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THE MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT: EVOLUTION OR MAKESHIFT OF THE WORLD TRADE ORGANIZATION'S APPELLATE BODY?

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The United States' veto of the appointments of Members of the Appellate Body of the World Trade Organisation (WTO) led to a systemic gridlock in the resolution of multilateral trade disputes within the WTO. To salvage the situation, some Members of the WTO established the Multi-Party Interim Appeal Arbitration Agreement (MPIA Agreement) under Article 25 of the Dispute Settlement Understanding as a temporary machinery for appellate review. This paper situates the MPIA within the ideological foundations of the WTO and the broader international dispute settlement systems while critically examining the efficacy, efficiency, and prospects of the MPIA as a viable substitute for the WTO Appellate Body. By analysing the content of the Agreement and some decisions of the MPIA, as well as political and academic sentiments, this paper argues that the MPIA is more makeshift than evolutionary. This work concludes that while the MPIA preserves appellate review to an extent in the short term, the WTO needs a more permanent, enduring reform for a credible and effective appellate system.

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I. INTRODUCTION

Against the backdrop of World War II, international trade became a means to not only foster economic cooperation amongst States but also to catalyse peaceful and diplomatic relations amongst formerly hostile nations, as well as facilitate regional integration. The World Trade Organization (WTO) was then founded to solidify these goals by enmeshing them into its covered agreements. The WTO's covered agreements not only carried on the ambitions of failed predecessors; they pioneered many areas, including trade in services, intellectual property, and indeed the nucleus of this article: trade dispute settlement. With great appreciation of the purpose of the WTO's Appellate Body, its recent impasse has caused a deadlock in multilateral trade dispute settlement and necessitated a reimagination and reinvention of the WTO's appellate system — its crown jewel — into the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).

In this essay, we clarify the history of the MPIA, provide an evaluation of its inner workings, offer a reasonable critique of its ideologies, and attempt to foreshadow its future.

II. BACKGROUND

A brief history of the predecessors of the MPIA is in order.

The founding of the WTO in 1995 marked the birth of multilateral trade relations under a rules-based system since the end of the Second World War. It is so momentous because it arrived with a self-contained Dispute Settlement System

(DSS) through which its Members[1] may resolve their trade disputes.[2] The DSS is exclusively organised under the Dispute Settlement Understanding 1994 (DSU) and is a shift from the General Agreement on Tariffs and Trade (GATT 1947), which was adopted on an opt-in basis.

The DSU established a double-tiered adjudication procedure much similar to those in some domestic judicial systems: at the first instance, a panel; at the second instance, an Appellate Body.[3] Needless to say, adjudication would of course have been preceded by bilateral or multilateral negotiations between the disputing Members. Whereas the panels are *ad hoc*, and their composition differs for each dispute — depending on the preferences of the Members — the Appellate Body has a fixed composition, and its members are appointed through positive consensus by the Dispute Settlement Body (comprising all Member states) to serve each a four-year term,[4] which brings us to the crux of this article.

The germ of this article is that the United States of America (US) has blocked appointments to the Appellate Body since 2017, causing an impasse in international trade dispute resolution as never before seen.[5] But a look at history reveals that contrary to popular perception, the US' anti-WTO sentiments preceded the first term of President Donald Trump's Republican government, and even former President Barack Obama's administration had been very critical of the WTO and its methodologies. In fact, Obama's administration had opposed the WTO since as early as 2011, refusing the reappointment of Jennifer Hillman, and in 2016, blocking the reappointment of South Korean Appellate Body Member Seung Wha Chang, who sat on many cases that ended with decisions adverse to US interests.[6] Thereafter, the operations of the Appellate Body were frozen in 2019 with the retirement of two of its last three members.

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[1] *See* WTO, *Members and Observers* (Aug. 30, 2024), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm ('Members' here refers to the 166 contracting parties who hold WTO membership and a few of whom are parties to the MPIA).

[2] Louise Johannesson & Petro C. Mavroidis, *The WTO Dispute Settlement System 1995-2016: A Data Set and Its Descriptive Statistics*, 51(3) J. WORLD TRADE 357-408 (2017).

[3] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1 & 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 U.N.T.S. 401 [hereinafter WTO DSU].

[4] *Id.* art. 17.

[5] *The WTO Appellate Body Crisis – a Way Forward?*, CLIFFORD CHANCE (Nov. 19, 2019), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/the-wto-appellate-body-crisis-a-way-forward.pdf.

[6] *Id.*

The reasons for the blockage are very political. The US has accused the WTO Appellate Body of judicial activism, of unnecessary use of *obiter dicta* in its decisions, of rendering decisions that sabotaged the US's core values, of violating the 90-day time limit for appeals, and of its liberal interpretation of the WTO covered agreements, chief of which is the Agreement on Subsidies and Countervailing Measures (ASCM).[7] But these criticisms are also ideological: the US continues to feel like a sore loser due to the decisions in *US—China AD/CVD*[8] (not least because it lost to its arch-rival, China) and *US—Hot Rolled Lead*,[9] which refuted key principles of US economic and industrial policy such as corporate economic autonomy and nation-State autonomy.[10] The US value presupposes that there should be little or no government interference in the market and that market success should be dictated solely by the forces of demand and supply. This value strikes at the heart of US engagement with the WTO, and it is a little mysterious that the Appellate Body's disregard constitutes an unforgivable sin from the perspective of the US. In vetoing appointments, the US hoped to assert its power and values on the multilateral plane by crippling a crucial element of the WTO's DSS. The vetoes have also been employed by the US as a strategic device to deprive a winner at the Panel of the fruits of their labour and turn their victory into a pyrrhic one by appealing to the non-functional Appellate Body (appealing into the void).[11] The US used this tactic recently against China in *US—Origin Marking Requirement*.[12]

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[7] Chad P. Bown & Soumaya Keynes, *Why Did Trump End the WTO's Appellate Body? Tariffs*, PETERSON INST. INT'L. ECON. (Mar. 4, 2020), https://www.piie.com/blogs/trade-and-investment-policy-watch/2020/why-did-trump-end-wtos-appellate-body-tariffs.

[8] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011) [hereinafter *US—Anti-Dumping and Countervailing Duties (China)(ABR)*].

[9] Panel Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DS138/R (adopted June 7, 2000) [hereinafter *US—Lead and Bismuth II*]; Appellate Body Report, *US—Lead and Bismuth II*, WTO Doc. WT/DS138/AB/R (adopted June 7, 2000).

[10] *See* Dan Sarooshi, *Sovereignty, Economic Autonomy, the US, and the International Trading System: Representations of a Relationship*, 15(4) EUR. J. INT'L. L. 651, 651-676 (2004) [hereinafter Sarooshi 2004]; DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 95-100 (2005); Dan Sarooshi, *The Future of the WTO and its Dispute Settlement System*, 2(1) INT'L. ORG. L. REV. 129 (2005) [hereinafter Sarooshi 2005].

[11] Mansi Khanna, *Multi-Party Interim Appeal Arbitration Arrangement: Savior of Multilateralism or Instrument of US Influence?,* INDIAN J. PROJ., INFRASTR. & ENERGY L. (Mar. 26, 2025), https://ijpiel.com/index.php/2025/03/26/multi-party-interim-appeal-arbitration-arrangement-savior-of-multilateralism-or-instrument-of-us-influence/.

