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Can Arbitration under Article 25 of the DSU Replace the WTO Appellate Body?

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Abstract

This paper examines whether arbitration under Article 25 DSU and the MPIA can serve as a substitute for the WTO Appellate Body following its paralysis. It is argued that both preserve appellate review only in a limited sense: they allow certain disputes to retain a second level of judicial review and may address some of the criticisms directed at the appellate model provided for by the WTO dispute settlement system. At the same time, they cannot fully replace the Appellate Body as a permanent and universally accessible institution, since their functioning, being based on arbitration, depends on the consent of the parties and applies selectively, contributing to a fragmented dispute settlement system. Article 25 DSU and the MPIA should therefore be viewed as pragmatic and valuable interim responses, but not as the definitive institutional solution to the crisis of the WTO Appellate Body.

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List of Abbreviations

WTO – World Trade Organization

AB – Appellate Body

DSU – Understanding on Rules and Procedures Governing the Settlement of Disputes

MPIA – Multi-Party Interim Appeal Arbitration Arrangement

DSB – Dispute Settlement Body

GATT – General Agreement on Tariffs and Trade

US – United States

EU – European Union

Introduction

The World Trade Organization (WTO) ¹ dispute settlement system was originally designed as a two-tier structure, combining first-instance review by Panels with appellate review by the Appellate Body (hereinafter AB) under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) ². This structure aimed to promote legal certainty and predictability in the interpretation of WTO law. Since 2019, however, the AB has been unable to hear appeals because it no longer has the minimum number of members required to function. This paralysis created a gap in WTO dispute settlement, reflected in the phenomenon of “*appeal into the void*”. In response, some Members turned to Article 25 DSU, which provides Arbitration as an alternative means of dispute settlement and developed the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) ³ for appeal arbitration among participating Members. The key question is whether these mechanisms can genuinely replace the AB or whether they should instead be regarded as temporary and partial substitutes. This paper analyses this question and argues that Article 25 and the MPIA might preserve appellate review in a limited sense but cannot fully replace the AB as a universally available institution. While both allow certain disputes to retain a second level of legal review and they may address some of the criticisms directed at the appellate model, they are structurally incapable of restoring the original model. This is due to the very nature of the mechanisms involved: arbitration, which is based on the agreement of the parties and the MPIA, which operates on a selective and non-universal basis, applying only among participating Members.

Chapter 1 – The Original WTO Appellate Framework and the Crisis of the Appellate Body

1.1. The original two-tier structure of the WTO dispute settlement

A core function of the WTO is the settlement of disputes arising within Member States in breach of the obligations under the WTO agreements. This function is governed by the DSU, which provides the legal framework for the resolution of disputes between WTO Members. The WTO dispute settlement system is structured as a two-tier system. At the first level, disputes are examined by panels, which are ad hoc quasi-judicial bodies, mostly composed of three independent experts ⁴.

¹ *Marrakesh Agreement Establishing the World Trade Organization* (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (hereinafter *Marrakesh Agreement*)

² *Understanding on Rules and Procedures Governing the Settlement of Disputes* (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, (hereinafter “DSU”)

³ *Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU* (30 April 2020) JOB/DSB/1/Add.12 (hereinafter “MPIA”), see also Geneva Trade Platform “*Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*”, available at https://wtoplurilaterals.info/plural_initiative/the-mpia/

⁴ DSU, Art. 8

Panels are established by the Dispute Settlement Body (DSB) ⁵, that is the General Council convening in its dispute settlement capacity. Their task is to examine the legal and factual aspects of the dispute and to determine whether the measure at issue is consistent with WTO law ⁶. At the second level, the system provides appellate review by the AB, a standing body, composed of seven members ⁷. Unlike panels, the AB was entrusted only with the review of issues of law covered in panel reports and the legal interpretations developed by the same ⁸. From this standpoint, the appellate review was conceived as an institutional guarantee of consistency, legal certainty and coherence in the interpretation of WTO law.

