

The First Case under Multi-party Interim Appeal Arbitration Arrangement and Its Implications for the Reform of WTO Dispute Settlement System

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Abstract: The Multi-party Interim Appeal Arbitration Arrangement (MPIA), which was established by several WTO members including China and the European Union, has absorbed and drawn on the relevant proposals of the Walker Plan, aimed at responding to some “concerns” of the United States about the Appellate Body (AB). The *Colombia — Frozen Fries* is the first case putting MPIA into effect, which not only tested the innovative institutional arrangements of MPIA, but also clearly deviated from the sequential approach adopted by the AB with respect to Article 17.6 (ii) of the Anti-dumping Agreement. The arbitral tribunals in this case and the *Turkey — Pharmaceutical Products* also deviated from the other two rulings of the AB by ways of clarification. In terms of the reform of the WTO dispute settlement WTO dispute settlement system (DSS), the procedural and substantive measures proposal mechanism set up innovatively by the MPIA should be actively and flexibly applied. On the issue of precedent, clear deviation from the AB rulings should follow the standard of “cogent reasons”, but some rulings of the Appellate Body can be prudently deviated from and improved by means of clarification. In addition, the phrasing of WTO rulings should also be optimized.

Keywords: Multi-party Interim Appeal Arbitration Arrangement (MPIA), DSU Article 11 Claims, Deviation from Precedent, WTO Dispute Settlement System (DSS)

I. INTRODUCTION

Due to the United States’ continuous obstruction of the World Trade Organization (WTO) initiating the selection process for members of the Appellate Body (AB), the Appellate Body has been paralyzed for over five years. In order to paralyze the WTO Appellate Body, the United States proposed the so-called “Six Sins” of the AB: “over-service”, “trial beyond time-limits”, “overwhelming

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precedent”, “advisory opinions”, “factual issues as law issues”, and “judicial overreach”.¹ In response to the United States’ criticism, some members of the WTO proposed several suggestions for improving the operation of the AB.² Ambassador Walker, who is responsible for handling the AB crisis, put forward the Walker Plan based on these suggestions. The Multi-party Interim Appeal Arbitration Arrangement (MPIA),³ which involved 26 WTO members including China and the European Union,⁴ made several institutional innovations while trying to replicate the WTO’s appellate mechanism, thereby responding to some of the United States’ criticisms.⁵

The reform of the WTO DSS is imminent. The 12th Ministerial Conference (MC12) held in June 2022 achieved a series of important results. Regarding the WTO DSS, the Ministers “committed to conduct discussions with a view to have a fully and well-functioning DSS available to all members by 2024”, and this commitment was reaffirmed by the 13th Ministerial Conference (MC13).⁶ The reform of the DSS is an urgent issue that WTO members need to address, and the appellate review mechanism is at the core of this reform. MC12 did not clearly define what constitutes a “fully and well-functioning” DSM. For instance, is it mandatory to be binding? Is it a single-instance final decision or a two-instance final decision? The reform proposals for the WTO DSM include: (i) the improvement faction, which aims to enhance the operation

1 Guohua Yang, *The Return of the Jungle Law? The Rise and Fall of the WTO Appellate Body*, People’s Publishing House, 2020, pp. 112 & 141–154; Guohua Yang, Legal Issues in the Crisis of the WTO Appellate Body, *International Law Journal*, No. 1, 2019, pp. 72–84; United States Trade Representative, Report on the Appellate Body of the World Trade Organization, February 2020 (hereinafter referred to as “USTR Report on AB”).

2 WT/GC/W/791, November 28, 2019; JOB/GC/225, December 9, 2019.

3 WTO, Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Addendum – Multi-party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU, JOB/DSB/1/Add.12, April 30, 2020 (hereinafter referred to as “JOB/DSB/1/Add.12”).

4 There’re 19 founding members of the MPIA: Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; New Zealand; Norway; Pakistan; Singapore; Switzerland; Ukraine and Uruguay. Since then, nine WTO members joined the MPIA: Ecuador; Nicaragua; Benin; Montenegro; Macao, China; Peru; Japan; Philippines and Paraguay have successively joined the MPIA. Including the 27 countries of the European Union, the number of participants in the MPIA has reached 55, accounting for nearly one-third of the total number of WTO members.

5 Jingxia Shi, WTO’s “Multi-party Interim Appeal Arbitration Arrangement”: An Alternative Appeal Based on Arbitration, *Chinese Journal of Law*, No. 6, 2020, pp. 179–182.

6 WTO Ministerial Conference Twelfth Session, MC12 Outcome Document (Adopted on June 16, 2022), WT/MIN (22)/24, WT/L/1135, June 22, 2022, para. 4; WTO Ministerial Conference Thirteenth Session, Dispute Settlement Reform: Ministerial Decision (Adopted on March 2, 2024), WT/MIN(24)/37, WT/L/1192, March 4, 2024.

of the AB based on the Walker Plan; (ii) the revolutionary faction, which advocates the abolition of the AB and the “two-instance final adjudication” system and reverts to the “one-instance final adjudication” from the General Agreement on Tariffs and Trade (GATT) era, but with the establishment of a permanent body composed of full-time experts; (iii) the sublation faction, which follows the objective laws of the development of the WTO DSS and discards the propositions of both the improvement and revolutionary factions, proposing and selecting different reform plans at various stages.⁷

The arbitral ruling in the *Colombia — Frozen Fries* was announced on December 21, 2022.⁸ This is the first MPIA case and the second case for a WTO member to use the dispute settlement understanding (DSU) Article 25 arbitration mechanism to address an appeal.⁹ The case not only tested the innovative institutional arrangements of MPIA (such as encouraging restraint in bringing DSU Article 11 claims), but also involved contentious precedent issues in WTO dispute settlement. The tribunal explicitly deviated from an AB ruling and deviated from another ruling by way of clarification.¹⁰ The case is significant for reform of the WTO DSS. In light of this, this paper first

7 Yi Liang, On the Reform of WTO Dispute Settlement System in the Context of the Existence or Abolition of the Appellate Body, *Law Journal*, No. 12, 2022, pp. 175–192; Julia Y. Qin, *Turkey – Pharmaceuticals: The First WTO Arbitration for Appellate Review*, *Legal Issues of Economic Integration*, Vol. 49, 2022, pp. 426–427.

8 Arbitration under Article 25 of the DSU, Award of the Arbitrators, *Colombia – Anti-dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WT/DS591/ARB25, December 21, 2022 (hereinafter referred to as “DSU Article 25 Award, *Colombia – Frozen Fries*”).

9 The *Turkey – Pharmaceutical Products* is the first WTO appellate arbitration case. See Guohua Yang, The First WTO Appellate Arbitration Case: *Turkey – Pharmaceutical Products*, *Journal of Shanghai University of International Business and Economics*, No. 6, 2022, p. 5.

10 In the context of this paper, a clear deviation from the Appellate Body’s ruling refers to the situation where the Appellate Body has already given a conclusion on the interpretation of specific provisions of the covered agreement through a relatively complete application of customary rules of interpretation of public international law. However, other adjudicating bodies such as the WTO panel or the arbitration tribunal under Article 25 of the DSU have again reached an interpretation that is significantly different from or conflicting with the Appellate Body’s interpretation through their own treaty interpretation. For example, the Appellate Body interpreted the relevant provisions of the Anti-dumping Agreement as prohibiting zeroing, while some WTO panel’s interpretation allowed for zeroing. A clarifying deviation from the Appellate Body’s ruling occurs in the following situation: although the Appellate Body’s previous ruling gave a conclusion on the interpretation of specific provisions of one WTO covered agreement, this conclusion was not the result of applying customary rules of interpretation of public international law. The WTO panel or other adjudicating bodies further clarified the interpretation of this provision in subsequent cases through case distinction and/or strict application of treaty interpretation rules, and their interpretation often covers the situations included in the Appellate Body’s previous ruling.

combines the debate on DSU Article 11 claims and related precedent issues in WTO dispute settlement, elaborating on how the *Colombia — Frozen Fries* arbitration tribunal encouraged the disputing parties to restrain from making DSU Article 11 claims, and explicitly deviated from the AB's sequential approach adopted for Article 17.6 (ii) of the Anti-dumping Agreement. The *Turkey — Pharmaceutical Products* and the *Colombia — Frozen Fries* tribunals deviated from previous AB rulings by way of clarification. Secondly, this paper analyzes the implications of the appeal arbitration under Article 25 of DSU for the reform of the WTO DSS. Finally, it provides conclusive comments and puts forward specific suggestions.

