A HOLISTIC APPROACH FOR WTO DISPUTE SETTLEMENT MECHANISM REFORMS: US DEMANDS AND THE RESTORATION OF THE APPELLATE BODY

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ABSTRACT

Against the backdrop of the crisis in the WTO Appellate Body and the diminishing relevance of the multilateral trading system itself, initiating negotiations to restore the Appellate Body should still be a priority for WTO reform. For years, the US has been consistently criticizing the Appellate Body and attempting to introduce new rules targeting non-market-oriented policies and practices by obstructing the restoration the Appellate Body. The Biden administration has recently convened discussions with a few WTO Members on reforming the dispute settlement mechanism, indicating a certain flexibility in delinking the reform of the Appellate Body with the incorporation of rules targeting non-market-oriented policies and practices. WTO Members should seize this opportunity to understand and sort out the US demands regarding the Appellate Body, consider their acceptability on a case-by-case basis, and thereby promote negotiations for the reform of the Appellate Body.

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KEYWORDS: *World Trade Organization (WTO), Dispute Settlement Mechanism, Appellate Body, US Demands, reform*

Table of Content

I. The Origin of the Discussion 317
II. The Root of the Problem: US Dissatisfaction with the Appellate Body 319
III. Directions of the WTO Dispute Settlement Mechanism Reform 324
A. The Key Objective: Re-Appointment of Appellate Body Members to Restore Its Function 324
B. The Biden Administration's Position on WTO Appellate Body Reform 326
C. Premises for WTO Dispute Settlement Mechanism Reform 329
IV. Challenges and Motivations for Advancing the Appellate Body Reform 331
A. Challenges: US Priorities and Comprehensive Agreements 331
B. Motivations: New Establishment of the MPIA 332
V. Strategies for the WTO Dispute Settlement Mechanism Reform 333
A. The Starting Point: Addressing the US Concerns 333
B. A Holistic Approach: Integrating Rule-Making and Dispute Settlement Mechanism Reforms 337
VI. Conclusion 340

I. THE ORIGIN OF THE DISCUSSION

The World Trade Organization (hereinafter "WTO") is characterized with binding global trade rules, among which the Dispute Settlement Mechanism (hereinafter "DSM"), often regarded as the "jewel in the crown",[1] is considered the core of the WTO. The Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") established the Dispute Settlement Body (hereinafter "DSB") accordingly.[2] The DSB establishes panels or the Appellate Body within specified timeframes and issues reports through these bodies.[3] As of December 31, 2022, WTO Members have raised 615 disputes,[4] and more than two-thirds

[1] Press Release, WTO Disputes Reach 400 Mark, Press/578, WORLD TRADE ORG. [hereinafter WTO] (Nov. 6, 2009), https:// www.wto. org/english/news_e/pres09_e/pr578_e.htm.
[2] *See generally* ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT (1997); WTO, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2d ed. 2017); PETROS C. MAVROIDIS, THE WTO DISPUTE SETTLEMENT SYSTEM: HOW, WHY AND WHERE? (2022).
[3] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
[4] *Dispute Settlement Activity — Some Figures*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited Nov. 1, 2023).

of panel reports have been appealed.[5]

However, amid the newly launched strategic competition and the wave of anti-globalization and trade protectionism, certain Members such as the United States (hereinafter "US"), strongly criticize the legislation and practices of the WTO. This includes the failure of WTO Members to strictly adhere to existing rules, slow progress in reaching and negotiating new rules, and problems with the DSM. As the dominant force behind the establishment of the WTO, the US is, in fact, the most important advocate and supporter of the DSM. From the early days of the formation of the WTO, the US has requested a standing Appellate Body capable of addressing issues with *ad hoc* panels.[6]

However, as the number of WTO Members increased, the US became increasingly involved in WTO dispute settlement cases and faced multiple defeats in several appellate cases.[7] The US gradually grew dissatisfied with the current state of the WTO DSM and has been opposing the appointment of new Appellate Body members since 2016.[8] According to Article 17 of the DSU, if more than three of the seven required positions on the Appellate Body are vacant, its review procedures cannot continue. Since the departure of two of the remaining three Appellate Body members, Mr. Ujal Singh Bhatia (India) and Mr. Thomas R. Graham (US), on December 10, 2019, the Appellate Body has been paralyzed.[9] Since the departure of Chinese judge Ms. Zhao Hong in November 2020, the WTO Appellate Body has had no serving members.[10]

Although WTO panels are still functioning, the absence of the Appellate Body in the DSM significantly undermines its credibility, leading to a series of potential subsequent issues.[11] Firstly, without a strict enforcement mechanism, WTO Members lack the motivation to fulfill their existing obligations. Secondly, the failure to adhere to existing rules and the difficulty

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[5] Joost Pauwelyn & Weiwei Zhang, *Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload*, 21(3) J. INT'L ECON. L. 461, 474 (2018).

[6] Bernard M. Hoekman & Petros C. Mavroidis, *To AB or Not to AB? Dispute Settlement in WTO Reform*, 23(3) J. INT'L ECON. L. 1, 8-9 (2020).

[7] A list of WTO cases can be accessed at *Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.ht m (last visited Nov. 1, 2023).

[8] For the blockage of the reappointment of the South Korea Member Seung Wha Chang, see generally U.S. Mission to Int'l Orgs. in Geneva, *Statement by the United States at the Meeting of the WTO Dispute Settlement Body*, WTO (May 23, 2016), https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf.

[9] See the list of the Appellate Body members at: *Appellate Body Members*, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Nov. 1, 2023).

[10] *Id*.

[11] *See generally* Chad P. Bown & Soumaya Keynes, *Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0*, PETERSON INST. FOR INT'L ECON. [hereinafter PIIE] (Mar. 2020), https://www.piie.com/publications/working-papers/why-trump-shot-sheriffs-end-wto-dispute-settlement-10; Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences*, 54(5) J. WORLD TRADE 667 (2020); Hoekman & Mavroidis, *supra* note 6; MAVROIDIS, *supra* note 2.

in reaching new rules have resulted in Members' reluctance to make new commitments. Thirdly, this situation greatly stimulates trade protectionism, forcing WTO Members to rely on domestic legislation to protect their trade interests. Fourthly, a Member and other like-minded Members will be unable to exert multilateral influence on targeted Members, including structural and systemic changes. Fifthly, the WTO will struggle to provide new rules for emerging issues such as climate change, supply chain resilience, digital trade, etc., thereby maintaining its relevance.

In recent years, there has been a constant stream of academic discussions on WTO DSM reform, with scholars attempting to reconstruct this crucial mechanism.[12] Fortunately, at the 12th Ministerial Conference (MC12) in June 2022, WTO Members committed to initiating discussions on DSM reform with the goal that by 2024, all Members will be able to access "a fully and well-functioning dispute settlement system".[13] The 13rd Ministerial Conference of the WTO (MC13) further renewed the commitment to have a fully and well-functioning dispute settlement system by 2024.[14] The realization of this vision hinges largely on the US' stance towards the Appellate Body. This article delves into the US perspective, seeking to understand the motivations behind its persistent obstruction of Appellate Body member appointments, and subsequently offers solutions to overcome the current stalemate.

II. THE ROOT OF THE PROBLEM: US DISSATISFACTION WITH THE APPELLATE BODY

For over twenty years, the US has expressed concerns about the operation of the WTO's DSM, particularly its Appellate Body, for not adhering to WTO rules. The US is the most active Member in the WTO dispute settlement system, bringing 124 cases to the WTO as the Complainant, defending in 158 cases as the Respondent, and participating in other 175 cases as a third party.[15] However, the Trump administration kept claiming it had lost the lawsuits, "almost all the lawsuits in the WTO",[16]

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[12] *See generally* Qingjiang Kong & Shuai Guo, *Towards a Mega-Plurilateral Dispute Settlement Mechanism for the WTO?*, 53(2) J. WORLD TRADE 273 (2019); Thomas Cottier, *Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review*, 24 J. INT'L ECON. L. 515 (2021); Bernard M. Hoekman et al., *Informing WTO Reform: Dispute Settlement Performance, 1995-2020*, 55(1) J. WORLD TRADE 1 (2021); Alan Wm. Wolff, *Further Thoughts on WTO Dispute Settlement*, PIIE (May 2, 2022), https://www.piie.com/commentary/s peeches-papers/further-thoughts-wto-dispute-settlement.

