that supporting the MPIA would divert essential resources and focus from other critical functions and reforms needed within the WTO framework. This perspective highlighted a prioritization of resource allocation within the WTO's various initiatives and programs.<sup>5</sup>

A significant aspect of the U.S. opposition stemmed from the belief that the MPIA would continue what it considered flawed appellate practices, a problem already presents in the AB. This included concerns over legal interpretations and the general approach to dispute resolutions within the WTO structure. The U.S. viewed these practices as detrimental to effective and fair-trade dispute resolution.<sup>6</sup>

The administration criticized the MPIA for potentially weakening the strict deadlines for appellate reports in the WTO dispute settlement process. For the U.S., the timely resolution of disputes was a critical feature of an effective trade dispute mechanism, and any dilution of these deadlines was seen as counterproductive.

The U.S. was concerned about the scope of review under the MPIA, particularly regarding the review of panel fact-finding. The American stance was that appellate processes should primarily aid the WTO's Dispute Settlement Body in issuing compliance recommendations rather than re-examining the factual findings in detail, which they believed should be the domain of individual case panels.<sup>7</sup>

The United States has contested the idea of creating a separate and independent structure for supporting the pool of arbitrators. They argue that such a structure cannot be financed from the general budget of the WTO. This disagreement raises questions about how the MPIA will be funded and whether the existing budgetary mechanisms of the WTO can accommodate it. The United States' opposition to the MPIA is rooted in its view that it seeks to emulate the Appellate Body's authority. They argue that the MPIA aims to create a substitute Appellate Body for future WTO disputes. However, the MPIA is temporarily flexible and aims to serve as a bridge solution to address the current impasse in the WTO's dispute settlement mechanism. The MPIA seeks to uphold the principles of security and predictability in the WTO's dispute resolution process.<sup>8</sup>

The U.S. opposition to the MPIA under the Trump administration was rooted in a desire to reform the WTO's appellate processes. The administration's stance reflected concerns about resource allocation, the perpetuation of practices deemed flawed, and the potential weakening of the dispute resolution process's efficiency and focus. This opposition was part of a larger debate about the effectiveness and fairness of the WTO's dispute resolution mechanism. While it has not explicitly rejected the MPIA, the Biden administration remains unlikely to support or join the MPIA in the near future.<sup>9</sup>

### ***Unresolved U.S. Concerns about WTO Appellate Body via MPIA***

Despite that MPIA addresses some U.S. concerns about WTO dispute settlement mechanism, it leaves others unaddressed. It embraces the principles of 'consistency and predictability, which could imply a precedent-setting nature of MPIA reports a concept the U.S. has historically criticized for undermining the flexibility of the dispute settlement process.

The MPIA ensures consistency and predictability in its rulings. While these principles are generally seen as positive, the United States has expressed concerns. The U.S. argues that a rigid adherence to precedent, as implied by these principles, could undermine the flexibility inherent in the WTO's dispute settlement process. In the WTO framework, past cases are not legally binding precedents but rather serve as informative references. The U.S. fears that the MPIA might shift towards a more precedent-driven approach,

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<sup>4</sup> 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).

<sup>5</sup> United States Trade Representative, Report on the Appellate Body of the World Trade Organization, Feb (2020).

<sup>6</sup> Simon Lester, "Can Interim Appeal Arbitration Preserve the WTO Dispute System?", *Free Trade Bulletin* Num 77, Sep 1, (2020).

<sup>7</sup> Mariana de Andrade, "Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism", Aug, (2020).

<sup>8</sup> Elisa Baroncini, "Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", *Federalismi.it*. 22 July, (2020).

<sup>9</sup> Pauwelyn, J, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", *World Trade Review*, (2023).

similar to domestic legal systems, which could limit the ability to interpret and apply rules based on the specific contexts of individual cases.

Another key concern is that the MPIA might undermine the WTO's appellate body. The U.S. has historically been critical of the functioning of this body, citing issues like judicial overreach and delays in delivering rulings. By establishing an alternative mechanism, there's a fear that it could either overshadow the official WTO process or set a parallel standard that might conflict with the WTO's established practices.<sup>10</sup>

The U.S. values the flexibility of the current WTO dispute settlement process. This flexibility allows for a more nuanced approach to each case, considering the unique circumstances and legal arguments presented. In its quest for consistency, the U.S. is concerned that the MPIA might adopt a more rigid and formulaic approach, which could be detrimental to the nuanced understanding of complex trade disputes.<sup>11</sup>

There are broader concerns about the long-term implications of the MPIA for global trade governance. If not aligned closely with WTO principles and practices, the U.S. is wary that this interim arrangement could set a precedent that might influence future global trade dispute resolution reforms. This could lead to a fragmentation of the global trade system, with different groups of countries adhering to different standards and processes.

The MPIA aims to address immediate issues in the WTO's dispute settlement process.<sup>12</sup> However, the U.S. remains concerned about its long-term impact on the principles and flexibility of the WTO framework. These concerns reflect broader debates about the future of international trade governance and the balance between consistency in rule application and flexibility in dispute resolution.

### **The nature of the MPIA agreement as an unbinding international agreement**

The MPIA, distinct from conventional international treaties, operates within a unique framework under international law. Unlike formal treaties, which create legally binding obligations for the signatory states, the MPIA does not establish such binding commitments. This divergence from the norm of binding international agreements is a crucial aspect of its structure. In contrast the MPIA is an interim solution adopted by a subset of WTO members, lacking the binding force of a formal treaty. This status means that while countries may choose to participate in the MPIA, they are not legally obligated under international law to comply with its provisions or the outcomes of its arbitration processes.<sup>13</sup>

The MPIA is considered a temporary solution created to respond to specific challenges, particularly addressing the impasse in the WTO's dispute settlement system. In this context, the MPIA serves as a stopgap measure, providing a platform for resolving trade disputes among its participants without a fully functional WTO Appellate Body.<sup>14</sup>

A key characteristic of the MPIA is its reliance on voluntary compliance.<sup>15</sup> Participating countries agree to its procedures, but this agreement is more a matter of political or diplomatic commitment than a legally enforceable contract. As a result, if a participant chooses not to comply with the procedures or rulings under the MPIA, there are no legal consequences under international law. This lack of enforceable penalties starkly contrasts typical international treaties, where non-compliance can lead to legal repercussions or sanctions.

This non-binding nature imparts a significant degree of flexibility and adaptability to the MPIA. Participating countries can adapt their approaches and interpretations of the arrangement to their needs and circumstances. This flexibility can allow quicker adjustments and responses to evolving international trade issues. However, it also means that the effectiveness of the MPIA largely depends on the cooperation of the participating states rather than on the legal enforceability of its provisions. The MPIA, by design, diverges from traditional international treaties by emphasizing voluntary compliance and flexibility. While this

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<sup>10</sup> United States Trade Representative, Report on the Appellate Body of the World Trade Organization", Feb (2020). Available at: [https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf).

<sup>11</sup> Ravi Kanth, "US Rejects EU-led Interim Appeal Arbitration Arrangement", TWN Info Service on WTO and Trade Issues, SUNS-9134, 9 Jun, (2020). Available at: <https://www.twn.my/title2/wto.info/2020/ti200608.htm>

<sup>12</sup> Brian McGarry & Nasim Zargarinejad, " Tracing the Powers of WTO MPIA Arbitrators", McGill Journal of Dispute Resolution, Vol 8, Num 2, (2022-2023).

<sup>13</sup> 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).

<sup>14</sup> Baroncini, Elisa, Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", Federalismi.it. 22 July, (2020).

<sup>15</sup> Ali Amerjee, " The Multiparty Interim Appeal Arbitration Arrangement: will the US be missed?", TradeLinks, (2020).



approach has certain advantages in terms of adaptability, it also relies heavily on its participants' political will and mutual cooperation, given the lack of legal enforceability under international law.

### **The legal nature of MPIA dispute settlement awards**

The legal implications of awards issued under the MPIA are complex and somewhat ambiguous, especially compared to the WTO's traditional dispute resolution mechanisms. To understand these implications, it is crucial to explore the nature of these awards and how they fit into the broader framework of WTO dispute settlement.

Under the MPIA, parties to a dispute can agree to have their appeal heard by an alternative panel of arbitrators. This arrangement was created to ensure that the WTO members could still resolve their disputes bindingly, even with the Appellate Body being non-functional.<sup>16</sup>

One key aspect of the MPIA awards is that they are deemed final and binding between the parties involved in a dispute. This means that once an award is issued, the disputing parties are expected to comply with its findings and recommendations. In this sense, MPIA awards hold a similar level of authority as traditional AB reports insofar as the involved parties are concerned.

However, there are notable differences between MPIA awards and AB reports, particularly in how they are treated within the WTO system. The WTO Dispute Settlement Body adopts Appellate Body reports under the 'negative consensus rule'. This rule requires that all WTO members, including the disputing parties, agree not to adopt the report for it to be rejected. In practice, this means AB reports are almost always adopted and become binding not only on the parties involved but also set precedents that other WTO members generally follow in similar future disputes.

MPIA awards are not subject to this process of adoption by the DSB. Although the DSB notifies them, there is no formal adoption process, and this distinction has significant legal implications.<sup>17</sup> The MPIA awards only bind the parties involved in the dispute and do not set a precedent for other WTO members. It should also be noted that MPIA awards do not necessarily bind the same parties in future disputes unless the future disputes are similar and the parties elect to follow the precedents set forth in the MPIA awards in the future.

Therefore, the legal status of MPIA awards represents a departure from the traditional dispute resolution process in the WTO. They provide a binding resolution for the parties involved but lack the broader implications of DSB adoption. This situation reflects the temporary and exceptional nature of the MPIA as a stop-gap measure in response to the challenges facing the WTO's dispute settlement system.

The MPIA practical functioning raises several dilemmas, especially about administrative support from the DSM Secretariat to MPIA. The U.S. has opposed certain forms of Secretariat assistance to the MPIA, potentially impacting its operation.

One of the primary concerns involves the U.S.'s opposition to certain forms of Secretariat assistance to the MPIA. The WTO Secretariat typically supports dispute resolution processes, but the U.S. has raised objections to its involvement in the MPIA.<sup>18</sup> This stance is significant because the Secretariat's assistance includes crucial logistical, legal, and technical support, which is essential for the effective functioning of any dispute resolution mechanism.