II. ENCOURAGING RESTRAINT IN SUBMITTING DSU ARTICLE 11 CLAIMS

A. Increasing DSU Article 11 Claims in WTO Dispute Settlement and Efforts to Restrict them

DSU Article 11 stipulates the objective assessment obligation of the WTO panel, including objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. In the practice of WTO dispute settlement, more and more disputing parties brought up DSU Article 11 claims on appeal, accusing the panel of violating the objective assessment of facts obligation stipulated by DSU Article 11.¹¹ According to DSU Article 17.6, an appeal shall be limited to the legal issues covered by the panel report and the legal interpretations developed by the panel. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.¹² Excessive or unnecessary DSU Article 11 claims not only consumed the limited judicial resources of the WTO and made it difficult for the AB to conclude cases within 90 days, but also raised concerns among some members about the AB's overstepping in reviewing factual issues. Reviewing the facts in DSU Article 11 claims and adjudicating the meaning of

¹¹ *Supra* n. 1, United States Trade Representative (2020), p. 45; Yury Rovnov, DSU Article 11 Violations: A Statistical Exercise, *Journal of International Economic Law*, Vol. 25, 2022, pp. 409–423.

¹² Report of the Appellate Body, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, January 16, 1998, para. 132.

a legal norm of a WTO member as a legal question are two situations in which the United States has alleged that the AB has exceeded its authority to review factual issues.¹³ How to standardize and even restrict the claims under DSU Article 11 is one of the issues that must be addressed in the reform of the WTO DSS.

Theoretically, there are three approaches to limit the invocation of the DSU Article 11. The first is denying the legal nature of allegations of panel not objectively assessing facts. This means that such allegations would not fall within the scope of appeal review and essentially amount to a complete prohibition on bringing DSU Article 11 claims. Such an approach would lead to unbridled fact-finding power of the panel, which is highly inappropriate in cases where the panel “deliberately ignores or refuses to consider evidence” or “willfully distorts or misrepresents evidence”.¹⁴ The second is explicitly restricting disputing parties from filing Article 11 DSU claims. The right to appeal is one of the important rights that WTO members enjoy in the DSS. As long as the appeal involves legal issues, the parties to the dispute can determine the scope of the appeal claim themselves.¹⁵ It is therefore not feasible to explicitly limit the right of WTO members to bring DSU Article 11 claims. The third is encouraging disputing parties to refrain from making DSU Article 11 claims. The Walker Plan, which aims to resolve the AB crisis, refers to the proposals of some WTO members and emphasizes in the “scope of appellate review” section: DSU Article 17.6 limits the matters that can be appealed to legal issues covered by the relevant panel report and the legal interpretation made by the panel; “The meaning of domestic law” should be treated as a factual issue and thus not According; DSU does not allow the AB to “re-examine” or “complete analysis of” the facts of a dispute; According to DSU Article 17.6, members participating in the appellate proceedings are obliged to restrain from making broad and unnecessary arguments based on DSU Article 11, because it may have the effect of overturning factual findings in a factual “re-examination”.¹⁶ MPIA also seeks to address the growing number of DSU Article 11 claims, which provides that if necessary in order to issue the award within the 90 day time-period, the arbitrators may also propose substantive

13 Statements by the United States at the Meeting of the WTO Dispute Settlement Body, August 27, 2018; *Supra* n. 1, United States Trade Representative (2020), pp. 37–46.

14 *Supra* n. 12.

15 See Articles 17.4 and 17.6 of the DSU.

16 *Supra* n. 2.

measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.¹⁷

B. Colombia — Frozen Fries

In the *Colombia — Frozen Fries*, the Agreed Procedures for Arbitration under Article 25 of the DSU (Agreed Procedures) concluded between the European Union (EU) and Colombia, both of which are parties to the MPIA, replicated the whole Article 13 of Annex I to the MPIA. Before the disputing parties filed an appeal, on September 19, 2022, the EU and Colombia received a pre-arbitration letter without signature.¹⁸ The letter states that, under paragraph 13 of the Agreed Procedures, “in order to issue the award within 90 days following the commencement of this arbitration, the arbitrators may “take appropriate organizational measures to streamline the proceedings, without prejudice to the procedural rights and obligations of the parties and due process”, and may “propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU”. In view of this, the parties in this dispute are invited to consider refraining from making claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU. Any Party considering making such claims is encouraged to: (i) appraise how any such Article 11 claim would affect the 90 day time-period for the issuance of the award as referred to in paragraphs 12 and 13 of the Agreed Procedures; and (ii) evaluate, in the light of paragraph 10 of the Agreed Procedures which requires arbitrators to address only “those issues that are necessary for the resolution of the dispute” and Article 3.7 of the DSU which calls on each WTO Member to “exercise its judgement as to whether action under these procedures would be fruitful”, 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”. It is strongly urged that any disputing party should 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, for example, as an allegation of panel error in the application of that provision to the facts of the case (rather than an allegation of error in the assessment of facts

¹⁷ See JOB/DSB/1/Add.12, Annex 1: Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X, Article 13, and footnote 6.

¹⁸ The arbitral ruling refers to paragraph 4.2 as the pre-appeal letter.

under Article 11 of the DSU).¹⁹

In conclusion, the pre-arbitration letter encourages disputing parties to exercise restraint in raising DSU Article 11 claims in appeal by providing guidance and pressure. The encouragement of the pre-arbitration letter played a role in Colombia's deliberate restriction of the scope of its appeal, which did not raise any DSU Article 11 claims.²⁰

III. CLEARLY DEVIATING FROM WTO AB RULINGS

A. Precedent Issues in WTO Dispute Settlement and the Resulting Controversies

1. The Panel of the US — Stainless Steel (Mexico) Clearly Deviated from AB's Zeroing Ruling

The AB pointed out as early as 1996 in the *Japan — Alcoholic Beverages II* that adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.²¹ The AB clarified in the *US — Shrimps* (Article 21.5-Malaysia) that the above reasoning applies to adopted Appellate Body Reports as well.²² In the *US — Sunset Review of Anti-dumping Countervailing Duties on Oil Country Tubular Goods*, the AB held that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but also is what would be expected from panels, especially where the issues are the same”.²³ In practice, there have been no clear deviations from previous rulings of the AB until the report of the Panel of the *US — Stainless Steel (Mexico)*.

In the *US — Stainless Steel (Mexico)*, the Panel was faced with the question

¹⁹ DSU Article 25 Award, *Colombia — Frozen Fries*, Annex 2: Pre-arbitration Letter, September 19, 2022.

²⁰ *Ibid.*, para. 4.2.

²¹ Report of the Appellate Body, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, October 4, 1996, p. 14.

²² Report of the Appellate Body, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (Recourse to Article 21.5 of the DSU by Malaysia), WT/DS58/AB/RW, October 22, 2001, para. 109.

²³ Report of the Appellate Body, *United States — Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, November 29, 2004, para. 188.

of whether Article 17 of the Anti-dumping Agreement permits simple zeroing in periodic reviews. The AB has ruled in the *US — Zeroing (EC)* and the *US — Zeroing (Japan)* that simple zeroing in periodic reviews is inconsistent with Article VI:2 of GATT 1994 and Article 9.3 of the Anti-dumping Agreement. However, the *US — Stainless Steel (Mexico)* Panel relied on a finding in one previous panel report, which has been overturned by the AB, that simple zeroing in periodic reviews is not inconsistent with relevant provisions of the Anti-dumping Agreement. The ruling clearly deviated from the AB's previous ruling prohibiting simple zeroing in periodic reviews.²⁴

2. The “Cogent Reasons” Standard for Deviation from AB Rulings

The AB was deeply concerned about the panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues and considered that the panel's approach has serious implications for the proper functioning of the WTO dispute settlement system. The AB also proposed the “cogent reasons” standard to allow deviations from previous AB rulings. Firstly, Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. Secondly, dispute settlement practice demonstrates that WTO members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports become part and parcel of the *acquis* of the WTO dispute settlement system. Thirdly, the objective of ensuring “security and predictability” in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that,

²⁴ Report of the Panel, *United States — Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, December 20, 2007, paras. 7.64–7.150.

absent of “cogent reasons”, an adjudicatory body will resolve the same legal question in the same way in a subsequent case. Fourthly, in the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play.²⁵ However, the AB has not elaborated on the specific criteria of “cogent reasons” or pointed out what circumstances can constitute “cogent reasons”.

