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Confronting Fragmentation: A Quest for a Plurilateral Appellate Mechanism under the WTO

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Abstract

Fragmentation in the international trading system, following the proliferation of free trade agreements (FTAs), has been a longstanding phenomenon. However, fragmentation in the systems for settling trade disputes has emerged only recently. The demise of the Appellate Body of the World Trade Organization (WTO) has caused a gradual change of preference of governments as to where and how to resolve disputes. Outside the WTO, an increasing number of disputes are brought under FTAs. Within the WTO, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is leading to fragmentation. This trend is fragmenting the interpretation and enforcement of trade rules, thereby diminishing predictability. Although the MPIA has to some extent maintained an appellate system, it is not a typical plurilateral and does not provide a long-term solution to the Appellate Body crisis. A critical mass-based, open plurilateral under the multilateral framework might offer an alternative path to rebuild an effective appellate mechanism.

Keywords

case law – dispute settlement system – enforcement – FTA – international trade

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1 Introduction

In December 2019, the Appellate Body, the World Trade Organization's (WTO) institution mandated to hear appeals of rulings given by panels in first instance, stopped functioning. This resulted from the decision of the United States (US) to refuse to (re)appoint Appellate Body members. These members must be nominated by consensus so that objection by one WTO Member was sufficient to prevent the Appellate Body from being restaffed. As the number of members dwindled from 7 to less than 3, the quorum required for the Appellate Body to hear appeals could not be met in accordance with Article 17 of the WTO Dispute Settlement Understanding (DSU). The lack of a functional Appellate Body has put the WTO's dispute settlement system into a gridlock because panel reports can now be appealed 'into the void'.[1] In other words, a defeated Member can effectively block the adoption of the relevant panel report by exercising its right of appeal, thereby preventing the report from becoming binding and rendering the dispute unresolved.[2]

As a result, the relevance of the WTO's dispute settlement system appears to be waning. Fewer disputes have been brought before it than ever since its creation nearly 30 years ago, despite heightened trade and geopolitical tensions. While this might not be so problematic for WTO Members which have the economic might to take unilateral actions to address their concerns, other WTO Members end up being penalized. This situation has led to two phenomena which we discuss in turn in this article: firstly, the creation of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) by a subset of WTO Members and, secondly, the increasing number of disputes being brought under free trade agreements (FTAs). These developments are related. The MPIA can be described as an Appellate Body by interim, aimed at providing a temporary fix to the issue of appeals 'into the void'. At the same time, at least some disputes being brought under FTAs are ones that could have been brought before the WTO but were redirected due to the current issues facing the system. This multiplicity of dispute settlement mechanisms in international trade law is leading to substantive fragmentation in the law and its implementation, hence diminishing predictability.

1 Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22(3) JIEL 297.

2 Isabelle Van Damme, '25 Years of Law and Practice at the WTO: Did the Appellate Body Dig its Own Grave?' (2023) 26(1) JIEL 124.

While the jewel in the crown,[3] as the dispute settlement system was known, faltered, the long deadlocked multilateral negotiations have started making progress in recent years. From the Information Technology Agreement[4] to initiatives on e-commerce[5] and investment facilitation,[6] the WTO has been able to achieve modest success through a plurilateral process whereby a subset of WTO Members move forward with negotiating on specific issues. Indeed, plurilateralism within the WTO is not new, as some plurilateral agreements date back to the GATT era. However, a systemic change may arise as plurilateralism has been increasingly regarded as a main way to revive the organization's negotiation function so as to maintain its relevance to contemporary trade-related challenges. In contrast, agreements among the entire WTO membership remain difficult to achieve, as demonstrated by the number of pressing problems which are yet to be addressed such as industrial subsidies, plastic pollution or reform of rules on agriculture.[7]

Yet, as will be discussed in Section 2, we are not convinced that the MPIA should be seen within this trend of increasing plurilateralism in international trade governance. While the MPIA bears some resemblance to plurilateral initiatives, it does not fit the same narrative. Nonetheless, international trade dispute settlement is fragmenting as a result of the MPIA and an increasing number of disputes being brought under FTAs. Thus, in Section 3, we review the major reasons for the longstanding under-utilization of dispute settlement mechanisms under FTAs and the potential shift from the WTO to these mechanisms for settling disputes. While more evidence is needed to ascertain whether there is actually a change in preference for settling disputes under FTAs, it is reasonable to predict that this shift would eventuate over time if the WTO dispute settlement system remains dysfunctional. Based on these observations, Section 4 discusses the implications of increasing fragmentation in international trade dispute settlement from two major standpoints: the development of trade law and the enforcement of decisions. We argue that increasing

3 William J Davey, 'WTO Dispute Settlement: Crown Jewel or Costume Jewelry?' (2022) 21(3) WTR 291; Cosette D Creamer, 'From the WTO's Crown Jewel to its Crown of Thorns' (2019) 113 AJIL 51.

4 WTO, 'Information Technology Agreement' <https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm> accessed 1 August 2024.

5 WTO, 'Joint Initiative on E-commerce' <https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm> accessed 1 August 2024.

6 WTO, 'Investment Facilitation for Development' <https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm> accessed 1 August 2024.

7 WTO, '13th WTO Ministerial Conference (Abu Dhabi, UAE)' <https://www.wto.org/english/thewto_e/minist_e/mc13_e/mc13_e.htm> accessed 1 August 2024.

fragmentation would cause a diversion of international trade law away from the WTO as the longstanding multilateral authority as well as its enforcement. Faced with the difficulties in progressing multilateral negotiations, we propose a critical mass-based, open plurilateral approach to reconstruct an appellate mechanism under the WTO in Section 5. This approach is consistent with the ongoing efforts by like-minded governments to tackle contemporary trade-related challenges under the multilateral framework. It provides a path towards multilateralism and can be designed in ways that reduce fragmentation. In conclusion, Section 6 puts forward a fundamental question for future work: whether predictability should remain a centre part of the international trading system.

2 MPIA in the Trend of Plurilateralism

2.1 *What's That?*

The MPIA was created in April 2020, shortly after the demise of the Appellate Body.[8] The idea to set up an alternative to the Appellate Body to avoid a deadlock of the dispute settlement system was championed by the European Union (EU) and received support by a small number of other WTO Members. Currently, 26 Members have signed up to the MPIA, including the EU representing all its member states, with the latest addition being Japan.[9]

The main goal of these Members was to preserve the functioning of the system and avoid appeals into the void. The agreement reached took the form of a political declaration by the signatories not to appeal panel reports into the void and to, instead, have recourse to Article 25 of the DSU to complete appeals between participants.[10] Article 25 of the DSU provides a mechanism for WTO Members to resolve disputes by arbitration. Arbitral awards have the same effect as panel and Appellate Body reports when it comes to implementation

8 WTO, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU', JOB/DSB/1/Add.12 (30 April 2020) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504> accessed 1 August 2024.

9 Geneva Trade Platform, 'Multi-Party Interim Appeal Arbitration Arrangement (MPIA)' <https://wtoplurilaterals.info/plural_initiative/the-mpia/> accessed 1 August 2024. While some major users of the dispute settlement system are signatories to the MPIA, other major users, notably, the US, India, Indonesia, Argentina, Thailand, South Korea, are not.

