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Tracing the Powers of WTO MPIA Arbitrators

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Contents

Introduction **3**

I. Distinguishing the sources of international judicial power **5**

II. The normative relationship between the DSU and the MPIA **7**

1. The dynamics of arbitration under Article 25 of the DSU 8

2. The DSU and Annex 1 to the MPIA as sources of implied powers 9

III. The reaction or silence of the MPIA in regard to AB practices **10**

1. AB controversies to which the MPIA expressly reacts 11

A. Exceeding deadlines 11

B. Relying on prior cases 13

C. Answering the unasked 15

2. Powers exercised by the AB on which the MPIA is silent 16

A. Determining the burden of proof 16

B. Drawing adverse inferences 18

C. Admitting amicus curiae submissions 20

IV. Conclusion **21**

Tracing the Powers of WTO MPIA Arbitrators

Introduction

To carry out its judicial tasks, an international court or tribunal may claim powers beyond those expressly granted in its mandate. For example, a court may assert the power to determine whether it has jurisdiction, or to order interim measures to ensure the effectiveness of its proceedings.[1] These assertions have at times been based on the premise that such powers are 'inherent' to the judicial function of international courts.[2] Ambiguity as to the scope of these powers has persisted since they were first explicitly applied in 19th–century English judicial practice,[3] and today underlies concerns over judicial activism in non-domestic proceedings.[4] As addressed in the present article, inherent powers have also informed recent calls from some governments to reform specific international organizations and agreements, and contributed to the functional demise of the World Trade Organization (WTO) Appellate Body (AB) in December 2019.

The U.S. led this charge, insisting on the need to address "systemic concerns" before permitting the required consensus for the WTO Dispute Settlement Body (DSB) to appoint or reappoint judges ('members') of the AB.[5] Months after this strategy deprived the AB of a quorum—thus preventing it from hearing new cases—the U.S. provided a full account of its allegations that the AB had exceeded its authority under the WTO Dispute Settlement Understanding (DSU). According to the U.S. Trade Representative's 2020 Report, the AB, inter alia,

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1 See e.g. *United States – Anti-Dumping Act of 1916 (Complaint by the European Communities)* (2000), *WTO* Doc WT/DS136/AB/R (Appellate Body Report), online: WTO < docsonline.wto.org > ("it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it" at 17, n 30).

2 See generally Brian McGarry, *Intervening in International Justice: Third States before Courts and Tribunals* (Cambridge: Cambridge University Press, forthcoming in 2023), Chapter 4.1.

3 See *Metropolitan Bank v Pooley*, [1885] 10 AC 210 (HL (Eng)) (Lord Blackburn states that the practice of invoking inherent jurisdiction to exercise specified procedural powers dates "from early times" at 220, para 2).

4 See e.g. Bundesverfassungsgericht [Federal Constitutional Court], *Judgment of the Second Senate of 05 May 2020*, 2 BvR 859/15 (Germany) [official translation] (non-recognition of a Judgment of the Court of Justice of the European Union at 1–2).

5 See WTO, Dispute Settlement Body, News Item, "Members urge continued engagement on resolving Appellate Body issues" (18 December 2019), online: WTO < https://www.wto.org > ("the United States once again said…that the systemic concerns that it previously identified remain unaddressed" at para 3). See also U.S. Trade Representative, *Ambassador Katherine Tai's Remarks as Prepared for Delivery on the World Trade Organization* (14 October 2021), online: *Office of the United States Trade Representative* < ustr.gov > (Ambassador Tai expressed the United States' disappointment with the current dispute settlement system: "is a system that requires 16 years to find a solution "fully functioning?"; similarly, Ambassador Tai stressed that "[r]eforming dispute settlement is not about restoring the Appellate Body for its own sake, or going back to the way it used to be").

- failed to recognize that it is "beyond the scope of the [AB]'s limited authority to attempt to direct how the [DSB] should perform its own responsibilities";[6]
- "asserted that it has the inherent authority to allow someone to serve on appeal even if that person is not an [AB] member";[7]
- went "beyond the role assigned to it by the DSU to help resolve disputes and has instead offered opinions on issues not needed or relevant to resolving the particular dispute it was reviewing";[8]
- "asserted that it has the authority to review panel findings on the meaning of a WTO Member's challenged domestic (or 'municipal') law";[9] and
- "wrongly claim[ed] that its reports are entitled to be treated as binding precedent".[10]

Whilst the U.S. Trade Representative prepared his report, however, several major trading nations formulated the details of a provisional escape plan. The E.U. and Canada spearheaded the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in response to the AB's suspension. In so doing, the MPIA revived the rarely utilized arbitration provision in Article 25 of the DSU, creating an opt-in mechanism for WTO Members to approximate the benefits of standing appellate review.[11] This stopgap appellate system entered into force in 2020[12] and counts over 50 participating members as of December 2022.[13] The appeal arbitration arrangement was recently invoked by two of its participating members, the E.U. and Colombia, in the *Colombia — Frozen Fries* case.[14] Moreover, a very similar procedure has been designed and agreed upon in the recent *Turkey — Pharmaceutical Products*

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6 U.S. Trade Representative, *Report on the Appellate Body of the World Trade Organization* (11 February 2020) at 73, online (pdf): *Office of the United States Trade Representative* < ustr.gov > [U.S., *Report on AB*].

7 *Ibid* at 25.

8 *Ibid*.

9 *Ibid* at 40.

10 *Ibid* at 55.

11 See European Commission's Directorate-General for Trade, News Article, "Interim appeal arrangement for WTO disputes becomes effective" (30 April 2020), online: *European Commission* < policy.trade.ec.europa.eu >; *Letter of the U.S. Permanent Mission to the World Trade Organization* (5 June 2020), online (pdf): *World Trade Law* < www.worldtradelaw.net>.

12 See WTO, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU* (30 April 2020), *WTO* Doc JOB/DSB/1/Add.12, online: *WTO* < docs.wto.org > [MPIA].

13 See European Commission, "EU wins in WTO appeal about Colombian anti-dumping duties on frozen fries," online: *European Commission* < policy.trade.ec.europa.eu >.

14 *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands (Complaint by the European Union)* (22 April 2021), *WTO* Doc WT/DS591/3/Rev.1 (Agreed Procedures for Arbitration under Article 25 of the DSU – Revision), online: *WTO* < docs.wto.org > [*Colombia — Frozen Fries*] (Colombia requested the Panel to suspend its work on the dispute so that arbitration could proceed in accordance with the Agreed Arbitration Procedures); WTO, Dispute Settlement Body, *Communication from the Panel* (issued on 16 September 2022), *WTO* Doc WT/DS591/6, online: *WTO* <docs.wto.org >.

(E.U.) arbitration.[15] The U.S. voiced its dissatisfaction with the procedure agreed between the E.U. and Turkey by expressing that the "agreement provided for an arbitration that incorporated many of the most troubling practices of appellate review under the Appellate Body."[16]

These events provide a timely opportunity to assess whether the MPIA's drafters have clarified the nature of appellate powers in response to the complaints of judicial overreach that led to the AB's demise. This article addresses the question of how MPIA arbitrators might draw from the powers exercised by the AB over the course of its quarter-century of practice.[17] SECTION I articulates the basic concepts employed throughout the article: the sources of international judicial power. SECTION II explores the normative relationship between the DSU and the MPIA: inquiring as to the main legal source of MPIA arbitrators' procedural powers and discussing whether the MPIA's arbitral and subsidiary characters distinguish the powers available to these arbitrators from those exercised by the AB. SECTION III applies this lens to the MPIA's treatment of specific powers which generated controversy in the AB's practice. In this light, the authors frame the text and omissions of the MPIA as reactive choices, before briefly concluding in *SECTION IV*.

