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WTO: The EU and the Multi-Party
Interim Appeal Arbitration
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Abstract [En]: Since May 2016, the United States of America has been vetoing the selection of the members of the WTO Appellate Body, alleging procedural and substantive criticisms on the activity of the Standing Tribunal. Consequently, at midnight of 10 December 2019 the World Trade Court ceased to be operational, as only Zhao Hong, the Chinese judge, remained in office. Faced with such an unprecedented WTO institutional crisis, the EU has chosen to be a major actor in the reform process of the multilateral appellate review mechanism. Beyond presenting important institutional proposals to amend Article 17 of the DSU, which have been highly considered in the Walker Principles, the EU launched a very interesting temporary solution to preserve appeals in Geneva, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), which is based on the autonomous alternative dispute settlement means already referred to in Article 25 of the DSU. After the consideration of the features of this provision, the present article analyses how the EU suggested, developed, and progressively gained support for its MPIA project within the WTO community, illustrating the main aspects of the temporary appeals arbitration arrangement and taking into account the objections the US started to raise against some aspects of the important interim procedure.

Abstract [It]: Dal maggio 2016, gli Stati Uniti d'America hanno posto il veto all'elezione dei membri dell'Organo d'appello dell'OMC, sollevando critiche di natura procedurale e sostanziale rispetto all'attività di tale Tribunale permanente. Di conseguenza, alla mezzanotte del 10 dicembre 2019, l'Organo d'appello ha cessato di essere operativo, essendo rimasta in carica solo la giudice cinese Zhao Hong. Dinanzi a questa crisi istituzionale dell'OMC, l'Unione Europea ha scelto di essere un protagonista del processo di riforma del meccanismo d'appello del sistema multilaterale degli scambi. Oltre a introdurre importanti proposte per emendare l'art. 17 dell'Intesa sulla risoluzione delle controversie, che hanno trovato ampio risalto nei cd *Walker Principles*, l'Unione Europea ha presentato una soluzione interinale di grande interesse volta a preservare il diritto d'appello nel sistema ginevrino, il *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA), basato sull'arbitrato previsto dall'art. 25 dell'Intesa sulla risoluzione delle controversie. Il presente lavoro analizza come l'Unione europea ha proposto, sviluppato e progressivamente acquisito l'interesse di un gruppo significativo di Membri dell'OMC sul suo progetto di arbitrato d'appello, esaminando gli aspetti principali dell'MPIA, e considerando le critiche che gli Stati Uniti hanno iniziato a rivolgere al meccanismo provvisorio di seconda istanza.

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* Articolo sottoposto a referaggio.

1. Introduction

Since May 2016,¹ the United States of America has been vetoing the selection of the members of the Appellate Body of the World Trade Organization (WTO), alleging procedural and substantive criticisms on the activity of the Standing Tribunal.² Consequently, at midnight of 10 December 2019 the World Trade Court ceased to be operational, as only Zhao Hong, the Chinese judge, remained in office.³ Not even the latter AB member was spared by the US administration: in fact, in March 2020, Ambassador Shea claimed before the Dispute Settlement Body (DSB) that Ms Zhao, being a paid affiliate of the People's Republic of China (PRC) Government, is not a valid member of the Appellate Body.⁴

Faced with such an unprecedented WTO institutional crisis,⁵ the European Union (EU) has chosen to be a major actor in the reform process of the WTO appellate review mechanism. Beyond presenting

¹ See WT/DSB/M/379, *Minutes of Meeting Held in the Center William Rappard on 23 May 2016*, 29 August 2016, paras. 6.2 – 6.10; WT/DSB/M/400, *Minutes of Meeting Held in the Center William Rappard on 31 August 2017*, 31 October 2017; WT/DSB/M/417, *Minutes of Meeting Held in the Center William Rappard on 27 August 2018*, 30 November 2018, paras. 4.2 – 4.17; WT/DSB/M/420, *Minutes of Meeting Held in the Center William Rappard on 29 October 2018*, 27 February 2019, paras. 4.2 – 4.19; WT/DSB/M/426, *Minutes of Meeting Held in the Center William Rappard on 25 February 2019*, 20 May 2019, para. 5.26.

² On these highly important and sensitive issues see LO, NAKAGAWA, CHEN (EDS.), *The Appellate Body of the WTO and its Reform*, Heidelberg, 2020; LEHNE, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?*, Berlin – Berne, 2019. The US concerns on the activity of the Appellate Body have been further enlarged and articulated in United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, Washington D.C., February 2020.

³ See DI DONFRANCESCO, *Intervista a Giorgio Sacerdoti: “Per colpa degli Stati Uniti la WTO non è più arbitro del commercio,”* in *Il Sole 24 Ore*, 11 December 2019.

⁴ See Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, February 28, 2020, Reconvened on March 5, 2020.

⁵ The blockage of the Appellate Body has been extensively commented: see *inter alia* ADINOLFI, *Procedural Rules in WTO Dispute Settlement in the Face of the Crisis of the Appellate Body*, in *Questions of International Law*, 2019, pp. 39 ff.; BACCHUS, *Might Unmakes Right: The American Assault on the Rule of Law in World Trade*, CIGI Paper No. 173, May 2018; BARONCINI, *Il funzionamento dell'Organo d'appello dell'OMC: bilancio e prospettive*, Bologna, 2018; CHARNOVITZ, *A WTO if You Can Keep it*, in *Questions of International Law*, 2019, pp. 6 ff.; CLAUSSEN, *The Other Trade War*, in *Minnesota Law Review Headnotes*, 2018, pp. 1 ff.; CREAMER, *Can International Trade Law Recover? From the WTO's Crown Jewel to its Crown of Thorns*, in *AJIL Unbound*, 2019, pp. 51 ff.; FIORINI, HOEKMAN, MAVROIDIS, SALUSTE, WOLFE, *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, Bertelsmann Stiftung, 2019; HILLMAN, *Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma*, in *AJIL Unbound*, 2017, pp. 364 ff.; HILLMAN, *Three Approaches to Fixing the World Trade Organization's Appellate Body: the Good, the Bad and the Ugly?*, IIEL Issues Brief, December 2018; HOEKMAN, MAVROIDIS, *Burning Down the House? The Appellate Body in the Centre of the WTO Crisis*, EUI Working Paper RSCAS 2019/56; HOEKMAN, MAVROIDIS, *Party Like It's 1995: Necessary but not Sufficient to Resolve WTO Appellate Body Crisis*, in *Vox*, 26 August 2019; MAURO, *Diritto internazionale dell'economia – Teoria e prassi delle relazioni economiche internazionali*, Napoli, 2019, pp. 173 ff.; MCDOUGALL, *Impasse in the WTO Dispute Settlement Body: Consequences and Responses*, ECIPE Policy Brief no. 11/2018; MCDOUGALL, *Crisis in the WTO – Restoring the WTO Dispute Settlement Function*, CIGI Papers no. 194, October 2018; MCDOUGALL, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, in *Journal of World Trade*, 2018, pp. 867 ff.; MCDOUGALL, *Revitalizing the WTO: Settling Trade Disputes in a Turbulent Multipolar World*, Bertelsmann Stiftung, 2019; PAYOSOVA, HUFBAUER, SCHOTT, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PIIE Policy Brief No. 18-5, March 2018; PETERSMANN, *Between “Member-Driven” WTO Governance and “Constitutional Justice”: Judicial Dilemmas in GATT/WTO Dispute Settlement*, in *Journal of International Economic Law*, 2018, pp. 103 ff.; PETERSMANN, *How Should the EU and Other WTO Members React to their WTO Governance and WTO Appellate Body Crises?*, EUI Working Papers, RSCAS 2018/71; PETERSMANN, *The “Crown Jewel” of the WTO Has Been Stolen by US Trade*

important institutional proposals to amend Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),⁶ which have been highly considered in the draft decision on the functioning of the Appellate Body presented in late 2019 by the WTO Facilitator Ambassador Walker,⁷ the EU launched a very interesting temporary solution to preserve appeals in Geneva, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA),⁸ which is based on the autonomous alternative dispute settlement means already referred to in Article 25 of the DSU.

Subsequent to the presentation of the stand-alone procedure foreseen in the latter provision, our work analyses how the EU suggested, developed, and progressively gained support for its MPIA project within the WTO community, illustrating the main aspects of the temporary alternative appeals arbitration mechanism and taking into consideration the objections the US started to raise against some aspects of the important interim appeal arbitration procedure.⁹

2. Arbitration as an alternative means for dispute settlement within the multilateral trading system: Article 25 of the DSU

Article 25 of the DSU introduces “expeditious arbitration as an alternative means for dispute settlement,” that WTO Members may have recourse to in order to “facilitate the solution of certain disputes ... concern[ing] issues ... clearly defined by both parties”. It confirms the choice made in the 1989 “Montreal Rules” or “Montreal Package,”¹⁰ which finally realized the proposal advanced, but never accomplished,

Diplomats – and They Have No Intention of Giving It Back, in PRÉVOST, ALEXOVIČOČÁ, HILLEBRAND POHL (EDS.), *Restoring Trust in Trade, Liber Amicorum in Honour of Peter Van den Bossche*, Hart Publishing, Oxford, 2019, pp. 106 ff.; SACERDOTI, *The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges*, in ELSIG, HOEKMAN, PAUWELYN (EDS.), *Assessing the World Trade Organization*, Cambridge University Press, Cambridge, 2017, pp. 147 ff.; SACERDOTI, *The WTO Dispute Settlement System and the Challenges to Multilateralism: Consolidating a “Common Global Good”*, in PRÉVOST, ALEXOVIČOČÁ, HILLEBRAND POHL (EDS.), *Restoring Trust in Trade, Liber Amicorum in Honour of Peter Van den Bossche*, Hart Publishing, Oxford, 2019, pp. 87 ff.; SACERDOTI, *The Stalemate Concerning the Appellate Body of the WTO: Any Way Out?*, in *Question of International Law*, 2019, pp. 37 ff.; SCHOTT, *The United States Relies on the WTO to Settle Trade Disputes More Than Any Other Member*, PIIE Charts, January 2019; STEWART, *The Broken Multilateral Trade Dispute System*, Asia Society Policy Institute, Feb. 7, 2018; VIDIGAL, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, in *Journal of World Investment & Trade*, 2019, pp. 862 ff.

⁶ The text of the DSU is available in World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge, 2011, pp. 354 ff.

⁷ See *infra* Section 3.

⁸ See *infra* Section 4.

⁹ See the Letter sent to the WTO Director General Azevêdo on 5 June 2020 by US Ambassador Shea (available at the link <https://drive.google.com/file/d/1QlhcAoqU8pmdR6nKz0LNmfx8GR6s1lr3/view>), considered in BASHUK, *U.S. Pledges to Block Funding for EU’s WTO Appellate Body Proxy*, *Bloomberg Law*, 12 June 2020; KANTH, *US Rejects interim Appeal Arbitration Arrangement*, *TWN Third World Network*, 9 June 2020; MONICKEN, *Shea: U.S. Opposes Use of WTO Budget for Interim Appellate Plan Inside US Trade*, 12 June 2020.

¹⁰ With these expressions are indicated the set of new rules developed for the multilateral dispute settlement mechanism during the Ministerial Meeting held in Montreal from 5 to 8 December 1988, which was the mid-term review of the Uruguay Round. See GATT L/6489, *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of the CONTRACTING PARTIES of 12 April 1989, BISD 36S/61.

in the Havana Charter of allowing the contracting parties to also resort to arbitration to settle their trade disputes.¹¹ Together with the good offices, conciliation and mediation procedures contemplated in Article 5 of the DSU, arbitration under Article 25 represents one of the alternative means available to WTO disputing parties to enhance and promote the accomplishment of the aim of the multilateral dispute settlement mechanism consisting in securing a positive, rapid solution to a dispute which fully respects and preserves the WTO rights and obligations, providing security and predictability to the multilateral trading system.

Article 25 arbitration proceedings, in fact, while being autonomous from the main DSU path of consultations and two-level adjudication, are fully integrated in the Geneva system, under three aspects. First, the agreement through which the disputants decide to resort to arbitration has to be notified to the WTO Membership “sufficiently in advance of the actual commencement of the arbitration process,”¹² so that any WTO Member may ascertain, comment, and determine what steps to take with respect to the announced controversy. Secondly, once the arbitral award is rendered, the parties have to notify it “to the DSB and the Council of Committee of any relevant agreement where any Member may raise any point relating thereto”.¹³ The disputants have, in fact, to agree “to abide by the arbitration award,” which will thus be mandatory without having to be approved by the DSB. However, as arbitral awards under Article 25 of the DSU interpret WTO law, become part of the WTO case law and have thus to be consistent with the WTO Agreements, they must be known by the WTO Membership: the transparency obligation at issue evidently aims at empowering WTO Members to wholly and promptly assess and introduce any remark on any aspect of the arbitral award. Thirdly, the DSB is fully involved in the implementation of the arbitral awards, as Article 25.4 of the DSU establishes that “Articles 21 and 22 of this Understanding shall apply *mutatis mutandis*,” thereby conferring the DSB with the same role it plays in the implementation of panel and AB reports.¹⁴

¹¹ See Artt. 93 and 94 of the *Havana Charter for an International Trade Organization*, done at Havana on 24 March 1948, in UN Doc E/CONF.2/78, 3. On the Havana Charter cfr. *inter alia* SACERDOTI, *Havana Charter (1948)*, in *Max Plank Encyclopedia of Public International Law*, Oxford, 2014.