1.2. The paralysis of the Appellate Body and the reasons for the crisis

Since 11 December 2019, the AB has been unable to hear appeals because it no longer has the minimum number of members required to function ⁹. This paralysis resulted from the continued block of appointments by the United States (US), in a system where the AB members are appointed by consensus under the DSU ¹⁰. As a result, the appellate stage of WTO dispute settlement has become non-functional leaving appealed panel reports in a state of legal uncertainty and undermining the effectiveness of the original two-tier structure created by the DSU ¹¹. This crisis is not only the result of blocked appointments, but also of a broader dissatisfaction of the AB, especially on the part of the US. Among the major criticisms there was a concern about the repeated failure to respect the 60-to-90-day deadline to complete the proceedings laid down in article 17.5 DSU. As a matter of fact, over time, appellate proceedings exceeded that limit, causing a weakening of the efficiency and credibility of the system ¹². A second line of criticism concerned what was often described as “*judicial overreach*” or “*judicial activism*” ¹³, namely the view that the AB sometimes went beyond what was necessary for the resolution of individual disputes by issuing reasoning of a broader and more systemic character, making findings regarded as unnecessary or advisory, expanding its interpretative role beyond what was clearly grounded in the DSU and, at times, coming too close to reconsidering factual findings made by panels even though it was formally entrusted only with the review of legal issues.

⁵ DSU, Art. 2.1, 6.1

⁶ DSU, Art. 11

⁷ DSU, Art. 17.1

⁸ DSU, Art. 17.2

⁹ Nikola Grochowska (2025), “*The Crown Jewel in Crisis: The WTO Appellate Body Paralysis*”, Lexpressed, available at: <https://www.lexpressed.com/projects/fair-trade/The-Crown-Jewel>

¹⁰ *Ibid.*

¹¹ Stratos Pahis (2024), “*Appeals after the Appellate Body*” 23 *World Trade Review* pp 296–298; Olga Starshinova (2021), “*Is the MPIA a Solution to the WTO Appellate Body Crisis?*” 55 *Journal of World Trade* pp 787–789;

¹² Pahis S. (2024) *op. cit.*, p. 300; Starshinova O. (2021), *op. cit.*, pp 799–800

¹³ Grochowska N. (2025), *op. cit.*

1.3. From the GATT system to the current crisis: legal consequences and the need for alternatives

The immediate legal consequence of the paralysis of the AB has been the phenomenon described as “*appeal into the void*”¹⁴. Under DSU, a panel report is not adopted by the DSB if one of the parties decides to appeal it¹⁵. In the absence of a functioning AB, however, such appeals cannot be completed. The result is that panel reports remain suspended and cannot reach the final stage. This has weakened the effectiveness of WTO dispute settlement by allowing parties to avoid the ordinary legal effect of an adverse panel report. Where appeals into the void are available, they create strong strategic incentives and have been used frequently for precisely that purpose¹⁶. This issue has consequences for both finality and enforceability¹⁷, since the inability to conclude appellate review leaves complainants without a final ruling capable of triggering the ordinary compliance mechanism of the DSU¹⁸. Therefore, the crisis has undermined one of the central objectives of the WTO dispute settlement system: to provide a binding and predictable framework for the resolution of trade disputes¹⁹. A useful comparison may be drawn with the earlier dispute settlement system laid down in 1947 in the General Agreement on Tariffs and Trade (GATT). Under GATT, panels also existed, but their reports were adopted only by positive consensus, which meant that the losing party could block adoption²⁰. One of the principal innovations of the WTO system was to overcome that weakness by making dispute settlement more automatic and binding²¹. As will be discussed in more detail in chapter 3, the current crisis does not mark a complete return to the GATT model, as WTO law still provides for binding decisions and also includes an internal arbitration mechanism as an alternative means of dispute resolution. Nevertheless, the inability to pursue appeals has undermined the automatic nature of appellate review, thereby increasing the importance of alternative solutions within the WTO framework itself.

¹⁴ Pahis S. (2024) *op. cit.*, p. 297

¹⁵ DSU, Art. 16.4

¹⁶ Pahis S. (2024) *op. cit.*, pp 296-298

¹⁷ *Ibid.*

¹⁸ DSU, Artt 21, 22

¹⁹ DSU, Art 3.2

²⁰ WTO, “*Adoption of GATT dispute settlement reports*”, GATT Disputes Database, available at: <https://gatt-disputes.wto.org/disputes/overview/adoption-reports>

