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approach to revive the WTO  
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# **From confrontation to coexistence: an appeal opt-out arrangement as an inclusive approach to revive the WTO dispute settlement system?**

Wenhua Ji \*

**Abstract:** Resolving the crisis of 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. So far, the reform negotiations have made some progress, but still face a number of significant challenges. It is highly uncertain whether a comprehensive solution can be reached in time. Taking into account the different positions of major Members and the possible causes of the deadlock in the negotiations, this paper recommends that Members reassess their negotiating tactics with a view to increasing openness and flexibility, seeking coexistence while reducing confrontation, and puts forward an inclusive compromise plan that provides for the option of opting out of the appellate review procedure within the framework of the existing DSU in order to realize the normal and good functioning of the WTO 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 of 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 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. 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 and there is an 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 content of

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the negotiations, using the US proposals as an example. Section 3 analyses the main challenges and prospects for the negotiations. On this basis, Section 4 proposes an inclusive compromise plan to help break the possible deadlock in the negotiations.

## **2 Progress: the new phase 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.<sup>1</sup> 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.<sup>2</sup> As a result, the AB currently exists nominally, with no operations as of the end of 2020.

### **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, 27 Members formally submitted a proposal to the DSB for a decision to start the selection process to fill the AB vacancies,<sup>3</sup> 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 30 July 2023, 129 proposing Members made the 68th proposal to initiate the selection of AB members, while the United States maintained its opposition as before.

Second, efforts to clarify the rules and address US concerns 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' (known as the "Walker Text"),<sup>4</sup> the product of nearly a year of consultations, was submitted 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.<sup>5</sup> Structured discussions

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<sup>1</sup> As of 31 July 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. See WTO: *Dispute settlement activity — some figures*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/disputats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm) (accessed 1 August 2023).

<sup>2</sup> On 11 December 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. One 10 December 2020, the term of the last AB member came to an end, and there has been no incumbent member since then.

<sup>3</sup> See WTO, *Appellate Body Appointments*, WT/DSB/W/609, 10 November 2017. By the end of May 2023, the proposed decision had been co-sponsored by 129 members (WT/DSB/W/609/REV.25).

<sup>4</sup> 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 October 2019.

<sup>5</sup> See WTO, *General Council - Minutes of meeting - Held in the Centre William Rappard on 9-10 December 2019*, WT/GC/M/18, p.22.

aimed at resolving the AB crisis by clarifying the rules seem to have receded to a low ebb within the WTO.

Third, some Members have been actively exploring alternative means to maintain the availability of appeal review pursuant to Article 25 of the DSU. The first bilateral arrangement was notified by Canada and the European Union (EU) on 25 July 2019.<sup>6</sup> In March 2020, the EU, China and other Members concluded a Multi-Party Interim Appellate Arbitration Arrangement (MPIA)<sup>7</sup> 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 26 (involving 53 WTO Members).<sup>8</sup> There have also been instances of recourse to Article 25 of the DSU through ad hoc appellate settlement agreements on a case-by-case basis.<sup>9</sup>

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,<sup>10</sup> the lopsided situation is undoubtedly doing considerable damage to its international reputation, whether the US admits it or not. 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 Ministerial Conference 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, '[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.'<sup>11</sup>

This was the first time after the complete paralysis of the AB at the end of 2019 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

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<sup>6</sup> See Interim Appeal Arbitration Pursuant to Article 25 of the DSU, JOB/DSB/1/Add.11, 25 July 2019.

<sup>7</sup> On March 27, 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 April, 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 Article 25 of the DSU, JOB/DSB/1/Add.12, 30 April 2020.

<sup>8</sup> With respect to participants in the MPIA, there are currently 26 Members if the EU is taken as one: 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 27 members of the EU are also included, there are currently 53 participants. See Parties to the MPIA, [https://wtoplurilaterals.info/plural\\_initiative/the-mpia/](https://wtoplurilaterals.info/plural_initiative/the-mpia/) (accessed 2 August 2023).

