International Economic Law Practicum

VIABILITY OF ARTICLE 25 DSU TO SOLVE THE APPELLATE BODY CRISIS

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TABLE OF ABBREVIATIONS

AB	Appellate Body
WTO	World Trade Organisation
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
USA/US	United States of America
DG	Director General
FTA	Free Trade Agreement
IMF	International Monetary Fund
TFA	Trade Facilitation Agreement
PIL	Public International Law
ICSID	International Centre for Settlement of Investment Disputes
UN	United Nations
GATT	General Agreement on Tariffs and Trade
DSB	Dispute Settlement Body
GATS	General Agreement on Trade in Services
ISD	Investor-State Disputes
NAFTA	North American Free Trade Agreement
ECT	Energy Charter Treaty

RESEARCH OBJECTIVES AND QUESTIONS

The current World Trade Organisation **["WTO"]** Appellate Body **["AB"]** crisis and its demise and has brought in a renewed focus on its role played in the resolution of trade disputes around the world. Currently, the AB cannot function as the minimum quorum of three Members at the AB is not met, pursuant to the Unites States blocking appointments to it. AB has served as bastion in rectifying the errors in Panel reports and has imparted trust and confidence to the Members of the WTO.[1] Until 2020, an appeal has been preferred in 66% of all cases in which a Panel report was circulated.[2] This underscores the faith the parties have in the AB and the incessant need for a viable alternative to the AB, in times of the present looming crisis.

The various alternatives to the resolution of the crisis include *inter alia*, taking recourse to solutions such as good offices, mediation, conciliation, or arbitration under the DSU, engaging in bilateral arrangements such as the ones adopted by EU, Canada and Norway, or even pushing for the Multi Party Interim Appeal Arbitration Arrangement **["MPIA"]** which is being led by the European Union **["EU"].** Notably, the MPIA based on Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes **["DSU"]** has been successful to garner Members' confidence as an interim alternative solution to the AB impasse. The MPIA has been in effect since 30th April, 2020 and has gathered the support of 22 WTO Members along with the EU.

In light of this the objective of the Report is to assess the efficacy of Article 5, Article 25 and the MPIA to deal with the incapacitated AB. In relation to Article 5, the Report undertakes a comparative analysis of good offices, mediation, arbitration and conciliation as used in other dispute resolution mechanisms and concludes on its viability as a solution to the AB impasse. The Report critically examines Article 25 i.e., arbitration assessing its practical capability to deal with the AB deadlock, given its advantages and disadvantages as a solution.

Against this backdrop, the Report assesses whether the MPIA is the best possible interim solution for the countries, at present. The Report thoroughly analyses the MPIA – its criticisms and advantages along with other aspects are discussed in a nonpartisan manner to arrive to the conclusion. Furthermore, the reservations of the countries with respect to MPIA are reviewed to suggest whether countries should consider joining the MPIA or not.

This Report achieves this in four sections:

- Analysing the various forms of the dispute settlement under the WTO;
- Analysing the implications of the MPIA on WTO jurisprudence and multilateralism;
- Analysing the enforceability of rulings by the arbitral tribunal as compared to Panel or AB reports and;
- Analysing the effectiveness of other means of dispute settlement in the DSU– good offices, conciliation, and mediation, and the viability of Article 25 of the DSU to serve as an alternate

[1] Aditya Rathore & Ashutosh Bajpai, *The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead*, JURIST (Accessed on Dec. 13, 2021), https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/.

[2] *Dispute Settlement Activity — Some Figures,* WORLD TRADE ORGANIZATION (Accessed on Dec. 13, 2021), https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm. [*Hereinafter* "Dispute Settlement Activity"]

adjudicatory mechanism to the AB.

The research questions as are follows:

- What are the various forms of dispute settlement mechanism in the WTO?
- How effective are other means of dispute settlement in the DSU – good offices, conciliation, and mediation?
- Whether Article 25 of the DSU is a viable option as an alternate adjudicatory mechanism to the AB?
- Whether the arbitral awards under Article 25 can be enforced on par with Panel or AB reports?
- What are the implications of the MPIA on WTO jurisprudence and multilateralism?
- What are the reservations that countries have towards the operability of MPIA?
- Whether the countries should join MPIA as an interim option to tackle the impasse created by the AB crisis?

EXECUTIVE SUMMARY

It is clear that the WTO's Dispute Settlement Mechanism, affords to the international trading security, predictability and legitimacy. The WTO AB has been an essential bulwark to correct errors in Panel reports and maintain WTO Members' faith and confidence. However, the AB is currently experiencing a crisis unprecedented in its history. The United States of America **["USA/US"]** has been blocking attempts to fill the AB's vacancies since July 2017. Two of the remaining three Members finished their four-year terms on December 10, 2019, leaving only one Member instead of the normal seven. As a result of the absence of quorum, the AB is unable to function. This has resulted in 'appeal to the void,' or WTO Members' incapacity to challenge the Panel's ruling. In the backdrop of the defunct AB, the Report analyses the viability of the arbitration mechanism as a solution to the AB crisis.

The Report initially delves deep into the role the DSU has played as the central pillar to the multilateral trading system. It delineates the process of the DSU which consists of procedural stages such as that of the consultations stage, the Panel Stage, and the Appellate Review. The lattermost stage, has been rendered ineffective due to the USA blocking appointments to the AB and the Report thus undertakes an analysis on options that could serve as an alternative to functioning of the AB, beginning with taking recourse to options under Article 5 and Article 25, of the DSU.

The former solution enlists three alternatives, namely, good offices, mediation and conciliation. While these mechanisms have their advantages, the Report brings out various deficiencies in these procedures such as, *inter alia*, the role given to the Director General **["DG"],** biasness, the lack of a second review system, etc. These issues coupled with the stark underutilisation of these modes to solve disputes at the WTO mean that these procedures cannot serve as a viable solution to the AB crisis alone. Similarly, the Report finds that arbitration under Article 25 acts only as a 'theoretically viable alternative to the crisis' since it could lead to numerous hindrances including the possibility of coercing the developing nations to agree to a certain set of rules, neglecting the wealth of expertise of the AB, the lack of a unified framework for WTO Members etc. Further, the Report finds that isolated bilateral agreements between countries, where parties agree to resort to arbitration or to not appeal Panel reports, fail to establish a uniform system of dispute resolution and take away security and predictability from the WTO regime. Owing to the limitations of the viability of Article 5 and Article 25 respectively, the Report suggests that the AB crisis would be better addressed by a uniform, comprehensive and binding agreement, such as the MPIA.

MPIA is an initiative led by the EU which aims at providing an appeal mechanism until the AB starts functioning again. To achieve the same, MPIA uses the arbitration procedure of Article 25 which would mirror the AB's substantive and procedural aspects. Further, in order to address the US concerns about the AB's functioning including the inability of AB to meet the 90 days' deadline and the engagement of AB into advisory opinions not relevant for the resolution of dispute, the MPIA has introduced certain reformative elements as well. To ensure that arbitrators are able to complete the appellate review within the 90 days deadline, arbitrators under the MPIA regime have the discretion to adopt adequate organizational measures such as placing a limit on the page number, time, or fixing the frequency and duration of hearing to be able to adhere to the deadline.

In addition to this, arbitrators may even encourage for omission of claims which are "based on the alleged lack of an objective assessment of the facts to Article 11 of the DSU". Moreover, the arbitrators are required to confine themselves only to those issues which are fundamental for the settlement of disputes.

However, concerns have been raised that MPIA might impinge upon the WTO's multilateral trading regime. Nonetheless, the Report suggests that the WTO's aim of ensuring multilateralism in international trade is in peril due its own working mechanism which is based on the consensus-based approach. In fact, MPIA aids in promoting multilateralism in the WTO, detailed arguments to prove this are provided in Chapter 7 of the Report. The MPIA is introduced with an aim to maintain the appellate function within the multilateralism dispute mechanism which is in consonance with the WTO's two-tiered dispute adjudication mechanism. Further, the arrangement is also drafted in a manner which ensures that it will become non-operational as and when the AB becomes operational again. Therefore, the MPIA's structure gives priority to reforming the AB thereby promoting the spirit of multilateralism.

Further, it is to be noted that the MPIA awards are based on WTO agreements and are not adopted by consensus since the award although *notified* is not *adopted* by the DSB. Thereby, the MPIA affords arbitrators the flexibility to diverge from reasoning's adopted in the past. However, the Report suggests that the objective of the MPIA is essentially basing its decision on sound legal reasoning and based on the facts of that particular case, thus only referring to the WTO agreements without any reference to AB rulings leaves MPIA Panels devoid of important resources. Thus, while MPIA arbitral Panels are free to adopt legal reasoning, in practice MPIA arbitrators would look at previous AB decisions and MPIA cases.

The Report also makes an attempt to compare the functioning of the MPIA vis-à-vis the International Centre for Settlement of Investment Disputes **["ICSID"]**. The international investment arbitration system established under ISCID has been successfully thriving for more than five decades. Albeit, despite the comprehensive design of the ICSID procedural clauses, ICSID is grappled with a number of problems which cast doubt on the finality of its award and the enforcement mechanism of its arbitration proceedings. Further, a few countries have also denounced ICSID and concerns have been raised on its exit mechanism. Consequently, this raises apprehension about the arbitration proceedings and the exit mechanism of the MPIA regime, owing to the similarity between the both these forums. However, the Report suggests that the procedural aspects of MPIA and ICSID vary considerably in aspects of denunciation, appointment of arbitrators, enforcement mechanism, etc. This makes it unlikely that the MPIA will meet the similar fate.

Lastly, the Report makes an attempt to address the apprehensions/concerns which some countries have with respect to the MPIA. Some of these concerns are inadequate representation of arbitrators, the uncertainty around the financing of MPIA's operation, potential bias against the developing countries interests, the possibility of rendering the already defunct AB into permanent abandonment and other political concerns such as hampering of trade relations with the USA. It is thus, suggested that though the MPIA is only an interim solution to the AB crisis, the practice followed by the arbitrators under the auspices of the MPIA might consequently lead to a resurrection of the AB in general since it has the potential of addressing certain criticisms of the

USA and it will provide a fertile ground for Members to suggest other reformative measures for enhancing the efficiency of AB.

1. INTRODUCTION

International dispute settlement is concerned with the techniques and institutions which are used to solve international disputes between States and/or international organizations.[3] Increasingly these disputes are no longer just primarily between states but also between states and other parties like international organizations and other non-state actors, and between these actors mutually.[4] In this context the Charter of the United Nations **["UN"]** plays a major role, in particular, regarding disputes between states.[5] Article 2(3) of the UN Charter states that all Member States have to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.[6] In the framework of international peace and security Article 33 of the UN Charter provides a number of alternatives to choose from in resolving disputes, e.g., negotiation, enquiry, mediation, conciliation, arbitration, and judicial settlement. Notwithstanding the free choice of means the Manila Declaration underlines the legal obligation of parties to find a peaceful solution to their dispute and refrain from action that might aggravate the situation.[7]

Specifically, in the General Agreement on Tariffs and Trade **["GATT"]** era, dispute settlement was dealt under Article XXII,[8] which established a right to consultations between individual contracting parties, and Article XXIII,[9] which applied this right to situations in which a Member considered that it was not receiving benefits to which it was entitled under the GATT because of actions by another Member. The primary emphasis has always been on finding a mutually satisfactory solution through the process of consultations. Where this failed, the collective GATT membership was called on to examine the matter, issue rulings or recommendations as appropriate and, if necessary authorize retaliatory action.[10] The system of appointing a Panel of three (sometimes five) independent experts was a standard practice.[11]

However, two deficiencies in particular were noted with the GATT mechanism. First, it was a consensus-based system. The Council made decisions on the basis of consensus of the Members throughout the process, as a result of which any one Member could block the process.[12] Second, the situation worsened after 1979 when a number of limited-membership agreements on non-tariff measures - the so-called "codes" negotiated in the Tokyo Round - entered into force.[13] Seven of these had their own dispute settlement procedures and the code obligations differed from those

[3] *Settlement of International Disputes*, PEACE PALACE LIBRARY (Accessed on Dec. 14, 2021), https://peacepalacelibrary.nl/research-guide/settlement-international-disputes.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] J. Haddock & R. Sharma, *Dispute Settlement*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (Accessed on Dec. 14, 2021), https://www.fao.org/3/x7352e/X7352E05.htm.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

of the GATT, leading to a real risk of inconsistent results.[14] As a result, the system was characterized by delays, inconsistencies, uncertainty and inadequacy of enforcement.[15]

Thus, arose the new dispute settlement procedure of the Uruguay Round. This is contained in the DSU**.** In order to administer these rules and procedures. The Dispute Settlement Body **["DSB"],** established under Article 2 of the DSU is given the authority to establish Panels, adopt Panel and AB reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.[16]

WTO dispute settlement has been a sought-after option for states, and this is evidenced by the fact that close to 600 disputes have been brought to it, since its creation in the year 1995.[17] The disputes proceed before a dispute settlement Panel that has been established specifically for the dispute, and Panel discussions have been appealed to a standing AB. The AB has functioned as the highest instance of WTO dispute settlement, upholding, modifying, or even reversing the findings of Panels.[18] It has for close to more than two decades functioned with seven Members that have served four year terms.[19] The DSB adopts decisions, which consequently becomes legally binding on the parties to dispute.[20] The AB, established pursuant to Article 17 of the WTO DSU, forms a very important part of the Dispute Settlement System of the WTO as it performs the function of hearing appeals against the findings of the Panel.

On account of appointments to the AB requiring the consensus of all the WTO Member states,[21] the USA blocking new appointments has rendered the AB inefficacious. The DSB is a critical organ of the WTO regime which helps ensure predictability and security to international trade. It has been called the 'Crown Jewel' of the WTO. However, with the expiry of the terms of the Members of the AB, the AB does no longer meet the three Member quorum required to be able to review appeals.[22] The term of the last sitting Member, Prof. Dr. Hong Zhao has also come to an end, resulting in a crisis.[23] Responsibility for this crisis can be pinned upon the USA, which is blocking the appointment of new Members to the AB.

The USA has been quite critical of the approach of the AB to questions that pertain to fact and law. The, appeals stage as delineated under the DSU system is to strictly confine to legal issues.[24] USA's objections of the AB revolve around, Judicial Activism by the AB, problem with precedents, and objections on working procedures. USA's main accusations against the AB is that it has time and again indulged in "Judicial Activism", and is creating new rules, which cannot be done, as the recommendations and rulings "cannot add to or diminish the rights and obligations provided in

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Dispute Settlement,* WORLD TRADE ORGANIZATION (Accessed on Oct. 4, 2021), https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. [*Hereinafter* "Dispute Settlement"]
[18] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). [*Hereinafter* "DSU"]
[19] DSU, *supra* note 18, Art. 17.1 & 17.2.
[20] DSU, *supra* note 18, Art. 17.14.
[21] DSU, *supra* note 18, Art. 2.4 &17.2.
[22] DSU, *supra* note 18, Art. 17.1.
[23] *Dispute Settlement: Appellate Body*, WORLD TRADE ORGANIZATION (Accessed on Oct. 5, 2021), https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.
[24] DSU, *supra* note 18, Art. 17.6.

the covered agreements", as per Article 3.2 of the DSU.[25] According to the US, there has been a disregard for the role of the AB in its approach towards the adjudication of the disputes and have an analysis which is mostly *obiter dicta*.[26] Illustratively, in Argentina – Financial Services, the USA has remarked that the analysis of the AB was nothing but obiter dicta, as it reversed the findings of the Panel and unnecessarily added to their analysis by clarifying on other provisions of the General Agreement on Trade in Services **["GATS"].** [27]

Another problem observed by the USA against the AB is that it creates persuasive precedents.[28] Lastly, during Ministerial Conferences, the USA has raised a separate concern about Rule 15 of the AB Working Procedures.[29] The objection relates to the point that the Members should not take any new cases as there might be a backlog which they would have to clear.[30] This sometimes inevitably leads to the delay in reports more than the stipulated time of 60 days, under Article 17.5.[31] Thus, it relates to the efficiency of the proceedings. The DSU provides for a mandatory 90-day deadline for Adjudicating appeals[32], and by not adhering to this at times, the USA believes that the AB has assumed the authority to take any time it wants.

Given the severity of the situation, the 12th Ministerial Conference, which has been postponed indefinitely due to the Covid-19 Pandemic, is expected to deal with the issue of the Restoration of the DSU. While, the DSB was notified of the MPIA as an interim measure, which uses Article 25 of the DSU as an appeal process, there is uncertainty as to it being used as a fundamental solution as it applies only amongst the participating Members.[33] The USA Trade Representative Katherine Tai has echoed the concerns of USA vis-à-vis the WTO, and stressed on the need to not just restore the AB but revitalize the agency of Members to secure mutually acceptable resolutions.[34] The G20 Trade and Investment Ministerial Statement, also reaffirmed the support of the Trade and Investment Ministers of the G20 to support the multilateral trading system and promote the necessary reform of the WTO to help improve its functioning. [35]

India, as a developing country and an active user of the WTO Dispute Settlement System has a strategic interest in the existence of the AB. It is keen to resolve the impasse at the AB as seen from its efforts of organising the New Delhi Mini-Ministerial which facilitated a free discussion between developing countries on critical issues which included the crisis of the AB. India believes

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[25] *Id.*
[26] *Id.*
[27] *Report on the Appellate Body of the World Trade Organization,* UNITED STATE TRADE REPRESENTATIVE, Feb., 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] DSU, *supra* note 18, Art. 17.5.
[33] JOB/DSB/1/Add.12, Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala Hong Kong – China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, Uruguay, Apr. 30, 2020, para 1. [*Hereinafter* "MPIA"]
[34] *Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization,* UNITED STATES TRADE REPRESENTATIVE (Accessed on Dec. 13, 2021), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tais-remarks-prepared-delivery-world-trade-organization.
[35] *G20 Trade and Investment Ministerial Meeting*, MINISTERIAL STATEMENT, May 14, 2020, http://www.g20.utoronto.ca/2020/G20SS_Statement_G20_Second_Trade_&_Investment_Ministerial_Meeting_EN.pdf.

that the impending paralysis of the AB is a fatal blow to the credibility of the WTO. India thus sided the proposal, with EU, China, Canada Norway, Australia, Korea, New Zealand, Singapore and Mexico, to issue a joint proposal on 26 November calling for filling the vacancies on the AB and to amend certain provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes.[36] A second proposal was followed India, EU and China which called for enhancing "the independence of the AB and its Members.[37] The countries called for providing longer terms for AB Members, so that greater independence of the AB and its Members can be achieved. This however was rejected by the USA as it believed that the changes to the rules would make the AB even lesser accountable.[38]

The blockage of appointments by the USA threatens not only the existence of the trade law regime since Panel reports that are appealed cannot be adopted until the AB approves of them,[39] but also the blockage of adoption of Panel rulings by Members 'appealing into the void.' The disputes that are currently subjected to the WTO dispute settlement mechanism might lead to retaliation and trade wars given the absence of a dispute settlement framework. Thus, dialogue between nations at upcoming Ministerial Conferences is crucial for finding a solution to the AB crisis.

