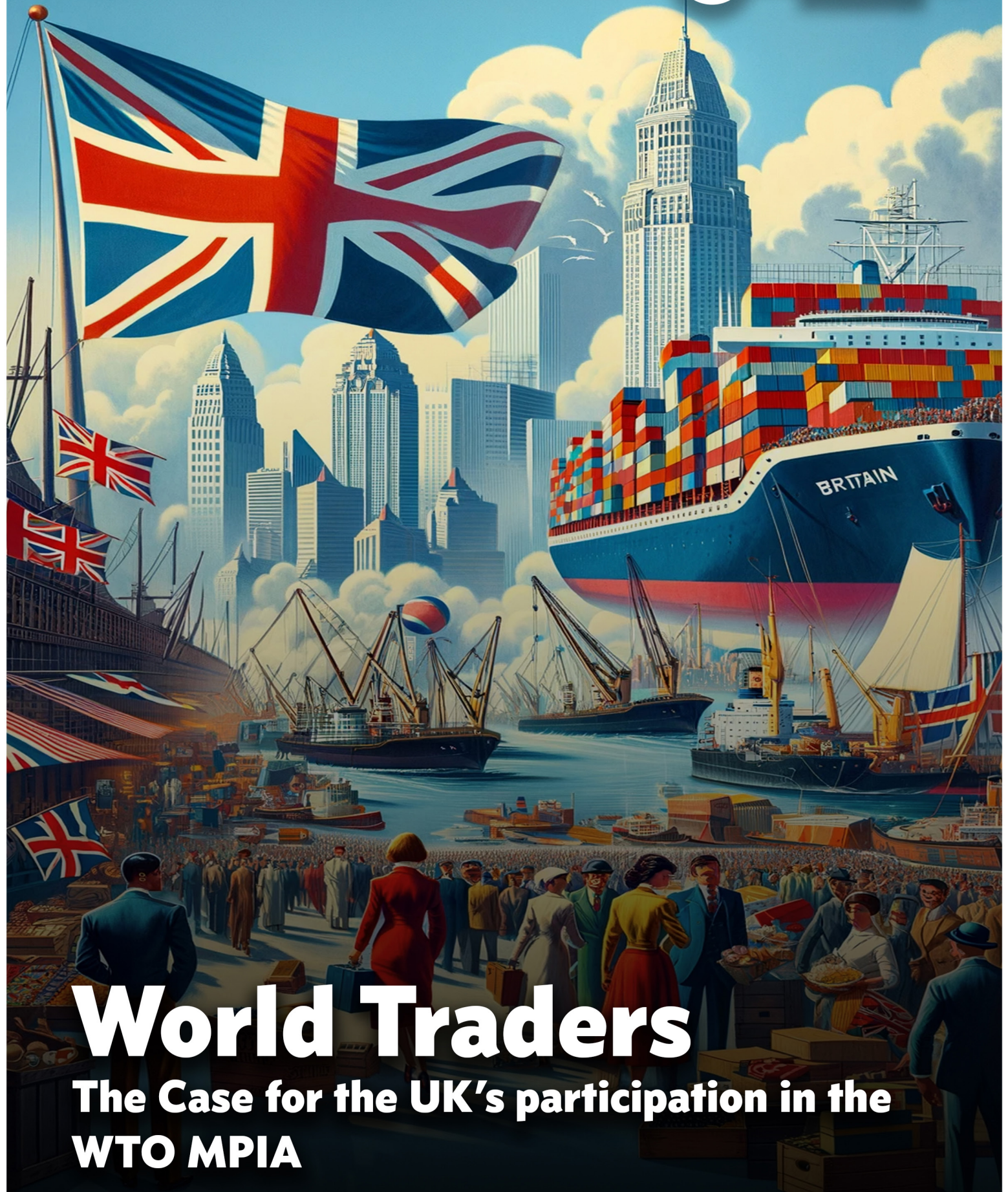




ADAM SMITH  
INSTITUTE



# World Traders

The Case for the UK's participation in the  
WTO MPIA

Professor David Collins



## ABOUT THE AUTHOR

**Professor David Collins** is a recognised authority on World Trade Organization law and international investment law, leads the Digital Trade Research Group at City Law School and is co-editor of the forthcoming Routledge Handbook on International Economic Law. He boasts a multifaceted legal career, having served as a prosecutor for the Attorney General of Ontario, and practices as a Solicitor in England & Wales, as well as being a member of both the Ontario and New York bar associations. As Co-Editor in Chief of “International Trade Law and Regulation” and Series Editor for Routledge’s “Insights on International Economic Law,” Collins has solidified his academic presence, supplemented by visiting academic positions at institutions like Columbia, Berkeley, and the Max Planck Institute. A recipient of grants from the British Academy and other scholarly councils, David contributes to the policymaking process through his roles in the Academic Advisory Councils of Politeia and the Institute of Economic Affairs, and as a Senior Fellow of the Macdonald Laurier Institute. Engaged in both academic administration and policy advisory, he has been nominated to international trade dispute panels, provided expert testimony to the UK’s International Trade Select Committee, and has been integral to the UK’s trade remedies authority.

