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Can Interim Appeal Arbitration Preserve the WTO Dispute System?

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If legal obligations cannot be enforced, their value is greatly reduced. International law is famous for its emphasis on soft law—that is, legal instruments with little or no legally binding force. In contrast to the typical approach in international law, the obligations of the World Trade Organization (WTO) stand out as being relatively enforceable. WTO dispute settlement is one of the most developed and legalistic adjudication systems that exists in international law, although it has far less power than a domestic court.

The precise scope of the WTO dispute system's authority is a proper subject of debate: Just how enforceable should the rules of the WTO be? There are degrees of enforceability, and it is up to the governments that make up the system to decide how much power to delegate to international organizations and other bodies.

The prior trade dispute system that existed under the General Agreement on Tariffs and Trade (GATT) was less enforceable than its WTO successor: losing governments could block the adoption of GATT panel reports by the GATT membership, which meant they had no legal effect. Blocking adoption grew more frequent toward the end of the GATT era and became a concern. As part of the creation of the WTO, governments changed these rules and adoption became, for all practical purposes, automatic. As a result, reports would always have legal effect. At this time, governments also added an appeals mechanism, called the Appellate Body, to review panel reports to ensure that automatically adopted reports were of sufficiently high quality.

In its early years, the Appellate Body received more praise than criticism, but recently the United States has offered strong objections to some of the rulings and behavior of the Appellate Body. The Trump administration has used these objections as justification for blocking appointments to the Appellate Body, which is down to one member and is no longer operating. There is now a fear that the WTO dispute system, without a functioning Appellate Body, has been brought back to the GATT in terms of the degree of its enforceability.

But other WTO members have not been willing to give up on appellate review. They have pushed for a negotiated solution, with changes to the appellate process that might satisfy the United States, but a resolution does not seem to be imminent. They have also put forward a temporary appeals mechanism, known as the Multiparty Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the Dispute Settlement Understanding, to keep the system functioning until a permanent solution can be found. As of July 31, 2020, the MPIA is in effect for the 23 parties that have signed on, and other WTO members may join at any time.

This paper considers the historical development of the Appellate Body, explains the U.S. objections, and then sets out the details of the MPIA and evaluates its prospects. For the WTO dispute system to function properly, two features are crucial: dispute settlement decisions must have automatic effect, and some form of appellate review must be available. Ideally, the Appellate Body itself would be revived, but if that is not possible, many governments are

hoping that the MPIA can preserve the effectiveness of the WTO dispute system during the continued shutdown of the Appellate Body.

THE CREATION OF THE APPELLATE BODY

The GATT set out few details on how disputes would be adjudicated, but in the early 1950s trade officials created a system where panels of neutral trade officials (i.e., unaffiliated with the parties to the dispute) would serve as adjudicators on an ad hoc basis. The system retained some diplomatic elements, however, including allowing a party that was the subject of a successful complaint to block the adoption of the panel report by the GATT membership, which would prevent the report from having legal effect.

The use of this dispute system fluctuated over time. There were periods in which cases were brought frequently, and there were also periods of disuse. By the late 1980s and early 1990s, in the midst of the Uruguay Round of trade negotiations, the case load had picked up, but there were concerns about the increased blocking of panel reports by losing parties. As part of the Uruguay Round negotiations on dispute procedures, there was a push to shift the requirement for adopting a panel report from a positive consensus (which is what allowed losing countries to block) to a negative consensus, under which the report would be adopted unless all GATT parties opposed adoption. Practically speaking, because the winning party would always support adoption, such an approach would mean that adoption, and legal effect of the report, was automatic.

The possibility of automatic adoption concerned some of the negotiators, as panel reports might not always be of the highest quality. If adoption were to now be automatic, they wanted a check to ensure that egregious mistakes did not become a formal part of GATT law. To address this concern, they created an appellate review mechanism known as the Appellate Body.¹ The Appellate Body was a standing tribunal of seven members, three of whom served on each appeal.

The negotiators did not expect that appellate review would be used very often.² However, for any government that had lost a complaint brought against it, the temptation to appeal to get a delay and possible reversal was quite strong, and appeals became common. The number has varied slightly over the years, but overall more than two-thirds of WTO panel reports have been appealed.³

As cases came to the Appellate Body with increasing frequency, its role and importance grew. It began to establish jurisprudence on a wide range of substantive and procedural

matters. It interpreted core principles such as the nondiscrimination obligation, and it addressed systemic issues such as the idea that WTO dispute procedures were the exclusive recourse for claims of WTO violation. As the scope of its work broadened, it was bound to cause offense to one WTO member or another, and it did so on occasion. But when it began to rule against various U.S. trade remedy practices and other measures, it aggravated the most powerful member, and it did so in a way that led to its own demise, at least for the moment.

