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NO SMALL FRY? THE COLOMBIA — FROZEN FRIES PROCEEDINGS AND THE LONG ROAD TO WTO DISPUTE SETTLEMENT REFORM

CHRISTIAN DELEV*

As the first World Trade Organization (WTO) dispute involving Multi-Party Interim Appeal (MPIA) arbitration, the Colombia — Frozen Fries proceedings have been seen by many members and commentators alike, as paving the way towards WTO dispute settlement reform. This article takes a different stance on the significance of the proceedings, that is, they reveal the limits of purely judicial approaches to resolving the ongoing Appellate Body crisis in two regards. First, the interpretation of Article 17.6(ii) of the Anti-Dumping Agreement advanced by the Colombia — Frozen Fries arbitrators is based on mutually incompatible claims and does not offer a workable solution to the concerns of the United States (U.S.) originating in the zeroing saga. Second, there is insufficient evidence to suggest whether MPIA arbitration will preserve the members' right to appeal panel reports in the interim period. Instead, the Colombia — Frozen Fries proceedings signal the effective need for the members to consider interpreting, or even reopening negotiations over the covered agreements and that the authority of WTO dispute settlement will likely rest on sustaining consensual economic diplomacy in the interim.

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I. INTRODUCTION

In March 2026, Colombia withdrew its anti-dumping duties on ‘potatoes, prepared or preserved (otherwise than by vinegar or acetic acid), frozen’ imported from Belgium, Germany, and the Netherlands.¹ This marked the definitive end to the *Colombia — Frozen Fries* dispute and the long-running proceedings within the WTO dispute settlement system. At first glance, the subject-matter of the dispute appears unremarkable because at the time that it was raised, the dispute was the 143rd WTO complaint concerning compliance with the Anti-Dumping Agreement (ADA),² and the measures at issue affected roughly 85% of the total USD 92 million worth of frozen fries imported annually to Colombia from the European Union (EU).

However, the significance of these proceedings lies in the broader institutional backdrop against which they took place. Since 2019, the WTO Appellate Body (AB) has been unable to review appeals due to the longstanding blockage on the appointments of new AB members by the U.S.³ This blockage was motivated by a range of concerns, which include dissatisfaction with the interpretative choices made by the AB that restrained the use of trade remedies, the alleged use of precedent within WTO dispute settlement, and the substantial delays in issuing AB reports beyond the strict ninety days deadline set out in Article 17.5 of the Dispute Settlement Understanding (DSU).⁴ As the AB currently has no sitting members to hear appeals, well below the three member quorum requirement, WTO Members can ‘appeal to the void’ and effectively prevent the adoption of unfavourable panel reports until the appointments deadlock is resolved.⁵

¹ EUR. COMM’N., *Access to Colombia’s frozen fries market restored for EU exporters*, (Mar. 17, 2026), https://policy.trade.ec.europa.eu/news/access-colombias-frozen-fries-market-restored-eu-exporters-2026-03-17_en [hereinafter Access to Colombia’s Frozen Fries Market].

² See WORLD TRADE ORG., *Disputes by agreement (as cited in request for consultations)*, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm. (last visited Apr. 06, 2026).

³ See Kristen Hopewell, *Unravelling of the trade legal order: enforcement, defection and the crisis of the WTO dispute settlement system*, 101(3) INT’L. AFF. 1103, 1103–1117 (2025) (for a useful summary of events around the US blockage of Appellate Body appointments).

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

⁵ *Id.* art. 17.1.

The *Colombia — Frozen Fries* proceedings are widely seen as a weather vane to examine and test solutions to the ongoing WTO dispute settlement crisis that followed the deadlocked negotiations to appoint new AB members. Substantively, the proceedings directly raised questions, including the standard of review regarding members' determination and calculation of anti-dumping duties as per Article 17.6(ii) of the ADA and the relevance of prior AB precedent over this question. Procedurally, this was the first dispute where the disputing parties decided to appeal the panel report to the Multi-Party Interim Appeal Arbitration Arrangement (MPIA)—a plurilateral arbitration mechanism set up to review appealed panel reports concerning disputes between its parties for the duration of the AB crisis.⁶ The *Colombia — Frozen Fries* proceedings have been praised by commentators as signifying that 'the MPIA has proven to be operational',⁷ that the arbitration award 'appeared to address one of the most prominent US criticisms of the Appellate Body' and might even have attracted US participation in the MPIA,⁸ and that its interpretation of Article 17.6(ii) of the ADA 'may be the direction in which things are moving'.⁹

In this article, a different view is taken on the significance of the *Colombia — Frozen Fries* proceedings and the lessons they offer for the broader WTO reform agenda. On closer inspection, the *Colombia — Frozen Fries* arbitral award does not provide a well-reasoned solution for addressing the U.S. concerns regarding the interpretation of Article 17.6(ii) of the ADA or a workable blueprint for timely dispute settlement by a restored AB. In fact, the award demonstrates the *limits* of purely judicial solutions and the urgency for meaningful reforms to the WTO covered agreements to complement any lasting DSU renegotiation. Moreover, the dispute settlement process alone does not make a convincing case for the viability of the MPIA as an interim plurilateral stopgap to the AB crisis. Instead, the broader *Colombia — Frozen Fries* proceedings put a spotlight on the underappreciated role of economic diplomacy within a WTO dispute settlement system in crisis.

⁶ See World Trade Organization, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes: Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, Preamble, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020) [hereinafter MPIA Communication].

⁷ Joost Pauwelyn, *The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?*, 22 WORLD TRADE REV. 693, 695 (2023) [hereinafter Pauwelyn].

⁸ Simon Lester, *Would the United States Join the MPIA?*, JAPAN SPOTLIGHT 25, 27–28 (2025) https://www.jef.or.jp/journal/pdf/259th_Cover_Story_02.pdf. [hereinafter Lester].

⁹ James Flett, *Where Angels Fear to Tread: The General Standard of Review in WTO Law*, in RECKONING AND RENEWAL: THE WORLD TRADE ORGANIZATION AND ITS DISPUTE SETTLEMENT SYSTEM AT 30: ESSAYS IN HONOUR OF VALERIE HUGHES 211, 228 (Nicolas Lamp ed., 2025).

The argument is made in four parts. Part II, sets out a brief overview of the facts of the *Colombia — Frozen Fries* dispute and the subsequent proceedings. Building on this, Part III evaluates how the *Colombia — Frozen Fries* arbitral award addressed the interpretation and application of Article 17.6(ii) of the ADA, as well as its broader implications for future of proceedings around anti-dumping duties. Part IV examines the significance of the MPIA proceedings and the broader role of multilateral diplomacy as a means to smooth cooperating between the disputing parties. Finally, Part V offers reflections on what the *Colombia — Frozen Fries* proceedings reveal about the long road ahead to any future reform of WTO dispute settlement.

II. OVERVIEW OF THE COLOMBIA — FROZEN FRIES PROCEEDINGS

In November 2019, the EU requested consultations over Colombia's adoption of anti-dumping duties on imported frozen fries from Belgium, Germany, and the Netherlands in the previous year.¹⁰ In particular, anti-dumping duties imposed on affected frozen fries ranged from 3.21% to 44.52% *ad valorem*, depending on the specific EU exporter.¹¹ The EU raised several concerns with the measure and its compatibility with the ADA, in particular the export prices used in calculating the dumping margin, the comparison between 'export price and the normal value', the evidence used to establish an 'injury' to Colombia's domestic industry, the use of evidence within the investigation, and certain procedural issues with how the investigation had been initiated and carried out.¹²

Following these initial consultations, a panel was established and the disputing parties agreed to procedures for arbitration under Article 25 of the DSU that allowed for either party to appeal the final panel report under arbitration "no later than 10 days prior to the anticipated date of [its] circulation . . . to the rest of the Membership' and for the report to be circulated to 'the [MPIA] pool of arbitrators'".¹³

¹⁰ Request for Consultations by the European Union, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/1, G/ADP/D133/1, G/VAL/D/14, and G/L/1339 (Nov. 20, 2019) [hereinafter EU Consultation Request].

¹¹ Panel Report: Addendum, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, Annex B-1, ¶ 4, WTO Doc. WT/DS591/7/Add.1 (adopted Oct. 10, 2022).

¹² EU Consultation Request, *supra* note 10, at 2–4.