10 WTO (n 8).

and enforcement. This enabled MPIA parties to ground an alternative appellate mechanism within the WTO through existing rules under the DSU.[11]

In a WTO dispute between MPIA parties, the parties must still conclude an appeal arbitration agreement in accordance with Article 25 of the DSU during the panel stage.[12] Such an agreement may also be reached on an *ad hoc* basis between WTO Members which are not parties to the MPIA. This recently occurred in the *Turkey – Pharmaceutical Products* case.[13] Although Turkey was not a party to the MPIA, the appeal procedure was largely based on the same processes established under the MPIA. This dispute was also the first appellate decision via arbitration based on Article 25 of the DSU, leading to implementation by the losing party (i.e. Turkey). Therefore, this sets a precedent for how an alternative appeal mechanism can be used to maintain binding dispute resolution.[14] The main difference between the MPIA and such *ad hoc* agreements is that the exact procedures for arbitration under the MPIA have been pre-agreed upon so that no specific negotiation is needed. In contrast, in the case of *ad hoc* agreement, the procedures must be agreed to, which might delay the settlement of disputes or, potentially, lead to no agreement being reached.

MPIA and Appellate Body appeals are largely the same in terms of both substance and procedure, although MPIA arbitration is being streamlined in practice for efficient resolution of disputes. The MPIA consists of a pool of ten arbitrators selected by consensus by MPIA parties, as compared to seven Appellate Body members selected by consensus by all WTO Members. Like the Appellate Body, a bench of three is composed to resolve each appeal arbitration, and a collegiality mechanism is provided, whereby the arbitrators may discuss each case with the entire pool of arbitrators.[15] Furthermore, MPIA arbitrators are similarly required to issue their awards to the parties within 90 days, which the Appellate Body failed to achieve in many disputes. This failure to issue reports within the required timeframe, coupled with other criticisms

11 Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?' (2023) 22(5) WTR 693.

12 ibid 696.

13 *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products* (*Turkey – Pharmaceutical Products*), WT/DS583/ARB25, Award of the Arbitrators (25 July 2022).

14 For a detailed discussion of this dispute, see generally Weihuan Zhou, 'Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products' (2023) 117(2) AJIL 322.

15 Simon Lester, 'Can Interim Appeal Arbitration Preserve the WTO Dispute System?' (01 September 2020) <https://www.cato.org/free-trade-bulletin/can-interim-appeal-arbitration-preserve-wto-dispute-system#mpia-temporary-replacement-appellate> accessed 1 August 2024.

openly levelled at the Appellate Body (such as reviewing factual findings made by panels, giving opinions unnecessary to resolve disputes, and treating precedents as *de facto* binding), remains the concern of the US with this institution.[16] Thus, in commenting on the arbitrators' award in *Turkey – Pharmaceutical Products*, while the US welcomed the parties' recourse to Article 25, it reiterated that the use of arbitration in future cases should avoid incorporating prior practices of the Appellate Body.[17] To address some of these criticisms, MPIA arbitrators have thus far confined the appellate review to issues necessary for the resolution of disputes, limited the length of written documents and the time for hearing, and requested parties to consider refraining from appealing findings on factual matters made by panels. While no page limit is set for the arbitrators' reports, there is an aim to shorten them compared to the lengthy Appellate Body reports.[18]

Once issued, an MPIA appeal award is *notified* to the WTO Dispute Settlement Body (DSB) and becomes binding by virtue of Article 25(3) of the DSU. This is different from panel and Appellate Body reports which must be *adopted* by the DSB to be binding. In accordance with Article 25(4), arbitral awards are implemented and enforced in the same way as panel and Appellate Body reports. Therefore, an MPIA award has the same effect as an adopted panel or Appellate Body report.

2.2 *A Plurilateral?*

As explained by the editors of this special issue, plurilateralism has a long history in the international trade regime. It emerged from the practice of a subset of GATT Contracting Parties, before the creation of the WTO, that signed "codes" or "arrangements" providing rules on specific matters such as trade remedies and government procurement. Many of these codes served as the basis for negotiations of multilateral agreements which became part of the WTO package – such as the Agreement on Sanitary and Phytosanitary (SPS) Measures, and the Agreement on Technical Barriers to Trade (TBT). Only a few plurilateral GATT agreements have retained that status under the WTO, such as the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. New plurilateral agreements have emerged under the auspices

16 United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization' (February 2020) <https://ustr.gov/sites/default/files/enforcement/DS/USTR.Appellate.Body.Rpt.Feb2020.pdf> accessed 1 August 2024.

17 WTO, 'Dispute Settlement Body Minutes of Meeting Held on 29 August 2022, WT/DSB/M/469' (10 October 2022) 6.

18 For a summary of innovative approaches adopted by MPIA arbitrators, see Pauwelyn (n 11) 697–701.

of the WTO. Examples include the Information Technology Agreement and the Agreement on Basic Telecommunications[19] agreed early on. Negotiations on other important topics, such as digital trade and investment facilitation, via a plurilateral route, have taken off again in the last decade, leading to positive outcomes that may not have been achieved via the multilateral route.[20]

Based on this history, the editors have defined plurilateral agreements as "multi-party, sector-specific agreements adopted in the frame of an international organization or broader multilateral agreement by a subset of the overall membership".[21] According to this definition, the MPIA seems to fall within the trend of increasing plurilateralism. It is specifically targeted at dispute resolution and takes place under the framework of the WTO by a subset of WTO Members.

Yet, due to some notable differences between the MPIA and a typical plurilateral agreement,[22] whether the former represents an effort to pursue plurilateralism remains debatable. First, existing plurilateral initiatives and ongoing plurilateral negotiations generally aim to conclude lasting agreements. In contrast, the MPIA is intended to create a contingent appeal mechanism as a temporary solution to a suddenly emerging problem. Indeed, the MPIA states that "[t]he participating Members remain committed to resolving the impasse of the Appellate Body appointments as a matter of priority and envisage that the MPIA will remain in effect only until the Appellate Body is again fully functional".[23] The MPIA may end up staying in place if no solution to the Appellate Body crisis is found; but this is not its intended goal.

Secondly, unlike typical plurilateral agreements, the MPIA does not provide novel rules. Rather, it essentially replicates the Appellate Body procedure with only minor tweaks. This suggests that the MPIA was not designed to advance negotiations on ways to reform the appellate mechanism. Instead, the solution

19 WTO, 'The WTO Negotiations on Basic Telecommunications' (6 March 1997), <https://www.wto.org/english/news_e/pres97_e/summary.htm> accessed 1 August 2024.

20 For a more detailed review of the plurilateral negotiating approaches under the WTO, see generally Rudolf Adlung and Hamid Mamdouh, 'Plurilateral Trade Agreements: An Escape Route for the WTO?', WTO Working Paper ERSD-2017-03 (25 January 2017) <https://www.wto.org/english/res_e/reser_e/ersd201703_e.htm> accessed 1 August 2024.

21 Cf Georgios Dimitropoulos, Richard C Chen and Julien Chaisse, 'Plurilateralism: A New Form of International Economic Ordering?' (2025) 26 JWIT 1–30, in this Special Issue.

22 For a similar view, see Pauwelyn (n 11) 694. For discussions of potential deficiencies of the MPIA, see eg Henry Gao, 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement' (2021) 24(3) JIEL 534; Olga Starshinova, 'Is the MPIA a Solution to the WTO Appellate Body Crisis?' (2021) 55(5) JWT 787; Lester (n 15).

