Recommendations for Restoration of a Rules-Based International Trading System by the Research Group on the International Trading System led by the Japan Economic Foundation

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# The MPIA as Sub-Optimal Solution to Restore WTO Dispute Settlement

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**Abstract**

In light of ongoing disagreements between WTO Members, the stopgap offered by the MPIA is most likely the best available option in the foreseeable future in order to maintain a functional dispute settlement system, albeit without the participation of some WTO Members, most notably the United States. The first MPIA appeal process achieved the MPIA's main objective of preserving the system's binding character and two levels of adjudication. As MPIA (and other Article 25) arbitration appeals can be adjusted and molded case-by-case by the disputing parties in their appeal arbitration agreements, one can expect further developments and innovations as more appeals are processed. In this sense, the MPIA can serve not only as an interim stop-gap to preserve WTO dispute settlement, it can also function as a laboratory to explore and test new ways of improving WTO dispute settlement . The choice, today, is not between a two-tiered system or a single-tier system. Rather, it is between DS that functions (no appeal into the void, thanks to the MPIA) or DS that does not function and can be blocked at will.

## 1. Introduction

The GATT/WTO dispute settlement system is going through its biggest crisis, at least since the 1980s/early 1990s when a series of GATT disputes were blocked and the system came to an almost halt. Similarly, today, and this since late 2019, most WTO panel reports are blocked as they are appealed to an Appellate Body that has ceased to function (so-called "appeal into the void"). The Appellate Body has ceased to function because the United States has vetoed the appointment of Appellate Body members. This started under the Obama administration (in 2016) and was a US policy continued under both Presidents Trump and Biden.

This contribution argues that, in light of continuing tensions and ongoing disagreements between WTO Members, the stopgap offered by the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is most likely the best available option in the foreseeable future in order to maintain a functional dispute settlement system, albeit without the participation of some WTO Members, most notably the United States. The crisis in the 1980s/early 1990s brought about the creation of the WTO in 1994, with binding dispute settlement. It can only be hoped that today's crisis will similarly spawn a positive reform of the system. In the meantime, WTO Members will most likely have to content themselves with the MPIA as a second-best option, but one that can already now be used to experiment with efficiency and accountability reform.

## 2. The crisis in WTO dispute settlement (DS)

The DS crisis is a double one, making it extremely hard to resolve. First, the DS system in and of itself evolved into something that one of its main users (the US) no longer supports, in essence because the Appellate Body (AB) took a life of its own by means of what the US labeled as expansive interpretations and overreach. Over the years (1994-2019), the DS system also ballooned into a highly complex, over-legalized regime where time limits were routinely ignored (proceedings taking years instead of the prescribed months) and reports became extremely lengthy and hard to read.[1] This complexity and lack of efficiency limited the number of WTO Members actively participating, and lead to a drop in new cases filed, well before the demise of the AB in 2019. Second, the DS crisis is deepened, and so much more difficult to resolve, because it is linked to a crisis in the broader multilateral trading system as a whole: the rise of China, COVID-19, wars and other disruptions in supply chains, the reemergence of economic security and industrial policy, tech competition and sustainability imperatives. Because of these dynamics, a general sense is emerging that the WTO rule book is no longer fit for purpose. If WTO Members believe that the rule book is outdated, it becomes extremely hard for them to agree to binding dispute settlement under these (outdated) rules. Given how difficult it is to change WTO rules, this means that the DS crisis is here to stay, at least for the medium term.

## 3. The key challenge to address

Focusing specifically on the crisis in DS itself, the core issue to address, in this author's view, is to rebalance the equilibrium between adjudicator (and related WTO Secretariat[2]) power, on the one hand, and WTO Members' control, on the other. Much of the criticism that has been raised

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[1] See J. Pauwelyn & W. Zhang, *Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload* (with W. Zhang), 21 Journal of International Economic Law 2018:3, 461-487.

[2] J. Pauwelyn & K. Pelc, *Who Guards the 'Guardians of the System'? The Role of the Secretariat in WTO Dispute Settlement* (with K. Pelc), 117 American Journal of International Law (2022) 534-566

against the system can, indeed, be reframed as an argument of either too much adjudicator/Secretariat power/freedom, or not enough control over the process by WTO Members themselves.

