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# Reform proposals and recent developments

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*The views expressed in this paper are attributable only to the author in a personal capacity and not to any institution with which he is associated. The author thanks Professor Bart Kerremans for feedback and comments on an earlier version of this paper.*

# Contents

**Abstract**

The multilateral trading system, with the World Trade Organization (WTO) at its centre, is in its deepest crisis since its creation. The EU and the US have entered into an era of geopolitical conflict that has centred around trade and technology, triggering several trade disputes and WTO-incompatible trade practices. In addition to its paralysed dispute settlement system due to the US' blockage of the Appellate Body, it is also questioned whether the WTO is still 'fit for purpose' as its members fail to manage new ambitious multilateral agreements on crucial trade(-related) issues. Both the Covid-19 crisis and Russia's invasion of Ukraine have further challenged the multilateral trading system as several WTO members increasingly rely on trade-distortive practices. The WTO's 12th Ministerial Conference (MC12), which took place from 12 to 17 June 2022, caused therefore a sigh of relief as WTO members finally managed to conclude several important new trade deals or initiatives. Moreover, WTO members agreed at MC12 to launch a reform process to improve "all functions" of the WTO. This paper aims to contribute to this topical discussion on WTO reform by analysing the different reform proposals tabled by the expert community and WTO members. The focus of this paper will be on the reform proposals and recent developments related to the dispute settlement and negotiating function of the WTO.

The first part of his paper focuses on the WTO's negotiating function. After discussing the US' concerns about the WTO's dispute settlement mechanism (DSM), the Appellate Body (AB) reform proposals by WTO members and the 'Walker Principles' are discussed. Then the new Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is analysed, focussing on the key legal and political challenges for this new appeal instrument. Thereafter, the DSM reform proposals developed in the academic literature are discussed. Finally, the options for a transatlantic alliance on WTO DSM reform under the Biden administration are explored.

The second part of this paper discusses the reform of the negotiating function of the WTO by analysing the recent developments and proposals related to plurilateral agreements. After introducing the rise of Joint Statement Initiatives, the legal options for establishing plurilateral agreements are being discussed. Then the legitimacy of such plurilateral agreements is being studied, together with the different positions WTO members have vis-à-vis this format. Finally, building on the body of literature on this topic, this paper concludes by proposing several governance principles for future plurilateral agreements.

## 1. Introduction

The multilateral trading system, with the World Trade Organization (WTO) at its centre, is in its deepest crisis since its creation. The EU and the US have entered into an era of geopolitical conflict that has centred around trade and technology, triggering several trade disputes and WTO-incompatible trade practices. It is also questioned whether the WTO is still 'fit for purpose' as its members fail to manage new ambitious multilateral agreements on crucial trade(-related) issues. Both the Covid-19 crisis and Russia's invasion of Ukraine have further challenged the multilateral trading system as several WTO members increasingly rely on trade-distortive practices such as export restrictions.

These developments contribute to – or are partially a result of – the demise of the three main pillars of WTO governance, i.e. dispute settlement, negotiations and monitoring. This has triggered an intensive discussion among experts and WTO members on how to reform these three WTO core functions.

The crisis of the WTO's dispute settlement mechanism (DSM), in particular the dysfunctional Appellate Body (AB), can be considered as one of the most important issues on the WTO reform agenda. Not only is the paralysed AB the most visible deficiency in the multilateral trading system, it was also the blockage of the AB by the Trump administration that triggered calls for a broader WTO reform process among several of its members. A restored WTO dispute settlement system with a reformed AB is needed to guarantee the effectiveness, implementation and enforcement of WTO rules. Moreover, a restoration of the WTO's DSM would demonstrate that WTO members are still capable to contribute to – and further develop – the multilateral trading system in times where the WTO is in its deepest crisis since its establishment a quarter of a century ago. Moreover, for several WTO members a reboot of the DSM needs to go hand in hand with an update of the WTO's substantive rulebook. This relates to the second WTO core function that is being discussed in this paper: the WTO's negotiating function. Since its establishment in 1995 the WTO has had little success in negotiating new multilateral disciplines to regulate or govern trade-related policies. In fact, except for the Trade Facilitation Agreement (which entered into force in 2017) and the Ministerial Decision on Export Competition, the WTO's negotiating function has failed to achieve a significant modernisation of the WTO rulebook. Several WTO members have therefore relied increasingly on bilateral or regional Free Trade Agreements (FTAs) and/or plurilateral initiatives among groups of WTO members to establish new trade rules.

The WTO's 12th Ministerial Conference (MC12), which took place from 12 to 17 June 2022 at the WTO headquarters in Geneva, caused therefore a "sigh of relief"[1] as WTO members finally managed to conclude several important new trade deals or initiatives, including an IP rights waiver concerning COVID-19 vaccines; an Agreement on Fisheries Subsidies – the first new WTO Agreement signed since the TFA (and also the first ever sustainability-focused WTO agreement); and an extension of a moratorium on applying customs duties to electronic transmissions.[2] MC12 was therefore considered a success, as this package showed that WTO members remain capable of agreeing new multilateral trade rules, even if the substance of such rules left some WTO members disappointed. Moreover, WTO members agreed at MC12 to launch a WTO reform process, although the details and

[1] R. Francis (2022), 'MC12: trade policy community gives sigh of relief', 17 June 2022, to consult at: MC12: trade policy community gives sigh of relief - Borderlex

[2] The entire outcome of MC12 can be found here: WTO | Ministerial conferences - Twelfth WTO Ministerial Conference - Geneva Switzerland

timeline of this remain vague. The WTO members agreed in the MC12 outcome document the following:

> *"While reaffirming the foundational principles of the WTO, we envision reforms to improve all its functions. The work shall be Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues. The General Council and its subsidiary bodies will conduct the work, review progress, and consider decisions, as appropriate, to be submitted to the next Ministerial Conference."*

This paper aims to contribute to this topical discussion on WTO reform by analysing the different reform proposals tabled by the expert community and WTO members. The focus of this paper will be on the reform proposals and recent developments related to the dispute settlement and negotiating function of the WTO (the monitoring function is briefly discussed as well). Chapter 2 will focus on the WTO' dispute settlement function. After discussing the US' concerns about the WTO DSM (2.1), the AB reform proposals by WTO members and the 'Walker Principles' are discussed (2.2). Then the new Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is analysed, focussing on the key legal and political challenges for this new appeal instrument (2.3). Thereafter, the DSM reform proposals developed in the academic literature are discussed (2.4). Finally, the options for a transatlantic alliance on WTO DSM reform under the Biden administration are explored (2.5). Chapter 3 discusses the reform of the negotiating function of the WTO by analysing the recent developments and proposals related to plurilateral agreements. After introducing the rise of Joint Statement Initiatives (3.1), the legal options for establishing plurilateral agreements are being discussed (3.2). Then the legitimacy of such plurilateral agreements are being studied (3.3), together with the different positions WTO members have vis-à-vis this format (3.4). Finally, building on the body of literature on this topic, this paper concludes by proposing several governance principles for future plurilateral agreements (3.5).

## 2. The WTO's dispute settlement function

Although frequently heralded as the 'crown jewel' of the WTO, several WTO members, notably the US, have been critical of the WTO's dispute settlement system, alleging, inter alia, that the AB has too frequently overstepped its mandate. The AB became dysfunctional in December 2019 because of the Trump's administration refusal to agree to appoint new AB members and/or re-appoint incumbents. US concerns about the DSM, in particular the AB, were not unique to the Trump administration, as these were already voiced during and before the Obama administration, and shared by other WTO members.

Since the AB became dysfunctional on 10 December 2019 (as on that day the terms ended for two of the three remaining AB Members, and three members are needed to hear a case), the EU, the US, Russia, China, India, Brazil, and Korea have appealed around 15 Panel reports "into the void".[3] For several WTO members like the EU, this practice can be considered as preservation of rights were the AB to be reconstituted in the future. However, for other

[3] There are currently fifteen Panel Reports appealed into the void, namely: DS 316, DS371 twice, as both the original as well as the second compliance panel reports were appealed; DS436; DS461; DS476; DS494; DS510; DS518; DS523; DS533; DS534; DS541; DS543; DS567; and WT/DS579/10, WT/DS580/10 and WT/DS581/11 (the last three are part of one appeal procedure).

members ‘appealing into the void’ is designed to prevent a prevailing party from having a final judgment, which in practice brings the DSM back to the GATT system where panel decisions could be blocked, ending the enforceability of the rules of the system (Wolff, 2022). While most WTO members oppose the US practice to block new appointments to the AB, a recent survey of WTO delegations and practitioners reveals that the US is not alone in having concerns about the performance of WTO adjudicating bodies (Fiorini et al., 2020).