THE TRUMP ADMINISTRATION'S DESTRUCTION OF THE APPELLATE BODY

Early on in the life of the Appellate Body, the United States praised some of its decisions that other governments considered to be overreach, such as the decision to allow amicus briefs.⁴ However, the United States also expressed concerns about some of the Appellate Body's jurisprudence, and in the early 2000s it made a number of reform proposals as part of the review of the WTO's Dispute Settlement Understanding (DSU).⁵ Later, the United States began to object to the reappointment of particular Appellate Body members. After putting forward former Office of the U.S. Trade Representative official Jennifer Hillman in 2007 (whose nomination was approved by the WTO membership), the U.S. government decided not to nominate her for a second term in 2011, and veteran U.S. trade lawyer Thomas Graham took her place.⁶ And in 2016, the U.S. government objected to the reappointment of South Korean academic Seung Wha Chang, and another South Korean was appointed to the Appellate Body instead.⁷

Things got more serious when Donald Trump came into office. The Trump administration began objecting to all Appellate Body appointments until its wide range of concerns about the Appellate Body were addressed. It set out these objections during various WTO Dispute Settlement Body meetings (in early 2020 it compiled them all in a single document).⁸ The objections included the following:

- that there were overbroad Appellate Body rulings on the scope of the nondiscrimination obligation;
- that there was lack of deference to investigating authorities in trade remedy cases, including in relation to the practice of zeroing and the proper interpretation of the term "public body";
- that there was an expansive approach to appeals of factual issues, including appeals under DSU Article 11;⁹
- that the Appellate Body was offering advisory opinions

on matters that did not need to be addressed to resolve the dispute at hand;

- that the Appellate Body treated its past rulings as binding precedent, when the United States considered that these rulings should have only persuasive value; and
- that the Appellate Body was taking longer than the mandated 90 days to issue its reports without first receiving permission from the parties to the dispute.

Opinions will vary on the merits of each of these concerns, but regardless, the Trump administration has used these objections as the basis for refusing to go forward with appointments to the Appellate Body, and as a result the Appellate Body is down to one member and no longer functioning. WTO members have attempted to respond to these concerns as part of an effort led by New Zealand ambassador David Walker (the so-called Walker Process), but the principles they have developed have not been able to assuage the Trump administration.¹⁰

That leaves WTO dispute settlement in an uncertain place. If there is a right of appeal, as there is under the DSU, but no Appellate Body to hear the appeal, a party that loses a complaint brought against it can effectively block a panel report by appealing into the void.¹¹ Does that mean the system has, for practical purposes, returned to its form under the GATT? Or, instead, will parties to disputes refrain from appealing and apply the principle of automatic adoption to WTO panel reports?¹² That would be an improvement on the situation under the GATT, although it could lead to incoherence in the jurisprudence if different panels interpret core WTO principles differently. The fundamental question is the following: What exactly will happen to the WTO dispute settlement process without an Appellate Body?

THE MPIA AS A TEMPORARY REPLACEMENT FOR APPELLATE REVIEW

In response to these concerns, the European Union has led an effort to use the general arbitration mechanism in Article 25 of the DSU as the basis for an appeal. Inspired by a 2017 paper from a group of experienced WTO lawyers, the EU initiative has now been joined by 22 other WTO members and is known as the Multiparty Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU.¹³ MPIA appeals are only available to parties to the MPIA, but other WTO members may join the MPIA at any time.¹⁴

The MPIA establishes a standing pool of 10 arbitrators to hear appeals of WTO panel reports. As with the Appellate

Body, three arbitrators hear the appeal in a specific case. There is also a parallel to the collegiality that exists at the Appellate Body, under which the three serving arbitrators may discuss each case with the full standing pool of arbitrators.¹⁵

The pool of arbitrators has now been selected.¹⁶ All 10 MPIA arbitrators have extensive experience working on WTO disputes, with many of them having served as panelists or arbitrators or in the WTO Secretariat divisions that assist panels and the Appellate Body.¹⁷ The experience of these arbitrators with WTO disputes, combined with their awareness of the circumstances of the MPIA's creation, could affect how the MPIA treats the work of the panels they are reviewing. For example, the Appellate Body tended to rewrite the reasoning of panels even where it agreed with the result. Perhaps the MPIA will defer a bit more to panels, offering more limited reasoning when it seems appropriate.