The so-called Molina text of February 2024[3], which was the result of more than one year of informal discussions between WTO Members, includes a number of proposed reforms going in this direction. In terms of limiting the role/power/freedom of adjudicators/the Secretariat, the Molina text proposes, inter alia: a renewed focus on mediation and good offices (instead of adjudication), strict time and word limits, no obiter dicta, no rule of precedent, a more limited role for WTO Secretariat support staff. In terms of enhancing the control of WTO Members over the process and DS outcomes: mandatory discussion of DS reports in technical committees where all WTO Members can provide feedback; the creation of an Advisory Working Group composed of all WTO Members to provide feedback on specific legal interpretations; an accountability mechanism, controlled by WTO Members, to keep track of compliance with the rules, procedures and time limits imposed on adjudicators.

The main question left open in the Molina text is that of appellate review. The Molina process has now been turned into a formal WTO reform process, with the question of appellate review prominently on the table. The US has made it clear that appellate review is not necessary in its view. Most other WTO Members, however, insist on maintaining a two-tiered system with the possibility to appeal panel rulings, for purposes of enhancing correctness and uniformity but also to bolster the legitimacy and compliance-pull of WTO rulings (it is generally perceived to be easier to convince, for example, domestic parliaments to change a law based on an appellate report coming from a standing body, as compared to a ruling by an ad hoc panel of three).

That said, the key challenge is arguably less that of setting up a two-tiered system (panel plus appellate review), but rather that of making DS functional again, that is, making sure it is "binding" in the sense that DS leads to a final outcome without the possibility for the losing party to block the process. The key novelty with the creation of WTO DS in 1994 was not the creation of an appellate body, but rather the establishment of panels and adoption of reports by negative consensus, taking away the veto rights of individual WTO Members. That should be the main goal in mind also in the current reform process.

## 4. The MPIA as sub-optimal solution for functioning DS in the medium term

1) Appeals into the void as the "new normal"

In late 2019 when the Appellate Body ceased to function, some observers expected that disputing parties might waive their right to appeal and generally agree to the adoption of panel

[3] WTO General Council, Job/GC/385, 16 February 2024.

reports, notwithstanding the option to block the process (as happened in the early years of GATT).[4] The reality has turned out to be different, however: most panel reports issued between 2020 and today were appealed into the void. Blockage in the process has, thereby, become the "new normal" (as it was in the late 1980s/early 1990s under GATT).

As a result, since 2020 fewer WTO disputes have been filed, not because fewer WTO violations have occurred (quite the contrary) but because potential claimants realized that a WTO complaint could be filed but then be as easily blocked by the defendant by appealing into the void. In this context, few WTO Members are willing to spend the political capital and other resources to trigger WTO dispute settlement. This, in turn, has softened the normative strength and compliance-pull of WTO rules: WTO Members tempted by imposing measures that violate WTO rules have less of a deterrent to do so; even if another WTO Member would challenge them, they can always block the system. If, indeed, potential complainants do not file cases when such measures are effectively enacted, such behavior further induces WTO Members to take WTO rules lightly.

In no time, the reputation costs linked to violating WTO rules are thereby eviscerated. This slippery slope and vicious circle risk, in turn, undermining the broader trading system and the stability it has built up and provided in the last decades. This return to power, away from rules, may work and be digestible for major trading countries with large domestic markets (such as the US, the EU or China). For middle powers, such as Japan and Korea, let alone small nations such as Switzerland or developing countries heavily dependent on export revenues, it threatens economic stability and prosperity.

2) The MPIA as the only "game in town"

At MC12 in June 2022, WTO Members committed to restoring "a fully and well-functioning dispute settlement system accessible to all Members by 2024". However, prospects for reaching a deal by this deadline are minimal.