[13] WTO, MC 12 Outcome Document, ¶ 4, WTO Doc. WT/MIN(22)/24, WT/L/1135 (June 22, 2022).

[14] WTO, Abu Dhabi Ministerial Declaration, ¶ 23, WTO Doc. WT/MIN(24)/DEC (Mar. 4, 2024); WTO, Dispute Settlement Reform Ministerial Decision, WTO Doc. WT/MIN(24)/37, WT/L/1192 (Mar. 4, 2024).

[15] *See Disputes by Member*, *supra* note 7.

[16] Ian Schwartz, *Full Lou Dobbs Interview: Trump Asks What Could Be More Fake than CBS, NBC,*

despite the fact that the US has prevailed in 91% of the cases as Claimant.[17]

From the US perspective, the Appellate Body has expanded its authority beyond what is authorized by WTO rules, resolving issues it does not have the authority to address and taking actions it does not have the authority to take. It has also interpreted WTO agreements in ways that WTO Members could not have anticipated, thereby increasing US obligations and diminishing US rights. This ongoing overreach clearly violates the limited authority granted to the Appellate Body as specified in WTO rules.[18] While expressing dissatisfaction with the Appellate Body, the US has even raised concerns about its legitimacy. Under a democratic constitutional system, actions taken by the Appellate Body without the consent of the US or approval from the US Congress lack legitimacy.[19] Specifically:

First, the Appellate Body members repeatedly violated Article 17.5 by disregarding the mandatory 90-day deadline for issuing reports. For example, in the case of *China — Certain Measures on Steel Fasteners from the European Union* (DS397), the appeal was received on March 30, 2011, but the Appellate Body report was not issued until February 12, 2016, spanning a period of five years.[20] According to a study, no appeal has been concluded within a 90-day timeframe since May 2014; furthermore, the average duration of appeals spanning from May 2014 to February 2017 stands at 149 days.[21] This issue is largely attributed to the drafters of the treaty not foreseeing the significant role the WTO would play in future international legal practice. As a result, too many cases entered the appellate process, making it impossible for the overloaded Appellate Body to complete its reviews within the time limits.

Second, the Appellate Body repeatedly breached DSU Article 17.2 by allowing former members to decide on cases after their terms ended. According to Rule 15 of the Working Procedures for Appellate Review,[22] a former Appellate Body member can continue to review cases not completed

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ABC and CNN?, REALCLEARPOLITICS (Oct. 25, 2017), https://www.realclearpolitics.com/video/2017/10/25/full_lou_dobbs_interview_trump_asks_what_could_be_more_fake_than_cbs_nbc_abc_and_cnn.html.

[17] Dan Ikenson, *US Trade Laws and the Sovereignty Canard*, FORBES (Mar. 9, 2017, 10:02 AM), https://www.forbes.com/sites/danikenson/2017/03/09/u-s-trade-laws-and-the-sovereignty-canard/.

[18] *See U.S. Views on the Functioning of the WTO Dispute Settlement System*, OFF. OF THE U.S. TRADE REPRESENTATIVE [hereinafter USTR], https://ustr.gov/issue-areas/enforcement/us-views-functioning-wto-dispute-settlement-system (last visited Dec. 21, 2023).

[19] USTR, *Introduction* to 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.

[20] Information can be accessed via Panel Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO Doc. WT/DS397/25/R (adopted Feb. 15, 2016).

[21] USTR, *supra* note 19, at 30.

[22] WTO, *Working Procedures for Appellate Review,* WTO Doc. WT/AB/WP/6 (Aug. 16, 2010).

during their term only if authorized and notified by the Appellate Body.[23] However, according to DSU Article 17.2, the Appellate Body does not have the authority to make such decisions. The selection of Appellate Body members should be determined by the WTO Members.

Third, the Appellate Body transgressed Article 17.6 by surpassing its prescribed authority, delving into legal issues, and scrutinizing factual determinations rendered by panels, including findings related to the interpretation of domestic laws of WTO Members. According to this provision, the Appellate Body's jurisdiction is limited to legal issues and legal interpretations covered in panel reports. The US argues that the Appellate Body has no authority to review the interpretation of domestic laws of a Member since it is a matter of fact, not law. However, this issue itself is controversial. Particularly in the dispute settlement process, the unquestioned interpretation of domestic laws obviously cannot be solely based on the unilateral opinions of the parties involved but requires legal analysis.

Fourth, the Appellate Body did not conform to Articles 3.7 and IX:2 of the Agreement Establishing the WTO by issuing advisory opinions on non-essential issues related to dispute settlement. For instance, in the *China — Publications* case, the Appellate Body exceeded its authority by discussing the availability of Article XX(a) of the GATT, under a hypothetical situation that certain measures were not necessary within the meaning of this provision. However, since the Appellate Body agreed with the Panel on the necessity question, there is no need to further discuss Article XX(a).[24] There are two possible scenarios regarding advisory opinions. If advisory opinions are given in response to a request by a Member, it could be seen as an integral part of dispute settlement without objection. In cases where advisory opinions are provided proactively, it should also be recognized that this contributes positively to clarifying the international legal principles and governance of trade law, and not all Members are opposed to this. The current issue is that the DSU does not explicitly specify that the Appellate Body can provide advisory opinions. The US believes that, according to the literal interpretation, the interpretation of WTO agreements can only be done by WTO Members in ministerial conferences or the General Council, not by dispute resolution bodies.

Fifth, the Appellate Body incorrectly claims that its reports have the authority to be treated as binding precedents that must be followed by panels.

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[23] *See* May 31, 2016, and September 28, 2018 letters from the Appellate Body to the chairperson of the DSB regarding Mr. Chang and Mr. Servansing, respectively, cited by USTR, *supra* note 19, at 33 n.45.

[24] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 336-37, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010). *See also* USTR, *supra* note 19, at 53.

Similarly, the US believes that only WTO Members have the authority to interpret WTO rules, while dispute settlement bodies can only address disputes. However, the Appellate Body considers its own interpretations of WTO rules as binding on subsequent panels, and deviations can only occur with "cogent reasons".[25] In the case of "*Mexico — U.S. Stainless Steel (Mexico II)*" (DS344), the provision in Article 3.2 of the DSU that the DSM ensures "security and predictability" of the multilateral trading system implies that the Appellate Body must resolve similar legal issues in subsequent cases in the same manner unless there are strong reasons to depart from its previous decisions or legal interpretations.[26] Therefore, the US argues that this practice effectively results in the Appellate Body members creating law and going against the foundational consent of WTO Members. However, precedents can provide sufficient legal certainty and legal expectations for Members, aiding the development of customary international law and international governance in the field of trade. Additionally, the WTO has established that precedents are difficult to overturn but not entirely binding, leaving room for change, and thus the guiding significance of precedents should also be recognized.[27]

Sixth, the Appellate Body failed to provide necessary recommendations when measures became ineffective after the establishment of a panel. According to DSU Article 19.1, panels and the Appellate Body should make appropriate recommendations when determining that a measure is inconsistent with WTO rules. However, the Appellate Body believes that such recommendations can be selectively issued, especially when a measure has become ineffective during the process and there is no longer a need to issue recommendations.[28] The US believes that the Appellate Body overstepped its authority in this regard; it does not have the freedom to choose whether to issue recommendations but should do so as per the DSU when finding inconsistent measures. Nevertheless, reissuing recommendations for measures that have already become ineffective is clearly a waste of judicial resources and is also undesirable from a judicial economy perspective.