²¹ DSU, Artt. 16.4 and 17.14

Chapter 2 – Article 25 DSU, the MPIA and the Emergence of Appeal Arbitration

2.1. The legal basis of Article 25 DSU

In this context, the paralysis of the AB made it necessary to assess whether the WTO legal framework itself contained mechanisms capable of preserving some form of appellate review. In this regard, Article 25 of the DSU is of particular importance, as it provides for arbitration as an alternative means of dispute settlement within the WTO system²². Article 25 DSU provides that expeditious arbitration within the WTO may facilitate the resolution of certain disputes, provided that the issues are clearly defined by the parties²³. Recourse to arbitration is expressly made subject to the mutual agreement of the parties, which must also agree on the procedures to be followed, consistent with the very definition of arbitration²⁴. The parties must further agree to abide by the arbitration award and such awards are to be notified to the DSB²⁵. In addition, Article 25.4 provides that the DSU's rules on implementation and retaliation, namely Articles 21 and 22 of the DSU, apply *mutatis mutandis*²⁶ to arbitration awards. In this respect, this system differs from dispute settlement mechanisms of a purely diplomatic or optional nature, as it is integrated in the WTO legal order and renders the outcome binding once the parties have chosen to invoke it. Originally, Article 25 DSU was not intended to replace the AB. Rather it was conceived as a flexible arbitration mechanism that the parties could use if they wished to clearly define a dispute and submit it to an alternative procedure²⁷. Its importance grew after the AB ceased to function, when Member States began to consider whether this existing provision could be used to perform a function similar to that of an appellate mechanism. In this sense, this mechanism did not create a new second instance within the WTO dispute settlement, but provided a legal basis upon which to establish, by consensus, a form of appellate review²⁸. If Article 25 DSU is to be understood as a possible response to the crisis in the AB, it must be viewed for what it is: not a restoration of the original institutional structure, but a legal mechanism within the WTO through which the parties may agree to continue the review process beyond the panel stage. It was precisely on this basis that the MPIA was subsequently developed.

²² DSU, Art. 25.1, see also: WTO, “DSU - Article 25”, WTO Analytical Index, available at: https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art25_jur.pdf

²³ *Ibid.*

²⁴ DSU, Art. 25.2

²⁵ DSU, Art. 25.3

²⁶ Thomson Reuter's Practical Law definition of *mutatis mutandis*: “[...] with the necessary changes having been made or with consideration of the respective differences.”, available at:

[https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I3f4a4332e8db11e398db8b09b4f043e0?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I3f4a4332e8db11e398db8b09b4f043e0?transitionType=Default&contextData=(sc.Default)&firstPage=true)

²⁷ Julia Y Quin (2022) “Turkey-Pharmaceuticals: The First WTO Arbitration for Appellate Review” 49 Legal Issues of Economic Integration pp. 415-417, Starshinova O. (2021) *op. cit.*, pp. 787, 790-791

²⁸ *Ibid.*; DSU Art. 25.2

2.2. The MPIA as a structured use of Article 25

The most significant initiative aimed at implementing Article 25 DSU in response to the AB's crisis is the MPIA²⁹. Established in April 2020 by a group of WTO Members, the MPIA was created as an interim mechanism to preserve the possibility of appellate review at a time when the AB was no longer able to hear appeals. Its objective was to avoid “*appeals into the void*” in disputes between participating Members and, in doing so, to maintain the binding nature and two-tier structure of WTO dispute settlement for such disputes³⁰. In this sense, the MPIA was conceived not as an abstract institutional declaration, but as a practical procedural framework for replacing the unavailable appellate stage with arbitration under Article 25 DSU³¹. The relationship between the MPIA and Article 25 DSU is therefore close, but the two are not identical. The latter provides the general legal basis: it provides for arbitration as an alternative means of dispute resolution, subject to the mutual agreement of the parties and in accordance with the procedures agreed upon by them. The MPIA, on the other hand, is a more specific and organized arrangement through which a subgroup of WTO Members has committed in advance to resort to the appellate arbitration provided for in Article 25 DSU in disputes among themselves until the AB is able to function. It therefore constitutes a structured recourse to it. For this reason, the MPIA should not be confused with Article 25 DSU itself. The latter remains applicable, in principle, whenever the parties to a dispute agree to invoke it, even outside the framework of the MPIA, which merely institutionalizes a particular application, namely “*appeal arbitration procedure*”³² and supplements it with standard procedures³³ and pre-established pool of arbitrators³⁴. At the same time, it does not re-establish the AB as a permanent body of jurisdiction. Its scope of application is limited to Members participating³⁵ and any specific appeal is conducted through arbitration rather than through a re-established AB. The significance of the MPIA lies precisely in its intermediary nature: it does not entirely deprive Members of the right to appeal, nor does it fully restore the original institutional structure of the WTO dispute settlement system. Rather, it offers a temporary, structured mechanism through which certain Members have sought to preserve the right to appeal, waiting for a more definitive solution³⁶.

