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

Chapter 1 Restoration & Enhancement of WTO Functions
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The MPIA & the Rule of Law under Geopolitical Tensions – from the Perspective of Japan as a Middle Power

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Abstract

Five years after the suspension of the Appellate Body starting at the end of 2019, the rule of law within the WTO regime has been undermined by rampant "appeals into the void". To address this situation, the Multilateral Provisional Appellate Arbitration Arrangement (MPIA) was launched in April 2020 at the initiative of the middle powers, which benefit most from a rules-based free trade regime.

In the 2020 disputes with China, Australia used the MPIA to successfully defend its trade interests against China's coercive measures. Japan is the country that has gained most from the appellate system under the DSU, and therefore joining the MPIA will be also beneficial for Japan. For middle powers that cannot play the power game, the MPIA can be an effective policy response, consistent with international law, to economic coercion.

The MPIA has been criticized as "bad" because of several constitutional flaws. However, such criticism is misplaced, and leaving the current interregnum in the rule of law would be far worse. The MPIA is the most realistic and optimal solution in the absence of any prospect for the resumption of the work of the Appellate Body, and it is an institutional framework that should be utilized while continuing to make procedural improvements and expanding its membership.

1. Introduction: The Absence of the United States and the Decline of the Rule of Law

More than five years have passed since the Appellate Body ceased to function at the WTO; in the summer of 2017, the US refused to appoint a successor to then-member Ricardo Ramírez-Hernández, whose term was expiring at the time, but since the WTO Dispute Settlement Understanding (DSU) requires consensus decision-making (Article 2.4), the US refusal created a vacancy for an Appellate Body member. The US then repeated this until December 2019, when the number of members fell below three which is the minimum to constitute a division to hear individual cases, and to date the Appellate Body has not functioned.

Meanwhile, the right of parties to a dispute to appeal (Article 16.4 of the DSU) has remained intact, leading to rampant "appeals into the void", whereby a party to a dispute dissatisfied with the panel's decision can appeal to a non-functioning Appellate Body, effectively preventing the dispute from being resolved. As a result, 32 disputes (based on the number of cases as of the end of February 2025) are currently on hold with no resolution in sight.[1]

If the Appellate Body remains non-functioning and the number of cases appealed into the void increases, the effectiveness and credibility of the WTO's dispute settlement procedures, which has even been described as the "crown jewel", will obviously deteriorate. In the 25 years from the establishment of the WTO in 1995 to the end of 2019, when the Appellate Body was barely functioning, an average of 23.7 disputes per year (593 in total) were referred to the WTO (based on the date of the request for consultations). However, this number dropped to an average of 7.6 per year (38 in total) in the five years from 2020 to 2024, after the Appellate Body ceased to function.

The first administration of US President Donald Trump was not only consistently hostile to the Appellate Body during this period, bringing it to a standstill, but also consistently uncooperative in improving the dispute settlement procedures. In 2020, the Trump administration was replaced by the multilateralist administration of Joe Biden. The latter advocated a "worker-centered trade policy,"[2] which was not very different from the Trump administration's view of trade policy as expressed by Robert E. Lighthizer, former US Trade Representative (USTR), in his recent book.[3] At the Atlantic Council symposium, then-USTR Katherine Tai also noted that the two parties' trade policies are consistent in terms of the need for a change in approach to trade and an awareness that the benefits of free trade are not sufficiently inclusive in the US.[4]

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[1] "Ongoing WTO Disputes," WorldTradeLaw.net, https://www.worldtradelaw.net/static.php?type=dsc&page=currentcases.

[2] "Ambassador Tai Outlined Biden's Goal of Worker-Focused Trade Policy," *NY Times*, June 10, 2021, https://www.nytimes.com/2021/06/10/business/economy/us-trade-katherine-tai.html.

[3] Robert Lighthizer, *No Trade Is Free: Changing Course, Taking on China, and Helping America's Workers* (Broadside Books, 2023).

[4] "US Trade Representative Katherine Tai on Modernizing the Transatlantic Partnership," Atlantic

At the 12th Ministerial Conference in 2022, WTO members agreed to restore the functioning of the dispute settlement system by the end of 2024,[5] and the US participated in the subsequent DSU reform negotiations in Geneva. Although some progress was made in revising panel procedures and a draft reform proposal (known as the "Morina text")[6] was issued, it did not include reform of the crucial appellate process.[7] In the end, the 13th Ministerial Conference in February 2024 only agreed to continue the work, and the deadline mentioned above has now passed. In particular, there is a wide gap between the EU and other WTO members, who support maintaining the two-tier system, and the US, which insists on a single-tier ad hoc panel system as was the case under GATT 1947.[8]

In January 2025, President Trump, who has never hidden his hostility to the WTO, returned to the White House. No one would dispute that normalization of the Appellate Body is unlikely for at least the next four years, and possibly for several more if subsequent reform negotiations are included.