[12] Panel Report, *United States—Origin Marking Requirement*, WTO Doc. WT/DS597/R (Circulated Dec. 21, 2022); Mona Paulsen, *Globalization, National Security, Non-Violation Nullification or Impairment, US-China Trade Relations, WTO Disputes*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG, (Jan. 30, 2023), https://ielp.worldtradelaw.net/2023/01/the-curious-case-of-us-self-judging-part-2/.

It is no surprise that, to overcome this paralysis, a subset of WTO Members entered into the MPIA in 2020, under the auspices of Article 25 of the DSU, which empowers WTO Members to employ arbitration as an independent means of dispute settlement.[13] To that effect, the MPIA is the interim successor of the WTO Appellate Body, and it indeed has hit the ground running. But if anything is certain, it is that the MPIA represents a shift from a multilateral institution hegemonised by the influence of key superpowers like the US and the European Communities (EC). Although some scholars argue that the MPIA may, on another look, be of a bilateral nature — with the EC on one side and all other nation-states on the other — this thesis is given equal examination in this article as well.

In this article, we fractionate the inner workings of the MPIA, including whether it inherited elements of the Appellate Body's ideologies (Part III); compare the MPIA with co-existing fora for the settlement of international disputes (Part IV); critically analyse the negative and positive aspects of the MPIA, especially in light of the hallmarks of a judicial system that combines party autonomy and systemic values (Part V); offer predictions of the future of the MPIA and its longevity (Part V); and, lastly, lay out our recommendations and conclusions (Part VI).

III. STRUCTURE AND IDEOLOGICAL FOUNDATIONS OF THE MPIA

As aforenoted, the MPIA is an interim mechanism for the resolution of appeals in the absence of the Appellate Body. Although it is an arbitration, it is technically convened under the auspices of the WTO framework, and to that end, it could be safely presumed to have inherited the WTO's ideologies and systemic foundations, not least global trade liberalisation — its theology, according to Sarooshi.[14] Indeed, as characterised by a group of 57 WTO Members, the MPIA aims to "preserve and replicate the substantive and procedural aspects of the WTO's appeal arbitration procedure, including independence and impartiality, while enhancing efficiency."[15] However, in practice, and unlike under the Appellate Body, the MPIA is a largely political agreement that must be individually invoked in each case between the parties to a dispute by submitting a joint notification to the DSB under Article 25

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[13] Bowon Choi, *Three Years of the Multi-Party Interim Appeal Arbitration Arrangement: An Interim Evaluation of Arbitration as Means to Appeal WTO Panel Reports*, WOLTERS KLUWER ARB. BLOG, (Aug. 11, 2023), https://arbitrationblog.kluwerarbitration.com/2023/08/11/three-years-of-the-multi-party-interim-appeal-arbitration-arrangement-an-interim-evaluation-of-arbitration-as-a-means-to-appeal-wto-panel-reports/.

[14] Sarooshi 2004, *supra* note 10, at 85.

[15] *Multi-Party Interim Appeal Arbitration Arrangement*, GENEVA TRADE PLATFORM https://wtoplurilaterals.info/plural_initiative/the-mpia/ [hereinafter MPIA].

of the DSU.[16] The secondary goal of the MPIA has been described as "to test the waters with possible innovations to enhance the procedural efficiency of appeal proceedings."[17] Therefore, the MPIA is the Appellate Body's successor and came in the wake of increasing geopolitics and the trade war between the US and China.[18] However, although the US has not become a party to the MPIA, the forum could see itself busy in the coming months since China has filed — as of April 10, 2025 — two new complaints against US tariffs at the WTO, whereas Canada and the EU have each filed one.[19]

The structure of an MPIA appeal implicates a number of stages.[20] First, a WTO Member that intends to use the MPIA structure must join by issuing a

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[16] *See* EUR. COMM'N., *Multilateral trading order strengthened as UK joins interim appeals system*, (June 26, 2025) https://policy.trade.ec.europa.eu/news/multilateral-trading-order-strengthened-uk-joins-interim-appeals-system-2025-06-26_en (the following countries are parties to the MPIA: Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, European Union, Guatemala, Hong Kong China, Iceland, Japan, Macao China, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, The Philippines, Singapore, Switzerland, Ukraine, and Uruguay, although all WTO Members are welcome to join. It was announced on 26 June 2025 that the UK joined the arrangement).

[17] Joost Pauwelyn, *The WTO'S Multi-Party Interim Appeal Arbitration Arrangement (MPIA); What's New?*, 22(5) WORLD TRADE REV. 693 (2023) [hereinafter Pauwelyn].

[18] *See* Emma Rossiter & Sam Hancock, *US pauses higher tariffs for most countries after market havoc, but hits China harder*, BBC (Apr. 10, 2025), https://www.bbc.co.uk/news/articles/c5y66qe404po [hereinafter Rossiter & Hancock] (since taking office in 2025, President Trump announced tariffs on about 60 of America's trading partners including China. When China retaliated with an 84% tariff, the President lowered tariffs on all countries to 10% but increased the tariffs slammed on China to 145%. China has retaliated with 125% tariffs. This no doubt will have a tremendous effect on trade liberalisation and multilateral trading relations. In particular, the tariff battle has also rattled the US and global stock markets with an air of unpredictability, leading to panic trading); *see* JOINT ECON. COMM., *Did Trump Create or Inherit the Strong Economy*, https://www.jec.senate.gov/public/_cache/files/2c298bda-8aee-4923-84a3-95a54f7f6e6f/did-trump-create-or-inherit-the-strong-economy.pdf (as earlier noted by a joint economic committee of the US Senate, American and Chinese citizens are the ultimate casualties of US-China tariff wars).

[19] Olivia Le Poidevin, *China files new complaint to WTO over Trump Tariffs*, REUTERS, (Apr. 9, 2025) https://www.reuters.com/markets/asia/china-expresses-grave-concern-wto-about-reckless-trump-tariffs-2025-04-09/ [hereinafter Poidevin]; Martin McElwee et al., *Trump's tariffs: WTO consultations requested by China, Canada and the European Union*, FRESHFIELDS RISK & COMPLIANCE (Apr. 9, 2025), https://riskandcompliance.freshfields.com/post/102k86k/trumps-tariffs-wto-consultations-requested-by-china-canada-and-the-european-un.

[20] *See* 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 ¶4, WTO Doc. JOB/DSB/1/Add.12 (Apr.

communication, and this is only necessary if they were not one of the original MPIA parties. This notification must be issued within 60 days of the constitution of the Panel in the dispute.[21] However, it has been held in *Turkey—Pharmaceutical Products*[22] that non-MPIA parties, who retain WTO Membership, like Turkey, could enter into an *ad hoc* arbitration agreement incorporating the rules of Article 25 of the DSU and use the MPIA institution, including its standing pool of arbitrators.[23] However, in the second phase, the MPIA parties still need to enter into a separate appeal arbitration agreement for each case, and this is the markedly different feature from the Appellate Body procedure, which automatically had jurisdiction over every appeal from the Panel.