### *2.1 US concerns about the WTO DSM*

The US’ main source of frustration about the AB is perceived judicial overreach. US policymakers, starting with the George W. Bush administration, have repeatedly voiced their displeasure with AB decisions, claiming that certain decisions have reached beyond the text of existing WTO agreements.

Remarkably, the US was the strongest proponent of creating an appellate body when the WTO was created in 1994. Since the WTO rules provide for a nearly automatic adoption of panel reports (under the so-called ‘negative consensus’ rule), the US sought a process to overturn any erroneous panel decisions before they became binding obligation. The two-instance adjudication was considered an insurance policy against the loss of sovereignty resulting from the passage to negative consensus under the GATT system (Hoekman and Mavroidis, 2020a). While appeals were expected to be rare and limited to narrow questions of law, access to the AB was considered essential both to ensure that countries could challenge decisions by ad hoc panels that they believed were wrongly made and to bring a measure of consistency across disputes over similar legal texts.

However, the expectations that appeals would be rare and narrow proved to be wrong. Nearly 70 percent of panel reports have been appealed. The US has been the most active WTO DSM user as well as the top target for complaints by other WTO members. WTO dispute resolution panels have generally validated US complaints, and the US often prevailed in cases where it was the respondent (Schott and Jung, 2019). But some decisions—including some in which the AB has reversed panel rulings—have found US practices inconsistent with US’ WTO obligations. The main targets of US litigation have been China and the EU, while the EU and Canada have been the leading complainants about US practices, accounting for about one-third of the cases against the US (Hoekman, Mavroidis and Saluste, 2021).

The main US concern about the WTO DSM, in particular the AB, is that of judicial activism amounting to overreach—expanding obligations under the WTO agreements and narrowing the members’ rights. In February 2020 the US detailed its concerns about the AB in a 174-page document shared with the full Membership of the WTO (USTR, 2020).

US complaints about the WTO AB relate to the following issues: *First*, the US objects to the practice of AB members staying on after their term has expired to finish an appeal that began while they were still in office. The US argues that WTO members, not AB members, should decide whether a term of office can be extended. *Second*, the US objects to the AB’s frequent failure to complete appeals in the required ninety days, arguing that a rules-based system needs the adjudicators themselves to follow the rules. *Third*, the US contends that the AB exceeds its authority in reviewing and sometimes overruling factual findings by panels, despite a mandate that appeals be limited to issues of law. *Fourth*, the US objects to the AB’s issuance of advisory opinions—statements or interpretations not necessary to resolve a dispute—that could be seen as making law in

the abstract. *Fifth,* the US objects to AB rulings that elevate the significance of past decisions to near-binding precedent that should be followed by future panels absent cogent reasons to depart from them. According to the US, giving precedent a strong role contravenes the WTO provision placing responsibility for definitive interpretations of WTO texts on the WTO Members. *Sixth*, the US asserts that the AB has overstepped its bounds by reaching decisions that go beyond the text of the agreements themselves, potentially taking away rights or adding to US obligations.

It is recognised that some of these claims have merit. For example, appeals frequently do violate the ninety-day rule and AB members have remained past their terms of office. Moreover, appeals frequently re-examine facts rather than resolve precise legal questions.

With regard to substance, the US' key complaints mainly relate to AB decisions concerning trade remedies. US concerns have focused on WTO rulings that tackled the US' use of anti-dumping and countervailing duties and on the AB's definition of 'public bodies', which complicated the US' application of tariffs against goods produced by state-owned enterprises in China and elsewhere (Kerremans, 2022). With regard to the former, the US argues that the AB's prohibition of 'zeroing' to determine margins of dumping has diminished the ability of WTO Members to address injurious dumped imports.[4] The US argues that this prohibition has no basis in the text of the GATT 1994 or Antidumping Agreement and that the AB's case law on this issue is inconsistent. As a result, the US claims that "workers and industries that are suffering or threatened with material injury due to dumped imports are unable to obtain the relief they are entitled to" (USTR, 2020). With regard to the latter, the US argues that the AB's narrow interpretation of "public body" fails to capture a potentially vast number of government-controlled entities, such as state-owned enterprises (SOEs), that are owned or controlled by foreign governments, and therefore undermines the ability of Members to effectively counteract subsidies that are injuring their workers and businesses. In addition, the US objects the AB's interpretation of the WTO's Safeguards Agreement, i.e. that safeguards can only be imposed if there is evidence that the increase in imports occurred as a result of "unforeseen developments" (Schott and Jung, 2019). In sum, the US perceives that the AB has tied the hands of the WTO members to use trade remedies to deal with unfair competition, in particular coming from non-market economies like China or elsewhere.[5] As noted by Kerremans, because the EU's trade defence measures have hardly been challenged before the WTO (in particular compared to those of the US), the EU and the US have a fundamentally different view on the role of the AB in trade defence disputes (Kerremans, 2022).

The US is not alone in these concerns about the AB. However, no other WTO member supports the US' blockage of the AB. Analysis of the use of the DSU and participation in the DSB and surveys among various officials from WTO members demonstrates that (i) the system is primarily of interest to large and richer players; (ii) there is near universal agreement on the appropriateness of the institutional framework; (iii) many insiders agree with some of the

[4] The WTO Antidumping Agreement provides that WTO members may counteract injurious dumping by foreign producers and exporters by imposing duties up to the amount by which the "normal value" of a product (often its home market price) exceeds its "export price." In making this calculation, the US and other WTO members focus on those transactions in which dumping occurs (i.e. only those transactions in which the normal value is higher than the export price). This approach has been described as "zeroing," because it assigns zero weight to non-dumped transactions.

[5] The US also argues that (i) the AB's stringent and unrealistic test for using out-of-country benchmarks to measure subsidies has weakened the effectiveness of trade remedy laws in addressing distortions caused by state-owned enterprises in non-market economies and (ii) that the AB has limited WTO members' ability to impose countervailing duties and anti-dumping duties calculated using a non-market economy methodology to address simultaneous dumping and trade-distorting subsidization by non-market economies like China (USTR, 2020).

concerns raised by the US regarding the operation of the system; (iv) and most WTO members are in favour of keeping the two-tier mechanism (Hoekman and Mavroidis, 2020b).

### *2.2 AB reform proposals by WTO members and the 'Walker Principles'*

Since the AB became dysfunctional in 2019, several AB reform proposals have been developed by individual WTO members. Most of these proposals focus on specific issues that directly or indirectly aim to accommodate some of the US' concerns about the AB (and require only targeted changes to the WTO legal framework (e.g. to the Dispute Settlement Understanding (DSU)), without aiming for a more general or comprehensive reform of the dispute settlement mechanism.

In the context of the DSU Review[6], several suggestions to improve the operation of the WTO dispute settlement process were made by WTO members before the break down of the AB.[7] The specific issues raised by the US regarding the functioning of the AB eventually became the focus of a separate process launched by the General Council in December 2018. Ambassador David Walker (New Zealand) was appointed by the Chair of the WTO General Council, as "facilitator," with a mandate to explore resolution of a number of issues raised by the US. Ambassador Walker gathered the opinions of WTO members on various reforms to the AB process that most would find acceptable. This exercise led in October 2019 to the so-called 'Walker principles',[8] which hold that the AB must, in the usual case:

- Respect the DSU's 90-day limit on issuing reports.
- Not assign new cases to AB members near the end of their terms.
- Not review the domestic laws of Members (as these would be considered factual issue).
- Not issue advisory opinions (only addressing issues raised by the disputing parties).
- AB reports would not become binding precedent. AB Members should take previous Panel/Appellate Body reports into account to the extent they find them relevant in the dispute they have before them.
- As provided in the DSU (Articles 3.2 and 19.2 of the DSU), the AB's findings cannot add obligations or take away rights provided by the WTO agreements

In addition, Ambassador Walker proposed a regular dialogue between the DSB and the AB by convening the DSB at least once a year to hear expressions of members' views on issues generally, unrelated to a particular case, with AB members present. Moreover, a vacancy on the AB would automatically launch the process to fill the position.