The *China — Rare Earths* Panel noted that the AB did not attempt to define the concept of “cogent reasons”, which could be understood as generally referring to a high threshold. The AB referred to the view of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia when introducing the concept of “cogent reasons”: instances of situations where “cogent reasons” in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is, a judicial decision that has been “wrongly decided, usually because the judge or judges were illinformed about the applicable law. The European Court of Human Rights considered that a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.”²⁶

The *United States — Countervailing and Anti-dumping Measures (China)* Panel discussed the concrete standard for “cogent reasons”. The United States argued that an AB decision being unconvincing or inconsistent with the covered agreement could constitute a “cogent reason”. However, China objected to this view. The Panel in this case held that the panel must take as its starting point the previous ruling of the AB. Reasons that could support but would not compel a different interpretative result to the one ultimately adopted by the Appellate Body would not rise to the level of “cogent reasons”. “Cogent reasons”, i.e. reasons that could in appropriate cases justify a panel in adopting a different interpretation, would encompass, *inter alia*: (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that

²⁵ Report of the Appellate Body, *United States — Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, April 30, 2008, paras. 158–162.

²⁶ Report of the Panel, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R&WT/DS433/R, March 26, 2014, para. 7.61, footnote 127.

a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a factually incorrect premise.²⁷

In the *United States — Differential Pricing Method*, the Panel allowed for zeroing in targeted dumping context, explicitly deviating from the AB previous rulings prohibiting zeroing. While recognizing that its conclusions differ from those of the *US — Washing Machines* Panel and AB, as well as the *US — Anti-dumping Methodology (China)* Panel, the Panel believes that it has found convincing reasons or “cogent reasons” for different conclusions.²⁸ The use of the term “convincing” by the Panel implies that a deviation from the AB rulings does not need to meet the “cogent reasons” standard. The report of the Panel, which has been appealed, is being shelved indefinitely due to the paralysis of the AB.

3. The Attitude of the United States towards the WTO Precedent System

The United States alleged that the AB established a too strong precedent system, especially proposing the “cogent reasons” standard for deviation from the AB rulings,²⁹ which led to the inability to correct multiple trade remedy rulings against the United States, such as those on double remedies, public entities, external benchmarks, and zeroing. The United States noted that following the AB's formulation of the “cogent reasons” standard, panels have increasingly applied the AB's *obiter dicta* on “cogent reasons” in a simplistic manner. Between 2008 and 2013, only 4% of panel reports cited the “cogent reasons” standard. Between 2014 and 2019, however, 19% of panel reports did so. The panels did not examine the legal texts of the DSU³⁰ and the WTO Agreements in these reports but instead relied directly on findings from previous WTO rulings.

²⁷ Report of the Panel, *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/R, March 27, 2014, paras. 7.311–7.326.

²⁸ Report of the Panel, *United States – Anti-dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R, April 9, 2019, para. 107.

²⁹ Statements by the United States at the Meeting of the WTO Dispute Settlement Body, December 18, 2018; USTR Report on AB, pp. 55–64.

³⁰ USTR Report on AB, pp. 62–63, footnote 131.

4. Main Solutions to the WTO Precedent Issue

In response to the United States' criticism of the WTO precedent system, a number of WTO members have proposed various solutions.

The first solution is to establish communication, dialogue or interaction mechanisms. The proposals from 14 WTO members, including China and the EU, to resolve the AB crisis did not propose specific solutions to the issue of precedent. Instead, they suggested establishing an annual communication mechanism. That is, the AB holds annual meetings with WTO members for communication, ensuring that concerns about certain practices, institutional matters, or trends of the AB can be reflected.³¹ This is not to supervise or control the AB, as this may affect the independent trial of the AB. This is also not to blindly trust the AB, as theoretically the AB has the possibility to “do whatever it wants”. Such an annual communication mechanism could or would be more appropriate to address the problem of “judicial activism”. It is not meaningful to communicate about the practice of “following precedent”, unless there is a dispute in a particular case as to whether there is a precedent and whether the reasons for departure from it are strong. The issue of “judicial activism” is dynamic, and whether there is an “increase or decrease” in rights and obligations in individual cases is worth discussing. Of course, communication is just to make the AB understand the views of WTO members, and the AB may be more rigorous in future case reviews.³² Japan, Australia and Chile proposed to establish a regular dialogue mechanism between the DSB and the AB to discuss issues including the precedential value of the AB's interpretations.³³

The second one is to emphasize that the interpretation of the AB and/or Panel is not authoritative or legally binding. For example, the proposals of Brazil, Paraguay and Uruguay stress that any interpretation contained in a report by a Panel or the AB will not become final as regards to the relevant provisions of the covered agreement by reason of the adoption of the DSB's report, and that the panels and AB are legally unbound by the reasoning and findings of previous reports of panels and Appellate Bodies.³⁴ For example, the

31 WT/GC/W/752, November 26, 2018; WT/GC/W/752/Rev.1, December 10, 2018; WT/GC/W/752/Rev.2, December 11, 2018.

32 *Supra* n. 1, Guohua Yang (2019).

33 WT/GC/W/768, April 18, 2019; WT/GC/W/768/Rev.1, April 26, 2019.

34 WT/GC/W/767, March 28, 2019; WT/GC/W/767/Rev.1, April 25, 2019.

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proposal from Thailand emphasizes that the rulings of the Panel and AB are not authoritative interpretations and have no legal binding force for subsequent disputes before the Panel and AB.³⁵

The third one is to emphasize that the AB or an Arbitration Tribunal should or may take into account previous rulings of the AB and/or the Arbitration Tribunal, and seeks to set certain limits. The proposals of Brazil, Paraguay and Uruguay highlight that the reports adopted by the panels and the AB create reasonable expectations among WTO members that they should be taken into account in any dispute, particularly if the Tribunal finds the reasoning in such reports to be persuasive.³⁶ The Thai proposal emphasizes that the Panel and AB should carefully consider the degree of relevance of previous reports to the current dispute, and should explain such a degree of relevance in their reports.³⁷ The proposal from Taiwan, China, emphasizes that in addressing relevant issues, the adjudicator could consider the reasoning and interpretation provided by the Panel and AB in previous disputes after appropriate independent deliberation.³⁸

The fourth one is to deny the precedential value of the AB's interpretations. Japan, Australia and Chile propose that an AB interpretation of any WTO provision will not be a precedent for subsequent interpretations and that panels may adopt a different interpretation from the one previously adopted by the AB.³⁹

Regarding the issue of precedent, the Walker Plan, which refers to the aforementioned proposals, puts forward three suggestions: (i) Precedent cannot be created through WTO dispute settlement litigation; (ii) Consistency and predictability in interpreting rights and obligations under covered agreements are of great value to all members; (iii) If found relevant to the current dispute, the panel and AB should consider previous panel or AB reports. The Walker Plan also suggests that the DSB establish a regular dialogue mechanism between WTO members and the AB, where WTO members can express their views on issues such as precedent.⁴⁰ However, the MPIA does not address the issue of precedent.

³⁵ WT/GC/W/769, April 26, 2019.

³⁶ *Supra* n. 34.

³⁷ *Supra* n. 35.

³⁸ *Ibid.*

³⁹ *Supra* n. 33.

⁴⁰ *Supra* n. 2.

B. Colombia — Frozen Fries

1. The Sequential Approach Established by the AB with Respect to Article 17.6(ii) of the Anti-dumping Agreement

In the *Colombia — Frozen Fries*, the MPIA Appeal Tribunal deviated from the AB's sequential approach to Article 17.6(ii) of the Anti-dumping Agreement. The Panel in this case touched upon an important institutional issue relating to the legal review standard of Article 17.6(ii) of the Anti-dumping Agreement. Under Article 17.6(ii), the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The AB sticks to a sequential approach. In the *US — Continued Zeroing*, the AB held that the second sentence of Article 17.6(ii) must therefore be read and applied in the light of the first sentence, and it gave general comments to this effect. Firstly, Article 17.6(ii) contemplates a sequential analysis. The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the Vienna Convention. Only after engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies. The structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence.