This paper describes the requirement of voluntariness to use the MPIA on a case-by-case basis as a 'double-edged' sword. It is desirable because it is important that Member States seeking to use this mechanism are able to exercise their discretion by voluntarily submitting to the jurisdiction of the MPIA, noting that the decision of the MPIA is binding and final. This is a privilege not attainable under the jurisdiction of the Appellate Body, which exercised compulsory jurisdiction over the Members. On the flip side, this voluntary nature of the MPIA jurisdiction might have the ultimate effect of working against the free trade objectives of the WTO. A party can assess the strength of its defence and, realising that there is a good chance of the decision of the Panel being overturned on appeal, might refuse to submit to the MPIA. The absence of a compulsory second-line review in such cases and subsequent others might weaken Members' overall trust in the WTO DSS, which is a situation the MPIA was created to avoid in the first place. This begs the question of whether the MPIA is actually effective in preserving the values of the WTO by effectively and efficiently resolving disputes.

As a third step in the MPIA procedure, either party at the Panel may request the suspension of the Panel up to 10 days before the Panel's final report is circulated,

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30, 2020), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504 [hereinafter Statement on Practises and Procedures under MPIA]; Pauwelyn, *supra* note, 17; *see also,* Recourse to Art. 25 of the DSU, Constitution of the Arbitrator, Note by the Secretariat, *Colombia—Anti Dumping Duties on Frozen Fries from Belgium, Germany, and The Netherlands*, WTO Doc. WT/DS591/8 (Article 25 Arbitrator Composed Oct. 12, 2022) (note who sat in the first MPIA appeal).

[21] Pauwelyn, *supra* note, 17.

[22] Art. 25 DSU Arbitration Award, *Turkey—Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/ARB25 (July 25, 2022) [hereinafter *Turkey—Pharmaceutical Products (EU)(ABR)*].

[23] *See* WORLDTRADELAW.NET, *WTO Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, https://www.worldtradelaw.net/static.php?type=public&page=mpia (provides a list of the arbitrators. The MPIA has a standing pool of 10 arbitrators selected by consensus of all MPIA parties, and three of whom sit on appeal tribunals).

which suspension will then pave the way for the MPIA appeal. Fourth, any party may file a notice of appeal alongside its written submission within 20 days of such suspension of Panel proceedings, and the other party would then have five days to make similar submissions. Fifth, appellee and third-party submissions are filed within 18 and 21 days, respectively, and the oral hearing is conducted between days 30 and 45. Finally, the MPIA has 90 days from the commencement of the appeal to issue its award, which is notified to the DSB and automatically binding on the parties. This automatic bindingness is a feature introduced by Article 25(3) of the DSU and MPIA Annex 1(5). However, it is an acute improvement from the GATT 1947 situation, where panel reports had to be adopted by consensus, giving the losing party the opportunity to veto the adoption and to be a judge in their own case. It also improves on the WTO position where Panel and Appellate Body reports required adoption. It can be argued, however, that the involvement of the states in the final step of the dispute resolution process through reverse consensus is one of the unique features of the WTO DSS and indeed one reason it has been eulogised as a politics-free, Member-driven system.

The reverse consensus feature reflects an image of the WTO as power-decentralised, neutral, and cooperative, as all Members have the opportunity to refuse the adoption of a decision cooperatively, absent which the DSB is obliged to adopt the same. In the MPIA system, the Members are helplessly at the mercy of the arbitrators of the MPIA, with no opportunity to check and balance the decision of the MPIA. It is especially disadvantageous for the signatories to the MPIA because of the presence of elements of judicial precedent in the MPIA adjudication process. The implication of this is that the decisions of the MPIA are bound to be followed in future cases without any opportunity for the Members to influence the same. As expected, the attendant demerits of a judicial precedent system would soon become the plight of the WTO as more inflexible legal rules emerge, making the MPIA a lawmaker, contrary to the spirit and intendment of the DSU[24] as discussed in Part V of this article, and one of the evils the US has accused the Appellate Body of perpetuating.[25] That may be, but the absence of a requirement of adoption (and a block by reverse consensus) assures that MPIA awards bear the same finality and bindingness of

[24] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996), 97 (more so contrary to its predecessor, the Appellate Body stated that "WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world," although it also then stated that it seeks to achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system (paragraph 32)).

[25] WTO DSU Art. 3.2. states "…[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

arbitral awards in domestic and international law, since there must be an end to litigation.

In the moment, although the MPIA remains relatively youthful, it has been signed by more developing and least developed countries, a suggestion of its more neutral and decentralised nature than the WTO's Appellate Body. This may be justified by reference to empirical figures and a game theory rhetoric. Out of the WTO's 166 Members, 113 have never brought a case against another Member (as of the time of writing), and 101 have never been the subject of litigation.[26] This last category may fall into a classification of countries that simply 'don't use' the DSS – so they 'don't care'.[27] By contrast, the MPIA now has a membership of 57 countries (if all EU countries are counted individually) and covers 57.6% of world trade.[28] Professor Pelc argues that a WTO member's decision to participate in the MPIA depends on a cost-benefit analysis, specifically, whether the member expects to bring more trade disputes against others than it expects to have brought against itself.[29] As Professor Pelc observes, joining the MPIA arrangement is a two-way street: it can help aggrieved countries obtain redress, but it can also exert a high price on serial violators by exposing them to politically costly challenges. Considering this thesis, developing countries have a lot more to gain than lose by joining the MPIA, at least in their own assessment; after all, the WTO itself reports that developing country Members accounted for 75% of all complaints in the WTO in a certain year. Chances are low that they would allow the US to take away their ability to bring complaints and pursue them up to the appellate level against developed country Members, which is usually their greatest bargaining chip for forcing the latter countries to come to the negotiating table. This accounts for the far greater membership from developing countries in the MPIA than developed countries – 21 of the 29 MPIA parties[30]

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[26] Chris Horseman, *Analysis: Could MPIA become new default WTO appeals system?*, BORDERLEX (July 16, 2025), https://borderlex.net/2025/07/16/analysis-could-mpia-become-new-default-wto-appeals-system/ [hereinafter Horseman].

[27] *Id.*

[28] Directorate-General for Trade and Economic Security, *Multilateral trading order strengthened as UK joins interim appeals system*, EUROPEAN COMMISSION (June 26, 2025), https://policy.trade.ec.europa.eu/news/multilateral-trading-order-strengthened-uk-joins-interim-appeals-system-2025-06-26_en.

[29] Krzysztof Pelc, *Institutional Innovation in Response to Backlash: How Members Are Circumventing the WTO Impasse*, REV. INT'L. ORG. (2024) [hereinafter Pelc].

[30] *See* WORLDTRADELAW.NET, *WTO Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, https://www.worldtradelaw.net/static.php?type=public&page=mpia; *See supra* note 28 [the current list of MPIA parties (29, counting the EU and its 27 member states as one) is as follows: Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, European Union, Guatemala, Hong Kong, China, Iceland, Japan, Macao, Malaysia, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Paraguay, Peru, Philippines,

outside the EU alone are listed as developing countries under WTO rubrics.[31] When compared with the WTO figures, only two-thirds (66%) of the WTO's Members are developing countries,[32] as opposed to 72% in the MPIA. Whilst this disparity may appear marginal, it is not, as the developing Members of the WTO are committed to an all-inclusive trade deal, whereas the developing Members of the MPIA have committed to appellate-level dispute settlement. Besides, there was an obvious disparity in participation in the WTO dispute settlement, as while developing Members are the majority of the WTO system, the same is not true of their participation in its dispute settlement system.[33] This may have given the system the shimmer of a tool for the exploitation of developing Members by developed Members, one where developed Members stand to make the greatest gains.