With this background, the Report extensively describes the various forms of dispute settlement under the WTO, it further delves into assessing the viability of options under Article 5 and Article 25, of the DSU to serve as an alternative to the WTO Crisis. In addition to this, the Report comprehensively examines the role of MPIA to overcome the AB Crisis.

[36] MPIA, *supra* note 33.
[37] WT/GC/W/753, Communication From The European Union, China And India to the General Council, Communication circulated at the request of the Delegations of European Union, China, India, Nov. 23, 2018.
[38] Bryce Baschuk, *U.S. Rejects The EU's Trade Reform Proposal*, *Putting WTO At Risk,* LIVEMINT (Accessed on Dec. 13, 2021), https://www.livemint.com/Politics/wnKPAo3nG4j0iXx3YTBqIM/US-rejects-the-EUs-trade-reform-proposal-putting-WTO-at.html.
[39] DSU, *supra* note 18, Art. 16.4.

2. VARIOUS FORMS OF THE DISPUTE SETTLEMENT UNDER THE WTO

The WTO dispute settlement is the central pillar of the multilateral trading system, and it uniquely contributes to the certainty, stability and predictability of the global trading regime.[40] Since without such a dispute settlement mechanism, the rules could not be enforced, the rules-based system would be less effective.[41] The WTO's procedure underscores the rule of law, thereby making the trading system more secure and predictable.[42] The WTO has established one of the most active international dispute settlement mechanisms in the world. Since 1995, 607 disputes have been brought to the WTO and over 350 rulings have been issued.[43]

Both developed as well as developing country Members use the WTO dispute settlement system alike.[44] In particular, the successful use of the dispute settlement system by small, sometimes very small, developing country Members against the largest among the developed- country Members is noteworthy.[45]

Third parties, which are referred to as Members having a substantial interest in a matter before a Panel and having notified its interest to the DSB, shall have an opportunity to be heard by the Panel and to make written submissions to the Panel.[46] Third parties shall receive the submissions of the parties to the dispute to the first meeting of the Panel.[47] If a third party considers that a measure already the subject of a Panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding.[48] Such a dispute shall be referred to the original Panel wherever possible.[49]

The primary WTO dispute settlement rules are set out in the DSU and the Working Procedures for Appellate Review.[50] The DSU clearly prefers solutions mutually acceptable to the parties reached through negotiations, over solutions resulting from adjudication.[51] In other words, the DSU prefers parties *not* to go for adjudication, but to settle their dispute amicably through negotiations.[52] Similar negotiation mechanisms find existence in other international dispute mechanism, such as, investment arbitration, which is a procedure to resolve disputes between

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[40] *Understanding the WTO: Settling Disputes*, WORLD TRADE ORGANIZATION (Accessed on Oct. 25, 2021), https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm. [*Hereinafter* "Understanding the WTO"]
[41] *Id.*
[42] *Id.*
[43] Dispute Settlement, *supra* note 17.
[44] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 468 (4 ed. Cambridge University Press 2017). [*Hereinafter* "Peter"]
[45] *See example*, dispute between Costa Rica and the USA, World Trade Organization, *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, DS24.
[46] DSU, *supra* note 18, Art. 10.2.
[47] DSU, *supra* note 18, Art. 10.3.
[48] DSU, *supra* note 18, Art. 10.4.
[49] *Id.*
[50] Understanding the WTO, *supra* note 40; *Working Procedures For Appellate Review*, WORLD TRADE ORGANIZATION (Accessed on Dec. 12, 2021), https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.
[51] DSU, *supra* note 18, Art. 3.7.
[52] Peter, *supra* note 44, at 507.

foreign investors and host States with the guarantee that the foreign investor will have access to independent and qualified arbitrators who will solve the dispute and render an enforceable award.[53]

The DSU process consists of a number of procedural stages. The various stages involved in the dispute resolution are:

2.1 Consultations

It is the request for consultations that formally, for the first time, initiates a dispute in the WTO.[54] As noted above, the DSU expresses a clear preference for resolving disputes amicably rather than through adjudication.[55] And to this end, WTO dispute settlement proceedings always start with consultations (or, at least, an attempt to have consultations) between the parties to the dispute.[56] They provide parties with a fair opportunity to discuss the matter and find a satisfactory solution without resorting to litigation.[57]

In addition to addressing the request for consultations to the responding Member, the complaining Member must also notify the request to the DSB and to relevant Councils and Committees overseeing the agreement(s) in question.[58] Such request must be made along with the reasons for the request, in writing and. This includes identifying the measures at issue and indicating the legal basis for the complaint.[59] Only if the mandatory consultations fail to produce a satisfactory solution within 60 days, can the complainant request for adjudication by a Panel.[60] However, even if consultations fail to resolve the dispute, it always remains open for the parties to find a mutually agreeable solution at any later stage of the proceedings.[61]

A majority of disputes referred to the WTO so far have not proceeded beyond consultations. This was because a satisfactory settlement was found, or because the complainant decided for other reasons not to pursue the matter further.[62] This goes on to show the effectiveness of consultations as a means of dispute resolution in the WTO.[63]

2.2 Panel Stage

If consultations fail to settle the dispute, the complaining party may request the establishment of a Panel to adjudicate the dispute, which initiates the phase of adjudication. Such request must be made in writing and addressed to the Chairman of the DSB.[64]

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[53] *International Arbitration Resources,* ACERIS LAW LLC (Accessed on Dec. 12, 2021), international-arbitration-attorney.com/investment-arbitration/.
[54] *The Process - Stages In A Typical WTO Dispute Settlement Case, Consultations*, WORLD TRADE ORGANIZATION (Accessed on Oct. 21, 2021), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm#fnt2. [*Hereinafter* "The Process"]
[55] DSU, *supra* note 18, Art. 3.7.
[56] DSU, *supra* note 18, Art. 4.
[57] DSU, *supra* note 18, Art. 4.5.
[58] DSU, *supra* note 18, Art. 4.4.
[59] *Id.*
[60] DSU, *supra* note 18, Art. 4.7.
[61] The Process, *supra* note 54.
[62] *Id.*
[63] *Id.*
[64] DSU, *supra* note 18, Art. 6.2.

Panels are composed on an ad hoc basis of three (or if the parties agree, five) well-qualified individuals: generally, academics, private lawyers or, quite often, present or former Members of government delegations to the WTO who are not parties to the dispute.[65] Moreover, when a dispute is between a developing country Member and a developed country Member the Panel shall, if the developing country Member so requests, include at least one Panellist from a developing country Member.[66]

Once the composition of the Panel is determined, the Panel process begins. Article 7 provides the standard terms of reference for Panels, and states that the Panel should examine the complaint as set out in the Panel request and 'make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)'. The Panel evaluates the factual and legal aspects of the dispute through written submissions from the parties, meetings with the parties, and the power to seek additional information and expert opinions.[67] The Panel then makes an 'objective assessment' of the matter by examining the facts of the case and the relevant WTO agreements.[68]

Based on the evidence presented, the Panel reaches conclusions on the legal claims, and thereafter issues an 'interim' report to the parties (the interim report is another new element introduced by the DSU and is intended to improve the quality of Panel reports).[69] On completion of the interim review process, the Panel issues the final report to the parties, having taken the interim review comments into account.[70] After issuance to the parties, the report is circulated to the full WTO membership and to the public.[71] Within 60 days after the date of circulation of a Panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[72]

2.3 Appellate Review

Appeals from Panel reports are made to the AB.[73] The AB is a standing body composed of seven persons with demonstrated expertise in law, international trade and the WTO agreements.[74] AB Members serve a four-year term, and may be reappointed once for a further four-year term.[75] The DSU requires that AB Members be broadly representative of membership in the WTO (there has always been a Member from the EC, the US and three or four Members from various developing countries).[76]

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[65] DSU, *supra* note 18, Art. 8.
[66] DSU, *supra* note 18, Art. 8.10.
[67] SIMON LESTER ET AL., WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY 155 (2 ed. Hart Publishing 2012). [*Hereinafter* "Simon"]
[68] DSU, *supra* note 18, Art. 11.
[69] DSU, *supra* note 18, Art. 15.
[70] *Id.*
[71] *Id.*
[72] DSU, *supra* note 18, Art. 16.
[73] DSU, *supra* note 18, Art. 17.1.
[74] DSU, *supra* note 18, Art. 17.2 &17.3.
[75] DSU, *supra* note 18, Art. 17.2.
[76] Simon, *supra* note 67, at 156.

Appeals are limited to legal questions, and they may only address issues of law covered in the Panel report and legal interpretations developed by the Panel.[77] It is not allowed to address the facts on which the Panel report is based, for example, by requesting the examination of new factual evidence or by re-examining existing evidence.[78] The AB has the authority to uphold, modify or reverse the legal findings and conclusions of the Panel.[79] Thus, it is not the role of the AB to engage in fact- finding or evaluation of the evidence, and findings of fact are, in principle, not subject to AB review.[80]

After the AB report is circulated, it along with the Panel report as upheld, modified or reversed by the AB report is placed on the agenda of a DSB meeting and is automatically adopted unless the DSB decides otherwise by consensus.[81] Again, the only circumstance in which the DSB will not adopt the report of the AB is if all Members including the 'winning' party decide by consensus not to adopt the report.[82]

However, the fact is that many cases do not go through all stages of the process as one moves forward in the dispute settlement procedure from consultations to Panels and the AB to compliance reviews and finally to the authorization of suspension and is to some extent a positive sign.[83]

Thus, the WTO dispute settlement system provides for several dispute settlement methods. In addition to *consultations* and *adjudication* by a Panel and the AB, which are by far the methods most frequently used, the WTO dispute settlement system also provides for other dispute settlement methods, and in particular: arbitration; and good offices, conciliation and mediation.[84] The viability of these methods will be discussed, in detail, in subsequent section.

2.4 Compliance Adjudication

Following DSB adoption of a Panel or AB report, the offending country must eliminate the violating measure and bring its practices into compliance with the ruling.[85] Members must comply within a 'reasonable time,'[86] as failure to do so triggers the possibility of suspension of concessions (i.e. retaliation) on the part of the prevailing Member.[87] When it is impractical for a Member to comply immediately, Members may resort to binding arbitration to determine the 'reasonable period of time' for compliance (Article 21(3)(c) arbitration).[88] Where there is disagreement regarding whether a Member has complied with the Panel or AB's recommendations, the DSB designates, when possible, the original Panel (i.e. the Panel that decided the substantive case) to

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[77] DSU, *supra* note 18, Art. 17.6.
[78] *The Process - Stages In A Typical WTO Dispute Settlement Case, Appellate Review*, WORLD TRADE ORGANIZATION (Accessed on Oct. 19, 2021), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p2_e.htm.
[79] DSU, *supra* note 18, Art. 17.13.
[80] Simon, *supra* note 67, at 157.
[81] Simon, *supra* note 67, at 157; DSU, *supra* note 18, Art. 17.14.
[82] DSU, *supra* note 18, Art. 17.14.
[83] *Evaluation Of The WTO Dispute Settlement System: Results To Date*, WORLD TRADE ORGANIZATION (Accessed on Oct. 19, 2021), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s2p1_e.htm.
[84] DSU, *supra* note 18, Art. 5 & 25.
[85] DSU, supra note 18, Art. 23.2(a).
[86] DSU, *supra* note 18, Art. 22.1.
[87] DSU, *supra* note 18, Art. 22.
[88] DSU, *supra* note 18, Art. 21.3(c).

settle such disputes (Article 21(5) Review).[89] Should the original Complainant also prevail in the latter type of dispute, it may request compensation (e.g. further tariff concessions, increased market access, etc.) in lieu of suspending concessions against the offending member.[90] Finally, when disputes over the level or method of retaliation arise, Members shall submit such disputes to arbitration (Article 22(6) arbitration), which shall also 'be carried out by the original Panel,' if these adjudicators are available.[91] In these cases, the arbitrator's jurisdiction is limited to the amount of nullification or impairment and whether the form of retaliation is allowed under the agreements; the arbitrator may not revisit previously litigated issues.[92] Since the mere possibility of applying such countermeasures provides a substantial incentive for compliance, suspension of WTO obligations against the offending Member is generally the exception, Members usually comply or offer some form of compensation.[93]

Summary

The various stages involved in the DSU process are: a. Consultations, b. Panel Stage, c. Appellate Review, and d. Compliance Adjudication. Consultations provide parties with a fair opportunity to discuss the matter and find a satisfactory solution without resorting to litigation. In case such consultations fail, complainant can file a request for adjudication by a Panel, which initiates the phase of adjudication. Thereafter, an appeal made from Panel reports initiates the stage of Appellate Review. Such appeals are limited to legal questions, and AB is not allowed to address the facts on which the Panel report is based. Lastly, following DSB adoption of a Panel or AB report, the offending country must eliminate the violating measure and bring its practices into compliance with the ruling.

[89] DSU, *supra* note 18, Art. 21.5.
[90] DSU, *supra* note 18, Art. 22.2.
[91] *Id.*
[92] DSU, *supra* note 18, Art. 22.6.
[93] Juscelino F. Colares, *The Limits of WTO Adjudication: Is Compliance the Problem?*, 14 JOURNAL OF INTERNATIONAL ECONOMIC LAW 403, 419 (2011).

3. THE EFFECTIVENESS OF ARTICLE 25, GOOD OFFICES, MEDIATION AND CONCILIATION

At times, involvement from outside i.e., of an independent person who is not related to the parties can help provide assistance to find mutually agreed solutions. The DSU provides for good offices, conciliation, and mediation on a voluntary basis if the parties agree to do so.[94] There is another alternative that parties may opt for i.e., arbitral proceedings under the purview of Article 25.[95]

3.1 Article 5: Effectiveness as an Alternative to the AB

Specifically, Article 5,[96] provides recourse to three mechanisms, i.e., good offices, conciliation and mediation. Good offices, is a means of providing logistical support by which the disputing parties may communicate productively with each other.[97] Conciliation provides for an independent investigation suggesting a solution to the dispute and in mediation the third party plays a more active role, and may bring about a resolution of the dispute.[98] These processes may begin at any time,[99] but not before a request for consultations since the request is necessary to trigger the application of the procedures of the DSU, including Article 5.[100] The Director-General may, in an ex-officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.[101]

3.2 Methods as used in other international Dispute Resolution Mechanisms

Treaties and International Conventions often tend to include good offices in the same grouping as of mediation. For instance, the Pact of Bogota[102] treats procedures of good offices and mediation together under Chapter II. However, good Offices implies a more discreet action between parties without an active participation, whereas mediation involves a more active part (by the mediator) in the discussions with him/her being expected to suggest some solutions to the problem.[103]

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[94] DSU, *supra* note 18, Art. 5.1.
[95] DSU, *supra* note 18, Art. 25.
[96] DSU, *supra* note 18, Art. 5.1.
[97] Aarshi Tirkey & Shiny Pradeep*, The WTO Crisis: Exploring Interim Solutions for India's Trade Disputes*, OBSERVER RESEARCH FOUNDATION (Accessed on Dec. 12, 2021), https://www.orfonline.org/research/the-wto-crisis-exploring-interim-solutions-for-indias-trade-disputes/#_edn9. [*Hereinafter* "Aarshi"]
[98] A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 94 (2 ed. Cambridge University Press, 2004) [*Hereinafter* "A Handbook"]; Liliia Khasanova & Adel Abdullin, *Pacific Means Of Dispute Settlement In The WTO: Challenges And Perspectives,* NATIONAL ACADEMY OF MANAGERIAL STAFF OF CULTURE AND ARTS HERALD (Accessed on Dec. 12, 2021), http://journals.uran.ua/visnyknakkkim/article/view/178169.
[99] DSU, *supra* note 18, Art. 5.3.
[100] DSU, *supra* note 18, Art. 1.1.
[101] S.R. MYNENI, WORLD TRADE ORGANIZATION (WTO) 126 (2 ed. Asia Law House 2003).
[102] American Treaty on Pacific Settlement (Pact of Bogotá), Apr. 30, 1948, Organization of American States, Treaty Series, No. 17 and 61.
[103] Sompong Sucharitkul, *Good Offices as a Peaceful Means of Settling Regional Differences,* GOLDEN GATE UNIVERSITY SCHOOL OF LAW (Accessed on Dec. 12, 2021), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1549&context=pubs. [*Hereinafter* "Sompong"]

Countries such as Paraguay,[104] Haiti,[105] Jordan[106] and least developed countries[107] had submitted a proposal to effectuate a change in the DSU rendering mediation mandatory. Despite the support towards utilization of these solutions by developing and least developing countries these solutions have been extremely underutilised at the WTO. However, this is not the case in other international dispute mechanisms. *Illustratively*, Article 33 of the UN Charter,[108] provides that the parties to a dispute, the continuance of which endangers the maintenance of peace and security shall seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or other peaceful means of their choice. Good Offices has often been used as a form of "*other peaceful means of their choice*" by parties and this can be seen through the successful case of the Bangkok agreement which helped resolve the uncertainty regarding the status of Malaysia.[109]