I. Distinguishing the sources of international judicial power

As noted at the outset of this article, an international court or tribunal enjoys certain inherent powers in the conduct of its proceedings. The term 'inherent powers' is often used interchangeably with the term 'implied powers', yet their commonplace meanings give rise to a critical distinction. The present subsection highlights the different meaning of the two concepts.

15 For the text of the agreement, see *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products – Agreed Procedures for Arbitration under Article 25 of the DSU* (held on 25 March 2022) *WTO* Doc WT/DS583/10, online (pdf): *WTO* < docs.wto.org/ > [*E.U.–Turkey Agreed Procedures for Arbitration*]. See also *Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products (Complaint by the European Union)* (25 July 2022), *WTO* Doc WT/DS583/ARB25 (Arbitration under Article 25 of the DSU – Award of the Arbitrators), online: *WTO* < docs.wto.org > [*Turkey — Pharmaceutical Products (E.U.)*] (in the middle of the Panel proceeding, the European Union and Turkey notified both the Panel and the DSB that they had agreed on procedures for arbitration under Article 25 of the DSU. Based on these agreed procedures, Turkey filed a notice of appeal, which the DSB then circulated). For more explanation regarding the background of this case, see Julia Ya Qin, "Turkey—Pharmaceuticals: The First WTO Arbitration for Appellate Review" (2022) 49:4 Legal Issues of Economic Integration 415 at 416–418.

16 U.S. Mission to International Organizations in Geneva, *Statements by the United States at the August 29, 2022, DSB Meeting* (29 August 2022) at 7, online (pdf): *U.S. Mission to International Organizations in Geneva* < geneva.usmission.gov > [U.S., *Statement at DSB Meeting*].

17 A similar theoretical framework may be applied elsewhere in the ongoing reform of international economic dispute settlement—in particular, the proposed establishment of an investor-State appellate mechanism. See generally Brian McGarry, "Enforcement of Investment Court Decisions under the New York Convention: A Search for Defining Elements" in Alan M. Anderson & Ben Beaumont, eds, *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Alphen aan den Rijn: Kluwer Law International, 2020) at 452, 462, 465–468 [McGarry "Investment Court Decisions"].

On the one hand, the doctrine of implied powers often appears in the context of international organizations, reflecting the scope of authority that contracting States tacitly delegate to bodies established through their constitutive treaties. Implied powers enable the organs of international organizations to fulfil the functions bestowed upon them. This doctrine can also be applied to judicial bodies that are established by convention.[18]

Inherent powers, on the other hand, are powers that an international court or tribunal may use to fulfil its judicial mandate, *i.e.,* the resolution of a dispute with *res judicata* force. To reach a decision with such force under international law, the court or tribunal must safeguard the effectiveness of the proceedings and ensure fairness in the treatment of the respective parties.[19] Accordingly, inherent powers may be defined as those which are 'implied' only in the objectively necessary elements of international adjudication, and which are therefore immanent in all international judicial systems.[20]

Inherent powers are non-derogable because they are necessary to preserve the *res judicata* force[21] of international courts and tribunals' decisions. Logically, States cannot establish an international court which is expressly prohibited from exercising powers essential to the effectiveness or fairness of its proceedings.

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18 See Niels M. Blokker, "International Organizations or Institutions, Implied Powers" in Anne Peters & Rüdiger Wolfrum, eds, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, April 2009, last updated in December 2021). The present article's construction of inherent powers as a purely judicial concept aligns with Professor Blokker's observation that—in the context of non-judicial organs—the approach of "[a]uthors such as Seyersted, and more recently White, [who] distinguish inherent powers from implied powers […] has not found much support, perhaps because *it could not convincingly be demonstrated how the notion of inherent powers could draw a clearer, more objective line than the notion of implied powers between what is inherent—or implied—and what is not*" [emphasis added] at para 4. See also Krzysztof Skubiszewski, "Implied Powers of International Organizations" in Tabory Mala, Yoram Dinstein, and Shabtai Rosenne, eds, I*nternational Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff Publishers, 1989) at 855; Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford: Oxford University Press, 2017) (discussion on the origins of this doctrine in constitutional law at 153); Manuel Rama-Montaldo, "International Legal Personality and Implied Powers of International Organizations" (1970) 44 Brit YB Intl L 111 at 154–155.

19 For a more subjective approach, see Chester Brown, "The Inherent Powers of International Courts and Tribunals" (2006) 76:1 Brit YB Intl L 195 (the judicial functions of international courts "are, chiefly, the settlement of international disputes by adjudication, and the proper administration of justice, although each international court may, in addition, have different functions specific to the regime within which it operates" at 244). Brown's landmark article tends to eschew terms such as "fair," expressly referencing this only in regard to the invocation of inherent powers by domestic courts "to correct any injustice caused by an earlier order, such as where an individual is subjected to procedural unfairness" at 206.

20 See David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed (Oxford: Oxford University Press, 2013) (characterization of inherent powers as those which "are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature" at 828).

21 See Scott J. Shapiro, *Legality* (Cambridge, Boston: Belknap Press, 2013) (assessment of the competing views of John Austin and H.L.A. Hart on legal nullity (i.e., the withholding of recognition) as a sanction at 62–66).

By contrast, contracting States are free to expressly prohibit powers which might otherwise be implied in the specialized functions of a particular court or tribunal. Such powers are not essential to international adjudication generally, and thus differ from court to court, treaty to treaty, and system to system.[22] Hence, while the MPIA's founding participating members could not have deprived arbitrators from exercising inherent powers, they were free to modify other powers which might have otherwise been implied in the MPIA's text, as explored below.

II. The normative relationship between the DSU and the MPIA

One of the traditional appeals of international arbitration is the high degree of autonomy and procedural flexibility it provides to disputing parties. Arbitration enables parties to draft or specify a procedural framework for the settlement of their dispute which reflects their case-specific interests.[23] In relation to purely ad hoc arbitration, arbitrations constituted under multilateral treaties may afford parties a more limited scope of autonomy to 'personalize' their dispute settlement proceedings in this manner. While the present section canvasses these limitations in regard to arbitration under Article 25 of the DSU, such proceedings remain fundamentally 'arbitral' in character because they require the parties' mutual consent to both jurisdiction and procedure. As an agreement constituted under Article 25, the MPIA in both respects confers its members' consent to the appellate arbitration of future WTO disputes. After overviewing the nature of Article 25 arbitration and its (very limited) practice, this section assesses the DSU and the procedures laid out in Annex 1 to the MPIA as complementary sources of implied powers in MPIA arbitrations.

22 *Contra* Brown, *supra* note 19 (conflating, in the present authors' view, inherent and implied powers "because the source of inherent powers lies in the need for international courts to fulfill their functions, *the particular functions of each international court* will determine the scope of its inherent powers" [emphasis added] at 238).