¹² Article 25.2 of the DSU.

¹³ Article 25.3 of the DSU.

¹⁴ Cfr. TANAKA, *The Peaceful Settlement of International Disputes*, Cambridge, 2018, pp. 304-305. On arbitration proceedings under this provision see BOISSON DE CHAZOURNES, *Arbitration at the WTO: A Terra Incognita to Be Further Explored*, in CHARNOVITZ, STEGER, VAN DEN BOSSCHE (EDS.), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano*, Cambridge, 2005, pp. 181 ff.; JACYK, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future*, in *Australian International Law Journal*, 2008, pp. 235 ff.; LO, *The Shrinking Role of Article 25 Arbitration in DSU: A Proper Understanding of “Clearly Defined” Issues to Enhance Efficiency of WTO Dispute Settlement Procedure*, in *US-China Law Review*, 2011, pp. 879 ff.; MALKAWI, *Arbitration and the World Trade Organization – The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding*, in *Journal of International Arbitration*, 2007, pp. 173 ff.; MONNIER, *Working Procedures before Panels, the Appellate Body and Other Adjudicating Bodies of the WTO*, in *Law and Practice of International Courts and Tribunals*, 2002, pp. 481 ff.; WOLFRUM, *Article 25 DSU – Arbitration*, in WOLFRUM, STOLL, KAISER (EDS.), *WTO - Institutions and Dispute Settlement*, Leiden / Boston, 2006, pp. 566 ff.

So far, WTO Members have resorted to Article 25 arbitration only once, and only to determine the level of nullification and impairment of benefits in a situation where a breach of some TRIPs (Agreement on Trade Related Aspects of Intellectual Property Rights)¹⁵ obligations had already been found and the panel report adopted by the DSB.¹⁶ In the *US — Section 110(5) Copyright Act* case, the parties asked the arbitrators to establish the damage suffered by the EU due to the breach by the US, via legislation, of copyrights of European musicians and performers.¹⁷ In this Article 25 arbitration, the WTO adjudicators authoritatively declared the *kompetenz-kompetenz* principle, recalling the Appellate Body's finding in the *US — 1916 Act (EC)* case pursuant to which “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative”.¹⁸ In the WTO award it was consequently stated that “[i]n the absence of a multilateral control over recourse to [Article 25 of the DSU] ... it is incumbent on the Arbitrators themselves to ensure that [such provision] is applied in accordance with the rules and principles governing the WTO system,”¹⁹ a duty including the responsibility of the WTO arbitrators to respect the obligation of Article 3.5 of the DSU, pursuant to which “[a]ll solutions” to WTO disputes “including arbitration awards ... [have to] be consistent with [the WTO Agreements and ... not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements”.

3. Setting up the scene for a temporary appellate mechanism under Article 25 of the DSU

The EU approach to the WTO dispute settlement mechanism has been constantly characterized by the firm belief in a rules-based multilateral trading system where controversies could be submitted to a two-step binding adjudicatory process, and hence rules could be enforced, if necessary, after having benefitted from the interpretation given by a standing appeal instance guaranteeing quality and independence.²⁰

Realizing that the persistent US veto to the selections of the members of the Appellate Body could realistically deprive the WTO Members of their right to an appeal review, the EU wisely chose to pursue

¹⁵ The text of the TRIPs Agreement is published in World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, cit., pp. 321 ff.

¹⁶ Panel Report, *United States - Section 110(5) of the US Copyright Act (US - Section 110(5) Copyright Act)*, WT/DS160/R, adopted 27 July 2000.

¹⁷ WT/DS160/ARB25/1, *United States - Section 110(5) of the US Copyright Act, Award of the Arbitrators*, 9 November 2001. On this award see GROSSMAN, MAVROIDIS, *US - Section 110(5) Copyright Act United States - Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU: Would've or Should've? Impaired Benefits Due to Copyright Infringement*, in *World Trade Review*, 2003, pp. 281 ff.

¹⁸ Appellate Body Report, *United States - Anti-Dumping Act of 1916 (US - 1916 Act (EC))*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 54.

¹⁹ WT/DS160/ARB25/1, cit., para. 2.1.

²⁰ For a comprehensive presentation of the EU vision of the WTO dispute settlement mechanism see the statement of the EU representative in WT/GC/M/181, *Minutes of Meeting Held in the Centre William Rappard on 9-10 December 2019*, 24 February 2020, paras. 5.130 -5.141.

two parallel paths. Brussels hence acknowledged the Washington concerns and wholly committed itself to work and develop common solutions “while preserving the essential features of the [dispute settlement] system and of its Appellate Body”.²¹ In fact, the EU was determined to save the WTO appellate function, and consequently considered with the greatest attention the idea presented by some scholars and practitioners on activating another dispute settlement tool already disciplined by the DSU - the arbitration under Article 25- “as a temporary avenue to enable appeals of panel reports”.²²

The EU then fully explored the possibilities for an interim solution flowing directly from Article 25 of the DSU. In particular, the European Commission worked with all the interested WTO Members to draft a model arrangement for a temporary appeal arbitration procedure based on the recalled DSU provision, with the aim of preserving a) the binding character of the WTO dispute settlement system, b) two levels of adjudication through an impartial appeal review of panel reports, and c) the independence of adjudicators.²³ The three “red lines” so identified by the European institution were reflected in the temporary alternative mechanism resulting from the exploratory talks.²⁴ The proposed interim solution was composed by a political statement of the participating Members, and an annex containing the template of the procedural rules agreement under Article 25 of the DSU, to be used in the future arbitral appeals.²⁵ The draft text so shaped by the European Commission found a comprehensive political backing at EU level, as it was endorsed by the EU Council²⁶ and then the European Parliament. The

²¹ WT/GC/W/752/Rev.2, *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council*, 11 December 2018, p. 1.

²² ANDERSEN, FRIEDBACHER, LAU, LOCKHART, REMY, SANDFORD, *Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals*, CTEI Working Papers, CTEI-2017-17, p. 1. See also BACCHUS, *Saving the WTO's Appeals Process*, www.cato.org/blog, 19 October 2018; HILLEBRAND POHL, *Blueprint for a Plurilateral WTO Arbitration Agreement under Article 25 of the Dispute Settlement Understanding*, in PRÉVOST, ALEXOVIĆOČÁ, HILLEBRAND POHL (EDS.), *Restoring Trust in Trade, Liber Amicorum in Honour of Peter Van den Bossche*, Oxford, 2019, pp. 139 ff.

²³ Cfr. SI (2019) 452, *WTO Appellate Body – Work on A Possible Interim Solution*, Brussels, 23 May 2019, p. 2. The mandate to explore the possibilities for such interim solution was endorsed by the EU Council in May 2019: see Council of the European Union, doc. 9506/19, *WTO Appellate Body*, 20 May 2019.

²⁴ On the three EU “red lines” see PAUWELYN, *WTO Dispute Settlement post 2019: what to Expect?*, in *Journal of International Economic Law*, 2019, pp. 297-321, p. 314, in particular fn. 60, where the author quotes the statement of an EU official made during the World Trade Institute Workshop on *WTO Appellate Review: Reform Proposals and Alternatives*, 24 May 2019, held in Geneva at the WTO headquarters: “it’s very simple – three red lines, two stage process, independence of the adjudicators, and binding dispute settlement. And if we look at those three red lines, Article 25 appeal arbitration squarely fits the bill”.

²⁵ The model arrangement was leaked by the media in the late 2019 spring: see World Trade Online, *EU Moving Forward with WTO Appellate Body Backup Plan*, 28 May 2019, available at <https://ielp.worldtradelaw.net/2019/06/the-wto-appellate-body-crisis-a-critique-of-the-eus-article-25-proposal.html>.

²⁶ Cfr. EU Council Conclusions 9753/19, *Outcome of the Council Meeting - 3695th Council meeting, Foreign Affairs - Trade issues*, Brussels, 27 May 2019, p. 3; Council of the European Union, doc. 10905/19, *WTO Appellate Body – Interim Arrangement – Endorsement*, 5 July 2019; EU Council Conclusions 11255/19, *Outcome of the Council Meeting - 3708th Council meeting, Agriculture and Fisheries*, Brussels, 15 July 2019, p. 11.

latter, in particular, declared to fully “[s]upport ... [these] recent EU initiatives to conclude interim arrangements for provisional solutions with our major trade partners that would preserve the European Union’s right to the resolution of trade disputes at the WTO through binding two-level, independent and impartial adjudication, while recalling that a Standing Appellate Body remains the core objective of the EU’s strategy”.²⁷

As a first partner with which to agree on the interim arbitral solution based on Article 25 of the DSU, the EU chose Canada, because of their common “strong support for the multilateral trading system”²⁸ and recognition of “the indispensable role that the World Trade Organization [...] plays in facilitating and safeguarding international rules-based trade”.²⁹ At the 17th Bilateral EU-Canada Summit, held in Montreal on 17-18 July 2019, the two WTO Members therefore announced that they were “finalizing an interim appeal arbitration arrangement based on existing WTO rules which could apply until the WTO Appellate Body is able to hear new appeals again”.³⁰ It was thus possible for the European Commission to officially present in Geneva the “Interim Appeal Arbitration Pursuant to Article 25 of the DSU,” combined with its Annex on “Agreed Procedures,” as a joint communication with Canada, notified to the WTO Secretariat on 25 July 2019.³¹

In this initial stage, the EU thoughtfully opted for the technique of proposing its model of temporary appeal arrangement to any interested WTO Member, i.e. reaching almost identical bilateral understandings with as many parties as possible, without waiting to gather a substantive number of partners before making operative its contingency measure. As the persistent absence of consensus in the WTO to fill the vacancies of the Appellate Body increasingly materialized the threat of the demise of the World Trade Court, more and more WTO Members gradually understood and appreciated the soundness of the pragmatic and well-founded EU approach, showing their willingness to share the EU temporary arrangement. Hence, in September 2019, the European Commission decided to confer the Commissioner in charge for Trade with the power “to adopt, on behalf of the Commission and under its responsibility,

²⁷ P9_TA-PROV (2019)0083, *European Parliament Resolution of 28 November 2019 on the Crisis of the WTO Appellate Body*, para. 5.

²⁸ *Canada-EU Summit Joint Declaration, July 17-18, 2019, Montreal*, para. 12.

²⁹ *Ibid.*

³⁰ *Ibid.* See also SEVUNTS, *Canada and EU Work on “Interim Fix” to Save Global Trade Body*, *Radio Canada International*, 18 July 2019.

³¹ JOB/DSB/1/Add.11, *Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Interim Appeal Arbitration Pursuant to Article 25 of the DSU*, Communication circulated at the request of the Delegations of Canada and the European Union, 25 July 2019. Para. 8 of the EU/Canada agreed procedures for arbitration under Article 25 of the DSU was slightly modified on 21 October 2019 by the WTO document JOB/DSB/1/Add.11/Rev.1.

certain measures concerning the interim appeal arbitrations at the World Trade Organization,³² a delegation allowing the European institution to rapidly answer to any request of joining the EU interim solution.³³ The EU-Canada arrangement was then copy-pasted and also accomplished with Norway on 21 October 2019.³⁴

In December 2019, the General Council did not succeed in gathering the consensus of the WTO Membership on the adoption of the proposal drafted by Ambassador David Walker,³⁵ the Facilitator of the multilateral consultations on the functioning of the Appellate Body.³⁶ The so-called Walker Principles skilfully collected and elaborated the contributions which many WTO Members presented to give an answer and overcome the grievances raised by the US on the activity of the WTO Standing Tribunal.³⁷ Yet Washington, who never tabled or collaborated to any proposal discussed in the Geneva informal process, opposed the Walker Principles whilst persisting in its veto on the AB members selection, leaving the World Trade Court with only one member.³⁸

The paralysis of the Appellate Body was achieved at midnight of 10 December 2019 with no reform proposal taken into consideration by the whole WTO Membership at the horizon. Such a deadlock definitively attracted the greatest attention on the Brussels' alternative dispute mechanism of an increasingly large group of trading partners, and prompted the EU to further escalate its efforts to

³² PV (2019) 2306 final, *European Commission, Minutes of the 2306th meeting of the Commission held in Brussels (Berlaymont) on Wednesday 4 September 2019 (morning)*, p. 10.

