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How WTO Member States and Arbitrators Approach Dispute
Resolution Without a Functioning Appellate Body

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ABSTRACT

The United States disabled the Appellate Body (AB) of the World Trade Organization (WTO) by blocking the appointment of all new members, leaving it without the quorum required to hear appeals since December 2019. In response to the crisis, a subset of WTO Members created the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) as an alternative appeals procedure. Dispute settlement is now fragmented between Members who have submitted to mandatory appeal arbitration *ex ante* and those who have not. Five years since the AB paralysis, there is now a sufficient body of dispute settlement practice to analyse the experience gathered in this new environment. Drawing on available WTO data from 2020 to 2025, this contribution analyses how WTO Member States and arbitrators are approaching dispute settlement without a functioning AB. It shows that Member States have normalised the blocking of panel rulings by so-called appeals into the void, and examines the incentives and game theory dynamics that drive this behaviour. It also shows that MPIA participants are underutilising the arrangement and suggests reasons for the marked decline in the number of appeals compared to pre-crisis levels. Furthermore, this contribution examines the three appeals arbitration awards issued to date – *Colombia–Frozen Fries*, *China-IPRs Enforcement*, and *Turkey-Pharmaceutical Products* – with an emphasis on how the arbitrators departed from AB jurisprudence so as to afford greater deference to Member States. The arbitrators are in a unique position to demonstrate alternative approaches that take seriously the Member concerns that led to the AB collapse; and through these cases they appear to signal a better balance between state autonomy and judicial oversight.

KURZFASSUNG

Die Vereinigten Staaten (US) haben das Berufungsgremium (AB) der World Trade Organization (WTO) lahmgelegt, indem sie die Ernennung aller neuen Mitglieder blockierten, wodurch das Gremium seit Dezember 2019 nicht mehr über das für die Verhandlung von Berufungsverfahren erforderliche Quorum verfügt. Als Reaktion auf diese Krise hat eine Gruppe von WTO-Mitgliedern die „Multi-Party Interim Appeal Arbitration Arrangement“ (MPIA) als alternatives Berufungsverfahren ins Leben gerufen. Die Streitbeilegung ist nun fragmentiert zwischen Mitgliedern, die sich im Voraus dem obligatorischen Berufungsschiedsverfahren unterworfen haben, und solchen, die dies nicht getan haben. Fünf Jahre nach der Lähmung des AB liegt nun eine ausreichende Anzahl von Streitbeilegungsfällen vor, um die die unter den neuen rechtlichen Rahmenbedingungen gewonnenen Erfahrungen zu analysieren. Auf der Grundlage verfügbarer WTO-Daten aus den Jahren 2020 bis 2025 untersucht dieser Beitrag, wie WTO-Mitgliedstaaten und Schiedsrichter die Streitbeilegung ohne ein funktionierendes AB angehen. Er zeigt, dass die Mitgliedstaaten die Blockade von Panel-Entscheidungen durch sogenannte Berufungen ins Leere zur Normalität gemacht haben, und untersucht die Anreize sowie die spieltheoretischen Dynamiken, die dieses Verhalten antreiben. Er zeigt zudem, dass die MPIA-Teilnehmer die Regelung nur unzureichend nutzen, und nennt Gründe für den deutlichen Rückgang Anzahl ihrer Berufungen im Vergleich zum Vorkrisenniveau. Darüber hinaus untersucht dieser Beitrag die drei bisher ergangenen Schiedssprüche in Berufungsverfahren – Colombia–Frozen Fries, China-IPRs Enforcement, und Turkey-Pharmaceutical Products – wobei der Schwerpunkt darauf liegt, inwiefern die Schiedsrichter von der Rechtsprechung des Berufungsgremiums abgewichen sind, um den Mitgliedstaaten mehr Spielraum einzuräumen. Die Schiedsrichter befinden sich in einer einzigartigen Position, um alternative Ansätze aufzuzeigen, die die Bedenken der Mitgliedstaaten, die zum Zusammenbruch des Berufungsgremiums geführt haben, ernst nehmen; und durch diese Fälle scheinen sie ein besseres Gleichgewicht zwischen staatlicher Autonomie und gerichtlicher Kontrolle zu signalisieren.

FOREWORD

As I near the conclusion of my LLM studies, I reflect with gratitude on the privilege to have pursued postgraduate education. I would like to sincerely thank the professors and academic staff of the University of Vienna for delivering such an excellent programme, and for providing me with the opportunity to study both in Vienna and on exchange at Stanford Law School.

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LIST OF ABBREVIATIONS

AB	Appellate Body
ADA	Anti-Dumping Agreement
ASBV	Avocado Sunblotch Viroid
ASI	Anti-Suit Injunction
DSB	Dispute Settlement Body
DSS	Dispute Settlement System
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FEDEPAPA	Colombian Federation of Potato Producers
FRAND	Fair, Reasonable, and Non-Discriminatory
GATT 1994	General Agreement on Tariffs and Trade 1994
ILUC	Indirect Land Change Usage
IP	Intellectual Property
MINCIT	Ministry of Commerce, Industry and Tourism (Colombia)
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
SG Agreement	Agreement on Safeguards
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Section 232	<i>Trade Expansion Act of 1962</i> , 19 USC § 1862 (United States)
Section 771B	<i>Tariff Act of 1930</i> , 19 USC § 1677-2 (United States)

SEP	Standard Essential Patent
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SSI	Social Security Institution
TBT Agreement	Agreement on Technical Barriers to Trade
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

INTRODUCTION

The World Trade Organization (WTO) dispute settlement system (DSS) is confronting its greatest crisis since its establishment. The United States (US) hegemon has disabled the Appellate Body (AB) by blocking the appointment of all new members, leaving it without the quorum required to hear appeals since December 2019. Although panels continue to issue first-instance reports as usual, the absence of an AB has significant consequences. If a party files an appeal, the panel ruling becomes stuck in a legal limbo where it cannot be adopted and has no legal effect.¹ Accordingly, any party can veto an adverse panel ruling by appealing it ‘into the void’.

In response to the impasse, a group of WTO Members established the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in April 2020. The MPIA is designed to preserve the WTO’s two-tiered system of binding adjudication by providing an alternative appellate mechanism while the AB remains non-operational.² Participating Members pre-consent to forgo appeals into the void and instead submit appeals to binding arbitration under the MPIA.³ However, because participation in the MPIA remains voluntary and not all Members have joined the arrangement, the DSS has become fragmented.⁴ Where both parties to a dispute are MPIA participants, any appeal is subject to compulsory appeal arbitration under the MPIA. Conversely, where at least one party is not a participant, the possibility of an appeal into the void remains.

It has now been five years since the AB became paralysed. That time has provided a sufficient body of dispute settlement practice to begin analysing how actors within the system have responded to the impasse. Against this background, this contribution examines two related research questions: (i) how are WTO Member States approaching dispute resolution in the absence of a functioning AB; and (ii) how are arbitrators approaching dispute resolution in the

¹ Kristen Hopewell, ‘Unravelling of the trade legal order: enforcement, defection and the crisis of the WTO dispute settlement system’ (2025) 101(3) *International Affairs* 1103, 1103.

² *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, WTO Doc JOB/DSB/1/Add.12 (30 April 2020), preamble (‘MPIA’).

³ *Ibid* para 1.

⁴ Stratos Pahis, ‘Appeals after the Appellate Body’ (2024) 23(3) *World Trade Review* 296, 297 (‘Appeals after the Appellate Body’).

absence of a functioning AB. To answer these questions, it draws on 37 panel reports containing adjudicative findings circulated from January 2020 to December 2025.

1. Thesis Structure

This contribution proceeds in four parts. The first situates the research questions by examining the demise of the AB, the role of arbitration as an alternative means of dispute settlement within the DSS, and the alternative appeal procedure under the MPIA (Chapters A-C).

The second outlines the selection and classification of disputes included in the analysis (Chapter D).

The third examines 37 panel reports containing adjudicative findings that were circulated in the first five years of the impasse. Chapter E provides an overview of the 26 panel reports that were appealed into the void.⁵ Chapter F closely examines all three disputes which have been arbitrated to date — *Colombia-Frozen Fries*,⁶ *China-IPRs Enforcement*,⁷ and *Turkey-Pharmaceutical Products*⁸ — with an emphasis on the arbitral procedures and the arbitrators' reasoning. Chapter G examines the eight disputes in which the panel report was adopted, focusing on the contexts in which parties chose to waive an appeal.

The fourth conducts a critical evaluation of dispute settlement practice in the post-AB world, providing a comprehensive answer to how WTO Members and adjudicators have approached dispute settlement in the absence of a functioning AB.

⁵ Ibid.

⁶ *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WT/DS591.

⁷ *China – Enforcement of Intellectual Property Rights*, WT/DS611.

⁸ *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WT/DS583.

A. THE DEMISE OF THE AB

The DSS, lauded as the crown jewel of the multilateral trading system, has been plunged into crisis. This chapter examines the successful record of the DSS and the operational tensions that emerged over time, ultimately culminating in the paralysis of its appellate review function. It then considers the theoretical implications of this development for WTO Members and for the broader WTO system.

1. The Operational Period of the AB from 1995 to 2019

The DSS is a critical pillar of the WTO's multilateral trading system, providing the legal framework through which trade disputes arising from the implementation of WTO Agreements are resolved.⁹ Regulated by the Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU'),¹⁰ the DSS is structured on two levels of binding adjudication. First instance adjudication is conducted by a panel of experts, and second instance review is conducted by the AB, to which this section now turns.

The Uruguay Round of multilateral trade negotiations in 1994 led to the creation of the WTO, during which the AB was proposed.¹¹ The Uruguay Round negotiators expected that recourse to the AB would only occur on rare occasions, such as egregious interpretations of law. As such, they did not carefully think out the judicial features of the AB and only included one article in the DSU, being Article 17, which related to the AB.¹² Contrary to the expectation that appeals would only happen occasionally, the AB assumed a heavy case load in practice. During the period in which the AB was operational from 1995 to 2019, Member States appealed the majority of panel reports. Appeals rose year by year, with the number of appeals rising to

⁹ Directorate-General for Trade and Economic Security, 'WTO Dispute Settlement', *Trade and Economic Security* (Web Page, 12 February 2026) <https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/wto-dispute-settlement_en>.

¹⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*') ('DSU').

¹¹ Stratos Pahiis, 'An Autopsy of the Appellate Body: International Legal Theory on the Demise of the Rule of Law at the WTO' (2025) 47(1) *University of Pennsylvania Journal of International Law* 226, 235.

¹² Debra Steger, 'The founding of the Appellate Body' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press, 2015) 447, 447-448; VanGrasstek, Craig, *The History and Future of the World Trade Organization* (World Trade Organization, 2013).

approximately 90% in 2016.¹³ Evidently, recourse to appellate review became systematic and sustained.

The frequency of appeals enabled the AB to develop a substantial and influential body of case law, albeit of an informal nature as *stare decisis*.¹⁴ Tasked with clarifying and interpreting WTO law under DSU Articles 3.2 and 17.6, the AB brought legal certainty to WTO dispute settlement proceedings. The AB also gained recognition and respect for its high quality of legal reasoning, which only added to its authority.¹⁵ In that sense, over its 25-year period of operation, the AB transformed from ‘an afterthought to a mature and well-respected international tribunal’.¹⁶

2. The WTO DSS Under Stress

By 2011, the DSS was under significant strain. The prescribed time limits for proceedings under the DSU came to be regularly exceeded across various stages of dispute settlement, including panel composition, panel proceedings, appellate proceedings and compliance proceedings.¹⁷ In the context of the AB, its limited resources were insufficient to manage the growing number, size, and complexity of appeals, with the consequence that proceedings routinely surpassed the maximum prescribed time limit of 90 days under DSU Article 17.5. By 2016, the appeal rate reached a peak of approximately 90%; and non-appealed panel reports tended to be relatively short, whereas the longest and most complex reports were almost always appealed.¹⁸

Delays in AB proceedings became regular in the years leading up to its demise in 2019. Concern grew among the WTO membership, as the delays reached levels that seemed incompatible with the effective functioning of the DSS.¹⁹ The issue of delays in the DSS should

¹³ Giorgio Sacerdoti and Niall Moran, *International Trade and Investment Dispute Settlement* (Routledge, 1st ed, 2025) 176.

¹⁴ David Collins, ‘World Traders: The Case for the UK’s Participation in the WTO’s MPIA’ (Adam Smith Institute, 2024) 3.

¹⁵ Sacerdoti and Moran (n 13) 140.

¹⁶ Ujal Singh Bhatia, ‘The Problems of Plenty: Challenging Times for the WTO’s Dispute Settlement System Address’ (Release of the Appellate Body Annual Report 2016, 8 June 2017).

¹⁷ The DSU prescribes time limits of 180 days for panel proceedings from the date of panel composition, up to 60 days for the filing of an appeal, and 90 days for appellate review, totalling an approximate 330 days; see Sacerdoti and Moran (n 13) 179-180 nn 21.

¹⁸ Bhatia (n 16) 5.

¹⁹ Sacerdoti and Moran (n 13) 180.

not be understated. Promptness is one of the major features that distinguishes the DSS from other international systems of adjudication, reflecting the needs of global commerce. The DSU itself emphasises that prompt settlement is ‘essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.’²⁰

At the same time, there is an inherent tension in any international adjudication system between the objectives of procedural speed, cost containment, and the production of high quality decisions. Within this ‘judicial trilemma’, only two of these values can be maximised, at most.²¹ In practice, WTO Members have ‘*de facto* preferred the quality of the reports and budgetary discipline over the respect of the stringent deadlines of the DSU’.²² This tension was similarly acknowledged at the AB level, where it was recognised that, despite the stringent timeframes for appellate review, the AB bore a responsibility to deliver reports of the highest quality. As the final instance of review within the DSS, the AB ‘could not afford to take shortcuts’.²³

3. The US Blocking of the AB and its Justifications

The general European Union (EU) view, which a majority of WTO Members share, is that the DSS, including the AB, does not have sufficient capacity to accommodate sustained recourse to dispute settlement.²⁴ However, the dominant US view is that the AB has repeatedly gone beyond its mandate in respect of several procedural and interpretive issues.

US concerns regarding the AB are not a recent development. As early as the Bush administration, the US signalled its dissatisfaction by blocking the reappointment of US national Merit Janow in 2007 for a second term on the AB. Because AB members are (re)appointed by way of positive consensus under DSU Article 2.4, any WTO Member acting alone can block the (re)appointment process. The Obama administration similarly blocked the reappointment of US national Jennifer Hillman in 2011. The US considered that both Janow

²⁰ DSU (n 10) art 3.3.

²¹ Sacerdoti and Moran (n 13); see also Jeffrey Dunoff and Mark Pollack, ‘The Judicial Trilemma’ (2007) 111(2) *American Journal of International Law* 225.

²² Sacerdoti and Moran (n 13) 180.

²³ Bhatia (n 16) 7.

²⁴ Alan Wm Wolff, ‘WTO 2025: Restoring Binding Dispute Settlement’ (Working Paper 22-5, Peterson Institute for International Economics, April 2022) (‘Restoring Binding Dispute Settlement’); Sacerdoti and Moran (n 13) 179-180.

and Hillman had not been sufficiently supportive of the US in appeals involving US participation, particularly in trade remedy cases.²⁵

Later in 2016, the Obama administration blocked the reappointment of AB Member Seung Wha Chang, a Korean national. The US claimed that Mr Chang's service on the division for various appeals 'did not reflect the role assigned to the AB by Members in the DSU',²⁶ and that its position was based on 'systemic issues that went to the adjudicative approach and proper role of the AB and the dispute settlement system.'²⁷ The blocking of Mr Chang attracted criticism within the WTO membership for threatening the independence and impartiality of the AB. Two letters were also sent to the Dispute Settlement Body (DSB) chair highlighting the risks posed to the WTO, one from Mr Chang's colleagues at the AB and the other from all living former AB members.²⁸

Nonetheless, the US was undeterred by such backlash. Since August 2017, the Trump administration has taken the unprecedented step of blocking all new appointments to the AB.²⁹ As the US continued to block appointments, the number of serving AB members steadily decreased. In December 2019, the membership fell below the minimum of three members required under DSU Article 17.1 to constitute a division to hear appeals, with the consequence that the AB ceased to function.

Unofficially, some of the US's concerns regarding the AB may be more political than legal.³⁰ Nonetheless, as grounds for its actions, the United States Trade Representative consolidated its criticisms into a report in 2020.³¹ In that document, the US advances five main criticisms of the AB which are summarised below.³²

²⁵ Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Carl Grossman Verlag, 2019) 7.

²⁶ *Minutes of the DSB Meeting of 23 May 2016*, WTO Doc WT/DSB/M/379 para. 6.2.

²⁷ *Ibid* para 6.9.

²⁸ Lehne (n 25) 10.

²⁹ *Ibid* 17.

³⁰ Sacerdoti and Moran (n 13) 140.

³¹ *Ibid* 182.

³² For a detailed analysis of the validity of US criticisms, see Lehne (n 25).

3.1. The Routine Failure to Issue Appeal Reports Within the 90-Day Deadline

The US is critical of the efficiency of proceedings,³³ noting that appellate review routinely exceeds the 90-day timeframe mandated by DSU Article 17.5, to which there are no exceptions. The US observes that since 2011 the AB has regularly disregarded the mandatory time limit.³⁴ The US argues that the AB ‘has never explained why it began disregarding the mandatory deadline and never provided a justification for violating the rule’.³⁵ On a related note, the US has also criticised the AB’s practice since 2011 of claiming unilateral authority to extend the 90-day period without the consent of the parties.

3.2. The Continuation of the Service of Former AB Members Whose Terms Have Expired

The US also objects to AB members participating in appeals where their terms have expired. The purported authority for this conduct is Rule 15 of the Working Procedures for Appellate Review (‘Working Procedures’), which provides that:

A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.

The AB drew up the Working Procedures in accordance with DSU Article 17.9. Rule 15 was specifically drawn up to ensure that new appointments do not delay proceedings that have already commenced.³⁶ Nonetheless, the US argues that the AB does not have any such authority to extend the terms of AB members. Rather, only WTO Members, sitting as the DSB, have the authority to appoint individuals to serve on the AB.³⁷ Furthermore, the US observes that from 2017 ‘the Appellate Body invoked Rule 15 in a number of disputes, for indefinite and extended

³³ Clifford Chance, *The Appellate Body Crisis – A Way Forward?* (Thought Leadership series, November 2019) 4.

³⁴ Office of the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (The USTR Archives 2007-2024 Reports and Publications, February 2020) 4-5 (‘Report on the Appellate Body’).

³⁵ *Ibid* 26.

³⁶ Clifford Chance (n 33) 5.

³⁷ *Ibid*.

periods of time, and even on appeals where work had not begun before the member's term expired.³⁸

3.3. *The Standard of Review of Issues of Fact*

Another criticism of the US is the AB's approach to questions of fact and law.³⁹ By way of background, DSU Article 17.6 provides that appeals 'shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' In other words, the AB does not have the authority to decide issues of fact.

First, the US is concerned about the AB revisiting issues of fact examined by the panel in the context of DSU Article 11 claims. That provision states:

[A] panel *should* make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

(emphasis added)

In practice, parties often mount claims on a violation of DSU Article 11. The AB asserts that such claims provide a basis to revisit issues of fact on appeal. This is because the question of whether the panel has made an objective assessment of facts is also a legal question which, when properly raised on appeal, then falls within the scope of appellate review.⁴⁰ According to the US, there is no basis in the DSU for the AB's decision to review issues of fact.⁴¹ It argues that '[a] panel's assessment of the facts does not become a 'legal question' just because a party to the dispute disagreed with it'. In a similar vein, the US contends that the word '*should*' in

³⁸ Office of the United States Trade Representative, *The President's 2018 Trade Policy Agenda* (The USTR Archives 2007-2024 Reports and Publications, March 2018) 26; Mariana de Andrade, 'Procedural Innovations in the MPIA: A Way to Strengthen the WTO Dispute Settlement Mechanism?', *QIL QDI* (Web Page, 28 September 2020) <<https://www.qil-qdi.org/procedural-innovations-in-the-mpia-a-way-to-strengthen-the-wto-dispute-settlement-mechanism/>>.

³⁹ Clifford Chance (n 33) 4.

⁴⁰ Office of the United States Trade Representative, 'Report on the Appellate Body' (n 34) 39.

⁴¹ *Ibid* 37-47.

the text of DSU Article 11 makes it clear that there is no intention to create a legal obligation subject to review.

Second, the US argues that the AB has no authority to revisit panel findings concerning the meaning of a Member's domestic law. In its view, it is well established in international law that the interpretation of municipal law constitutes a question of fact.⁴² The US argues: 'The need for a panel to undertake a detailed examination of the meaning of a domestic law (the factual issue) in order to determine whether that domestic law complied with the WTO Agreements (the legal issue), does not somehow empower the Appellate Body to review factual issues.'

3.4. The Issuance of Opinions Not Necessary for Resolution of the Dispute

The US criticises the prevailing practice of rendering advisory opinions which are not directly necessary for the resolution of the dispute in question (i.e. *obiter dicta*). The US observes that in some cases *obiter dicta* has consumed the majority of the AB's report; for example, in *Argentina — Measures Relating to Trade in Goods and Services*⁴³ more than two thirds of the report reflect *obiter dicta*.⁴⁴

The US maintains that the proper role of the AB in reviewing a panel report 'is limited to making only those legal determinations that would assist the DSB in making a recommendation to a Member to bring a WTO-inconsistent measure into conformity with WTO rules'. In its view, advisory opinions: (i) do not advance the objective of the DSS to secure a positive solution to the dispute; (ii) introduce unnecessary complexity and prolong proceedings; and (iii) reflect an attempt to make law that could later be relied upon to constrain Members in subsequent disputes.⁴⁵

⁴² Clifford Chance (n 33) 4.

⁴³ Appellate Body Report, *Argentina — Measures Relating to Trade in Goods and Services*, WTO Doc WT/DS453/AB/R (14 April 2016).

⁴⁴ de Andrade (n 38).

⁴⁵ Office of the United States Trade Representative, 'Report on the Appellate Body' (n 34) 47-55.

3.5. The Binding and Precedential Value of AB Reports, Absent 'Cogent Reasons'

The US is particularly concerned about the issue of precedent. The WTO, like almost all international law systems, does not recognise stare decisis. Nonetheless, the AB set out the following rule in *US-Final Anti-Dumping Measures on Stainless Steel from Mexico*: 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.'⁴⁶ The panel in *China-Rare Earths* later noted that 'cogent' means 'able to compel assent or belief; ... persuasive, expounded clearly and logically, convincing.'⁴⁷

It is essentially understood that, when facing the same legal question, panels should resolve it in the same manner that the AB previously dealt with it. Only the existence of 'cogent reasons' would allow a departure from previous case law. The idea behind this standard is that it facilitates similar disputes to be handled in a consistent way, ensuring security and predictability in the rule of law.⁴⁸ The AB has maintained that its reports only bind the parties to the dispute and are not binding precedents.⁴⁹

The US, however, fundamentally rejects the above approach and considers that the AB is maintaining a system of precedent. In its view, prior reports may carry 'persuasive value' but do not constitute binding precedent and therefore possess no 'precedential value'.⁵⁰ The US draws a hard distinction between, on one hand, a panel referring to reasoning in a prior report that it finds persuasive in conducting its own objective assessment of matter, and on the other hand, treating the interpretation as precedent in a future dispute. Moreover, the US claims that the treatment of AB reports as binding precedent entrenches erroneous interpretations of law in the absence of any mechanism to challenge the AB report.⁵¹

It is important to note that some Members are sympathetic to US concerns, including the issue of judicial overreach; however, they are less sympathetic to the way in which the US has gone

⁴⁶ Appellate Body Report, *United States- Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc WT/DS344/AB/R (30 April 2008) [160].