The legal enforceability of the MPIA under international law is another consideration. The MPIA operates within the broader framework of WTO rules and is consistent with the principles of international trade law. It is a stop-gap measure agreed upon by a group of WTO members, and its decisions are expected to be binding on the parties to a dispute, in the same way as decisions of the WTO Appellate Body. However, the enforceability of MPIA decisions could be questioned if key WTO members, like the U.S., do not recognize or support this arrangement.<sup>19</sup> Furthermore, the MPIA is essentially a temporary arrangement and does not have the same status as the WTO's Appellate Body, a permanent feature of the WTO dispute settlement system established by the WTO agreements.<sup>20</sup> Therefore, while the MPIA serves an important function in

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<sup>16</sup> Bowon Choi, "Three Years of the Multi-Party Interim Appeal Arbitration Arrangement: An Interim Evaluation of Arbitration as a Means to Appeal WTO Panel Reports", 11 Aug (2023).

<sup>17</sup> Ravi Kanth, "US Rejects EU-led Interim Appeal Arbitration Arrangement", TWN Info Service on WTO and Trade Issues, SUNS-9134, 9 Jun, (2020).

<sup>18</sup> See the United States Trade Representative, Report on the Appellate Body of the World Trade Organization, Feb (2020).

<sup>19</sup> Ravi Kanth, "US Rejects EU-led Interim Appeal Arbitration Arrangement", TWN Info Service on WTO and Trade Issues, SUNS-9134, 9 Jun, (2020).

<sup>20</sup> 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).

the current WTO framework, its long-term viability and effectiveness will depend on broader reforms to the WTO dispute settlement system and the resolution of the underlying issues that led to the impasse in the Appellate Body.

The MPIA is a significant mechanism to uphold the rule of law in international trade amid the Appellate Body crisis. However, its practical functioning, including the legal enforceability of its decisions and the role of the WTO Secretariat, remains subject to international trade politics and law dynamics. The arrangement's effectiveness and future will largely depend on how these operational uncertainties are addressed and how major WTO members, especially the U.S., engage with and support this mechanism.<sup>21</sup>

### **Provisions and procedures of MPIA do not automatically legitimize the initiative**

While the MPIA is an innovative approach to maintaining the integrity of the WTO's dispute resolution system, its provisions and procedures do not automatically legitimize the initiative for several reasons. The MPIA is a plurilateral arrangement, not a universal one. It involves only a subset of WTO members who have agreed to participate. This selective participation raises questions about the representativeness and inclusivity of the arrangement. Since the WTO operates on a consensus basis and emphasizes the equal treatment of all members, the MPIA's limited membership could be seen as undermining these principles. Consequently, the decisions made under the MPIA may not carry the same weight or acceptance as those made by the universally recognized Appellate Body.

The legitimacy of the dispute resolution mechanism of WTO relies on its adherence to the established rules and procedures outlined in the WTO agreements.<sup>22</sup> The MPIA, while attempting to replicate the Appellate Body's procedures, may not entirely align with the existing WTO legal framework. Any deviation, however minor, could be perceived as a challenge to the established legal order of the WTO, potentially undermining the legitimacy of the MPIA's decisions.<sup>23</sup>

The establishment of the MPIA was born out of necessity due to the Appellate Body's dysfunction, a symptom of more profound systemic and political challenges within the WTO. The MPIA does not address these underlying issues but is a temporary workaround. This provisional nature raises questions about its long-term viability and effectiveness in providing a sustainable solution to the WTO's dispute settlement challenges.<sup>24</sup>

The MPIA represents an innovative and pragmatic approach to bypass the current deadlock in the WTO's Appellate Body, and its legitimacy is not automatically assured. The arrangement's limited membership, potential deviations from the established WTO legal framework, and its status as a temporary measure rather than a comprehensive solution to the underlying problems all contribute to ongoing debates about its legitimacy and effectiveness in the global trade system.

### **Differences of MPIA decisions from the compulsory nature of the WTO dispute settlement decisions**

The differences between decisions made under the MPIA and the compulsory nature of the traditional WTO dispute settlement decisions are significant and can be analyzed across various dimensions.

One of the most fundamental differences lies in the legally binding nature of the decisions. Under the traditional WTO dispute settlement system, decisions are generally compulsory. This means that once a decision is made, it is binding on the parties involved, and non-compliance can lead to authorized retaliatory measures. In contrast, the MPIA, which is a temporary arrangement created by a group of WTO members, operates somewhat differently. While intended to be binding on the parties that agreed to the MPIA, its decisions do not carry the same value as the traditional system.<sup>25</sup> This is primarily because the MPIA is not a formal part of the WTO's dispute settlement understanding and is more of a stop-gap measure in response to the impasse in the WTO's Appellate Body.

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<sup>21</sup> Giorgio Sacerdoti, "The WTO and its Dispute Settlement System in 2021 and the outlook after MC12 in June 2022", Bocconi University, (2022)

<sup>22</sup> Tetyana Payosova & Gary Clyde Hufbauer, and Jeffrey J Schott, "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures", Peterson Institute for International Economics Policy Brief, (2018).

<sup>23</sup> Marie Van Luchene, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO", Stanford-Vienna TTLF Working Paper No. 90, (2022).

<sup>24</sup> 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).

<sup>25</sup> Bowon Choi, "Three Years of the Multi-Party Interim Appeal Arbitration Arrangement: An Interim Evaluation of Arbitration as a Means to Appeal WTO Panel Reports", 11 Aug (2023).

Another key difference is in the scope and participation. The traditional WTO dispute settlement process is available to all WTO members and covers a broad range of trade disputes.<sup>26</sup> However, The MPIA is a limited arrangement participated in by only a subset of WTO members. This means that its applicability is limited to disputes among these participating members only, and it does not have the universal reach that the WTO's dispute settlement system has.<sup>27</sup>

Procedurally, there are also notable differences. The MPIA was designed to mimic the WTO's appellate process but with certain modifications to address the concerns that led to the blockage of the Appellate Body.<sup>28</sup> For example, MPIA allows for arbitration to be conducted consistently with the usual WTO appeal process but with timelines and procedural flexibility. This flexibility can lead to variations in how disputes are handled under the MPIA compared to the WTO's standard process.

Enforcement mechanisms and the right to retaliate differ significantly between the two systems. In the traditional WTO system, enforcement of decisions is backed by the organization's rules, allowing for authorized retaliation if a member fails to comply with a ruling. Under the MPIA, while decisions are expected to be binding between the parties, the enforcement mechanism is less clear, and the process for authorized retaliation is not as well-established as in the traditional WTO system.

The MPIA serves as an alternative mechanism to the WTO's dispute settlement process, and it differs in terms of its binding nature, scope, procedural aspects, and enforcement mechanisms. These differences reflect the MPIA's nature as a temporary, stop-gap solution designed to address specific issues within the WTO system rather than a permanent or comprehensive substitute for the WTO's dispute resolution mechanism.

### **The unadoptable of MPIA decisions by the WTO dispute settlement body**

The issue of unadoptable decisions under the MPIA of WTO is a complex and multifaceted challenge with significant implications for the functioning and credibility of the WTO's dispute settlement system. The MPIA was established as an alternative mechanism to address the deadlock in the traditional Appellate Body, offering a temporary means of resolving trade disputes among willing WTO members. However, its effectiveness hinges on widespread acceptance and recognition.<sup>29</sup>

A fundamental challenge arises due to the consensus-based decision-making process within the WTO's Dispute Settlement Body. Under this system, all WTO members agree to decisions, and not all members have universally accepted the MPIA. Consequently, decisions rendered under this arrangement may not be adopted or recognized by the DSB, creating a situation where legally sound rulings lack formal adoption. This issue threatens the integrity and predictability of the dispute resolution mechanism, as any system's credibility heavily depends on its decisions' enforceability.<sup>30</sup>

The implications of this challenge extend beyond immediate concerns. The inability to guarantee that MPIA decisions will be adopted and enforced undermines the certainty and efficacy a functional dispute resolution mechanism should provide. This uncertainty may discourage WTO members from utilizing the MPIA, exacerbating the challenges in resolving trade disputes within the WTO framework. In essence, if parties cannot rely on the enforceability of MPIA decisions, they may seek alternative avenues for dispute resolution or, worse, engage in unilateral actions, further eroding the multilateral trading system's stability and predictability.

The issue of unadoptable MPIA decisions also reflects deeper systemic problems within the WTO. It exposes the underlying disagreements among members concerning the functioning and reform of the dispute settlement system and broader political and institutional issues within the organization. The inability to reach a consensus on adopting these decisions highlights the urgent need for comprehensive reform within

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<sup>26</sup> Amponsah Afari-Djan, "Using the dispute settlement mechanism (DSM) as an indicator for the participation of developing nations in WTO", Master's Thesis, School of Business and Economics, (2020).

<sup>27</sup> 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).

<sup>28</sup> Matteo Fiorini, Bernard M. Hoekman, Petros C. Mavroidis, Maarja Saluste & Robert Wolfe, "WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences", *Journal of World Trade*, (2020).

<sup>29</sup> 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).

<sup>30</sup> Baroncini, Elisa, *Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement*", *Federalismi.it*. 22 July, (2020).

the WTO, addressing dispute settlement and other structural and procedural challenges that impede its effectiveness.

Furthermore, the long-term implications of unadoptable MPIA decisions concern the WTO's future effectiveness as a global trade governing body. If the WTO cannot provide a reliable and universally accepted mechanism for resolving trade disputes, it risks losing relevance and effectiveness in facilitating international trade and promoting global economic stability. This underscores the critical importance of addressing these complex challenges within the dispute resolution mechanism and the broader institutional framework of the WTO to ensure its continued viability in the evolving framework of international trade.<sup>31</sup>

### **Akin of MPIA decisions to the mutually agreed solution (MAS) in WTO disputes**

The MPIA diverges significantly from the traditional WTO dispute settlement process regarding legal enforceability under international law. From the outset, the MPIA aimed to align itself with the DSU, the cornerstone of WTO's dispute resolution mechanism. It was introduced as an addendum to the WTO's broader guidelines on dispute conduct, emphasizing its intention to operate within the existing WTO framework. However, this alignment is more notional than practical, as the MPIA's incorporation into the WTO system is superficial. This is evident in the language used in Article 25 of the MPIA, which is notably brief and lacks clarity on several operational aspects of the arbitration mechanism. This ambiguity raises questions about the legal enforceability of the MPIA under international law.