Seventh, the Appellate Body overstepped its authority by providing opinions on matters within the purview of other WTO bodies (including the

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[25] Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008).
[26] *Id.*
[27] *See generally* James Bacchus & Simon Lester, *The Rule of Precedent and the Role of the Appellate Body*, 54(2) J. WORLD TRADE 183 (2020); Mariana Clara de Andrade, *Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism*, 11(2) J. INT'L DISP. SETTLEMENT 262 (2020).
[28] Appellate Body Report, *United States — Subsidies on Upland Cotton*, ¶ 272, WTO Doc. WT/DS267/AB/R (adopted Mar. 21, 2005); Appellate Body Report, *European Union — Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, ¶ 5.43, WTO Doc. WT/DS486/AB/R (adopted May 25, 2018).

Ministerial conferences, the General Council, and Dispute Settlement Body). The US points out that the DSM is only used to determine whether a Member's measures comply with WTO rules, whereas the Appellate Body exceeds its authority by offering advice to WTO bodies. In the case of "*European Union — Large Civil Aircraft*" (DS353), the Appellate Body analyzed Annex V of the Agreement on Subsidies and Countervailing Measures and made recommendations on how the WTO DSM should handle issues related to information gathering and the appointment of representatives under that agreement.[29] The US argues that this practice goes beyond the authority granted to the Appellate Body by the DSU. The determination of the jurisdiction of WTO bodies should be decided by Members, not by the Appellate Body. However, the reason for this opinion in this case is due to the lack of clarity in the wording of Annex V, and the Appellate Body needed further clarification on it. Furthermore, when drafting WTO rules, there was no clear distinction between the rights and responsibilities of Members and WTO bodies, which may lead to unresolved issues in certain areas.

Overall, the suggestions put forward by the US do reflect certain existing issues and the fact that the DSM, particularly the Appellate Body, has not strictly adhered to the provisions of the DSU. However, it should be noted that the U.S. stance is based on a very strict and rigid textual interpretation and legalism, without considering the practical difficulties of the DSM, the need to promote international trade rules and the rule of law, as well as specific issues such as judicial economy and the effective principle. Nonetheless, the design of the DSU provisions did not comprehensively consider all issues and lacks anticipation of future developments, requiring further reform.

However, since President Biden took office, it appears that the United States has returned to multilateralism. In January 2023, Maria Pagan, Deputy United States Trade Representative, revealed that the US "is entering a third phase of talks with countries to reform the WTO hobbled trade dispute arbitration system and aims for it to be 'fully functioning' by the end of 2024".[30] However, the goal that the US is seeking is not very clear. On 5 July 2023, the WTO published US Objectives for a Reformed Dispute Settlement System.[31] Yet, this policy document is overly vague and lacks concrete reform measures that could be achieved at the implementation level. This article therefore attempts to analyze the intention of the US, which is

[29] Appellate Body Report, *United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint*, ¶ 549, WTO Doc. WT/DS353/AB/R (adopted Mar. 23, 2012).

[30] Emma Farge, *U.S. Wants World Trade Organization Dispute System Fixed by 2024*, REUTERS (Jan. 27, 2023, 2:00 PM), https://www.reuters.com/markets/us-wants-world-trade-organization-dispute-system-fixed-by-2024-2023-01-26/.

[31] *See generally* Disp. Settlement Body, *US Objectives for a Reformed Dispute Settlement System Communication from the US*, WTO Doc. JOB/DSB/4 (July 5, 2023).

the key player in restoration of the WTO dispute settlement.

III. DIRECTIONS OF THE WTO DISPUTE SETTLEMENT MECHANISM REFORM

A. The Key Objective: Re-Appointment of Appellate Body Members to Restore Its Function

According to a survey, while most Members support the US's criticism of the WTO DSM, not all Members agree with the US obstructing the normal functioning of the Appellate Body. The majority of respondents believed that: (1) the existing system is more attractive to larger and wealthier Members; (2) the current framework is appropriate; (3) they agree with the US's identification of issues with the existing DSM; and (4) most WTO Members agree to maintain the appellate system.[32] The WTO DSB was created to adjudicate trade disputes for the purpose of de-politicization of the multilateral trading system[33] and the Appellate Body is the key to achieve the goal. First, the establishment of the Appellate Body aimed to guarantee a consistent interpretation of WTO rules. Since the WTO panel are selected from a pool of over 400 specialists in trade law and policy,[34] maintaining a coherent application of agreed WTO laws during this panel stage is difficult. Instead, the standing Appellate Body would ensure the consistency of rule interpretation, providing sufficient legal predictability.[35] Second, from an institutional perspective, panel reports can be subject to appeal, and only appellate reports can carry final effects and thus ensure effective enforcement.[36] This institutional design also explains why appeals persisted even after the dysfunction of the Appellate Body.[37] This is due to the incentive of blocking the enforcement of WTO reports. On the contrary, a one-tiered system with only the panel phase cannot ensure adequate legal certainty, unless standing panel members are appointed and decide cases on the basis of collegiality.[38] However, achieving this also seems impossible, given the same ongoing objections to the Appellate Body member appointment. These reasons may explain why most Members would support

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[32] *See* Bernard M. Hoekman & Petros C. Mavroidis, *Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?*, 32(3) EUR. J. INT'L L. 743, 750 (2021).
[33] *See* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 9 (1993).
[34] As of March 2023, there are 468 experts in the indicative list. *See* Disp. Settlement Body, *Indicative List of Governmental and Non-Governmental Panelists*, WTO Doc. WT/DSB/44/Rev.61 (Mar. 31, 2023).
[35] *See* Fiorini et al., *supra* note 11, at 686.
[36] DSU art. 17.
[37] As of December 2022, appeals in 25 proceedings were pending before the Appellate Body and cannot be further advanced until new members are appointed. *See Dispute Settlement Activity — Some Figures*, *supra* note 4.
[38] *See* Hoekman & Mavroidis, *supra* note 6, at 10.

the reform of the Appellate Body instead of abolishing it. In a nutshell, Appellate Body reform should not be held hostage to the appointment of Appellate Body members, as these are two related but separate issues.

The appointment of Appellate Body members requires the unanimous agreement of all WTO Members, meaning the US can veto the proposals for new Appellate Body members on its own, thus affecting the functioning of the DSM. Since the Obama administration vetoed the reappointment of a serving Appellate Body member (Korean Judge Seung Wha Chang) in 2016, the US has been blocking all appointments of Appellate Body members since 2017.[39] Mexico and other Members proposed a selection process for Appellate Body judges starting in 2017, but it was ultimately rejected by the US.[40]

While many WTO Members have been urging the US to reappoint Appellate Body members, the US has consistently opposed this move citing systemic issues. The US government seems to suggest abolishing the Appellate Body altogether, shifting from a "two-tiered" process (panel and appellate review) to a "single-tiered" process conducted solely by panels.[41] From the US response, it can be inferred that reappointing Appellate Body members without any reforms is now highly unlikely.

Since the paralysis of the Appellate Body, Members other than the US have been actively promoting reform, aiming to restore the functioning of the Appellate Body. Examples include the European Union's "Concept Paper on WTO Modernization",[42] Canadas discussion paper on "Strengthening and Modernizing the WTO"[43] and the Ottawa Group's Ministerial Statement on WTO Reform.[44] China published its "Position Paper on WTO Reform" in 2018, outlining three principles and five propositions for WTO reform.[45] In 2019, China submitted a proposal on WTO reform, addressing key and urgent issues for the survival of the WTO.[46] Among them, the

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[39] U.S. Mission to Int'l Orgs. in Geneva, *supra* note 8.

[40] Disp. Settlement Body, *Proposal Regarding the Appellate Body Selection Process: Communication from Argentina, Brazil, Colombia, Chile, Guatemala, Mexico and Peru*, WTO Doc. WT/DSB/W/596 (May 12, 2017).

