

To Be or Not to Be? The Implementation of the MPIA from the Perspective of the WTO Dispute Settlement*

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The EU, China, and other WTO members recently released their concluded MPIA with its Annexes I and II as a temporary arrangement to deal with the appeals of panel rulings before the Appellate Body resumes its operation. The WTO dispute settlement mechanism is a complete unit with unique features and inherent logic. Although this arrangement maintains the two-tier process with arbitration to replace the appellate review, there is a fundamental difference between them, which is embodied not only in the dispute settlement process but also in the implementation of the rulings. The challenges that the WTO dispute settlement mechanism encounters are not limited to those procedural issues, but they are also connected with the substantive rules, with which the procedural issues should be jointly resolved. This is the correct way to deal with the current challenges and to reform the multilateral trade regime.

Keywords: MPIA, Arbitration, Appellate Review, Dispute Settlement, WTO

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I. INTRODUCTION

Facing the paralysis of the Appellate Body of the World Trade Organization (WTO),¹ the European Union (EU), China, and some other WTO members publicized their recently concluded “Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU” (MPIA) on March 27, 2020, together with its Annex I <Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DSX> and Annex II <Composition of the Pool of Arbitrators Pursuant to Paragraph 4 of Communication JOB/DSB/1/ADD.12>.² This publication aims to provide a temporary arrangement to review the panel rulings through arbitration until the Appellate Body resumes its operation. In terms of its legal status, the MPIA is a provisional agreement concluded among a group of the WTO members to review the first-instance panel rulings if necessary and preserve the two-tier adjudication. In terms of effectiveness, the MPIA would be workable as long as the Appellate Body (AB) is unable to hear appeals.

The legal basis of MPIA is Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),³ which is the arbitration clause within the WTO dispute settlement system. The WTO arbitration is a form of “state-to-state arbitration” that contains the basic elements of public international law and the features of traditional international arbitration. The “bilateralism” of commercial arbitration has been weakened by the WTO multilateral system. However, the WTO agreements provide no unified and clear rules about arbitration procedures under the WTO. Only in certain specific situations will arbitration be used as an alternative means to first-instance procedures.⁴

Unlike Article 6 and Article 17, which are concerned with the establishment of panels and appellate review, respectively, Article 25 of the DSU contains no explicit expressions on whether arbitration can be one of the initial options for the WTO members to resolve their dispute. Based on the analysis of relevant articles of the DSU, this research reaches a negative conclusion on this issue.

Article 25(1) of the DSU clearly states that “[e]xpeditious 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.”⁵ In other words, in the WTO, arbitration is not a proper way to solve factual

issues. Instead, it is used to deal with certain procedural issues in the dispute settlement proceedings, including determining a reasonable period of time for the implementation of panel rulings, assessing the performance of the losing party to comply with the panel rulings or recommendations adopted by the Dispute Settlement Body (DSB), etc.⁶ Therefore, arbitration is merely an auxiliary case hearing approach to facilitate panel rulings within the WTO dispute settlement framework.

Article 25 of the DSU is not complicated in its context. The key provision that deserves special attention is Article 25(4), which provides that “Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.” This provision has the effect of indirectly applying the implementation rules under the DSU to arbitration awards. To better understand the implementation effectiveness of MPIA, it is crucial to clarify not only the relations between MPIA and Article 25 of the DSU, but also the relations between MPIA and Articles 21 and 22 of the DSU, as indicated by Article 25(4), as well as the relations between the MPIA and the entire WTO dispute settlement system.

II. RELATIONS BETWEEN ARBITRATION AND ARTICLES 21 AND 22 OF THE DSU

Articles 21 and 22 of the DSU are the “implementation clauses” under the DSU, which are considered the kernel and backbone of the WTO dispute settlement system. Consultations, first-instance panel examination, second-instance appellate review, together with implementation arrangements under Articles 21 and 22 of the DSU, constitute an integrated dispute settlement process. The reason why the WTO is described as “the tiger with teeth” is because of the guarantee of its effective implementation mechanism.⁷ Article 21 of the DSU (Surveillance of Implementation of Recommendations and Rulings) is designed for circumstances in which the respondent state can enforce the recommendations or rulings adopted by the DSB, while Article 22 of the DSU (Compensation and the Suspension of Concessions) applies only when the respondent state is unwilling or unable to implement these recommendations or rulings. Their effective implementation is a key element to fulfill the WTO’s obligations and maintain the multilateral trading

system. In this regard, Article 21(1) of the DSU has clarified that “[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”⁸

Article 21 of the DSU is applied to the cooperation intention between the disputing parties. For instance, they can consult each other and agree on a reasonable period of time for the respondent to comply with the DSB recommendations or rulings.⁹ Although it is mentioned in Article 21(5) that certain disputes should be reviewed by the original panel, these disputes are related to the claimant’s dissatisfaction with the implementation measures taken by the respondent rather than with the respondent’s refusal to implement the recommendations or rulings. On the contrary, Article 22 of the DSU applies in a situation with confrontation and hostility between the disputing parties. Specifically, the first sentence of Article 22(1) of the DSU underlines that “[c]ompensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings [adopted by the DSB] are not implemented within a reasonable period of time.”¹⁰ In other words, the WTO prefers the amicable resolution of disputes and the full implementation of the DSB recommendations or rulings.