**Cover Image** - Maxwell Marlow

The Adam Smith Institute has an open access policy. Copyright remains with the copyright holder, but users may download, save and distribute this work in any format provided: (1) that the Adam Smith Institute is cited; (2) that the web address [adamsmith.org](http://adamsmith.org) is published together with a prominent copy of this notice; (3) the text is used in full without amendment (extracts may be used for criticism or review); (4) the work is not re-sold; (5) the link for any online use is sent to [info@adamsmith.org](mailto:info@adamsmith.org).

# EXECUTIVE SUMMARY

- This paper advocates that the United Kingdom (UK) join the Multi-Party Interim Appeal (MPIA) arbitration mechanism, designed to create a route of appeal from decisions of lower panels arising from disputes under World Trade Organization (WTO) rules.
- The MPIA was created in 2020 in response to the dissolution of the WTO's Appellate Body (AB), itself the result of blockage by the United States (US) of the appointment of new appeal judges, allegedly due to a pattern of judicial activism (creating laws rather than merely interpreting them). The MPIA is an agreement among 53 WTO members comprising the world's largest trading nations (other than the US and the UK).
- Under this new system, parties may appeal a decision of a WTO panel based on an error of law to a tribunal chosen from a roster of 10 expert arbitrators. This results in a legally binding decision, authorising retaliation in the event of non-compliance as in the case of the original AB. The article argues that the MPIA system, which has already issued its first brief but reasoned judgement, offers a feasible solution to the AB crisis, helping establish predictable and legally coherent outcomes which should act as a basis for a more secure global trading environment.
- As the UK moves forward with an independent international trade policy during an era fraught with protectionism, reliance on rule of law as provided by an established, globally-recognised adjudicatory procedure has become more imperative than ever. The UK should therefore follow other leading trading nations and join the MPIA as soon as practicable.

# INTRODUCTION

The importance of rule of law to the functioning of markets throughout history is well-recognised. The enforcement of property rights and contractual obligations provides essential security to the efficient exchange of goods and services. Independent, unbiased courts delivering reasoned judgments based on established precedent have enhanced the predictability of commercial activities, making the common law of England and Wales (and a good portion of the Anglosphere) the envy of the world.

While international law does not have quite the same level of enforceability (due to the equally important principle of national sovereignty), rule of law has also played a pivotal role in the functioning of global markets. Since the latter part of the 20th Century, the World Trade Organization (WTO), in particular its sophisticated system for the settlement of disputes between states (codified in the Dispute Settlement Understanding, DSU), has been a central pillar of wealth-maximising free trade among its member nations. Without the discipline imposed by the WTO's judicial arm, the benefits of tariff reduction and the elimination of other non-tariff barriers to its 164 member nations would never have been fully realised. In spite of themselves and against their own self-interest, many nations would fail to pursue the specialisation conceived of in David Ricardo's theory of comparative advantage were it not for multilateral sanctions authorised by the WTO's state-to-state dispute settlement system.<sup>1</sup> This paper will argue that the United Kingdom (UK) should join the WTO Multi-Party Interim Appeal arbitration mechanism (MPIA), the alternative to the WTO's Appellate Body (AB) set up by the world's leading economies in 2020, including Hong Kong, Japan, Norway, Singapore, and Switzerland.

The remainder of this section will outline the function and importance of the WTO AB. This will be followed by a brief explanation of the reasons for the AB's collapse as a consequence of the non-appointment of new judges by the United States (US). Section III will provide an overview of the MPIA, touching on some of the ongoing controversies while highlighting the unlikelihood of a superior alternative. Section IV suggests that the UK join the MPIA because of the legal certainty that it provides for the UK as an independent trading nation committed to rule of law in a time of global economic turmoil. Section V concludes.

Before proceeding to a discussion of the AB's demise it is necessary to illustrate the vital function that it served in the world trading system. A dispute can arise in the event a WTO member country is accused of breaching a commitment under one of the roughly 60 WTO 'covered' agreements, including the original General Agreement on Tariffs and Trade (GATT) from the 1940s. These are treaties which are binding under international law. The procedure to resolve disputes are administered by the WTO's Dispute Settlement Body (DSB) in accordance with procedural rules as set out under the DSU. The first stage under this procedure is the consultation phase between the disputed parties.<sup>2</sup> In the event consultation fails to resolve the matter, the complaining party can make a request in writing to the DSB for the establishment of a panel to examine the case, essentially a euphemism for suing.<sup>3</sup> This panel, composed of trade experts selected by the WTO secretariat from a list of approved individuals, issues a report, essentially a legal judgement, which will be adopted by DSB if the relevant parties do not notify its intention to appeal (so-called 'reverse consensus').<sup>4</sup> The

---

<sup>1</sup> *Principles of Political Economy and Taxation*, 1821

<sup>2</sup> DSU, art 4.

<sup>3</sup> DSU, art 6.

