

Can the WTO Dispute Settlement System Be Revived?

Options for Addressing a Major Governance Failure of the World Trade Organization

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Abstract

The dispute settlement system of the WTO is, due to the paralysis of the WTO Appellate Body, in an existential crisis. This crisis is a major governance failure of the WTO. At the Ministerial Conference in June 2022, WTO Members committed themselves to address this failure. This paper deals with past and present efforts to restore the WTO dispute settlement system and examines, more generally, the options available to WTO Members to overcome the current crisis. It also discusses the MPIA, which may be in the coming years the best hope for rules-based, binding dispute resolution among WTO Members.

1. Introduction

The dispute settlement system of the World Trade Organization ('WTO'), which for many years was lauded as the jewel in the crown of this organization, is a mere shadow of its former self in 2023. The current crisis of the WTO dispute settlement system – a bold, but now aborted, experiment with the rule of law in international trade relations – is a major governance failure of the WTO. Recognizing the importance and urgency of addressing this failure, WTO Members agreed at the Ministerial Conference in June 2022 to conduct discussions 'with the view to having a fully and well-functioning dispute settlement system accessible to all

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Members by 2024’.² To this end, Members have been engaged since February 2023 in an intensive process of informal, small and larger-group meetings referred to as the Molina Process. In this paper, I will first briefly recall the past successful functioning of the WTO dispute settlement system and its recent demise because of the paralysis of the Appellate Body (‘AB’). I will subsequently discuss the unsuccessful attempt in 2019 to avoid the current crisis (‘the Walker Process’) and the establishment and operation of an alternative system for appellate review (‘the MPIA’), before assessing – based on the information available – the chances of success of the ongoing Molina Process. In conclusion, I will review the options available to overcome the current crisis of WTO dispute settlement and address this major governance failure of the WTO.

2. The road from success to failure

2.1. The success of WTO dispute settlement

One of the most notable features of the WTO is its dispute settlement system. Its establishment in 1995 was one of the main achievements of the Uruguay Round of Multilateral Trade Negotiations (1986-1994).³ With its compulsory jurisdiction, mandatory pre-litigation consultations, appellate review, strict time frames for proceedings, and surveillance and enforcement of compliance, the WTO dispute settlement system is in many respects unique among international dispute resolution systems.

Since its initiation in 1995, the WTO dispute settlement system has been the most frequently used system for the resolution of State-to-State disputes. To date, WTO Members have brought 618 disputes to the WTO for resolution.⁴ To date, the WTO dispute settlement system has been used, as a party or third party, by 111 of the 164 WTO Members, and it has

² WTO Ministerial Conference, MC12 Outcome Document, adopted on 17 June 2022, WT/MIN(22)/24, dated 22 June 2022, para. 4.

³ Understanding on Rules and Procedures Governing the Settlement of Disputes (‘Dispute Settlement Understanding’ or ‘DSU’), Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization, https://www.wto.org/english/tratop_e/dspu_e/dsu_e.htm

⁴ See <https://www.worldtradelaw.net/databases/searchcomplaints.php>.

been used by developed and developing countries alike.⁵ While the United States ('US') and the European Union ('EU') have been the most frequent complainants (as well as the most frequent respondents), the system has often been used by other WTO Members to see legal rights prevail over economic and other might.⁶ On 1 September 2023, a total of 290 panel reports and 148 AB reports had been issued and circulated.⁷ When compared with other state-to-state dispute resolution systems, such as the International Court of Justice ('ICJ') or the International Tribunal for the Law of the Sea ('ITLOS'), this reveals a very high level of activity. In the period from 1 January 1995 to 1 September 2023, the ICJ rendered 90 judgments and 7 advisory opinions.⁸ The ITLOS, an international tribunal with jurisdiction limited to a specific field of international law like the WTO dispute settlement system, has rendered in total 30 judgments, advisory opinions and orders of removal since its establishment in 1996.⁹ While the law applied by WTO panels and the AB is highly technical, the issues raised in many WTO disputes are often politically sensitive, as they concern the legality under WTO law of domestic legislation and policies for the protection of core societal values and interests, such as public health, public morals, environmental protection, employment, economic development and national security. The rulings in many WTO disputes have attracted much interest, receiving high praise as well as sharp criticism from WTO Member governments, economic operators, and civil society. Finally, but most importantly, it should be noted that the WTO dispute settlement system has not only been used frequently and has 'produced' many rulings on politically sensitive issues, but it also has an excellent record of compliance with its rulings.¹⁰

⁵ See 'Dispute settlement activity — some figures' (World Trade Organization). <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm> accessed 20 September 2023; <https://www.worldtradelaw.net/databases/complaintscomplainant.php>.

⁶ J. Lacarte and P. Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System', (2000) 3(3) *Journal of International Economic Law* 395, 400.

⁷ 'WTO Panel Reports' (WorldTradeLaw.net). <<https://www.worldtradelaw.net/databases/wtopanels.php>> accessed 20 September 2023; 'WTO Appellate Body Reports and other appellate decisions' (WorldTradeLaw.net). <<https://www.worldtradelaw.net/databases/abreports.php>> accessed 20 September 2023.

⁸ 'Judgments, Advisory Opinions and Orders' (International Court of Justice). <https://www.icj-cij.org/decisions?type=2&from=1995&to=2023&sort_bef_combine=order_DESC> accessed 20 September 2023; 'Judgments, Advisory Opinions and Orders' (International Court of Justice). <https://www.icj-cij.org/decisions?type=4&from=1995&to=2023&sort_bef_combine=order_DESC> accessed 20 September 2023.

⁹ 'Contentious Cases' (International Tribunal for the Law of the Sea). <<https://www.itlos.org/en/main/cases/contentious-cases/> and <https://www.itlos.org/en/main/cases/advisory-proceedings/>> accessed 20 September 2023.

¹⁰ See <https://www.worldtradelaw.net/databases/summary.php>.

2.2.A crisis looming since long

While in the early years of the WTO dispute settlement system, WTO Members often expressed their satisfaction with its functioning, there were, nevertheless, a number of crisis moments (e.g., the *Helms-Burton Act* national security crisis in 1997, the Articles 21.5/22.6 DSU sequencing crisis in 1999, and the *amicus curiae* brief crisis in 2000).¹¹ Also, while expressing satisfaction with the operation of the dispute settlement system, WTO Members tabled many proposals for its reform, both before and during the early stages of Doha Round negotiations in the first half of the 2000s.¹² Some of these proposals were aimed at a further judicialization of the system, while others reflected a desire to introduce greater Member (i.e., political) control over WTO dispute settlement. Note that Claude Barfield of the American Enterprise Institute, wrote in 2001 that the WTO dispute settlement system is ‘substantively and politically unsustainable’ and that its powers would have to be curbed. Further, Claus-Dieter Ehlermann, the first European AB member, stated in 2002 that the WTO dispute settlement system is threatened by a dangerous institutional imbalance between the weak legislative and the successful judicial branch of the WTO.¹³

From the beginning of the 2010s, the WTO dispute settlement came under an ever-increasing pressure. A major crisis was looming for several, related reasons.¹⁴ *First*, the workload of panels and the AB significantly augmented due to the increased size and the complexity of the disputes brought to the WTO for resolution, while the financial and other resources made available for dispute settlement fell short. *Second*, the paralysis of the ‘legislative’ branch of the WTO made Members seek change to WTO law through adjudication, rather than negotiations. This paralysis also made it impossible for Members to ‘correct’ alleged errors by the AB in the interpretation of WTO law. *Third*, some Members, and in particular the US, increasingly made antagonistic allegations of judicial overreach by

¹¹ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, (5th edn, CUP 2022) 1015, 416 and 423.

¹² *Ibid*, p. 194-95.

¹³ Claude E. Barfield, ‘Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization’ (2001) 2(2) *Chicago Journal of International Law*, Article 13, 403, 410; Claus-Dieter Ehlermann, *Some Personal Experiences as Member of the Appellate Body of the WTO*, Policy Papers, RSC No. 02/9 (European University Institute, 2002), para 124.

