From Confrontation to Coexistence: An Appeal Opt-out Arrangement as an Inclusive Approach to Revive the WTO Dispute Settlement System?

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Resolving the crisis in the dispute settlement system is a priority issue for the reform of the World Trade Organization (WTO), and Members have made sustained efforts in this regard. Since the Twelfth Ministerial Conference (MC12), discussions on the dispute settlement system have entered a new phase, focusing on facilitator-organized meetings and proposals from Members. The reform negotiations have made some progress, but still face a number of significant challenges, in particular with regard to the appellate procedures. It is highly uncertain whether a comprehensive solution can be reached by 2024 as mandated by the MC12. Taking into account the different positions of Members and the imminent approach of the Thirteenth Ministerial Conference (MC13), this paper recommends that Members show more pragmatism and flexibility, puts forward a compromise proposal to establish a multilateral arrangement that would allow Members to opt out of the appellate review process under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and argues that this could be conducive to restoring a fully and well-functioning dispute settlement system.

Keywords: WTO, Appellate Body Crisis, Dispute Settlement Reform, Opt-out Arrangement

1 INTRODUCTION

The reform of the World Trade Organization (WTO) is of great concern for the international community and has a crucial bearing on the future of the multilateral trading system. While there are many topics to address during the WTO reform, Members generally view resolving the crisis in the dispute settlement system as the top priority. Progress in this area also serves as an essential indicator for the development of the rule of law and the maintenance of a rule-based system in the international trade arena.

Since mid-2017, when the United States (US) blocked the initiation of the selection process for the appointment of new Appellate Body (AB) members for the first time, Members have made persistent efforts to address the US concerns.

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However, the overall result has not been satisfactory, as the AB remains unrestored and the crisis continues. The Twelfth WTO Ministerial Conference (MC12), held in June 2022, produced a relatively positive outcome and formally committed to engaging in discussions concerning the reform of the dispute settlement system. As such, the negotiations can therefore be considered to have entered a new phase. More than a year has passed since MC12 and there is a growing interest in the progress of the dispute settlement reform negotiations. The purpose of this paper is to examine the evolution and prospects of the negotiations, and what Members might do if the crisis is not resolved. Section 2 discusses the progress of the negotiations so far and the possible core content of the negotiations, using some of the US proposals as an example. Section 3 analyses the main challenges and prospects for the dispute settlement reform negotiations. On this basis, section 4 proposes an inclusive proposal as a compromise alternative to help break the possible deadlock on the appeal issue in the negotiations.

2 PROGRESS: THE NEW STAGE OF NEGOTIATIONS ON THE DISPUTE SETTLEMENT SYSTEM REFORM

Since its establishment in 1995, the dispute settlement system of the WTO has been widely considered successful in resolving a significant number of trade disputes between its members.[1] It has made an essential contribution to improving the stability and predictability of the multilateral trading system. However, the US has blocked the initiation of the selection process for the AB members since 2017, leading to the gradual paralysis and final hibernation of the AB.[2] As a result, the AB currently exists nominally, with no operations as of the end of 2020.[3]

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1 As of 31 Jul. 2023, a total of 617 disputes were submitted to the WTO dispute settlement system. In the original proceedings, the Dispute Settlement Body (DSB) has set up a total of 316 panels, adopted 202 panel reports and 124 AB reports. In the Art. 21.5 compliance proceedings, the DSB established a total of 56 panels, adopted 36 panel reports and 26 AB reports. In addition, the relevant arbitral tribunals rendered 38 decisions on the reasonable period of time for enforcement and 27 decisions on the level of retaliation. The DSB, which oversees WTO dispute settlement activities, met more than 480 times during this period. *Also see* WTO: *Dispute Settlement Activity – Some Figures*, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (accessed 1 Aug. 2023).

2 On 11 Dec. 2019, with the expiry of terms of the two AB members, there are fewer than three AB members to compose a division to hear the case, so the AB suspended its work on new appeals due to the lack of a quorum.

3 On 30 Nov. 2020, the term of the last AB member came to an end, and there has been no incumbent member since then.

2.1 Members made endeavors but were unable to deliver outcomes

In the view of the vast majority of WTO Members, the paralysis of the AB not only seriously damages the WTO dispute settlement mechanism, but also threatens the entire multilateral trading system. In response, many Members have made tremendous efforts to address the AB crisis:

First, there have been persistent calls in the Dispute Settlement Body (DSB) of the WTO to resume the selection of the AB members. In November 2017, for the first time, twenty-seven Members formally submitted a proposal to the DSB for a decision to start the selection process to fill the AB vacancies,[4] and the proposal was rejected by the US at the DSB meeting. The proponents continued their efforts at almost every subsequent DSB meeting. At the DSB meeting on 26 October 2023, the sixty-eighth requests to initiate the selection of AB members was made by 130 supporting Members, while the US maintained its opposition as before.[5]

Second, efforts to clarify the rules and address the concerns of the US were made, but ultimately failed. As authorized by the WTO General Council, New Zealand's Ambassador David Walker initiated informal consultations with Members in early 2019 to seek workable and agreeable solutions to improve the functioning of the AB and avoid the impending deadlock. A comprehensive text entitled 'Draft General Council Decision on Functioning of the Appellate Body' (also known as the 'Walker Text'),[6] the result of almost a year of consultation and discussion, was submitted to the General Council by Ambassador Walker for consideration in October 2019. Regrettably, these collective efforts did not succeed in appeasing the Trump Administration, and the US formally vetoed the Walker Text at the General Council on 9 December 2019.[7] Structured discussions aimed at finding a solution to the AB crisis through clarification of the rules seem to have receded to a low ebb in the WTO since then.

Third, some Members have been actively exploring alternative means to maintain the availability of appeal review pursuant to Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The first bilateral arrangement was notified by Canada and the European Union (EU) on 25 July 2019.[8] In March 2020, the EU, China and other Members

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4 *See* WTO, *Appellate Body Appointments*, WT/DSB/W/609, 10 Nov. 2017. By the end of May 2023, the proposed decision had been co-sponsored by 129 members (WT/DSB/W/609/REV.25).

5 *See* WTO, *WTO Panel to Review US Anti-dumping Duties on Tubes and Pipes from Argentina* (26 Oct. 2023), https://www.wto.org/english/news_e/news23_e/dsb_26oct23_e.htm (accessed 28 Oct. 2023).

6 *See* WTO, *Draft General Council Decision on Functioning of the Appellate Body, Informal Process on Matters Related to the Functioning of the Appellate Body-Report by The Facilitator*, JOB/GC/222 (15 Oct. 2019).

7 *See* WTO, *General Council – Minutes of Meeting – Held in the Centre William Rappard on 9-10 December 2019*, WT/GC/M/18, at 22.