23 WTO (n 8).

to the Appellate Body crisis has been intended to come from the entire WTO membership. At the WTO's Twelfth Ministerial Conference, Members agreed to rebuild "a fully and well-functioning dispute settlement system accessible to all Members by 2024".[24] Lately in the Thirteenth Ministerial Conference, WTO Members reiterated this commitment by agreeing to accelerate negotiations in an inclusive and transparent manner.[25] These negotiations do not seem to have treated the MPIA as an existing plurilateral agreement.

Finally, it is worth reiterating that the MPIA is not even an agreement but rather a political declaration. Until an appeal agreement is concluded under Article 25 of the DSU for a particular dispute, MPIA parties are not legally bound to respect the MPIA appeal process, and no legal action under the WTO can be taken in cases where promises are disregarded – although there can be political and diplomatic repercussions.[26] Moreover, unlike the standard closed plurilateral initiatives (known as Annex 4 agreements) which must be created by consensus and are legally binding on a subset of WTO Members, the MPIA was established without such consensus and is not binding. The MPIA also differs from open plurilateral agreements[27] since its benefits are not extended to non-parties.

2.3 *What's Next?*

Since we do not see the MPIA as an example of plurilateral dispute settlement, what may constitute such plurilateralism? In a basic sense, plurilateral dispute settlement could first be linked to a specific plurilateral agreement in the form of a specific dispute settlement mechanism applicable to such an agreement. For example, the Government Procurement Agreement[28] and the Agreement on Trade in Civil Aircraft[29] both have specific provisions on dispute settlement (while the International Bovine Meat Agreement[30] and International Dairy

24 WTO, MC12 Outcome Document, adopted by the Ministerial Conference on 17 June 2022, WT/MIN(22)/24 (dated 22 June 2022) para 4.

25 WTO, Dispute Settlement Reform, adopted by the Ministerial Conference on 2 March 2024, WT/MIN(24)/37 (dated 4 March 2024). See also a detailed text on dispute settlement reform tabled before the 13th Ministerial Conference to facilitate multilateral negotiations, WTO, General Council, Special Meeting of the General Council, JOB/GC/385 (16 February 2024).

26 Starshinova (n 22).

27 See Adlung and Mamdouh (n 20).

28 WTO, 'Agreement on Government Procurement' (2012) <https://www.wto.org/english/tratop_e/gproc_e/gpa_1994_e.htm> accessed 1 August 2024.

29 WTO, 'Agreement on Trade in Civil Aircraft' <https://www.wto.org/english/docs_e/legal_e/air-79_e.htm> accessed 1 August 2024.

30 WTO, 'International Bovine Meat Agreement' <https://www.wto.org/english/docs_e/legal_e/ibma-94_e.htm> accessed 1 August 2024.

Agreement,[31] which are no longer in force, do not). Although these provisions are largely based on the DSU, they apply only to disputes between the parties to these agreements. Similar experimenting and tailoring of dispute settlement procedures under specific future plurilateral agreements could thus be conceived.

At the same time, if no multilateral solution can be found to restore an appeal mechanism within the WTO, devising a proper plurilateral appeal system might be a solution for WTO Members who want to retain a two-tier adjudication. Regarding the reform of the WTO dispute settlement system, the US position is critical. While we do not know all the details of its position, the US did reiterate that a more flexible system is required to "maximize the tools available under the DSU to assist WTO Members in resolving trade disputes" and allow more efficient resolution of disputes.[32] In commenting on the arbitrators' decision in *Turkey – Pharmaceutical Products*, the US noted that WTO Members have "a variety of means under the DSU through which they could achieve a resolution" including (apart from adjudication) consultations, good offices, mediation, and conciliation, while at the same time, it remained concerned about the use of the Appellate Body's practices under the MPIA.[33] These statements send a strong signal that the US will not accept an appellate mechanism similar to the Appellate Body,[34] or that it prefers to have a one-stage adjudication (i.e. panels) only. This position is in stark contrast with that of other core Members such as the EU, China, and India, which have insisted on a rules-based adjudicative mechanism with a fully functional Appellate Body.[35]

Therefore, a compromise must be reached among WTO Members on how the dispute settlement system should be redesigned. Given the divided positions above, it is likely that no multilateral solution can be found to restore an

31 WTO, 'International Dairy Agreement' <https://www.wto.org/english/docs_e/legal_e/ida-94_01_e.htm#articleVIII> accessed 1 August 2024.

32 WTO, 'U.S. Objectives for A Reformed Dispute Settlement System', JOB/DSB/4 (05 July 2023) 2 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/DSB/4.pdf&Open=True> accessed 1 August 2024.

33 WTO (n 17) 6. See also the detailed text on dispute settlement reform which seems to reflect the US position, WTO (n 25).

34 The US's latest reiteration of its resistance to the restoration of the Appellate Body can be found at US Mission to International Organizations in Geneva, 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, July 26, 2024', 12 <https://geneva.usmission.gov/wp-content/uploads/sites/25/2024/07/Jul26.DSB_.Stmt_.as_.deliv_.fin_.pdf> accessed 1 August 2024.

35 See eg WTO, Dispute Settlement Reform: Reflections on Substantive Issues – Joint Communication from Bangladesh, Egypt, India, Indonesia and South Africa, JOB/DSB/8 (dated 12 February 2024).

appeal mechanism within the WTO in the near future. Therefore, a plurilateral approach might need to be taken. That is, WTO Members wishing to maintain an appeal mechanism could come together to conclude a plurilateral appeal procedure agreement and find a way to incorporate it in the WTO rulebook. As such, an agreement would not be a rushed temporary fix as was the MPIA. Rather, parties could seize the opportunity to create a lasting mechanism addressing the deficiencies of the Appellate Body. In short, a plurilateral may be necessary for restoring an effective appeal mechanism in the WTO. There is a pressing need for such a solution (further discussed in Section 5) as trade disputes are increasingly redirected from the WTO to FTAs.

3 A Shift to FTAs

Fragmentation in international trade dispute settlement is mounting, in part because of the MPIA but more significantly because of increasing recourse to FTAs, following the rapid development in regionalism.[36] In reality, FTAs are increasingly concluded by multiple parties on a plurilateral as opposed to a bilateral basis. As such, dispute settlement under FTAs also contributes to the ongoing trend of plurilateralism, particularly the shift of trade disputes from the WTO to FTAs which becomes a major source of fragmentation. In this section, we briefly explain the dispute settlement mechanisms under FTAs (Section 3.1) before discussing the reasons for their under-utilization in the past (Section 3.2) and why this trend might be changing (Section 3.3).

3.1 *Dispute Settlement Mechanisms under FTAs*

Most FTAs include a mechanism for settling disputes, although the forms and effects of such mechanisms vary. Three typical types of dispute settlement mechanisms under FTAs have emerged. The first type involves a political or diplomatic approach to resolving disputes via consultations or other means. This model "often reflects asymmetric power relations between the PTA parties."[37] Thus, while it provides flexibility for FTA parties to decide how to

36 For a detailed review of the historical evolution of regionalism and its interaction with the development of the multilateral framework, see WTO, 'World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence' (2011) 48–54 <https://www.wto.org/english/res_e/publications_e/wtr11_e.htm> accessed 1 August 2024.