¹⁴ See Van den Bossche and Zdouc (n 11), 424.

the AB and accused it of unacceptable disregard of procedural rules, in particular the 90-day time frame for appellate review. *Fourth* and finally, the US took overt as well as covert action affecting the independence and impartiality of AB members, primarily in the context of the process of reappointment of AB members. While its gravity was unexpected, the current crisis had been looming for years.

2.3. The existential crisis

The current crisis was triggered by the blockage of the Trump administration of the process of appointment (or reappointment) of AB members. Due to this blockage, the AB, ordinarily seven strong, had only one member left on 11 December 2019 and was thus rendered unable to hear and decide any new appeals filed from then onwards.¹⁵ Subsequently, the term of the one remaining member expired on 30 November 2020. Since then, the AB has been a court without judges.

The US has blocked the appointment process because it has fundamental concerns regarding the AB and its functioning.¹⁶ The most significant of these concerns is that the AB added to or diminished the rights and obligations of WTO Members under the WTO agreements. It accuses the AB of ‘judicial activism’ on matters relating to anti-dumping measures, subsidies, countervailing measures, safeguard measures and technical barriers to trade. The US argues, in particular, that the AB case law limits its ability to counteract the importation of goods, which harms its domestic industry, and contends that other Members use litigation to obtain what they have not achieved through negotiation. In addition, according to the US, the AB disregarded the rules of WTO dispute settlement by:

- (1) exceeding the mandatory 90-day time limit for appellate review (without the consent of the parties);
- (2) allowing outgoing AB members to complete work on appeals to which they had been assigned before the end of their term;
- (3) issuing ‘advisory opinions’ on issues not necessary to resolve the dispute;

¹⁵ Of the 13 appeals pending before the Appellate Body on 11 December 2019, only three were still decided. The other ten appeals remained pending.

¹⁶ The United States set out its concerns in detail in February 2020 in United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> accessed 20 September 2023.

- (4) reviewing factual findings of panels and, in particular, panel findings on the meaning of the respondent's domestic law; and
- (5) treating its rulings as binding precedent.

It should be noted that most of these concerns regarding the functioning of the AB had already been raised by the US under the Obama and the George W. Bush administrations respectively. However, only the Trump administration saw fit to paralyse the AB and deprive WTO Members of appellate review of panel reports.

The US blockage of the appointment process of AB members, however, did not only paralyze the AB but also plunged the entire WTO dispute settlement system into an existential crisis. Pursuant to Article 16.4 of the DSU, when a panel report is appealed, it can only be adopted by the WTO Dispute Settlement Body ('DSB'), and become legally binding, once the AB has completed its appellate review. To prevent adverse rulings in panel reports from becoming legally binding, the losing parties in WTO disputes have since December 2019 systematically appealed panel reports to the dysfunctional AB. This has been most appropriately referred to as 'appealing into the void' and, as a result, most disputes brought to the WTO in recent years have remained in legal limbo, i.e., unresolved. Only five of the 29 panel reports circulated since 11 December 2019 have been adopted by the DSB.¹⁷ Twenty of the panel reports were appealed into the void.¹⁸ With regard to the remaining four panel reports, parties are still to decide whether to appeal.¹⁹ It is obvious that in view of the significant risk of disputes remaining unresolved, there are few incentives for WTO Members to have recourse to the WTO dispute settlement system. Not surprisingly, the number of new disputes brought to the WTO for resolution in 2020, 2021, 2022 and 2023 (as of 1 September) fell to 5, 9, 7 and

¹⁷ See Panel Report, *China - AD on Stainless Steel Products (Japan)*, WT/DS601/R, adopted 28 July 2023; Panel Report, *US - Safeguards on Washers*, WT/DS546, adopted 28 April 2023; Panel Report, *EU - Steel Safeguard Measures (Turkey)*, WT/595/R, adopted 31 May 2022; Panel Report, *Costa Rica - Avocados*, WT/DS524/R, adopted 31 May 2022; Panel Report, *United States - Anti-dumping and countervailing duties on ripe olives from Spain*, WT/DS577/R, adopted 20 December 2021. Note that the panel reports in *Colombia - Frozen Fries*, WT/DS591/R and *Turkey - Pharmaceutical Products*, WT/DS583/R were the subject appeal arbitration under Article 25 of the DSU, and the underlying disputes were thus brought to a legally binding resolution. See below, Section 4. Note that in four disputes in which a panel had been established, the parties reached a mutually agreed solution in these disputes. This was the case in 2023 in *China - AD/CVD on Barley* (DS598) (complaint by Australia); in *India - Additional Duties* (DS585) (complaint by the United States); and in *US - Steel and Aluminium* (DS547) (complaint by India); and in 2021 in *Canada - Wine (Australia)* (DS537) (complaint by Australia).

¹⁸ See 'WTO Panel Reports' (WorldTradeLaw.net). <<https://www.worldtradelaw.net/databases/wtopanels.php>> accessed on 20 September 2023. There are currently appeals of 22 panel reports pending before the paralyzed Appellate Body. See <https://www.worldtradelaw.net/static.php?type=dsc&page=currentcases>

¹⁹ Ibid.

4 respectively, while in 2018, it was 39.²⁰ The end of appellate review by the AB has severely undermined the effectiveness and credibility of the entire WTO dispute settlement system.

3. The 2019 attempt to address the US concerns by reforming the AB

3.1. The Walker Process

Faced with a possible collapse of the WTO dispute settlement system, no less than 22 WTO Members and the African Group tabled, in the period from November 2018 to June 2019, either individually or jointly, position papers with proposals for the reform of the AB to address the concerns raised by the US. On 26 November 2018, the EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, the Republic of Korea, Iceland, Singapore and Mexico submitted a communication to the WTO General Council (WT/GC/W/752/Rev. 2) setting out proposals for amendments to WTO appellate review. On the same day, the European Union, China, and India submitted a second communication to the General Council (WT/GC/W/753) setting out proposals for additional amendments, particularly with regard to institutional issues concerning the AB. However, at the General Council meeting of 12 December 2018, the US curtly rejected these proposals as not addressing the concerns it had raised.²¹ Subsequently, Honduras (in January and February 2019, WT/GC/W/758, /759, /760 and /761), Chinese Taipei (in February 2019, WT/GC/W/763 and /763/Rev.), Brazil, Paraguay and Uruguay (in March and April 2019, WT/GC/W/767 and /767/Rev.), Japan, Australia and Chile (in April 2019, WT/GC/W/768 and /768/Rev), Thailand (in April 2019, WT/GC/W/769) and the African Group (in June 2019, WT/GC/W/776) submitted position papers to the General Council setting out further proposals, varying in detail and approach, for amending WTO appellate review. Some of these position papers, such as the first position paper referred to above, i.e., the paper by the European Union, China, Canada, India, and others, were rather ‘sceptical’ about the legitimacy of the concerns raised by the US and made proposals which firmly safeguarded the key features of WTO appellate review. Other position papers, such as the paper by Japan, Australia and Chile, or the paper by Brazil, Paraguay and Uruguay were more sympathetic to

²⁰ See <https://www.worldtradelaw.net/databases/searchcomplaints.php>.

²¹ On the US reaction to the Communication from the EU, China, Canada, India and others, see Statements by the United States at the Meeting of the WTO General Council on 12 December 2018 (agenda items 7 and 8). <https://geneva.usmission.gov/2018/12/12/statements-items-7-and-8-by-the-united-states-at-the-meeting-of-the-wto-general-council/>.

the US concerns and proposed to alter some key features of WTO appellate review. Finally, the position paper of Thailand, or the position papers of Honduras tried to strike a middle ground. In parallel with formal discussions on these proposals in the General Council, Members engaged in frequent and informal discussions under the leadership of Ambassador David Walker of New Zealand, the Chair of the WTO Dispute Settlement Body (the ‘Walker Process’) in 2019. However, the US did not actively participate in these discussions and did not put forward any specific proposals for changes to address the concerns regarding the functioning of the AB it had raised.