<sup>9</sup> See Agreed Procedures for Arbitration under Article 25 of the DSU, Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products (DS583), WT/DS583/10, 25 March 2022.

<sup>10</sup> See United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, February 2020, [https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf) (accessed 15 July 2023).

<sup>11</sup> WTO, *MC12 OUTCOME DOCUMENT*, WT/MIN(22)/24, 17 June 2022, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/mc12\\_e.htm#outcomes](https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm#outcomes) (accessed 15 July 2023).

outcome in paragraph 4 of the MC12 Outcome Document did not appear out of nowhere at 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 originally scheduled Ministerial Conference in November 2021,<sup>12</sup> and was finally accepted by other Members and included in the MC12 outcomes. This proved that when China and the US worked together, positive results could be achieved even on difficult issues. Moreover, to some extent, it indicated that the US, as the ‘perpetrator’ 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 to convene informal, closed-door brainstorming meetings in Geneva with a handful of Members on the dispute settlement system.<sup>13</sup>

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.<sup>14</sup> Meanwhile, Members expressed more interest in returning to the formal WTO framework to advance concrete discussions and move towards possible text negotiations.<sup>15</sup>

Information regarding the progress was revealed during the DSB meeting held in March 2023. This meeting saw the Deputy Permanent Representative of Guatemala to the WTO, Mr. Marco Molina, provide a personal capacity report on his role as a facilitator for the dispute settlement reform.<sup>16</sup> As the negotiations have been conducted primarily in closed-door meetings since 2022, this report marks the initial publicized disclosure of the developments that have arisen as a result of the MC12 mandates regarding the negotiation of the dispute settlement system. From the report, it is known that the negotiations were organized in a structured but informal manner by the facilitator, and that the aim was to identify agreeable issues by the August break and to conclude text drafting by the end of 2023. Furthermore, the facilitator reported at the 2023 July DSB meeting 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.<sup>17</sup> The outlook for the negotiations seems optimistic after an initial reading of the reports.

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<sup>12</sup> The 12th Ministerial Conference (MC12) was originally scheduled to start on 30 November and run until 3 December 2021. See WTO, *General Council decides to postpone MC12 indefinitely*, [https://www.wto.org/english/news\\_e/news21\\_e/mc12\\_26nov21\\_e.htm](https://www.wto.org/english/news_e/news21_e/mc12_26nov21_e.htm) (accessed 15 July 2023).

<sup>13</sup> See Mission of the US, *Statement by Ambassador Maria Pagan at the WTO Dispute Settlement Body Meeting*, 27 April 2022, <https://geneva.usmission.gov/2022/04/27/us-statement-by-ambassador-maria-pagan-at-the-WTO-dsb-meeting/> (accessed 15 July 2023).

<sup>14</sup> See Inside U.S. Trade, *U.S. continues block on Appellate Body nomination restart*, 26 October 2022, <https://insidetrade.com/trade/us-continues-block-appellate-body-nomination-restart> (accessed 15 July 2023).

<sup>15</sup> See Inside U.S. Trade, *After months of informal talks, WTO members push for ‘mainstreaming’ dispute reform negotiations*, 28 December 2022, <https://insidetrade.com/daily-news/after-months-informal-talks-WTO-members-push-mainstreaming-dispute-reform-negotiations> (accessed 15 July 2023).

<sup>16</sup> The facilitator reported that he had over 40 bilateral meetings with delegates and regional coordinators representing more than 130 WTO members. 70 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 March 2023, [https://www.wto.org/english/news\\_e/news23\\_e/dsb\\_31mar23\\_e.htm](https://www.wto.org/english/news_e/news23_e/dsb_31mar23_e.htm) (accessed 15 May 2023).

<sup>17</sup> 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 July 2023, [https://www.wto.org/english/news\\_e/news23\\_e/dsb\\_28jul23\\_e.htm](https://www.wto.org/english/news_e/news23_e/dsb_28jul23_e.htm) (accessed 2 August 2023).