2. MPIA – Middle Power Driven Restoration of the Rule of Law

An interesting panel discussion took place at the WTO Public Forum on Sept. 10, 2024.[9] The panel was chaired by Richard Baldwin of the University of Geneva and featured several leading figures among Geneva insiders, including Anabel González, former deputy director general of the WTO, and Cecilia Malmström, former trade commissioner of the European Commission. At the event, Adam Posen of the Peterson Institute for International Economics, quoting an old US proverb, urging the US and China to "lead, follow, or get out of the way", i.e., to lead WTO reforms, follow the initiative of other members, or at least refrain from obstructing reform. He argued that the coming era is "the era of third countries", but not that of the US or China. In other words, he emphasized the importance of a middle-power coalition of like-minded countries supporting free trade without the US, which has not cooperated in WTO reform, and China, which has not changed its market-distorting practices.

Council (June 3, 2024), https://www.atlanticcouncil.org/commentary/transcript/us-trade-representative-katherine-tai-transatlantic-trade/

[5] MC12 Outcome Document Adopted on 17 June 2022, WTO Doc. WT/MIN(22)/24, WT/L/1135, ¶ 4 (June 22, 2022).

[6] Special Meeting of the General Council, Wednesday, 14 February 2024: Report by H. E. Mr. Petter ØLBERG, Chairman of the DSB, Annex 1, JOB/GC/385 (Feb. 16, 2024).

[7] Dispute Settlement Reform – Ministerial Decision, WTO Doc. WT/L/1192, WT/MIN(24)/37 (March 4, 2024).

[8] "WTO Unlikely to Hit December Deadline for Dispute Settlement Reform," *Inside US Trade*, Nov. 29, 2024, pp. 9-10.

[9] "Re-globalization: Trade in a Geopoliticized World," Session 36, WTO Public Forum 2024 (Sept. 10, 2024), https://www.wto.org/english/forums_e/public_forum24_e/pf24_session_fullpage_e.htm?session=1098.

The US has not shown willingness to accept the normalization of the dispute settlement procedures, and the rule of law has deteriorated due to the Appellate Body's dysfunction. Under these circumstances, such a middle power initiative was clearly demonstrated with the conclusion of the Multilateral Provisional Appellate Arbitration Arrangement (MPIA)[10] in April 2020. Presently, a total of 54 WTO members are part of the MPIA, including the EU and its member countries, as well as Australia, Brazil, Canada, Singapore, and other prudent middle powers, in addition to China. Under the provisions of the MPIA, in the event that a party to the dispute finds the panel report unsatisfactory, that party is expected to refrain from appealing the case into the void and instead refer the panel report for review by arbitration as stipulated in Article 25 of the DSU.

Appellate arbitrations under the MPIA are heard by 10 arbitrators.[11] The MPIA parties selected the arbitrators through an appointment process similar to that for Appellate Body members, and three of them will form a division that will hear an individual case. In addition, the procedures for the Appellate Body will be applied *mutatis mutandis* to the MPIA arbitration. In addition, pursuant to Article 25.4 of the DSU, arbitral awards will also be reported to the Dispute Settlement Body (DSB) and their implementation will be ensured by the compliance system (including countermeasures) under Articles 21 and 22 of the DSU.

However, the MPIA arbitration procedure is not simply a copy of the Appellate Body procedure. It attempts to make certain improvements in response to US criticisms of the Appellate Body. First, the DSU provides that the Appellate Body has to circulate its report within a maximum of 90 days of the notice of appeal, but for cases appealed since 2011 it took an average of 237 days to circulate the reports, which the US criticized.[12] For cases filed after July 2017, when the US began refusing to appoint Appellate Body members, it took an average of 430 days for the report to be circulated.[13] The MPIA allows its arbitrators to make the process faster by limiting the volume of written submissions and the length and number of oral hearings, for example, in order to strictly adhere to the 90-day deadline. In addition, arbitrators can also propose to exclude certain types of claims from the appeal to meet the deadline. For example, claims related to Article 11 of the DSU (standards of review) are good examples. These claims challenge errors in the panel's objective assessment of the facts and should be excluded because they tend to prolong the

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[10] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, WTO Doc. JOB/DSB/1/Add.12 (April 30, 2020).

[11] For the list of the arbitrators, *see* Multi-Party Interim Appeal Arbitration Arrangement (MPIA), https://wtoplurilaterals.info/plural_initiative/the-mpia/.

[12] USTR, *Report on the Appellate Body of the World Trade Organization*, pp.26–32 (2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf .

[13] The number of days was calculated by the author based on data from the following website. Timing of Appeal, Circulation and Adoption of Appellate Body Reports, WorldTradeLaw.net, https://www.worldtradelaw.net/databases/abtiming.php.

appellate process and often force the Appellate Body, a legal tribunal, to address factual issues.

The US criticism of the Appellate Body for "overreaching" includes unnecessary advisory opinions and *obiter dicta*.[14] For this reason, the MPIA procedure allows arbitrators to consider only those issues raised by the parties to the dispute that are necessary to resolve individual disputes before them.

In terms of performance, agreements on MPIA arbitration have been concluded in 11 cases, of which only one, *Colombia — Frozen Fries* (DS591), has resulted in an award. In addition, although not disputes between MPIA parties, the EU and Turkey have agreed to appellate arbitration under Article 25 of the DSU, which is virtually identical to that under the MPIA, in *Turkey — Pharmaceutical Products (EU)* (DS583) and *EU — Safeguard Measures on Steel (Turkey)* (DS595), and an award[15] has been delivered in the former case. In *Colombia—Frozen Fries*, the arbitrators applied Article 17.6(ii), which requires deferential review by the Appellate Body of a WTO member's interpretation of the Anti-Dumping Agreement. The Appellate Body had previously first derived the "correct" interpretation under the Vienna Convention on the Law of Treaties (VCLT) and then considered whether the respondent's own interpretation was consistent with it. Instead of following this precedent, the arbitrators in this case considered whether the respondent's interpretation could be reached by applying the VCLT.[16] In this case, the parties also agreed to put into practice the new procedural attempts of the MPIA described above, such as limiting the volume of submissions and the length of time of oral statements.[17] In addition, the arbitrators in this case convened a meeting similar to a pre-trial conference in domestic legal proceedings (presumably an online conference, as the award report describes it as "virtual") and discussed the issues with the parties to the dispute.[18] As a result, the report was circulated only two and a half months after the notification of appeal.

So far, even though only two arbitral awards have been issued (DS591 and DS583), in nine of the other cases, the disputes were substantially resolved at some stage before being referred to MPIA arbitration. These cases were settled because the MPIA prevented appeals into the void. In this sense, although there are only few arbitration awards, the MPIA has certainly brought the rule of law to the WTO, despite the absence of the Appellate Body.

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[14] USTR, *supra* note 12, pp.47–54.

[15] Award of the Arbitrators, *Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/ARB25 (July 25, 2022).

[16] Award of the Arbitrators, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands: Arbitration under Article 25 of the DSU*, paras. 4.13–4.15, WTO Doc. WT/DS591/ARB25 (Dec. 21, 2022).

[17] Agreed Procedures for Arbitration, *Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WTO Doc. WT/DS591/ARB25 (Apr. 22, 2021).

[18] *Colombia — Frozen Fries* (DSU art. 25 Award), *supra* note 16, ¶¶ 1.11–1.12. For the novelty of the procedural agreement and decision in the case, *see* Joost Pauwelyn, "The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?" *World Trade Review* Vol. 22(5): 693–701(2023).

3. MPIA & Economic Coercion

3.1 The Australia-China Dispute Experience

As explained above, the MPIA has been established and is being operated on the initiative of the middle powers. At its root is the recognition that upholding the rule of law through the WTO dispute settlement system remains essential for these countries, which cannot play the power game to exchange unilateral trade retaliations as the US and China do. Australia's response to China's economic coercion in recent years is a striking illustration of this.

In the 2010s, under the Julia Gillard and Tony Abbott governments, Australia and China rebuilt their relationship, which developed into a close one and a high degree of interdependence, including the signing of the Australia-China Free Trade Agreement in 2015. In 2020, however, when then Prime Minister Scott Morrison called for an independent investigation into the origin of Covid-19, which caused a global pandemic, China strongly objected and imposed restrictive trade measures on imports from Australia, including anti-dumping and countervailing duties on barley and wine, stricter sanitary and phytosanitary measures on lobster, beef and timber, and import restrictions on coal.[19] Nevertheless, under the policy of "open regionalism", Australia made unremitting efforts to develop sales channels to other countries. With the exception of wine and lobster, which had been heavily dependent on China, Australia escaped this crisis by shifting its exports to China to other markets. In other words, by taking advantage of the rules-based free trade regime, such as the WTO, CPTPP, RCEP, and other bilateral free trade agreements to which Australia is a party, Australia was able to fend off China's economic pressure.[20] Thus, China's coercive measures were neutralized and eventually phased out with the improvement of Australia-China relations since the fall of 2023.

