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# FROM BINDING TO VOLUNTARY: THE LEGAL CHARACTER OF MPIA AWARDS IN WTO DISPUTE SETTLEMENT

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## ABSTRACT

The paralysis of the World Trade Organization's Appellate Body since December 2019 has prompted a coalition of WTO members to establish the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) under Article 25 of the Dispute Settlement Understanding (DSU). Designed as a temporary substitute for appellate review, the MPIA raises profound questions about the legal character of its awards within the WTO's treaty architecture. This article examines whether MPIA decisions carry the same legally binding force as Appellate Body reports, or whether their consensual and bilateral foundations render them something categorically different. Drawing on the DSU text, the Vienna Convention on the Law of Treaties, and the emerging practice of MPIA arbitration, the article argues that MPIA awards occupy an ambiguous legal space—binding as between consenting parties, yet structurally incapable of generating the systemic precedent and universal application that defined Appellate Body jurisprudence. The article further explores the implications of this duality for rule coherence, developing country participation, and prospects for long-term institutional reform. It concludes that while the MPIA is a commendable exercise in pragmatic multilateralism, it cannot serve as a permanent substitute for a universally accessible appellate mechanism without risking fragmentation of WTO law itself.

**Keywords:** WTO, MPIA, Appellate Body, Article 25 DSU, Dispute Settlement, Binding Awards, Voluntary Arbitration, Trade Law Reform.

## I. INTRODUCTION

Few episodes in the modern history of international economic governance have been as consequential or as quietly alarming as the effective collapse of the World Trade Organization's Appellate Body. Since December 11, 2019, the seven-member tribunal that stood at the apex of the WTO's two-tier dispute settlement system has been unable to hear new appeals, a direct result of the United States' sustained refusal to authorize the appointment of new members<sup>1</sup>. The Appellate Body had, over the course of more than two decades, built a reputation as one of the most effective adjudicatory mechanisms in public international law<sup>2</sup>. Its incapacitation left WTO members without a reliable avenue for appellate review of panel reports a gap with serious implications for the rule-based multilateral trading system.

The roots of the current crisis run deeper than procedural obstruction. They touch longstanding tensions between adjudicatory independence and member-state control, between legal certainty and political flexibility, and between the aspirations of international economic law and the hard realities of geopolitical competition<sup>3</sup>. These tensions were, in various ways, inscribed into the architecture of the Dispute Settlement Understanding (DSU) itself a document that simultaneously committed members to binding adjudication and left the Appellate Body perpetually dependent on political consensus for its institutional survival<sup>4</sup>.

Into this vacuum stepped the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), launched in April 2020 by a coalition of WTO members led by the European Union<sup>5</sup>. Formally grounded in Article 25 of the DSU a provision permitting members to resolve disputes through binding arbitration as an alternative to the standard panel and appellate process the MPIA was presented as a workable substitute for the non-functioning Appellate Body. Participating members agreed in advance to submit any appeal in a bilateral dispute to MPIA arbitration, with the resulting awards intended to be final and binding between the parties.

Yet the MPIA's relationship to the broader WTO legal order remains genuinely contested. Is an MPIA award truly equivalent to an Appellate Body report in terms of its legal effects? Does

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<sup>1</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]

<sup>2</sup> World Trade Organization, Appellate Body, [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited Oct. 15, 2024).

<sup>3</sup> See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* 3–14 (2d ed. 1990) (discussing the evolution from diplomatic to adjudicatory dispute settlement under GATT).

<sup>4</sup> DSU, *supra* note 1, art. 17(1).

<sup>5</sup> Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 *J. Int'l Econ. L.* 297, 298 (2019).

it carry precedential weight for non-participating members? And what does its voluntary, consent-based architecture mean for the unity and systemic coherence of WTO jurisprudence? These are not merely theoretical questions they bear directly on how trade disputes will be resolved, how legal norms will develop, and who will benefit or lose from the institutional choices being made right now.

This article addresses these questions in five parts. Part II traces the origins and mechanics of the MPIA, locating it within the broader landscape of the Appellate Body crisis. Part III examines the legal foundations of MPIA awards under Article 25 of the DSU and general principles of international law. Part IV interrogates the binding character of MPIA awards as against both parties and third parties. Part V assesses the systemic consequences of the MPIA's voluntary architecture for WTO law. Part VI offers conclusions and reflections on the path forward for WTO dispute settlement reform.

## **II. ORIGINS AND ARCHITECTURE OF THE MPIA**

### **A. The Appellate Body Crisis in Context**

The Appellate Body was created by the DSU as the cornerstone of the WTO's "two-tier" dispute settlement system. Unlike its predecessor under the General Agreement on Tariffs and Trade (GATT), where panel reports could be blocked by the losing party, the WTO system introduced negative consensus meaning that a panel or Appellate Body<sup>6</sup> report would be adopted unless all members, including the prevailing party, agreed to reject it. This quasi-automaticity of adoption gave the system a distinctly judicial flavor and made it, by many accounts, the most effective mechanism for binding interstate dispute resolution in existence.