<sup>4</sup> DSU, art 16.

parties can submit an appeal request if they are not satisfied with the panel's report in order for the case to be heard by the AB.<sup>5</sup>

The AB is the higher 'court' in the two-tiered system. It is composed of seven standing members (judges) who are experts in WTO law and intended to be broadly representative of the world's chief legal systems. It has the authority to uphold, modify, and reverse the panel's judgement.<sup>6</sup> However, as an appeal tribunal, the AB's authority is limited only to legal interpretations made by the panel – not questions of fact, which are to be decided only by the lower panel.<sup>7</sup> Importantly, under Article 3(2) of the DSU, the AB is not allowed to deviate from the WTO treaties, nor to make rulings which add or diminish rights and obligations of the WTO members. Members of the AB are appointed for four years and can only be re-appointed once.<sup>8</sup> Of the seven members, a minimum of three members work on one case in rotation (called a 'division').<sup>9</sup> This means that the AB is not able to operate if there are less than three members.

Charged with clarifying and interpreting WTO law rather than creating it, the AB brought much-needed certainty and predictability to the world trading system, gradually enabling the development of a body of influential and illuminating (if informal) precedent. Once described as the 'jewel in the crown' of the WTO,<sup>10</sup> the two-tiered system of dispute settlement under the WTO produced more case law than the United Nations International Court of Justice, the International Tribunal for the Law of the Sea and the International Criminal Court combined, enjoying higher levels of compliance by its member states in the process.<sup>11</sup> It was truly a marvel of international law. The importance of the AB to the overall integrity of the WTO's dispute settlement process was further evinced by the frequency of appeals from panel decisions – well over half of all panel rulings were appealed.<sup>12</sup>

## THE DEMISE OF THE APPELLATE BODY

Just as the Americans are owed much gratitude for creating the WTO and with it the system of world trade that brought hundreds of millions of people out of poverty, raising living standards worldwide, so too must the United States Government take the blame for the system's current demise. Starting with Obama, successive US presidents vetoed appointments of new judges to the AB and, as the old judges' terms ended, the AB has been eviscerated. As of end 2019, the AB was no longer able to hear appeals. Contrary to what many believe, this was not due to an ideological aversion to global institutions, but a resentment of the way legal decision-making had been taking place at the AB.

While this is not the place to fully evaluate these criticisms here, the US accused the AB of over-

---

<sup>5</sup> DSU, art 17(4).

<sup>6</sup> DSU, art 17(13).

<sup>7</sup> DSU, art 17(6).

<sup>8</sup> DSU, art 17.

<sup>9</sup> *Ibid.*

<sup>10</sup> An expression probably first used by then WTO Director-General Renato Ruggiero in 1996

<sup>11</sup> 615 requests for consultations (i.e. claims) were submitted to the DSB since it went into effect on 1 January 1995 and 31 December 2022: 'Dispute Settlement Activity: Some Figures' WTO: [https://www.wto.org/english/tratop\\_e/dispu\\_e/disputats\\_e.htm#:~:text=As%20of%2031%20December%202022,formal%20rulings%20to%20resolve%20them](https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm#:~:text=As%20of%2031%20December%202022,formal%20rulings%20to%20resolve%20them). The level of compliance is reported at approximately 90%: 'MC11 In Brief: Dispute Settlement' WTO: [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/briefing\\_notes\\_e/bfdispu\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm)

<sup>12</sup> 65% of all cases that went to panels have been appealed to the AB: 'Dispute Settlement Activity: Some Figures' WTO <[https://www.wto.org/english/tratop\\_e/dispu\\_e/disputats\\_e.htm#:~:text=As%20of%2031%20December%202022,formal%20rulings%20to%20resolve%20them](https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm#:~:text=As%20of%2031%20December%202022,formal%20rulings%20to%20resolve%20them)>

reaching its authority in interpreting WTO agreements as well as imposing obligations on the member states which were not agreed under WTO rules.<sup>13</sup> The US asserted that, contrary to the AB's mandate under the DSU, the court 'added to or diminished rights or obligations' of the members under the covered agreements.<sup>14</sup> For example, the Continued Dumping and Subsidy Offset Act of 2000,<sup>15</sup> the US accused the AB of creating a new category of banned subsidies which was outside the scope of the Agreement on Subsidies and Countervailing Measures.<sup>16</sup> The US insisted that the AB strictly follow WTO rules as written instead of applying 'non-text-based interpretation,' which in the US's opinion could undermine the members rights to enact key measures such as safeguards.<sup>17</sup> The US was also unhappy that the AB has stated that absent 'cogent reasons,' the AB considers its reports (judgments) as precedents and, therefore, the same legal issue should be resolved in the same manner.<sup>18</sup> The US claimed that previous rulings adopted by the AB were therefore erroneously regarded by the AB as binding jurisprudence.<sup>19</sup> Rather than carrying precedential weight, as in the UK common law, the US wanted previous AB rulings to be merely persuasive in establishing interpretations. This would ensure that the rule-making power of the WTO rests with its members rather than its judiciary.<sup>20</sup> The US also objected to non-compliance of the AB with the 90-day time limit for appeal (many have taken much longer than this, with the average over 140 days), as well as its issuance of 'advisory opinions,' essentially making legal statements which were not necessary for the resolution of the dispute at hand.<sup>21</sup>

For these reasons, the US has blocked new appointments of AB members since 2016.<sup>22</sup> As noted above, a minimum of three judges are required to hear an appeal and therefore as of late 2019, there are no judges left. The AB, as we knew it, is gone and with it much of the security and predictability that underpinned world trade. Appeals from panel rulings are now made 'into the void' – meaning that they are stuck in limbo as to their legal significance, engendering uncertainty for governments, producers and consumers alike. Since the right of appeal is enshrined in the DSU, the absence of the AB may mean that the lower panel reports are unable to be adopted.<sup>23</sup> It had been hoped that once the AB ceased to function WTO members would exercise restraint and avoid appealing decisions of the panels, essentially foregoing their right to appeal,<sup>24</sup> but this was not the case. Since the AB ceased to function, 20 cases have gone to appeal, including 8 notified by the US itself.

