

Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism?

*Mariana de Andrade**

1. *Introduction*

On December 2019, the World Trade Organization (WTO) Appellate Body (AB) ceased to function due to the insufficient number of members on its bench. This happened after months of attempted negotiations based on United States' (US) criticisms against some of the practices of the AB.¹ The paralysis of the AB resulted in a structural crisis in the WTO dispute settlement mechanism (DSM), since the notification to appeal prevents the adoption of a report, and consequently excludes its binding effect. As a result, the dispute is not definitively settled.

To remedy the paralysis of the AB and the systemic consequences thereof, some WTO Members² devised an appeals mechanism under Article 25 of the 'Understanding on dispute settlement rules and procedures' (DSU), the WTO/DSM 'procedural rulebook.' Article 25 envisages the option for arbitration for dispute resolution in the multilateral trading system. This provision serves as basis for the institution of an interim arbitration mechanism that would act as an alternative system of appeal. This approach, initially conceived by the European Union, gradually gained ground among other major WTO players.³ On April 30,

* PhD in International Law, University of Milano-Bicocca. This paper is updated as of August 2020.

¹ See USTR, 'Report on the Appellate Body of the World Trade Organization' (February 2020) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body>> ('2020 report').

² For purposes of clarity, the WTO Members (States and the European Union) are here referred to with capital 'M,' while AB members are referred to with lowercase 'm'.

³ For a detailed overview of the development of this alternative, see E Baroncini, 'The EU Approach to Overcome the WTO Dispute Settlement Vacuum: Art 25 DSU Interim Appeal Arbitration as a Bridge Between Renovation and Innovation', in M Lewis and



2020, after intense debates on how to implement this idea (debates that continue to take place), the Multi-party Interim Appeal Arbitration Mechanism (MPIA) was officially notified before the WTO and entered into force.⁴ To date, 22 delegations have indicated their interest in being part of the mechanism.⁵

The question posed by the present Zoom-out is whether there is a ‘meaningful place for the World Trade Organization in the future of International Economic Law.’ The other contributions to this issue, crafted by some of the most renowned names of international trade law, have provided thorough responses to this question. This contribution proposes, much more modestly, to address the role that the newly established MPIA may play in the future of the WTO. In particular, it can be interesting to see how procedural innovations introduced by the MPIA can serve as a trigger for a systemic change in the WTO dispute settlement.

So far, the US seems to be an isolated voice against the functioning of the AB. Nevertheless, because of the need for consensus for the selection of AB members, the reinstatement of the AB depends on the will of this delegation.⁶ It is important to note that the objective of the MPIA is not to address the US criticisms, nor to replace the AB. As indicated by its very title, it is an ‘interim arrangement,’ negotiated by some WTO delegations to preserve the binding nature of the reports until AB becomes functional again.⁷ However, one can argue that these changes have the potential to ‘change course’ in the practice of WTO adjudication, thereby conforming to some of the criticisms regarding judicial overreach by the US. Thus, the practices followed by the parties and the

others (eds), *A Post-WTO International Legal Order: Utopian, Dystopian and other scenarios* (Springer 2020).

⁴ WTO, ‘Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO disputes’ (30 April 2020) JOB/DSB/1/Add.12 (‘MPIA’).

⁵ As of 06 July 2020, these are: Australia; Brazil; Benin; Canada; China; Chile; Colombia; Costa Rica; Ecuador; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Nicaragua; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay.

⁶ At the same time, as pointed out by Hoekman and Mavroidis, the crisis of the AB is a symptom of a larger malfunctioning of the legislative branch of the multilateral trading system. See B Hoekman, PC Mavroidis, ‘Twin Crises in the WTO, and No Obvious Way Out’ (2019) 63 *QIL-Questions Intl L* 113-119.

⁷ WTO, ‘MPIA’ (n 4) 7th recital and para 15.



arbitrators under the auspices of MPIA may influence a future resurrection of the permanent AB.

This article starts from the concerns advanced made by the US regarding the functioning of the Appellate Body, and considers how some of the procedural innovations introduced by MPIA may serve to address these criticisms. It is thus divided into three parts. First, it explains the US complaints, and briefly describes the objectives and functioning of the MPIA (Section 2). Second, it analyses in greater detail the potential that the MPIA procedural innovations may bring to the implementation of changes in the form and procedure of WTO dispute settlement system (Section 3). Third, it considers other elements, in addition to the procedural innovations in the text of the MPIA, which may play a role in influencing the functioning of this arrangement (Section 4).

2. The criticisms of the United States and the creation of the MPIA

2.1. The US criticisms against AB practices

The US generally claims that the AB has indulged in ‘overreaching’ practices, which have altered (and diminished) Members’ rights under the WTO. In the words of the United States Trade Representative (USTR), ‘The Appellate Body has exceeded its authority and breached the limitations explicitly agreed and imposed by WTO Members. Individuals on the Appellate Body have repeatedly attempted to assume for themselves authority not granted to them by WTO Members.’⁸

The criticisms described below have been made unilaterally by the US administration, and their validity can be debated. It is not the aim of this contribution to review this debate, which has been thoroughly examined by other contributors to this Zoom-out. The US concerns were considered during the informal talks mediated by New Zealand ambassador David Walker in the WTO, resulting in the drafting of the so-called ‘Walker Principles’ at the end of 2019.⁹ The draft decision proposed to the WTO General Council consists of 22 paragraphs that consider ways

⁸ USTR, ‘2020 report’ (n 1) 4.

⁹ WTO, General Council, Draft Decision, ‘Functioning of the Appellate Body’, WTO Doc WT/GC/W/791 (28 November 2019) (‘Draft Decision’).



on how to mitigate the problems indicated by the US. These proposals, however, were not accepted by the US.¹⁰

The US criticisms are not recent, and this delegation has effectively been a ‘persistent objector’ to certain practices followed by the AB since its early years of functioning.¹¹ The US addresses its criticisms to practices which are substantive, procedural and systemic in nature.¹² More specifically, the US delegation advances five main criticisms of the operation of the AB.¹³

(i) *Failure to meet the 90-day deadline established by Article 17(5) of the DSU for issuing reports*

Article 17(5) of the DSU establishes that the time limit for the presentation of the appeal report is 90 days from the notification of the decision to appeal by one of the parties to the dispute. In recent years, however, the AB had not been able to meet that deadline.¹⁴ The US delegation, moreover, points out that not only has the AB consistently breached the 90-day time limit, but it has similarly breached the obligation, also determined by DSU Article 17(5), to ‘[...] inform the [Dispute Settlement Body] in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.’ Therefore, the US has expressed its dissatisfaction not only with the AB’s failure to meet the deadline, but also with the lack of transparency in stating reasons, estimating the deadline and consulting the parties to the dispute regarding the delay.¹⁵

¹⁰ ‘Statement as Delivered by Ambassador Dennis Shea at the WTO General Council Meeting, December 9, 2019’ <<https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/>>.