23 While parties often authorize an inter-State arbitral tribunal to establish its own rules of procedure, they also at times renvoi to institutional rules of procedure. See e.g. *Algiers Accords*, Iran and United States (19 January 1981) (Iran and the U.S. agreed that "the Tribunal shall conduct its business in accordance with the arbitration rules of the UNCITRAL except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out" at art III(2)). In some other instances, ad hoc tribunals prefer to make a renvoi to institutional rules of other courts instead of drafting a new set of rules. See e.g. *Case concerning the delimitation of the Maritime Boundary (Guinea v Guinea-Bissau)* (1989), Reports of International Arbitral Awards XX 121 at 125, para 9.

1. The dynamics of arbitration under Article 25 of the DSU

Article 25 of the DSU offers arbitration as an alternative method of dispute settlement to standard WTO panel and AB proceedings.[24] Prior to the MPIA's establishment, WTO members had resorted to Article 25 in only one dispute.[25] According to Article 25.2, in order to resort to arbitration, the parties must mutually agree to the referral of their case to arbitration, as well as to the procedure to be followed by the arbitral tribunal.[26] These requirements reflect both the consensual nature of the procedure and its flexibility.

As noted above, however, arbitration under Article 25 is not a purely ad hoc form of arbitration, and thus the autonomy of disputing parties is limited by certain mandatory provisions of the DSU.[27] While parties to ad hoc arbitrations are free to adopt procedural rules which 'tie the hands' of the tribunal from exercising non-inherent powers,[28] party autonomy in proceedings instituted under multilateral conventions may itself be restricted by not only *lex specialis*[29] but also customary rules.[30] Article 25.2 alludes to

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24 Articles 21.3(c) and 22.6 of the DSU also provide for arbitration; however, arbitration under these provisions is not alternative to AB proceedings. See WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (1994), *WTO* Doc LT/UR/D-1/6, online: *WTO* < docsonline.wto.org > [WTO, *Dispute Settlement Understanding*]; McGarry, "Investment Court Decisions", *supra* note 17 at 462–469.

25 See WTO, *United States – Section 110(5) of the U.S. Copyright Act – Recourse to Arbitration under Article 25 of the DSU* (3 August 2001), *WTO* Doc WT/DS160/15, online: *WTO* < docsonline.wto.org > (the parties agreed that the arbitrators would follow procedures already set down in the DSU and the principles developed on that basis at 1).

26 See David Jacyk, "The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future" (2008) 15 Austl Intl LJ 235 (the consent of both parties is required for the institution of arbitration under Article 25, which distinguishes this form of arbitration from other arbitrations under the DSU at 238–239, 250).

27 See Angshuman Hazarika & Pieter Van Vaerenbergh, "'One Rule to Rule Them All': Rules for Article 25 DSU Arbitration" (2019) 36:5 J Intl Arb 595 (Article 3.5 of the DSU provides for the consistency of arbitral awards with the covered agreements and thus makes it impossible for the parties to choose a contravening applicable law); WTO, *Dispute Settlement Understanding*, *supra* note 24 ("a solution mutually acceptable to the parties to a dispute and *consistent with the covered agreements* is clearly to be preferred" [emphasis added] at art 3.7).

28 Caron & Caplan, *supra* note 20 ("the desire for flexibility must be balanced against other interests such as the need for some ultimate control of procedural fairness and legal certainty concerning the international acceptance of the award" at 31).

29 The principle of *lex specialis derogat legi generali* dictates that, in the case of overlapping rules, the more specific rule takes precedence over the general rule. On the other hand, when there is no clash between specific and general norms, *lex specialis* cannot vacate or replace *lex generalis*. See Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UNGA, 58th Sess, Chapter XII, UN Doc A/CN.4/L.702 (2006) 175 at para 251.5.

30 See *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS 1155 art 41(2) (entered into force 27 January 1980). The customary rule reflected in art 41(2) of the Vienna Convention on the Law of Treaties excludes the possibility of modifying a treaty by certain parties of a multilateral treaty through the conclusion of an inter se agreement when the treaty prohibits such a modification. As a matter of customary international law, it is thus impossible for MPIA parties—or the E.U. and Turkey in their arbitration—to modify the DSU *inter partes* by concluding an agreement which runs afoul of mandatory provisions of the DSU.

such boundaries when opening with the caveat "[e]xcept as otherwise provided in this Understanding." Article 25.4 more specifically incorporates into WTO arbitrations the mutatis mutandis application of the WTO's 'supervisory' dispute settlement mechanisms. Article 25 arbitration awards are in this manner subject to Articles 21 (concerning the surveillance of implementation) and 22 (concerning the remedies of compensation and concession suspension). Another mandatory provision of the DSU, Article 3.2, precludes dispute settlement proceedings from "add[ing] to or diminish[ing] the rights and obligations of parties under the covered agreements." As discussed below, this complex relationship between the DSU and the MPIA informs the interpretation of implied powers in MPIA arbitrations.

2. The DSU and Annex 1 to the MPIA as sources of implied powers

When WTO members elect to arbitrate a dispute arising under the covered agreements, Article 25.2 of the DSU requires them to mutually agree on the procedures that will be used in their arbitration. Annex 1 to the MPIA contains a template of rules which are intended to fulfil this purpose, and to thus serve as a mutually agreed procedure in arbitrations between participating members.[31] Critically, the MPIA makes clear that participating members are not obliged to follow this template when resorting to arbitration, and that it will not govern the proceedings without the disputing parties' mutual consent.[32] However, if participating members were to indeed agree to treat Annex 1 to the MPIA as their agreed procedure in a particular arbitration, it will serve as the primary source of the arbitrators' express and implied procedural powers in that case.

While Annex 1 to the MPIA specifies many procedural matters—such as the scope of the appeal, the selection of arbitrators, and the deadline for rendering the award—it remains silent on many other procedural matters. To fill these gaps, paragraph 11 of Annex 1 specifies that MPIA arbitrations "shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review."[33] On the basis of this express renvoi, arbitrators may construe their powers by reference to the DSU, the Working Procedures for Appellate Review (the AB's self-penned procedural rules, discussed below), and Annex 1 to the MPIA in tandem. In so doing, they must refrain from exercising any AB power that is specifically modified or rejected by a rule in the appeal arbitration agreement.

Finally, while this paragraph allows arbitrators to adapt the "Working Procedures for Appellate Review and the timetable for appeals," it requires two conditions: a) that arbitrators consult with the parties first, and b) that their action be justified in accordance

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31 Annex 1 to the MPIA has been invoked in the *Colombia — Frozen Fries* case, see *supra* note 14 at 1–3.

32 MPIA, *supra* note 12 ("in order to make the appeal arbitration procedure operational in specific disputes," the disputing parties must notify "the appeal arbitration agreement contained" in Annex 1 to all WTO Members at paras 10–11; "with respect to a specific dispute, parties to that dispute may, without prejudice to the principles set forth in this communication, mutually agree to depart from the procedures set out in the appeal agreement" at para 11).

33 *Ibid* at para 11.

with Rule 16 of the AB's Working Procedures.[34] These requirements demonstrate that arbitrators cannot amend or add any procedural rules with unfettered discretion.[35]

III. The reaction or silence of the MPIA in regard to AB practices

When establishing the MPIA, participating members had the opportunity to respond to controversial AB practices by limiting or endorsing such practices in their template agreed procedure, as set out in Annex 1 to the MPIA.[36] Alternatively, they had the opportunity to leave the MPIA silent on certain powers exercised by the AB.[37]

The present section of this article first assesses those controversial powers which have been explicitly endorsed (or arguably rejected) by the text of MPIA, in Annex 1.