Although these principles target most of the US' procedural concerns about the AB and are fully consistent with what is already in the DSU, it is unlikely that they will convince the current US administration to drop its AB blockage and truly engage in a constructive reform process (cf. *infra*). It is argued that if the US or other WTO members believe the AB is exceeding its mandate, they will have to address the problem by renegotiating the substantive

[6] The WTO DSU process was launched in 1994 by the then GATT members to complete a full review of dispute settlement rules and procedures under the newly-created WTO within four years after the entry into force of the WTO Agreement. WTO members did not manage to conclude this process, but a review of the DSU is currently being carried out within a framework of 12 "thematic" issues. For an overview, see: WTO | Dispute settlement — Negotiations to improve dispute settlement procedures.

[7] For example, in 2002, the US and Chile put forward a proposal on "improving flexibility and member control in WTO dispute settlement," which aimed to address US concerns regarding AB rulings on anti-dumping that targeted zeroing (WTO, Dispute Settlement Body, Special Session, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement, Contribution by Chile and the United States (held on 23 December 2002), WTO Doc TN/DS/W/28).

[8] WTO, 'Informal process related to the functioning of the Appellate Body, 15 October 2019', JOB/GC/222.

provisions of specific WTO agreements to narrow down the scope of interpretation of AB Members (Hoekman and Mavroidis, 2020a; Payosova, Hufbauer & Schott, 2018).

Parallel to the 'Walker process', several WTO members submitted proposals for reforming the WTO dispute settlement procedure, focusing in particular on the AB. The most vocal member on this issue has been the EU. The European Commission stressed in its 2021 Trade Policy Review (which includes an 18-page Annex on WTO reform) that "the most urgent of WTO reform is finding an agreed basis to restore a function dispute settlement system and to proceed to the appointment of the members of the Appellate Body" (European Commission, 2021). Moreover, the Commission stressed that this task should not be linked to other aspects of WTO reform.

The European Commission has recognised that some of the US' concerns about the AB are valid. It agrees that AB members are not bound by "precedent" but should take into account previous rulings to the extent they find them relevant in the dispute they have before them, and that the role of the AB should be strictly limited to addressing legal issues raised on appeal to the extent this is necessary to resolve a dispute. Moreover, the Commission also finds that mandatory timelines should be strictly respected both at the Panel and Appellate Body stage of disputes. For the EU, WTO dispute settlement reform should maintain the negative consensus rule, the independence of the Appellate Body and the central role of dispute settlement in providing security and predictability to the multilateral trading system (European Commission, 2021).

The Commission had already outlined in a Concept paper in 2018 a two-stage approach for DSM reform (European Commission, 2018). In a first stage the Commission aims to unblock the AB appointments by tweaking the provisions of the DSU relating to the functioning of the AB. In a second stage the substantive issues concerning the application of WTO rules should be addressed. With regard to the former, the Commission submitted with several other WTO members in December 2018 two proposals that tackle several of the US' concerns about the AB and that were also taken up in the Walker principles. These include transitional rules for outgoing AB Members and principles related to the 90-day timeframe for AB procedures, the meaning of municipal law as an issue of fact, the practice to make finding on issues not necessary to resolve a dispute and the issue of precedent.[9] Moreover, in order to "strengthen the independence and impartiality of the Appellate Body", the EU, together with India and China, summitted a proposal with additional amendments to the selection and mandate of AB Members, including one single but longer term (6-8 years), increasing the number of AB Members from 7 to 9, transitional rules for outgoing AB Members and the launch of the AB selections process.[10]

China, which co-sponsored these EU proposals for AB reform, has also prioritised in its May 2019 Communication on WTO reform the reinstatement of the AB, returning as fast as possible to a functioning dispute settlement mechanism.[11] As an active user of the DSM, China's position on the AB seems to be very much aligned with the EU, although it has yet to take a position on a possible comprehensive reform of the DSM, including the Panel stage.

### *2.3 The MPIA: an interim solution or alternative for the AB?*

With the multilateral WTO dispute settlement procedure in limbo (or in any case the AB), the EU led an effort to use the general arbitration mechanism in Article 25 of the DSU as the basis

[9] WTO, 'Communication from the EU et al.', WT/GC/W/752, 26 November 2018.
[10] WTO, 'Communication from the EU et al.', WT/GC/W/753, 26 November 2018.
[11] WTO, 'China's proposal on WTO Reform – Communication from China', WT/GC/W/773, 13 May 2019.

for a new plurilateral appeal mechanism. On 30 April 2020, the EU and 18 other WTO members[12] notified the organization of the creation of a new Multi-Party Interim Appeal Arbitration Arrangement (MPIA) on the basis of Article 25 DSU and their intention to resort to this mechanism to arbitrate any WTO disputes among themselves which would otherwise be appealed to the non-functional WTO AB. MPIA appeals are only available to parties to the MPIA (in the meantime 25 WTO members)[13], but other WTO members may join the MPIA at any time. The participating members commit that they will not pursue appeals under Articles 16.4 and 17 of the DSU, but will instead use the MPIA appeal arbitration procedure. Appeals under the MPIA will be heard by three appeal arbitrators selected from the pool of 10 standing arbitrators.[14]

The main provisions of the arbitration procedure established through MPIA are generally the same as the regular appeal procedure in article 17 of DSU. However, some changes have been made to enhance the efficiency of the proceedings, including rules that encourage procedural efficiency to preserve the DSU's 90-day timeline on appeals. For example, the MPIA allows the arbitrators to take the necessary organizational measures to streamline procedures, such as the page limits for submissions, time limits and deadlines.[15] Both the DSU (Article 17(6)) and MPIA (Annex 1, para 9) state that appeals shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel. The DSU also provides that the aim of the dispute settlement mechanism is to secure a positive solution to a dispute (Article 3.7). However, the MPIA requires arbitrators to only address issues necessary for resolution of disputes (Annex 1, para 10). This is arguably a step towards addressing concerns raised in relation to the AB around judicial overreach. Moreover, the MPIA repeats the DSU's injunction that appeals "shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel." It adds however additional instructions, such as that issues not appealed are not to be reviewed, and that MPIA arbitrators "address only those issues that have been raised by the parties". These modifications seem to address the US's concerns about the AB such as the advisory opinions within the AB reports, frequent 'overdue adjudication' and tackling of 'issues of fact'.

In seven recent WTO dispute procedures, the MPIA parties involved have submitted Article 25 notifications indicating their commitment to using the MPIA to resolve their dispute should either party decide to appeal the relevant WTO panel's ruling.[16] However, there have been no appeals to the MPIA as of yet. This can be partially explained by the fact that in two recent WTO cases between MPIA members, the parties involved decided not to appeal, but to accept the outcome of the panel reports (*European Union — Safeguard Measures on Certain Steel Products* (DS595); and *Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico* (DS524)). However, in a dispute between Turkey and the EU (*Turkey – Pharmaceutical Products dispute (DS583)*), there is now an arbitration appeal under Article 25 DSU on an ad hoc basis, using procedures similar to the MPIA but not the actual MPIA (Turkey is not a party to the MPIA). That appeal was made on 28 April 2022 and on 25 July 2022 the appeal award confirmed the Panel's ruling, finding that the challenged Turkish localisation measure indeed discriminated against foreign pharmaceutical products.[17]

[12] WTO, 'Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 DSU', JOB/DSB/1/Add.12, 30 April 2020.
[13] The MPIA parties currently are: Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; European Union; Guatemala; Hong Kong, China; Iceland; Macao, China; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Peru; Singapore; Switzerland; Ukraine; Uruguay.
[14] The pool of arbitrators has been selected in July 2020 (see WTO, JOB/DSB/1/Add.12/Suppl.5).
[15] MPIA para. 12.
[16] For an overview, see: Multi-Party Interim Appeal Arbitration Arrangement (MPIA) (wtoplurilaterals.info)
[17] WTO, 'Turkey – certain measures concerning the production, importation and marketing of pharmaceutical products – Arbitration under Article 25 DSU, Award of the Arbitrators', WT/DS583/ARB25, 25 July 2022.