There may be some merit in US criticisms of the AB. Perhaps the AB did engage in judicial activism by over-reaching in some of its interpretations of WTO law, going beyond what was required and

**13** William J Davey, 'WTO Dispute Settlement: Crown Jewel or Costume Jewellery?' (2022) 21 World Trade Review 291, 292.

**14** USTR 2018 Report.

**15** WTO, United States — Continued Dumping and Subsidy Offset Act of 2000 – Report of the Appellate Body (16 January 2003) WT/DS217/AB/R and WT/DS234/AB/R.

**16** USTR 2018 Report, 22.

**17** USTR 2018 Report, 24. Safeguards are emergency trade restrictions designed to deal with a sudden unexpected influx of goods that can be damaging to the importing country's economy.

**18** Office of the United States Trade Representative, '2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program' (March 2018) <<https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>> (USTR 2018 Report)

**19** James Bacchus and Simon Lester, 'The Rule of Precedent and the Role of the Appellate Body' 54:2 Journal of World Trade (2020) 183 at 185

**20** *ibid* at 193

**21** *ibid*.

**22** Jean Galbraith, 'United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process' (2019) 113 American Journal of International Law 822 at 822

**23** Furculita Cornelia, *The WTO and the New Generation EU FTA Dispute Settlement Mechanisms: Interacting in a Fragmented and Changing International Trade Law Regime* (Springer, 2021) at 122

**24** See comments from Jennifer Hillman, 'Restoring WTO Dispute Settlement: Lessons Learned' WTO Public Forum, 2022 (video) available at: <https://youtu.be/DpdTA2FYgOO>

arguably creating new law in the process – something the AB was never supposed to do. On the other hand, the inherent vagueness of certain aspects of WTO law, such as the understanding of a ‘public body’ when considering the legality of subsidies, meant that some ‘gap-filling’ was inevitable and in some respects desirable. By loose analogy, if legal principles are unclear then the English common law has typically enabled judges to exercise discretion, as long as it is reasonable.

Sadly, this debate has largely become moot. It appears that efforts to reform the WTO AB taking into account US objections, have been abandoned, at least for the time being. We no longer hear much about how to fix the AB as we did even just a year or two ago.<sup>25</sup> Some thought that President Biden would save it, but he seems as disinterested as his predecessor. For Americans of all political stripes, it seems the era of multilateral courts is already over. Without support from the US, the AB has no future because consensus across the WTO membership is needed for the appointment of new AB members.

## THE MULTI-PARTY INTERIM APPEAL ARBITRATION MECHANISM

In 2020 a group of 16 like-minded WTO member countries led by the European Union (EU) established the Multi-Party Interim Appeal arbitration mechanism (MPIA). Crafted around Article 25, the seldom-used arbitration provision of the DSU, the MPIA enables appeals from lower WTO panel decisions to a tribunal of three expert judges (selected at random from a roster of 10), much like an ordinary appeal to the old AB. The founders of MPIA emphasised the importance of preserving the two levels of adjudication and binding character in WTO dispute settlement system,<sup>26</sup> which has been impaired due to the AB crisis. Crucially, the MPIA is not applicable to all members of WTO - only to participating members.<sup>27</sup> It is thus an example of plurilateralism – the advancement of new issues at the WTO through a smaller subset of its membership rather than the classic multilateral (every member) approach.

Article 15 of the Agreed Procedures for MPIA (Annex I to the MPIA Statement) states that arbitral awards shall ‘only be notified’ to the WTO DSB, but not formally accepted. Moreover, Article 25(3) of the Agreed Procedures explains that parties are bound by the terms of the award, which shall be final. In other words, their binding character does not hinge upon the DSB approval, but rather on the consensual agreement amongst the parties. While Art 3(2) of the DSU mentions the objective of ‘security and predictability’ that dispute settlement will bring to the world trading system, paragraph 5 of the MPIA Agreement speaks instead of ‘coherence and predictability’ [*italics added*]. This change in wording is telling. The emphasis on ‘coherence’ appears to encourage consistent interpretations grounded in previous case law. It also suggests a principle of collegiality where conflicting views between arbitrators are less likely to transpire.<sup>28</sup> This should foster legitimacy among MPIA rulings that should in turn enable trading countries to enact legislation which complies with broadly accepted understanding of legal concepts, rather than ones which are perceived to be up for challenge. The three additional arbitrators (recall the original AB had 7 standing judges) is further believed to improve the efficiency of the MPIA in handling cases and also promote

<sup>25</sup> Hillman *ibid*.

<sup>26</sup> Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes (30 April 2020) JOB/DSB/1/Add.12 (MPIA Statement).

<sup>27</sup> *Ibid*, Annex 2 art 9.