A critical aspect of the MPIA is its voluntary nature, MPIA unlike the compulsory dispute settlement process of the WTO, where panel and Appellate Body reports are binding on all WTO members, the MPIA operates on mutual consent. Both the decision to resort to MPIA arbitration and the acceptance of the final arbitration award are contingent on the agreement of the disputing parties. This is further reinforced by Article 15 of the Agreed Procedures for the MPIA, which states that the arbitration award is to be notified to the Dispute Settlement Body (DSB) but not adopted by it.<sup>32</sup> This distinction is significant as it implies that the MPIA's decisions do not carry the same weight as the traditional WTO dispute settlement process, which enjoys the backing of all WTO members.

The implications of this voluntary nature are profound. The MPIA awards are binding only on the disputing parties involved in a specific case and do not extend to other WTO members or even to the same parties in future disputes. This aspect makes the MPIA similar to the WTO's mutually agreed solutions (MAS) in dispute cases. The implications of this voluntary nature are profound. The MPIA awards are binding only on the disputing parties involved in a specific case and do not extend to other WTO members or even to the same parties in future disputes. This aspect makes the MPIA similar to the WTO's mutually agreed solutions in dispute cases.<sup>33</sup>

The concept of "MAS" in the WTO dispute settlement system context in Article 3.6 of the DSU expresses a preference for parties in a dispute to seek mutually acceptable solutions.<sup>34</sup> However, it clarifies that Article 3.6 does not impose a condition that prevents parties from initiating compliance proceedings or mandates a specific type of settlement. Parties have flexibility in reaching solutions as long as they are consistent with WTO agreements.<sup>35</sup>

The parties are expected to exercise their judgment in deciding whether pursuing compliance proceedings would be fruitful. It points out that the term "solution" in Article 3.7 refers to problem-solving, and there can be various ways to achieve compliance. Parties may agree to forgo compliance proceedings or suspend them until agreed-upon steps are implemented, but this is not mandatory. It is essential to clearly indicate in the agreement between parties if they intend to waive their right to recourse to Article 21.5 compliance proceedings.<sup>36</sup>

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<sup>31</sup> Ravi Kanth, "US Rejects EU-led Interim Appeal Arbitration Arrangement", TWN Info Service on WTO and Trade Issues, SUNS-9134, 9 Jun, (2020). Available at: <https://www.twn.my/title2/wto.info/2020/ti200608.htm>

<sup>32</sup> MPIA, Annex 1, para 15, "The parties agree to abide by the arbitration award, which shall be final. Pursuant to Article 25.3 of the DSU, the award shall be notified to, but not adopted by, the DSB and to the Council or Committee of any relevant agreement".

<sup>33</sup> 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).

<sup>34</sup> See Article 3.6 DSU "Mutually agreed solutions".

<sup>35</sup> ALVAREZ JIMÉNEZ ALBERTO. "Mutually agreed solutions under the WTO Dispute Settlement Understanding: An Analytical Framework after the Softwood Lumber Arbitration". *World Trade Review*. (2011).

<sup>36</sup> See the definition of Mutually Agreed Solutions "MAS" M.6.1 EC — Bananas III (Article 21.5 — Ecuador II) / EC — Bananas III (Article 21.5 — US), paras. 211–212, 215. Available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/repertory\\_e/m6\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/repertory_e/m6_e.htm)



The DSU allows for mutually agreed solutions even after recommendations and rulings by the Dispute Settlement Body (DSB). Article 22.8 of the DSU specifies that the suspension of concessions should continue until a mutually satisfactory solution is reached. Therefore, the possibility of reaching such solutions after DSB recommendations and rulings is explicitly recognized.<sup>37</sup> The flexibility of mutually agreed solutions in WTO dispute resolution highlights that parties can choose various approaches and that such agreements can be reached even after DSB recommendations and rulings. However, the effectiveness of MAS has been mixed with compliance records, and this parallel raises concerns about the MPIA potential as a reliable and enforceable mechanism for dispute resolution in the international trade arena.<sup>38</sup>

The MPIA presents itself as an adjunct to the WTO's DSU, its voluntary basis and lack of comprehensive integration into the WTO's legal framework limit its enforceability under international law. The arrangement, therefore, stands in stark contrast to the compulsory nature of the standard WTO dispute settlement process and may face challenges in achieving widespread acceptance and compliance among WTO members.<sup>39</sup>

### **The Voluntary Nature of the MPIA: Flexibility vs. Enforceability in WTO Dispute Resolution**

The voluntary nature of the MPIA is a fundamental aspect that sets it different from the traditional and compulsory nature dispute settlement mechanism of the WTO, where panel and Appellate Body reports are binding on all WTO members, the MPIA operates based on mutual consent. In other words, deciding to resort to MPIA arbitration and accepting the final arbitration award is contingent upon the disputing parties' agreement in a particular case.

This voluntary characteristic of the MPIA is further emphasized by Article 15 of the Agreed Procedures for the MPIA, which specifies that the arbitration award is to be notified to the Dispute Settlement Body but not adopted by it.<sup>40</sup> This distinction is crucial because it means that the MPIA's decisions do not carry the same level of authority as the traditional WTO dispute settlement process, which enjoys the backing of all WTO members. In essence, MPIA awards are binding only on the parties engaged in a particular dispute and do not extend to other WTO members or even to the same parties in potential future disputes.<sup>41</sup>

This voluntary nature of the MPIA aligns it with the concept of mutually agreed solutions (MAS) in WTO dispute cases.<sup>42</sup> However, it's important to note that the effectiveness of MAS has been mixed, with varying levels of compliance among WTO members. This parallel between the MPIA and MAS raises concerns about the MPIA's potential as a reliable and enforceable mechanism for dispute resolution in the international trade arena.

While the MPIA aims to complement the WTO's Dispute Settlement Understanding, its voluntary basis and limited integration into the WTO's legal framework challenge its enforceability under international law. This starkly contrasts the compulsory nature of the standard WTO dispute settlement process, where decisions are binding on all members. Consequently, the MPIA may encounter difficulties gaining widespread acceptance and ensuring compliance among WTO members.

The voluntary nature of the MPIA distinguishes it from the compulsory dispute resolution process of the WTO.<sup>43</sup> While it offers a flexible approach to dispute resolution, its limited enforceability and potential challenges in achieving widespread acceptance raise questions about its effectiveness as a mechanism for addressing trade disputes on a broader scale. The MPIA's success will depend on its ability to navigate these inherent limitations and gain the confidence and cooperation of WTO member states.

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<sup>37</sup> See Article 22.8 Understand on rules and procedures governing the settlement of disputes.

Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf)

<sup>38</sup> Alvarez J.A. "Mutually agreed solutions under the WTO Dispute Settlement Understanding: An Analytical Framework after the Softwood Lumber Arbitration". World Trade Review. (2011).

<sup>39</sup> 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).

<sup>40</sup> MPIA, Annex 1, para 15.

<sup>41</sup> 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).

<sup>42</sup> 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).

<sup>43</sup> Ravi Kanth, "US Rejects EU-led Interim Appeal Arbitration Arrangement", TWN Info Service on WTO and Trade Issues, SUNS-9134, 9 Jun, (2020). Available at: <https://www.twn.my/title2/wto.info/2020/ti200608.htm>

## **The Non-Precedential Nature of MPIA Decisions: Balancing Flexibility and Legal Certainty in International Trade Disputes**

One notable aspect of the MPIA is that its decisions are binding only among the disputing parties involved in a specific case, and these decisions do not create binding precedents for future disputes, even if they involve the same parties.<sup>44</sup>

This characteristic of the MPIA's decisions being non-precedential is significant for several reasons. To begin with, MPIA ensures that each dispute is treated on its own merits, allowing for a tailored approach to each case. This is important in international trade, where the specifics of each case can vary widely due to the complex and dynamic nature of trade relationships and regulations.

Furthermore, by not establishing binding precedents, the MPIA avoids the risk of rigidly codifying practices or interpretations that may not be suitable in all contexts or for all WTO members.<sup>45</sup> This flexibility is essential in a global trade environment where economic, political, and legal frameworks constantly evolve. However, this approach also has its downsides. Without precedential decisions, WTO members have less legal certainty and predictability regarding the interpretation of trade rules. This can lead to inconsistencies in decision-making and might compel parties to litigate similar issues repeatedly. Moreover, it can also reduce the deterrent effect of arbitration decisions, as parties may be less motivated to comply with a decision if they know it does not set a binding precedent for future cases.

The MPIA's approach to making its decisions binding only among the disputing parties in a specific case reflects a balance between flexibility and the need for resolution in international trade disputes. While it allows for case-specific solutions and avoids the pitfalls of rigid precedential rules, it also poses challenges regarding legal certainty and consistency in interpreting trade regulations.

## **The Constitutional Defects of the MPIA: Challenges to Justice, Fairness, and the Right to Appeal**

The MPIA should be under scrutiny due to a constitutional defect that has raised significant concerns regarding its alignment with fundamental principles of justice, fairness, and the right to appeal.<sup>46</sup> At the heart of the matter is the concern that the constitutional defect undermines the core principles of justice. Justice is not merely about rendering verdicts; it encompasses the concept of due process, where every party involved is entitled to a fair and impartial hearing. Any element in the Arrangement that jeopardizes this fundamental principle is a grave concern. In essence, justice is about reaching the right outcome and ensuring that the process leading to that outcome is just and equitable.