Indonesia and Philippines had both withheld the recognition of the new State Malaysia, which led to the severing of diplomatic relations between Malaysia and the other two neighbours.[110] It was due to the good offices provided by Thailand such as holding private bilateral consultations between the Thai Foreign Minister and each of the other Ministers at various time or the Foreign Minister of Thailand playing host to the delegations from Indonesia and Malaysia, and providing the necessary facilities to the parties that it led to Southeast Asian Cooperation, since Members were put back in the family of free Asian nations.[111]

Similarly, Article 33 of the UN Watercourses Convention also provides for resorting to processes such as mediation, good offices and conciliation, in the event that negotiations fail. Successful examples of mediation involved the Indus River Dispute where the World Bank mediated the solution and it resulted in the negotiation of the 1960 Indus Water Treaty[112], or the Israeli Jordanian Bilateral Negotiations which were combined with informal discussions and the American and Russian Diplomats acted as mediators.[113] It led to the 1994 Treaty of Peace between Israel and Jordan.[114]

These methods can help bring in flexibility, affordability, and can act as an expeditious means of solving disputes in other international dispute mechanisms,[115] yet they have been underutilized by

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[104] TN/DS/W/16, Negotiations On Improvements And Clarifications Of The Dispute Settlement Understanding, Communication circulated at the request of Paraguay, Sept. 11, 2002.
[105] TN/DS/W/37, Text For LDC Proposal on Dispute Settlement Understanding Negotiations, Communication circulated at the request of Haiti on behalf of the LDC Group, Jan. 17, 2003.
[106]TN/DS/W/43, Jordan's Contribution Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding, Communication circulated at the request of Jordan, Jan. 28, 2003.
[107] TN/DS/W/17, Negotiations on the Dispute Settlement Understanding, Communication circulated at the request of Zambia on behalf of the LDC Group, Sep. 19, 2002.
[108] United Nations, Charter of the United Nations, Jun. 26, 1945, 1 UNTS XVI, Art. 33.
[109] Sompong, *supra* note 103.
[110] *Id.*
[111] *Id.*
[112] *Fact Sheet: The Indus Waters Treaty 1960 and the Role of the World Bank*, THE WORLD BANK (Accessed on Dec. 12, 2021), https://www.worldbank.org/en/region/sar/brief/fact-sheet-the-indus-waters-treaty-1960-and-the-world-bank.
[113] Convention on the Law of the Non-navigational Uses of International Watercourses, May 21, 1997, UN doc A/RES/51/229, Art. 33.
[114] *Id.*
[115] Dr. Stefanie Pfahl, *Is the WTO the only way?*, ADELPHI CONSULT, FRIENDS OF THE EARTH EUROPE & GREENPEACE (Accessed on Dec. 12, 2021),

the WTO Members. The reasons for such under-utilization could stem from the lack of precedents to examine the process of mediation, and consequently little evidence on how the process should operate. Furthermore, since they infrequently occur in another international context, the WTO delegations cannot draw on their non-WTO experiences to educate themselves on what the mediation should look like. Thus, a significant barrier to such solutions is the uncertainty around the process.[116] Often, WTO delegates have downplayed the need for meditation believing that their skills in ADR processes render a mediator unnecessary.[117] Moreover, the stake involved in the disputes could also act as an impediment for Members to avail remedies under Article 5.

Lack of precedents to invoke Article 5, has led to the increased practise of relying on a 2005 communication from the WTO DG Mr Mike Moore, clarifying the procedure, logistics and the role of the DG.[118] The WTO DG acts in an ex-officio capacity to help provide these solutions, the implication of which is that he/she handles the proceedings directly. This has led to a concern over the role given to the WTO DG to act as a neutral third party in disputes.[119] This acts as an impediment to utilizing Article 5 as a solution to the current WTO AB crises, since analysts have put forth the bias showcased against the global south.[120]

With the lack of material on Article 5, it would be difficult to gauge whether the WTO DG would be able to effectively fulfil his/her role to remain a neutral third party in the disputes involving major powers. The implications for India are severe, since most of its disputes involve major countries such as the US or the EU.[121] Moreover, out of 56 disputes involving India since 1995 it has appealed rulings in 12.[122] Further, India has three cases pending before the AB.[123]

Without the involvement of the opposing parties in the process of finding an amicable solution to disputes, the chances of a lasting outcome are less,[124] however such settlement is only possible when parties have faith, and trust in the process to resolve the crises. Given its past, it is unlikely for the Members to utilize this process as an *alternative* to the WTO AB, when they have failed to effectively utilize it as a *supplementary* process earlier.

The fact that these modes have the inherent advantage of convenience since they can be exhausted and terminated at any time, and can be continued even during Panel proceedings with the consent

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https://www.wto.org/english/forums_e/ngo_e/posp66_greenpeace_wto_e.pdf.

[116] *Id.*

[117] *Interview with Robert E. Hudec, Professor*, THE FLETCHER SCHOOL, Medford, Mass., Nov. 15, 2002.

[118] *Article 5 Of The Dispute Settlement Understanding*, WORLD TRADE ORGANIZATION (Accessed on Oct. 17, 2021), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=86918&CurrentCatalogueIdIndex=0&FullTextSearch=.

[119] Raghavan Chakravarthi, *The WTO, Its Secretariat And Bias Against The South*, THIRD WORLD NETWORK (Accessed on Oct. 5, 2021), https://www.twn.my/title2/wto.info/2019/ti190420.htm. [*Hereinafter* "Raghavan"]

[120] *Id.*

[121] Dispute Settlement, *supra* note 17.

[122] Aarshi Tirkey, *The WTO Dispute Settlement System: An Analysis of India's Experience and Current Reform Proposals*, OBSERVER RESEARCH FOUNDATION (Accessed on Dec. 12, 2021), https://www.orfonline.org/wp-content/uploads/2019/09/ORF_OccasionalPaper_209_WTO.pdf.

[123] World Trade Organization, *United States — Certain Measures Relating to the Renewable Energy Sector*, DS510; World Trade Organization, *India — Certain Measures on Imports of Iron and Steel Products*, DS518; World Trade Organization, *India — Export Related Measures*, DS541.

[124] Cezary Fudali, *A Critical Analysis Of The WTO Dispute Settlement Mechanism: Its Contemporary Functionality And Prospects*, 39 NETHERLANDS INTERNATIONAL LAW REVIEW 45 (2002).

of both parties[125], showcase that the objective was to utilize these modes before the Panel gives its recommendation. Considering these objectives, utilization of Article 5 as an alternative to the AB mechanism does not seem appropriate.

This brings into question the feasibility of '**agreements to not appeal Panel reports'** such as the ones entered into between Indonesia and Vietnam regarding the dispute on iron and steel products.[126] Their agreements entail not to appeal Panel reports in the absence of a functioning AB. This has also been followed by South Korea and the USA.[127]

These agreements overlook the possibility imposed by the implementation of faulty Panel reports, and this is also not ensured by Article 5, since none of the other modes provide for a second review at the appellate stage. Statistics have shown that during the period 1995-2018, close to two-thirds of the reports were appealed.[128] Resorting to merely the structure under Article 5, would deprive WTO Members of an appellate mechanism which aims to check and balance reasoning that was adopted in Panel proceedings, which is needed since Panellists are not lawyers and have limited advocacy experience.[129]

3.3 Article 25: Arbitration as a viable solution to the AB crisis?

3.3.1 Introduction

There is another alternative that parties may opt for i.e., arbitral proceedings under the purview of Article 25.[130] Such proceedings can be contrasted to the arbitrations that are conducted under Article 21.3(c) and Article 22.6[131] which only compliment the implementation of recommendations or rulings and cannot act as alternatives to the Panel procedures.[132] *Au contraire,* arbitration under Article 25 is independent from Panel and AB procedures and thus, can act as an alternative, rather than a supplement to the standard DSU mechanism.[133] Under Article 25 of the DSU, WTO Members can agree to resolve the dispute through arbitration as an alternative means of dispute settlement, the exact procedures of which would be determined by the dispute parties through a prior agreement.[134] The subsequent arbitral award is binding on the concerned parties and there is no ability to object to or appeal enforcement of an award.[135] Unlike the AB recommendations,

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[125] DSU, *supra* note 18, Art. 5.5.
[126] World Trade Organization, *Indonesia — Safeguard on Certain Iron or Steel Products*, DS496. [*Hereinafter* "Indonesia-Safeguard on Certain Iron or Steel Products"]
[127] World Trade Organization, *United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea,* DS488.
[128] Dispute Settlement Activity, *supra* note 2.
[129] JHH Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191 (2001).
[130] DSU, *supra* note 18, Art. 25.
[131] DSU, *supra* note 18, Art. 21.3(c) & 22.6.
[132] Scott Andersen et al., *Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals*, CENTRE FOR TRADE & ECONOMIC INTEGRATION (Accessed on Dec. 12, 2021), https://repository.graduateinstitute.ch/record/295745?ln=en. [*Hereinafter* "Scott"]
[133] *Id.*
[134] Peter*, supra* note 44, at 151.
[135] Bashar H. Malkawi, *Can Article 25 Arbitration Serve as a Temporary Alternative to WTO Dispute Settlement Process?*, KLUWER ARBITRATION BLOG (Accessed on Oct. 17, 2021), http://arbitrationblog.kluwerarbitration.com/2019/01/05/can-article-25-arbitration-serve-as-a-temporary-alternative-to-wto-dispute-settlement-process/.

arbitration awards need not be approved by the DSB and the arbitral award only has to be notified to the DSB.[136]

3.3.2 Advantages

Prima Facie, it seems that arbitration under Article 25 can act as a viable alternative to the AB crisis since the flexible language of Article 25 means proceedings can be moulded to mirror the AB process under Article 17 that already exists at the WTO.[137] The parties are empowered to determine the procedures and rules through a prior agreement and have the freedom to determine the rules and procedures to choose arbitrators, collect, evidence, etc.[138] Therefore, the parties can theoretically adopt the same procedures and rules that are applicable to the AB such as the Working Procedures for Appellate Review, 2010. This would help preserve the advantages of the appellate system of the DSU that parties previously enjoyed, i.e., predictability and procedural security. Moreover. Article 25 is subject to the rules and procedures of the DSU[139] as well as all the WTO agreements.[140]

Further, Article 25[141] itself states that Article 21 and 22 of the DSU apply '*mutatis mutandis*' to arbitration awards, which ensures that arbitral awards under Article 25 are subject to the enforcement mechanisms enshrined under the DSU which govern the surveillance and monitoring of implementation[142] and compensation and suspension of concessions in the event of non-compliance (art 22).[143] In general, it has been held that recourse to arbitration under 25 strengthens the dispute resolution system by complementing negotiation under Article 22.2 of the DSU.[144] The possibility of the parties to a dispute seeking arbitration vis-à-vis negotiation of compensation operates to increase the effectiveness of that option as under Article 22.2.[145] It has also been reiterated that there can be no reason why the assessment of the compatibility of a measure cannot be done by Article 25 arbitration, as one of the WTO dispute Settlement procedures.[146]

Arbitration under Article 25 has been resorted to in the case of the US – Section 110(5) Copyright Act Case.[147] The European Communities initially requested consultations with the USA in relation to Section 110 (5) of the US Copyright Act as they contended that the section permits the playing of radio and television in public places without the payment of a royalty fee, and consequently this is inconsistent with US obligations under Article 9(1) of the TRIPS agreement.[148] Subsequently, the European Communities requested the establishment of a Panel which led to the adoption of the Panel report on 2000. Finally, in the year 2001, the USA and the European Communities

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[136] DSU, *supra* note 18, Art. 25.3.
[137] C. Christopher Parlin, *Operations of Consultations, Deterrence, and Mediation*, 31 LAW AND POLICY IN INTERNATIONAL BUSINESS 565, 567 (2000).
[138] DSU, *supra* note 18, Art. 25.2.
[139] DSU, *supra* note 18, Art. 1.1.
[140] DSU, *supra* note 18, Art. 3.5.
[141] DSU, *supra* note 18, Art. 25.
[142] DSU, *supra* note 18, Art. 21.
[143] Garima Deepak, *WTO Dispute Settlement – The Road Ahead*, 51 INTERNATIONAL LAW AND POLITICS 981, 995 (2019).
[144] World Trade Organization, *United States — Section 110(5) of US Copyright Act*, DS160. [*Hereinafter* "United States — Section 110(5)"]
[145] *Id.*
[146] World Trade Organization, *United States — Import Measures on Certain Products from the European Communities*, DS165.
[147] United States — Section 110(5), *supra* note 144.
[148] *Id.*

informed the DSB of their agreement to resort to arbitration under Article 25 to determine the level of nullification or the impairment of benefits caused to the European Communities as a result of Section 110(5)B of the US Copyright Act. On deciding whether such question was apt to be dealt by them, they concluded that the procedure provided under Article 25.1 is an alternative to a Panel procedure. It was held that arbitration under Article 25 is fully consistent with the object and purpose of the DSU since it contributes to the prompt settlement of disputes between Members, which is in consonance with Article 3.3 of the DSU. [149]

These features theoretically make the arbitration process under Article 25 of the DSU a suitable alternative method of dispute settlement at the WTO, as the process is also supplemented by sufficient enforcement mechanisms to ensure compliance.

3.3.3 Disadvantages

3.3.3.1 Political Impairments

From a practical and political standpoint, it is not so easy and effective to simply use Article 25 as a parallel system of dispute resolution and the alternative has certain drawbacks. The flexibility accorded by Article 25 to adopt any rules and procedures on the basis of consent can be seriously threatened if powerful WTO Members like the EU or China coerce smaller parties to adopt rules that put them at a disadvantage.[150] Further, parties will also have very little incentive to agree to arbitration under Article 25 if they believe that the likelihood of an unfavourable ruling is high.[151] Such parties might refuse arbitration and block the adoption of the Panel report by filing for appeal with the incapacitated AB which would mean that the dispute would remain in the void with no imminent measure to resolve. Also, some parties might also be disincentivised to enter into an arbitration agreement if they feel that there is a higher chance of the Panel ruling being in their favour.[152] Thus, adopting a parallel mechanism through Article 25 as an alternative would provide no clarity or predictability in international trade law as it would be dependent on Members' consent.

The stance that the USA will take on this matter will also have a big impact on its viability. If the procedure that is adopted under Article 25 simply mirrors the AB procedure, it can be reasonably expected that the USA would not agree to such a system. This would have the consequence of the trade measures of the USA not being subjected to the enforcement mechanisms under Article 21 and 22 of the DSU even though these provisions would become applicable to parties who agree to use arbitration for appeals under Article 25 and this would put the accepting parties at a disadvantage.[153] The USA's exclusion would also take away from the credibility of any parallel

[149] *Id.*
[150] Laura Von Daniels et al., *Ways out of the WTO December Crisis*, SWP BERLIN (Accessed on Oct. 18, 2021), https://www.swp-berlin.org/10.18449/2019C46/.
[151] William Alan Reinsch, *Article 25: An Effective Way to avert the WTO Crisis*, CENTRE FOR STRATEGIC AND INTERNATIONAL STUDIES (Accessed on Oct. 18, 2021), https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis.
[152] Raghavan, *supra* note 119.
[153] *Id.*

system that is established under Article 25 due to the status of USA as the world's largest economy. Such a system would have very limited utility.[154]

3.3.3.2 Limited Precedence and Wealth of Expertise of the WTO DSU

Another fallacy in the approach is that arbitration under Article 25 has only ever been used in one dispute in the history of the WTO which is the US – Section 110(5) Copyright Act Case.[155]

The fact that it has not been used by others might make the Members hesitant to utilize this option now.[156] Most importantly, the biggest obstacle in the way of arbitration being a permanent solution to the crisis is that over the past decades, WTO Members have developed a wealth of expertise and knowledge regarding WTO DSU, which they cannot simply forgo. Reports of the WTO AB and Panels helped define and shape many treaty provisions. It is hard to envisage that WTO Members would put aside such experience and enter into Article 25 arbitration, which is essentially uncharted territory. Therefore, resorting to Article 25 arbitration and circumventing the US blockade of the AB, while theoretically possible, would at best be a partial and temporary solution to the overall crisis at the WTO. Moreover, this option also requires the consent of the parties and thus the mechanism would only apply to those that have given consent and not to those the states that have not. This, thus cannot act as a permanent solution to the AB and fails to bind Members to a compulsory dispute settlement system.

3.4 Voluntary Appeal Restraint Agreements as an Alternative

The DSU requires Members seeking to settle WTO disputes to *have recourse to* and abide by the rules and procedures of the understanding[157], thus it is not possible that the Members merely resort to ad hoc arbitration or adjudication before a court. Instead, they must rely on the 'in-regime' options available under the ambit of the DSU. Such agreements would include those that prescribe not to appeal Panel reports, for instance the sequencing agreements in Indonesia-Safeguard on Certain Iron or Steel Products.[158] These agreements have resulted out of the incongruence between Article 21 and Article 22.[159] While Article 22[160] allows a prevailing party to request authorization to retaliate within 30 days after a compliance period ends, Article 21.5[161] provides that disagreements over the existence or adequacy of compliance measures are to be decided in accordance with WTO dispute procedures, which includes resort to Panels. A compliance Panel's report is due within 90 days post the dispute is referred to it and it may be appealed.[162] The DSU does not however integrate Article 21.5 procedure into the 30-day deadline as provided under Article 22 and it also not provide for the determination of compliance for a prevailing party to pursue retaliatory action under Article 22. In Indonesia – Safeguard on Iron and Steel Products, specifically it was provided in the sequencing agreement that, the parties agreed that if on the date

[154] Dispute Settlement Activity, *supra* note 2.
[155] United States — Section 110(5)*, supra* note 144.
[156] David Jacyk, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future*, 15 AUSTRALIAN INTERNATIONAL LAW JOURNAL 254 (2008).
[157] DSU, *supra* note 18, Art. 23.1.
[158] Indonesia-Safeguard on Certain Iron or Steel Products, *supra* note 126.
[159] DSU, *supra* note 18, Art. 21 & 22.
[160] DSU, *supra* note 18, Art. 22.
[161] DSU, *supra* note 18, Art. 21.5.
[162] *Id.*

of circulation of the report under Article 21.5 of the DSU, the AB comprises fewer than three Members then the report would not be appealed under Articles 16.4 and 17 of the DSU.[163]

However, if one of the parties fails to abide by the agreement not to appeal, it may create problems for the DSB. In accordance with Article 16.4,[164] of the DSU, if a party has notified its decision to appeal, then the report by the Panel shall not be considered for adoption by the DSB until the appeal is completed. If the DSB needs to make a decision of the application of the agreement between the parties rather than the DSU, then this decision should be made by consensus and is thus susceptible to a block by any of the WTO Members present at the meeting. Thus, while principally WTO Members would comply with in-dispute agreements, the lack of enforceability might lead to significant hurdles for the DSB.