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34 Rule 16(1) of the Working Procedures for Appellate Review refers to "the interests of fairness and orderly procedure in the conduct of an appeal" as reasons for "adopt[ing] an appropriate procedure for the purposes of that appeal." Under Rule 16(2), the modification of the deadline for appeal is possible provided that the "strict adherence to a time-period…would result in a manifest unfairness." See *Working Procedures for Appellate Review* (16 August 2010), WTO Doc WT/AB/WP/6 at Rule 16, online: *WTO* < wto.org > [*Working Procedures for Appellate Review*].

35 In *Colombia — Frozen Fries*, MPIA arbitrators used this paragraph to adopt "Additional Procedures for Arbitration" in order to "facilitate" the proceeding. The additional procedure specifies that it "should be read in conjunction with the Agreed Procedures" and "the DSU and the other rules and procedures applicable to appellate review." See *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (Complaint by the European Union) (21 December 2022), WTO Doc WT/DS591/ARB25/Add.1 (ANNEX A-2 Additional Procedures for Arbitration under Article 25 of the DSU), online: *WTO* < docsonline.wto.org > para 3 [*Additional Procedures for Arbitration under Article 25 of the DSU*].

36 See U.S., *Statement at DSB Meeting*, *supra* note 16 (the U.S. criticized the Agreed Procedures for Arbitration under Article 25 of the DSU between the E.U. and Turkey for incorporating "many of the most troubling practices of appellate review under the Appellate Body" and urged member States to examine alternative means to dispute resolution rather than advancing the AB's "problematic interpretations or conduct" at 7).

37 Yet such silence might constitute members' acquiescence to certain powers in MPIA arbitration. See C. MacGibbon, "The Scope of Acquiescence in International Law" (1954) 31 Brit YB Intl L 143 (MacGibbon considers the function of acquiescence as "a procedure for enabling the seal of legality to be set upon rules which were formerly in process of development and upon rights which were formerly in process of consolidation" at 145); Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing 2019) (Kolb conceptualizes acquiescence as an alternative to formal and express recognition of certain facts that can similarly bind States at 89–90); Nuno Sérgio Marques Antunes, "Acquiescence" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedias of International Law* (online: Oxford Public International Law, 2006) (Antunes defines acquiescence under international law as "consent," which is "tacitly conveyed by a State, unilaterally"); Alexis Marie, *Le silence de l'État comme manifestation de sa volonté* (Paris: Éditions A. Pedone, 2018) (Marie accepts that State silence has a legal effect in practice arguing that it reveals "que cela ne tient pas à l'impossibilité d'attribuer des effets au silence étatique - une telle position serait contraire à la pratique - mais à la notion même d'acte juridique" at 38); *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, [1984] ICJ Rep ("acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent" at para 130); *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)*, [1992] ICJ Rep (the Court put acquiescence in the category of consent by declaring that "the conduct of Honduras vis-à-vis earlier effectivités reveals an admission, recognition, acquiescence or other form of tacit consent to the situation" at 364).

It then discusses those AB powers which the MPIA does not specifically and expressly address.

1. AB controversies to which the MPIA expressly reacts

A. Exceeding deadlines

Upon receiving an appealed panel report, the AB was required under the DSU to issue its report within 90 days.[38] Despite this clear and tight deadline, Rule 16(2) of the AB's Working Procedures codifies a power to modify time limits, provided that such modification is deemed necessary to avoid "manifest unfairness."[39]

On its face, this Rule appears to contradict not only the 90-day deadline for AB reports, but also other provisions of the DSU. For example, Article 3.3 of the DSU includes a *lex specialis* requirement of "prompt settlement" of disputes as "essential to the effective functioning of the WTO." This express requirement of efficiency—phrased as an obligation incumbent upon the dispute settlement system itself—is rarely seen in such clear terms. While other tribunals have at times warranted scrutiny for framing efficiency as a peremptory obligation in the conduct of proceedings,[40] the codification of this requirement in the DSU (along with strict timelines for proceedings) creates an obligation which is specialized to this system, rather than universal to international adjudication. By way of example, comparing Article 23 of the DSU and Article 33 of the U.N. Charter illustrates the unique role that prompt adjudication holds within the WTO system. While Article 23 of the DSU requires Members to use prescribed mechanisms for all disputes under the covered agreements, including unilateral transfer to adjudication,

38 See Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, 5th ed (Cambridge, UK: Cambridge University Press, 2022) (DSU art 17.5 sets forth a 60-day time limit from the notice of appeal, but permits the AB to extend this to 90 days provided that it notifies the DSB of the reasons for the delay; in practice, the AB complied with this 90-day limit in most cases up until 2011 while exceeding it in the vast majority of cases afterwards at 268).

39 See *Working Procedures for Appellate Review*, supra note 34, at Rule 16(2). See further U.S., *Report on AB*, *supra* note 6 at 4–5. The AB's chronic failure to meet its 90-day deadline after 2011 was not the result of issues arising in the treatment of disputing parties. Instead, this failure was first caused by the expanding number and complexity of appeals, which were not anticipated in the Uruguay Round negotiation when this time restriction was drafted. Additionally, this failure was sustained by the DSB's continued refusal to agree to corresponding expansions of support staff in the AB Secretariat. Thus, the U.S. finds some support for its argument that the AB's disregard for the 90-day deadline constituted an *ultra vires* act.

40 See e.g. *Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, 30 June 2016, PCA Report ("procedural fairness includes the right to an impartial and independent judge, which the Tribunal agrees is of paramount importance, but also the right to a timely decision in respect of the matters consigned to the Tribunal" at 227). See also *Prosecutor v Joseph Kony*, ICC-02/04-01/05, Decision on "Requête de la Défense en extension de délai afin de répondre aux 'Observations de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06'" (23 February 2007) (International Criminal Court), online: *ICC Judgments, Decisions and Orders* < icc-cpi.int > (in the international criminal law context, the decisions mentions "the inherent power which the Chamber has to control the proceedings in such a way as to ensure that they be conducted fairly and expeditiously" at 7).

Article 33 of the U.N. Charter requires Members to mutually "seek a solution" for all disputes under the constitutive treaty, thus permitting endless negotiation. Because the efficiency requirements of the DSU go beyond the core requirement of effectiveness in international adjudication, it is most coherent to interpret unstated powers exercised in furtherance of Article 3.3 of the DSU as *implied* in the treaty—or else *ultra vires*—rather than inherent to international courts generally.

Yet a power that predominantly serves to ensure fairness in the proceedings is inherent to the judicial function, as discussed above. In this sense, Rule 16 of the AB's Working Procedures could be said to codify an inherent power to take measures necessary to ensure the fairness of proceedings.

Turning to the MPIA, Annex 1 explicitly reaffirms the 90-day window for appellate procedures.[41] To facilitate this, Annex 1 invests MPIA arbitrators with the power to reduce the scope of party autonomy by limiting the page length of submissions, or the number of hearings, "without prejudice to the procedural rights and obligations of the parties and due process."[42] Annex 1 also requires consultation with the parties (rather than mere notification) before modifying time limits. In this manner, the MPIA participating members have clearly circumscribed any power of MPIA arbitrators to exceed the 90-day timeline, thus reflecting the "expeditious" character of arbitration under Article 25 of the DSU.