3.2. The draft General Council Decision on the Functioning of the Appellate Body of October 2019

In October 2019, two months before the AB was expected to become dysfunctional, the discussions among WTO Members on amending WTO appellate review, i.e., the Walker Process, resulted in a draft General Council Decision on the Functioning of the Appellate Body.²² As stated by Ambassador Walker, the draft Decision was aimed at ‘seeking workable and agreeable solutions to improve the functioning of the Appellate Body’, in the hope of avoiding the paralysis of the AB as from December 2019.²³

The draft Decision *inter alia*, addressed: (1) the US concern regarding judicial activism by stating that, pursuant to Articles 3.2 and 19.2 of the DSU, AB rulings ‘cannot add to or diminish the rights and obligations provided in the covered agreements’; (2) the US concern regarding binding precedent by stating that precedent is ‘not created through WTO dispute settlement proceedings’, but that consistency and predictability in the interpretation of WTO law is ‘of significant value to Members’; (3) the US concern regarding advisory opinions rendered by the AB by stating that the latter may only address issues raised by the parties to the extent necessary to resolve the dispute; (4) the US concern regarding appellate review of panel findings on the meaning of municipal law by stating that the meaning of municipal law is to be treated as a matter of fact and, therefore, pursuant to Article 17.6 of the DSU, not subject to appellate review; (5) the US concern regarding the ninety-day time frame for appellate review by stating

²² General Council, Informal Process on Matters related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand), Agenda Item 4, Annex, JOB/GC/222, dated 15 October 2019.

²³ Ibid., Agenda Item 4, para. 1.9.

that, pursuant to Article 17.5 of the DSU, the AB is obligated to issue its report within ninety days of the notice of appeal and that this time frame can only be extended with the agreement of the parties; and (6) the US concern regarding Rule 15 of the Working Procedures by providing that only the DSB can authorise outgoing AB Members to complete the disposition of an appeal after the expiry of their term in office, provided that the hearing in the appeal took place prior to the expiry of the term.²⁴

The draft Decision was a carefully constructed compromise, which preserved the core features of the WTO appellate review while addressing US concerns. It was a good-faith effort of the WTO membership (minus one) to avert the crisis. However, any hope that it would be successful in doing so was short-lived. At the General Council meeting of 15 October 2019, the US rejected off-hand the draft Decision as insufficient in addressing its concerns. According to the US, WTO Members failed to discuss what it considered to be the most important question, namely, why did the AB come to feel it could operate outside of its mandate?²⁵

At the General Council meeting of 9 December 2019, two days before the AB became paralysed, the EU ambassador to the WTO, Amb. João Aguiar Machado, stated that:

[T]he European Union wishes to emphasise that [the Appellate Body] has served well all Members in an independent, highly professional and, given the circumstances, very efficient manner. The European Union, therefore, would like to commend all the present and past members of the Appellate Body on their work, as well as the staff working on the Appellate Body's secretariat.²⁶

The US position on the functioning of the Appellate Body arguably reflects: (1) its strong disagreement with especially those parts of the AB case law which, in its view, restricts its ability to protect the domestic industry from import competition by using trade remedy measures; and (2) its desire to return to a pre-WTO kind of dispute settlement that would not

²⁴ Van den Bossche and Zdouc (n 11), 428.

²⁵ See Statement by Ambassador Dennis Shea (US) at the WTO General Council meeting of 15 October 2019, Item 4, <https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/>.

²⁶ See Statement by Ambassador João Aguiar Machado (EU) at the WTO General Council meeting on 9 December 2019, Item 5, WT/GC/W/791, dated 9 December 2019.

restrain the use economic power to ‘resolve’ disputes with other countries, and especially China.

With the rejection of the draft General Council Decision, the impasse was complete and the paralysis of the AB on 11 December 2019, unavoidable. From 2020 to 2022, WTO Members made no new concerted efforts to reform WTO appellate review.²⁷ Many Members, including the European Union, China, and India, disagree with the US that the AB systematically engaged in judicial activism or demonstrated consistent and malicious disregard for procedural and institutional rules.²⁸ Almost all WTO Members were, and still are, of the view that whatever legitimate concerns the US might have regarding the functioning of the AB, these concerns did not justify the obstruction of the appointment process, which resulted in the paralysis of the AB and plunged the entire WTO dispute settlement system into crisis. This is clearly demonstrated by the fact that WTO Members, at every regular DSB meeting of the past years, have requested the DSB to launch the appointment process of AB members without delay. At the DSB meeting of 19 September 2023, 130 WTO Members supported such a request.²⁹ In response to this request, the US stated, as it had done in response to all similar requests in the past, that its longstanding concerns with WTO dispute settlement ‘remain

²⁷ Note, however, that on 27 March 2020, 16 WTO Members, including Australia Brazil, Canada, China, the European Union and Mexico announced that they had reached an agreement on the *Multi-Party Interim Appeal Arbitration Arrangement under Article 25 of the DSU*, commonly referred to as the ‘MPIA’, which became effective on 30 April 2020, when it was notified to the DSB. See Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, JOB/DSB/1/Add. 12, dated 30 April 2020, at https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf. At the DSB meeting of 28 June 2020, the European Union delivered a statement explaining that the MPIA is an interim arrangement intended: ‘to preserve, in disputes among Members participating in the MPIA, a functioning and two-step dispute settlement process, as envisaged by the DSU’. According to the United States, the MPIA ‘incorporates and exacerbates some of the worst aspects of the Appellate Body’s practices’. The MPIA has currently has 25 parties, representing WTO Members, but to date no appeal of a panel report has been heard and decided under the MPIA.

²⁸ See e.g. Amb. Joao Aguiar Machado (European Union), ‘Statement at the WTO General Council meeting on 15 and 16 October 2019 on Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator’ (Permanent Mission of the European Union to the World Trade Organization, 16 October 2019) <https://eeas.europa.eu/delegations/world-trade-organization-wto/68955/eu-statement-ambassador-joão-aguiar-machado-general-council-meeting-15-and-16-october-2019_en> accessed 20 September 2023; Amb. ZHANG Xiangchen (China), ‘Statement at the WTO General Council meeting on 15 & 16 October 2019 on Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator’ <<http://wto.mofcom.gov.cn/article/meetingsandstatements/201807/20180702770676.shtml>> accessed 20 September 2023

²⁹ See DSB Meeting of 19 September 2023, at <https://www.wto.org/english/news_e/news23_e/dsb_19sep23_e.htm> accessed 24 September 2023. This was the 68th time that such request was tabled.

unaddressed’ and that it therefore does not support the proposed decision.³⁰ However, it should be noted that the Biden administration, unlike the Trump administration, has shown readiness to discuss the reform of the WTO dispute settlement. At the DSB meeting of 27 April 2022, the US ambassador to the WTO, Amb. Maria Pagán stated:

The United States supports WTO dispute settlement reform. ... I can appreciate the benefits of a system that effectively meets the needs of Members. WTO dispute settlement currently fails in this regard ... My delegation has been, and will continue to be, hard at work, meeting with Members to better understand the interests of all Members.³¹

In the months that followed this statement, the United States did indeed engage in multiple bilateral meetings with other WTO Members to ensure, as Amb. Pagán explained, ‘a true reform discussion’ on WTO dispute settlement that ‘reflects the real interests of Members’.³²

4. The establishment and operation of an alternative system for appellate review

4.1. The Multi-Party Interim Appeal Arbitration Arrangement

While committed to finding a solution to the AB crisis, but, having abandoned any hope of doing so any time soon, a group of Members, at the initiative of the European Union, reached in March 2020, an agreement on the Multi-Party Interim Appeal Arbitration Arrangement, commonly referred to as the ‘MPIA’.³³ The MPIA, which came into effect on 30 April 2020 among 19 Members, provides for a temporary alternative procedure for appellate review under

³⁰ See U.S. Statements at the July 28, 2023, DSB Meeting, at US Mission Geneva, ‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body’ (US Mission to International Organizations in Geneva, 28 July 2023) <https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2023/07/Jul28.DSB_.Stmt_.as_.deliv_.fin_-1.pdf> accessed 20 September 2023.