### 2.3 The primary focus of the dispute 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 70 proposals and demands were put forth, indicating the high level of engagement and interest in the reform negotiations.<sup>18</sup> Besides concept proposals tabled to the facilitator, the statements or position declarations of major Members during the same period were also noteworthy. For example, the EU said it 'supports reforms that maintain the core features of the dispute settlement system',<sup>19</sup> 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'.<sup>20</sup> 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 defense against the possible request of the US. From an objective point of view, Members recognize that the critical issues in the current dispute settlement reform negotiations revolve around the proposals that will be 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 conducted in informal and closed manner, and no documents or records of the negotiations are publicly available for discussion and analysis. Nevertheless, occasional press reports or releases regarding the progress of the dispute settlement negotiations have surfaced,<sup>21</sup> providing at least a usable, though perhaps not always reliable, foundation for comprehending some fundamental US demands that lie at the heart of, and could determine the fate of, the entire negotiations. Based on a synthesis of relevant information, in particular the revelations made by the South Centre in April 2023,<sup>22</sup> the core demands of the US may include addressing the following issues:

- (1) Panel composition and expertise: Suggestions have been made to refresh the

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<sup>18</sup> See Washington Trade Daily, *New Process for DSB Reform Talk*, 3 April 2023, pp.5-7.

<sup>19</sup> EU Mission to the WTO, *EU Statements at the Regular Dispute Settlement Body Meeting*, 31 March 2023, [https://www.eeas.europa.eu/delegations/world-trade-organization-WTO/eu-statements-regular-dispute-settlement-body-meeting-31\\_en?s=69](https://www.eeas.europa.eu/delegations/world-trade-organization-WTO/eu-statements-regular-dispute-settlement-body-meeting-31_en?s=69)(accessed 15 July 2023).

<sup>20</sup> Mission of China to the WTO, *Statement by Ambassador Li Chenggang at the WTO Informal Heads of Mission and Trade Negotiation Committee Meeting*, 19 April 2023, <http://WTO.mofcom.gov.cn/article/hyfy/202304/20230403406910.shtml>(accessed 30 May 2023).

<sup>21</sup> See, e.g. Hannah Monicken, *WTO dispute settlement reform talks enter 'new phase,' with non-U.S. facilitator*, 28 February 2023, <https://insidetrade.com/daily-news/wto-dispute-settlement-reform-talks-enter-new-phase-non-us-facilitator>(accessed 15 July 2023); Washington Trade Daily, *New Process for DSB Reform Talk*, 3 April 2023; D. Ravi Kanth, *WTO: In a radical overhaul, US proposes single-tier dispute settlement system*, 26 April 2023, <https://twn.my/title2/wto.info/2023/ti230414.htm>(accessed 15 July 2023); D. Ravi Kanth, *WTO: US proposals on dispute settlement reform could hurt smaller countries*, 27 April 2023, <https://twn.my/title2/wto.info/2023/ti230415.htm>(accessed 15 July 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 July 2023); Washington Trade Daily, *Debate on WTO Reform Continues*, 2 June 2023; D. Ravi Kanth, *WTO: UK, US raise controversial proposals on DS reform*, 2 June 2023, <https://twn.my/title2/wto.info/2023/ti230602.htm>(accessed 15 July 2023); Washington Trade Daily, *More WTO DS Reform Questions*, 5 June 2023; Hannah Monicken, *U.S. outlines 'objectives' for WTO dispute settlement reform*, 5 July 2023, <https://insidetrade.com/daily-news/us-outlines-objectives-wto-dispute-settlement-reform>(accessed 15 July 2023).