This may overall be reflective of the developing countries' grievance that the WTO regime is hegemonised by the US and the contestation of its values,[34] and the perception that the MPIA is a breath of fresh air in terms of neutrality. Indeed, the current MPIA composition appears more decentralised, given that its developing country Members far outnumber its developed country Members.

IV. COMPARISON WITH EXISTING SYSTEMS IN PUBLIC INTERNATIONAL LAW, INVESTOR-STATE DISPUTE SETTLEMENT, AND WTO APPELLATE BODY

The MPIA is no novelty, nor does it exist in a vacuum. In fact, it draws some similarities in principle and practice from pre-existing international dispute settlement systems, including permanent courts like the International Court of Justice (ICJ) and the European Court of Justice (ECJ), *ad hoc* arrangements like Investor-State arbitration generally, and investor-State arbitration under institutional settings like the International Centre for Settlement of Investment Disputes

Singapore, Switzerland, Ukraine, Uruguay. This list excludes the United Kingdom, which recently joined the arrangement].

[31] *See* WTO, *List of Developing Countries' Trade Facilitation Agreement Database* (2025), https://www.tfadatabase.org/en/developing-countries (the following Members are developing countries under WTO rubrics: Benin, Brazil, China, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Hong Kong, China, Macao, China, Malaysia, Mexico, Montenegro, Nicaragua, Pakistan, Paraguay, Peru, Philippines, Singapore, Ukraine, and Uruguay).

[32] WTO, *Developing Countries; How the WTO deals with the special needs of an increasingly important group* (2025), https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf.

[33] WORLD TRADE ORGANIZATION, HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM Ch. 11 (2017), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm [hereinafter WTO Handbook].

[34] Heinkelmann-Wild et al., *The Cooptation Dilemma: Explaining US Contestation of the Liberal Trade Order*, 4(2) GLOB. STUD. Q. 1 (2024).

(ICSID), and indeed the WTO Panel and Appellate Body themselves. We consider some of these similarities and some deviations in turn.

A. Party Autonomy

The most prominent difference between the MPIA and the Appellate Body is the opt-in nature of the MPIA arrangement; in other words, WTO Members who have not opted into the MPIA arrangement cannot be parties to it (except when they sign the *ad hoc* appeal arbitration agreement). While this is an abrogation of the WTO's status as a single undertaking — taking backward steps to the GATT *à la carte* offering — and the Appellate Body's compulsory jurisdiction over appeals, it is a representation of the voluntary nature of international adjudication reflected in arbitration, essentially, consent.[35] Hence, WTO Members who wish to use the MPIA must sign an *ad hoc* appeal arbitration agreement even if they are MPIA parties. This resembles the arbitral clauses used in Investor-State Dispute Settlement (ISDS) and compromissory clauses or special agreements used in international permanent courts. In addition to the dangers of a purely voluntary adjudicatory system, as already discussed in this paper, it discourages reciprocity within the WTO institution, which is one of its key values as a single undertaking. The opt-in system creates obligations (especially when such obligations are created or emphasised by the arbitral tribunals) on some states which are parties to the MPIA, towards all States, including states which are not parties and which are not bound to reciprocate in those circumstances; it essentially creates a free-riding situation. Whilst MPIA parties can be sued at the MPIA by non-MPIA parties who sign the appeal arbitration agreement, MPIA parties cannot sue non-MPIA parties who have not signed the appeal arbitration agreement. This will also upset the balance of reciprocal concessions as powered by the WTO's single undertaking package. Reciprocity is reflected in a balance of rights and obligations in terms of different multilateral agreements, which apply horizontally and not just in Member-specific circumstances.[36]

B. Procedural Efficiency

The MPIA's existence as an appeal mechanism within the WTO ensures accuracy and procedural efficiency that is lacking in ISDS institutions like the ICSID and permanent courts and tribunals like the ICJ, the International Tribunal for the Law of the Sea (ITLOS), and the ECJ. Although appeals can give rise to costs and accessibility issues for developing countries and least developed countries, their

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[35] ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION (2012).
[36] Matthew Kennedy, *Two Single Undertakings – Can the WTO Implement the Results of a Round?*, 14(1) J. INT'L. ECON. L. 77, 114 (2011).

participation lends more legitimacy and credibility to the system. The backdrop for this assertion is the WTO's assertion that:

> [T]he very existence of a compulsory multilateral dispute settlement system is itself a particular benefit for developing countr[ies] and small Members. Such a system, to which all Members have equal access and in which decisions are made on the basis of rules rather than on the basis of economic power, empowers developing countries and smaller economies by placing "the weak" on a more equal footing with "the strong". In this sense, any judicial law enforcement system benefits the weak more than the strong because the strong would always have other means to defend and impose their interests in the absence of a law enforcement system.[37]

This is explicable in reality, since developing Members have won a sizeable number of cases against developed Members using the WTO dispute settlement, some high-profile ones by Brazil, including *US—Subsidies on Upland Cotton*[38] and *European Communities—Export Subsidies on Sugar*,[39] and by Latin American countries in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*.[40] These victories — and developing Member participation in general — are all the more remarkable given the challenges often faced by developing countries (cost, personnel, lack of repeat player advantage and experience) in accessing the WTO dispute settlement.[41] The fact that developing Members brought 75% of all complaints in one year alone is itself definitive proof that the benefits they obtain from the system outweigh the costs.[42] However, the dire reality remains that the least-developed country Members have been neither complainants nor respondents in any WTO dispute.[43] This disappointing outcome is a product of systemic inaccessibility, rather than apathy. For instance, the cotton subsidies applied by the US in the Upland Cotton case were directly injurious to the economies of least developed country Members in Sub-Saharan Africa who rely on revenue accruing from their status as major exporters of cotton, such as Burkina Faso, Benin, Mali,

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[37] WTO Handbook, *supra* note 33.
[38] Panel Report, *United States—Subsidies on Upland cotton*, WTO Doc. WT/DS267/R (adopted on Mar. 21, 2005).
[39] Panel Report, *European Communities—Export Subsidies on Sugar*, WTO Doc. WT/DS265/R (adopted May 19, 2005).
[40] Second Recourse to Art. 21.5 of the DSU by Ecuador, Communication from Ecuador and the European Union, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/97 (Jan. 11, 2010) [hereinafter *EC—Bananas III*].
[41] WTO Handbook, *supra* note 33.
[42] *Id.*
[43] *Id.*

and Niger,[44] but they waited helplessly for a developing country — Brazil — who is a veteran at WTO adjudication to bring the complaint. As the Appellate Body itself has noted whilst commenting on the Enabling Clause in *EC—Tariff Preferences*,[45] there is an insidious inequality existing within the inequality in the multilateral trading system, akin to a double-decked layer of inequality: the first between developed Members and both developing and least developed Members on one hand, and the second between developing Members and least developed Members on the other hand. The WTO acknowledges that,[46] the ability of developing countries to make effective use of the DSS is essential for them to fully reap the benefits they are entitled to under the WTO Agreement, as what are benefits if there is no way to reap them? Given their majority in the MPIA, their participation in the same will aid in bridging this gap and lend it at least some legitimacy.

