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Decisions of MPIA Arbitration Panels and their Jurisprudential Value

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The multilateral trading system has served the world remarkably well over the past seventy years, as it ha during the World Trade Organization's ("WTO") twenty-five years in existence. On average, global incomes hav risen dramatically, and the number of those living in poverty has declined sharply.[1] There is, neverthele criticism of the WTO.[2] One area for this criticism is the WTO Appellate Body ("AB").

Over the years, the AB has developed a strong tradition of precedents.[3] This, in part, subjected AB to criticis mainly by the U.S and eventually lead to blocking the appointment of AB judges.[4] Although decisions by WT panels and the Appellate Body are not a formal source of law in the strict sense, their status in practice cannot b ignored. In reality, WTO jurisprudence developed the rule that like cases should be decided alike. There must b cogent reasons for departing from precedents.[5]

Against this backdrop, the European Union ("EU") and some twenty-one countries have agreed on a arrangement, known as the Multiparty Interim Appeal Arbitration Arrangement ("MPIA"),[6] which allows the to bring appeals and solve trade disputes among them. The MPIA covers any dispute between participatir countries, whether ongoing or new disputes, including the compliance stage of such disputes.[7] There is sort of hierarchy so that the WTO dispute settlement system – the panel process and appeal review – is analogous domestic court systems.

The focus of this essay is on the jurisprudential value of MPIA arbitral awards. According to the MPIA, tl participating WTO members agree to abide by the arbitration award, which shall be final.[8] The award will l notified to, *but not adopted* by, the Dispute Settlement Body ("DSB") and to the Council or Committee of ar relevant agreement. Arbitrators under the MPIA are obliged to follow WTO agreements but not previous Appella Body jurisprudence.

To start off, precedents under the GATT and WTO differ. In GATT 1947, there was horizontal precedent whereby panel was looking at the ruling of another panel which was not hierarchically superior.[9] In other word horizontal precedents had only persuasive value and it was up to each panel to decide whether or not that wa the case in the case before it. In the context of the WTO, there is *de facto* vertical precedent whereby the precede emanates from a hierarchical structure, i.e. the AB.[10] Therefore, what was acceptable under the GATT horizont precedent is now not acceptable under the WTO.

The AB in the U.S.-Stainless Steel case set the standard for the "cogent reasons" doctrine to depart from i precedents. Mere disagreement by the WTO panel is not a cogent reason.[11] Cogent reasons could include proce failure or when the AB findings are not persuasive or not in keeping with the covered agreements.

There is no question that AB rulings have value for panels to follow. The most important ruling is the one decide by the AB. For the sake of stability and certainty,[12] WTO panels consider AB rulings to have binding value. Tl "cogent reason" standard results from reasonable self-limitation and the hierarchical second-level review of tl AB, which did not exist in GATT. Yet, also in WTO law, panel and AB precedents are not legally binding beyor the specific dispute (*res judicata*), and the AB might accept well-reasoned disagreements. This is likely continue also with the MPIA arbitration.

Arbitration MPIA panels can diverge from past AB reasoning. This is a way to thread the needle and mal everyone, including the U.S., happy. As stated earlier, MPIA arbitral awards cast doubt on the persuasive authori of these awards on future WTO disputes. MPIA arbitral awards are supposed to be resolved according to WT agreements, and they will not be adopted by consensus by the whole membership of the WTO, i.e. DSB. Mar questions remain as to whether an MPIA panel must follow its own rulings and other MPIA panel rulings. addition, it is unclear if future AB rulings, when the AB re-operates again, will follow MPIA interpretation ar whether not following could constitute legal error. These issues get complicated, knowing that the DSB does n adopt MPIA arbitral panels. Thus, there is no general consensus among WTO members. The dominant thinkir should be to transform MPIA panel rulings into consensus so that a WTO order is based on agreement.