<sup>22</sup> See D. Ravi Kanth, *WTO: In a radical overhaul, US proposes single-tier dispute settlement system*, 26 April 2023, <https://twn.my/title2/wto.info/2023/ti230414.htm>(accessed 15 July 2023); D. Ravi Kanth, *WTO: US proposals on dispute settlement reform could hurt smaller countries*, 27 April 2023, <https://twn.my/title2/wto.info/2023/ti230415.htm>(accessed 15 July 2023).

indicative list through a dedicated process, to include improved categorization of panelists and functionality of the list (i.e., searchable), and strengthen the code of conduct for the panelists 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 limited to the appellate stage. This is not only 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,'<sup>23</sup> but also demonstrates that the ongoing negotiations are not a mere simulation or extension of prior discussions before 2019, which were aimed at preventing the AB crisis. Instead, the current reform negotiations bear some resemblance to the DSU Review of the Doha Round,<sup>24</sup> which has been in progress for numerous years without yielding tangible outcomes. The extension of negotiation coverage undoubtedly will present intricate implications for the whole negotiations.

In addition, a number of US proposals seek to modify certain core features of

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<sup>23</sup> See WTO, *MINUTES OF MEETING, Dispute Settlement Body*, 27 February 2023, WT/DSB/M/476, para.3.3.

<sup>24</sup> See WTO, *Negotiations to improve dispute settlement procedures*, [https://www.wto.org/english/tratop\\_e/di\\_spu\\_e/dispu\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/di_spu_e/dispu_negs_e.htm)(accessed 2 August 2023).



the dispute settlement mechanism as established by the DSU, such as the accessibility of the appeals process, the coherence and predictability of decisions, and others. Some subversive demands, such as the correction of past interpretative errors, are 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 negotiations and may even shape the final outcome.

### **3 Challenges: Will the reform negotiations deliver a tangible outcome?**

Judging from the information in the facilitator's report at the end of July, 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 shown that whether the negotiations will 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 AB 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 AB specifically. On one hand, the US still opposes launching the election of the AB members and repeatedly claims 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.<sup>25</sup> 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 latest G20 Trade and Investment Ministerial Meeting, which the US participated in. The G20 outcome document simply repeated the MC12 language on dispute settlement issue,<sup>26</sup> and this is interpreted to imply that the dispute settlement system under the DSU ‘is unlikely to be restored’.<sup>27</sup> On the other hand, numerous 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’<sup>28</sup>, and formed different groups (e.g. MPIA participant Members, DSB decision participating Members, BRICS countries, etc.) to collectively progress their demands. Although it is not

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<sup>25</sup> See e.g. WTO, *MINUTES OF MEETING, Dispute Settlement Body*, 27 February 2023, WT/DSB/M/47/6, para.3.3; US Mission to the WTO, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, 28 July 2023, p.15, [https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2023/07/Jul28.DSB\\_Stmt\\_as\\_deliv\\_fin\\_-1.pdf](https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2023/07/Jul28.DSB_Stmt_as_deliv_fin_-1.pdf)(accessed 2 August 2023).

<sup>26</sup> ‘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*, 24<sup>th</sup>-25<sup>th</sup> August, 2023, Jaipur, Rajasthan, [https://www.g20.org/content/dam/gtwenty/gtwenty\\_new/document/G20\\_Trade\\_and\\_Investment\\_Ministers\\_Meeting.pdf](https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20_Trade_and_Investment_Ministers_Meeting.pdf)(accessed 26 August 2023).

<sup>27</sup> See Washington Trade Daily, *G20 Statement Disappoints Some*, 25 August 2023, p.2.

<sup>28</sup> Article 3.4 of the DSU.

entirely clear which aspects of the dispute settlement system are encompassed by the term ‘core features’ referenced by prominent Members, it appears certain that the preservation of a two-tier system and the impartiality of adjudicating organs are among them. For instance, the latest BRICS submit explicitly declares 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”,<sup>29</sup> which is in sharp contrast to the outcome of the G20 trade ministerial meetings during the same period. In light of considerable conceptual disparities, it seems improbable that either side will yield their position readily through conventional persuasive or confrontational negotiating tactics, unless there comes a politically acceptable reconciliation between the opposing parties.

