

FROM THE TRENCHES

The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?

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Abstract

To preserve the functioning of WTO dispute settlement following the blockage of the Appellate Body, a sub-set of WTO Members created the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). In the wake of the first appeal award rendered under the MPIA, this contribution describes how the MPIA process works and lists some of the innovations that can be found in the first MPIA procedure. More innovations can be expected as arbitration under Article 25 of the Dispute Settlement Understanding (DSU) (be it ad hoc or under the MPIA) can be adjusted and molded case-by-case by the disputing parties in their appeal arbitration agreements. In this sense, the MPIA can serve not only as an interim stop-gap to preserve WTO dispute settlement. It can also function as a laboratory to explore and test new ways of making WTO dispute settlement more efficient and in line with WTO Members' goals and interests: experimental reform by doing, rather than one-off, formal DSU review.

1. Introduction

On 21 December 2022, more than two and a half years after its creation, the World Trade Organization's (WTO's) Multi-Party Interim Appeal Arbitration Arrangement (MPIA) finally produced its first appellate award.¹

The inaugural MPIA award was issued in a dispute filed by the EU in November 2019 against anti-dumping duties imposed by Colombia on frozen fries from Belgium, Germany, and The Netherlands. The three MPIA appeal arbitrators reversed one panel finding of violation, and confirmed three other panel findings that were appealed by Colombia.²

This contribution (i) explains what the MPIA is, (ii) examines whether the MPIA worked, (iii) provides a roadmap for MPIA appeals, and (iv) describes some of the novelties that can be found in the first MPIA procedure.

* Full disclosure: the author was one of the three arbitrators in the first MPIA appeal. This contribution is written in the author's personal capacity, conveys only publicly available information, and is limited to providing factual information about (not a critical or substantive assessment of) the MPIA and its process in order to enrich the public debate about WTO dispute settlement, its state-of-play and reform process. The cut-off date for this contribution is 21 March 2023.

¹One earlier appeal arbitration award was issued under DSU Article 25, in a dispute between the EU and Turkey, but this was not formally under the MPIA (as Turkey is not an MPIA participant) but as a result of an ad hoc appeal arbitration agreement between the parties which incorporated some but not all elements of the MPIA. See *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS583/ARB25, 25 July 2022.

²*Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS591/ARB25, 21 December 2022.

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2. What is the MPIA?

The MPIA was created in April 2020, by a sub-set of WTO Members, originally 19, today 26, out of 136 (counting the EU and its 27 member states as one).³ The MPIA was set up as an interim response to the demise of the WTO's Appellate Body in December 2019, brought about by a US block on appointments to the Appellate Body.

Pending negotiations to fix the situation relating to the Appellate Body, MPIA participants wanted, above all, to preserve the functioning of WTO dispute settlement. More specifically, the main goal was to prevent 'appeals into the void', that is, blocking of the dispute resolution process by appealing a panel report to an Appellate Body that no longer functions. Instead, MPIA participants committed *ex ante* 'not [to] pursue appeals under Articles 16.4 and 17 of the DSU [Dispute Settlement Understanding]'⁴ and to use the alternative of (appeal) arbitration, explicitly foreseen in Article 25 of the DSU, to complete possible appeals in disputes between MPIA participants.⁵

The MPIA's primary objective is, therefore, to preserve the system's 'binding character and two levels of adjudication'⁶: a panel stage, which remains the same as before (pre-2019), and an appellate stage, now conducted through Article 25 arbitration instead of the old Appellate Body.

Importantly, as the MPIA is in effect a form of arbitration implemented within a regular WTO dispute, albeit only at the appeal stage (see section 2, below), the MPIA is not a plurilateral agreement. It is nested within the multilateral WTO and explicitly foreseen and allowed for under DSU Article 25 (entitled 'Arbitration'). The political commitment not to appeal into the void and to use MPIA appeal arbitration as an interim solution may be an open plurilateral (as in: concluded *ex ante* between a sub-set of WTO Members but open to all WTO Members wanting to join). An actual MPIA appeal process is entered into bilaterally and pursued within the four corners of the multilateral DSU. Illustrating the multilateral character of the MPIA, MPIA arbitrators hearing an appeal are paid out of the regular WTO dispute settlement budget and assisted by regular Secretariat staff.