Australia effectively utilized the MPIA in this crisis. Australia referred a couple of disputes over anti-dumping and countervailing duties on barley and wine by China to the WTO, requested the establishment of a panel, and agreed with China to refer panel reports, if issued, to appellate arbitration under the MPIA. With improved diplomatic relations, China eventually eliminated the measures in question and these disputes were resolved bilaterally by the parties.[21] But without

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[19] Yuki Yoshida, "Goshu to Chugoku no Nikokukan Kankei: Gochu Tairitsu no Yukue," ("Australia-China Bilateral Relations: Fate of the Bilateral Conflict,") *Fainansu* (*Finance*) Vol. 57(12): 40–42 (2022, in Japanese).

[20] James Laurenceson and Shiro Armstrong, "Learning the Right Policy Lessons from Beijing's Campaign of Trade Disruption against Australia", *Australian Journal of International Affairs* Vol. 77(3): 258-275 (2023).

[21] Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Doc. WT/DS602/R (Apr. 19, 2024); Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc. WT/DS598/R (Aug. 24, 2023).

the MPIA, China would have been in a strategically more advantageous position by appealing these disputes into the void. Australia's experience shows that WTO dispute settlement procedures, restored by the MPIA, can be an effective policy option alongside diplomatic negotiations and countermeasures when faced with economic coercion.

3.2 Japan's Experience in the WTO Dispute Settlement System

For its part, Japan is one of the WTO members that have benefited most from the WTO dispute settlement procedures, including its appellate system. Looking back at Japan's experience in the WTO dispute settlement system over the past 30 years, it is clear from the table that Japan has been successful in defending its trade interests through the Appellate Body's active stance in both clarifying the meaning of texts and thereby resolving disputes.

TABLE: Japan's track record in WTO disputes

Status	Number of Cases	Panel (Appellate Body) Reports	cases in which won*
As a complainant	28	22 (14)	21(12)
of which, cases that led to the compliance procedure	1	1 (1)	1 (1)
As a defendant	16	6 (4)	1 (0)
of which, cases that led to the compliance procedure	1	1 (0)	0 (0)

*= Cases that have resulted in the repeal of, or the redress of violations in, the measures in question

The two cases in which Japan ultimately did not prevail include *Korea — Radionuclides (Japan)* (DS495) in 2019. South Korea imposed import restrictions on seafood from Japanese waters, primarily from Fukushima and Miyagi, due to radioactive leaks from the Fukushima Daiichi Nuclear Power Plant (FDNPP) accident following the 2011 Great East Japan Earthquake. Although the Appellate Body almost completely overturned the panel's report accepting Japan's claims on the basis of the panel's erroneous fact-finding and interpretation of the SPS Agreement, the Appellate Body, as an appeal court only to consider issues of law, could not conduct the fact-finding necessary for its own decision, nor could it remand the case to the panel for additional fact-finding due to lack of authority to do so. Thus, the Appellate Body simply reversed the panel's

decision on most of the claims, but did not rule on Japan's claims.[22] This case was highly political in nature, as it was rooted in the cooling of Japan-South Korea relations at that time and deeply related to the reconstruction of the fishery industry in the affected areas. Therefore, the decision in this case has greatly shaken Japan's confidence in the Appellate Body and, by extension, in the WTO dispute settlement system.

Although many questions remain about the Appellate Body's decision in this case, it seems the result of the Appellate Body's shift from its traditional stance of active dispute solving due to strong criticism of the US against judicial activism and the imminent suspension of the Appellate Body.[23] It is also true that this is only one of many cases in which Japan was a party, and that in an overwhelming majority of the cases, the disputes were resolved in favor of Japan.

The cessation of the Appellate Body's function has, of course, had a negative impact on Japan. So far, in three cases (*India — Iron and Steel Products* (DS518), *Korea — Stainless Steel Bars* (DS553), and *India — Tariffs on ICT Goods (Japan)* (DS584)), an avenue for resolution has been closed by appeals into the void, damaging the export earnings of Japanese companies. Nevertheless, Japan's initial reluctance to participate in the MPIA was due to the government's skepticism about WTO dispute settlement procedures as a result of the above Appellate Body's decision in *Korea — Radionuclides (Japan)* and its desire to serve as a mediator between the US and the EU, whose positions on the Appellate Body are far apart.[24] Perhaps more importantly, the Japanese government was concerned about being seen as favoring China, especially in light of the Trump administration's expressed displeasure[25] with the MPIA, which it dismissed as a "China-EU arrangement".

On the other hand, at that time the panel procedure was underway in *China — AD on Stainless Steel (Japan)* (DS601). If Japan had not join the MPIA, it would have been inevitable that China would appeal the case into the void in the event that Japan won the case before the panel. Faced with this situation, the Japanese business community strongly urged its government to join the MPIA, and in June 2022 the METI Expert Group prepared a report recommending Japan's membership in the MPIA.[26] Subsequently in March 2023, Japan finally joined the MPIA. As a

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[22] Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WTO Doc. WT/DS495/AB/R (April 11, 2019).