<sup>28</sup> Mariana De Andrade, ‘Procedural innovation in the MPIA: A way to strengthen the WTO dispute settlement mechanism?’ (2019) QIL, Zoom-out 63, 121-149

a more geographically diverse institution.<sup>29</sup> Despite these differences, the MPIA is similar to the AB in many respects. The scope of appeal is only limited to issues of law covered by the panel report and legal interpretations developed by the panel. The MPIA arbitrators also have the authority to uphold, modify or reverse findings of the panel.

The MPIA was established as a temporary appeal arrangement and was not intended to be a permanent solution to the AB crisis. The MPIA was only considered as a contingency in order to maintain basic procedural rights contained in the WTO DSU that had been jeopardised because of the non-functional AB. Although the creation of MPIA was seen by some as the best solution to bring back a central element of WTO dispute settlement,<sup>30</sup> there are some lingering questions about how the MPIA will work. First, the existence of the MPIA creates a gap between the participating and non-participating members. As noted above, unlike dispute settlement procedures under the DSU that are applicable to all WTO members, MPIA can only provide its services to countries that have given notification to the WTO that they intend to join. Instead of decreasing inequality between its members, the establishment of MPIA created an apparent disparity in the WTO. Second, it is not clear whether the MPIA is part of WTO or is an extraneous mechanism.<sup>31</sup> Since the MPIA Statement outlines that it is established in accordance with Article 25 of the DSU,<sup>32</sup> it might imply that MPIA is part of the WTO. On the other hand, funding for the MPIA comes only from its signatories, not from the WTO itself. As outlined in Article 15 of the Procedures of MPIA, parties to the dispute must voluntarily accept that they will comply with the award as issued. This means that decisions issued by the MPIA do not bind other WTO members that are not participating in this body.<sup>33</sup> In contrast, normal dispute settlement in WTO has an imperative nature,<sup>34</sup> where reports issued by the panels and AB will be considered ‘approved’ by all WTO members unless there is a negative consensus. Unlike the AB, arbitral awards issued under MPIA are only required to be notified to the DSB, but it is not mandatory that they are adopted.<sup>35</sup> Some believe that this arrangement undermines the legitimacy of the MPIA as a dispute settlement mechanism in WTO.<sup>36</sup> It is also not clear that the MPIA will address the criticisms levied by the US concerning judicial overreach.<sup>37</sup> Indeed, the US remains sceptical towards MPIA.<sup>38</sup> It could be argued that it would be difficult for the MPIA to function as a long-term solution if it is supported by and applicable to all WTO members. This ignores the reality that it is exceedingly difficult to get multilateral consensus on any issues - suggesting that partial support will have to do. As mentioned earlier, plurilateralism may be the best way forward at the WTO, as seen with regards to other issues such as government procurement and soon, digital trade.

The MPIA has proved popular – it now has the support of 53 WTO member states including the EU, Canada, Australia, China and most recently Japan. It has already issued its first judgement<sup>39</sup>

**29** D Sharma, ‘The Move Towards Multi-party Interim Appeal Arbitration: How Efficacious?’ (2022) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Kluwer Law International: Sweet & Maxwell, Vol. 88, pp.117-134

**30** ‘Multi-Party Interim Appeal Arbitration Arrangement (MPIA)’ (WTO Plurilaterals): [https://wtoplurilaterals.info/plural\\_initiative/the-mpia/](https://wtoplurilaterals.info/plural_initiative/the-mpia/)

**31** Henry Gao, ‘Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement’ (2021) 24 *Journal of International Economic Law* 534 at 541

**32** MPIA Statement, 1

**33** Gao, above n 31 at 541

**34** *ibid.*

**35** MPIA Statement, annex 1 art 15

**36** Gao, above n 31 at 541-542

**37** *ibid* at 542.

**38** *ibid.*

**39** Colombia — Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands (DS591) (award issued 21 December 2022). The judgement is only 39 pages long compared to recent AB decisions reaching several hundred pages.



and most observers appear to be generally impressed with the quality and timeliness of the ruling.<sup>40</sup> The decision was delivered well under the 90-day time limit and is also much briefer than a typical AB judgement, evincing a concerted effort to focus on the key issues with a view to resolving the matter as efficiently as possible. It leads one to wonder whether AB decisions had become longer and more complex than needed. At the time of writing there are 8 disputes currently before the MPIA and three more were finalised without appeal, withdrawn or settled. Support for the MPIA has also been voiced by the business community. For example, Japan's (delayed) decision to sign onto the MPIA was motivated in part by Keidanren's (Japan's Federation of Business Organisations) recommendation that Japan take part for the sake of securing Japan's status as a safe trading nation.<sup>41</sup>

As indicated in the Marrakesh Agreement establishing the WTO, the WTO was founded with the aim to 'develop an integrated, more viable and durable multilateral trading system.'<sup>42</sup> This can only be achieved if WTO can convince countries around the world to have faith in how it works and therefore be willing to commit themselves to follow WTO treaties. Much as commercial transactions between strangers, especially those involving delayed performance required the sanction of the common law courts, there must be a certain level of trust among the WTO members that dispute settlement system can yield a fair and correct decision. As is the case with international law which by its nature encroaches on national sovereignty, WTO rules essentially ask countries to 'surrender' elements of their regulatory autonomy that impact upon trade. In order to create a non-discriminatory trading system that can benefit the whole world, WTO needs a mechanism to establish and enforce its rules. This function is carried out by its dispute settlement system. As with most judicial bodies around the world, the process can only work where errors – meaning errors of legal interpretation – can be rectified through appeal, effectively a check on the decisions of the lower court. But the actual 'correctness' of a higher court's decision matters less than the certainty that is achieved by its finality. As US Supreme Court Justice Robert Jackson famously stated: 'We [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final.'<sup>43</sup>