²⁹ See n. 3

³⁰ MPIA preamble: “*Resolved [...] to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports [...]*”

³¹ MPIA para. 1

³² *Ibid.*

³³ MPIA para. 3; MPIA Annex I

³⁴ MPIA para. 4; MPIA Annex II

³⁵ MPIA para. 2

³⁶ Joost Pauwelyn (2023), “*The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?*” 22 World Trade Review, pp. 693-695; Starshinova O. (2021) *op. cit.*, pp. 787-791

2.3. Appeal arbitration in practice

The practical implications of Article 25 DSU became apparent only once it began to be used to review panel reports in actual disputes. The first and most important example is Turkey – Pharmaceutical Products (DS583)³⁷. In that dispute, the European Union (EU) and Turkey agreed on procedures for resorting to arbitration to decide on any appeal filed against the final panel report³⁸. This case is especially significant because it was the first use of this mechanism to serve an appellate following the AB's paralysis³⁹. It demonstrated that Article 25 DSU could, in concrete cases, be adapted to replicate the examination of legal issues normally associated with the appellate stage. A second key example is Colombia – Frozen Fries (DS591)⁴⁰. Unlike the previous case, this dispute fell within the scope of the MPIA, since both Colombia and the EU were part of the agreement⁴¹. The WTO described the award circulated on December 21, 2022, as the first arbitration proceeding based on the MPIA between participating members⁴². This case is important because it shows that MPIA is a functioning procedural arrangement capable of producing a final award within the WTO system, thereby shifting the MPIA from an institutional level to a practical judicial use⁴³. Recent developments confirm that this mechanism has not remained isolated. In China – Enforcement of Intellectual Property Rights (DS611)⁴⁴ the WTO reported in April 2025 that China and the EU had agreed on procedures for “*arbitration under Article 25 of the DSU to decide any appeal from any final panel report*” in the dispute⁴⁵. The resulting award of the case was the second appeal arbitration conducted under the MPIA among the participating Members⁴⁶. Although still limited in number, such cases demonstrate that Article 25 DSU has become an operational feature of post-AB dispute settlement, rather than a purely theoretical element that risked remaining dormant in the text of the

³⁷ Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS583/ARB25 (25 July 2022), see also WTO, “DS591: Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products”, Case Page, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm

³⁸ *Ibid.* para. 1.7.

³⁹ Qin J. Y. (2022) *op. cit.*

⁴⁰ Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS591/ARB25 (21 December 2022), see also WTO, “DS591: Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands”, Case Page, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm

⁴¹ Pauwelyn J. (2023) *op. cit.*

⁴² WTO “WTO arbitrators issue award in EU-Colombia frozen fries dispute”, WTO Official Website, news item (21 December 2022), available at: https://www.wto.org/english/news_e/news22_e/ds591arb25_21dec22_e.htm

⁴³ *Ibid.*

⁴⁴ China – Enforcement of Intellectual Property Rights, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS611/ARB25 (21 July 2025), see also WTO, “DS611: China – Enforcement of Intellectual Property Rights”, Case Page, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm

⁴⁵ WTO, “EU initiates appeal arbitration in intellectual property dispute, discloses panel report”, WTO Official Website, WTO news (24 April 2025), available at: https://www.wto.org/english/news_e/news25_e/disp_24apr25_e.htm

⁴⁶ *Ibid.*; WTO, “Arbitrators issue award in EU-China intellectual property dispute”, WTO Official Website, WTO news (21 July 2025), available at: https://www.wto.org/english/news_e/news25_e/ds611arb25_21jul25_e.htm

DSU. These cases highlight two points. First, they show that Article 25 DSU can be applied on an *ad hoc* basis even outside the MPIA ⁴⁷. Second, they show that through the latter, it has evolved into a more structured mechanism of appellate review among participating Members ⁴⁸. The small number of cases calls for caution in drawing overly broad conclusions, but the practice is already sufficient to show that Article 25 DSU is not merely a piece of text. It has become a real, even if limited, instrument for preserving the right to appeal within the WTO system.

2.4. Does the MPIA address the criticisms made against the Appellate Body?

One of the most interesting questions raised by the analysis of the MPIA is whether it merely preserves appellate review on a temporary basis, or whether it can also address the criticisms that contributed to the crisis of the AB. In this regard, the MPIA appears to address at least some of these criticisms. First, it places particular emphasis on the time frame ⁴⁹. Both MPIA proceedings and early appeal arbitrations conducted under Article 25 DSU underscore the goal of issuing awards within 90 days, thereby addressing the recurring criticism that AB's proceedings have increasingly failed to meet the DSU deadline ⁵⁰. Second, the MPIA framework aims to exercise greater control over the scope of reasoning in appeals ⁵¹. MPIA arbitrators are encouraged to adopt organizational measures aimed at streamlining proceedings, including rules regarding page limits, time limits, deadlines, as well as the number and duration of hearings ⁵². Moreover, the MPIA allows arbitrators to focus exclusively on the issues necessary to resolve the dispute and only on those raised by the parties ⁵³. In this regard, the mechanism appears designed to reduce the risk of superfluous or advisory reasoning, a frequent criticism of the AB ⁵⁴. In addition, the procedures agreed upon in the first appellate arbitrations addressed the US complaints regarding excessive review of the facts and advisory opinions ⁵⁵. At the same time, the available data remains preliminary and limited ⁵⁶. The small number of concluded appellate arbitration proceedings does not yet allow for definitive conclusions to be drawn as to whether the MPIA has definitively resolved the issues attributed to the AB ⁵⁷. At most, it can be said that the MPIA represents a deliberate effort to establish a more rigorous