8 *See* Interim Appeal Arbitration Pursuant to Art. 25 of the DSU, JOB/DSB/1/Add.11, 25 Jul. 2019.

concluded a Multi-Party Interim Appellate Arbitration Arrangement (MPIA)[9] pursuant to Article 25 of the DSU, which temporarily provides an institutional appeal mechanism for cases between signatory Members. To date, the number of participants in the MPIA has grown to twenty-six (involving fifty-three WTO Members).[10] There have also been instances of recourse to Article 25 of the DSU through ad hoc appellate arbitration agreements on a case-by-case basis.[11]

It's worth noting that the above efforts were parallel, but not overlapping, with the common goal of restoring the normal functioning of the AB while putting pressure on the US. Because of the differences in positions and demands, it has often been the case that the discussions or debates on the restoration of the AB have taken place between a large number of Members collectively as one side and the US as the other side. Even though the US is the most influential member in the WTO, and even though the US has made a number of allegations against the AB to justify its refusal to start the AB selection process,[12] the lopsided situation is inevitably doing considerable damage to its international reputation and leadership. After the Biden administration took office in early 2021, the US still refused to fill the AB vacancies. This led to the prolongation of the AB crisis to the present day.

2.2 The mandate of the 12th ministerial conference (MC12) started a new phase

The MC12 in June 2022 delivered a number of outcomes, including an important one on the dispute settlement system. Paragraph 4 of the MC12 Outcome Document reads:

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[9] On 27 Mar. 2020, sixteen WTO Members, including the EU and China, issued a joint ministerial statement, deciding to establish a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) at the WTO. On 30 Apr., the text of the MPIA was formally communicated to the Dispute Settlement Body. The MPIA will enter into force upon notification to the WTO. *See* Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Art. 25 of the DSU, JOB/DSB/1/Add.12, 30 Apr. 2020.

[10] With respect to participants in the MPIA, there are currently 26 Members: Australia, Benin, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, EU, Guatemala, Hong Kong, China; Iceland, Japan, Norway, Macao, China; Mexico, Montenegro, New Zealand, Singapore, Nicaragua, Pakistan, Peru, Switzerland, Uruguay, Ukraine. If the twenty-seven Member States of the EU are also included, there are currently fifty-three participants. *See* Geneva Trade Platform, *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, https://wtoplurilaterals.info/plural_initiative/the-mpia/ (accessed 2 Aug. 2023).

[11] *See* Agreed Procedures for Arbitration under Art. 25 of the DSU, *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products (DS583)*, WT/DS583/10 (25 Mar. 2022).

[12] *See* United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (accessed 15 Jul. 2023).

> [W]e acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the AB, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.[13]

This was the first time since the complete paralysis of the AB at the end of 2020 that WTO Members reached an outcome with a clear timeframe and objective regarding the dispute settlement mechanism, and such a formal mandate also marks the beginning of a new phase of discussions on the reform. It is understood that the language in paragraph 4 of the MC12 Outcome Document did not come out of nowhere during the MC12 in Geneva, but first emerged as a result of bilateral discussions between the US and China at the end of October 2021, shortly before the MC12 originally scheduled in late November 2021,[14] and was finally accepted by other Members and included in the 2022 MC12 Outcome Document. This evidenced that when China and the US worked together in a cooperative way, positive results could be achieved even on difficult issues. Moreover, to some extent, this also indicated that the US, as the 'maker' of the AB crisis, had gradually shown a change of strategy and attitude on how to resolve the dispute settlement system impasse since late 2021. Coincidentally, after the new US Ambassador to the WTO took office in March 2022, the US took the initiative in April 2022 to convene informal, closed-door brainstorming meetings in Geneva with the participation of a handful of Members on the dispute settlement system.[15]

It appears that WTO Members did not enter into formal negotiations immediately after the MC12, as the US-led brainstorming process continued until the end of 2022.[16] Meanwhile, Members expressed more interest in returning to the formal WTO framework to advance concrete discussions and move towards possible text negotiations.[17]

Information regarding the progress after the US-led brainstorming stage was officially revealed during the DSB meeting held in March 2023. At this meeting,

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[13] *See* WTO, *Mc12 Outcome Document*, WT/MIN(22)/24 (17 Jun. 2022), https://www.wto.org/english/theWTO_e/minist_e/mc12_e/mc12_e.htm#outcomes (accessed 15 Jul. 2023).

[14] The 12th Ministerial Conference (MC12) was originally scheduled to start on 30 Nov. and run until 3 Dec. 2021. *See* WTO, *General Council Decides to Postpone MC12 Indefinitely* (26 Nov. 2021), https://www.wto.org/english/news_e/news21_e/mc12_26nov21_e.htm (accessed 15 Jul. 2023).

[15] *See* Mission of the US, *Statement by Ambassador Maria Pagán at the WTO Dispute Settlement Body Meeting* (27 Apr. 2022), https://geneva.usmission.gov/2022/04/27/us-statement-by-ambassador-maria-pagan-at-the-WTO-dsb-meeting/ (accessed 15 Jul. 2023).

[16] *See* Inside US Trade, *U.S. Continues Block on Appellate Body Nomination Restart* (26 Oct. 2022), https://insidetrade.com/trade/us-continues-block-appellate-body-nomination-restart (accessed 15 Jul. 2023).

[17] *See* Inside US Trade, *After Months of Informal Talks, WTO Members Push for 'Mainstreaming' Dispute Reform Negotiations* (28 Dec. 2022), https://insidetrade.com/daily-news/after-months-informal-talks-WTO-members-push-'mainstreaming'-dispute-reform-negotiations (accessed 15 Jul. 2023).

Mr Marco Molina, Deputy Permanent Representative of Guatemala to the WTO, gave a personal report on his role as the facilitator of the dispute settlement reform.[18] Because the discussions since 2022 have been conducted primarily in closed-door meetings, this report marked the first publicized disclosure of the developments that have arisen as a result of the MC12 mandates regarding the dispute settlement reform negotiations. From this report, it is known to the public that the negotiations were organized in a structured but informal manner by a facilitator, and that the aim was to identify agreeable issues by the August break and to conclude text drafting by the end of 2023. At the 2023 July DSB meeting, Mr Molina made the second report indicating that consensus had been reached on the majority number of issues, enabling text drafting to commence in September but conceptual differences still exist between Members on a few highly sensitive issues.[19] In the facilitator's third report on 26 October 2023, it was told that Members were about to finalize the first review of a consolidated draft text, and the consolidated draft text continued to evolve.[20] The outlook for the negotiations seems optimistic after an initial reading of these reports.

2.3 The primary focus of the dispute settlement reform negotiations exemplified by some of the US proposals

Given the significance of the dispute settlement reform, it is likely that plenty of WTO Members will seize this opportunity to propose their ideas and requests. According to the facilitator's report in March 2023, over seventy proposals were put forth, indicating the high level of engagement and interest in the reform negotiations.[21] Besides concept proposals tabled to the facilitator, the position statements or declarations of major Members during the same period

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[18] The facilitator reported that he had over 40 bilateral meetings with delegates and regional coordinators representing more than 130 WTO members. Seventy proposals have been received from members. The expectation is to include agreed solutions in a 'green' table before the summer break which will serve as the basis to start a drafting exercise when WTO members come back from their summer break and concluding before the end of the year. *See* WTO, *Members Briefed on Informal Dispute Settlement Reform Talks* (31 Mar. 2023), https://www.wto.org/english/news_e/news23_e/dsb_31mar23_e.htm (accessed 15 May 2023).