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 the dispute resolution process. Looking back at the negotiations on dispute settlement rules since the establishment of the WTO, neither the DSU review from 1997 to 2001<sup>30</sup> nor the Doha Round negotiations on improvements and clarifications of the DSU,<sup>31</sup> which began in 2002 and has continued to date, has successfully concluded to produce a final text for the decision of the Ministerial Conference. The technical and legal complexity of many issues partially contributed to the lack of resolution in these negotiations. From a technical perspective, certain crucial propositions in the ongoing reform deliberations, such as the availability of appeal review, the precedent effect of prior jurisprudence, the correction of so-called erroneous interpretations, and the sunset review of relevant adjudicative provisions, are highly innovative and unprecedented among other global tribunals. They naturally raise many challenging questions, which both the proponent and opponent must consider carefully and discuss in detail. This is regardless of whether there is conceptual disagreement among members. For instance, with respect to the proposal on correcting the so-called misinterpretations in previous AB and panel reports, be it national security exceptions or trade remedies, there are quite a number of technical issues to consider. This may include wondering if it is appropriate to address substantive issues under specific WTO agreements in the dispute settlement reform negotiations, deciding on the

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<sup>29</sup> See XV BRICS Summit Johannesburg II Declaration, *BRICS and Africa: Partnership for Mutually Accelerated Growth, Sustainable Development and Inclusive Multilateralism*, 23 August 2023, [https://www.gov.za/sites/default/files/speech\\_docs/Jhb%20II%20Declaration%2024%20August%202023.pdf](https://www.gov.za/sites/default/files/speech_docs/Jhb%20II%20Declaration%2024%20August%202023.pdf) (accessed 26 August 2023).

<sup>30</sup> A decision adopted at the Marrakech Ministerial Conference 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 July 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](https://www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm) (accessed 15 July 2023); WTO, *Extension of the Deadline for Review of the DSU*, 8 Dec 1998, WT/DSB/M/52.

<sup>31</sup> Paragraph 30 of the 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, *Negotiations to improve dispute settlement procedures*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm) (accessed 15 July 2023); WTO, *Report by the Chairman, Ambassador Coly Seck, to the Trade Negotiations Committee, Special Session of the Dispute Settlement Body*, TN/DS/31, 17 June 2019.

appropriate method for the corrections (a DSB decision to annul the previous report, an authoritative interpretation by the General Council, or amendment of relevant WTO Agreement), and clarifying the legal status of corrected and implemented prior reports. These factors frequently impede substantive and rapid progress in negotiations.

The third challenge is the potential inter-relatedness or trade-offs between different negotiation areas. At this point, it is uncertain whether this is a genuine risk, 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.<sup>32</sup> 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,"<sup>33</sup> which may mean "that dispute settlement reform likely can move forward 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 U.S. has argued the AB, or WTO as a whole, has failed, like trade remedies and industrial subsidies."<sup>34</sup> A recent report further revealed 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".<sup>35</sup> While such a trade-off is not uncommon in WTO negotiations, if it were to occur, it would inevitably add more complexity to the atmosphere for the ongoing reform negotiation and generate significant ambiguity about the translation of technical progress into a final outcome.

The fourth challenge could be the time constraints. The target date set by the MC12 - 'by 2024', 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 reform negotiation 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, the negotiations have not reached an agreement on the core issues, which inevitably requires more time and resources to be allocated towards these issues. On the other hand, extending the negotiations from an appellate stage to an overall dispute resolution system dilutes the priority issues of negotiations, consumes typically scarce resources of most Members, and may not facilitate resolution of key issues. Furthermore, it appears that numerous developing country Members with less adequate staff and resources have expressed serious concerns regarding the intense paces of the current reform negotiations.<sup>36</sup> It is crucial to observe how this will impact the subsequent negotiation progression.