⁴⁷ See n. 37

⁴⁸ See n. 40 and 44

⁴⁹ MPIA, Annex 1, para. 12

⁵⁰ Pahis S. (2024) *op. cit.*

⁵¹ Pauwelyn J. (2023) *op. cit.*

⁵² MPIA Annex 1, para. 12;

⁵³ MPIA Annex 1, para. 10

⁵⁴ Pahis S (2024) *op. cit.*, pp 299,300; Pauwelyn J, (2023) *op. cit.*, pp. 694,695

⁵⁵ *Ibid.*; MPIA Annex 1, paras. 10 and 13

⁵⁶ Starshinova O. (2021) *op. cit.*, pp.787,788 and 803,804

⁵⁷ Pauwelyn J. (2022) *op. cit.*, pp. 693-697

and streamlined form of appellate review⁵⁸. Whether this effort is sufficient to make Article 25 DSU a substitute for the AB remains the central question.

Chapter 3 – Can Article 25 DSU Replace the Appellate Body?

3.1. Arguments in favor of substitution

It is clear from the preceding analysis that the strongest argument in favor of Article 25 DSU as a substitute for the AB is that it allows WTO Members to maintain a form of appeal within the current WTO legal framework. In fact, Article 25 DSU is expressly provided for by DSU itself and makes the outcome binding once the parties agree to invoke it. In this sense, invoking it does not amount to an external deviation from WTO law, but rather to the activation of a mechanism already contained within it⁵⁹. This feature is particularly important in the current crisis, as it allows Members to respond to the paralysis of the AB without abandoning the logic and institutional framework of WTO dispute settlement⁶⁰. A second argument in favor of substitution is that Article 25 DSU has already proven capable of functioning in practice as a mechanism similar to an appeal⁶¹. The cases analyzed demonstrate that arbitration can be used to review panel reports and to issue final decisions that the parties are willing to comply with⁶² and that Article 25 DSU is not merely a theoretical and “dormant” provision within the DSU, but a living mechanism capable of ensuring judicial review beyond the panel stage⁶³. This argument is even more powerful in the case of the MPIA⁶⁴. By requiring participating Members to invoke Article 25 DSU in advance in disputes among themselves, the MPIA preserves the fundamental logic of the two-tier dispute settlement system, at least for a portion of WTO disputes. In this regard, it aims to preserve one of the distinctive features of the original WTO dispute settlement system, namely the possibility of a judicial review of the panel’s findings before the dispute reaches its final stage. The MPIA thus supports the assertion that Article 25 DSU can, at least from a functional standpoint, serve as a substitute for the appellate stage, which is not available in a structured and predictable manner⁶⁵. Furthermore, Article 25 DSU, particularly when analyzed in light of the MPIA framework, appears to address some of the criticisms directed at the AB⁶⁶. As noted in the previous Chapter, the MPIA framework places greater emphasis on time limits, procedural economy and limiting review to the issues necessary for resolving the dispute. In this

⁵⁸ *Ibid*, pp 694,695.; *MPIA* Annex 1, paras. 10, 12 and 13

⁵⁹ *Ibid*, p. 693; Qin J. Y. (2022) *op. cit.*, pp 415-418; *DSU* Artt. 25.2-25.4

⁶⁰ Starshinova O. (2021) *op. cit.*, pp 789-791

⁶¹ Pahis S. (2024) *op. cit.*, pp 300-304 ; Qin J. Y (2022), pp 415-417

⁶² See n. 37, 40 and 44

⁶³ Pauwelyn J. (2023) *op. cit.*, pp 693-697; Starshinova O. (2021), pp 787-791

⁶⁴ *MPIA*, paras. 1-2

⁶⁵ Pauwelyn J (2023) *op. cit.*, pp 695-697 ; Starshinova O. (2021) *op. cit.*, pp 789-791, 799-800