A secondary goal of the MPIA is to test the waters with possible innovations to enhance 'the procedural efficiency of appeal proceedings'.⁷ This includes a mandate for MPIA appeal arbitrators to 'take appropriate organizational measures to streamline the proceedings' including 'decisions on page limits, time limits and deadlines as well as on the length and number of hearings required'.⁸ MPIA participants also allow arbitrators to propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the

³For updated information on MPIA participants and cases, see https://wtoplurilaterals.info/plural_initiative/the-mpia/. The current 26 MPIA participants are: Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, EU, Guatemala, Hong Kong, Iceland, Japan, Macao, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine, and Uruguay.

⁴MPIA Pursuant to Article 25 of the DSU, 30 April 2020, JOB/DSB/1/Add.12 (hereafter 'MPIA'), para. 2.

⁵DSU Article 25 provides, in crucial parts, as follows:

1. Expedient 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 ...
3. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB ... where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding [on implementation and enforcement of WTO panel/Appellate Body rulings] shall apply mutatis mutandis to arbitration awards.

⁶MPIA, 4th preambular paragraph.

⁷Ibid., Annex 1, para. 12.

⁸Ibid.

facts pursuant to Article 11 of the DSU⁹ and explicitly limit the scope of appellate review to ‘only address those issues that are necessary for the resolution of the dispute’ and ‘only those issues that have been raised by the parties’.¹⁰

3. Did the MPIA Work?

The answer to the question of whether ‘it works’ is clear: Yes, the MPIA worked, in the sense that it enabled the completion of the EU–Colombia frozen fries dispute, without blockage, thereby preserving the system’s ‘binding character and two levels of adjudication’.

In earlier disputes between MPIA participants, no MPIA appeal materialized. More importantly, however, in those cases, the process was completed and neither party appealed into the void. Indeed, the mere existence of the MPIA, and its commitment not to appeal into the void, may have contributed to the parties reaching a settlement (as in *Canada–Wine*¹¹ (complaint by Australia)) or agreeing to the adoption of the panel report without appeal (as in *Costa Rica–Avocados*¹² (complaint by Mexico)).

In the EU–Colombia frozen fries dispute, as before, the EU was able to obtain the establishment and composition of a first level panel. That panel found that Colombia’s anti-dumping duties violate a number of provisions of the WTO Anti-Dumping Agreement.¹³ Colombia’s right to appeal the panel report was preserved and exercised. The EU could have, but did not appeal the panel report. The MPIA appeal arbitrators reversed one but confirmed three other panel findings. The MPIA award was notified to, and discussed at, the WTO’s Dispute Settlement Body (DSB). Pursuant to DSU Article 25, paragraph 3, there is no need for formal DSB adoption. At the DSB meeting, Colombia said that ‘while it disagreed with some of the findings, it intends to implement the arbitrators’ award in a manner that respects Colombia’s WTO obligations’.¹⁴ In the event that Colombia fails to comply, the EU can invoke the implementation, compliance, and retaliation mechanisms that apply mutatis mutandis to standard panel and Appellate Body reports (as explicitly confirmed in DSU Article 25, paragraph 4). At the DSB meeting, Colombia also added that ‘the MPIA procedure has now proven to be a viable and well-functioning interim mechanism that can replace, on a temporary basis, the Appellate Body and preserve members’ right to appeal’. The EU, and a long list of other WTO Members, agreed.

In sum, considering the first MPIA award in the EU–Colombia frozen fries dispute, the MPIA has proven to be operational. It ensured both the right of parties to appeal panel reports and to obtain a final, binding ruling, without loopholes to block the process. Although the MPIA as such is only a political commitment to sign appeal arbitration agreements in the future in specific cases, in all eight WTO disputes between MPIA participants where panels have been established to date, such agreements have been entered into within the set 60-day time limit.¹⁵ While originally some doubt had been expressed as to whether this would happen, whether panels would

⁹Ibid., Annex 1, para. 13.

¹⁰Ibid., Annex 1, para. 10.

¹¹*Canada – Measures Governing the Sale of Wine*, WT/DS537.

¹²*Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*, WT/DS524.

¹³Panel Report, *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands (Colombia – Frozen Fries)*, attached to Notification of an Appeal by Colombia under Article 25 DSU, WT/DS591/7, 10 October 2022.

¹⁴WTO News Item, ‘Panels Established to Review EU Complaints Regarding Chinese Trade Measures’, summary of the DSB meeting of 27 January 2023.