Based on the principles and standpoints noted above, if the respondent refuses to implement the DSB recommendations or rulings, the WTO will encourage the disputing parties to negotiate on compensation issues in the first place.¹¹ Only when no compensation agreement is to be reached between the parties, the DSB will authorize the complaining party to take retaliation measures against the respondent, i.e., to suspend concessions or other obligations under the WTO agreements.¹² This is an exception to the most-favored-nation treatment since the restrictive measures are specifically directed at the party that refuses to comply with the DSB recommendations or rulings. The complaining party that has been authorized to take such measures is still required to maintain its tariff and market access commitments to other WTO members. In addition, when considering what concessions to suspend, the complaining party should comply with Article 22(3) of the DSU to lessen the retaliation’s negative effects.¹³

Retaliation in the WTO refers to restrictive measures imposed on market access for trade of goods and services, or the release of intellectual property right protection, rather than the use of military force between countries or other

countermeasures in the case of diplomatic relations. It should be noted that the retaliation granted under Article 22 of the DSU is limited to suspension of obligations rather than their termination. “Suspension” means that the disputing parties possibly reconcile and shake hands in the future, while “termination” indicates that their relationship is over.¹⁴

Articles 21 and 22 of the DSU hold different approaches toward arbitration due to the different level of cooperation sincerity between the disputing parties; as for Article 21, its application depends on the cooperation intention of these parties. Even if a dispute arises over whether the respondent’s implementation is consistent with the DSB recommendations or rulings, Article 21(5) still suggests that such disputes should be resolved by the original panel. Article 22, however, applies when the respondent refuses to implement such recommendations or rulings. Given that the cooperation intention between the disputing parties no longer exists, it is necessary to submit their dispute to arbitration for settlement. As such, Article 22(6) provides that if the respondent objects to the level of suspension proposed by the complaining party, such dispute should be resolved through arbitration.¹⁵

Although Article 22(6) also recommends the arbitration be carried out by the original panel, it is of a different nature from Article 21(5) of the DSU. Article 21(5) suggests that the dispute be submitted to the original panel for “retrial,”¹⁶ while Article 22(6) explicitly requires that the dispute be “referred to arbitration.”¹⁷ The arbitration tribunal can make an arbitration award that is binding and enforceable, which is different from the previous panel rulings. The decision made by the panel under Article 21(5), however, is more a “review” of its own adjudication rather than an independent ruling.

The reason why arbitration has not widely been adopted in the WTO dispute settlement is that the panel proceeding already resembles international commercial arbitration; panels are ad hoc bodies in their functions.¹⁸ Article 8 of the DSU stipulates that panels shall generally consist of three panelists,¹⁹ with each party nominating one panelist, respectively and then jointly nominating the third member as the chairman of the panel. If the parties cannot agree upon the selection of panelists, they can request the WTO Director-General to determine the panelists for them.²⁰ Panelists nominated by the WTO members are well-qualified experts in the fields covered by the WTO agreements,²¹ who are not standing members of the DSB. The panel will be dissolved once the panelists accomplish their adjudication

task. Experts who are citizens of either disputing party shall not serve as panelists in that dispute.²²

The arbitration clauses in the DSU are specifically designed for certain issues arising during the WTO dispute settlement proceedings. For instance, Article 22(7) of the DSU explicitly provides:

[t]he arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. [...] if the proposed suspension of concessions or other obligations is allowed under the covered agreement.²³

All these issues that arbitrators are allowed to review are procedural rather than substantive in nature. This aspect is different from international commercial arbitration, where the parties can independently negotiate and agree upon arbitration issues.

The above analysis indicates that arbitration in the WTO is not a self-contained dispute settlement process, as in the case of panel examination or appellate review. Instead, it is used to resolve certain procedural issues during the panel process to facilitate the solution of disputes. If any dispute had to go through all the dispute settlement procedures, the efficiency of the WTO dispute settlement system would be reduced. Worse still, the WTO members might be caught in the vicious circle of a “litigation chain” because any WTO member can request the establishment of a panel without mutual agreement. Under this circumstance, the responding party has no choice but to accept the dispute settlement procedures, unless the DSB decides by consensus not to establish a panel.²⁴

In contrast, arbitration as a supplementary part of the panel process fully respects the choice of the disputing parties and could improve the efficiency of the WTO dispute settlement. MPIA employs arbitration as a makeshift to replace appellate review. This may raise several issues that deserve special attention.

III. RELATIONS BETWEEN ARBITRATION AND OTHER RELEVANT ARTICLES OF THE DSU

Article 3(2) of the DSU defines the objectives of the WTO dispute settlement system as

[a] central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.²⁵

According to Article 3(2), the WTO dispute settlement mechanism has played an essential role in maintaining the stability of the multilateral trading system. Institutionally, the WTO has two levels of adjudication: the first-instance panel and second-instance AB. Once a ruling is adopted by the DSB through this process, it must be complied with. So far, the DSB has accepted a total of 597 cases,²⁶ which demonstrates its leading role among international dispute settlement institutions.

One of the significant features of the WTO rules is the “consensus in decision-making,” which respects all members fairly - whether big nations or small ones. It has also laid the foundation of the WTO voting mechanism. According to footnote 1 of the Marrakesh Agreement Establishing the World Trade Organization (hereafter WTO Agreement), a matter shall be deemed to have been accepted by consensus if “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”²⁷ “Consensus in decision-making” does not consider the opinions of members who abstain from voting or are absent from the meeting. For any matter that needs to be decided, the other voting methods specified in Article X of the WTO Agreement may be applied only if the WTO members fail to reach a consensus.²⁸

In accordance with the agreement reached by the WTO members, the selection of the AB members must be approved by consensus. The US took advantage of this mechanism and formally opposed appointment of new members of the AB.²⁹ Consequently, the AB became paralyzed due to insufficient standing members.

For the past 25 years, most of the losing parties have complied with the

recommendations or rulings adopted by the DSB despite it not being a judicial body and the panel or Appellate Body recommendations or rulings not being court judgments.³⁰ As the components of a complete dispute settlement mechanism, the consultations, panel process, appellate review, and the final implementation are closely interrelated; they reflect the overall coherence and inherent logic of the WTO dispute settlement system.

Although consultation is the precondition for dispute settlement under the DSU, it does not necessarily mean that consultation is based on the mutual agreement of the disputing parties. According to Article 4(3) of the DSU, if the complaining party has requested consultations, the respondent party must respond in good faith. If the parties cannot reach a consensus within a certain time, the complaining party may “proceed directly to request the establishment of a panel.”³¹

As noted above, the DSU does not prohibit the disputing parties from resorting to arbitration to initiate their dispute resolution, but there is no such supporting mechanism within the DSU. Articles 6-8 of the DSU stipulate the establishment, terms of reference, and composition of the panels; Article 11 clarifies their function, while Article 12 stipulates the panel procedures. Although the contents of these articles are similar to those of commercial arbitration including the selection of panelists, they are directed at the “panel” process rather than at “arbitration.” The change of a single word can make a significant difference.