¹³ Agreed Procedures for Arbitration under Article 25 of the DSU, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, ¶ 4, WTO Doc. WT/DS591/3 (adopted Jul. 15, 2020) (notably, the rules on procedure were later 'revised' and 'superseded' by the World Trade Organization); Agreed Procedures for Arbitration under Article 25 of

The panel issued its final report to the parties on August 29, 2022, where its findings were largely in favour of the EU. The panel established that Colombia had breached its obligations under the ADA on a number of grounds when carrying out its dumping investigation, as well as in calculating and imposing anti-dumping duties. These are, in brief: (i) failing to determine whether use of third-country sales prices instead of domestic prices was ‘appropriate’ when initiating its investigation (Article 5.3 of ADA); (ii) failing to require EU exporters to ‘furnish non-confidential summaries’ of ‘confidential’ material (Article 6.5.1); (iii) disregarding export prices provided by some EU exporters in favour of its domestic customs database (Article 6.8); (iv) failing to make a ‘fair comparison’ when denying parties’ various cost-related adjustment requests (Article 2.4); and (v) including imports from EU exporters with *de minimis* and negative dumping margins when determining ‘injury’ and ‘causation’ (Articles 3.1, 3.2, 3.4, and 3.5).¹⁴ In response to these findings, the panel proceedings were suspended as Colombia appealed the dispute with the notable exception of the finding of breach of Article 6.8—to MPIA arbitration on October 06, 2022.¹⁵

The MPIA arbitration was constituted on October 12, 2022 following the selection of three arbitrators in line with the agreed rules of procedure. Following the hearings, the arbitral award was ‘issued to the parties in English on December 19, 2022’ and circulated to the broader membership two days later.¹⁶ The arbitrators reversed the panel findings concerning Article 5.3 largely on the facts of the case, holding that they did ‘not see that an assessment of “appropriateness” required that an additional explanation be provided or examined as to why domestic sales prices were not used’.¹⁷ Notably, the arbitrators also examined Colombia’s additional

the DSU, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/3/Rev.1 (revised Apr. 22, 2021)[hereinafter Revised Rules of Procedure].

¹⁴ Notification of Appeal by Colombia under Article 25 of the DSU, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/7 (Oct. 10, 2022); Annex, Panel Report, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (panel suspended) [hereinafter Colombia — Frozen Fries Panel Report].

¹⁵ World Trade Organization, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands — Notification of an Appeal by Colombia under Article 25 DSU*, ¶¶1–4, WTO Doc. WT/DS591/7 (Oct. 10, 2022).

¹⁶ Award of the Arbitrators, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, ¶ 1.14, WTO Doc. WT/DS591/ARB25 (circulated Dec. 21, 2022) [hereinafter Colombia — Frozen Fries Arbitral Award].

¹⁷ *Id.*, at ¶¶ 4.31–4.32.

argument that the panel had incorrectly interpreted Article 5.2(iii) in light of the Article 17.6(ii) interpretation rule. Article 5.2(iii) reads:¹⁸

An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

[. . .]

iii. information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

Ultimately, the arbitrators refused to recognise Colombia's interpretation of the provision to mean that the phrase 'where appropriate' means 'granting an applicant "free choice" in the selection of normal value prices' as *permissible*, since this reading could not be justified using 'the method for treaty interpretation set out in the Vienna Convention [[on the Law of Treaties (VCLT)]]'.¹⁹ We will return to this question and examine the approach adopted by the arbitrators in Part III. The remaining findings made by the *Colombia — Frozen Fries* panel were upheld.

Following the notification of the MPIA arbitral award to the WTO Dispute Settlement Body (DSB) in line with Article 25.3 of the DSU, Colombia 'confirm[ed] its intention to comply with the Arbitrators and the Panel's findings', while requiring

¹⁸ Agreement on Implementation of Article VI of GATT 1994, art. 5.2(iii), Apr. 15, 1994, 1868 U.N.T.S. 201 [hereinafter ADA]; Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹⁹ Colombia — Frozen Fries Arbitral Award, *supra* note 16, ¶ 4.22 (referring to the Vienna Convention on the Law of Treaties); see Vienna Convention on the Law of Treaties, arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

a ‘reasonable period of time’ to bring their anti-dumping duties into compliance, in line with Article 21.3.²⁰

While the anti-dumping duties at issue were amended as a result, the EU contested how Colombia had ‘calculat[ed] dumping’ and alleged that the revised measures ‘artificially created and/or inflated dumping margins for the exporting producer’.²¹ As bilateral consultations failed to resolve the dispute, the EU requested compliance proceedings under Article 21.5 on November 14, 2024.²² Following its substantive meetings with the disputing parties and intervening third parties, the compliance panel issued its final report on October 06, 2025. In reviewing the revised measures, the compliance panel established that Colombia had breached Article 2.4.2 of the ADA by using a ‘simple average of intermediate weighted average normal values’ against the ‘weighted average export price’ to calculate dumping margins and Article 9.1 by imposing anti-dumping duties above the dumping margin, while dismissing the remainder of the EU’s complaints.²³

The compliance panel recommendations were subsequently adopted by the DSB on November 17, 2025, where Colombia noted that it had ‘accepted the findings’ of the compliance panel.²⁴ Subsequently, Colombia withdrew the anti-dumping duties altogether in March 2025, putting an end to the dispute.²⁵

III. ‘REASONABLY’ EMBRACING HERMENEUTIC AMBIGUITY IN ARTICLE 17.6(ii) ADA?

The aspect of the *Colombia — Frozen Fries* arbitral award that has by far received the most attention within Dispute Settlement Body discussions and by commentators concerns its departure from the AB approach to interpreting Article 17.6(ii) of the ADA.²⁶ In practice, this question was not decisive to the dispute generally or for

²⁰ Dispute Settlement Body, *Minutes of Meeting: Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, ¶ 2.2, WTO Doc. WT/DSB/M/475 (Jan. 27, 2023) [hereinafter *Minutes of Meeting* WTO Doc. WT/DSB/M/475].

²¹ Request for the Establishment of a Panel by the European Union, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/14, at 2 (Nov. 15, 2024).

²² *Id.*

²³ Panel Report, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, ¶¶ 7.57–7.73, WTO Doc. WT/DS591/RW (adopted Oct. 23, 2025).

²⁴ Dispute Settlement Body, *Minutes of Meeting: Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, ¶¶ 2.1–2.5, WTO Doc. WT/DSB/M/507 (Dec. 12, 2025) [hereinafter *Minutes of Meeting* WTO Doc. WT/DSB/M/507].

²⁵ Access to Colombia’s Frozen Fries Market, *supra* note 1.

²⁶ See *Minutes of Meeting* WTO Doc. WT/DSB/M/475, *supra* note 20, ¶¶ 2.6–2.7, 2.16–2.17, and 2.21–2.22 (refer this regarding WTO members); see also Nu Ri Jung, *Who Determines*

determining Colombia's compliance with Article 5.3, as the arbitrators sided with Colombia on this issue on the facts. Instead, the reason for this attention comes down to this question being central to the substantive concerns underpinning the U.S. blockage of AB appointments.

To put this issue into perspective, we first begin by briefly setting out the controversy surrounding Article 17.6(ii) as interpreted and applied by the AB. We will then explain, why the approach adopted in the *Colombia — Frozen Fries* by the arbitrators, does not offer a workable solution in the long-run and will consider what this means for understanding the WTO dispute settlement reform process.

A. Zeroing in on the Article 17.6(ii) ADA Conundrum

In 2020, the Office of the United State Trade Representative (USTR) indicated in their report on the AB that a central US concern with the AB came down to how the standard of review under Article 17.6(ii) had been construed and applied.²⁷ To explain this issue, it is important to first consider Article 17.6(ii) itself and its negotiating history. The provision states as follows:²⁸

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

In terms of its structure, the provision reaffirms in its first sentence that treaty interpretation under the ADA must follow the 'customary rules of interpretation of public international law', akin to Article 3.2 of the DSU.²⁹ The second sentence of

the 'Permissibility' of an Interpretation Within the Meaning of Article 17.6(ii) of the Anti-dumping Agreement?: A Constructive Commentary on the Colombia – Frozen Fries Approach, 59(2) J. WORLD TRADE 327 (2025); Stratos Pahiis, *Appeals after the Appellate Body*, 23(3) WORLD TRADE REV. 296, 301–307 [hereinafter Pahiis]; Yuri Rovnov, *Article 17.6(ii) of the WTO Anti-Dumping Agreement: Waiting for Chekhov's Gun to Go Off*, 15(1) J. INT'L DISP. SETTLEMENT 106, 113–114 (2024) [hereinafter Rovnov]; Lester, *supra* note 8, at 27; Pauwelyn, *supra* note 7, at 700–701 (refer these for commentators' view on the departure from the AB approach to interpreting Article 17.6(ii) of the ADA).

²⁷ U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 102–103 (Feb. 2020) [hereinafter United States Trade Representative Report].

²⁸ ADA, *supra* note 18, art. 17.6(ii).

²⁹ DSU, *supra* note 4, art. 3.2.

the provision, however, further stipulates that ‘where’ panels ‘find’ there to be ‘more than one permissible interpretation’, then they ‘shall find the authorities’ measure’ to be consistent with the ADA if the measure complies with one of these ‘permissible’ readings. On its face, the structure of the provision is concerned with situations where there is hermeneutic ambiguity *after* ADA provisions have been interpreted in light of the customary rules of treaty interpretation embodied in Articles 31 and 32 VCLT.³⁰ Without addressing how the provision must be operationalised, however, the *travaux préparatoires* of the ADA notably present a more complicated picture of *why* the provision was introduced as a standard of review.