The WTO itself claims that the dispute settlement system emphasises the rule of law.<sup>44</sup> In any adjudication process governed by law, decision-makers should be monitored to ensure that they perform consistently within their authority as set out in the applicable rules.<sup>45</sup> Much as judicial review ensures that administrative bodies do not deviate from their authority, appeals ensure that courts interpret the law correctly.<sup>46</sup> In short, the availability of a route of appeal is key to the legitimacy of the WTO's dispute settlement procedure. Without it, there is a strong likelihood that countries would be unwilling to yield some of their sovereignty to an international organisation. The absence of the AB has been described by some as 'the most challenging conflict,' one which threatens the very existence of the WTO.<sup>47</sup>

<sup>40</sup> Alan Yanovich, 'WTO Issues First Award Under MPIA and Tackles Standard of Review in Anti-Dumping Disputes' Akin Gump, (17 Jan 2023) <<https://www.akingump.com/en/insights/blogs/ag-trade-law/wto-issues-first-award-under-mpia-and-tackles-standard-of-review-in-anti-dumping-disputes>>

<sup>41</sup> Arata Kuno, 'Japan's joining MPIA an outside chance to boost momentum for WTO reform' East Asia Forum (1 May 2023): <https://www.eastasiaforum.org/2023/05/14/japans-joining-mpia-an-outside-chance-to-boost-momentum-for-wto-reform/>

<sup>42</sup> *ibid.*

<sup>43</sup> *Brown v Allen*, 344 US 443 (1953) (USSC, separate and concurring opinion) at 540

<sup>44</sup> 'A Unique Contribution' WTO.: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.html](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.html)

<sup>45</sup> Denise Wohlwend, *The International Rule of Law: Scope, Subjects, Requirements* (Edward Elgar, 2021) at 47

<sup>46</sup> Tom Bingham, *The Rule of Law* (Penguin, 2011) at 61. See also Richard Nobles and David Schiff, 'The Right to Appeal and Workable Systems of Justice' (2002) 65 *The Modern Law Review* 676 at 682

<sup>47</sup> Bacchus and Lester, above n 19 at 183

There are no feasible alternatives to the MPIA on the current horizon. Some have been suggested to overcome the AB crisis, but none offer realistic hope. Perhaps most obviously, the WTO could consider bringing back the AB into operation with some modifications in its role in line with the US's requirements.<sup>48</sup> Another alternative would be a return to the panel-only system of the General Agreement on Tariffs and Trade (GATT) before the WTO was established. However, considering the success of WTO dispute settlement in the last few decades, returning to the old regime would not be the best solution in this matter. Reforming the AB in step with the US's wishes, might seem advisable. Indeed, some changes, notably strict adherence to timeframes, could be applied immediately, should all members agree. But it would seem that if the AB is to be revived with the support of the US, the WTO would have to attempt to limit the body's authority so that it will not interpret the rules disproportionately, as the US has alleged.<sup>49</sup> Under the general guidance of the WTO adjudicators, WTO members can decide to limit the role of the AB so that it will not overstep the boundaries as set out under the established rules.<sup>50</sup> However, such fundamental changes would be very hard to implement in practice, even if new wording could be established in the DSU regarding the avoidance of 'gap filling.' US Trade Representative Katherine Tai commented recently of the need for a 'fundamental rethink of the dispute settlement system ... to ensure that we end the practice of judicial rulemaking.'<sup>51</sup> It is difficult to see how the AB could be re-instigated with this sweeping restriction imposed upon it. The distinction between interpreting and making law, especially when principles were vaguely drafted, is often a fine one. One imagines that a new AB circumscribed in such a manner to suit the Americans would end up being effectively a remand court – merely re-hearing the initial dispute, rather than clarifying legal concepts in a meaningful manner. Over time it is likely that the AB would begin to drift towards 'overreach' in seeking to clarify ambiguities naturally arising in the course of disputes. It is also quite likely that the US would agitate once again were they to begin to lose cases.