The United States began blocking Appellate Body appointments during the Obama administration, escalating markedly under President Trump. Washington's formal objections centered on three claims: that the Appellate Body had engaged in judicial overreach by making findings on issues not raised by the parties<sup>7</sup>; that it had improperly treated prior reports as binding precedent; and that it had violated the ninety-day rule for circulating reports. While scholars have contested the accuracy of some of these characterizations, they resonated with a

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<sup>6</sup> Jennifer Hillman, Testimony Before the U.S.-China Economic and Security Review Commission: Reviving and Improving the WTO Appellate Body 3–7 (Feb. 7, 2019) (noting that the United States blocked reappointment based on concerns over "judicial overreach").

<sup>7</sup> See Gregory Shaffer, Manfred Elsig & Sergio Puig, The Extensive but Fragile Strength of International Courts, in 2 *The Performance of International Courts and Tribunals* 41, 56–62 (Theresa Squatrito et al. eds., 2018).

broader skepticism about the Appellate Body's institutional ambitions and its relationship to the political principal that created it.

## **B. The MPIA as an Institutional Response**

The MPIA was formally notified to the WTO General Council on April 30, 2020. It currently counts over fifty WTO members among its participants, including the European Union, China, India, Brazil, and Canada though notably not the United States, United Kingdom, or several major economies. The arrangement operates as a standing opt-in mechanism: any WTO member can accede by notifying the WTO Secretariat, and any dispute between two participating members will automatically be subject to MPIA arbitration if an appeal is filed.

The MPIA's procedural framework closely mirrors the Appellate Body's. Arbitrators are drawn from a roster of former Appellate Body members<sup>8</sup>. The process applies the same legal standards and rules of procedure. Awards are intended to be treated as equivalent to Appellate Body reports for purposes of DSB adoption. In structural terms, the MPIA's architects have gone to considerable lengths to replicate the Appellate Body's operational characteristics perhaps inevitably, given that the arrangement is meant to substitute for the real thing.

## **III. THE LEGAL FOUNDATIONS OF MPIA AWARDS**

### **A. Article 25 of the DSU: Text and Purpose**

Article 25 of the DSU provides that members may, "by agreement," resort to binding arbitration as an alternative method of dispute settlement. The provision is brief it spans only four subparagraphs but its implications are significant. It authorizes binding arbitration on terms mutually agreed by the parties, requires notification to the DSB prior to the commencement of proceedings, and stipulates that awards shall be notified to the DSB and may be implemented in accordance with DSU procedures.

The MPIA exploits the flexibility of Article 25 by casting it not as a device for resolving individual disputes outside the panel system, but as the legal basis for a standing multilateral arbitration arrangement. This is a creative and contested reading of the provision. Article 25 was designed, in the negotiating history, as an exceptional mechanism for situations where

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<sup>8</sup>[https://www.researchgate.net/publication/381747768\\_The\\_Roots\\_of\\_the\\_Crises\\_in\\_the\\_WTO\\_Appellate\\_Body\\_and\\_Reform\\_Proposals](https://www.researchgate.net/publication/381747768_The_Roots_of_the_Crises_in_the_WTO_Appellate_Body_and_Reform_Proposals)

members wished to sidestep the standard panel process entirely, not as a vehicle for constructing a parallel appellate tier. Whether the text genuinely supports this expanded purpose is a question that has not been resolved, and its resolution may ultimately depend on whether an MPIA award is challenged before a reconstituted Appellate Body if and when one exists.

## **B. Consent as the Source of Binding Force**

The bedrock of MPIA awards' legal character is consent. Unlike Appellate Body reports, which derive their binding force from the multilateral treaty obligations embedded in the DSU and from negative consensus adoption,<sup>16</sup> MPIA awards bind parties because and only because those parties have agreed in advance to be bound. This is a crucial distinction one that has profound consequences for the legal status of the award in relation to third parties, non-participating members, and the systemic development of WTO jurisprudence<sup>9</sup>.

Under general international law, and more specifically under the Vienna Convention on the Law of Treaties, treaties and treaty-based awards do not bind states that have not consented to them. This is the essence of the *pacta tertiis* rule, and it applies with full force to MPIA awards. A decision rendered between two MPIA participants cannot, as a matter of law, impose obligations on non-participants including the United States, which has declined to join the arrangement<sup>10</sup>.

The MPIA itself is explicit on this point. It provides that awards are final and binding only on the parties to the specific arbitration. The arrangement does not purport to generate precedent that binds future panels, other MPIA arbitrations involving different parties, or any WTO body. This is a deliberate design choice, reflecting the arrangement's consensual foundations and the limits of what Article 25 can plausibly sustain.