³¹ See US Mission Geneva, ‘U.S. Statement by Ambassador Maria Pagán at the WTO Dispute Settlement Body Meeting, Geneva’ (US Mission to International Organizations in Geneva, 27 April 2022) <<https://geneva.usmission.gov/2022/04/27/us-statement-by-ambassador-maria-pagan-at-the-wto-dsb-meeting/>> accessed 20 September 2023.

³² Ibid.

³³ See Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, JOB/DSB/1/Add.12, dated 30 April 2020.

Article 25 of the DSU and is intended ‘to preserve, in disputes among Members participating in the MPIA, a functioning and two-step dispute settlement process, as envisaged by the DSU’.³⁴ On 1 September 2023, twenty-six WTO Members were a party to the MPIA, including Brazil, Canada, China, the EU, Japan and Mexico, i.e. six of the ten most frequent users of the WTO dispute settlement system.³⁵

Under the MPIA, which is a political rather than a legally binding arrangement, Members commit not to appeal panel reports to the paralysed AB (i.e., agree not to appeal panel reports into the void), but instead to resort to appellate arbitration under Article 25 of the DSU.³⁶ As stated in the MPIA, appeal arbitrations under the MPIA are to a large extent governed, with any necessary adjustments, by the provisions of the DSU and other rules and procedures applicable to appellate review under the DSU, such as the Working Procedures for Appellate Review.³⁷ At the same time, the MPIA contains some procedural innovations to enhance procedural efficiency and streamline the proceedings, such as page limits, time limits, deadlines and the length and number of hearings as well as regarding claims under Article 11 of the DSU (i.e., claims regarding a panel’s failure to make an objective assessment of the facts).³⁸

Under the MPIA, appeals are dealt with by three arbitrators selected randomly from a pool of ten. This pool of ten arbitrators is made up of persons of recognised authority and demonstrated expertise.³⁹ The appeal arbitrators are to review only issues of law, may only

³⁴ See European Union, ‘Statement at the Regular DSB meeting’ (Permanent Mission of the European Union to the World Trade Organization, Agenda point 13, 29 June 2020) <https://www.eeas.europa.eu/delegations/world-trade-organization-wto/eu-statement-regular-dispute-settlement-body-meeting-29_en> accessed 20 September 2023. .

³⁵ When comparing the number of MPIA parties (26) with the number of WTO Members (164), one should consider that also that the 27 Member States of the European Union are also WTO Members, and that it can therefore be argued that the 53 Members, or almost 1/3 of WT Members, are a party to the MPIA.

³⁶ See Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, Multiparty Appeal Interim Arbitration Arrangement Pursuant to Article 25 of the DSU, paras. 1–2 and Annex 1, para. 15, JOB/DSB/1/Add.12, dated 30 April 2020. Since the MPIA is a political, rather than legally binding, arrangement, MPIA parties will adopt in every single dispute between them a legally binding appeal arbitration agreement, referred to as ‘Agreed Procedures for Arbitration under Article 25 of the DSU’, and they will do so within 60 days of the establishment of the panel. See, e.g., Agreed Procedures for Arbitration under Article 25 of the DSU, *Colombia – Frozen Fries*, WT/DS591/3, dated 15 July 2020.

³⁷ See Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, Multiparty Appeal Interim Arbitration Arrangement Pursuant to Article 25 of the DSU, Annex 1, para.11, JOB/DSB/1/Add.12, dated 30 April 2020.

³⁸ See *ibid.*, para. 12.

³⁹ See *ibid.*, para. 7, and Annex 2. The list of MPIA arbitrators was communicated to WTO Members in JOB/DSB/1/Add.12/Suppl.5, dated 3 August 2020. See also Geneva Trade Platform, ‘Multi-Party Interim Appeal

address the issues necessary to resolve the dispute, and cannot add to or diminish the rights and obligations provided in the covered agreements.⁴⁰ Pursuant to Article 25.3, second sentence, of the DSU, the appeal arbitration awards are final and binding on the parties.⁴¹ Article 21 of the DSU, regarding the surveillance of implementation, including compliance proceedings, as well as Article 22 thereof, regarding compensation and arbitration on the suspension of concessions, apply to arbitration awards emanating from Article 25 procedures, and therefore also to MPIA procedures.

In its statement on the MPIA at the DSB meeting of 29 June 2020, the US objected to any arrangement that would ‘perpetuate the failings’ of the AB.⁴² According to the US, the MPIA ‘incorporates and exacerbates some of the worst aspects of the Appellate Body’s practices’, and it does so by:

- (1) weakening the mandatory deadline for completing AB reports;
- (2) contemplating appellate review of panel findings of fact;
- (3) failing to reflect the limitation on appellate review to those findings necessary to resolve the dispute;
- (4) promoting the use of precedent by identifying ‘consistency’ (regardless of correctness) as a guiding principle for decisions; and
- (5) encouraging arbitrators to create a body of law through litigation.⁴³

The US considered that ‘the numerous departures from the DSU highlight that at least some Members prefer an appellate ‘court’ with expansive powers, instead of the more narrow appellate review envisioned by Members in the DSU’.⁴⁴

Arbitration Arrangement (MPIA)’ <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 20 September 2023.

⁴⁰ See *ibid.*, Preamble and Annex 1, paras. 8–10.

⁴¹ Note that the panel report appealed will be attached to the appeal arbitration award and that the non-appealed findings of the panel report will, as a result, also become binding.

⁴² See US Mission Geneva, ‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body’ (US Mission to International Organizations in Geneva, Agenda item 13, 29 June 2020) <<https://geneva.usmission.gov/2020/06/29/statements-by-the-united-states-at-the-june-29-2020-dsb-meeting/>> accessed 20 September 2023.

⁴³ See *ibid.*

⁴⁴ See *ibid.*

4.2. Appeal arbitration under the MPIA and otherwise to date

The MPIA entered into force in May 2020. The first recourse to appeal arbitration under the MPIA was, however, only in October 2022, when Colombia appealed the panel report in *Colombia – Frozen Fries* (DS591) (complaint by the EU).⁴⁵ In earlier disputes between MPIA parties, such as *Canada – Wine* (DS537) (complaint by Australia) or *Costa Rica – Avocados* (DS524), the parties either reached a mutually agreed solution or the panel report was not appealed. The appeal arbitrators in *Colombia – Frozen Fries* circulated their award on 21 December 2022.⁴⁶

As noted above, appeal arbitration under the MPIA ‘will be based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 of the DSU’, but also provides for some novelties to enhance the procedural efficiency of appeal proceedings. The question thus arises of how much of the appeal arbitration procedure, as it was applied in *Colombia – Frozen Fries*, differed from the appellate review procedure under Article 17 of the DSU.⁴⁷ One must note that the appeal arbitrators issued their award within 74 days of the filing of the notice of appeal, i.e., well within the mandatory 90-day timeframe, and that the report was only 39 pages long. During the last ten years of its operation, the AB seldom managed to respect the 90-day timeframe and its reports were always much longer. Pursuant to paragraph 12 of the Agreed Procedures in *Colombia – Frozen Fries*, the arbitrators set a word limit on the appellant and appellee submissions of 27,000 words or 40 per cent of the word count of the appealed panel report, and on third participant submissions of 9000 words.⁴⁸ Such word limit on submissions may be helpful as it obliges parties to focus on the essence of their arguments on appeal. However, it may also necessitate the later filing of additional memoranda to clarify and

⁴⁵ Notification of an Appeal by Colombia under Article 25 DSU, *Colombia –Frozen Fries*, WT/DS591/7, dated 10 October 2022.