[19] According to the facilitator report, Members have reached an understanding on 80% of the issues under consideration, which are now ripe to move to the drafting process. Half of the issues in the remaining 20% are close to reaching the level of maturity needed for the drafting process, while the other half of that 20% refers to highly sensitive issues for which members still hold different conceptual views about how to tackle them. *See* WTO, *Discussions Concerning Dispute Settlement Reform* (28 Jul. 2023), https://www.wto.org/english/news_e/news23_e/dsb_28jul23_e.htm (accessed 2 Aug. 2023).

[20] *See* WTO, *Discussions Concerning Dispute Settlement Reform* (26 Oct. 2023), https://www.wto.org/english/news_e/news23_e/dsb_26oct23_e.htm (accessed 30 Oct. 2023).

[21] *See* Washington Trade Daily, *New Process for DSB Reform Talk* 5–7 (3 Apr. 2023).

were also noteworthy. For example, the EU said it 'supports reforms that maintain the core features of the dispute settlement system',[22] and China proclaimed it 'encourages all Members to focus on the core issues in an open and flexible manner, while maintaining the core features of the dispute settlement system'.[23] These statements, which all emphasize the term 'core features', may not be coincidental, but have some implicit meaning, arguably serving as both a precaution to and a defence against the possible request of the US. From an objective point of view, Members recognize that the critical issues in the dispute settlement reform negotiations inevitably revolve around the proposals made by the US, in particular on the appellate procedure, which are of concern not only to Members but also to the wider international trade and law community.

In fact, the ongoing dispute settlement reform negotiations, like many other WTO negotiations, are routinely conducted in informal and closed manner, and no documents or negotiating records are publicly available for research and analysis. Nevertheless, occasional press reports or releases regarding the progress of the dispute settlement negotiations have surfaced,[24] at least providing usable, though perhaps not always reliable, materials for comprehending some fundamental US demands that lie at the heart of, and could determine the fate of, the entire dispute settlement reform negotiations. Based on a synthesis of available information,[25] the core demands of the US may include addressing the following issues:

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[22] EU Mission to the WTO, *EU Statements at the Regular Dispute Settlement Body Meeting* (31 Mar. 2023), https://www.eeas.europa.eu/delegations/world-trade-organization-WTO/eu-statements-regular-dispute-settlement-body-meeting-31_en?s=69 (accessed 15 Jul. 2023).

[23] Mission of China to the WTO, *Statement by Ambassador Li Chenggang at the WTO Informal Heads of Mission and Trade Negotiation Committee Meeting* (19 Apr. 2023), http://WTO.mofcom.gov.cn/article/hyfy/202304/20230403406910.shtml (accessed 30 May 2023).

[24] *See* e.g., Hannah Monicken, *WTO Dispute Settlement Reform Talks Enter 'New Phase', With Non-U.S. Facilitator* (28 Feb. 2023), https://insidetrade.com/daily-news/wto-dispute-settlement-reform-talks-enter-new-phase-non-us-facilitator (accessed 15 Jul. 2023); Washington Trade Daily, *New Process for DSB Reform Talk* (3 Apr. 2023); D. Ravi Kanth, *WTO: In a Radical Overhaul, US Proposes Single-Tier Dispute Settlement System* (26 Apr. 2023), https://twn.my/title2/wto.info/2023/ti230414.htm (accessed 15 Jul. 2023); D. Ravi Kanth, *WTO: US Proposals on Dispute Settlement Reform Could Hurt Smaller Countries* (27 Apr. 2023), https://twn.my/title2/wto.info/2023/ti230415.htm (accessed 15 Jul. 2023); Hannah Monicken, *WTO Coordinator of Dispute Settlement Reform Talks Touts Quick Pace, Progress* (30 May 2023), https://insidetrade.com/daily-news/wto-coordinator-dispute-settlement-reform-talks-touts-quick-pace-progress (accessed 15 Jul. 2023); Washington Trade Daily, *Debate on WTO Reform Continues* (2 Jun. 2023); D. Ravi Kanth, *WTO: UK, US Raise Controversial Proposals on DS Reform* (2 Jun. 2023), https://twn.my/title2/wto.info/2023/ti230602.htm (accessed 15 Jul. 2023); Washington Trade Daily, *More WTO DS Reform Questions* (5 Jun. 2023); Hannah Monicken, *U.S. Outlines 'Objectives' for WTO Dispute Settlement Reform* (5 Jul. 2023), https://insidetrade.com/daily-news/us-outlines-objectives-wto-dispute-settlement-reform (accessed 15 Jul. 2023).

[25] Particularly the revelations made by the Third Word Network in Apr. 2023. *See* D. Ravi Kanth, *WTO: In a Radical Overhaul, US Proposes Single-Tier Dispute Settlement System* (26 Apr. 2023), https://twn.my/title2/wto.info/2023/ti230414.htm (accessed 15 Jul. 2023); Kanth, *supra* n. 24.

(1) Panel composition and expertise: Suggestions have been made to refresh the indicative list through a dedicated process, to include improved categorization of panellists and functionality of the list (i.e., searchable), and strengthen the code of conduct for the panellists and WTO Secretariat, including to strengthen the concepts of independence and impartiality.

(2) No expansion of rights or obligations: In this regard, proposals have been tabled to correct erroneous interpretations in the past, including interpretations concerning the essential security exception, trade remedies (including public body and benchmarks) and others identified by the US or other members. It is also proposed to set out guidance for adjudicators on the correct method for interpreting treaties within the WTO framework, with a particular focus on the negotiating history. The US also suggests confirming that reports do not hold any legal or precedential weight outside of the specific dispute context.

(3) Appeal/review mechanism: The US has proposed several measures, including but not limited to the following: limit the appeal review of issues in a final panel report to be only by agreement between the parties, with the appeal review adjudicator to be selected via a mechanism agreed by the parties; clarify that any appeal review mechanism has no jurisdiction to review questions of fact, including the meaning and effect of municipal law; establish a standard of review for questions of law; and confirm that the deadline for issuance of the appeal review report may not be extended by the appeal adjudicator.

(4) Consistency: The US seems to contend that reliance on litigation to clarify treaty interpretation has undermined the other functions of the WTO. Thus, it is recommended to establish a mechanism whereby the relevant WTO committees can discuss treaty interpretations found in reports as an addition to the already-established authoritative interpretation process.

(5) Secretariat support: Proposals have been put forward to devise secretariat guidelines for panel staffing (e.g., at least one staffer with a legal background, and each staffer must either support the relevant committee or have relevant, practical subject matter expertise), and establish parameters on the support to panels to be limited to the administration of the proceeding, and legal support that is responsive to the submissions of the parties. It is

further suggested that the panel report (particularly its findings and conclusions) must be prepared by the panel itself.