In view of these challenges, the potential outcome of the upcoming negotiations appears less optimistic than previously indicated by the facilitator's reports. There is

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<sup>32</sup> See Brett Fortnam, *Appellate Body blocks the only way to ensure reforms*, 12 March 2019, <https://insidetrade.com/daily-news/ligthizer-appellate-body-blocks-only-way-ensure-reforms>(accessed 15 July 2023).

<sup>33</sup> See Katherine Tai, *Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization*, 14 October 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 July 2023).

<sup>34</sup> See Hannah Monicken, *Tai: Dispute settlement, negotiating reforms 'intimately linked' at WTO*, 14 October 2021, <https://insidetrade.com/daily-news/tai-dispute-settlement-negotiating-reforms-'intimately-linked'-wto> (accessed 15 July 2023).

<sup>35</sup> See D. Ravi Kanth, *WTO: US proposals on dispute settlement reform could hurt smaller countries*, 27 April 2023, <https://twon.my/title2/wto.info/2023/ti230415.htm>(accessed 15 July 2023).

<sup>36</sup> See Hannah Monicken, *Drafting of WTO dispute settlement reform text to begin in September*, 28 July 2023, <https://insidetrade.com/daily-news/drafting-wto-dispute-settlement-reform-text-begin-september>(accessed 2 August 2023).

still a substantial distance to cover. Furthermore, this paper argues 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 unforeseen 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 dispute settlement reform negotiation, this cannot be regarded as a success because the dispute settlement crisis remains unresolved, and the following situations continues: (1) the majority of Members continue to call for the resumption of the AB selection, and the US continues to oppose it while bearing pressure and blames; (2) the number of disputes in limbo is growing due to frequent appeals to the vacant AB (appeal into the void);<sup>37</sup> (3) the MPIA still serves as an interim measure, despite a gradual increase in cases reviewed, yet with fewer new participants than anticipated; and (4) the authority of the multilateral trading system and the enforcement of its rules suffer a continued erosion.

Obviously, neither the multilateral trading system nor any Member benefits from the continuation of the dispute settlement crisis. From the perspective of maintaining the multilateral trading system and upholding the rule of law in international trade affairs, 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 an inclusive compromise to restore 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.<sup>38</sup> 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 appeals system and improvements to the 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 theoretical ideas as very feasible or suitable for consideration or implementation. Given this context and possibility, it is necessary to explore new ideas to break the deadlock in the reform negotiations if the crisis in the dispute settlement system persists.

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<sup>37</sup> See WTO, *Current Notified Appeals*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm#fnt-1](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#fnt-1) (accessed 2 August 2023).

<sup>38</sup> See, e.g. Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises?*, 18(3) *World Trade Rev.* 503-525 (2019); Jennifer Hillman, *Three Approaches to Fixing the WTO's Appellate Body: The Good, the Bad and the Ugly*, <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*, <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. Law 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); Steve Charnovitz, *How to Save WTO Dispute Settlement from the Trump Administration*, <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, <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); Kong, Qingjiang & Guo, Shuai. *Towards a Mega-Plurilateral Dispute Settlement Mechanism for the WTO?* 53(2) *J. World Trade* 273 - 292 (2019); 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).

Bearing in mind the differences in positions among major Members and the potential causes of the negotiating impasse, this paper proposes that Members reassess their negotiating tactics to promote openness and flexibility, whilst reducing confrontation, and tables an inclusive compromise plan that provides for the option to opt out of the appellate review procedure under the current DSU as a concurrence or coexistence solution. This approach might be of help to achieve the objective set by the MC12—having a fully and well-functioning dispute settlement system accessible to all Members.

#### **4.1 The methodology of the new approach to solution**

The main focus of the current dispute settlement reform negotiations is undoubtedly the question of whether and how to establish an appellate mechanism. These concerns are 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 could potentially lead to confrontational negotiations, 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 issue lies in the fact that when two opposing sides wield equal influence and remain steadfast in their respective stances, discussions can rapidly devolve into a deadlock without a swift resolution. An alternative or detour approach may be necessary to overcome the impasse or resolve the standoff, so long as two sides all have this wish. Accordingly, this paper suggests that Members could rethink their negotiating tactics, moving from trying to suppress the opposing side's demands to exploring 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 concurrence or coexistence solution.