Secondly, conflicting interpretations are not allowed. For example, by applying the customary rules of interpretation of public international law, the AB ruled that zeroing was inconsistent with Article 9.3. It would be completely contradictory to consider zeroing also consistent with Article 9.3. Such contradiction would be repugnant to the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii). Consequently, it is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence.⁴¹

The *Colombia — Frozen Fries* Panel followed the AB's approach to Article 17.6 (ii) of the Anti-dumping Agreement. The Panel states that the question

⁴¹ Report of the Appellate Body, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, February 4, 2009, paras. 271 & 317.

of whether a relevant provision admits of more than one “permissible” interpretation, the situation contemplated under the second sentence, depends on whether more than one such interpretation emerges when the Panel examines the provision in accordance with the “customary rules of interpretation of public international law”, that is, when the Panel applies the first sentence of Article 17.6(ii). As the starting point of our interpretative analysis, we must therefore interpret the term “dumped imports” in Articles 3.1, 3.2, 3.4, and 3.5 in accordance with the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the Vienna Convention. The starting point of the panel’s interpretative analysis requires an interpretation of the relevant provisions in accordance with treaty interpretation rules, including Articles 31 and 32 of the Vienna Convention.⁴²

*2. The Integrative Approach Developed by the MIPA Arbitrators in the
Colombia — Frozen Fries Clearly Deviates from the AB Rulings*

The Arbitrators adopted a different analytical approach to Article 17.6 of Anti-dumping Agreement, holding that the question of whether an explanation advanced by the anti-dumping investigating authorities is “permissible” should be examined first, rather than applying the customary rules of interpretation of public international law to the disputed provisions in accordance with the first sentence of Article 17.6(ii). The reasons given by the Arbitrators include: Firstly, the approach of focusing solely on the first sentence of Article 17.6(ii) without regard to its immediate context, namely Article 17.6(i) and Article 16.6(ii), second sentence, is inadequate. Secondly, each provision must be understood in a manner that accords special respect to the investigating authorities under the Anti-dumping Agreement. A standard interpretative exercise applicable to any WTO agreement would not reflect the unique character of Article 17.6 as it applies to the Anti-dumping Agreement. It is difficult to understand the addition of Article 17.6, which was intended by its drafters to reflect only the traditional approach to treaty interpretation in the Vienna Convention and a WTO decision requiring that “the review criteria in Article 17.6 shall be considered for universal application after three years”. The second sentence of Article 17.6(ii) requires the panel to respect

⁴² Report of the Panel, *Colombia – Anti-dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WT/DS591/7, October 10, 2022, para. 286.

and accept a measure of the investigating authorities as long as the measure “relies on” a “viable” interpretation. Thirdly, the Tribunal refers to Article 17.6(i) which requires respect for the factual findings and assessments of the investigating authorities. Article 17.6(i) prevents the panel from conducting a *de novo* evaluation of the facts of the case, as long as they are “appropriate” and “fair and unbiased and objective”, the findings and assessments of the investigating authorities must be allowed, even if the panel might have arrived at a different conclusion. The Arbitrators would like to integrate the elements of interpretation in Article 17.6(ii) and have these provisions read together. Accordingly, the Tribunal first examined whether Colombia’s interpretation of the phrase “where appropriate” in Article 5.2(ii) of the Anti-dumping Agreement was a “permissible” one.⁴³

The Arbitrators believed that the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii) of the Anti-dumping Agreement is a measure of “permissibility”. However, the Arbitrators did not interpret the words “where appropriate” *de novo* to arrive at a result which they considered to be “final” or “correct” application of Articles 31 and 32 of the Vienna Convention. Conversely, the Arbitrators will examine whether, applying the methods of treaty interpretation stipulated in Articles 31 and 32 of the Vienna Convention, a treaty interpreter would arrive at Colombia’s interpretation, even though the Arbitrators, acting as *de novo* treaty interpreters, might reach a different conclusion.⁴⁴

The approach to Article 17.6(ii) of the Anti-dumping Agreement adopted by the Arbitrators in the *Colombia — Frozen Fries* is referred to as the “integrative approach”,⁴⁵ which deviates from the sequential approach consistently supported by the AB. The Arbitrators did not refer to the “cogent reasons” standard, but simply stated that it had taken a different approach to the interpretation claims in this appeal.⁴⁶ However, the Arbitrators’ reasons for rejecting the AB’s sequential approach are not unassailable and the Arbitrators’ proposed integrative approach does not fit within the structure and content of Article 17.6(ii) of the Anti-dumping Agreement. The non-*de novo* approach based on only some of the interpretative elements of the Vienna Convention,

⁴³ *Supra* n. 8, paras. 4.12–4.13, footnote 42.

⁴⁴ *Ibid.*, para. 4.13.

⁴⁵ Simon Lester, The First MPIA Award Is Out, and It Discusses AD Agreement Article 17.6(ii) “Permissible” Interpretations, December 21, 2022, <https://ielp.worldtradelaw.net/2022/12/the-first-mpia-award-is-out-and-it-discusses-ad-article-176ii-permissible-interpretations.html> (Last Visited on May 9, 2025).

⁴⁶ *Supra* n. 8, para. 4.12.

while it can be used to reject an interpretation advanced by investigating authorities, is likely to lead to an error if used in support of an interpretation advanced by that authority.

IV. DEVIATION FROM WTO AB BY WAYS OF CLARIFICATION

Unlike the *Colombia — Frozen Fries* tribunal, which explicitly deviated from the AB's sequential approach to applying Article 17.6(ii), the *Turkey — Pharmaceutical Products* tribunal departed from the AB rulings by ways of clarification when interpreting GATT 1994 Article III:8(a) government procurement exemption and the *Colombia — Frozen Fries* adopted the same method when elucidating the legal meaning of the "immediate termination of the investigation" requirement of Article 5.8 of the Anti-dumping Agreement.

A. Turkey — Pharmaceutical Products

In the *Turkey — Pharmaceutical Products*, in order to meet the requirement of GATT 1994 Article III:8(a) exemption for government procurement, the WTO panel simply assumed that there must be a "purchase by governmental agencies"⁴⁷ and examined whether reimbursements made by the Turkish Government for drugs sold by private pharmacies constituted "government procurement" on this basis.⁴⁸ The panel may have been influenced by the manner in which Turkey presented its case in the panel proceedings. Turkey contended that its social security institutions purchased pharmaceutical products because Turkish social security institutions acquired rights to those pharmaceutical products. As an alternative claim, retail pharmacies on behalf of Turkish social security institutions purchased pharmaceutical products from wholesalers and these retail pharmacies themselves were "governmental bodies" purchasing pharmaceutical products.⁴⁹ The Turkish and the panel in this case may also be influenced by the previous rulings of the AB. The panel has repeatedly cited the AB rulings in the *Canada — Renewable Energy/Feed-in Tariff* case and the *India — Solar Cells* case when interpreting GATT 1994 Article III:8(a).⁵⁰ It is unlikely that the panel did not take note of the statement in the ruling that "the

⁴⁷ Report of the Panel, *Turkey — Pharmaceutical Products*, para. 7.37.

⁴⁸ *Ibid.*, paras. 7.40 & 7.61–7.103.

⁴⁹ *Ibid.*, para. 6.34.

⁵⁰ *Ibid.*, paras. 7.35–7.42.

entity purchasing the product must be a ‘government agency’.”⁵¹ The *Turkey — Pharmaceutical Products* arbitral tribunal reversed the precedent of the panel by stating that governmental agencies are “procurement” rather than “purchase” subjects.⁵²

The EU argued on appeal that the AB had the entity purchasing products needs to be a governmental agency. The Arbitrators noted that in the *Canada — Renewable Energy/Feed-in Tariff*, the AB held that “the reference to ‘governmental agencies’ defines the identity of the entity carrying out the procurement and ‘procurement’ is the operative word in Article III:8(a) describing the process and conduct of the governmental agency”. The word “purchased” is then used to describe the type of transaction used to put into effect that procurement. The Arbitrators’ understanding of Article III:8(a) properly accords with these observations. Regarding the AB’s statement “the entity purchasing products needs to be a ‘governmental agency’” in the *India — Solar Cells*, the Arbitrators believed that this statement was not the result of an interpretation of Article III:8(a) by the Appellate Body; it is found in a short paragraph briefly summarizing the various elements of Article III:8(a) in reference to the Appellate Body reports in the *Canada — Renewable Energy / Canada — Feed-in Tariff*. Yet, whether a non-governmental entity could be the purchasing entity for the purposes of Article III:8(a) was not at issue in either of these two disputes. The Appellate Body did not discuss the proper interpretation of the words “products purchased” with respect to the interpretative issue raised by Türkiye in this Arbitration. The key interpretative issue in both disputes related to the word “products” in Article III:8(a), not to the notion of “purchase” or who purchases products. While certain statements, taken out of context, could arguably suggest that the Appellate Body read Article III:8(a) to cover only purchases by governmental agencies, these statements are, in our reading, a reflection that, in those disputes, governmental agencies were both procuring and purchasing the product at issue. To that extent, these Appellate Body reports provide only limited assistance to the interpretative issue raised in this Arbitration.⁵³

In the face of the AB’s explicit statement in the *India — Solar Cells* that “the

⁵¹ Appellate Body Report, *India — Solar Cells*, para. 5.18.