¹¹ R McDougall, ‘The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance’ (2018) 52 *J World Trade* 878.

¹² *ibid* 879.

¹³ See USTR, ‘The President’s 2018 Trade Policy Agenda’ available at <<https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>> (‘2018 Trade Policy Agenda’) and ‘2020 report’ (n 1). See also G Sacerdoti, ‘The Stalemate Concerning the Appellate Body of the WTO: Any Way Out?’ (2019) 63 *QIL-Questions Intl L* 37-58.

¹⁴ The current average between notice and appeal and circulation of AB reports is 140.75 days. See ‘Timing of Appeal, Circulation and Adoption of Appellate Body Reports’ available at <www.worldtradelaw.net/databases/abtiming.php>.

¹⁵ USTR, ‘2020 report’ (n 1) 30-31.



- (ii) *The continuation of the service of AB members whose term has expired, in accordance with Rule 15 of the Working Procedures for Appeal Review*

Rule 15 of the Working Procedures for Appeal Review ('Working procedures')¹⁶ states that

A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.¹⁷

This possibility has been put in place in the practice of the AB. However, the US argues that AB members would have extrapolated the terms of Rule 15, and that 'it is the Dispute Settlement Body, not the Appellate Body, that has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving.'¹⁸ Moreover, according to the US, until 2017 this provision was used sparingly, but from 2017 onwards 'the Appellate Body invoked Rule 15 in a number of disputes, for indefinite and extended periods of time, and even on appeals where work had not begun before the member's term expired.'¹⁹

- (iii) *Reports containing 'advisory opinions on issues not necessary to resolve a dispute'*

The US also claims that AB reports excessively delve into legal questions and findings which are not necessary or relevant to the resolution

¹⁶ The Working Procedures were drafted by the Appellate Body, in accordance to art 17.9 of the DSU ('Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information'). On this, see D Steger, 'The Founding of the Appellate Body' in G Marceau (ed), *History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading System* (CUP 2015) 450-451.

¹⁷ WTO, 'Working procedures for appellate review' <www.wto.org/english/tratop_e/dispu_e/ab_e.htm>.

¹⁸ USTR, '2018 Trade Policy Agenda' (n 13) 26.

¹⁹ *ibid* 26.

of disputes. This complaint is intricately linked to the broader US criticism that the AB has indulged in judicial law-making. As an example, the US mentions the AB report *Argentina — Measures Relating to Trade in Goods and Services*, in which, as it argues, more than two thirds of the report reflect *obiter dicta*, with no relevance to the resolution of the case, ‘consisting simply of advisory opinions in legal matters.’²⁰

The criticisms related to what the US calls ‘advisory opinions not essential to dispute resolution’ in AB reports involve, in particular, the application of DSU Article 17(12). This provision states that ‘The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.’ In general, the strategy of the litigating parties and their lawyers is to argue their allegations from the broadest possible regulatory framework. As a consequence of Article 17(12), the AB would have a legal obligation to examine all allegations in dispute by the parties.²¹

In contrast to this interpretation of Article 17(12), the US argues that this provision ‘[...] does not direct the Appellate Body to “make legal findings and conclusions” on each of the issues raised in the appeal.’²² The US then advances the principle of the judicial economy as a way of preventing unnecessary issues from being addressed in a report.

In this regard, the US delegation argues that the purpose of the WTO dispute settlement mechanism is to ‘resolve disputes,’ not to ‘create law.’²³ Under the WTO Agreement, only Members of the Organization have the power to create new rights and obligations; and, according to

²⁰ *ibid* 27.

²¹ Chen argues that DSU art 17(12) determines that the AB should consider all claims raised on appeal, and that ‘Perhaps based on this understanding, in the Appellate Body’s earlier decisions, the Appellate Body understood art 17.12 DSU as requiring it to set out in its decision a formal legal conclusion on every issue raised. It may be the reason, for example, that the Appellate Body would question a panel’s legal interpretation without considering the interpretation’s effect on the actual outcome of the case’ (Tsai-fang Chen, ‘Judicial Economy and Advisory Opinions of the Appellate Body—Potential Reform of Article 17.12 of the DSU’ in C Lo, J Nakagawa, T Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2020) 190, *fn* omitted). The author also considers, however, that this understanding was relativised with the AB’s subsequent practice.

²² USTR, ‘2020 report’ (n 1) 51.

²³ *ibid* 47.



the DSU, the WTO dispute settlement mechanism cannot create or diminish Members' rights and obligations.²⁴ According to the United States, by engaging in extensive unnecessary legal reasoning, the AB would be creating the law, especially as these *obiter dicta* are potentially invoked to resolve subsequent disputes (a critique related to the use of decisions with precedential value, as discussed below).

(iv) AB review of facts and review of a Member's domestic law

DSU Article 17(6) provides that 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' Put differently, the review of issues of fact are excluded from the AB's scope of review.²⁵ However, in practice, appeals are oftentimes based on allegations of violation of DSU Article 11, which in turn states that 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.'

Due to the overarching scope of Article 11, appellants' submissions not rarely invoke this provision to ground the argument that a panel disregarded its obligation to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.'²⁶ This means revisiting, on appeal, issues of fact that were examined by the panel. In the same vein, the AB often needs to revisit issues

²⁴ Art 3(2) of the DSU famously states that 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

²⁵ On this, see J Bohanes, N Lockhart, 'Standard of Review in WTO Law' in D Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 379-433.

²⁶ The problems ensuing from resort to DSU art 11 as a basis for appeal claims are not novel, and are described by Ehlermann, one of the original AB members, in the first years of functioning of the AB (CD Ehlermann, 'Six Years on the Bench of the World



of fact in order to correctly determine the application of a legal standard to the issue at stake. Therefore, a blurred line separates questions of fact from questions of law.²⁷ Instead, the US argues that the AB's approach to address such claims is overreaching, and that it 'consistently reviewed panel fact-finding under different legal standards, and has reached conclusions that are not based on panel factual findings or undisputed facts.'²⁸

As an illustration, in the DSB meeting of 29 June 2020, upon the circulation of the *Australia – Plain Packaging* AB report, the US stated that '[t]he Appellate Body's decision to review the "objective assessment" of a panel has been seized by appellants to cover practically all factual determinations by a panel, as illustrated by this monstrous appeal.'²⁹ The US also criticised the disputants' approach in extensively relying on Article 11 claims: 'Such erroneous and unfounded claims of error under Article 11 resulted in significant expenditures of time and resources. The parties and third parties met with the Division for two oral hearings in June and November 2019, spanning a total of eight days of hearings.'³⁰ There is, therefore, also a correlation between the AB's approach to fact-finding and *de novo* domestic law review and the delays in the circulation of appeal reports.