37 See Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffour and Jean-Christopher Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (The World Bank 2011) 467, 470.

resolve their disputes, it can put less powerful states at a disadvantage due to the power inequalities, a major problem that the WTO's "juridical and legalistic system for disputes" was designed to overcome.[38] While the less powerful party may still recourse to the WTO dispute settlement system, it remains a possibility that the other party has bargaining power to convince its counterpart to resolve disputes via diplomatic means under their FTA.

The second type, adopted in a majority of current FTAs, incorporates third-party adjudication processes similar to the WTO's dispute settlement system.[39] This is also termed as a quasi-judicial model, consisting of an *ad hoc* first instance adjudicative body (i.e. panels), with only a few also having a standing appellate body.[40] While this model generally also starts with diplomatic consultations, the adjudication process becomes virtually "automatic" once the consultations do not resolve the dispute within the pre-determined timeframe.

The third type refers to a dispute settlement system with standing tribunals or permanent adjudicating bodies. Compared to the other models, this model has been the least preferred by governments, accounting for a remarkably small portion of existing FTAs (around 2%).[41]

Given the overwhelming preference for the quasi-judicial/WTO model, our discussion below will focus on this model and particularly how it may bring about a growing diversion from the multilateral system and fragmentation in international trade law.

3.2 *The Under-Utilization of FTA Dispute Settlement Mechanisms*

While FTAs proliferated, their dispute settlement mechanisms were largely under-utilized as governments continued to use the WTO as the preferred

38 See John H Jackson, 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism' in Susan M Collins and Dani Rodrik (eds), *Brookings Trade Forum: 2000* (Brookings Institution Press 2001) 179, 179–80.

39 See generally Claude Chase and others, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements, Innovative or Variations of a Theme?' (10 June 2013) 1–58 <https://www.wto.org/english/res_e/reser_e/ersd201307_e.pdf> accessed 1 August 2024; Petros Mavroidis and André Sapir, 'Dial PTAs for Peace: The Influence of Preferential Trade Agreements on Litigation between Trading Partners' in Jagdish Bhagwati and others (eds), *The World Trade System: Trends and Challenges* (MIT Press 2016) 91, 103.

40 See Porges (n 37) 473.

41 See Chase and others (n 39) 14; Mavroidis and Sapir (n 39) 103. For some typical examples of this model, see Porges (n 37) 471–73.

forum for settling disputes.[42] Governments' choice of forums may be affected by a mix of considerations.

The first has to do with the rules of some FTAs, which exclude certain matters from dispute settlement processes. A typical example of a relatively old FTA is the North American Free Trade Agreement (NAFTA) which excluded anti-dumping and countervailing laws and practices from its quasi-judicial dispute settlement mechanism[43] – while these measures have been the most litigated at the WTO. This exclusion is maintained in the United States-Mexico-Canada Agreement (USMCA), the successor of the NAFTA.[44] Broader exclusions can be found in other more recent major FTAs. For example, the dispute settlement mechanism under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is widely regarded as having the highest standards among mega-regionals, does not apply to trade remedies, SPS and TBT measures, competition policy, etc.[45] The Regional Comprehensive Economic Partnership (RCEP), the latest mega-regional and the world's largest FTA to date, provides for exclusions similar to those under the CPTPP as well as e-commerce which are subject to

42 See Chase and others (n 39) 46; World Trade Report 2011 (n 36) 176; Geraldo Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' (2017) 20(4) JIEL 927, 929–30; Cornelia Furculiță, *The WTO and the New Generation EU FTA Dispute Settlement Mechanisms Interacting in a Fragmented and Changing International Trade Law Regime* (Springer 2021) 61–62.

43 See David A Gantz, 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for NAFTA Parties' (1999) 14(4) AUILR 1025, 1035–36; Gabrielle Z Marceau, 'NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison' (1997) 31(2) JWT 25, 33–35; Patrick Macrory, 'Chapters 19 and 20 of NAFTA: An Overview and Analysis of NAFTA Dispute Settlement' in Kevin Kennedy (ed), *The First Decade of Nafta: The Future of Free Trade in North America* (Brill Nijhoff 2004) ch 17. Indeed, Chapter 19 of NAFTA maintained a separate dispute settlement mechanism for antidumping and countervailing actions. However, this mechanism is not a standard international law and adjudication process. Rather, Chapter 19 panels are binational and hence are not an international tribunal. Moreover, in Chapter 19 disputes, domestic antidumping and countervailing laws of NAFTA parties, rather than international laws, are applicable.

44 United States Trade Representative, 'Agreement between the United States of America, the United Mexican States, and Canada (USMCA)' ch 10, s D <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 1 August 2024.

45 Australian Government Department of Foreign Affairs and Trade, 'Trans-Pacific Partnership Agreement (CPTPP)' (6 October 2015) chs 6–8, 16 and 28 <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents> accessed 1 August 2024.

diplomatic consultations.[46] The exclusions of major traditional and emerging areas of trade from dispute settlement may diminish the efficacy of these rules and consequently the actual level of liberalization and economic integration. They have arguably contributed to the longstanding preference for the WTO dispute settlement system. However, this preference may gradually disappear if the practice of 'appealing into the void' continues to increase.

The second factor pertains to some notable procedural deficiencies in the dispute settlement mechanisms of FTAs, particularly in relation to the lack of predictable and compulsory third-party adjudication, which causes delays and uncertainties.[47] For example, the dispute settlement mechanism under the NAFTA provided room for a responding party to block the composition of a panel, which was used by the US in several disputes.[48] Moreover, there was no automatic adoption of panel reports or formal mechanism to induce compliance.[49] While these deficiencies had incentivized governments to resort to the WTO dispute settlement system for years, they have been addressed in recent FTAs. For instance, the USMCA has fixed the issue related to the blockage of panel composition by allowing the complaining party to select panellists if its counterpart fails to do so.[50] Other major FTAs, such as the CPTPP and RCEP, have also incorporated similar mechanisms to avoid this issue.[51] In addition, compared to WTO dispute settlement rules, modern FTAs have created more sophisticated rules to provide detailed guidance on procedures, enhance transparency and third-party rights, and facilitate the settlement of disputes based on more efficient and flexible timelines, amongst other improvements.[52] Innovative approaches to inducing compliance or otherwise rebalancing rights and obligations have also been developed in recent FTAs.

46 Australian Government Department of Foreign Affairs and Trade, 'Regional Comprehensive Economic Partnership (RCEP)' (15 November 2020) chs 5–7, 12 and 13 <https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text> accessed 1 August 2024.

47 See Vidigal (n 42) 932–34; Marceau (n 43) 81.

48 See Vidigal (n 42) 932–34; Jenya Grigorova and Elli Zachari, 'Dispute Settlement in Free Trade Agreements as a Suggested Alternative to WTO Dispute Settlement' in Manfred Elsig, Rodrigo Polanco and Peter van den Bossche (eds), *International Economic Dispute Settlement: Demise or Transformation* (CUP 2021) 470, 484; David A Gantz, 'Settlement of State-To-State and Unfair Trade Disputes under the USMCA' in Gilbert Gagné and Michele Rioux (eds), *NAFTA 2.0: From the First NAFTA to the United States-Mexico-Canada Agreement* (Palgrave Macmillan 2022) 199, 204–05.