Considering that this was the first appeal ruling since the AB became dysfunctional (and the first time that Article 25 DSU was used for appeal arbitration), the European Commission rightly stated that "the significance of this appeal arbitration procedure goes far beyond the specific case" (European Commission, 2022). At a meeting of the WTO DSB in August 2022, Turkey stated its intention to implement the recommendations and rulings of the arbitrators and the panel in the dispute in a manner that respects its WTO obligations. However, pursuant to the agreed Article 25 DSU procedures between Turkey and the EU, the arbitrator's award is not to be adopted by the DSB. At the same meeting, the EU stated that it was particularly pleased with this appellate review procedure, which demonstrated that there is a functional and efficient alternative to preserve the right of appeal for the parties, which is very similar to the MPIA.[18]

The MPIA has several advantages. It preserves for the participating WTO Members the two-stage dispute settlement system and prevents appeals into the void in the absence of a functioning and staffed WTO Appellate Body. The MPIA also is a token of support by a considerable amount of WTO members for an enforceable rules-based multilateral trading system, bypassing the US blockage of the AB. Moreover, as noted above, the MPIA has addressed some concerns identified by the US and other WTO members with respect to the AB.

However, the MPIA is also facing several political and legal challenges. First, the number of WTO members that agreed to join the MPIA remains (so far) limited (25 in total), as well as the number of (potential) disputes to be handled by the MPIA. In general disputes among MPIA participants account for approximately a quarter of the total DSU case load. Signatories include several WTO members that are heavy users of the dispute settlement system, including Australia, Brazil, Canada, China, the EU and Mexico. However, other important WTO members such as Japan and Korea have not joined. Significantly, although the MPIA addresses some of the US' concerns about the AB, the US strongly opposes the new appeal mechanism. The Trump administration even wrote on 5 June 2020 a letter to the Director General of the WTO, expressing strong objection to the MPIA, claiming that the system was no more than a duplication of the AB and stressing the particular concern of using WTO resources and funding to support the MPIA.[19] The letter states that the MPIA will exacerbate "the erroneous Appellate practice, rather than reforming it", as it "weakens the mandatory deadlines for appellate reports," "contemplates appellate review of panel findings of fact," and "fails to reflect the limitation on appellate review to those findings that will assist the DSB in recommending to a Member to bring WTO-inconsistent measure into conformity with WTO rules."[20] Moreover, when China joined the MPIA, the Trump administration saw this appeal arrangement as a provocation rather than an interim solution to the stalled AB (in the above-mentioned letter the US even consistently refers to the MPIA as "the China-EU arrangement"). Although the Biden administration aims to engage more constructively with other WTO members on the AB issue (cf. *infra*) and has not explicitly rejected the MPIA, it remains unlikely that it will support (or join) the MPIA in the near future. However, during a WTO DSB meeting on 29 August 2022, the US welcomed the outcome of the Article 25 arbitration procedure between the EU and Turkey (in case *Turkey – Pharmaceutical Products dispute (DS583),* cf. *supra).*[21] In particular, the US stated at this occasion that "the aim of dispute settlement is to facilitate the prompt settlement of a dispute between members […] and

[18] WTO, 'Türkiye states intention to implement findings in pharmaceuticals dispute with EU', 29 August 2022.
[19] The letter can be consulted at: WorldTradeLaw.net
[20] *Ibid.*
[21] WTO, 'Türkiye states intention to implement findings in pharmaceuticals dispute with EU', 29 August 2022.

it does not object to members utilizing Article 25 of the DSU or other procedures to help resolve disputes".

Second, the MPIA also leaves several concerns of the US against the AB unresolved. For example, contrary to the DSU, the MPIA refers to the principles of 'consistency and predictability', envisaging a more coherent case law. This seems to promote the precedential nature of the MPIA reports, which is strongly criticised by the US.

Third, the legal implications of awards issued by the MPIA are unclear – or in any case considered weaker than that of an AB report. The MPIA provides that "the parties agree to abide by the arbitration award, which shall be final". However, pursuant to Article 25.3 of the DSU, MPIA awards are to be notified, but not adopted by the DSB (AB reports are adopted 'quasi automatically' on the basis of the 'negative consensus rule' in Art. 17.4 DSU). It is argued that the MPIA is therefore only binding among the disputing parties in a specific case, but it does not bind other WTO members, or even the same parties in future disputes (Gao, 2021). It has therefore been argued that the MPIA "introduces further confusion and uncertainty into the legal order of the WTO, with the risk that jurisprudence will be made for some WTO members that is inapplicable to others" (Howse, 2021).

Forth, it remains unclear how to MPIA will work in practice. Numerous questions on administrative support to the MPIA remain, in particular as the US has already opposed to some aspects of Secretariat assistance to the MPIA (Lester, 2020; Gao, 2021; Starshinova, 2021).

In sum, in the current situation the MPIA is a relevant 'interim' solution to circumvent the US' blockage of the AB and to provide an appeal mechanism for WTO members willing to join this initiative. However, it is clear from the analysis above that the MPIA is not an appropriate alternative for the AB, in particular as the US (the most active Member in WTO dispute settlement procedures) and more than 100 other members are not on board. As stressed in the MPIA, the parties to this initiative only aim to resort to the MPIA "as long as the Appellate Body is not able to hear appeals of panel reports in disputes among them due to an insufficient number of Appellate Body members". The finalité of this process should therefore be the restoration of a reformed AB.

### *2.4 WTO DSM reform proposals: an overview of academic contributions*

The Walker principles and the AB reform proposals from the EU and other WTO members mainly aim to improve the existing dispute settlement structure with procedural changes, targeting in particular the concerns that the US has about the AB. The MPIA on the other hand is essentially an interim solution until the (reformed) AB is back up and running, and not a sustainable multilateral alternative for WTO appeal procedures. Both options do not envisage a more comprehensive or revolutionary reform of the two-stage WTO dispute settlement procedure. Such proposals have however been made by several academics or WTO experts and observers.

Several authors have made specific suggestions, proposing procedural innovations in relation to the functioning and composition of the AB or suggesting a type of oversight by WTO members over the AB. A more conservative proposal was formulated by Howse. He argues that it is unlikely that in the current political context the WTO members will agree any time soon on a comprehensive reform of the dispute settlement mechanism, including by amending the DSU (Howse, 2021). However, he argues that the Biden administration offers a window of opportunity to relaunch the AB appointment process to get the body back up and running.

Although he recognises that this would remain challenging, reinstating the AB under the existing rules is still more realistic and feasible than a general – more ambitious – reform of the system, which would require amending the DSU. In order to convince the US (and other WTO members critical towards the AB), he suggests developing a "framing document" that articulates some basic expectations of WTO Appellate judges, including on matters such as deference in trade remedies disputes, following and overruling past precedents, and judicial economy. This framing document would inform the selection of nominees, their vetting, and the ultimate selection of new members.

