



# The Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and the Rule of Law under Geopolitical Tensions in Asia Pacific —Japan, Australia and China—

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# AB Crisis and DS Reform at WTO: Status quo

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- AB has been dysfunctional for more than four and three-quarter years since Dec. 2019
  - Currently 29 cases have been appealed into the void
- DSU reform at MC 13
  - Agreement only on continuation of work
  - No draft on appeal stage in the Morina text

# The appeal system is indispensable for us

- Middle powers can't and won't play the power game
  - Rule-based multilateral trading regime remains essential
- Japan made successful achievement in DS and AB
  - Obtained 13 positive decisions out of 14 appeals (*see Appendix*)
  - Saved by AB's "overreach" in trade remedy cases against the US, including,
    - *U.S.-CDSOA ("Byrd Amendment") (DS217)*
    - *U.S.–Steel Safeguards (DS249)*
    - *U.S.–Zeroing (Japan) (DS322)* etc...



# Reality of geopolitics: Trade and security

- US infinite expansion of ‘national security’ in trade
  - Steel & aluminum, semiconductors, EV
  - Human rights measures (UFLPA, ERA, US-HK Act)
- China’s economic coercion
  - Both Japan and Australia have faced it in recent years
- Role of AB and WTO DS
  - Clarify the security exceptions (GATT art. XXI)
    - GATT art. XXI is not “incantation” (*Russia – Traffic in Transit* (DS512))
  - Condemn unilateral coercive measures

# What should we do?: Message from WTO Public Forum

- “Era of the third country”
  - Cooperation among “middle powers” or “silent majority” is key to keep the open and multilateral trading system alive
  - Time to say “Lead, follow, or get out of the way!” to the U.S. (Posen@PIIE)
- Another four-year interregnum of AB?
  - Whether it's Harris or Trump, the US will have little appetite for AB reform
  - Never be afraid do the right thing even without the US

# So here comes MPIA!!

- What is MPIA?
  - Alternative appeal system substituting the defunct AB
  - Established in Apr. 2020
  - Parties: 54 WTO members including Japan, Australia, Canada, China, EU and its members
  - Two final reports have been issued so far
    - *Turkey–Pharmaceutical* (DS583)
    - *Columbia–French Fries AD* (DS591)
- Procedure
  - Use of the arbitration procedure under DSU art. 25
  - No appeal into the void, recourse to MPIA instead
  - Arbitration is essentially in accordance, *mutatis mutandis*, with current DSU and other rules for appellate review
  - Arbitrators: a pool of 9 experts



# Why does Japan need MPIA?

- Japan joined MPIA in Mar. 2023
- Japan's Special Situation
  - Interdependence with China
    - China has been the Largest trading partner since 2007
    - Tangled web of supply chains in China
  - China weaponizes this interdependence
    - Import ban on seafoods
    - Export restrictions on rare metals (antimony, gallium, germanium, graphite)
- Need for a DS forum involving both Japan and China
  - Success in *China – Stainless Steel (DS601)*, preventing China from appeal the case into the void

# Australia's successful experience

- Australia faced China's economic coercion
  - Triggered by the PM Morrison's demand for COVID-19 investigation in 2020
  - Import restrictions on beef, lumber etc./Imposition of ADD/CVD
- WTO system helped Australia tackle the problem
  - Australia successfully found alternative markets and sources under the free trade regime (Laurenceson & Armstrong 2023)
- MPIA is a part of its policy toolkit
  - Enabled Australia to bring WTO cases against China, resulting in mutually-agreed solution w/o panel reports
    - *China – Barley* (DS598)
    - *China – Wine* (DS601)



# Implication for G7 cooperation

- G7 Hiroshima Summit and G7 Osaka-Sakai Trade Ministerial

“We will continue our joint efforts, including at the WTO, to address economic coercion, ensure rapid information sharing, and collectively explore responses, as appropriate and in line with our respective legal systems and in conformity with international law.” (G7 Trade Ministers’ Statement, Oct. 29, 2023, emphasis added)

- MPIA is an effective policy option "consistent with international law"

- Anti-coercion measures

- Risk to undermine stability of multilateral trading system in a long run

- “G7+A” collective countermeasures (Cha@CSIS)

# MPIA: Pros and Cons

- Criticism
  - “Bad” (Hilman 2018)
    - Going to MPIA arbitration leads to giving up AB
    - Unclear binding effect of award without adoption by DSB
  - “Constitutional birth defect” (Gao 2021)
    - Prohibition to appeal to the AB is inconsistent with DSU
    - Members should appoint new AB members at General Council by majority vote
- MPIA is no perfect, but...
  - The only viable and realistic alternative: Is it wise to leave the current rule-of-law vacuum in place?
  - Just a temporary solution: Notwithstanding the MPIA, a fully functioning and permanent DS system is essential for all WTO members

# Remaining issues

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- To make MPIA successful
  - Expand MPIA membership: India, Korea, UK, and ASEAN economies
  - Continue to update and improve the rule
- How can we manage a dispute with the US w/o AB and MPIA?
- But most importantly...
  - How can we Expedite DS reform in Geneva?



# Appendix

## Japan's Achievements in WTO Disputes

	Cases (on a DS no. basis)	Panel (Appellate Body) Reports	Cases won <sup>*</sup>
Cases as complainant	28	21 (14)	20 (13) <sup>†</sup>
those brought to compliance review	1	1 (1)	1 (1)
Cases as respondent	16	5 (4) <sup>#</sup>	1 (0)
those brought to compliance review	1	1 (0)	0 (0)

- <sup>\*</sup> = Cases in which any one of Japan's claims was accepted as a complainant and no violation was found as a respondent.
- <sup>#</sup> = A panel report for a mutually agreed solution in DS323 is NOT included.
- <sup>†</sup> = The case where Japan lost both in panel and appeal stage is DS244.

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