During the era of the General Agreement on Tariffs and Trade (GATT), Contracting Parties already “recognize[d] that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens [injury or material retardation]” to importing Contracting Parties’ domestic industries, while still permitting the practice.³¹ However, given the limited constraints placed on anti-dumping practices by Article VI of GATT, the ADA emerged as a compromised solution. In particular, it was an effort to reconcile the push for greater constraints on anti-dumping by Korea and other export-oriented developing countries, on the one hand, and resistance by the U.S. and European Communities who favoured maintaining more ‘trade-restrictive’ anti-dumping measures, on the other hand.³² Article 17.6(ii) of ADA, accordingly, became a tool for reconciling the various disagreements across the WTO membership and was seen as a means of ensuring

³⁰ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 15 (adopted May 20, 1996) (VCLT arts. 31 & 32 have regularly been treated as reflecting the ‘customary rules of interpretation of public international law’ within WTO dispute settlement); Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 57, WTO Doc. WT/DS184/AB/R (adopted Aug. 23, 2001); see ISABELLE VAN DAMME, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* (2009); Georges Abi-Saab, *The Appellate Body And Treaty Interpretation*, in *TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 99* (Malgosia Fitzmaurice et al. eds., 2010); Christian Palmenov Delev, *Beyond Powder Kegs and Crystal Balls: Finding Meaning in the Appellate Body’s Interpretation of WTO Law*, 8(1) GRONINGEN J. INT’L. L. 1 (2020) (for a commentary on how these provisions have been invoked within the WTO dispute settlement).

³¹ General Agreement on Tariffs and Trade 1994, art. VI:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 190 [hereinafter GATT 1994].

³² See generally, Gary N. Horlick & Eleanor C. Shea, *The World Trade Organization Antidumping Agreement*, 29(1) J. WORLD TRADE 5 (1995) (for an overview of the ADA background and negotiations).

hermeneutic deference. For the U.S., this was seen as an analogy to the now-defunct *Chevron* deference rule in US administrative law.³³

The ongoing US concerns surrounding how the AB approached Article 17.6(ii) emerged within the broader context of WTO jurisprudence around the controversial use of ‘zeroing’ methodology to determine dumping margins.³⁴ The significance of this issue is prominent within WTO dispute settlement. In 2008 already, Prusa and Vermulst noted that “[a]s far as [they] can tell, zeroing is the single most litigated subject in the history of the WTO”.³⁵ While there are various grounds under the ADA that effectively prohibit zeroing as a practice,³⁶ for illustrative purposes, we turn to the jurisprudence on establishing dumping margins under Article 2.4.2 specifically.

The issue of zeroing as a methodology first emerged during the *EC — Bed Linen* dispute, where the then-European Communities had used zeroing in applying the ‘W-W’ methodology to calculate dumping margins of imported cotton-type bed linen from Egypt, India, and Pakistan (so-called model zeroing). During the proceedings, the AB relevantly confirmed the panel’s conclusion that zeroing was inconsistent with the requirements of Article 2.4.2, as: (i) “[u]nder this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions” since zeroing meant the authorities “did not take fully into account the entirety of the prices of *some* export transactions”; and (ii) the term ‘comparable’ to mean that “all types or models falling within the scope of a ‘like’ product must necessarily be

³³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984) [hereinafter *Chevron*] (requiring Courts to answer two questions when reviewing agency interpretations: (i) “[w]hether Congress has directly spoken to the precise question at issue”, and (ii) “. . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”) *see also* Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, House Doc. 103-316, 103d Cong., 2d Sess. 818, 818 (Sept. 27, 1994) (as cited and explained in Rovnov, *supra* note 26, at 115).

³⁴ Zeroing refers to the methodology for calculating dumping margins, where negative differences between export prices and normal values are discounted and treated as ‘0’.

³⁵ Thomas J. Prusa & Edwin Vermulst, *A One-Two Punch on Zeroing: US–Zeroing (EC) and US–Zeroing (Japan)*, 8(1) WORLD TRADE REV. 187, 226 (2008).

³⁶ *See generally*, Kamal Saggi & Mark Wu, *Yet Another Nail in the Coffin of Zeroing: United States–Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, 12(2) WORLD TRADE REV. 377, 380–386 and 390–398 (2013) (for an overview and discussion of how the incompatibility of zeroing methodology with the ADA has been addressed within WTO jurisprudence).

‘comparable’, and export transactions involving those types or models must therefore be considered ‘comparable export transactions’ within the meaning of Article 2.4.2.’³⁷

While the *EC — Bed Linen* dispute was only concerned with model zeroing, a broader series of jurisprudence emerged which challenged the use of other forms of zeroing methodology by the U.S. Department of Commerce and their compatibility with Article 2.4.2. In *US — Zeroing (EC)*, the panel had concluded that the U.S. use of zeroing was compatible with the provision; however, the AB was not able to review the issue on appeal since ‘the condition on which the European Communities’ conditional appeal predicated was not fulfilled’.³⁸ The AB returned to the question in *US — Softwood Lumber V*, both during the initial and compliance proceedings. During the initial proceedings, the question turned to whether the use of zeroing under the ‘W-W’ methodology was compatible with Article 2.4.2. The AB, referring to both its previous interpretation in *EC — Bed Linen* and citing Articles VI:2 GATT alongside Articles 2.2.1, 9.2 and 9.4 ADA as treaty context—held that “the terms ‘dumping’ and ‘margins of dumping’ . . . apply to the product under investigation as a whole and do not apply to sub-group levels”.³⁹

In the *US — Softwood Lumber V* dispute, the U.S. further developed an argument based on Article 17.6(ii). It contested the interpretation developed by the panel (and, by extension, the AB), citing Article 17.6(ii) and the use of the plural ‘margins of dumping’ in Article 2.4.2 to mean ‘it was *permissible* to interpret Article 2.4.2 as addressing only the manner in which comparisons between export price and normal value are to be made,’ though the AB rejected this argument as well.⁴⁰ Instead, the AB explained that a ‘single investigation may involve establishing margins of dumping for a number of exporters or producers, and may relate to more than one country’.⁴¹ Accordingly, as under the first sentence of Article 17.6(ii) there was no room for more than one ‘permissible’ reading per Articles 31 and 32 of the VCLT, it established a breach of Article 2.4.2.

³⁷ Appellate Body Report, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, ¶¶ 53–58 and 66, WTO Doc. WT/DS141/AB/R (adopted Mar. 12, 2001) [hereinafter AB, *EC — Bed Linen*].

³⁸ Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 162, WTO Doc. WT/DS294/AB/R (adopted May 09, 2006).

³⁹ Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, ¶¶ 96–103, WTO Doc. WT/DS264/AB/R (adopted Aug. 31, 2004) [hereinafter US — *Softwood Lumber V*].

⁴⁰ *Id.*, ¶ 114.

⁴¹ US — *Softwood Lumber V*, *supra* note 40, ¶ 115.

The U.S. revised its measures by instead adopting a ‘T-T’ methodology whilst still maintaining its use of zeroing. The revised measures were subsequently challenged, with the compliance panel finding in its favour during the compliance proceedings.⁴² On appeal, however, the AB went further than its previous pronouncements, clarifying that zeroing was inconsistent with both ‘W-W’ and ‘T-T’ methodologies *as such*. The U.S. contended the lack of a reference to ‘all comparable export transactions’ in the first sentence of Article 2.4.2 when discussing the ‘T-T’ methodology meant that zeroing was permissible in such instances.⁴³ However, the AB seemingly shifted away from its previous textual argument in *EC — Bed Linen* for prohibiting model zeroing, instead, holding that its reasoning for prohibiting zeroing drew on the broader context of the ‘fair comparison’ test under Article 2.1 and the effectiveness of the obligation: “[i]f zeroing were allowed under the [T-T] methodology, while being impermissible under the [W-W] methodology, having recourse to one or the other methodology provided in the first sentence of Article 2.4.2 could produce results that are systematically different.”⁴⁴ In so doing, the AB likewise dismissed the alternative arguments brought by the U.S. to maintain that zeroing under the ‘T-T’ methodology was ‘permissible’ per the Article 17.6(ii) standard of review, notably based on the broader context of Article 2.4.2, second sentence, other ADA provisions, and Article II GATT, as well as the ADA negotiating history.⁴⁵ This interpretation was subsequently maintained in the AB, notably in the *US — Zeroing (Japan)* proceedings.⁴⁶ In its 2020 report, the USTR accordingly drew a close line between the shifting interpretation of Article 2.4.2 and the AB’s reluctance to recognise other ‘permissible’ interpretations: “[b]ecause the Appellate Body has concluded that there is a single permissible interpretation of these provisions of the Antidumping Agreement, then the term ‘all’ is either relevant, or it is not.”⁴⁷

⁴² Panel Report: Recourse to Article 21.5 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, ¶ 6.2–6.3, WTO Doc. WT/DS264.RW (adopted Sept. 01, 2006).