49 See Gantz (n 43) 1084–86; Marceau (n 43) 43–44.

50 USMCA (n 44) ch 31, clause 9.

51 CPTPP (n 45) ch 28, clause 9; RCEP (n 46) ch 19, clause 11.

52 For a detailed discussion of new generation of EU FTAs, see Furculiță (n 42) ch 6. See also Grigorova and Zachari (n 48) 470, 486–87.

For example, the CPTPP allows retaliation without prior authorization.[53] These improvements of procedural predictability and efficiency, if effectively applied in practice, would make FTA dispute settlement mechanisms more attractive than before, particularly given the ongoing problems with the WTO dispute settlement system.

The third factor concerns the stronger political influence that the WTO dispute settlement proceedings may generate compared to such proceedings under FTAs. This speaks to the benefit of the multilateral system in general, which can create pressure on compliance from a much wider community and, in turn, impose more significant reputational costs on parties that fail to implement a report.[54] Such reputational concerns were one of the key drivers behind the high record of compliance by major WTO Members, such as China.[55] However, the growing fragmentation of the WTO dispute settlement system may reduce the rigor of community pressure for compliance. This is not only because the growing practice of appealing into the void by major WTO Members tends to reduce reputational concerns. It also has to do with the possibility that governments may gradually lose interest in participating in WTO disputes.

The final factor relates to the significant body of case law developed by WTO tribunals over the past decades,[56] which provides enhanced predictability and certainties over the interpretation and application of trade rules, possible outcomes, ways for implementation, etc. While this may work against the WTO as a forum for settling disputes if FTA parties (particularly the complainant) want to avoid the creation of, or reliance on, precedent,[57] the value of WTO jurisprudence is widely recognized and extends beyond the system itself to shape the development of international trade law in general, including FTAs. Thus, the ongoing crisis in the WTO dispute settlement system, if left unresolved, is likely to undermine the role of the WTO as the multilateral authority in interpreting trade rules and lead to fragmentation in international trade law over time.

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53 CPTPP (n 45) ch 28, clause 20.

54 See Vidigal (n 42) 943.

55 See generally Weihuan Zhou, *China's Implementation of the Rulings of the World Trade Organization* (Hart Publishing 2019).

56 See Fernando Piérola and Gary N Horlick, 'WTO Dispute Settlement and Dispute Settlement in the "North-South" Agreements of the Americas: Considerations for Choice of Forum' (2007) 41(5) JWT 885, 891.

57 See Gantz (n 43) 1071 and 1090.

3.3 *An Ongoing Shift from WTO to FTAs for Settling Trade Disputes?*

The major reason why the absence of the Appellate Body can render the entire WTO dispute settlement system dysfunctional is the problem of appealing into the void. Since the appellate mechanism became paralysed from 10 December 2019, there have been more than 20 disputes in which responding parties (ab)used their right of appeal to effectively block the adoption of panel decisions, including major WTO Members such as the US, the EU, China, India, Indonesia, and South Korea.[58] This means that a majority of panel reports issued in this period were appealed.[59] While it is still possible for disputing parties to reach a mutually agreed solution after a notice of appeal is lodged, this has rarely occurred.[60] Comparatively, it has been more likely for parties to reach such a solution before panel reports are released.[61] In such circumstances, the panel rulings would not be made public, which suggests that a defaulting party may use its right of appeal for at least two strategic purposes: reducing reputational cost by preventing the circulation of adverse panel decisions and pushing the winning party to reach a mutually agreed solution so as to reserve the possibility of maintaining the WTO-illegal measures in question.

These ongoing challenges for the WTO dispute settlement system have adversely affected its predictability, certainty, and enforceability and consequently Members' faith in it. If one considers the factors that had incentivized governments to recourse to the system, as discussed in Section 3.2, these advantages may no longer exist and may arguably flow into the new generation of FTAs that have developed rules to improve their mechanisms and processes for third-party adjudication and implementation. The MPIA does not provide an adequate solution to this gradual loss of trust in the WTO system, largely because it only applies to a small number of Members and has not prevented the practice of "appeal into the void" in many disputes as noted

58 See WTO, 'Appellate Body' <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> accessed 1 August 2024.

59 See World Trade Law, 'WTO Panel Reports' <https://worldtradelaw.net/databases/wtopanels.php> accessed 1 August 2024.

60 *Saudi Arabia – IPRs* (DS567) has been an exception. See *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm> accessed 1 August 2024.

61 See eg *Canada – Measures Governing the Sale of Wine* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds537_e.htm>; *United States – Certain Measures on Steel and Aluminium Products*, <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds547_e.htm>; *India – Additional Duties on Certain Products from the United States* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds585_e.htm>; *China – Anti-dumping and Countervailing Duty Measures on Barely from Australia* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds598_e.htm> all accessed 1 August 2024.

above. Although disputes involving non-MPIA parties may be resolved based on the MPIA or similar processes, this is subject to the agreement of the disputing parties. Since its creation, the MPIA has been used to deliver appellate rulings and to induce implementation in only two disputes.[62] This does not deny the value of having such an interim appellate mechanism to maintain the effectiveness of the system among certain Members. However, it is important to realize that the MPIA, with its currently limited scope, will not be in the position to prevent declining faith in the utility of the system. The number of consultation requests since the Appellate Body crisis is telling. Between 2020 and 2023, the total number of such requests was merely 28 whereas there were 38 consultations in 2018 alone (i.e. the year before the crisis).[63]

At the same time, evidence on the growing use of dispute settlement mechanisms under FTAs has started to emerge. For example, Furculiță reported the EU's increasing recourse to dispute settlement mechanisms under its bilateral FTAs not only on issues that are not covered by WTO rules but also in disputes which could have been brought to the WTO.[64] High-profile disputes have been initiated and adjudicated under the USMCA within three years of its ratification in 2020, while the parties have not used the WTO for settling any of their disputes since then.[65] In contrast, CPTPP and RCEP parties have not resorted to their FTA dispute settlement mechanisms often enough to demonstrate a shift from the multilateral forum to regional and bilateral ones. In the case of the CPTPP, there has been one dispute which involved Canada's administration of its CPTPP dairy tariff rate quotas.[66] No disputes have been brought under RCEP, which came into effect only in January 2022. The CPTPP and

62 See *Turkey – Pharmaceutical Products* (n 13); *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*, WT/DS591/ARB25, Award of the Arbitrators (21 December 2022) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm> accessed 1 August 2024.

63 See WTO, 'Dispute Settlement Activity – Some Figures' <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm>; WTO, 'Chronological List of Disputes Cases' <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> both accessed 1 August 2024.

64 See Furculiță (n 42) 63–64.

65 See eg Joshua P Meltzer and others, 'USMCA at 3: Reflecting on Impact and Charting the Future' (19 July 2023) <https://www.brookings.edu/articles/usmca-at-3-reflecting-on-impact-and-charting-the-future/> accessed 1 August 2024; WTO (n 63).

66 See New Zealand Foreign Affairs & Trade, 'Current Disputes' <https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/current-wto-disputes/?m=379563#search:Y3BocHAgZGlzcHV0ZSBzZXRobGVtZW50> accessed 1 August 2024.