⁴⁶ Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Colombia – Frozen Fries*, WT/DS591/ARB25, dated 21 December 2022.

⁴⁷ See on this, the reflections of Joost Pauwelyn, one of the appeal arbitrators in *Colombia – Frozen Fries*, at Joost Pauwelyn, ‘The MPIA: What’s New (Part III)’ (International Economic Law and Policy, 21 February 2023)<<https://ielp.worldtradelaw.net/2023/03/the-mpia-whats-new-part-iii.html>> [accessed 20 September 2023](#).

⁴⁸ See Agreed Procedures for Arbitration under Article 25 of the DSU, Revision, *Colombia – Frozen Fries* (DS591), WT/DS591/3/Rev.1, dated 22 April 2022; and Pre-Arbitration Letter, dated 19 September 2022, Section 1, attached as Annex 2 to the Additional Procedures for Arbitration under Article 25 of the DSU, Adopted by the Arbitrators on 19 October 2022, which itself is Annex A-2 to the Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Colombia – Frozen Fries*, WT/DS591/ARB25/Add.1, dated 21 December 2022.

elaborate arguments which were underdeveloped in the submissions.⁴⁹ The arbitrators in *Colombia – Frozen Fries* also set time limits of 30 to 35 minutes and 7 minutes on oral statements of the participants and third participants respectively.⁵⁰ This is, however, merely the continuation of a long-established AB practice.

Pursuant to paragraph 13 of the Agreed Procedures in *Colombia – Frozen Fries*, the appeal arbitrators also invited Colombia and the EU ‘to consider refraining from making [Article 11] claims’.⁵¹ The consideration of such claims that the panel failed to make an objective assessment of the facts, was notoriously time-consuming for the AB. In the event that a party would nevertheless decide to bring Article 11 claims, that party was requested to ‘set forth succinctly’ in its appeal: (1) whether and how the alleged panel error was raised before the Panel, in particular during the interim review stage; (2) in what way the Article 11 claim is an issue necessary for the resolution of the dispute; and (3) in what way the alleged panel error is not simply an appreciation of a factual issue (within the exclusive domain of panels).⁵² Colombia refrained in its appeal from making any Article 11 claims of error. However, whether this is because it was discouraged to do so by the arbitrators is an open question. Under paragraph 13, appeal arbitrators cannot prevent or prohibit parties from making Article 11 claims, but paragraph 13 may nevertheless be useful in limiting such claims by rendering it more onerous to make them.

Another noteworthy procedural novelty in the appeal arbitration procedure in *Colombia – Frozen Fries* is the pre-hearing conference. This pre-hearing conference was convened by the arbitrators six days before the actual hearing. The purpose of this pre-hearing conference was to assist the arbitrators in identifying the issues to be addressed at the hearing, and to avoid

⁴⁹ In 2015, the Chair of the AB had discussed with WTO Members the possibility of introducing limits on the length of submissions, but at that time this idea was, after initial support, eventually not favourably received by Members and subsequently dropped.

⁵⁰ Additional Procedures for Arbitration under Article 25 of the DSU, Adopted by the Arbitrators on 19 October 2022, para. 23, which is attached as Annex A-2 to the Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Colombia – Frozen Fries*, Annex A-2, WT/DS591/ARB25/Add.1, dated 21 December 2022.

⁵¹ See Agreed Procedures for Arbitration under Article 25 of the DSU, Revision, *Colombia – Frozen Fries* (DS591), WT/DS591/3/Rev.1, dated 22 April 2022, para. 13; and Pre-Arbitration Letter, dated 19 September 2022, Section 3, attached as Annex 2 to the Additional Procedures for Arbitration under Article 25 of the DSU, Adopted by the Arbitrators on 19 October 2022, which itself is Annex A-2 to the Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Colombia – Frozen Fries*, WT/DS591/ARB25/Add.1, dated 21 December 2022.

⁵² Ibid. The arbitrators noted that these requirements are “without prejudice to the question of whether (and, if so, under what conditions) such claims fall within the appeal mandate set out in Article 17.6 of the DSU and/or paragraph 9 of the Agreed Procedures”.

issues that are not within their mandate, were not necessary for the resolution of this dispute, or where not contested between the parties.⁵³ Also, the pre-hearing conference gave the arbitrators an opportunity to signal to the parties what they would like the parties to focus on at the hearing. Time will tell how useful such pre-hearing conferences are in narrowing down the issues that need to be discussed at the hearing.

The word limits on submissions, discouraging of Article 11 claims and the pre-hearing conference may all have contributed to the fact that the appeal arbitrators in *Colombia – Frozen Fries* were able to issue a short award in record time.⁵⁴ However, it should be noted that the appeal in *Colombia – Frozen Fries* was a small appeal in a dispute on one single measure raising only a few issues of limited complexity. It remains to be seen whether these procedural innovations will work as well in much larger appeals raising more complex and politically more sensitive issues. Also, small is not always beautiful and fast is often dangerous, certainly in the convoluted world of international trade disputes.

At present, there are eight disputes between MPIA parties in which Agreed Procedures for Arbitration under Article 25 of the DSU have been adopted, and in which, if the panel report is appealed, appeal arbitration under the MPIA will allow a dispute to be brought to a legally binding conclusion.⁵⁵ Whether the procedural innovations in the *Colombia – Frozen Fries* will also lead to shorter and faster reports in these cases, some of which are much more complex and politically sensitive, remains to be seen, but it is certainly worthwhile to try it out and, where necessary, further develop these and other procedural innovations.

Finally, it should be noted that apart from appeal arbitration under the MPIA, appeal arbitration can also be made available on an *ad hoc* basis under Article 25 of the DSU in disputes involving one or more WTO Members, which are not MPIA parties. In *EU – Steel Safeguard Measures (Turkey)* (DS595) and *Turkey – Pharmaceutical Products (EU)* (DS583), the EU and Turkey (which is not an MPIA party) agreed, in the course of the panel proceedings,

⁵³ Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Colombia – Frozen Fries*, WT/DS591/ARB25/Add.1, dated 21 December 2022, [1.11 – 1.12].

⁵⁴ A procedural innovation on *Colombia – Frozen Fries*, which will not have contributed to the shortness of the report or the appellate process, but is a welcome, albeit modest, step in ensuring more transparency in appellate proceedings, is the online recording of the opening statements at the oral hearing of the parties and some of the third parties. See Additional Procedures for BCI Protection and Partial Public Viewing of the Hearing, Adopted by the Arbitrators on 1 November 2022, Annex A-3 to the Award, para. 2. For the recording, see https://www.wto.org/english/tratop_e/dispu_e/material_e/ds591_arb25.mp4.

⁵⁵ See Geneva Trade Platform, ‘Multi-Party Interim Appeal Arbitration Arrangement (MPIA)’ <https://wto plurilaterals.info/plural_initiative/the-mpia/> accessed 20 September 2023.

that they would not appeal the panel reports to the paralyzed AB, but would instead, in case of an appeal, have recourse to *ad hoc* appeal arbitration under Article 25 of the DSU. The procedural rules for *ad hoc* appeal arbitration agreed to by the EU and Turkey in these disputes were almost identical to the rules under the MPIA. However, there was one exception which related to the appeal arbitrators. In *EU – Steel Safeguard Measures (Turkey)* the arbitrators would be two former AB members and in *Turkey – Pharmaceutical Products (EU)* the reverse. Only the panel report in the latter case was appealed. The arbitrators in this appeal circulated their Award on 25 July 2022.⁵⁶ At the DSB meeting of 29 August 2022, the US, while observing that the Agreed Procedures for Appeal Arbitration between the EU and Turkey ‘provided for an arbitration that incorporated many of the most troubling practices of appellate review under the Appellate Body’, it nevertheless welcomed ‘the agreement of the parties on a way forward in this dispute’.⁵⁷

5. Ongoing efforts to restore the dispute settlement system (the Molina Process)

5.1. Main features of the Molina Process

As mentioned above, the WTO Members committed themselves, at the Twelfth Ministerial Conference in Geneva in June 2022, to conduct discussions ‘with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024’.⁵⁸ While not much happened during the first six months after the Ministerial Conference, since February 2023, there have been frequent small-group and larger-group meetings of Members to discuss how to revive the WTO dispute settlement system, and thus fulfil the June 2022 ministerial mandate. These informal meetings have been convened – at the request of a group of WTO Members – by Marco Tulio Molina, the Deputy Permanent Representative of Guatemala to the WTO, and are therefore commonly referred to as the ‘Molina Process’. As an indication of the

⁵⁶ Award of the Arbitrators, Arbitration under Article 25 of the DSU, *Turkey – Pharmaceutical Products (EU)*, WT/DS583/ARB25, dated 25 July 2022.