Also focussing on AB procedural issues, Hillman has suggested that, hand in hand with the adoption of the Walker principles, an oversight committee should be established (Hillman, 2020). This oversight Committee should be composed out of the chairs of the lead WTO committees and the DSB, together with several independent trade-law experts. The committee's sole task should be to assess whether the AB has adhered to the Walker principles, either over the course of a given year or, when asked, in an individual case. A similar proposal was suggested by Bercero, who proposed to establish a regular dialogue between the AB and the DSB (Bercero, 2020). He suggests that the DSB chairman could establish every year a report that presents an analysis of the AB's rulings. The dialogue would also provide an opportunity for members with serious concerns about the systemic implications of an AB ruling to present the case in a manner that allows for a reasoned discussion going beyond the resolution of an individual dispute. This proposal does not specify whether the AB would be bound in any way to the findings of this Committee, or would be accountable to it. A more far-reaching proposal relating to the concerns about the AB's 'judicial overreach' would be to set up a procedure which would allow the WTO members to give a binding interpretation to existing or new WTO Agreements, which the AB would be obliged to follow in its case-law. Such a mechanism is for example foreseen in the EU's new investor-state dispute settlement mechanism included in several recent EU FTAs or Investment Protection Agreements (i.e. the Investment Court System) (ICS)). In these agreements the contracting parties may adopt in a joint Committee an interpretation to provisions of the agreement, which is binding on the ICS's Tribunal.[22] In the context of the WTO, such binding interpretation can for example be adopted by the DSB or other Committees dealing with the WTO rule at hand. Such a procedure is actually already provided in the WTO agreements, but so far has not been used. Article IX:2 of the WTO Agreement confers upon "[t]he Ministerial Conference and the General Council […] the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." While Members cannot use this 'Authoritative Interpretation procedure' under Article IX:2 to amend provisions of the WTO Agreements as that would "undermine the amendment provisions in Article X" of the WTO Agreement,"[23] they can adopt an "authoritative interpretation" to clarify provisions of the WTO Agreement. Since interpretations adopted pursuant to Article IX:2 are binding upon the WTO members, and, as such, binding upon the Appellate Body, they need to be followed by the Appellate Body regardless of its own previous interpretations (Fukunaga 2019; Ehlermann and Ehring, 2019). It has been argued that such authoritative interpretations could be used to specify some "imprecise and incomplete" elements of the DSU, such as prioritising the objectives of dispute settlement (Articles 3 and 19.2), establishing various standards of review (Articles 11, 12.7, 17.6 and 17.12), limiting the scope of appeal (Articles 17.6 and 17.12), and providing guidance on interpretative approaches (Article 3.2) (McDougall, 2018). Considering that such authoritative interpretation

[22] See for example Article 8.31(3) CETA.
[23] WTO Agreement, Article IX:2.

decisions can be taken by a three-fourths majority of the members,[24] this procedure has the potential to play a more important role in the AB reform discussions. Another proposal mentioned by Hoekman and Mavroidis to deal with these situations is to require the AB not to rule on matters where the rules are unclear (Art. 3.2 DSU prohibits the AB from undoing the balance of rights and obligations reflected in WTO agreements) and by requiring the AB to ask the WTO bodies that are responsible for the implementation of the agreements invoked in a dispute to clarify the rules or fill a gap (Hoekman and Mavroidis, 2020b).

Another specific proposal relating to the appointment procedure of AB members has been to force a decision on AB appointment with majority voting at the General Council (Gao, 2021). The author recognises that most WTO Members are opposing voting procedures in the WTO, however, he argues that the legal basis to do so is already present (under Article IX.1 of the WTO Agreement) and that this procedure is the only option to deal with the US' practice of blocking the AB. Other proposals have focused on the 'professionalisation" of the panel and appellate stage (and the adjudicators) (Hoekman and Mavroidis, 2020b) or have focused on the role of the WTO Secretariat in WTO disputes (Wauters, 2021; Pauwelyn and Pelc, 2021; Pauwelyn and Pelc, 2022).

A more creative reform proposal was suggested by former AB Member Jennifer Hillman. Because most of the US' complaints about the AB stem from the body's trade remedy decisions (e.g. outlawing the US' previously long-standing practice of 'zeroing' in the calculation of anti-dumping margins, and the AB's case law on safeguards and its narrow definition of 'public body' (cf. supra)), she proposes a separate dispute settlement system for trade remedy decisions (Hillman, 2019). One option would be to create a special Appellate Body to hear only appeals of trade remedy decisions. A second approach to trade remedy disputes would be to establish a moratorium on appeals from panel decisions—or even just to amend the rules to make panel decisions on trade remedy matters final.[25] This option was also proposed by Schott and Jung (2019). Similarly, considering the recent proliferation of disputes that require adjudicators to determine whether a measure is justified under the national security exception of the GATT (Article XXI) (e.g. *Russia — Measures Concerning Traffic in Transit* (DS512)), a specific (and separate) procedure has been suggested as an alternative to the launch of a WTO dispute settlement case to deal with this political sensitive issue (Bercero, 2020). However, although carving out specific types of cases (e.g. anti-dumping) from appellate review could address some of the US concerns, it would not resolve the problem that arises when WTO rules are unclear (and where 'judicial activism' is therefore more likely to occur). As noted above, a way to deal with these situations could be that WTO members adopt binding interpretations on rules of WTO law, which the AB is obliged to take into account.

Several authors have also stressed the importance of reforming or improving WTO working practices that would increase the effectiveness of WTO bodies as fora to oversee the implementation of specific agreements. As noted by Wolff: "Whatever path is chosen for reconstituting binding dispute settlement, the emphasis throughout should be bringing about the settlement of individual disputes as a higher priority than using dispute settlement to clarify WTO obligations, as important as the latter is" (Wolf, 2022). The DSU provides for consultation procedures, but those are not being used or pursued by disputing parties to the fullest extent, as there is often a preference to move quicky to adjudication. WTO bodies are recognised as useful venues for dialogue, deliberation on non-implementation of commitments and for informal resolution of potential conflicts (dispute prevention) (Hoekman and Mavroidis, 2020;

[24] WTO Agreement, Article IX:2.
[25] Two other reform options suggested by the author are (i) arbitration under Article 25 of the DSU and (ii) procedural changes to the AB based on the Walker principles and to adopt these by vote in the absence of consensus.

Hoekman, 2019; Wolff 2022, Wolfe 2020a and 2020b; Karttunen, 2020). Several ideas have been formulated on how to optimise the use of these bodies, in particular to reduce the burden on the formal dispute settlement system. Wolfe (2020a, 2020b) and Karttunen (2020) for example have proposed several innovations to the working methods of WTO bodies that aim to foster dialogue and deliberation among WTO members on trade irritants, preventing dispute settlement procedures. They suggest increasing the use of 'specific trade concerns' (STCs) – written questions posed by one member regarding (planned) regulatory measures of another member – and 'thematic sessions' that focus on areas of policy relevant to a WTO committee or other body and that is of interest (concern) to members. An interesting innovation in this regard has recently been included in the WTO Trade Facilitation Agreement (TFA). Article 18.5 TFA calls on the TFA Committee to establish an Expert Group of five independent trade facilitation professionals to examine the situation and make recommendations to resolve implementation difficulties notified by developing countries after transition periods have expired. No recourse can be made to the DSU until the recommendation the Expert Group has been considered.

The proposals to strengthen the WTO's working practices also relate to another key function of the WTO that needs to be improved: the monitoring function. Although this element of WTO reform is not discussed in detail in this paper, it should be noted that several proposals have been made to strengthen the two key elements of the WTO's monitoring function: the WTO members' notification requirements and the periodic Trade Policy Reviews prepared by the WTO Secretariat (Hoekman, 2019). For example, in order to tackle the poor notification record by key WTO Members such as China, the US proposed in the run-up to the 11th Ministerial Conference in Buenos Aires in December 2017 a Ministerial Decision in recognition of the "chronic low level of compliance with existing notification requirements under WTO agreements".[26] Among the proposed measures to be taken against 'delinquent' members failing to meet their notification obligations were denial of the right to chair WTO bodies, denial of access to documentation and the members' website, and an Inactive Member designation. The punitive elements of this proposal have in the meantime been softened by other WTO members that joined this proposal. The latest version of the proposal introduced several support measures including technical assistance for members that have difficulties with complying with their notification requirements; the proposal to the include in the Trade Policy Reviews a specific, standardized focus on the Member's compliance with its notification obligations; and an obligation on WTO members to explain to the relevant Committee why they failed to comply with their notification requirements, including the requirement to provide any elements of a partial notification to limit any delay in transparency.[27]

Wolff, sees the creation of a "new MPIA" between the EU and the US as a way out of the AB deadlock. Considering that it is essential to have both the US and the EU on board in the AB reform process (which is not the case for the current MPIA), he argues that these two WTO members should establish first, possibly together with a few other heavy DSM users like Brazil or Canada, an interim arrangement for disputes between parties of this "New MPIA (NMPIA)" (Wolff, 2022). The circle could then be broadened to other MPIA parties and a number of non-MPIA parties. The author provides for "a menu" of elements for a possible negotiation leading to restoring an appellate stage to which all WTO members might ultimately agree - including the US. The proposed options go beyond the Walker principles or the MPIA's

[26] WTO, 'Procedures to enhance transparency and strengthen notification requirements under WTO agreements', JOB/GC/148, 30 October 2017.
[27] WTO, 'Procedures to enhance transparency and strengthen notification requirements under WTO agreements', JOB/GC/204/Rev.11, 14 July 2022.

innovations.[28] If all WTO members were comfortable with the outcome, this could become an updated DSU. According to the author, the EU would arguably wish the outcome to be as close as possible to the current MPIA, whereas the US' Biden administration would wish policy space with respect to worker-centered trade remedies and include flexibilities to deal with non-market-oriented competition.