According to Article 3(2) of the DSU, the “customary rules of interpretation of public international law” contained in the Vienna Convention on the Law of Treaties (VCLT)³² is the main source for clarifying the WTO rules.³³ Article 26 of the VCLT stipulates that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”³⁴ The package of multilateral trade agreements reached during the Uruguay Round, including the DSU, contains the rules commonly accepted by the WTO members.³⁵ According to Article X(8) of the WTO Agreement, an amendment of the DSU requires the consensus of all WTO members.³⁶ Given that the MPIA was drafted and concluded without the participation of the US, it is almost impossible to obtain its approval for amending the DSU.

Even if the MPIA arrangement is aimed solely at panel recommendations or rulings, and the abovementioned problems do not exist, the implementation clauses of the DSU may not be invoked by the parties to arbitration under the

MPIA. Without the recommendations or rulings made by panels or Appellate Body, the implementation mechanism under the DSU is a fountain without source. Article 16(4) of the DSU serves as the link between the dispute settlement and the implementation of the final decisions, which states that “either party to the dispute can appeal the panel decision within 60 days after the panel report is circulated. If no appeal is initiated, the panel report will be adopted at a DSB meeting unless the DSB decides not to adopt it by consensus.”³⁷ Article 17 of the DSU sets out specific provisions about the appellate review, including the terms of office of the AB members, their qualification requirements as well as the time frame and the terms of reference of the appeal review.³⁸

The MPIA was adopted to temporarily replace appellate review with arbitration to cater for the WTO members who wish to have the opportunity to appeal the panel report. Some scholars have pointed out that “Article 25 arbitration could be designed to replicate closely the DSU’s regular appellate proceedings through what we refer to as an ‘appeal arbitration.’”³⁹ The arbitration mechanism designed by the MPIA serves as an “alternative means for appeal procedure” rather than “alternative means for dispute settlement,” as claimed by Article 25 of the DSU, which, to some extent, has changed the nature of arbitration under Article 25.⁴⁰

More importantly, without the guarantee of implementation mechanism, the effectiveness of the MPIA is nothing more than a bilateral agreement concluded between two WTO members. It is still unclear how the parties to arbitration under the MPIA will invoke the implementation clauses of the DSU. Therefore, the relationship between the MPIA and the implementation clauses of the DSU is worthy of further discussion.

The implementation of recommendations or rulings can be grouped into “unconditional implementation” and “conditional implementation.” The former refers to the situation provided in Article 19 of the DSU, which reflects a smooth and amicable solution to the dispute.⁴¹ In particular, the respondent party would agree to follow the DSB recommendations or rulings by amending or removing its restrictive measures within the specific period, while the complaining party would not ask for any compensation for its impaired benefits. Meanwhile, the latter refers to the situations stated in Articles 21 and 22 of the DSU.⁴² Article 21 applies to circumstances where the respondent state cannot “comply with the recommendations and rulings immediately” due to some unexpected situations

and needs an extended period of time for implementation,⁴³ while Article 22 applies in a situation where the respondent state refuses to implement the recommendations or rulings.⁴⁴ In such a case, the complaining party may resort to retaliation authorized by the DSB to force the respondent state to implement the DSB decisions.

Articles 21 and 22 of the DSU are designed for the recommendations or rulings made by panels or the Appellate Body under either “unconditional implementation” or “conditional implementation.” Article 21(3) of the DSU stipulates that the WTO member, within 30 days after the adoption of “the panel or Appellate Body report” by the DSB, shall inform the DSB of its intention to implement such recommendations or rulings.⁴⁵ In other words, Articles 21 and 22 are under the same context to stipulate implementation issues, and their relevant relations are clear and consistent. That is why many “recommendations or rulings” expressions in Article 22 are not preceded by the specific term “panel” or “Appellate Body.” When the “panel” or “Appellate Body” needs to be explicitly identified, Article 22 again puts these terms before them.⁴⁶ Furthermore, Article 23 of the DSU, as a general obligation, requires the WTO members to follow the rules and procedures of the DSU and comply with the panel or AB findings adopted by the DSB, including arbitration award rendered under the DSU.⁴⁷

Based on the above analysis, it can be concluded that the arbitration mechanism under the WTO dispute settlement system cannot replace the suspended appellate review. The reasons can be summarized as follows. First, the arbitration mechanism introduced in Articles 21 and 22 of the DSU involves those procedural issues rather than the substantive ones, which is determined by the basic structure of the WTO dispute settlement system. In principle, the arbitrators are the original panelists, and they cannot be compared with those standing members in the second-instance appeal proceeding. The AB is a standing institution with seven independent experts, “three of whom shall serve one case by rotation,”⁴⁸ and its members do not need to withdraw from making recommendations or rulings due to the conflicts of nationalities. The arbitrators selected in accordance with Annex 2 of the MPIA seem to have functions similar to those of the AB members. Nevertheless, they are different in nature as the legal basis of their functions is fundamentally different.

Second, the DSU does not rule out the possibility that the disputing parties may

resort to arbitration to deal with substantive issues in their dispute. Nevertheless, the WTO members would neither make such a choice, nor is it realistic for them to replace the appellate review with arbitration due to the system's inherent defects. The practice of the WTO dispute settlement has proved this argument. In view of Article 25 of the DSU, the disputing parties may ignore the panel procedure and directly resort to arbitration as the initial means to resolve their disputes. However, this is not feasible since both the appellate review and the implementation derive from panel rulings. Article 22(6) of the DSU even suggests that the arbitrators should be the original panelists because they have a better understanding of the case concerned.⁴⁹

The enforcement of arbitration awards made under the MPIA can only depend on the willingness of the participating members, and it can hardly be enforced through mandatory retaliation measures authorized by the DSB. Without safeguard under the implementation clauses of the DSU, the participating members of the MPIA will only accept the arbitration arrangement on the basis of their common commitments and good faith.