⁴³ Appellate Body Report: Recourse to Article 21.5 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, ¶ 90, WTO Doc. WT/DS264/AB/RW (adopted Sept. 1, 2006). [hereinafter AB, *US — Softwood Lumber V (Article 21.5 DSU)*].

⁴⁴ *Id.*, ¶¶ 91–93; see Chad P. Bown & Alan O. Sykes, *The Zeroing Issue: a critical analysis of Softwood V*, 7(1) WORLD TRADE REV. 121, 131–133 (2008) (for a criticism of the AB interpretation of ADA, art. 2.4.2 in the light of art. 17.6(ii)).

⁴⁵ AB, *US — Softwood Lumber V (Article 21.5 DSU)*, *supra* note 43, ¶¶ 95–121.

⁴⁶ Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 119–129, WTO Doc. WT/DS322/AB/R (adopted Jan. 23, 2007).

⁴⁷ United States Trade Representative Report, *supra* note 27, at 99.

It is worth highlighting that, in response to the zeroing jurisprudence, a separate line of criticism emerges in the 2020 USTR report: namely, judicial overreach within the WTO dispute settlement system by treating AB reports as precedent. In the broader application of the ADA, the AB consistently pushed back on panels which contradicted its interpretations of the ADA which effectively prohibited the use of zeroing methodology. This amounted to several pronouncements on how panels should approach prior AB reports. In *US — Continued Zeroing*, an AB member argued in a concurring opinion, *inter alia*, that “[t]he Appellate Body exists to clarify the meaning of the covered agreements’ and ‘[o]n the question of zeroing it has spoken definitively”.⁴⁸ The question was specifically addressed in *US — Stainless Steel (Mexico)*, where the AB established a horizontal rule of precedence: “Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”⁴⁹

While the ‘absent cogent reasons’ rule formally allows for departures from past determinations of what are ‘permissible’ interpretations where ‘cogent reasons’ are given by a panel, the 2020 USTR report took a critical view of what this entailed. Given the rare instances where panels had directly invoked ‘cogent reasons’, for the U.S., this “has snatched from WTO Members the authority to determine the meaning of WTO agreements” per Article IX:2 of the WTO Agreement and even “suggests that serious, systemic errors are increasingly being made without any consideration of the actual text that WTO Members have agreed to.”⁵⁰

⁴⁸ Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, ¶ 119, WTO Doc. WT/D350/AB/R (adopted Feb. 19, 2009) [hereinafter AB, *US — Continued Zeroing*].

⁴⁹ Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R, (adopted May 20, 2008) [hereinafter AB, *US — Stainless Steel (Mexico)*].

⁵⁰ United States Trade Representative Report, *supra* note 27, at 62–63; *see also* Dispute Settlement Body, *Minutes of Meeting: United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 47–55, WTO Doc. WT/DSB/M/250 (Jul. 01, 2008) (notably, there is a wealth of literature that extends beyond this article on the authority of precedents within WTO dispute settlement); *see, e.g.*, Gregory Messenger, *Reforming the Law and Institutions of the WTO: the Dangers of Unexpected Consequences*, in *THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE* (Antonio Segura Serrano ed., 2018); Jorge Miranda & Manuel Sánchez Miranda, *Chronicle of a crisis foretold: how the WTO Appellate Body drove itself into a corner*, 26(3) J. INT’L. ECON. L. 435 (2023) (for scholarship aligning with the USTR criticism); *see also* Mariana Clara de Andrade, *Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism*, 11(2) J. INT’L. DISP. SETTLEMENT 262 (2020); Jeffrey Kucik et al., *Rewriting Precedent: How International Adjudicators Influence Compliance*, 46(2) MICH. J. INT’L. L. 283 (2025) (for more nuanced takes on the AB use of precedent); *see* Isabelle Van Damme, *25 Years of*

In brief, the saga of WTO litigation around zeroing methodology reveals two central US concerns with how the AB has approached the ADA: its narrow understanding of what constitute ‘permissible’ interpretations under Articles 31 and 32 of the VCLT in applying Article 17.6(ii) ADA and the reliance on its past reports as ‘precedent’ in justifying the *de facto* prohibition on zeroing methodology under the ADA. As the 2020 USTR report indicates, these concerns are central to the U.S. blockage of AB appointments.⁵¹ Accordingly, the question remains: could these concerns be addressed through judicial means alone?

B. The Colombia — Frozen Fries Arbitral Award: A Solution or Lip Service?

As set out in Part II, the issue of what the standard of review under Article 17.6(ii) of the ADA entails arose in relation to Colombia’s argument that the phrase “where appropriate” in Article 5.2(iii) should be interpreted to mean an investigating Member has ‘free choice’ in ‘selecting’ what constitutes a ‘normal price value’.⁵² Before turning to the specific issue of compliance at hand, the *Colombia — Frozen Fries* arbitrators first considered the broader issue of how they should approach the interpretation of Article 17.6(ii). After noting that the original panel had followed the traditional two-step process of first establishing “whether more than one such interpretation emerges after the Panel has examined the relevant provision under customary rules of interpretation of public international law” before considering whether more than one interpretation is ‘permissible’.⁵³

While the panel relied on treaty interpretation under Articles 31 and 32 of the VCLT as a ‘starting point’ reflecting customary international law, the arbitrators instead suggested that the two steps—reflecting the two sentences of the provision—should be collapsed into a singular operation where investigating Members are afforded ‘special deference’. Notably, this set a clear break with the AB precedent on Article 17.6(ii), as already discussed.⁵⁴ The arbitral award relevantly explains its singular approach as follows:⁵⁵

Law and Practice at the WTO: Did the Appellate Body Dig its Own Grave?, 26(1) J. INT’L. ECON. L. 124, 130–131 (2023) (for defence of the ‘absent cogent reasons’ rule).

⁵¹ WTO 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)*, Annex: Draft General Council Decision on Functioning of the Appellate Body, WTO Doc. JOB/GC/222, at 6 (Oct. 15, 2019) (note the connection drawn between both issues as being central to resolving the ongoing AB crisis by Ambassador Walker in early diplomatic efforts).

⁵² Colombia — Frozen Fries Arbitral Award, *supra* note 16, ¶ 4.16.

⁵³ *Id.*, ¶ 4.11.

⁵⁴ See, e.g., AB, US — Continued Zeroing, *supra* note 49, ¶ 272.

⁵⁵ Colombia — Frozen Fries Arbitral Award, *supra* note 16, ¶ 4.12.

Our approach to the interpretation claims in this appeal differs. We do not begin the interpretative exercise by focusing solely on the first sentence of Article 17.6(ii), as this in our view pays insufficient regard to the immediate context of this sentence, namely Article 17.6(i) and the second sentence of Article 17.6(ii). Each of these provisions must be understood in a manner granting special deference to investigating authorities under the Anti-Dumping Agreement. The second sentence of Article 17.6(ii) mandates panels to defer to and accept an authority's measure as soon as it 'rests upon' a 'permissible' interpretation.

While the *Colombia — Frozen Fries* arbitrators set out that Article 17.6(ii) requires panels to 'integrate' both sentences of the provision, they subsequently contradicted themselves by stating that "the ultimate question for us when testing a proposed interpretation is to draw a line beyond which an interpretation is no longer 'permissible' under the Vienna Convention method for treaty interpretation" (emphasis added).⁵⁶ It is unclear how this approach is exactly distinct from the two-step approach followed by the panel, as the 'special deference' afforded to Members still remains constricted by Articles 31 and 32 of the VCLT as otherwise applied. Indeed, in the words of the arbitrators, "[t]he interpretative process under the Vienna Convention sets out an outer range beyond which meanings cannot be accepted".⁵⁷ The only clear distinction in approach from the panel, accordingly, comes down to how the arbitrators framed the VCLT general rule of interpretation: treaty interpretation is 'not an exact science' and 'does not magically and inevitably lead to a single result'; instead, 'in most cases' the general rule 'involves weighing, balancing, and choice'.⁵⁸

⁵⁶ *Id.*, ¶ 4.15 (curiously, in setting out this singular approach, the MPIA itself departed from the two-step process that underpinned the now-defunct *Chevron* deference rule).

⁵⁷ *Id.*

⁵⁸ *Colombia — Frozen Fries* Arbitral Award, *supra* note 16, ¶ 4.14; INT'L. L. COMM'N, Rep. of the ILC on the Work of its 19th Session: Draft Articles on the Law of Treaties with Commentaries, U.N. Doc. A/6309/Rev.1, at 50, ¶ 4 [hereinafter ILC Report] (note that the reference to treaty interpretation not being 'an exact science' seemingly alludes to the famous use of the phrase in by the International Law Commission (ILC) when adopting the draft articles on the law of treaties); see also VLADIMIR ĐURO DEGAN, L'INTERPRÉTATION DES ACCORDS EN DROIT INTERNATIONAL 163–164 (1963); Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26(1) EUR. J. INT'L. L. 169 (2015); Panos Merkouris, *Interpretation is a Science, is an Art, is a Science, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 1* (Malgosia Fitzmaurice et al. eds., 2010) (refer these on the broader debate around treating treaty interpretation as an 'art' or a 'science'); see Delev, *supra* note 30, at 9–13.