Furthermore, fairness is an essential component of any legal system. It ensures that each party is treated equitably, regardless of status or position.<sup>47</sup> If the constitutional defect in the MPIA results in an imbalance of power or an unfair advantage for one party over another, it raises significant red flags. Fairness is essential for the parties directly involved and the public's perception of the legal system's integrity and credibility.<sup>48</sup>

Equally crucial is the right to appeal, a worldwide cornerstone of many legal systems. The right to appeal provides a critical safeguard against potential errors or injustices in the initial decision-making process. If the constitutional defect in the Arrangement restricts or impairs the parties' ability to exercise their right to appeal effectively, it undermines a fundamental aspect of the legal system's checks and balances.<sup>49</sup>

The constitutional defect within the MPIA raises substantial questions about its compatibility with fundamental principles of justice, fairness, and the right to appeal. A thorough and in-depth examination of the specific issues causing this defect is essential to gauge its potential impact on the legal process. It is imperative that any potential shortcomings are addressed to ensure that the Arrangement can effectively

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<sup>44</sup> Pauwelyn, J., "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", *World Trade Review*, (2023).

<sup>45</sup> Marie Van Luchene, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO", *Stanford-Vienna TTLF Working Paper No. 90*, (2022).

<sup>46</sup> 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).

<sup>47</sup> Nobles, Richard, and David Schiff. "The Right to Appeal and Workable Systems of Justice." *The Modern Law Review* 65, no. 5 (2002). Pp. 676–701.

<sup>48</sup> Baroncini, Elisa, "Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", *Federalismi.it*. 22 July, (2020).

<sup>49</sup> Nobles, Richard, *Ibid.*

serve its intended purpose without infringing on the parties' rights and the principles that underpin legal systems. The MPIA constitutional defects can be summarized in these points:

- 1- MPIA, based on Article 25 laconic many details about the Arbitration mechanism
- 2- MPIA Article 2 of the MPIA arrangement restrictions Article 16.4 of the DSU, which guarantees the right to appeal
- 3- An MPIA collapses if a party appeals to the void after losing
- 4- MPIA not identifying the burden of proof

### ***MPIA based on Article 25 laconic many details about the Arbitration process***

Article 25 of the Dispute Settlement Understanding of the WTO addresses the mechanism of arbitration as an alternative method for resolving disputes between member states. This article is an integral part of the DSU, which itself is a cornerstone of the international trade law system under the WTO.

The essence of Article 25 is to provide a streamlined, efficient, and potentially less confrontational means of dispute resolution compared to the panel and Appellate Body processes traditionally used in WTO disputes. Arbitration under Article 25 is voluntary; both parties involved in the dispute must agree to this method. This mutual consent is critical as it underscores the cooperative nature of arbitration compared to more adversarial forms of dispute resolution.<sup>50</sup> One of the key features of Article 25 is its flexibility. Unlike the panel process, which is more formal and has specific procedures and timelines, arbitration allows the parties to tailor the process to their specific needs. This can include setting their own timelines, choosing their arbitrators, and defining the scope and rules applicable to the arbitration. This flexibility can be particularly useful in complex or sensitive cases where a one-size-fits-all approach may not be appropriate.<sup>51</sup>

Another important aspect of Article 25 is the binding nature of the arbitrators' decisions. Once the parties have agreed to arbitration and the arbitrators have made their decision, that decision is final and binding on the parties. This provides a level of certainty and finality that can be appealing, especially in cases where ongoing disputes could harm the economic or political interests of the parties involved.<sup>52</sup>

However, there are some limitations and concerns associated with Article 25 arbitration. One concern is the lack of transparency. Unlike panel proceedings, which are more open and include written submissions and reports that are eventually made public, arbitration proceedings can be much more private. This lack of transparency can be a concern for those interested in developing and interpreting international trade law, as well as for other WTO members not involved in the dispute but potentially affected by its outcome.<sup>53</sup>

Article 25 of the DSU introduces a flexible, binding arbitration mechanism as an alternative to the more formal panel and Appellate Body processes of the WTO's dispute settlement system. While it offers advantages in terms of flexibility and efficiency, concerns about transparency and the broader impact on the international trade law system should be considered. The effectiveness and popularity of Article 25 arbitration will depend on how WTO members use it and how it evolves over time within the broader context of international trade disputes.

### ***Restricts the right to appeal***

The MPIA faces several constitutional challenges. One of the most significant concerns is the right of WTO members to appeal. Under Article 2 of the MPIA, participating members agree not to pursue appeals under Articles 16.4 and 17 of the DSU when they agree to use the MPIA.<sup>54</sup> This provision raises questions about its mandatory nature and compatibility with the existing rights under the DSU. Article 16.4 of the DSU guarantees WTO members the right to appeal decisions made by panels in disputes. By potentially restricting this right, the MPIA might be seen as conflicting with the established procedures and protections offered by the DSU.

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<sup>50</sup> 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).

<sup>51</sup> Baroncini, Elisa, "Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement", *Federalismi.it*. 22 July, (2020).

<sup>52</sup> Giorgio Sacerdoti, "The WTO and its Dispute Settlement System in 2021 and the outlook after MC12 in June 2022", Bocconi University, (2022)

<sup>53</sup> Simon Lester, "Can Interim Appeal Arbitration Preserve the WTO Dispute System?", *Free Trade Bulletin* Num 77, Sep 1, (2020).

<sup>54</sup> See Article 2 of the Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU", *JOB/ DSB/1/ Add.12*. 30 Apr (2020).

Article 23.1 of the DSU stipulates that member shall utilize and conform to the rules and procedures of the DSU.<sup>55</sup> This broad requirement encompasses the appeal process as an integral part of the dispute settlement system. If the MPIA prohibition on pursuing appeals under the DSU is mandatory, it would imply a deviation from this requirement. This could be viewed as undermining the comprehensive dispute resolution framework that the DSU provides, thereby challenging the fundamental principles on which the WTO dispute settlement mechanism is based. Hence the tension lies in balancing the need for an effective interim appeal mechanism with the established rights and procedures under the DSU. Resolving this conflict is crucial for maintaining the integrity and efficacy of the WTO dispute settlement system.<sup>56</sup>

MPIA parties have agreed not to appeal to the Appellate Body (Article 2). Therefore, parties cannot appeal a panel report to the "void", to the paralyzed Appellate Body. As a result of developments in India and the US's dispute over countervailing duties imposed on certain steel products from India, this is relevant. The US informed the DSB that it would appeal the panel's legal interpretations and legal issues after a WTO compliance panel found it had failed to implement certain aspects of the DSB's recommendations and rulings. Despite the recent agreement between both sides to resolve this issue amicably, an appeal notice or appellant submission filed by the US could effectively veto the agreement.<sup>57</sup>

The right to appeal is fundamental to any legal system, ensuring that individuals or parties can challenge and rectify erroneous decisions. If the Arrangement imposes unreasonable restrictions on this right, it may violate the Constitution's access to justice and fairness principles. Such restrictions could include limiting the grounds for appeal, imposing excessively high filing fees, or requiring cumbersome procedural hurdles that make it practically impossible for parties to exercise their right to appeal.<sup>58</sup>

The MPIA constitutional defect might also be related to the composition and independence of the arbitration panel or body responsible for hearing appeals. If the constitution does not adequately address concerns related to the impartiality and integrity of the panel members, it could create a situation where parties have a legitimate reason to doubt the fairness of the appeals process. This, in turn, would undermine the credibility and legitimacy of the Arrangement as a whole.

Another aspect to consider is whether the Arrangement complies with international standards and conventions on arbitration and the right to appeal. Many countries adhere to international norms and principles, such as those outlined in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If the Arrangement's constitution fails to meet these international standards, it could impact the enforceability of arbitral awards and cross-border recognition, further complicating matters for the parties involved.

The constitutional defect of MPIA raises severe concerns about its compatibility with fundamental principles of justice, fairness, and the right to appeal. A thorough examination of the specific issues causing this defect and their potential impact on the legal process is essential to determine whether the Arrangement can effectively serve its intended purpose without infringing on the parties' rights.<sup>59</sup>

### ***The Fragile Future of the MPIA in Legitimacy, Compliance, and the Risk of Collapse***

The potential collapse of the MPIA in the event of a party appealing to the void after losing hinges on several key factors. The MPIA, as a stopgap measure designed to address the impasse in the WTO appellate body, represents a crucial element in the international trade dispute resolution framework.<sup>60</sup>

To begin with, the concept of appealing to the void refers to a scenario where a losing party in a dispute, unsatisfied with the MPIA's decision, seeks redress outside the established framework.<sup>61</sup> This action could undermine the legitimacy and effectiveness of the MPIA. The arrangement is built on mutual trust and adherence to its rules and procedures. If parties start bypassing or disregarding the MPIA's decisions, it

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<sup>55</sup> See World Trade Organization, Dispute Settlement Understanding, Article. 23.1.

<sup>56</sup> 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).

<sup>57</sup> Ali Amerjee, "The Multiparty Interim Appeal Arbitration Arrangement: will the US be missed?" *TradeLinks*, (2020).

<sup>58</sup> Nobles, Richard, and David Schiff. "The Right to Appeal and Workable Systems of Justice." *The Modern Law Review* 65, no. 5 (2002). Pp. 676–701. <http://www.jstor.org/stable/1097612>.

<sup>59</sup> Marie Van Luchene, "The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO", *Stanford-Vienna TTLF Working Paper No. 90*, (2022).

<sup>60</sup> 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).

<sup>61</sup> 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).



would erode the confidence in the system, potentially leading to its collapse. This outcome would be particularly likely if major trading nations or those with significant influence in global trade policies were to engage in such practices.

Furthermore, the stability of the MPIA is also contingent on its perceived fairness and effectiveness. If parties believe that the MPIA consistently delivers equitable and well-reasoned decisions, they are less likely to seek alternatives.<sup>62</sup> However, if the arrangement is perceived as biased or ineffective, parties may be more inclined to appeal to the void, undermining the arrangement's stability. The key here is the perceived value of the MPIA as a dispute resolution mechanism. If it fails to provide a credible alternative to the WTO's appellate body, its *raison d'être* is called into question.

Additionally, the international trade framework is highly dynamic, with geopolitical shifts and emerging global challenges continually reshaping. The MPIA's ability to adapt to these changes and address the concerns of its members is crucial for its survival. If it cannot evolve to meet the needs of the international trading community, parties may seek other avenues, such as bilateral agreements or alternative dispute resolution mechanisms, which could precipitate the collapse of the MPIA.