(6) Compliance: The US proposal mandates the respondent to suggest a solution or compensate within 60 days of an adopted recommendation, and allows the complainant to either accept or request arbitration for nullification or impairment level.

Though the above summary may only touch upon a portion of the US proposals, one conclusion that can be drawn is that they address a broad spectrum of issues within the WTO dispute settlement system – not only limited to the appellate stage. This is consistent with what the US had declared, for example, '[T]he United States believed that fundamental reform was needed to ensure a well-functioning WTO dispute settlement system',[26] but also demonstrates that the ongoing negotiations are not a mere simulation or extension of prior discussions before 2020, which were aimed at preventing the paralysis of the AB. Instead, the current dispute settlement reform bears some resemblance to the DSU Review of the Doha Development Agenda (DDA) negotiations,[27] which has been in progress for numerous years without yielding tangible outcomes. The expansion of covered issues in the negotiations undoubtedly will present intricate implications for the whole negotiating process.

In addition, a number of US proposals seems to modify certain 'core features' of the dispute settlement mechanism as established by the DSU, such as the accessibility of the appeals process, the coherence and predictability of decisions, and the independence of adjudicators. Some subversive ideas, such as the correction of 'erroneous interpretations in the past', would be highly controversial and contentious from both legal and political perspectives. To some extent, these pressing issues signal the potential clash of Members' positions in the current dispute settlement reform negotiations and may even shape the final outcome.

3 CHALLENGES: WILL THE REFORM NEGOTIATIONS DELIVER A TANGIBLE OUTCOME?

Based on the information provided in the facilitator's reports in March, July and October 2023, respectively, the ongoing dispute settlement reform negotiations seems to be gaining much momentum and has a relatively promising future. However, the history and experience of many WTO negotiations have repeatedly

[26] *See* WTO, *MINUTES OF MEETING, Dispute Settlement Body*, 27 Feb. 2023, WT/DSB/M/476, para. 3.3.

[27] *See* WTO, *Negotiations to Improve Dispute Settlement Procedures,* https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm (accessed 2 Aug. 2023).

shown that whether the negotiations could finally reach a successful conclusion often pivots on the few remaining but hardcore issues. At the same time, the dispute settlement reform negotiations cannot be isolated from the changing dynamics of the international relations and the overall progress of the WTO reform. Although the international community generally expects WTO Members to reach an agreement on the restoration of the normal functioning of the dispute settlement mechanism through negotiations as soon as possible, the dispute settlement reform negotiations still face many challenges and difficulties, and there is a great deal of uncertainty about reaching a comprehensive and concrete solution.

The first challenge arises from clear conceptual disparities amongst major Members concerning the function of the dispute resolution system in its entirety, as well as with respect to the appellate procedure and the AB specifically. On one hand, the US continues to oppose the start of the election of the AB members and repeatedly argues that '[A] well-functioning dispute settlement system supports WTO Members in the resolution of their disputes in an efficient and transparent manner, and in doing so limits the needless complexity and interpretive overreach that has characterized dispute settlement in recent years' at the DSB meeting.[28] Given that the US is approaching the 2024 presidential election year, it appears highly improbable that there will be a reversal in the US's stance towards the AB, or that the US will consent to reinstate the AB without receiving any concessions on the WTO dispute settlement system or on other topics. This might be evidenced by the outcome of the G20 Trade and Investment Ministerial Meeting in 2023, which the US participated in. The 2023 G20 outcome document simply repeated the MC12 language on dispute settlement issue,[29] and this has been interpreted to imply that the dispute settlement system under the DSU 'is unlikely to be restored'.[30] On the other hand, the vast majority of WTO Members have exhibited a significant level of affirmation and acknowledgement of the value of the dispute settlement mechanism established by the DSU and its important role in 'providing reliability and predictability to the multilateral trading system'.[31]

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[28] *See* e.g., WTO, *MINUTES OF MEETING, Dispute Settlement Body*, 27 Feb. 2023, WT/DSB/M/476, para. 3.3; US Mission to the WTO, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body* 15 (28 Jul. 2023), https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2023/07/Jul28.DSB_.Stmt_.as_.deliv_.fin_-1.pdf (accessed 2 Aug. 2023).

[29] '12. We note the ongoing discussions on Dispute Settlement reform, and remain committed to conducting discussions with a view to having a fully and well-functioning Dispute Settlement System, accessible to all members by 2024'. *See* G20 Trade and Investment Minister's Meeting, *Outcome Document and Chair's Summary* , Jaipur, Rajasthan (24–25 Aug. 2023), https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20_Trade_and_Investment_Ministers_Meeting.pdf (accessed 26 Aug. 2023).

[30] *See* Washington Trade Daily, *G20 Statement Disappoints Some* 2 (25 Aug. 2023).

[31] Article 3.4 of the DSU.

They have formed different groups (e.g., MPIA participant Members, DSB decision participating Members, BRICS countries, etc.) to collectively progress their demands. Although it is not entirely clear which aspects of the dispute settlement system are encompassed by the term 'core features' referenced by some prominent Members, it appears highly possible that the preservation of a two-tier system and the binding nature of adjudicative reports are included. For instance, the Summit Declaration of BRICS countries in 2023 explicitly and clearly voices that '[W]e call for the restoration of a fully and well-functioning two-tier binding WTO dispute settlement system accessible to all members by 2024, and the selection of new AB Members without further delay',[32] which is in sharp contrast to the outcome of the 2023 G20 trade ministerial meetings during the same period. In light of considerable conceptual disparities, it seems improbable that either side will yield their positions easily and readily through conventional persuasive or confrontational negotiating tactics, unless there comes a politically acceptable reconciliation between the opposing sides.

The second challenge stems from the intricate and challenging nature of the crucial legal matters under consideration. The creation of new rules at the WTO has always been a daunting task, and this is especially true in the context of designing and drafting dispute settlement procedures. Looking back at the negotiations on dispute settlement rules since the establishment of the WTO, neither the DSU review from 1997 to 2001[33] nor the Doha Round negotiations on improvements and clarifications of the DSU,[34] which began in 2002 and has continued to

[32] *See* XV BRICS Summit Johannesburg II Declaration, *BRICS and Africa: Partnership for Mutually Accelerated Growth, Sustainable Development and Inclusive Multilateralism* (23 Aug. 2023), https://www.gov.za/sites/default/files/speech_docs/Jhb%20II%20Declaration%2024%20August%202023.pdf (accessed 26 Aug. 2023).