⁴⁷ Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Docs WT/DS431/R, WT/DS432/R and WT/DS433/R (26 March 2014) [7.61].

⁴⁸ Fernando Piérola, 'General Thoughts on the Standard of Cogent Reasons in the Treatment of WTO Jurisprudence' (2014) 9(9) *Global Trade and Customs Journal* 427.

⁴⁹ Sacerdoti and Moran (n 13) 183.

⁵⁰ de Andrade (n 38).

⁵¹ Office of the United States Trade Representative, 'Report on the Appellate Body' (n 34) 55-64.

about it. WTO Members have largely sought to resolve the impasse through negotiation rather than confrontation.⁵² Approximately 130 WTO Members petitioned the US to unblock the AB, however, it has repeatedly refused to do so.⁵³ Groups of WTO Members also submitted at least 18 proposals prior to the paralysis of the AB in late 2019.⁵⁴ The US rejected these proposals on the basis that they did not address its concerns. For the US, a precondition to any talks is the recognition of the AB's failings by other Members.⁵⁵ In the US own words, 'Members need to engage in a deeper discussion of why the Appellate Body has felt free to depart from what Members agreed to.'⁵⁶

4. The Legal Effect of a Non-Functioning AB

The paralysis of the AB since the end of 2019 triggered a crisis in the DSS which eclipsed the issue of delays.⁵⁷ WTO Members may still bring claims against one another for non-compliance with the WTO Agreements, and the panel phase can be completed as normal. If however at least one party notifies its intention to appeal the panel report, the dispute effectively comes to a standstill because there is no body available to decide the appeal. Where parties have notified their intention to appeal, a panel report cannot be considered for adoption by the DSB until the appeal has concluded.⁵⁸ In these circumstances, parties cannot obtain a final and binding decision. It is an appeal 'into the void'. Consequentially, a losing party may unilaterally block any findings with which it disagrees. In this sense, the impasse facilitates WTO Members to operate the DSS based on the use of power rather than respect for the rule of law.

The impasse results in asymmetrical effects which favour respondents.⁵⁹ If the panel rules against a respondent, the respondent has a clear incentive to appeal the panel report in order to veto any adverse findings and keep the challenged measure(s) in place. Conversely, if a panel rules in the respondent's favour, the respondent has no reason to appeal a decision it agrees

⁵² Wolff, 'Restoring Binding Dispute Settlement' (n 24) 4.

⁵³ Hopewell (n 1) 1105.

⁵⁴ Sacerdoti and Moran (n 13) 184.

⁵⁵ Wolff, 'Restoring Binding Dispute Settlement' (n 24) 4.

⁵⁶ Statements delivered by Ambassador Dennis Shea – WTO General Council Meeting, July 23, 2019' *U.S. Mission to International Organisations in Geneva* (23 July 2019) <<https://geneva.usmission.gov/2019/07/23/statements-delivered-by-ambassador-dennis-shea-wto-general-council-meeting-july-23-2019/>>.

⁵⁷ Sacerdoti and Moran (n 13) 181.

⁵⁸ *DSU* (n 10) art 16.4.

⁵⁹ Pahis, 'Appeals after the Appellate Body' (n 4) 298.

with, and the complainant cannot get the decision reversed since there is no body to hear the appeal.

The impasse has naturally undermined the integrity of the DSS, once lauded as the ‘jewel in the crown’ of the multilateral trading system. With two-tiered binding adjudication no longer guaranteed, WTO rules exert a weaker deterrent effect. Even when a challenged measure is found to be inconsistent with WTO obligations, the respondent can block any adverse findings and leave the measure in place indefinitely.

B. ARBITRATION UNDER ARTICLE 25 OF THE DSU

DSU Article 25 allows parties to have recourse to arbitration as an alternative means of dispute settlement. As Article 25 provides the legal basis for the establishment of the MPIA as an interim solution to the AB crisis, it is helpful to introduce this provision before considering it in an MPIA context. This chapter explains the text of Article 25 and presents its use in WTO dispute settlement practice to date.

1. The Text of DSU Article 25

The text of DSU Article 25 provides:

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of *certain disputes* that concern *issues that are clearly defined* by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

(emphasis added)

Article 25.1 refers to the use of arbitration in ‘certain disputes that concern issues that are clearly defined.’ A plain reading of this text, together with the reasoning of the arbitrators in the first award issued under Article 25 (discussed below), indicates that arbitration may be used in respect of the complete dispute resolution process, rather than limiting its use for the resolution of certain issues arising in the particular phases of a dispute.⁶⁰ On this reading, the requirement that ‘certain disputes’ concern ‘issues that are clearly defined’ entails that the parties must identify the issues to be submitted to arbitration with sufficient clarity.⁶¹ In this respect, Weiß and Furculita doubt that an ex ante agreement providing for appeal arbitration in respect of all potential future disputes involving undefined issues would satisfy the requirement that arbitration be used for ‘certain disputes’ concerning ‘clearly defined issues’.⁶² By contrast, this requirement is readily met where the arbitration agreement is concluded only after a specific dispute between the parties has materialised.⁶³

Article 25.2 provides that arbitration is subject to the mutual agreement of the parties, who must also agree on the procedures to be followed. The parties to the dispute may therefore draft their own arbitration agreement according to their case-specific needs. In this way, Article 25 is an independent alternative to the standard procedures outlined in the DSU (subject to the conditions prescribed therein).⁶⁴ Once agreed, the arbitration agreement must be notified to all Members, thereby providing them with an opportunity to comment or take steps in respect of the dispute.⁶⁵

Under Article 25.3, third-party participation in an Article 25 arbitration requires the consent of the disputing parties. The resulting arbitral award is binding on the parties and is not subject to appeal, unlike panel reports. The parties are also required to notify the DSB and the relevant Council or Committee; however, the award does not require adoption by the DSB.⁶⁶ The

⁶⁰ Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 1 February 2026) ‘Arbitration Pursuant to Article 25 DSU: Dispute Settlement System of the World Trade Organization (WTO)’ [18] (‘Arbitration Pursuant to Article 25 DSU’).

⁶¹ *Ibid.*

⁶² Wolfgang Weiß and Cornelia Furculita, ‘The EU-Led MPIA’ in *Open Strategic Autonomy in EU Trade Policy* (Cambridge University Press, 1st ed, 2024) 128.

⁶³ *Ibid.* 133.

⁶⁴ *Ibid.* 128.

⁶⁵ Elisa Baroncini, ‘Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: The EU and the Multi-Party Interim Appeal Arbitration Arrangement’ (2019) 29(1) *The Italian Yearbook of International Law* 33, 36.

⁶⁶ Weiß and Furculita (n 62) 128.

notification requirement allows WTO Members to be informed of the outcome and to express their views, which is important from a transparency perspective because Members are otherwise unable to participate in the arbitration absent the consent of the disputing parties.⁶⁷

Article 25.4 provides that arbitration awards are subject to Articles 21 and 22, which respectively govern the surveillance of implementation and the determination of compensation or suspension of concessions. In other words, arbitration awards under Article 25 are implemented according to the same rules as panel and AB reports with respect to these provisions.⁶⁸

Despite its character as an independent means of dispute settlement, Article 25 is integrated into the DSS through the obligation to notify all Members of the arbitration agreement prior to the commencement of arbitration, the requirement to notify the arbitration award to the DSB and the relevant Council or Committee, and the involvement of the DSB in the implementation under DSU Articles 21 and 22.⁶⁹

2. The Use of Article 25 Arbitration

Prior to being considered for the MPIA, Article 25 arbitration was only used once in *US—Section 110(5) Copyright Act*.⁷⁰ The US and the European Communities (EC) resorted to Article 25 to calculate the level of EC benefits being nullified or impaired following a finding of a violation in the panel report. Such calculations are typically conducted under Article 22.6 arbitration, which determines the permissible response a complainant may impose if the DSB's recommendations and rulings are not complied with. The parties nevertheless opted for Article 25 to obtain an expedited decision before the US Congress adjourned.⁷¹

The arbitrators emphasised that Article 25 'should not be applied so as to circumvent the provisions of Article 22.6.'⁷² Importantly, the Article 25 arbitration was not conducted in place

⁶⁷ Baroncini (n 65) 36.

⁶⁸ Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?' (2023) 22(5) *World Trade Review* 693, 695 ('The WTO's MPIA: What's New?').

⁶⁹ Baroncini (n 65) 36.

⁷⁰ *United States—Section 110(5) of the US Copyright Act*, WT/DS160.

⁷¹ Arbitration under Article 25 of the DSU, Award of the Arbitrators, *United States—Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/ARB25/1 (9 November 2001) [1.12] ('Arbitration Award, *US—Section 110(5) Copyright Act*').

⁷² *Ibid* nn 22.

of an Article 22.6 arbitration because the ‘reasonable period of time’ to comply with the dispute ruling had not yet expired, meaning that an Article 22.6 arbitration remained merely a possibility.⁷³

In considering their jurisdiction under Article 25, the arbitrators noted that this was the first instance in which WTO Members had had recourse to arbitration pursuant to that provision.⁷⁴ They firstly observed the argument that the Article 25 procedure is solely intended as an alternative to a panel procedure and therefore could not be used for determining the nullification or impairment of benefits.⁷⁵ However, the arbitrators found that this argument was outweighed by the fact that there is no language in Article 25 or another provision of the DSU which would preclude arbitration for the latter purpose.⁷⁶

Further, the arbitrators stated that the language of Article 25.1 — ‘the solution of certain disputes that concern issues that are clearly defined’ — may support the view that ‘Article 25 should be understood as an arbitration mechanism to which Members may have recourse whenever necessary within the WTO framework’.⁷⁷ The arbitrators also found this approach to be fully consistent with the object and purpose of the DSU, particularly given that arbitration is likely to contribute to the prompt settlement of a dispute as commanded by Article 3.3 of the DSU.⁷⁸ The inference here is that parties may agree to Article 25 arbitration at any stage of dispute settlement insofar as it aligns with DSU’s object and purpose.⁷⁹ The arbitrators ultimately concluded that they had jurisdiction under Article 25 to determine the level of nullification of impairment, ‘pending further interpretation by the Members.’⁸⁰ Although this case is not directly informative on the application of the mechanism to appellate arbitration, the decision in *US—Section 110(5) Copyright Act* highlights that Article 25 gives Members a high degree of flexibility to choose which disputes and issues to submit to arbitration.⁸¹

⁷³ Müslüm Yilmaz, ‘Arbitration in WTO Dispute Settlement: The Magic Toolbox of the System’ in Nicholas Lamp (ed), *Reckoning and Renewal: The World Trade Organization and Its Dispute Settlement System at 30* (University of Toronto Press, 2025) 450, 456–457.

⁷⁴ Arbitration Award, *US—Section 110(5) Copyright Act* (n 71) [2.1].

⁷⁵ *Ibid* [2.3].

⁷⁶ *Ibid*.

⁷⁷ *Ibid* [2.4].

⁷⁸ *Ibid* [2.5].

⁷⁹ Weiß and Furculita (n 62) 130.

⁸⁰ Arbitration Award, *US—Section 110(5) Copyright Act* (n 71) [2.7].

⁸¹ Yilmaz (n 73) 458.

Following the award in *US—Section 110(5) Copyright Act*, Members ignored Article 25 arbitration for nearly two decades. The literature identifies several reasons for its underuse, including uncertainty arising from its broad scope, the absence of defined boundaries and procedural rules, and the time and difficulty involved in reaching agreement on all aspects of the arbitration.⁸² Its role in WTO dispute settlement only became prominent in 2020, when the AB crisis prompted Members to consider Article 25 as a mechanism for appeals of panel reports.⁸³

⁸² Oxford University Press, ‘Arbitration Pursuant to Article 25 DSU’ (n 60) 22.

⁸³ *Ibid.*

C. THE MPIA AS A RESPONSE TO THE APPELLATE BODY CRISIS

The EU-led MPIA is an interim response to the AB crisis. Grounded in DSU Article 25, it preserves a form of binding two-tiered adjudication among participating members. Its structure, participating Members, procedural framework, and key innovations compared with ordinary appellate review are outlined hereunder.

1. Overview of the MPIA

The demise of the AB forced WTO Members to explore solutions to preserve the functioning of the DSS. Of the proposals put forward, it was the EU-led MPIA which gained speed. The MPIA came into effect in April 2020 between 19 WTO Members (counting the EU and its Member States as one).⁸⁴

The MPIA is a mechanism which preserves two levels of adjudication through an independent and impartial appellate review of panel reports.⁸⁵ To that end, the MPIA system temporarily replaces ordinary appellate review under Article 17 of the DSU with the alternative of appeal arbitration for as long as the AB is inoperative.⁸⁶

As Bohanes aptly describes, the MPIA has two defining characteristics.⁸⁷ First, the appellate arbitration procedure mimics ordinary appellate review, in that it is based on the substantive and procedural aspects of appellate review under DSU 17 and ‘keep[s] its core features, including independence and impartiality’.⁸⁸ In this sense, the MPIA affirms WTO appellate review.⁸⁹ Second, the MPIA seeks to improve the efficiency of appeal proceedings through the introduction of various procedural innovations.⁹⁰

⁸⁴ Peter Van den Bossche, ‘Can the WTO Dispute Settlement System Be Revived?’ in Ernst-Ulrich Petersmann and Armin Steinbach (eds), *Constitutionalism and Transnational Governance Failures* (Brill | Nijhoff, 2024) 308, 318.

⁸⁵ *MPIA* (n 2) preamble.

⁸⁶ *Ibid* para 1.

⁸⁷ Jan Bohanes, ‘The Multi-Party Interim Appeal Arbitration Arrangement and the MPIA Drafters’ Attempt to Improve on the Traditional Appellate Review Process’ in Nicholas Lamp (ed), *Reckoning and Renewal: The World Trade Organization and Its Dispute Settlement System at 30* (University of Toronto Press, 2025) 470, 471.

⁸⁸ *MPIA* (n 2) para 3; see also Annex 1, para 11: ‘the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review’.

⁸⁹ Bohanes (n 87) 471.

⁹⁰ *Ibid*.

1.1. The Legal Basis of the MPIA

The MPIA is grounded in DSU Article 25, which is the only provision to foresee arbitration as an independent and alternative means of dispute settlement.⁹¹ Under this framework, appellate review of the panel report is conducted through Article 25 arbitration rather than by the AB.⁹² The panel stage remains unchanged.

1.2. The Text of the MPIA

The MPIA system is set out in multiple legal documents, which are divided into three parts.⁹³ The first part is the main text of the MPIA, which comprises the preamble and 15 paragraphs detailing the general principles of the arrangement.

The second part comprises Annex I, which contains the ‘Agreed Procedures for Arbitration’. It is a template agreement of model procedures to be followed by the parties and arbitrators, which is to be concluded after a specific dispute has materialised.⁹⁴ The MPIA parties may however depart from the model procedures in particular disputes.⁹⁵ Furthermore, the Agreed Procedures for Arbitration contemplate that the MPIA arbitrators will issue additional working procedures, setting out further procedural details including ‘deadlines, word limits for written submissions, the rules governing the oral hearing, and rules for filing documents.’⁹⁶

The third part comprises Annex II, which details the procedure for composing the pool of MPIA arbitrators. The pool consists of ten arbitrators, each nominated by a participating MPIA Member, after which the participating Members finalise the pool by consensus.⁹⁷ From this pool of ten, three are selected in each dispute through a DSU rotation system. The current pool has already been composed in line with the procedure established by Annex II. Annex II

⁹¹ Bowon Choi, ‘Three Years of the Multi-Party Interim Appeal Arbitration Arrangement: An Interim Evaluation of Arbitration as a Means to Appeal WTO Panel Reports’, *Kluwer Arbitration Blog* (11 August 2023) <<https://legalblogs.wolterskluwer.com/arbitration-blog/three-years-of-the-multi-party-interim-appeal-arbitration-arrangement-an-interim-evaluation-of-arbitration-as-a-means-to-appeal-wto-panel-reports/>>.

⁹² Pauwelyn, ‘The WTO’s MPIA: What’s New?’ (n 68) 694.

⁹³ Bohanes (n 87) 472.

⁹⁴ *Ibid* 473.

⁹⁵ *MPIA* (n 2) para 11.

⁹⁶ Bohanes (n 87) 473.

⁹⁷ *MPIA* (n 2) Annex II, para 1, 4.

otherwise provides for the periodic partial re-composition of the pool to account for the impasse persisting over an extended period.⁹⁸

1.3. The Scope of the MPIA

The MPIA applies to any future dispute between any two or more participating MPIA Members, including the compliance stage.⁹⁹ Any appeal is limited to issues of law and legal interpretations covered in the panel report.¹⁰⁰

1.4. The MPIA as a Multi-Party, Ex Ante, Interim Arrangement

The MPIA is best characterised as a multi-party, ex ante and interim arrangement.¹⁰¹ First, the MPIA is a ‘multi-party arrangement’ rather than a strictly ‘plurilateral agreement’.¹⁰² Unlike plurilateral agreements, the MPIA is fully permitted by DSU Article 25 and therefore inscribed within the WTO multilateral framework.¹⁰³ Moreover, the MPIA cannot technically be a ‘plurilateral agreement’ because paragraphs 1 and 10 of the MPIA text only solidify an *intention* to resort to Article 25 arbitration and to enter into an appeal arbitration agreement to make that arbitration procedure operational. In that sense, the MPIA is actually a ‘political commitment’ between parties to act in a pre-agreed manner.¹⁰⁴

Second, and in the same vein, the MPIA has an ex ante character because it constitutes a commitment to agree on appeal arbitration procedures in future disputes in specific cases.¹⁰⁵ Accordingly, the MPIA cannot be the appellate arbitration agreement itself. As already discussed, DSU Article 25.1 requires that only certain disputes concerning ‘clearly defined issues’ are submitted to arbitration. Despite the MPIA’s ex ante character, the MPIA complies

⁹⁸ Ibid Annex II, para 5.

⁹⁹ Ibid para 9.

¹⁰⁰ Ibid Annex I, para 9.

¹⁰¹ Weiß and Furculita (n 62) 132-145.

¹⁰² Pauwelyn, ‘The WTO’s MPIA: What’s New?’ (n 68) 694.

¹⁰³ Ibid.

¹⁰⁴ Olga Starshinova, ‘Is the MPIA a Solution to the WTO Appellate Body Crisis?’ (2021) 55(5) *Journal of World Trade* 787; Krzysztof Pelc, ‘Institutional Innovation in Response to Backlash: How Members Are Circumventing the WTO Impasse’ (2024) 8(3) *The Review of International Organizations* 1209, 1215.

¹⁰⁵ Pauwelyn, ‘The WTO’s MPIA: What’s New?’ (n 68) 695.

with Article 25.1 because the parties enter into a dispute-specific arbitration agreement for each case.

Third, the interim nature of the MPIA is explicit in both its title and its text. The preamble underlines the arrangement's 'interim nature', resolves to put in place 'contingency measures', and recites the participating Members' determination to find a 'lasting solution' to the impasse. Similarly, the main text of the MPIA makes several mentions that the participants will resort to Article 25 arbitration as long as the AB is inoperative¹⁰⁶ and makes clear that resolving the impasse is a matter of priority for the participants.¹⁰⁷ Ultimately, the MPIA does not substitute the AB.

2. The MPIA Members

The MPIA was established by 19 WTO Members (counting the EU and its Member States as one), out of 136 WTO Members.¹⁰⁸ Membership has since steadily expanded. As of December 2025, the MPIA comprises 31 participants (again counting the EU and its Member States as one), representing approximately 59.5% of global trade.¹⁰⁹

The current MPIA participants are Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the EU (and its Member States), Guatemala, Hong Kong (China), Iceland, Japan, Macao (China), Mexico, Malaysia, Montenegro, New Zealand, Nicaragua, Norway, Paraguay, Pakistan, Peru, the Philippines, Singapore, Switzerland, Ukraine, the United Kingdom, Uruguay, and Vietnam.¹¹⁰ Four of the five biggest users of the DSS are MPIA members, based on the total disputes participated in up to November 2024, being the EU, Japan, China and Canada. Notably absent is the US, who is the second biggest user of the DSS.¹¹¹

¹⁰⁶ *MPIA* (n 2) paras 1, 15; Annex 1, para 2.

¹⁰⁷ *Ibid* para 15.

¹⁰⁸ Pauwelyn, 'The WTO's MPIA: What's New?' (n 68) 694.

¹⁰⁹ Directorate-General for Trade and Economic Security, 'EU Welcomes Vietnam to WTO's Alternative Arbitration Arrangement', *Trade and Economic Security* (16 October 2025)

<https://policy.trade.ec.europa.eu/news/eu-welcomes-vietnam-wtos-alternative-arbitration-arrangement-2025-10-16_en>.

¹¹⁰ *Ibid*.

¹¹¹ Hopewell (n 1) 1109.

3. The MPIA Process

The following outlines the key stages of the MPIA appeal arbitration process and simultaneously demonstrates the mechanism's compliance with DSU Article 25. The description draws on the Agreed Procedures for Arbitration (i.e. Annex 1 to the MPIA) and the explanation of the process by MPIA arbitrator Joost Pauwelyn.¹¹²

- (a) **A WTO Member Decides to Join the MPIA:** Any WTO Member may join the MPIA at any time, upon notification to the DSB that it endorses the arrangement.¹¹³ The decision to join the MPIA is not normally specific to a dispute.

- (b) **Following the Establishment of the Panel, the Parties to the Dispute Conclude an Arbitration Agreement:** Where a dispute has materialised between WTO Members who are both MPIA participants, the parties must enter into an appeal arbitration agreement specific to that dispute following the establishment of the panel. A dispute-specific agreement is required to comply with DSU Article 25.1, which requires that only certain disputes concerning clearly defined issues are submitted to arbitration. Further, and in compliance with DSU Article 25.2, the MPIA requires that the parties notify the appeal arbitration agreement to the Members within 60 days of the establishment of the panel.¹¹⁴

- (c) **If a Party Wishes to Appeal, It May Request Suspension of the Panel Proceedings Before Circulation of the Panel Report to the WTO Membership:** Once the parties to the dispute have concluded an appeal arbitration agreement, the panel proceedings run in a standard manner. The parties then request the panel to notify them of the anticipated date of the circulation of the final panel report, no later than 45 days in advance of that date.¹¹⁵ Following the issuance of the panel report to the parties, but no later than ten days before its circulation all WTO Members, either of the parties may request the panel to suspend its proceedings with a view to initiating the arbitration

¹¹² Pauwelyn, 'The WTO's MPIA: What's New?' (n 68) 696-697.