The challenge of setting out what is a ‘permissible’ interpretation per Article 17.6(ii)—as opposed to establishing the ‘correct’ interpretation—in light of the general rule of interpretation comes down to each exercise requiring a seemingly *distinct* application of the *same* hermeneutic rule to an ADA provision (and, indeed, as opposed to the interpretation of all provisions under other WTO covered agreements). This is problematic for two reasons.

First, the arbitrators assumed that there is a range of permissible interpretations that could be arrived at by applying the VCLT general rule. In their own words, “different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the ‘correct’ interpretation of a treaty provision.”⁵⁹ However, this essentially means that the principles of treaty interpretation which are ‘thrown into the crucible’ of the general rule, will mostly lead to different *hermeneutic* conclusions.⁶⁰

In practice, however, this assumption can be rebutted where only one interpretation is supported after weighing the hermeneutic principles reflected in the general rule. Ironically, as explained below, the *Colombia — Frozen Fries* arbitrators themselves ultimately failed to identify what an alternative ‘permissible’ interpretation is regarding Article 5.2(iii) of the ADA beyond the interpretation reached by the panel and thus, proved this point.

Second, drawing a methodological distinction between finding *the* ‘correct’ and *a* ‘permissible’ interpretation runs counter to the framework of Articles 31 and 32 of the VCLT *per se*, which enables the ‘elucidation of the meaning of the text’.⁶¹ As the general rule is designed as a singular process, any exercise of treaty interpretation requires panels to go through a process of elimination by first applying the method under Article 31. Where Article 31 leaves the treaty meaning “ambiguous or obscure” or alternatively “leads to a result which is manifestly absurd or unreasonable”, then recourse may be made to “supplementary means of interpretation” (such as *travaux préparatoires*) to “confirm” or “determine the meaning”.⁶²

⁵⁹ Colombia — Frozen Fries Arbitral Award, *supra* note 16, ¶ 4.14.

⁶⁰ ILC Report, *supra* note 58, at 51, ¶ 8.

⁶¹ *Id.*, at 51, ¶ 11.

⁶² VCLT, *supra* note 19, art. 32 (notably, international courts and tribunals frequently recognise that recourse to *travaux préparatoires* is unnecessary where the meaning is ‘sufficiently clear’ after applying Article 31); *see, e.g.*, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, I.C.J. Rep. 2019 558, ¶ 112 (Nov. 2019); Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 32 (Aug. 02, 2004); M/V Saiga (No. 2) (St. Vincent

Fitzmaurice and Merkouris accordingly suggest, “any dispute the application of the customary rules on interpretation would always lead to a result, a singular interpretation of the provision in question”.⁶³ Indeed, even if we forego the conclusion that there will *always* be a ‘singular’ correct ‘result’ of treaty interpretation, at minimum Articles 31 and 32 of the VCLT are designed to prevent multiple ‘permissible’ interpretations from emerging through the *separate* application of different treaty interpretation methods.⁶⁴ Accordingly, in most instances, treaty interpretation through a singular rule runs counter to the arbitrators’ presumption that there will often be distinct ‘permissible’ interpretations.⁶⁵

The issues surrounding the new Article 17.6(ii) ADA approach proposed by the *Colombia — Frozen Fries* arbitrators become apparent when examining their application of this standard of review to Article 5.2(iii) in the award.⁶⁶

v. Guinea), Case No. 2, Judgment of July 01, 1999, Separate Opinion of Judge Nelson, ITLOS Rep. 116, at 117.

⁶³ Malgosia Fitzmaurice & Panos Merkouris, *Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 185 (Malgosia Fitzmaurice, et al. eds., 2010) [hereinafter Fitzmaurice & Merkouris]. See, by analogy, *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 112 (Sep. 05, 2007).

⁶⁴ *Chevron*, *supra* note 34 (this is a key point of distinction from the first question in the now-defunct *Chevron* deference rule); see also Amy Semet, *Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. IRVINE L. REV. 621, 664–684 (2022) [hereinafter Semet] (note that there is no such singular rule of statutory interpretation in US administrative law, which means that different methods of interpretation could support different outcomes and create ambiguity. In this regard, see illustratively, Semet for empirical study of how US appellate courts relied on different methods of interpretation to determine ‘ambiguity’ in applying *Chevron* deference); Rovnov, *supra* note 26, at 115–122 (for critique of the *Chevron* deference analogy within WTO dispute settlement).

⁶⁵ See Fitzmaurice & Merkouris, *supra* note 63, 189–190 (on ‘generic’ meaning as a tool to ensure *different* permissible interpretations are allowed in *different* disputes concerning the ADA. It is unclear how much merit there is to this approach, as nothing in ADA, Art. 17.6(ii) indicates that *all* language constitutes ‘known legal term[s]’, whose content the Parties expected would change through time’: Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 3, ¶ 77 (Dec. 1978). As such, this solution would only be possible where Parties treat ADA language as being evolutive, instead of merely contested – with Art. 17.6(ii) itself seeming to suggest the latter. Equally, it is unclear how Art. 17.6(ii) could instead be construed as additionally imposing ‘an implicit limit on the *appellate* review of ADA disputes’); see Pahis, *supra* note 26, at 305 (as this is a question of whether there is a different standard of review between panels and the AB – or, in this instance, the MPIA).

⁶⁶ See also Pahis, *supra* note 26, at 306–307; Joanna Gomula, *WTO Dispute Settlement System (WTO DSS): The Role of the WTO Dispute Settlement System (WTO DSS) in Developing*

In justifying its ‘free choice’ interpretation, Colombia raised three central arguments. First, Colombia developed a textual interpretation of the provision and suggested that ‘Article 5.2(iii) mentions third-country sales prices and constructed value in parentheses, and after “where appropriate”, simply means that the drafters considered domestic sales prices to be the usual basis for normal value’.⁶⁷ Second, Colombia proposed a contextual interpretation that took into account other WTO covered agreement provisions featuring the phrase ‘where appropriate’ that do not require a Member to ‘explain its choice’.⁶⁸ Likewise, the immediate context of Articles 5.2 and 5.3 was referenced as supporting an *inclusio unius* reading, i.e., that the requirement to provide reasons should have been set out explicitly.⁶⁹ Finally, Colombia made an argument based on the principle of effectiveness and emphasised what the initial *Colombia — Frozen Fries* panel’s interpretation entailed:

Third country sales prices indicating dumping cannot be offset by the existence of low-priced domestic sales and cannot make an initiation WTO-inconsistent. For that reason, it would also not be logical to invalidate an application that does not contain domestic sales data, but does contain probative third-country export sales data.⁷⁰

The arbitrators, however, rejected Colombia’s interpretation and addressed the three arguments raised in the submissions. First, textually, the arbitrators understood the placement of the phrase “*where appropriate*” in Article 5.2(iii) to mean that ‘only [third-country sales prices and constructed normal value] require an authority to “examine” their “appropriateness” to initiate an investigation’.⁷¹ Second, *contra* the contextual argument developed by Colombia, they understood the context of Article 5.3 to simply mean that ‘all that is required is that the evidence in the application must be *sufficient*’ (original emphasis).⁷² Likewise, the broader use of the phrase in provisions across other WTO covered agreements was not found to be convincing, as the

International/Global Law: A Survey of WTO Judicial Decisions 2022–2023, in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2023: GLOBAL LAW, POLITICS, ETHICS, JUSTICE 505, 511–519 (Giuliana Ziccardi Capaldo ed., 2024) [hereinafter Gomula] (refer these for other assessments of the arbitral award).

⁶⁷ Award of the Arbitrators: Addendum, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, Annex C-1, ¶ 3.2, WTO Doc. WT/DS591/ARB25/Add.1 (Dec. 21, 2022) [hereinafter *Colombia — Anti-Dumping Duties*: Award of the Arbitrators: Addendum].

⁶⁸ *Id.*, ¶ 3.3.

⁶⁹ *Id.*, ¶¶ 3.4–3.5.

⁷⁰ *Id.*, ¶ 3.7.

⁷¹ *Colombia — Frozen Fries* Arbitral Award, *supra* note 16, ¶ 4.20.