[33] A decision adopted at the Marrakech Ministerial Conference in Apr. 1994 mandated the ministerial conference to complete a full review of the WTO dispute settlement rules and procedures within four years after the establishment of the WTO, and to take a decision after the completion of the review, whether to continue, modify or terminate the DSU. Pursuant to this decision, the DSB conducted extensive discussions in informal meetings on the basis of the proposals and questions raised by Members since 1997. Consensus could not be reached and the deadline was extended until 31 Jul. 1999. Regrettably, the 1999 Seattle Ministerial Conference ended without agreement and while Members informally continued to prepare draft proposals, strong differences of opinion on several key issues continued to prevent the DSU Review from being completed. The DSU Review was then seemingly removed from the agenda, or permanently suspended. *See* Uruguay Round Ministerial Decisions and Declarations, *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, https://www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm (accessed 15 Jul. 2023); WTO, *Extension of the Deadline for Review of the DSU*, 8 Dec. 1998, WT/DSB/M/52.

[34] Paragraph 30 of the 2021 Doha Ministerial Declaration reads as follows: We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter. *See* WTO, *supra* n. 27; WTO, *Report by*

date, has successfully concluded to produce a final text for the decision of WTO Members. The technical and legal complexity of many issues partially contributed to the lack of final resolution in both DSU review and Doha DSU negotiations. From a perspective of law, certain crucial propositions in the ongoing dispute settlement reform negotiations, such as the preconditions on the availability of appeal review, the restriction on precedent effect of prior jurisprudence, the correction of so-called erroneous interpretations, and the possible 'sunset' of relevant adjudicative provisions, are highly innovative and unprecedented among other global tribunals. They naturally attract many challenging questions, which both the proponents and opponents must consider carefully and discuss in detail, regardless of whether there are conceptual disagreements among Members. For instance, with respect to the proposal on correcting so-called misinterpretations in previous AB and panel reports, no matter they refer to national security exceptions or some practices in trade remedy investigations, there are quite a number of technical questions to consider. They may include whether it is appropriate to address substantive issues under specific WTO agreements in the dispute settlement reform negotiations, what might be the appropriate method to make corrections (a DSB decision to annul the previous reports, an authoritative interpretation by the General Council to clarify the ambiguity, or amendments of relevant WTO Agreement to delineate new rules), and how about the legal status of those reports which have already been implemented but now-corrected, etc. These technical factors are certainly worth of discussions, but they frequently make it difficult to have a substantive and rapid progress in negotiations.

The third challenge is the potential linkages or trade-offs between different negotiation areas. At the point of this writing, it is uncertain whether this is a genuine risk since the negotiations are still going on, but it is not an unreasonable concern. The former US Trade Representative (USTR) under the Trump Administration hinted that the US deliberately created the AB crisis to accomplish more substantial and far-reaching reforms at the WTO.[35] The incumbent USTR made it clear that '[D]ispute settlement was never intended to supplant negotiations. The reform of these two core WTO functions is intimately linked',[36] which was construed to mean 'that dispute settlement reform likely can move forward

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the Chairman, Ambassador Coly Seck, to the Trade Negotiations Committee, Special Session of the Dispute Settlement Body, TN/DS/31 (17 Jun. 2019).

[35] *See* Brett Fortnam, *Appellate Body Blocks the Only Way to Ensure Reforms* (12 Mar. 2019), https://insidetrade.com/daily-news/lighthizer-appellate-body-blocks-only-way-ensure-reforms (accessed 15 Jul. 2023).

[36] *See* Katherine Tai, *Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization* (14 Oct. 2021), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tais-remarks-prepared-delivery-world-trade-organization (accessed 15 Jul. 2023).

only if the membership also is making progress in instituting new rules. Specifically, those new rules must address some of the key areas where the US has argued the AB, or WTO as a whole, has failed, like trade remedies and industrial subsidies'.[37] There was a report in April 2023 revealing that 'the US could ask for a payment from members, namely a trade-off between its dispute settlement reform proposals on the one side, and Washington's acceptance of outcomes in other areas in the run-up to MC13, on the other'.[38] Relatively new and optimistic news in this regard told that '[T]he US is not linking World Trade Organization dispute settlement reform to the broader reform of the negotiating function'.[39] If so, this would indicate an new adjustment of positions on the US side and it is generally conducive to the dispute settlement reform, because although trade-offs and linkages are not uncommon in WTO negotiations, if this were to happen, it would inevitably add more complexity and uncertainty to the feasibility of a final outcome.

The fourth challenge could be the time constraints. The target deadline set by the MC12 – 'by 2024', despite being a due date with a lot of ambiguity, is rapidly approaching, and the MC13 is scheduled for February 2024. Understanding the significance of utilizing the MC13 as an opportunity to achieve a break-through and finalize the negotiations, the facilitator of the present dispute settlement reform negotiations has proposed an intensive negotiation schedule with the objective of concluding text drafting of issues with agreement by the end of 2023. However, a dilemma lies ahead. On one hand, it seems that the negotiations, until October 2023, have not reached agreements on some core issues, particularly the appeal issue,[40] while reaching a final package inevitably requires more investments of time and resources on these hard issues. On the other hand, the expansion of topics under negotiations from the appeal stage to the overall dispute settlement procedures consumes typically scarce resources of most Members, dilutes priority issues at stake, and may not facilitate the solution of the AB crisis. Furthermore, numerous developing country Members with less adequate staff and resources have expressed serious concerns regarding the intense paces of and the lack of

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37 *See* Hannah Monicken, *Tai: Dispute Settlement, Negotiating Reforms 'Intimately Linked' at WTO* (14 Oct. 2021), https://insidetrade.com/daily-news/tai-dispute-settlement-negotiating-reforms-'intimately-linked'-wto (accessed 15 Jul. 2023).

38 *See* Kanth, *supra* n. 24.

39 *See* Hannah Monicken, *Pagán: U.S. Isn't Linking Dispute Settlement Talks With Negotiating Reform* (24 Oct. 2023), https://insidetrade.com/daily-news/pag-n-us-isn-t-linking-dispute-settlement-talks-negotiating-reform (accessed 2 Nov. 2023).

40 *See* Emma Farge, *Exclusive: Reform Proposals Emerge to Fix WTO by Early 2024 – Document* (26 Oct. 2023), https://www.reuters.com/business/reform-proposals-emerge-fix-wto-by-early-2024-document-2023-10-26/ (accessed 2 Nov. 2023).

inclusiveness and transparency in the current reform negotiations.[41] It is crucial to observe how these factors will impact the progression of subsequent negotiations.

In view of these challenges, the potential outcome of the upcoming dispute settlement reform negotiations appears less optimistic than previously indicated by the facilitator's reports. There is still a substantial distance to cover. Furthermore, this paper would argue that, given the present propositions of major Members and negotiation tactics, it is highly uncertain whether a comprehensive solution on the dispute settlement reform can be found, unless prominent Members exhibit unexpected flexibility at the MC13 or reach concurrence on a new and politically viable compromise.

Even if it is assumed (indeed, it is possible) that the MC13 recognizes the progress made so far and extends the mandate for further negotiations, this cannot be regarded as a success because the current crisis facing the WTO dispute settlement system remains unresolved, and the following situations would continues: (1) the majority of Members continue to call for resuming the selection of the AB members, and the US continues to oppose it while bearing global pressure and blames; (2) the number of disputes in legal limbo is growing due to frequent appeals to the vacant AB (so-called 'appeal into the void')[42]; (3) the MPIA still serves as an interim measure, despite a gradual increase in cases reviewed, yet with fewer new participants than originally anticipated; and (4) the authority of the multilateral trading system and the enforce-ability of WTO rules suffer a continued erosion.