RCEP parties have brought disputes under the WTO since 2020, although not as regularly as before.[67]

Thus, while a clear shift from WTO to FTA dispute settlement is not yet evident, changes in that direction appear to be taking place. Although WTO Members pledged to find a way to make the system fully functional by 2024, whether the system can regain its integrity, legitimacy and efficacy will depend on how it can be reformed to garner support by at least a majority of WTO Members. More broadly, the system's continued relevance will also require further development of WTO rules to keep abreast of emerging issues and the advancement of rules in FTAs. Indeed, where an FTA has developed rules beyond the WTO rulebook, disputes based on these rules can only be addressed under the FTA. In short, fragmentation in international trade dispute settlement is not a mere speculation but an imminent challenge. This trend, if materialized, will further undermine the WTO as the leading forum for developing trade law and settling trade disputes.

4 Confronting Fragmentation

Fragmentation in international trade dispute settlement may come out of not only an increasing recourse to FTAs for settling disputes, but also an increasing use of the MPIA or the possible development of a formal plurilateral approach to resolve the ongoing disagreements on the appellate mechanism within the WTO. This fragmentation has different implications with regard to the substance of international trade law (Section 4.1) as well as the methods for settling disputes (Section 4.2).

4.1 *Case Law*

As far as trade law is concerned, interpretative fragmentation through growing recourse to FTAs or alternative mechanisms within the WTO for settling disputes would likely impact the coherence and predictability of international trade rules.

'Forum shopping' did occur in a few past trade disputes, such as *Brazil – Retreaded Tyres*, where similar rules were litigated under both FTAs and the WTO.[68] However, the current situation with the WTO dispute settlement system may lead to the redirection of trade disputes away from the WTO to FTA

67 See WTO (n 63).

68 See eg Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted 17 Dec. 2007); Jennifer Hillman, 'Conflicts between Dispute

tribunals at a much larger scale. Consequently, the influence of WTO case law on judicial decisions under FTAs may well diminish or even be reversed as an increasing number of disputes are diverted to FTA dispute settlement mechanisms or to alternative fora within the WTO.

Indeed, WTO case law and the resulting interpretations themselves are becoming less coherent. WTO panels have arguably deviated from established case law in recent disputes due to the lack of possibility for the parties to appeal the ruling to the Appellate Body.[69] In the two completed disputes based on the MPIA processes, the arbitrators have arguably not strictly followed the previous decisions of the Appellate Body.[70] Moreover, since arbitrators decisions are not formally adopted by the DSB, these decisions may not have the same precedential value as Appellate Body decisions (at least before the demise of the Appellate Body) and may not be applied in future disputes.

Furthermore, the increasing number of decisions rendered by FTA tribunals on matters that could have been brought to the WTO will also contribute to this fragmentation. Unlike WTO panels, FTA tribunals do not need "cogent reasons" to diverge from WTO case law[71] and may develop new interpretations on similarly worded provisions. For example, FTA tribunals may become more deferential to the policy space of governments in environmental regulation in light of the ongoing global effort to promote greener and more sustainable economies. Indeed, new interpretative approaches to balancing trade and non-trade values can be positive developments of trade law. However, the development of new approaches by different FTA tribunals is likely to cause inconsistency and hence fragmentation and uncertainty.

At the same time, as FTA tribunals are increasingly requested to interpret and apply WTO-plus or WTO-X provisions,[72] these judicial decisions can lead

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Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should the WTO Do?' (2009) 42(2) CILJ 193.

69 See Zhou (n 14); Weihuan Zhou and Mandy Meng Fang, "Unforeseen Developments' Before and After US – Safeguard Measure on PV Products: High Standard or New Standard?' (2023) 22(5) WTR 541.

70 See Zhou (n 14); WTO, 'Minutes of Meeting Held in the Centre William Rappard on 27 January 2023, WT/DSB/M/475' (13 March 2023) 14–15 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DSB/M475.pdf&Open=True> accessed 1 August 2024.

71 See Geraldo Vidigal, 'Living without the Appellate Body: Hegemonic, Fragmented and Network Authority in International Trade' (30 March 2019) 1, 27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343327> accessed 1 August 2024.

72 See eg Furculiță (n 42) 71–81; Vidigal (n 71) 21. For the distinction between WTO-plus and WTO-X rules, see Petros C Mavroidis, 'Always Look at the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today' (2011) 10(3) WTR 375, 381.

to the creation of case law that extends beyond the WTO jurisprudence. Here too, the issue is that tribunals under different FTAs may develop different interpretations which may not be adopted by tribunals under other FTAs or at the multilateral level in the future if similar rules are brought in under the WTO. In other words, this case law creation would not prevent trade law from fragmenting although it might be less problematic than the deviation from WTO jurisprudence on similar rules.

In short, as disputes are adjudicated by different tribunals within or outside the WTO, case law is likely to become increasingly fragmented due to diversion from established WTO jurisprudence. While this may lead to positive development of case law, it can also reduce the predictability of the system.

4.2 *Enforcement*

Regarding enforcement and implementation, the lack of a functional Appellate Body has already fragmented the ways in which decisions are expected to be implemented. In particular, there appears to be a shift from strict compliance by modifying or repealing WTO-inconsistent measures to more flexible approaches agreed upon by disputing parties to rebalance their rights and obligations. Despite the longstanding debate about the fundamental function of the WTO dispute settlement system concerning whether it is intended to induce compliance or merely rebalance rights and obligations,[73] in practice governments maintained an impressive record of compliance in the past decades, making compliance the preferred way to settle disputes.[74]

The Appellate Body impasse seems to have brought about a shift from that standard approach to dispute settlement and have led to a notable increase of pending disputes or disputes settled via diplomatic means.[75] This shift suggests a broader, systemic failure of the WTO as an institution to maintain its intended function to promote the settlement of disputes in a rules-oriented manner while minimizing the influence of power.[76]

The anticipated increase of disputes under FTAs may lead to similar outcomes, that is, trade disputes being resolved in more flexible ways rather than via strict implementation. As reported by the Asian Trade Centre, most disputes

73 See eg Judith Hippler Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90(3) AJIL 416; John H Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation' (1997) 91(1) AJIL 60.

74 See WTO, 'Dispute Settlement' <https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm> accessed 1 August 2024.

75 See World Trade Law (n 59).

76 See eg William J Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 17(3) JIEL 679, 685–87.

under FTAs have been resolved informally via diplomatic means, rendering implementation "always the weakest link for any trade deal".[77] This situation may well remain unchanged even under recent FTAs in which dispute settlement mechanisms have become more legalistic. For instance, Article 31.18(2) of the USMCA explicitly contemplates compliance as merely one of the ways to resolve disputes. Unlike WTO tribunals, USMCA panels did not always recommend that the defaulting party bring the measures at issue into conformity with its obligations.[78] However, this is not to suggest that FTAs with a legalistic and binding dispute settlement mechanism would not be able to induce compliance based on rules. Rather, it is to stress that the institutional failure of the WTO would lead to the diversion of the enforcement of trade rules and consequently increase fragmentation in how disputes may be resolved.

5 A WTO Plurilateral Appeal Mechanism

While there is an existing commitment of the WTO membership to deliver a fully functional dispute settlement system by 2024, key players remain widely divided on whether an appellate mechanism is desirable, and if it is, how it should be (re)constructed to address the known problems with the Appellate Body. Therefore, reaching a consensus will be difficult, and negotiations will take time. This means that the multilateral approach for amendments to existing WTO agreements, which was used to create the Agreements on Trade Facilitation and Fisheries Subsidies, would be unlikely to work. These agreements were added to Annex 1A of the WTO rulebook as amendments to existing Annex 1A agreements pursuant to the procedure envisaged in Article X:3 of the Marrakesh Agreement. This provision requires acceptance of amendments by two-thirds of the Members and provides room for these agreements to apply to signatories only. In contrast, amendments of the DSU (i.e. Annex 2), under Article X:8 of the Marrakesh Agreement, must be adopted

77 See Asian Trade Centre, 'Enforcement in Free Trade Agreements' (15 June 2023) <https://asiantradecentre.org/talkingtrade/enforcement-in-free-trade-agreements#:~:text=The%20problem%20is%20that%20governments,tend%20to%20be%20handled%20informally> accessed 1 August 2024.