3.5 Functions Of Appellate Body v. Article 25

3.5.1 Appellate Body

The AB is a permanent body of seven Members entrusted with the task of reviewing the legal aspects of the reports issued by Panels.[165] The AB is thus the second and final stage in the adjudicatory part of the dispute settlement system.[166] The DSU eliminated the right of individual parties, typically the one whose measure is being challenged, to block the establishment of Panels or the adoption of a report.[167] The situation that prevailed under GATT 1947, when Panels' reports could be adopted only on the basis of a positive consensus has witnessed a drastic change.[168] Now, the DSB automatically establishes Panels and adopts Panel and AB reports unless there is a consensus not to do so.[169] This is known as the "negative" consensus rule.[170]

The appellate review carried out by the AB now has the function of correcting possible legal errors committed by Panels.[171] In doing so, the AB also provides consistency of decisions, which is in line with the central goal of the dispute settlement system to provide security and predictability to the multilateral trading system.[172] If a party files an appeal against a Panel report, the AB reviews the challenged legal issues and may uphold, reverse or modify the Panel's findings.[173]

3.5.2 Arbitration Panel Under Article 25

As an alternative to adjudication by Panels and the AB, the parties to a dispute can resort to arbitration.[174] The parties must agree on the arbitration as well as the procedures to be followed,[175]

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163 Indonesia-Safeguard on Certain Iron or Steel Products*, supra* note 126.
164 DSU, *supra* note 18, Art. 16.4.
165 *WTO Bodies Involved In The Dispute Settlement Process*, WORLD TRADE ORGANISATION (Accessed on Oct. 17, 2021) https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm. [*Hereinafter* "WTO Bodies Involved"]
166 *Id.*
167 *Historic Development of The WTO Dispute Settlement System*, WORLD TRADE ORGANISATION (Accessed on Dec. 12, 2021), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm.
168 *Id.*
169 *Id.*
170 *Id.*
171 WTO Bodies Involved, *supra* note 165.
172 DSU, *supra* note 18, Art. 3.2.
173 DSU, *supra* note 18, Art. 17.13.
174 DSU, *supra* note 18, Art. 25.1.
175 DSU, *supra* note 18, Art. 25.2.

and thus, parties to the dispute are free to depart from the standard procedures of the DSU. The parties must also clearly define the issues in dispute.

Much more frequent are two other forms of arbitration foreseen in the DSU for specific situations and questions in the process of implementation.[176] The first such situation, which an arbitrator may be called to decide on, is the establishment of the "reasonable period of time" granted to the respondent for implementation.[177] The second is where a party subject to retaliation may also request arbitration if it objects to the level or the nature of the suspension of obligations proposed.[178] These two forms of arbitration are thus limited to clarifying very specific questions in the process of implementation and they result in decisions that are binding for the parties.

To date, in only one dispute, have the parties resorted to arbitration under Article 25 of the DSU.[179] The procedure was not used as an alternative to the Panel and AB procedure, but at the stage of implementation, when the Panel report had already been adopted.[180] The parties asked the arbitrators to determine the level of nullification or impairment of benefits caused by the violation established in the Panel report. Under the standard procedures of the DSU, parties can obtain a binding determination of the level of nullification or impairment by recourse to arbitration.[181] A prerequisite for such arbitration is that the complainant has requested the DSB's authorization for the suspension of obligations and that the respondent disagrees with the proposed level of retaliation.[182]

3.6 The enforceability of rulings by the arbitral tribunal as compared to Panel or Appellate Body reports

S. No.		Arbitral Tribunal	Appellate Body
1.	Relevant provision	Article 25, DSU[183]	Article 17, DSU[184]
2.	Binding nature	Article 25 DSU states that the parties to the proceeding shall agree to abide by the arbitration award.	AB reports are final and binding on the parties to the dispute.[185]

[176] *Legal Effect Of Panel And Appellate Body Reports And DSB Recommendations And Rulings*, WORLD TRADE ORGANISATION (Accessed on Oct. 18, 2021), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm; A Handbook, *supra* note 98, at 34.
[177] DSU, *supra* note 18, Art. 21.3(c).
[178] DSU, *supra* note 18, Art. 22.6.
[179] United States — Section 110(5), *supra* note 144.
[180] *Id.*
[181] DSU, *supra* note 18, Art. 22.6.
[182] United States — Section 110(5), *supra* note 144.
[183] DSU, *supra* note 18, Art. 25.
[184] DSU, *supra* note 18, Art. 17.
[185] DSU, *supra* note 18, Art. 17.4; Carmen Francis & Oksana Migitko, *WTO Appellate Body Impasse: Potential Paths Forward*, MCCARTHY TETRAULT (Accessed on Oct. 18, 2021), https://www.mccarthy.ca/en/insights/blogs/terms-trade/wto-appellate-body-impasse-potential-paths-forward [*Hereinafter* "Carmen"]; *The WTO Appellate Body Crisis – A Way Forward?*, CLIFFORD CHANCE (Accessed on Oct. 18, 2021), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/the-wto-appellate-body-crisis-a-way-forward.pdf. [*Hereinafter* "The WTO Appellate Body Crisis"]

		Thus, arbitration tribunal awards are final and binding on the parties to the dispute.	
3.	Dependence of enforceability on the DSB	Although, an award must be notified to the DSB and the relevant WTO Councils and Committees,[186] binding nature of arbitral tribunal awards have no dependence on adoption by DSB Members, and thus, is automatically binding on the parties to the dispute.[187]	Yes, the binding character of an AB report depends on the adoption or approval by the DSB.[188] Such adoption based on 'reverse consensus' rule.[189]
4.	Precedent?	No	No, although persuasive in nature.
5.	Consequences of non-abidance	Article 25.4, DSU: "Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards."[190]	Articles 21 and 22, DSU,[191] provide the usual DSU procedures governing the surveillance and monitoring of implementation, as well as compensation and suspension of concessions in the event of non-compliance.
6.	MPIA	Arbitrators under the MPIA are obliged to follow WTO agreements but not previous AB jurisprudence.[192] However, in practice, MPIA arbitrators will look at previous AB decisions and MPIA cases.[193] Reports of the MPIA themselves no matter how important they are will	N/A

[186] DSU, *supra* note 18, Art. 25.3.
[187] Scott, *supra* note 132; Jennifer Hillman, *Three Approaches To Fixing The World Trade Organization's Appellate Body: The Good, The Bad And The Ugly?*, INSTITUTE OF INTERNATIONAL ECONOMIC LAW (Accessed on Dec. 12, 2021), https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf. [*Hereinafter* "Jennifer"]
[188] DSU, *supra* note 18, Art. 17.
[189] DSU, *supra* note 18, Art. 17.14.; The WTO Appellate Body Crisis*, supra* note 185; Carmen, *supra* note 185.
[190] DSU, *supra* note 18, Art. 25.4.
[191] DSU, *supra* note 18, Art. 21 & 22.
[192] Bashar H. Malkawi, *Born out of Necessity: MPIA Arbitration and WTO*, KLUWER REGULATING FOR GLOBALIZATION BLOG (Accessed on Oct. 17, 2021), http://regulatingforglobalization.com/2020/06/16/born-out-of-necessity-mpia-arbitration-and-wto/. [*Hereinafter* "Bashar"]
[193] *Id.*

		not have greater precedential value because they were not adopted by the DSB.[194]	

Summary

Article 5 provides recourse to three mechanisms, i.e., good offices, conciliation and mediation. Through Good offices, logistical support is provided to enable disputing parties to communicate productively with each other. Conciliation provides for an independent investigation suggesting a solution to the dispute whereas in mediation a third party helps bring about a resolution of the dispute. Given their advantages of flexibility and affordability, these methods have been used in international dispute mechanisms, such as to resolve water disputes or regional disputes. Illustratively, such mechanisms have led to the negotiation of the Indus Water Treaty and the formulation of Bangkok Agreement. However, utilization of these mechanisms in the WTO has remained quite low. The reasons for such under-utilization stem from, inter alia, lack of precedents, inability to draw from WTO experience, concern over the role of the WTO DG to act as a neutral party etc. Thus, alternative procedures under Article 5 cannot act as a sufficient alternative to the dysfunctional AB.

Arbitration as under Article 25 of the DSU also offers a myriad of advantages such as freedom to the parties, flexibility, low cost and is also subject to the enforcement mechanism that is enshrined under the DSU. The language of Article 25 allows parties to, hypothetically, mirror the AB procedure to resolve their disputes. However, only theoretically is it a viable solution since the mechanism is underlined by political impediments, limited precedence and failure to apply the wealth of WTO expertise. The system leads to an incongruence in the WTO regime where parties are subject to varying enforcement mechanisms. Consequently, the principles that govern the WTO regime i.e., of security and predictability are violated.

Voluntary Appeal Restraint Mechanisms, where parties agree to take a uniform stance such as not to appeal Panel reports cannot act as a solution to the dysfunctional AB since if one of the parties fails to abide by the agreement not to appeal, it may create problems for the DSB. While principally WTO Members would comply with in-dispute agreements, the lack of enforceability might lead to significant hurdles for the DSB. Similarly, agreements to resort to arbitration such as those entered into between EU and Canada and EU and Norway also only establish an intention and not a binding commitment for parties and thus, they do not provide for a means to re-establish a compulsory and binding system. The AB is a seven Member body entrusted with the reviewing the legal aspects of the reports issued by Panels.

The DSB automatically establishes Panels and adopts Panel and AB reports unless there is a consensus not to do so. The AB now has the function of correcting possible legal errors committed by Panels. As an alternative to adjudication by Panels and the AB, the parties to a dispute can resort to arbitration. The parties must agree on the arbitration as well as the procedures to be followed, and thus, parties to the dispute are free to depart from the standard procedures of the DSU. To date, in only one dispute, have the parties resorted to arbitration under Article 25 of the DSU. The procedure was not used as an alternative to the Panel and AB procedure, but at the stage of implementation, when the Panel report had already been adopted. The parties asked the arbitrators to determine the level of nullification or impairment of benefits caused by the violation established in the Panel report.

Both Article 25 decisions and AB reports are binding on the parties, with the only distinction being that arbitral tribunal reports are automatically binding on the parties. AB reports, however have to be adopted by the DSB first to be binding. Neither the AB's nor the arbitral tribunal's decisions act as precedents.

In case either party fails to abide by the decision, arbitral tribunal report would be enforceable in the same way as adopted Panel and AB reports. According to paragraph 15 of Annex 1 of the MPIA, the participating WTO Members agree to abide by the arbitration award, which shall be final.

[194] *Id.*

4. MULTIPARTY INTERIM APPEAL ARBITRATION ARRANGEMENT

Prior to the formalisation of the MPIA there were bilateral agreements entered into between countries where Members decided to resort to arbitration under the ambit of Article 25 of the DSU given the WTO AB might stop functioning. Illustratively, two appeal arbitration agreements have been entered into between the EU and Canada[195] and EU and Norway.[196] The Agreement entered into between Canada and EU replicates Article 17 of the Appellate Review Process as closely as possible. Thus, as per the agreement the arbitrators for a dispute are selected by the DG based on the same criteria as under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review.[197] The terms of the EU-Norway agreement are identical to that of Canada-EU interim appeal mechanisms.

Such agreements are valid and in line with the DSU when they fall within the framework of a dispute. While, Articles 16.4 and 17.4 of the DSU provide that parties may appeal a Panel report, in *Peru-Agricultural Products*, the AB held that it is possible for Members to relinquish their procedural rights through '*actions taken in relation to, or within the context of, the rules and procedures of the DSU.*'[198] However, if a party does not abide by the agreement to not appeal then this may create significant systematic problems for the DSB. Article 16.4[199] provides that *'if a party has notified its decision to appeal, the report by the Panel shall not be considered for adoption by the DSB until after completion of the appeal'*. However, if the DSB and not the DSU is required to take a substantive decision of whether or not to apply the agreement and can be blocked by any Member that is present at the meeting since decisions are made by consensus. Thus, the lack of enforceability may lead to significant hurdles if the question arises before the DSB.

These agreements have received widespread support from practitioners[200] and as a form that is specifically provided for in appeal arrangements would serve the dual purpose; of allowing the dispute settlement system to operate as usual and leaving the Panel being responsible for the gathering of evidence and fact finding. The appeal Arbitrator would be tasked with reviewing the issues of law. The EU-Norway and EU-Canada appeal arbitration arrangements seek to replicate all substantive and procedural aspects along with the practice of Appellate Review pursuant to Article 17 of the DSU.[201] This has been done by providing for an ex ante commitment, through

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[195] *EU - Canada Interim Appeal Arbitration Pursuant to Article 25 of the DSU*, EUROPEAN COMMISSION, Jul. 25, 2019, https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf. [*Hereinafter* "EU - Canada Interim Appeal Arbitration"]

[196] *EU - Norway Interim Appeal Arbitration Pursuant to Article 25 of the DSU*, EUROPEAN COMMISSION, Oct. 21, 2019, https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf. [*Hereinafter* "EU - Norway Interim Appeal Arbitration"]

[197] EU - Canada Interim Appeal Arbitration, *supra* note 195, para 3.

[198] World Trade Organization, *Peru — Additional Duty on Imports of Certain Agricultural Products*, DS457.

[199] DSU, *supra* note 18, Art. 16.4.

[200] Scott, *supra* note 132; Tetyana Payosova et al., *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Accessed on Oct. 26, 2021), https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures.

[201] EU - Canada Interim Appeal Arbitration, s*upra* note 195, para 2; EU - Norway Interim Appeal Arbitration, *supra* note 196, para. 2.

which both parties can resort to arbitration for an appeal arbitration procedure, considering the fact that the AB cannot hear appeals due to the lack of sufficient arbitrators to hear the dispute.[202]

The problem with the wording of such agreements is that by establishing an intention and not a binding commitment, these arrangements provide leeway for defendants to reject the applicability of arrangements to a specific dispute. Thus, such solutions do not provide for a means to re-establish a compulsory and binding system. Ad hoc agreements require consent of parties,[203] which consequently empowers defendants to refuse consent once the terms of the dispute are known, and this can be used as a means of establishing conditions only pursuant to which shall the defendant grant consent.[204]

Such Agreements were also only proposed as a means of preserving dispute settlement rights at the stage where there was a possibility that the WTO Appellate Body does not function. However, to help restore a binding dispute settlement mechanism, the Members must go beyond such ad hoc agreements, as they give room to the respondents to refuse consent. Moreover, a set-up is needed that functions not on a bilateral basis rather aims at gathering support from all Members. Such a solution could be that of **MPIA.**

MPIA is an initiative led by the EU against the backdrop of defunct AB.[205] The membership of MPIA is open to all the WTO Members,[206] however, at present only 24 Members are part of it.[207]

MPIA aims at providing an appeal mechanism until the AB starts functioning again.[208] It is, therefore, an interim attempt to safeguard the two-tiered structure of dispute resolution of WTO which has fallen into impasse due to the USA's unilateral refusal to appoint AB Members.[209] Thus, MPIA will come into picture only to decide appeals of the Panel's reports.[210] To achieve this, MPIA uses arbitration procedure of Article 25, DSU[211] which would mimic the AB's substantive and procedural aspects.[212]

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[202] *Id*, para 1.
[203] Scott, *supra* note 132.
[204] In the GATT era, the United States only agreed to establish a Panel on its embargo on Nicaragua if the Panel did not adjudicate on the GATT Security Exception (WTO, *United States – Trade Measures Affecting Nicaragua*, Report of the GATT Panel (not adopted) (Oct. 13, 1986) L/6053, para 1.4).
[205] Yves Melin & Jin Woo Kim, *The Carrot And The Stick: A Tale Of How The EU Is Using Multilateral Negotiations And Threats Of Unilateral Retaliation To Buttress The Multilateral, Rule-Based Trade System, And Protect Its Markets*, REEDSMITH (Accessed on Oct. 20, 2021), https://www.reedsmith.com/en/perspectives/2020/04/the-carrot-and-the-stick-a-tale-of-how-the-eu-is-using-multilateral. [*Hereinafter* "Yves"]
[206] Bashar, *supra* note 192.
[207] *The WTO Multi-Party Interim Appeal Arrangement Gets Operational*, EUROPEAN COMMISSION (Accessed on Dec. 8, 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690521/EPRS_BRI(2021)690521_EN.pdf. The member countries are: Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Singapore; Switzerland; Ukraine; and Uruguay.
[208] MPIA, *supra* note 33.
[209] Carline Glöckle, *Bridging the gap: the MPIA as a valuable short-term solution to the impasse of the WTO's Appellate Body?*, VOELKERRECHTSBLOG (Accessed on Oct. 21, 2021), https://voelkerrechtsblog.org/bridging-the-gap-the-mpia-as-a-valuable-short-term-solution-to-the-impasse-of-the-wtos-appellate-body/. [*Hereinafter* "Carline"]
[210] Yves, *supra* note 205.
[211] MPIA, *supra* note 33, at 2, para 1.
[212] MPIA, *supra* note 33, at 2, para 3.