[23] For problems of, and criticism against the decision, *see* Tsuyoshi Kawase, "Kankoku–Hoshaseikakushu Jiken ni Miru WTO Funso Kaiketsu Tetsuzuki no Genkai: Jikkoutekina Funso Kaiketsu wo Habamu Fukanzenna Nishinsei," ("Limitations of the WTO Dispute Settlement Procedures Observed in the Korean Radionuclide Case: Incomplete Two-Tier Adjudication System Preventing Effective Dispute Settlement,") *Kokusai Mondai* (International Affairs) No. 686: 17–28 (2019, in Japanese).

[24] Kunio Miyoka and Colin Trehearne, "Explaining Japan's Decision to Join the MPIA: Avoiding the Void," *Global Trade and Customs Journal* Vol. 18 (7&8): 276 (2023).

[25] "Shea: U.S. Opposes Use of WTO Budget for Interim Appellate Plan," *Inside US Trade*, June 19, 2020, p. 21.

[26] *WTO Jyokyu Iinkai no Kino Teishika no Seisaku Taio Kenkyukai Chukan Houkokusho* (*Interim Report of the Expert Panel on Policy Responses under the WTO Appellate Body Dysfunction*) (METI, June 2022,

result, Japan was able to prevent China from appealing the case into the void. Japan prevailed before the panel in June 2023,[27] China accepted the ruling, and the panel report was adopted by the DSB without recourse to MPIA arbitration. Finally, the measure in question was repealed in July 2024.[28]

On the other hand, Japan missed the opportunity to have its citizens elected as arbitrators because it was not an MPIA founding party. In this sense, the delay in joining the MPIA was detrimental to Japan's interests.

3.3 Significance of the MPIA

The Australian example, as described above, demonstrates that the MPIA is an effective policy tool for middle powers to counter economic coercion. The same is true for Japan. When Japan-China relations deteriorated due the territorial dispute over the Senkaku Islands, Japan faced restrictions on exports of rare metals and rare earths by China, but it also effectively used the WTO dispute settlement procedures to resolve the dispute.[29] Now that the Appellate Body has ceased to function, this role has been taken over by the MPIA. China has imposed a ban on imports of Japanese seafood since August 2023 in protest against the discharge of ALPS-treated water from the FDNPP into the sea. If Japan refers the case to the WTO, it can expect the dispute to be resolved under the WTO rules without the risk of China appealing into the void. As China remains Japan's most important trading partner (in terms of total imports and exports), ahead of the US in second place,[30] it would be of great benefit to Japan to be able to manage contain China's economic coercion to some extent through rules. In particular, Japan has traditionally been extremely reluctant to take countermeasures that are inconsistent with WTO agreements, and if the WTO dispute settlement procedures do not work, virtually all avenues of redress will be blocked for Japan.[31]

In addition to the Australia-China cases mentioned above, in seven other cases involving China,

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in Japanese), https://www.meti.go.jp/press/2022/06/20220627001/20220627001-d.pdf.

[27] Panel Report, *China — Anti Dumping Measures on Stainless Steel Products from Japan*, WT/DS601/R June 19, 2023).

[28] "China's Measure Imposing Anti-Dumping Duties on Stainless Steel Products Originating from Japan Revoked" (METI, July 23, 2024), https://www.meti.go.jp/english/press/2024/0723_001.html.

[29] "Rea-ahsu Funso, Tateyakusha Futari ga Kataru Nihon Shoso no Butaiura," ("Rare Earths Dispute: Two Key Officials Share the Behind-the-Scenes Story of Japan's Victory,") METI Journal Online, Aug. 18, 2022 (in Japanese), https://journal.meti.go.jp/p/22923/.

[30] "Japan-China Economic Overview," Ministry of Foreign Affairs, Japan, January 2024, https://www.mofa.go.jp/files/100540401.pdf.

[31] Arata Kuno, "Japan's Joining MPIA an Outside Chance to Boost Momentum for WTO Reform," East Asia Forum, May 14, 2023, https://eastasiaforum.org/2023/05/14/japans-joining-mpia-an-outside-chance-to-boost-momentum-for-wto-reform/. Articles 6 and 9(4) of Custom Tariff Act require Japan's retaliatory custom duties to be based on the WTO Agreement.

the parties agreed to refer their cases to MPIA arbitration. In addition, there are currently several disputes between Canada, the EU and China regarding additional duties on electric vehicles (EV) and anti-dumping and countervailing duties that appear to be countermeasures against the EV duties. Although no arbitration agreement has yet been reached in these cases, they are all potentially subject to MPIA arbitration, and these middle powers can ensure that trade disputes caused by China's non-market trade practices and economic coercion are resolved through the rules.