⁵⁷ US Mission Geneva, ‘Statements by the United States at the August 29, 2022, DSB Meeting’ (US Mission to International Organizations in Geneva, 30 August 2023) < <https://geneva.usmission.gov/2022/08/30/statements-by-the-united-states-at-the-august-29-2022-dsb-meeting/> > accessed 20 September 2023.

⁵⁸ WTO Ministerial Conference, MC12 Outcome Document, adopted on 17 June 2022, WT/MIN(22)/24, dated 22 June 2022, para. 4.

intensity of this Process, in April and May 2023, Molina held no less than 57 meetings.⁵⁹ The ambition of Molina is to find ‘practical solutions’ to the WTO dispute settlement crisis by the Ministerial Conference to be held in Abu Dhabi in February 2024.⁶⁰

The Molina Process is different in several respects from the Walker Process, the informal negotiations conducted in 2019 to avert the paralysis of the AB. First, the Molina Process addresses the functioning of the entire WTO dispute settlement system, and not only the functioning of the AB, as was the case for the Walker Process. This is a positive development, as many of the (real or perceived) problems with appellate review have their origin in, or are related to, problems with other elements of the WTO dispute settlement. Second, unlike the Walker Process, the US is an active participant in the Molina Process. It is obviously only with the active participation of the US, that there can be any hope to overcome a crisis triggered by the US. Third, while in the context of the Walker Process, many Members, either individually or collectively, tabled position papers, which were publicly available, the 70-plus proposals made by Members in the context of the Molina Process are kept confidential. At the DSB meetings in March, May, and July 2023, Molina briefed, in general terms, WTO Members on the informal meetings convened by him, but did not give any specific information on the reform proposals tabled by the Members.⁶¹

At the DSB meeting of 28 July 2023, Molina reported that Members had continued to ‘actively participate in the intense programme of meetings’ on dispute settlement reform, and had reached ‘an understanding on 80% of the issues under consideration’.⁶² According to Molina, these issues were ripe to move to the drafting process, which was to start over the summer break.⁶³ Another 10% of the issues under consideration were ‘close to reaching the

⁵⁹ See DSB Meeting of 30 May 2023, at https://www.wto.org/english/news_e/news23_e/dsb_30may23_e.htm accessed 24 September 2023.

⁶⁰ Ibid.

⁶¹ See for the DSB meeting of 31 March 2023, at https://www.wto.org/english/news_e/news23_e/dsb_31mar23_e.htm accessed on 24 September 2023; the DSB meeting of 30 May 2023, at https://www.wto.org/english/news_e/news23_e/dsb_30may23_e.htm accessed on 24 September 2023; the DSB meeting of 28 July 2023, at https://www.wto.org/english/news_e/news23_e/dsb_28jul23_e.htm accessed on 24 September 2023. Note that at the DSB meeting of 19 September 2023, the Molina Process was not on the agenda. See https://www.wto.org/english/news_e/news23_e/dsb_19sep23_e.htm accessed on 24 September 2023.

⁶² See DSB Meeting of 28 July 2023, at https://www.wto.org/english/news_e/news23_e/dsb_28jul23_e.htm accessed on 24 September 2023.

⁶³ Ibid.

level of maturity needed for the drafting process'.⁶⁴ However, on the remaining 10%, Molina reported that Members 'still hold different conceptual views about how to tackle them'. He did not indicate which these highly controversial issues were but announced that he would continue his consultation efforts after the summer break with the aim of reaching a common understanding on these issues.⁶⁵ Molina reported to the WTO Members that he was 'convinced that despite the conceptual differences, members can find a solution at the technical level that can reconcile their interests and concerns'.⁶⁶ One would, of course, expect Molina to strike an optimistic tone, but wonders whether his optimism is justified.

5.2. Will the Molina Process be successful?

On a number of issues on the reform agenda, such as the use of alternative dispute resolution (ADR) methods and the streamlining of the panel process, there may indeed be a growing consensus.⁶⁷ However, if the reporting from Ravi Kanth of The Third World Network, in April and June 2023⁶⁸, on some of the core reform proposals of the US and the reactions of other Members to these proposals is accurate, the resolution of the WTO dispute settlement crisis is still a long way off. Not surprisingly, the most controversial US proposal relates to the appellate review in WTO dispute settlement.

First, the US would want to make appellate review optional. While it reportedly does not provide any details on how exactly this would be achieved, the general idea would be that a panel report could only be appealed when both parties would agree on this. Also, appellate

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Regarding the streamlining of the panel process, it may well possible to reach agreement on: (1) panel establishment at the first DSB meeting; (2) one rather than two meetings of the parties with the panel; (3) word limits for written submissions and time limits for meeting of the parties with the panel; (4) sharing with the parties the questions of the panel in advance of the meeting of the parties with the panel; (5) adherence to timeframes; and (6) allowing the panel to invite parties to focus on certain claims or exclude certain claims.

⁶⁸ See Ravi Kanth, 'WTO: In a radical overhaul, US proposes single-tier dispute settlement system' (Third World Network (TWN) Info Service on WTO and Trade Issues, 26 April 2023) <<https://twon.my/title2/wto.info/2023/ti230414.htm>> accessed on 24 September 2023; Ravi Kanth, 'WTO: US proposals on dispute settlement reform could hurt smaller countries' (Third World Network (TWN) Info Service on WTO and Trade Issues, 27 April 2023) <<https://twon.my/title2/wto.info/2023/ti230415.htm>> accessed on 24 September 2023; and Ravi Kanth, 'WTO: UK, US raise controversial proposals on DS reform' (Third World Network (TWN) Info Service on WTO and Trade Issues, 2 June 2023) <<https://twon.my/title2/wto.info/2023/ti230602.htm>> accessed on 24 September 2023.

review would no longer be done by a standing body, as the AB, but by an *ad hoc* review adjudicator or adjudicators selected via a mechanism agreed by the parties. It is unlikely that there will be many cases in which both parties will agree to allow for appellate review. In all but a few cases, one of the parties considers itself to be the ‘winner’ at the panel stage and will not initiate appeal proceedings which may endanger this ‘win’. It is a fact that in many AB proceedings, the ‘winning’ party cross-appealed some panel findings it did not agree with, but this party would not have cross-appealed in the absence of an appeal initiated by the ‘losing’ party. Moreover, in the (very) few disputes in which both parties would agree on appellate review, the parties would subsequently have to agree on whom to appoint as review adjudicator(s). It is unclear whether in case of disagreement between parties on the review adjudicator(s), it would be for the WTO Director General to appoint her/him(them). More importantly, appellate review by an *ad hoc* adjudicator or adjudicators would not ensure the consistency of the case law, which is one of the main functions of appellate review. The EU and other major players in the WTO, including China, Brazil, and India, have stressed that the WTO dispute settlement system must be a system providing for effective appellate review of panel reports. A WTO dispute settlement system providing for voluntary appeal review by an *ad hoc* adjudicator or adjudicators is therefore unlikely to be acceptable to them.