⁵² *Supra* n. 47, paras. 6.40–6.50.

⁵³ *Ibid.*, para. 6.48.

entity purchasing the product must be a government agency”, the Arbitrators in the *Turkey — Pharmaceutical Products* believed from two aspects that this statement is not helpful for the interpretative issues raised during the appeal arbitration. Firstly, this statement is not the result of interpreting Article 3.8(a), but a direct conclusion. Secondly, this statement should be understood in the context of the cases, as the *Canada — Renewable Energy/Feed-in Tariff* and the *India — Solar Cells* did not raise the issue of whether a non-governmental entity could become purchasing entity.

B. Colombia — Frozen Fries

In the *Colombia — Frozen Fries*, in reviewing whether the term “dumped imports” in the Anti-dumping Agreement Articles 3.1, 3.2, 3.3 and 3.5 includes imports from an exporter that has been found to have committed a final margin of dumping, the Arbitrators analyzed the Anti-dumping Agreement Article 5.8 on which the panel relied in reaching its interpretative conclusions. Under Article 5.8, the investigation shall be terminated immediately if the anti-dumping investigating authorities find that the margin of dumping is insignificant or that the actual or potential quantity of dumped imports or injury is negligible. If the dumping margin expressed as a percentage of the export price is less than 2%, it shall be regarded as a minimal margin.

On appeal, Colombia relied on the AB’s statement in the *Mexico — Measures Affecting Rice Anti-dumping* concerning Anti-dumping Agreement Article 5.8: “the only way to terminate immediately is to exclude them from the scope of the order”. This statement can be understood as meaning that the anti-dumping investigation authorities do not need to exclude imports from exporters with a small dumping margin at an earlier stage of damage and causality analysis. The Arbitrators states that the AB’s statement does not support Colombia’s argument, as it is derived from the AB’s application of Article 5.8 to the particular factual scenario of that dispute, namely, where Mexico did apply duties to imports with 0% dumping margins. The Appellate Body made this statement after noting that, “in the present case, the order establishing anti-dumping duties came after the final determination of a margin of dumping of zero per cent was made for the exporters at issue, but the order nevertheless covered these exporters”. The *Mexico — Measures Affecting Rice* focuses on the final treatment of exporters with a small margin of dumping, rather than their role in injury determination. In the event that a final determination of a margin

of dumping is made, these findings do not exhaustively define the manner in which the investigation may be terminated under Article 5.8.⁵⁴

In the face of the AB's statement in the *Mexico — Measures Affecting Rice* that “the only way to immediately terminate an investigation against exporters with a 0% dumping margin is to exclude them from the scope of the duty order”, the Arbitrators in the *Colombia — Frozen Fries*, by clarifying the particular context in which the statement was made, effectively deviated from or denied the AB's statement.

V. INSPIRATIONS FROM SUCCESSFUL PRACTICES IN APPEAL ARBITRATION

It is generally believed that the successful implementation of DSU Article 25 appeal arbitration is only a temporary measure during the paralysis of the AB, and should be terminated once the AB resumes. However, legally speaking, the DSU does not prevent WTO members from continuing to use the DSU Article 25 arbitration mechanism to resolve disputes after the AB resumes, including appeals against panel rulings. Of course, the ideal state is that after the appeal mechanism is restored, WTO members will no longer use DSU Article 25 arbitration to resolve appeal issues. The two completed DSU Article 25 appeal arbitration cases indicate that the practices of DSU Article 25 appeal arbitration during the suspension of the AB can provide important reform experiences for the reform of the WTO DSS.

A. “Substantive Measures Proposals” Are Replicable

Although the surest way to thwart DSU Article 11 claims is to amend the DSU to impose certain limitations, there are obvious obstacles to obtaining that result,⁵⁵ such as governments' possible reluctance to agree to such limitations. Meanwhile, MPIA rules tentatively pursue that goal through pressure applied

⁵⁴ *Supra* n. 8, para. 4.92, footnote 221.

⁵⁵ It has been suggested that the panel interim review procedure may be the most effective way to reduce DSU Article 11 appeals. If a party does not raise a factual issue in the interim review, it cannot raise it on appeal. This would allow the panel to address any claimed error with respect to its factual assessment. If the panel still proceeds on the basis of what the appellant believes is an erroneous factual assessment, then the appellant can make a valid DSU Article 11 claim. As panels will explain the basis for their factual assessments in response to interim review requests, situations where appellants still bring DSU Article 11 claims should be very rare. See Simon Lester, *The First MPIA Award and DSU Article 11*, December 21, 2022, <https://ielp.worldtradelaw.net/2022/12/the-mpia-award-on-dsu-article-11.html> (Last Visited on May 9, 2025).

by the Arbitrators. The *Colombia — Frozen Fries* indicates that this method has achieved some success.⁵⁶ Can the practice of encouraging disputing parties to exercise restraint in making DSU Article 11 claims be replicated in non-MPIA appeal arbitrations or future appeal mechanism? In this regard, the timing of the constitution of an Appeal Division or Tribunal is critical. It is only if a Division or Tribunal is constituted before an appeal is initiated by a party to the dispute that it may propose substantive measures to the parties to the dispute. This does not preclude, however, the AB or the MPIA pool of arbitrators, as a collective, from proposing substantive measures to the parties to the dispute prior to the initiation of an appeal or arbitration proceedings.

In the *Turkey — Pharmaceutical Products*, despite the Agreed Procedures for Arbitration under Article 25 of the DSU between the EU and Turkey replicating Article 13 of Annex I to the MPIA,⁵⁷ the Arbitrators in that case did not propose substantive measures such as restraining from making claims under DSU Article 11 to the disputing parties.⁵⁸ From a chronological perspective, Turkey filed an appeal on April 25, 2022, while the Arbitrators was only established on April 28, 2022. It would have been impossible for the Arbitrators to propose substantive measures to the disputing parties before one party submitted a notice of appeal.⁵⁹ The respondent Turkey's claim under Article 11 of the DSU that the panel failed to make an objective assessment of the facts was rejected by the AB.⁶⁰ Thus, in non-MPIA appeals, the tribunal constituted upon appeal does not have any opportunity at all to propose substantive measures to the disputing parties. In the *Colombia — Frozen Fries*, neither the award nor the pre-arbitration letter indicates the author of the letter. From the relevant information, it is most likely that the tribunal in this case sent the pre-arbitration letter to the disputing parties on behalf of the MPIA pool of arbitrators, which means that before the appeal was filed in Colombia, the disputing parties had reached a consensus on the issue of appeal arbitration and constituted the Arbitrators.

Legally speaking, the MPIA is essentially a plurilateral arrangement and political commitment made by some WTO members.⁶¹ It does not have a

⁵⁶ *Ibid.*

⁵⁷ WT/DS583/10, March 25, 2022, para. 13.

⁵⁸ DSU Article 25 Award, *Turkey — Pharmaceutical Products* and Its Addendum, WT/DS583/ARB25/Add.1.

⁵⁹ WT/DS583/13, May 4, 2022.

⁶⁰ DSU Article 25 Award, *Turkey — Pharmaceutical Products*, paras. 6.131–6.142.