According to the G7 Osaka-Sakai Trade Ministerial Statement of October 2023, the G7 countries agreed to "continue [their] joint efforts, including at the WTO, to address economic coercion … and collectively explore responses ... in conformity with international law."[32] The G7 Reggio Calabria Trade Ministerial Statement in July of the following year stated, "we are increasing our collective ... response to economic coercion ... by developing new tools ... in line with ... international law."[33] Although both statements imply that the G7 members will innovate new policy tools to combat economic coercion, it clearly states that they will be consistent with international law and does not mean measures such as the G7 collective countermeasure to economic coercion proposed by Victor D. Cha,[34] for example. As the G7 countries other than the US are all middle powers, for them the MPIA could be a means of countering economic coercion in accordance with international law.

4. Criticisms & Challenges

4.1 Is the MPIA "bad" and does it suffer from a "constitutional birth defect"?

However, there is no shortage of criticism of the MPIA. For example, former Appellate Body member Jennifer Hillman described the MPIA as "bad" for several reasons: if the MPIA succeeds, it would discourage reform of the Appellate Body and WTO members would abandon the Appellate Body system; referral to MPIA arbitration is voluntary and not necessarily guaranteed; MPIA awards are not adopted by the DSB and are therefore outside the scope of the binding WTO dispute settlement system.[35]

Prof. Henry Gao of the Singapore Management University, a member in this JEF project, argues

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[32] G7 Trade Ministers' Statement, Osaka-Sakai, Oct. 29, 2023, https://www.mofa.go.jp/mofaj/files/100573173.pdf.

[33] G7 Trade Ministerial Meeting, Reggio Calabria and Villa San Giovanni, 16-17 July 2024: Ministerial Statement, https://www.mofa.go.jp/mofaj/files/100699442.pdf.

[34] Victor D. Cha, "Collective Resilience: Deterring China's Weaponization of Economic Interdependence," *International Security* Vol. 48(1): 91–124 (2023).

[35] Jennifer Hillman, "Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?" pp. 8–9, IIEL Issue Brief, Institute of International Economic Law, Georgetown University Law Center (2018), https://georgetown.box.com/s/966hfv0smran4m31biblgfszj42za40b.

that there are "constitutional birth defects" in the MPIA. Similar to Hillman, Prof. Gao points out that MPIA arbitration reports are not binding because they are not adopted by the DSB, and goes on to say that since their binding force derives from the agreement of the parties, it is a logical contradiction that MPIA arbitration reports are more binding than regular Panel/Appellate Body reports, which leave open a (very small) possibility of non-adoption by the DSB. Prof. Gao further points out that the removal of the language suggesting the precedential value of the award from the MPIA arbitration would result in further inconsistencies in arbitral awards on top of inconsistent panel reports. Finally, he argues, depriving disputants of their right to appeal and failing to resolve the dispute in accordance with the DSU would violate Article 23 of the DSU.[36]

Now, however, the Trump administration has returned and the US is expected to increasingly deviate from the WTO, and by extension the rules-based international trade regime, in favor of unilateralism. Under the circumstances, these criticisms are not convincing. First, from a technical point of view, there is no violation of Article 23 of the DSU in the MPIA; as long as MPIA arbitration is based on Article 25 of the DSU, such dispute settlement is nothing more than one under the DSU. Looking at the history of the drafting process, the negotiating parties agreed to the flexibility of Article 25 of the DSU, and there is no problem with using that Article as the basis for the MPIA, although certainly not in the way it was originally intended.[37] As long as alternative dispute resolution (ADR) falls within the framework of the DSU, each WTO member has the right to explore methods of resolution other than the normal appellate process. Given the obligation to "participate in good faith in the settlement of such disputes" (Article 3.10 of the DSU), efforts by parties to a dispute to seek a resolution through such methods should be encouraged in the current situation where the Appellate Body is not functioning properly.