Obviously, neither the multilateral trading system nor any Member benefits from the continuation of the dispute settlement crisis. For the sake of safeguarding the global trade order and the authority of a rule-based multilateral system, Members ought to persist in their efforts to break the deadlock in the negotiations and mitigate the crisis as much as possible.

4 PROPOSAL: AN APPEAL OPT-OUT ARRANGEMENT AS A COMPROMISE TO REVIVE THE DISPUTE SETTLEMENT SYSTEM

Since the US began blocking the filling of AB vacancies in 2017, various proposals have been put forward by academics and practitioners to tackle the AB crisis.[43]

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41 *See* Hannah Monicken, *Drafting of WTO Dispute Settlement Reform Text to Begin in September* (28 Jul. 2023), https://insidetrade.com/daily-news/drafting-wto-dispute-settlement-reform-text-begin-september (accessed 2 Aug. 2023).

42 *See* WTO, *Current Notified Appeals*, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#fnt-1 (accessed 2 Aug. 2023).

43 *See* e.g., Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises?*, 18(3) World Trade Rev. 503–525 (2019), doi: 10.1017/S1474745619000144; Jennifer Hillman, *Three Approaches to Fixing the WTO's Appellate Body: The Good, the Bad and the Ugly* (3 Jan. 2020),

These include (but are not limited to) voting, the implementation of case-specific no-appeal agreements, the adoption of an appellate arbitration system under Article 25, the introduction of a plurilateral appeal system, and the recourse to an enhanced first instance system. So far only the proposal for appellate arbitration under Article 25 has been put into effect as the Multi-Party Interim Appeal Arrangement (MPIA) by some WTO members. This goes some way to suggesting that major Members may not see other academic ideas on the table as feasible or suitable for consideration or implementation.

As Mr Molina, the facilitator coordinating the dispute settlement reform negotiations, recently pointed out, 'this is the last chance to restore the system. If we don't reach a proposal by the ministerial conference, there won't be another window of opportunity like the one we have today'.[44] In this context and with the fast approach of the MC13, it's both necessary and urgent to consider whether there might be new and even somewhat different approaches that could help break the very possible deadlock in the dispute settlement reform negotiations ahead of the MC13.

Taking into account the differences in the positions of key Members and the reasons for the deadlock in the negotiations, this paper suggests that Members review their negotiating tactics in order to promote openness and flexibility and thereby reduce confrontation, and presents a compromise plan that includes the option of opting out of the appeal review procedure under the current DSU as a concurrence or coexistence solution. This approach will also be of help to achieve the objective set by the MC12 – a fully and well-functioning dispute settlement system accessible to all Member.

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https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf (accessed 30 May 2023); Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make* (14 Aug. 2019), https://ssrn.com/abstract=3415964 (accessed 30 May 2023); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93(3) Calif. L. Rev. 899–956 (2005); Pieter Jan Kuijper, *From the Board: The US Attack on the WTO Appellate Body*, 45(1) Leg. Issues Econ. Integr. 1–12 (2018), doi: 10.54648/LEIE2018001; Steve Charnovitz, *How to Save WTO Dispute Settlement from the Trump Administration* (03 Nov. 2017), https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html (accessed 30 May 2023); Scott Andersen et al., *Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals*, CTEI Working Papers 2017-17, https://repository.graduateinstitute.ch/record/295745 (accessed 30 May 2023); Geraldo Vidigal, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, 20(6) J. World Invest. Trade 862–890 (2019), doi: 10.1163/22119000-12340160; Qingjiang Kong & Shuai Guo, *Towards a Mega-Plurilateral Dispute Settlement Mechanism for the WTO?*, 53(2) J. World Trade 273–292 (2019), doi: 10.54648/TRAD2019013; Henry Gao, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, 24(3) J. Int'l Econ. L. 534–550 (2021), doi: 10.1093/jiel/jgab031.

44 *See* Farge, *supra* n. 40.

4.1 The methodology of the new approach

The main focus of the current dispute settlement reform negotiations is undoubtedly on whether and how to establish an appellate mechanism. This issue is not only of importance to the US, but also to the EU, China, and many other Members who believe it is crucial to maintain the 'core features' of the dispute settlement system. It is conceivable that divergent positions between prominent Members naturally lead to confrontational discussions and debates, with each side seeking to persuade or repress the other side in order to secure an outcome that best satisfies its own demands, while also being universally applicable. The difficulty lies in the fact that when two opposing sides have equal influence and are adamant in their positions, discussions can quickly become deadlocked without a quick resolution. To overcome the impasse or to resolve the stalemate, an alternative or circuitous approach will be necessary and might be useful, as long as two sides have the will to do so.

Accordingly, this paper suggests that Members could review their negotiating tactics, moving from trying to suppress the opposing side's demands to finding ways to achieve a compromise solution that satisfies the main demands of all parties within a certain range, and exploring novel designs within the current DSU legal framework to achieve a kind of concurrence or coexistence.

In accordance with this methodology, the approach to a new proposal commences by reflecting on a list of queries: If a Member wishes to solely have a first instance process available (or have recourse to other dispute resolution channels under the DSU) for cases where this Member is a disputing party, could this request be honoured or this option be actualized? On the other hand, is it essential that all cases involving Members should not offer an option to appeal upon a unilateral choice by a disputing party, unless upon agreement by all disputing parties? If some Members, from which all the parties in a case are, wish to have the option of appeal upon a unilateral decision by a disputing party, should such a request be honoured and an opportunity/a right to appeal in cases between these Members be provided? Could the AB only examine appeals in cases involving certain Members? Does the current DSU allow for each of these opportunities and permit flexible arrangements?

This paper contends that the DSU allows for both the aforementioned choices and adaptive arrangements whilst also leaving intact the mandatory, automatic and binding characteristics of the WTO dispute settlement mechanism. Specifically, Article 17 of the DSU is a discretionary procedure that any disputing party may initiate in accordance with Article 16.4 of the DSU,[45] rather than an obligatory

[45] Article 16.4 of the DSU: Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its

automated process that every dispute must undergo. Therefore, if all Members agree to establish supplementary institutional arrangements concerning non-recourse to the appellate procedure and granting individual Member the option to opt-out of the appellate procedure in advance, while guaranteeing that panel reports will be adopted by the DSB in line with Article 16 of the DSU in opt-out scenarios, Articles 16 and 17 can provide essential legal flexibility instead of posing a legal hurdle.

4.2 Key elements of the new proposal

The core of the new proposal is to establish an arrangement within the current DSU framework to ensure the choice by a Member to opt out of the appellate review process. To make it operational, Members can achieve this by unanimously agreeing on a document, for instance, perhaps called 'Arrangement Concerning Opt-out of Appeal Procedures under the DSU' (referred to as the Appeal Opt-out Arrangement) and notifying it to the DSB for adoption or recognition. In any future dispute, all Members should not only adhere to the DSU but also act in good faith in accordance with the provisions established in the Appeal Opt-out Arrangement.