## THE UK AND THE MPIA

In addition to the US which, unsurprisingly, has refused to join the MPIA, there remains only one hold-out among the world's advanced economies: the United Kingdom. It is true that in the two full calendar years since the AB ceased to function (2021 and 2022), UK exports in goods and services increased (£654 billion in 2021, a modest increase from £616 billion in 2020, and £815 billion in 2022). UK imports are also up the last two years, at £682 billion and £901 billion respectively.<sup>52</sup> Still, it is difficult to extrapolate whether UK's trade position was adversely affected by the AB's demise over this short period which coincided with a sharp recovery from the Covid-19 pandemic in which much pent-up demand was released, as well as adjustments to a new trading landscape outside the EU including benefits from numerous preferential trade agreements to which the EU is not party. It is difficult to quantify how joining the MPIA might affect the UK's trade going forward. More qualitatively, though, failure to join the new agreement reflects disregard for an important element of the world trading order which has generated much wealth across the world. This is bound

<sup>48</sup> Davey above n 13 at 294

<sup>49</sup> Bruce Hirsh, 'Resolving the WTO Appellate Body Crisis: Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators' National Foreign Trade Council (June 2020) 2 at 7: [https://www.nftc.org/archive/Trade%20Policy//WTO\\_Issues/Resolving%20the%20WTO%20AB%20Crisis%20vol2%2006042020.pdf](https://www.nftc.org/archive/Trade%20Policy//WTO_Issues/Resolving%20the%20WTO%20AB%20Crisis%20vol2%2006042020.pdf)

<sup>50</sup> *ibid.*

<sup>51</sup> Comments from USTR Katherine Tai at the G20 Trade and Investment Ministers' Meeting: <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/august/remarks-ambassador-katherine-tai-g20-trade-and-investment-ministers-meeting>

<sup>52</sup> UK Official Statistics: Trade in Numbers: <https://www.gov.uk/government/statistics/uk-trade-in-numbers/uk-trade-in-numbers-web-version>

to have long-term impacts to the UK's trading position which may only begin to appear over time.

At one point the UK's resistance to signing on to the MPIA made sense. In the era of post-Brexit uncertainty and strained relations with the EU, the UK understandably sought to remain broadly aligned with the US in matters of trade policy. In the early days there was also a risk that the MPIA could have frustrated efforts to save the AB. Neither of these arguments against joining the MPIA remain valid. Membership of the MPIA will have no effect on whether the UK gets a free trade agreement (FTA) with the US (unlikely in the near future regardless of who is in the White House since the US appears to be abandoning FTAs entirely). The US has made it clear that it does not object to other WTO members using arbitration as specified in Article 25 of the DSU or joining the MPIA. Indeed, while the US appears to be averse to FTAs generally at this moment in time, the US did create the Trade and Technology Council with the EU in 2021. It appears to be close to negotiating an agreement with the EU on taxing carbon-intensive steel and aluminium. Clearly the EU's support for the MPIA has not been a barrier to trade bilateralism with the EU in either of these contexts. The US also signed an agreement with Japan regarding the supply of critical materials in March 2023, the same month that Japan joined the MPIA. Perhaps most notably of all, the UK's non-accession to the MPIA, ostensibly in solidarity with the US, has not helped it secure a US FTA. A UK FTA with the US, should it ever arise, would contain its own dispute settlement mechanism, as all FTAs do. This could be a single-tier panel arbitration mechanism without an appeal, as is common to FTAs.

And, as suggested earlier, it would seem as though there is little appetite to resurrect the AB in its previous form as an appeal court of WTO law from lower panel decisions. Should efforts to reform the AB pick up in earnest, membership of the MPIA would not frustrate this initiative. Indeed, the UK is poised, along with the US and other WTO members, to take a leading role in addressing deficiencies of the old AB.

Frustratingly, the UK government has yet to articulate a coherent reason for not signing onto the MPIA, preferring instead to ignore the issue in official statements. It is telling that the UK's permanent representative to the WTO in Geneva, Simon Manley, in delivering his speech on the 'UK Statement on Reform' in May 2023 did not mention the MPIA nor even the AB crisis. The MPIA did not feature in the UK's submissions to the WTO General Council in July 2023. Some idea of the UK's original aim behind staying out of the MPIA may be discerned from comments made by the then International Trade Secretary Liz Truss in 2021: "We need to get the WTO dispute resolution system fully working again, and it is very important that the 'big' players do not get to set the rules. It is critical that the WTO dispute settlement is binding, enforceable and impartial."<sup>53</sup> At that point the MPIA, which then had only a handful of signatories, may have justifiably been viewed as an impediment to the rehabilitation of the multilateral AB. The explanation for the UK's ambiguity on the MPIA may be a reflection of a reluctance to commit to an initiative with a built-in obsolescence – it would disappear as soon as the AB was fixed. But this no longer makes sense as AB is unlikely ever to be revived.

For those who believe in rule of law at the international level as a fundamental component of free trade, the only way forward is the MPIA. The UK must join the MPIA now. The longer it goes without doing so, the more marginalised the UK will become when it comes to contributing to the establishment of best-practice at the MPIA (for example there appears to be a greater emphasis in the MPIA on informal consultations as well as more sensitivity to timeliness than under the old AB). No longer properly described as an 'interim' mechanism, the MPIA is here to stay, and the UK should have a say in how it functions and what direction it takes. For example, the UK could en-

<sup>53</sup> Statement to the Ottawa Group of WTO Members (March 2021)

courage other MPIA signatories to enlarge the transparency of MPIA hearings, departing from the confidentiality of the old AB procedure. WTO dispute settlement has always been closed to public – a fact which may have some adverse impact on the oversight of the process, potentially leading to inconsistent interpretation of law,<sup>54</sup> as well as a faltering image for the WTO on the global stage. As a non-signatory state, there is also no British judge on the roster of MPIA arbitrators<sup>55</sup> – unbecoming for a G7 country, particularly the one that created the common law. Worst of all, failure to join the MPIA sends the signal to the UK's trading partners to be wary of uneven, unpredictable legal outcomes should the UK find itself embroiled in a trade dispute, for example in relation to the application of trade remedies (subsidies, dumping and safeguards) in an era of expanding industrial policy. This would hardly be in keeping with the 'global Britain' strategy that has been frequently articulated by the government following Brexit. The absence (so far) of vocal support for the MPIA from the British business community should not be taken as tacit disdain for the MPIA. It is more likely the result of the fact that the importance of the WTO itself is not yet fully appreciated by a British public that was severely cautioned against 'trading on WTO terms' during the fraught Brexit negotiations.