[41] Terence P. Stewart, *USTR Lighthizer's Op Ed in the Wall Street Journal – How to Set World Trade Straight*, CURRENT THOUGHTS ON TRADE (Aug. 24, 2020), https://currentthoughtsontrade.com/2020/08/24/ustr-lighthizers-op-ed-in-the-wall-street-journal-how-to-set-world-trade-straight/.

[42] *See WTO Modernisation – Introduction to Future EU Proposals*, ASTRID 14 (Sept. 18, 2018), https://www.astrid-online.it/static/upload/comm/0000/commue_wto-reform_18_09_18.pdf [hereinafter The EU Proposal].

[43] General Council, *Strengthening and Modernizing the WTO: Discussion Paper — Communication from Canada*, WTO Doc. JOB/GC/201 (Sept. 24, 2018).

[44] Ottawa Group, *Joint Communique of the Ottawa Group on WTO Reform — Communication from Canada*, WTO Doc. WT/L/1057 (Jan. 25, 2019).

[45] *See generally* MINISTRY OF COM. OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter MOFCOM], CHINA'S POSITION PAPER ON WTO REFORM (2018).

[46] MOFCOM, ZHONGGUO GUANYU SHIMAO ZUZHI GAIGE DE JIANYI WENJIAN (中国关于世贸组织改革的建议文件) [THE CHINESE PROPOSAL ON WTO REFORM DOCUMENT] (2018).

European Union has been pushing for a solution to be reached "no later than MC13".[47] In the WTO Dispute Settlement Body meeting in January 2023, the EU reiterated the need to accelerate DSB reforms and emphasized that "the most urgent area of WTO reform involves finding an agreed basis to restore [the Appellate Body] system and proceeding to the appointment of the members of the Appellate Body", which should be a priority task.[48] On 27 September 2023, the Chinese leadership systemically studied the WTO legal system at an *ad hoc study session*, while President Xi Jinping alerted members to the urgency of WTO reforms and required China's full participation in WTO reforms in light of the spirit of innovation, while highlighting the maintenance of the authority and effectiveness of the multilateral trading system, and restoration of the DSM.[49] Members cannot miss the deadline in 2024 to establish a full and well-functioning dispute settlement mechanism. As demonstrated in numerous policy documents and academic literature, the restoration of the Appellate Body signifies a profound commitment to upholding the judicial authority of the WTO.[50] This authority has earned a level of respect that remains unparalleled among other international judicial bodies. It serves as a beacon of consistency and coherence in the resolution of disputes, embodying the unwavering commitment to the principles of the rule of law within the framework of the multilateral trading system.

B. The Biden Administration's Position on WTO Appellate Body Reform

Since taking office, the Biden administration has continued the criticism of China's economic system inherited from the Trump administration, arguing that China's economic and trade practices have not shifted towards stronger, market-oriented principles but have intensified its state capitalism with Chinese characteristics.[51] The administration believes that the current

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[47] *EU Statements at the Regular Dispute Settlement Body meeting, 27 January 2023*, EUROPA (Jan. 30, 2023), https://www.eeas.europa.eu/delegations/world-trade-organization-wto/eu-statements-regular-dispute-settlement-body-meeting-27_en?s=69.

[48] *Id.*

[49] *Xi Jinping Zai Zhonggong Zhongyang Zhengzhiju Di Baci Jiti Xuexi Shi Qiangdiao: Jiji Canyu Shijie Maoyi Zuzhi Gaige Tigao Jiayu Gao Shuiping Duiwai Kaifang Nengli* (习近平在中共中央政治局第八次集体学习时强调：积极参与世界贸易组织改革 提高驾驭高水平对外开放能力) [*Xi Jinping Emphasized at the Eighth Collective Study Session of the Political Bureau of the CPC Central Committee: Actively Participate in the Reform of the World Trade Organization and Improve the Ability to Control High-Level Opening Up to the Outside World*], XINHUANET (Sept. 27, 2023), http://www.news.cn/politics/leaders/2023-09/27/c_1129889418.htm.

[50] *See generally* Kong & Guo, *supra* note 12; Cottier, *supra* note 12; Valerie Hughes, *Maintaining Relevance in a Much-Changed World: Reforming WTO Dispute Settlement*, 26(1) J. INT'L ECON. L. 133 (2023).

[51] Wolff, *supra* note 12.

WTO rules are ineffective in constraining China's harmful practices.[52] However, the administration has given up on demanding structural changes from China, not because China has made alleged changes or the U.S. and China have reached a reconciliation, but because the administration sees the demand for structural changes as impractical or has become disillusioned with this demand.[53]

Regarding the WTO DSM, the Biden administration has continued to block the filling of vacancies in the Appellate Body, rendering it unable to hear new appeals. However, it has departed from the Trump era's outright criticism of the Appellate Body and the unwillingness to engage in discussions on its reform, shifting towards a values-based multilateral trade policy and reaffirming the pursuit of multilateralism with allied Members.[54] The Office of the United States Trade Representative (hereinafter "USTR") has expressed willingness to negotiate Appellate Body reform and has convened several small-scale meetings to discuss reform, thus opening the door to progress on this issue.[55]

In October 2021, US Trade Representative Katherine Tai stated at an academic conference in Geneva that she would like to see the WTO focus more on negotiation and deliberation rather than litigation.[56] Rules related to international trade should be the result of negotiations among Members, rather than being directly established by the Appellate Body through Member litigation. She also suggested that the WTO system should provide multiple avenues for dispute resolution, and litigation should not largely exclude smaller, lower-income Members. Fundamental reforms to the WTO dispute settlement must reflect the true interests of all WTO Members, including

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[52] USTR, 2022 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 2 (2023), https://ustr.gov/sites/default/files/2023-02/2022%20USTR%20Report%20to%20Congress%20on%20China%27s%20WTO%20Compliance%20-%20Final.pdf.

[53] *See generally* Vivek Mishra, *From Trump to Biden, Continuity and Change in the US's China Policy*, ORF (2022), https://www.orfonline.org/public/uploads/posts/pdf/20230816230711.pdf; Gavin Bade, *'A Sea Change': Biden Reverses Decades of Chinese Trade Policy*, POLITICO (Dec. 26, 2022, 7:00 AM), https://www.politico.com/news/2022/12/26/china-trade-tech-00072232; Steve Davis, *Finding Safe Harbors for Development Impact: Navigating U.S.-China Stormy Waters for the Global Public Good*, CSIS (Aug. 2023), https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-08/230823_Davis_SafeHarbors_DevelopmentImpact.pdf?VersionId=Jhv5P6gFu2wYO_4C_eImrNCa05R.MZ3u.

[54] Mona Pinchis-Paulsen, *Trade Multilateralism and US National Security: The Making of the GATT Security Exceptions*, 41(1) MICH. J. INT'L L. 109, 119-20 (2020); Mishra, *supra* note 53; Aldo Ligustro, *Biden Foreign Trade Policy: The Return to Multilateralism?*, 56(1) DPCE ONLINE 125, 137 (2023).

[55] Clete Williems, *Revitalizing the WTO Under a Biden Administration*, HINRICH FOUND. (Jan. 12, 2021), https://www.hinrichfoundation.com/research/article/wto/wto-2021-biden-administration/.

[56] *Ambassador Katherine Tai's Remarks as Prepared for Delivery on the World Trade Organization*, USTR (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#:~:text=We%20all%20recognize%20the%20importance,fairer%2C%20more%20inclusive%20global%20economy.

those who traditionally have not turned to formal dispute settlement.

In 2022, the US initiated informal discussions and engaged with other WTO Members on what they hoped to achieve from the WTO dispute settlement system. Nearly 20 Members listed dispute settlement reform as one of their top priorities. On 21 September 2022, the US convened an informal discussion at the G20 Trade Ministers' meeting in Bali, Indonesia, focusing on the reform of the Appellate Body.[57] So far, the discussions appear to be informal, and details regarding the outlines of the negotiations, including specific issues being discussed and whether any proposals are on the table, remain unknown. However, this indicates that the Biden administration's approach to WTO Appellate Body strategy may have changed.