⁷² *Id.*, ¶ 4.21.

arbitrators were ‘unable to discern that they support a generalized understanding of the phrase to grant “free choice” in the selection of pricing information under Articles 5.2(iii) and 5.3’.⁷³ Third, the arbitrators were not convinced by Colombia’s invocation of the principle of effectiveness, suggesting that the phrase ‘can only be given effect if it indicates, as we have suggested, some duty on MINCIT to examine the sufficiency of third-country sales prices in light of an evidentiary preference for domestic sales prices’.⁷⁴ In so holding, the *Colombia — Frozen Fries* award did not follow the integrated approach to Article 17.6(ii) that had initially been set out, that is, ‘draw[ing] a line’ between permissible and impermissible interpretations. Indeed, the arbitrators ultimately aligned their understanding of ‘permissible’ interpretations with the two-step process followed by the initial panel.⁷⁵

While the arbitrators aimed to distinguish their approach from the two-step process introduced by the AB that first rested on identifying if multiple permissible interpretations existed before reviewing a member’s conduct, their justification appears self-contradictory and the application of the standard of review essentially overlapped with the original panel’s interpretation. The order of analysis followed by the arbitrators also did not align with either the structure of Article 17.6(ii) or with the methodology it set out, instead beginning by interrogating Colombia’s proposed interpretation.⁷⁶ Indeed, some of these concerns formed part of the DSB discussions of the award. While the U.S. had praised the arbitrators since their ‘analysis differed from – and implicitly rejected – the past reports of the Appellate Body that expressed disregard for the meaning and importance of Article 17.6(ii)’ and developed an ‘interpretation that was *more consistent with the text* agreed by Members’, it is notable that the interpretation of Article 5.2(iii) specifically was *not* a provision whose interpretation by the AB was a point of concern for the U.S.⁷⁷ Colombia, as respondent, agreed with the approach, while taking issue with the adopted interpretation of Article 5.2(iii) and, likewise, with how the phrase ‘dumped imports’ in Article 3 had been interpreted, arguing the latter ‘afforded no deference to Colombia’s interpretation’.⁷⁸ These comments may indicate the weakness of the singular approach followed by the arbitrators in broadening which interpretations are ‘permissible’. Indeed, this raises questions over how this approach could be applied to interpreting more controversial ADA provisions, including Articles 2.1 and 2.4.2. More broadly, Russia offered scathing criticism of the arbitral award. It suggested the arbitrators had ‘confused the prohibition of the *de novo* review of facts

⁷³ *Id.*, ¶ 4.23.

⁷⁴ *Id.*, ¶ 4.22.

⁷⁵ *Id.*, ¶ 4.24; see Gomula, *supra* note 66, at 517–518.

⁷⁶ Pahis, *supra* note 26, at 304–305.

⁷⁷ Minutes of Meeting WTO Doc. WT/DSB/M/475, *supra* note 20, ¶ 2.22; see Pahis, *supra* note 26, at 307 (making a similar argument).

⁷⁸ Minutes of Meeting WTO Doc. WT/DSB/M/475, *supra* note 20, ¶ 2.7.

before the investigating authority with the task of an adjudicator under Article 3.2 of the DSU’, ‘absolutely disregarded the structure of the Article itself’, and even that a ‘permissible interpretation’ as the first step of analysis would inevitably incorporate a subjective element into the interpretation exercise, which should not be there.⁷⁹

In summary, while the *Colombia — Frozen Fries* award aimed to tackle the underlying US concerns with Article 17.6(ii) and arguably showed willingness to formally break with so-called AB ‘precedent’, it is unlikely that its proposed singular approach will provide a workable framework to address Members’ conflicting views over the ADA. This reflects both the seeming incompatibility between what Article 17.6(ii) intends and the VCLT rules on treaty interpretation achieve – a matter on which the WTO negotiators themselves provided little guidance. Indeed, even setting aside the mutually contradictory claims made in the *Colombia — Frozen Fries* award, the arbitrator’s application of the standard does not mean that the *specific* hermeneutic concerns raised by the U.S., for instance Article 2.4.2, could be tackled. In practice, this suggests that legislative reform of the WTO covered agreements offers a more concrete route to resolving this challenge given the problematic assumptions underpinning Article 17.6(ii).

Members may, accordingly, choose to do this through a wealth of options as treaty-makers. These include amending commitments under the ADA itself to explicitly allow or prohibit controversial anti-dumping practices like zeroing, introducing a ‘special meaning’ to ADA provisions in accordance with Article 31(4) by amending the text, or even adopting authoritative interpretations per Article IX:2 WTO Agreement that recognise specific ‘plausible’ interpretations.⁸⁰ Each of these options would allow Members to concretely establish what is (or is not) ‘permissible’—which panels would subsequently respect. At the same time, they require the difficult negotiations over the ADA and the original bargain struck to be reopened.

IV. *COLOMBIA — FROZEN FRIES* BEYOND THE MPIA: NAVIGATING THROUGH (QUASI-) ADJUDICATION, ARBITRATION, AND ECONOMIC DIPLOMACY

A. *Moving Past the ‘MPIA as Interim Appellate Body’ Question*

For proponents of the MPIA, the successful resolution of the *Colombia — Frozen Fries* dispute is oftentimes cited as evidence that the mechanism could effectively operate as an ‘interim’ or ‘stopgap’ mechanism safeguarding participating Members’

⁷⁹ *Id.*, ¶¶ 2.15–2.18.

⁸⁰ VCLT, *supra* note 19, art. 31(4); Marrakesh Agreement Establishing the World Trade Organization, art. IX:2, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

right to appeal panel reports.⁸¹ In addition to resolving the dispute over Colombia's anti-dumping duties, proponents have referred to how the arbitral proceedings addressed (some of) the procedural concerns raised by the 2020 USTR report on the AB: in particular, keeping to the time limits for issuing reports under the DSU.⁸² Indeed, the *Colombia — Frozen Fries* arbitrators highlighted that the award was notified to 'both' the parties and relevant WTO bodies 'within 90 days of the commencement of the arbitration'.⁸³ One of the arbitrators, Joost Pauwelyn, went further and drew direct comparisons with the speed of AB review:

Like the Appellate Body, the MPIA operates under a strict deadline of 90 days. The first MPIA procedure was completed in 74 days. [. . .] The last time the Appellate Body circulated a report within the 90-day time limit dates from July 2014. The average duration of the last 20 appeals filed before the Appellate Body was 360 days.⁸⁴

These bold statements on the merits of the MPIA generally and the *Colombia — Frozen Fries* award specifically should be nuanced in two respects.

First, it is important to recognise the context within which MPIA arbitration—as a temporary plurilateral appeals process—operates. At the time of writing, there are sixty WTO Members that are parties to the MPIA (if counting each of the twenty-seven EU Member States), including a wide range of both developed and developing country WTO Members.⁸⁵ At the same time, while the MPIA Parties may rely on the mechanism to appeal disputes among themselves, it is not a formal substitute for the right of appeal: nothing in Article 16.4 or 17 DSU places conditions on WTO Members' right to effectively 'appeal to the void' and it remains unclear if Members

⁸¹ See Muhammad Abid Hussain Shah, *Procedural Pluralism and the MPIA Role in WTO Dispute Governance*, 60(2) J. WORLD TRADE 263, 282–283 (2026); Frances Chisomaga Nwadike, *Plurilateral Agreements and the Multilateral Trade System: Lessons from the Past and Present for the Future*, 58(5) J. WORLD TRADE 829, 839–841 (2024) (these views emerged in response to early criticism of the MPIA); E.g., Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, 24(3) J. INT'L. ECON. L. 534, 539–544 (2021) [hereinafter Gao]; MPIA Communication, *supra* note 6, Annex 1, ¶ 18 (referring to lack of clarity over whether the MPIA prevents “[a]ppeals into the void” and that appellants may withdraw from the arbitration owing to unfavourable rulings).

⁸² United States Trade Representative, *supra* note 28, at 26–32.

⁸³ Colombia — Frozen Fries Arbitral Award, *supra* note 16, ¶ 1.14.

⁸⁴ Pauwelyn, *supra* note 7, at 697.

⁸⁵ See Geneva Trade Platform, *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)* (2026), wtoplurilaterals.info/plural_initiative/the-mpia/ (for the latest tally of MPIA Parties).

may waive this right.⁸⁶ Resorting to the MPIA *as such* is only possible where the disputing parties agree to do so in a *particular* instance through an arbitration agreement, as was the case in *Colombia — Frozen Fries*.⁸⁷ Moreover, the creation of the MPIA has not prevented MPIA Parties themselves from resorting to appeals to the void against non-MPIA Parties. Two notable examples include China's appeal of the *US — Safeguard Measure on PV Products (China)* panel report which found no breaches of the Safeguards Agreement by the U.S. safeguards measures,⁸⁸ and the EU's appeal of the *EU — CVD/AD on SSCRFP (Indonesia)* panel report that found against the EU measures targeting so-called transnational subsidies.⁸⁹

Second, there are limited lessons that can be drawn from the *Colombia — Frozen Fries* award and its relevance in demonstrating the institutional potential of the MPIA. In focusing narrowly on the arbitration process, there is a risk that too much is read into the fact that Colombia did not contest the award or that the process was timely. Indeed, Colombia had already noted that it would accept the arbitral award in the Article 25 arbitration agreement. Likewise, while the arbitrators satisfied the deadlines set in their rules of procedure (which notably mirrored the ninety-day deadline in Article 17.5 for the AB), this took place in a context where there is substantially reduced dispute settlement activity within the WTO dispute settlement system and limited use of MPIA arbitration.⁹⁰ It is difficult to extrapolate whether

⁸⁶ DSU, *supra* note 4, arts. 16.4 and 17 (here, a contrast can be drawn with the jurisdictional condition under Art. 3.7 requiring a Member to 'exercise its judgement as to whether action under these procedures would be fruitful' before initiating dispute settlement proceedings); see MPIA Communication, *supra* note 6, ¶ 2 (it remains unclear whether "[i]n such circumstances, the participating Members will not pursue appeals under Articles 16.4 and 17 of the DSU" would amount to a waiver of the Parties' rights to appeal).