Furthermore, bearing in mind that the finality of the MPIA (as not being subject to adoption by the DSB) pulls it short of the further red-line advantage obtained under the Appellate Body system of the WTO, the EU has argued that an Article 25 arbitration (like the MPIA) matches the independent 3-red-line-review advantage the Appellate Body system enjoyed.[47] It is, however, unclear as to how it does so because it is clearly a two-stage adjudication process and not three. In terms of the procedural efficiency of this two-stage process instead of three, it offers a more streamlined dispute resolution process and saves more time, ensuring a faster and smoother dispensation of justice, which is very important for international trade liberalisation.

C. Access for non-State actors of the multilateral trading system

To WTO observers, including investors, consumers and non-governmental organisations (NGOs), the MPIA perpetuates the lack of access inherent in the WTO's adjudicatory proceedings, particularly for the stakeholders and substantive rightsholders. This is because under the MPIA arrangement, only parties — who are

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[44] Karen Cross, *King Cotton, Developing Countries and the 'Peace Clause': The WTO's US Cotton Subsidies Decision*, 9(1) J. INT'L. ECON. L. 149 (2006).

[45] Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (Apr. 20, 2004).

[46] *Id.*

[47] Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22(3) J. INT'L. ECON. L. 297, 314 (2019) (cites the statement by an EU Official speaking in his personal capacity, at a World Trade Institute Workshop on WTO, Appellate Review: Reform Proposals and Alternatives, May 24, 2019, held in Geneva at the WTO headquarters: "[i]t's very simple three red lines, two stage process, independence of the adjudicators, and binding dispute settlement. And if we look at those three red lines, Article 25 appeal arbitration squarely fits the bill").

essentially States — can initiate the appeal.[48] This bar extends to even *amicus curiae* participation, the law on which is a literal quagmire.[49] Contrary to MPIA and its parent, the WTO, the complainants in ISDS are the investors, who are either human or corporate, but hardly States. Although parties to the ICJ are exclusively States, private individuals, companies, and NGOs can bring cases before its counterpart — the ECJ — if their rights are allegedly breached. Indeed, the right of access of individuals is codified in Articles 263(4) and 265(3) of the Treaty on the Functioning of the European Union. From an accessibility standpoint, the MPIA is restrictive, as only States, specifically those that opted in, may initiate or respond to disputes. This continues the WTO tradition of state-centric adjudication. While some have argued that wide access will overwhelm the WTO DSS with frivolous and unmeritorious complaints,[50] a combination of objective thresholds and cost sanctions may obviate this concern. Access is a guarantee of transparency in judicial systems, and transparency lends credence to legitimacy. Assessing this against the interest of developing states, the non-accessibility of interest groups and other non-state stakeholders appears to curtail the propensity for the politicisation of the DSS. Overwhelming access for non-State participants, firstly, dilutes the rule-based system and, secondly, introduces power play, the influence of NGOs and other stakeholders, and a game that developing countries would always lose at.

D. Role of Judicial Precedent

Although the MPIA does not explicitly mention 'precedent', the provisions of the MPIA addressing consistency of the decisions of the arbitral panels unmistakably point to an intention to 'promote consistency and coherence in decision-making'

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[48] *See* Statement on Practices and Procedures under MPIA, *supra* note 20.

[49] Panel Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (Adopted Nov. 6, 1998); Appellate Body Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Adopted Nov. 21, 2001) (the law is a quagmire because WTO Panel and Appellate Body decisions on it have not reflected a common and unified position. The Panel rejected *amicus* briefs from environmental interest groups, but the Appellate Body held that amicus was allowed under WTO DSU Art. 13. Following political backlash and criticism from developing countries); Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/R (Adopted Apr. 5, 2001); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos–Containing Products*, WTO Doc. WT/DS135/AB/R (Adopted Apr. 5, 2001) (the Appellate Body backtracked and introduced preconditions to the participation of amicus and since they were unfulfilled in that case, ultimately rejected the *amicus* submissions); Appellate Body Report, *European Communities—Trade Descriptions of Sardines,* WTO Doc. WT/DS231/AB/R (Adopted Oct. 23, 2002) (Morocco submitted *amicus* briefs as part of the State's memorial).

[50] Sarooshi 2005, *supra* note 10.

through precedent and collegiality.[51] Collegiality discourages a divergence of views among different arbitrators and therefore furnishes strong impetus for the promotion of consistent case law.[52] The MPIA has implied that it will apply the doctrine of judicial precedent in respect of its previous cases,[53] a feature that is present in domestic adjudication in common law systems, in the Appellate Body, and implicitly in permanent courts like the ICJ. Hence, the arbitrators in the *Turkey*,[54] and *Colombia*,[55] cases have relied on prior Appellate Body reports in interpreting provisions of the GATT and DSU. It is expressed that the strict adherence to judicial precedent can affect the evolution of trade disputes, which are complex in nature, involving diverse national interests and subject to rapidly changing trade realities. It is unpredictable how well judicial precedent would fare as trade continues to interplay with issues like artificial intelligence, sustainability concerns, globalisation, diversity and inclusion, and digital intellectual property, amongst others. Although it is expected that arbitrators are able to distinguish cases and depart from earlier decisions when they must do so, where the MPIA panels constantly deviate from earlier decisions because of the changing trade realities, that introduces a special strain of unpredictability worse than may be obtainable when there is no judicial precedent at all. Of what use then is the assumed reliance on precedent?

Additionally, it must be noted that the use of judicial precedent is an imposition of an unfamiliar terrain on civil law countries which do not use such systems. For example, in France, Article 5 of the Civil Code forbids judges' proceeding by way of *arrêt de règlement*, that is, to establish a general rule in a specific proceeding,[56] although the courts would be inclined to generally consider previous decisions. This is not a case for or against the general efficiency of the common law judicial precedent system; rather, it is a call to consider the rapidly changing tides of

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[51] MPIA Annex 1, Paragraph 5, which states: "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."

[52] Mariana De Andriade, *Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism?*, QUESTIONS OF INT'L. L. (Sept. 28, 2020), https://www.qil-qdi.org/procedural-innovations-in-the-mpia-a-way-to-strengthen-the-wto-dispute-settlement-mechanism/.

[53] *See* Statement on Practices and Procedures under MPIA, *supra* note 20, at the Preambular Paragraph (affirms that "[c]onsistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members.").

[54] Pauwelyn, *supra* note 17.

[55] Poidevin, *supra* note 19.

[56] Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) J. INT'L. DISP. SETTLEMENT 5, 5-23 (2011).

international trade law and how the 'certainty' judicial precedent brings may be a clog in the wheel of progress in times like this.

The MPIA's leaning towards precedent stands in sharp contrast to the practice in investor-State arbitration and international arbitration in general, where different tribunals reach different conclusions on the same issue with no consideration of precedent.[57] This feature is a fundamental marker that the MPIA imports several elements of both *ad hoc* arbitration and permanent courts: although the MPIA is an *ad hoc* arbitration arrangement, its decisions create precedent like in permanent courts. Perhaps, an explanation could be that this feature ensures the retention of the WTO's systemic values from a change in character through radicalised interpretations — a constant source of worry to the US.