³³ See C (2019) 6380, *Commission Decision of 4.9.2019 Granting an Empowerment Relating to Interim Appeal Arbitration Procedures in the World Trade Organization*, Brussels, 4.9.2019, and also *European Commission Adopts Mandate to Extend Interim Appeal Arbitration Arrangement*, Brussels, 4 September 2019.

³⁴ JOB/DSB/1/Add.11/Suppl.1, *Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes - Interim Appeal Arbitration Pursuant to Article 25 of the DSU*, Communication circulated at the request of the Delegations of the European Union and Norway, 21 October 2019. See also C(2019) 7471, *Commission Decision of 14.10.2019 Relating to Interim Appeal Arbitration Procedures in the World Trade Organization*, Brussels, 14.10.2019, where the European Commission considered “in the interest of the European Union” to enter into the appeal arbitration arrangement with Norway “in the event that the Appellate Body is not able to hear appeals due to the insufficient number of its members”; and *EU and Norway Agree in Interim Appeal System in Wake of World Trade Organization Appellate Body Blockage*, Brussels, 21 October 2019. For an analysis of this first set of bilateral arrangements see BARONCINI, *The EU Approach to Overcome the WTO Dispute Settlement Vacuum: Article 25 DSU Interim Appeal Arbitration as a Bridge Between Renovation and Innovation*, in LEWIS, NAKAGAWA, NEUWIRTH, PICKER, STOLL (EDS.), *A Post-WTO International Legal Order - Utopian, Dystopian and Other Scenarios*, Heidelberg, 2020, pp. 115 ff.; FURCULITA, *The EU's Interim Appeal Arbitration Arrangements: What to Expect?*, in *EUTIP Blog*, 27 January 2020.

³⁵ WT/GC/W/791, *Draft Decision – Functioning of the Appellate Body*, 28 November 2019.

³⁶ See WT/GC/M/181, cit., pp. 12-33.

³⁷ *Inter alia* the EU proposals, i.e. WT/GC/W/752/Rev.2, cit., and WT/GC/W/753/Rev.1, *Communication from the European Union, China, India and Montenegro to the General Council*, 11 December 2018.

³⁸ Mr. Ujal Singh Bhatia (India) and Mr. Thomas R. Graham (United States) terminated their mandate as members of the Appellate Body on 10 December 2019. From 11 December 2019 just Ms Zhao Hong (China) remained in office, with the consequence of blocking the Appellate Body, as three adjudicators are needed to decide an appellate case. See Article 17.1 of the DSU.

preserve the rule of law in international trade and thus the right to an appeal review within the WTO system.

Instead of persisting in the strategy of endlessly re-proposing the same model of bilateral arrangement, the EU made a further significant qualitative leap multilateralizing its initiative to preserve the WTO appellate review through its multilateralization, a dimension already enquired by Argentina when commenting the EU – Canada joint document.³⁹ In mid-December 2019, the EU gathered in an informal Geneva meeting the supporters of its Article 25 initiative,⁴⁰ targeting the major economies that are heavy users of the Geneva dispute mechanism together with the interested developing countries, for whom the jurisdictional pillar of the WTO, composed by consultations together with a binding two-level adjudication phase, was an essential part of the bargain when they decided to join the multilateral trading system. The Chinese Ambassador to the WTO had, in fact, declared that “Beijing is actively working to support the EU’s vision of an appeal-arbitration model,”⁴¹ while Geneva trade experts announced that the EU interim appeal arbitration proposal, beyond Canada and Norway, could be accepted by other WTO Members, such as Australia, Argentina, Brazil, Chile, India, Japan and Turkey.⁴² The small or vulnerable WTO Members, for their part, declared during the discussion of the Walker Principles that they “had always looked for a robust Appellate Body to resolve trade disputes without fear or favour and ... did not want might to become right when it came to deciding disputes between Members,”⁴³ considering the blocking of the World Trade Court as “a grave risk of seeing a prevalence of the law of force where the Appellate Body represented the force of law.”⁴⁴

During the Geneva informal meeting, the EU thus proposed to the invited WTO Members to define together “a multi-party interim appeal arbitration arrangement,”⁴⁵ whose objective “would be to offer a stop-gap solution, pending the ... issue of appointments, by closely replicating the Appellate Body review process in the framework of Article 25 of the DSU. The stop-gap solution would apply within a group of interested members and would preserve both the access to a binding adjudication of disputes and the

³⁹ In fact, at the DSB meeting of 30 September 2019, Argentina asked “whether these Members [Canada and the European Union] intended to somehow multilateralize or encourage others to join the Interim Appeal Arbitration Arrangement proposal. Argentina also wished to know what would be the most suitable way of doing this”. WT/DSB/M/434, *Minutes of Meeting Held at the Centre William Rappard on 30 September 2019*, 10 December 2019, para. 11.6.

⁴⁰ Cfr. KANTH, *WTO: Interim Arrangement to Resolve Global Trade Disputes in the Works*, in *The Hindu Business Line*, 15 December 2019.

⁴¹ BASCHUK, *China May Back EU’s Trade-Dispute “Plan B” as Trump Hobbles WTO*, in *Bloomberg*, 10 December 2019.

⁴² See MILES, *EU, Canada Agree First Workaround to Avoid U.S. Block on WTO Judges*, in *Reuters Business News*, 25 July 2019.

⁴³ Statement by the representative of Indonesia at the General Council meeting of 9-10 December 2019, in WT/GC/M/181, cit., para. 5.143.

⁴⁴ Statement by the representative of Cameroon at the General Council meeting of 9-10 December 2019, in WT/GC/M/181, cit., para. 5.193.

⁴⁵ KANTH, *WTO: Interim Arrangement to Resolve Global Trade Disputes in the Works*, cit.

right to appellate review”.⁴⁶ Also Russia manifested its interest in joining the EU proposal, which would be formulated in a communication to the DSB presented by all the interested WTO Members, and containing “a political commitment to apply model appeal arbitration procedures, based on Article 25 of the DSU, in disputes among themselves”.⁴⁷

One month later, in Davos, on the sidelines of the World Economic Forum, “the Ministers of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, Uruguay”⁴⁸ released a joint statement confirming their commitment “to work with the whole WTO Membership to find a lasting improvement to the situation relating to the WTO Appellate Body,”⁴⁹ and announcing they would negotiate “contingency measures that would allow for appeals of WTO panel reports in disputes among [themselves] in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding”.⁵⁰ Such arrangement would be “open to any WTO Member willing to join it [and applied] only ... until a reformed WTO Appellate Body becomes fully operational”.⁵¹

The EU and those 16 WTO Members intended to address two major threats for the rules-based multilateral trading system: through the multi-party initiative, on one hand they aimed at avoiding that any defending party, by appealing into the void, could sink into the sands the WTO jurisdictional pillar; on the other hand, they meant to maintain the appellate function within the multilateral dispute settlement mechanism.

On 27 March 2020, another joint ministerial statement was issued, announcing that those WTO Members -though with the absence of South Korea and Panama, and the new entry of Hong Kong- secured the interim appellate solution.⁵² The “Multi-Party Interim Appeal Arbitration Arrangement” (MPIA) hence

⁴⁶ EU proposal reported by KANTH, *WTO: Interim Arrangement to Resolve Global Trade Disputes in the Works*, cit.

⁴⁷ KANTH, *WTO: Interim Arrangement to Resolve Global Trade Disputes in the Works*, cit.

⁴⁸ Statement by Ministers, Davos, Switzerland, 24 January 2020.

⁴⁹ Statement by Ministers, Davos, cit.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* The temporary nature of the *ad hoc* solution continues to be emphasised: The Mission of Brazil to the WTO accompanied the Davos Statement with a message remarking that the Latin-American country “remains committed to a permanent solution to the Appellate Body crisis and WTO reform as a whole. In the meantime, Brazil is willing to adopt contingency measures to allow for appeals and ensure predictability for domestic stakeholders in the conduct of disputes” (Twitter message of 24 January 2020 available at <https://twitter.com/BrazilWTO/status/1220758666535673858>); Switzerland closed the Davos Meeting recalling that the participating Ministers all convened that “the WTO dispute settlement system is a central element in providing security and predictability to the multilateral trading system”, underlining “the urgency of taking the necessary actions to restore a fully functioning dispute settlement system in line with its fundamental principles” (Informal WTO Ministerial Gathering, Davos, 24 January 2020, *Personal Concluding Remarks by the Chair, Federal Councillor Guy Parmelin, Switzerland*, available at <https://www.news.admin.ch/news/message/attachments/60028.pdf>).

⁵² Ministerial Statement, 27 March 2020, available at https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158684.pdf.

achieved is a significant political success expressing also high technical drafting quality. As easily predictable, the important institutional development has to constantly confront itself with the opposing action of the United States: “[s]everal Geneva sources -as reported by the specialized press- have indicated there has been United States political pressure on many countries to stop them from joining the MPIA ... in this regard the absence of Korea, which had originally signed up to the initiative when announced in Davos back in January, is notable”.⁵³ Other frequent users of the WTO adjudication stage like Japan, Argentina, India and Indonesia, remain, for the moment, outside from the MPIA. The existing frictions between the EU and Russia are determining, at least for the moment, the choice of Moscow not to join the MPIA, although Russia is very critical of the US attack to the Appellate Body.⁵⁴

However, the alternative appellate mechanism currently includes other major global trading powers and frequent users of the system such as China, Brazil, and Mexico; important Pacific countries and close US allies, i.e. Australia, New Zealand, Singapore; and smaller Latin American States -Colombia, Guatemala, Costa Rica- politically and trade dependent on the US. It does not appear an overstatement to consider the MPIA as “a major symbolic victory,”⁵⁵ or, in the words of Bernd Lange, Chair of the Committee on International Trade of the European Parliament, “a big success”.⁵⁶ The MPIA has already started to meet the concrete appreciation of other WTO Members. Few weeks after the MPIA presentation, three more countries joined the initiative: Iceland, Pakistan, and Ukraine;⁵⁷ then, shortly subsequent to the formal WTO notification, Ecuador⁵⁸ and Nicaragua⁵⁹ endorsed the MPIA, while the EU Commissioner for trade, Phil Hogan, sent a letter to the trade ministers of over 100 WTO Members, inviting them to join the MPIA.⁶⁰

⁵³ See DREYER, *Leap of Faith: the New 16-Member Alternative Appeals Tribunal at the WTO*, in *Borderlex*, 22 April 2020.

⁵⁴ “The existence of the Appellate Body ensured the predictability and consistency in the application of WTO provisions. Its non-existence, *de jure* or *de facto*, was clearly in contradiction with the Dispute Settlement Understanding and impeded the attainment of the objectives of not only the Understanding itself but of the WTO Agreement in general. The disruption of the Appellate Body's work or even its non-functioning was not a solution to any of the concerns the United States had deigned to vocalise to date unless the Appellate Body's mere existence, as enshrined under Article 17 as it had been agreed and as it had been included in the DSU, was the real concern of the United States”. Statement by the representative of the Russian Federation at the General Council meeting of 9-10 December 2019, in WT/GC/M/181, cit., para. 5.150.

⁵⁵ Iana DREYER, *Leap of Faith*, cit.

⁵⁶ Lange: *Spare a Thought for Developing Countries in a Post Corona trade World*, *Borderlex*, 16 April 2020.

⁵⁷ DREYER, *Iceland, Pakistan, Ukraine Join MPLA as New Arrangement Made Official at WTO*, in *Borderlex*, 30 April 2020.

⁵⁸ JOB/DSB/1/Add.13, *Statement on A Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, 19 May 2020.

⁵⁹ JOB/DSB/1/Add.14, *Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, 20 May 2020.

⁶⁰ See European Commission, *EU Puts forward its Candidate for the Pool of Arbitrators in the Multi-Party Interim Appeal Arbitration Arrangement and Encourages More WTO Members to Join*, Brussels, 13 May 2020.

4. The Multi-Party Interim Appeal Arbitration Arrangement: structure and principles

On 30 April 2020, once all the originally involved WTO Members completed their internal adoption procedure,⁶¹ the MPIA was formally notified to the WTO,⁶² a notification which “mark[ed] the start of the application of the MPIA to disputes arising between the participa[nts]”.⁶³ The new multi-party solution significantly improves the previous model of bilateral arrangements: benefitting from the contributions brought by all the participants during the consultations, it also anticipates some of the innovations proposed for the functioning of the Appellate Body in the Walker Principles and in the EU proposals presented to revise Article 17 of the DSU.⁶⁴

The MPIA is structured in three separate parts: the communication to the DSB enshrining the principles of the alternative appellate mechanism, formally entitled “Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU”; the template for the arbitration agreement to be used by the disputants, i.e. the “Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X,” which is Annex 1 to the communication; and the body of rules concerning the composition of the pool of arbitrators to be set up under the interim solution, presented as Annex 2 to the introductory document.