(v) *The claim that AB treats its own reports as precedent, binding to subsequent panels*

Another US criticism against AB practices is that 'Without basis in the DSU, the Appellate Body has asserted its reports effectively serve as

Trade Court' (2002) 36 J World Trade 619-623). Interestingly, the Ehlermann describes that the United States was then already a critic of the approach taken by the AB.

²⁷ The AB drew the distinction between issues of fact and issues of law for the first time in the early *EC — Hormones* dispute: 'Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by art 11 of the DSU, is also a legal question, which, if properly raised on appeal, would fall within the scope of appellate review' (para 132).

²⁸ USTR, '2018 Trade Policy Agenda' (n 8) 28.

²⁹ USTR, 'U.S. Statements at the June 29, 2020 DSB Meeting' <https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun29.DSB_Stmt_as-deliv_fin_public13218.pdf> 18.

³⁰ *ibid* 17.



precedent and that panels are to follow prior Appellate Body reports absent “cogent reasons”.³¹ The US claims that previous reports provide ‘persuasive value,’ but are not to be treated as precedent.³²

In general, the understanding that there is no formal precedent system in the WTO dispute settlement mechanism is undisputed, even within WTO Membership.³³ However, as in any legal system, previous judicial decisions serve to clarify the meaning of the law and serve as a reference for subsequent legal disputes. This is fundamental for legal certainty and predictability of the law, elements recognised as fundamental also by DSU Article 3(2).

Thus, the debate is of a practical nature: the US argues that previous reports have ‘persuasive value,’ but not ‘precedential value.’ The US criticises the AB’s approach, claiming that the AB would have placed an incorrect emphasis on the precedential value of its own reports. The issue is difficult to resolve, since the line between ‘precedent value’ and ‘persuasive value’ is not clearly delineated in practice.³⁴ In other words, while it is recognised that following previously established legal conclusions for resolving new cases is useful and important, it is not clear to which extent new cases can be decided differently, and to what extent, in the interest of legal coherence, one can deviate from previous legal conclusions. Likewise, the delimitation of this fine line can hardly be achieved by means of drafting new legal instruments. During negotiations mediated by Ambassador David Walker, this issue was the subject of debate, and as a result the following paragraphs were inserted in the final instrument suggested by the mediator:

³¹ USTR, ‘2018 Trade Policy Agenda’ (n 8) 28. On the ‘absent cogent reasons’ criterion, see J Bacchus, S Lester, ‘The Rule of Precedent and the Role of the Appellate Body’ (2020) 54 *J World Trade* 183–198; M de Andrade, ‘Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism’ (2020) 11(2) *J Intl Dispute Settlement* 262–277.

³² USTR, ‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body – Geneva, December 18, 2018’ (‘DSB Statements of 18 December 2018’) 10 ff.

³³ See General Council, ‘Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)’ WTO Doc JOB/GC/215 (1 March 2019) para 1.27.

³⁴ On this, and arguing that this distinction lacks practical implications, see Lester, Bacchus (n 31).



- ‘15. Precedent is not created through WTO dispute settlement proceedings.
 16. Consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.
 17. Panels and the Appellate Body should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them.’³⁵

As mentioned, however, the draft decision by Ambassador Walker was not accepted by the US.³⁶

2.2. *The paralysis of the AB and the creation of the MPIA: An ‘interim arrangement’ with potential permanent impacts*

Legally and politically motivated by the above complaints, the US decided to block the nomination and renewal of terms for all AB members. DSU Article 16.4 determines that ‘If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.’ If the panel report cannot be adopted by the DSB, it does not become final and binding. Consequently, parties to the dispute have no legal obligation to abide by this report. If one of the (or both) parties to a dispute notify their intention to appeal, the dispute is brought to a halt. The controversy, therefore, will not have a binding final decision, nor can it be submitted to subsequent compliance procedures. In other words, it is an ‘appeal into the void.’³⁷ This situation of standstill largely eliminates the effectiveness of the dispute settlement mechanism that has been traditionally seen as exemplary in international law, and the ‘crown jewel’ of the multilateral trading system.³⁸

³⁵ WTO, ‘Draft Decision’ (n 9).

³⁶ See (n 10) and accompanying text.

³⁷ See J Pauwelyn, ‘WTO Dispute Settlement Post 2019: What to Expect?’ (2019) 22 *J Intl Economic L* 297.

³⁸ Thus called, inter alia, by JH Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006) 135.



To circumvent the legal vacuum created by the lack of the AB, WTO Members have thus far fostered two solutions.³⁹ The first one is the possibility that, after the start of a specific dispute, parties to it make an *ad hoc* agreement stating their intention not to appeal to the panel's report. This alternative was adopted, for example, between *Indonesia — Safeguard on Certain Iron or Steel Products* dispute (DS 496).⁴⁰ In other words, the parties undertake (on an *ad hoc* basis and valid only for that dispute) to adopt the panel's report, so that there is no possibility of 'appealing into the void.'

The second solution, which is discussed in more detail in the next sections of this work, is the creation of an interim appeal mechanism based on Article 25 of the DSU.⁴¹ This provision determines the possibility of resorting to arbitration procedures, by agreement between the disputing parties, as an alternative to the standard procedure established in the DSU:

'Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.'

³⁹ For a complete description of the legal and procedural scenario ensuing from the demise of the AB, see Pauwelyn (n 37).

⁴⁰ WTO, 'Understanding between Indonesia and Chinese Taipei Regarding Procedures under arts 21 and 22 of the DSU' WTO Doc WT/DS490/13 (15 April 2019) para 7.

⁴¹ See Baroncini (n 3).

In short, the above paragraphs determine the possibility of resorting to an arbitral procedure if the parties to a dispute so agree, as an ‘alternative means of dispute settlement.’ In this case, as usual in international arbitration, the parties must agree on the procedure to be followed.⁴² Paragraph 2 sets out the need for an agreement between the parties to use this mechanism. Paragraph 3 determines that the parties will agree to abide by the arbitration award – that is, they will accept the binding nature of the decision. Paragraph 4 provides that the arbitration award will be subject to the procedures for implementing the decision (DSU Article 21) and retaliation (compensation and suspension of concessions, DSU Article 22).