¹¹³ *MPIA* (n 2) para 12.

¹¹⁴ *Ibid* para 10.

¹¹⁵ *Ibid* Annex 1, para 3.

under the agreed procedures.¹¹⁶ Such request is considered a joint request by the parties for the suspension of panel proceedings for 12 months.

- (d) **Either Party Can Initiate an MPIA Appeal by Filing a Notice of Appeal:** Following the suspension of the panel proceedings, either party has 20 days to file a Notice of Appeal together with its written appeal submission to the WTO Secretariat.¹¹⁷ The appeal is limited to issues of law and legal interpretations covered in the panel report.¹¹⁸ The Notice of Appeal must simultaneously be notified to the other party and third parties in the panel proceedings.¹¹⁹ The other party has five days to submit a notice of other appeal together with its appeal submission.
- (e) **The Appeal Arbitration is Conducted:** The MPIA employs a pool of ten arbitrators, and any given MPIA appeal is decided by three arbitrators who are selected from the pool.¹²⁰ The arbitrators have a 90-day time limit to issue the arbitration award, which begins from the date of filing the notice of appeal.¹²¹ In the case of appeal arbitration, appellants may withdraw their appeal at any time during the arbitration by notifying the arbitrators, the panel and third parties. In such a scenario, regular panel proceedings resume if no appeal remains.¹²²
- (f) **The Arbitrators Issue the MPIA Award:** The MPIA award includes the award findings. Since the arbitration is implemented under DSU Article 25, the conditions prescribed therein apply: the award is binding; the award may not be appealed; and the award must be notified to the DSB. As noted above, Article 25.4 ensures that MPIA awards are implemented according to the same rules as panel and AB reports. The award must also be translated into the WTO's three official languages.

¹¹⁶ Ibid Annex 1, para 4.

¹¹⁷ Ibid Annex 1, para 5.

¹¹⁸ Ibid Annex 1, para 9.

¹¹⁹ Ibid.

¹²⁰ Ibid Annex 1, para 7.

¹²¹ Ibid Annex 1, para 12.

¹²² Ibid Annex 1, para 18.

4. The MPIA'S Key Innovations

Although the MPIA is intended to replicate AB procedure, it introduces several innovations designed to improve upon aspects of the appellate process.¹²³ First, the MPIA emphasises respect for the 90-day deadline. Paragraph 12 of the Agreed Procedures mirrors the requirement in DSU Article 17.5 to conclude appellate proceedings within 90 days following the filing of the Notice of Appeal. Paragraph 14 of the Agreed Procedures further provides that the parties may agree to extend the 90-day deadline upon a proposal from the arbitrators. In this way, the MPIA arbitrators cannot unilaterally extend the deadline. Paragraphs 12 and 14 appear to respond to US criticism concerning routine violations of the 90-day deadline, particularly where this occurs without party consent.

Second, the MPIA limits the issues that arbitrators may address. Paragraph 10 of the Agreed Procedures states: 'The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.' The goal of paragraph 10 is to prevent obiter dicta and to require the arbitrators to exercise judicial economy.¹²⁴

Third, the MPIA authorises arbitrators to streamline organisational measures with a view to respecting the 90-day deadline. In that respect, paragraph 12 of the Agreed Procedures states that arbitrators 'may take appropriate organisational measures to streamline the proceedings' insofar as those measures are 'without prejudice to the procedural rights of the parties or due process'. Party consent is not required. Paragraph 12 goes on to give examples of such measures, such as decisions on page limits, time limits and deadlines, and the length and number of hearings. These are non-exhaustive, allowing the arbitrators sufficient flexibility to streamline other organisational measures according to the specific dispute.¹²⁵

Fourth, and on a related note, arbitrators may also propose substantive measures with a view to respecting the 90-day deadline. Paragraph 13 of the Agreed Procedures provides that arbitrators may 'propose substantive measures to the parties,' giving as an example 'an

¹²³ Weiß and Furculita (n 62) 138.

¹²⁴ Bohanes (n 87) 479-480.

¹²⁵ Ibid 484-488.

exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.’ Since Article 11 claims necessarily involve a return to panel fact-finding, these claims have historically increased the AB’s workload, making paragraph 13 helpful in shortening proceedings. Furthermore, it is emphasised that arbitrators can only *propose* such measures, meaning the parties retain their discretion.

Parties may otherwise introduce other innovations to the appeal arbitration process since the MPIA provides that parties may depart from the model procedures.¹²⁶

5. Factors Influencing Participation and Non-Participation in the MPIA

There are many factors, some overlapping, relating to why a WTO Member joins, or does not join, the MPIA. Although the MPIA is not a plurilateral agreement in the strict sense, it shares a common goal with plurilateral initiatives: to increase pressure on non-members to join or enact reforms with a similar effect.¹²⁷ Encouragement to join the MPIA has at times been explicit, particularly by the EU.¹²⁸ For example, in statements at a regular meeting of the DSB in November 2025, the EU ‘invite[d] other Members to join the MPIA in the interim, to strengthen the multilateral rules-based trading order.’¹²⁹ As MPIA membership increases, the pressure on non-members to join increases.¹³⁰ At the same time, there is a ‘natural limit’ to the number of Members willing to join the arrangement.¹³¹ In other words, the MPIA is highly unlikely to achieve the universal recognition enjoyed by the AB.¹³²

Molina offers a way to conceptualise the divergent responses to MPIA accession. In his assessment of whether more countries would join the MPIA, Molina categorises WTO Members into three broad groups.¹³³ First are ‘like-minded’ nations that have joined the MPIA

¹²⁶ *MPIA* (n 2) para 11.

¹²⁷ Pelc (n 104) 1218.

¹²⁸ *Ibid.*

¹²⁹ ‘Regular Meeting of the Dispute Settlement Body, 24 November 2025’, *EU Mission to the WTO in Geneva* (Web Page, 24 November 2025) <https://www.eeas.europa.eu/delegations/world-trade-organization-wto/eu-statements-regular-dispute-settlement-body-meeting-24-november-2025_en> (‘EU Statements at DSB Meeting of 24 November 2025’).

¹³⁰ Pelc (n 104) 1218.

¹³¹ Chris Horseman, ‘Analysis: Could MPIA Become New Default WTO Appeals System?’, *Borderlex* (16 July 2025) <<https://borderlex.net/2025/07/16/analysis-could-mpia-become-new-default-wto-appeals-system/>>.

¹³² *Ibid.*

¹³³ *Ibid.*

to signal continued commitment to the WTO, its institutions, and the rule of law. The second group comprises WTO Members that regard the MPIA as a potential risk since it disincentivises Members to find a permanent solution to the AB crisis—a nod to the debate of whether the MPIA is a stumbling block or a building block towards reform. Molina observes, however, that such an argument becomes less credible the longer the reform process remains blocked. The third group of Members do not participate in the DSS and ‘don’t care’.

Molina’s categories do not purport to fully capture the motivation behind a WTO Member’s decision to join the MPIA and are therefore useful as a high level typology. In practice, accession decisions may be influenced by a broader range of material and non-material considerations.

For WTO Members who have not joined, one recurrent concern relates to the potential fragmentation of case law. Specifically, there is apprehension that MPIA awards may not form part of the ‘WTO acquis’, with the result that non-participating Members who oppose the MPIA may be reluctant to rely on or follow jurisprudence developed under MPIA procedures.¹³⁴ Other Members are fearful about the consequences of accession on their relations with the US, a factor relevant for close US trading partners with asymmetric dependence. A Member’s general wariness toward international dispute settlement may also be informative.¹³⁵ Some Members who were slow to play their hand may have otherwise adopted a cautious wait-and-see approach, unsure of whether the MPIA replicates the functionality and legitimacy of the AB, or whether broader reform efforts materialise. Arguably, the wait-and-see period has now passed.¹³⁶

Even among Members that have joined the MPIA, accession should not be understood as reflecting solely a principled commitment to the rule of law. An empirical study by Pelc argues that the choice to join the MPIA comes down to material interests. In that respect, Pelc states that ‘offensive potential’ is the strongest predictor of MPIA participation; that is, the greater the number of grounds for legal challenge against other MPIA members, the more likely a WTO Member is to join the MPIA. Conversely, the more trade-distorting measures a WTO

¹³⁴ Kholofelo Kugler, ‘Operationalizing MPIA Appeal Arbitrations: Opportunities and Challenges’ in Manfred Elsig et al (eds), *International Economic Dispute Settlement Demise of Transformation?* (Cambridge University Press, 2021) 87.

¹³⁵ Pelc (n 104) 1221.

¹³⁶ Collins (n 14) 15.

Member maintains, the more it stands to lose from an effective enforcement system.¹³⁷ In that respect, WTO Members engage in a cost-benefit assessment of the potential gains and losses associated with stronger dispute settlement.¹³⁸

Unsurprisingly, the US is the loudest voice against the MPIA. To oversimplify, its official position reflects a fundamental disagreement with the concept of two tier adjudication in WTO dispute settlement, of which the MPIA is an explicit affirmation, and an opposition to the binding nature of MPIA decisions, particularly as ‘precedents’ for future disputes in the WTO.¹³⁹ In this respect, the US has commented that the MPIA ‘incorporates and exacerbates the worst aspects of the Appellate Body’ and that the ‘real goal’ of the MPIA is to ‘create an ersatz Appellate Body that would serve as a model for any future WTO Appellate Body’.¹⁴⁰ While not exhaustive, the above factors demonstrate that participation in the MPIA reflects a complex interaction of interests.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Henry Gao, ‘Beyond the MPIA: A Rule-Based Solution to the Appellate Body Crisis’ (Research Paper 1-3.3, Research Group on the International Trading System led by the Japan Economic Foundation, January 2025) 3.

¹⁴⁰ *Minutes of the DSB Meeting of 29 June 2020*, WTO Doc WT/DSB/M/442 (13 October 2020) para 13.11.

D. SELECTION AND CLASSIFICATION OF DISPUTES FOR ANALYSIS

The paralysis of the AB affected two groups of disputes. The first consists of disputes in which panel reports had already been appealed prior to 10 December 2019, when the AB was still operational, but for which no AB report was issued due to the suspension of the AB's functions. The second comprises disputes in which the panel report was circulated on or after 10 December 2019, when there was no longer a functioning AB to hear any appeal.¹⁴¹ In such disputes, the absence of a functioning AB materially shaped the context in which the parties determined whether to notify or waive an appeal. This contribution focuses on the latter category.

Specifically, the analytical scope is WTO panel reports containing adjudicative findings which were circulated between January 2020 and December 2025.¹⁴² Disputes resolved by way of a mutually agreed solution therefore fall outside the analytical scope, as the panel report circulated in such cases reflects a negotiated outcome rather than an adjudicated one, recording only a brief description of the dispute and the fact that a mutually agreed solution was reached under DSU Article 12.7.

From 2020 to the end of 2025, a total of 38 panel reports containing adjudicative findings were issued:

- (i) 26 were appealed into the void;
- (ii) three were appealed to arbitration (pursuant to either the MPIA or a bilateral agreement);
- (iii) four were adopted notwithstanding the retained option to appeal into the void;
- (iv) four were adopted notwithstanding an appeal arbitration agreement (pursuant to either the MPIA or a bilateral agreement); and

¹⁴¹ Oxford University Press, *Max Planck Encyclopedias of International Law* (online at 7 February 2026) 'Multi-Party Interim Appeal Arbitration Arrangement (MPIA): Dispute Settlement System of the World Trade Organization (WTO)' [11].

¹⁴² The AB ceased to be operational in December 2019 however no panel rulings were issued in December 2019.

- (v) one remains within the period for appeal or adoption.¹⁴³

For the purposes of this contribution, the latter dispute is excluded from further analysis as the parties have not yet indicated whether they will appeal or adopt the panel report, or pursue an alternative course of resolving the dispute.¹⁴⁴ Accordingly, the analytical baseline comprises the remaining 37 panel reports issued from 2020 to the end of 2025.

¹⁴³ See Appendix 1.

¹⁴⁴ Panel Report, *India — Tariff Treatment on Certain Goods in the Information and Communications Technology Sector*, WTO Doc WT/DS588/R (17 April 2023); the deadline for appeal or adoption of the panel report expires on 27 October 2026.

E. APPEALS INTO THE VOID

Of the 37 panel reports circulated from January 2020 to December 2025, 26 (70%) were appealed into the void.¹⁴⁵ It is noted however that appeals into the void are only possible in disputes between two non-MPIA Members, or between an MPIA Member and a non-MPIA Member—a configuration that applied in 32 of the 37 disputes.¹⁴⁶ Of those 32 reports, 26 were appealed, meaning that the panel ruling was blocked in approximately 81% of eligible cases. The data shows that Members have done little to hold themselves back from appealing into the void.

1. The Impasse Disproportionately Benefits Respondents

When the AB ceased operating in late 2019, early observers expected that waiving an appeal and allowing adoption, despite the option to block the ruling, may become standard practice.¹⁴⁷ This expectation has proved unrealistic. For the respondent Member State, the ability to appeal a ruling into the void is a significant tactical advantage. If the panel report is adverse, the respondent can appeal it into the void, effectively vetoing the ruling. If the panel report is favourable, the respondent has no reason to seek appellate review at all. In both cases, the respondent retains the upper hand. This explains why there is very little incentive for a respondent to surrender its veto power and agree to appellate arbitration *ex post*.¹⁴⁸

Indeed, respondents initiated 25 of the 26 appeals into the void. The sole exception is *US-Safeguard Measure on PV Products*.¹⁴⁹ China, as complainant, appealed into the void after the panel upheld the US' safeguard measures on certain Chinese photovoltaic products. China has no way to have the decision reversed.

¹⁴⁵ See Appendix 1.

¹⁴⁶ The figure of 32 is calculated on the basis that, although the parties DS583 and DS595 ultimately consented to a bilateral arbitration agreement pursuant to DSU Article 25, at least one party was a non-MPIA member, such that an appeal into the void remained possible when the dispute materialised and until the conclusion of those arbitration agreements.

¹⁴⁷ Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22(3) *Journal of International Economic Law* 297, 306-307 ('What to Expect?').

¹⁴⁸ Pahis, 'Appeals after the Appellate Body' (n 4) 298.

¹⁴⁹ *United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, WT/DS562.

2. Both MPIA and Non-MPIA Participants Appeal into the Void

Both MPIA participants and non-MPIA participants have launched appeals into the void. Of the 26 appeals into the void, 6 (23%) were initiated by MPIA participants against non-MPIA members. The remaining 20 of the 26 appeals into the void (77%) were initiated by non-MPIA members.

Table 1: Appeals into the Void Initiated by MPIA Members

<i>By</i>	<i>Against</i>	<i>Dispute</i>	<i>Year of Appeal</i>
EU	Russia	DS494: <i>Cost Adjustment Methodologies II</i>	2020
	Indonesia	DS616: <i>CVD/AD on Stainless Steel</i>	2025
	Indonesia	DS618: <i>CVDs on Biodiesel</i>	2025
China	US	DS562: <i>Safeguard Measure on PV Products</i>	2021
	US	DS558: <i>Additional Duties</i>	2023
Pakistan	UAE	DS538: <i>BOPP Film</i>	2021

Table 2: Appeals into the Void Initiated by Non-MPIA Members

<i>By</i>	<i>Against</i>	<i>Dispute</i>	<i>Year of Appeal</i>
US	Canada	DS533: <i>Softwood Lumber VII</i>	2020
	China	DS543: <i>Tariff Measures</i>	2020
	Korea	DS539: <i>Anti-Dumping and Countervailing Duties</i>	2021
	China	DS544: <i>Steel and Aluminium Products</i>	2023
	Norway	DS552: <i>Steel and Aluminium Products</i>	2023
	Switzerland	DS556: <i>Steel and Aluminium Products</i>	2023
	Turkey	DS564: <i>Steel and Aluminium Products</i>	2023
	HK, China	DS597: <i>Origin Marking Requirement</i>	2023
India	Brazil	DS579: <i>Measures concerning Sugar and Sugarcane</i>	2021
	Australia	DS580: <i>Measures concerning Sugar and Sugarcane</i>	2021
	Guatemala	DS581: <i>Measures concerning Sugar and Sugarcane</i>	2021
	EU	DS582: <i>Tariffs on ICT Products</i>	2023
	Japan	DS584: <i>Tariffs on ICT Products</i>	2023
Saudi Arabia	Qatar	DS567: <i>Intellectual Property Rights</i>	2020
Korea	Japan	DS553: <i>Stainless Steel Bars</i>	2021
Tunisia	Morocco	DS578: <i>Definitive AD Measures on Exercise Books</i>	2021
Indonesia	EU	DS592: <i>Raw Materials</i>	2022
Dominican Republic	Costa Rica	DS605: <i>AD on Steel Bars</i>	2023

<i>By</i>	<i>Against</i>	<i>Dispute</i>	<i>Year of Appeal</i>
Turkey	US	DS561: <i>Additional Duties</i>	2024
Panama	Costa Rica	DS599: <i>Import Measures</i>	2025

The US and India are responsible for the highest number of appeals into the void. The US accounts for 8 of the 26 appeals into the void (30%), while India accounts for 5 of the 26 (19%). Together, these two Members are responsible for nearly half (49%) of all appeals into the void.

3. Members Are Increasingly Content to Appeal into the Void

The high frequency of appeals into the void, when appeal arbitration remains on the table, supports that Member States are increasingly content to exploit the impasse in their favour. *Indonesia-Raw Materials* provides an example of this dynamic.¹⁵⁰ In that dispute, the EU challenged Indonesia's export ban and domestic processing requirements on nickel ore.¹⁵¹ Indonesia justified its measures on the basis they were temporarily applied to prevent an imminent critical shortage of an essential product.¹⁵² Alternatively, Indonesia claimed that the measures were necessary in order to secure compliance with Indonesian laws on sustainable mining and mineral resource management requirements.¹⁵³ However, critics consider that the measures are ostensibly a resource-nationalist strategy aimed at leveraging Indonesia's market power as the dominant global producer of nickel, in order to increase the value of its exports and attract downstream processing industries.¹⁵⁴

The panel ultimately sided with the EU, finding that the export ban and domestic processing requirement were inconsistent with Articles XI:1, XI:2(a) and XX(d) of the General Agreement on Tariffs and Trade 1994 (GATT 1994)¹⁵⁵ for a couple of reasons.¹⁵⁶ First, Indonesia had not demonstrated its measures were 'temporarily applied', that there was an 'imminent critical

¹⁵⁰ *Indonesia — Measures Relating to Raw Materials*, WT/DS592.

¹⁵¹ Panel Report, *Indonesia — Measures Relating to Raw Materials*, WTO Doc WT/DS592/R (30 November 2022) [2.1] ('Panel Report, *Indonesia-Raw Materials*').

¹⁵² *Ibid* [7.2.4-7.2.4.1]

¹⁵³ *Ibid* [7.214].

¹⁵⁴ Hopewell (n 1) 1110.

¹⁵⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('General Agreement on Tariffs and Trade 1994').

¹⁵⁶ Panel Report, *Indonesia-Raw Materials* (n 151) [8].

shortage' of nickel ore, or that low-grade nickel ore was an 'essential product'.¹⁵⁷ Second, alternative and less restrictive trade measures were reasonably available to Indonesia to secure compliance with its policy framework for mining activities.¹⁵⁸ Accordingly, the panel concluded that Indonesia's measures did not relieve a critical shortage of an essential product within the meaning of Article XI:2(a) as an exemption from Article XI:1 (concerning the elimination of quantitative restrictions); and that the measures did not fall within the scope of Article XX(d) as necessary to secure compliance with laws or regulations. The panel recommended Indonesia to bring the measures into conformity.¹⁵⁹

Indonesia subsequently appealed the panel report into the void in 2022 and has maintained its rule violations to date. Unilaterally blocking the panel ruling enabled Indonesia to attract high levels of foreign direct investment, cement itself as the largest global exporter of stainless steel and generate significant economic value for the country.¹⁶⁰ Indonesia has since extended its export ban and domestic processing requirement to other raw minerals, such as raw bauxite ore. The foregoing paints a strong picture that Indonesia used the impasse in this instance to defy WTO obligations.

Nonetheless, dispute settlement practice suggests that an appeal into the void is not always a nuclear option. For example, although the EU ultimately appealed three panel reports into the void,¹⁶¹ it did so only after the complainant in each case declined its invitations to agree to appeal arbitration procedures. In *EU-Cost Adjustment Methodologies II*,¹⁶² the EU offered Russia to 'agree on a means of having the appeal heard through appeal arbitration based on Article 25 of the DSU'.¹⁶³ Russia did not agree. The EU then appealed the panel report, stating at the DSB meeting of October 2020 that:

[T]he EU's appeal to the Appellate Body...should not be confused with "blocking the dispute resolution" or appealing "into the void". The EU attached great importance to maintaining a functioning two-tier dispute settlement process. This was why the EU

¹⁵⁷ Ibid [7.2.5].

¹⁵⁸ Ibid [7.336]-[7.338].

¹⁵⁹ Ibid [8.5].

¹⁶⁰ Iain MacIntyre, 'Indonesia's Nickel Gamble Pays Off' *Breakbulk* (Web Page, 13 November 2025) <<https://breakbulk.com/articles/indonesias-nickel-gamble-pays-off>>.

¹⁶¹ See Appendix I.

¹⁶² *European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia — (Second complaint)*, WT/DS494.

¹⁶³ *Minutes of the DSB Meeting of 26 October 2020*, WTO Doc WT/DSB/M/446 para. 4.13.

had actively supported all efforts to find a solution to the impasse over AB appointments and this was also why the EU, together with other Members, had put in place the MPIA. However, if the other party to a dispute was not willing to agree on such contingency measures while the AB impasse continued, the EU could have no choice but to appeal before the Appellate Body. Whether or not such appeal would be processed was in the hands of the other party.¹⁶⁴

Similarly, in its notification of appeal in *EU-CVDs on Biodiesel*,¹⁶⁵ the EU stated that it had repeatedly invited Indonesia, ‘in the context of this dispute and other disputes’, to join the MPIA or ‘agree to similar appeal arbitration procedures on a bilateral and *reciprocal* basis (emphasis added)’.¹⁶⁶ The EU then used almost identical wording in notifying its appeal in *EU-CVD/AD on SSCRFP*.¹⁶⁷ The reference to appeal arbitration on a ‘reciprocal basis’ reflects that the EU and Indonesia were involved in parallel disputes, such that reciprocity would protect future wins for either party from being appealed into the void.¹⁶⁸ Interestingly, this would mimic the ‘reciprocal collaboration’ that exists between MPIA members.¹⁶⁹ However, Indonesia rejected the EU’s invitations. The EU considered that ‘in the absence of appeal arbitration being available to review the legal errors contained in the panel report’, it had ‘no choice but to exercise its right to appeal’ in both DS616 and DS618.¹⁷⁰ From Indonesia’s perspective, it had ‘remained open to pursuing ad hoc arbitration’ but considered that the ‘requirements put forward by the EU have effectively rendered such arbitration unworkable in practice’.¹⁷¹ Indonesia did not specify what the EU’s requirements were.¹⁷²

¹⁶⁴ Ibid.