⁶⁶ Pahis S. (2024) *op. cit.*, pp 296-300

sense, it can be argued, and one might even venture to say, that Article 25 DSU does not merely replicate the old appeal process but seeks to preserve it while avoiding some of the issues that contributed to its crisis ⁶⁷. Taken together, these factors support the view that Article 25 DSU could serve as a realistic substitute for the AB, as it preserves judicial review, operates in accordance with WTO law, has already demonstrated its practical feasibility and could also address, at least in part, to some of the criticisms that have contributed to the paralysis of the AB, particularly those regarding procedural timelines and the scope of reasoning in appeals. The validity of this position, however, depends on whether the aim is to replace the functions or the institution itself.

3.2. Structural limits of Article 25 DSU

Despite its usefulness, Article 25 DSU cannot simply be equated with the AB. The first and most obvious reason is that recourse to the arbitration mechanism depends on the mutual agreement of the parties, in accordance with the very definition of arbitration ⁶⁸. Unlike the original appeal mechanism provided for in the DSU, which was part of the WTO's ordinary dispute settlement structure and did not require an agreement between the parties, Article 25 DSU operates only when the disputing Members consent to use it and agree on the procedures to be followed. This consensual basis is not a marginal feature: it is the distinctive legal characteristic of Article 25 DSU⁶⁹. The fundamental difference between appeal arbitration and appeal before the AB lies precisely in the consensual nature of arbitration, since the parties themselves agree on both the adjudicators and the procedural framework ⁷⁰. A second structural limitation is that Article 25 DSU does not establish a permanent, full-fledged appellate mechanism. The AB was conceived, pursuant to Article 17 DSU, as a permanent body within the WTO dispute settlement system, entrusted with a general appellate function. Article 25 DSU, by contrast, provides only a legal basis for arbitration in specific disputes ⁷¹. Even the MPIA, although more structured, does not establish a permanent appellate mechanism. Rather, it offers a procedural framework through which participating Members and only them may organize an appellate arbitration among themselves as long as the AB remains unable to function ⁷². This is linked to the absence of a universal right of appeal under Article 25 DSU. In the original WTO model, appellate review was in principle accessible to all Members as part of the DSU system. Article 25 DSU does not provide for equivalent rights. Access to arbitration depends, as noted, on prior participation in the MPIA or on a case-specific agreement between the parties. Consequently, Article

⁶⁷ MPIA Annex 1 paras. 10,12, 13

⁶⁸ DSU Art 25.2

⁶⁹ Qin J. Y. *op. cit.*, (2022), pp 415-418

⁷⁰ *Ibid.*

⁷¹ DSU Artt 17, 15.2; Pauwelyn (2023) *op. cit.*, pp 693,694

⁷² MPIA, paras. 1,2; Starshinova O. (2021) *op. cit.*, pp 787-800

25 DSU is not automatically applicable to all disputes and to all WTO Members as was the case for the AB. In this regard, it can replace a function, namely, the review of legal issues after the panel stage, but it cannot in itself restore the institution that originally performed that function. The distinction is fundamental and it is precisely this gap between functional replacement and institutional restoration that limits Article 25 DSU's ability to serve as a complete substitute for the AB.

3.3. The concerns: fragmentation and strategic behavior

One of the most serious limitations of appellate arbitration is that it contributes to the fragmentation of the WTO dispute settlement system⁷³. Under the original WTO framework, appellate review was part of a single, unified institutional structure. In the post-2019 context, dispute settlement has become uneven. WTO dispute settlement is now effectively segmented: among MPIA Members, appeals against panel reports are channeled into arbitration, while outside that framework, disputes remain subject to appeals into the void⁷⁴. This means that the availability of appellate review no longer depends on a common institutional framework, but on the identity of the parties and the legal framework applicable to them. This differentiated treatment of disputes is evident when comparing cases between MPIA Members with those involving at least one non-participating Member. Under the MPIA, participating Members commit not to file appeals under Articles 16.4 and 17 of the DSU in disputes among themselves and instead to resort to appellate arbitration under Article 25 DSU⁷⁵. However, this commitment has limited scope since it does not apply universally to all disputes involving an MPIA Member. Consequently, the same Member may agree to arbitration in one dispute and still file an appeal into the void in another, depending solely on whether the other party is also covered by the MPIA framework. The system thus ceases to function as a single multilateral model and becomes contingent on membership patterns and bilateral procedural possibilities. This fragmentation is confirmed by more recent practice. For the period up to the end of 2022, MPIA participants such as EU, Pakistan and China, were among the Members that appealed panel reports into the void when the opposing party was not covered by the MPIA⁷⁶. Subsequent practice shows that this phenomenon did not end there. In DS558, a dispute between the US and China, the latter, an MPIA Member, notified its decision to appeal on 20 September 2023⁷⁷. Likewise, in DS618, a dispute