The MPIA's reliance on Article 25 of the DSU, which offers little in the way of guidance, to recreate the appellate review process could lead to other key differences from the Appellate Body. One of the most noteworthy of these is that with the MPIA, its awards will be notified to the WTO's Dispute Settlement Body but not formally adopted by it. (Nevertheless, the awards will be binding on the parties, as the MPIA states: "The parties agree to abide by the arbitration award, which shall be final."¹⁸) The implications of this for the value of MPIA awards as precedent is uncertain. Presumably, without formal adoption by the WTO membership, there will be some lesser degree of precedential value for these awards, but how much is unclear.

The approach to the use of legal and administrative support staff by MPIA arbitrators is also uncertain, with the MPIA text somewhat vague on the issue.¹⁹ In WTO disputes, specific divisions of the Secretariat have assisted panels and the Appellate Body, performing the role that law clerks play in domestic legal systems. The Legal Affairs Division and Rules Division took the lead on assisting panels while the Appellate Body had its own dedicated secretariat, which was disbanded and its staff distributed to other WTO divisions after the Appellate Body stopped functioning. Will the former staff of the Appellate Body Secretariat be partially or fully reconstituted to play the same role with the MPIA? Or will the MPIA hire assistants to work only on specific cases?

The arbitrators are going to need some sort of assistance, and the form that it takes could help shape the culture and role of the MPIA. A permanent group of staffers who frequently work together could play a role that is different from that of a shifting group of ad hoc assistants. Staff from the WTO could provide this assistance, but there have been

early indications that the United States would object to this, so the MPIA parties may have to provide funding for this assistance on their own, independently of the WTO.²⁰

In terms of substantive law, the MPIA has an innovation that will perhaps address the U.S. concern about the consideration of facts in appeals under DSU Article 11. The MPIA provides that “arbitrators may . . . propose . . . an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU,” though it notes that such a proposal “is not legally binding and it will be up to the party concerned to agree with the proposed substantive measures.”²¹ Thus, under this provision, if the MPIA arbitrators choose to do so, they can try to limit the use of Article 11 as a means of addressing factual issues on appeal.

Just as there was uncertainty about the Appellate Body in 1995, there is uncertainty about the MPIA now. In addition to the points noted above, there are other questions: What approach will the MPIA take regarding the interpretation of core WTO principles such as the nondiscrimination obligation and public policy exceptions? How often will the MPIA appeal process be used? What kind of legal culture will develop around it, including the approach of the arbitrators and of the litigants themselves? How much deference will the MPIA show toward politically sensitive domestic laws and regulations? How much deference will the MPIA show toward the findings and reasoning of WTO panels? Will the MPIA avoid novel and controversial issues that are put before it or take them on? Only practical experience will give us clear answers.

The first practical experience may come from several ongoing WTO disputes for which the parties have agreed to procedures for using the MPIA.²² The dispute that may provide the first opportunity for the MPIA to hear an appeal was brought by Australia against Canadian measures that affect the sale of wine. The arbitrators who hear the early cases will have an opportunity to set the tone with high-quality work that satisfies the parties to the MPIA and perhaps gains favor with other WTO members.

THE FUTURE OF APPELLATE REVIEW AND DISPUTE SETTLEMENT IN THE WTO

There have been no indications that the Trump administration’s trade policy team will change its mind about Appellate Body appointments. Thus if Trump wins the presidential election in November, the United States is likely to continue its current course, and the MPIA experiment will begin.

It is still an open question whether the MPIA will work for the countries that are part of it. Only time will tell whether

the decisions the MPIA issues will have the authoritative force that one might hope for, in terms of both resolving the dispute at hand and providing a degree of certainty as to what the WTO’s legal obligations mean.

And many WTO members, including some major trading countries, are not part of the MPIA. What will happen to their ongoing disputes? Japan and South Korea, for example, have not joined. How will they and others approach the issue of adoption or appeal of panel reports in their disputes?