The comprehensive draft of MPIA is divided into three parts. The first part prescribes the MPIA's core features of the appeal mechanism and also serves as a means of communication of its intention to the DSB.[213] The second part consists of the agreed arbitration rules under Article 25 of the DSU.[214] And the last part lays down the procedure for the selection of arbitrators.[215]

To begin with, it is prescribed that a pool of 10 standing arbitrators shall be established under MPIA with the consensus of all the participating Members.[216] Although, only a division of three arbitrators selected from the pool of 10 arbitrators will hear a specific appeal.[217] However, this does not bar the three arbitrators hearing the appeal to discuss their decisions with the remaining arbitrators.[218] Thus, the principle of collegiality is incorporated under the MPIA regime to ensure consistency and coherence in the decision making and prevent the scope of any personal bias to crop up.[219] Moreover, there is likely to be greater efficiency and more diversity under MPIA since there has been an augmentation in number of Members in the standing body, *i.e*, from 7 AB Members to 10 arbitrators.[220]

4.1 Reformative Elements Introduced in MPIA

Further, in order to address the concerns of the USA with respect to the AB's inability to meet the 90 days deadline, the MPIA has introduced certain reformative elements as well.[221] To ensure that arbitrators are able to complete the appellate review within the 90 days deadline, arbitrators under the MPIA regime have the discretion to adopt adequate organizational measures such as placing a limit on the page number, time; or fixing the frequency and duration of hearing to ensure adherence to the deadline.[222] In addition to this, arbitrators may even encourage for omission of claims which are "based on the alleged lack of an objective assessment of the facts to Article 11 of the DSU".[223] Since, the arbitrators are required to review only the issues of law,[224] the claims brought pursuant to Article 11 take considerable amount of time as adjudicators have to carefully delineate the line between issues of law and issues of facts.[225] This makes it difficult for adjudicators to adhere to the 90 days' timeline. Thus, with a reduction in Article 11 claims, arbitrators will be able to save their time and resources by channelizing the appeal mechanism under MPIA more towards the legal issues.

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213 MPIA, *supra* note 33, at 2 & 3.
214 MPIA, *supra* note 33, at 4, 5 & 6.
215 MPIA, *supra* note 33, at 7.
216 MPIA, *supra* note 33, at 7, para 4.
217 MPIA, *supra* note 33, at 5, para 7.
218 MPIA, *supra* note 33, at 5, para 8.
219 Bashar H. Malkawi, *MPIA and Use of Arbitration: Bypassing the WTO Appellate Body,* JURIST (Accessed on Oct. 21, 2021), https://www.jurist.org/commentary/2020/05/bashar-malkawi-mpia-wto-appellate-body/. [*Hereinafter* "Malkawi"]
220 Thibaud Bodson, *WTO and Multi-Party Interim Appeal Arbitration Arrangement: Searching for Right Medicine*, INTERNATIONAL LITIGATION BLOG (Accessed on Oct. 22, 2021), https://www.sipotra.it/wp-content/uploads/2020/07/Saving-the-Right-to-Appeal-at-the-WTO-The-EU-and-the-Multi-Party-Interim-Appeal-Arbitration-Arrangement.pdf. [*Hereinafter* "Thibaud"]
221 Malkawi, *supra* note 219.
222 MPIA, *supra* note 33, at 5, para 12.
223 MPIA, *supra* note 33, at 5, para 13.
224 MPIA, *supra* note 33, at 5, para 9.
225 Thibaud, *supra* note 220.

Moreover, the arbitrators are required to confine themselves only to those issues which are necessary for the settlement of dispute.[226] This will prevent arbitrators from involving in *obiter-dicta* like deliberations and issuing advisory opinions, which is also one of the concerns of the USA.[227]

Such measures under the MPIA regime, thus, promote the idea of judicial economy.[228] It further implicitly reflects the EU's pursuit to reform the AB and pacify some of the issues raised by the USA.[229]

Till now, 8 cases[230] have come up where parties involved have either submitted Article 25 notifications indicating their commitment to using the MPIA to resolve their dispute should either party decide to appeal the relevant WTO panel's ruling, or are likely to do so at the panel stage because they are both parties to the MPIA. These cases, inter alia, have involved consultations (a) with respect to measures imposed by Costa Rica that allegedly restrict or prohibit the importation of fresh avocados for consumption from Mexico, (b) Brazil's consultation with Canada with respect to measures concerning trade in commercial aircraft, (c) Canada's consultations with China regarding the measures allegedly affecting the importation of canola seed. The fact that cases under MPIA have already started coming up indicates its potential success.

Summary

MPIA is a European Union led project with an aim to create an appeal mechanism amid the current AB impasse. MPIA achieves this by employing the arbitration procedure set forth in Article 25 of the DSU, which is designed to mimic the AB's substantive and procedural characteristics. The MPIA has also incorporated several reformative aspects in order to address US's concerns with respect to the AB's functioning, such as the AB's inability to achieve the 90-day deadline and its engagement in advisory opinions that are not important to the resolution of disputes. Arbitrators under the MPIA system have the option to take appropriate organisational steps to ensure that the appeal review is completed within the 90-day timeframe, such as limiting the number of pages, time, or the frequency and duration of hearings in order to meet the deadline. The arbitrators may also suggest for the exclusion of claims "based on the alleged lack of an objective assessment of the facts to Article 11 of the DSU." Furthermore, the arbitrators must limit themselves to only those factors that are necessary to the resolution of the dispute.

[226] MPIA, *supra* note 33, at 5, para 10.
[227] Carline, *supra* note 209.
[228] *Id.*
[229] Yves, *supra* note 205.
[230] World Trade Organization, *Canada – Measures Concerning Trade in Commercial Aircraft*, DS524, World Trade Organization, World Trade Organization, *Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico*, DS524; World Trade Organization, *Canada — Measures Governing the Sale of Wine*, DS537; World Trade Organization, *China — Measures Concerning the Importation of Canola Seed from Canada*, DS589; World Trade Organization, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, DS591; World Trade Organization, *China — Anti-dumping and countervailing duty measures on barley from Australia*, DS598; World Trade Organization, *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, DS602; World Trade Organization, *European Union — Measures Concerning the Importation of Certain Poultry Meat Preparations from Brazil,* DS601.

5. ICSID: WHAT CAN MPIA LEARN FROM IT?

ICSID was established in 1966 for providing a forum for settlement of disputes between governments and private parties.[231]

The objective of ICSID is to aid the process of economic development.[232] It provides an institutional structure to facilitate conciliation and arbitration for international investment disputes through constitution of conciliation commissions and arbitral tribunals respectively on an *ad hoc* manner for each dispute.[233] Though conciliation is provided under the ICSID Convention but the popular practice of parties is to resort to arbitration, .[234]

ICSID investment arbitration shall not come into play unless both the Contracting State and a national of another Contracting State consent.[235] However, there are some advantages to resort to ICSID arbitration: it provides standard provisions and procedural rules, institutional support and promotes the recognition and enforcement of the arbitral awards.[236]

Both the investor and the host country benefit from ICSID arbitration. The benefit to the investor is self-evident, i.e., it receives immediate access to an effective international forum in the event of a disagreement and the host state benefits as its investment climate gets enhanced.[237] Before 1966, no direct agreement existed between the host country and the investor which led to investor being subjected to the local laws of the host country if any dispute arose.[238] Therefore, a pressing need arose for an international forum to provide redressal to the grievances of the investors, which led to the birth of ICSID.

Similarly, if we look at the formation of MPIA, there is an uncanny similarity between the situations/conditions that led to the creation of both these forums. MPIA has also been introduced to provide a platform to the countries to work out their appeals from Panel reports amidst the absence of functioning AB.[239] Further, the major common feature between MPIA and ICSID is the use of arbitration mechanism for the resolution of disputes in the area of international trade and international investment respectively.[240] Moreover, it is pertinent to note that the majority of MPIA Members, including some major economies like China, Canada, Australia etc,

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[231] *See*, *History of the ICSID Convention*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf. [*Hereinafter* "History of the ICSID Convention"]

[232] Christoph Schreuer, *International Centre for Settlement of Investment Disputes (ICSI*D), UNIVERSITY OF VIENNA (Accessed on Oct. 10, 2021), arbitrationhttps://www.univie.ac.at/intlaw/pdf/101_icsid_epil.pdf. [*Hereinafter* "Christoph"]

[233] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug. 27, 1965, 575 U.N.T.S. 15, Art. 1(2). [*Hereinafter* "ICSID"]

[234] Christoph, *supra* note 232.

[235] ICSID, *supra* note 233, Art. 25(1).

[236] ICSID, *supra* note 233, Chapter IV.

[237] Christoph, *supra* note 232.

[238] History of the ICSID Convention, *supra* note 231.

[239] Olga Startshinova, *Is the MPIA a solution to the WTO Appellate Crisis?*, 55 JOURNAL OF WORLD TRADE 787 (2021).

[240] ICSID, *supra* note 233, Chapter IV; MPIA, *supra* note 33, at 2, para 1.

are part of ICSID as well.[241] This implicitly exhibits the preference of countries to resort to arbitration mechanism for the resolution of their international claims.

Against this backdrop, it becomes imperative to analyse the effectiveness and the lacunas of ICSID in order to gauge the effectiveness of MPIA's arbitration mechanism.

5.1 Effectiveness of ICSID Arbitration facility

The relevance of ICSID remains intact even today. At present, 156 Member States and 8 Signatory States are part of ICSID and only three countries have denounced it since its inception (though one country has rejoined recently).[242] However, this hasn't affected the credibility of ICSID as far more countries continue to sign and ratify this convention. One of the reasons could be the meticulous drafting of the ICSID Convention. The arbitration clauses of ICSID seek to overcome some of the inherent dangers of the arbitration system.[243] For instance, once a party has consented to the jurisdiction of ICSID, it cannot unilaterally withdraw its consent.[244] In addition to this, the arbitral awards are made binding and enforceable to curb the menace of parties disregarding the award.[245] Such provisions, thus, instil trust and confidence of the parties on the awards rendered and prevent unilateral obstruction of proceedings.

Consequently, the ICSID arbitration clauses have gained worldwide acceptance. Over the years, ICSID has successfully examined around 70% of all known Investor-State Disputes **["ISDS"]**.[246] Its arbitration clauses are widely referred to in the domestic legislations of the Third World states and bilateral investment treaties involving these states, respectively, to enhance foreign investment.[247] Moreover, the arbitration clauses of ICSID have also been incorporated in multilateral agreements such as the North American Free Trade Agreement **["NAFTA"],**[248] the Energy Charter Treaty **["ECT"],**[249] *et al.*[250] Thus, ICSID has established itself as a leading international arbitration forum for ISDS cases.

Concerning the caseload, ICSID has administered 68 cases in the year 2020 – the highest number of annual disputes in its history – despite the chaos of pandemic.[251] Therefore, it is apparent that the international investment arbitration system established under ICSID has been successfully thriving for more than five decades. Thus, in order to assess whether MPIA can prove to be a viable alternative to the AB, a comparative analysis between ICSID and MPIA has been carried

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241 *List of Member States – ICSID/3*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Accessed on Oct. 18, 2021) https://icsid.worldbank.org/resources/lists/icsid-3.
242 *Id.*
243 *International Centre for Settlement of Investment Disputes: Selecting the Appropriate Forum,* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, https://unctad.org/system/files/official-document/edmmisc232add1_en.pdf.
244 ICSID, *supra* note 233, Art. 25(1).
245 *Id*, Art. 53 & 54.
246 *Special Features and Benefits of ICSID Membership*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Accessed on Oct. 7, 2021), https://icsid.worldbank.org/sites/default/files/publications/ICSID_Benefits_English.23.2020.pdf.
247 Ibironke T Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INTERNATIONAL LAW JOURNAL 345, 349 (2007). [*Hereinafter* "Ibironke"]
248 North American free Trade Agreement between Canada, the United States and Mexico, Dec. 19, 1992, 32 I.L.M. (1993), Art. 1120.
249 Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 373, 381 (1995), Art. 25(4).
250 Ibironke, *supra* note 247.
251 *ICSID Caseload – Statistics*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Accessed on Oct. 7, 2021), https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

out in this section. The procedures, rules, practices implemented in ICSID over the years have also been thoroughly analysed in light of the MPIA's substantive and procedural rules.

5.2 Concept of Denunciation: ICSID vis-à-vis MPIA

The concept of denunciation is of immense importance in contemporary treaty law. Denunciation clauses are usually included in the treaty and can be seen in varied forms – some allow for denunciation after ending of certain period of time, for e.g. after 5 years of ratification of the treaty; while some allow the parties to denounce any time.[252] Therefore, the importance of denunciation in multilateral, plurilateral arrangements/treaties is of immense value. For the aforementioned reasons, it is necessary to discuss the denunciation clause with respect to ICSID and MPIA.

The right to denounce flows from Vienna Convention which provides a state entering into treaty with each other, or with an international organisation the right to withdraw from the treaty if it so provides.[253] Countries while entering into treaties, without fail, assess the denunciation clause, especially in commercial treaties. The countries need to identify the options available to them if in future the treaty is not aligning with their internal policies/interests, they can be absolved from their obligations and liabilities.

Under ICSID, denunciation is governed by Article 71[254], which has come into operation three times in the past when Ecuador, Venezuela, and Bolivia denounced the convention.[255] Although, Ecuador recently re-signed the convention in June 2021.[256] The countries that have denounced from ICSID are developing Latin America countries, therefore the reasons forwarded by them to arrive at such an arduous decision are inevitable to not be assessed.

One common reason that has been noted among the countries that denounced ICSID was that they were not treated on par with the developed countries since the regulations favoured the developed countries. India has also expressed its conservation about presence of bias and developed countries being favoured over developing countries.

Therefore, it is crucial for the countries to assess the denunciation clause before entering into any agreement/treaty as they need to ensure that they will be treated without any bias, and further ascertain that the procedure to exit is straightforward, if they ever decide to leave.

The denunciation clause in ICSID is infamous to be ambiguous and has more than one interpretation in cases where the country denounces from the convention. Article 72 of the

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[252] Kelvin Widdows, *The Unilateral Denunciation of Treaties containing no Denunciation Clause*, 53 BRITISH YEARBOOK OF INTERNATIONAL LAW 83, 83 (1983).
[253] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 54.
[254] ICSID, *supra* note 233, Art. 71.
[255] Vanessa Giraud, *Is Investment Arbitration in Latin America in Crisis?*, KLUWER ARBITRATION BLOG (Accessed on Oct. 8, 2021), http://arbitrationblog.kluwerarbitration.com/2014/05/19/is-investment-arbitration-in-latin-america-in-crisis/.
[256] *Ecuador Signs the ICSID Convention*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Accessed on Oct. 9, 2021), https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention.

Convention governs and sets out the consequences of the denunciation set forth in Article 71[257] which furthers the confusion.

Article 71 states, '*Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.*'[258]

Article 72 lays down that the notice under Article 71 shall not affect the rights and obligations of the State if the consent to refer the disputes have been given to the centre prior to sending of notice under Article 71.

Therefore, in this situation the pertinent question that arises is whether the investor justifiably submit the claim to ICSID arbitration on the ground that such intent was expressed by the State in an earlier BIT.[259]

Currently, there is divergence of opinion about the meaning of this provision – some believe that Article 72 refers only to those disputes where consent has been "perfected", i.e. proceedings initiated by the time of the denunciation.[260] *Per contra*, the other set of people forward that Article 72 encompasses all unilateral offers of consent which remain standing even after the denunciation (most importantly, consents given by states in BITs that remain in force and those terminated BITs which remain in effect due to the operation of the "survival clause"). In one instance it has been seen that investors brought claim against the State even after 8 years of denunciation.

In the absence of an agreed uniform interpretation by the ICSID Contracting Parties, arbitral tribunals will be the ones deciding the issue. The approach that will be taken by the arbitral tribunals will not only affect the contracting parties, but also other countries that might consider joining or withdrawing from ICSID in the future.[261]

The price of the existing ambiguity and equivocalness is usually paid by the investors and states involved.

In case of denunciation of Bolivia, an investor brought a claim[262] against the country after a long period of more than 2 years. The case however didn't go forward as the parties settled for US$ 357 million.[263] Albeit, it was the parties that suffered due to the unsettled meaning of Article 72.

Coming to position under MPIA,[264] in case countries want to exit from the arrangement, they can do so by simply communicating their intention to the DSB. Thereby the countries have complete

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[257] Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation And Proposals For Change*, 11 THE JOURNAL OF INTERNATIONAL BUSINESS & LAW 239, 260-263 (2012).
[258] ICSID, *supra* note 233, Art. 71.
[259] Mariana Durney, *Legal Effects and Implications of the Denunciation of the ICSID Convention on Unilateral Consent Contained in Bilateral Investment Treaties: A Perspective from Latin American Cases*, 17 MAX PLANK YEARBOOK OF UNITED NATIONS LAW ONLINE (2013).
[260] E. Schnabl and J. Bedard, *The Wrong Kind of Interesting*, THE NATIONAL LAW JOURNAL (2007).
[261] *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims,* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, (IIA Issues Note, No.2, December 2010).
[262] Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8.
[263] José Carlos Bernal Rivera & Mauricio Viscarra Azuga, *Life after ICSID: 10th anniversary of Bolivia's withdrawal from ICSID*, KLUWER LAW ARBITRATION (Accessed on Oct. 11, 2021), http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/.
[264] MPIA, *supra* note 33, at 3, para 14.

autonomy with regard to their decision to leave. Although, if any dispute is pending or consent to refer the dispute to MPIA was given during the course of participation, it will be binding on the parties and MPIA tribunal will have the jurisdiction to decide the dispute.[265]

The position under MPIA is quite clear and straightforward, therefore, the States should not have any conservations with regard to exit mechanism of the MPIA. Thereby, it makes linear and easy for the Members to adopt MPIA since there are no hurdles to undo the same.

5.3 Criticisms of ICSID: Is MPIA likely to meet the same fate?

Despite comprehensive design of the ICSID procedural clauses, ICSID is grappled with a number of problems which cast doubt on the finality of its award and the enforcement mechanism of its arbitration proceedings. Consequently, this raises apprehension about the arbitration proceedings that will take place under the MPIA regime, owing to the similarity between the situations that led to the creation of both these forums. However, it is pertinent to note that procedural aspects of MPIA and ICSID vary considerably. This makes it unlikely that arbitration proceedings and arbitral awards under MPIA will meet the similar fate.