The stability and continued relevance of the MPIA largely depends on its perceived legitimacy, fairness, and effectiveness. An appeal to the void following a loss could signal a lack of confidence in the arrangement, potentially leading to its collapse. This scenario underscores the importance of maintaining a robust, impartial, and adaptable international trade dispute resolution mechanism.<sup>63</sup>

### **Vagueness of the Burden of Proof in MPIA: A Legal Oversight**

In the context of the WTO dispute settlement system, there are certain powers exercised by the Appellate Body that are not explicitly addressed in the text of the MPIA.<sup>64</sup> One such power is related to the burden of proof. The MPIA does not explicitly outline how the burden of proof is determined. The AB has taken it upon itself to address this issue, the AB has examined the burden of proof by considering general international practice, and, in the case of U.S.-Wool Shirts, it relied on logical arguments and prevailing domestic practices. The AB has asserted that adopting a minimal evidentiary standard is crucial for the effectiveness of dispute settlement proceedings, as merely asserting a claim cannot be considered proof. Therefore, the AB sees the maintenance of this standard as its obligation.<sup>65</sup>

This emphasis on maintaining a certain standard of proof is important for the effectiveness of proceedings and for ensuring fairness. There is a fundamental tension between the AB's assertion standard and basic concepts of legality and due process commonly understood in adjudication. Therefore, it can be inferred that international courts or tribunals have an inherent power to take measures necessary to maintain this minimum threshold required for the fairness and legality of their decisions. However, any authority beyond this minimal threshold would be considered implied and subject to modification or withdrawal by the WTO membership, as per the DSU.

Additionally, the MPIA conditions arbitrators' organizational measures on the need to avoid harming due process or the parties' procedural and obligations rights. This reinforces the idea that maintaining fairness in dispute settlement proceedings is fundamental.<sup>66</sup>

Another power exercised by the AB is the ability to draw adverse inferences, this power is considered part of the AB's broad legal authority to request information, as it believes that drawing inferences is an inherent aspect of a panel's basic task, as defined in Article 11 of the DSU. The AB has asserted the authority to draw adverse inferences in specific scenarios, such as a party's failure to provide requested information or non-appearance in proceedings.

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<sup>62</sup> Pauwelyn, J. "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", *World Trade Review*, (2023).

<sup>63</sup> Marie Van Luchene, *The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO*, Stanford-Vienna TTLF Working Paper No. 90, (2022).

<sup>64</sup> See *Canada Measures affecting the import of milk and export of dairy products*, Second reference to Article 21.5 of the DSU From New Zealand and the United States, WT/DS103/AB/RW2, 20 Dec (2002). Available at: <http://www.sice.oas.org/dispute/wto/ds103/ds103r3e.asp>

<sup>65</sup> See *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Appellate Body Report, WT/DS33/AB/R (1997). (We find it difficult to see how any judicial settlement system could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and in most jurisdictions that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense.

<sup>66</sup> *Multiparty Interim Appeal Arbitration Arrangement*, Annex 1, para 12

In the case of a failure to provide requested information, the AB has found that WTO dispute settlement instruments allow panels the discretion to draw adverse inferences from this lack of candor. Similarly, the International Court of Justice (ICJ) in its first case, *Corfu Channel*, appeared to characterize its powers under Article 49 of its Statute.<sup>67</sup>

However, when it comes to a party's non-appearance or lack of participation in proceedings, there is a divergence between the ICJ and WTO dispute settlement systems. The AB has referred to the "legal duty" of parties to provide requested information, implying a duty to participate that is not easily inferred from instruments like the ICJ Statute. This difference highlights the non-inherent nature of the power to draw adverse inferences in cases of non-appearance.<sup>68</sup>

The AB has exercised certain powers related to the burden of proof and the drawing of adverse inferences, which are not explicitly stated in the MPIA. The AB powers may be inherent or implied, depending on the circumstances, and are essential for maintaining fairness and effectiveness in dispute settlement proceedings. However, the distinction between inherent and implied powers can vary, and the exercise of these powers may differ in practice, particularly in consensual MPIA proceedings where parties have significant autonomy.<sup>69</sup>

### **Assessing the MPIA dispute settlement**

The emergence of the MPIA was prompted by prolonged U.S. blockages in appointing AB members, resulting in a paralyzed state of the WTO dispute resolution system. This situation left trade disputes unresolved, as appeals faced a deadlock without a functioning Appellate Body. The motivations behind the U.S. blockades were centered on criticisms of delay in completing AB reports, issues with internal rules, concerns about the scope of appellate review, and perceived excessive judicial activism.<sup>70</sup>

The MPIA was conceived as a response to this crisis, initiated by the European Union and China and later joined by other trade partners. It operates under Article 25 of the DSU and mirrors key features of arbitration within the WTO framework. Presently, the MPIA boasts a membership of 53 states, though influential players like the United States and South Korea have yet to join. However, its legal nature is debatable, falling under the category of "procedural agreements" within the WTO, with unclear legal standing if disputes related to it come before the Dispute Settlement Body.<sup>71</sup>

The legal text of the MPIA emphasizes its interim nature, covering two types of trade disputes: future disputes between MPIA participants and pending disputes as of April 30, 2020, provided that the interim panel report had not been issued. The MPIA introduces measures derived from DSB discussions to enhance and innovate the Appellate Body's operation, including an increased number of adjudicators, greater collaboration among pool members, organizational measures, and substantive remedies, the latter requiring the agreement of the disputing parties.

Upon critical evaluation, the MPIA exhibits both advantages and disadvantages. On the positive side, it maintains a two-stage dispute settlement system, allowing for the examination of WTO panel rulings for legal mistakes and addressing procedural issues for greater efficiency. However, it lacks enforceability as a non-legally binding international agreement, raising concerns about parties acting in bad faith. Additionally, the limited number of MPIA members in relation to the entire WTO membership and the limited number of trade disputes among MPIA participants diminish its impact. Furthermore, it does not fully address the underlying motives behind the U.S. blockades, which could discourage further participation.<sup>72</sup>

Despite its interim nature, the MPIA is portrayed as more than a temporary solution. It addresses critical procedural issues within the Appellate Body, shaping the future of the WTO. The chapter contends that the

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<sup>67</sup> See *Corfu Channel* case between the United Kingdom of Great Britain and Northern Ireland v Albania, [1949] ICJ Rep 18, 32, stating that the Court noted the obligation to produce documents but could not draw differing conclusions due to the case's specific circumstances.

<sup>68</sup> Brian McGarry & Nasim Zargarinejad, "Tracing the Powers of WTO MPIA Arbitrators," *McGill Journal of Dispute Resolution*, Vol 8, Num 2, (2022-2023).

<sup>69</sup> Pauwelyn, J., "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?," *World Trade Review*, (2023).

<sup>70</sup> Mohamed Salah Adawi, et al. "MPIA as Solution of Appellate Body Dilemma: An Overview of the Advantages of New Mechanism of WTO Dispute Settlement". *Valley International Journal Digital Library*, (2024). pp.473-496.

<sup>71</sup> B. Hoekman & P. C. Mavroidis and M. Saluste, "Informing WTO Reform: Dispute Settlement Performance, 1995-2020", *Journal of World Trade* 55, no. 1, (2021).

<sup>72</sup> 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).

MPIA is a potential pathway to reforming and revitalizing the WTO, providing hope for a more effective and responsive international trade regime.<sup>73</sup>

However, it is acknowledged that the MPIA cannot fully replace the WTO's Dispute Settlement Mechanism (DSM). The discussion surrounding its replacement is complex, considering the voluntary nature of the MPIA and the limited participation of major trading nations. The effectiveness of the MPIA is closely tied to its perceived legitimacy and fairness, and concerns about budgetary considerations and the potential fragmentation of WTO law are crucial factors.

### **A proposal to strengthen the MPIA of the WTO dispute settlement system**

The MPIA dispute settlement mechanism is recognized as a temporary legal solution. However, politically will be a solution for a long period. In light of its status as the only available mechanism for resolving international trade disputes, the reforming proposal includes reforming the constitutional defects and constraints.

The MPIA has been instrumental in maintaining the integrity of the global trade order. However, as with any international agreement, there have been concerns and critiques voiced by various countries. One notable critic has been the United States, which has raised substantial objections to certain aspects of the MPIA. In response to these concerns and with the overarching goal of strengthening the MPIA, this proposal outlines a series of reforms aimed at addressing the issues raised by the U.S. opposition and improving the overall effectiveness and legitimacy of the MPIA.<sup>74</sup>

One of the central concerns raised by critics, including the United States, is the need to establish binding status for the MPIA. While the MPIA serves as an interim mechanism, its decisions lack the binding nature of regular WTO dispute settlement decisions. To enhance its effectiveness, there is a pressing need to make the MPIA a binding international agreement. This will assure WTO members that the decisions rendered under the MPIA will be upheld and implemented in good faith. Furthermore, mechanisms must be explored to ensure compliance with MPIA decisions, as the absence of enforceability has been a significant drawback.<sup>75</sup>

Another aspect of the MPIA that requires attention is its legitimacy. To maintain the confidence of WTO members and the international community, it is imperative to propose measures that increase the legitimacy of the MPIA. This could involve changes in the composition of the arbitration panels and the inclusion of more stakeholders in the decision-making process to ensure a broader perspective and more balanced outcomes.

Furthermore, addressing the disparities between MPIA decisions and regular WTO dispute settlement decisions is crucial. These disparities have led to inconsistencies in international trade law and potentially undermine the MPIA's credibility. To address this issue, steps must be taken to harmonize the two systems, ensuring that MPIA decisions are aligned with the principles and rules of the WTO dispute settlement process.

Encouraging the adoption of MPIA decisions by the WTO Dispute Settlement Body is also a significant challenge that needs to be addressed. Strategies should be developed to incentivize the WTO dispute settlement body to adopt MPIA decisions, as this adoption can bring about a more seamless integration of the MPIA into the broader WTO system, thus benefiting the international trade community.

Moreover, the proposal considers the integration of Mutual Agreement Solutions (MAS) into the MPIA framework. A comparative analysis of MPIA decisions and MAS in WTO disputes reveals opportunities to streamline and enhance the dispute resolution process.