The waiver of the right to appeal by joining the MPIA and agreeing to an arbitration agreement under it in an individual case is entirely at the discretion of each party to the dispute and is no different from the usual decision on whether or not to appeal. Rather than reserving the right to appeal a case into the void, the MPIA parties have simply opted for a rules-oriented solution for their future cases under the circumstances of Appellate Body dysfunction. The language of the MPIA suggests, of course, that the arrangement is not binding and that each party reserves the right to decline to refer an individual case to MPIA arbitration.[38]

With regard to precedential value, since the establishment of the Permanent Court of International Justice (PCIJ), the decisions of international tribunals are not binding on anyone

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[36] Henry Gao, "Finding a Rule-Based Solution to the Appellate Body Crisis: Looking beyond the Multiparty Interim Appeal Arbitration Arrangement," *Journal of International Economic Law* Vol. 24(3): 534–550 (2021).
[37] Olga Starshinova, "Is the MPIA a Solution to the WTO Appellate Body Crisis?" *Journal of World Trade*, Vol. 55(5): 791–792 (2021).
[38] *Ibid*, p. 797.

other than the parties to the case, and precedents cannot be a source of law. This principle has been continued in Articles 38 and 59 of the current Statute of the International Court of Justice (ICJ).[39] Therefore, even though MPIA awards do not constitute binding precedents, this is not unique among international dispute resolution proceedings in general. Moreover, since the MPIA is only a provisional institution, not an official body like the Appellate Body, it does not have the legitimacy to establish precedents. It is rather undesirable for a line of precedents to be established in MPIA arbitrations that contradict past Appellate Body decisions. There is already a sufficient accumulation of Appellate Body precedents for key articles of the WTO agreements, and the interpretation of these provisions in MPIA arbitrations should in principle follow such precedents. Although some problems have been identified in the Appellate Body's interpretations to date, these should be corrected either by the Appellate Body once it is reinstated or by an interpretative resolution of members (Article 9.2 of the WTO Agreement).

Moreover, the fact that the MPIA does not specify the precedential value of an arbitral award does not mean that future arbitral tribunals cannot refer to precedents under the MPIA. Despite the exclusion of the principle of *stare decisis* in international law, tribunals in various international dispute settlement fora have frequently referred to precedents and ensured the consistency of their decisions with them;[40] even in the WTO, where there is no mention of the precedential value of panel/Appellate Body reports anywhere in the DSU, let alone the WTO Agreement, but the panels/Appellate Body have frequently referred to their own precedents to ensure the consistency of their interpretations and decisions.[41]

Second, from a policy perspective, Prof. Gao's proposal is not feasible and, if implemented, could make matters worse. First, even if the General Council were to break with the convention of consensus decision-making and adopt a majority vote by ballot, it may not be able to secure a majority. Although more than three-quarters of members currently support initiating the process of appointing Appellate Body members,[42] these countries have proposed initiating the appointment process in the DSB, which still requires a consensus of all members, including the US. If the General Council were to initiate the process of appointing Appellate Body members by a majority vote, many countries, especially allies and friends of the US, would not support such a resolution that would exclude the US. In the first place, Japan has not even supported the initiation of the process of appointing Appellate Body members out of consideration for the intentions of the US, and there is no possibility that Japan would agree to a majority vote that

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[39] Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators," *Journal of International Dispute Settlement*, Vol. 2(1): 5–23 (2011).
[40] *Ibid*.
[41] David Palmeter et al., *Dispute Settlement in the World Trade Organization: Practice and Procedure* pp. 119–127 (Cambridge University Press, 2022).
[42] The 130 WTO Members Supported the Latest Proposal: Appellate Body Appointment, WTO Doc. WT/DSB/W/609/Rev.26 (Sept. 6, 2023).

would disregard the opposition of the US.

Moreover, if the General Council were to force the appointment of Appellate Body members by majority vote, US distrust of WTO dispute settlement procedures would rise to an irreparable level. Although Prof. Gao says that there is no danger of the US withdrawing from the WTO,[43] it is inevitable that the US will become extremely uncooperative not only in the dispute settlement process, but also in the operation of the WTO thereafter, and the functioning of the WTO will deteriorate even further.

Hillman says that the MPIA is "bad", but leaving a void in the rule of law is nothing less than the "worst". The MPIA will at least ensure that trade relations among major members other than the US will remain highly rules-based and predictable. For other middle powers, the MPIA is an effective tool for counterbalancing China's economic coercion, especially since China is willing to accept MPIA arbitration. While the MPIA has certain flaws, there is no question that it is the best possible solution to the absence of the Appellate Body under the current WTO Agreement.

4.2 **Toward a More Effective MPIA**

While the MPIA is undoubtedly almost the only realistic option for ensuring the rule of law in the WTO regime for the time being, challenges remain.

First, there is an urgent need to expand the membership. Among the major WTO members, India, South Korea and the United Kingdom have not joined the MPIA, and among the ASEAN countries, only the Philippines and Singapore have joined. In the Middle East and Africa, only Benin, a small country that is by no means an active player in the WTO dispute settlement, participates in the MPIA. Among the members with a relatively large number of dispute settlement cases, Argentina, Indonesia, Thailand, Turkey and Ukraine are desirable candidates for accession.