IV. ARBITRATION IN THE GATT/WTO DISPUTE SETTLEMENT PRACTICES

As a dispute settlement means under the multilateral trading system, arbitration has evolved from the proposal of the stillborn International Trade Organization (ITO) to the institutional deficiency of the General Agreement on Tariffs and Trade (GATT) and then to the component of a complete dispute settlement system within the WTO. First, the designers of the Bretton Woods system intended to introduce arbitration into the ITO as a dispute settlement method through the Havana Charter for an International Trade Organization (hereinafter Havana Charter).⁵⁰ Article 93 of the Havana Charter provides:

1. If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the provisions of this Charter other than Article I, is being nullified or impaired as a result of [...] the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving

them shall give sympathetic consideration thereto. 2. The Members concerned may submit the matter arising under paragraph 1 to arbitration upon terms agreed between them; Provided that the decision of the arbitrator shall not be binding for any purpose upon the Organization or upon any Member other than the Members participating in the arbitration.⁵¹

With the failure to establish the ITO, however, the abovementioned dispute settlement system did not materialize.

The GATT dispute settlement system was inherently deficient because it was designed based on a Protocol of Provisional Application.⁵² Only two articles of the GATT text are concerned with dispute settlement: Article XXII provides the consultation for the disputing parties, while Article XXIII lists three situations in which a contracting party can initiate the dispute settlement procedure.⁵³ It is obvious that the entire GATT dispute settlement system is designed for a mechanism similar to arbitration since the GATT is a “provisional” institution without legal status and is thus unable to make binding decisions upon its contracting parties. The disputing parties enjoy full autonomy with regard to either the initiation of dispute settlement procedure or the selection and appointment of ruling members.

Although the institution in charge of adopting panel reports and rulings was changed from the Ministerial Conference to the Dispute Settlement Body, this is only a matter of facilitating the effectiveness of the dispute settlement under the GATT. For almost half a century, the “negotiation” feature of the GATT dispute settlement system remained unchanged, and arbitration was not considered a separate dispute settlement procedure during the GATT period.

Arbitration-in theory and practice - has developed since the Uruguay Round negotiations. Along with a new set of dispute settlement systems as part of the multilateral trading regime under the WTO, it is referred to as a supplementary means of dispute settlement in a separate article in DSU, which was formed on the basis of nearly half a century’s practices under the GATT. According to the statistics compiled by REN Yuanyuan, over 10 contracting parties, including the US and the European Community (EC), proposed to add arbitration to the dispute settlement system during the GATT period.⁵⁴ Meanwhile, the GATT contracting parties also tried to resolve some of their trade disputes through arbitration, in, e.g., European Communities/Canada-Article XXVIII Rights.⁵⁵ These practices laid

the foundation for the WTO arbitration system.

The WTO has fully inherited the GATT dispute settlement system and further built a two-tier adjudication procedure. Within this new dispute settlement framework, arbitration is considered as an auxiliary case hearing approach due to its different features from the first- and second-instance rulings. To date, the DSB has accepted 49 arbitration cases.⁵⁶ Among them, 38 cases involved “reasonable period of time” arbitration (Article 21(3) of the DSU), accounting for 77.55%; 10 cases related to trade retaliation arbitration (Article 22(6) of the DSU), accounting for 20.40%; one case just referred to Article 25(1) of the DSU which is the general provisions about arbitration, constituting just 2.04%.⁵⁷

Table 1: Arbitrations that determine reasonable periods of time according to Article 21(3) of the DSU⁵⁸

	Case Title and Serial Number	Time	Disputing Parties
1	Japan-Taxes on Alcoholic Beverages (DS8, DS10, DS11)	1997	European Communities; Canada; United States vs Japan
2	European Communities-Regime for the Importation, Sale and Distribution of Bananas (DS27)	1998	Ecuador; Honduras; Mexico; Guatemala; United States vs European Communities
3	European Communities-Measures Concerning Meat and Meat Products (Hormones) (DS26, DS48)	1998	United States; Canada vs European Communities
4	Indonesia-Certain Measures Affecting the Automobile Industry (DS54, DS55, DS59, DS64)	1998	European Communities; Japan; United States vs Indonesia
5	Australia-Measures Affecting Importation of Salmon (DS18)	1999	Canada vs Australia
6	Korea-Taxes on Alcoholic Beverages (DS75, DS84)	1999	European Communities; United States vs Korea
7	Chile-Taxes on Alcoholic Beverages (DS87, DS110)	2000	European Communities vs Chile
8	Canada - Patent Protection of Pharmaceutical Products (DS114)	2000	European Communities vs Canada
9	Canada-Certain Measures Affecting the Automotive Industry (DS139, DS142)	2000	Japan; European Communities vs Canada

10	United States-Section 110(5) of US Copyright Act (DS160)	2001	European Communities vs United States
11	United States-Anti-Dumping Act of 1916 (DS136, DS162)	2001	European Communities; Japan vs United States
12	Canada-Term of Patent Protection (DS170)	2001	United States vs Canada
13	Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (DS155)	2001	European Communities vs Argentina
14	United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (DS184)	2002	Japan vs United States
15	United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (DS202)	2002	Korea vs United States
16	Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS207)	2002	Argentina vs Chile
17	United States-Continued Dumping and Subsidy Offset Act of 2000 (DS217)	2003	Australia; Brazil vs United States
18	European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries (DS246)	2004	India vs European Communities
19	United States-Final Dumping Determination on Softwood Lumber from Canada (DS264)	2004	Canada vs United States
20	United States-Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (DS268)	2005	Argentina vs United States
21	United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS285)	2005	Antigua and Barbuda vs United States
22	Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes (DS302)	2005	Honduras vs Dominican Republic
23	European Communities-Export Subsidies on Sugar (DS265, DS266, DS283)	2005	Brazil; Thailand; Australia vs European Communities