Some areas of concern under ICSID are:

5.3.1 Issue of annulment

As per Article 52(1) of ICSID, any party can request for the annulment of the arbitration award on the following limited grounds: "(a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a Member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."[266]

Based on these five limited grounds, the annulment mechanism works as a system of review for invalidating the arbitral award either completely or partially. The award cannot be modified on the basis of merit as the purpose of annulment is not to serve as an appeal mechanism.[267] However, this exceptional remedy is now being used as an ordinary remedy by the losing parties. This problem is further exacerbated by the increased willingness of *ad hoc* committees to annul.[268] The two notable infamous cases in this regard are *Klockner v. Cameroon*[269] and *Amco v. Indonesia*[270]. The awards rendered in these two cases were referred for annulment review. In both these cases it was alleged that the arbitral awards were annulled on the basis of merits in the guise of annulment mechanism. This goes against the purpose of annulment and was severely criticised by the scholars for blurring the line between annulment and appeal.[271]

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[265] *Id.*
[266] ICSID, *supra* note 233, Art. 52(1).
[267] Dohyun Kim, *The Annulment Committee's Role In Multiplying Inconsistency In Icsid Arbitration: The Need To Move Away From An Annulment based System*, 86 NEW YORK UNIVERSITY LAW REVIEW, 242, 250 (2011). [*Hereinafter* "Dohyun"]
[268] Christoph, *supra* note 232.
[269] Klockner Industrie-Anlagen GmbH and others v. Republic of Cameroon and Societe Camerounaise des Engrais, Decision annulling the award, May 3, 1985, 2 ICSID REP. 95 (1994).
[270] Amco Asia Corporation and others v. Republic of Indonesia, Decision annulling the award, May 16, 1986, 1 ICSID REP. 509 (1993).
[271] Dohyun, *supra* note 266, at 263.

Moreover, the misuse of annulment mechanism unnecessarily prolongs and increases the cost of proceeding and further hampers the confidence of the parties on the ICSID's arbitration machinery to reach a final decision in a decisive way.

However, the arbitral awards rendered under the aegis of MPIA will be final[272] as the awards are not subjected to any review or appeal mechanism. Thus, it promotes the MPIA's ability to reach conclusive decisions in a more efficient manner.

5.3.2 Issue of non-compliance by states

Under ICSID, each party is required "to abide by and comply with the terms of the award."[273] Further, each party is required to recognize the award "as binding and enforce the pecuniary obligations imposed" which is to be enforced like the final judgment of a domestic court of that state.[274] ICSID, thus, establishes a regime of voluntary compliance and enforcement of the arbitral awards[275] which is a major factor for non-compliance.

Although, the states generally comply with the awards but the instances of non-compliance are also in significant number.[276] When a state refuses to comply with the award, the investor seeks for enforcement. However, the enforcement process itself is very complex which involves multi-jurisdiction litigation, humongous financial resources, a lot of time*, inter alia*.[277] And despite undertaking this complex process, the investors fail to seek enforcement.[278] For instance, Argentina has been notorious for its refusal to comply with the investment arbitral awards and anti-enforcement stand.[279] However, owing to the mounting diplomatic pressure, Argentina finally decided to settle the long-term pending adverse arbitration claims in 2013.[280] Such instances, therefore, raises concerns about the effectiveness of the ICSID mechanism.

Whereas under MPIA, pursuant to Article 25.4 of the DSU, the procedures of compliance and enforcement applicable on Panel/AB reports "apply *mutatis mutandis* to arbitration awards."[281] Thereby, the awards under MPIA would require the violating Member to modify or withdraw the measure which is inconsistent with the WTO rules, unlike awards under ICSID, where the losing party is required to compensate in terms of pecuniary obligation.[282] Further, if the violating party fails to comply within a reasonable time, the complaining party may resort to enforcement remedies which may vary from compensation (not defined in terms of monetary payments but

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[272] MPIA, *supra* note 33, at 6, para 15.
[273] ICSID, *supra* note 233, Art. 53(1).
[274] ICSID, *supra* note 233, Art. 54(1).
[275] Katia Fach Gomez, *Latin America and ICSID: David versus Goliath?* (Accessed on Oct. 13, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708325.
[276] Emmanuel Gaillard & Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 540, 544 (2021). [*Hereinafter* "Emmanuel"]
[277] *Id*, at 591.
[278] *Id.*
[279] *Argentina Settles Five Outstanding Investment Treaty Arbitration Claims In Historic Break With Its Anti-Enforcement Stance*, HERBERT SMITH FREEHILLS (Accessed on Oct. 13, 2021), https://hsfnotes.com/arbitration/2013/10/14/argentina-settles-five-outstanding-investment-treaty-arbitration-claims-in-historic-break-with-its-anti-enforcement-stance/.
[280] Emmanuel, *supra* note 276, at 553.
[281] *See*, MPIA, *supra* note 33, at 6, para 17; DSU, *supra* note 18, Art 25.4.
[282] ICSID, *supra* note 233, Art. 53(1).

requires offending Member to provide additional trade benefits to the complaining Member)[283] to suspension of concessions by the complaining Member.[284]

Thus, the stringent compliance and enforcement mechanism under MPIA would ensure compliance by the offending party and bolster the legitimacy and certainty of the awards that will be rendered under the MPIA regime.

5.3.3 Issue of conflicting decisions

Another issue with the arbitration regime of ICSID is rendering of conflicting decisions by the arbitrators. In *Continental Casualty Company v. Argentine Republic,*[285] the tribunal found that the actions of Argentina in response to the Argentina crisis of 2001 were necessary to preserve the public order. While in *Sempra Energy International v. Argentine Republic*,[286] the tribunal did not recognize its actions in response to the 2001 crisis as necessary to preserve the public order. This issue primarily arises due to the lack of transparency and biasness of arbitrators in favour of the investors[287] which might stem from the fact that ICSID allows parties to appoint arbitrators from outside the Panel of Arbitrators.[288] Thus, the lack of coherence severely threatens the rule of law in international investment regime and the legitimacy of the awards.[289]

However, the issue of conflicting and inconsistent decisions is less likely to arise in MPIA as any arbitration proceeding will be adjudged only by the arbitrators from the pool of ten standing appeal arbitrators[290] which is composed by the consensus of all the Members.[291] Further, the arbitrators are required to "discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable" to ensure "consistency and coherence in decision-making".[292]

Hence, the MPIA's provisions significantly vary from that of ICSID. The drafters of MPIA have ensured that the awards that will be rendered by its arbitrators promote utmost confidence of the Member states in the legitimacy and decisiveness of the awards.

Summary

A comparative analysis has been done between ICSID and MPIA owing to the uncanny similarity between the conditions that led to the creation of both these forums. The major common feature between MPIA and ICSID is the use of arbitration mechanism for the resolution of disputes in the area of international trade and international investment respectively. Against this backdrop, the effectiveness and the lacunas of ICSID have been analysed in order to gauge the future success of MPIA's arbitration mechanism. Albeit, despite the comprehensive design of the ICSID procedural clauses, ICSID is grappled with a number of problems which cast doubt on the finality of its award and the enforcement mechanism of its arbitration proceedings. Further, a few countries have also denounced ICSID and concerns have been raised on its exit mechanism. Consequently, this raises apprehension about the arbitration proceedings and the exit mechanism of the MPIA regime,

[283] Simon, *supra* note 67, at 160.
[284] *See*, DSU, *supra* note 18, Art. 22.
[285] *See,* Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9.
[286] *See,* Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16.
[287] Nicolas Boeglin, *ICSID And Latin America : Criticisms, Withdrawals And Regional Alternatives*, BILATERALS (Accessed on Oct. 15, 2021), https://www.bilaterals.org/?icsid-and-latin-america-criticisms&lang=fr#nb15.
[288] *See*, ICSID, *supra* note 233, Art. 40.
[289] Dohyun, *supra* note 267, at 258.
[290] MPIA, *supra* note 33, at 2, para 4.
[291] MPIA, *supra* note 33, at 7, para 4.
[292] MPIA, *supra* note 33, at 2, para 5.

owing to the similarity between both of these forums. However, the procedural rules of MPIA and ICSID vary considerably in aspects of denunciation, appointment of arbitrators, enforcement mechanism, etc. Therefore, it is unlikely that the MPIA will meet the similar fate.

6. IMPLICATIONS OF MPIA ON APPELLATE BODY'S JURISPRUDENCE

6.1 25 years' Legacy of the Appellate Body

Under the current Appellate Body approach, the default is to follow the reasoning of past cases, and an argument for a departure from past cases faces the burden of offering "cogent reasons."[293] In contrast, if the past reasoning had "persuasive value", panels and the Appellate Body could look to past cases and would follow them where they considered the reasoning and found it convincing.[294]

Clarifications provided by panels and the Appellate Body can have persuasive value, but are of less authority than the interpretations adopted under Article IX:2 of the WTO Agreement. The AB has over the years developed a tradition of precedents,[295] and albeit decisions of WTO Panels and AB in the strict sense of law do not in general constitute formal sources of law, in practicality their importance cannot be ignored. WTO jurisprudence upholds the rule that like cases must be treated alike and only cogent reasons permit a departure.[296] In the words of the Appellate Body, these GATT and WTO panel reports — and equally adopted Appellate Body reports — "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[297] The standard for such reasons to depart from precedents is quite high and a mere disagreement does not satisfy such threshold.[298] Specific instances could include a situation of process failure or when the findings of the AB do not either constitute as persuasive or in line with covered agreements. Undoubtedly, AB rulings have value for Panels to follow and since it imparts the advantages of stability and certainty[299] the WTO Panels consider the AB rulings to have binding value. The precedential value of AB reports stems from the mandate of the dispute settlement system to provide "security and predictability to the multilateral trading system."[300]

The inclusion of cogent reasoning to function as a ground for departure stems from the hierarchical second level review of the AB. However, this did not exist in the GATT and in WTO law the precedents do not constitute as legally binding beyond the specific dispute, and there may be acceptance of a reasoned disagreement by the AB. This is likely to be followed by the MPIA as well. While, the MPIA states "*re-affirming that consistency and predictability in the interpretation of rights and*

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[293] Simon Lester, *Persuasive Value vs. Precedent in Appellate Body Reasoning*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Accessed on Jan. 28, 2022), https://worldtradelaw.typepad.com/ielpblog/2018/12/persuasive-value-vs-precedent-in-appellate-body-reasoning.html.

[294] *Id.*

[295] *See,* Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in Two Adjudication (Part Two of a Trilogy)*, 9 JOURNAL OF TRANSACTIONAL LAW AND POLICY, 9-12 (2000).

[296] *See*, *Status of Panel and Appellate Body Reports*, WORLD TRADE ORGANIZATION (Accessed on Oct. 15, 2021), https://www.wto.org/english/tratop_e/dispu_e/repertory_e/s8_e.htm.

[297] *Legal Effect Of Panel And Appellate Body Reports And DSB Recommendations And Rulings,* WORLD TRADE ORGANISATION (Accessed on Jan. 28, 2022), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm.

[298] *See*, World Trade Organisation, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, DS344. [*Hereinafter* "United States – Final Anti-Dumping Measures"].

[299] DSU, *supra* note 18, Annex. 2.

[300] United States – Final Anti-Dumping Measures, *supra* note 298.

obligations under the covered agreements is of significant value to Members,"[301] this is a mere arrangement between these specific Members and not by the WTO Members in general.

6.2 Conundrum surrounding the Precedential value of MPIA's Arbitral Awards

The MPIA affords arbitrators the flexibility to diverge from reasoning's adopted in the past. The arbitral awards given by the MPIA, however cast uncertainty on the persuasive authority of these awards in the future disputes. The MPIA awards are based on WTO agreements and are not adopted by consensus since the award although *notified* is not *adopted* by the DSB.[302] This would mean that in general the MPIA report would not hold a precedential value since it is not adopted on the DSB pursuant to Article 17.14 of the DSU. Thus, while arbitrators are bound by WTO agreements, they are not bound by AB decisions nor by past MPIA cases. However, unadopted reports [as was the case in Panel reports] do serve guidance in that they can provide useful guidance and the reasoning of such reports can be considered relevant.[303]

MPIA arbitral tribunals would have to follow the WTO agreements, which includes Article 11 of the DSU, and consequently the objective assessment requirement would oblige MPIA Panels to adopt past interpretations of the WTO agreement including even AB rulings. Thus, in some way or the other the MPIA arbitral tribunals need to make a reference to either past AB rulings or its own rulings. It also would not be reasonable for MPIA Panels to start afresh and ignore the wealth of expertise generated by AB reports. Moreover, if the MPIA arbitral Panels fail to follow their own rulings or previous it would entitle Panels to follow to examine legal issues afresh in every case. This does not seem reasonable and could lead to a series of conflicting decisions.

The objective of the MPIA is essentially basing its decision on sound legal reasoning and based on the facts of that particular case, thus only referring to the WTO agreements without any reference to AB rulings leaves MPIA Panels devoid of important resources. Thus, while MPIA arbitral Panels are free to adopt legal reasoning, in a case where the facts of a case are similar appear before it, it would make sense to follow the previous AB rulings.

Since the WTO forms a subset of Public International Law **["PIL"]**,[304] Article 38(1) of the ICJ Statute serves as guidance for potential sources of law.[305] As MPIA awards, forms judicial decisions, they could be relevant for determination of law under Article 38(1)(d).[306] Since a principle of WTO law is that of *security and predictability*, if the AB starts functioning again a legally sound report could be of immense value for future WTO dispute settlements. Thus, it will depend ultimately on a case to case basis depending majorly on how the parties and adjudicators approach the issues.[307] On a question of how much weightage these awards would have can be answered partly, by assessing the legitimacy of the MPIA, which depends on whether it would fulfil set

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[301] MPIA, *supra* note 33, at 1.
[302] MPIA, *supra* note 33, at 3, para 15.
[303] World Trade Organization, *Japan — Taxes on Alcoholic Beverages,* DS8.
[304] Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?,* 95 AMERICAN JOURNAL OF INTERNATIONAL LAW, 535 (2001).
[305] DAVID PALMER AND PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 50 (2 ed. Cambridge University Press 2012).
[306] Statute of the International Court of Justice, Jun. 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933, Art. 38(1)(d).
[307] *Brief | 'The Appellate Body Crisis at the WTO', following the online conference held on April 28th, 2020*, HYPOTHESES (Accessed on Dec. 12, 2021), https://devpol.hypotheses.org/1680. [*Hereinafter* "Brief"]

standards during execution of its mandate.[308] This could include factors such as procedural issues, fact finding, the manner of interpretation etc. The MPIA has been formed keeping in mind the concerns of legitimacy and transparency. The selection of arbitrators is quite similar to that of AB Members,[309] and the board of arbitrators comprises very qualified people having experience in the DSU of the WTO.[310] At this point, this is the most that can be answered on the precedential value that MPIA awards would hold, and such factors along with the acceptance of the MPIA from the WTO Members would help determining the weightage of these awards if the AB starts functioning again.

Summary

Arbitrators would be theoretically able to diverge from MPIA awards since while they are based on WTO agreements, they are not adopted by consensus as the award that is notified is consequently not adopted by the DSB. However, from a practical standpoint even unadopted reports do serve guidance since the reasoning of such reports can be considered relevant as was also in the case of Panel reports.

MPIA arbitral tribunals would have to follow the WTO agreements which includes Article 11 of the DSU, and consequently the objective assessment requirement would oblige MPIA Panels to adopt past interpretations of the WTO agreement including AB rulings. Thus, MPIA arbitral tribunals need to make a reference to either past AB or MPIA rulings. Moreover, WTO is a subset of PIL, and MPIA awards forming a 'source of law', under "judicial decisions" could be relevant for determination of law under Article 38(1)(d), of the ICJ.

The question of weightage that would be allocated to MPIA awards can only presently be answered partly and would depend on various factors such as procedural issues, fact finding, the manner of interpretation etc.

308 ROBERT HOWSE ET AL., THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS 6 (Cambridge University Press 2018).

309 WT/DSB/RC/1, Rules Of Conduct For The Understanding On Rules And Procedures Governing The Settlement Of Disputes, World Trade Organization, Dec. 11, 1996, provision IV & VI.; DSU, *supra* note 18, Art. 17.3.

310 Simon Lester, *The MPIA Pool of Arbitrators Has Been Announced*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Accessed on Oct. 10, 2021), https://ielp.worldtradelaw.net/2020/08/the-mpia-pool-of-arbitrators-has-been-announced.html.

7. IMPLICATIONS OF MPIA ON MULTILATERALISM

7.1 WTO and Multilateralism

GATT had championed the cause of multilateralism in the regime of international trade since the end of Second World War.[311] However, need was felt to further strengthen and bolster the multilateral system. To achieve this, Members engaged in the largest ever trade negotiation in Uruguay round which led to the establishment of WTO with the consensus of 123 Members.[312]

Since its inception in 1995, WTO has been the prime body to regulate and govern the multilateral trading system by providing a platform to negotiate, settle disputes and make rules in the arena of international trade.[313] It provides a rule-based trading regime to its Members and has significantly contributed in boosting world's economy through facilitating dialogue over mutually beneficial trade liberalization.[314]

Further, WTO has produced some remarkable feats in recent years as well, including the Trade Facilitation Agreement **["TFA"].** TFA aims to facilitate expeditious movement and clearance of goods.[315] Negotiations of TFA were concluded at the 2013 Bali Ministerial Conference and it has come into force recently in 2017.[316] Moreover, "Nairobi Package" was also adopted recently in the 2015 Ministerial Conference to address the concerns of least developed countries.[317]

Thus, WTO has been able to achieve multilateralism in international trade to a remarkable extent which has been advantageous to both developed and developing countries alike.

7.2 Working procedure of WTO

WTO has been able to carve a distinct niche for itself through its working process. WTO is a member-driven organisation, i.e., any decision is arrived at by the consensus of all the Members.[318] It is unlike other international organizations such as World Bank and International Monetary Fund **["IMF"]** where power to take decisions is headed either by the Board of governors or the head of their respective institutions.[319]

Considering the large membership of WTO, consensus, in fact, appears to be an ideal method to accommodate the concerns of Members given the wide asymmetries in the size, interests, power,

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311 *See generally*, *The GATT years: from Havana to Marrakesh*, WORLD TRADE ORGANIZATION (Accessed on Oct. 7, 2021), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

312 *See generally*, *The Uruguay Round*, WORLD TRADE ORGANIZATION (Accessed on Oct. 6, 2021), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

313 *Multilateralism in International Trade, Reforming the WTO*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Accessed on Oct. 12, 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603919/EPRS_BRI(2017)603919_EN.pdf. [*Hereinafter* "Multilateralism"]

314 Richard Baldwin, *The World Trade Organisation and the future of Multilateralism*, 30 THE JOURNAL OF ECONOMIC PERSPECTIVES, 95 (2016).