E. Enforceability of awards

The binding character of an MPIA award is brought into question by virtue of Article 18 of the Agreed Procedures of the MPIA, which empowers an MPIA disputant (particularly the Appellant and may only include the appellee with respect to a cross appeal) to withdraw from the MPIA arbitration and go back to the WTO dispute settlement process at the Panel level. The freedom to so withdraw casts aspersions on the reliability of the MPIA system for managing appeals. However, in addressing a similar flaw in Article 30.1 of the Working Procedures for Appellate Review, which Gao[58] argues the MPIA's was simply copied from, the Appellate Body in *EC—Sardines*[59] noted that "the right to withdraw an appeal must be exercised subject to these limitations", such as "fair, prompt and effective resolution of trade disputes" or "good faith". There are two major issues with this provision and its

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[57] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (Jan. 25, 2000), 5 ICSID Rep. 396 (2002); *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 9, 2004); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011); Dissenting Opinion of Arbitrator Brigitte Stern (2011); *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (Oct. 24, 2011); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (Aug. 22, 2012); *Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20, Decision on Jurisdiction (July 2, 2013) (addresses the question of whether MFN applies to the dispute settlement clauses of bilateral investment treaties, and the mess made by different ICSID tribunals).

[58] 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, 544 (2021) [hereinafter Gao].

[59] Appellate Body Report, *European Communities—Trade Description of Sardines*, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002), DSR 2002: VIII, 3359, ¶¶ 139-40.

interpretation by the Appellate Body. Firstly, it must be noted that terms like 'fair' and 'good faith' are grossly fluid and ambiguous and would make for unpredictability of the dispute resolution system via the MPIA. Secondly and more importantly, it makes more sense for the withdrawal of appeals at the Appellate Body back to the Panel, as both are two peas in a pod and simply two levels of one adjudicatory system. Whereas, in the case of the MPIA, it is a slightly different regime from the traditional DSS, and it already faces the challenge of the absence of automatic jurisdiction of the MPIA. There continues to exist a risk for dissatisfied disputants to appeal into the void, side-stepping the MPIA, and these provisions only aggravate the situation.

The above may be a plausible prediction of a possible future quagmire, but the practice reveals that the MPIA has not failed as widely predicted and has rendered some quite efficacious awards. Our analysis of the awards enforcement reveals a notable improvement from the position under the WTO, albeit one-sided. Indeed, scepticism that the MPIA represents a move from the hegemonised WTO Appellate Body appears now to be an incomplete assertion unravelling itself; perhaps, it is only a move from a hegemony by the US to one by the EC. For instance, in the very first MPIA award, *Colombia—Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*[60], the EU alleged that Colombia's Ministry of Trade's anti-dumping investigation and countervailing duties were in breach of the Anti-Dumping Agreement, the Customs Valuation Agreement, and the GATT on four grounds, *inter alia*:

(i) that Colombia's use of third-country sales prices as the only evidence to initiate the investigation was in breach of Article 5.3 of the Anti-Dumping Agreement;

(ii) that Colombia's Ministry of Trade had breached its confidentiality obligation in the way it handled information, breaching Article 6.5 of the of the Anti-Dumping Agreement;

(iii) Colombia disregarded exporters' data and requests for adjustments from exporters relating to product mix, oil costs, and packaging, causing a discrepancy in their calculation of the difference between export price and normal value; and

(iv) that Colombia's wide threshold for considering "dumped imports" included de minimis margins (less than 2%) and in breach of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

The Panel found against Colombia on all four grounds, but the MPIA disagreed with the Panel on the first ground, finding that the EU had not proven otherwise, and agreed on the remaining grounds. Quite laudably, Colombia quickly intimated to the

[60] Status report by Colombia, *Colombia—Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/12 (Dec. 11, 2023).

DSB its intention to implement the award, which was largely against its interests. Indeed, Colombia implemented the award within a "reasonable period of time."[61]

This is at stark variance with the practice under the WTO Appellate Body, where big powers like the US and EC would often refuse or deliberately delay in enforcing panel and Appellate Body reports simply because the application of countervailing measures by developing countries who have the victory would be injurious to their own economies and in any case is subject to DSB approval under Article 22 of the DSU. This is represented in history. In *EC—Bananas*,[62] the Appellate Body Report was issued on September 9, 1997, and subsequently adopted by the DSB in September 1997. However, the EC did not comply until 2006 — nine full years later, despite significant protest from Ecuador.[63] In *EC—Sardines*,[64] the EC failed to comply for almost a year. In the *US—Boeing Airbus,*[65] dispute, the US and the EC were in a cycle of retributions and failed to comply with DSB-adopted reports for 17 years.[66] Hence, the bindingness of MPIA awards is a noticeable upgrade from the Appellate Body system, but this represents only the bright side. The EC contests Colombia's compliance, and this is an example of the EC demanding what it has not given, simply because it can.

Hence, the benefits of the MPIA for the EC might be greater than for developing Members, which could explain why it has championed the MPIA the most. Indeed, it has been involved in all three cases decided by the MPIA to date, as the complainant, and has been largely successful in a majority of the claims, all against developing country Members.

V. FUTURE AND PROSPECTS OF THE MPIA

The MPIA is an interim adjudicatory solution to the vacancies in the Appellate Body of the WTO, and many views have been expressed as to its future in the WTO and the chances of its evolution into other forms in the coming years, and with recent

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[61] *Id.* It is noted that the EU disputes this compliance and has constituted a compliance panel.
[62] Appellate Body Report, *EC—Bananas III*, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).
[63] *See* James McCall Smith, *Compliance bargaining in the WTO: Ecuador and the bananas dispute*, *in* NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 257-288 (John S. Odell ed. 2009).
[64] Modification of the Agreement under Art. 21.3(b) of the DSU, *European Communities — Trade Description of Sardines,* WTO Doc. WT/DS231/17 (Apr. 22, 2003).
[65] *See* Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft—Second Complaint*, WTO Doc. WT/DS353/AB/R (adopted Mar. 23, 2012).
[66] Sylvia Amaro & Leslie Josephs, *U.S. and EU resolve 17-year Boeing-Airbus trade dispute*, CNBC (June 15, 2021), https://www.cnbc.com/2021/06/15/us-and-eu-truce-boeing-airbus-dispute.html.

happenings. Some scholars have argued that, although by its very name, the MPIA seems to be designed to be interim, one can say that these changes have the potential to 'change course' in the practice of WTO adjudication, thereby proving some of the US' concerns about judicial overreach to be valid.[67] However, there is no gainsaying the fact that the MPIA would become redundant once the Appellate Body is restored. In the subsequent paragraphs, we evaluate the prospects of the MPIA to reshape multilateral trade disputes by drawing from the jurisdictional and structural limits of the MPIA to its own longevity, the role of the US in the future of the MPIA, and the political implications of the perceived dominance of the EU.