¹⁵To date, there are eight disputes between MPIA participants where panels have been established and where the 60-day time period has lapsed (DS522, 524, 537, 589, 591, 598, 602, and 603). In all of these disputes, bilateral appeal arbitration agreements have been concluded. See https://wtoplurilaterals.info/plural_initiative/the-mpia/. Another four disputes between MPIA participants are pending where the deadline for concluding an appeal arbitration agreement has not yet lapsed (DS601, 607, 610, 611).

suspend proceedings to allow for MPIA appeals and whether parties would follow the MPIA process instead of appealing into the void¹⁶, so far, none of these concerns has materialized.

4. Roadmap for MPIA Appeals

The key stages of the MPIA process are as follows:

1. A *WTO Member decides to join the MPIA*. This is normally done outside of any specific dispute and merely implies joining a communication issued in April 2020¹⁷ that contains a political commitment to enter into an appeal arbitration agreement in future disputes where both parties are MPIA participants. This needs to be done within 60 days after the establishment of the panel. Both the EU and Colombia are original MPIA participants. As occurred in *Turkey–Pharmaceutical Products*, WTO Members (though not both MPIA participants) may also decide ad hoc, in one or more specific disputes, to enter into Article 25 appeal arbitration using all or part of the MPIA rules and/or pool of arbitrators.¹⁸
2. Once a panel is established between MPIA participants, the parties conclude an appeal arbitration agreement. When a dispute arises between two WTO Members that are both MPIA participants (say, between Colombia and the EU, or between Australia and China or Mexico and Brazil), the parties in the dispute must enter into a dispute-specific appeal arbitration agreement. No dispute-specific agreement to rely on the Appellate Body was needed. Since the MPIA is implemented under DSU Article 25 for each dispute, a separate appeal arbitration agreement is needed for each MPIA case. In the frozen fries dispute, such agreement was concluded between the EU and Colombia in July 2020.¹⁹ Attesting to the flexibility and adaptability of appeal arbitration, to be defined and implemented in each specific dispute, in April 2021 the EU and Colombia revised their appeal arbitration agreement, mainly to make the panel report available to the pool of MPIA arbitrators right before the suspension of panel proceedings, instead of waiting to do so until the notice of appeal is filed (this gives MPIA arbitrators 20 more days to read the panel report and get acquainted with its findings).²⁰
3. If a party wants to appeal, it can request the suspension of panel proceedings before the panel report is circulated. Once the appeal arbitration agreement is concluded, the panel proceeding runs its usual course, with two rounds of submissions and two hearings, an interim report, and final report which is issued to the parties. Up to 10 days before the circulation of the final panel report to all WTO Members, either party can request the panel to suspend its proceedings which the panel must grant, as stipulated in the appeal arbitration agreement. Such suspension paves the way for a potential MPIA appeal.
4. Either party can initiate an MPIA appeal with a notice of appeal. Once the panel suspends its proceedings at the request of a party, either party has 20 days to file a notice of appeal. This notice of appeal starts the 90-day clock for the MPIA award to be issued, includes the final panel report and is circulated to all WTO Members. With its notice of appeal, the

¹⁶See, for example, Geraldo Vidigal (2019) 'Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis', *Journal of World Investment & Trade* 20, 862–890 at 884–889 and Henry Gao (2021) 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement', *Journal of International Economic Law* 24, 534–550 at 541–544.

¹⁷See footnote 1 above.

¹⁸See footnote 1 above.

¹⁹*Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS591/3, 15 July 2020.

²⁰*Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Agreed Procedures for Arbitration under Article 25 of the DSU, Revision, WT/DS591/3/Rev.1, 22 April 2022, para. 4(i).

party must concurrently file its written appeal submission. The other party then has five days to submit a notice of other appeal which must also include its appeal submission.