¹⁶⁵ *European Union — Countervailing Duties on Imports of Biodiesel from Indonesia*, WT/DS618.

¹⁶⁶ ‘Regular Meeting of the Dispute Settlement Body, 26 September 2025 - Statements delivered by Mr. Davide Grespan’ *EU Mission to the WTO in Geneva* (Web Page, 26 September 2025) 4 <https://www.eeas.europa.eu/delegations/world-trade-organization-wto/regular-meeting-dispute-settlement-body-26-september-2025_en> (‘EU Statements at DSB Meeting of 26 September 2025’).

¹⁶⁷ *European Union — Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia*, WT/DS616.

¹⁶⁸ See DS592, DS593, DS616 and DS618, all of which involved the EU and Indonesia as disputing parties and were ongoing during different, though partially overlapping, periods.

¹⁶⁹ Kayah Bhan et al, ‘What are the implications of the United States’ blockage of appointments to the WTO Appellate Body in 2019, and what progress has been made towards reforming the dispute settlement system?’ *OxJournal* (Web Page, 24 September 2025) <<https://www.oxjournal.org/united-states-blockage-of-appointments-to-the-wto-appellate-body/>>.

¹⁷⁰ EU Mission to the WTO in Geneva, ‘EU Statements at DSB Meeting of 26 September 2025’ (n 166); EU Mission to the WTO in Geneva, ‘EU Statements at DSB Meeting of 24 November 2025’ (n 129).

¹⁷¹ *Minutes of the DSB Meeting of 24 November 2025*, WTO Doc WT/DSB/M/507 para. 6.2.

¹⁷² Chris Horseman, ‘EU appeals Indonesian steel case ‘into the void’ at WTO’ *Borderlex* (24 November 2025) <<https://borderlex.net/2025/11/24/eu-appeals-indonesian-steel-case-into-the-void-at-wto/>>.

4. Members are Engaging with the DSS More Selectively

Since the AB ceased to function, the number of WTO disputes initiated has fallen to approximately one third of the level prior to the AB's collapse.¹⁷³ Until 2019, an average of 19 new disputes were taken to the WTO each year, whereas data from 2020 to 2024 shows that the average number of cases has fallen to seven.¹⁷⁴ Hopewell suggests that this decline signals a strong loss of confidence in the effectiveness of the DSS as a means to enforce WTO rules and resolve trade disputes; however, this conclusion is low hanging fruit. Dispute settlement practice suggests a more nuanced picture. First, despite the significant decline in the number of cases brought to the WTO, an average of seven new disputes filed per year shows there is still a level of regular recourse to the DSS. Second, of the 37 panel reports circulated in the five years since the AB ceased to function, only five (13.5%) of those concerned disputes between two MPIA participants. This means that claims are still being brought to WTO dispute resolution despite the high risk that any panel report will be unilaterally blocked.¹⁷⁵ Without understating the severity of the AB crisis, the evidence suggests that confidence in the system has eroded less dramatically than is claimed. Rather, Member States are more selective about when and which disputes to bring to the WTO due to the high likelihood of an appeal into the void.

5. Conclusion: Appeals into the Void

Appeals into the void were possible in 32 of the 37 disputes analysed. Of those 32, Members appealed 26 panel reports (81%) over a five-year period. The data shows that appeals into the void have become normalised. Commentators have often characterised appeals into the void as Members exploiting the impasse in their favour. That is fitting of many cases of appeals into the void; however, it is also added that it may be helpful to view this behaviour from a game theory perspective. In that sense, appealing into the void may be the most rational strategy that a Member State can take to protect its immediate interests. That explains why the EU, which generally prefers systemic alternatives to appeals into the void, nonetheless did so after the opposing party declined its invitations to agree to appeal arbitration. In that case, it would have

¹⁷³ Hopewell (n 1) 1104.

¹⁷⁴ Ibid 1113.

¹⁷⁵ Pahis, 'Appeals after the Appellate Body' (n 4) 298-299.

been irrational for the EU to absorb the cost of an adverse ruling in the name of systemic integrity.

F. APPEALS TO ARBITRATION

Of the 37 panel reports issued, three (8%) have been appealed to arbitration. Two of these arbitrations were administered under the MPIA, namely *Colombia-Frozen Fries* and *China-IPRs Enforcement*. The remaining arbitration, *Turkey-Pharmaceutical Products*, was conducted as an ad hoc arbitration under Article 25 of the DSU.

Table 3: Panel Rulings Appealed to Arbitration (MPIA or Ad Hoc)

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Year of Arbitration Award</i>
EU	Turkey	DS583: <i>Pharmaceutical Products</i>	2022
EU	Colombia	DS591: <i>Frozen Fries</i>	2022
EU	China	DS611: <i>IPRs Enforcement</i>	2025

1. The First MPIA Award: *Colombia-Frozen Fries*

Colombia-Frozen Fries produced the first ever MPIA award. The EU brought the dispute in November 2019 concerning anti-dumping measures imposed by Colombia on frozen fries originating in Belgium, Germany and the Netherlands. The panel issued its final report to the parties on 22 August 2022, finding that Colombia had acted inconsistently with several provisions of the Anti-Dumping Agreement (ADA).¹⁷⁶ Colombia then notified an appeal on 6 October 2022. The arbitrators issued their award on 21 December 2022, confirming three of the panel’s findings and reversing one other.¹⁷⁷

1.1. The Panel Report

The Colombian Federation of Potato Producers (FEDEPAPA) filed an application before MINCIT — the Colombian investigating authority — requesting the initiation of an anti-

¹⁷⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*Anti-Dumping Agreement*’).

¹⁷⁷ ‘DS591: Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands’ *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm>.

dumping investigation into the alleged dumping of frozen fries imports.¹⁷⁸ Against this backdrop, the EU challenged the initiation of the anti-dumping investigation.

The panel ruled that Colombia violated Article 5.3 of the ADA (concerning the justification of an investigation) because it relied on flawed methodologies as evidence to justify the initiation of the investigation.¹⁷⁹ Specifically, MINCIT improperly initiated the investigation based on FEDEPAPA's application, which used third-country sales prices instead of domestic sales prices to determine the 'normal value' of the products. The practical significance of this is that states are incentivised to inflate a product's normal value to increase the dumping margin and the dumping duties.

Colombia claimed that the phrase 'where appropriate' in Article 5.2 (iii) of the ADA (concerning evidence included in an application) granted it the complete 'free choice' to submit any information to calculate the normal value of the products, including information on third-country sales prices.¹⁸⁰ The panel disagreed and determined that Article 5 of the ADA requires at least 'an exercise of judgment as to the...appropriateness of using third-country sales prices, instead of domestic sales prices.'¹⁸¹ Going further, the panel determined that FEDEPAPA's

¹⁷⁸ Panel Report, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc WT/DS591/7 (10 October 2022) [7.6] ('Panel Report, *Colombia-Frozen Fries*').

¹⁷⁹ Articles 5.2(iii) and 5.3 of the ADA respectively concern the contents of an application to initiate an investigation and an investigating authority's examination of the evidence contained therein to determine whether the initiation of an investigation is justified.

¹⁸⁰ Panel Report, *Colombia-Frozen Fries* (n 178) [7.67], [7.70]; Article 5.2 of the Anti-Dumping Agreement provides:

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

...

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

(emphasis added)

¹⁸¹ Panel Report, *Colombia-Frozen Fries* (n 178) [7.70]; Article 5.3 of the Anti-Dumping Agreement provides:

application did not offer, and MINCIT therefore did not examine, any explanation as to why it was ‘appropriate’ that domestic sales prices were not used as a basis for normal value. Accordingly, the panel found that Colombia and MINCIT did not examine the ‘adequacy’ of the evidence in the application to determine whether there was sufficient evidence to justify the initiation of the investigation as required by Article 5.3.¹⁸²

1.2. The Arbitration Procedure

On 13 July 2020, the EU and Colombia informed the DSB of their Agreed Procedures ‘to decide any appeal from any final panel report as issued to the parties in [this] dispute.’ On 20 April 2021, the parties amended the Agreed Procedures to give the arbitrators earlier access to the panel report.¹⁸³ The Agreed Procedures otherwise replicated the model MPIA procedures.

Some of the distinctive procedural features of the first appeal arbitration include:

Word and time limits: As permitted by paragraph 12 of the Agreed Procedures, the arbitrators set word and time limits to facilitate the 90-day deadline. In a pre-arbitration letter dated 19 September 2022, the pool of arbitrators set indicative guidelines on the length of written submissions, including a limit of 2,000 words on Notices of Appeal and 27,000 words (or 40% of the panel report, whichever is higher) on Appellant/Appellee submissions.¹⁸⁴ The AB has never imposed word limits.¹⁸⁵

In the Additional Procedures for Arbitration Under Article 25 of the DSU adopted by the arbitrators on 19 October 2022, the arbitrators also set various time limits regarding the hearing;

The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

¹⁸² Panel Report, *Colombia-Frozen Fries* (n 178) [8.1(a)(iii)].

¹⁸³ Agreed Procedures for Arbitration under Article 25 of the DSU, notified by the parties to the Dispute Settlement Body on 20 April 2021, which is attached as Annex A-1 to the Arbitration under Article 25 of the DSU, Award of the Arbitrators, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc WT/DS591/ARB25/Add.1 (21 December 2022) (‘Agreed Procedures, *Colombia-Frozen Fries*’).

¹⁸⁴ Pre-Arbitration Letter (19 September 2022) section I, attached as Annex 2 to the Additional Procedures for Arbitration under Article 25 of the DSU (19 October 2022), which is Annex A-2 to the Arbitration under Article 25 of the DSU, Award of the Arbitrators, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc WT/DS591/ARB25/Add.1 (21 December 2022) (‘Pre-Arbitration Letter, *Colombia-Frozen Fries*’).

¹⁸⁵ Pauwelyn, ‘The WTO’s MPIA: What’s New?’ (n 68) 698.

namely: (i) opening statements by the parties shall be no longer than 30 to 35 minutes; (ii) opening statements by third parties shall be limited to 7 minutes each; and (iii) closing statements by parties shall be limited to five minutes each.¹⁸⁶ Such time limits reflect established AB practice.¹⁸⁷

DSU Article 11 claims: Under paragraph 13 of the Agreed Procedures, arbitrators may propose substantive measures with a view to respecting the 90-day deadline, including the exclusion of claims based on an alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU. In the pre-arbitration letter, the pool of MPIA arbitrators invited the parties to refrain from making such claims under Article 11.¹⁸⁸ The letter also made it more onerous for Colombia to raise an Article 11 claim, by encouraging a party making any such claim to ‘appraise how [it] would affect the 90-day time period for the issuance of the award’ and ‘evaluate...whether such...claim has the potential to impact the substantive outcome of the dispute and whether and how it is “necessary for the resolution of the dispute”.’¹⁸⁹ Colombia ultimately did not make an Article 11 claim in its appeal, but it is anyone’s guess as to how influential the pre-arbitration letter was in this restraint.¹⁹⁰

Virtual pre-hearing conference: In anticipation of the hearing on 15 November 2022, the arbitrators convened a virtual pre-hearing conference on 9 November 2022.¹⁹¹ Per the arbitrators, the purpose of the conference was ‘not to replace the hearing’¹⁹² but ‘to assist us in identifying the issues to be addressed at the hearing, and to avoid issues that were not within our mandate, were not necessary for the resolution of this dispute, or were not contested between the parties...[and] signal to the parties what we would like to explore or focus on at the hearing, and to allow the parties an opportunity to limit their submissions should they so

¹⁸⁶ Additional Procedures for Arbitration under Article 25 of the DSU, adopted by the Arbitrators on 19 October 2022 [23], which is attached as Annex A-2 to the Arbitration under Article 25 of the DSU, Award of the Arbitrators, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc WT/DS591/ARB25/Add.1 (21 December 2022).

¹⁸⁷ Van Den Bossche (n 84) 321.

¹⁸⁸ Pre-Arbitration Letter, *Colombia-Frozen Fries* (n 184) section 3.

¹⁸⁹ Ibid.

¹⁹⁰ Van Den Bossche (n 84) 321-322.

¹⁹¹ Arbitration under Article 25 of the DSU, Award of the Arbitrators, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc WT/DS591/ARB25/Add.1 (21 December 2022) [1.12]-[1.13] (‘Arbitration Award, *Colombia-Frozen Fries*’).

¹⁹² Ibid [1.11].

wish’.¹⁹³ The pre-hearing conference has not been previously employed in WTO appellate proceedings.

1.3. The Arbitration Award

In assessing the panel’s findings under Articles 5.2(iii) and 5.3 of the ADA, the arbitrators defined two issues on appeal. First, whether the phrase ‘where appropriate’ in Article 5.2(iii) permits a ‘free choice’ to use third-country sales prices as a basis for normal value.¹⁹⁴ Second, whether the panel erred in requiring an explanation as to why domestic sales prices were not used.¹⁹⁵ The arbitrators considered that their assessment of the panel’s findings under Articles 5.2(iii) and 5.3 ‘must be guided’ by Article 17.6(ii) of the ADA.¹⁹⁶ Accordingly, the following analysis focuses on the arbitrators’ interpretative exercise regarding Article 17.6(ii), which states:

17.6 In examining the matter referred to in paragraph 5:

...

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those *permissible* interpretations.

(emphasis added)

By way of background, the AB has consistently taken a sequential approach to Article 17.6(ii). This means that the ‘correct’ interpretation must first be derived from the Vienna Convention on the Law of Treaties (VCLT)¹⁹⁷ under the first sentence of Article 17.6(ii), before considering

¹⁹³ Ibid [1.11]-[1.12].

¹⁹⁴ Ibid [1.12]-[1.13] [4.2.3].

¹⁹⁵ Ibid [4.2.4].

¹⁹⁶ Ibid [4.8].

¹⁹⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

the ‘permissibility’ of the Member’s own interpretation under the second sentence.¹⁹⁸ As the AB illustrated in *US-Continued Zeroing*:¹⁹⁹

The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the [VCLT]. Only after engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies. The structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence.²⁰⁰

The panel followed this sequential approach in arriving at the conclusion that Colombia’s interpretation of Article 5 was not a ‘permissible interpretation’ under Article 17.6(ii). The panel first conducted its own interpretation of Articles 5.2(iii) and 5.3, and only after assessed whether this admitted the alternative interpretation reached by Colombia.²⁰¹

The arbitrators deviated from the AB’s jurisprudence on Article 17.6(ii) and applied their own approach to the provision. In doing so, the arbitrators did not cite the ‘cogent reasons’ standard²⁰² but simply stated that its ‘approach to the interpretation claims in this appeal differ[ed]’ from the panel’s.²⁰³ The tribunal began by clarifying that Article 17.6(ii) is contextualised by Article 17.6(i) and the second sentence of Article 17.6(ii), and that both of these provisions ‘must be understood in a manner granting special deference to investigating authorities under the ADA’.²⁰⁴ The arbitrators then noted that Article 17.6(i) prevents a panel from conducting a *de novo* assessment of the facts on record; that an authority’s establishment and evaluation of facts must be allowed to stand so long as it is ‘proper’ and ‘unbiased and

¹⁹⁸ Nu Ri Jung, ‘Who Determines the ‘Permissibility’ of an Interpretation Within the Meaning of Article 17.6(ii) of the Anti-dumping Agreement?: A Constructive Commentary on the *Colombia – Frozen Fries* Approach’ (2025) 59(2) *World Trade Review* 327, 333-334.

¹⁹⁹ *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350.

²⁰⁰ Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WTO Doc WT/DS350/AB/R (4 February 2009).

²⁰¹ Pahis, ‘Appeals after the Appellate Body’ (n 4) 302.

²⁰² Jianguo Hu, ‘The First Case under Multi-Party Interim Appeal Arbitration Arrangement and Its Implications for the Reform of WTO Dispute Settlement System’ (2025) 15(2) *Journal of WTO and China* 30, 44.

²⁰³ Arbitration Award, *Colombia-Frozen Fries* (n 191) [4.11]-[4.12].

²⁰⁴ *Ibid* [4.12].

objective’; and that this is the case ‘even though the panel might have reached a different conclusion’.

The arbitrators determined that Article 17.6(ii) precluded the tribunal from engaging in their own *de novo* interpretation of the terms "where appropriate" in Article 5.2(ii) to arrive at the ‘correct’ application of VCLT. Rather, the arbitrators assessed the permissibility of Colombia’s interpretation according to the standard of a reasonable third-party interpreter:

[W]e will ask whether a treaty interpreter, using the method for treaty interpretation set out in [VCLT] ... could have reached Colombia’s interpretation. And this even though we, as *de novo* treaty interpreters, might have reached a different conclusion.

Our approach assumes, as the second sentence [of Article 17.6(ii)] does, that different treaty interpreters applying the same tools of the [VCLT] may, in good faith and with solid arguments in support, reach different conclusions on the ‘correct’ interpretation of a treaty provision.²⁰⁵

The arbitrators further reasoned that, ‘[t]reaty interpretation is not an exact science and applying the [VCLT’s] method does not magically and inevitably lead to a single result. In most cases, treaty interpretation involves weighing, balancing, and choice.’²⁰⁶ Accordingly, ‘the ultimate question’ when testing an interpretation, ‘is to draw a line beyond which an interpretation is no longer ‘permissible’ under the [VCLT] method for treaty interpretation.’²⁰⁷ The tribunal added that ‘[d]ictionary meanings support the idea that the search for “permissible” interpretations differs from an attempt to find one’s own “final” and “correct” interpretation.’ Instead, the relevant question is whether a Member’s interpretation is “permitted,” “allowable,” “acceptable,” or “admissible” as an outcome resulting from a proper application of the VCLT.’²⁰⁸

Essentially, the arbitrators held that the assessment of permissibility under the second sentence of Article 17.6(ii) begins with the member’s own interpretation (and not the panel’s

²⁰⁵ Ibid [4.13]-[4.14].

²⁰⁶ Ibid [4.14].

²⁰⁷ Ibid [4.15].

²⁰⁸ Ibid.

interpretation).²⁰⁹ In this way, the arbitrators' approach involves an assessment of whether the Member's interpretation can be reached through the application of the VCLT.

The tribunal also included the proviso that 'not just any interpretation' of an investigating authority can be accepted as 'permissible', and that 'the interpretative process under [VCLT] sets out an outer range beyond which meanings cannot be accepted.'²¹⁰ In this sense, 'not all interpretations have the required degree of solidness or analytical support for them to be given deference as "permissible" within the bounds of the [VCLT] method for treaty interpretation.'

Even though the arbitrators' departed from the AB reports applied by the panel, the tribunal agreed with the panel that Colombia's interpretation of the phrase 'where appropriate' in Article 5.2(iii) was not permissible within the meaning of Article 17.6(ii). The arbitrators reasoned that:

Article 5.2(iii) specifies three types of product prices for normal value: (i) domestic sales; (ii) third-country sales; and (iii) constructed normal value. The structure of the sentence, however, does not place these three sources of prices on equal footing. Rather than simply listing the three in sequence, third-country sales prices and constructed normal value, but not domestic sales prices, are qualified by the phrase 'where appropriate'.

...

[T]he fact that the phrase 'where appropriate' only applies to third-country sales prices and constructed normal value signifies that only these prices require an authority to 'examine' their 'appropriateness' to initiate an investigation.'²¹¹

Nonetheless, the arbitrators concluded that the panel had applied the legal standard in an 'overly stringent manner'.²¹² Specifically, the arbitrators considered that an unbiased and objective authority could have found the use of third-country sales prices in FEDEPAPA's

²⁰⁹ Pahis, 'Appeals after the Appellate Body' (n 4) 303.

²¹⁰ Arbitration Award, *Colombia-Frozen Fries* (n 191) [4.18]; Jung (n 198) 336.

²¹¹ Arbitration Award, *Colombia-Frozen Fries* (n 191) [4.20].

²¹² Ibid [4.28], [4.31].

application to be ‘sufficient’ to initiate the investigation.²¹³ The tribunal therefore reversed the panel’s finding that Colombia acted inconsistently with the obligation under Article 5.3 to determine the sufficiency of evidence to justify the initiation.²¹⁴

1.4. Analysis of Colombia-Frozen Fries

The first appeal under the MPIA was efficient overall.²¹⁵ The MPIA arbitrators issued an award of 39 pages within 74 days of the filing of the notice of appeal. By way of comparison, the average length of the last 10 AB reports is 112 pages. Undoubtedly, the procedural innovations cumulatively supported the arbitrators to comfortably issue the award within the 90-day deadline under paragraph 12 of the Agreed Procedures.²¹⁶ Additionally, the arbitrators did not explicitly revisit any panel fact finding.²¹⁷

Substantively, the award is notable for the tribunal’s interpretation of Article 17.6(ii) of the ADA. Article 17.6(ii) is a controversial provision. Its interpretation has been in issue in several anti-dumping disputes involving the US regarding its practice of zeroing—an antidumping calculation methodology which is criticised for artificially inflating duties.²¹⁸ The AB has consistently found that Article 17.6(ii) admits only one permissible interpretation (i.e. the panel’s interpretation), and that zeroing is illegal because the US based its practice on its own interpretation of the ADA, which is not ‘permissible’ under Article 17.6(ii).²¹⁹ The US has sharply criticised the AB rulings on zeroing for ‘fail[ing] to give meaning to Article 17.6(ii)’,²²⁰ and maintains that ‘the very premise underlying Article 17.6(ii) is that two interpretations can be permissible simultaneously.’²²¹ In fact, the interpretation of Article 17.6(ii) is so important to DSS reform efforts that Ambassador David Walker’s draft decision on the functioning of the AB explicitly identified Article 17.6(ii) under the category of ‘overreach’.²²²

²¹³ Ibid [4.31].

²¹⁴ Ibid [4.32].

²¹⁵ Alan Yanovich, ‘WTO Issues First Award Under MPIA and Tackles Standard of Review in Anti-Dumping Disputes’, *Akin* (Web Page, 17 January 2023) <<https://www.akingump.com/en/insights/blogs/ag-trade-law/wto-issues-first-award-under-mpia-and-tackles-standard-of-review-in-anti-dumping-disputes>>.

²¹⁶ Pauwelyn, ‘The WTO’s MPIA: What’s New?’ (n 68) 697.

²¹⁷ Pahis, ‘Appeals after the Appellate Body’ (n 4) 300.

²¹⁸ Ibid 306.

²¹⁹ Ibid.

²²⁰ Office of the United States Trade Representative, ‘Report on the Appellate Body’ (n 34) 102.

²²¹ Ibid 103.

²²² Pahis, ‘Appeals after the Appellate Body’ (n 4) 307.

As discussed, the arbitrators departed from the AB's interpretive approach in finding that Article 17.6(ii) admits more than one permissible interpretation, thereby affording greater deference to the national authority's interpretation of the ADA. The tribunal's approach to Article 17.6(ii) invokes different reactions. Lester views the arbitrators' interpretation of Article 17.6(ii) as an 'olive branch' to the US. The US welcomed the willingness of the arbitrators to distance themselves from the AB's 'erroneous views',²²³ praising in particular the tribunal's finding that the VCLT rules 'do not 'instruct the treaty interpreter to find a single meaning of the treaty' as a former Appellate Body member has written.'²²⁴ The tribunal's approach thus appears to be one that the US is more 'comfortable' with.²²⁵ Whilst it is doubtful that this 'olive branch' alone has any persuasive effect on swaying critics of WTO adjudication,²²⁶ it seems that arbitrators may be trying to signal greater balance between state autonomy and judicial oversight.