A. Jurisdictional and Structural Limits of the MPIA

The opt-in nature of the MPIA is a self-inflicted open sore in its structure and one of its main jurisdictional limits. The MPIA has no jurisdiction unless parties consent to it; thus, it is doubtful if this mechanism is potent enough to solve the current trade problems in the world. The US has been on the offensive, imposing tariffs and commencing trade hostilities with the rest of the world, with little regard for the provisions of the covered agreements of the WTO. One does not see a chance where the US submits to the jurisdiction of the MPIA on claims filed against it. This does have the tendency for the nations of the world to disregard the covered agreements altogether as states continue to adjust reciprocity and other obligations to match the impact of the US' tariffs on their respective economies and economic relations. For instance, early on in the year, President Emmerson Mnangagwa of Zimbabwe announced Zimbabwe's intention to suspend all tariffs on goods imported from the US as a way of building a friendly trade atmosphere with the US.[68] No announcement has been made for any arrangements to extend the same treatment to other Members of the WTO on an MFN basis. This evinces a chain reaction effect of the US' refusal to submit to the MPIA due to its opt-in jurisdiction, which could potentially crumble multilateral trade under the auspices of the WTO rules. Responding to concerns about the plight of the WTO in the wake of the actions of the US and its bilateral trade negotiations, the WTO Director-General, Dr. Ngozi Okonjo-Iweala, stated that such arrangements "…seemingly fail to comply with the core multilateral rules enshrined in the WTO's rulebook, particularly the condition on covering 'substantially all trade'…"[69] as enshrined in Article XXIV of the GATT, which allows WTO Member States to have preferential trade agreements under specific and strict conditions. Although the survival of the

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[67] Mariana De Andrade, *Procedural innovations in the MPIA: A way to strengthen the WTO dispute settlement mechanism?* 63 QUESTIONS INT'L. L., 122, 121-149 (2019) [hereinafter Andrade].

[68] Farouk Chothia, *Zimbabwe to scrap tariffs on US goods as it faces 18% Trump levy*, BBC (Apr. 6, 2025), https://www.bbc.co.uk/news/articles/c62xqel9l18o.

[69] D. Ravi Kanth, *Trade: Mounting Criticism over US "reciprocal tariffs" at WTO*, THIRD WORLD NETWORK (May. 19, 2025), ahttps://twn.my/title2/wto.info/2025/ti250521.htm.

WTO is not within the scope of this paper, it is crucial to a discussion of the future of the MPIA because the MPIA was created to enforce the covered agreements of the WTO, and without the WTO, the MPIA would be redundant. In recent times, US-China and other trade talks have led to a de-escalation of the quandary created by the early unilateral imposition of tariffs by the US. The Director-General, further to this, still reckoned that, "…despite these new measures, the majority of global trade still flows under the WTO's Most Favoured Nation (MFN) terms."[70]. If this progresses, the restoration of the Appellate Body would be more likely than the endurance of the MPIA.

Another structural limitation of the MPIA is with respect to the appointment of arbitrators, as the transition rules were designed to truly be interim by being too simplistic for the MPIA to survive long term. As Andrade noted, citing Annex 2 paragraph 6 of the MPIA, 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."[71] However, it must be noted that 'resignation' is mentioned just as an example and, of course, not a strict condition for the replacement of arbitrators. In June 2025, a smooth transition took place pursuant to Annex 2 of the MPIA. Five of the ten arbitrators were replaced by five new arbitrators who were appointed by a consensus of all the Member States of the WTO that are participating in the MPIA.[72] A successful composition of the arbitration pool signals the strength of the MPIA to withstand the structural defect informed by its initial interim design. This also indicates the willingness of the MPIA participating States to continue to use the MPIA pending the resuscitation of the WTO Appellate Body.

However, the over-simplicity of the recomposition/transition rules in the MPIA might become problematic with the expansion of the MPIA and the attendant complexity of managing more disputes, ensuring independence of the arbitrators and accommodating structural changes presented by powerful states as conditions for joining the MPIA. This paper proposes more elaborate provisions on arbitrators'

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[70] *WTO DG, Dr Ngozi Okonjo Iweala, Says U.S. Tariffs could lead to 1% Contraction in 2025 Global Merchandise Trade Volumes*, PROSHARE (Apr. 6, 2025), https://www.proshare.co/articles/wto-dg-dr-ngozi-okonjo-iweala-says-u.s.-tariffs-could-lead-to-1-contraction-in-2025-global-merchandise-trade-volumes?menu=Business&classification=Read&category=Trade%20Investment.

[71] Andrade, *supra* note 67.

[72] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.12/Suppl.14 (June 2, 2025), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/JOBS/DSB/1A12S14.pdf&Open=True.

pool recomposition to safeguard the future of the MPIA, should there be any need for its continued existence.

B. The Impact of the US' Position

Granted, many provisions of the MPIA try to remedy some of the issues raised by the US with respect to the Appellate Body; for instance, Article 10 of the Agreed Procedures of the MPIA follows the US position against the issuance of *obiter dicta* or advisory opinions by the Appellate Body. Similarly, the problem of the Appellate Body exceeding the 90-day limit is addressed by Article 12.[73] Hence, there are predictions that the MPIA will "survive [President] Trump's administration because his actions will increase the appetite for MPIA."[74] This is a particularly prominent position, given that the US, besides India, is the major into-the-void appellant.

According to Hopewell, of the 36 panel reports issued between 2020 and 2023, 24 (64%) were appealed into the void, and the US and India were responsible for more than half of those appeals.[75] The former US Trade Representative Robert Lighthizer had stated that from an American perspective, if the Appellate Body "never goes back into effect … that would be fine."[76] Therefore, as theorised earlier, it is apparent that reviews of the MPIA based on the objections of the US to the Appellate Body may not change the US' attitude. Given the spate of tariffs announced by President Trump in the early stages of his second administration, the truth may simply be that the US is opposed to any form of multilateral dispute settlement under a rules-based system, and not just the WTO Panel and Appellate Body. As a result, the US has largely ignored or declined reform proposals and negotiations,[77] and has not joined the MPIA or expressed any intentions of joining the MPIA. Nonetheless, MPIA arbitrators are paid out of the WTO budget, to which the US is a major contributor, and the US has not entirely withdrawn from the WTO itself.[78] The US has excoriated this and the MPIA generally in an open letter to the WTO Director-General by the US Ambassador to the WTO as a *China—EU Arrangement*, stating that:

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[73] Gao, *supra* note 58.
[74] Horseman, *supra* note 26.
[75] Kristen Hopewell, *Unravelling of the trade legal order: enforcement, defection and the crisis of the WTO dispute settlement system*, 101(3) INT'L. AFFAIRS, 1103-1117 (2025).
[76] *Id.* (citing Hannah Monicken & Maria Curi, *Grassley: administration would need congressional approval to change bound tariffs*, INSIDE US TRADE DAILY REPORT (Feb. 14, 2020)).
[77] *Id.*; *see* Emma Farge, *U.S. wants World Trade Organization dispute system fixed by 2024*, REUTERS (Jan. 27, 2023), https://www.reuters.com/markets/us-wants-world-trade-organization-dispute-system-fixed-by-2024-2023-01-26/? (the Deputy US Trade Representative Maria Pagan in January 2023, presented some demands and stated the US wanted a "[f]ully functioning" dispute system by 2024).
[78] Pelc, *supra* note 29.