315 *Trade Facilitation*, WORLD TRADE ORGANIZATION (Accessed on Oct. 6, 2021), https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

316 *Id.*

317 *Nairobi Package*, WORLD TRADE ORGANIZATION (Accessed on Oct. 7, 2021), https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm.

318 *Whose WTO is it anyways?*, WORLD TRADE ORGANIZATION (Accessed on Oct. 6, 2021), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

319 *See generally*, *IMF and World Bank Decision – Making and Governance*, BRETTON WOODS PROJECT (Accessed on Oct. 2, 2021) https://www.brettonwoodsproject.org/2020/04/imf-and-world-bank-decision-making-and-governance-2/.

and per capita income across the membership.[320] Thus, it ensures that all members, particularly the developing countries have the equal opportunity to voice their points and withhold their consent until reconciliation.

However, the consensus based approach for promoting multilateralism has backfired in the present conflicting world. Reaching a consensus has become increasingly difficult because of the ability of even a small minority to cause obstruction. Further, consensus is required not only in the area of negotiations but also in the routine activities of the WTO such as deciding the agenda of the Committee meetings or even a discussion on trade-policy related matters.[321] Thereby, it makes the possibility of any reform in WTO extremely far-fetched.[322]

7.3 Multilateralism in 21st century: A far-fetched idea

The WTO's aim of ensuring multilateralism in international trade is in peril due its own working mechanism. Except for a few noteworthy examples, the Members have not been able to bring any breakthrough in international trade lately.[323] Currently, WTO is grappled with various challenges, one of these is inconclusive trade negotiations. For instance, the failure of Doha round of negotiations is largely attributed to WTO's 'consensus-based' and 'single-undertaking' approach.[324] The negotiations of this round began in 2001 with the aim of lowering the trade barriers and enhancing the trade opportunities for developing countries.[325] However, the reluctance of developed countries and developing countries to make mutual concessions for one another led to the impasse.[326] This deadlock deeply affected the credibility of WTO as a vehicle for addressing meaningful multilateral trade issues.[327] Further, even the latest Ministerial Conference held in Buenos Aires ended without any Ministerial Declaration. The consensus-based approach is to be blamed for this as well.[328] Consequently, due to the difficulties in negotiating multilateral agreements, countries have started engaging in bilateral, regional and other preferential trade agreements outside the WTO.[329]

In addition to the challenge of 'single undertaking' in WTO agreements, members have also not been able to address the issue of unfair trade practises under the existing WTO regime. Further, with the rise of China's share in the global trade and its trade distorting practices including the

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[320] Christian Bluth et al, *Revitalizing Multilateral Governance at the World Trade Organisation: Report of the High-Level Board of Experts on the Future of Global Trade Governance*, BERTELSMANN STIFTUNG (Accessed on Dec. 12, 2021), https://www.wto.org/english/news_e/news18_e/bertelsmann_rpt_e.pdf. [*Hereinafter* "Christian"]

[321] *Id.*

[322] Jean Yves Remy, *Dispute Settlement at the WTO: How Did We Get Here and What's Next for Commonwealth States?*, THE COMMONWEALTH (Accessed on Oct. 6, 2021), https://thecommonwealth.org/sites/default/files/inline/THT_166_UPDF.pdf. [*Hereinafter* "Jean"]

[323] Bernard Hoekman & Petros C. Mavroidis, *WTO Reforms: Back to the Past to Build for the Future,* 12 GLOBAL POLICY 5, 5 (2021). [*Hereinafter* "Bernard"]

[324] Multilateralism, *supra* note 319.

[325] *The Doha Round*, WORLD TRADE ORGANISATION (Accessed on Oct. 6, 2021), https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

[326] *Global Trade After the Failure of Doha Round*, THE NEW YORK TIMES (Accessed on Oct. 8, 2021), https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html.

[327] *Why the Doha Rounds Failed*?, END POVERTY (Accessed on Oct. 9, 2021) https://www.endpoverty.org/blog/why-the-doha-rounds-failed.

[328] Asit Ranjan Mishra, *WTO Buenos Aires Meet Ends With No Consensus On Key Issues*, LIVE MINT (Accessed on Oct. 7, 2021) https://www.livemint.com/Politics/gEIZALjPC16StkiH4VNh8H/WTO-Buenos-Aires-meet-ends-with-no-consensus-on-key-issues.html.

[329] Multilateralism, *supra* note 319.

state-owned enterprises and the industrial subsidies are also of primary concern to the members.[330] To address these concerns the USA, EU and Japan have engaged in a trilateral joint action to reinforce the current inadequate WTO rules.[331] However, any development in trade rules in a multilateral set up is all the more difficult, given the backdrop of US-China trade war [332] and the reluctance of the major powers to involve China in early stage of reform process.[333] This has consequently given rise to adoption of unilateral policies (including the suspension of appointment of AB Members by the USA)[334] which is a major threat to multilateralism.[335]

Therefore, it is apparent that decision making in the scheme of WTO's multilateralism is an uphill task in the current divided world and has promoted unilateralism. At the very least, open plurilateral arrangements can help preserve the multilateralism to some extent. They provide a platform for the countries with similar interests to deliberate on diverse issues and identify areas where cooperation is feasible.[336] This helps Members to make an informed choice in deciding the agenda which is probable to succeed at the multilateral platform of WTO.

7.4 MPIA and Multilateralism

In the WTO dispute resolution system, the countries have agreed to use multilateral system of settling disputes.[337] This is in tandem with the aim of WTO to ensure that security and predictability is maintained while setting the disputes among the countries.[338]

The MPIA has been introduced as a stop-gap solution in the absence of the operational AB. The MPIA is introduced on the lines of Article 25 DSU which is an alternative means to dispute resolution within the multilateral trading system.[339] The MPIA is introduced with an aim to maintain the appellate function within the multilateral dispute mechanism[340] which in turn aids in promoting multilateralism in the WTO which might not be the case if countries did not have any other option but appeal in the void amid defunct AB.

The MPIA has been introduced by the EU on a large scale along the lines of its interim appeal mechanism with Canada agreed to in 2019.[341] It is an interim solution[342] introduced to provide the countries an alternative to settle their disputes to achieve the objective of WTO dispute resolution

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330 Bernard, *supra* note 329, at 10.
331 *EU, U.S. and Japan agree on new ways to strengthen global rules on Industrial Subsidies*, EUROPEAN COMMISSION (Accessed on Oct. 6, 2021), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2101.
332 Daniel Warner, *The World Trade Organisation and the demise of multilateralism*, SWISS INFO (Accessed on Oct. 1, 2021), https://www.swissinfo.ch/eng/opinion_the-world-trade-organization-and-the-demise-of-multilateralism/45763264.
333 Sherman Katz, *How the US, EU and Japan are trying to rein in China's State Capitalism*, HARVARD BUSINESS REVIEW (Accessed on Oct. 13, 2021), https://hbr.org/2018/11/how-the-u-s-the-eu-and-japan-are-trying-to-rein-in-chinas-state-capitalism.
334 *United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process*, 113 AMERICAN JOURNAL OF INTERNATIONAL LAW, 822 (2019). [*Hereinafter* "United States Continues to Block New Appellate Body Members"]
335 Bernard, *supra* note 329, at 10.
336 Christian, *supra* note 326.
337 *A Unique Contribution*, WORLD TRADE ORGANISATION (Accessed on Oct. 9, 2021) https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.
338 DSU, *supra* note 18, Art. 3.2.
339 Di Elisa Baroncini, *Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement*, FEDERALISM.IT Pg. No. 3. [*Hereinafter* "Baroncini"]
340 *Id*, at 10.
341 EU- Canada Interim Appeal Arbitration, *supra* note 195.
342 MPIA, *supra* note 33, at 7, para 5.

system. The interim nature of the arrangement has also been stressed repeatedly in the statement released by the initial participating countries.[343] The EU further affirmed that it is firmly and actively committed to resolve the issue of AB on priority and urgency, and supports all the reforms necessary to make the AB functional again. The arrangement is also drafted in a manner which ensures that it will become non-operational as and when the AB is up and running.[344] Therefore, the MPIA's structure gives priority to reform the AB, thereby promoting the spirit of multilateralism.

Although, the arbitration under Article 25 is an alternate mode to settle disputes which is outside the DSU path of consultation and two tier adjudication but it is well within the structure of DSU. Further, MPIA uses arbitration procedure of Article 25, DSU[345] which would mimic the AB's substantive and procedural aspects,[346] thereby it follows the aim of ensuring multilateralism which is corroborated by the principles and structure of MPIA. The features of MPIA that support multilateralism are as follows:

First, the participating Members must indicate their intention to resort to arbitration by communicating it to the WTO Members within 60 days of establishment of Panel[347] so that any WTO Member may ascertain, comment, and determine what steps to take with respect to the dispute at hand.

Second, since the awards will be considered as arbitral award under Article 25, [348] it is argued that they would interpret WTO law, become part of the WTO case law and have thus to be consistent with the WTO agreements. Further, they must be known by the WTO Members to enable them to wholly and promptly assess and introduce any remark on any aspect of the arbitral award.[349]

Third, Article 21 and 22 DSU will apply *mutatis mutandis* to the awards given by the tribunal composed under the aegis of MPIA.[350] This makes DSB responsible for compliance and implementation of awards. Thereby, MPIA gives same powers to DSB as has been given under AB decisions, and thus, old position is maintained ensuring the participation of countries and preserving multilateralism.

Fourth, third party rights have been preserved in the MPIA as have been provided to the members of WTO in DSU. Third party rights is one of the integral features which promotes the spirit of multilateralism in WTO. [351] The Third Party rights play a valuable role for the members, as it helps the countries who cannot qualify as complainant but has interest in the issue at hand to put forward

[343] MPIA, *supra* note 33.
[344] MPIA, *supra* note 33, at 2, para 1.
[345] MPIA, *supra* note 33, at 2, para 1.
[346] MPIA, *supra* note 33, at 2, para 3.
[347] MPIA, *supra* note 33, at 3, para 10.
[348] MPIA, *supra* note 33, at 6, para 17.
[349] Baroncini, *supra* note 345, at 4.
[350] MPIA, *supra* note 33, at 6, para 17.
[351] The process — Stages in a typical WTO dispute settlement case, WORLD TRADE ORGANISATION(accessed on Jan. 26 2022).

its concerns. It further helps the developing countries to voice their interests without incurring the expenses of bringing a complaint. [352]

Furthermore, it is to be noted that the rights that have been provided to the third parties are not merely on paper but are actively exercised by the parties for their benefit.

The third party rights are specifically provided in the MPIA draft[353] on the same footing as has been provided in the DSU which although promotes multilateralism but raises certain questions which can be only answered once MPIA arbitrators begin deciding the disputes. MPIA members may raise concerns with regard to the expenses that should be paid by third parties. They may argue that since they are paying for maintaining the pool of arbitrators (as has been argued in the subsequent part of the Report), third parties shouldn't be allowed to enjoy the services of the arbitrators without paying for it. Therefore, the question of expenses to be incurred by the third party is not clear, although it is to be noted that the decision to remain a third party at an appellate stage is a conscious choice of the country. This discretion to act as a third party is provided in the MPIA as well and hence, they could be asked to pay for the expenses incurred for availing the services of MPIA arbitrators.

In addition to promoting the spirit of multilateralism, it is noteworthy that the MPIA has taken into consideration the objections that have surrounded the working of AB for some years and have tried to overcome those objections, majority being forwarded by the USA.

First, the countries criticized the AB's practice of over-reaching its duty of interpreting points of law discussed in the Panel report and going into points other than that were ruled upon in the report. Under MPIA it is clearly mentioned that the tribunal should limit itself to the legal issues included in the Panel report.[354]

Second, the AB was notorious for exceeding the time period of 90 days to give its decision on almost every occasion. Under MPIA, the arbitrators are given express rights to limit the written submissions, oral proceedings, impose deadlines on the parties, restrict number of hearings, etc to ensure that the award is pronounced before the deadline of 90 days is breached.[355] Although, these measures come with a caveat i.e. procedural rights of parties and due process of law mustn't be compromised[356] while taking aid of these measures for timely issuance of awards.

MPIA's attempt to address the AB's criticisms is a big step in the direction to ensure that more WTO Members join the MPIA. It thus protect the multilateral resolution of disputes through an arrangement which is built on the line of one of the alternate mechanisms mentioned in the DSU.

The MPIA has been negotiated in a record time i.e. four months which is in itself commendable and can be seen as an opportunity to ensure that a binding dispute settlement with an independent and impartial appeal stage is available to the WTO Members.[357] This is the best premise for

[352] Inu Manak, Third Party Submissions at the WTO, TRADELAB(accessed on Jan. 28 2022).
[353] MPIA, supra note 33, at 6, para 16.
[354] MPIA, *supra* note 33, at 5, para 9.
[355] MPIA, *supra* note 33, at 5, para 12.
[356] *Id.*
[357] Baroncini, *supra* note 345, at 14.

foreseeing that the countries should continue cooperating and promoting collaboration through the pragmatic tool of the MPIA which can very well act as a temporary bridge for achieving a multilateral long-term solution to the crisis of the AB.[358]

Summary

There have been concerns that MPIA will have an impact on the WTO's multilateral trading regime. Nonetheless, the paper implies that the WTO's goal of preserving multilateralism in international commerce is jeopardised due to its own consensus-based working structure. In reality, MPIA aids in the promotion of multilateralism in the WTO, as extensive arguments in Chapter 7 of the Report demonstrates. The MPIA has been created with the goal of preserving the appellate feature of the WTO's two-tiered dispute resolution system. Furthermore, the arrangement is drafted in such a manner that it will become non-operational as soon as the AB resumes operations. As a result, the MPIA's structure prioritises modernising the AB, encouraging the multilateralist spirit.

[358] *Id.*

8. WHY ARE COUNTRIES APPREHENSIVE TO JOIN MPIA?

At present, only 24 out of 164 WTO Members have joined MPIA.[359] Less than a fifth of the members have signed up so far, excluding some of the major economies such as the USA, South Africa, Japan and India; it becomes pertinent to address the concerns that countries have with respect to the MPIA. Further, it becomes equally important to understand if the criticisms are mere rhetoric in nature or have some merit in them.

8.1 Political concerns of few countries

To begin with, the USA has unequivocally stated its intention of not joining MPIA, at least for the time being. Despite including certain reformative elements in MPIA, the USA claims that it "incorporates and exacerbates some of the worst aspects of the AB's practices."[360] Further, the USA has been in the forefront to dysfunction the AB.[361] Since, MPIA aims to preserve the two-tiered multilateral structure of dispute resolution, it apparently runs against the USA's preference for a dispute resolution system that existed during the GATT regime which was non-binding and without an appeal mechanism.[362] Thereby, it is very unlikely for the USA to join any initiative which aims at preserving the essential aspects of the AB. Moreover, China is a major player in MPIA.[363] This makes the USA's participation in MPIA even less probable amidst the USA-China trade war.[364] Thus, the USA resistance to MPIA is apparent owing to the inability of MPIA to quench its political thirst.

However, for other developed countries such as Japan and South Korea their reasons for non-participation seem ambiguous. The absence of South Korea which initially took an undertaking to be a part of MPIA and conceded the significance of a rule-based trading regime is unanticipated.[365] In this context, it is pertinent to note that the USA has been putting political pressure on countries against joining MPIA[366] and South Korea might have been subdued due to the mounting political pressure.

Further, the non-participation of Japan, which is being considered as a champion of a multilateral trading regime,[367] is little shocking as well. It can be deduced that the US factor has come into play in case of Japan as well. This suggests that Japan prefers stable relations with the USA over and above a reformative initiative in the arena of international trade. This stand of Japan is also

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[359] Jean, *supra* note 328.
[360] *Permanent Mission Of The United States To The World Trade Organization*, US LETTER, Jun. 5, 2020, https://www.worldtradelaw.net/misc/USLetterJune5.pdf.download.
[361] United States Continues to Block New Appellate Body Members*, supra* note 340.
[362] *US Trade Policy Priorities: Robert Lighthizer, United States Trade Representative*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Accessed on Oct. 23, 2021), https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative.
[363] Kristen Hopewell, *EU The New Kingpin In Global Trade Order*, THE LOWY INSTITUTE (Accessed on Oct. 17, 2021), https://www.lowyinstitute.org/the-interpreter/eu-new-kingpin-global-trade-order.
[364] Jean, *supra* note 328.
[365] *Statement of Ministers*, *Davos, Switzerland*, Jan. 24, 2020, https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf.
[366] Iana Dreyer, *Leap Of Faith: The New 16-Member Alternative Appeals Tribunal At The WTO,* BORDERLEX (Accessed on Dec. 12, 2021), https://borderlex.net/2020/04/22/leap-of-faith-the-new-16-member-alternative-appeals-tribunal-at-the-wto/. [*Hereinafter* "Iana"]
[367] Michael Hirsh, *How Japan Became the Adult at the Trade Table*, FOREIGN POLICY (Accessed on Dec. 12, 2021), https://foreignpolicy.com/2019/04/10/how-japan-became-the-adult-at-the-trade-table/.

corroborated from the US-Japan Trade agreement.[368] The ambit of this Free Trade Agreement **["FTA"]** is limited in nature and misses out on major sectors such as automotive sector.[369] Consequently, owing to its limited coverage, it violates one of the requirements of FTAs that they should cover 'substantially all trade'.[370] Notwithstanding, the violation is only in terms of the spirit and not the letter of the WTO law, it goes on a long way to suggest that even countries like Japan prioritize their political concerns. This poses a greater harm to the multilateral trading structure than the explicit attacks of the USA to dismantle the functioning of the WTO.[371]

In addition to Japan and South Korea, many developing countries, which largely depends on the USA for aid and trade prospects, are also unlikely to join MPIA in the fear that their trade relations might get hampered with the USA.[372]

On the other hand, some prominent Pacific countries and close allies of the USA such as Australia, New Zealand, and Singapore are Members of MPIA. This seems to be a significant achievement for the MPIA. Further, even economically smaller countries, like Costa Rica, Colombia and Guatemala, which depend on the USA's support are also the Members of MPIA.