This means that, in the medium term, if a WTO Member genuinely wants functional DS, the only "game in town" is joining the MPIA. The MPIA was set up in 2020, by a sub-set of WTO Members (currently 54, or 27 counting the EU as one), with two goals in mind: (i) avoid blockage in DS by agreeing not to "appeal into the void", and (ii) ensure the right to appeal by setting up appeal arbitration under Article 25 of the DSU (to be decided by three arbitrators randomly selected from a pool of ten arbitrators, appointed by consensus of all MPIA

[4] See Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What To Expect?,* 22 Journal of International Economic Law (2019) 297-321.

participants).

Crucially, the choice, today, is not between a two-tiered system or a single-tier system. Rather, it is between DS that functions (no appeal into the void) or DS that does not function and can be blocked at will.

For a WTO Member to join the MPIA means that as a complainant it can seek redress for WTO violations against other Members that participate in the MPIA. There is reciprocity in that if a WTO Member (such as the US) is not an MPIA participant, that other Member cannot invoke MPIA rights. If, for example, Japan files a WTO complaint against the US, the US can block the process by appealing into the void. Similarly, if the US were to file a WTO complaint against Japan, Japan can still appeal an adverse panel report into the void, even though Japan is an MPIA participant. It is only in disputes with other MPIA participants (say, a dispute between Japan and the EU or China) that the prohibition to appeal into the void and the right to appeal before MPIA arbitrators are triggered.

The DS experience to date as between MPIA participants is promising: considerably more cases between MPIA participants are settled or when they move to a panel, the panel report is adopted without appeal. Only in one dispute (EU v. Colombia – Frozen Fries) has MPIA arbitration actually been invoked. Yet, in many other disputes between MPIA participants, the very existence of the MPIA meant that losing parties did not appeal or agreed to settle. This shadow function of the MPIA fulfils an important role: the fact that DS is binding and cannot be blocked. This is, as noted earlier, a more important feature than actually seeing many MPIA appeal processes. The first objective of WTO DS is finding a positive settlement. If appeals can be avoided, all the better. That has been a key effect of the MPIA to date.

3) The MPIA remains sub-optimal but can be a testing ground for improving DS

That said, the MPIA is not optimal. Although it includes many of the main participants in WTO DS (e.g. Australia, Brazil, Canada, Chile, China, Colombia, EU, Japan, Mexico, New Zealand, Peru, the Philippines, Ukraine), key trading partners and some of the traditional DS participants, especially the US (but also e.g. India, Indonesia and Korea) have not (yet) joined the MPIA.

In addition, the MPIA is modelled on the old Appellate Body, including some of its perceived defects. However, the MPIA is flexible and can be used in a reform-by-doing process whereby MPIA participants work out certain reforms and can agree to certain changes, based on past experience.[5]

[5] See Joost Pauwelyn, *The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?,* 22 World Trade Review (2023) 693-701.

The MPIA allows appeal arbitrators to "take appropriate organizational measures to streamline the proceedings" including "decisions on page limits, time limits and deadlines as well as on the length and number of hearings required". Arbitrators can also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU. In addition, given that the MPIA itself is a political agreement that needs to be implemented in each specific case, such implementation can include certain adjustments or reforms, to be agreed on by two disputing parties at the start of the panel proceedings. This means that, in effect, the MPIA can function as a laboratory and testing ground for DS reforms.

4) The first MPIA appeal process confirms that the MPIA works

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

In sum, considering the first MPIA award in the EU–Colombia frozen fries dispute, the MPIA has proven to be operational. It ensured both the right of parties to appeal panel reports and to obtain a final, binding ruling, without loopholes to block the process.

The key stages of the MPIA process are as follows:

*1. A WTO Member decides to join the MPIA*. This is normally done outside of any specific dispute and merely implies joining a communication issued in April 2020 that contains

a political commitment to enter into an appeal arbitration agreement in future disputes where both parties are MPIA participants.

*2. Once a panel is established between MPIA participants, the parties conclude an appeal arbitration agreement*. No dispute-specific agreement to rely on the Appellate Body was needed. Since the MPIA is implemented under DSU Article 25 for each dispute, a separate appeal arbitration agreement is needed for each MPIA case.