While joining the MPIA should not be viewed as an affront to the US, failing to do so could raise the prospect of further trade tensions with the EU, still the UK's largest trading partner. The EU, the greatest champion of the MPIA, modified its EU's Trade Enforcement Regulation of 2014<sup>56</sup> to encourage retaliatory measures against WTO members who resist joining MPIA and who frustrate resolution by appealing panel decisions 'into the void.' This means that when another WTO member enacts unlawful trade measures and hinders the dispute settlement process by appealing, the EU can take unilateral countermeasures immediately. The EU's response is understandable – if trading partners are unwilling to seek resolution under international law, then retaliation is the only recourse. Unfortunately, this is precisely the kind of behaviour that can escalate into a trade war.

It is noteworthy also that the first case before the MPIA concerned an interpretation of a controversial provision of the WTO Anti-Dumping Agreement which calls for an evaluation of the rules of customary international law as an interpretive aid.<sup>57</sup> As alluded to above, the important point is not whether the MPIA tribunal made this determination correctly or not,<sup>58</sup> but than in giving an opinion on the role of customary international law in interpreting WTO texts, the MPIA is establishing a pattern of judicial behaviour that may be influential going forward. This is the first step in creating what might be termed as a coherent body of MPIA jurisprudence. If the UK is not a party to this, it undermines the clarity and therefore enforceability of the UK's commitments under WTO law.

This underscores the most important reason for the UK to join the MPIA: the UK is more needful now than ever of the security provided by informed, coherent adjudication at the international level. Freed from the EU's restrictive trade policy, but no longer protected by the economic might of the bloc, the UK has begun to embark on an ambitious programme of FTAs. While this is encouraging and will unquestionably yield economic benefits, the multilateral rules of the WTO are likely to remain dominant for some time. Indeed, countries have been reluctant to bring disputes under FTAs partially because these procedures are untested. In contrast with the WTO and its history of caselaw, rulings by these tribunals carry little weight beyond the relevant bilateral or regional ar-

<sup>54</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) at 132

<sup>55</sup> There are currently arbitrators from Canada, the EU, Australia, New Zealand and China (among those from other countries).

<sup>56</sup> Regulation (EU) No 654/2014

<sup>57</sup> Art 17.6 ii). This in turn requires an assessment of the rules of interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties which states that a treaty must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

<sup>58</sup> Some commentators see this as another example of the very judicial activism which undermined the legitimacy of the AB, according to the US: Yanovich, above n40



rangement. It is no surprise that the EU chose to use the WTO dispute settlement system to bring its first dispute against the UK rather than the UK-EU Trade and Cooperation Agreement.<sup>59</sup> As the UK establishes its own trade policy for the first time in decades, it runs a high risk that its interpretation of WTO rules will be challenged by others. The UK's new disciplines on trade remedies, for example, could easily face opposition in an era of industrial policy spurred by the US Inflation Reduction Act, not to mention heightened geopolitical tensions. Protectionism is rising globally<sup>60</sup> – a trend which should be of serious concern to a country like the UK which relies heavily on global trade. Better to have the safety of appellate review than to take the chance that a first instance panel will, for example in conducting a review of the application of the UK Trade Act 2021, reach an interpretation which fully understands the law.

## CONCLUSION

The importance of the WTO dispute settlement system to free trade has been severely challenged by the recent dissolution of its AB. Although there may be some merit to the criticisms of the AB, an appeal mechanism is essential to the rule of law and by extension to the effective operation of the WTO. The MPIA, created as an interim solution to the AB crisis, offers a plausible alternative. It is a functioning appeal court that should provide valuable certainty to the WTO members which have chosen to use it. It now enjoys membership of the world's largest economies, other than the US and the UK, and has begun issuing timely rulings that should add a layer of legitimacy and stability to global trading relations.

While reviving the old AB would be the ideal outcome, the best should not be the enemy of the good. The UK has a proud tradition for upholding the rule of law and is a long-standing champion of free trade. It is also engaging in trade policy making on its own for the first time in many years, and doing so in an era of increasing global protectionism where legal stability is most needed. The 'wait and see' period for dealing with problems in WTO dispute settlement has passed. The UK must get off the fence and nail its colours to the mast: it is time to sign on to the MPIA.

---

<sup>59</sup> United Kingdom – Measures Relating to the Allocation of Contracts for Difference in Low Carbon Energy Generation WTO Doc. WT/DS612 (Mar. 28, 2022)

<sup>60</sup> 'Overview of Developments in the International Trading Environment' WTO Trade Policy Review Body WT/TPR/OV/25 (22 November 2022)