Thus, keeping the political fears aside and considering the future of dispute settlement, the developed and the developing countries should use the opportunity of interim appeal mechanism under MPIA to cater to their individual and collective interests.[373]

8.2 Developing Countries' Perspective on MPIA

Developing countries' stand on MPIA is divided. It is pertinent to note that, on one hand, there are developing countries like China, Brazil, Mexico, Colombia, etc which are participants and ardent supporters of MPIA. On the other hand, there are developing countries like India and South Africa which are hostile and in stark opposition to it.

Against this backdrop, it is to be noted that India and South Africa along with China, Brazil and Russia reinforced the preservation of dispute resolution system as envisioned under the WTO law.[374] Despite this, India and South Africa are not showing any intention of joining MPIA at the moment.

India has been maintaining the status quo on its decision to join MPIA due to several reasons. Apparent and instant one being the delicate dispute around tariffs on Information Technology goods is prevalent and thus India is maintaining the status quo for the time being, to remain safe from the possibility of arbitral Panel issuing an adverse decision.[375] Furthermore, the majority of

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[368] *US-Japan Trade Agreement Text*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Accessed on Dec. 12, 2021), https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text.
[369] Marianne Schneider, *Reforming the World Trade Organization*, CHATHAM HOUSE (Accessed on Dec. 12, 2021), https://www.chathamhouse.org/2020/09/reforming-world-trade-organization/05-revitalizing-wtos-negotiation-function. [Hereinafter "Marianne"]
[370] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), Art. 24.
[371] Marianne, *supra* note 376.
[372] Jean, *supra* note 328.
[373] Jean, *supra* note 328.
[374] Anirban Bhaumik, *India, China Join other BRICS Nations to Support WTO*, DECCAN HERALD (Accessed on Dec. 12, 2021), https://www.deccanherald.com/national/india-china-join-other-brics-nations-to-support-wto-882626.html.
[375] Malkawi, *supra* note 219.

disputes India has is with the USA and since the USA is not a party to the MPIA, India's participation will not bear any fruits for India in the short term.[376] South Africa has also raised several concerns on MPIA. Some of these are: the probability of MPIA becoming a permanent system and resulting in abandonment of the AB, disregard to the needs of developing countries within the MPIA framework, lack of attention to the matters concerning African countries including cost and representation, and the ambiguity in the MPIA's draft with respect to the matters of funding.[377]

Further, after the failure of Doha round of negotiations, the distrust between the developed and developing countries of the WTO has been widened.[378] The failure to reach consensus has resulted in proliferation of the plurilateral agreements among the like-minded countries, particularly the developed countries.[379] This phenomenon may have raised concerns among the developing countries about the MPIA which appears to be in the nature of a plurilateral arrangement.[380] There is a fear that the strongest parties would dictate the rules and a probability of potential bias against the developing countries' interests and needs.[381] Such concerns, however, lack any merit. As already discussed in the previous section, MPIA has been introduced with a commitment to preserve the "multilateral rules-based trading system".[382] Moreover, MPIA is marked by its flexibility and openness which provides an adequate platform to advance better initiatives for resolving the AB crisis.[383] Thus, it is unlikely for such fears to materialise. Moreover, the participation of China and Brazil in MPIA, who had majorly championed the cause of developing countries in the Doha round,[384] reaffirms that MPIA would not run counter to the interests of developing countries.

Despite the noble aim of MPIA to preserve the multilateral structure of DSU, the developing countries have raised concerns that MPIA has the possibility of rendering the already defunct AB into permanent abandonment,[385] as MPIA will divert attention away from the AB's deadlock. It has been argued that taking a recourse to arbitration under Article 25, DSU is "bad" and implies "giving up on the AB."[386] Again, this apprehension is devoid of any merit. It is pertinent to note that, MPIA is not a treaty but an interim arrangement.[387] This implies that the Members are not bound by legal obligations but political commitments.[388] The parties only commit to use MPIA's

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[376] Holger Hestermeyer, *Saving Appeals in WTO Dispute Settlement: The Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, EU LAW LIVE (Accessed on Dec. 14, 2021), https://eulawlive.com/op-ed-saving-appeals-in-wto-dispute-settlement-the-multi-party-interim-appeal-arbitration-arrangement-pursuant-to-article-25-of-the-dsu-by-holger-hestermeyer/.
[377] Jean, *supra* note 328.
[378] Andrea M. Ewart, *Paralysis at the WTO: Is the MPIA the Answer?*, INTLAWGRRLS (Accessed on Oct. 19, 2021), https://ilg2.org/2020/07/29/paralysis-at-the-wto-is-the-mpia-the-answer/. [*Hereinafter* "Andrea"]
[379] Jesse Kreier, *India, South Africa and the MPIA*, INTERNATIONAL ECONOMIC AND POLICY BLOG (Accessed on Oct. 19, 2021), https://ielp.worldtradelaw.net/2020/06/india-south-africa-and-the-mpia.html.
[380] Andrea, *supra* note 385.
[381] Asit Ranjan Mishra, *New Delhi May Not Join Interim Arrangement To Replace Appellate Body At WTO*, LIVE MINT (Accessed on Oct. 17, 2021) https://www.livemint.com/news/india/new-delhi-may-not-join-interim-arrangement-to-replace-appellate-body-at-wto-1564511083552.html.
[382] MPIA, *supra* note 33, at 1.
[383] Baroncini, *supra* note 345, at 13.
[384] Martin Khor, *Behind the July Failure of the WTO Talks on Doha*, 43 ECONOMIC AND POLITICAL WEEKLY 35, 40 (2008).
[385] Aarshi, *supra* note 97.
[386] Jennifer, *supra* note 188.
[387] Carline, *supra* note 209.
[388] Thibaud, *supra* note 220.

appeal mechanism unless the AB crisis is resolved.[389] There is no objective to replace the AB but, in fact, preserve "the two levels of adjudication".[390] Further, the MPIA was formally adopted at the time when Covid-19 was at its peak. And despite the travel restrictions and export restrictions, the MPIA Members were not sceptical of its adoption.[391] This goes on a long way to suggest the intention and conviction of the MPIA Members to preserve the rule-based trading regime.

Moreover, the strong statements made in support of the MPIA by some developing countries like Mexico and Colombia assure that MPIA would cater to the developing countries' interests. For instance, the Ambassador and Permanent Representative of Colombia to the WTO, Mr Santiago Wills, conceded the fact that not all countries have the adequate resources to engage instantly to MPIA. However, the arrangement will help check the integrity of Panel reports in disputes.[392]

Further, during the Mission on Mexico at WTO, it was explained that the developing countries would particularly benefit from this arrangement as MPIA would ensure final resolution of the disputes and consequentially prevent other adversities such as 'unilateral measures or non-compliance' in their disputes with strong and developed countries.[393] In this context, it is important to note that the EU has introduced a legislative amendment which seeks to impose unilateral measure against a country (which is not a Member of MPIA) that 'appeals into void' a Panel decision in favour of the EU.[394]

Thus, MPIA although will not serve as a panacea for all the concerns of developing countries, however, it can be assured that it will not function to hamper the developing countries' interests.

8.3 Finance of MPIA

At the time of writing, questions including how the MPIA arbitrators will be paid, whether the WTO DG will provide the support staff to the arbitrators specifically for cases dealt by the MPIA arbitrators await answers. This has led to increased ambiguity and undermines the confidence of the countries that are considering to sign the interim arrangement.

In the MPIA draft, the participating countries have requested the WTO DG to ensure that the support structure is available to the arbitrators.[395] The participants seek that the arbitrators should be provided with staff to fulfill the legal and administrative needs and they should possess requisite qualifications to ensure quality and independence of work trusted to them.[396] Further, it is also requested that the staff supporting the arbitrators be separate from the WTO Secretariat staff and

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[389] MPIA, *supra* note 33, at 3, para 15.
[390] MPIA, *supra* note 33, at 1.
[391] Ali Ameerjee & Himaansu Servansingh, *The Multiparty Interim Appeal Arbitration Arrangement: Will The US Be Missed?,* LINKLATERS (Accessed on Oct. 20, 2021), https://www.linklaters.com/en/insights/blogs/tradelinks/2020/july/the-multiparty-interim-appeal-arbitration-arrangement-will-the-us-be-missed.
[392] Brief, *supra* note 313.
[393] Iana, *supra* note 373.
[394] *Regulation (EU) 2021/167 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules*, EUROPEAN PARLIAMENT (Accessed on Dec. 10, 2021), https://www.europeansources.info/record/proposal-for-a-regulation-amending-regulation-eu-no-654-2014-concerning-the-exercise-of-the-unions-rights-for-the-application-and-enforcement-of-international-trade-rules/.
[395] MPIA, *supra* note 33, at 2, para 7.
[396] *Id.*

be answerable only to the MPIA arbitrators to ensure impartiality and independence to work freely.[397]

It is to be noted that the notwithstanding anything, the DG has the inherent duty to provide assistance to facilitate the arbitrations under Article 25, as it is a dispute resolution method guaranteed under the DSU to the WTO Members to settle disputes as other DSU dispute resolution mechanisms like the Panels, the AB.

Once any dispute is referred to MPIA, the participants will ask the DG to staff the appropriate resources. He/she will then have to act consequently, well-knowing that a) the purpose of the MPIA is not to put in place a second Panel, but provide an independent high quality appellate review, therefore, the Secretariat lawyers serving the same complaint at first instance level cannot of course assist the MPIA appeal; and b) statistics concerning the number of MPIA appeals and the timing of their filings are relevant when planning the appropriate supporting arrangements.[398]

Furthermore, in the meeting held by Committee on Budget, Finance and Administration in late 2019 clarified that "any expenditure for Arbitration under Article 25 of the DSU would be funded out of the WTO Secretariat Budget ... and Arbitrators would be compensated on the same basis as Panelists." Therefore, the arbitrators should be entitled to the perks and compensation required for them to discharge their duty of hearing the dispute and passing the award.

Therefore, in light of the statements forwarded above, it is prudent to argue that the DG should provide the daily working fee as long as the arbitration continues. Further, they should also get the meal and lodging allowance if they are required to stay in Geneva. These perks are necessary to ensure that the WTO Members' right to dispute resolution under Article 25 DSU is respected.

However, the costs that are associated with maintaining the Panel of arbitrators should be paid by the participating Members because WTO is not obliged under the DSU for payment of such costs, as also has been mentioned in the objections raised by the USA.[399]

8.4 Representation of Arbitrators

The formation of pool of arbitrators has been mandated in the MPIA draft. The process of composition starts with each participating Member forwarding one nominee, then the pre-selection committee suggesting the names of best suited nominees to be on the pool of arbitrators, and finally the participating Members confirming the suggestion of the pre-selection committee.[400] The Members have been appointed for a period of 2 years subject to the inoperability of the AB.[401]

This points to the fact that the Members that will be joining the MPIA before the expiry of 2 years period of the current pool of arbitrators will not be able to take part in the appointment process, therefore they won't be able to forward their nominee. The inability to give the nominee name is proving to be an apprehension for the countries since they believe that this might lead to under-

[397] *Id.*
[398] Baroncini, *supra* note 345, at 25.
[399] Simon Lester, *Who's going to pay for supporting the MPIA?*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Accessed on Oct. 20, 2021), https://ielp.worldtradelaw.net/2020/06/whos-going-to-pay-for-the-mpia.html.
[400] MPIA, *supra* note 33, at 7, para 4 & 5.
[401] MPIA, *supra* note 33, at 7, para 5.

representation of their countries. They also fear that they might suffer due to biasness, favouritism of the arbitrators towards the countries that nominated them.

Although, this concern of the countries does not hold much ground due to the fact that only ten Members are selected to be a part of the pool of arbitrators, therefore, the chances of a country's nominee being selected in the pool of arbitrators are already bleak.

Furthermore, the arbitrators that serve on the pool of arbitrators are independent from the country which nominated them and are unaffiliated with any government.[402] They are screened by a highly qualified pre-selection committee which ensures that the arbitrators are of high reputation, recognized authority and have demonstrated expertise in subject matter of the agreements generally executed.[403]

Moreover, it is to be noted that over the years, the standing body formed under the AB, the composition has revealed that at all times the standing body was equally represented by the Members from developing countries. In the current MPIA pool of arbitrators, majority Members are from developing countries, therefore the countries should not be concerned about their view point being less considered in the appeal stage.

8.5 Composition of Tribunal for Disputes

The tribunal for a dispute under the MPIA will be formed by following the process as was being followed for choosing the members from the standing body of AB.[404] The AB relied on a computer application that chose the name randomly from the standing body of AB, and then those Members were responsible for hearing the dispute for which they were chosen.

The MPIA following this process to choose the arbitrators raises a concern, i.e. the computer software selecting the arbitrator belonging to the nation that is a party in dispute. This might lead the other country challenging the credibility of the award, therefore measures should be taken to prevent this from happening in actuality.

To keep this from happening, the algorithm should be designed in a way to exclude the arbitrator who is the national of the country in dispute. Therefore, it will ensure that they are not adjudicating any dispute that might create a direct or indirect conflict of interest.

Summary

This part makes an attempt to addresses the apprehensions and concerns that some countries have with respect to the MPIA and understand if the criticisms are mere rhetoric in nature or have some merit in them. The concerns range from political concerns of countries such as the US, which believes that MPIA exacerbates some of the worst aspects of the AB practices, including the preservation of the two-tiered multilateral structure of dispute resolution. Further, developing countries fear that the strongest parties would dictate the rules, and there is a probability of potential bias against the developing countries' interests and needs within the framework of MPIA. Moreover, there is ambiguity with respect to matters of funding, which is essential to keep the MPIA thriving. This has also undermined the confidence of the countries

[402] Daniel Hohnstein & Greg Tereposky, *Pool of Ten Appeal Arbitrators Established for the WTO Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, LEXOLOGY (Accessed on Oct. 25, 2021), https://www.lexology.com/library/detail.aspx?g=5d84b477-ba5c-4e0e-be25-0e291883b6d3.
[403] MPIA, *supra* note 33, at 7, para 5.
[404] MPIA, *supra note* 33, at 2, para 6.

that are considering to sign the interim arrangement. In addition to this, a few countries have raised their concerns with respect to the representation of arbitrators and the composition of tribunals for disputes, as these factors are very crucial for the determination of the legitimacy of the award rendered through the MPIA mechanism.

9. CONCLUSION

In the Report, the focus was to analyse the options present before the WTO and the member countries to tackle the AB crisis present before them. To achieve the same, the feasibility of Article 5 of the DSU that deals with mediation, conciliation and good offices to address the current crises, was carried out to assess its viability. It is concluded that though these methods impart advantages of flexibility and affordability, their rare utilization and lack of jurisprudence makes it difficult to gauge the level of support by member countries considering they did not express support to these procedures even as a *supplementary* mechanism when the AB was functioning. Along with this, there are reasons of bias exhibited by the DG against the global south and towards the developed nations. This, would make countries sceptical to resort to this alternative especially in a dispute with major powers such as the USA or the EU.

Further, recourse to arbitration under Article 25 of the DSU as a means to address the crisis in its present form has been analysed and while it is a theoretically viable option it cannot operate given the political and practical underpinnings present in the international context. This could arise in the form of pressure exerted on the smaller states to adopt to rules that is favourable to the developed nations, or even due to a washing away of credibility owing to the exclusion of the USA rendering a dispute settlement system with limited utility. Moreover, recourse to this option has again been very limited in the past as well.

More importantly, the MPIA has been gaining traction due to its voluntary plurilateral approach and primarily follows the Article 25 of the DSU which gives it credibility and thus member countries are confident about the same. Albeit, some countries are also approaching the wait and watch method with respect to signing of MPIA subsequent to the impasse created by the AB crisis. Even big developing countries like India, South Africa, etc that usually are parties to many disputes due to their large trading activities with other countries have adopted the wait and watch approach which will act as a roadblock for MPIA to achieve its full potential.

The countries with a limited participation in dispute settlement would be erring in their judgment if they think that they can *'sit this one out'*. The view that these states have little at stake is faulty and contributes in discrediting the fact that that all countries have an inherent interest in having clarity of rules and their enforcement, even when they are not directly involved in litigation, since they can 'free-ride' on the coattails of those with greater litigating experience, sufficient resources at their disposal and more direct trade interests.

A system without a two tier dispute resolution is highly unlikely in WTO. The countries need security and predictability which is unpracticable to achieve without a rule of law and a mechanism through which the countries can settle their disputes. In such a scenario the MPIA may provide an unexpected solution – with its emphasis on efficiency and parties' ability to streamline proceedings.

A fundamental question that arises at the time of this crisis is whether member countries want to preserve a system of binding dispute settlement or they want the plaguing unilateralism to crawl in amid the AB impasse. The priority for the countries who want to choose the former should be to find a workaround to current DSU rules that would lead to automatic adoption of Panel reports,

which might prove to be non-practical. Another option for them is to consider signing the MPIA, wherein they will have to place its hopes in the able hands of MPIA arbitrators to fill the gaps and do what can be done to keep pluralism alive until multilateralism can return. There are some gaps in the full picture of the MPIA, and the burden of filling them will fall on the MPIA arbitrators.

Currently, MPIA is the only viable option on the table for the countries to settle their disputes, which even has the prospects to become the default option for many countries for years to come if the AB is not reformed and made operational. The crisis could prove to be an opportunity for the WTO Members to address how to best preserve the positive aspects of the WTO multilateral system, while maintaining sensitivity to new concerns and changes. It further offers a window of opportunity to test the different reform proposals in settling trade disputes and then carry them into the WTO AB if it becomes operational again.

The mislaying of the AB may not descent into complete 'breakaway' from the rules-based system as some are fearing, but its impact should not be taken lightly. Thus, MPIA has the features to prove to be an interim viable option for the countries to settle their disputes without getting drowned in the rogue waves of unilateralism.

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