Antithetically, Pahis argues that the tribunal could have dispensed with their interpretative exercise of Article 17.6(ii).²²⁷ He emphasises that the tribunal's interpretation of Article 17.6(ii) had no bearing on the outcome, as the arbitrators ultimately upheld the panel's finding that Colombia's interpretation was impermissible.²²⁸ Accordingly, the tribunal could have simply 'acknowledged two competing interpretations of the Article and concluded, without prejudice as to which interpretation was correct, that Colombia was in violation of Article 5 under either.'²²⁹ Moreover, Colombia did not raise a claim appeal that the panel had erred under Article 17.6(ii).²³⁰ This raises the question of whether it was truly necessary for the tribunal to articulate its own approach to Article 17.6(ii) in order to resolve the dispute.²³¹ On this view, the tribunal's reasoning may be an example of judicial overreach, that the AB itself was criticised for.

²²³ Office of the United States Trade Representative, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body* (The USTR Archives 2007-2024 Press Releases, 27 January 2023) 2.

²²⁴ *Ibid.*

²²⁵ Simon Lester, 'Would the United States Join the MPIA?' (Research Paper 1-3.2, Research Group on the International Trading System led by the Japan Economic Foundation, January 2025) 5.

²²⁶ *Ibid.* 5.

²²⁷ *Ibid.*

²²⁸ Pahis, 'Appeals after the Appellate Body' (n 4) 306.

²²⁹ *Ibid.*

²³⁰ Arbitration Award, *Colombia-Frozen Fries* (n 191) [4.8].

²³¹ *Ibid.*; see also Yanovich (n 215).

2. The Second MPIA Award: *China-IPRs Enforcement*

China-IPRs is the second and most recent MPIA award. The EU initiated the dispute in February 2022. Its primary claims relate to anti-suit injunctions (ASIs) issued by Chinese courts in standard essential patent (SEP) litigation. The panel issued its final report to the parties on 21 February 2025, rejecting the EU's substantive claims. The EU notified an appeal on 22 April 2025 and China cross appealed. The arbitrators issued their award on 21 July 2025, reversing the panel's main findings.

2.1. *The Panel Report*

As a background to the dispute, the panel explained the following. Technical standards 'are an agreed or established technical description of an idea, product, service, or way of doing things where that understanding needs to be shared with others,' such as 5G technology, Bluetooth, and wireless connectivity.²³² SEPs are patents protecting 'a product or process that is essential to implementing a standard'.²³³ Where a particular standard requires the use of a SEP, the implementer of that standard 'will need to obtain a licence to use one or more patent-protected technologies'.²³⁴ Because 'the inclusion of a patent in a standard can provide a SEP holder with significant market power over the implementer', the SEP holder typically licenses the patent Fair, Reasonable, and Non-Discriminatory (FRAND) terms.²³⁵ Given the absence of any supranational or international body to determine what constitutes FRAND, it is 'not uncommon' for parties to fail to reach agreement on what is fair and reasonable and to resort to litigation instead.

As patents are territorial in nature, multiple jurisdictions may be implicated in FRAND disputes. In that respect, an ASI 'is a means whereby a court can resolve issues of simultaneous litigation in different jurisdictions'.²³⁶ An ASI in the context of SEP litigation, 'is an *in personam* court order whereby a litigant is ordered to take or refrain from certain action with

²³² Panel Report, *China — Enforcement of Intellectual Property Rights*, WTO Doc WT/DS611/11 (24 April 2025) [2.4], [2.5] ('Panel Report, *China-IPRs Enforcement*').

²³³ *Ibid* [2.7].

²³⁴ *Ibid*.

²³⁵ *Ibid* [2.8].

²³⁶ *Ibid* [2.11].

respect to litigation in other jurisdictions.’²³⁷ Such an order could include ‘a prohibition on initiating or continuing proceedings in foreign jurisdictions regarding disputes involving the same patent families and the same or related counterparties.’²³⁸

Against this backdrop, the EU challenged China’s ‘alleged unwritten ASI policy in SEP litigation’, which it argued prevented SEP holders from asserting their rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)²³⁹ in other jurisdictions.²⁴⁰ The EU also separately challenged five individual decisions in which Chinese courts had issued an ASI: *Huawei v. Conversant*,²⁴¹ *ZTE v. Conversant*,²⁴² *OPPO v. Sharp*,²⁴³ *Xiaomi v. InterDigital*,²⁴⁴ and *Samsung v. Ericsson*.²⁴⁵ The panel agreed with the EU that China had maintained an unwritten policy of encouraging ASIs in SEP litigation but rejected that China violated Articles 1.1, 28.1 and 28.2.²⁴⁶

Central to the legal issue in this dispute was the scope of the TRIPS obligation in Article 1.1, which provides:

²³⁷ Ibid [2.11].

²³⁸ Ibid.

²³⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (‘*Agreement on Trade-Related Aspects of Intellectual Property Rights*’).

²⁴⁰ Panel Report, *China-IPRs Enforcement* (n 232) [2.5].

²⁴¹ *Huawei v. Conversant*, Supreme People's Court, Civil Ruling issuing an anti-suit injunction, 28 August 2020 (China).

²⁴² *ZTE v. Conversant*, Shenzhen Intermediate People's Court, Civil Ruling issuing an anti-suit injunction, 29 September 2020 (China).

²⁴³ *OPPO v. Sharp*, Shenzhen Intermediate People's Court, Civil Ruling issuing an anti-suit injunction, 16 October 2020 (China).

²⁴⁴ *Xiaomi v. InterDigital*, Wuhan Intermediate People's Court, Civil Ruling issuing an anti-suit injunction, 23 September 2020 (China).

²⁴⁵ *Samsung v. Ericsson*, Wuhan Intermediate People's Court, Civil Ruling issuing an anti-suit injunction, 25 December 2020 (China).

²⁴⁶ Panel Report, *China-IPRs Enforcement* (n 232) [3.2.a]-[3.2.d]; Article 28 of the TRIPS Agreement provides:

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing⁶ for these purposes that product; (footnote original) ⁶ This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

The panel adopted a restrictive interpretation of Article 1.1, particularly of the obligation of Members to ‘give effect’ to the provisions of the TRIPS Agreement in the first sentence.²⁴⁷ The panel stated that the second and third sentences of Article 1.1, which refer to Member actions to be taken domestically,²⁴⁸ ‘give immediate context to the interpretation of the first sentence.’²⁴⁹ Reading the provision as a whole, the panel concluded that the first sentence of Article 1.1 ‘merely requires WTO Members to implement the [TRIPS Agreement] within their domestic legal systems and does not require them to refrain from taking measures that undermine the protection and enforcement of intellectual property (IP) rights in the territories of other Members.’²⁵⁰

Moreover, the panel did not agree with the EU (and third parties) that the principle of good faith in Article 26 of the VCLT supported an interpretation of Article 1.1 that considered the protection and enforcement of IP rights in other territories.²⁵¹ The panel narrowly interpreted the principle of good faith as an interpretive tool, stating: ‘[it] is ostensibly an expectation and requirement of WTO Members—it is not a principle of interpretation that requires the covered agreements to be interpreted in a manner that accommodates obligations or requirements that exceed the ordinary meaning of a given provision, as read in its context, and in light of the object and purpose of the agreement.’²⁵²

²⁴⁷ Rafał Sikorski ‘SEP-related disputes between the EU and China at the WTO’ in Jorge Contreras (ed), *FRAND Cases in Context* (Elgaronline, 2026), 420.

²⁴⁸ Ibid.

²⁴⁹ Panel Report, *China-IPRs Enforcement* (n 232) [7.214]-[7.215].

²⁵⁰ Arbitration under Article 25 of the DSU, Award of the Arbitrators, *China — Enforcement of Intellectual Property Rights*, WTO Doc WT/DS611/ARB25 (21 July 2025) [4.1.a] (‘Arbitration Award, *China-IPRs Enforcement*’).

²⁵¹ WorldTradeLaw.net, *Dispute Settlement Commentary on the Award of the Arbitrators in China - Enforcement of Intellectual Property Rights* (11 October 2025) 26.

²⁵² Arbitration Award, *China-IPRs Enforcement* (n 250) [7.226].

Based on the foregoing, the panel found that the EU failed to show that China's ASI policy was inconsistent with: Article 28.1 (concerning certain exclusive rights of patent holders), whether or not read in conjunction with Article 1.1; and Article 28.2 (concerning patent holders' right to licence their patents), read in conjunction with Article 1.1. In other words, none of Articles 28.1 or 28.2, even if read with the first sentence of Article 1.1, 'extend to protecting patent rights or judicial authority in other Members' territories'.²⁵³

2.2. The Arbitration Procedure

The parties communicated their Agreed Procedures under DSU Article 25 to decide any appeal from any final panel report on 4 July 2023, replicating the model MPIA procedures. Notably, this communication exceeded the 60 day-deadline following the establishment of the panel under paragraph 10 of the MPIA text.²⁵⁴ Despite this procedural irregularity, the parties' decision to conclude the agreement and submit their dispute to binding arbitration underscored their commitment to resolving the dispute under the MPIA.²⁵⁵

On 4 April 2025, the pool of arbitrators issued a pre-arbitration letter, which almost replicated the organisational and substantive measures in the pre-arbitration letter in *Colombia-Frozen Fries*.²⁵⁶ The main point of difference between the pre-arbitration letters is that the pool of arbitrators set a more generous 3,000 word limit for the Notice of Appeal in the present dispute, possibly reflecting its greater complexity and technical nature.²⁵⁷ Following consultation with the parties, the arbitrators adopted the Additional Procedures for Arbitration under Article 25 of the DSU as contemplated by paragraph 12 of the Agreed Procedures.²⁵⁸

²⁵³ Nirmalya Sirm, 'WTO arbitration on China's standard patents policy threatens TRIPS balance and national autonomy' (South Centre, 2026) 5.

²⁵⁴ Agreed Procedures for Arbitration under Article 25 of the DSU, notified by the parties to the Dispute Settlement Body on 4 July 2023, which is attached as Annex A-1 to the Arbitration under Article 25 of the DSU, Award of the Arbitrators, *China — Enforcement of Intellectual Property Rights*, WTO Doc WT/DS611/ARB25/Add.1 (21 July 2025) ('Agreed Procedures, *China-IPRs Enforcement*').

²⁵⁵ 'WTO Multi-Party Interim Appeal Arbitration (MPIA): Shrinking the Void?', *Aceris Law* (Web Page, 26 July 2025) <<https://www.acerislaw.com/wto-multi-party-interim-appeal-arbitration-mpia-shrinking-the-void/>>.

²⁵⁶ Pre-Appeal Letter (4 April 2025), attached as Annex 2 to the Additional Procedures for Arbitration under Article 25 of the DSU (19 October 2022), which is Annex A-2 to the Arbitration under Article 25 of the DSU, Award of the Arbitrators, *China — Enforcement of Intellectual Property Rights*, WTO Doc WT/DS611/ARB25/Add.1 (21 July 2025).

²⁵⁷ *Ibid*; see also Pre-Arbitration Letter, *Colombia-Frozen Fries* (n 184).

²⁵⁸ Additional Procedures for Arbitration under Article 25 of the DSU, adopted by the Arbitrators on 7 May 2025, which is attached as Annex A-2 2 to the Arbitration under Article 25 of the DSU, Award of the Arbitrators, *China — Enforcement of Intellectual Property Rights*, WTO Doc WT/DS611/ARB25/Add.1 (21 July 2025).

The arbitrators also repeated the practice from *Colombia-Frozen Fries* of convening a virtual pre-hearing conference. Per the arbitrators: ‘we decided to convene a virtual pre-hearing conference with the parties and third parties to help identify "those issues that are necessary for the resolution of the dispute," as provided in paragraph 10 of the Agreed Procedures, and to highlight the key issues raised in the appeal that required further discussion at the hearing.’²⁵⁹ On 31 May 2025, before the hearing, the arbitrators also ‘held a discussion with the other members of the pool of MPIA arbitrators ... pursuant to paragraph 5 of the MPIA Arbitration Arrangement and paragraph 8 of the Agreed Procedures’.²⁶⁰

2.3. *The Arbitration Award*

The arbitrators addressed several claims in the award raised by the EU and China, who cross-appealed. As a preliminary issue, the arbitrators upheld the panel's finding that the EU had provided sufficient evidence to demonstrate the existence of the ASI policy and that it constituted a norm or rule of general and prospective application.²⁶¹ Turning to the EU's claims, the central legal issue concerned the interpretation of Article 1.1, first sentence, which formed part of the EU's subsequent claims under Articles 28.1 and 28.2 of the TRIPS Agreement, amongst others.²⁶²

As will be recalled, the panel had narrowly interpreted the obligation of Members to ‘give effect’ to the provisions of the TRIPS Agreement in Article 1.1, first sentence, concluding that it simply meant Members were obliged to implement the TRIPS Agreement in their domestic territory and did not impose obligations ‘relating to the...implementation of the TRIPS Agreement by other WTO Members.’ In reaching that conclusion, the panel had also espoused a narrow view of the concept of good faith as expressed in Article 26 of the VCLT as an interpretive tool.

The arbitrators overturned the panel's interpretation of Article 1.1, first sentence, finding that the obligation in the provision was not limited to domestic implementation.²⁶³ The arbitrators’

²⁵⁹ Arbitration Award, *China-IPRs Enforcement* (n 250) [1.13].

²⁶⁰ Ibid [1.14].

²⁶¹ Ibid [4.42].

²⁶² Ibid [4.10].

²⁶³ Sirm (n 253) 1.

interpretation rested chiefly on two conclusions. The first concerned the distinction between the terms ‘give effect’ and ‘implement’ within Article 1.1. The arbitrators held that ‘give effect’ as used in the first sentence, requires ‘an active and continuing duty to ensure that the provisions of the TRIPS Agreement are made operative on an ongoing basis’, whereas ‘implement’, as used in the second and third sentences, ‘could connote a singular act in which something is enacted.’²⁶⁴ On that basis, they found that the panel had ‘failed to recognize that the term ‘give effect’ in the first sentence of Article 1.1 has a broader connotation than the term ‘implement’ as used in the second and third sentences of Article 1.1.’²⁶⁵

The second conclusion related to an anti-frustration reading of Article 1.1. The arbitrators stated that ‘the raison d’être of the TRIPS Agreement is to have minimum standards for the protection and enforcement of IP rights given effect through national systems in the territory of each and every WTO Member,’²⁶⁶ whereby ‘[t]he provisions of the TRIPS Agreement would be rendered inoperative if Members were allowed to frustrate the implementation by other Members of their obligations under the TRIPS Agreement.’²⁶⁷ From this reading of the provision, the arbitrators derived a ‘key corollary’ to the obligation in Article 1.1, first sentence: ‘there is only one obligation in the first sentence of Article 1.1, namely, the obligation to ‘give effect to the provisions of [the TRIPS Agreement] in its territory, where the corollary of the obligation is to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories.’²⁶⁸

There was limited relevant case law to support the arbitrators’ interpretive exercise on Article 1.1, first sentence. The arbitrators did, however, endorse *Australia - Tobacco Plain Packaging*.²⁶⁹ In that dispute, the panel held, and the AB endorsed, that Articles 7 and 8 of the TRIPS Agreement ‘set out general goals and principles underlying the TRIPS Agreement, which are to be borne in mind when specific provisions of the Agreement are being interpreted

²⁶⁴ Arbitration Award, *China-IPRs Enforcement* (n 250) [4.55].

²⁶⁵ Ibid.

²⁶⁶ Ibid [4.73].

²⁶⁷ Ibid.

²⁶⁸ Ibid [4.74].

²⁶⁹ Panel Reports, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R (28 Jun 2018) (‘Panel Reports, *Australia-Tobacco Plain Packaging*’); Appellate Body Reports, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/AB/R and WT/DS441/AB/R (9 June 2020) (‘Appellate Body Reports, *Australia-Tobacco Plain Packaging*’).

in their context and in light of the object and purpose of the Agreement.’²⁷⁰ Drawing on that authority, the arbitrators stated that ‘Article 7 (as well as Article 8) of the TRIPS Agreement has a function in interpreting the Agreement,’²⁷¹ and that ‘the protection and enforcement of IP rights should contribute “to a balance of rights and obligations”’.²⁷² In their conclusion on the ‘correct’ interpretation of Article 1.1, the arbitrators cited Article 7 directly in support of their anti-frustration reading: ‘the balance of rights and obligations foreseen in Article 7 would be defeated if a WTO Member prevents or frustrates the exercise of IP rights derived from the implementation of the TRIPS Agreement by another Member in that other Member’s territory.’²⁷³

Based on the foregoing, the arbitrators held that the panel did not properly interpret the obligation in the first sentence of Article 1.1.²⁷⁴ The arbitrators subsequently relied on this interpretation to support their finding that China’s ASI policy frustrated the ability of SEP holders to exercise their rights under Articles 28.1 and 28.2 to respectively prevent the use of their SEPs without their consent, and to conclude licensing contracts. Accordingly, the arbitrators concluded that China had violated Articles 28.1 and 28.2 of the TRIPS Agreement, read in conjunction with Article 1.1.²⁷⁵

Otherwise, and in contrast to the panel, the arbitrators did not opine on the good faith principle or rely on any general principles in conducting their interpretative exercise on Article 1.1.²⁷⁶ The arbitrators’ reasoning instead centred solely on ‘the text, context, and object and purpose of Article 1.1’.²⁷⁷

2.4. Analysis of China-IPRs Enforcement

The MPIA arbitrators issued an award of 59 pages exactly on the 90-day deadline under paragraph 12 of the Agreed Procedures. It is a positive development for WTO dispute

²⁷⁰ Panel Reports, *Australia – Tobacco Plain Packaging* (n 269) [7.2402]; Appellate Body Reports, *Australia-Tobacco Plain Packaging* (n 269) [6.658].

²⁷¹ Arbitration Award, *China-IPRs Enforcement* (n 250) [4.68].

²⁷² Ibid [4.69].

²⁷³ Ibid [4.70].

²⁷⁴ Ibid [4.74].

²⁷⁵ Ibid [4.109], [4.129].

²⁷⁶ WorldTradeLaw.net (n 251) 26.

²⁷⁷ Ibid.

settlement that both MPIA awards to date have been issued within the prescribed timeframe and have resulted in binding appellate decisions. In this context, the EU noted at the subsequent DSB meeting of 26 September 2025:

‘[T]his appeal arbitration further demonstrates that, despite the current Appellate Body situation that is the subject of a long-standing point later on today’s agenda, there is a functional and efficient interim arrangement that — among its participants — safeguards the possibility of exercising effectively the right to binding, two-tier, independent and impartial adjudication in accordance with WTO rules.’²⁷⁸

The arbitrators otherwise did not revisit issues of fact in any noticeable way. Indeed, they were explicit in acknowledging that their analysis could proceed only on the basis of factual findings made by the panel and uncontested record evidence.²⁷⁹

On the merits, the award is distinct from DS583 and DS591 because it does not involve a departure by the arbitrators from AB jurisprudence; however, the arbitrators’ interpretative exercise was largely a novel one in which the available AB jurisprudence was only indirectly relevant. Otherwise, the award is interesting for the arbitrators’ anti-frustration interpretation of Article 1.1, which broadened the perceived scope of the TRIPS Agreement in a way that limits the autonomy of state courts.²⁸⁰ The arbitrators clarified that China’s ASI policy frustrates the ability of SEP holders to exercise their rights, as conferred on them under Articles 28.1 and 28.2 of the TRIPS Agreement, to prevent the use of the subject of their SEPs without their consent, and to conclude licensing contracts.²⁸¹ The arbitrators’ interpretive exercise concerning Article 1.1 was clearly necessary for the resolution of the dispute, as it had significant implications for the panel’s findings under Articles 28.1 and 28.2. Read in light of the arbitrators’ interpretation of Article 1.1, the panel’s conclusions on those provisions were consequently reversed.

²⁷⁸ EU Mission to the WTO in Geneva, ‘EU Statements at DSB Meeting of 26 September 2025’ (n 166),

²⁷⁹ Arbitration Award, *China-IPRs Enforcement* (n 250) [4.90].

²⁸⁰ Riccardo Verzella, ‘Analysis of the WTO’s Ruling on the China-EU Patent Dispute’, *D’Andrea & Partners* (Web Page, 22 August 2025) < <https://www.dandreadpartners.com/analysis-of-the-wtos-ruling-on-the-china-eu-patent-dispute/> >.

²⁸¹ EU Mission to the WTO in Geneva, ‘EU Statements at DSB Meeting of 26 September 2025’ (n 166),

Notably, the arbitrators did not engage with the principle of good faith as an interpretative tool. The arbitrators' 'anti-frustration' interpretation of Article 1.1, and the reversal of the panel's findings, was based on the ordinary meaning, context, object and purpose of Article 1.1.²⁸² On that reading, China would arguably be in violation of Articles 28.1 and 28.2 whether or not good faith were used as an interpretative tool. In this sense, the good faith arguments were not necessary to resolve the dispute, and the decision not to address them can be understood as an exercise in judicial economy.

3. The Ad Hoc Arbitration Award: *Turkey-Pharmaceutical Products*

Turkey-Pharmaceutical Products is the only case in which DSU Article 25 arbitration has produced an award on appeal from a panel report. The EU brought the dispute in April 2019 regarding various measures concerning the production, importation and marketing of pharmaceutical products imposed by Turkey. Turkey is not an MPIA member, so there was no mandatory appeal arbitration. The parties nonetheless communicated their agreement 'to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report' on 22 March 2022.²⁸³ On the same day, the EU and Turkey notified their agreement to ad hoc arbitration procedures in the parallel dispute *EU-Safeguard Measures on Steel*, which is discussed below.²⁸⁴ On 25 April 2022, Turkey filed a notice of recourse to Article 25 under the agreed procedures. The arbitrators issued their award on 25 July 2022, ultimately supporting the rulings of the panel.

3.1. The Panel Report

By way of background, Turkey's Social Security Institution (SSI) reimbursed part of the price of pharmaceutical products distributed to outpatients by retail pharmacies under a national health insurance scheme. Amongst other eligibility criteria, Turkey imposed a 'localisation requirement' on foreign producers to commit to localise in Turkey their production of certain

²⁸² WorldTradeLaw.net (n 251) 26.

²⁸³ Agreed Procedures for Arbitration under Article 25 of the DSU, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc WT/DS583/10 (25 March 2022) [1] ('Agreed Procedures, *Turkey-Pharmaceutical Products*').