*3. If a party wants to appeal, it can request the suspension of panel proceedings before the panel report is circulated*. Once the appeal arbitration agreement is concluded, the panel proceeding runs its usual course, with two rounds of submissions and two hearings, an interim report, and final report which is issued to the parties. Up to 10 days before the circulation
of the final panel report to all WTO Members, either party can request the panel to suspend its proceedings which the panel must grant, as stipulated in the appeal arbitration agreement. Such suspension paves the way for a potential MPIA appeal.

*4. Either party can initiate an MPIA appeal with a notice of appeal*. Once the panel suspends its proceedings at the request of a party, either party has 20 days to file a notice of appeal. This notice of appeal starts the 90-day clock for the MPIA award to be issued, includes the final panel report and is circulated to all WTO Members. With its notice of appeal, the party must concurrently file its written appeal submission. The other party then has five days to submit a notice of other appeal which must also include its appeal submission.

*5. The appeal arbitration process itself*. The MPIA consists of a pool of ten arbitrators, selected by consensus of all MPIA participants in July 2020. Any given MPIA appeal is, however, decided by only three arbitrators randomly selected out of the pool of ten. Nationals of a party can sit as MPIA arbitrators. By day 18 (counting from the day of the notice of appeal), appellee (or response) submissions must be filed. By day 21, third parties in the dispute (which may or may not be MPIA participants themselves) can file a third-party submission. Next comes the oral hearing (between day 30 and day 45). By day 90 at the latest, the MPIA arbitrators must issue their award to the parties.

*6. The MPIA award, its bindingness and enforcement*. The MPIA appeal award includes the panel's un-appealed findings. Awards must be translated into the WTO's three official languages.

Pursuant to DSU Article 25, paragraph 3, arbitration awards must be notified to the DSB, where any Member may raise any point relating to the award. There is no need for the DSB to formally adopt the award before it is binding on the parties. The binding effect of MPIA awards is triggered by DSU Article 25, paragraph 3, itself ("parties to the proceeding shall agree to abide by the arbitration award") and is confirmed in the MPIA itself ("the parties agree to abide by the arbitration award, which shall be final"). DSU Article 25, paragraph 4, makes it clear that DSU Articles 21 and 22 on implementation and enforcement of WTO panel/Appellate Body rulings "shall apply mutatis mutandis to arbitration awards". In this sense, an MPIA award is exactly like an adopted panel or Appellate Body report.

### 5) Conclusion

As WTO Members remain engaged to put WTO dispute settlement back on the rails, following the demise of the Appellate Body in late 2019, the interim solution of the MPIA deserves wider attention. This contribution explained what the MPIA is and offered a step-by-step roadmap of how WTO Members can take advantage of the MPIA arrangement in specific disputes. It illustrated how the first MPIA appeal process achieved the MPIA's main objective of preserving the system's binding character and two levels of adjudication. As MPIA (and other Article 25) arbitration appeals can be adjusted and molded case-by-case by the disputing parties in their appeal arbitration agreements, one can expect further developments and innovations as more appeals are processed. In this sense, the MPIA can serve not only as an interim stop-gap to preserve WTO dispute settlement, it can also function as a laboratory to explore and test new ways of making WTO dispute settlement more efficient and in line with WTO Members' goals and interests: experimental reform by doing, rather than one-off, formal DSU review. Indeed, the prospects of formal DSU review by the end of 2024 are dim, at best. In light of continuing tensions and ongoing disagreements between WTO Members, the stopgap offered by the MPIA is most likely the best available option in the foreseeable future in order to maintain a functional dispute settlement system, albeit without the participation of some WTO Members, most notably the United States. The choice, today, is not between a two-tiered system or a single-tier system. Rather, it is between DS that functions (no appeal into the void, thanks to the MPIA) or DS that does not function and can be blocked at will. The crisis in the 1980s/early 1990s brought about the creation of the WTO in 1994, with binding dispute settlement. It can only be hoped that today's crisis will similarly spawn a positive reform of the system. In the meantime, WTO Members will most likely have to content themselves with the MPIA as a second-best

option, but one that can already now be used to experiment with efficiency and accountability reform.

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