MPIA arbitral panels will have to follow WTO agreements including Article 11 of the Dispute Settlement Understanding ("DSU"). Article 11 of the DSU dictates clearly that "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of th case and the applicability of and conformity with the relevant covered agreements, and make such other findinç as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…".[13] The objective examination requirement of Article 11 obliges MPIA panels to adopt the interpretations of the WTO Agreement they consider correct including previous AB rulings.

One way or another, MPIA arbitral panels will have to refer to previous AB rulings or even its own rulings. course, the MPIA will never directly provide for precedential effect. Denying the force of AB prior rulings is n realistic. MPIA arbitral panels cannot start from scratch, ignoring previous AB reports as they relate to tl substance of their assessment and the logic behind reaching the conclusion of their decisions. In other words,

MPIA arbitral panels do not follow their own rulings or previous AB ruling, panels would be entitled to examir all legal issues afresh in every dispute. This adds burden to panels and parties alike and could lead to conflictir rulings.

The objective of the MPIA arbitral panels is to deviate from prior AB practice and instead bases its decisions c what it deems the correct legal reasoning in a particular case as based on the facts established in that particul case. Focusing only on WTO agreements without regard to rich AB rulings would deprive MPIA arbitral pane from valuable resources. The issue is not one of subordination. MPIA arbitral panels are free to adopt leg reasoning but when facts are similar it makes sense to follow prior AB rulings. In the long-term, this approac will give more weight for MPIA awards when the AB operates again. Otherwise, MPIA panel rulings will hav little value as the AB or WTO members could interpret these rulings as rulings that served a particular need at particular time.

MPIA arbitral awards, WTO panel reports, and AB rulings ought to form a coherent system whereby decisions each of these bodies interact with each other. There should be a culture of respect to previous rulings. By th same token, flexibility – not rigidity – should be adopted so as to deviate from previous rulings when necessar MPIA arbitral panels should confess when making a mistake in its decision and thus overrule the decision future arbitration cases. Shutting down the door to a corrective ex-post mechanism through a new pan disagreement is not the solution. There is a need for striking the right balance between predictability ar flexibility.

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[1] See Max Roser and Esteban Ortiz-Ospina, Global Extreme Poverty (2019), available at https://ourworldindata.org/extreme-poverty>.

[2] See Silvia Amaro, A Reform-or-Die Moment: Why World Powers Want to Change the WTO, CNBC (Feb. 7, 202(available at < https://www.cnbc.com/2020/02/07/world-powers-us-eu-china-are-grappling-to-update-th wto.html >.

[3] See Raj Bhala, The Precedent Setters: De Facto Stare Decisis in Two Adjudication (Part Two of a Trilogy), 9 Transnat'l L. & Pol'y 1, 9-12 (1999-2000).

[4] See Jens Lehne, Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the Unite States Legally Justified? 79-113 (Carl Grossmann Publishers; Germany, 2019).

[5] See WTO, Status of Panel and Appellate Body Reports, available <https://www.wto.org/english/tratop_e/dispu_e/repertory_e/s8_e.htm>.

[6] See Multiparty Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, available at https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf > (last visited June 8, 2020).

[7] *Id.* at para.9. The following cases will follow MPIA arbitration procedures: Canada-Sale of Wine (DS537), Cos Rica-Avocado (DS524), and Canada-Aircraft (DS522). See WTO, Chronological List of Disputes Cases, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.

[8] See Multiparty Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, *supra* note 6, anne 1, para. 15.

[9] The EEC-Apples panel stated explicitly that it did not feel it was legally bound by all the details and leg reasoning of the 1980 Panel report. See GATT Panel Report, European Economic Community, Restrictions c Imports of Apples, para.5.1, L/6513-36S/135 (1989).

[10] See Meredith K. Lewis, Dissent as Dialectic: Horizontal and Vertical Disagreement in W TO Dispu Settlement , 48 Stan. J. Int'l L. 1, 24-25 (2012).

[11] See United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – AB-2008-1 – Report of tl Appellate Body, para. 164 (30-4-2008).

[12] See Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement Disputes, available < https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm >.

[13] *Id.* Art. 3.2.