78 See *Canada – Dairy TRQ Allocation Measures*, CDA-USA-2021-31-010, Final Panel Report (20 December 2021) <https://ustr.gov/sites/default/files/enforcement/USMCA/Canada%20Dairy%20TRQ%20Final%20Panel%20Report.pdf>; *United States – Automotive Rules of Origin*, USA-MEX-CDA-2022-31-01, Final Report (14 December 2022) <https://ustr.gov/sites/default/files/enforcement/FTA/USMCA%2031/USMCAAutomotive%20ROO.pdf> both accessed 1 August 2024.

by consensus and, once adopted, apply to all Members. Thus, the amendments procedure contemplated in Article X:8 precludes the possibility of developing an instrument to amend the DSU for it to become a plurilateral agreement on a revised appellate mechanism that applies to a subset of WTO Members.

How can a plurilateral approach be pursued to maintain an appellate mechanism in a way that overcomes fragmentation issues? Discussions have already taken place in this space. For example, some has proposed an opt-out arrangement whereby Members are given the option to decide to either opt into an appeal system with a standing Appellate Body or opt out of it but agree not to appeal panel decisions.[79] While this arrangement may address the issue of appealing into the void, it may not be an adequate solution to the fragmentation in trade law and enforcement discussed above. In any event, such an arrangement requires a plurilateral agreement to be established in the first place. Below, we set out two major approaches to establish such an agreement: a closed plurilateral or a critical mass-based, open plurilateral.

The former is essentially based on Article X:9 of the Marrakesh Agreement, which provides room for Members to establish a plurilateral agreement on specific matters as an addition to Annex 4 of the WTO rulebook. One problem with this approach is that the addition of such an agreement is subject to approval by the whole membership. Thus, such a plurilateral cannot become a formal WTO agreement without consensus. Another problem is that even if consensus is reached, this plurilateral applies to signatories only, meaning that non-signatories will not have access to the revised appellate mechanism contemplated therein. Consequently, such a closed plurilateral is unlikely to resolve the fragmentation issues.

The latter, which we advocate, has received growing attention and support by trade scholars and policymakers alike as a desirable alternative to multilateral negotiations within the WTO.[80] As noted earlier, this critical mass-based,

79 See eg Wenhua Ji, 'From Confrontation to Coexistence: An Appeal Opt-out Arrangement as An Inclusive Approach to Revive the WTO Dispute Settlement System?' (2024) 58(2) JWT 177.

80 See eg Bernard Hoekman and Petros Mavroidis, 'WTO "à la carte" or "menu du jour"? Assessing the Case for More Plurilateral Agreements', (2015) 26(2) EJIL 319; Adlung and Mamdouh (n 20); Axel Berger and others, 'Improving Key Functions of the World Trade Organization: Fostering Open Plurilaterals, Regime Management, and Decision-Making' (15 December 2020) <https://www.global-solutions-initiative.org/policy_brief/improving-key-functions-of-the-world-trade-organization-fostering-open-plurilaterals-regime-management-and-decision-making/>; Sait Akman and others, 'Making Plurilateral Initiatives Work for All: Reforming the WTO through Inclusive and Development-Friendly Approaches' (May 2023) <https://dgap.org/system/files/article_pdfs/T20PolicyBrief_May2023_WTO.pdf> both accessed 1 August 2024.

open plurilateral approach is used to move forward negotiations on several high-profile contemporary issues, such as digital trade and investment facilitation. A "critical mass" is required to ensure this plurilateral includes all major players in the sector concerned so as to reduce the risk of free riding by non-participants.[81] The "open" requirement has three major elements: the negotiation is open to all Members; the outcomes/benefits are extended to non-participants on an MFN basis; and the agreement is open for accession by non-participants without discrimination.[82] These requirements are also intended to ensure that such plurilaterals would constitute stepping stones, rather than stumbling blocks toward multilateralism. Importantly, such plurilaterals are arguably not constrained by the requirement of consensus and can be developed by like-minded Members "without adoption by the entire membership."[83]

Given the difficulties in reaching a consensus on the future of the WTO's appellate mechanism, a critical mass-based, open plurilateral provides a viable and sensible way to reform the existing mechanism. To maintain the integrity and predictability of the global trading system and reduce fragmentation, restoring the WTO's authority is key.[84]

For the WTO to regain its authority in interpreting and enforcing trade rules, a plurilateral appeal mechanism will need to involve a majority of WTO Members or at least the major users of the dispute settlement system. This "critical mass" is absent under the MPIA, as noted in Section 2. Nevertheless, given the longstanding support for reappointing Appellate Body judges by a majority of WTO Members (including major users of the dispute settlement system which are non-signatories of the MPIA),[85] it is possible that they would also support the establishment of an alternative standing appellate mechanism.

81 See Adlung and Mamdouh (n 20) 5; Berger and others (n 80) 6.

82 See Berger and others (n 80) 7.

83 See Adlung and Mamdouh (n 20) 8.

84 The lack of multilateral authority has been the central cause of the ongoing fragmentation in the international investment system. International investment law emerged through the conclusion of a myriad of mostly bilateral investment treaties. While these treaties had similar provisions, their interpretation by arbitral tribunals has been remarkably different despite the effort to enhance coherence in recent years. Moreover, since the decisions of arbitral tribunals were not subject to appeal, they were free to interpret anew treaty provisions in each dispute. See Colin M Brown, 'The Contribution of the European Union to the Rule of Law in the Field of International Investment Law Through the Creation of a Multilateral Investment Court' (2022) 27(1–3) ELJ 96.

85 See one of the latest joint submissions by 129 Members to the Dispute Settlement Body at WTO, Dispute Settlement Body, 'Appellate Body Appointments', WT/DSB/W/609/Rev.26 (6 September 2023).

The current MPIA parties may propose and lead such a plurilateral initiative for negotiation which should be open to all Members. Here, Article 25.2 of the DSU arguably provides the textual hook to do so. It provides that "resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed." This could be used to create a plurilateral standing appeal arbitration mechanism between parties instead of signing one off agreements for each dispute as is the case with the MPIA.

This plurilateral should also be designed as a lasting agreement which not only develops systemic solutions to the existing problems with the Appellate Body but also reconstructs an appellate mechanism that can be built into the ongoing negotiations to reform the WTO dispute settlement system more broadly.[86] Accordingly, the goal is to enshrine the plurilateral in the multilateral package for the dispute settlement system reform while providing a binding appellate mechanism before the multilateral negotiations conclude.

While the initiative proposed above would be sub-optimal when it remains plurilateral, it would still be more inclusive than any FTAs and more institutional than the MPIA and therefore more likely to develop the required authority. It could be clarified that interpretations developed by this plurilateral appeal system should have guiding value for WTO panels, even though some WTO Members might not be part of the mechanism.