Second, adding insult to injury, the US reportedly proposes to reduce drastically the scope of appellate review. Pursuant to Article 17.6 of the DSU, the scope of appellate review by the AB comprises all ‘issues of law covered in the panel report and legal interpretations developed by the panel.’ The US proposes to limit appellate review to instances in which the appellant contends that the panel: (a) was guilty of gross misconduct, bias, or serious conflict of interest, or otherwise materially violated the rules of conduct; (b) seriously departed from a fundamental rule of procedure; or (c) manifestly exceeded its powers, authority or jurisdiction, and any of these acts by the panel materially affected the decision and threatens the integrity of the process. This is not truly an appellate review as it will not allow parties to challenge a panel’s interpretation and application of WTO law but is much more in the nature of an annulment procedure, as it exists in ICSID arbitration. Note, however, that under ICSID rules, there are more and broader grounds for annulment than the US proposes. As this would only be an appellate review in name, this proposal on the scope of appellate review is, as the proposal on voluntary appellate review, unacceptable for the EU and many other WTO Members.

Among the other reported proposals of the US, there are some that may receive a more positive reception from other Members. This is the case, for example, for the proposal to improve, and give more importance to, the interim review of panel reports, in the hope that this

would allow for, and encourage, parties to settle disputes before a panel adopts and makes its final report public. Such an improved interim review would also empower panels to make better decisions as parties would point out mistakes and shortcomings in the interim report, which the panel could then subsequently address. While giving more importance to interim review would be useful, many Members may mistrust the US' undeclared goal when making this proposal. Is it the US' aim to reduce the instances in which panels clearly and publicly pronounce on what is and what is not WTO-consistent, and increase the instances in which disputes do not get resolved on the basis of the law but through negotiations in which the US can fully exploit its economic and other powers?

Truly puzzling is the US proposal to give Members more power to correct what it considers erroneous interpretations of WTO law, i.e., interpretations that add to or diminish the rights and obligations of Members. Already now, Members have the authority, pursuant to Article IX:2 of the WTO Agreement, to adopt 'authoritative interpretations'; pursuant to Article XII to amend existing provisions; or, finally, pursuant to Article IX:1, to adopt new rules. To date, Members have made no use of this authority to correct erroneous interpretations by the dispute settlement bodies, because the consensus among Members to correct the interpretations was always lacking. While the losing party in a dispute may consider certain interpretations of WTO law to be erroneous, it is unlikely that the winning party in that dispute shares that opinion and joins the consensus to overturn an interpretation favorable to it. It is unclear how US wants to give more power to Members to correct what it considers wrong interpretations of WTO law. But it is safe to assume that it would not advocate abandoning the firmly established WTO practice of taking decisions by consensus.

The US has reportedly also advocated changes in the rules on panel composition and the Rules of Conduct so that only panelists with the appropriate level of expertise and integrity would serve on panels. No Member would disagree that panelists must have these qualifications, but many would argue that the integrity of panelists has certainly not been a problem in the past and that there is, therefore, no need for any rule change. With regard to the role of the WTO Secretariat in supporting WTO adjudicators, it has been reported that US wishes to limit that role to the administration of the proceedings and legal support that is responsive to the submissions of the parties (i.e., no 'creative' thinking on what the correct interpretation of the legal provision at issue is). Most surprisingly here is, however, that US calls for more legal expertise at the Secretariat. The WTO Secretariat lawyers arguably constitute the most experienced group of international trade lawyers anywhere. Many WTO

Members are likely to consider this US proposal as a call for more lawyers who share the US government's position on the interpretation and application of WTO law.

Finally, the US has reportedly proposed to exclude, from the jurisdiction of the WTO dispute settlement system, disputes relating to measures adopted for the protection of national security. The mere invocation of the national security exception would then place a challenged measure outside the reach of rules-based adjudication. While such limitation of jurisdiction may be appealing to some WTO Members, other Members may be expected to object strongly to such limitation as it would give Members a blank cheque to adopt any trade restrictive measure they wish.

6. Options available to overcome the WTO dispute settlement crisis

In considering the future of WTO dispute settlement and, more generally, the future of international trade dispute resolution, several options are, at least in theory, available to WTO Members. One option is to abandon WTO dispute settlement in favor of dispute resolution under bilateral or regional trade agreements. Many of these agreements provide for a dispute resolution procedure. With some exceptions,⁶⁹ there has, however, been very limited use made of the dispute resolution mechanisms under bilateral and regional trade agreements. This is arguably because these mechanisms are untested, usually less elaborate, and lack the institutional support that the WTO provides for dispute resolution. Also, there is, unlike in the context of the WTO, only limited, if any, peer pressure to comply with adverse rulings. If disputes arise between parties of bilateral or regional trade agreements, these parties usually prefer to resolve them through diplomatic means, or, where possible, to bring these disputes to the WTO for resolution.⁷⁰

Faced with the crisis of the WTO dispute settlement system, countries may reconsider their position on the use of dispute resolution mechanisms under bilateral and regional trade agreements, and have more frequent recourse to it. However, to date, there has been no notable

⁶⁹ A notable exception is dispute resolution in the context of the United States-Mexico-Canada Agreement (USMCA) (formerly NAFTA). See 'CUSMA Dispute' (The Secretariat Canada-Mexico-United States, 22 September 2023) <<https://can-mex-usa-sec.org/secretariat/disputes-litges-controversias.aspx?lang=eng>> accessed on 24 September 2023.

⁷⁰ E.g., *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371). This dispute could have been dealt with under the ASEAN Enhanced Dispute Resolution Mechanism, but instead was brought to the WTO.

increase in the number of disputes brought to bilateral or regional dispute resolution mechanisms.⁷¹ Also, some trade relations that give rise to frequent disputes, such as, for example, the trade relations between the US and the EU on the one hand and China on the other hand, are not subject to any bilateral or regional trade agreement, and dispute resolution under such agreement is therefore not an option.

Another option available to WTO Members for resolving trade disputes is to employ diplomatic methods of dispute resolution, such as mediation and conciliation, rather than legal methods, i.e., judicial settlement and arbitration. As mentioned above, such alternative dispute resolution ('ADR') is currently being discussed in the context of the Molina Process. While there are, undoubtedly, disputes in which ADR is appropriate, many WTO Members, and, in particular, the economically or otherwise less powerful Members, would not consider such voluntary, non-binding, and ultimately power-based (rather than rules-based) methods of dispute resolution, as a desirable alternative to WTO adjudication. It should be noted that Article 5 of the DSU already provides, since 1995, for the possibility of Members to have recourse to mediation and conciliation, and that very little use has been made of this possibility.⁷² Against the background of the current crisis of WTO dispute settlement, recourse to mediation or conciliation may, however, be more appealing in some disputes between some Members.

An oft-discussed option for overcoming the current WTO dispute settlement crisis is to abandon appellate review under Article 17 of the DSU and limit WTO dispute settlement to a single-stage adjudication by panels. This option was most prominently advocated by Bernard Hoekman and Petros Mavroidis, who propose a single-stage dispute settlement by a standing panel body of 15 members, which decides specific cases in panels of three, randomly selected panel body members.⁷³ The idea of having a standing panel body, rather than *ad hoc* panels,

⁷¹ For an overview of complaints under bilateral and regional trade agreements, see <https://www.worldtradelaw.net/databases/ftacomplaints.php>. Note that in September 2023, a dispute between New Zealand and Canada was, for the first time, resolved under the dispute resolution mechanism of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). See CPTPP Panel Report, *Canada - Dairy Tariff Rate Quota Allocation Measures*, 5 September 2023, [https://www.worldtradelaw.net/document.php?id=dsc/fta/canada-dairytrq\(dsc\)\(cptpp\)\(panel\).pdf](https://www.worldtradelaw.net/document.php?id=dsc/fta/canada-dairytrq(dsc)(cptpp)(panel).pdf)

⁷² Van den Bossche and Zdouc (n 11), 436.