The text of the MPIA, which was formally notified to the WTO on 30 April 2020,⁴³ is divided into three parts. The first part consists of a preamble and a series of paragraphs in which the participant Members confirm their interest in maintaining the WTO DSM functional, and thus

‘indicate their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure (hereafter the “appeal arbitration procedure”), as long as the Appellate Body is not able to hear appeals of panel reports in disputes among them due to an insufficient number of Appellate Body members.’⁴⁴

Participating Members also state that they will not pursue the ‘traditional’ appeals procedure set out in Articles 16(4) and 17 of the DSU. They thus give their confirmation (which serves at least for good faith purposes) that they will not ‘appeal into the void’ when other participating parties are involved.⁴⁵

The second part of the MPIA (Annex 1: ‘Agreed procedures for arbitration under Article 25 of the DSU in dispute DSX’) consists of a template agreement to be submitted by the parties to the MPIA, and it gives effect to the consensus requirement between litigating parties set out by Article 25.2 of the DSU. Annex 1 is composed of 19 paragraphs detailing the procedure to be followed by the parties and the arbitrators. While

⁴² See United Nations, *Handbook on the Peaceful Settlement of Disputes between States* (New York 1992) 55 ff.

⁴³ See (n 4).

⁴⁴ WTO, ‘MPIA’ (n 4) para 1.

⁴⁵ *ibid.*



the first part of the MPIA provides a declaration of general principles agreed by all members participating to the MPIA, Annex 1 details procedural issues including questions of deadline, jurisdictional limits, third party rights, and enforcement of the arbitration award.

The third part (Annex 2: ‘Composition of the pool of arbitrators pursuant to paragraph 4 of communication JOB/DSB/1/ADD.12’), details the procedure for choosing the list of MPIA arbitrators. This is a list of ten arbitrators, to be appointed by the participating members of the MPIA.

To date, the use of the MPIA as an alternative appealing mechanism has been notified in the cases *Canada — Aircraft* (DS 522),⁴⁶ *Costa Rica — Avocados* (DS 524),⁴⁷ and *Canada — Sale of Wine* (DS 537).⁴⁸

3. *Adapt or perish: The MPIA’s potential for triggering changes in the WTO dispute settlement system*

This section takes up the US criticisms briefly described in Section 2 and contrasts them with some of the procedural provisions established by the MPIA. Partly influenced by the concerns that led to the crisis of the AB, as well as by the discussions mediated by Ambassador David Walker,⁴⁹ MPIA negotiators included procedural provisions that address, directly or indirectly, US criticisms. MPIA provisions touch upon the question of precedent (sixth recital of the preamble and Paragraph 5 of the MPIA), the criticism regarding ‘advisory opinions’ on ‘issues unnecessary for the resolution of a dispute’ (Paragraphs 10 and 13 of Annex

⁴⁶ WTO, ‘Canada — Measures Concerning trade in commercial aircraft’, Agreed procedures for Arbitration under Article 25 of the DSU’ Communication dated 29 May 2020 (WT/DS522/20).

⁴⁷ WTO, ‘Costa Rica — Measures concerning the importation of fresh avocados from Mexico, Agreed procedures for Arbitration under Article 25 of the DSU’ Communication dated 29 May 2020 (WT/DS524/5).

⁴⁸ WTO, ‘Canada — Measures governing the sale of wine’, Agreed procedures for Arbitration under Article 25 of the DSU’ Communication dated 29 May 2020 (WT/DS537/15).

⁴⁹ See WTO, ‘General Council, Minutes of the meeting - Held in the Centre William Rappard on 28 February 2019’ WTO Doc WT/GC/M/176; General Council, ‘Informal process on matters related to the functioning of the Appellate Body – Report by the facilitator H.E. Dr. David Walker (New Zealand)’ WTO Doc JOB/GC/220 (23 July 2019).



1 of the MPIA), the AB's non-compliance with the 90-day deadline (Paragraphs 12 to 14 of MPIA Annex 1), and the standard of review of issues of fact (also touched upon in Paragraph 13 of MPIA Annex 1).

The MPIA does not address the application of Rule 15 of the Working procedures. The absence of provisions related to Rule 15 is not surprising, since in other international jurisdictions arbitrators also continue to serve in cases to which they have been assigned even after the end of their term.⁵⁰ Moreover, MPIA Annex 2, Paragraph 5, highlights the 'interim nature' of the arrangement, and states that 'Should the conditions laid down in paragraph 15 of the communication remain for a longer period of time, the participating Members will, periodically, partially re-compose the pool of arbitrators, starting two years after composition.'

The only MPIA provision related to transition rules for arbitrators foresees only the case of resignation by arbitrators: 'Should a need arise to complete the pool of arbitrators, for instance following the resignation of a member of the pool, the procedure set out above will apply.'⁵¹ Thus, one can infer that MPIA participants have not initially determined how to reappoint arbitrators if the AB is not reestablished within two years. Furthermore, it can also be concluded that, at the end of the two years, the list of arbitrators will be recomposed, but the arbitrators who have

⁵⁰ For instance, art 56(2) of the ICSID Convention sets out that 'A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.' Arbitral proceedings under UNCLOS Annex VII establish that 'The name of an arbitrator shall remain on the list until withdrawn by the State Party which made the nomination, provided that such arbitrator shall continue to serve on any arbitral tribunal to which that arbitrator has been appointed until the completion of the proceedings before that arbitral tribunal' (Annex VII, art 2(3)). An illustration of a non-arbitral international jurisdiction, but which follows the same lines, is the ICC: art 36(10) of the Rome Statute determines that 'Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.' Art 13(3) of the ICJ Statute establishes that '3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.' At the same time, art 33 of the Rules of the ICJ determine: 'Except as provided in art 17 of these Rules, Members of the Court who have been replaced, in accordance with art 13, paragraph 3, of the Statute following the expiration of their terms of office, shall discharge the duty imposed upon them by that paragraph by continuing to sit until the completion of any phase of a case in respect of which the Court convenes for the oral proceedings prior to the date of such replacement.'

⁵¹ WTO, 'MPIA' (n 4) Annex 2 para 6.



already been assigned to a case will continue to hear it. This practice is not only in accordance with Rule 15 of the Working Procedures, but also, as mentioned above, common to arbitration procedures in international jurisdictions.

The next subsections examine relevant MPIA provisions which touch upon the other criticisms by the US.