⁷³ Pahis S. (2024) *op. cit.*, pp. 296-300

⁷⁴ *Ibid.*

⁷⁵ MPIA, paras. 1-2

⁷⁶ Pahis (2024) *op. cit.*, pp 289, 299

⁷⁷ China – Additional Duties on Certain Products from the United States, Notification of an Appeal by China under Article 16.4 and Article 17 of the DSU, WT/DS558/8 (18 September 2023), see also WTO, “DS558: China — Additional Duties on Certain Products from the United States”, Case Page, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds558_e.htm, see also WTO, “China appeals WTO dispute panel report regarding Chinese duties on US products”, WTO official website, WTO news (20 September 2023), available at: https://www.wto.org/english/news_e/news23_e/ds558apl_20sep23_e.htm

between Indonesia and the EU, the latter, also an MPIA Member, notified its decision to appeal on 26 September 2025⁷⁸. These examples do not show a violation of the MPIA as such; rather, they illustrate that the MPIA does not eliminate appeals into the void outside disputes among its participants. The result is a segmented procedural landscape in which access to appellate review depends not on a universal institutional structure, but on whether the parties happen to be linked by the MPIA or by a separate agreement, in accordance with Article 25 DSU. The solution created by the MPIA is therefore highly uneven: an unsuccessful respondent, where appellate arbitration is not available, has a strong incentive to file an appeal into the void to suspend the legal consequences of an unfavorable panel ruling. Where appellate arbitration is available, by contrast, the respondent faces a genuine second-tier review that could confirm the panel's legal conclusions and lead the dispute toward implementation. The result is a system in which some disputes retain a consistent appellate phase while others do not. This difference is significant not only from a procedural standpoint but also from a systemic one: it affects litigation strategy, bargaining power and the very practical value of bringing a case to the WTO⁷⁹. Fragmentation weakens the consistency and equality of access that were at the heart of the original rationale for WTO dispute settlement. Article 25 DSU may preserve appellate review, but it does so unequally across Members and disputes. The consequence is a pluralized and differentiated appellate system. Some Members continue to benefit from a structured form of appellate review; others remain in a system where panel reports can be nullified through appeals into the void. For this reason, Article 25 DSU and the MPIA may be effective as partial solutions, but they also institutionalize a more fragmented model of WTO dispute settlement than the one originally intended by the DSU⁸⁰.

3.4. Comparison with the pre-WTO GATT dispute settlement model

A useful way to assess the current use of Article 25 DSU is to compare it with the previous dispute settlement model under the 1947 GATT. Under the GATT system as well, there were special groups that could issue reports containing legal findings and recommendations. However, these reports did not automatically take effect. As explained by the WTO's GATT Dispute Database, GATT reports had to be adopted by positive consensus, which required the agreement of the respondent; out of 136

⁷⁸ *European Union – Countervailing Duties on Imports of Biodiesel from Indonesia*, Notification of an Appeal by the European Union under Article 16.4 and Article 17 of the DSU, WT/DS618/5 (26 September 2025), see also WTO, “DS618: European Union — Countervailing Duties on Imports of Biodiesel from Indonesia”, Case Page, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds618_e.htm; see also WTO, “EU appeals dispute panel report regarding duties on imports of biodiesel from Indonesia”, WTO official website, WTO news (26 September 2025), available at: https://www.wto.org/english/news_e/news25_e/dsb_26sep25_e.htm

⁷⁹ Pahis (2024) *op. cit.*, pp 297-300

⁸⁰ *Ibid.*, MPIA paras. 1-2

GATT dispute settlement reports, 40 were not adopted⁸¹. This was one of the main institutional weaknesses of the GATT model, as it allowed the losing party to prevent a panel's legal findings from becoming operative. The DSU was intended to remedy this weakness by making WTO dispute settlement more automatic and binding. Unlike under GATT, panel reports could no longer be blocked so easily and the AB lent the system greater consistency and stability⁸². From this perspective, the current invocation of Article 25 DSU does not amount to a complete return to the GATT logic. This is because it remains integrated into the WTO legal order and once chosen by the parties, produces a ruling that they are bound to comply with. Rulings under Article 25 DSU are accorded with the same binding force as adopted Panel and AB reports, since Articles 21 and 22 DSU apply *mutatis mutandis* to arbitral awards⁸³. Article 25 DSU thus preserves a degree of legal binding force that was often lacking in GATT's old adoption model. The current system, however, departs from the WTO's original model of universal appellate review. While it does not replicate the GATT rule of adoption by positive consensus, it makes appellate review contingent on consensus, whether through an ad hoc agreement under Article 25 DSU or through participation in the MPIA, rather than on a permanent institution available for all disputes⁸⁴.