⁷³ Bernard M. Hoekman and Petros C. Mavroidis, 'To AB or not the AB? Dispute Settlement in WTO Reform' [2020] 23 JIEL 1, 12.

to adjudicate WTO disputes was already advanced by the EU as early as 1998.⁷⁴ The establishment of a standing panel body would be a very welcome improvement to the WTO dispute settlement system, as it will make the system more judicial in nature. It would, however, not make appellate review redundant. Even with a standing panel body, appellate review would still be needed. WTO dispute settlement concerns State-to-State disputes, often on matters of high political sensitivity and/or great legal complexity. In such disputes, a second bite of the apple, i.e., appellate review, is very useful in ensuring that a well-considered decision is made and that the losing party is (more) willing to accept this decision. Also, there is no reason to assume that an adverse panel finding would be more ‘acceptable’ to Members, and especially the US, than an adverse AB finding. Moreover, as mentioned above, for many WTO Members, and in particular the EU, appellate review is an essential, indispensable feature of WTO dispute settlement, and any proposal to dispose of appellate review is therefore unlikely to be accepted.

The obvious option for overcoming the current crisis of WTO dispute settlement is to reform the AB and WTO appellate review with the aim of addressing the concerns of US, which triggered the crisis. As mentioned above, this is what WTO Members attempted to do in 2019 in the context of the Walker Process, which led to the draft General Council Decision on the Functioning of the Appellate Body. This good faith effort to address the concerns of the US was, however, summarily rejected by the latter. Nevertheless, the 2019 draft General Council Decision should be the starting point of any negotiations on the reform of the AB and WTO appellate review. A number of the changes set out in the draft Decision were subsequently taken up in the MPIA, and some of them have already been put into practice by the arbitral tribunal in *Colombia – Frozen Fries*, the first MPIA case. However, it is unlikely that those changes will suffice to address the US concerns and resolve the crisis. While the proposals that the US reportedly tabled in the context of the Molina process regarding voluntary appellate review and its very limited scope gives little hope that an agreement on reform can be reached currently. Among the changes, in addition to those already reflected in the draft General Council Decision and the MPIA, is the adoption by a resurrected AB of a more deferential standard of appellate review. In the past, the AB always conducted a full and *de novo* review of the legal issues on appeal. This is how it, correctly, understood its mandate under the DSU. Thomas Cottier, one of the current MPIA arbitrators, has proposed that the AB should rather adopt a standard of reasonableness when reviewing panel findings on legal

⁷⁴ See, e.g., *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, Communication of the European Communities, NT/DS/W/1, dated 13 March 2002.

issues.⁷⁵ This means that the AB would uphold an appealed panel finding when it considered that finding to be ‘reasonable’, and would, in that case, restrain from developing its own reasoning on the legal issue concerned. The AB would thus show much more deference to a panel’s reasoning and findings. However, for appeals of panel findings on legal issues of a constitutional nature, such a deferential standard of appellate review would, according to Cottier, not be appropriate. For appeals of such findings, he proposes to maintain full and *de novo* review by the AB. As Cottier concedes, it may not be easy to distinguish panel findings on constitutional issues, which would be subject to full and *de novo* appellate review, from other panel findings, which would be subject to the much more deferential standard of reasonableness.

Among the other possible changes to appellate review, which are not already reflected in the Draft General Council Decision or the MPIA, are: (1) a more reasonable and flexible time frame for appellate review (because, while swift dispute resolution is important, time pressure should not prevent careful consideration of all issues on appeal); (2) an increase in the number of AB members (to allow for more appeals to be heard simultaneously and for the AB membership to be more ‘representative’ of membership in the WTO); (3) fixed 6 to 8 year non-renewable terms in office for AB members (to better ensure the independence and impartiality of AB Members); (4) ‘law clerks’ assigned to, and supporting, individual AB members rather than having lawyers from an AB Secretariat providing support to a division hearing an appeal (as proposed by the US to limit undue influence of the Secretariat over the decisions by the AB); (5) guidelines for the AB on treaty interpretation, for going beyond and/or deviating from the rules on treaty interpretation of the Vienna Convention of the Law of Treaties (such as, for example, giving more importance to the negotiating history of the WTO agreements and not having recourse to other international law in giving meaning to WTO provisions); and (6) providing for oversight over the AB and its decisions (either by a dispute settlement review committee composed of delegates of WTO Members or by a special a-political legal expert group). None of the above-mentioned possible changes is likely to gather enthusiastic support from all Members.

Finally, the last option to be mentioned for overcoming the current crisis of WTO dispute settlement is the option Members have now chosen, namely to reform the whole dispute settlement system. As discussed above, the ongoing Molina Process, unlike the 2019 Walker

⁷⁵ Thomas Cottier, ‘Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review’ [2021] 24 JIEL 515, 524.

Process, deals with the reform of WTO dispute settlement as a whole, rather than focusing on appellate review only. As mentioned above, this is a welcome development as many of the concerns raised regarding the AB are related to what happens (or does not happen) in the earlier and later stages of the WTO dispute settlement process. WTO Members have already been discussing how to improve the consultation stage, the panel stage, and the implementation and enforcement stages of the dispute settlement process since 1997 in the context of the DSU review negotiations and subsequently, since 2002, in the context of the Doha Development Round negotiations on DSU reform. Members can now build on these negotiations, and the progress in the ongoing discussions, which Marco Molina referred, at the DSB meeting of July 2023, is undoubtedly related – primarily, if not exclusively – to changes to the panel stage of the dispute settlement process. An agreement on useful improvements to the panel stage is certainly within reach. However, without an agreement on how to reform appellate review, the current crisis of WTO dispute settlement will not be overcome.

7. Conclusion

The WTO dispute settlement system, imperfect as it was, worked remarkably well until it no longer did because of the refusal of the US to allow for the appointment of new AB members. This refusal led, in December 2019, to the paralysis of the Appellate Body and resulted in an existential crisis of the WTO dispute settlement system. This crisis is a major governance failure of the WTO. In these times of polycrisis (the climate crisis; the geopolitical confrontation between the US and China; the war in Ukraine; the social and economic impact of digitalization on the production of goods and services; the rise of populist anti-globalism and economic nationalism; and the weaponization of trade) a multilateral system for the rules-based resolution of trade disputes is more needed than ever.

The options available to Members to address this failure are diverse and include disposing of appellate review, reforming appellate review, and reforming the entire WTO dispute settlement system. WTO Members committed themselves at the WTO Ministerial Conference in June 2022 to conduct discussions with the view to having ‘a fully and well-functioning dispute settlement system accessible to all Members by 2024’. Since February 2023, serious efforts to this end have been undertaken in the context of the Molina Process. The proposals tabled by Members in this context are confidential, but from what is known of them, there seems little hope that Members will be able to come to an agreement, in particular, on appellate review. The AB of yesteryear is unlikely to make a comeback, but for many WTO Members, a reformed WTO dispute settlement system must provide for genuine and effective appellate

review. From what it is known of the proposals it tabled, this is not something the US is ready to agree to. Also, it is unlikely that the US will allow the dispute settlement crisis to be resolved without a ‘correction’ of the alleged errors of interpretation by the AB of provisions of, in particular, the Anti-Dumping Agreement, the SCM Agreement, and the Agreement on Safeguards. Such correction requires, however, consensus among WTO Members, which is unlikely to be attained. At the core of the problem of the WTO dispute settlement is the institutional imbalance between the adjudicative function of the WTO, which used to work well, and the rule-making function, which underperformed due to the practice of consensus decision-making in the WTO. Addressing this imbalance is essential if one wants to overcome the dispute settlement crisis in the long term.

WTO Members have occasionally surprised the world by finding some middle ground on divisive issues allowing for a pragmatic solution to a challenging problem. While I hope to be proven wrong, it is unlikely that Members will be able to come to an agreement on ‘a fully and well-functioning dispute settlement system accessible to all Members’ any time soon. For the foreseeable future, the best option for WTO Members for remedy, at least partially and among the willing, is to have recourse to appeal arbitration under the MPIA. The latter can, and should, be used as a testing ground for how appellate review could be done differently, and possibly better, than the AB did.

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