²⁸⁴ *European Union — Safeguard Measures on Certain Steel Products*, WT/DS595.

pharmaceutical products.²⁸⁵ If such commitments are not given, fulfilled, or accepted by the Turkish authorities, the pharmaceutical products are excluded from Turkey's reimbursement scheme.²⁸⁶ The localisation requirement related to Turkey's policy objective of gradually transitioning from imports to domestic manufacturing of pharmaceuticals, with a view to meeting 60% of domestic pharmaceutical demand through domestic production.²⁸⁷

Turkey argued that the localisation requirement was covered by the government procurement derogation in Article III:8(a) of the GATT 1994 and therefore excepted from the national treatment obligation under Article III:4 of the GATT 1994.²⁸⁸ Article III:8(a) provides:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

The panel explicitly stated that Article III:8(a) requires, as one of its elements, a *purchase* of products by a governmental agency.²⁸⁹ It then found that the SSI did not acquire ownership of pharmaceutical products and, therefore, the SSI's reimbursements of the costs of those products did not qualify as a *purchase* by the SSI.²⁹⁰ Accordingly, the panel concluded that the localisation requirement was not covered by the derogation.²⁹¹

²⁸⁵ Panel Report [2.18], which is included in the Notification of an Appeal by Turkey Under Article 25 of the DSU, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc WT/DS583/12 (28 April 2022) ('Panel Report, *Turkey-Pharmaceutical Products*').

²⁸⁶ Ibid.

²⁸⁷ Ibid [20] nn 75.

²⁸⁸ Ibid [7.32]; Article III:4 of the GATT provides:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

²⁸⁹ Panel Report, *Turkey-Pharmaceutical Products* (n 285) [7.37].

²⁹⁰ Ibid [7.98].

²⁹¹ Ibid [7.104].

The panel's interpretation is consistent with the available AB jurisprudence it considered.²⁹² In *India-Solar Cells*,²⁹³ the AB stated that 'the entity purchasing products needs to be a government agency'.²⁹⁴ In *Canada-Renewable Energy*²⁹⁵ and *Canada-Feed-in Tariff Program*,²⁹⁶ the AB stated that "'procurement" is the operative word in Article III:8(a), describing the process and conduct of the governmental agency,' whereas "'purchased" describes the type of transaction through which that procurement is carried out.'²⁹⁷ Accordingly, Article III:8(a) exempts 'certain measures containing rules for the process by which government *purchases* products.'²⁹⁸

Having rejected the derogation argument under Article III:8(a), the panel found that the localisation requirement violated the national treatment rule under Article III:4. The panel considered it self-evident that a measure creating a financial incentive for outpatients to choose domestically produced pharmaceutical products over imported ones accords 'less favourable treatment' to the imports.²⁹⁹ The panel therefore concluded that the localisation requirement 'confer[red] an advantage on locally produced pharmaceutical products...to the detriment of like imported products'.³⁰⁰

The panel further rejected Turkey's defences that the measure was justified under the general exceptions in Article XX of the GATT, specifically Article XX(b) for the protection of human life or health, and Article XX(d) for compliance with domestic laws and regulations.³⁰¹

3.2. The Arbitration Procedure

The Agreed Procedures between the EU and Turkey were largely based on the MPIA model procedures. The principal point of departure lies in the method of arbitrator appointment. The

²⁹² Pahis, 'Appeals after the Appellate Body' (n 4) 309.

²⁹³ *India — Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456.

²⁹⁴ Appellate Body Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R (16 September 2016) [5.18].

²⁹⁵ *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412.

²⁹⁶ *Canada — Measures Relating to the Feed-in Tariff Program*, WT/DS426.

²⁹⁷ Appellate Body Reports, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R (6 May 2013) and *Canada — Measures Relating to the Feed-in-Tariff Program*, WT/DS426/AB/R (6 May 2013) [5.59].

²⁹⁸ Panel Report, *Turkey-Pharmaceutical Products* (n 285) [5.74].

²⁹⁹ *Ibid* [7.125].

³⁰⁰ *Ibid*.

³⁰¹ *Ibid* [8.1(iii)].

parties adopted a custom selection mechanism under which arbitrators were randomly selected from a combined list comprising former AB members and appeal arbitrators.³⁰² It is likely that the arbitrators were not entirely selected from the MPIA pool because Turkey played no role in its composition.³⁰³

Unlike in MPIA appeal arbitration, it was impossible for the arbitrators to set any organisational measures (such as word limits on the Notice of Appeal) or propose any substantive measures (restraint on DSU Article 11 claims) before Turkey filed the notice of appeal on 25 April 2022;³⁰⁴ this is because the tribunal was only composed after this on 28 April 2022. In the absence of such guidance, Turkey's Notice of Appeal, whilst relatively concise, included a claim under DSU Article 11.

The arbitrators otherwise adopted organisational measures to streamline the proceedings after their composition, including an organisational meeting with the parties to consider the draft working procedures at the outset of the arbitration, page limits on submissions, and time limits for the hearing. The arbitrators also emphasised that they took 'internal organisational steps' to streamline their work to meet the 90-day deadline.³⁰⁵

3.3. The Arbitration Award

Amongst other claims, Turkey challenged the panel's findings concerning the localisation requirement under Articles III:4 and III:8(a).³⁰⁶ As summarised above, the panel ruled that a purchase must be made by a governmental agency to qualify for the national treatment derogation established in Article III:8(a). Here is that provision once more:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for

³⁰² Agreed Procedures, *Turkey-Pharmaceutical Products* (n 283) [7].

³⁰³ Pahis, 'Appeals after the Appellate Body' (n 4) 300.

³⁰⁴ Hu (n 202) 49.

³⁰⁵ Arbitration under Article 25 of the DSU, Award of the Arbitrators, *Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc WT/DS583/ARB25 (25 July 2022) [2.2] ('Arbitration Award, *Turkey-Pharmaceutical Products*').

³⁰⁶ *Ibid* [3.4].

governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

The arbitrators found that the panel had erred in stating that Article III:8(a) requires a *purchase* by a governmental agency. The arbitrators began by stating that there is no strict ‘textual support’ for the requirement that a ‘purchase’ must be made by a ‘government agency’.³⁰⁷ They reasoned that only the word ‘procurement’ is qualified by the phrase ‘by governmental agencies’, and not the word ‘purchase’.³⁰⁸ Accordingly, there only needs to be a *procurement* by a ‘government agency’ for the derogation to apply. That being the case, the ‘relevant purchase transaction might be entered into by a non-governmental agency’,³⁰⁹ as long as ‘there is procurement by a governmental agency and procurement of products purchased for governmental purposes.’³¹⁰ In this regard, the arbitrators held that their interpretation accorded with the AB’s observations in *India -Solar Cells*, *Canada-Renewable Energy* and *Canada-Feed-in Tariff Program*. They recognised that particular statements in those decisions, when ‘taken out of context,’ could ‘arguably suggest that the [AB] read Article III:8(a) to cover only purchases by government agencies.’ However, the arbitrators found that those statements only provided ‘limited assistance to the interpretative issue raised in this Arbitration’ because the ‘governmental agencies were both procuring and purchasing the product at issue’.³¹¹ The arbitrators therefore concluded that Article III:8(a) only requires the government agency to ‘procure’ the pharmaceutical products, rather than ‘purchase’ them.

Nevertheless, as in *Colombia-Frozen Fries*, this interpretative divergence did not affect the resolution of the dispute. The arbitrators upheld the panel’s finding that the localisation requirement falls outside the ambit of Article III:8(a), albeit on different grounds. The arbitrators first noted that the term ‘procurement’ is distinguishable from the term ‘purchase’.³¹² In this context, the tribunal clarified that ‘procurement’ is not limited to ‘scenarios of ownership acquisition of the products’.³¹³ However, ‘procurement’ entails that the government agency has ‘a certain level of control over the products purchased’ which is

³⁰⁷ Weihuan Zhou, ‘Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products, WT/DS583/ARB25’ (2023) 117(2) *American Journal of International Law* 322, 327.

³⁰⁸ Arbitration Award, *Turkey-Pharmaceutical Products* (n 305) [6.46].

³⁰⁹ Ibid [6.47].

³¹⁰ Ibid [6.46].

³¹¹ Ibid [6.45]-[6.48].

³¹² Ibid [6.57].

³¹³ Ibid [6.58].

distinguishable from ‘merely financing or regulating the acquisition of products’.³¹⁴ The arbitrators then affirmed that the panel’s factual findings for the purpose of looking at the issue of purchase were equally relevant to the assessment of the issue of procurement.³¹⁵ The arbitrators therefore adopted the panel’s factual findings that under the reimbursement scheme the SSI did not ‘acquire any right of possession, any right of control, any right of exclusion, any right to derive income, or any right to freely dispose of the pharmaceutical products that it acquire[d]’. On those facts, the arbitrators concluded that ‘[w]hile the SSI pays for pharmaceutical products when they are obtained by outpatients subject to certain conditions, sets their price, and decides which pharmaceutical products are included in the Annex 4/A list’...‘there is no *procurement* by the SSI purchased for governmental purchases’ (emphasis added).³¹⁶ The arbitrators otherwise upheld all other findings of the panel.

3.4. Analysis of Turkey-Pharmaceutical Products

As in *Colombia-Frozen Fries* and *China-IPRs Enforcement*, the arbitrators issued their award within prescribed 90-day deadline. The award is relatively concise, spanning 50 pages. The arbitrators also explicitly adopted the panel’s factual findings relevant to procurement.³¹⁷ Reinforcing this deference to panel fact finding, the tribunal also rejected Turkey’s claim under DSU Article 11 that the panel failed to make an objective assessment of the facts.³¹⁸

On the merits, the arbitrators slightly broadened the scope of the ‘government procurement’ derogation under Article III:8(a) in finding that the government agency only needed to ‘procure’ the products, and not purchase them. The arbitrators sought to frame their approach as consistent with that of the AB in *India-Solar Cells*, *Canada-Renewable Energy* and *Canada-Feed-in Tariff Program*. The arbitrators emphasised that the AB ‘did not discuss the proper interpretation of the words “products purchased”’ with respect to the interpretative issue raised...in this Arbitration’³¹⁹ and that it was thus necessary to ‘to consider the specific case context in which the AB has made a particular legal interpretation or expression, and to

³¹⁴ Ibid.

³¹⁵ Ibid [5.59].

³¹⁶ Ibid [6.67]-[6.69].

³¹⁷ Ibid [6.59].

³¹⁸ Ibid [6.3.4].

³¹⁹ Ibid [6.84].

distinguish between different cases’.³²⁰ In this sense, the arbitrators’ departure from the prior AB reports was by way of clarification and not an explicit one reminiscent of *Colombia-Frozen Fries*.³²¹

Nonetheless, the award does bear certain parallels with *Colombia-Frozen Fries*. The arbitrators, who were likewise mandated by paragraph 10 of the Agreed Procedures to confine the dispute to only those issues necessary for its resolution, engaged in an interpretation of Article III:8(a) that had no impact on the outcome. In rejecting the panel’s analysis of whether a government agency had purchased the products and redirecting their focus to whether the products were procured, the result was nonetheless that the challenged measure did not fall within the ambit of Article III:8(a), even applying an expanded standard of the derogation.³²²

While the arbitrators’ reasons for broadening the scope of Article III:8(a) are not apparent from the face of the award, Pahis again argues that they could have dispensed with the interpretive exercise and simply observed that Turkey’s measure was not covered by the derogation under either analysis.³²³ Hu takes a different view to Pahis, arguing in favour of the arbitrators’ decision to clarify the deviation from the AB. He emphasises that interpretations made by the AB in a specific case context for a specific provision may not necessarily apply to another case, and that the legal interpretation made by the AB in a specific case may not have exhausted all possible factual situations that the provision may apply to.³²⁴ In that sense, their interpretative approach assisted in providing greater certainty for Members as to their understanding of the provision in question.

4. Conclusion: Appeals to Arbitration

Out of the 37 panel reports, only three (8%) were submitted to appellate arbitration. Although only five disputes have been between two MPIA members, this nonetheless underscores an underutilisation of the MPIA and DSU Article 25 by Member States. The low recourse to DSU Article 25 is logical, since once a dispute has materialised, the respondent Member State has

³²⁰ Hu (n 202) 58.

³²¹ Ibid 58-59.

³²² Pahis, ‘Appeals after the Appellate Body’ (n 4) 311.

³²³ Ibid.

³²⁴ Hu (n 202) 58-59.

little incentive to surrender its de facto veto. It is more surprising that the MPIA has only produced two appeal arbitration awards to date, which shows that the MPIA has experienced a marked decline in the number of appeals compared to the experience of the AB.

The three disputes resolved through appeal arbitration — *Colombia-Frozen Fries*, *China-IPRs Enforcement*, and *Turkey-Pharmaceutical Products* — provide a window into how arbitrators are approaching dispute resolution in the absence of a functioning AB. On the procedural side, the arbitrators in all three cases produced the appeal arbitration award within the prescribed 90-day deadline. They deployed several innovations to improve upon AB procedure, such as word and time limits. On substance, the arbitrators departed from AB jurisprudence in *Colombia-Frozen Fries* and *Turkey-Pharmaceutical Products*, adopting interpretive approaches that afforded more deference to the state. In *Colombia-Frozen Fries*, the arbitrators' reading of Article 17.6(ii) of the ADA gave greater deference to the national authority's interpretation of the ADA. In *Turkey-Pharmaceutical Products*, the arbitrators' reading of Article III:8(a) of the GATT established slightly broader criteria for a government to qualify for the government procurement derogation. It may be that the arbitrators are signalling a better balance between Member autonomy and judicial oversight.

G. WAIVED APPEALS

Of the 37 panel reports issued between January 2020 and December 2025, eight (22%) were not appealed, either into the void or to arbitration.³²⁵ Of these, four (11%) were adopted notwithstanding the retained option to appeal into the void; and four (11%) were adopted notwithstanding an agreement to arbitrate the appeal under DSU Article 25. Naturally, the factors underpinning a decision to waive an appeal vary significantly depending on whether the option to appeal into the void is available.

1. Panel Reports Adopted Notwithstanding the Retained Option to Appeal into the Void

The following analysis concerns four disputes in which the option to appeal the panel report into the void was retained, because at least one party was not an MPIA member and no Article 25 arbitration agreement was concluded at any stage, yet the option to block the process was not exercised. In that respect, a ‘losing’ party who allows the adoption of a panel report effectively concedes its de facto veto and accepts to comply with the rules.

Of the four disputes in this category, two involved the US as respondent: *US-Ripe Olives from Spain*,³²⁶ which produced mixed findings both in favour of and against the US, and *US-Safeguard Measure on Washers*,³²⁷ which concerned a safeguard measure that had expired by the time of adoption. The remaining two involved the EU as respondent: *EU-Palm Oil*³²⁸ and *EU and Certain Member States-Palm Oil*,³²⁹ both of which resulted in mixed findings.

³²⁵ See Appendix 1; see also DSU (n 10) art 16.4: Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

³²⁶ *United States — Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577.

³²⁷ *United States — Safeguard Measure on Imports of Large Residential Washer*, WT/DS546.

³²⁸ *European Union — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WT/DS593.

³²⁹ *European Union and certain Member states — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WT/DS600.

Table 4: Panel Rulings Adopted Notwithstanding the Retention of the Option to Appeal into the Void

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Year of Panel Ruling Adoption</i>
EU	US	DS577: <i>Ripe Olives from Spain</i>	2021
Korea	US	DS546: <i>Safeguard Measure on Washers</i>	2023
Malaysia	EU	DS600: <i>Palm Oil</i>	2024
Indonesia	EU	DS593: <i>Palm Oil</i>	2025

1.1. US-Ripe Olives from Spain

US-Ripe Olives from Spain relates to countervailing and anti-dumping duties that the US imposed on imports of Spanish ripe olives. The US applied the measures on the basis that Spanish olive processors benefitted indirectly from subsidies granted by the EU's Common Agricultural Policy to Spanish olive producers. At the core of the panel report was the legislative basis for these duties, being section 771B of the US Tariff Act of 1930 ('Section 771B'). That provision presumed that any subsidy provided to producers of the agricultural input is automatically and fully passed downstream to the processed product.³³⁰

The panel found that Section 771B was inconsistent with Article VI:3 of the GATT 1994 and Article 10 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).³³¹ The panel reasoned that the section 771B presumed that the entire benefit of a subsidy from agricultural producers passes downstream based on a consideration of only two factual circumstances prescribed in the provision, without leaving open the possibility of that considering any other relevant factors that are relevant to the determination of a pass through. In conclusion, section 771B failed to take into account relevant evidence as required by Article 10.³³²

³³⁰ Panel Report, *United States — Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WTO Doc WT/DS577/R (19 November 2021) [2.3], [7.3] ('Panel Report, *US-Ripe Olives from Spain*').

³³¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Subsidies and Countervailing Measures*').

³³² Panel Report, *US-Ripe Olives from Spain* (n 330) [7.170].

The US nevertheless secured important findings in its favour. First, the panel found that the US' injury determination complied with the ADA and SCM Agreement.³³³ Second, the panel found that the EU's subsidies fell within the scope of the SCM Agreement. Commentators suggested that this may explain why the US did not appeal the report into the void, as the ruling may 'leave the door open for the US to challenge other elements of the EU's core agricultural support programme under the aegis of the SCM Agreement.'³³⁴

At the time of the panel ruling, observers considered the US decision not to appeal to be a 'nice sign of a good faith approach to WTO obligations.'³³⁵ That interpretation has not aged well. The US ultimately failed to bring its measures fully into compliance with the panel ruling, and following arbitration under DSU Article 22.6, the EU has been authorised to retaliate against the US.

1.2. *US-Safeguard Measure on Washers*

US-Safeguard Measure on Washers concerns a definitive safeguard measure imposed by the US on imports of large residential washers from Korea. The panel report ruled largely against the US, but it nonetheless forewent an appeal.³³⁶ The US indicated this was partly because the safeguard measure had already expired by the time the report came before the DSB. As the US stated at the DSB meeting of 28 April 2023:

Although it was disappointed with certain of the Panel's findings, on balance, we have decided to permit the report to be adopted today. We take this step in light of all the circumstances, including ...the fact that *the safeguard measure is now expired*.

(emphasis added)

The DSB adopted the panel report at its meeting on 28 April 2023, and on the same day, the US and Korea informed the DSB that they had reached a mutually agreed solution. Given that

³³³ Ibid [7.5.6].

³³⁴ Chris Horseman, Spanish olives WTO panel avoids 'the void' – but Appellate Body stays in limbo, *Borderlex* (20 December 2021) <<https://borderlex.net/2021/12/20/spanish-olives-wto-panel-avoids-the-void-but-appellate-body-stays-in-limbo/>>.

³³⁵ Ibid.

³³⁶ Panel Report, *United States — Safeguard Measure on Imports of Large Residential Washers*, WTO Doc WT/DS546/R (8 February 2022).

the primary goal of the WTO DSS is to secure the withdrawal of inconsistent measures,³³⁷ and a losing party does not need to pay damages to the winning party, the US did not lose much skin off its back by adopting a ruling relating to an expired measure.

1.3. EU-Palm Oil and EU and Certain Member States-Palm Oil

EU-Palm Oil and *EU and Certain Member States-Palm Oil* are parallel cases, in which Indonesia and Malaysia respectively challenged the EU's restriction on the use of palm oil in biofuels under its renewable energy directive 'RED II', as well as related French tax measures. The arguments and conclusions in both cases almost replicate one another.³³⁸

The objective of RED II is to establish targets for the consumption of biofuels in the EU transport fuel market as part of a decarbonisation initiative; however, it limits the contribution that certain high-risk crop-based biofuels can make towards achieving those targets.³³⁹ In that respect, the EU established criteria to determine which crop-based biofuels carry a high risk of increasing greenhouse gas emissions due to 'indirect land usage change' (ILUC). Only biofuels made from palm oil were categorised as high ILUC risk.³⁴⁰ Accordingly, the directive significantly lowered demand for palm oil, of which Indonesia and Malaysia are the dominant global exporters.

In favour of the EU, the panels ruled two-to-one that the environmental objective of RED II complied with Article 2.2 of the Technical Barriers to Trade Agreement (TBT Agreement) and Article XX of the GATT 1994.³⁴¹ The panel reasoned that the measures were not more trade-restrictive than was necessary to limit ILUC-related greenhouse gas emissions associated with

³³⁷ David Palmeter et al, *Dispute Settlement in the World Trade Organization* (Cambridge University Press, 3rd ed, 2022) 458.

³³⁸ Chris Horseman, 'WTO panel gives EU qualified clean slate on palm oil regulation' *Borderlex* (10 January 2025) < <https://borderlex.net/2025/01/10/wto-panel-gives-eu-qualified-clean-slate-on-palm-oil-regulation/> >.

³³⁹ Panel Report, *European Union — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WTO Doc WT/DS593/R (10 January 2025) [2.2] ('Panel Report, *EU-Palm Oil*'); Panel Report, *European Union and certain Member states — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WTO Doc WT/DS600/R (5 March 2024) [2.2] ('Panel Report, *EU and Certain Member States-Palm Oil*').

³⁴⁰ Panel Report, *EU-Palm Oil* (n 339) [2.3]; Panel Report, *EU and Certain Member States-Palm Oil* (n 339) [2.3].

³⁴¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*').

crop-based biofuels.³⁴² In that respect, the measures were necessary to fulfil a legitimate objective under Article 2.2 and Article XX.

Notwithstanding this, the panels found two-to-one that the manner in which the measures had been administered were inconsistent with Article 2.1 of the TBT Agreement and Article XX of the GATT 1994.³⁴³ Amongst other things, the EU had failed to conduct a timely review of the data used to determine which biofuels carried a high ILUC risk. The panel concluded this resulted in arbitrary discrimination in violation of Article 2.2 and Article XX.³⁴⁴

In both cases, one member of the panel dissented, finding that the inconsistencies with the TBT Agreement and the GATT 1994 were not limited to deficiencies in the manner in which it has been administered.³⁴⁵ Indonesia and Malaysia had provided ‘sufficient evidence’ to demonstrate that the objective of RED II included an element of protectionism.³⁴⁶ The dissenter emphasised that there was an element of arbitrariness in singling out palm oil when other oils, notably soy-bean, posed the same alleged risk.³⁴⁷ The dissenter therefore concluded that the measures did not have an exclusively legitimate objective and were fundamentally inconsistent with Article 2.2 of the TBT Agreement.³⁴⁸

Commentators have described the panel reports as giving the EU ‘a fairly clean slate overall’,³⁴⁹ and a ‘qualified clean slate’³⁵⁰ because the directive itself and its use of ILUC as a criterion were not faulted, thereby confirming the ability of the EU to pursue measures to curb greenhouse gas emissions outside of its borders.³⁵¹

³⁴² Panel Report, *EU-Palm Oil* (n 339) [7.1.2.3.7]; Panel Report, *EU and Certain Member States-Palm Oil* (n 339) [7.1.2.3.7].

³⁴³ Panel Report, *EU-Palm Oil* (n 339) [7.1.2.4.6]; Panel Report, *EU and Certain Member States-Palm Oil* (n 339) [7.1.2.4.6].

³⁴⁴ *Ibid.*

³⁴⁵ Panel Report, *EU-Palm Oil* (n 339) [8]; Panel Report, *EU and Certain Member States-Palm Oil* (n 339) [8].