The reform proposal also delves into expanding the scope of the MPIA to cover a broader range of issues or disputes. While this expansion may present benefits and challenges, it is essential to explore these possibilities to ensure that the MPIA remains a relevant and effective tool in addressing the evolving needs of the global trade framework.

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<sup>73</sup> Matteo Fiorini, Bernard M. Hoekman, Petros C. Mavroidis, Maarja Saluste & Robert Wolfe, WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences, 54 *Journal of World Trade* 667 (2020).

<sup>74</sup> Stratos Pahis, "WTO Appeals After the Appellate Body" *World Trade Review*, (2023).

<sup>75</sup> Pauwelyn, J, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", *World Trade Review*, (2023).

Concerns about the binding nature of MPIA decisions among the same parties in future disputes must also be addressed. Proposing mechanisms to ensure consistency and fairness in such scenarios will contribute to international trade relations' long-term stability and predictability.<sup>76</sup>

Furthermore, constitutional reforms are essential to clarify arbitration mechanisms and address issues related to party appeals that may lead to the collapse of MPIA cases. These reforms can help streamline the MPIA process and prevent unnecessary delays.

The proposed reforms aim to strengthen the MPIA within the WTO Dispute Settlement system. By addressing the concerns and critiques raised by the U.S. opposition and other stakeholders, these reforms can enhance the legitimacy, effectiveness, and overall functionality of the MPIA. Achieving these goals requires international cooperation and consensus-building among WTO members, reaffirming the commitment to a fair and rules-based global trading system.

### **Establishing Binding Status for making the MPIA a binding agreement**

Establishing binding status for the MPIA decisions is critical to enhancing its effectiveness in resolving international disputes. This reform proposal outlines a comprehensive plan to achieve this objective by emphasizing the importance of various key elements:

To transform the MPIA into a binding agreement, it is imperative to establish a clear legal framework. This can be achieved by drafting a treaty that explicitly recognizes the MPIA as a legally binding instrument. This treaty should not only affirm the binding nature of the MPIA but also outline the specific obligations of participating parties. Additionally, it should establish robust mechanisms for enforcement and compliance, including consequences for non-compliance.

The legitimacy and widespread acceptance of the binding MPIA, it is essential to encourage all relevant parties to join the agreement. Diplomatic channels should be used to engage potential signatories and emphasize the benefits of participating in a binding agreement. To make participation more appealing, consider offering incentives to nations to become signatories, such as preferential trade agreements or technical assistance.<sup>77</sup>

To ensure the agreement's binding nature is upheld, monitoring and enforcing compliance mechanisms should be created. This could involve appointing an independent body or organization responsible for overseeing compliance and initiating enforcement measures when necessary. Sanctions or penalties for non-compliance should be clearly defined to deter parties from violating their obligations.

Adapt to evolving international circumstances, provisions for regular reviews and amendments of the binding agreement should be included. This could involve periodic conferences or consultations among signatories to address emerging issues and make necessary adjustments to the agreement, ensuring its continued relevance and effectiveness.

Establishing binding status for the MPIA is a complex but essential undertaking for resolving international disputes. This reform proposal underscores the significance of a clear legal framework, inclusive participation, domestic implementation, robust dispute resolution mechanisms, compliance and enforcement measures, regular reviews, public awareness, and international cooperation to achieve this transformation successfully. By turning the MPIA into a binding international agreement, nations can collaborate more effectively to promote peace, stability, and global prosperity.

### **Aligning and harmonizing between the traditional WTO and MPIA dispute settlement decisions**

Aligning and harmonizing the dispute settlement decisions between the traditional WTO and the MPIA presents a complex challenge, as these two mechanisms have distinct features and purposes. The traditional WTO dispute settlement system has been in place for decades and is governed by the DSU, while the MPIA is a more recent development created by a group of WTO member states seeking an alternative avenue for resolving disputes after the Appellate Body's paralysis. Achieving coherence between these two systems requires a careful examination of their differences and similarities and a commitment to upholding the principles of the WTO.

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<sup>76</sup> Gao, Henry S., "Finding a Rule-based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement". forthcoming in *Journal of International Economic Law*, 1 Sept, (2020),

<sup>77</sup> Marie Van Luchene, *The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO*, Stanford-Vienna TTLF Working Paper No. 90, (2022).



One of the primary points of divergence between the traditional WTO and MPIA lies in their institutional structures. The WTO dispute settlement system has a well-established Appellate Body comprising seven members central in reviewing panel decisions. In contrast, the MPIA has a more flexible structure, with ad hoc arbitrators appointed on a case-by-case basis. Harmonizing these structures would involve finding a way to ensure consistency in the interpretation and application of WTO agreements while respecting the autonomy of MPIA members to select their arbitrators.<sup>78</sup>

Another key issue is the legal framework governing the two dispute settlement mechanisms. The DSU provides a comprehensive set of rules and procedures for dispute resolution, which includes strict timelines for various stages of the process. The MPIA, on the other hand, offers a more streamlined approach, with expedited procedures designed to resolve disputes more swiftly. Aligning these frameworks may require compromises, such as adopting certain aspects of the MPIA's efficiency measures within the traditional WTO system while preserving the fundamental principles of due process and transparency.<sup>79</sup>

Moreover, the issue of precedent poses a significant challenge. In the traditional WTO system, panel and Appellate Body reports establish precedent, contributing to developing a consistent body of jurisprudence. The MPIA has no formal precedent-setting mechanism, which can lead to variability in decisions. To harmonize these approaches, WTO members and MPIA participants might explore options for selectively incorporating MPIA decisions into the broader WTO jurisprudence or developing a mechanism for recognizing MPIA decisions as persuasive authority.

Additionally, ensuring the transparency and inclusivity of the dispute settlement process is crucial for alignment. The WTO operates within a multilateral framework, with clear rules for all member states' notification, consultation, and participation. The MPIA, being a plurilateral initiative, involves a subset of WTO members, potentially raising concerns about the inclusivity of the decision-making process. To address this, mechanisms for information-sharing and coordination between the two systems must be established to minimize fragmentation and ensure that non-participating WTO members are not disadvantaged.<sup>80</sup>

Aligning and harmonizing dispute settlement decisions between the traditional WTO and the MPIA is complex and challenging. It requires a delicate balance between preserving the core principles of the WTO and accommodating the specific needs and preferences of MPIA participants. Achieving this goal will necessitate constructive dialogue, negotiation, and a commitment to upholding the rules-based international trading system that the WTO represents. Ultimately, the success of these efforts will contribute to the stability and predictability of global trade relations.

#### **Enhance the legitimacy of the MPIA by involving more parties**

To enhance the legitimacy of the MPIA in light of the limited participation of WTO members, it is imperative to consider strategies that involve more parties in this dispute settlement mechanism. The limited engagement of WTO members in the MPIA has raised concerns about its representativeness and effectiveness. Expanding nations' participation ensures the MPIA garners wider acceptance and trust within the international trade community.<sup>81</sup>

One way to bolster the legitimacy of the MPIA is by actively encouraging more WTO members to join the arrangement. This can be achieved through diplomatic efforts and negotiations to convince countries that have not yet joined to become part of the MPIA. Efforts should be made to address non-participating WTO members' concerns and reservations and highlight the benefits of being part of a robust and impartial dispute settlement mechanism. Additionally, the MPIA could explore partnerships and agreements with regional trade organizations. Collaborating with these entities could provide a platform for involving more countries indirectly, as many WTO members are also part of regional trade blocs. By aligning the MPIA's objectives

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<sup>78</sup> Pauwelyn, J, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", World Trade Review, (2023).

<sup>79</sup> Marie Van Luchene, The MPIA: A Mere Interim Solution or the Pathway to Fixing the WTO", Stanford-Vienna TTLF Working Paper No. 90, (2022).

<sup>80</sup> World Trade Organization "The WTO trade monitoring database enhancing transparency and accountability" 29 Sep (2023).

<sup>81</sup> 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).

and procedures with those of regional organizations, it may be possible to extend the reach and inclusivity of the MPIA's dispute settlement services.<sup>82</sup>

Furthermore, transparency and openness in the MPIA's operation can contribute significantly to its legitimacy. To this end, the arrangement should consider mechanisms for engaging with civil society organizations, academic institutions, and non-governmental organizations specializing in trade and international law. These stakeholders can help ensure that the MPIA's proceedings are conducted in a manner that is perceived as fair, objective, and accountable.

Another crucial step is to work on improving the accessibility of the MPIA's dispute settlement process. This can be achieved by providing technical assistance and capacity-building support to developing countries with limited resources to participate effectively. By assisting in navigating the complex legal procedures and requirements, the MPIA can make itself more attractive to a wider range of WTO members.

Enhancing the legitimacy of the MPIA in the context of limited WTO member participation requires a multifaceted approach. Encouraging more countries to join, partnering with regional organizations, engaging with civil society, and improving accessibility are all vital components of a strategy aimed at broadening the MPIA's participation base and strengthening its credibility as a viable dispute settlement mechanism in the world of international trade. By involving more parties and addressing the concerns of those who have not yet joined, the MPIA can establish itself as a more representative and effective instrument for resolving trade disputes.

### **Encourage the WTO dispute settlement body to adopt MPIA decisions**

Encouraging the WTO dispute settlement body to adopt decisions of the MPIA is vital for upholding the integrity and effectiveness of the WTO's dispute resolution process. The MPIA, established by a group of WTO members in response to the Appellate Body's paralysis, offers an interim solution to address the pressing need for a functioning dispute settlement mechanism within the WTO. Recognizing the challenges faced by the WTO due to the ongoing impasse in the Appellate Body's functioning, it is essential that the DSB adopts the decisions issued by the MPIA. The MPIA has demonstrated its commitment to preserving the rules-based international trading system and ensuring a fair and impartial dispute settlement process. Adopting the MPIA's decisions, the DSB can help bridge the gap in the WTO's dispute resolution framework.

Furthermore, the MPIA has successfully attracted the participation of a significant number of WTO members, indicating widespread support for its objectives and procedures. This support underscores the importance of recognizing the MPIA as a valuable tool in addressing disputes among WTO members. The DSB should take cognizance of this collective effort and its members' trust in the MPIA.<sup>83</sup>

Incorporating the MPIA's decisions into the WTO dispute resolution process also safeguards the rights and interests of WTO members. It ensures that disputes are resolved promptly and effectively, providing certainty and predictability to international trade. This is particularly crucial in today's global economic framework, where trade tensions and disputes can have far-reaching consequences.