5. The appeal arbitration process itself. The MPIA consists of a pool of ten arbitrators, selected by consensus of all MPIA participants in July 2020.²¹ Any given MPIA appeal is, however, decided by only three arbitrators randomly selected out of the pool of ten.²² Nationals of a party can sit as MPIA arbitrators. However, ‘two nationals of the same Member shall not serve on the same case’.²³ By day 18 (counting from the day of the notice of appeal), appellee (or response) submissions must be filed. By day 21, third parties in the dispute (which may or may not be MPIA participants themselves) can file a third-party submission. Next comes the oral hearing (between day 30 and day 45). By day 90 at the latest, the MPIA arbitrators must issue their award to the parties.
6. *The MPIA award, its bindingness and enforcement.* The MPIA appeal award includes the panel’s un-appealed findings. Awards must be translated into the WTO’s three official languages. Pursuant to DSU Article 25, paragraph 3, arbitration awards must be notified to the DSB, where any Member may raise any point relating to the award. There is no need for the DSB to formally adopt the award before it is binding on the parties. The binding effect of MPIA awards is triggered by DSU Article 25, paragraph 3, itself (‘parties to the proceeding shall agree to abide by the arbitration award’) and is confirmed in the MPIA itself (‘the parties agree to abide by the arbitration award, which shall be final’).²⁴ DSU Article 25, paragraph 4, makes it clear that DSU Articles 21 and 22 on implementation and enforcement of WTO panel/Appellate Body rulings ‘shall apply mutatis mutandis to arbitration awards’. In this sense, an MPIA award is exactly like an adopted panel or Appellate Body report.

5. Novelties in the First MPIA Appeal

The list of eight items below is limited to procedural/systemic issues and does not address the case-specific substantive findings in the award:

1. *Timing.* Like the Appellate Body, the MPIA operates under a strict deadline of 90 days. The first MPIA procedure was completed in 74 days, from notice of appeal to issuance of the award. The last time the Appellate Body circulated a report within the 90-day time limit dates from July 2014. The average duration of the last 20 appeals filed before the Appellate Body was 360 days.²⁵
2. *Secretariat support.* Since the demise of the Appellate Body, the Appellate Body Secretariat has been disbanded. In line with paragraph 7 of the MPIA,²⁶ MPIA arbitrators are supported by staff from the WTO Secretariat. However, in order to ensure independence, the staff is housed in neither the Legal Affairs nor the Rules Division which normally

²¹The list of MPIA arbitrators was communicated to WTO Members in JOB/DSB/1/Add.12/Suppl.5, 3 August 2020. See also https://wtoplurilaterals.info/plural_initiative/the-mpia/. The MPIA states that ‘the participating Members will, periodically, partially re-compose the pool of arbitrators, starting two years after composition’. In July 2022, MPIA participants ‘agreed that the pool of 10 standing arbitrators ... is to remain unchanged’ (JOB/DSB/1/Add.12/Suppl.8, 6 July 2022). They added that should the situation related to the Appellate Body remain unresolved in two years’ time, ‘the participating Members will consider a partial re-composition of the pool of arbitrators with effect from 31 July 2024’.

²²The three arbitrators in the EU–Colombia frozen fries dispute were: José Alfredo Graça Lima (chair), Alejandro Jara, and Joost Pauwelyn. See *Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Recourse to Article 25 of the DSU, Constitution of the Arbitrator, WT/DS591/8, 12 October 2022.

²³MPIA, Annex 1, footnote 4.

²⁴Ibid., Annex 1, para. 15 and confirmed in *Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Agreed Procedures for Arbitration under Article 25 of the DSU, Revision, WT/DS591/3/Rev.1, para. 15.

²⁵See <https://worldtradelaw.net/databases/abtiming.php>.

²⁶MPIA, para. 7: ‘the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work, only to appeal arbitrators’.

support first-instance panels. Staff is seconded to the MPIA from other Secretariat divisions and for the duration of the process is ‘answerable, regarding the substance of their work, only to appeal arbitrators’. Supervisors or the Director of the Division from which the staff was seconded are not in the picture. Like MPIA arbitrators themselves, staff is paid not by the disputing parties but out of the normal WTO budget. This is in line with other arbitration procedures that have been conducted pursuant to Article 25 of the DSU. As noted earlier, the MPIA is not a plurilateral deal that operates outside of the WTO; via the hook of DSU Article 25, it is housed squarely within the multilateral DSU itself.

3. Word and time limits. As envisaged in paragraph 12 of the MPIA procedures agreed between the parties (hereafter ‘Agreed Procedures’),²⁷ the arbitrators set word limits for written documents and time limits for the hearing and oral statements. Since the appellant’s submission must be filed together with its Notice of Appeal, these limits were set in a pre-arbitration letter, sent out on behalf of the pool of ten MPIA arbitrators (not the three arbitrators that would eventually hear the appeal) after the panel suspended its proceedings but before an appeal was even filed. In this pre-appeal letter, the following ‘indicative guidelines’ were set²⁸:

- (i) Notices of Appeal/Other Appeal should normally be limited to a maximum of 2,000 words;
- (ii) Appellant/Other Appellant/Appellee submissions should normally be limited to a maximum of 27,000 words or 40% of the word count of the appealed panel report, whichever is the highest;
- (iii) Third Parties who wish to make a submission should normally limit them to a maximum of 9,000 words; and
- (iv) where MPIA appeal proceedings are conducted in French or Spanish, the above indicative limits are increased by 15%.