3.1. *The AB's alleged disregard to the 90-day deadline for the issuance of reports*

As described in subsection 2.1, the US criticises the fact that the 90-day deadline for appeals established by DSU Article 17(5) has not been observed by the AB. This US criticism is not without merit; after all, international trade disputes usually have relevant short-term practical implications. However, attributing the non-compliance with the deadline only to AB practices is a questionable approach, since the the pace of the procedures also depends to a large extent on the actions of the parties (for example, size and complexity of submissions), the number of cases in an adjudicatory body's docket, and even on the Secretariat support for AB members.⁵²

The MPIA text features some provisions that deal with this issue. Pursuant to Paragraph 12 of its Annex 1, the MPIA follows the 90-day term determined by Article 17(5) of the DSU. Despite this, and possibly recognising the difficulties related to meeting this deadline, Paragraphs 12 and 13 of the MPIA state that

‘12. The parties request the arbitrators to issue the award within 90 days following the filing of the Notice of Appeal. To that end, the arbitrators may take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process. Such measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required.

⁵² For a detailed assessment on the influence of dispute settlement submissions to the workload and observance of deadlines in panel and AB proceedings, see CD Ehlermann, ‘The Workload of the WTO Appellate Body: Problems and Remedies’ (2017) 20 J Intl Economic L 705.

13. If necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.⁵³

Paragraph 13 is accompanied by a footnote which states that ‘For greater certainty, the proposal of the arbitrators is not legally binding and it will be up to the party concerned to agree with the proposed substantive measures. The fact that the party concerned does not agree with the proposed substantive measures shall not prejudice the consideration of the case or the rights of the parties.’⁵⁴

Although this possibility is clearly subordinate to the choice of the party affected to follow by the arbitrators’ suggestion, it should be kept in mind that MPIA participating parties are few in number, and represent a parcel of WTO Membership who, in general, is particularly concerned with the functioning of the WTO dispute settlement mechanism. Thus, it is to be expected that, in the interest of the proper functioning of the newly implemented system and with a view to promoting good faith in the use of the mechanism, there could be greater inclination to follow the arbitrators’ suggestions.

Finally, Annex 1, Paragraph 14, states that ‘On a proposal from the arbitrators, the parties may agree to extend the 90 day time-period for the issuance of the award.’⁵⁵ As mentioned in Subsection 2.1(i), one of the US criticisms is the AB’s lack of transparency to the disputant parties regarding the extension of deadlines. According to the US, ‘Recent communications from the Appellate Body simply inform WTO Members that the Appellate Body will not meet the 90-day deadline, without providing any estimated date for when the Appellate Body will circulate a report.’⁵⁶ Despite, once again, having an indicative and not mandatory nature, Paragraph 14 inserts in the MPIA procedure an important element which has the potential to strengthen legitimacy: it emphasises the choice of the parties to the possibility of the extension of the period for the issue of the report, consequently preventing the arbitrators from determining it on

⁵³ WTO, ‘MPIA’ (n 4) Annex 1 para 12 (fn omitted).

⁵⁴ *ibid* fn 6.

⁵⁵ *ibid* para 14.

⁵⁶ USTR, ‘2020 report’ (n 1) 31.



their own initiative. This approach can be a valuable tool to address the US' criticism of lack of transparency.

3.2. *The use of obiter dicta and the issuance of 'advisory opinions not necessary to resolve a dispute'*

The US argues that 'The purpose of the dispute settlement system is not to produce reports or to "make law," but rather to help Members resolve trade disputes among them.'⁵⁷ Conversely, according to the US the AB would have indulged in making lengthy findings which are unnecessary to resolve a dispute. However, the difference between analysis and legal findings which are 'necessary to resolve a dispute' and those that are 'unnecessary,' superfluous, is not evident. As mentioned, the AB has an obligation to review all claims raised by the parties – and, more generally, this obligation stems from the broader principles of due process and transparency. In this sense, it is unclear which findings are 'necessary for the resolution of a dispute' and which ones are not.

Another obvious problem related to this specific criticism is how to grasp the difference advanced by the US between advisory opinions / *obiter dicta* and the natural and necessary process stemming from an adjudicator's exercise to determine the meaning of the law to reach a legal finding. The US claims that

'the dispute settlement system is plainly structured around the idea that panels and the Appellate Body *cannot* add to or detract from obligations undertaken by WTO Members. The use of "clarify" in [DSU Article 3(2)], therefore, does not and cannot authorize panels or the Appellate Body to provide interpretations in the abstract or on issues not necessary to resolve the particular dispute.'⁵⁸

Nevertheless, it is not clear to what extent the US believes that an interpretation is 'in the abstract' and to which extent it is a necessary hermeneutical step for the resolution of a dispute.

⁵⁷ USTR, '2018 Trade Policy Agenda' (n 13) 26. See also separate opinion in *India – Solar Cells* (WT/DS456/AB/R) adopted on 14 October 2016 54 and ff.

⁵⁸ USTR, '2020 report' (n 1) 50 (original emphasis, fns omitted).



Perhaps the only legal tool to avoid the AB's legal obligation to address all claims raised in the appeal and mitigate the *perception* that reports extensively comprise *obiter dicta* is through judicial economy.⁵⁹ Indeed, this principle has gained wide acceptance and has been largely applied in the practice of WTO dispute settlement, at both panel and appeal levels.⁶⁰

MPIA negotiators included Paragraph 10 (Annex 1), which states that 'The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.'⁶¹ Yet, this provision does not clearly stipulate to what extent judicial economy can be exercised without overstepping considerations of transparency and the principle of motivation of judicial decisions.

Moreover, the inclusion of this paragraph is not particularly innovative in terms of substance. On the contrary, AB and panels' practice already displays resort to judicial economy when adjudicators consider that the analysis of an issue is not necessary to the resolution of a dispute, or that it is unnecessary given another previous conclusion that leads to the same result.⁶²

Despite the practical limitation of the inclusion of this paragraph, the explicit determination in Paragraph 10 that adjudicators must limit their

⁵⁹ On this, see Chen (n 21).

⁶⁰ For a detailed description on the exercise of judicial economy in the case law of WTO dispute settlement, see A Alvarez-Jiménez, 'The WTO Appellate Body's Exercise of Judicial Economy' (2009) 12 J Intl Economic L 393. The discretionary character of resort to judicial economy should be born in mind, given that this principle opens the door for 'cherry-picking' specific complaints by adjudicators within their understanding of what is relevant for the assessment of the dispute. For a thorough analysis in this sense, see ML Busch, K Pelc, 'Ruling Not to Rule: The Use of Judicial Economy by WTO Panels' in A Porges, ML Busch, T Broude (eds), *The Politics of International Economic Law* (CUP 2010).

⁶¹ WTO, 'MPIA' (n 4) para 10. It is interesting to note that this provision authorizes the consideration *proprio motu* of matters of jurisdictional character, such as the determination of *kompetenz-kompetenz*.