Moreover, embracing the MPIA's decisions complements the broader efforts to reform and strengthen the WTO's dispute settlement mechanism. It demonstrates the WTO members' commitment to adapt to changing circumstances and preserve the organization's core functions. The DSB's endorsement of MPIA decisions strongly signals that member states are willing to cooperate and find innovative solutions to overcome challenges.

Encouraging the WTO Dispute Settlement Body to adopt the MPIA decisions is not only a pragmatic response to the current impasse but also a reaffirmation of the WTO's importance in maintaining a rules-based international trading system. It is an opportunity for the DSB to uphold the principles of fairness, impartiality, and effectiveness in dispute resolution while demonstrating the organization's resilience and adaptability in the face of evolving global trade dynamics.

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<sup>82</sup> Joost Pauwelyn, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", *World Trade Review* (2023).

<sup>83</sup> 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).

## **Reforms the Constitutional defects of MPIA**

The MPIA comes under scrutiny due to constitutional defects that have raised substantial concerns regarding its alignment with fundamental principles of justice, fairness, and the right to appeal. At the heart of this matter lies the worry that these constitutional defects undermine the core principles of justice.<sup>84</sup> Justice, in the context of international trade dispute resolution, is not limited to rendering verdicts; it encompasses the broader concept of due process, ensuring that every party involved is entitled to a fair and impartial hearing. Any element within the MPIA that jeopardizes this fundamental principle is a cause for grave concern. In essence, justice is about reaching the right outcome and ensuring that the process leading to that outcome is just and equitable. This essay will shed light on some of the key constitutional defects of the MPIA procedures that demand reform to uphold the principles of justice and fairness in international trade dispute resolution. These defects include restrictions on the right to appeal, lack of clarity in the arbitration mechanism, consequences of appeals, and the failure to identify the burden of proof. Addressing these issues is crucial to ensure that the MPIA operates in accordance with the principles that underpin the rule of law and equitable trade relations among nations. This is what we discuss in the following context.

### ***Amend Article 25 of the DSU to clarify arbitration mechanisms***

While MPIA was created with the intention of providing a temporary solution, there have been concerns regarding its constitutionality, particularly in relation to Article 25 of the Dispute Settlement Understanding. These concerns stem from the fact that Article 25 of the DSU, which governs the MPIA, is often criticized for its brevity and lack of detailed provisions regarding the arbitration mechanism. This constitutional defect has raised significant issues that necessitate a reform of Article 25 to clarify the role and governance of the MPIA.<sup>85</sup>

One of the fundamental issues with Article 25 of the DSU is its brevity and lack of specificity. This brevity leaves room for interpretation and ambiguity, which can lead to disputes and confusion among WTO members. The MPIA was established to address situations where the Appellate Body, the WTO's primary appellate review body, cannot function due to a lack of members. However, Article 25 does not provide clear guidance on how the MPIA should operate, how arbitrators should be selected, or how the decision-making process should be structured. This lack of detail can undermine the legitimacy and effectiveness of the MPIA.<sup>86</sup>

Furthermore, the constitutional defect in Article 25 raises concerns about the accountability and transparency of the MPIA. In a system where decisions can have significant economic and trade implications, it is crucial that the arbitration mechanism is transparent and accountable to WTO members. Without clear rules and procedures outlined in Article 25, there is a risk that the MPIA could operate opaquely and lack accountability. This could erode trust in the dispute settlement system and the WTO as a whole.

Another important aspect of reforming Article 25 is addressing the selection and appointment of arbitrators. The current text of Article 25 does not provide guidance on how arbitrators for the MPIA should be chosen. This lack of clarity can lead to questions about the independence and impartiality of arbitrators, which are essential principles in dispute settlement. A reformed Article 25 should establish clear criteria and procedures for the selection and appointment of arbitrators to ensure their integrity and expertise.

Additionally, the role of the MPIA within the broader WTO dispute settlement system needs to be clarified. While the MPIA is meant to be a temporary solution to address the Appellate Body's paralysis, it should not undermine the DSU's fundamental principles and procedures. Reforming Article 25 should ensure that the MPIA operates consistently with the DSU and does not create conflicts or inconsistencies within the WTO's dispute settlement framework.

The constitutional defect in Article 25 of the DSU has raised significant concerns about the MPIA's operation, accountability, and transparency. To address these concerns, we suggest a proposal to reform Article 25 of DSU as follows:

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<sup>84</sup> Pauwelyn, J, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", World Trade Review, (2023).

<sup>85</sup> Yury Rovnov, "Article 17.6(ii) of the WTO Anti-Dumping Agreement: Waiting for Chekhov's Gun to Go Off", Journal of International Dispute Settlement, Volume 15, Issue 1, March (2024).

<sup>86</sup> Gao, Henry. "Finding a Rule-based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement". forthcoming in Journal of International Economic Law, 1 Sept, (2020).

The reform proposal for Article 25 specifies the qualifications and expertise required of arbitrators to resolve disputes. Currently, the DSU does not provide clear criteria for selecting arbitrators. Reforming this aspect could involve establishing a pool of experienced trade experts well-versed in WTO rules and principles. This would ensure that arbitrators possess the necessary expertise to make informed decisions, enhancing the credibility of the arbitration process.<sup>87</sup>

Additionally, there have been suggestions to outline the procedural rules and timelines for arbitration proceedings in Article 25. Currently, the DSU is relatively silent on these matters, leading to uncertainty and delays in dispute resolution. Reforming Article 25 could involve specifying the steps and timeframes involved in the arbitration process, such as deadlines for submitting arguments and counterarguments, conducting hearings, and rendering decisions. This would promote efficiency and timeliness in dispute resolution.

Another aspect of Article 25 that has been a subject of debate is the issue of transparency. Some proposals for reform call for greater transparency in arbitration proceedings. This could include making arbitration submissions and awards publicly available, allowing for third-party participation or observations, and ensuring that dispute records are accessible to all WTO members. Increased transparency would contribute to the legitimacy of the arbitration process and enhance the credibility of the WTO's dispute settlement system.

Furthermore, some reform proposals seek to address the issue of compliance with arbitration awards. There are concerns that parties may not always fully comply with arbitration rulings. Strengthening Article 25 could involve establishing clearer mechanisms for enforcing arbitration awards, including specifying the consequences for non-compliance and the role of the WTO's Dispute Settlement Body in overseeing and ensuring compliance.

Reforming Article 25 of the DSU is a complex and important endeavor to enhance the effectiveness and fairness of the WTO's dispute settlement system. By providing more detailed guidance on the qualifications of arbitrators, procedural rules, transparency, and compliance mechanisms, reform proposals seek to address the limitations of the current Article 25 and make the arbitration mechanism more robust and responsive to the needs of WTO members. These reforms, if implemented, could contribute to a stronger and more reliable dispute resolution process within the WTO framework.

### ***Ensuring the Future Stability of the MPIA “appealing to the void”***

The potential collapse of the MPIA in the case of a loser parties “appealing to the void” is a significant concern for the international trade dispute resolution system. Several key reforms should be considered to ensure the continued effectiveness and stability of the MPIA. The proposal for Reforming the MPIA to Prevent Collapse can be summarized as follows:

Transparency and accountability are fundamental to any dispute resolution mechanism. The MPIA should prioritize transparency in its decision-making processes to address bias or perceived unfairness concerns. This could involve making all case-related documents and proceedings publicly accessible, allowing for greater scrutiny. Additionally, an independent body or ombudsman could be established to oversee the MPIA's operations, ensuring fairness and impartiality in its functioning.<sup>88</sup>

Many disputes escalate to the void due to a lack of understanding of the MPIA's procedures and benefits. The MPIA should invest in outreach and education initiatives to mitigate this issue. This could involve conducting workshops, webinars, and information campaigns to inform parties about the advantages of using the MPIA for dispute resolution. By improving awareness and knowledge about the MPIA, parties may be less likely to bypass it.<sup>89</sup>

As the international trade framework continually evolves, the MPIA must be flexible and adaptable. The MPIA should establish a mechanism for periodic reviews and update its rules and procedures. This would allow it to address emerging challenges and incorporate best practices, ensuring its continued relevance in a

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<sup>87</sup> 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).

<sup>88</sup> 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).

<sup>89</sup> 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).



changing global environment. Moreover, the MPIA should consider establishing specialized panels or experts to handle specific disputes, promoting expertise and efficiency.

To discourage parties from appealing to the void, the MPIA should introduce incentives for compliance. This could include a system of rewards for parties that consistently adhere to MPIA decisions or sanctions for those who seek alternative avenues without valid reasons. Such incentives would encourage parties to trust and respect the MPIA's authority, strengthening its legitimacy.

An internal review mechanism should be created to address concerns and disputes related to the MPIA itself. This mechanism would allow parties to raise concerns about the MPIA's functioning or decisions, providing an avenue for resolution within the framework. A standing committee or panel of experts could be designated to handle such reviews, enhancing the MPIA's credibility and demonstrating its commitment to self-improvement.

To prevent the collapse of the MPIA, it is crucial to secure the participation of major trading nations and influential global players. Encouraging multilateral engagement and ensuring that all countries, regardless of economic size, have a voice in the MPIA's decision-making process can help build trust and legitimacy. This may involve revisiting the MPIA's membership criteria and decision-making structures to ensure inclusivity. The MPIA represents a vital component of the international trade dispute resolution framework. To prevent its collapse in the face of parties appealing to the void, reforms are essential to enhance transparency, accountability, flexibility, and trust. By implementing these reforms, the MPIA can continue to serve as a robust, impartial, and adaptable mechanism for resolving trade disputes and maintaining global economic stability.

### ***Reforming the MPIA in Light of Article 16.4 of the DSU***

The MPIA has been a topic of significant discussion and debate within the realm of international trade and dispute resolution. Its introduction has raised concerns about potential restrictions it places on the rights of parties involved in trade disputes, particularly in relation to Article 16.4 of the DSU, which guarantees the right to appeal. In this proposal, we aim to address these concerns and suggest reforms to ensure a fair and balanced approach to multiparty dispute resolution.