No such word limits had ever been set by the Appellate Body. The arbitrators also set time limits for statements at the hearing:

Opening statements by parties shall be no longer than 30 to 35 minutes each; opening statements by third parties shall be limited to seven minutes each; and closing statements by parties shall be limited to five minutes each.²⁹

4. DSU Article 11 claims. It is well-known that so-called Article 11 claims where parties appeal factual (not legal) findings by panels have considerably complicated and delayed the Appellate Body process. Paragraph 13 of the Agreed Procedures provides that ‘[i]f necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based

²⁷*Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Agreed Procedures for Arbitration under Article 25 of the DSU, Revision, WT/DS591/3/Rev.1, 22 April 2022.

²⁸See Pre-Arbitration Letter, 19 September 2022, section 1, attached as Annex 2 to the Additional Procedures for Arbitration under Article 25 of the DSU, Adopted by the Arbitrators on 19 October 2022, which itself is Annex A-2 to the Award (*Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, Addendum, WT/DS591/ARB25/Add.1, 21 December 2022). In detailed endnotes, the arbitrators explain on what basis these numbers were set.

²⁹*Colombia – Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, Addendum, WT/DS591/ARB25/Add.1, 21 December 2022, Annex A-2, Additional Procedures for Arbitration under Article 25 of the DSU, Adopted by the Arbitrators on 19 October 2022, para. 23.

on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU’.

In their pre-appeal letter, MPIA arbitrators invited the parties ‘to consider refraining from making [such Article 11] claims’ and added that:

any Party considering making such claims is encouraged to ... (i) appraise how any such Article 11 claim would affect the 90 day time-period ... (ii) evaluate ... whether such Article 11 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 ... [and (iii)] consider whether the substance of any possible Article 11 claim could be brought under one of the substantive treaty provisions at issue in the dispute.

If a party nonetheless decides to file such Article 11 claim, MPIA arbitrators requested that party to ‘set forth succinctly’ in its appeal:

- (i) whether and how the alleged panel error was raised before the panel, in particular during the interim review stage ...
- (ii) in what way the Article 11 claim is an issue ‘necessary for the resolution of the dispute’ and a matter that cannot be brought under one of the substantive treaty provisions at issue in the dispute; and
- (iii) in what way the alleged panel error is not simply an appreciation of a factual issue (within the exclusive domain of panels).³⁰

Colombia’s appeal in this procedure refrained from making any Article 11 claims.

5. Pre-hearing conference. On 9 November 2022, 6 days before the actual hearing and on top of an earlier organizational meeting held on 18 October 2022, the arbitrators convened a so-called pre-hearing conference. According to the arbitrators, the purpose of this novel step included for the first time in a WTO appeal process, was 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 ... The purpose of the conference was not to replace the hearing, but to 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 wish’.³¹
6. Online recording of the hearing. For the first time in WTO history, a video recording of parts of the oral hearing is permanently available online. So far, public hearings in WTO dispute settlement meant the possibility to attend, in person, a projection of the hearing in a physical meeting room in Geneva, most often weeks after the actual hearing took place. In the few cases where video recordings were made available online, this was time-limited (e.g. available for 72 hours only). In the first MPIA appeal, the opening statements of some of the parties and third parties were recorded and uploaded on the WTO website.³²

³⁰Pre-Arbitration letter, section 3. The arbitrators noted that these requirements are ‘without prejudice to the question of whether (and, if so, under what conditions) such claims fall within the appeal mandate set out in Article 17.6 of the DSU and/or para. 9 of the Agreed Procedures’.

³¹Award, para. 1.11 and 1.12.

³²The recording is available here: www.wto.org/english/tratop_e/dispu_e/material_e/ds591_arb25.mp4. One needs a registered account with the WTO, but this can be set up in 2 minutes, without restrictions.