⁶¹ Yongsha Li (Chief Editor), *Supporting and Practicing Multilateralism — China's Participation in WTO Dispute Settlement Legal Practice (2011–2020)*, Commercial Press, 2021, p. 637.

formal legal status in the WTO legal system. However, this does not prevent the pool of arbitrators under the MPIA from proposing substantive measures directly to the disputing parties in their own name. Proposals by the Arbitrators shall not be binding and it is up to the disputing parties concerned to consent to the proposed substantive measures. The fact that the parties to a dispute have not agreed to the substantive measures proposed shall not prejudice the examination of the case or the rights of the parties to the dispute.⁶²

The Agreed Procedures essentially replicate MPIA Annex I, but do not indicate when an arbitration tribunal should be constituted. Article 7 of Agreed Procedures provides that three arbitrators shall be selected from the pool of ten standing appeal arbitrators established under Article 4 of document JOB/DSB/1/Add.12. The selection of arbitrators from the pool of arbitrators shall be made in accordance with the same principles and methodology, including the principle of rotation, that are applicable to the composition of AB panels (in accordance with Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review). The WTO Director-General should inform the disputing parties and third parties of the selection. The arbitrators should choose a chair among themselves. This arrangement provides time flexibility for the formation of an arbitral tribunal, and also provides an opportunity for the tribunal to communicate with the disputing parties on issues regarding the appeal arbitration before any party files an appeal in the dispute. However, the formation of an arbitral tribunal before an appeal is filed by a disputing party requires close cooperation between the disputing parties. Whether the successful experience of the *Colombia — Frozen Fries* can be replicated in other DSU Article 25 appeal arbitration cases remains to be seen.

If the WTO AB is resumed, can the successful experience of the *Colombia — Frozen Fries* be replicated? Neither Article 17 of the DSU nor the Working Procedures for Appellate Review explicitly stipulates when to establish a WTO Appellate Tribunal. From a practical perspective, before one party to a dispute files an appeal, it usually does not consult with the other party; only after one party initiates an appeal will there be an appeal case, and then the Appeal Division will be established in accordance with Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review. Because of the lack of voluntariness in arbitration, it is unlikely that the disputing parties

62 *Supra* n. 17.

would consult before filing an appeal, and the WTO Appeal Division could not be constituted before a party to a dispute files an appeal, so it cannot propose substantive measures to the disputing parties before one of them files an appeal. However, the AB is able to propose substantive measures in its own name to the disputing parties. Nevertheless, since it is not known whether the disputing parties will file an appeal, it would be highly inappropriate for the AB to propose substantive measures to the disputing parties in every case in which the panel report is circulated. Another proposal is that, given the generality of the guideline on restraint in bringing DSU Article 11 claims by the arbitral tribunal in *Colombia — Frozen Fries*, the AB, as well as the pool of arbitrators under the MPIA, may also consider issuing similar guidelines of a general nature for reference by WTO members or participants to the MPIA.

Overall, to replicate the success of the *Colombia — Frozen Fries* in dealing with Article 11 of the DSU claims, consultations between disputing parties before the filing of an appeal are essential and need to demonstrate that one party will file an appeal. In terms of appeal arbitration under Article 25 of the DSU, forming an appeal tribunal before initiating the appeal requires cooperation from both disputing parties. If the WTO AB is resumed, at least one or both of the disputing parties should indicate their intention of appeal to the AB, so that the AB can propose substantive measures such as refraining from making requests under Article 11 of the DSU in its own name. The AB or the MPIA pool of arbitrators could consider issuing general guidelines for refraining from making DSU Article 11 claims. MPIA participants or some WTO members could also use the JOB/DSB/1 mechanism to inform the DSB about their practices of refraining from making DSU Article 11 claims.⁶³

B. Explicit Deviation from the Rulings of the WTO AB Should Be Cautious

1. The High Quality of WTO AB Reports and Their Guaranteeing Factors

It is generally believed that the rulings of the WTO AB are of high quality.

⁶³ On July 8, 2016, Canada submitted the JOB/DSB/1 document to the WTO, proposing to voluntarily participate a mechanism for establishment, documentation, and sharing of practices and procedures in the conduct of WTO disputes, referred to as the “JOB/DSB/1 mechanism”. The MPIA was established with the aid of this mechanism. See Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, JOB/DSB/1, July 11, 2016.

Some WTO members, especially those who lost the case, criticize the AB rulings during the DSB meetings discussing the AB reports.⁶⁴ This is a normal exercise of their right to express their views on the AB reports, and does not mean that there are errors or improprieties in the AB rulings, nor does it negate the high quality of the AB rulings. Apart from expressing different views on the rulings of the AB when issuing statements on specific disputes, the vast majority of WTO members have not consistently criticized the rulings of the AB on other occasions, and most of the panel and AB rulings have been implemented. Only the United States has consistently criticized the AB rulings on zeroing, public bodies, double remedies, external benchmarks, and unforeseen developments, which mainly involve trade remedies.

The high quality of WTO AB rulings is the result of a combination of factors. Firstly, the members of the AB are of high qualities and representative. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO.⁶⁵ Secondly, the system of collegiality ensures the high quality of each AB report. In order to guarantee the consistency and coherence of the AB decisions, and to leverage the individual and collective wisdoms of its members, the AB regularly convenes to discuss policy, practice, and procedural issues. At the same time, AB members should follow dispute settlement and other relevant WTO activities. In particular, each member should receive all documents submitted in appeals. In addition, the WTO division responsible for hearing each appeal should exchange views with other members before forming the final report of the AB.⁶⁶ From a practical perspective, the seven members of the AB collectively discuss important legal issues involved in each case. Thirdly, the AB is independent, and its seven members must not be affiliated with any government, and disputing parties may not have private contact with the AB regarding the issues under review. Fourthly, the AB Secretariat, composed of 10 professional lawyers, has been independent from the WTO Secretariat and has continuously provided high-quality services to the AB. Fifthly, from the perspective of the judicial process, the AB only reviews the

64 The Appellate Body report ensures that the rights of each member to express their views on an Appellate Body report are not compromised. See Article 17.14 of the DSU.

65 See DSU, Article 17.3.

66 *Ibid.*; Working Procedures for Appellate Review, 2010, Article 4.

legal issues covered in the panel report and the legal interpretations made by the panel. These legal issues and interpretations have already been thoroughly examined by the panel after multiple rounds of interaction with the disputing and third parties. After the AB interacts with the disputing and third parties, a collective re-examination of these laws and legal interpretations effectively ensures the high quality of the AB rulings.

The ruling of AB is the result of the collective wisdoms of the disputing and third parties, as well as their high-level lawyers, the WTO Panel and the WTO Secretariat that serve it, the seven members of the AB, and the AB Secretariat. The probability of making a mistake is very low. The MPIA strives to emulate the WTO appellate mechanism, establishing a pool of ten arbitrators. Members of the pool of arbitrators will stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable.⁶⁷ In a specific dispute, the arbitrators may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators.⁶⁸ However, there is not an institution or personnel similar to the AB Secretariat serving the MPIA Arbitrators, and other members of the pool of arbitrators who do not participate in the appeal hearing do not receive any remuneration. DSU Article 25 appeals that do not rely on the MPIA or similar arrangements, such as the *Turkey—Pharmaceutical Products*, are far removed from the WTO AB.

2. Desirability of Complying with Binding WTO AB Rulings

With a few exceptions, it is desirable to treat the interpretations and rulings of the AB as binding precedents. Granting substantial precedential weight to the rulings of the AB and following them has many benefits. Firstly, it could increase the legitimacy of the WTO DSS. If both panels and the AB consistently reached the same conclusions when faced with the same legal issues, it would indicate that a stable legal system was emerging from the dispute settlement process.⁶⁹

⁶⁷ *Supra* n. 17, Articles 4–5, Annex 2: Composition of the Pool of Arbitration Pursuant to Paragraph 4 of Communication.

⁶⁸ *Supra* n. 17, Annex I, Article 8.

⁶⁹ Mostafa Beshkar and Adam S. Chilton, Revisiting Procedure and Precedent in the WTO: An Analysis of *US – Countervailing and Anti-dumping Measures (China)*, *World Trade Review*, Vol. 15, 2016, p. 385.

Secondly, it can enhance the security and predictability of the WTO multilateral trading system, avoiding or reducing trade disputes and WTO litigations. Binding precedents reduce the uncertainty of future DSB rulings, forming stable expectations among WTO members and their domestic interest groups. This avoids or reduces trade protectionist measures that would contravene binding WTO rulings, thereby preventing or minimizing the occurrence of trade disputes. Even if trade protectionist measures are taken and appealed to the WTO, binding precedents and the formed expectation of losing the case will make the respondent more willing to agree on a settlement. Thirdly, binding precedents may eventually become part of future trade agreements.