⁶¹ For the EU, the European Commission approved the MPIA on 6 April 2020: see C (2020)2163/1, *Commission Decision on the Multi-party interim arrangements*, Brussels, 6 April 2020. The EU Council endorsed the new interim solution on 15 April 2020: “all delegations voted in favour of the approval of the text of the Multi-party interim appeal arbitration arrangement (MPIA)”, see CM 2000/20, *End of Written Procedure - Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU – Approval*, Brussels, 15 April 2020. See also EU Council Press Release, *Council Approves a Multi-Party Interim Appeal Arbitration Arrangement to Solve Trade Disputes*, Brussels, 15 April 2020. The activity and participation of the European Commission to the MPIA has been politically backed through the application of the “Arrangements for Non-Binding Instruments” agreed among the Secretary Generals of the Council, the Commission and the EEAS as a follow-up to the judgment of the EU Court of Justice in case C-660/13, *Council of the European Union v European Commission*, EU:C:2016:616 (Council of the European Union, doc. 15367/17, *Follow up to Judgment in Case C-660/13 – Arrangements between Secretaries General on Non-Binding Instruments*, 4 December 2017). See Council of the European Union, doc. 7096/20, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU - Decision to Use the Written Procedure for the Approval*, 2 April 2020.

⁶² 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, 30 April 2020.

⁶³ Cfr. European Commission, *Interim Appeal Arrangement for WTO Disputes Becomes Effective*, Brussels, 30 April 2020.

⁶⁴ For first comments on the MPIA see BODSON, *WTO and Multi-Party Interim Appeal Arbitration Arrangement: Searching for Right Medicine*, in *International Litigation Blog*, 26 May 2020; GLADSTONE, *The WTO's Interim Appeal Arbitration Arrangement - A Bridge Over Troubled Waters?*, Clifford Chance, 12 June 2020; HESTERMEYER, *Saving Appeals in WTO Dispute Settlement: The Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, in *EULawLive*, 2 April 2020; MALKAWI, *MPIA and Use of Arbitration: Bypassing the WTO Appellate Body*, in *Jurist*, 28 May 2020; NEDUMPARA, *Saving WTO Disputes via Multiparty Interim Arbitration Mechanism?*, in *IJIEL Blog*, 6 May 2020; Sidley Austin, *Major Trading Countries Bolster World Trade Rules With Arbitral Mechanism*, 1 April 2020; SINGH JASWANT, *Arbitration in the WTO: Changing Regimes Under the New Multi-Party Interim Appeal Arbitration Arrangement*, in *Kluwer Arbitration Blog*, 14 May 2020; STOYANOV, BOURGEOIS, *Arbitration Frees WTO from Appeals Deadlock*, in *Thomson Reuters – Practical Law Arbitration*, 29 May 2020.

The wording of the first element of the MPIA intends to express the soft law nature of the communication, which has been conceived by the participants as a political statement “indicat[ing] their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure”.⁶⁵ The MPIA is, in fact, characterized by its temporariness, flexibility, openness, but above all for being functional to gain diplomatic space and develop ideas to successfully overcome the crisis of the Appellate Body, which is a “priority” for the participants to be successfully pursued with the whole WTO Membership. The text hence remarks twice this priority approach of the participants: when recording their commitment to resolve the impasse of the AB members appointments “as a matter of priority,”⁶⁶ and while reporting their pledge “to work with the whole WTO Membership to find a lasting improvement to the situation of the Appellate Body *as a matter of priority* ... so that it can resume its functions as envisaged by the DSU”.⁶⁷ The overall mission of the MPIA is thus to support and strengthen the multilateral rules-based trading system, of which the jurisdictional pillar is an essential and inalienable part: “a functioning dispute settlement system of the WTO -declare the participants- is of the utmost importance for a rules-based trading system, and ... an independent and impartial appeal stage must continue to be one of its essential features”.⁶⁸

As the purpose of the MPIA procedures is “to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports,”⁶⁹ the interim appeal arbitration arrangement may consequently be applied only in the “extraordinary circumstances”⁷⁰ of the non-operability of the WTO Standing Tribunal, i.e. “*as long as* the Appellate Body is not able to hear appeals of panel reports in disputes among [the participants] due to an insufficient number of Appellate Body members,”⁷¹ and it “will [thus] remain in effect *only until* the Appellate Body is again fully functional”.⁷²

The basic commitment undertaken by the participants is not to pursue appeals into the void but safeguard the appellate review using instead the MPIA proceedings. As the role of the Appellate Body for preserving a rules-based multilateral trading system is considered essential by the participants, who are engaged in strengthening and reforming the Standing Tribunal, the interim solution based on Article 25 of the DSU has been set up mirroring the WTO appellate function. The alternative mechanism will then

⁶⁵ JOB/DSB/1/Add.12, cit., para. 1, p. 2.

⁶⁶ JOB/DSB/1/Add.12, cit., para. 15, p. 3.

⁶⁷ JOB/DSB/1/Add.12, cit., p. 1 (emphasis added).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ JOB/DSB/1/Add.12, cit., p. 2.

⁷¹ JOB/DSB/1/Add.12, cit., para. 1, p. 2 (emphasis added).

⁷² JOB/DSB/1/Add.12, cit., para. 15, p. 3 (emphasis added).

be built on the substantive and procedural aspects of the appellate review pursuant to Article 17 of the DSU -which include in particular the Working Procedures for Appellate Review⁷³ and the Rules of Conduct⁷⁴ “in order to keep its core features, including independence and impartiality”.⁷⁵ Of course, the applicability of the substantive and procedural principles of the AB review process to the temporary appellate arbitration will need adequate adaptation of the recalled WTO sources, also when disciplining the connection between panels and the MPIA arbitrators.⁷⁶ Consequently, the participants clarified several times, within the text of the alternative mechanism, that “the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review”.⁷⁷ Beyond the just quoted general statement, the MPIA indicates adjustments’ possibilities with respect to panel procedures,⁷⁸ notice of appeal,⁷⁹ transmission of panel records,⁸⁰ decision-making of the arbitrators,⁸¹ time-frame for the MPIA award,⁸² rights of third parties,⁸³ and implementation and enforcement proceedings,⁸⁴ similarly to what already foreseen, in this last case, by Article 25.4 of the DSU. It is therefore evident that cooperation by disputants, panels, MPIA arbitrators and also third parties is a central element for the successful application of the MPIA: all those actors will need to perform a constructive collaboration when dealing with the various elements of the temporary contingency dispute measure. One has also to underscore that the MPIA has been negotiated in record time for what are the WTO standards -just four months.⁸⁵ Such a tight schedule reveals by itself the high level of cooperation among the MPIA drafters, united by the common political will to preserve a binding dispute settlement with an independent and impartial appeal stage. This is the best premise for foreseeing that they should go on cooperating and promoting collaboration for the pragmatic tool of the MPIA as a temporary bridge for achieving a multilateral long-term solution to the crisis of the Appellate Body.

⁷³ WT/AB/WP/6, cit.

⁷⁴ WT/DSB/RC/1, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, 11 December 1996.

⁷⁵ JOB/DSB/1/Add.12, cit., para. 3, p. 2; see also *ibid.*, para. 11, p. 5.

⁷⁶ On this aspect see *infra* Section 8.

⁷⁷ JOB/DSB/1/Add.12, cit., para. 11, p. 5.

⁷⁸ JOB/DSB/1/Add.12, cit., para. 8, p. 2.

⁷⁹ JOB/DSB/1/Add.12, cit., para. 5, p. 4.

⁸⁰ JOB/DSB/1/Add.12, cit., para. 4, p. 4.

⁸¹ JOB/DSB/1/Add.12, cit., para. 7, p. 5.

⁸² JOB/DSB/1/Add.12, cit., para. 14, p. 6.

⁸³ JOB/DSB/1/Add.12, cit., para. 4, p. 4, and para. 16, p. 6.

⁸⁴ JOB/DSB/1/Add.12, cit., para. 17, p. 6.

⁸⁵ Roughly from December 2019 to March 2020.

5. The MPIA anticipation of innovations proposed in the WTO debate for the reform of the Appellate Body

The MPIA introduces some of the proposals emerged within the WTO debate to improve and innovate the functioning of the Appellate Body, thus putting on paper suggestions which have been discussed at length and very much looked for. The temporary appeal arbitration procedure aims, in fact, at “enhancing the procedural efficiency of appeal proceedings”.⁸⁶ The MPIA thus enlarges the number of the adjudicators: the pool of arbitrators hearing the Article 25 appeals has to be composed by ten experts, a composition which may be further enlarged “by agreement of all participating Members at any time”.⁸⁷ It is evident the dynamic nature so conferred to the MPIA mechanism: should the participants realize that more arbitrators are needed, also because new WTO Members join the contingency measures, the size of the pool may easily be adjusted. This is the smooth implementation of a suggestion present in one of the 2018 EU proposals, aimed at ensuring the quality of the appellate reports and the reasonable time frame of review proceedings.⁸⁸

Another improvement for the promptness of the MPIA adjudicatory activity is brought by the rules concerning the respect of the 90-day time-limit to issue the MPIA awards.⁸⁹ This is the time lapse which also the Appellate Body should respect pursuant to Article 17.5 of the DSU, albeit the observance of such provision has become materially impossible for WTO appellate proceedings, because of the - increasing- low number of AB judges, the high complex nature and impressive number of arguments characterizing each appeal, and the amount of panel reviews requested in the Geneva mechanism.⁹⁰ The solutions put forward by the Walker Principles -and the 2018 EU proposals- inspire the temporary appellate review mechanism. In order to respect the three month deadline, the arbitrators have in fact been conferred by the MPIA with practical tools which may be distinguished into two categories: the organizational measures, that the adjudicators have the authority to decide; and the substantive measures, which the arbitrators may only recommend, as those measures are subject to the agreement by the parties to MPIA disputes.

To streamline the proceedings, the arbitrators may *decide* on organizational measures such as “page limits, time limits and deadlines as well as ... the length and number of hearing required” to deal with a specific

⁸⁶ JOB/DSB/1/Add.12, cit., para. 3, p. 2.

⁸⁷ JOB/DSB/1/Add.12, cit., para. 5, p. 7.

⁸⁸ In order to “strengthen [...] the independence and impartiality of the Appellate Body” and “improv[e] efficiency so as to enable it to meet the required timeframes”, Brussels advised to provide for one single but longer mandate for the AB members (to be fixed between six and eight years), to increase the AB membership from seven to nine judges, and to establish that the appellate review activity of the appointed adjudicators be their exclusive occupation, thus overcoming the current status of part-time job of the AB members. See WT/GC/W/753/Rev.2, cit., p. 1.

⁸⁹ JOB/DSB/1/Add.12, cit., para. 12, p. 5.

⁹⁰ See LEHNE, *Crisis at the WTO ...*, cit., pp. 40-50.

MPIA appeal,⁹¹ procedural limitations recalling the so-called “Jara Process,” aimed to enhance the efficiency of the panel process and reduce its costs.⁹² “[S]ubstantive measures to the parties,” on the contrary, may only be *proposed* by the adjudicators:⁹³ this type of proposals, in fact, is not legally binding, as “it will be up to the party concerned to agree with the proposed substantive measures,”⁹⁴ and in case the disputant disagrees with the arbitrators’ recommendation, the MPIA takes care to specify that such an eventuality “shall not prejudice the consideration of the case or the rights of the parties”.⁹⁵

The MPIA directly indicates “[the] exclusion of claims based on the alleged lack of an objective assessment of the facts to Article 11 of the DSU” as an example of substantive measure which may be suggested by the adjudicators. Article 11 claims, requiring the WTO appeals adjudicators to significantly and substantively intervene on the panel assessment of domestic facts and disciplines, are constantly on the edge between law and facts, and usually entail a considerable amount of work during an appeal review.⁹⁶ Initially, Article 11 claims were limited by the litigants to cases of egregious errors, but subsequently appellants’ practice considerably extended the grounds for review, as parties aimed at relitigating the facts of a case in front of the Appellate Body. The latter tried to intervene, cautioning appellants to reduce Article 11 claims: in *China - Rare Earths*, the Standing Tribunal “encouraged appellants to consider carefully when and to what extent to challenge a panel’s assessment of a matter pursuant to Article 11, bearing in mind that *an allegation of violation of Article 11 is a very serious allegation*. This is in keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members exercise judgment in deciding whether action under the WTO dispute settlement procedures would be *fruitful*.”⁹⁷

⁹¹ See JOB/DSB/1/Add.12, cit., para. 12, p. 5. For the similar approach in one of the two 2018 EU proposals see WT/GC/W/752/Rev.2, cit., pp. 2 and 4.