The arbitrators ‘did not consider that limiting the time period for public viewing of the video recording was necessary’.³³

7. Length of award and citations to prior Appellate Body reports. The first MPIA award is 39 pages long. The actual analysis by the arbitrators is 28 pages long. This is short compared to recent Appellate Body reports. The average length of the last 10 Appellate Body reports is 112 pages.³⁴ The first MPIA report refers to 10 prior Appellate Reports (counting multiple references to the same report only once). The average number for Appellate Body reports is 22. Counting per page, the first MPIA award includes two Appellate Body references every three pages. In the last five years of the Appellate Body, the average number of prior reports cited is around six every three pages (two per page).
8. Standard of review. Article 17.6(ii) of the Anti-Dumping Agreement, the key substantive agreement at issue in the first MPIA appeal, provides for a specific standard of review/interpretative approach:

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.

Although Colombia did not file an appeal directly under Article 17.6(ii) itself, it did ask the arbitrators to take a different approach to this provision as compared to that taken by the panel. Both parties agreed that the arbitrators had to take a position on Article 17.6(ii) when assessing the panel’s substantive findings under Articles 3 and 5 of the Anti-Dumping Agreement, which Colombia did appeal.

The arbitrators summarized the panel’s approach to Article 17.6(ii) as follows:

4.11 The Panel stated that whether a provision admits of more than one ‘permissible’ interpretation (under the second sentence) depends on whether more than one such interpretation emerges after the Panel has examined the relevant provision under customary rules of interpretation of public international law (under the first sentence).

The arbitrators then deviated from this approach and adopted the following, novel interpretation of Article 17.6(ii) to their assessment of whether the panel erred under Article 5 of the Anti-Dumping Agreement:

4.13. ... we will begin by asking ourselves whether Colombia’s proposed interpretation of the phrase ‘where appropriate’ in Article 5.2(iii) ... is a ‘permissible’ one. As a yardstick for ‘permissibility’, the first sentence of Article 17.6(ii) refers us to the customary rules of treaty interpretation. However, we will not engage in our own, *de novo* interpretation of the terms ‘where appropriate’ so as to arrive at what we consider to be the ‘final’ or ‘correct’ application of Articles 31 and 32 of the Vienna Convention. Instead, we will ask whether a treaty interpreter, using the method for treaty interpretation set out in the Vienna

³³Additional Procedures for BCI Protection and Partial Public Viewing of the Hearing, Adopted by the Arbitrators on 1 November 2022, ANNEX A-3 to the Award, para. 2.

³⁴See data available at www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm. For the increase in length of Appellate Body reports, see Joost Pauwelyn (2016) ‘Minority Rules: Precedent and Participation before the WTO Appellate Body’, in J. Jemielniak, L. Nielsen, and H. Palmer Olsen (eds.), *Establishing Judicial Authority in International Economic Law*. Cambridge University Press, 139 ff.

Convention ... could have reached Colombia's interpretation. And this even though we, as *de novo* treaty interpreters, might have reached a different conclusion.

4.15. Thus, the ultimate question for us when testing a proposed interpretation is to draw a line beyond which an interpretation is no longer 'permissible' under the Vienna Convention method for treaty interpretation ... the question is whether someone else's interpretation is 'permitted', 'allowable', 'acceptable', or 'admissible' as an outcome resulting from a proper application of the interpretative process called for under the Vienna Convention.

6. Conclusion

As WTO Members remain engaged to put WTO dispute settlement back on the rails, following the demise of the Appellate Body in late 2019, the interim solution of the MPIA deserves wider attention.

More than two and a half years after the creation of the MPIA, the first MPIA appeal award is now out. The latest WTO Member to join the MPIA was Japan, on 10 March 2023, a few months after the first MPIA appeal award was issued.³⁵ This contribution explained what the MPIA is and offered a step-by-step roadmap of how WTO Members can take advantage of the MPIA arrangement in specific disputes. It illustrated how the first MPIA appeal process achieved the MPIA's main objective of preserving the system's 'binding character and two levels of adjudication' and highlighted some of the procedural innovations that can be found in the first MPIA appeal: from faster and shorter reports, to word limits and a pre-hearing conference; a new approach to Secretariat support, online hearings, Art. 11 claims and standard of review.

As MPIA (and other Article 25) arbitration appeals can be adjusted and molded case-by-case by the disputing parties in their appeal arbitration agreements, one can expect further developments and innovations as more appeals are processed. In this sense, the MPIA can serve not only as an interim stop-gap to preserve WTO dispute settlement, it can also function as a laboratory to explore and test new ways of making WTO dispute settlement more efficient and in line with WTO Members' goals and interests: experimental reform by doing, rather than one-off, formal DSU review.

³⁵See JOB/DSB/1/Add.12/Suppl.9, 10 March 2023.