⁶² A Alvarez-Jiménez (n 60) 403. The author divides what he calls resort to 'substantive judicial economy' in the practice of the AB into two categories: '(i) refusing to assess a substantive issue when it is not necessary to resolve the dispute; and (ii) not seeing the pertinent case as an appropriate occasion to make a very important ruling on a systemic issue for some case-specific reasons' (ibid).

findings to ‘issues necessary to resolve the dispute’ has the potential to *encourage* the exercise of judicial economy. In an almost contrary sense to DSU Article 17(12), this MPIA provision provides the arbitrators with the possibility of using an explicit legal means to justify recourse to judicial economy, partially reducing the discretionary power stemming from the exercise of this procedural tool.

3.3. The precedential value of previous AB reports

Unlike Paragraph 15 of the Walker principles,⁶³ the MPIA does not explicitly cite the expression ‘precedent.’ However, interestingly, already in the preamble of the MPIA one can find a recital which is potentially relevant to the issue:

‘Re-affirming that consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members and that arbitration awards cannot add to or diminish the rights and obligations provided in the covered agreements.’⁶⁴

Although the wording of this recital is overarching and to a large extent reproduces DSU Article 3(2),⁶⁵ it would be surprising if it had not been conceived having in mind the debate regarding the precedential value of adopted reports to the resolution of disputes. Indeed, this debate focuses largely on the need for a dispute settlement system that, on the one hand, promotes consistency and predictability, but at the same time respects the DSU’s determination that DSB rulings cannot add or diminish the rights and obligations of WTO agreements.⁶⁶

⁶³ See (n 35) and accompanying text.

⁶⁴ WTO, ‘MPIA’ (n 4).

⁶⁵ Art 3(2) sets out: ‘2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’

⁶⁶ A conundrum which Bacchus and Lester (n 31) describe as ‘inherent tension on the question of precedent’ (185). See also G Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 J Intl Dispute Settlement 5.



In this vein, it is particularly interesting to note that there is a slight difference in the wording of DSU Article 3(2) and the MPIA's sixth recital: while the former speaks of 'security and predictability,' the latter mentions 'coherence and predictability.' One may argue that *coherence* is a choice of words that puts more emphasis on the need of a consistent case law. The use of the term *coherence* is also repeated in MPIA Annex 1, Paragraph 5, this time combined with the term 'consistency':

'5. Members of the pool of arbitrators will stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote *consistency* and *coherence* in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable.'⁶⁷

This provision does not directly refer to the precedential value of previous adopted reports, but it confirms the central value of 'consistency and coherence' in MPIA arbitral awards. Moreover, it also reaffirms the principle of collegiality in the MPIA decision-making process. Indeed, the principle of collegiality directs arbitrators to exchange views even among those MPIA adjudicators who have not been assigned to a given case. Collegiality discourages divergences of views among different arbitrators, and is therefore a strong element for the promotion of a consistent case law.

The principle of collegiality was established early on in the practice of the AB. As explained by Marceau, Porges and Baker,

'[...] the "original seven" [members of the AB], together with the support of [Debra] Steger and her staff, implemented a procedure known as the "exchange of views" in which all Appellate Body members sit together, sometimes for days, to discuss and share opinions on all the issues in a dispute. This fosters collegiality and ensures coherence and consistency in the development of Appellate Body jurisprudence.'⁶⁸

⁶⁷ WTO, 'MPIA' (n 4), emphasis added.

⁶⁸ G Marceau, A Porges, D Baker, 'Introduction and Overview' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading System* (CUP 2015) 48 (fn omitted).



Indeed, Rule 4(1) of the Working Procedures for Appellate Review clearly indicates that consistency is a desired aim of the principle of collegiality:

‘To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure.’⁶⁹

The absence of a provision which more explicitly notes the absence of a system of precedent in the WTO, similar to Paragraph 15 of the Walker principles, is also noteworthy. In fact, the MPIA omits to make any attempt to clarify the value of past reports. The details discussed during the negotiation process of the MPIA are not publicly available, and therefore any conclusion regarding this omission can only be speculative; in any case, it is important to remark such an omission.

Against this background, the MPIA seems to reinforce the importance of consistent jurisprudence, but it does not clarify the precedential value of previous reports. In this sense, it is to be expected that the approach followed by the arbitrators will continue along the same lines already followed by the panels and the AB.

At the same time, references to previous reports in the WTO are largely influenced by the work of its Secretariat (more specifically, by the Rules, Legal Affairs and Appellate Body divisions).⁷⁰ Accordingly, the weight given to past reports in new arbitration decisions in MPIA will possibly be influenced by the institutional apparatus that the arbitrators will receive for the decision-making process, i.e. the administrative and legal support provided to the arbitrators.⁷¹ In addition, it can be inferred

⁶⁹ WTO, *Working procedures for appellate review* <www.wto.org/english/tratop_e/dispu_e/ab_e.htm>.

⁷⁰ See J Pauwelyn, K Pelc, ‘Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement’ (September 26, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872>.

⁷¹ WTO, ‘MPIA’ (n 4) para 7 determines that ‘The participating Members envisage that appeal arbitrators will be provided with appropriate administrative and legal support, which will offer the necessary guarantees of quality and independence, given the nature of the responsibilities involved. The participating Members envisage that the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work,



that the way in which the arbitrators will exercise the collegiality principle established by MPIA Paragraph 5 will also constitute an important element in shaping the precedent weight of previous decisions in MPIA practice.

3.4. *Standard of review of issues of fact and Members' domestic law at appellate stage*

Paragraph 13 of MPIA Annex 1, previously mentioned in Subsection 3.1, is also relevant to the US criticism regarding the 'Appellate Body Review of facts and review of a Member's domestic law *de novo*.' As discussed above, Paragraph 13 explicitly allows arbitrators to request the exclusion of claims based on DSU Article 11. As described in subsection 2.4, appellants often invoke this provision to claim that a panel failed to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.' Consequently, in several disputes the AB had to revisit factual conclusions by panelists in order to determine whether the panel had incurred in a violation of Article 11.

It should be stressed (again) that MPIA Paragraph 13 sets out the possibility for arbitrators to advance a *suggestion* that parties withdraw a given claim, and it is up to the affected party to decide whether to follow the suggestion. In any case, the explicit mention to exclude arguments based on Article 11 of the DSU on appeal proceedings has two possible implications. The first is that, by making direct reference to DSU Article 11 in Paragraph 13, the MPIA leaves no doubt as to the possibility for arbitrators to request the exclusion of claims based on the allegation of lack of 'objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.' If the arbitrators follow this prerogative, and the parties abide by the indication, there may be a decrease in disputes involving this provision on appeal. The second consequence is the 'psychological' effect that the direct reference to Article 11 may have on the participants of the MPIA (i.e. the litigants). Influenced by this provision, it is possible that the litigating parties will

only to appeal arbitrators. The participating Members request the WTO Director General to ensure the availability of a support structure meeting these criteria.'



refrain from making appeals based on DSU Article 11 on their own initiative.