⁹² See WTO Press Release, *DDG Jara Reports on Consultations to Enhance Efficiency of Panels*, 13 March 2012; JARA, *Enhancing the Efficiency of the Panel Process at the WTO*, in *Global Trade and Customs Journal*, 2014, pp. 88 ff. More generally, negotiations on improvements and clarifications of the DSU are ongoing since the 1990s: cfr. GARCIA BERCERO, GARZOTTI, *DSU Reform: Why Have Negotiations to Improve WTO Dispute Settlement Failed So Far and What Are the Underlying Issues*, in *The Journal of World Investment & Trade*, 2005, pp. 847 ff.

⁹³ “If necessary in order to issue the award within the 90 day time-period, the arbitrators may also *propose* substantive measures to the parties”. JOB/DSB/1/Add.12, cit., para. 13, p. 5 (emphasis added).

⁹⁴ JOB/DSB/1/Add.12, cit., fn. 6, p. 5

⁹⁵ *Ibid.*

⁹⁶ On this very delicate aspect in international proceedings see GRUSZCZYNSKI, WERNER (EDS.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford, 2014; SALUZZO, *Domestic Law Beyond Facts – The Scope of the WTO Appellate Body’s Review on Domestic Law*, in *Diritto del commercio internazionale*, 2020, pp. 125 ff.; VOON, YANOVICH, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, in *Journal of World Trade*, 2006, pp. 239 ff.

⁹⁷ Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (China – Rare Earths)*, [WT/DS431/AB/R](#) / [WT/DS432/AB/R](#) / [WT/DS433/AB/R](#), adopted 29 August 2014, para. 5.228.

Those words have been very recently evoked in the last (for now) AB report. In the *Australia — Tobacco Plain Packaging* case, appellants were reproached for “the sheer volume”⁹⁸ of their claims under Article 11 of the DSU, considered unprecedented, and the Appellate Body firmly refused to “entertain attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case ... entertaining such factual arguments would undermine the Panel in its role as the trier of facts and the adjudicator of first instance in WTO dispute settlement ... [and] it would also not be in line with the Appellate Body's caution that we: (i) will not "interfere lightly" with the panel's fact-finding authority ...; (ii) will not "second-guess the [p]anel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]" ...; and (iii) will not reach "a finding of inconsistency under Article 11 simply on the conclusion that [we] might have reached a different factual finding from the one the panel reached".”⁹⁹ The MPIA deals with the thorny issue of Article 11 claims granting the arbitrators the possibility to advise the parties to withdraw non adequate allegations, and so *prevent* the attempt of a disputant to overcome the limits to the scope of appellate review, which, for the interim arbitration, of course replicates that of the Appellate Body enshrined in Article 17.6 of the DSU: the MPIA appeal, in fact, “shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel,” so that “[t]he arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel”.¹⁰⁰ The MPIA then, while making available new rules for expediting the process, also addresses the thorny issue of the distinction between issues of law and issues of fact, promoting the respect of the limitation of appeals to legal issues. The MPIA even goes a step further by comparison with the Walker Principles: according to the latter, in fact, the disputants are exhorted, when filing an appeal, to exercise self-restraint on whether to raise claims under Article 11 of the DSU, while no role is contemplated for the Appellate Body.¹⁰¹

⁹⁸ Appellate Body Reports, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging (Australia — Tobacco Plain Packaging (Honduras) - Australia — Tobacco Plain Packaging (Dominican Republic))*, [WT/DS435/AB/R, WT/DS441/AB/R](#), circulated to WTO Members 9 June 2020 (adoption pending), para. 6.48

⁹⁹ Appellate Body Reports, *Australia — Tobacco Plain Packaging (Honduras), Australia — Tobacco Plain Packaging (Dominican Republic)*, para. 6.50.

¹⁰⁰ See JOB/DSB/1/Add.12, cit., para. 9, p. 5.

¹⁰¹ “[I]t is incumbent upon Members engaged in appellate proceedings to refrain from advancing extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal, under DSU Article 11, in a *de facto de novo* review”. See WT/GC/W/791, cit., para. 12.

Reducing Article 11 claims is also a manifestation of the principle of judicial economy,¹⁰² which, in the alternative appeal mechanism, is clearly expressed by another anticipation of the Walker Principles:¹⁰³ the MPIA, in fact, requires the arbitrators to “only address those issues that are necessary for the resolution of the dispute,”¹⁰⁴ surmounting the present strict prescription of considering each of the issues raised by the appellants, fixed by Article 17.12 of the DSU.¹⁰⁵ This innovation additionally performs the purpose of containing the alleged practice of advisory opinions, another aspect of the WTO appellate case law the US complains about.¹⁰⁶

Of course, “[o]n a proposal from the arbitrators, the parties may agree to extend the 90 day time-period for the issuance of the award”.¹⁰⁷ Procedural efficiency and a constructive approach to appeal review, litigating on the essential aspects of a controversy, are then a joint responsibility of arbitrators and disputants, for whose optimal performance the MPIA offers a good set of new and innovative tools.

In a letter sent to the WTO Director General Azevêdo on 5 June 2020, the United States *inter alia* observed that “the [MPIA] arrangement weakens the mandatory deadline for appellate reports [and] contemplates appellate review of panel findings of fact”.¹⁰⁸ In our view, the above exposed elements and

¹⁰² “In international adjudication, the principle of judicial economy requires the judge to obtain the best result in the management of a controversy with the most rational and efficient use possible of his or her powers”: see PALOMBINO, *Judicial Economy and Limitation of the Scope of the Decision in International Adjudication*, in *Leiden Journal of International Law*, 2010, pp. 909 ff., p. 909.

¹⁰³ “Consistent with Article 3.4 of the DSU, the Appellate Body shall address issues raised by parties in accordance with DSU Article 17.6 only to the extent necessary to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements in order to resolve the dispute”. WT/GC/W/791, cit., para. 14.

¹⁰⁴ JOB/DSB/1/Add.12, cit., para. 10, p. 5.

¹⁰⁵ Pursuant to this provision “[t]he Appellate Body shall address *each of the issues* raised in accordance with paragraph 6 during the appellate proceeding” (emphasis added). It has to be underlined that the World Trade Court has approached Article 17.12 of the DSU finding that the latter does not preclude the exercise of judicial economy, which the Appellate Body considers as a way to address a claim or an objection provided that it is expressly stated: “509. In *US – Wool Shirts and Blouses*, the Appellate Body cautioned that ... “[g]iven the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute[.]. 510. With this in mind, we observe that although an interpretation by the Appellate Body, in the abstract, of the meaning of the phrase “world market share” in Article 6.3(d) of the SCM Agreement might offer at best some degree of ‘guidance’ on that issue, it would not affect the resolution of this particular dispute. Indeed, irrespective of whether we were to uphold or reverse the Panel’s finding on this issue, upon adoption of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation. Thus, although we recognize that there may be cases in which it would be useful for us to review an issue, despite the fact that our ruling would not result in rulings and recommendations by the DSB, we find no compelling reason for doing so in this case. 511. Accordingly, we believe that an interpretation of the phrase ‘world market share’ in Article 6.3(d) of the SCM Agreement is unnecessary for purposes of resolving this dispute” (Appellate Body Report, *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WT/DS267/AB/R, adopted 21 March 2005, paras. 509-511). On the principle of judicial economy in the WTO case law see MATSUSHITA, SCHOENBAUM, MAVROIDIS, HAHN, *The World Trade Organization – Law, Practice, and Policy*, Oxford, 2015, p. 105; BUSCH, PELC, *The Politics of Judicial Economy at the World Trade Organization*, in *International Organization*, 2010, pp. 257 ff..

¹⁰⁶ For the corresponding Walker Principle see WT/GC/W/791, cit., para. 14.

¹⁰⁷ JOB/DSB/1/Add.12, cit., para. 14, p. 6.

¹⁰⁸ Letter sent to the WTO Director General Azevêdo on 5 June 2020 by US Ambassador Shea, cit., p. 2.

considerations demonstrate, on the contrary, that the MPIA introduces measures capable to streamline appellate proceedings and reduce the size of a dispute focusing on the key legal features of a case, indeed providing for a concrete answer to the US criticisms.

6. The MPIA pool of arbitrators, the principle of collegiality and the MPIA awards

Similarly to the Appellate Body, the pool of arbitrators has to be standing and “comprise persons of recognized authority, with demonstrated expertise in law, international trade and the [WTO Agreements] generally”.¹⁰⁹ They have to be unaffiliated with any government, nor may they participate in the consideration of any dispute that would create a direct or indirect conflict of interest. Former or current Appellate Body members may be appointed,¹¹⁰ but they are no longer the only persons who may be arbitrators under the contingency measures, contrary to what previously required by the EU/Canada and EU/Norway arrangements.¹¹¹

Pursuant to Annex 2, each participant may nominate, within 30 days after the date of the WTO notification of the MPIA communication, one candidate having the requested characteristics.¹¹² The candidature has to be reported to all the participants, opening a pre-selection process closely resembling the one followed to appoint the members of the Appellate Body,¹¹³ which, of course, will not be (re)applied to former or current AB judges recommended by MPIA participants.¹¹⁴ The pre-selection committee examining the proposals is formed by the WTO Director General (DG), the Chairperson of the DSB, and the Chairpersons of the Goods, Services, TRIPs and General Councils. It seems those diplomats will have to act in their personal capacities, as no WTO Agreement or measure confers the WTO Chairs and the DG with an institutional authority similar to the task considered by the MPIA for the pre-selection committee: in fact, the EU Ambassador to the WTO has recently written to those diplomats asking them to assist, on a private level, the MPIA participants in the assessment of their candidates.¹¹⁵

¹⁰⁹ JOB/DSB/1/Add.12, cit., para. 4, p. 2.

¹¹⁰ JOB/DSB/1/Add.12, cit., footnote 1, p. 7.

¹¹¹ See e.g. JOB/DSB/1/Add.11/Rev.1, *Interim Appeal Arbitration pursuant to Article 25 of the DSU*, para. 3.

¹¹² JOB/DSB/1/Add.12, cit., paras. 1-2, p. 7.

¹¹³ VAN DEN BOSSCHE, ZDOUC, *The Law and Policy of the World Trade Organization*, Cambridge, 2017, pp. 234-235.

¹¹⁴ See JOB/DSB/1/Add.12, cit., fn. 1, p. 7.

¹¹⁵ “The WTO Members participating in the MPIA would be grateful if you (Roberto Azevedo), Ambassador Dacio Castillo, Ambassador Hung Seng Tan, Ambassador Mikael Anzen and Ambassador Xolelwa Mlumbi-Peter – in your personal capacities – could assist them in the pre-selection process’ for selecting the arbitrators”. Excerpt from the letter sent on 5 June 2020 to the WTO Director General written by the EU Ambassador to the WTO João Aguiar Machado quoted by Ravi KANTH, *US Rejects interim Appeal Arbitration Arrangement*, *TWN Third World Network*, cit. The author also highlights that the WTO Chairs listed in the EU letter do not include Ambassador David Walker, Chair of the WTO General Council, as apparently he declined the MPIA invitation “due to his heavy agenda”.

“After appropriate consultations,” the pre-selection committee, within one month from the expiry of the deadline to nominate candidates, has to indicate the persons fulfilling the MPIA criteria.¹¹⁶ The participants have to compose the pool of arbitrators by consensus, making their best efforts to appoint the MPIA adjudicators within three months following the communication of the MPIA to the WTO Secretariat, i.e. the end of July 2020.¹¹⁷ The selection so defined has to ensure “appropriate overall balance,”¹¹⁸ a generic obligation within which geopolitical and gender balance considerations may fall. Periodically, the pool of arbitrators has to be partially recomposed, always observing the procedures set up by Annex 2, opening this exam two years after the first composition.¹¹⁹

Each arbitral appellate tribunal is formed by three arbitrators selected from the MPIA pool. The adjudicatory section will be appointed on a random basis using a computer-based algorithm, i.e. observing the same principles and methods, including rotation, that apply to form a division of the Appellate Body under Article 17.1 of the and Rule 6(2) of the AB Working Procedures,¹²⁰ according to the mathematical scheme devised by the Said El-Naggar, one of the original AB members.¹²¹ Once an MPIA division will be so formed, it will be up to the Director General “to notify the parties and third parties of the results of the selection”.¹²²

Also the AB principle of collegiality has to be respected: the pool of arbitrators has, in fact, to “stay abreast of WTO dispute settlement activities and [...] receive all documents relating to appeal arbitration proceedings under the MPIA”.¹²³ Furthermore, “[i]n order to promote consistency and coherence in decision-making, the members of the pool of arbitrators [have to] discuss amongst themselves matters of interpretation, practice and procedure,” albeit “to the extent practicable”.¹²⁴

MPIA arbitration awards, in compliance with Article 25 of the DSU,¹²⁵ will be immediately binding and become part of the WTO case law, and have to be notified to the DSB and all the relevant WTO bodies.¹²⁶ Subsequent to such notification, any WTO Member -including of course the litigants, but also third parties- may inscribe the MPIA award as an item on the agendas of the DSB and the other multilateral councils and committees, where it may be considered and discussed by all the WTO Membership,

¹¹⁶ JOB/DSB/1/Add.12, cit., para. 3, p. 7.