Article 16.4 of the DSU plays a crucial role in upholding the principles of transparency, fairness, and accountability in the dispute settlement process of the WTO. It grants WTO members the right to appeal panel reports and enhances the overall credibility of the WTO's dispute resolution mechanism. However, the introduction of the MPIA has raised concerns that it may restrict the exercise of this important right.<sup>90</sup>

### **Proposal for Reform**

Clarifying the Scope of the MPIA via address the concerns regarding the potential restrictions on the right to appeal, we propose a reform that explicitly clarifies the scope of the MPIA. This clarification should ensure that the MPIA operates as an additional mechanism for resolving multiparty disputes without impinging on the rights guaranteed under Article 16.4 of the DSU. By clearly defining the boundaries of the MPIA, WTO members can have confidence that their right to appeal panel reports remains intact, and the MPIA operates as a complementary mechanism for resolving multiparty disputes.<sup>91</sup>

To maintain the voluntary nature of the MPIA and protect the rights of WTO members, we recommend that participation in the MPIA be based on an opt-in mechanism. Parties involved in multiparty disputes should have the choice to opt into the MPIA or pursue alternative dispute resolution mechanisms under the DSU. An opt-in mechanism respects the sovereignty of WTO members and ensures that no party is compelled to participate in the MPIA against its will, thus preserving the principles of consent and voluntariness.

To strike a balance between the efficiency of the MPIA and the right to appeal, we propose the incorporation of safeguards within the MPIA. These safeguards should include provisions that allow parties to exercise their right to appeal panel reports rendered through the MPIA in alignment with Article 16.4 of the DSU. By including provisions for appeal within the MPIA, WTO members can feel confident that their rights are protected even when utilizing this alternative dispute resolution mechanism.

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<sup>90</sup> See Article 16 of DSU, "Adoption of Panel Reports".

<sup>91</sup> 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).

To continuously assess and improve the operation of the MPIA, we recommend the establishment of a periodic review mechanism. This mechanism should involve regular assessments by WTO members to evaluate the impact of the MPIA on the dispute settlement process, including its compatibility with Article 16.4 of the DSU. A review mechanism allows for ongoing transparency and accountability, enabling necessary adjustments to be made to the MPIA if any inconsistencies with the DSU or issues related to the right to appeal arise.<sup>92</sup>

The reform proposals outlined above aim to balance the MPIA efficiency and protect the right to appeal as guaranteed under Article 16.4 of the DSU. These reforms can contribute to a more equitable and balanced international dispute settlement system of WTO by clarifying the scope, ensuring voluntariness, incorporating safeguards, and establishing a review mechanism.

### ***Reform the binding nature of MPIA decisions among the same parties in future disputes***

The binding nature of decisions made under MPIA arrangement in future disputes among the same parties is a matter of significant concern within the realm of international dispute resolution. While MPIA mechanisms serve as valuable tools for resolving complex disputes efficiently, their effectiveness can be hindered by ambiguity regarding the precedential value and enforceability of decisions in subsequent disputes involving the same parties.<sup>93</sup> It is imperative to propose reforms that provide clarity, predictability, and consistency in applying MPIA decisions over time to address this concern.

One fundamental reform proposal is the establishment of a robust system for precedent within the MPIA framework. Precedent plays a crucial role in common law systems, ensuring that decisions in earlier cases guide and inform future ones. Similarly, within the MPIA context, a precedent system would help establish a clear hierarchy of decisions, categorizing them as binding, persuasive, or non-precedential. This categorization should be based on factors such as the level of consensus among arbitrators, the issue's complexity, and the case's importance. Parties entering an MPIA agreement should explicitly outline the rules and criteria for determining precedential value.

To further strengthen the binding nature of MPIA decisions, it is essential to encourage greater participation and buy-in from the disputing parties themselves. One reform proposal requires parties to accept MPIA decisions as binding in all future disputes involving the same subject matter or related issues. This commitment could be embedded in the original arbitration agreement or a separate MPIA specific contract, making it clear that the decisions reached under the MPIA arrangement hold substantial legal weight.

Moreover, the proposal should include a mechanism allowing parties to challenge or seek clarification of MPIA decisions in exceptional circumstances. This could be achieved by establishing an appellate body or an oversight committee, which would provide a forum for parties to raise concerns about applying MPIA decisions to new disputes. Such a mechanism would ensure that MPIA decisions remain dynamic and adaptable to changing circumstances while maintaining their binding nature.

In addition to addressing the binding nature of MPIA decisions, it is crucial to consider the enforcement aspect. One way to enhance the enforceability of MPIA decisions is to promote the adoption of international treaties or conventions that recognize and facilitate the enforcement of these decisions across different jurisdictions. These treaties could establish a streamlined process for recognizing and enforcing MPIA awards, similar to the New York Convention for enforcing arbitral awards.<sup>94</sup>

Furthermore, the reform proposal should emphasize the importance of transparency and accessibility in the MPIA process. It should encourage the publication of MPIA decisions with appropriate redactions for confidentiality to guide other parties facing similar disputes and enhance the overall predictability of the MPIA system. Transparency can also help build confidence in the system and discourage parties from attempting to circumvent MPIA decisions in future disputes.

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<sup>92</sup> Joost Pauwelyn, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", World Trade Review (2023).

<sup>93</sup> 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).

<sup>94</sup> Gao, Henry S., "Finding a Rule-based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement". forthcoming in Journal of International Economic Law, 1 Sept, (2020).

The binding nature of MPIA decisions in future disputes among the same parties is a legitimate concern that requires thoughtful reforms to ensure clarity, predictability, and consistency.<sup>95</sup> A reform proposal should establish a precedent system, party commitments to accept MPIA decisions as binding, a mechanism for challenging or clarifying decisions, efforts to enhance enforceability through international treaties, and a commitment to transparency. These reforms would help strengthen the effectiveness and credibility of MPIA mechanisms in resolving multiparty disputes.

In summary the reform proposals represent a comprehensive and ambitious effort to enhance the MPIA within the WTO Dispute Settlement System. They address a wide array of concerns, ranging from the binding nature of the arrangement to its alignment with the traditional WTO framework, its scope, consistency in decisions, constitutional reforms, participation, and the adoption of MPIA decisions by the DSB. Achieving these reforms requires concerted international cooperation and consensus-building among WTO member states, aiming to uphold a fair and rules-based global trading system.

## **Conclusion**

Despite serving as a temporary solution to the paralysis of the WTO's Dispute Settlement Mechanism (DSM), the MPIA remains an inadequate long-term alternative to DSM due to its voluntary nature, limited participation, and potential legitimacy concerns. The rise of regional and bilateral dispute resolution mechanisms, coupled with budgetary constraints and legal fragmentation risks, further weakens its effectiveness as a universally accepted appellate review system. The MPIA does not offer a comprehensive, inclusive, and universally binding solution that guarantees fairness and predictability in international trade. Addressing these shortcomings requires a commitment to broader structural reform of the DSM to reinforce independence, accountability, and accessibility, particularly for developing economies that may lack the resources to engage in alternative dispute-resolution mechanisms.

Despite the fact the MPIA is a temporary solution, it is important to recognize that we have to deal with it for an extended period, and some structural reforms will need to be made to its structure. To improve the MPIA's effectiveness, WTO Members should focus on revising its structural framework, particularly the language of Article 25 DSU, which currently suffers from ambiguity and brevity, undermining its integration into the WTO system. Strengthening its legal foundation through explicit and clarified language would enhance its enforceability under international law. Moreover, striking a balance between voluntarism and enforceability is essential. While maintaining the flexibility of mutual consent, provisions should be introduced to encourage arbitration as a preferred method of dispute resolution, thereby increasing compliance. Additionally, extending the binding nature of MPIA awards beyond the involved parties in specific cases could enhance the mechanism's overall credibility and effectiveness.

A key challenge is the non-precedential nature of MPIA decisions, which can create legal uncertainty. To address this, a system should be developed to identify and codify emerging principles or interpretations from MPIA cases that could inform future disputes. This would help establish greater legal predictability while preserving the flexibility of case-specific resolutions. Furthermore, constitutional defects, particularly in Article 2 of the MPIA, need reconsideration. Ensuring alignment between the MPIA and the Dispute Settlement Understanding (DSU) is crucial to maintaining justice, fairness, and the right to appeal. A more nuanced approach to the right of appeal within defined parameters could enable the MPIA to function as a complementary rather than contradictory mechanism to the DSU.

To prevent the potential collapse of the MPIA, reinforcing trust and adherence to established rules is imperative. The practice of "appealing to the void" should be addressed by implementing clear penalties or consequences for parties engaging in such actions. Additionally, diplomatic efforts should be intensified to dissuade major trading nations from undermining the MPIA's legitimacy. Financial sustainability must also be ensured through a structured funding mechanism to guarantee the long-term viability of the WTO's dispute resolution system. Legal consistency should be reinforced by aligning MPIA rulings with established WTO jurisprudence, ensuring coherence across all dispute resolution proceedings, and preventing legal fragmentation.

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<sup>95</sup> Joost Pauwelyn, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?", *World Trade Review* (2023).

The failure to explicitly define the burden of proof within the MPIA must be rectified through a transparent and structured evidentiary framework. Drawing from the Appellate Body's approach, clear guidelines should be established to determine evidentiary standards in MPIA proceedings. By addressing these legal, procedural, and structural shortcomings, WTO Members can strengthen the MPIA as an interim solution while working toward broader DSM reform. Ultimately, restoring a universally accepted and fully functional appellate review system is essential for maintaining confidence in the WTO dispute settlement process, and ensuring fairness, transparency, and accessibility for all trading nations, regardless of economic capacity.

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### **Abbreviations**

WTO	World Trade Organization
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
RTAs	Regional Trade Agreements
MFN	Most-Favored-Nation
AB	Appellate Body
DSB	Dispute Settlement Body
EU	European Union
DSM	Dispute Settlement Mechanism
DSS	Dispute Settlement System
DSU	Understanding on rules and procedures governing the settlement of disputes