By using "organizational measures" that sped up the process, the arbitrators in the recent *Pharmaceutical Products* case were able to issue the award within the 90-day window stipulated in the Agreed Procedures for Arbitration adopted by the E.U. and Turkey.[43] Those "organizational measures" included actions such as decisions on page limits for submissions, as well as decisions on time limits for opening and closing statements at the hearing.[44]

Similarly, in the first appeal between MPIA participating members, the arbitrators in *Frozen Fries* also used this specified authority to take steps to expedite the proceeding. In the "Additional Procedures for Arbitration" adopted in this case, the arbitrators provided guidelines on the length of written submissions. Moreover, they encouraged the parties to be selective in the number of claims they present on the appeal, a matter which was deliberately accepted by Colombia as the appellant.[45]

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41 MPIA, *supra* note 12 at Annex 1, para 12.

42 MPIA, *supra* note 12 at Annex 1, paras 12–13.

43 *Turkey — Pharmaceutical Products (E.U.), supra* note 15 at paras 2.1–2.2.

44 *Ibid* at para 2.2.

45 *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (21 December 2022), WTO Doc WT/DS591/ARB25 (Award of the Arbitrators), online: *WTO* < docsonline. wto.org > at para 4.2 [*Colombia – Frozen Fries* Award].

B. Relying on prior cases

One of the U.S.' more quixotic allegations against the AB was that its reliance on decisions in prior cases deprived the parties before it of their right to be heard. Certainly, there is room to dispute the factual premise of this critique, as reference to a *jurisprudence constante* on a legal issue may be distinguished from slavish deference to *stare decisis*. Moreover, the predictability of legal interpretations of WTO law[46]—and thus the ability of Members to resolve disputes through consultations under Article 4 of the DSU—would suffer substantially if the AB were to resolve each appeal in a *tabula rasa* fashion. Yet while the broader field of international dispute settlement makes clear that there is no general judicial imperative to treat each case as first impression,[47] nor is there any basis in this article's underlying theory for concluding that there are inherent powers relating to the treatment of prior case law.

The U.S. frequently opposed the precedential effect of AB reports.[48] When the issue arose in *U.S.—Stainless Steel*, the U.S. considered the AB's jurisprudence on relevant substantive questions to be misguided,[49] and argued that panels must conduct an objective assessment of the matters before them.[50] Among today's MPIA participating members,

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46 WTO, *Dispute Settlement Understanding*, *supra* note 24 ("[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system... Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" at art 3.2).

47 See *Statute of the International Court of Justice*, ICJ at art 38(1)(d); *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, [1998] ICJ Rep ("[t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases" at para 28). *Cf Case Concerning Right of Passage over Indian Territory (Portugal v India)*, [1957] ICJ Rep at 125, 146–147.

48 See Mariana Clara de Andrade, "Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism" (2020) 11:2 J Intl Disp Settlement 262 (the United States' criticism of AB began in 2004 and increased after the circulation of the AB's report in the *U.S.—Stainless Steel (Mexico)* case in 2008 at 267–268). The U.S. distinguished between the AB's reasoning in the *U.S.—Stainless Steel* case and in the *Japan—Alcoholic Beverages II* case, which is considered the first precedent in this regard. The U.S. considered that taking account of adopted reports is not equivalent to following them without hesitation.

49 The Panel deviated from the AB's longstanding case law on the interpretation of Article 11 of the DSU. See *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (Complaint by Mexico)* (2008), *WTO* Doc WT/DS344/AB/R (Appellate Body Report), online: *WTO* < docsonline.wto.org > (although the AB acknowledged that its reports are not binding, it held that "[e]nsuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" at para 160).

50 WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 20 May 2008), *WTO* Doc WT/DSB/M/250, online: *WTO* < docs.wto.org/ > ("panels were simply to abdicate their responsibility to conduct an objective assessment of the matters before...[t]his did a disservice to panels and the serious responsibility that the DSB assigned to them" at para 52).

some took a similar position,[51] while other members expressed more diverse reactions.[52]

Although Annex 1 to the MPIA—the primary source of MPIA arbitrators' implied powers, as set out above—is silent on this matter, the MPIA's preamble makes clear that its participating members have embraced the preservation of a *jurisprudence constante* through the consideration of previous findings. Its preamble "reaffirms" that "consistency and predictability in the interpretation of rights and obligations under the covered agreements" is a shared value underlying the MPIA's establishment.[53]

The aforementioned Agreed Procedures for Arbitration[54] adopted by the E.U. and Turkey under Article 25 of the DSU similarly "promote[s] consistency and coherence", while more specifically endorsing the cross-fertilization of jurisprudence between arbitral panels constituted to hear the appeals of two distinct WTO panel reports in *Pharmaceutical Products*[55] and *E.U.—Safeguard Measures on Steel (Turkey)*.[56] The parties' agreed procedure empowered the arbitrators in the *Pharmaceutical Products* appeal "to inform the arbitrators in the other dispute of the issues susceptible to be adjudicated" after consultation with the parties.[57] It also provided that arbitrators in the two appeals may consult and comment on questions before the other, and that "the arbitrators in both appeals may receive any document relating to the other appeal."[58]

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51 Chile argued that attributing a controlling precedential character to prior AB reports "would have not only prejudge future disputes and even tied the hands of future panels, but it would have also created rights and obligations when the Membership alone could do so" (*ibid* at para 67).

52 Among future MPIA participating members, Hong Kong welcomed the AB's reasoning and its consistency with its previous rulings (*ibid* at para 61). Additionally, Australia agreed with the AB's "statements…on the importance of the security and predictability of the dispute settlement system," and noted that "while panel and Appellate Body reports were binding only on the parties concerned, Australia – like other WTO Members – referred extensively to adopted Panel and Appellate Body reports in its own submissions" (*ibid* at para 63). Mexico also pointed out that "[p]anels must pay attention to the Appellate Body's findings particularly when dealing with the same legal questions" (*ibid* at para 73).

53 MPIA, *supra* note 12 at 1. This endorsement is in contrast with the 2019 report by the WTO General Council's appointed facilitator of AB reform negotiations, Ambassador David Walker of New Zealand. See WTO, General Council, *Agenda Item 5(B) – Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)* (held on 23 July 2019) *WTO* Doc JOB/GC/220, online (pdf): *WTO* < docs.wto.org > [*Walker Report*] (the Walker Report observed that "[p]recedent is not created through WTO dispute settlement proceedings" at para 1.25). See also WTO, General Council, *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council* (issued on 11 December 2018) *WTO* Doc WT/GC/W/752/Rev.2, online (pdf): *WTO* < docs.wto.org > [Communication to the General Council].

54 *E.U.–Turkey Agreed Procedures for Arbitration*, *supra* note 15.

55 *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products – Recourse to Article 25 of the DSU – Constitution of the Arbitrator* (held on 4 May 2022) *WTO* Doc WT/DS583/13, online (pdf): *WTO* < docs.wto.org >.

56 See *European Union – Safeguard Measures on Certain Steel Products (DS595) (Complaint by Turkey)* (2022), *WTO* Doc WT/DS595/R (Panel Report), online: *WTO* < docs.wto.org >.