¹¹⁷ Cfr. JOB/DSB/1/Add.12, cit., para. 4, p. 7.

¹¹⁸ JOB/DSB/1/Add.12, cit., para. 4, p. 7.

¹¹⁹ JOB/DSB/1/Add.12, cit., para. 5, p. 7.

¹²⁰ JOB/DSB/1/Add.12, cit., para. 7, p. 5.

¹²¹ Cfr. VANGRASSTEK, *The History and Future of the World Trade Organization*, Geneva, 2013, p. 241.

¹²² JOB/DSB/1/Add.12, cit., para. 6, p. 2.

¹²³ JOB/DSB/1/Add.12, cit., para. 5, p. 2.

¹²⁴ *Ibid.*

¹²⁵ See *supra* Section 2.

¹²⁶ JOB/DSB/1/Add.12, cit., para. 15, p. 6.

similarly to the practice followed for the Article 25 award in the *US — Section 110(5) Copyright Act* case.¹²⁷ MPIA arbitrations “cannot add to or diminish the rights and obligations provided in the covered agreements,”¹²⁸ as “[a]ll solutions” to WTO disputes “including arbitration awards ... [have to] be consistent with [the WTO A]greements and ... not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements”.¹²⁹

Since MPIA awards are the expression of an appellate review which has to replace, on a temporary basis, the authoritativeness of the Appellate Body, and contribute to create the necessary political conditions to reform its functioning, the requirements for the arbitrators, the selection mechanism, and the working methods of the pool have been set up with the aim of ensuring high quality for such appellate decisions. The MPIA case law, in fact, being based on Article 25 of the DSU, *is* WTO case law, and must consequently be achieved and implemented in good faith and considered as fully integrated in the WTO *acquis*. It does not have to give origin to a parallel jurisprudence ignoring the multilateral dispute settlement reports.

The United States commented that the MPIA “promotes the use of precedent by identifying “consistency” (regardless of correctness) as a guiding principle for decisions. The phrase “consistency and coherence in decision-making” does not appear anywhere in the DSU, but the proposed arrangement makes such “consistency and coherence” an explicit objective for different arbitrators in different disputes and then proposes procedures to facilitate this objective. Arbitrators are thus encouraged to create a body of law through litigation, rather than to focus on assisting the parties in securing a positive solution to a dispute.”¹³⁰

While it is true that the DSU wording does not contemplate the expression “consistency and coherence in decision-making,” this expression is nevertheless well integrated in the WTO dispute settlement mechanism, very well known -and, up to now, never called into question- by Geneva diplomats and, more generally, WTO experts. Since 1996, it is, in fact, enshrined in Rule 4 of the Working Procedures for Appellate Review, the provision devoted to the setting up of the collegiality of the Appellate Body: “[t]o ensure *consistency and coherence in decision-making*, and to draw on the individual and collective expertise of the [AB] Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure”.¹³¹ And the purpose of the required method of collegiality, for the Appellate Body as

¹²⁷ See the considerations by the representatives of the EU and the US in WT/DSB/M/113, *Minutes of Meeting Held in the Centre William Rappard on 21 November 2001*, 17 December 2001, paras. 31 – 33.

¹²⁸ JOB/DSB/1/Add.12, cit., p. 1. See also Article 3.2 of the DSU.

¹²⁹ Article 3.5 of the DSU.

¹³⁰ Letter sent to the WTO Director General Azevêdo on 5 June 2020 by US Ambassador Shea, cit., p. 2.

¹³¹ Emphasis added.

well as the MPIA pool of arbitrators, is not to promote binding precedents: it is fully recognized by all the WTO Membership that the principle of *stare decisis* is not a principle of WTO law,¹³² and universally agreed that there is no rule of precedent in international law,¹³³ for adjudicatory “decisions have no binding force except between the parties and in respect of [their] particular case”.¹³⁴ The “consistency and coherence in decision-making,” targeted through the MPIA collegiality, just reformulates what is the central element of the multilateral dispute settlement system, i.e., pursuant to Article 3.2 of the DSU, “providing security and predictability to the multilateral trading system”.

The dispute settlement mechanism -beyond the goal of securing a positive solution to a dispute,¹³⁵ recalled by the US in its letter and one of the *raison d'être* of the MPIA, set up also to prevent a WTO Member from appealing into the void a panel report and thus precluding the binding adjudication of a case- has the more general purpose of clarifying the existing WTO provisions¹³⁶ to provide security and predictability to the multilateral trading system.¹³⁷ It is undisputed that, within the DSU, each complaint must be settled on the basis of its own facts and merits, and coherently the MPIA underscores “the exclusive responsibility and freedom”¹³⁸ of each division of arbitrators for the appeal they have to decide: the Geneva dispute settlement mechanism, however, has at the same time to convey reasonable legal certainty for governments and the business community on the meaning of WTO law and the way in which it will be applied. Therefore, recalling “consistency and coherence” in the decision making of the MPIA arbitrators is correct and due, a necessary step for the participants of the temporary arrangement to fulfil the DSU target of “security and predictability”. Of course, such a target has to and can only be achieved by the WTO dispute settlement mechanism as a whole, through the multitude of all the dispute settlement procedures contemplated in the DSU, thus also by the arbitrations based on Article 25 of the DSU.

Therefore, no rule of binding precedent nor the creation of a body of law is promoted by the MPIA. The interim appeal arbitration, by setting up a pool of highly professional arbitrators and the principle of

¹³² See DE ANDRADE, *Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism*, in *Journal of International Dispute Settlement*, 2020, pp. 1 ff.; FUKUNAGA, *The Appellate Body's Power to Interpret the WTO Agreements and WTO Members' Power to Disagree with the Appellate Body*, in *Journal of World Investment & Trade*, 2019, pp. 792 ff..

¹³³ GUILLAUME, *The Use of Precedent by International Judges and Arbitrators*, in *Journal of International Dispute Settlement*, 2011, pp. 5 ff.; SHAHABUDEEN, *Precedent in the World Court*, Cambridge, 1996.

¹³⁴ See BACCHUS, LESTER, *The Rule of Precedent and the Role of the Appellate Body*, in *Journal of World Trade*, 2020, pp. ff., pp. 185 and 183.

¹³⁵ “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute” (Article 3.7 of the DSU).

¹³⁶ “[T]he dispute settlement system of the WTO ... serves to ... clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law” (Article 3.2 of the DSU).

¹³⁷ “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system” (Article 3.2 of the DSU).

¹³⁸ JOB/DSB/1/Add.12, cit., para. 8, p. 5.

collegiality, aims at delivering high quality dispute solutions, avoiding conflicts or inconsistent interpretations, as the latter undermine the credibility, authority, and reputation of a legal system. Of course, in international practice, the exclusion of the principle of *stare decisis* does not mean that previous judgments, decisions, awards do not have a *de facto* authoritative power or precedential effect, as international adjudicators “will not depart from ... settled jurisprudence unless [they] find ... very particular reasons to do so”.¹³⁹ As stated by the Appellate Body in the *Japan – Alcoholic Beverages II* case, “[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.”¹⁴⁰

Panels may find useful guidance in well-reasoned and persuasive MPIA awards, and the possibility to have their reports assessed in future MPIA appeals should induce them to pay attention to previous Article 25 decisions, whilst, of course, always having the duty to make an objective assessment of the complaints they have to decide on.¹⁴¹ The same should happen also for non-MPIA parties, who may rely on and cite to prior MPIA awards if the latter support their arguments. Contrary to what remarked by the United States, it thus seems to us that the MPIA fully respects the articulated purpose of the DSU, implementing its principles.

7. The WTO support structure for the MPIA pool of arbitrators and its funding on the WTO budget

The target, for the interim appeal awards, of high quality, full knowledge of, and integration within, the WTO legal framework also emerges from the institutional support which the participants “envisage”¹⁴² to be provided to the MPIA activities by the WTO Secretariat. On the eve of the exploratory talks for the multi-party arrangement, the WTO Director General Azevêdo underlined the relevance of arbitration under Article 25 as an effective interim mechanism while working towards a permanent solution to the Appellate Body crisis.¹⁴³ In the MPIA, the participants involve the DG in the selection process and in the definition of the adjudicatory interim arbitral tribunals, whose composition will be notified to the parties

¹³⁹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, 18 November 2008, ICJ Reports (2008), para. 52.

¹⁴⁰ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, [WT/DS8/AB/R](#), [WT/DS10/AB/R](#), [WT/DS11/AB/R](#), adopted 1 November 1996, p. 14.

¹⁴¹ See Article 11 of the DSU.

¹⁴² JOB/DSB/1/Add.12, cit., para. 7, p. 2.

¹⁴³ Cfr. WT/GC/M/181, cit., para. 5.196.

and third parties by the WTO Director General.¹⁴⁴ Furthermore, the participants ask the latter to ensure that the pool of arbitrators be assisted by a technical structure, “answerable [...] only to appeal arbitrators,” giving them “appropriate administrative and legal support,” and being “entirely separate from the WTO Secretariat staff and its divisions supporting the panels,” as such MPIA structure has to offer “the necessary guarantees of quality and independence, given the nature of the responsibilities involved”.¹⁴⁵ In his letter dated 5 June 2020, US Ambassador Shea contested also this aspect of the MPIA. He claimed that a group of WTO Members is not entitled under Article 25 of the DSU to direct the WTO Director General to create a new separate and independent structure for supporting their pool of arbitrators; and, more generally, the US representative remarked that this sort of new WTO Division, to be established for the exclusive benefit and use of the MPIA participants, cannot be financed from the general budget of the WTO.

Legal teams supporting adjudicators play a key role for the effective and successful implementation of dispute settlement mechanisms.¹⁴⁶ Consequently, the MPIA “envisage[s]”¹⁴⁷ a model for the structure they deem appropriate in assisting the pool of arbitrators when preparing and settling a case. In the MPIA communication -which is, as remarked *supra*,¹⁴⁸ a soft law document- the participants thus suggest their view on the characteristics the structure supporting the MPIA activity should have. In fact, MPIA participants cannot of course “order” or “dispose” the activity of the Director General, as, pursuant to Article VI:4 of the WTO Agreement, they have to “respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat,” and do not have to “seek to influence them in the discharge of their duties”.¹⁴⁹

The DG, through the WTO Secretariat, has nevertheless the duty to set up appropriate assistance for Article 25 arbitrations, as it is a means for settling disputes contemplated by the DSU, like the other

¹⁴⁴ JOB/DSB/1/Add.12, cit., para. 6, p. 2.

¹⁴⁵ JOB/DSB/1/Add.12, cit., para. 7, p. 2.

¹⁴⁶ On this most important aspect of international adjudication see BAETENS (ED.), *Legitimacy of Unseen Actors in International Adjudication*, Cambridge, 2019.

¹⁴⁷ JOB/DSB/1/Add.12, cit., para. 7, p. 2.

¹⁴⁸ In Section 4.

¹⁴⁹ The text of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) is published in World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, cit., pp. 3 ff.

arbitration-type DSU mechanisms,¹⁵⁰ the panels,¹⁵¹ or the Appellate Body.¹⁵² Once the pool of arbitrators is appointed, once MPIA appeals are introduced, 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 to provide for 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.¹⁵³

With reference to the funding of the MPIA on the WTO budget, it has to be underlined that the WTO Secretariat clarified in the meeting held by the Committee on Budget, Finance and Administration in late 2019 that “any expenditure for Arbitration under Article 25 of the Dispute Settlement Understanding would be funded out of the WTO Secretariat Budget ... and Arbitrators would be compensated on the

¹⁵⁰ Timeframe arbitrators under Article 21.3 of the DSU and Concessions arbitrators under Article 22.6 of the DSU are generally assisted by the Legal Affairs Division (LAD) of the WTO Secretariat. On the role of Secretariat lawyers, also with reference to panels and the Appellate Body see BAKER, MARCEAU, *The World Trade Organization*, in BAETENS (ED.), *Legitimacy of Unseen Actors in International Adjudication*, cit., pp. 70 ff.; PAUWELYN, PELC, *Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement*, 26 September 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872; KUIJPER, *Guest Post: Some Remarks on “Who writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement”*, IELP Blog, 9 October 2019, available at https://ielp.worldtradelaw.net/2019/10/guest-post-some-remarks-on-who-writes-the-rulings-of-the-world-trade-organization-a-critical-assessm.html?asset_id=6a00d8341c90a753ef0240a48e915f200c.