24	European Communities-Customs Classification of Frozen Boneless Chicken Cuts (DS269, DS286),	2006	Brazil vs European Communities
25	United States-Measures Relating to Zeroing and Sunset Reviews (DS322)	2007	Japan vs United States
26	Brazil-Measures Affecting Imports of Retreaded Tyres (DS332)	2008	European Communities vs Brazil
27	Japan-Countervailing Duties on Dynamic Random Access Memories from Korea (DS336)	2008	Korea vs Japan
28	United States-Final Anti-Dumping Measures on Stainless Steel from Mexico (DS344)	2008	Mexico vs United States
29	Colombia-Indicative Prices and Restrictions on Ports of Entry (DS366)	2009	Panama vs Colombia
30	United States-Certain Country of Origin Labelling (COOL) Requirements (DS384, DS386)	2012	Canada; Mexico vs United States
31	China-Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414)	2013	United States vs China
32	United States-Anti-Dumping Measures on Certain Shrimp from Viet Nam (DS429),	2015	Viet Nam vs United States
33	United States-Countervailing Duty Measures on Certain Products from China (DS437)	2015	China vs United States
34	Peru-Additional Duty on Imports of Certain Agricultural Products (DS457)	2015	Guatemala vs Peru
35	Colombia-Measures Relating to the Importation of Textiles, Apparel and Footwear (DS461)	2016	Panama vs Colombia
36	United States-Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)	2017	Korea vs United States
37	United States-Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)	2018	China vs United States
38	Ukraine-Anti-Dumping Measures on Ammonium Nitrate (DS493)	2020	Russian Federation vs Ukraine

Table 2 : Arbitrations that determine trade retaliation measures
according to Article 22(6) of the DSU⁵⁹

	Case Title and Serial Number	Time	Disputing Parties	Arbitrators
1	European Communities-Regime for the Importation, Sale and Distribution of Bananas (DS27)	1994 2000	Ecuador; Honduras; Mexico; Guatemala; United States vs European Communities	Original panel members
2	European Communities-Measures Concerning Meat and Meat Products (Hormones) (DS26, DS48)	1999	United States; Canada vs European Communities	Original panel members
3	Brazil - Export Financing Programme for Aircraft (DS46)	2000	Canada vs Brazil	Original panel members
4	United States - Tax Treatment for Foreign Sales Corporations (DS108)	2002	European Communities vs United States	Original panel members
5	Canada - Export Credits and Loan Guarantees for Regional Aircraft (DS222)	2003	Brazil vs Canada	Original panel members
6	United States-Anti-Dumping Act of 1916 (DS 136)	2004	European Communities vs United States	Original panel member + Arbitrators appointed by WTO Director-General
7	United States-Continued Dumping and Subsidy Offset Act of 2000 (DS234)	2004	Canada; Mexico vs United States	Original panel members
8	United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS285)	2007	Antigua and Barbuda vs United States	Original panel members
9	United States - Subsidies on Upland Cotton (DS267)	2019	Brazil vs United States	Original panel member + Arbitrators appointed by WTO Director-General
10	United States-Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)	2019	China vs United States	Original panel members

Table 3: General provisions on arbitration according to Article 25(1) of the DSU⁶⁰

	Case Title and Serial Number	Time	Disputing Parties	Arbitrators
1	United States-Section 110(5) of US Copyright Act (DS160)	2001	European Communities vs United States	Original panel member + Arbitrators appointed by WTO Director-General

The above statistical analysis indicates that only one WTO case has resorted to arbitration under Article 25 of the DSU so far-the US-Section 110(5) Copyright Act.⁶¹ On October 27, 1998, the US enacted the Fairness in Music Licensing Act, which amended Section 110(5) of the US 1976 Copyright Act. Especially, the new Music Licensing Act extended the scope of exemptions under Section 110(5) for the use of music and video works.⁶² The EC claimed that the US had violated Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which requires the WTO members to comply with Articles 1 to 21 of the Berne Convention.⁶³ The two parties submitted this dispute to the DSB when their consultation failed.

The US did not object to the panel decision on its violation, but wanted to extend the time for its compliance with the panel report to 15 months, which was rejected by the EC.⁶⁴ To determine a reasonable period of time for the US to implement the panel report, the EC resorted to arbitration and requested arbitrators to be the original panelists in accordance with Article 21(3)(c) of the DSU. The arbitrators finally settled on 12 months.⁶⁵ This was the first recourse to arbitration invoked by the parties in this case. However, the US failed to amend its domestic laws before the expiry date of the 12-month reasonable period of time due to its domestic legislative procedures. In response, the EC requested the DSB to authorize it to take retaliatory measures against the US in accordance with Article 22(2) of the DSU.⁶⁶

Disputes between the two parties kept arising as they could not agree on the level of retaliatory measures. Both the US and the EC requested a second arbitration according to Article 25 of the DSU.⁶⁷ As the chairman and one panelist of the original panel were unable to participate in the arbitration, two new arbitrators were appointed with the assistance of the WTO Director-General. The

arbitrators determined that the US should compensate the EC Euro 1.2199 million per year for exceeding the reasonable period of time.⁶⁸ According to Article 25(3) of the DSU and the arbitration agreement reached between the US and the EC, this arbitration award had a binding effect on both parties, which finally accepted the level of nullification or impairment of the EC benefits determined by the arbitrators. This level served as the factual basis for further trade retaliation measures in accordance with Article 22 of the DSU.

The arbitration in the US-Section 110(5) Copyright Act merely solved part of factual issues without legal interpretations involved. This is different from the appellate review defined by the DSU. Article 17(6) of the DSU stipulates that “[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”⁶⁹ In other words, the AB hears cases that concern legal application and interpretation issues. In contrast, arbitration usually deals with factual issues in dispute. This unique feature may be the original intention of the designers of the multilateral trade system.

The significance of the US-Section 110(5) Copyright Act can be summarized as follows. First, arbitration within the WTO dispute settlement system is optional in nature. In other words, recourse to arbitration requires the mutual agreement of both parties in the dispute, which is different from the initiation of the panel procedure. The disputing parties agreed on such issues as the composition of the arbitration tribunal, the selection of arbitrators, the arbitration procedure, and the application of laws. Therefore, arbitration stipulated in Article 25 of the DSU reflects the temporary nature and the parties’ autonomy. The MPIA currently has 19 participating members.⁷⁰ In the future, should two members be involved in an arbitration dispute, a question would arise as to whether the MPIA alone is enough for initiating the arbitration or whether the disputing parties need to sign a separate arbitration agreement to clarify specific issues and terms.