Much of the debate on the functioning of the WTO's dispute resolution mechanism focuses primarily on the AB. Hoekman and Mavroidis however argue that an effective, coherent and consistent WTO dispute resolution does not need to include an AB, provided that the WTO's settlement mechanism at panel stage is adjusted to guarantee the key *raison d'être* of the DSM: a de-politicised conflict resolution mechanism to deal with disputes among WTO Members (Hoekman, Mavroidis, 2020a). These authors propose several changes to the panel stage of the dispute settlement process (i.e. the only stage in their proposal) that would (i) improve the quality of adjudication, thereby reducing the prospects of legal errors and (ii) address weaknesses in the performance of panels that are due to inadequate analysis and/or inconsistent treatment of facts across similar cases over time. For example, they propose the establishment of a standing body of full-time panellists to improve the consistency of Panel reports.[29]

Reforming the WTO DSM to a one-tier dispute settlement process based solely on the Panel stage would be the most drastic way of dealing with the concerns about the AB. Remarkably, several WTO members have in the period just before or after the breakdown of the AB adopted actions to avoid appellate procedures in their WTO dispute procedures. For example, in March 2019, when the demise of the AB was approaching, Indonesia and Vietnam agreed in their dispute *Indonesia – Safeguard on Certain Iron or Steel Products* (DS496) that in case the AB was not able to function due to a lack of Members, they would not appeal the Panel report (thus avoiding that the dispute can be appealed into the void).[30] Or, more recently, in two recent cases the parties to these WTO disputes decided not to appeal the Panel reports, i.e. *Costa Rica — Measures Concerning the Importation of Fresh Avocados from* Mexico (DS524) and *European Union — Safeguard Measures on Certain Steel Products* (DS595). In the former case between Costa Rica and Mexico, both sides had the option to appeal under the MPIA (as they are both MPIA parties). However, neither side chose to appeal, and the panel report was therefore the final word in the case. Similarly, in Case DS595 between the EU and Turkey, both parties decided not to appeal the panel report, although they agreed in advance on alternative appeals procedures under Article 25 of the DSU (Turkey is not an MPIA member, cf. *supra*). Remarkably, in the DSB meeting from 31 May 2022, during which these Panel Reports were adopted, the US reacted positively to these developments, arguing that this demonstrated that the WTO dispute settlement procedure (at Panel level) can still solve disputes between its members.[31] However, this does not mean that the Biden administration wants to get rid of the AB altogether and keep only a one-tier system. As evidenced by the MPIA membership, a large part of the WTO Membership, including several key members, want to preserve the two-tier system (Fiorini et al, 2020). Moreover, a single-stage dispute

[28] The elements proposed by the author cover specific proposals relating to (i) the authority of the Appellate Body; (ii) expansion of the Roster of Appellate Body Members, Appellate Body Panel Composition; (iii) term of Office of Appellate Body Members, Operation of Appellate Body Panels; (iv) standards of Review; (v) the WTO Secretariat's Role; (vi) the role of the Dispute Settlement Board; (vii) Ancillary Changes; (viii) Effective Date for Compliance and; (ix) Voluntary Nature of the Dispute Settlement System.

[29] Other changes proposed by the authors relate to the number of adjudicators working in Chambers, criteria for eligibility and the selection process; and terms of appointment, administrative support and staffing.

[30] WTO, 'Understanding between Indonesia and Viet Nam regarding procedures under articles 21 and 22 of the DSU', WT/DS496/14, 27 March 2019. The AB eventually adopted the report on 28 August 2018 (WT/DS496/AB/R).

[31] WTO, 'Members adopt panel reports in fresh avocados, steel safeguards disputes', 31 May 2022.

settlement can create unappealable but incorrect outcomes and inconsistent results for cases with similar fact patterns. According to Wolff, some of the lack of uniformity in a panel-stage only system could be avoided if the operation of the Panels is overseen by the appointment of a kind of an 'Office of Legal Counsel' that reports to the DSB (Wolff, 2022). In the case of serious inconsistency, the OLC can be entrusted with certain powers to intervene. According to the author, whether a one-tier system would suffice for the WTO dispute settlement process depends on whether the sole objective is settling a given dispute before a given panel or maintaining a single set of rules for the global trading system.

### *2.5 Outlook: towards a transatlantic alliance for DSM reform?*

The commitment of the Biden administration to return the US to the international community after four years of confrontational policies under Donald Trump (as for example evidenced by the US re-joining the Paris Climate Agreement and by recommitting to the World Health Organization) raised hopes and expectations that the US would also deploy a more constructive attitude towards the WTO and the AB issue.

The President's trade agenda is a key part of the Biden-Harris Administration's effort to defeat COVID-19, help the economy recover, and its Build Back Better agenda. The first Trade Policy Agenda (2021) of the Biden administration confirmed that the key priorities of this administration are to develop a "worker-centered trade policy" and "addressing China's coercive and unfair trade practices that harm American workers, threaten US technological edge, weaken supply chain resiliency, and undermine US national interests" (USTR, 2021). In relation to the WTO, the administration pledged to "restoring US leadership around the world and repairing partnerships and alliances" and "work with like-minded trading partners to implement necessary reforms to the WTO's substantive rules and procedures to address the challenges facing the global trading system". The President's 2022 Trade Policy Agenda further specified that the Biden Administration supports a WTO reform agenda "that reflects the priorities of its worker-centered approach – one that protects our planet, improves labour standards, and contributes to shared prosperity" (USTR, 2022). The US' priorities for WTO reform include restoring efficacy to the negotiating arm and promoting transparency; improving compliance with and enforcement of Members' WTO commitments; and equipping the organization to effectively address the unfair practices of non-market economies—such as economic coercion—and global market distortions. This was illustrated by the different proposals that the US submitted and defended ahead and during the WTO's MC12 in Geneva in June 2022.

However, despite these commitments concerning WTO reform, the current US' administration still needs to take a clear stance on the WTO DSM and AB. The Biden administration has repeated the US' concerns about the WTO DSM (in particular the AB) loud and clear but refrains from submitting detailed reform proposals to address these. Instead, the Biden administration continues to block the appointment procedure for new AB members. In the DSB meeting on 31 May 2022, Mexico, speaking on behalf of 123 co-sponsors, introduced for the 54th time the group's proposal to start the selection processes for filling vacancies on the AB. However, the US blocked again this process and stated that "members are aware of the longstanding US concerns with WTO dispute settlement" and "that those concerns remain unaddressed".[32] The US recited again its position that "the first step towards reform is to better understand the interests of all members in WTO dispute settlement" and that "a true reform

[32] WTO, 'Members adopt panel reports in fresh avocados, steel safeguards disputes', 31 May 2022.

discussion should aim to ensure that WTO dispute settlement reflects the real interests of members, and not prejudge what a reformed system would look like". Frustrated by this US position, Mexico, speaking for 123 Members, stated that the fact a member has concerns about certain aspects of the functioning of the AB "cannot serve as pretext to impair and disrupt the work of the DSB and dispute settlement in general, […] which is causing concrete nullification and impairment of rights for many members".[33] The US position did not change at the first DSB meeting after MC12 (on 29 August 2022),[34] during which members agreed to have "a fully and well-functioning dispute settlement system accessible to all Members by 2024".[35]

Although the Biden administration still refuses to put concrete DSM/AB reform proposals on the table, it has repeated several of its well-known concerns about the dispute settlement mechanism. Recent statements and policy initiatives illustrate that the current US administration's concerns can be brought back to two key issues. *First*, on several occasions the United States Trade Representative (USTR) Katherine Tai repeated the US' view that the WTO DSM has become too much about litigation at the cost of its function to settle disputes. For example, she stated that:

> *"Over the past quarter century, WTO members have discovered that they can get around the hard part of diplomacy and negotiation by securing new rules through litigation. Dispute settlement was never intended to supplant negotiations. The reform of these two core WTO functions is intimately linked. The objective of the dispute settlement system is to facilitate mutually agreed solutions between Members. Over time, "dispute settlement" has become synonymous with litigation – litigation that is prolonged, expensive, and contentious*."[36]

The USTR further emphasised that the WTO's DSM has become "unwieldy and bureaucratic" and gave the example of the recent of the EU-US Airbus/Boeing Dispute, that after 16 years of DSM procedures was eventually 'solved' in a negotiated way in the bilateral 'Large Civil Aircraft Agreement'[37] (Van der Loo et al, 2022). Similarly, the EU and the US also managed to find an agreement on the US' Section 232 tariffs on EU steel and aluminium (although the EU remains dissatisfied with the remaining tariff quota system). As part of this arrangement, the EU and the US agreed to terminate their panel procedures on this issue in *United States – Certain Measures on Steel and Aluminium Products* (DS548) and *European Union – Additional Duties on Certain Products from the United States* (DS559) and to resort instead to arbitration pursuant to Article 25 DSU.[38] The US also welcomed the outcome of the Article 25 DSU arbitration procedure between the EU and Turkey in *Turkey – Pharmaceutical Products dispute* (DS583), stating that "the aim of dispute settlement is to facilitate the prompt settlement of a dispute between members" (cf. *supra*).[39]

The USTR hinted that for the US a reform of the WTO DSM should strengthen the 'dispute-resolution' function of the mechanism, as she stressed that reforming the WTO dispute settlement mechanism "is about revitalizing the agency of Members to secure

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[33] *Ibid.*
[34] WTO, 'Türkiye states intention to implement findings in pharmaceuticals dispute with EU', 29 August 2022.
[35] WTO, 'MC12 Outcome Document', WT/MIN(22)/24, 22 June 2022.
[36] USTR, 'Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization'.
[37] EU-US Understanding on a cooperative framework for Large Civil Aircraft, to consult at: Understanding on a cooperative framework for Large Civil Aircraft (europa.eu)
[38] EU-US Joint Statement, 31 October 2021, to consult at: EU-US Trade Relations on steel and aluminium EU-US Joint Statement (europa.eu). On 21 January 2022 the EU and the US formally ended these Panel disputes and European retaliatory duties and initiated, and immediately suspended, arbitration proceedings for the disputes that cannot be resumed until at least November 2022.
[39] WTO, 'Türkiye states intention to implement findings in pharmaceuticals dispute with EU', 29 August 2022.

acceptable resolutions".[40] Moreover, she stressed that the DSM should reinforce and facilitate the functioning of the other aspects of the WTO, the negotiating function and also the monitoring function at the WTO, "as opposed to stifling them". In the view of this, it could be argued that, in addition to adopting the Walker principles, several of the proposals discussed above could convince the US to actually make concrete steps towards DSM/AB reform, and eventually lifting its blockage of the AB. In particular the proposals that (i) aim to establish a kind of oversight by the WTO Members over the AB (through Committees like the DSB); (ii) promote the use of the 'Authoritative Interpretation procedure' under Article IX:2; or (iii) that aim to strengthen (or effectively use) the consultation procedures foreseen in the DSU and the deliberation mechanisms (e.g. using the STC) in the WTO bodies and Committees can be a useful starting point for transatlantic discussions on WTO DSM reform. As there is still a wide consensus among WTO Members to maintain a two-tier system, the proposals for abandoning the appellate stage should not be pursued, but the specific reform proposals to improve the panel stage should be considered.

A second US concern about the AB that relates to one of the key trade policy priorities of the Biden administration is the US' 'policy space' to deploy its trade remedy instruments to tackle unfair (and non-market) trade practices from China, which harm workers and businesses in the US and in other countries. Whereas the Walker principles would already address this issue partially, the reform proposals discussed above that suggest to carve-out appeals on trade remedy disputes from the DSM (or to establish a specific AB for trade remedy disputes) could be essential to bring the US back to the WTO DSM, including to the (reformed) AB.

As the EU and the US are the most important actors in the WTO's DSM (and in the debate on its reform), and considering the renewed and strengthened transatlantic trade partnership under the Biden administration (as evidenced by the – partial – resolution of several lingering trade disputes and the establishment of the Trade and Technology Council (Van der Loo et al. 2022)), the EU and the US should first set the framework for the DSM/AB reform in a manner that would be acceptable to China, India, and the rest the WTO Membership. This would require that the US finally engages in a constructive way on this issue by putting concrete reform priorities and options on the table. The WTO members committed in the outcome document of WTO MC12 to launch a WTO reform process to improve all its functions. Significantly, WTO Members (thus including the US) "acknowledged the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body", "recognized the importance and urgency of addressing those challenges and concerns", and committed to conduct discussions "with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."[41] This leaves the WTO membership with a very tight schedule to agree on – and set up – a new (or reformed) dispute settlement system. This can only happen if the US finally puts concrete reform priorities and proposals on the table. The fact that the US' opening statement at MC12 did not even mention the WTO's dispute settlement mechanism, or its potential reform, does not bode well.[42]

## 3. The WTO's negotiating function

[40] USTR, 'Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization', to consult at: Ambassador Katherine Tai's Remarks As Prepared for Delivery on the World Trade Organization | United States Trade Representative (ustr.gov)
[41] WTO, 'MC12 Outcome Document', WT/MIN(22)/24, 22 June 2022.
[42] WTO, 'Statement by H.E. Ms Katherine Tai United States Trade Representative', WT/MIN(22)/ST/16, 12 June 2022.

### *3.1 The rise of plurilateral Joint Statement Initiatives*

Since its establishment in 1995 the WTO has had little success in negotiating new multilateral disciplines to regulate or govern trade-related policies. As noted in the introduction, MC12 caused in June 2022 a "sigh of relief"[43] as WTO members managed to conclude several important new trade deals, including an IP rights waiver concerning COVID-19 vaccines; an Agreement on Fisheries Subsidies; and an extension of a moratorium on applying customs duties to electronic transmissions. The 'Geneva package' agreed at MC12 was considered as a proof that the WTO is still relevant and that its members are still capable of agreeing new multilateral trade rules, even if the substance of such rules left some WTO members disappointed.

However, despite this modest success at MC12, the last two decades, since the launch of the Doha Development Round, made clear that WTO members do not manage to conclude new ambitious multilateral agreements on key trade-related issues in the framework of the WTO. Instead, trade governance has been increasingly pursued through bilateral or regional preferential trade agreements. The inability to (re)negotiate multilateral rules has led to – or is the result of – new trade conflicts, such as between the US and China, and resulted in an 'outdated' multilateral framework for trade governance, as new crucial issues that are high on the global trade agenda (e.g. digital issues and the nexus between trade and sustainable development) are not sufficiently covered by the WTO framework. Much of this stalemate is attributable to the practice of consensus decision-making and the 'single undertaking approach' in the WTO. The WTO is founded on the principle that all members are equal in rights and obligations. While consensus is primarily a practice and not a formal rule – the WTO makes provision for voting – in practice voting does not occur, reflecting a widely held view this would undermine the legitimacy of WTO decisions (Hoekman and Sabel, 2020).

This state of affairs has led many WTO members to think about ways of making progress on agendas and agreements under the WTO umbrella without the need for a consensus decision implicating the entire WTO membership. This has resulted recently in several new forms of 'plurilateral' negotiations. For example, at the 11th WTO Ministerial Conference in Buenos Aires in 2017, groups of WTO members launched new plurilateral initiatives on e-commerce (71 members), investment facilitation for development (70 members), services domestic regulation, and micro, small, and medium-sized enterprises (MSMEs) (87 members).[44] Known as Joint Statement Initiatives (JSIs), the aim of the participating WTO members was to initiate forward-looking, results-oriented negotiations or discussions on issues of increasing relevance to the world trading system. The JSIs are open to all WTO members, seek the participation of as many members as possible and envisage MFN treatment for all WTO members regardless of whether they participated in the initiatives.