³⁴⁶ Panel Report, *EU-Palm Oil* (n 339) [7.3]; Panel Report, *EU and Certain Member States-Palm Oil* (n 339) [7.4].

³⁴⁷ Panel Report, *EU-Palm Oil* (n 339) [7.1462]; Panel Report, *EU and Certain Member States-Palm Oil* (n 339) [7.1458].

³⁴⁸ Panel Report, *EU-Palm Oil* (n 339) [7.1463]; Panel Report, *EU and Certain Member States-Palm Oil* (n 339) [7.1459].

³⁴⁹ Iana Dreyer, ‘Malaysia palm oil WTO panel divided over EU protectionist intent’ *Borderlex* (5 March 2024) < <https://borderlex.net/2024/03/05/malaysia-palm-oil-wto-panel-divided-over-eu-protectionist-intent/> >.

³⁵⁰ Chris Horseman, ‘WTO panel gives EU qualified clean slate on palm oil regulation’ *Borderlex* (10 January 2025) < <https://borderlex.net/2025/01/10/wto-panel-gives-eu-qualified-clean-slate-on-palm-oil-regulation/> >.

³⁵¹ Clémentine Baldon and Nikos Braoudakis, ‘EU-Malaysia Palm Oil Dispute: WTO Confirms Legitimacy of Environmental Regulation but Cautions on its Concrete Implementation’ *Baldon Advocats* (March 2024)

1.4. Analysis of US-Ripe Olives from Spain, US-Safeguard Measure on Washers, EU-Palm Oil and EU and Certain Member States-Palm Oil

To date, there are only two broad situations in which respondents have allowed the adoption of panel reports in disputes not bound by DSU Article 25 appeal arbitration. The first arises where the panel report contains at least partial victories for the respondent (*US-Ripe Olives from Spain*, *EU-Palm Oil* and *EU and Certain Member States-Palm Oil*). The second occurs where adoption imposes no meaningful compliance burden on the respondent, because the challenged measure had already expired at the time of adoption (*US-Safeguard Measure on Washers*). It is reasonable to infer from the cases that appeals into the void were foregone because the panel findings were sufficiently favourable or tolerable to the respondent, or the overall balance was acceptable despite the inclusion of some adverse determinations.

For completeness, it is also noted that appeals into void are not necessarily costless. The EU may have also weighed up the following costs of appealing into the void:

- (i) Retaliation costs, in that an appeal into the void does not preclude retaliation outside the WTO system.
- (ii) Emulation costs, whereby a Member's appeal into the void may increase the risk that it suffers the same fate at the hands of other Members.
- (iii) The costs to the integrity of the DSS, insofar as there is an interest in preserving the capacity to bring claims effectively as a future complaint.
- (iv) Reputational costs, although these have arguably abated as appeals into the void have become increasingly normalised.³⁵²

What is clear is that, for disputes not bound by DSU Article 25 appeal arbitration, waiving an appeal and permitting the adoption of a panel report has not become common practice in the post-AB reality. Indeed, this is consistent with the broader findings of Chapter F that appeals into the void have become the prevailing practice.

<<https://baldon-avocats.com/eu-malaysia-palm-oil-dispute-wto-confirms-legitimacy-of-environmental-regulation-but-cautions-on-its-concrete-implementation/>>.

³⁵² Pauwelyn, 'What to Expect?' (n 147) 306-307.

2. Panel Reports Adopted Notwithstanding an Appeal Arbitration Agreement

The following analysis concerns four disputes in which an appeal was waived notwithstanding an arbitration agreement. Of those, three disputes were bound by mandatory arbitration under the MPIA, *Costa Rica-Avocados*,³⁵³ *China-AD on Stainless Steel*,³⁵⁴ and *Australia-AD/CVD on Certain Products*,³⁵⁵ and one was subject to a bilateral arbitration agreement, *EU-Safeguard Measures on Steel*.

Table 5: Panel Reports Adopted Notwithstanding an Arbitration Agreement

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Year of Panel Ruling Adoption</i>
Mexico	Costa Rica	DS524: <i>Avocados</i>	2022
Turkey	EU	DS595: <i>Safeguard Measures on Steel</i>	2022
Japan	China	DS601: <i>AD on Stainless Steel</i>	2023
China	Australia	DS603: <i>AD/CVD on Certain Products</i>	2025

2.1. *Costa Rica-Avocados*

Costa Rica-Avocados was brought by Mexico against Costa Rica in March 2017. Both parties are original members of the MPIA, which came into effect after Mexico requested the panel to be established in December 2018 but before the panel report was circulated in April 2022. Accordingly, Mexico and Costa Rica participated in the MPIA knowing that any appeal in *Costa Rica-Avocados* would be subject to arbitration. Costa Rica lost the case but forewent an appeal.³⁵⁶

The dispute relates to restrictions imposed by Costa Rica on Mexican avocado fruit imports.³⁵⁷ Costa Rica claimed the restrictions were necessary as Mexican avocado fruits posed a

³⁵³ *Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico*, WT/DS524.

³⁵⁴ *China — Anti Dumping Measures on Stainless Steel Products from Japan*, WT/DS601.

³⁵⁵ *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WT/DS603.

³⁵⁶ Pahis, ‘Appeals after the Appellate Body’ (n 4) 314; ‘DS524: Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico’ *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds524_e.htm>.

³⁵⁷ Panel Report, *Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico*, WTO Doc WT/DS524/R (13 April 2022) (‘Panel Report, *Costa Rica-Avocados*’).

contamination risk of avocado sunblotch viroid (ASBV) to Costa Rican avocado trees. ASBV is disease which exclusively affects avocado trees and fruit, meaning that fewer fruit are produced.³⁵⁸ To ostensibly protect its domestic avocado production, Costa Rica introduced measures requiring Mexico to provide official certification that its avocados were ASBV-free and came from an ASBV-free production area. Costa Rica otherwise required Mexico to comply with a bilateral program in relation to ASBV.³⁵⁹

The panel particularly faulted the risk assessment that the measures were based on, which it found to be inconsistent with Articles 2 and 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).³⁶⁰ First, the panel found that Costa Rica's assertion that its territory was free from ASBV, which formed part of the basis of its risk assessment, was not 'legitimately scientific'.³⁶¹ Second, the panel found that the measures did not take into account available scientific evidence³⁶² and were not based on scientific principles.³⁶³ Third, the panel found that Costa Rica failed to consider a number of relevant economic factors in assessing the ASBV risk, including the cost-effectiveness of alternative approaches to limiting risks.³⁶⁴ Based on these factors, the panel concluded that the measures were not based on scientific principles as required by Article 2.2 of the SPS Agreement, and that its assessment of the risk to plant life or health did not comply with Articles 5.1-5.3 of the SPS Agreement.³⁶⁵

2.2. *China-AD on Stainless Steel*

In *China-AD on Stainless Steel*, Japan brought an anti-dumping case against China. China was one of the original participants in the MPIA when it was announced in 2020. Japan was not an MPIA participant when it initiated the dispute in June 2021 but joined the arrangement before

³⁵⁸ Ibid [2.1.2.2.1]; 'Avocado sunblotch disease' *Biosecurity New Zealand* (Web Page, 15 July 2025) <<https://www.mpi.govt.nz/biosecurity/pest-and-disease-threats-to-new-zealand/horticultural-pest-and-disease-threats-to-new-zealand/avocado-sunblotch-disease>>.

³⁵⁹ Panel Report, *Costa Rica-Avocados* (n 357) [2.1]; Pahis, 'Appeals after the Appellate Body' (n 4) 314.

³⁶⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary and Phytosanitary Measures*'); Panel Report, *Costa Rica-Avocados* (n 357) [8].

³⁶¹ Panel Report, *Costa Rica-Avocados* (n 357) [7.861].

³⁶² Ibid [7.1633].

³⁶³ Ibid [7.1735].

³⁶⁴ Ibid [7.1686].

³⁶⁵ Ibid [8].

the panel circulated its report in June 2023.³⁶⁶ In other words, Japan joined the MPIA knowing that any appeals in *China-AD on Stainless Steel* would be subject to DSU Article 25 arbitration. Ultimately, the panel sided with Japan and China waived an appeal.

The dispute itself is an anti-dumping case on stainless steel billets, hot-rolled coils and hot-rolled plates from Japan. The panel found that China had violated several provisions of the ADA and Article VI of the GATT 1994 governing anti-dumping duties.³⁶⁷ Commentators observed that the dispute was a standard anti-dumping case which ‘finds the imposing country at fault for having wrongly defined their domestic industry, for making erroneous price comparisons to determine the normal value of a product, and for engaging in a range of procedural missteps, thus violating the terms of the [ADA].’ Again, there is nothing overtly unusual about China’s decision to forgo an appeal.³⁶⁸

More interesting is that Japan acceded to the MPIA in the course of the panel proceedings. Japan was not an original participant in the MPIA. Indeed, in 2019 the Shinzo Abe administration had begrudged an AB ruling issued in *Korea-Radionuclides*.³⁶⁹ The dispute concerned South Korean import bans on seafood from Japanese waters, due to radioactive leaks from the Fukushima nuclear power plant disaster, a dispute that was highly politicised against the backdrop of Japan-South Korea relations.³⁷⁰

Japan appears to have had a shift in perspective, with the present dispute being a key factor in its decision to ultimately join the MPIA.³⁷¹ Kawase states that if Japan had stayed out of the arrangement, ‘it would have been inevitable that China would appeal the case into the void in the event that Japan prevailed before the panel.’³⁷² Faced with this prospect, Japan’s business community urged the government to accede to the MPIA.³⁷³ Japan did so in March 2023,

³⁶⁶ ‘DS601: China — Anti Dumping Measures on Stainless Steel Products from Japan’ *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds601_e.htm>.

³⁶⁷ Panel Report, *China — Anti Dumping Measures on Stainless Steel Products from Japan*, WTO Doc WT/DS601/R (19 June 2023) [8].

³⁶⁸ Iana Dreyer, ‘WTO Corner: Another panel that does not go to the MPIA’ (Web Page, 20 June 2023) <https://borderlex.net/2023/06/20/wto-corner-another-panel-that-does-not-go-to-the-mpia/> (‘WTO Corner’).

³⁶⁹ Appellate Body Report, *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*, WTO Doc WT/DS495/R (11 April 2019).

³⁷⁰ Tsuyoshi Kawase, ‘The MPIA & the Rule of Law under Geopolitical Tensions – from the Perspective of Japan as a Middle Power’ (Research Paper 1-3.4, Research Group on the International Trading System led by the Japan Economic Foundation, January 2025) 7-9.

³⁷¹ Dreyer, ‘WTO Corner’ (n 368).

³⁷² Kawase (n 370) 8.

³⁷³ Ibid.

thereby removing the option for China to appeal into the void and playing a role in its ultimate decision to allow the panel report to be adopted. China has since repealed the challenged measure.

2.3. *Australia-AD/CVD on Certain Products*

Australia-AD/CVD on Certain Products concerned a dispute initiated in 2024 between two original MPIA participants, China and Australia. Accordingly, the parties' consent to appeal arbitration was ex ante. The dispute concerned anti-dumping duties imposed by Australia on various Chinese manufactured goods, including stainless sinks, wind towers and railway wheels, as well as countervailing measures on stainless steel sinks. Australia lost the dispute but did not appeal its loss.³⁷⁴

The panel report largely concentrated on the fact that Australia had used an erroneous methodology to calculate the challenged duties, which was found to violate a number of articles of the GATT 1994 and the ADA.³⁷⁵ The dispute arose against the backdrop of a difficult trade relationship between the two countries. In 2020, the Australian government called for an independent investigation into the origins of COVID19, a move to which China strongly objected. China subsequently imposed a number of restrictive trade measures on Australian exports, including anti-dumping and countervailing duties.³⁷⁶ In response, Australia challenged two of these measures at the WTO: (i) *China-AD/CVD on Barley*, regarding anti-dumping and countervailing duties on barley;³⁷⁷ and (ii) *China-AD/CVD on Wine*, regarding anti-dumping and countervailing duties on wine.³⁷⁸ Just five days after Australia initiated *China-AD/CVD on Wine*, China filed the present dispute. China-Australia relations have been improving since 2023 following a change of government in Australia. In both *China-AD/CVD on Barley* and *China-AD/CVD on Wine*, China and Australia ultimately reached a mutually agreed solution. As already mentioned, Australia forewent an appeal in DS603.

³⁷⁴ Panel Report, *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Doc WT/DS603/R (26 March 2024).

³⁷⁵ Ibid [8].

³⁷⁶ Kawase (n 370) 6-7.

³⁷⁷ Panel Report, *China — Anti Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598/R (24 August 2023).

³⁷⁸ Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Doc WT/DS602/R (19 April 2024).

Without the MPIA, *Australia-AD/CVD on Certain Products*, as well as *China-AD/CVD on Barley* and *China-AD/CVD on Wine*, could have unfolded quite differently. The MPIA functioned as a mechanism for Australia to respond to Chinese economic coercion in *China-AD/CVD on Barley* and *China-AD/CVD on Wine*,³⁷⁹ and as a mechanism through which China could strategically pursue its own claim and preserve its own victory in *Australia-AD/CVD on Certain Products*.

2.4. Analysis of *Costa Rica-Avocados*, *China-AD on Stainless Steel* and *Australia-AD/CVD on Certain Products*

In disputes covered by the MPIA, the decision whether to appeal a panel ruling involves considerations such as the perceived legal merit of an appeal, the resources required to pursue appellate proceedings, and political considerations. A party may also weigh the likelihood that an appeal could entrench an adverse ruling if confirmed. In this respect, the calculus resembles the types of considerations that ordinarily informed appeal decisions under the two-tiered system of dispute settlement prior to the AB crisis.

While the precise motivations for waiving an appeal can only be speculated upon in DS524, DS601 and DS603, the analysis did not reveal anything overtly unusual about the decisions of the respondents to forgo an appeal. As Pahis notes, historical practice likewise indicates that leaving a panel report unappealed is not inherently unusual: during the first 25 years of the DSU, approximately 24% of panel reports were not appealed.³⁸⁰ Indeed, the parties would have faced a very different situation had the option existed to appeal into the void. This point was particularly underscored in DS601, where Japan acceded to the MPIA during the panel proceedings in order to remove that possibility from its opponent.

2.5. *EU-Safeguard Measures on Steel*

EU-Safeguard Measures on Steel is a dispute between one MPIA member and one non-member, respectively, the EU and Turkey. The EU introduced a provisional safeguard measure

³⁷⁹ Kawase (n 370) 6-7.

³⁸⁰ Pahis, 'Appeals after the Appellate Body' (n 4) 314.

and a definitive safeguard measure on imports of certain steel products.³⁸¹ The panel only reviewed the definitive safeguard measure, which had replaced the provisional safeguard measure. The definitive safeguard took the form of duty-free tariff-rate quotas for each of the 26 product categories subject to the measure and an out-of-quota duty rate of 25% for all product categories.³⁸²

The EU imposed the safeguards on the basis that ‘unforeseen developments’ had resulted in an increase in imports of certain steel products into the EU market, and that the increase in imports was threatening the EU with serious injury.³⁸³ The unforeseen developments included the following cumulative developments: (i) ‘unprecedented’ overcapacity in the steel sector; (ii) the greater use of trade-restrictive measures in third-country markets and a steady increase in trade defence measures on steel; and (iii) Section 232 of the Trade Expansion Act of 1962 (United States)³⁸⁴ (Section 232) which enacted far-reaching import restrictions on steel.³⁸⁵

Turkey challenged the measures on the grounds that they were inconsistent with various provisions of the Agreement on Safeguards (SG Agreement) and the GATT.³⁸⁶ The panel ruling was mixed, accepting some of Turkey’s claims and rejecting others.

One of Turkey’s main claims was that the definitive safeguard measure violated Article XIX:1(a) of the GATT because the EU had erred in its assessment that the increase in imports resulted from ‘unforeseen developments’. Specifically, Turkey argued that: (i) the EU did not identify unforeseen developments; (ii) if it did identify developments, that they were not unforeseen; and (iii) it did not demonstrate that the injurious increase in imports took place ‘as a result of’ the unforeseen developments.³⁸⁷ Of these arguments, the panel accepted only the latter.

³⁸¹ Panel Report, *European Union — Safeguard Measures on Certain Steel Products*, WTO Doc WT/DS595/R (29 April 2022) [2.1] (‘Panel Report, *EU-Safeguard Measures on Steel*’).

³⁸² Ibid [7.51].

³⁸³ ‘DS595: European Union — Safeguard Measures on Certain Steel Products’ *World Trade Organization* (Web Page) < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds595_e.htm >.

³⁸⁴ *Trade Expansion Act of 1962*, 19 USC § 1862.

³⁸⁵ Panel Report, *EU-Safeguard Measures on Steel* (n 381) [7.92].

³⁸⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*Agreement on Safeguards*’).

³⁸⁷ Panel Report, *EU-Safeguard Measures on Steel* (n 381) [7.76].

First, the panel clarified that the phrase ‘as a result of’ in Article XIX:1(a) did not establish a ‘causation requirement’, although it did require the EU to substantiate a ‘logical connection’ between the unforeseen developments and the increase in imports.³⁸⁸ The panel then separately considered each of the unforeseen developments (i.e. overcapacity, the increase in trade restrictive and trade defence measures, and the Section 232 measures) to determine whether there was a *logical connection* to the increase in imports.

Overcapacity: The panel found that the EU was not required to do ‘a great deal of analysis’ to establish the requisite connection between the unforeseen development (here, over capacity) and the increase in imports. However, the EU did not satisfy this requirement because it merely asserted the connection existed, without referencing any evidence for its assertion.³⁸⁹

Trade restrictive and trade defence measures: The panel found that the EU was required to do ‘a more detailed analysis’ to establish the requisite connection between the unforeseen development (here, trade restrictive and trade defence measures) and the increase in imports; however, the EU offered no such analysis.³⁹⁰

Section 232 measures: The EU’s finding that the unforeseen development (here, the Section 232 measures) resulted in an increase in imports rested on: (i) the level and scope of the US measures; (ii) the claim that the EU is an attractive market for steel products in terms of demand and price; and (iii) data showing that ‘between the imposition of the Section 232 tariff on steel in March 2018 and September 2018, monthly imports of steel into the United States had decreased compared to the same month of 2017, except in April, and monthly imports into the EU had correspondingly increased. The panel found that the EU needed a ‘much more detailed analysis’ than simply ‘bringing two sets of facts together’ to establish the requisite connection. Accordingly, the panel concluded that the increase in imports did not occur ‘as a result of’ the unforeseen developments, as required by Article XIX:1(a).³⁹¹ The panel further accepted Turkey’s claim that the EU’s finding of a threat serious injury was not ‘based on facts’ as required by Article 4.1(b) of the SG Agreement.

³⁸⁸ Ibid [7.127].

³⁸⁹ Ibid [7.131].

³⁹⁰ Ibid [7.137].

³⁹¹ Ibid [7.142].

2.6. Analysis of EU-Safeguard Measures on Steel

The EU could have appealed the panel report into the void as Turkey is not an MPIA member however the parties notified that they had agreed to ad hoc arbitration procedures on 22 March 2022.³⁹² On the same day, the EU and Turkey notified their agreement to ad hoc arbitration procedures in the parallel dispute *Turkey-Pharmaceutical Products*.

It is of extreme interest that both arbitration agreements were simultaneously entered into after the panel reports were circulated to the parties. That is to say, the parties consented to appeal arbitration after confirming that each had lost one dispute and prevailed in the other.³⁹³ Ultimately, Turkey appealed its loss in *Turkey-Pharmaceutical Products* and the EU allowed adoption of the panel report notwithstanding its loss in *EU-Safeguard Measures on Steel*.

Pahis observes that this behaviour can be plausibly explained by a ‘logic of reciprocity’.³⁹⁴ The EU’s agreement to arbitrate any appeal in DS595 appears to be exchanged for Turkey’s agreement to arbitrate any appeal in *Turkey-Pharmaceutical Products*. In this sense, the EU and Turkey are each precluded from appealing their respective losses in the void and nullifying each other’s victories. Put differently, the EU’s consent to appeal arbitration in *EU-Safeguard Measures on Steel* is a concession made in exchange for Turkey’s agreement to do the same in *Turkey-Pharmaceutical Products*.³⁹⁵ Pahis concludes that reciprocal arbitration agreements can be reproduced ex post in the context of parallel losses, as demonstrated by *Turkey-Pharmaceutical Products* and *EU-Safeguard Measures on Steel*. Although a respondent generally has little incentive to concede its ability to appeal into the void ex post, this is not necessarily true in the context of parallel losses whereby each party can agree not to appeal its loss into the void to try and preserve its own win in the other dispute.³⁹⁶ Nonetheless, not all Members involved in parallel cases are swayed by this logic, as demonstrated above by Indonesia’s refusal to accept the EU’s invitations to arbitrate parallel disputes on a reciprocal basis.

³⁹² Agreed Procedures for Arbitration Under Article 25 of the DSU, *European Union — Safeguard Measures on Certain Steel Products*, WTO Doc WT/DS595/10 (25 March 2022).

³⁹³ Pahis, ‘Appeals after the Appellate Body’ (n 4) 313.

³⁹⁴ Ibid.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

3. Conclusion: Waived Appeals

Of the 37 panel reports circulated in the first five years of the impasse, an appeal was foregone in four disputes despite the option to appeal into the void (11%), and four disputes despite an arbitration agreement (11%).

It is noteworthy that, among disputes subject to mandatory arbitration, Members more frequently forewent an appeal than pursued one. Of the five disputes between two MPIA members, three appeals were foregone and two were submitted to appeal arbitration. Of the two disputes subject to a bilateral arbitration agreement, one appeal was foregone and one was submitted to arbitration. The sharp underutilisation of DSU Article 25 is expected because there is no real incentive for a respondent to agree to appeal arbitration *ex post* and concede its *de facto* veto. That the MPIA has only been used to obtain a second instance decision two times in the first years of its operation is less expected. This underutilisation of the MPIA is examined further in the following chapter.

Of the four disputes in which an appeal was foregone despite the availability of an appeal into the void, respondent Member States (the US and the EU) were willing to relinquish their *de facto* veto where the outcome was sufficiently acceptable to the respondent or where the challenged measure had already expired. The limited circumstances in which Members have foregone an appeal into the void indicate that it is based on a rational cost-benefit calculation.

H. CRITICAL EVALUATION

1.0 How are Member States approaching dispute resolution in the absence of a functioning AB?

The following critically evaluates the findings and analysis in the preceding chapters, with a view to answering the research question: *How are Member States approaching dispute resolution in the absence of a functioning AB?*

1.1 Member States are Increasingly Content to Appeal into the Void

Appeals into the void are the dominant way in which Member States engage with the DSS in the absence of a functioning AB. Appealing into the void was available in 32 of the 37 disputes, and Members initiated an appeal in 26 (81%) of those cases. The high frequency of appeals into the void over a sustained five-year period, initiated by 12 different Member States encompassing both MPIA participants and non-participants, means that appeals into the void are the new normal.