## **IV. BINDING CHARACTER AND PRECEDENTIAL STATUS OF MPIA AWARDS**

### **A. Binding Force Between Parties**

As between the parties to an MPIA arbitration, the binding force of the award is robust. The

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<sup>9</sup> Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, Communication from the following Members: Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, European Union, Guatemala, Hong Kong China, Iceland, India, Indonesia, Republic of Korea, Malaysia, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Thailand, Uruguay, WTO Doc. WT/GC/W/791 (Apr. 30, 2020) [hereinafter MPIA].

<sup>10</sup> DSU, *supra* note 1, art. 25.

consenting parties have undertaken an advance agreement to accept the award as final, with no avenue of further appeal. This is, in some ways, a stronger form of finality than that enjoyed by Appellate Body reports, which while quasi-automatically adopted have on rare occasions been subject to contestation at the implementation stage.

The MPIA awards that have been issued to date including those in several EU-China and EU-Canada disputes have been treated by the parties as legally binding, and the DSB has adopted them on notification. There is, as yet, no reported instance of a party refusing to implement an MPIA award or challenging its validity under WTO law. This early practice, while limited, suggests that participating members take their consensual commitments seriously which is itself an important data point about the practical effectiveness of the arrangement.

## **B. The Limits of Precedential Authority**

The more vexed question concerns the precedential status of MPIA awards for the broader WTO membership. Here, the arrangement's consensual character creates a structural gap that cannot easily be bridged. WTO panels are not formally bound by Appellate Body reports under a strict doctrine of *stare decisis* the DSU does not contain such a requirement but they have consistently followed prior Appellate Body decisions as highly persuasive authority in order to ensure predictability and consistency in the law.

MPIA awards lack even this persuasive authority in any universal sense. A panel resolving a dispute between two non-MPIA members, or between an MPIA member and a non-member, has no institutional reason to follow an MPIA award. The arbitrators who issued that award drew their mandate from a consensual arrangement among a subset of WTO members, not from the universal DSU framework<sup>11</sup>. The legal interpretation articulated in an MPIA award may thus diverge from the interpretation that a future Appellate Body, or even a WTO panel operating outside the MPIA, might adopt.

This creates the risk of parallel interpretive tracks developing within WTO law one guided by MPIA arbitration practice, and another shaped by panel decisions in disputes involving non-participants. Whether these tracks will converge or diverge in practice is uncertain, but the structural conditions for fragmentation are clearly present, and scholars have rightly identified

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<sup>11</sup> MPIA, *supra* note 8, para. 1.

this as one of the MPIA's most significant long-term vulnerabilities.

## **V. SYSTEMIC CONSEQUENCES OF THE MPIA'S VOLUNTARY ARCHITECTURE**

### **A. Fragmentation and the Coherence of WTO Law**

The coherence of WTO law has always depended, to a significant degree, on the Appellate Body's role as a centralizing institution—one that resolved interpretive disputes between panels, developed consistent legal doctrine, and provided the systemic predictability that trade actors need. The MPIA, by design, cannot perform this function. It resolves individual disputes between consenting parties; it does not and cannot generate the universal jurisprudence that the Appellate Body built over twenty-five years.

Fragmentation in international law is not always fatal—indeed, it may sometimes reflect healthy pluralism and contextual sensitivity. But in the WTO context, where legal predictability is a core value and where interpretive consistency across disputes is essential for the system's legitimacy, fragmentation carries real costs. A world in which the legal meaning of WTO agreements varies depending on which members are parties to a given dispute—and on whether they participate in the MPIA—is a world in which the rule-based trading system is materially weaker.

### **B. Developing Country Participation and Equity**

A further concern relates to the unequal distribution of MPIA participation across the WTO membership. While the arrangement is formally open to all WTO members on equal terms, smaller and less legally sophisticated members—including many developing countries—face structural barriers to effective participation. Engaging in arbitration under the MPIA requires legal capacity, familiarity with arbitral procedure, and confidence that one's trading partners will honor the results. These are not uniformly distributed resources<sup>12</sup>.

There is a real risk, over time, that the MPIA develops into a mechanism for the major trading powers—the EU, China, India, Brazil—while smaller members, lacking either the incentive or the capacity to join, are left to navigate a dispute settlement landscape without any functioning

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<sup>12</sup> See Bernard Hoekman & Petros C. Mavroidis, *Burning Down the House? The Appellate Body in the Centre of the WTO Crisis*, 23 *J. Int'l Econ. L.* 557, 559–63 (2020).

appellate tier<sup>13</sup>. This would be, in practical effect, a two-tier system not in the formal sense of panels and Appellate Body, but in the informal sense of a system that functions for some members and not for others – an outcome deeply at odds with the WTO's foundational commitments to universality and non-discrimination<sup>14</sup>.