57 *E.U.–Turkey Agreed Procedures for Arbitration*, *supra* note 15 at para 8.

58 *Ibid*.

Unfortunately, there will be no opportunity to assess the practice of this novel mechanism, since the parties have since decided not to appeal the *Safeguard Measures* report.[59] Yet this innovation—along with the prospect of future practice under the MPIA—highlights a potential distinction between the precedential effects of AB jurisprudence and WTO arbitral jurisprudence. One might draw such a distinction on the basis that arbitral awards rendered under Article 25 of the DSU, unlike AB reports, need not be adopted by the DSB.[60] Because MPIA awards are not 'multilateralized' in this manner, there is room to argue that while WTO arbitrators may exercise an implied power to rely upon the AB's jurisprudence, they should not afford the same deference to findings in MPIA awards. This is because there is nothing in the MPIA which indicates that the participating members want the arbitrators to accept legal interpretations adopted in prior MPIA arbitrations.[61]

C. Answering the unasked

Arguably the most significant development in Annex 1 to the MPIA concerns criticisms that the AB sometimes analyzed questions *ultra petita*—i.e., which had not been raised by the parties on appeal.[62] An example is where the AB examines whether a certain domestic legislation or regulation is compatible with WTO law. Such examination may seem to be *ultra petita* because the panel's legal characterization of municipal law is a matter of fact,[63] while the AB's review, according to Article 17.6 of the DSU, must be limited to the "issue of law covered in the panel report and legal interpretations developed by the panel."

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59 WTO, *Dispute Settlement Understanding*, *supra* note 24 at art 25.3; MPIA, *supra* note 12 at Annex 1, para 15; *E.U.–Turkey Agreed Procedures for Arbitration*, *supra* note 15 at art 15.

60 U.S. Trade Representative, *supra* note 6 at 52–53 (the U.S. maintains that the AB "strayed from its limited role" at 52, offering concrete examples at 52–53; the U.S. concludes that, in the mentioned cases, the AB "made findings not necessary to resolve a dispute, but rather engaged in an exercise of making advisory opinions contrary to the text of the DSU and Article IX of the WTO Agreement" at 53).

61 See Julia Ya Qin, *supra* note 15 at 429.

62 See *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland)* (1926), PCIJ (Ser A) No 7 [Germany v Poland] ("from the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" at 19).

63 See WTO, General Council, *Annex – Amendment of Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes* (held 12-13 December 2018), *WTO* Doc WT/GC/W/752, online (pdf): WTO < trade.ec.europa.eu > (proposing that a footnote 7 *bis* be inserted into DSU Article 17.6, stating "[f]or greater certainty, the 'issues of law covered in the panel report and legal interpretations developed by the panel' do not include the panel findings with regard to the meaning of municipal measures of a party but do include the panel findings with regard to their legal characterization under the covered agreements" at 4); WTO, General Council, *Agenda Item 4 – Informal Process on Matters Related to the Functioning of the Appellate Body - Report by the Facilitator, H.E. Dr. David Walker (New Zealand)* (held on 15 October 2019), *WTO* Doc JOB/GC/222, online (pdf): *WTO* < docs.wto.org > ("[t]he meaning of municipal law' is to be treated as a matter of fact and therefore is not subject to appeal" at 6); *Germany v Poland*, *ibid* (overview of the PCIJ's historical development of this distinction at 19). For a critical perspective, see Jean d'Aspremont, "The Permanent Court of International Justice and domestic courts: a variation in roles" in Malgosia Fitzmaurice & Christian J. Tams, eds, *Legacies of the Permanent Court of International Justice* (Dordrecht: Martinus Nijhoff Publishers, 2013) at 221.

Both a 2018 proposal by the E.U.-led coalition and 2019 report by the WTO General Council's appointed facilitator of AB reform negotiations, Ambassador David Walker (Walker Report), contain proposed amendments to Article 17 of the DSU. These proposals specify that examining a panel's findings about the meaning of municipal law is beyond the purview of AB review.[64]

Annex 1 to the MPIA is less precise on this point than those proposals by stipulating that arbitrators "shall *only* address those issues that are necessary for the resolution of the dispute."[65] This provision's further statement that arbitrators "shall address only those issues that have been raised by the parties." This provision must also be read together with Article 25.1 of the DSU, which envisages that "expeditious arbitration…can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties." Although these provisions do not explicitly limit the power of arbitrators to review the panel's findings on issues of municipal law, they do preclude arbitrators from making decisions on non-requested or *ultra petita* issues.

We have thus seen that the MPIA takes divergent approaches when expressly invoking powers that generated controversy in the AB's practice. While the MPIA participating members have seemingly endorsed the power of arbitrators to treat AB reports as effectively binding precedent, they have significantly limited the power of arbitrators to exceed procedural timelines or questions raised by parties. As discussed below, the MPIA's silence in respect of other notable powers exercised by the AB raises the question as to whether its drafters have tacitly implied that MPIA arbitrators enjoy each of these powers as well.

2. Powers exercised by the AB on which the MPIA is silent

A. Determining the burden of proof

An untouched power in the express text of the MPIA concerns the burden of proof.[66] The AB has examined the burden of proof within the broader ambit of inherent powers in international dispute settlement, although it has offered explanations on the basis of both general international practice[67] and, in *U.S.—Wool Shirts*, a combination of

64 MPIA, *supra* note 12 at Annex 1, para 10 (while this provision's further statement that arbitrators "shall address only those issues that have been raised by the parties" does nothing to clarify this point, its final clause rightly asserts that any such discretion exercised by the arbitrators is "without prejudice to their obligation to rule on jurisdictional issues").

65 *Ibid* [emphasis added].

66 See e.g. *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Complaint by the United States)* (20 December 2002), *WTO Doc* WT/DS103/AB/RW2 (Second Recourse to Article 21.5 of the DSU by New Zealand and the United States – Appellate Body Report), online: *WTO* < docs.wto.org > ("[w]e will not readily find that the usual rules on burden of proof do not apply as they reflect a 'canon of evidence' accepted and applied in international proceedings" at 66).

67 See e.g. *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Complaint by the United States)* (20 December 2002), *WTO Doc* WT/DS103/AB/RW2 (Second Recourse to Article 21.5 of the DSU by New Zealand and the United States – Appellate Body Report), online: *WTO* < docs.wto.org > ("[w]e will not readily find that the usual rules on burden

logical argument and prevalence in domestic practice.[68] In that case, the AB considered it essential to the effectiveness of the proceedings that it adopt an evidentiary standard of a certain minimal threshold, finding it "difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof." The AB thus framed the maintenance of this standard as an obligation incumbent upon it.

The present authors consider that maintaining this standard is essential not only to the effectiveness of the proceedings (as noted by the AB), but also the fairness thereof, given the obvious tension between the "assertion" standard hypothesized by the AB and basic concepts of legality and due process as commonly understood and practiced in adjudication.[69] Extrapolating this premise, the most supportable inference is that an international court or tribunal has an inherent power to take measures necessary to maintain this minimum threshold required for the fairness of the proceedings, and thus for the legality of the resulting decision. Beyond and above this minimum threshold, however, any unstated authority in the DSU to apply a specific standard of proof would be at best an implied power—and thus subject to modification or withdrawal by the WTO membership.