Second, the ambiguous reference in Article 25 of the DSU itself has led to a weak foundation for the MPIA to replace the appellate review. Article 25(1) of the DSU provides that “[e]xpeditious 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.”⁷¹ The status and function of arbitration within the WTO dispute settlement system can hardly be determined from it. In this regard, arbitrators in the US - Section 110(5) Copyright Act pointed

out that “[t]he term ‘dispute settlement’ is generally used in the WTO Agreement to refer to the complete process of dispute resolution under the DSU, not to one aspect of it [...]”⁷²

It may be deduced that arbitration provided in Article 25 of the DSU is de facto an alternative choice to the panel procedure.⁷³ It was also proposed during the GATT period that arbitration was regarded as “an alternative to panel proceedings” because there was no appeal procedure in the GATT dispute settlement system.⁷⁴ With the establishment of the appellate procedure under the WTO, arbitration may remain an alternative for a second review of the panel rulings. Nevertheless, this is not a simple combination of two different systems, but it calls for a complete set of procedures with its coherent structure and clear definition of different functions.

V. The MPIA AND THE DSU: MORE THAN PROCEDURAL ISSUES

On June 5, 2020, Dennis C. Shea, the US Ambassador to the WTO, wrote to the WTO Director-General Azevêdo, expressing the US position on the application of the MPIA, namely that the US did not object to the WTO Members utilizing Article 25 of the DSU or other alternatives to help resolve disputes while the AB remained inoperative.⁷⁵ However, the US strongly opposed the use of the WTO’s financial and administrative resources, including the support provided by the WTO Secretariat.⁷⁶ The US further argued that the operating costs of the MPIA should be financed by the participating Members themselves, including the costs of selecting arbitrators, arbitration venue usage, translation, and other administrative expenses.⁷⁷ These arguments may raise question on the nature of the MPIA and its status within the WTO legal framework.

The MPIA was signed by 19 WTO members including China and the EU. Although it is similar to a plurilateral trade agreement in its form, the two have a basic difference. Article II(3) of the WTO Agreement provides that “[t]he agreements and associated legal instruments included in Annex 4 (Plurilateral Trade Agreements) are also part of this Agreement for those Members that have accepted them, and are binding on those Members.”⁷⁸ This provision contains two

layers in its meaning: first, these agreements create neither obligations nor rights for those WTO members that have not accepted them; second, the plurilateral trade agreements are an integral part of the WTO Agreement to a state that has accepted them, and they should be adopted together with the WTO Agreement by its national legislature before an applicant joins the WTO.

For the WTO members that have accepted these plurilateral trade agreements, the rights and obligations under the agreements are the same with those in other multilateral trade agreements. Appendix 1 of the DSU lists the agreements covered by the DSU, including the WTO Agreement and its Annexes 1, 2, and 4. The last paragraph of Appendix 1 specifically states that “[t]he applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures [...]”.⁷⁹

According to Appendix 1 of the DSU, the agreements covered by the WTO dispute settlement system are not limited to multilateral trade agreements. Also, the WTO members who have joined the plurilateral trade agreements can submit their disputes to the DSB and agree upon special rules or procedures for dispute settlement.⁸⁰ Appendix 2 of the DSU outlines special rules and procedures contained in both multilateral trade agreements and plurilateral trade agreements for dispute settlement.⁸¹ This special arrangement is similar to the MPIA arrangement, but a critical question is whether MPIA constitutes a plurilateral trade agreement within the WTO and thus can invoke the DSU rules.

To answer this question, we should first clarify the nature of these agreements. Plurilateral trade agreements were those signed by some WTO members on a voluntary basis in several trade areas during the Uruguay Round negotiations; they are concerned with trade in goods with substantive provisions governing the market access. The main difference between plurilateral trade agreements and multilateral trade agreements lies in the scope of their membership. All WTO members are participating parties to the multilateral trade agreements, while only some have accepted plurilateral trade agreements, which exclude China.⁸²

The MPIA is simply a temporary arrangement for the WTO members to settle their disputes. It has neither involved their rights and obligations concerned with market access, nor been approved by the national legislatures of its

participating members. On the contrary, the WTO rules, including plurilateral trade agreements, are formulated in accordance with the legislative procedures of international treaties, and their effectiveness is stable and predictable. The MPIA is not a plurilateral trade agreement within the WTO legal framework, but a temporary arrangement for dispute settlement approved by a group of the WTO members.

Given that MPIA is neither a multilateral trade agreement nor a plurilateral trade agreement as those covered in Annex 1 or Annex 4 of the WTO Agreement, does it constitute an amendment to the DSU rules? Article X (8) of the WTO Agreement provides that the decision to approve amendments to the Multilateral Trade Agreement in Annex 2 “shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference.”⁸³ In other words, amendments to the DSU, after being approved by the Ministerial Conference, will have a permanent binding effect on all WTO members. The MPIA has no intention to amend the DSU, nor has it gone through the strict amendment procedures mentioned above. It is only a matter of expediency at this extraordinary time, which is also recognized by the designers of the MPIA.⁸⁴

As the MPIA is not a formal amendment to the WTO dispute settlement system, it can be concluded that the MPIA is merely a “gentlemen’s agreement” without an effective implementation guarantee only agreed within a small group of members without going through the formal procedure under the WTO Agreement. Although the WTO members that have participated in it can devote resources to select arbitrators, rent arbitration venues, or formulate specific arbitration procedures for dispute resolution, this is hard to realize since the consensus on the aforementioned issues is difficult to achieve. Moreover, it does not help to maintain the unity of the WTO members.