> [T]he MPIA incorporates and exacerbates some of the worst aspects of the Appellate Body practices. It is an arrangement that seeks to clothe itself with faux Appellate Body authority while impinging on the rights of non-participating Members. The United States also objects to the use of WTO budget funds for a process that is clearly far more than a simple Article 25 arbitration.[79]

Furthermore, there are more reasons the MPIA is a further journey down the opposite direction of the preferences of the US. The MPIA has expressed a position favouring judicial precedents leading to judicial law-making, a more liberal approach to dispute settlement, and a two-stage adjudicatory process, among other things. It is unlikely that the US will submit to that process, not in the least. It is not even among the top 10 WTO Members likely to join the arrangement and falls on predictions by 50%.[80]

C. Perceived EU Dominance

There is a likelihood that the US might view the MPIA as an innovation by the EU and for the EU, given the input of the EU in the development and publicity of the MPIA. Scholars like Gao opine that the MPIA is more or less a bilateral agreement with the EU on one side and the rest of the Member States on the other, citing the European Commission's amendment to Regulation (EU) No. 654/2014 in December 2019.[81] This amendment allows the EU to unilaterally impose retaliatory tariffs when the other party, in a dispute that the EU won at the panel stage, tries to 'appeal into the void' by filing an appeal before the Appellate Body and refusing to join an arbitration.[82] Gao interprets this as the EU trying to force other WTO Members to accept the MPIA by using threats of unilateral sanctions.

This is telling on how the MPIA affords the EU the room to affect domestic policies of other MPIA Members, especially in the absence of its usual trade dispute

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[79] Letter from Dennis C. Shea, U.S. Ambassador to the WTO, to Roberto Azevedo, WTO Director Gen. (June 5, 2020) https://currentthoughtsontrade.com/wp-content/uploads/2020/06/June-5-2020-letter-from-Amb.-Shea-to-DG-Azevedo.pdf; also available at https://drive.google.com/file/d/1QIhcAoqU8pmdR6nKz0LNmfx8GR6s1lr3/view.

[80] Pelc, *supra* note 29, at 26.

[81] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, 2021 O.J. (L 49) 1 (Feb. 10, 2021).

[82] *Id.*

opponent, the US. In the latest case, *China—Enforcement of Intellectual Property Rights*,[83] the EC targeted China and Chinese courts under several provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Chinese courts habitually issue anti-suit injunctions against EC companies to prevent them from bringing court claims to protect their patents in China and abroad, even in their home countries. These injunctions are often issued with the threat of heavy fines and sanctions, putting European companies at a gross disadvantage and allowing Chinese companies untrammelled access to European technology.[84] Admittedly, China is fond of anti-trade practices, as alleged by many, not least the US.[85] However, the EC's easy success at the MPIA in that case spotlights the EC's ability to alter domestic economic and judicial realities through the MPIA and unconstrained by the systemic values of the Appellate Body, which often attempted to offset the imbalance between the big powers like the EC and the US and other Members, not least developing Members, which is the cause of its comatose situation. By comparison, the Appellate Body refused to uphold the US' assertion of what was a "public body" in *US—China AD/CVD*[86] for systemic reasons and may have mustered the brazenness to so curtail the EC's dominance in *China—Enforcement of Intellectual Property Rights.*

The EC's dominance has also roped in a non-MPIA party like Turkey. In *Turkey—Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*,[87] the EC successfully argued that Turkey's Universal Health Insurance Scheme that imposed a "locali[s]ation requirement" violated its national treatment obligation under the GATT Article III. *In précis*, the localisation requirement mandated foreign producers to commit to localising their production in Turkey or be excluded from Turkey's social security system's reimbursement scheme. Although the award was against Turkey, it was admittedly Turkey that appealed under the MPIA apparatus, which is unchanged by the fact that it did not get what it wanted and was hoisted by its own petard. From a practical perspective, the MPIA forestalled a situation where Turkey would 'appeal into the void' and keep the EU in perpetual limbo. It also allows WTO Members that are not MPIA parties to use the MPIA system on a one-off, ad hoc basis. Although this has an inherent weakness — the creation of non-reciprocal commitments, criticised earlier in this article for giving a stranger the ability to attack but not be attacked — it is inclusive and allows

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[83] Art. 25 DSU Arbitration Award, *China—Enforcement of intellectual property rights*, WTO Doc. WT/DS611/ARB25 (July 21, 2025).
[84] Request for the establishment of a panel by the European Union, *China—Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS611/5 (Dec. 9, 2022).
[85] Rossiter & Hancock, *supra* note 18.
[86] *US—Anti-Dumping and Countervailing Duties (China)(ABR)*, *supra* note 8.
[87] *Turkey—Pharmaceutical Products (EU)(ABR)*, *supra* note 22.

sceptical parties to ostensibly enhance the continuation of proceedings and appeal out of nothing but good will, even when they are likely to lose.

Apart from these two decisions, the EC has been triumphant in another complaint against Colombia, particularly at the MPIA level, and two of the cases pending at the MPIA also involve the EC.[88] Thus, as rightly stated by Philippe Cellard, a legal advisor at the Canadian mission to the WTO in Geneva, "The MPIA is not a treaty. As its name indicates, it's an arrangement. It is an important political commitment by the participating Members."[89] It is unclear what the MPIA will evolve into, but it is certain that it is not here forever.

VI. CONCLUSION AND RECOMMENDATION

In précis, the MPIA represents a significant development in the WTO's DSS, marking a crucial step towards addressing the existential crisis precipitated by the US' blockage of Appellate Body appointments. The MPIA's introduction has sparked intense debate among WTO stakeholders and scholars, highlighting the complexities and challenges inherent in reforming the WTO's appellate function as has been presented in this paper.

A thorough analysis of the MPIA and its Colombia, China, and Turkey awards reveals both promise and pitfalls. On the one hand, the MPIA offers a temporary solution to the current impasse, enabling WTO Members to revive the appellate function and provide a measure of predictability and stability in trade relations. The MPIA's design, which draws on arbitration procedures under the WTO's DSU, as well as from other international dispute settlement systems, also provides a framework for resolving disputes in a manner, albeit arguably, consistent with WTO rules and principles. Its opt-in nature also optimistically propagates continuity and inclusiveness, allowing non-parties, such as Turkey, to use the apparatus on an *ad hoc* basis.

However, the MPIA's opt-in nature, reliance on judicial precedent, and potential for inconsistent decisions inherent in *ad hoc* tribunals of its kind, among other issues, raise fundamental questions about its effectiveness, legitimacy, and long-term viability. The arrangement's limited membership and potential for fragmentation may also undermine the coherence and consistency of WTO jurisprudence, creating uncertainty and unpredictability for traders and investors. For traders and non-State actors, a more tragic situation is created as they are completely ousted from

[88] MPIA, *supra* note 15.

[89] Iana Dreyer, *Leap of faith: the new 16-member alternative appeals tribunal at the WTO*, BORDERLEX (Apr. 22, 2020), https://borderlex.net/2020/04/22/leap-of-faith-the-new-16-member-alternative-appeals-tribunal-at-the-wto/.

participating in the MPIA, a situation which was a teething struggle under the traditional Panel/Appellate Body system. Additionally, the dominance of the EC provides support to Gao's thesis of a new hegemony, and the MPIA may just be a low-budget WTO Appellate Body.

As the MPIA continues to evolve, its ability to balance the competing interests of its members, promote a rules-based trading system, and ensure transparency and accountability is subject to intense scrutiny. Overall, it is recommended that the WTO pursue a more permanent solution to the WTO's Appellate Body crisis, building on the momentum generated by the MPIA and exploring options for reform that address the concerns of all WTO Members.