⁸⁷ DSU, *supra* note 4, art. 17.5; MPIA Communication, *supra* note 6, Annex 1, ¶ 13 (the main incentives for resorting to the MPIA and not appealing to the void, as such, are based on Parties' institutional interest in preserving a well-functioning dispute settlement system and their self-interest in having continued recourse to the MPIA in future disputes with other MPIA Parties); Pahis, *supra* note 26, at 298–299 (arguably, it is the threat that an appellant suspending proceedings against appellees); see Gao, *supra* note 82 (or appealing a dispute to the void, would be reciprocated in the future, that is, tit-for-tat retaliation).

⁸⁸ Notification of an Appeal by China under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), *United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, WTO Doc. WT/DS562/12 (Sept. 20, 2021).

⁸⁹ Notification of an Appeal by the European Union under Article 16.4 and Article 17.1 of the understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and Under Rule 20(1) of the Working Procedures for Appellate Review, *European Union — Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia*, WTO Doc. WT/DS616/6 (Nov. 25, 2025).

⁹⁰ Award of the Arbitrators, *China — Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS611/ARB25 (July 21, 2025) [hereinafter, China — IPRs Enforcement (EU) Arbitral Award] (the only other dispute formally settled through the MPIA so far); Award of the

the MPIA—as a mechanism or model for a restored AB—would operate under the dispute settlement pressures that were previously placed on its dockets.

In this context, it is also notable that the *Colombia — Frozen Fries* original panel proceedings lasted 735 days between the panel establishment and the circulation of the final report—well beyond the Article 12.9 requirement that “[i]n no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine month”.⁹¹ Assuming the MPIA were a workable model, any contributions to more rapid dispute settlement that it makes are restricted by delays at the initial panel stage. Likewise, the *Colombia — Frozen Fries* arbitration was subject to additional rules of procedure than those applicable to MPIA arbitration *per se*, in particular, benefitting from the early circulation of the panel report to the pool of arbitrators.⁹² There is no guarantee that these innovations will be replicated in future MPIA arbitrations. The successful resolution of one dispute through arbitration is only an anecdote, and reading too much into this fact risks setting unrealistic ambitions on the MPIA.⁹³

At the time of writing, there is simply insufficient evidence to either affirm or dismiss the view that the MPIA is an effective interim solution to the AB crisis.⁹⁴ Indeed, the *Colombia — Frozen Fries* award itself provides limited (if any) support for either proponents or critics of the MPIA’s merits or future role. Nonetheless, the

Arbitrators, *Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/ARB25 (July 25, 2022) (this case was settled through DSU, Art. 25 arbitration outside of the MPIA as Türkiye was not an MPIA party at the time, two of the three arbitrators were selected from the MPIA pool of arbitrators).

⁹¹ DSU, *supra* note 4, Art. 12.9.

⁹² Revised Rules of Procedure, *supra* note 13, ¶. 8; *see infra* Part IV.B (for further discussion).

⁹³ In the Matter of the Maritime Boundary Between Timor-Leste and Australia (The “Timor Sea Conciliation”) (Timor-Leste v. Austl.), Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case N° 2016-10, (May 09, 2018) (indeed, an analogy can be drawn to the early expectations following the successful resolution of the Timor Sea maritime delimitation dispute between Timor-Leste and Australia through conciliation for increased resort to conciliation); Sir Daniel Bethlehem QC, Barrister Twenty Essex, London, Am. Soc’y Int’l L., The 2020 Virtual Annual Meeting: The Greening of International Dispute Settlement? Stepping Back a Little (June 26, 2020). 114 PROC. ANN. 225, 231–232 (2021) (despite early expectations for increased resort to conciliation, in practice, this surge has not materialised).

⁹⁴ *See* Pahis, *supra* note 26, at 297 (warning “[t]he number of disputes that have been adjudicated in this new reality is relatively small, and certainly too small to draw any definite conclusions”); *see also* Nicolas Lamp, *Introduction: Taking Stock of the World Trade Organization and Its Dispute Settlement System at 30*, in RECKONING AND RENEWAL: THE WORLD TRADE ORGANIZATION AND ITS DISPUTE SETTLEMENT SYSTEM AT 30: ESSAYS IN HONOUR OF VALERIE HUGHES 1, 9–11 (Nicolas Lamp ed., 2025) (to see beyond proponents and dissenters, there are other ‘narratives’ on the MPIA).

broader process used in settling the *Colombia — Frozen Fries* dispute remains an underexamined case-study into how WTO dispute settlement has adapted in the wake of the ongoing appointments blockage. We turn to this less-discussed dimension of the dispute next.

B. A Renaissance of Economic Diplomacy in the Interim?

The initial consultations to resolve the *Colombia — Frozen Fries* dispute began in November 2019—only a month before the WTO AB was no longer able to meet its three-member quorum requirement under Article 17.1 of the DSU and effectively became paralyzed. As such, the resolution of the dispute ironically required *increased* bilateral diplomatic cooperation between the two disputing parties over the right course of action, alongside broader plurilateral negotiations among the initial MPIA parties to set up the interim arbitral mechanism.

In this sense, the *Colombia — Frozen Fries* proceedings reflect a dynamic that is characteristic of dispute settlement during the GATT era: namely, where ‘disputes procedure never really succeeded in establishing and institutionalizing independent authority’.⁹⁵ As resort to MPIA arbitration depends on the explicit choice of disputing parties and the threat of appeals to the void is only removed once an Article 25 agreement is concluded, in principle at least, even MPIA parties maintain their *ex ante* control over dispute settlement ‘activities’ until the agreement is concluded.⁹⁶ This lack of ‘independent authority’, to borrow the phrase from Hudec in describing the requirement for GATT panel reports to gain a positive consensus of support to be adopted, manifests itself in two respects within the current WTO dispute settlement process: *directly* through the more active role played by diplomatic forms of dispute settlement within international trade law, and indirectly for MPIA parties through their *ex ante* choices to innovate in setting out and managing the MPIA arbitral process.⁹⁷

⁹⁵ ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 190 (1975).

⁹⁶ See Nicolas Lamp, *Arrested norm development: The failure of legislative-judicial dialogue in the WTO*, 38(3) LEIDEN J. INT’L L. 570, 570–571 and 589–591 (2025) (The AB crisis has thus revealed that Members can re-assert their control over two central ‘activities’ involved in WTO dispute settlement without altering the system: (i) the dispute settlement ‘resolution’ process by suspending or continuing proceedings; and (ii) by exercising a choice over whether to defer interpretation to the original panel, appeal to arbitrators, or exert their own interpretations by appealing to the void. For the distinction between both activities, (note the argument by Lamp)).

⁹⁷ See Gregory Messenger, *Free Trade Agreements as Sites of Economic Diplomacy: Agreeing Common Standards for Sustainable Development*, 24(2) WORLD TRADE REV. 194 (2025); Gregory Messenger, *Mitigating the Rise of Unilateralism: Lessons from Forestry Management*, 27(2) J. INT’L ECON. L. 223, 224–225 and 234–239 (2024); Christian Delev, *Walking the Talk? Assessing EU-*

The active role of bilateral economic diplomacy as a form of international dispute settlement is well-manifested in the *Colombia — Frozen Fries* proceedings. While in a narrow sense the formal bilateral consultations between the disputing parties under Article 4 did not resolve the dispute *as such*, these provided important opportunities for communication between the two disputing parties, particularly in identifying the subject-matter of the dispute itself.⁹⁸ Maintaining such cooperation became important, as the disputing parties agreed *ex ante* to: (i) foregoing their right to appeal to the now-defunct AB; and (ii) linking the WTO panel quasi-adjudication process to the subsequent MPIA arbitration. Maintaining such levels of cooperation, in other words, resembles the intricate relationship between diplomacy and adjudication generally found within inter-State dispute settlement outside the WTO.⁹⁹ Moreover, following both the MPIA arbitrators and the compliance panel issuing their decisions against it, Colombia agreed to bring its anti-dumping duties in line with the ADA and eventually withdrew its measures.¹⁰⁰ Okim and Akpambgo suggest that this can be contrasted with the oftentimes strong backlash against, and delayed compliance with, AB reports that occurred prior to the U.S. blockage of appointments.¹⁰¹

Latin America FTA Trade Committees as Drivers of Sustainability Action, 30(SI) EUR. FOREIGN AFFR. REV. 135 (2025) (on the nature and functioning of both forms of diplomacy within the WTO and international trade law more broadly); (it should be noted, however, that economic and regulatory diplomacy already permeate within WTO decision-making and international trade law-making more broadly).