One of the fundamental features of the GATT/WTO multilateral trading system is the member-driven momentum that ensures members’ control over all important matters and maintains the interpretation of trade obligations and commitments agreed upon. Although the WTO dispute settlement system contains the tendency of judicialization, it seems that the WTO’s founding members had no intention to create a complete and independent judicial system. For instance, the AB report shall be legally binding only after it is approved by the DSB, unlike the judgment made by the court of the final trial.⁸⁵ In addition, the terms used in

the DSU try to avoid the judicial features of the DSB, such as “institution” instead of “court,” “appellate body members” instead of “judges,” “reports” instead of “judgment,” etc.⁸⁶

Apart from the theoretical analysis, the above conclusion has also been proved in practice. On December 12, 2016, China requested a consultation with the EU on the calculation method of the normal price of export products based on the “non-market economy entity” provision contained in the new EU trade regulations.⁸⁷ After the unsuccessful consultation between the two parties, the DSB established a panel on April 3, 2017 at China’s request.⁸⁸ This case has experienced twists and turns, with the panel repeatedly applying for delays in delivering the rulings. Just as the panel was to close the case after the two-year marathon review,⁸⁹ China requested that the panel suspend its examination. On June 14, 2019, the panel notified the DSB of having suspended the examination.⁹⁰ Then, on June 14, 2020, EU-Measures Related to Price Comparison Methodologies was automatically terminated according to Article 12(12) of the DSU because the suspension period had exceeded 12 months.⁹¹

If China had not voluntarily abandoned the panel examination on EU-Measures Related to Price Comparison Methodologies, China and the EU, as participating Members of the MPIA, could have brought the panel rulings before an arbitral tribunal for a second review, established in accordance with the MPIA. Nevertheless, China gave up the opportunity to try and implement the MPIA. Although it is understandable for China to have made such a decision, the future of the MPIA will be full of uncertainty without any practical experiences. Under these circumstances, it is reasonable for others to be skeptical of the fate of this arrangement.

VI. CONCLUSION

Described as the “jewel in the crown,”⁹² the WTO dispute settlement system is an essential element of the multilateral trading system. However, the radiance of this “jewel” has been progressively dimming since the AB stopped working. The multilateral trading system is facing challenges of reform, and temporarily replacing the appellate review with arbitration is the last resort to secure a positive

resolution to disputes. Although the MPIA is helpful to resolve disputes, its related legal issues deserve further discussion. At present, the MPIA has only 19 participating members. Considering that the WTO has a total number of 164 members, its influence is far from significant.

So far, the US has been the most active user of the WTO arbitration mechanism. As either the respondent or the complaining party, it has participated in most arbitration cases, which are far more than those of the MPIA participating members together. Therefore, the representativeness of the MPIA is still in question.⁹³ On August 3, 2020, China and the EU jointly announced the successful establishment of the MPIA Arbitrators Pool with 10 experts in the list,⁹⁴ to allow people to see how ad hoc MPIA arbitration unfolds and what will happen next.

The challenges faced by the WTO dispute settlement system are not simply procedural issues, but also closely related to the substantive rules and provisions. In practice, it is hard to distinguish whether the AB is ‘clarifying’ the WTO agreements or improperly exercising the exclusive legal interpretation power reserved to the WTO members. With the failure of the Doha Round of negotiations and the weakening of the WTO’s negotiating function, the power of the AB and the influence of its recommendations or rulings on the rights and obligations of the WTO members have been magnified to a certain extent.

The US believes that the WTO dispute settlement system is similar to the contract arbitration that embodies parties’ autonomy and has thus expressed its dissatisfaction with the WTO for a long time.⁹⁵ However, constrained by the existing WTO system, the US cannot shake the multilateral trading system by unilateral action and protectionist policies. Nevertheless, by taking advantage of the “consensus in decision-making” requirement and blocking the appointment of Appellate Body members, the US has successfully disrupted the operation of the WTO dispute settlement system.

In this regard, the MPIA can be a dispute settlement measure for the parties concerned to freely adopt out of the panel report. However, this is different from the proceedings designed in Article 5 of the DSU as the latter is processed under the auspice of the DSB. Also, running the MPIA with 19 member States to replace the AB in a separate manner is not a violation of Article 17 of the DSU as it is a voluntary choice by those participating members. In this sense, the arrangement under the MPIA is not restricted by the WTO rules. In the long run, resolving

procedural issues together with the substantive ones is the right path to reform the multilateral trading regime and to address the challenges confronted by the WTO members.

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2. The participating members include the EU, China, Hong Kong (China), Canada, Australia, Brazil, Mexico, New Zealand, Chile, Guatemala, Colombia, Costa Rica, Norway, Singapore, Switzerland, Uruguay, Iceland, Pakistan, and Ukraine. For details, see Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.12, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=229881&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.
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6. *Id.* arts. 21(3), 22(6) & 22(7).
7. MOFCOM, *The Rulings and Recommendations of WTO Dispute Settlement System Has 'Teeth,'* CHINA NEWS, Mar. 9, 2017, <http://www.chinanews.com/cj/2017/03-09/8169782.shtml>.

8. DSU art. 21(1).
9. *Id.* art. 21(3).
10. *Id.* art. 22(1).
11. Notification of a Mutually Satisfactory Temporary Agreement, *United States-Section 110(5) of the US Copyright Act*, WTO Doc. WT/DS/160/23 (adopted June 26, 2003).
12. DSU art. 22.
13. This is the so-called “cross-retaliation” clause. Paragraph f specifically defines “sector” with respect to trade in goods, trade in services, and protection of intellectual property rights as the bottom line for exercising “cross retaliation.”
14. DSU art. 22(8).
15. *Id.* art. 22(6).
16. *Id.* art. 21(5).
17. *Id.* art. 22(6).
18. *Id.* art. 8.
19. *Id.* art. 8(5).
20. *Id.* art. 8(7).
21. *Id.* art. 8(1).
22. *Id.* art. 8(3).
23. *Id.* art. 22(7).
24. P. VAN DEN BOSSCHE & D. PRÉVOST, *ESSENTIALS OF WTO LAW* 144 (2016).
25. DSU art. 3(2).
26. About one-third of these cases ended in consultation phase; one-third ended with an effective panel ruling; and another one-third went through the complete two-tier adjudication process of the WTO dispute settlement system. For details, *see* WTO, Chronological List of Disputes Cases, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.
27. Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, footnote 1.
28. *Id.* art. X.
29. G. Vidigal, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, 20(6) J. WORLD INV. & TRADE 862 (2019).
30. WTO, Evaluation of the WTO dispute settlement system: results to date, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c12s2p1_e.htm.
31. DSU art. 4(3).
32. Vienna Convention on the Law of Treaties (VCLT), 27 January 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679.
33. DSU art. 3(2).
34. VCLT art. 26.
35. Article II(2) of the WTO Agreement provides: “The agreements and associated legal instruments included in Annexes 1, 2 and 3 are integral parts of this Agreement, binding