The same conclusion may be drawn from Annex 1 to the MPIA, which conditions arbitrators' organizational measures upon the need to not harm due process or the parties' procedural rights and obligations.[70]

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of proof do not apply as they reflect a 'canon of evidence' accepted and applied in international proceedings" at 66).

68 See *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India (Complaint by India)* (25 April 1997), *WTO Doc* WT/DS33/AB/R (Appellate Body Report), online: *WTO* < docsonline.wto.org > ("we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence" at 14). The AB did not apply Article 3.8 of the DSU in this analysis (at 13), a provision that assumes that a violation has already been established.

69 See Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen, "International Court Authority in a Complex World," in Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, eds, *International Court Authority* (Oxford: Oxford University Press, 2018) (pairing the requirement of a legally binding ruling with the authority that derives from stakeholders' implementation of such rulings at 1).

70 MPIA, *supra* note 12 at Annex 1, para 12.

B. Drawing adverse inferences

Like a range of other judicial bodies,[71] the AB has framed the power to draw such inferences as part of its "broad legal authority to request information", concluding that "the drawing of inferences is [...] an inherent and unavoidable aspect of a panel's basic task" as defined in Article 11 of the DSU (i.e., an "objective assessment of the facts").[72] Relying principally on *lex specialis* provisions of the Agreement on Subsidies and Countervailing Measures, WTO panels have asserted in obiter dicta a "residual authority to draw adverse inferences" from a party's failure to provide evidence or other requested information.[73] Indeed, the "drawing of inferences" is core to the task of a fact-finder. However, the drawing of *adverse* inferences, as commonly phrased in two particular scenarios, warrants further scrutiny.

The first such scenario is a failure to provide the tribunal with specifically requested information. As noted above, the AB found that WTO dispute settlement instruments provide for the panel's discretion in drawing adverse inferences from this lack of candour to the tribunal. In *Corfu Channel*, the ICJ in its first case appeared to similarly characterize its powers under Article 49 of its Statute.[74]

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71 See Charles Nelson Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* (Dordrecht: Nijhoff 1998) at 104-195 (the Iran-U.S. Claims Tribunal has drawn adverse inferences in multiple cases despite the fact that its rules of procedure contain no provision for such a power. The Tribunal even held that drawing such inferences is an "accepted principle"). See also *Arthur J. Fritz & Co. v. Sherkate Tavonie Sherkathaye Sakhtemanie (cooperative Society of Construction Companies) and the Government of the Islamic Republic of Iran* (1989) IUSCT Case No. 276 at 42. In some domestic judicial systems, candour to the tribunal is moreover treated as a peremptory obligation, even when in conflict with other obligations regulating counsel's participation in proceedings. See e.g. American Bar Association Model Rules of Professional Conduct 2019, Rule 3.3, Comment 11.

72 *Canada – Measures Affecting the Export Of Civilian Aircraft (Complaint by Brazil)* (2 August 1999), *WTO* Doc WT/DS70/AB/R (Appellate Body Report), online: *WTO* < docsonline.wto.org > [*Canada — Aircraft*] ("[t]he DSU does not purport to state in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts. Yet, in all cases, in carrying out their mandate and seeking to achieve the "objective assessment of the facts" required by Article 11 of the DSU, panels routinely draw inferences from the facts placed on the record" at paras 197–198).

73 *Korea – Measures Affecting Trade in Commercial Vessels (Complaint by the European Communities)* (7 March 2005), *WTO* Doc WT/DS273/R (Panel Report), online: *WTO* < docsonline.wto.org > [*Canada — Aircraft*]; *Agreement on Subsidies and Countervailing Measures* (entered into force 1 January 1995), in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 14 at Annex V, para 7 [SCM Agreement].

74 See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania),* [1949] ICJ Rep at 18, 32 (noting this obligation but, under the specific circumstances of the case, observing that "[t]he Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise"). In the context of a lack of physical access to archives, see *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, [1980] ICJ Rep at 11–13. See also *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, [1970] ICJ Rep at 21, 97 (Separate Opinion of Judge Jessup); Christian Tams, "Article 49," in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat, eds, *The Statute of the International Court of Justice: A Commentary,* 2nd ed (Oxford: Oxford University Press, 2012), (discussing related confidentiality issues in the PCIJ's *Diversion of Waters from the Meuse* case at 1276, 1284).

The second such scenario is the non-appearance (i.e., lack or cessation of official participation) of a party to the proceedings.[75] Examining this scenario seems particularly appropriate in light of the current deadlock concerning the reconstitution of the AB—a reminder of the potential in large multilateral dispute settlement frameworks for a dissatisfied Member to refuse to participate constructively. The AB has referred generally to the "legal duty" of parties to provide requested information, entailing a duty to participate that is difficult to infer from instruments such as the ICJ Statute.[76]

The power to draw adverse inferences in the two scenarios addressed above should be characterized as, at most, an implied power. There is no element of fairness compromised in drawing adverse inferences from a failure of candour or non-appearance, so long as the opportunity to resume good-faith participation is afforded. In this light, the power may be understood as implied, rather than inherent. Such powers are indeed implied in both the WTO and ICJ systems in respect of the first scenario, as noted above regarding certain *lex specialis* dispute settlement provisions in WTO covered agreements and Article 49 of the ICJ Statute. As concerns adverse inferences from non-appearance, however, we see that the two dispute settlement frameworks diverge, further confirming the non-inherent nature of this power. There is indeed a stark systemic difference between the ICJ model reflected in Article 53 of its Statute (envisaging and, in the view of many, condoning non-appearance before the Court)[77] and WTO dispute settlement, as reflected in its compulsory nature and the absence of any similar provision in the DSU. Whereas the DSU appears to place a legal duty of participation upon Members,[78] and therefore does not distinguish between these two scenarios, the ICJ does not have the

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75 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1984] ICJ Rep (the court must establish its jurisdiction over the case and the validity of the claim even when the State opts not to not appear. The ICJ made this point by holding that: "The Court is bound to "satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim" of the party appearing is well founded in fact and law..." at para 28).

76 *Canada — Aircraft*, *supra* note 72 ("that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals" at paras 202–203).

77 See *Nuclear Tests (Australia v France)*, [1973] ICJ Rep at 150, 153; Hugh Thirlway, *Non-appearance before the International Court of Justice* (Cambridge: Cambridge University Press, 1985) (where "the idea of an obligation [...] as to compel a state to participate fully in the proceedings not only would rob Article 53 [of the ICJ Statute] of any meaning whatsoever, but would also be wholly unworkable" at 65); Jerome B Elkind, *Non-appearance before the International Court of Justice* (Dordrecht: Nijhoff 1984). For a lively debate between these two authors with identical book titles but very different views on the subject—and on either side of the same journal's name change, to boot, see Jerome B. Elkind, "Normative Surrender" (1988), 9 Mich J Intl L 263; Hugh Thirlway, "Normative Surrender and the Duty to Appear before the International Court of Justice: A Reply" (1989) 11 Mich J Intl L 912.

78 WTO, *Dispute Settlement Understanding*, *supra* note 24 ("[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they *shall* have recourse to, and abide by, the rules and procedures of this Understanding" [emphasis added] at art 23.1; similarly, "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member *is essential* to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members" [emphasis added] at art 3.3).

power to draw adverse inferences from a fully non-appearing party's failure to provide information.