In accordance with this methodology, the approach to a new proposal commences by reflecting on a list of queries: Must all disputes among Members be appealed compulsorily under the WTO dispute settlement system? 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 agreements 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,<sup>39</sup> rather than an obligatory

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<sup>39</sup> 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 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.

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 specific circumstances, 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. 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. In any future disputes, 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 content, 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 future disputes in which it is a party to the dispute. This declaration is 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 cases. 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 declaration made by a Member under paragraph 2. They shall not initiate the appeal procedure under Article 17 of 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 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 applicable to all future cases wherein the Member is involved as a complainant or defendant and is considered *ex ante*, meaning that it has no retroactive effect on past cases.

(5) Case-specific Arrangement: Notwithstanding the provisions of paragraphs 2 and 3, in a specific case, if all parties to the case so agree, special arrangements may be made for the appellate review of the panel report in the case, 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 case 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 Procedures: The AB shall take full account of the contents in Document JOB/GC/222 (the Walker Paper) in revising the AB Working Procedures.

(8) The way to handle appeals in cases of multiple complainants.<sup>40</sup>

(9) The way to handle panel reports appealed but not heard.<sup>41</sup>

(10) Other matters (e.g. precedential effect issue).<sup>42</sup>

### **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 cases in which they are parties to the dispute, and C and D have not made any declaration (i.e. they will continue to apply 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 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

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<sup>40</sup> In cases 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 cases, 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 complainant to initiate an appeal procedure in such scenario, and that the panel report could be submitted directly to the DSB for adoption.

<sup>41</sup> 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 cases 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 cases 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 request 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; in other appealed cases 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, but the review period may be extended as appropriate.

<sup>42</sup> The content of the "other matters" can be extensive or concise, depending on the technical issues discussed by Members. For example, there have been strong 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 clear rules which previous reports are 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 paragraph 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 Article 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".

AB by invoking Article 16.4 normally or recourse to Article 25 appellate arbitration.

In terms of effectiveness, the Appeal Opt-Out Arrangement to a certain 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 have largely achieved their goal of reforming appellate review or eliminating 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. (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' dilemma, even though only the one-tier legal procedure is available. (4) It also allows case-specific arrangement to have an appeal/review opportunity, basically incorporating the idea proposed by the US to the limit the appeal review of issues in a 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, but limiting it to a case-specific scenario. (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.

### **3.4 Pragmatic features useful in facilitating implementation**

The new proposal is not a plan to optimize the whole dispute settlement system. Rather, it seeks a pragmatic solution to the possible 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 these issues, it seems very impossible to have a final package, no matter how much technical progress has been made on other 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 easily be restored, ideally in combination with, but not dependent on, progress on other dispute settlement 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 Ministerial Conference. 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 a consensus-based negotiation 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 implementation. The Appeal Opt-out Arrangement requires the unanimous consent of all Members and the simultaneous reinstatement of the dispute settlement procedures under the DSU (including the restoration of the AB), retains the characteristic of being multilateral rather than plurilateral, and naturally has the legal connection with the DSU.<sup>43</sup>

Third, it prefers to use holistic and institutional elements to provide predictability and stability rather than resorting to case-specific pact. In several disputes,<sup>44</sup> the disputing parties have reached a no-appeal agreement due to the possible paralysis of the AB. Such a bilateral no-appeal agreement helps to avoid the ‘appeal into the void’ dilemma in a particular case, but it also has some disadvantages,<sup>45</sup> in particular the lack of predictability and the difficulty of reaching a bilateral pact. The Appeal Opt-out Arrangement only requires an opt-out declaration which is *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. Meanwhile, the Appeal Opt-out Arrangement maintains technical neutrality and objectivity, because it does not require the exclusion of certain disputes or issues from the appeal process, nor the inclusion of issue such as the correction of prior interpretations. This helps to avoid overly politicized discussions and increase the level of acceptance.