With regard to the United States, part of the U.S. objection to the Appellate Body seems to be based on the view that the Appellate Body saw itself as an institution with the ability to develop and expand its own powers. The U.S. position may be that there is something inherent in creating a permanent body that leads to the growth of such power, and thus institutions themselves are suspect. An appellate review mechanism that is more ad hoc, and less institutional, might therefore be of interest to the United States. If it turns out that, in practice, the MPIA addresses some of the U.S. concerns, is it possible the United States would itself join?²³ At this point in time, the precise functioning of the MPIA is still uncertain. The approach taken by the MPIA arbitrators in early cases on the issues noted above, and the form of support the MPIA receives from WTO staff or other assistants, could shape the U.S. view of it.

If, on the other hand, Joe Biden wins the election, it is possible that the United States would be more amenable to compromise on the Appellate Body.²⁴ In the Walker principles, at least some of the U.S. concerns have been addressed to an extent. Perhaps with a Biden administration, a negotiation can begin again over how to reform the Appellate Body and get appointments moving. Alternatively, a Biden administration might decide to build on the MPIA as the appeals mechanism for WTO panels, depending on how its work has progressed.

Any international legal system must strike a balance in terms of its degree of enforceability. Legal rulings must push toward compliance but also respect domestic sovereignty. GATT dispute settlement had become less effective in terms of enforcement because of members blocking the adoption of panel reports. Under WTO dispute settlement, the system became a bit more enforceable while still maintaining the flexibility of governments to negotiate solutions where compliance was politically sensitive. While many of the specific details can be subject to legitimate disagreement, it is crucial for the WTO to maintain automatic effect of dispute settlement reports and some form of appellate review to preserve the coherence and effectiveness of the system. With a bit of luck, perhaps the MPIA can keep the system functioning in the absence, temporary or otherwise, of the Appellate Body.

NOTES

1. Debra Steger, "The Founding of the Appellate Body," in *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Gabrielle Marceau, ed. (Cambridge: Cambridge University Press, 2015), p. 447; Mireille Cossy, "From Theory to Practice: Drafting and Applying the Dispute Settlement Understanding," in *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Gabrielle Marceau, ed. (Cambridge: Cambridge University Press, 2015), p. 303.
2. Steger, "The Founding of the Appellate Body," p. 447.
3. "Proportion of Circulated Panel Reports That Have Been Appealed," WorldTradeLaw.net.
4. "Minutes of Meeting Held in the Centre William Rappard on 22 November 2000," World Trade Organization General Council, WT/GC/M/60, January 23, 2001, paras. 74–77.
5. Office of the U.S. Trade Representative, "U.S. Proposals in WTO Dispute Settlement Understanding Negotiations."
6. "USTR Blocks Hillman's Bid for Second WTO Appellate Body Term," *Inside U.S. Trade*, April 29, 2011.
7. "Debate Erupts Over U.S. Blocking Korean Appellate Body Re-appointment," *Inside U.S. Trade*, May 12, 2016.
8. Office of the U.S. Trade Representative, *Report on the Appellate Body of the World Trade Organization* (Washington: Office of the U.S. Trade Representative, February 2020).
9. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, April 15, 1994.
10. 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)," JOB/GC/222 (October 15, 2019).
11. Joost Pauwelyn, "WTO Dispute Settlement Post 2019: What to Expect?," *Journal of International Economic Law* 22, no. 3 (September 2019): 297–321.
12. They could do this through a nonappeal pact, either as a general matter or in specific disputes. See, for example, WTO, "Understanding between Indonesia and Chinese Taipei Regarding Procedures under Articles 21 and 22 of the DSU," WT/DS490/13, April 15, 2019 ("The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU."); WTO, "Understanding between Indonesia and Viet Nam Regarding Procedures under Articles 21 and 22 of the DSU," WT/DS496/14, March 27, 2019; and WTO, "Understanding between the Republic of Korea and the United States Regarding Procedures under Articles 21 and 22 of the DSU," WT/DS488/16, February 10, 2020 ("Following circulation of the report of the Article 21.5 panel, either party may request adoption of the Article 21.5 panel report at a meeting of the DSB within 60 days of circulation of the report. Each party to the dispute agrees not to appeal the report of the Article 21.5 panel pursuant to Article 16.4 of the DSU.").
13. Scott Andersen, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy, and Iain Sandford, "Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals," Graduate Institute of Geneva, Centre for Trade and Economic Integration Working Paper no. CTEI-2017-17, 2017; WTO, "Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU," addendum to "Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes," JOB/DSB/1/Add.12/, April 30, 2020; and WTO, "Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU," supplement to "Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes," JOB/DSB/1/Add.12/Supp.1-4, May 19–July 28, 2020.
14. WTO, "Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU," addendum to "Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes," JOB/DSB/1/Add.12, April 30, 2020, para. 12.
15. WTO, "Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU," addendum to "Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes," JOB/DSB/1/Add.12, April 30, 2020, Annex I, para. 8 ("The arbitrators may discuss their decisions relating to the appeal with all of the other members of the pool of arbitrators, without prejudice to the exclusive responsibility and freedom of the arbitrators with respect to such decisions and their quality.")