It can thus be said that MPIA arbitrators' power to draw adverse inferences from a failure to produce evidence should invite closer scrutiny in practice. In this respect, the arbitral character of such proceedings—where parties exercise significant autonomy over such questions, and where resort to these procedures is consensual—may warrant some distinction from the relevant powers of the AB. As such, it may be difficult to identify an implied power to draw adverse inferences from the non-submission of requested information, or the non-appearance of respondents, in MPIA proceedings.

C. Admitting amicus curiae submissions

One of the earliest and most visible controversies to arise in WTO dispute settlement proceedings concerned the acceptance of amicus curiae briefs from non-governmental organizations. This controversy arose from the fact that neither the DSU, nor the AB's Working Procedures, specifically and expressly regulates this power.[79] As the AB has emphasized, however, nor does the DSU explicitly *prohibit* it from admitting amicus curiae.[80] The AB has further developed this practice by adopting case-specific additional procedures under Rule 16(1) of its Working Procedures, in order to manage high volumes of amicus curiae submissions.[81]

In contrast to other powers discussed above, the U.S. was an early supporter of both amicus participation and, in this particular respect, the maintenance of a *jurisprudence constante*. It endorsed the AB's reasoning on this point in *U.S.—Shrimp*,[82] and later argued in *U.S.—Lead and Bismuth II* that the same approach should be applied.[83] By contrast, the European Communities and many other WTO members protested the acceptance of amicus curiae submissions in these proceedings.[84]

Like the DSU, the MPIA contains no provision specifically and expressly governing amicus curiae participation. Annex 1 to the MPIA provides that arbitrations are to be governed mutatis mutandis by "the provisions of the DSU and other rules and procedures applicable to Appellate Review," including the AB's Working Procedures.[85] The MPIA characterizes the procedures laid out in Annex 1 as intended to maintain the

79 *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Complaint by the European Communities)* (2000), *WTO* Doc WT/DS138/AB/R (Appellate Body Report) at 39, online: *WTO* < docsonline.wto.org > [*US – Lead and Bismuth II*].

80 *Ibid*.

81 *European Communities – Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)* (2001), *WTO* doc WT/DS135/AB/R (Appellate Body Report) at paras 52–55, online: *WTO* < docs.wto.org>.

82 WTO, General Council, *Minutes of the Meeting* (held on 22 November 2000), *WTO* Doc WT/GC/M/60, online: *WTO* < docs.wto.org >.

83 See C.L. Lim, "The Amicus Brief Issue at the WTO" (2005) 4:1 Chinese J Intl L 85 at 93, 95–96.

84 *Ibid* (refers to Brazil and Mexico, noting that the European Communities subsequently softened their position at 100–101); *US – Lead and Bismuth II*, *supra* note 79 at 76.

85 MPIA, *supra* note 12 at Annex 1, para 11.

"core features" of WTO appellate review, "including independence and impartiality, while enhancing the procedural efficiency of appeal proceedings."[86] The question thus arises as to whether the admission of amicus curiae briefs may be characterized as one of the "core features" of appellate review, given that it is unrelated to questions of "independence and impartiality" and generally inhibits "procedural efficiency."

From this perspective, it is unclear where MPIA arbitrators would base an implied power to accept amicus curiae submissions. Such skepticism may be particularly warranted in light of the arbitral character of MPIA proceedings, which suggests a high degree of party autonomy to decline the participation of non-parties. Moreover, it may be difficult to reconcile such a power with the MPIA's reinforcement of the 90-day appeals period discussed above, in furtherance of the "expeditious" objective of Article 25 of the DSU. As the MPIA specifically empowers arbitrators to "streamline" proceedings by reducing the length of pleadings or number of hearings,[87] it does not appear to imply any power which would prioritize the submissions of non-parties over the parties' own right to be heard.

This assessment of non-party participation for amicus curiae may be contrasted with the treatment of *third-party* participation for intervening WTO members. The latter prospect is not merely implied, but explicitly provided in Article 10 of the DSU[88] (which is itself incorporated by reference in paragraph 16 of Annex 1 to the MPIA). It is thus unsurprising that while the recent *Frozen Fries* arbitration attracted several third-party interventions,[89] this inaugural MPIA case included no amicus curiae participation. Indeed, such ad hoc participation would seem antithetical to measures adopted by the arbitrators to reinforce the efficiency of the proceedings, including limitations on the length of pleadings and scope of submissions by parties and third parties.[90]

IV. Conclusion

Criticism concerning the AB's residual authority vis-à-vis the DSB recalls that multilateral courts cannot lawfully incorporate in their standing rules a power which is neither inherent to all international tribunals nor implied in the terms of its constitutive treaty. As explained in this article, MPIA arbitrators enjoy the same inherent powers held by all treaty-based courts and tribunals. This comprises a limited set of procedural tools necessary to safeguard the fairness and effectiveness of the proceedings, and thus ensure the settlement of disputes with *res judicata* force under international law. MPIA arbitrators also enjoy powers not

86 MPIA, *supra* note 12 at para 3.

87 MPIA, *supra* note 12 at Annex 1, para 12.

88 See further McGarry, *supra* note 2 at Chapter 7.2.3.

89 See *Colombia –Frozen Fries* Award, *supra* note 45 at para 1.10. Notably, among the several intervening WTO members in this arbitration, only Brazil and China had also become members of the MPIA.

90 *Ibid* at para 4.2. See further *Additional Procedures for Arbitration under Article 25 of the DSU*, *supra* note 35 at paras 13, 16(i), 20.

meeting this threshold, but which have been tacitly implied by MPIA participating members in the text of Annex 1. This interpretative analysis must account for the character of arbitration under Article 25 of the DSU, as well as the MPIA's object and purpose, which cannot be divorced from the context of the AB's demise. In the authors' view, the text of the MPIA should be construed in this light as a direct response to criticisms that the AB attracted when exercising unstated procedural powers. Likewise, the silence or inaction of participating members toward certain controversial powers of the AB could arguably be construed as their tacit acceptance.

Among the controversial powers expressly referenced in the MPIA, its participating members have seemingly endorsed the power of arbitrators to treat AB reports as effectively binding precedent, while instead limiting the powers to exceed procedural timelines and address questions which were not raised on appeal. Among those powers on which the MPIA is silent, the powers to draw adverse inferences and accept non-parties' submissions are unlikely to be implied in an arbitration treaty (through which disputing parties retain significant procedural autonomy).

While the fledgling MPIA may have a relatively low number of participating members at present, their collective trade volume—perhaps a more accurate indicator of the number of disputes to expect—is substantial. Such practice may indeed raise questions concerning several of the powers canvassed above. By interpreting their powers according to the general framework advanced in this article, MPIA arbitrators can administer more predictable proceedings and avoid the accusations of overreach which the AB continues to attract, three years after its demise.[91] Future practice under the MPIA and other WTO arbitration agreements may in this manner refine public perceptions of the WTO adjudicator—revealing her to be neither the mechanical umpire idealized by the U.S., nor the imperial lawmaker it came to see in the AB.

91 See Simon Lester, "Katherine Tai on Fixing WTO Dispute Settlement" (7 June 2022), online (blog): *International Economic Law and Policy Blog* < ielp.worldtradelaw.net > (in June 2022, the U.S. Trade Representative stated that "the ability of WTO Members to obtain findings through litigation that effectively create rules that did not need to go through the negotiation process is part of the significant challenge that the WTO has had as an institution").