Maria Pagan, Deputy US Trade Representative, emphasized at the WTO Dispute Settlement Body meeting in January 2023 that dispute settlement reform remains a high priority for the US, and the government will continue to engage seriously on this issue.[58] She argued that some Members criticized the non-functioning Appellate Body for weakening their rights as WTO Members, which was the US's perception of its overreach before the Appellate Body's demise and the reason for the need for reform.

However, the US's objective is not clearly stated or conveyed. In its July 2023 Communication to the WTO, the US continued to use vague expressions such as "achieving fundamental reform . . . through a collective, Member-driven process", and the "dispute settlement system should preserve the policy space in WTO rules for Members to address their critical societal interests and support rather than undermine the WTO's role as a forum for discussion and negotiation to help Members address new challenges", without clarifying specific agendas for WTO reforms.[59] Ten objectives were listed, namely, (1) "facilitating the resolution of trade disputes", (2) "maintaining existing commitments and rules as agreed"; (3) "preserving and promoting fairness in the trading system"; (4) "respecting the essential security interests of Members"; (5) "utilizing all available tools to resolve disputes"; (6) "reducing costs to enable wider access to dispute resolution"; (7) "resolving disputes efficiently"; (8) "promoting transparency of the system"; (9) "building trust in the system and its results"; (10) "safeguarding the integrity of the dispute settlement system".[60] Most importantly, the US "emphasizes that it is not advancing specific negotiating

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[57] *USTR Convenes Meeting to Discuss WTO's Dispute Settlement Reforms in Bali on Sep 21; Piyush Goyal to Attend*, ECON. TIMES (Sept. 18, 2022, 2:14 PM), https://economictimes.indiatimes.com/news/economy/foreign-trade/ustr-convenes-meeting-to-discuss-wtos-dispute-settlement-reforms-In-bali-on-sep-21-piyush-goyal-to-attend/articleshow/94280640.cms?from=mdr.

[58] U.S. Mission to Int'l Orgs. in Geneva, *supra* note 8.

[59] *See* Disp. Settlement Body, *supra* note 31, ¶ 1.

[60] *Id.* ¶¶ 6-15.

proposals at this time".[61] Without explicit proposals, it is difficult to initiate concrete negotiations with the US on a textual basis. A further look into the intentions or underlying needs of the US is needed.

On 22 September 2023, USTR Representative Katherine Tai once again made the following statement: "The goal here is not restoring the Appellate Body or going back to the way things used to be. It is about providing confidence that the system is fair. And revitalizing the agency of Members to settle their disputes. And revitalizing the agency of Members to settle their disputes."[62] It is therefore inferred that the US is not actively willing to participate in the discussions of restoration of the Appellate Body. More likely, the US is simply using the reappointment of Appellate Body members as the leverage to achieve its trade policy goals. The following section therefore investigates what the US's priorities are.

C. Premises for WTO Dispute Settlement Mechanism Reform

It is obvious that whether the Appellate Body can be restored in the game between the US and other WTO Members depends on whether both sides can satisfy each other's demands. The question is whether the US's demand for restoring the Appellate Body is limited to the appeal mechanism itself, or if it will leverage the crisis of the Appellate Body to pressure other Members. Will WTO reform develop in a direction favorable to US interests, bundling WTO reform proposals together and using them as a bargaining chip? As indicated by Katherine Tai in her 22 September speech, the US top concerns are (i) transparency; (ii) new rules in relation to topics such as non-market policies and practices; and (iii) the dispute settlement mechanism, which, as the US stands, should be more of a negotiation platform instead of an overreaching judicial body.[63] In addition, the speech mentioned several other aspects and challenges, including technology, climate change, supply chains, geopolitical friction, inequality and food security.[64] It is worthwhile looking into the US's real demands.

At the top of international relations concern for the Biden administration is the US-China relationship.[65] In terms of trade, the discussions focus on several aspects. For instance, there arises the issue of non-market-oriented

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[61] *Id.* ¶ 5.

[62] *Remarks by Ambassador Katherine Tai on the World Trade Organization and the Multilateral Trading System*, USTR, http://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/september/remarks-ambassador-katherine-tai-world-trade-organization-and-multilateral-trading-system (last visited Nov. 1, 2023) [hereinafter *Remarks by Ambassador*].

[63] *Id.*

[64] *Id.*

[65] Alan Wm. Wolff, *Discarding a Utopian Vision for a World Divided: The Effect of Geopolitical Rivalry on the World Trading System*, PIIE 5 (2023), https://www.piie.com/sites/ default/files/2023-06/2023-06-16wolff.pdf.

policies and practices. In recent years, major WTO Members such as the US, the EU, and Japan have argued that non-market-oriented policies and practices have tarnished the text and spirit of WTO rules, and that the existing WTO rules are insufficient to address these issues.[66] The core of WTO reform lies in developing rules that specifically target non-market-oriented policies and practices. China's unique economic model presents a challenge to the WTO, and the focus of reform is to develop rules that address China's economic model and empower the WTO. However, it would be unrealistic to fundamentally change China's economic model.[67] Yet, it is possible to discuss technical issues such as subsidies,[68] transparency,[69] or state-owned enterprises[70] etc. A more pragmatic approach would be addressing these issues separately instead of seeking a fundamental change of Chinese economic or political reform.

Another issue worth noting is the question of whether national security measures can be subject to review.[71] In recent cases involving trade measures taken on the grounds of national security, particularly due to the US government's refusal to accept WTO panel rulings, the already embattled WTO DSM has suffered further blows and has made the path to restoring the DSM more complex. Despite the US repeatedly claiming that GATT Contracting Parties and WTO Members have the right to unilaterally determine when to raise tariffs on the grounds of national security or disregard multilateral trade rules, the panels should not review such decisions.[72] They argue that the DSM will respect their bottom line and

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[66] *See* Petros C. Mavroidis & André Sapir, *All the Tea in China: Solving the 'China Problem' at the WTO*, 12(53) GLOB. POL'Y 41, 44-45 (2021). *Cf.* Weihuan Zhou & Xiaomeng Qu, *Confronting the 'Non-Market Economy' Treatment: The Evolving World Trade Organization Jurisprudence on Anti-Dumping and China's Recent Practices*, 13(3) J. INT'L DISP. SETTLEMENT 510, 515-16 (2022).

[67] Chinese scholars defend the position of China's market-economic status. *See, e.g.*, Yutong Niu (牛钰彤), *WTO Gaige Zhong di "Shichang Daoxiang Tiaojian" Tanjiu* (WTO 改革中的"市场导向条件"探究) [*A Study on "Market-Oriented Conditions" in the WTO Reform*], HAIGUAN YU JINGMAO YANJIU (海关与经贸研究) [J. CUSTOMS & TRADE] 84, 93 (2021).

[68] *See generally* Zhen Yu (余振) & Xuechun Wang (王雪纯), *WTO Gaige: Zhong Mei Zhuyao Fenqi Yu Hezuo Qianneng* (WTO 改革：中美主要分歧与合作潜能) [*WTO Reform: Major Differences and Potential Cooperation between China and the US*], KAIFANG DAOBAO (开放导报) [CHINA OPENING J.] 34 (2022); Ding Ru & Xiang Yiqian, *Emerging Rules on Cross-Border Subsidies: A Typological Analysis and Proposals for China's Approach*, 12(2) J. WTO & CHINA 45 (2022).

[69] *See generally* Ming Du & Qingjiang Kong, *Explaining the Limits of the WTO in Shaping the Rule of Law in China*, 23(4) J. INT'L ECON. L. 885 (2020); Bernard Hoekman & Robert Wolfe, *Reforming the World Trade Organization: Practitioner Perspectives from China, the EU, and the US*, 29(4) CHINA & WORLD ECON. 1 (2021).

[70] *See generally* Ru Ding, *Interface 2.0 in Rules on State-Owned Enterprises: A Comparative Institutional Approach*, 23(3) J. INT'L ECON. L. 637 (2020).