This mechanism should be open for non-participants to use so as to maximize its utility and influence and facilitate its expansion towards a multilateral framework over time. It could be open in the sense that non-parties could elect to join for a specific dispute at the early stage of the proceedings on a reciprocal basis. However, to discourage the practice of "appealing into the void", this mechanism, and the benefits derived from it, should not be made available to Members continuing that practice. If a non-party chooses to use the appeal mechanism against a party, then it must commit not to appeal into the void in future disputes. If the non-party fails to do so, then it will be denied access to the plurilateral mechanism and will be subject to retaliation by the parties by way of the parties "appealing into the void" in future disputes with the non-party. Over time, the combination of these two elements, i.e. denial of access and retaliation, can prevent non-cooperative Members (that continue the practice of "appealing into the void" and block the restoration of an appellate mechanism) from enjoying any benefit under the WTO dispute settlement system. Accordingly, they can effectively dissuade the practice of "appealing into the void" while inducing participation in the plurilateral mechanism. This

86 See WTO, Special Meeting of the General Council, Report by Chairman of the DSB, JOB/GC/385 (dated 16 February 2024).

mechanism should also include language to reinforce the position that compliance remains the preferred way for settling disputes, although participants are given the flexibility to resolve disputes in a non-adjudicative fashion.

To address the criticisms of the Appellate Body, this plurilateral system should take on board some of the creative approaches experimented with by MPIA tribunals to avoid delays or rulings unnecessary for the resolution of disputes (amongst other improvements). Of utmost importance is perhaps the need to ensure that the power to develop trade rules is strictly grasped in the hands of WTO Members. This would require mechanisms which provide Members the room to exercise necessary political oversight, particularly where the issue of judicial overreach arises.[87] In this regard, the authoritative interpretation mechanism contemplated under Article IX.2 of the Marrakesh Agreement can of course be applied but alternative thinking might be needed. Thus, additional options for the plurilateral appeal system to deal with difficult issues which judicial interpretation cannot resolve (i.e. even after applying supplementary means of interpretation) or are too politically sensitive such as national security must be provided for. For example, the possibility for this new system to declare a *non liquet* could be contemplated, potentially with the addition that, when a *non-liquet* is declared, WTO Members must resolve the matter by consensus within a prescribed timeframe or else proceed on the basis of a majority vote.[88] Given the controversies over the role of *non liquet* in international adjudication,[89] this approach must be set out expressly in the plurilateral agreement. Towards this end, it should be noted that these legislative fixes would not resolve the deeper legislative deficit caused by the failure of the Members to conclude negotiations of WTO reform and modernizations. Nevertheless, they would to some degree alleviate the pressure put on the WTO dispute settlement system resulting from the institutional imbalance between its legislative and judicial functions.[90]

To sum up, the above proposed plurilateral approach to re-establish an effective appellate mechanism at the WTO fits nicely the ongoing attempt to find an alternative path to address contemporary trade-related challenges under

87 For discussions of the issue of judicial overreach and some solutions, see generally Weihuan Zhou and Henry Gao, '"Overreaching" or "Overreacting"? Reflections on the Judicial Function and Approaches of WTO Appellate Body' (2019) 53(6) JWT 951.

88 Peter Holes & Sunayana Sasmal, 'To Judge or Not to Judge: Non Liquet in WTO Adjudication', (2024) UKTPO Working Paper.

89 See eg Joel Trachtman, 'The Domain of WTO Dispute Resolution', (1999) 40 Harv Intl L J 333, 341–42.

90 Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' (2008) 53(4) ICLQ 861.

the multilateral framework. While a plurilateral mechanism will still leave room for the development of fragmentation in trade law and enforcement, it is 'the next-best solution'[91] in the current state of multilateral negotiations and should be designed in ways that reduce such fragmentation and as a step towards restoring multilateralism.

6 Concluding Remarks: Is Predictability Needed?

Fragmentation in international trade dispute settlement is on the rise. This ongoing trend did not come from the longstanding proliferation of FTAs itself (since FTA dispute settlement mechanisms were strikingly underutilized). Rather, it emerged from the recent impasse in the WTO's dispute settlement system which has long served as the multilateral authority in the global trading system. While the MPIA is arguably not a typical plurilateral, it leads to fragmentation in dispute settlement. This has been further exacerbated by the recent increase in disputes initiated under FTAs. This growing fragmentation within and outside the WTO's dispute settlement system is causing a diversion of the application and development of case law, undermining the established authority of the WTO. Fragmentation also leads to a diversion in how decisions are expected to be implemented, particularly from compliance to other ways of resolving disputes.

The MPIA, in its current form and coverage, cannot properly address these fragmentation issues. Instead, a critical mass-based, open plurilateral approach provides a viable and sensible way to rebuild an effective appellate mechanism under the WTO. For the WTO to regain its authority, this plurilateral mechanism must involve a majority of WTO Members or at least the major users of the dispute settlement system. It must be designed in a way that addresses fragmentation issues, thereby enabling the re-establishment of a desirable level of consistency and predictability in international trade law and its enforcement. This approach is consonant with the ongoing efforts by WTO Members to tackle contemporary trade-related challenges through plurilateral initiatives within the multilateral framework.

Having come to that conclusion, we leave a more fundamental question for further deliberation. That is, should predictability be the end goal? Here, some reflections on international investment law are useful. As mentioned above, the lack of a multilateral agreement and an appellate mechanism in

91 Cf Dimitropoulos, Chen and Chaisse (n 21).

international investment law has long been seen as a main cause of the fragmentation of this branch of international law, leading to its inconsistent and unpredictable application by arbitral tribunals. This lack of predictability has been perceived as highly problematic as governments are left in the dark as to whether their policies and actions would be in line with international investment law. This increases the risk of disputes with investors and violations of international investment law which may result in hefty awards against governments. To address the issues of unpredictability, the EU has recently pushed for the establishment of a multilateral investment court to build certain level of coherence into the development of case law. Such a development would be welcome in investment law as predictability is needed for governments to avoid regulatory "chill" or paying substantial amounts of damages to investors.

However, whether predictability is equally necessary in international trade law requires further discussion. Under the WTO and FTAs, a defeated party in a dispute does not need to pay damages to the successful party. Ideally, it must withdraw the inconsistent measure or amend it to eliminate illegality. If the defeated party does not abide by the ruling, it may be subject to trade retaliation in the future. In other words, no retroactive remedy or damage is available for violations of international trade law. As such, the consequences of a less predictable international trading system might not be as severe as for international investment. On the contrary, a less predictable international trading system might provide more room for trial and error by governments in developing new measures, particularly when tackling emergent issues such as protecting the environment, labour rights, and economic security. Indeed, a less predictable system might provide opportunities for governments to explore new policies, knowing that the consequences of violating the rules would only be prospective.

The discussion on this point boils down to the rationale for the international trading system. Is it a system of rules regulating states' behaviours or merely a system to defuse tensions and resolve disputes? If the former is preferred, as seems to be the case for certain players such as the EU and China, then an appeal mechanism within the WTO would be necessary. If the latter prevails, as appears to be the case in the US, then abandoning any form of appeal system might not be that terrible in the end. A concerted solution, however, will have to be a compromise that reflects both of the positions. This means that the WTO's appellate mechanism, if successfully maintained, will need to strike a delicate balance between predictability and flexibility.