Commentators have characterised appeals into the void as power-based moves or instances of Member exploiting the impasse in their favour. That is fitting in many cases of appeals into the void; however, it is also helpful to view such Member State behaviour from a game theory perspective. Members continue to operate within a trading environment shaped by geopolitical competition, and appealing into the void may be the most rational strategy that an individual Member State can take to protect its immediate interests. Each Member's individually 'rational' decision to appeal into the void—on the basis that it possesses a de facto veto against any adverse ruling—contributes to an environment in which the next Member feels more comfortable, or encouraged, to do the same. In that sense, the practice of appealing into the void has therefore become self-reinforcing: the more Members appeal into the void, the more rational (and less costly) it becomes for others to follow suit. It is therefore difficult to characterise all appeals into the void as a rejection of systemic integrity. For example, even the EU, which generally prefers systemic alternatives to appeals into the void, is captured by the same rational calculus. The EU appealed three disputes into the void after the claimant in each

case refused its offer to agree to a form of appeal arbitration. Once the opposing party declined to cooperate, it would not have been rational for the EU to absorb the cost of an adverse ruling in the name of systemic integrity.

1.2. Member States Are Using the DSS More Selectively

Member States are bringing fewer disputes to the DSS. Until 2019, an average of 19 new disputes were filed each year; since 2020, that figure has fallen to approximately seven. This decline is unsurprising given the high likelihood that any panel ruling will be appealed into the void. Yet Member States still have an appetite for resolving their differences through the WTO DSS. An average of seven disputes per year still represents a steady stream of cases, but suggests that Members are more selective about which disputes to bring to the WTO, likely pursuing only those where the expected value justifies the investment. Even if a panel ruling is ultimately appealed into the void, there may be political or symbolic value in obtaining a favourable report. A panel finding of WTO-inconsistency can be invoked in diplomatic negotiations and may strengthen a claimant's hand, even if the ruling is formally blocked.³⁹⁷ Member States also continue to resolve their disputes in other ways, such as through mutually agreed solutions and adoption of the panel ruling, which was always an intended function of the DSS.³⁹⁸

1.3. MPIA Participants Underutilise the Arrangement

The overall appeal rate is 78%, which is similar to pre-crisis levels. For reference, as of 2007, an estimated 70% of cases were appealed, which increased year by year, with the number of appeals rising to approximately 90% in 2016.³⁹⁹ But the overall appeal rate is not particularly useful for making comparisons to the number of appeals before the impasse, because that rate includes appeals into the void, meaning there is no mechanism to have the appeal heard. That

³⁹⁷ Hopewell (n 1).

³⁹⁸ 'DG cites MPIA as "practical, confidence-building bridge" pending dispute reform deal' *World Trade Organization* (Web Page, 28 March 2026) <https://www.wto.org/english/news_e/news26_e/mc14_28mar26_350_e.htm>.

³⁹⁹ Agata Zwolankiewicz, 'THE WTO APPELLATE BODY CRISES: CAN THE CRISIS BE CURED?' (2022) I(1) *IUS Law Journal* 30, 32.

being the case, it is more useful to compare the MPIA experience with the experience of the original AB.

Of the disputes subject to the MPIA, three (60%) resulted in a foregone appeal, whilst two (40%) proceeded to arbitration. Although the sample size is small, this represents a marked departure from the pre-crisis norm in the lead up to the impasse, where Member States appealed the overwhelming majority of panel reports. Member States who are MPIA participants are therefore underutilising the MPIA. Nonetheless, the underutilisation of the MPIA should not be considered as a limitation of the arrangement.

The underutilisation of the MPIA reflects a more fundamental shift in how Members resolve their disputes in the DSS. Over the past five years, Member States have grown accustomed to the fact that binding two-tiered adjudication may not be available and have adjusted their expectations and strategies accordingly. Since appellate review can no longer be treated as a ‘default’ avenue, Member States likely changed their mindset about how to resolve disputes and learned that there are certain advantages to resolving their differences in other ways, including through negotiation, reaching mutually agreed solutions or accepting the panel report. A Member that has grown accustomed to resolving disputes without recourse to an appeal — and found that doing so can produce acceptable or tolerable outcomes — may see the same advantages even if the dispute is bound by the MPIA (and there is therefore a body to hear the appeal). This is especially so because a respondent MPIA member has less incentive to appeal than it would have had under ordinary appellate review. Under the AB, the routine exceeding of the 90-day deadline meant that an appeal could serve as an efficient delay tactic, allowing a respondent to keep a challenged measure in place lengthy periods while appeal proceedings ran their course. The MPIA removes that incentive because its two awards to date were issued within the 90-day deadline.⁴⁰⁰ In this sense, the AB crisis may have inadvertently nudged MPIA members closer to what the AB's proponents originally envisaged: a system in which appeals are a less frequent occurrence.⁴⁰¹

⁴⁰⁰ Alan Wm. Wolff, ‘Can the rule of law be restored to the world trading system?’, *Peterson Institute for International Economics* (Web Page, 20 January 2026) <<https://www.piie.com/blogs/realtime-economics/2026/can-rule-law-be-restored-world-trading-system>>.

⁴⁰¹ Ibid.

2.0 How are arbitrators approaching dispute resolution in the absence of a functioning AB?

The three disputes resolved through appeal arbitration — *Colombia–Frozen Fries*, *China–IPRs Enforcement*, and *Turkey–Pharmaceutical Products* — offer insights into the arbitrators' approach to the impasse.

2.1. The Arbitrators are Improving upon AB Procedure

The MPIA procedures are specifically designed to mimic those of the AB, but there is much to suggest that the arbitrators improved upon AB procedure with a view to respecting the 90-day deadline. Because *Colombia–Frozen Fries* and *China–IPRs Enforcement* were subject to the MPIA, the pool of arbitrators had the opportunity to issue pre-arbitration letters before the filing of the appeal in both cases. The content of the letters is similar. The pool of arbitrators set indicative word limits for written submissions and set time limits for oral statements at the hearing. The AB had never set any such word limits.⁴⁰² The pool of arbitrators also encouraged the parties to exercise restraint in making claims under DSU Article 11, and no such claim was brought in either dispute. Given that *Turkey–Pharmaceutical Products* was an ad hoc case, the tribunal did not have the same opportunity to contact the parties before the filing of the appeal (and therefore discourage DSU Article 11 claims), but nonetheless also set word and time limits in that case.

The cases show that the MPIA (and ad hoc arbitration) function as a testing ground through which arbitrators can experiment with new ways to streamline appellate proceedings, effectively as a type of ‘experimental’ DSU reform.⁴⁰³ It is clear that the arbitrators take the deadline seriously, remembering that the AB's exceeding of its deadlines played a large role in the US precipitating the AB crisis, and have prioritised a procedural culture oriented toward efficiency.

That said, a caveat is warranted regarding the 90-day deadline. The arbitrators have not been burdened by the heavy caseload that contributed to the AB's routine exceedance of the

⁴⁰² Pauwelyn, ‘The WTO’s MPIA: What’s New?’ (n 68) 698.

⁴⁰³ Ibid 702.

prescribed time limit for appeal proceedings. It is considerably easier for the tribunal to comply with the prescribed timeframe when it has only been seized by three disputes. However, the underutilisation of the MPIA in the first five years of the impasse suggests that, at least in the near term, the arrangement is unlikely to face the volume pressures that overwhelmed the AB.

2.2. The Arbitrators are Willing to Depart from AB Jurisprudence

The arbitrators faced an important question of whether to adopt the precedent system of the AB or to depart from the practice of AB.⁴⁰⁴ *Colombia–Frozen Fries* and *Turkey–Pharmaceutical Products* show that arbitrators are clearly willing to depart from AB jurisprudence, while the AB insisted that its rulings be followed in later cases absent cogent reasons.

In *Colombia–Frozen Fries*, the arbitrators explicitly departed from AB reports which held that Article 17.6(ii) of the ADA only allows a panel to reach one permissible interpretation. The arbitrators found that Article 17.6(ii) allows for multiple interpretations to be permissible simultaneously, thereby granting greater deference to the interpretations of Member States. The arbitrators did not cite the ‘cogent reasons’ standard in their explicit departure from AB jurisprudence in *Colombia–Frozen Fries*. Rather, they simply stated that their ‘approach to the interpretation claims in this appeal differ[ed]’ from the panel’s. It appears that the arbitrators were eager to set out what they considered to be the correct approach to a controversial provision,⁴⁰⁵ but did not feel obliged to justify their decision not to rely on the AB’s interpretation. Yet, a light version of the cogent reason test can be implied. The tribunal, as the last-instance decision-maker, is responsible for deciding the case in the best way possible. In that respect, it is implied that the arbitrators deemed it necessary to depart from AB case law in order to decide the case in the best way they thought possible. The lighter the application of a cogent reasons or similar test, the more deference can be afforded to Member States. Accordingly, in their departures from AB case law, the arbitrators may have been providing informal guidance on the tension between state autonomy and judicial review in the DSS. On that reading, the arbitrators’ approach strikes at the centre of the AB crisis and US concerns.

⁴⁰⁴ Sarvagya Agarwal and Akshat Gaur, ‘Precedential Value of MPIA Awards in WTO Law’, GNLU Centre for Public & Private International Law (Web Page, 5 December 2025) <<https://www.gnlucpil.com/post/precedential-value-of-mpia-awards-in-wto-law>>.

⁴⁰⁵ Yanovich (n 215).

In *Turkey–Pharmaceutical Products*, the arbitrators’ departure was by way of clarification. The arbitrators’ reading of Article III:8(a) of the GATT established slightly broader criteria for the government procurement derogation, finding that only ‘procurement’ (and not a ‘purchase’) needed to be made by a government agency. Here, the arbitrators framed their departure from AB jurisprudence as a clarification, this time offering a brief explanation for their departure: that the AB ‘did not discuss the proper interpretation of the words “products purchased”’ with respect to the specific context at hand, and that the AB reports ‘provide only limited assistance to [this] interpretative issue’.

2.3. The Arbitrators’ Departures from AB Jurisprudence as Guidance Towards a More Coherent Post-AB System

The arbitrators’ departures in *Colombia–Frozen Fries* and *Turkey–Pharmaceutical Products* did not impact the resolution of either dispute because the tribunal ultimately came to the same conclusion as the panel. This raises an interesting question: if the approach was not necessary to resolve the dispute, should the arbitrators have dispensed with it?

Regarding *Colombia–Frozen Fries*, Pahis considers that the tribunal could have dispensed with detailing their interpretative approach. In his view, the arbitrators could have acknowledged two competing interpretations of Article 17.6(ii) and concluded, without prejudice as to which was correct, that Colombia was in violation of Article 5 under either. However, this view is too rigid. Five years on from the demise of the AB, Member States continue to navigate a segmented DSS in which 70% of all panel reports are being appealed into the void. In this environment, there is a meaningful balance between what is necessary to resolve a dispute and experimental DSS reform. The arbitrators are in a unique position to demonstrate, through practice, alternative approaches that take seriously the Member concerns that led to the AB’s paralysis. In granting more deference to the Member States’ interpretation over the panel’s, particularly regarding a controversial provision, the arbitrators are addressing one of the major criticisms of judicial overreach directed at the AB. In this context, the arbitrators’ interpretive reasoning — even if it is conceded that it was not strictly necessary to resolve the dispute at hand — is better understood as an informal guidance towards a post-AB system that better balances state autonomy and judicial oversight. For that reason, and because of the severity of the crisis, it is less helpful to argue in favour of dispensing with the arbitrators’ interpretative

approach. Lester therefore has the better view; that the arbitrators' interpretation of Article 17.6(ii) is better understood as an 'olive branch' to critics of the MPIA and the US, with the latter welcoming the arbitrators' willingness to distance themselves from the views of the AB on Article 17.6(ii) and to allow for multiple permissible interpretations.⁴⁰⁶

Moreover, the tension between state autonomy and judicial oversight is not unique to the WTO. A parallel can be drawn to the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), both of which have developed their case law much further beyond the original treaties — partly because adjudicative bodies naturally expand their interpretive reach over time. Both courts have been heavily criticised by EU Member States for doing so. The AB faced similar criticism for expanding its interpretive reach beyond what Member States had agreed to, and that criticism was central to the US decision to disable it. The arbitrators' departures from AB jurisprudence can thus be seen as an attempt to recalibrate the balance in a way that avoids repeating the same trajectory.

For similar reasons, it is also arguably too rigid to suggest that the arbitrators should have dispensed with their interpretive approach in *Turkey–Pharmaceutical Products*. The departure shows that their willingness to depart from AB jurisprudence in a way that affords slightly greater autonomy to the state is not a one-off, and it can likewise be characterised as a form of informal guidance by the arbitrators toward a post-AB system that seeks to better balance state autonomy vis-à-vis judicial oversight.

⁴⁰⁶ Lester (n 225) 5.

CONCLUSION

Five years since the AB ceased to function, there is now a sufficient body of dispute settlement practice to make a concrete assessment of how WTO Member States and arbitrators are navigating the post-AB world.

On the Member State side, the post-AB landscape is dominated by appeals into the void. Member States had the option to appeal 32 of the 37 panel reports into the void. Of those 32 reports, Member States exercised that option in 26 cases (81%). The high frequency of appeals into the void over a sustained five-year period, initiated by 12 different Member States encompassing both MPIA participants and non-participants, demonstrates that appeals into the void are the new normal. The practice has become self-reinforcing; the more Members appeal into the void, the more rational and less costly it becomes for others to follow suit. Even the EU, which generally prefers systemic alternatives, appealed three disputes into the void after the opposing party refused its invitations to agree to a form of appeal arbitration.

Members are also using the DSS more selectively. Until 2019, an average of 19 new disputes were filed each year; since 2020, that figure has fallen to approximately seven. Arguably, the DSS still oversees a steady stream of cases, albeit on a reduced level. On this view, the crisis has not fundamentally undermined Member confidence in the DSS, but has made Member States more selective about when and how they use the system due to the high likelihood that the panel ruling will be unilaterally blocked.

At the same time, MPIA participants are underutilising the arrangement. The MPIA has only overseen two awards to date. MPIA participants more frequently forewent an appeal or notified a mutually agreed solution than pursued recourse to MPIA appeal arbitration. Although the sample size is small, this represents a marked departure from the pre-crisis norm, where Member States appealed the overwhelming majority of panel reports. However, the underutilisation of the MPIA should not be considered as a failing of the arrangement. Member States have grown accustomed to the fact that binding two-tiered adjudication may not be available and adjusted their expectations and strategies accordingly. It appears that Members have learned that there are certain advantages to resolving their differences in other ways, especially since appeal proceedings under the MPIA have all been completed within the

prescribed 90-day deadline, thereby removing the incentive to use the appeal mechanism as a delay tactic. In this sense, the AB crisis may have inadvertently nudged MPIA members closer to a system in which appeals are a less frequent occurrence, as the proponents of the AB originally envisaged.

On the arbitrator side, the tribunal is improving upon AB procedure to ensure that appellate decisions are produced within the prescribed 90-day deadline. In all three cases, the arbitrators deployed innovations such as indicative word limits for written submissions and time limits for oral statements at hearings. Appeals arbitration appears to function as a testing ground through which arbitrators can experiment with new ways to streamline appellate proceedings, effectively as a type of experimental DSU reform.

On substance, the arbitrators showed a willingness to depart AB jurisprudence in ways that granted greater deference to the state. In *Colombia–Frozen Fries*, the arbitrators departed from the AB's interpretive approach to Article 17.6(ii) of the ADA, finding that the provision admits more than one permissible interpretation simultaneously, thereby affording greater deference to the national authority's interpretation. In *Turkey–Pharmaceutical Products*, the arbitrators' reading of Article III:8(a) of the GATT established slightly broader criteria for the government procurement derogation. Notably, neither departure impacted the resolution of the dispute. However, five years on from the demise of the AB, there is a meaningful balance between what is necessary to resolve a dispute and what is necessary to improve the DSS. The arbitrators are in a unique position to demonstrate, through practice, alternative approaches that take seriously the Member concerns that led to the AB paralysis; and through these cases they appear to signal a better balance between state autonomy and judicial oversight.

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Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS556/R (9 December 2022)

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Panel Report, *United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, WTO Doc WT/DS562/R (2 September 2021)

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APPENDIX

Appendix 1

Table of WTO Panel Reports Circulated Between 1 January 2020 to 31 December 2025⁴⁰⁷

Current as of 20 January 2026

Key

-  = Panel report appealed into the void
-  = Panel report appealed to arbitration (MPIA or ad hoc)
-  = Panel report adopted notwithstanding the retained option to appeal into the void
-  = Panel report adopted notwithstanding an arbitration agreement (MPIA or ad hoc)
-  = Panel report remains within the period for appeal or adoption

 = MPIA Member at time of panel circulation

 = Non-MPIA Member at time of panel circulation

⁴⁰⁷ 'Dispute Settlement - Current Status of Disputes', *World Trade Organization* (Web Page) https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm; Appendix 1 builds on Pahis 'Appeals after the Appellate Body' (n 4) 296.

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Date of Panel Report Circulation</i>	<i>Case Status</i>
Qatar	Saudi Arabia	DS567: <i>IPRs</i>	16.06.2020	Saudi Arabia appealed panel report into the void on 28.07.2020, Qatar terminated the dispute on 21.04.2022
Russian Federation	EU	DS494: <i>EU - Cost Adjustment Methodologies II</i>	24.07.2020	EU appealed panel report into void on 28.08.2020; Russian Federation cross-appealed panel report on 02.09.2020
Canada	US	DS533: <i>Softwood Lumber VII</i>	24.08.2020	US appealed panel report into void on 28.09.2020
China	US	DS543: <i>Tariff Measures</i>	15.09.2020	US appealed panel report into void on 26.10.2020
Japan	Korea	DS553: <i>Stainless Steel Bars</i>	30.11.2020	Korea appealed panel report into the void on 22.01.2021
UAE	Pakistan	DS538: <i>BOPP Film</i>	18.01.2021	Pakistan appealed panel report into void on 22.02.2021
Korea	US	DS539: <i>Anti-Dumping and Countervailing Duties</i>	21.01.2021	US appealed panel report into void on 19.03.2021
Tunisia	Morocco	DS578: <i>Definitive AD Measures on Exercise Books</i>	27.07.2021	Morocco appealed panel report into void on 28.07.2021
China	US	DS562: <i>Safeguard Measure on PV Products</i>	02.09.2021	China appealed panel report into void on 16.09.2021

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Date of Panel Report Circulation</i>	<i>Case Status</i>
EU	Turkey	DS583: <i>Pharmaceutical Products</i>	11.11.2021	Panel report appealed to ad hoc arbitration; arbitration award circulated on 25.07.2022; reasonable period of time mutually agreed by the parties on 10.01.2023
EU	US	DS577: <i>Ripe Olives from Spain</i>	19.11.2021	Panel report adopted on 20.12.2021 (appeal into the void waived); EU authorised to retaliate for non-implementation on 19.12.2025
Brazil	India	DS579: <i>Measures concerning Sugar and Sugarcane</i>	14.12.2021	India appealed panel report into void on 24.12.2021
Australia	India	DS580: <i>Measures concerning Sugar and Sugarcane</i>	14.12.2021	India appealed panel report into void on 24.12.2021
Guatemala	India	DS581: <i>Measures concerning Sugar and Sugarcane</i>	14.12.2021	India appealed panel report into void on 24.12.2021
Korea	US	DS546: <i>Safeguard Measure on Washers</i>	08.02.2022	Panel report adopted on 28.04.2023 (appeal into the void waived); parties also notified a mutually agreeable solution on 28.04.2023
Mexico	Costa Rica	DS524: <i>Avocados</i>	13.04.2022	Panel report adopted on 31.05.2022 (MPIA arbitration waived)
Turkey	EU	DS595: <i>Safeguard Measures on Steel</i>	29.04.2022	Panel report adopted on 31.05.2022 (ad hoc arbitration waived)

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Date of Panel Report Circulation</i>	<i>Case Status</i>
EU	Colombia	DS591: <i>Frozen Fries</i>	29.08.2022	Panel report appealed to MPIA arbitration; arbitration award circulated on 21.12.2022
EU	Indonesia	DS592: <i>Measures Relating to Raw Materials</i>	30.11.2022	Indonesia appealed panel report into void on 08.12.2022
China	US	DS544: <i>Certain Measures on Steel and Aluminium Products</i>	09.12.2022	US appealed panel report into void on 26.01.2023
Norway	US	DS552: <i>Certain Measures on Steel and Aluminium Products</i>	09.12.2022	US appealed panel report into void on 26.01.2023
Switzerland	US	DS556: <i>Certain Measures on Steel and Aluminium Products</i>	09.12.2022	US appealed panel report into void on 26.01.2023
Turkey	US	DS564: <i>Certain Measures on Steel and Aluminium Products</i>	09.12.2022	US appealed panel report into void on 26.01.2023
Hong Kong, China	US	DS597: <i>Origin Marking Requirement</i>	21.12.2022	US appealed panel report into void on 26.01.2023
EU	India	DS582: <i>Tariffs on ICT Products</i>	17.04.2023	India appealed panel report into void on 08.12.2023

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Date of Panel Report Circulation</i>	<i>Case Status</i>
Japan	India	DS584: <i>Tariffs on ICT Products</i>	17.04.2023	India appealed panel report into void on 17.05.2023
Chinese Taipei	India	DS588: <i>Tariffs on ICT Goods</i>	17.04.2023	The deadline for appeal or adoption of the panel report expires 27.10.2026.
Japan	China	DS601: <i>AD on Stainless Steel</i>	19.06.2023	Panel report adopted on 28.07.2023 (MPIA arbitration waived)
Costa Rica	Dominican Republic	DS605: <i>AD on Steel Bars</i>	27.07.2023	Dominican Republic appealed panel report into void on 18.09.2023
US	China	DS558: <i>Additional Duties</i>	16.08.2023	China appealed panel report into void on 18.09.2023
US	Turkey	DS561: <i>Additional Duties</i>	19.12.2023	Turkey appealed panel report into void on 26.01.2024
Malaysia	EU	DS600: <i>Palm Oil</i>	05.03.2024	Panel report adopted on 26.04.2024 (appeal into the void waived)

<i>Claimant</i>	<i>Respondent</i>	<i>Dispute</i>	<i>Date of Panel Report Circulation</i>	<i>Case Status</i>
China	Australia	DS603: <i>AD/CVD on Certain Products</i>	26.03.2024	Panel report adopted on 26.04.2024 (MPIA arbitration waived)
Costa Rica	Panama	DS599: <i>Import Measures</i>	05.12.2024	Panama appealed panel report into void on 24.01.2025
Indonesia	EU	DS593: <i>Palm Oil</i>	10.01.2025	Panel report adopted on 24.02.2025 (appeal into the void waived)
EU	China	DS611: <i>IPRs Enforcement</i>	10.04.2025	Panel report appealed to MPIA arbitration; arbitration award circulated on 21.07.2025
Indonesia	EU	DS618: <i>CVDs on Biodiesel</i>	22.08.2025	EU appealed panel report into void on 26.09.2025
Indonesia	EU	DS616: <i>CVD/AD on Stainless Steel</i>	02.10.2025	EU appealed panel report into void on 21.11.2025; Indonesia cross-appealed on 27.11.2025