[71] *See generally* Justin Hughes, *Fitting China-US Trade into WTO Trade Law—National Security and Non-Violation Mechanisms*, 2022 MICH. ST. L. REV. 319 (2022); Stephen Kho & Yujin K. McNamara, *Focus on China: The Expansive Use of National Security Measures to Address Economic Competitiveness Concerns*, 17(3) U. PA. ASIAN L. REV. 368 (2022).

[72] *See, e.g.*, Panel Report, *Russia — Measures Concerning Traffic in Transit*, ¶¶ 7.51-.52, WTO Doc.

reject Members' hopes of surpassing their bottom line through litigation. However, these trade measures taken on the grounds of national security are considered by multiple panels to be inconsistent with Article 21 of the GATT.[73] In response, the infuriated US claims not only to reject the rulings but also to effectively appeal them. In this situation, the US is highly likely to link the reform of the Appellate Body with the DSB's review power over national security-related trade measures.

Ultimately, the premise for initiating WTO appellate mechanism reform is the US's consent to prioritize the restoration of the Appellate Body as part of WTO reform. For both the US and other Members, a pragmatic approach to the Appellate Body should involve categorizing their various demands in a realistic manner, addressing one issue at a time, and increasing the likelihood of progress.

IV. CHALLENGES AND MOTIVATIONS FOR ADVANCING THE APPELLATE BODY REFORM

A. Challenges: US Priorities and Comprehensive Agreements

The US has demonstrated its priority position by refusing to implement panel reports in cases involving the national security exception and appealing into the void under the paralyzed Appellate Body. The "America First" slogan has been explicitly clear from the Trump administration to the Biden Administration. While the Biden administration has continued the policy focus, it has abandoned complete trade protectionism and indiscriminate trade measures, instead seeking to build alliances and form its own circle of mini-lateralism.[74] However, the core of US priority remains unchanged. Despite the momentum and enthusiasm from other Members, the US remains the most important and opaque negotiator on the Appellate Body issue. The US government has been unwilling to provide a substantive vision or proposal for a new or reformed dispute settlement system, and previous written reform attempts to address US criticisms and concerns have also failed.[75] It should be recognized that the US concerns about dispute settlement are systemic, and obstructing the appointment of new Appellate Body members is part of maintaining its dominance within the WTO and even global hegemony. By influencing the normal functioning of the WTO DSM, the US can attempt to deter unfavorable outcomes while pressuring

WT/DS512/R (adopted Apr. 26, 2019).

[73] *See* Warren Maruyama & Alan Wm. Wolff, *Saving the WTO from the National Security Exception*, PIIE 8 (May 2023), https://www.piie.com/sites/default/files/2023-05/wp23-2.pdf.

[74] *See, e.g.*, Joel Wuthnow, *U.S. 'Minilateralism' in Asia and China's Responses: A New Security Dilemma?*, 28(115) J. CONTEMP. CHINA 133, 133-34 (2019).

[75] *See generally* Bown & Keynesf, *supra* note 11.

other Members to engage in negotiations on new rules, such as non-market economy status, forced technology transfer, subsidies, and security interests. It is difficult to get the US back to the negotiating table before these issues are resolved.

It seems increasingly unlikely to negotiate separately on the relatively simple issue of restoring the Appellate Body. WTO Director-General Ngozi Okonjo-Iweala has called for a "clear roadmap and way forward"[76] on dispute settlement reform, but also stated that progress must be achieved within a broader framework, rather than narrowly focused on the Appellate Body. It is evident that the US promotes a similar strategy.

However, progress on comprehensive agreement negotiations has been very slow. The agreements reached at MC12 are issues of common concern to all Members. For example, the Fisheries Subsidies Agreement addresses the serious situation of global fisheries resources. According to the Food and Agriculture Organization (FAO) statistics, the proportion of fish stocks at biologically sustainable levels has decreased from 90% in 1974 to 64.6% in 2019.[77] This has motivated Members to regulate issues such as illegal, unreported, and unregulated (IUU) fishing and overfishing. Conversely, regarding non-market economy systems, industrial policies, subsidies, and other issues, there is currently a game between the two largest economies, the US and China, making it difficult to reach a consensus. In this context, progress on the DSM, which serves as leverage and a bargaining chip, is also challenging.

B. Motivations: New Establishment of the MPIA

Currently, the hope lies in the demands conveyed by the Biden administration for reshaping WTO rules and the DSM.[78] However, the demands of the US and other Members are not consistent. Significant differences remain among China, the US, and the EU regarding WTO reform.[79] In terms of substantive issues, the US and the EU differ greatly from China in their positions and practices concerning non-market economy systems and related public institutions, industrial policies, and subsidies. However, in terms of the DSM, both China and the EU strongly recommend

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[76] *DG Okonjo-Iweala: "We Cannot Afford to Have an MC13 That Does Not Deliver"*, WTO (Feb. 28, 2023), https://www.wto.org/english/news_e/news23_e/hod_28feb23_e.htm.

[77] *The Status of Fishery Resources*, FOOD & AGRIC. ORG. OF THE U.N. [FAO], https://www.fao.org/3/cc0461en/online/sofia/2022/status-of-fishery-resources.html (last visited Nov. 1, 2023).

[78] Simon Schropp, *Biden and Trade: No Trade Policy, No-Trade Policy or Both?*, 57(6) INTERECONOMICS 399, 399-400 (2022).

[79] Bernard Hoekman & Robert Wolfe, *Informing WTO Reform: Practitioner Perspectives from China, the EU, and the U.S.*, EUR. U. INST. 20 (Feb. 26, 2020), https://globalgovernanceprogramme.eui.eu/wp-content/uploads/2021/03/China-US-EU-WTO-reform-practitioner-perspectives_2021-1.pdf.

the restoration of the Appellate Body's operation, while the US uses the appointment of Appellate Body members as a leverage to influence substantive rule negotiations. Nevertheless, this does not prevent the establishment of a new arrangement for the Appellate Body within limited space.

In particular, the establishment of the Multiparty Interim Appeal Arrangement (hereinafter "MPIA")[80] and its formal adjudication of cases have provided a temporary substitute mechanism for the Appellate Body, alleviating concerns among Members about handling trade disputes. Based on Article 25 of the DSU, the MPIA creatively incorporates arbitration as the appellate channel for panel reports and establishes a panel of ten arbitrators. To some extent, the MPIA has addressed the shortcomings of the current DSM.[81] However, the arrangement does not include the US, which may still make the US feel excluded from the international governance process, even though the US had shown no interest in getting involved at the time of the negotiation of the MPIA. It perhaps may provide incentives for the US to participate in the negotiations of the new dispute settlement arrangements.

V. STRATEGIES FOR THE WTO DISPUTE SETTLEMENT MECHANISM REFORM

A. The Starting Point: Addressing the US Concerns

Regardless of whether the discussion on the DSM continues to be led by the US or the General Council, for Members other than the US, it is important to consider the reasonable demands of the US before embarking on the restoration of the Appellate Body. Specifically, what are the demands of the US and which ones are acceptable? For instance, one of the previous proposals was the Walker Principles, which was raised by New Zealand Ambassador David Walker to address the US concerns.[82] These Principles include six main points in response to US concerns: (1) completion of appellate review within 90 days, (2) Appellate Body members no longer handling cases after their term expires, (3) clarification that precedents are not binding, (4) the Appellate Body cannot address factual issues and

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[80] *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, WTO PLURILATERALS, https://wtop lurilaterals.info/plural_initiative/the-mpia/ (last visited Nov. 1, 2023).

[81] Andrea M. Ewart, Esq., *Paralysis at the WTO: Is the MPIA the Answer?*, INTLAWGRRLS (July 30, 2020), https://ilg2.org/2020/07/29/paralysis-at-the-wto-is-the-mpia-the-answer/; Olga Starshinova, *Is the MPIA a Solution to the WTO Appellate Body Crisis?*, 55(5) J. WORLD TRADE 787, 789 (2021); Joost Pauwelyn, *The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?*, 22(5) WORLD TRADE REV. 693, 694-95 (2023).