In regards to contents, the Appeal Opt-out Arrangement may consist of the following, but not limited to, legal components:

(1) Purpose: A reaffirmation of the objectives of the DSU, and the importance of facilitating dispute settlement and providing for alternative and inclusive arrangements.
(2) Opt-out Declaration: A Member may declare that it will opt out of the appeal procedure under Article 17 of the DSU in all new disputes in which it is a disputing party. This declaration is generally applicable to all future cases wherein this Member is involved as a complainant or defendant and is considered *ex ante*, meaning that the declaration has no retroactive effect on past disputes and is not dispute-specific. This declaration must be communicated in writing to the DSB and will come into effect after a specified period of time from the date of receipt of such communication by the DSB.
(3) Recognition: Other Members shall recognize and respect the Opt-out Declaration made by a Member under paragraph 2. They shall not initiate the appeal procedure under Article 17 of

decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

the DSU in all new disputes involving the declaring Member as a disputing party after the declaration's entry into force. All Members understand that under such circumstances, the DSB may adopt a panel report in accordance with Article 16 of the DSU upon the request of any disputing party.

(4) Withdrawal: A Member may declare its withdrawal of its Opt-out Declaration made under paragraph 2 and notify the DSB of the withdrawal decision. The declaration of withdrawal shall become effective after a designated time frame starting from the date of receipt of such communication by the DSB. This declaration of withdrawal is generally applicable to all future disputes wherein the declaring Member is involved as a complainant or defendant and is also considered *ex ante*, meaning that it has no retroactive effect on past disputes and is not dispute-specific.

(5) Case-specific Arrangement: Notwithstanding the provisions of paragraphs 2, 3 and 4, in a specific dispute, if all disputing parties so agree, special arrangements may be made for the appellate review of the panel report on the dispute, for example by normal submission to the AB for review in accordance with Article 16 of the DSU, or by an appellate arbitration under Article 25 of the DSU. The parties to the dispute shall notify the DSB in writing of these arrangements no later than the establishment of the panel.

(6) AB selection: All Members agree to commence the selection process of AB members according to Article 17 of the DSU and the pertinent procedures and decisions once the notification of this Arrangement has been made to the DSB. All members, no matter whether or not they have made a declaration of opt out, can take part on an equal footing in the selection process.

(7) AB Working Procedures: The AB shall take full account of the contents in Document JOB/GC/222 (Draft General Council Decision on Functioning of the AB) in revising the AB Working Procedures.

(8) The way to handle appeals in cases of multiple complainants.[46]

[46] In disputes where there are multiple complainants, the situation might be a bit complex when one or more complainants opt out of the appeal procedure while other complainants did not. As a matter of practice, a single panel is typically established for such disputes, with the panel making a uniform and consistent decision on the same matter. Under the Appeal Opt-out Arrangement, a possible solution for Members to consider is that, because all complainants know whether one or more of them opt out of the appeal procedures before agreeing to a single panel, it would not be appropriate for any

(9) The way to handle panel reports appealed but not heard.[47]
(10) Other matters (e.g., precedential effect issue).[48]

4.3 Illustrative analysis of the operation and effectiveness

Under the Appeal Opt-out Arrangement, disputes between different Members can be effectively adjudicated in a timely manner, despite of differences in the availability of appeal procedures.

To give an example: A, B, C, D are WTO Members. In accordance with the provisions of the Appeal Opt-out Arrangement Agreement, A and B have declared that they opt for the appellate procedures for new disputes in which they are parties to the dispute, and C and D have not made any declaration (i.e., they will continue to abide by the DSU as usual). Accordingly, in any new dispute involving A or B as a disputing party, whether between A and B, A or B and C, or A or B and D, all parties to the dispute will/should not appeal the panel report, and the panel report, once issued, could be submitted directly to the DSB for adoption in accordance with Article 16 of the DSU. Meanwhile, in any new dispute between C and D, the normal procedures under the DSU will apply, which means that once a panel report has been issued, any disputing party may appeal the report to the standing AB and the AB report will be submitted to the DSB for adoption together with the panel report. In the meanwhile, if in a new dispute involving A

complainant to initiate an appeal procedure in such scenario, and that all panel reports could be submitted directly to the DSB for adoption.

[47] With respect to the handling of those panel reports that have previously been appealed into the void, a transitional special arrangement could be considered. In appealed disputes involving a Member that has opted out of the appeal procedure as the appellant, the withdrawal of the appeal may be permitted within a specified time-frame after the effective date of the Opt-out Arrangement; In appealed disputes involving a Member that has opted out of the appeal procedure as the appellee, the withdrawal of the appeal may be permitted upon the joint requests from both the appellant and the appellee, otherwise the restored Appellate Body shall proceed with the review of the case, but the review period may be extended as appropriate due to heavy workloads; in other appealed disputes not involving a Member that has opted out of the appellate procedure, the reinstated Appellate Body shall proceed with the review of the case as normal with the review period may be extended as appropriate.

[48] The content of the 'other matters' can be extensive or concise, depending on the technical issues discussed by Members. For example, there have been some concerns and even objections from a certain Member on the issue of the 'precedential role' of previous Appellate Body and panel reports, or whether there would be a 'spillover' effect of arbitration reports under the MPIA. Due to the complex legal and practical factors involved in this issue, it seems extremely difficult to clarify through clearly-articulated rules which previous reports are convincing and acceptable and which are not. In this context, if Members consider it feasible in practice, a relatively straightforward approach is to provide in 'other parts' of the Appeal Opt-out Arrangement that: in panel proceedings involving Members that have made opt-out declarations under para. 2, the parties to the dispute should, to the extent possible, refrain in their written submissions and oral presentations from referring to previously adopted panel and Appellate Body reports and Art. 25 appellate arbitration awards; and in its report, the panel should also seek to avoid referring to previously adopted panel and Appellate Body reports. This method might help 'literally' avoid the 'role of precedent'.

or B as a disputing party, whether between A and B, A or B and C, or A or B and D, all disputing parties agree that in this specific dispute they would like to have a opportunity to appeal the panel report, they should reach an specific arrangement and delineate the way of making appeal, either recourse to the standing AB by invoking Article 16.4 normally or recourse to Article 25 appellate arbitration upon agreement.