Each of these countries has advantages in joining the MPIA. With respect to the UK, for example, in the current situation where the US does not agree to the normalization of the Appellate Body for the time being and the MPIA becomes the norm, not joining the MPIA would cause some inconveniences. These include the inability to provide arbitrators and to participate in the formation of the procedural practices of the MPIA, despite being a G7 member, and being subject to countermeasures by the EU against the UK's appeal into the void in the event of a dispute with the EU.[44] Failure to join the MPIA would also deprive the UK's trading partners of consistency and predictability of legal outcomes in trade disputes with the UK, which would undermine the Global Britain initiative to advocate free trade and the rule of law.[45]

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[43] Gao, *supra* note 36, pp. 548–550.

[44] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021, 2021 Official Journal L 49, pp. 1ff (Feb. 12, 2021).

[45] David Collins, "World Traders: The Case for the UK's Participation in the WTO's MPIA," pp. 11–13,

India also benefits from MPIA membership because it protects its trade interests arising from trade relations with WTO members other than the US (e.g., China, Switzerland, and Germany), and also because it can avoid EU countermeasures against appeals into the void.[46] Indonesia also has several trade disputes with the EU, and as a respondent it strategically uses appeals into the void, while as a complainant it loses market access if it faces an EU appeal.[47] Moreover, following the EU's example, Brazil has also introduced countermeasures against appeals into the void.[48] Although there are reservations about the WTO consistency of such measures,[49] if the attitude of not allowing free riding through appeals into the void becomes widespread among WTO members, the incentive for countries to join the MPIA in order to avoid facing such countermeasures will increase.

Second, continuous improvement of procedures is needed. The US has identified a number of problems with the current Appellate Body procedures, some of which hit the nail on the head. While it was noted earlier that several innovations have already been incorporated into the MPIA and the procedural agreement in *Colombia — Frozen Fries*, the MPIA parties can continue to improve the procedures and make additional efforts to establish best practices. For example, one option would be to open the Appellate Body meetings to the public.[50] In principle, Appellate Body meetings are closed to the public (Article 17.10 of the DSU), which has led to a lack of transparency and democratic legitimacy and has been derided as akin to the Star Chamber under English absolute monarchism.[51]

5. Conclusion

Immediately after taking office, the second Trump administration announced and implemented a series of tariff increases in clear violation of WTO agreements. Michael Beeman, assistant secretary of the USTR in the first Trump administration, argues that the US is "walking out" of

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Report, Adam Smith Institute (2024), https://openaccess.city.ac.uk/id/eprint/32057/.

[46] Vishakha Raj and M. P. Ram Mohan, "Appellate Body Crisis at the World Trade Organization: View from India," *Journal of World Trade* Vol. 55(5): 850–852 (2021).

[47] Tsuyoshi Kawase, "The Appellate Void in Indonesia's Trade Policy," East Asia Forum, Oct. 21, 2024, https://eastasiaforum.org/2024/10/21/the-appellate-void-in-indonesias-trade-policy/.

[48] "Brazil May Now Retaliate Against Countries Involved in Paralysed WTO Disputes," HKTDC Research, July 4, 2022, https://research.hktdc.com/en/article/MTEwNjIwNzk0OQ; "Brazilian President Signs Decree Allowing Unilateral Retaliation on Trade Disputes," *The Rio Times*, Jan. 27, 2022, https://www.riotimesonline.com/brazil-news/brazil/brazilian-president-signs-decree-allowing-unilateral-retaliation-on-trade-disputes/.

[49] Gao, *supra* note 36, p.544; Wolfgang Weiß and Cornelia Furculita, "The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014," *Journal of International Economic Law*, Vol. 23(4): 872–879 (2020).

[50] Collins, *supra* note 45, pp. 11–12.

[51] Gabrielle Marceau & Mikella Hurley, "Transparency and Public Participation: A Report Card on WTO Transparency Mechanisms," *Trade, Law and Development*, Vol. IV(1): 21 (2012).

the principles of the traditional free trade regime, such as non-discrimination and rules-based dispute settlement.[52] This suggests that the Appellate Body is unlikely to be revived in the foreseeable future – perhaps a decade or more.

We cannot tolerate the absence of the rule of law for that long. In the meantime, the MPIA is indispensable and, as David Collins puts it, "here to stay" in the WTO regime.[53] However, once the US has returned to the rules-based free trade regime and we have restored robust dispute settlement procedures after reform of the Appellate Body, the MPIA will end its role as an "interim" scheme. The MPIA is the best solution at this time because it is flexible enough to adapt to both the "new normal" we face and the changing circumstances that lie ahead.

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[52] Michael Beeman, *Walking Out: America's New Trade Policy in the Asia-Pacific and Beyond* (Stanford University Press, 2024).
[53] Collins, *supra* note 45, p. 11.