[82] *Agenda Item 4, Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)*, WTO Doc. JOB/GC/222 (Oct. 15, 2019).

domestic law issues, (5) the Appellate Body cannot issue advisory opinions, and (6) the Appellate Body cannot expand or mitigate existing rights and obligations of WTO Members. Although the effectiveness of the Walker Principles is questionable, the fundamental idea therein could serve as the basis for further proposals, namely, to address the concerns of the US and improve the overall WTO dispute settlement system from a systemic point of view. This article proposes the following perspectives for reforming the WTO DSM, particularly the Appellate Body.

First, consider extending the time limit for Appellate Body reports to 120 days or, as an alternative, increasing the number of Appellate Body members while keeping the three-member bench unchanged. The EU proposed a more stringent measure of amending DSU Article 17.5 to state that "[i]n no case shall the proceedings exceed 90 days, unless the parties agree otherwise."[83] The EU-China-Canada-India proposal attempted to explore flexible arrangements for the 90-day time limit while fully respecting the DSU's obligation for prompt settlement of disputes.[84] If it is anticipated that the review workload may exceed 90 days during the initial assessment, the Appellate Body can consult with the parties on working methods before the work begins. This could include persuading the parties to focus on the scope of the appeal, streamlining the content of submissions, allowing the Appellate Body to summarize and concentrate on the core issues, and reducing the length of reports or publishing them in the language(s) of the parties involved, or even using "mandatory judicial restraint" if necessary. Honduras proposed addressing the issue of systematic dissipation by compensating for the time spent on non-substantive hearings, such as translation of reports, circulation of documents, and excluding weekends and holidays. Alternatively, it is proposed to extend the 90-day time limit for appeals and allow a more flexible timeframe to avoid a concentration of cases filed with the Appellate Body during specific periods.[85] Considering the surging number of cases handled by the Appellate Body, this article would be in favor of the extension of the time limit or simply increasing the number of Appellate Body members.

Second, make clear provisions regarding whether former members whose terms have expired can continue to handle pending cases they have

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[83] *See* The EU Proposal, *supra* note 42, at 16.

[84] *See Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council*, WTO Doc. WT/GC/W/752/Rev.2, at 2 (Dec. 11, 2018).

[85] *See Fostering a Discussion on the Functioning of the Appellate Body, Communication from Honduras*, WTO Doc. WT/GC/W/758 (Jan. 21, 2019); *Fostering a Discussion on the Functioning of the Appellate Body, Communication from Honduras*, WTO Doc. WT/GC/W/759 (Jan. 21, 2019); *Fostering a Discussion on the Functioning of the Appellate Body, Addressing the Issue of Alleged Judicial Activism by the Appellate Body Communication from Honduras*, WTO Doc. WT/GC/W/760 (Jan. 29, 2019).

previously worked on. Currently, the US centers around Rule 15 of the Appellate Body Working Procedures, which allows Appellate Body members to continue participating in the hearing of assigned cases during the transition and handover phase at the beginning of their term, with authorization from the Appellate Body and reporting to the DSB. To ensure a smooth transition between departing and incoming Appellate Body members, the EU proposed revising Rule 15 to improve the transitional mechanism for departing Appellate Body members and, as a standard, allow departing members to complete the cases they have participated in during their term to ensure consistency in the proceedings.[86] Building on the EU proposal, Honduras further suggests that within 60 days before an Appellate Body member's appointment expires, no new cases should be assigned to him/her, and the relevant member should be notified that the term is expiring, prompting them to expedite proceedings.[87] The root of this problem lies in the lack of clear rules in the DSU itself, and further discussions among the WTO Members are needed to establish specific transitional mechanisms. The freezing period before the expiry of an Appellate Body member's term should be adjusted to the time limit for Appellate Body reports.

Third, establish clear rules regarding whether the Appellate review includes significant errors of fact and whether the consideration of domestic law is a matter of fact or a matter of law. The EU-China-Canada-India proposal suggests that the scope of Appellate Body review should be limited to matters of law and expressly exclude domestic procedures of WTO Members.[88] Honduras holds a similar view.[89] However, this article believes, in accordance with the spirit of the DSU and the objectives of the WTO, the WTO DSM is precisely designed to address the compatibility of domestic measures, including domestic laws, with WTO rules. Therefore, domestic measures should not be excluded from the scope of dispute settlement. It is recommended that the WTO clarifies that domestic measures are within the scope of appeal.

Fourth, establish clear provisions regarding whether the Appellate Body can issue advisory opinions. The EU-China-Canada-India proposal suggests revising Article 17.2 of the Understanding to state that the Appellate Body shall address each issue raised in the appeal "to the extent this is necessary for the resolution of the dispute".[90] Honduras suggests considering the

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[86] *See* The EU Proposal, *supra* note 42, at 16.

[87] *See Fostering a Discussion on the Functioning of the Appellate Body, Communication from Honduras*, *supra* note 85.

[88] *See Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council*, *supra* note 84.

[89] *See Fostering a Discussion on the Functioning of the Appellate Body, Communication from Honduras*, *supra* note 85.

[90] *Communication from the European Union, China, Canada, India, Norway, New Zealand,*

inclusion of a mandatory judicial restraint clause to prohibit the Appellate Body from including obiter dicta in its reports and from engaging in abstract discussions or providing advisory opinions on WTO law.[91] This article suggests that to fully respect the views of the parties, advisory opinions could be issued only on the basis of agreement. This would contribute to the interpretation and development of trade rules while also improving efficiency in proceedings.

Fifth, establish clear provisions on whether Appellate Body reports can serve as precedents and the conditions that must be met for them to be considered precedents. The EU-China-Canada-India proposal advocates for the establishment of a communication channel between WTO Members and the Appellate Body through annual meetings, focusing on the legal methods, reasoning, and technical approaches applied by the Appellate Body in its rulings.[92] This allows Members to be informed about the cutting-edge WTO legal theories and the systemic errors encountered during specific deliberations. Without new agreement among the Members, this article holds that the Appellate Body report is one of persuasive authorities rather than that of a binding force. Clarifying the role of precedents is aimed at ensuring the uniformity of WTO judicial practice and the orderly development of international trade rules.[93] However, when errors are clearly identified or significant changes occur, subsequent panels may still express different views on the same issue, on the condition that they provide very strong justifications, better serving the construction of international trade rule of law.

Sixth, make clear provisions on measures that become ineffective after the establishment of the panel and whether a ruling should be made on this issue. The US's dissatisfaction was merely due to doctrinal reasons. In fact, the handling of this issue should be very simple. From a judicial-economic perspective, measures that have already become ineffective do not affect the trade of Members, and there is no need for the panel and the Appellate Body to continue examining such measures. This article suggests further clarifying in the DSU that such cases do not require further examination.

Seventh, establish clear provisions on the division of authority between the Appellate Body and other WTO bodies (such as ministerial conferences, the General Council, and the DSB). On this issue, the Appellate Body indeed lacks the jurisdiction to adjudicate the decisions of other WTO bodies or

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Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, *supra* note 84.

[91] *See Fostering a Discussion on the Functioning of the Appellate Body, Communication from Honduras*, *supra* note 85.

[92] *See Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council*, *supra* note 84.

[93] *See generally* Bacchus & Lester, *supra* note 27; de Andrade, *supra* note 27.

evaluate their actions. Appellate Body members should exercise judicial restraint in their review powers. If doubts arise regarding the actions of other WTO bodies during the proceedings, the matter can be referred to the DSB for a joint decision by the Members. To dispel US concerns, this article recommends further clarifying the authority of the Appellate Body in the DSU, respecting the rights of WTO Members, and confining its responsibilities solely to dispute settlement, with non-dispute settlement matters being determined by the Members.