- on all Members.” The DSU constitutes Annex 2 of the WTO Agreement.
36. WTO Agreement art. X(8).
 37. DSU art. 16(4).
 38. *Id.* art. 17.
 39. S. Andersen et al., *Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals 4* (Centre for Trade and Econ. Integration Working Paper, 2017).
 40. DSU art. 25.
 41. *Id.* art. 19.
 42. *Id.* arts. 21 & 22.
 43. *Id.* art. 21(3).
 44. *Id.* arts. 22(1) & 22(8).
 45. *Id.* art. 21(3).
 46. *E.g.*, Article 22(3)(d) of the DSU provides that “the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party.”
 47. DSU art. 23.
 48. *Id.* art. 17(1).
 49. Hu, *supra* note 1.
 50. UN, Final Act of the United Nations Conference on Trade and Employment: Havana Charter For An International Trade Organization, UN Doc. E/Conf.2/78, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.
 51. Havana Charter, ch. VIII (Settlement of Differences), art. 93.
 52. General Agreement on Tariffs and Trade (GATT), 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
 53. *Id.* arts. XXII & XXIII.
 54. Yuanyuan Ren, Research on the Arbitration System in the WTO Dispute Settlement Mechanism [WTO争端解决机制中的仲裁制度研究] (2012), at 15-6 (unpublished Ph.D. dissertation, Fudan University) (on file with author).
 55. Award by the Arbitrator, *European Communities/Canada-Article XXVIII Rights*, GATT Doc. DS12/R (adopted Oct. 16, 1990).
 56. Some cases involved both “reasonable period of time” arbitration and trade retaliation arbitration, which are counted twice. In other cases, arbitrators did not make mandatory decisions; instead, the disputing parties reached their agreement on the arbitration issues and notified the arbitrators. Nevertheless, they are also included in the statistics.
 57. The statistics comes from the WTO website (and the specific ratios are calculated based on these statistics), https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.
 58. *Id.* According to Article 21(3)(c) of the DSU, if the parties cannot reach an agreement on a period of time for complying with the DSB recommendations and rulings, the reasonable period of time may be determined through binding arbitration.

59. *Id.* According to Article 22(6) of the DSU, if no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, the DSB may authorize the complaining party to suspend the application to the member concerned of concessions or other obligations under the covered agreements. If the member concerned objects to the level of suspension proposed or claims that the required principles and procedures have not been followed by the complaining party, the matter shall be referred to arbitration.
60. *Id.* Article 25(1) of the DSU provides that “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.”
61. Award of the Arbitrator, *United States-Section 110(5) of the US Copyright Act-Arbitration under Article 21.3(c) of the DSU*, at 657, WTO Doc. WT/DS160/12 (adopted Jan.15, 2001). See also Award of the Arbitrator, *United States-Section 110(5) of the US Copyright Act-Recourse to Arbitration under Article 25 of the DSU*, at 667, WTO Doc. WT/DS160/ARB25/1 (adopted Nov. 9, 2001).
62. The exemptions extend to commercial exemption and family exemption, including free use of music, film, and television works in public places such as bars, shopping malls, and small restaurants.
63. Panel Report, *United States - Section 110(5) of the US Copyright Act*, at 3769 (1), WTO Doc. WT/DS160/R (adopted June 15, 2000).
64. Award of the Arbitrator, *United States-Section 110(5) of the US Copyright Act-Arbitration under Article 21.3(c) of the DSU*, *supra* note 61, at 1-2.
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68. *Id.* at 34.
69. DSU art. 17(6).
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73. *Id.*
74. Multilateral Trade Negotiations of the Uruguay Round, MTN.GNG/NG13/W/6, at 2; MTN.GNG/NG13/W/19, at 3.

75. MOFCOM, Online Regular Press Conference of the Ministry of Commerce, June 19, 2020, <http://english.mofcom.gov.cn/article/newsrelease/press/202006/20200602976274.shtml>.
76. *Id.*
77. *Id.*
78. WTO Agreement, art. II(3).
79. DSU app'x 1.
80. *Id.*
81. *Id.* app'x 2.
82. *E.g.*, only 21 WTO members (with the EU counted as one member) have acceded to the Agreement on Government Procurement, China and other 10 WTO members are in the process of acceding, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.
83. WTO Agreement, art. X(8).
84. Paragraph 15 of the MPIA provides that “[t]he participating Members remain committed to resolving the impasse of the Appellate Body appointments as a matter of priority and envisage that the MPIA will remain in effect only until the Appellate Body is again fully functional.”
85. DSU art. 17.
86. *E.g.* DSU art. 17(3) & art. 2(1).
87. Request for consultations by China, *European Union-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (adopted Dec. 15, 2016), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/516-1.pdf&Open=True>
88. Request for the establishment of a panel by China, *European Union-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/9 (adopted Mar.10, 2017), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/516-9.pdf&Open=True>.
89. According to Articles 12(8) and 12(9) of the DSU, the panel generally should issue its report within six months. Under special circumstances, the examination time may be extended, but “[i]n no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.”
90. Communication from the Panel, *European Union-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/13 (adopted June 17, 2019), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/516-13.pdf&Open=True>.
91. Note by the Secretariat, *European Union-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/14 (adopted June 15, 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/516-14.pdf&Open=True>.
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93. Paragraph 13 of the MPIA provides that “[t]he participating Members will review the MPIA one year after the date of this communication.”

94. The 10 arbitrators are Mateo Diego-Fernández ANDRADE (former Mexican official to the WTO), Locknie HSU (professor at School of Law of Singapore Management University), Valerie Hughes (former Canadian trade official), Thomas COTTIER (professor at School of Law of Berne University, Switzerland), Alejandro JARA (former Chilean ambassador to the WTO), José Alfredo Graça LIMA (former Brazilian trade official), Claudia OROZCO (former Colombian official to the WTO), Joost PAUWELYN (EU scholar), Penelope RIDINGS (former New Zealand's chief legal counsel), and Yang Guohua (professor at School of Law of Tsinghua University, China).
95. Raj Bhala, *The Power of the Last: Toward De Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. L. REV. 873 (2001). See also D. Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 471(2000).