16. WTO, “Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU,” supplement to “Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes,” JOB/DSB/1/Add.12/Supp.5, August 3, 2020.
17. The selected arbitrators (with WTO dispute experience noted) are as follows: Thomas Cottier, Switzerland (5 General Agreement on Tariffs and Trade [GATT] panel reports, 8 WTO panel reports, 2 Article 22.6 decisions, and an ongoing panel); Mateo Diego-Fernandez Andrade, Mexico (6 WTO panel reports and an ongoing panel); José Alfredo Graça Lima, Brazil (3 WTO panel reports and an ongoing panel); Locknie Hsu, Singapore; Valerie Hughes, Canada (former director of the WTO Appellate Body Secretariat and of the WTO Legal Affairs Division, a WTO panel report, and an ongoing panel); Alejandro Jara, Chile (2 GATT panel reports); Claudia Orozco, Colombia (14 WTO panel reports, an Article 21.3(c) arbitration, an Article 22.6 decision, and an ongoing panel); Joost Pauwelyn, Belgium (former legal officer in the WTO Legal Affairs Division and the Appellate Body Secretariat); Penelope Ridings, New Zealand (3 WTO panel reports); and Guohua Yang, China. This information is taken from data available on WorldTradeLaw.net.
18. WTO, “Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU,” addendum to “Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes,” JOB/DSB/1/Add.12, April 30, 2020, Annex I, para. 15.
19. WTO, “Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU,” addendum to “Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes,” JOB/DSB/1/Add.12, April 30, 2020, para. 7 (“The participating Members envisage that appeal arbitrators will be provided with appropriate administrative and legal support, which will offer the necessary guarantees of quality and independence, given the nature of the responsibilities involved. The participating Members envisage that the support structure will be entirely separate from the WTO Secretariat staff and its divisions supporting the panels and be answerable, regarding the substance of their work, only to appeal arbitrators. The participating Members request the WTO Director General to ensure the availability of a support structure meeting these criteria.”).
20. Dennis C. Shea (U.S. Ambassador to the WTO) to Roberto Azevêdo (WTO Director-General), June 5, 2020 (“If Members desire a separate support staff for their dispute resolutions, those Members (and not the WTO membership as a whole) should finance it. Members should not be allowed to create their own support structure within the WTO that is separate from the WTO Secretariat and expect other Members to pay.”); and D. Ravi Kanth, “US Rejects EU-Led Interim Appeal Arbitration Arrangement,” Third World Network, June 10, 2020.
21. WTO, “Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU,” addendum to “Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes,” JOB/DSB/1/Add.12, April 30, 2020, Annex I, para. 13 and n.6.
22. Simon Lester, “The First MPIA Appeals?,” *International Economic Law and Policy Blog*, June 3, 2020; and Lester, “A Possible Fourth MPIA Case,” *International Economic Law and Policy Blog*, July 15, 2020.
23. It is worth noting that in a recent case between South Korea and the United States, neither of whom has joined the Multiparty Interim Appeal Arbitration Arrangement, the parties stated the following in their agreement on implementation procedures: “If the parties agree to arbitration procedures under Article 25 of the DSU to provide for review of the report of the Article 21.5 panel, they will amend this agreement on procedures accordingly.” Simon Lester, “Agreement Not to Appeal and Possibility of an Article 25 Appeal in a Case Involving the U.S.,” *International Economic Law and Policy Blog*, February 10, 2020.
24. For one suggestion for a set of compromises that might be politically acceptable, see Simon Lester, “WTO Dispute Settlement Misunderstandings: How to Bridge the Gap between the United States and the Rest of the World,” *International Economic Law and Policy Blog*, April 19, 2020.