The paralysis of the WTO DSM, especially the Appellate Body, has significantly diminished the role and position of the WTO in international trade. Trade frictions continue to escalate, and trade rules are gradually being disregarded as Members turn toward trade protectionism. To reverse the current situation and further promote the development of international rule of law and facilitate international economic and trade cooperation, it is crucial to address the impasse in the WTO DSM, particularly the Appellate Body. Although the Biden administration has maintained the "America First" principle of its predecessor, the Trump administration, its approach has been relatively more flexible, aiming to unite allies and enhance its position in international organizations. Seizing this opportunity, it is advisable to propose a solution for the current impasse, considering the demands of the US and the vision of various parties to restore the Appellate Body. Timely presentation of a reasonable reform proposal for the WTO DSM will help expedite the improvement and reestablishment of a new dispute resolution mechanism.

B. A Holistic Approach: Integrating Rule-Making and Dispute Settlement Mechanism Reforms

As mentioned in the previous section, from a more pragmatic point of view, any discussions of reforming the WTO's dispute settlement mechanism cannot be addressed on a standalone basis, but integrating the needs and demands of the US and all WTO Members in terms of the substantive rule-making, formulating a package reform plan covering both substantive rules and dispute settlement procedures.

A closer examination of the US demands in this regard is necessary. The former Deputy Director-General of the WTO and now a distinguished visiting researcher at the Peterson Institute for International Economics, Alan Wolff, believes that any negotiations with the Biden administration must consider factors such as American workers and competition with China.[94] For the US, most cases it lost involved the use of trade remedies, which were taken for the benefits of American workers. Repeated failures in WTO cases

[94] *See generally* Wolff, *supra* note 12.

where the US's trade remedies are challenged have led to US dissatisfaction with the WTO's dispute resolution mechanism, especially the Appellate Body.[95] From the US perspective, in recent years, due to the Appellate Body's difficulties in acknowledging the existence of subsidies to state-owned enterprises in China in cases brought against US relief measures, the effectiveness of US domestic trade remedies has been further undermined.[96]

As a result, given the key role the US plays in restoring the WTO DSM, especially the Appellate Body, it is crucial to understand the US's demands and to find a middle path that can satisfy both sides. As Katherine Tai stated, "a Member-driven approach" is needed.[97] Therefore, it is of utmost significance that Members can start the discussions and negotiations. This article suggests a holistic approach in that a package reform plan should be on the table, which allows sufficient room for diplomatic negotiations.

On the one hand, a shared objective among all Members is the revitalization of confidence in the multilateral trading system. A pivotal stride towards achieving this goal involves reinstating the previous DSM. Nevertheless, there exists room for adaptability in our approaches. Ideally, the primary aim should be the reappointment of Appellate Body members. However, recognizing the firm stance of the US, which does not advocate for a complete restoration of the Appellate Body, we must consider alternative avenues. One such option could involve broadening the scope of signatories to the MPIA, with particular attention to including the US, thus preserving the enduring two-tiered judicial tradition of the WTO.[98] Additionally, the establishment of bilateral approaches, such as those between the United States and China for addressing disputes through panel reports, remains a viable path forward. The core aim is to have in place a two-tiered system that ensures consistent interpretation of the WTO rules and thus provides legal certainty.

Should the United States choose to embark on reforms to the present DSU, it would be prudent to draw inspiration from principles akin to the Walker Principles as a foundational starting point.[99] It is acknowledged that the concerns raised by the US are shared by many Members, and therefore, a systematic reform of the DSM is needed, including the procedures, functions and roles of the Appellate Body and its members. Furthermore, it is imperative to actively engage developing Members and minimize the costs and barriers associated with dispute settlement. In pursuit of this, we ought

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[95] Ikenson, *supra* note 17.

[96] USTR, *supra* note 52. *See generally* Richard Lockridge, *Doubling down in Non-Market Economies: The Inequitable Application of Trade Remedies against China and the Case for a New WTO Institution*, 24(1) S. CAL. INTERDISC. L.J. 249 (2014); Chad P. Bown, *Trump Ended WTO Dispute Settlement. Trade Remedies Are Needed to Fix It*, 21(3) WORLD TRADE REV. 312 (2022).

[97] *Remarks by Ambassador*, *supra* note 62.

[98] *Cf.* Hoekman & Mavroidis, *supra* note 6.

[99] Other proposals can also be viewed, see generally Hughes, *supra* note 50.

to explore alternative dispute resolution methods, including good offices, conciliation, and mediation, in a more efficient and frequently employed manner.[100]

On the other hand, it is imperative to give due consideration to the substantive concerns raised by the US in tandem with the ongoing negotiations for DSU reform. For instance, one core issue pertains to public policy or public security matters within the ambit of WTO reforms. It is pointed out that China is advocating for heightened security considerations in global trade governance dialogues.[101] Hence, policy deliberations should encompass efforts to alleviate adverse impacts stemming from security concerns on the multilateral trading system, alongside DSU reforms.

This includes a thorough examination of how the reform aligns with the interests and advantages of US domestic markets and workers. As a matter of fact, the opening words of the Marrakesh Agreement Establishing the World Trade Organization invoke the objective for WTO Members "that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services".[102] For instance, a more concrete guidance could be given in relation to the evaluation of "injury to the domestic industry of another Member" or "nullification or impairment of benefits accruing directly or indirectly to other Members".[103] Furthermore, it is reasonable to shift the burden of proof to the defendant who stands accused of government intervention that disrupts market forces. This adjustment would enhance transparency and accountability in the dispute settlement process, ensuring that parties engaging in such intervention are required to provide compelling evidence to justify their actions.[104] This approach also aligns seamlessly with the market-oriented objectives of the WTO system, emphasizing the importance of allowing market forces, rather than state intervention, to dictate competition outcomes. It underscores the principle of fair competition and the minimization of government interference in market dynamics, which are fundamental tenets of the WTO's mission.

It is important to acknowledge that the aforementioned points may seem to confer special privileges upon the US, deviating from established WTO rules. Nonetheless, viewed as a compromise, this approach holds significant

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[100] *Remark by Ambassador*, *supra* note 62.

[101] *See generally* Weihuan Zhou et al., *Trade vs. Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses from Defensive to Proactive*, 22(2) WORLD TRADE REV. 193 (2023).

[102] Marrakesh Agreement Establishing the WTO, Apr. 15, 1994, 1867 U.N.T.S. 154.

[103] Agreement on Subsidies and Countervailing Measures art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

[104] Wolff, *supra* note 12.

merits. It avoids the need for substantial concessions or radical alterations to existing WTO regulations while effectively demonstrating to the US the genuine commitment of other trading partners to accepting a reform plan tailored to the dispute resolution mechanism. These measures should be approached as part of a comprehensive negotiation and discussion package, intertwined with the overarching goal of reforming the dispute settlement mechanism, which holds paramount importance for other WTO Members. Also from a Chinese perspective, the restoration of the DSM holds a prominent position and will be prioritized by the Chinese leadership.[105] Elevating this point to a position of priority increases the likelihood of successful negotiations taking place. By addressing both aspects in tandem, we can foster a balanced and constructive dialogue that takes into account the diverse interests and concerns of all parties involved.

VI. CONCLUSION

In summary, the current stagnation of the WTO's DSM has led to increasing tensions, a disregard for trade rules, and a gradual shift toward protectionism among nations. To reverse this troubling trend, promote the advancement of international rule of law, and bolster global economic cooperation, it is imperative to address the current impasse in the WTO's DSM, particularly concerning the Appellate Body. While the Biden administration maintains the core principle of "America First" inherited from its predecessor, the Trump administration, its approach is notably more conciliatory, with a focus on uniting allies and elevating its standing in international organizations. Seizing upon this opportunity, it becomes worthwhile to put forth concrete plans for reforming the WTO's DSM that consider the US's demands and align with the shared vision of all the other Members. It is submitted in this article that the two-tiered system should be restored, which would contribute to the consistent interpretation of the WTO rules and thus provide predictable guidance for Members.

[105] *See* XINHUANET, *supra* note 49.

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