Another relevant provision in MPIA Annex 1 is Paragraph 9: ‘An appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel.’ This sentence is, however, a reproduction of Article 17(6) of the DSU and, therefore, does not really address the US criticisms regarding the standard of review at appeal stage.

Although it is difficult to clarify through legal texts questions like the determination of the standard of review of issues of fact and domestic measures, as well as the debates about ‘consultative opinions,’ some specifications on these questions could be attempted. In this sense, ‘[a] more prescriptive and deferential standard of review could be adopted to supplement the current requirement to make an “objective assessment of the facts”, especially in cases where obligations are ambiguous or cases involving national measures that result from quasi-judicial proceedings.’⁷² For instance, the Walker principles suggested the adoption of four paragraphs regarding the scope of appeal:

‘9. Article 17.6 of the DSU restricts matters that can be raised on appeal to issues of law covered in the relevant panel report and legal interpretations developed by that panel.

10. The ‘meaning of municipal law’ is to be treated as a matter of fact and therefore is not subject to appeal.

11. The DSU does not permit the Appellate Body to engage in a “de novo” review or to “complete the analysis” of the facts of a dispute.

12. Consistent with Article 17.6 of the DSU, it is incumbent upon Members engaged in appellate proceedings to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a de facto “de novo review”.⁷³

These paragraphs of the Walker Principles provide useful specifications, which could have been incorporated, at least in part, into the MPIA

⁷² McDougall (n 11) 890 (fns omitted).

⁷³ WTO, ‘Draft decision’ (n 9).



text. At the same time, such determinations would have significant implications for appeals procedures.⁷⁴ It can be speculated that the negotiators of the MPIA text did not consider it appropriate to innovate in this area.

4. *Elements potentially influencing the functioning of the MPIA*

The MPIA includes in its text important provisions that detail or clarify some of the issues pointed out by the US as the cause of its discontent. As considered in the previous subsections, the application (both on the side of the parties and on the side of the arbitrators) of some of these new procedural elements in the practice of the MPIA provisions has the potential to trigger practical changes in WTO adjudication. Consequently, it is speculated here that some of these practical changes may also reinstate the US interest in reviving the AB, or at least possibly joining the MPIA (although the latter is not the desired solution, given the ‘interim nature’ of the mechanism).

At the same time, it is to be expected that many of the conditions which existed prior to the paralysis of the AB will continue to exist with the MPIA. First, MPIA participants are not particularly dissatisfied with the approach previously taken by the AB. As McDougall pointed out, part of the disagreement between the US and other Members is based on a different understanding of the nature of WTO dispute settlement: that of ‘only’ settling disputes between Members, or that of authoritatively providing interpretation and clarifying the meaning of WTO law.⁷⁵ In particular, the European Union (who is arguably the main promoter of the MPIA) appears to be on the spectrum of Members who advocate for an independent dispute resolution system with a more markedly judicial role (as opposed to a mere ‘settler of disputes’).⁷⁶ Indeed, the ‘European governance model’ approach has strongly influenced the judicial approach followed in WTO adjudication.⁷⁷

⁷⁴ For a detailed assessment on this topic, see J Bohanes, N Lockhart, ‘Standard of Review in WTO Law’ in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009).

⁷⁵ McDougall (n 11) 881.

⁷⁶ *ibid* 883.

⁷⁷ See T Soave, ‘European Legal Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva’ (2020) 19 *L and Practice of Intl*



Thus, from the viewpoint of the legitimacy of the functioning of a body which is subject to the approval of its Members, there is little incentive for MPIA arbitrators to adopt an approach more deferential to the WTO Membership, as arguably aimed by the US. Secondly, because the WTO agreements remain – of course – unchanged, the same interpretative issues will arise. As many times remembered by trade law scholarship, WTO agreements are the product of negotiations between different Members.⁷⁸ These negotiations were particularly driven by the need for consensus. This process, as is common in treaty negotiation, has left a series of gaps and ‘constructive ambiguities’ in the text of the agreements, and these ambiguities are taken for clarification in practical cases before the adjudicatory mechanism.⁷⁹ This process of ‘clarification of law’ gives the adjudicator a minimal lawmaking role, regardless of whether it is a panel, the AB, or an ‘interim agreement’ for appeals.

At the same time, it is also true that the institutional effect created by an ‘Appellate Body’ may create unique systemic consequences. These can be mitigated with the substitution of a permanent review organ by an ‘interim arrangement’ for appeals. In the case of the AB, three elements are noteworthy. First, the fact that the AB is a *body*, a permanent organ for appeals – this denomination carries with it a certain weight. As put by Marotti, perhaps the arbitral nature of the appeals would mean a ‘return to the purely private functions of the double degree of jurisdiction.’ By setting aside the permanent character of the second instance tribunal, the MPIA would weaken the systemic impacts of the review mechanism.⁸⁰

Courts and Tribunals 129. Soave eloquently describes that ‘This self-perceived role was made explicit through a number of jurisprudential postures, including: (i) establishing “a doctrine of implicit judicial powers, including to fill gaps”; (ii) rejecting a “notion of institutional balance that would require some deference to political/diplomatic rule-making processes of the WTO”; and (iii) highlighting the “precedential weight” of past decisions as a means to ensure security and predictability in the interpretation of trade norms’ (ibid 130).

⁷⁸ See for instance Ehlermann (n 26).

⁷⁹ In the same sense, McDougall (n 11) 878.

⁸⁰ Translated from the original: ‘D’altro canto, se, con una certa approssimazione (data la menzionata complessità della crisi attuale dell’intero sistema multilaterale degli scambi internazionale), imputiamo la crisi dell’Organo di Appello ad una resistenza nei confronti della nomofilachia, l’appello arbitrale decreterebbe un ritorno alle funzioni puramente private del doppio grado, facendo venir meno uno dei fattori principali – la permanenza del tribunale di seconda istanza – che, secondo la nostra ipotesi, determinano

This institutional design has implications that differentiate the AB from the MPIA, considering the interim and limited aspect in terms of the latter's applicability.