¹⁵¹ Article 27 of the DSU indicates that “[t]he Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support”. Panels dealing with trade remedies (i.e. complaints on alleged violations of the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Safeguards) are assisted by the Rules Division of the WTO Secretariat, while those working on the remaining WTO Agreements are supported by the Legal Affairs Division, and may be joined by experts belonging to other sections of the WTO Secretariat. For a full reconstruction and analysis on the role of Secretariat lawyers in the multilateral trading system see MARCEAU (ED.), *A History of Law and Lawyers in the GATT/WTO – The Development of the Rule of Law in the Multilateral Trading System*, Cambridge, 2015. The texts of the WTO Agreements on trade remedies are available in World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, cit., pp. 147 ff.; pp. 231 ff.; pp. 275 ff.

¹⁵² The DSB, in its first decision in June 1995 also implementing Article 17.7 of the DSU (pursuant to which “[t]he Appellate Body shall be provided with appropriate administrative and legal support as it requires”) set up an Appellate Body Secretariat “administratively separate” and “independent” from the WTO Secretariat, whose staff had to be selected by the DG. See WT/DSB/1, *Establishment of the Appellate Body - Recommendations by the Preparatory Committee for the WTO Approved by the Dispute Settlement Body on 10 February 1995*, 19 June 1995, para. 17.

¹⁵³ In his comments, the US Ambassador *inter alia* observes that “[a] permanent support structure would be particularly inappropriate in light of the limited expected use of the procedures set forth in the arrangement ... since 2015, there have only been four appeals in disputes between participating Members” (Letter sent to the WTO Director General Azevêdo on 5 June 2020 by US Ambassador Shea, cit., p. 3 and fn. 4, p. 2). More generally, at the moment of writing (26 June 2020), the MPIA participants represent 14 percent of the WTO Membership, and the disputes between them already brought within the multilateral trading system amount to approximately a quarter of the total DSU case-load during the period 1995-2019: see HOEKMAN, MAVROIDIS, *To AB or Not to AB? Dispute Settlement in WTO Reform*, EUI Working Paper RSCAS 2020/34, p. 2.

same basis as Panellists”¹⁵⁴ The annual WTO budget has to be adopted by the General Council: even if Article VII:3 of the WTO Agreement requires a qualified majority, budgets have been constantly approved through positive consensus in the multilateral trading system, and within such institutional context the US opposition to the MPIA structure and its WTO funding is going to be sharp and conditioning. Further negotiating efforts will therefore be needed from the MPIA participants, who nevertheless have in common with the United States the fact that also the latter intends to have recourse to the Article 25 arbitration mechanism for review purposes, even if on a case by case basis, thus not in the structured MPIA-style. The US, in fact, together with South Korea, has already notified to the DSB an understanding related to the case *US — OCTG (Korea)*, expressly referring to the possibility to use arbitration proceedings under Article 25 of the DSU to review the future Article 21.5 panel report.¹⁵⁵ More generally, the United States describe the MPIA as “an arrangement that seeks to clothe itself with faux Appellate Body authority,”¹⁵⁶ whose “real goal ... is to create an ersatz Appellate Body that would serve as a model for any future WTO Appellate Body”¹⁵⁷ In reality, the MPIA, based on a non-binding communication, is characterized by its temporary nature¹⁵⁸ and the greatest flexibility, as WTO Members may easily opt in and out from the MPIA, also with reference to a specific dispute.¹⁵⁹ These features are opposite to the characteristics of the Appellate Body. The MPIA aims to be just a bridge from the current blockage of the WTO Standing Tribunal to the full multilateral renovation of the appellate review stage in the WTO, legitimately using the arbitration mechanism provided by Article 25 of the DSU. To fully respect the purpose of the Geneva dispute settlement system -ensuring security and predictability, so much looked after by States and economic operators- the MPIA provides for a set of measures for the appointment and the coordination of the MPIA arbitrators, and their collaboration with the disputing parties. The intent is to achieve high quality and effective MPIA awards which are fully consistent with and integrated in the WTO legal framework, preserving the best of the Appellate Body process, suggesting innovations for the future, and promoting a cooperation approach to litigation. In our view these are elements to be appreciated, as they provide *ex ante* an important tool of transparency and

¹⁵⁴ “That is, daily fees of CHF 300 for Government Panellists and CHF for Non-Government Panellists, with no monthly retainer” (WT/BFA/183, *Report of the Meeting Held on 12 and 17 November and 5 December 2019*, 6 December 2019, para. 1.34, let. a)).

¹⁵⁵ See WT/DS488/16, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea – Understanding between the Republic of Korea and the United States Regarding Procedures under Articles 21 and 22 of the DSU*, 10 February 2020, para. 5.

¹⁵⁶ Letter sent to the WTO Director General Azevêdo on 5 June 2020 by US Ambassador Shea, cit., p. 1.

¹⁵⁷ Letter sent to the WTO Director General Azevêdo on 5 June 2020 by US Ambassador Shea, cit., p. 2.

¹⁵⁸ See *supra* Section 4.

¹⁵⁹ See *infra* Section 10.

constructive organization, which is on the contrary absent, at least up to now, in the case-by-case approach the United States shows to be adopting with reference to Article 25 proceedings.¹⁶⁰

8. The suspension of panel proceedings and the role of third parties in the MPIA

In order to use the MPIA, the participants acknowledged the need to arrange “limited adjustment to panel procedures ... to the extent it is necessary to facilitate the proper administration of the appeal arbitration procedure”.¹⁶¹ First of all, MPIA parties have to notify their intention to enter into the appeal arbitration arrangement -the template contained in Annex 1- within 60 days after the establishment of the panel.¹⁶² Therefore, should a disputant decide to appeal a panel report through the MPIA, it has to activate the appellate process by first requesting the panel to suspend its proceedings. The MPIA establishes that the request of the suspension of panel proceedings, made by any party, has to be deemed as to constitute “a *joint request* by the parties for suspension of the panel proceedings for 12 months pursuant to Article 12.12 of the DSU”.¹⁶³ Such binding characterization is necessary because the recalled DSU provision confers only the complainant with the possibility to ask the panel to suspend its work,¹⁶⁴ while also the respondent may obviously get to the decision to appeal, and this option has of course to be preserved by the MPIA. By agreeing to consider any request of suspension as a *joint request*, the MPIA thus bypasses the obstacles posed by the wording of Article 12.12 of the DSU.

The future appellant has a narrow time span to request the suspension of the panel’s work: after “the issuance of the final panel report to the parties, but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the Membership”.¹⁶⁵ This is because the panel must be given the time to complete the translation of its report in the two other official languages of the WTO,

¹⁶⁰ US Ambassador Shea, in fact, communicates in his letter that “[t]he United States does not object to WTO Members utilizing Article 25 or other informal procedures to help resolve disputes. Indeed, the United States has had discussions with a number of Members regarding alternatives to the traditional WTO dispute settlement system” (Letter sent to the WTO Director General Azevêdo on 5 June 2020 by US Ambassador Shea, cit., p. 1). Apart from the US / Korea Understanding in the *US — OCTG (Korea)* case, reported in the text before, to our knowledge, the United States did not give further details on its approach to Article 25 arbitration proceedings.

¹⁶¹ JOB/DSB/1/Add.12, cit., para. 8, p. 2. On panel proceedings in the DSU see MARCEAU, *Consultations and the Panel Process in the WTO Dispute Settlement System*, in YERXA, WILSON (EDS.), *Key Issues in WTO Dispute Settlement: The First Ten Years*, Cambridge, 2005. pp. 29 ff.

¹⁶² JOB/DSB/1/Add.12, cit., para. 10, p. 3.

¹⁶³ JOB/DSB/1/Add.12, cit., para. 4, p. 4 (emphasis added).

¹⁶⁴ “The panel may suspend its work at any time *at the request of the complaining party* for a period not to exceed 12 months” (Article 12.12 of the DSU, emphasis added).

¹⁶⁵ JOB/DSB/1/Add.12, cit., para. 4, p. 4.

beyond the working language of its proceedings,¹⁶⁶ a task which should usually be completed within three weeks from the issuance of the final report to the disputants.¹⁶⁷

In fact, the MPIA notice of appeal, which has to be filed with the WTO Secretariat no later than 20 days after the panel suspension, has to include the final panel report in the working languages of the WTO.¹⁶⁸

Such transparency measure has a double purpose: on one side, it gives the wider WTO Membership and, more generally, the public, access to the panel report, to be assessed and discussed, together with the MPIA notice of appeal; on the other side, it is necessary to consider as binding the findings of the panel report which have not been appealed in the interim arbitration because those findings “shall be deemed to form an integral part of the arbitration award together with the arbitrators’ own findings”.¹⁶⁹

Furthermore, the request to the panel to transmit the final report in all the three WTO official languages is functional to allow the prompt adoption of that report by the DSB in case no MPIA notice of appeal is filed within 20 days from the suspension of panel proceedings, or should the appeal be withdrawn. In these two circumstances, the MPIA considers that the parties jointly request the panel to resume its proceedings,¹⁷⁰ which would lead to the official circulation of the panel report to the DSB, and thus its adoption through negative consensus ex Article 16.4 of the DSU. Pursuant to Article 12.12 of the DSU, the suspension of panel proceedings cannot exceed 12 months, after which “the authority for establishment of the panel shall lapse”. Should the withdrawal of the appeal happen subsequent to this lapse of time, the MPIA then provides that “the arbitrators shall issue an award that incorporates the findings and conclusions of the panel in their entirety,”¹⁷¹ thus overcoming the risk of dissolving the first level of WTO adjudication into nothing.

These adjustments to DSU panel procedures -to which it has to be added also the request to the panel to communicate to the disputants the date of circulation of the final panel report “no later than 45 days in advance of that date ... to facilitate the proper administration of [the MPIA] arbitration”-¹⁷² have been criticized by the United States when commenting the EU/Canada arrangement. The bilateral contingency measure was qualified as expressing “a number of legal flows ... such as publication of a panel report

¹⁶⁶ Since 1983, the official working languages of the multilateral trade system are English, French, and Spanish. See *Analytical Index - Guide to GATT Law and Practice*, Vol. 2. Geneva, WTO, 1995, p. 915. On the problematic aspects in interpreting and applying WTO texts in each official linguistic version cfr. CONDON, *Lost in Translation: Plurilingual Interpretation in WTO Law*, in *Journal of International Dispute Settlement*, 2010, pp. 191 ff.; SHAFFER, *Three Developing Country Challenges in WTO Dispute Settlement: Some Strategies for Adaptation*, in GEORGIEV, VAN DER BORGHT (EDS.), *Reform and Development of the WTO Dispute Settlement System*, London, 2005, pp. 309 ff.

¹⁶⁷ See the Panel Working Procedures of Appendix 3 to the DSU, para. 12 (k).

¹⁶⁸ JOB/DSB/1/Add.12, cit., para. 5, p. 4.

¹⁶⁹ JOB/DSB/1/Add.12, cit., para. 9, p. 5.

¹⁷⁰ JOB/DSB/1/Add.12, cit., para. 6, p. 5, and para. 18, p. 6.

¹⁷¹ JOB/DSB/1/Add.12, cit., fn. 7, p. 6.

¹⁷² JOB/DSB/1/Add.12, cit., para. 3, p. 4.

that was not a panel report,”¹⁷³ referring to the duty to attach the final panel report issued to the parties to the appellate arbitration notice, as such report, formally, is not a WTO panel report until the formal circulation to all the WTO Members.¹⁷⁴ With respect to this US negative remark, it has to be underscored that the MPIA, in order to overcome it, agrees on the joint request by the parties that the panel lift the confidentiality, as disciplined in the DSU Working Procedures, with respect to the final panel report.¹⁷⁵ It is evident that the MPIA shaping of various procedural aspects of panel proceedings requires a constructive collaboration between the WTO adjudicators and the disputants, in order to set in motion, the smooth application of the temporary appeals arbitration mechanism. Panels hearing cases with a MPIA arrangement will have to make the best use of the margin of discretion they have been conferred by the DSU when defining their own working procedures;¹⁷⁶ and the parties should approach on this aspect the panelists as early as the composition process is finalized, to promote a most suitable procedural framework.