Fourthly, Members who opt out of the appeal process are not deliberately deprived of the opportunity and right to participate in re-establishment of the AB, thus maintaining the openness and goodwill that may help to allay the objections and concerns of those opt-out Members and lay the groundwork for the AB and its Secretariat to receive the necessary administrative support. In short, the revived AB will remain public goods for all Members. A member that declares its opt out will still be able 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 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 and does not necessarily affect the substantive rights and obligations of Members under the WTO. 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 Appellate Body 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’.<sup>46</sup>

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<sup>43</sup> An essential factor contributing to the efficacy of the MPIA or Article 25 appeal arbitration arrangement is that arbitral awards can be legally ‘incorporated’ into the DSU framework. Under Article 25.4 of the DSU, Articles 21 and 22 apply *mutatis mutandis* to the enforcement of arbitral awards under Article 25. Conversely, if Members do not invoke the Article 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.

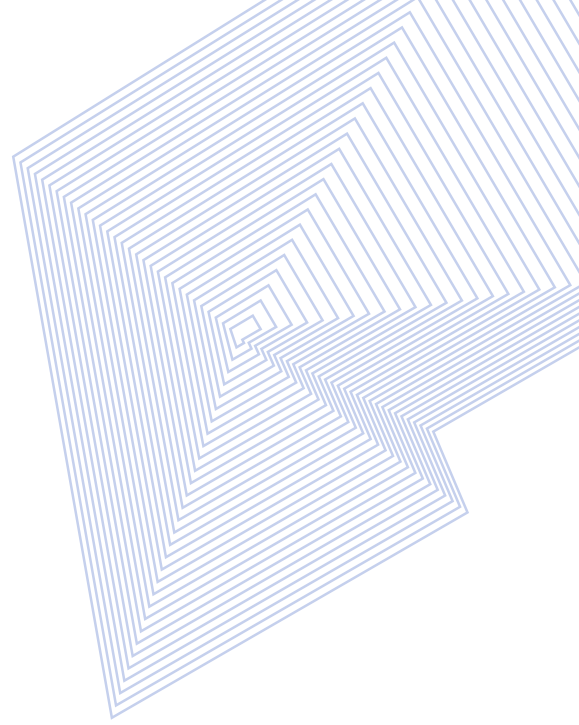
<sup>44</sup> See Indonesia—Safeguard on Certain Iron or Steel Products, *Understanding Between Indonesia and Chinese Taipei Regarding Procedures Under Articles 21 and 22 of the DSU*, 15 April 2019, WT/DS490/13; Indonesia—Safeguard on Certain Iron or Steel Products, *Understanding Between Indonesia and Viet Nam Regarding Procedures Under Articles 21 and 22 of the DSU*, 27 March 2019, WT/DS496/14 .

<sup>45</sup> See, e.g. Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22(3) J. Int’l Econ. L. 297-321 (2019), pp. 311-312.

<sup>46</sup> Article 3.2 of the DSU.

## **5 Conclusion**

Negotiations on the reform of the WTO dispute settlement system are currently underway with great intensity and some progress has been made. Although the international community generally expects WTO Members to reach a consensus through negotiations as soon as possible, a summary analysis of the content of some core proposals tabled and the positions of other major Members demonstrates that the ensuing negotiations still face several challenges. Prolonging the dispute settlement crisis is not in the interest of any Member. Members should explore new ideas to break or avoid the possible deadlock in the reform negotiations with a forward-looking attitude. The inclusive compromise proposal put forward in this paper may serve as one choice for Members to consider during this hard but necessary process. It is to be hoped that such a proposal can make some positive contribution to promoting the resumption of the normal functioning of the WTO dispute settlement system.



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