3.5. Alternative response: majority voting to appoint Appellate Body members

An alternative response to the AB crisis would be not to seek to replace appellate review with alternative solutions, but rather to restore the original institution itself. In this regard, some scholars have argued that the Marrakesh Agreement could allow for the appointment of AB members by majority vote, should it not be possible to reach consensus⁸⁵. The legal basis for this argument is Article IX, paragraph 1 of the Marrakesh Agreement which provides that the WTO shall continue the practice of decision-making by consensus, but also stipulates that "*except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting*" and that decisions of the Ministerial Conference and the General Council shall be adopted by a majority vote⁸⁶. At the same time, the same provision adds that decisions of the General Council, when convened as the DSB, are taken only in accordance with Article 2.4 of the DSU, which is why the legality of majority voting for AB appointments remains contested⁸⁷. The difficulty arises because

⁸¹ WTO, "Adoption of GATT dispute settlement reports", GATT Disputes Database

⁸² DSU Artt 16.4 and 17.14

⁸³ Qin J. Y (2022) *op. cit.*, pp 415-417

⁸⁴ DSU Art 25.5; MPIA paras. 1-2 ; Pauwelyn J. (2023) pp 693-695

⁸⁵ Kaijun Pan (2025), "Breaking the Impasse of Appointing Members of the WTO Appellate Body: A Perspective from International Institutional Law", 24 World Trade Review, (Abstract)

⁸⁶ Marrakesh Agreement Art. IX:1; WTO, "WTO Agreement – Article IX", WTO Analytical Index, available at: https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art9_jur.pdf

⁸⁷ *Ibid.*

Article 2.4 of the DSU provides that decisions shall be taken by consensus. Since appointments to the AB are made by the DSB, this provision is commonly invoked against the use of majority voting, even though Article IX:1 of the Marrakesh Agreement appears to permit voting in the absence of consensus. From this perspective, a majority vote by the General Council could be considered a legally sound mechanism for reinstating the AB and ensuring the effective functioning of the WTO dispute settlement system. At the same time, such a solution would not eliminate all the broader difficulties afflicting the system. Its significance would lie primarily in facilitating the rapid reconstitution of the AB, rather than in providing a comprehensive response to the institutional crisis⁸⁸. The relevance of this debate to the present paper is limited but significant. If majority voting were legally and politically feasible, it would aim to reconstitute the AB as a permanent institution, rather than preserving appellate review through consensual arbitration under Article 25 DSU. This paper does not intend to resolve this institutional law debate. It refers to it only to highlight a more specific point: Article 25 is not the only conceivable response to the crisis. Its value lies in its pragmatic and immediately usable nature, but that does not necessarily make it the definitive or most satisfactory response to the paralysis of the AB.

Conclusion

This paper argued that Article 25 DSU could serve as a valid substitute for the AB only in a limited and functional sense. It preserves judicial review beyond the panel stage, operates within the WTO legal framework and has already demonstrated its ability to function in practice through both ad hoc appellate arbitration and the MPIA. It can also address, at least in part, some of the criticisms directed at the AB, particularly those concerning procedural rules and the scope of reasoning on appeal. At the same time, Article 25 DSU cannot be considered a complete substitute for the AB. Its use depends on the agreement of the parties; it does not establish a permanent institution of general jurisdiction and does not create a universal right of appeal in all WTO disputes. Consequently, it preserves appellate review only selectively and contributes to a more fragmented system, in which some disputes retain a second level of adjudication while others remain subject to appeals into the void. The most compelling conclusion, therefore, is that Article 25 DSU and the MPIA should be understood as pragmatic and valuable interim responses to the crisis, but not as the definitive institutional solution. They mitigate the disruptive effects of the AB's paralysis and preserve appellate review where conditions permit, but they do not restore the universal and permanent nature of the appellate mechanism originally established within the WTO. The long-term resolution of the crisis therefore

⁸⁸ Pan K. (2025), *op. cit.*

lies not only in functionally preserving appellate review, but also in addressing the broader institutional question of how a truly multilateral and stable appellate adjudication system can be reestablished within the WTO.

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