Second, another factor that will possibly distinguish the MPIA to the AB is the absence of a specific division that assists MPIA arbitrators. It can be assumed that such absence will bear an influence not only on how the procedural innovations described above will be implemented in practice, but also how the adjudicatory mechanism will function. For example, the role of the Secretariat in assisting the drafting of reports is well-known, at both panel and AB levels. As demonstrated in an empirical study carried out by Pauwelyn and Pelc, the participation of the Rules, Legal Affairs and Appellate Body divisions in different instances of the adjudicatory procedure (from the choice of panelists' to the formulation of questions for the parties in oral proceedings and the writing of so-called 'issue papers') significantly impacts the final product of the process, ie the reports.⁸¹ The authors also stress that the role of the Secretariat in drafting the first versions of the report to be circulated is an 'open secret' in Geneva.⁸²

The assistance of the WTO Secretariat in the various stages of dispute resolution bears consequences to at least three of the US criticisms:

'what we describe below as an inclination to write rulings that are ambitious and expansive in scope may, indeed, lead to what at least some Members have viewed as (i) activist interpretations that go "beyond the text"; (ii) advisory opinions on issues not necessary to resolving the dispute; and (iii) an expansive position on "legal issues" subject to AB review (e.g. including panel findings on the meaning of domestic law). Convoluted writing style and longer reports and proceedings, in turn, may partly explain why the AB has struggled to decide within the prescribed 90 days which, in turn, has necessitated many outgoing AB members to continue working on appeals even after their term ended (pursuant to Rule 15 of the AB Working Procedures).'⁸³

il cedimento alla "forza espansiva" del doppio grado verso la sua dimensione sistemica' (L Marotti, *Il doppio grado di giudizio nel processo internazionale* (Giappichelli 2019) 239).

⁸¹ Pauwelyn, Pelc (n 70) 10-11.

⁸² *ibid* 11.

⁸³ *ibid* 26.



Therefore, the final output of arbitrators – the format of the awards, the language there employed, the references to previous case law – will possibly be largely influenced by the *absence* of this institutional apparatus.⁸⁴

Third, it can be speculated that there will be a difference in the *authoritative value* of MPIA's arbitral reports when compared to AB reports. In addition to the 'systemic impact,' described above, stemming from the advent of an appeals *permanent organ*, the MPIA also has a much more modest Membership representation than that of the AB. Put differently, while the AB's jurisdiction formally encompasses the entirety of WTO Membership, the MPIA is subscribed by only a portion of those Members. This aspect also lessens the institutional legitimacy of the MPIA when compared to the AB, and may bear implications in the functioning of this interim arrangement.

In addition to these considerations, one cannot forget the evident political nature of the US complaints. It is true that such complaints are not recent. At the same time, there is an evident element of power politics that cannot be underestimated.⁸⁵ As a result, it is possible, even if the MPIA brings about changes in the practice of WTO adjudication which are in line with US criticisms, that such changes may be completely ineffective for the reestablishment of the AB.

5. Concluding remarks

The text of the MPIA introduces in WTO dispute settlement a few provisions which may bear an impact on the systemic functioning of the appeals system. Perhaps the most notable one is Annex 1, Paragraph 13.

⁸⁴ See also G Marceau, A Porges, D Baker, 'Introduction and Overview' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading System* (CUP 2015) 29, describing: 'the increasing involvement of Secretariat staff in the work of dispute settlement panels. [...] The more disputes there were, the more Secretariat staff were required to step in to assist panels.'

⁸⁵ See M Wagner, 'The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?' in C Lo, J Nakagawa, T Chen (eds) *The Appellate Body of the WTO and Its Reform* (Springer 2019) 67-90. For a fierce criticism of the US' approach and justifications to the blocking of appointment of AB members, see E-U Petersmann, 'How Should WTO Members React to Their WTO Crises?' (2019) 18 *World Trade Rev* 503.



This inclusion tackles directly at least two of the US concerns: the observance of the 90-day time limit for appeals and the standard of review for issues of fact and domestic law *de novo* review. Moreover, by allowing for the possibility of excluding claims from the scope of the appeal, Paragraph 13 also has the potential to mitigate the perception of ‘findings unnecessary to resolve a dispute’ in Article 25 awards. At the same time, other provisions do not seem to bear a particularly ‘transforming’ potential. An example in this sense is Annex 1, Paragraph 9, which is a reproduction of DSU Article 17(6). On the issue of precedent, little seems to have been clarified with the adoption of the MPIA. As discussed, this may be so because MPIA negotiators do not particularly partake with the US’s criticism in this area.

To be sure, it is not contended here that adjusting adjudicatory practices to the concerns expressed by the US will solve the more systemic issues in the multilateral trading system. It seems well-acknowledged that the AB crisis is intrinsically linked with a broader dysfunction of the WTO, that of the stalemate of negotiations and the hurdles involved in changing and amending the existing rules.⁸⁶ Moreover, given the underlying political nature of the US’s intentions, it is difficult to know whether adapting to its concerns would constitute a step towards re-establishing the AB.

However, the considerations advanced in this work may serve two pragmatic purposes. The first is to regain the support of the US, the WTO Member who is in fact stopping the AB from functioning, and whose participation in WTO adjudication more generally is significant.⁸⁷ Moreover, based on scholarly works and statements from delegations in DSB meetings, it can be considered that there is merit to some of the criticisms advanced by the US, such as the lack of clarity in the standard

⁸⁶ In this sense, see Hoekman, Mavroidis (n 6); CB Picker, ‘The AB Crisis as Symptomatic of the WTO’s Foundational Defects or: How I Learned to Stop Worrying and Love the AB’ in C Lo, J Nakagawa, T Chen (eds) *The Appellate Body of the WTO and Its Reform* (Springer 2019).

⁸⁷ As of September 2020, 155 complaints have been filed against the US, and 124 complaints have been filed by the US. Excluding disputes in which the US appears as third-party, this adds up to 278 disputes (out of a total of 596 DSU complaints), an equivalent of approximately 46% of the DSU complaints. Data available in WTO, ‘United States of America and the WTO’ <www.wto.org/english/thewto_e/countries_e/usa_e.htm> and ‘Dispute Settlement Statistics and Tables’ <www.worldtradelaw.net/static.php?type=dsc&page=stats>.



of review for Article 11 and the impossibility to abide by the 90-day deadline for appeals. Therefore, the second pragmatic outcome of adjusting some of the practices in WTO adjudication (both on the side of the Membership and on the side of adjudicators) is to enhance the WTO dispute settlement mechanism and strengthen the legitimacy as perceived by WTO Members. This contribution concludes that, although procedural innovations contained in the MPIA are insufficient to address these concerns, some of them, combined with a good faith approach by the MPIA participants and adjudicators, may serve to trigger a positive change in WTO adjudicatory practices, thus ensuring a more strengthened role of the WTO in the future of international trade law.