Some scholars have proposed that there are many defects in treating the rulings of the AB as binding precedents. Firstly, giving precedents a strong weight may lead to a higher frequency of litigation, because precedents increase the future benefits brought by the current disputes. Secondly, the adoption of AB rulings as binding precedents could lead to a judicial error in one case being perpetuated over time. Thirdly, granting a higher precedential weight to the rulings of the AB would increase the number of third-party participants in WTO disputes. The involvement of third parties in panel proceedings could raise the overall cost of WTO dispute settlement and might also reduce the prospects for reaching a settlement. Fourthly, making AB rulings binding precedents could create injustice for developing countries, as big powers can make law through precedents in a way that serves their interests. Fifthly, making AB interpretations binding precedents would make it almost impossible to amend WTO agreements.⁷⁰

The aforementioned analysis has certain merits, but the issue of precedent should be evaluated in the context of WTO dispute resolution and all AB rulings. Firstly, while an increase in litigation frequency may exist, it is only a low-probability event. WTO members have multiple considerations when initiating a lawsuit. The substantive interests involved in a dispute are the fundamental reason, and it is unlikely that forming a precedent favorable to oneself will become an important consideration, because the plaintiff cannot influence the panel and AB to form a precedent in their favor. Secondly, while third-party participation in WTO litigation does incur legal representation costs and increases the workload of panels, the AB, and their support staff, it plays

⁷⁰ *Ibid.*, pp. 386–388.

a crucial role in pooling wisdom. This can help panels and the AB improve the quality of their rulings, benefiting both the WTO DSS and the multilateral trading system. Whether a settlement can be reached in a WTO lawsuit mainly depends on the position of disputing parties, and third-party participation has little effect. Thirdly, claims of judicial errors, unfairness issues, and difficulties in amending the covered agreements have extremely limited applicability. Fourthly, genuine judicial errors in WTO dispute settlement are extremely rare, and criticisms of the AB rulings from individuals or a small number of members are not sufficient to constitute a judicial error. Fifthly, due to the high degree of independence of the AB and its Secretariats, as well as the existence of a collegiality mechanism, it is highly improbable for major powers to establish precedents favorable to themselves by influencing the AB. On the contrary, individual major powers are more likely to influence the WTO Secretariat and subsequently affect the rulings of the *ad hoc* panels. Developing members such as China and India, as third parties, participate extensively in WTO litigations, which can exert certain constraints on the panel and AB, and also assist the panel and AB in making high-quality rulings. Binding rulings of the AB are likely to protect the interests of a vast number of developing members, as they can influence the trade policies of major powers or provide legal standards for measuring trade policies. Sixthly, binding AB rulings may indeed make it difficult to amend covered agreements. However, such claims are primarily based on the assumption that the AB rulings are erroneous or inappropriate, which is extremely rare in practice, and such rulings can be corrected or improved through clarification and other means.

3. Explicit Deviations from WTO AB Rulings Should Be Subject to the “Cogent Reasons” Standard

Given the high quality of AB reports, the multiple benefits of following AB reports and the fact that WTO dispute settlement practice does not demonstrate that AB reports have indeed been erroneous, WTO panels, the AB, DSU Article 25 Arbitrators, or other adjudicative bodies should follow previous AB reports. If there is an intention to deviate from previous rulings of the AB, “cogent reasons” must be found. The four specific situations proposed by the Panel in the *The United States — Countervailing and Anti-dumping Measures (China)* for deviating from the rulings of the AB can serve as an important reference.

Firstly, the “cogent reasons” standard should be followed. Some scholars

believe that since the AB has not adopted a definition of “cogent reasons”, it is unclear what future panels will do. In the situation where a previous ruling establishes a precedent, even if the AB adopts the definition of “cogent reasons” proposed by the Panel in the *United States — Countervailing and Anti-dumping Measures (China)*, it still does not resolve the issue of precedent in the WTO. This is because future litigants can argue that since the AB ruling itself does not have precedential value, the AB’s guidelines on precedent are not binding on future cases. Changing the WTO’s approach to precedents is beyond the authority of the DSB.⁷¹ In fact, the AB has not established a “precedent system”, but merely elaborated on the principle of “treating like cases alike”. In practice, many panels have relied on previous rulings of the AB based on the “cogent reasons” standard, or rejected requests from disputing parties to deviate from the AB rulings. For example, the *EC — Biodiesel (Argentina)* Panel considered that there were no “cogent reasons” to deviate from the AB’s approach in past cases, and followed the same approach. The *Canada — Welded Pipe* panel ruled that Canada had not shown that there was a “cogent reason” to deviate from those rulings.⁷²

Secondly, the “cogent reasons” definition proposed by the Panel in the *United States — Countervailing and Anti-dumping Measures (China)* does leave room for ignoring previous AB rulings, but it suggests that even if a future panel finds a legal argument that could lead to a more convincingly different conclusion, it should still follow the previous interpretation of the AB. However, beyond listing the four situations in which “cogent reasons” may be invoked, the Panel engaged in no discussion and the scope of these conditions to deviate from previous AB rulings remains unclear.⁷³

Thirdly, the four situations proposed by the Panel in the *United States — Countervailing and Anti-dumping Measures (China)* that could constitute “cogent reasons” have certain merits. Some scholars believe that the situation 1 (the AB’s previous ruling are different from an authoritative interpretation under Article IX:2 of the WTO Agreement) would certainly constitute a legitimate reason for deviating from the AB jurisprudence. It is unclear whether the other three situations can constitute “cogent reasons”. Different sets of facts or factual premises (situation 2 and situation 4) simply show that the

⁷¹ *Supra* n. 69.

⁷² *Supra* n. 1, United States Trade Representative (2020), pp. 62–63, footnote 131.

⁷³ *Supra* n. 69.

disputes are not like; therefore, a ‘different’ interpretation by a panel would not constitute a deviation from the Appellate Body’s position. On the other hand, the showing of a potential legal conflict that was not considered relevant by the Appellate Body before (situation 3) simply shows a disagreement with respect to the relevant context for the interpretation of the provisions at issue. It is unclear to what extent this type of discrepancy in legal viewpoints may qualify as a “cogent reason” allowing a departure from previous case law. Therefore, with the exception of authentic interpretations, it seems to me difficult to identify situations that may constitute “cogent reasons” allowing deviations from the Appellate Body jurisprudence.⁷⁴ If the AB does not discuss in detail the interpretation of a covered agreement provision in the context of a specific case, but merely gives an interpretative conclusion or expresses its views, or fails to notice (an extremely unlikely event) another provision that may potentially conflict with it when interpreting a covered agreement provision (context), the future WTO adjudicators may find “cogent reasons” to deviate from previous ruling made by the AB. The *Turkey – Pharmaceutical Products* and the *Colombia – Frozen Fries* Arbitrators’ clarification-style departure from two previous AB reports would be examples of such a situation.

Fourthly, establishing specific criteria can reduce the uncertainty of applying the general standard of “cogent reasons”. The advantage of establishing a general standard for “cogent reasons” is that it provides an opportunity for modifying problematic, controversial, or unclear rulings. It also indicates that the WTO DSS has not established jurisprudence binding on all members. However, it also imposes certain costs. By requiring panels to look into the existence of “cogent reasons”, it increases the complexity of the panel assessment – and this aggravated by the fact that nowadays panels do not have any specific guidance on how to resolve this question. This is also likely to lead to an increase in litigation costs for the parties. For the time being, panels have been particularly strict with the assessment of cases under this standard. However, were panels to adopt a lighter approach, it would appear that the application of the “cogent reasons” standard might give rise to uncertainty in the application of the law. Ultimately, the higher cost that the selectivity in the application of jurisprudence may impose upon the system is the weakening of its credibility and of the value of the rule of law in the resolution of disputes.⁷⁵

⁷⁴ Fernando Piérola, General Thoughts on the Standard of “Cogent Reasons” in the Treatment of WTO Jurisprudence, *Global Trade and Customs Journal*, Vol. 9, 2014, p. 428.

⁷⁵ *Ibid.*, pp. 428–429.