In terms of effectiveness, the Appeal Opt-Out Arrangement to a large extent creates a kind of inclusiveness or win-win situation: (1) All cases involving A or B as a disputing party will not be appealed in the future, and their concerns and dissatisfaction with the appeal process and the AB will not arise or could be largely resolved in cases involving them in the future. It can be said that A and B largely (though not entirely) achieve their goal of reforming appellate review or solving appeal-related problems insofar as they are disputing parties. (2) All cases between C and D can still be reviewed by the restored AB in accordance with the normal procedure of the DSU. C and D may also claim that they are largely (though not entirely) successful in achieving the objective of preserving appellate review and the AB insofar as the disputes are between them. (3) In cases between C or D and A or B, the agreement ensures that a panel report can be adopted by the DSB in a timely manner, and that there is no 'appeal into the void' impasse, even though only a one-tier legal procedure is available. (4) The Arrangement also allows case-specific arrangements for an appeal in opt-out scenario, basically incorporating the idea proposed by the US limiting the appeal review of issues in a panel report to be only by agreement between the parties. (5) The AB will be reconstituted with substantial improvements in its working procedures. (6) All Members will participate in the arrangement, and there won't be any significant changes to the regular panel and appeal procedures with which Members are familiar and which are generally considered to be effective and fair. In this sense, 'a fully and well-functioning dispute settlement system accessible to all Members' could be somewhat realized.

4.4 Pragmatic features facilitating implementation

The new proposal is not a plan to optimize the whole dispute settlement system. Rather, it explores a pragmatic solution to the potential negotiation deadlock, and aims to restore the normal functioning of the dispute settlement system with minimal substantive modifications. Such a tactic seems more practical and feasible at this stage of the reform negotiations. Meanwhile, the proposal has certain characteristics that are potentially useful in highlighting key issues and facilitating implementation.

First, it focuses primarily on the appellate issues that are clearly at the heart of WTO dispute settlement reform. Without a proper solution to the appeal-related issues, it seems very impossible to have a final package on dispute settlement, no matter how much progress might have been made on other technical issues of the dispute settlement system. On the contrary, if Members find a landing zone on the appellate issues, whatever the solution might be, the normal operation of the dispute settlement system could relatively quickly be restored, ideally in combination with, but not dependent on, progress on other technical issues.

Second, it takes the form of an agreement by Members rather than an amendment to the DSU. According to Article 10.8 of the WTO Agreement, amendments to the DSU are made by consensus and enter into force for all Members upon approval by the MC. There is no acceptance requirement for the amendment of the DSU by the WTO Members. However, this does not rule out the possibility that some WTO Members may still need to obtain prior approval from their legislative bodies to amend the DSU in accordance with their respective domestic requirements. If so, this would add considerable difficulty and uncertainty to consensus-based negotiations in Geneva. In contrast, an agreed arrangement or a DSB decision, which is normally within the competence of Member governments, can achieve the same objective in terms of effectiveness. Moreover, by adding flexibility to the existing DSU framework, there are no procedural obstacles or legitimacy issues with respect to the implementation of the Appeal Opt-out Agreement. The Arrangement requires the unanimous consent of all Members and the simultaneous reinstatement of the normal dispute settlement procedures under the DSU (including the restoration of the AB), retains the characteristic of being multilateral rather than plurilateral, and has legitimacy under the DSU.[49]

Third, it prefers to keep holistic and institutional requirements to provide predictability and stability rather than resorting to case-by-case pacts. In several disputes,[50] the disputing parties have beforehand reached a no-appeal agreement due to the

[49] An essential factor contributing to the efficacy of the MPIA or Art. 25 appeal arbitration arrangement is that arbitral awards can be legally 'incorporated' into the DSU framework. Under Art. 25.4 of the DSU, Arts 21 and 22 apply mutatis mutandis to the enforcement of arbitral awards under Art. 25. Conversely, if Members do not invoke the Art. 25 procedure, but instead invoke other independent arbitration (or any other dispute settlement mechanism outside the DSU, be it dispute settlement mechanism under an regional trade arrangement (RTA) or a separate plurilateral appellate body), it will be challenging to effectively incorporate the outcome of such an award into the DSU framework due to the absence of a legal connection and the inability to obtain enforcement guarantees under the DSU.

[50] *See* Indonesia – Safeguard on Certain Iron or Steel Products, *Understanding Between Indonesia and Chinese Taipei Regarding Procedures Under Articles 21 and 22 of the DSU*, 15 Apr. 2019, WT/DS490/13; Indonesia – Safeguard on Certain Iron or Steel Products, *Understanding Between Indonesia and Viet Nam Regarding Procedures Under Articles 21 and 22 of the DSU*, 27 Mar. 2019, WT/DS496/14 .

possible paralysis of the AB. Such a bilateral no-appeal agreement could help to avoid the 'appeal into the void' impasse in a particular case, but it also has some disadvantages,[51] in particular the lack of predictability and the difficulty of reaching a bilateral pact when a dispute really takes place. The Appeal Opt-out Arrangement explicitly requires an opt-out declaration to be *ex ante*, unilateral and holistic, so that when one Member initiates a new case against another Member, all Members can clearly know whether the case will have a chance of appeal in the future, thus providing greater predictability and stability in terms of procedures. Meanwhile, the Appeal Opt-out Arrangement maintains technical neutrality and objectivity, because it does not require the exclusion of certain sorts of disputes (e.g., trade remedy cases) or issues (e.g., national security issue) from the appeal process, nor ask for the inclusion of controversial issues (e.g., the correction of prior erroneous interpretations). This helps to avoid overly politicized discussions and therefore may increase the possibility of acceptance by Members.

Fourth, Members who opt out of the appeal process will not be deliberately deprived of the opportunity and prerogative to participate in re-establishing the AB. Such kind of openness and goodwill may help to allay the objections and concerns of opt-out Members and lay the groundwork for the AB and its secretariat to receive necessary administrative supports. In short, the revived AB will remain public goods for all Members. A Member that have made an opt-out declaration still has the right to nominate its own nationals to participate in the selection of the AB members and to express its views on related matters.

Fifth, it will not necessarily affect the balance of rights and obligations of Members under the WTO. While it is true that, under the Appeal Opt-out Agreement, some dispute reports will have a chance of appeal while others will not, but such difference is mainly procedural. In fact, even when the dispute settlement system and the AB were operating normally, there were still some panel reports that went directly to the DSB for adoption rather than to the AB for review. In any event, the panel and the AB have the same legal responsibility under the DSU not to 'add to or diminish the rights and obligations provided in the covered agreements'.[52]

5 CONCLUSION

Negotiations on the reform of the WTO dispute settlement system have been taking place on a very intensive timetable since the beginning of 2023, and some technical progress has been made. Although the international community generally

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[51] *See* e.g., Pauwelyn, *supra* n. 43, at 311–312.
[52] Article 3.2 of the DSU.

expects WTO Members to reach consensus through negotiations as soon as possible, a summary analysis of the content of some key proposals put forward by the US and the positions of other major Members indicates that the ensuing negotiations still face several significant challenges. The prolongation and continuation of the crisis in the WTO dispute settlement system is not in the interest of the multilateral trading system as a whole or of any WTO Member. Members should explore new ideas to break or avoid the possible deadlock in the reform negotiations with a forward-looking attitude. This paper proposes the establishment of a multilateral arrangement allowing Members to opt out of the appellate review procedure under the current DSU and hopes that such a proposal could make a positive contribution to the resumption of the normal functioning of the WTO dispute settlement system.