In the *Canada – Sale of Wine* case, the first dispute which could end up with a MPIA award, it can be witnessed a first positive practice of collaboration by the panel. The latter, in fact, subsequent to the notification by the disputants of their agreement for appeal arbitration under Article 25 of the DSU,¹⁷⁷ has already communicated the date of issuance of the final report to the parties, well in advance of the 45 days in advance required by the MPIA.¹⁷⁸

Last but not least, the MPIA establishes that “[t]hird parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to Article 10.2 of the DSU may make written submissions to, and shall be given an opportunity to be heard by, the arbitrators,”¹⁷⁹ applying *mutatis mutandis* Rule 24 of the Working Procedures for Appellate Review. In this way, the alternative appeal mechanism overcomes the only problematic aspect of Article 25.3 of the DSU, which provides that the disputants have the power to decide on the participation of other WTO Members to the arbitration proceeding: by introducing the obligation of accepting in advance the presence of third parties, the MPIA maintains the

¹⁷³ WT/DSB/M/434, *Minutes of Meeting Held at the Centre William Rappard on 30 September 2019*, cit., para. 11.5.

¹⁷⁴ See Articles 15 and 16 of the DSU.

¹⁷⁵ JOB/DSB/1/Add.12, cit., para. 4, p. 4.

¹⁷⁶ “Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute” (Article 12.1 of the DSU). With reference to the panels’ procedural power the Appellate Body clarified that “the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated” (Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 152, fn. 138).

¹⁷⁷ See *infra* Section 9.

¹⁷⁸ WT/DS537/11/Add.4, *Canada – Measures Governing the Sale of Wine*, Communication from the Panel – Addendum, 12 June 2020.

¹⁷⁹ JOB/DSB/1/Add.12, cit., para. 16, p. 6.

important inclusive institutional feature of the role of third parties characterizing panel and AB adjudicatory activities.¹⁸⁰ The attention to third parties by the interim arbitral solution also represents an additional element for strengthening, through the contribution of the legal analysis of third parties, the definition of the awards in full coherence with the WTO system and case law, and may be an important channel for involving non-participating WTO Members in the MPIA adjudicatory activities, thus expanding the endorsement for the temporary appellate review solution.

9. The first MPIA Agreed Procedures for Arbitration under Article 25 of the DSU

The MPIA provides that “[f]or pending disputes where, on the date of this communication, the panel has already been established but an interim report has not yet been issued, the participating Members will enter into the appeal arbitration agreement and notify that agreement pursuant to Article 25.2 of the DSU within 30 days after the date of this communication,” i.e. by 30 May 2020. All the MPIA participants having pending cases falling into the just reported typology timely notified the Agreed Procedures for Arbitration under Article 25 of the DSU, fully respecting the template of Annex 1 to the MPIA Communication, in order to be able to propose MPIA appeals should they decide to challenge the future panel reports.

The cases involved are *Canada – Sale of Wine*,¹⁸¹ where Australia protests that the Canadian distribution system for wine discriminates foreign products and would thus infringe the principle of national treatment;¹⁸² *Costa Rica – Avocados*,¹⁸³ a complaint filed by Mexico claiming that Costa Rica illegitimately restricts or prohibits the importation of Mexican fresh avocados for consumption, allegedly disregarding both the SPS Agreement and the GATT;¹⁸⁴ and *Canada – Commercial Aircraft*,¹⁸⁵ a dispute started by Brazil claiming that the financial support Bombardier received from the Canadian authorities is incompatible with the SCM Agreement.¹⁸⁶

¹⁸⁰ On the role devised for third parties in WTO litigation shaped by the case law of WTO adjudicators see BARONCINI, *L'approccio inclusivo dell'Organo d'appello dell'OMC per una giurisprudenza informata, partecipata, ed aperta*, in *Liber Amicorum Angelo Davì, La vita giuridica internazionale nell'età della globalizzazione*, Napoli, Vol. III, 2019, pp. 1767 ff.

¹⁸¹ WT/DS537/15, *Canada – Measures Governing the Sale of Wine*, Agreed Procedures under Article 25 of the DSU, 29 May 2020.

¹⁸² WT/DS537/8, *Canada – Measures Governing the Sale of Wine*, Request for the establishment of a panel by Australia, 16 August 2018.

¹⁸³ WT/DS524/5, *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*, Agreed Procedures under Article 25 of the DSU, 29 May 2020.

¹⁸⁴ WT/DS524/2, *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*, Request for the establishment of a panel by Mexico, 27 November 2018.

¹⁸⁵ WT/DS522/20, *Canada – Measures Concerning Trade in Commercial Aircraft*, Agreed Procedures for Arbitration under Article 25 of the DSU, 29 May 2020.

¹⁸⁶ WT/DS522/6, *Canada – Measures Concerning Trade in Commercial Aircraft*, Request for the establishment of a panel by Brazil, 21 August 2017.

The panel report of the *Canada – Sale of Wine* case is expected to be issued to the parties by mid-August 2020,¹⁸⁷ and therefore, should it be appealed, we could have a first MPIA award before the end of 2020. A far less close timing for possible MPIA appeals may be predicted for the other two controversies: in fact, in *Costa Rica – Avocados*, the panel expects to deliver the final report in the second half of 2020,¹⁸⁸ while in *Canada – Commercial Aircraft* the panel's work is suspended until 4 November 2020 at the request of Brazil.¹⁸⁹

10. Conclusions

The very delicate institutional crisis triggered by the United States over the Appellate Body composition may appear as peculiar since the World Trade Court “has over the years served as a point of reference in different academic and policy debates about efficient institutional design for international dispute resolution”.¹⁹⁰ In such a thorny and sensitive scenario, the EU succeeded in developing a well devised strategy. The MPIA initiative is to be appreciated because it makes the most of an already existent WTO tool, the alternative arbitration mechanism codified in Article 25 of the DSU. The EU was the driving force in the creation of this temporary instrument which seems capable of ensuring persuasive appeals awards and maintaining the appellate function within the Geneva dispute settlement mechanism while the whole WTO Membership gains vital diplomatic space to reform and strengthen the functioning of the Appellate Body.

Squarely rooting the MPIA into the WTO jurisdictional pillar and mirroring the rules and practice of the Appellate Body allowed the EU to overcome the many political difficulties and legal uncertainties involved in the various other solutions which have been proposed to defeat the paralysis of the World Trade Court.¹⁹¹ Furthermore, the MPIA choice to base the interim solution on the existing alternative mechanism contemplated in Article 25 of the DSU, combined with the already-in-force WTO Working Appellate Procedures and Rules of Conduct, overcomes the thorny issue of indicating which procedural

¹⁸⁷ See WT/DS537/11/Add.4, cit.

¹⁸⁸ WT/DS524/4, *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*, Communication from the Panel, 19 November 2019.

¹⁸⁹ WT/DS522/19, *Canada – Measures Concerning Trade in Commercial Aircraft*, Communication from the Panel, 14 April 2020.

¹⁹⁰ LAM, *WTO AB as a Model for Other Adjudicatory Bodies – The Case of EU’s Investment Court System*, in LO, NAKAGAWA, CHEN (EDS.), *The Appellate Body ...*, cit., pp. 331 ff., p. 331.

¹⁹¹ On the problematic aspects for the setting up a formal plurilateral agreement on dispute settlement within the WTO legal framework see KONG, GUO, *Towards a Mega-Plurilateral Dispute Settlement Mechanism for the WTO?*, in *Journal of World Trade*, 2019, pp. 273 ff. Perplexities may likewise arise on the feasibility of a treaty of “The Real Friends of Dispute Settlement” outside the multilateral trade system, in particular because of the principle of exclusive WTO jurisdiction for complaints concerning the Marrakesh Agreements on the basis of Article 23 of the DSU: on this project see KUJIPER, *From the Board: The US Attack on the WTO Appellate Body*, in *Legal Issues of Economic Integration*, 2018, pp. 1 ff., in particular pp. 10-11.

rules would be advisable to choose for the temporary arbitration to guarantee WTO-coherent proceedings and awards.¹⁹²

The flexible, dynamic, and open nature of the MPIA is attracting the important attention of more WTO Members: any interested country may join the interim solution “at any time,”¹⁹³ through a simple notification to the DSB declaring the endorsement of the contingency measures; likewise, a participating Member “may decide to cease its participation in the MPIA” just by notifying its intention to the same institution.¹⁹⁴ Participants to the appellate contingency measures may also agree to depart from the MPIA discipline “with respect to a specific dispute”.¹⁹⁵

Additionally, the temporary appellate review mechanism has adopted some of the innovations discussed in the WTO debate, and comprised in the Walker Principles, to enhance the procedural efficiency of appeals proceedings: the enter into force of the MPIA permits an important test of those anticipated reform proposals, a further reason of interest for potential new participants, and, more generally, for the WTO diplomacy engaged in reforming the Appellate Body. Under this aspect, it has to be underscored that the MPIA also takes into account the perspective of the developing countries. For the latter, the majority of the Geneva complaints has become so large and so complex as to present real accessibility issues: the human resources and expertise needed to adequately litigate a WTO dispute are prohibitively difficult to meet for small WTO Members. Requesting the arbitrators to address only the issues necessary for the resolution of the dispute, giving the adjudicators the option to impose e.g. page and time limits, or to advise the parties to drop certain claims, the MPIA expresses the potential of quite significantly reducing the size of a case. This is beneficial for all the DSU users: but it has further utility in improving access to multilateral disputes for those WTO Members with limited capacity.

The strict time frame for the composition of the pool of arbitrators -nominations had to be presented by the end of May 2020¹⁹⁶ and the entire process has to be completed by the end of July 2020- will promote discussion on the MPIA and keep high the attention on WTO reforms. The close deadline foreseen for the review process of the MPIA -to be held one year after the MPIA notification to the WTO, i.e. in April 2021-¹⁹⁷ should maintain constantly prominent the level of consideration of the appellate

¹⁹² See HAZARIKA, VAN VAERENBERGH, “One Rule to Rule Them All”: Rules for Article 25 DSU Arbitration, in *Journal of International Arbitration*, 2019, pp. 595 ff.

¹⁹³ JOB/DSB/1/Add.12, cit., para. 12, p. 3.

¹⁹⁴ See JOB/DSB/1/Add.12, cit., para. 14, p. 3.

¹⁹⁵ JOB/DSB/1/Add.12, cit., para. 11, p. 3.

¹⁹⁶ The EU publicly announced its candidate, Professor Joost Pauwelyn (see European Commission, *EU Puts forward Its Candidate for the Pool of Arbitrators* ..., cit.); the same transparency choice has been realized by New Zealand, whose candidate is Dr. Penelope Ridings (New Zealand – Foreign Affairs & Trade Ministry, *Nomination of Dr Penny Ridings as Arbitrator*, 27 May 2020).

¹⁹⁷ See JOB/DSB/1/Add.12, cit., para. 13, p. 3.



contingency measures and the awareness of the need of renovating the functioning of the WTO Standing Tribunal.

The European Commission guided by President von der Leyen has chosen the WTO reform process as one of the top priority of its mandate.¹⁹⁸ This target is becoming increasingly challenging, because of the disarticulation of the WTO jurisdictional pillar relentlessly pursued by the current US administration,¹⁹⁹ and the unprecedented impact on global trade and economy caused by the COVID-19 pandemic.²⁰⁰ The diplomatic work promoted by the EU to preserve, through the MPIA, the right to appeals review is a first valuable step for strengthening the rule of law in international trade and promoting the multilateral innovation of the WTO system.

¹⁹⁸ See Ursula von der Leyen, President-elect of the European Commission, *Mission Letter to Phin Hogan, Commissioner-designate for Trade*, Brussels, 10 September 2019, p. 4.

¹⁹⁹ As lately witnessed by the US decision to introduce drastic cuts in the WTO budget for expenses to cover the functioning of the Appellate Body. Originally threatening to veto the entire 2020 WTO budget, the US administration conditioned its endorsement to the latter to the acceptance by the rest of the WTO Membership of drastic cuts of the Appellate Body's expenses: see *Statements by the United States at the Meeting of the WTO Dispute Settlement Body Delivered by Ambassador Dennis Shea, U.S. Permanent Representative to the World Trade Organization*, Geneva, November 22, 2019.

²⁰⁰ According to the forecast of the WTO economist's world trade is expected to fall by between 13% and 32% in 2020 due to the global health crisis: see WTO Press Release, *Trade Set to Plunge as COVID-19 Pandemic Upends Global Economy*, 8 April 2020. On the impact of the pandemic to the WTO system see SACERDOTI, "Quo Vadis" WTO after Covid-19?, Bocconi Legal Studies Research Paper Series, May 2020. More generally, on the WTO reform process cfr. GARCIA BERCERO, *What Do We Need a World Trade Organization for? – The Crisis of the Rule-Based Trading System and WTO Reform*, BertelsmannStiftung, 2020.