The establishment of specific criteria for “cogent reasons” helps to mitigate such risks.

Fifthly, from the perspective of WTO dispute settlement practice, there are only two cases where the panel explicitly deviated from the AB ruling: the *US — Stainless Steel (Mexico)* and the *US — Differential Pricing Method*. The AB has never expressly deviated from its own jurisprudence. As the first MPIA case, the Arbitrators in the *Colombia — Frozen Fries* expressly deviated from the sequential approach adopted by the WTO AB with respect to Article 17.6(ii) of the Anti-dumping Agreement. However, the aforementioned three examples indicating departure from AB jurisprudence fall far short of the “cogent reasons” standard and at most can be seen as instances where panels or the Arbitrators found their own legal interpretation or approach more persuasive on a controversial issue. The legal standard of review set out in Article 17.6(ii) of the Anti-dumping Agreement applies to the interpretation of the provisions of the Anti-dumping Agreement interpretation by the measures of the investigating authorities of WTO members, and not to the interpretation and application of Article 17.6(ii) itself. In terms of other provisions of the Anti-dumping Agreement, if the AB has already reached a unique interpretation result according to the first sentence of Article 17.6(ii), subsequent panels and the AB should follow this interpretation result.

C. A Clear Deviation from AB Rulings Is Feasible but with Limited Scope

The Arbitrators in the *Turkey — Pharmaceutical Products* and the *Colombia — Frozen Fries* have provided a line of thought for deviating from or refining the legal interpretations or expressions of the WTO AB: to consider the specific case context in which the AB has made a particular legal interpretation or expression, and to distinguish between different cases.

There are several reasons for the feasibility of clarifying deviations from the AB rulings. Firstly, the legal interpretations or statements made by the AB regarding a certain provision of the WTO covered agreement occur in the specific context of each case, which lays the foundation for distinguishing different cases. The legal interpretations or statements made by the AB in a certain case context may not necessarily apply to another case. Secondly, the legal interpretations or statements made by the AB in a specific case

context for a certain provision may not necessarily exhaust all possible factual situations that the provision might apply to. Thirdly, due to the specific case background, the legal interpretations or expressions made by the AB regarding specific provisions may not necessarily consider all elements of treaty interpretation (text, context, purpose and aim, means of interpretation). Sometimes, conclusions are directly given without any interpretation based on the customary rules of international public law. In essence, legal interpretations or views expressed with respect to specific provisions without detailed analysis may not only have been given without serious considerations by the three-member AB hearing a particular appeal, but also without discussion with other members of the AB. Therefore, by clarifying deviations from the AB rulings, it does not contravene the legal principle of “treating like cases alike”, nor does it undermine the security and predictability of the multilateral trading system. On the contrary, by clarifying deviations from the AB rulings, it helps deepen the understanding of the provisions of the WTO agreements, providing more guidances for WTO members and enhancing the security and predictability of the multilateral trading system. Judging from the two cases, the legal interpretations developed by the Arbitrators are indeed more reasonable and appropriate.

The application scope of deviation from an AB by ways of clarification is subject to one important limitation: if a legal interpretation or pronouncement is the result of a detailed explanation by the AB of a particular legal provision, in order to depart from that ruling, a treaty interpreter would need to find “cogent reasons”.

VI. CONCLUDING COMMENTS AND RECOMMENDATIONS

The WTO appellate mechanism is the first appellate mechanism in the history of inter-state DSS and the first attempt of human society,⁷⁶ and even the result of “afterthought” by Uruguay Round negotiators.⁷⁷ The DSU governs all matters involved the WTO appeal mechanism with only 4 clauses.⁷⁸ The WTO

⁷⁶ *Supra* n. 1, pp. 1 & 3.

⁷⁷ Peter Van Den Bossche, From Afterthought to Centerpiece: The Appellate Body and Its Rise to Prominence in the World Trading System, In: Giorgio Sacerdoti, Alan Yanovich and Jan Bohannes (Eds.), *The WTO at Ten: The Contributions of the Dispute Settlement System*, Cambridge University Press, 2016, pp. 289-325.

⁷⁸ See Articles 17-20 of the DSU.

AB developed the Working Procedures for Appellate Review after consultation with the Director-General and the DSB Chair, followed by six revisions in response to developments in practice,⁷⁹ refining and enriching Article 17 of the DSU. The WTO AB and its operation are not perfect, and some problems have indeed been exposed in practice,⁸⁰ but it is not objective to attribute these problems entirely to the AB. Regardless, the WTO AB does indeed need certain reforms. The Walker Plan, which incorporates multiple proposals from WTO members, provides a solid foundation for the reform of the AB.⁸¹ The innovative institutional design of the MPIA also offers some references.⁸² The arbitration cases based on DSU Article 25 during the suspension of the AB provide practical experience for the reform of the WTO's appeal mechanism.

A. Actively and Flexibly Applying the Proposed Procedural and Substantive Measures Mechanism

In light of the increasing number of DSU Article 11 claims, the Arbitrators in the *Colombia — Frozen Fries* made a beneficial attempt based on the MPIA, which can still be applied in the future MPIA appeal arbitration cases. MPIA participants may even consider submitting a document to the DSB, fixing the procedural and substantive measures proposal of the *Colombia — Frozen Fries* arbitration tribunal regarding DSU Article 11 and other matters. Given the flexibility of DSU Article 25 arbitration, this approach could also be used in cases of appeal arbitration involving non-MPIA participants. Since the WTO Appeal Division can only be constituted after one party to the dispute files an appeal, this approach cannot be applied to cases to be heard by the WTO Appeal Division, but the AB may consider issuing general guidelines for reference by WTO members. In the reform of the WTO DSS, the following content can be added after the first sentence of DSS Article 17.4: Encourage disputing parties to exercise restraint in lodging a claim under DSU Article 11.⁸³

79 See Working Procedures for Appellate Review, WT/AB/WP/6, August 16, 2010, https://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm (Last Visited on May 9, 2025).

80 Most of the criticisms from the United States towards the WTO Appellate Body are difficult to substantiate, but some criticisms do objectively reflect certain issues, such as exceeding the maximum review period of 90 days and an increasing number of appellants invoking Article 11 of the DSU.

81 *Supra* n. 2.

82 *Supra* n. 5.

83 Parties to the dispute are encouraged to refrain from making claims under Article 11 of the DSU.

B. Deviations and Refinement of Some AB by Ways of Clarification with Care

The reform of the WTO DSS, especially its appeal mechanism, is not only a procedural and institutional reform, but also includes the perfection of WTO dispute settlement practices, such as the burden of proof, precedent system, treaty interpretation, and even WTO rulings. The WTO AB has issued over 150 reports since its establishment. Are the AB rulings (especially legal interpretations of provisions of covered agreements or opinions expressed) contained in these reports flawless? How to make it perfect if there are flaws? Although the collegiality mechanism can guarantee the high quality, consistency and coherence of WTO AB rulings, the Appeal Division for an individual case does not carefully discuss every legal issue involved in the case with other Appellate Body members, which may lead to the AB's legal interpretations or views on a specific provision not being perfect. In this context, the WTO AB, DSU Article 25 AB (and even the WTO panel) should be allowed to clarify, refine or even deviate from its previous rulings in an appropriate manner. The shutdown of the AB provides an opportunity for the DSU Article 25 Arbitrators to revisit its rulings. As seen in the *Turkey — Pharmaceutical Products* and the *Colombia — Frozen Fries*, a clear deviation from an AB ruling still should adhere to the “cogent reasons” standard and be approached with caution. However, it is desirable to deviate by way of clarification and refine the legal interpretations developed or opinions expressed by the AB but without detailed analysis.

C. Optimizing the Expression of WTO Judgments

Two cases involving the DSU Article 25 appeal arbitration show that WTO panels, the AB, or other adjudicators can refine their formulation when giving a legal interpretation or opinion on provisions of covered agreements, such as by adding a qualifying phrase like “in this case”. In this regard, the *Colombia — Frozen Fries* provides an example: the arbitral tribunal emphasizes that our analysis is framed by the question put before us, namely, whether it is permissible to interpret the term “dumped imports” to include imports of exporters who are “determined” to have final *de minimis* dumping margins. For greater clarity, we are not asked to, and we do not, address the implication of a preliminary determination of a *de minimis* margin in an authority's investigation prior to the final dumping determination.