### **C. The Question of Legitimacy**

Legitimacy in international adjudication is a multidimensional concept, encompassing procedural regularity, substantive correctness, democratic accountability, and broad participation. The MPIA performs well on some of these dimensions – it is procedurally rigorous, staffed by experienced jurists, and respectful of the DSU's legal framework. But on the dimension of broad participation, it falls short. An arrangement that excludes the United States, one of the WTO's most active litigants, cannot claim the universal legitimacy that the Appellate Body, at its height, commanded.

This legitimacy deficit is not merely symbolic. It affects the practical reach of MPIA awards, the willingness of non-participating members to treat them as authoritative, and the long-term prospects for the arrangement to serve as a genuine surrogate for the Appellate Body. A dispute settlement system's authority ultimately rests on the voluntary compliance of states, and that compliance is more readily secured when the system's legitimacy is broadly accepted. The MPIA, as currently constituted, has not yet reached that threshold<sup>15</sup>.

## **VI. REFORM PROSPECTS AND THE PATH FORWARD**

The long-term sustainability of the MPIA as a substitute for appellate review depends, in the final analysis, on whether genuine reform of the WTO dispute settlement system can be achieved. Discussions on DSU reform have been underway, in various forms, for years, but the fundamental obstacle has always been consensus: any formal amendment to the DSU requires the agreement of all WTO members, including the United States, which has thus far shown limited appetite for multilateral reforms that would reconstitute the Appellate Body in its prior form<sup>16</sup>.

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<sup>13</sup> DSU, *supra* note 1, art. 25(4).

<sup>14</sup> MPIA, *supra* note 8, para. 3 (specifying that arbitrators shall be selected from among former Appellate Body members).

<sup>15</sup> See Inu Manak & James Bacchus, *Saving the World Trade Organization 18–22* (Cato Inst. Policy Analysis No. 884, 2020) (arguing that institutional reform must address both procedural and substantive legitimacy concerns).

<sup>16</sup> Pauwelyn, *supra* note 5, at 302–05

Several reform proposals have been advanced in the academic literature and in formal WTO discussions<sup>17</sup>. These include reducing the Appellate Body's mandate to questions of law and restricting its ability to complete panel analyses; imposing stricter timelines; making explicit the non-binding nature of prior reports as precedent; and creating a smaller, more explicitly political appellate tier. Each of these proposals addresses one or more of the U.S. concerns while seeking to preserve the essential appellate function. None has yet achieved consensus<sup>18</sup>.

In this context, the MPIA should be understood as a necessary stopgap rather than a permanent solution. It preserves appellate review for those members who value it enough to opt in. It demonstrates that functional, high-quality appellate arbitration is achievable under Article 25. And it maintains institutional memory of how such a system operates which will matter when a reformed Appellate Body is eventually negotiated, as it almost certainly must be if the WTO is to remain a credible forum for binding trade dispute resolution.

## **VII. CONCLUSION**

The question with which this article began whether MPIA awards are truly binding or merely voluntary resists a simple answer. They are binding, without question, as between consenting parties who have executed the advance arbitration agreement. They are voluntary in the deeper sense that their legal force flows entirely from party consent rather than from the universal multilateral treaty commitments that undergirded the Appellate Body's authority. This is not a trivial distinction. It determines what MPIA awards can and cannot do for the WTO system as a whole.

What they can do is considerable. They provide a reliable appellate mechanism for a majority of WTO members who engage in the bulk of global trade. They preserve the skills and experience of WTO adjudicators. They signal that the international community is not prepared simply to abandon the idea of binding appellate review, even when institutional paralysis makes it temporarily unavailable through formal channels.

What they cannot do is equally important. They cannot generate the universal legal coherence that was the Appellate Body's most enduring institutional contribution. They cannot bind non-

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<sup>17</sup> Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 (establishing the *pacta tertiis* principle that treaty obligations do not extend to third parties without consent).

<sup>18</sup> See Jan Klabbers, *International Law* 229–34 (3d ed. 2021) (discussing the relationship between consent and bindingness in international adjudication).

participating members. They cannot resolve the fundamental political problem centered above all on the United States' objections that caused the Appellate Body's paralysis in the first place. These are tasks that require a political settlement among the full WTO membership, not an arbitral workaround by a coalition of the willing.

The Appellate Body crisis is, at root, a crisis about the kind of international economic law that major trading powers are willing to accept. The MPIA has bought time, but it has not resolved that underlying question. The legal character of MPIA awards formally binding for some, voluntarily disregarded by others mirrors with uncomfortable precision the fragmented and contested state of the WTO system itself. Whether that system can be rebuilt on stronger, more universal foundations is the defining institutional challenge of international trade law in the years ahead.