⁹⁸ See Hélène Ruiz Fabri, *The Relationship between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the EC–Bananas Dispute*, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 87, 100–105 (Laurence Boisson de Chazournes et al. eds., 2012) (making a similar point about the role of consultations per DSU).

⁹⁹ See generally, Pablo Sandonato de León, *Diplomatic and Judicial Means of Dispute Settlement and How They Got Along In The Pulp Mills Case*, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 71, 79–855 (Laurence Boisson de Chazournes et al. eds., 2012).

¹⁰⁰ Minutes of Meeting WTO Doc. WT/DSB/M/475, *supra* note 20, ¶ 2.2; Minutes of Meeting WTO Doc. WT/DSB/M/507, *supra* note 24, ¶¶ 2.1–2.5.

¹⁰¹ Ikanna Okim & Odina Akpambgo, *The Multi-Party Interim Appeal Arbitration Arrangement: Evolution or Makeshift of the World Trade Organization's Appellate Body?*, 17(1) TRADE L. & DEV. 160, 176–177 (2025) (while Okim and Akpambgo further suggest that this may be owed to Colombia's status as a developing country, it is worthwhile to also highlight that China — as arguably the second largest economy in the world, albeit a self-declared developing country — similarly agreed to comply with the China — IPRs Enforcement (EU) Arbitral Award despite arguing that the MPIA arbitrators acted inconsistently with DSU, art. 3.2); Dispute Settlement Body, *Minutes of Meeting: China — Enforcement of Intellectual Property Rights (DS611)*, ¶ 2.4, WTO Doc. WT/DSB/M/505 (Oct. 14, 2025) (note, however, the comments by the EU in the same meeting (at para. 2.5)).

The bilateral economic diplomacy between Colombia and the EU was seemingly supplemented by *plurilateral* support, as well as pressure, from the broader WTO membership. In the shadow of the dispute, the creation of the MPIA as an arbitral mechanism itself was signalled in the Davos statement released following an informal WTO ‘ministerial gathering’ in January 2020,¹⁰² and formally announced in a statement by nineteen Members in April 2020.¹⁰³ The diplomatic negotiations around the creation of the MPIA and selection of the pool of arbitrators accordingly established the arbitration mechanism that Colombia and the EU would subsequently rely on to address Colombia’s concerns with the initial panel report. At the same time, third parties also placed pressure on the disputing parties to ensure the peaceful resolution of the dispute following the arbitral award being issued. During the DSB discussion of the arbitral award, for instance, sixteen third-party Members made statements either welcoming Colombia’s commitment to ensure the WTO’s -compatibility of its measures, highlighting what they saw as the merits of the MPIA process, or a combination of the two.¹⁰⁴

Since the MPIA is formally established under Article 25 of the DSU, Colombia and the EU were able to exercise their autonomy in setting the procedural rules of the arbitration process. In so doing, their arbitration agreement adopted a range of additional procedural innovations that went beyond the MPIA procedure (that is, MPIA-plus procedures).¹⁰⁵ These MPIA-plus procedures reflect the assertion of the disputing parties in ensuring that the process is deemed ‘socially legitimate’, that is, that the disputing parties themselves, vouch for the process and see it as being both politically as well as legally authoritative.¹⁰⁶ For present purposes, it is useful to consider two noteworthy innovations made by the disputing parties concerning: (i)

¹⁰² Federal Councillor Guy Parmelin, Informal WTO Ministerial Gathering, Davos, 24 January 2020: Personal Concluding Remarks by the Chair, Federal Councillor Guy Parmelin, Switzerland (Jan. 24, 2020), <https://www.news.admin.ch/newsd/message/attachments/60028.pdf>.

¹⁰³ MPIA Communication, *supra* note 6.

¹⁰⁴ See Minutes of Meeting WTO Doc. WT/DSB/M/475, *supra* note 20, ¶¶ 2.10–2.14, 2.19, and 2.23–2.33 (for the statements by Australia, Brazil, Canada, Chile, China, Costa Rica, Guatemala, Hong Kong, China, Iceland, Japan, New Zealand, Norway Peru, Singapore, Switzerland and Uruguay in WTO Dispute Settlement Body).

¹⁰⁵ See JOHN MERRILLS & ERIC DE BRABANDERE, *Arbitration*, in MERRILLS’ INTERNATIONAL DISPUTE SETTLEMENT 132 (7th ed., 2022); Chester Brown, *Mock Debate: Is the Primacy of the International Court of Justice in International Dispute Settlement under Threat? – Report by Chester Brown*, 110 AM. SOC’Y. INT’L L. 191 (2016) (on the difference between arbitration and adjudication within inter-State dispute settlement and the role of party autonomy in the latter).

¹⁰⁶ See Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34(4) OXFORD J. LEGAL STUD. 729, 741–742 (2014) (on the meaning of social legitimacy within international law).

time management and satisfying the ninety-day deadline, and (ii) deferring central organizational decisions to the discretion of the arbitrators.¹⁰⁷

First, to ensure the feasibility of the 90-day deadline, the disputing parties allowed the initial *Colombia — Frozen Fries* panel report to be circulated early to the entire MPIA pool of arbitrators prior to the composition of the specific arbitration.¹⁰⁸ This afforded the arbitrators additional time to gain familiarity with the issues raised under the dispute prior to receiving written submissions from the disputing parties and third-party interveners.

Second, the disputing parties agreed to allow arbitrators to “take appropriate organizational measures to streamline the proceedings”, including “decisions on page limits, time limits, and deadlines as well as on the length and number of hearings required”.¹⁰⁹ The arbitrators accordingly set “indicative guidelines” on the length of submissions by the disputing parties and third-party interveners.¹¹⁰ In granting the arbitrators greater flexibility, it is notable that the disputing parties were concerned with ensuring that the arbitration process was seen as publicly legitimate by the broader membership and, at the same time, reflective of their private interests. This became evident during the DSB deliberations. While both disputing parties highlighted that such restrictions were “a useful method of streamlining proceedings” and the process “confirmed that appeal proceedings in the WTO could be conducted swiftly and efficiently”, Colombia complained that such restrictions were useful “as long as it was not so strict as to limit a Member’s right to appeal rather than simply streamlining the arguments, which had been precisely the case in this appeal.”¹¹¹

While the *Colombia — Frozen Fries* dispute was neither complex, nor complicated – involving only two disputing parties and affecting a substantial proportion of EU frozen fries’ exports to Colombia – its resolution reveals that WTO dispute settlement following the AB crisis has become far more heterogenous. To address the issue, the disputing parties resorted to a wide gamut of inter-State dispute settlement forms, including negotiation, quasi-adjudication, and arbitration. Underpinning this diversity of forms, however, is the reassertion of economic diplomacy as the source of authority within the WTO dispute settlement system. The restoration of a functioning AB appears distant given the range of sensitive

¹⁰⁷ See Pauwelyn, *supra* note 7, 697–701 (for a more detailed outline of innovations made by the disputing parties in the Revised Rules of Procedure, *supra* note 13).

¹⁰⁸ Revised Rules of Procedure, *supra* note 13, ¶ 4(i).

¹⁰⁹ *Id.*, ¶ 12.

¹¹⁰ Colombia — Anti-Dumping Duties: Award of the Arbitrators: Addendum, *supra* note 67, Annex 2, at 13.

¹¹¹ Minutes of Meeting WTO Doc. WT/DSB/M/475, *supra* note 20, ¶¶ 2.4 and 2.9.

disputes ‘appealed to the void’, the ongoing disregard for WTO law by the second Trump administration, and the persistent multilateral negotiations deadlock visible during the recent 14th WTO Ministerial Conference in Yaoundé.¹¹² At least in the medium-term, the renaissance of consensual economic diplomacy as the *locus* of WTO dispute settlement authority will likely persist.

V. CONCLUDING REFLECTIONS

While the *Colombia — Frozen Fries* proceedings have been highly lauded by commentators and WTO Members alike, in practice they reveal the bumpy road ahead to reforming the WTO DSU. As this article has suggested, the dispute demonstrates the limits of relying on judicial solutions and experimentation to address the ongoing crisis. In terms of addressing Members’ substantive concerns, a close reading of the *Colombia — Frozen Fries* arbitral award has not developed a workable approach towards construing Article 17.6(ii) of the ADA and its application of the ‘singular’ approach shows limited potential in overturning the *de facto* prohibition on zeroing established in AB jurisprudence.

Moreover, rather than offering a short-cut to resolving the AB crisis and broadly preserving Members’ right to appeal, the *Colombia — Frozen Fries* proceedings reveal a broader shift within WTO dispute settlement: a more active role for economic diplomacy and the Member-driven management of judicial proceedings. It remains to be seen how the WTO membership will navigate through this moment of turbulence and innovation.

¹¹² Peter Foster & Michael Pooler, *WTO reform talks collapse over US-Brazil stand-off*, FINANCIAL TIMES (Mar. 30, 2026) <https://www.ft.com/content/ac711230-3ee6-467f-824a-3a74d356076c?syn-25a6b1a6=1>.