Plurilateral cooperation is not new for the WTO. In the GATT years there were several agreements that bound only signatories, ranging from anti-dumping to product standards. Almost all came to be incorporated as multilateral agreements when the WTO was created in 1995, but the GATT practice illustrates that plurilateral agreements are nothing new for the trading system (Hoekman and Sabel, 2021). Plurilateral negotiation processes in the WTO have always been open to any WTO member that wishes to participate. However, such plurilateral negotiations raise in each case a range of legal and political questions and

[43] R. Francis (2022), 'MC12: trade policy community gives sigh of relief', 17 June 2022, to consult at: MC12: trade policy community gives sigh of relief - Borderlex

[44] Several other WTO members joint the initiatives since then. For an overview, see: WTO Plurilateral Initiatives - A Geneva Trade Platform Site (wtoplurilaterals.info)

challenges, including transparency issues during the negotiation process, questions about sufficient 'critical mass', the risk of 'free riding', and linkages with other negotiation interests across subjects. Moreover, integrating plurilateral agreements in the WTO framework must ensure that outcomes do not prejudice existing rights and obligations of non-participants.[45]

### *3.2 Legal options to establish plurilateral agreements*

There are basically two legal avenues for WTO members to pursue plurilateral agreements. The *first* option is explicitly provided for under Article X of the WTO Agreement. Under Article X:9 of the WTO Agreement, the Ministerial Conference may decide by consensus to add trade agreements concluded by a group of WTO Members to Annex 4 of the WTO Agreement. These agreements contain rights and obligations that apply only to the signatories.[46] They are thus an exception to the MFN rule as they discriminate against the rest of the WTO membership. Currently, only two active agreements exist under Annex 4 – the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. As the advantages of such a plurilateral agreement do not need to be extended to non-signatories, these agreements are also referred to as "closed plurilateral agreements" (Bronckers, 2020; Kelsey, 2022). In order to be incorporated in the WTO system, they require the consensus of the membership.[47]

The second option to establish a plurilateral agreement within the framework of the WTO is through integrating additional commitments into the participating members' schedules of tariffs or services (the Schedules of Concessions). These agreements are also referred to as "critical mass agreements" (CMA) (e.g. Bercero, 2020; Hoekman and Sabel, 2021; Low, 2022). In contrast to the first option discussed above, such agreements are MFN-consistent as they apply on a non-discriminatory basis to all WTO members, including non-participating members. There are therefore also labelled as "open plurilateral agreements" (Bronckers, 2022; Hoekman and Sabel, 2021). A clear example of such a plurilateral agreement is the Information Technology Agreement (ITA). The ITA was signed in 1996 and it removed tariffs on a wide range of covered products imported by the signatories. These changes were entered into the tariff schedules of the participating members (a smaller sub-group of members agreed in 2015 to reduce tariffs on an even larger list of IT products in what is known as ITA II). This approach was also recently used for the Joint Statement Initiative on Services Domestic Regulation, by integrating the commitments into the participating members' GATS Schedules.[48] However, this option has several limits. First, not all WTO(-plus) commitments can be framed or incorporated in the WTO goods or services schedules, such as potential new principles in the area of e-commerce or investment facilitation (which are not covered by WTO Agreements). These problems were illustrated by the experiences with the Reference Paper on telecommunications, a set of competition law principles that participating WTO members inscribed in their services schedule (Bronckers, 2020). Second, open plurilateral agreements have as a fundamental drawback free riding as non-participants are deemed to enjoy the same benefits as participants (e.g. a tariff reduction). When a group of WTO members aims to establish a plurilateral agreement (because of a lack of multilateral support), the participating countries must determine whether free-riding constrains apply and, if so, what constitutes a 'critical mass' of participation that internalises enough of the benefits within the participating

[45] Art. II(3) of the WTO Agreement states that plurilateral agreements included in Annex 4 "do not create either obligations or rights for Members that have not accepted them".
[46] Art. II.3 WTO Agreement.
[47] Art. X.9 WTO Agreement.
[48] WTO, Reference Paper on Services Domestic Regulation, INF/SDR/2, 26 November 2021.

group of countries (Hoekman and Sabel, 2021). It is argued that an open plurilateral agreement is only feasibly if most of the benefits associated with trade liberalisation are internalised by the participants and that enough products are covered and a large enough set of countries participate (Hoekman and Sabel, 2021). Another, more political, challenge about this option is that non-participants may bring a dispute settlement case for breach of these additional scheduled commitments, even if they, as non-participants, are not bound by such commitments.

Considering that such 'critical mass' or 'open plurilateral agreements' are only enshrined in the participating members' schedules, several authors have recognized the desirability of finding ways of amending the WTO in order to put such agreements on a firmer legal footing. Mamdouh, for example, argues for the addition of an Annex 5 for agreements binding only on signatories while creating rights for all members (Mamdouh, 2021). This is in recognition of the fact that Annex 4 agreements are binding only on signatories and essentially exclude non-signatories from benefits as well as obligations. This author also stressed that when considering the legal framework for plurilaterals in the WTO, a clear distinction must be made between "processes" and "outcomes" of plurilateral negotiations (Mamdouh, 2021). This author points out that there are no legal requirements in the WTO how a plurilateral negotiation process should be launched, conducted, or concluded. While it may be politically desirable for WTO Members to take decisions by consensus in launching a negotiation, such action is not required by the WTO Agreement.[49]

### *3.3 Plurilateral agreements: a legitimate alternative for multilateral rulemaking in the WTO?*

Considering that WTO members can hardly agree anymore on ambitious new multilateral agreements, there is a call to facilitate the use of plurilateral agreements in the WTO framework. Several authors claim that, provided that the rights of non-participants are not undermined, there is no justification for exploiting the WTO consensus rule to prevent members from using the WTO framework to agree on disciplines that go beyond the current WTO rules, and that open plurilateral agreements are a legitimate tool to circumvent this deadlock (Zampetti, Low and Mavroidis, 2022; Bercerco, 2020; Hoekman and Sabel, 2021, Hoekman, 2018; Bronckers, 2020; Adlung and Mamdouh, 2018). The alternative to open plurilateral agreements would not be multilateral rulemaking, but rather a more fragmented trading system based on an increasing number of bilateral or regional FTAs or other forms of negotiation outside the WTO framework. Moreover, plurilateral agreements allow WTO members to engage and cooperate without liberalising "substantially all trade", as required under FTAs.[50]

However, several authors are also critical about the plurilateral format. Discussing the JSIs that were initiated at the 11th Ministerial Conference in Buenos Aires in December 2017 (e.g. electronic commerce, domestic regulation of services, and investment facilitation), Kelsey argues that this strategy "enables participants to circumvent the WTO's core tenets of multilateralism, Member-driven consensus decision-making, and special and differential treatment, and sidelines the WTO's role to mandate negotiations and its established bodies" (Kelsey, 2022). This author finds that the justifications for the recent JSIs rely on tenuous

[49] Art. III(2) of the WTO Agreement states that: "The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference."
[50] Art. XXIV GATT.

interpretations of WTO rules and that the preferred mode of implementation involves a misuse of trade in services schedules. She warns that the precedent set by these JSIs would license future rule making by self-selecting groups of members on a potentially limitless range of matters and deepen existing fissures within the WTO. This author even considers four options for challenging the lawfulness of the JSI process and outcomes: interventions at WTO Councils and committees; authoritative interpretations of disputed provisions; certification of modified schedules; and a formal dispute (Kelsey, 2022).

One of the main constraints to WTO member's willingness to negotiate and conclude plurilateral agreements is the MFN requirement because of free riding concerns. Restricting the benefits of plurilateral agreements only to participating WTO members is politically difficult to realise as this would require the approval of all WTO members, including the non-participants. However, Hoekman and Sabel nuance this as some policy areas giving rise to systemic trade tensions – notably subsidies – do not lend themselves to discriminatory solutions. Others, for example, data privacy, data flows or use of trade policy when implementing national climate change programs, are premised on the ability to discriminate (Hoekman and Sabel, 2021).

It has been argued that open plurilateral agreements are useful not only for market-access commitments, but also for regulatory issues. Given the broad scope of the GATS, a wide range of crucial issues, including investment-, competition- and labour-related disciplines, could be tackled within the agreement's existing framework (Adlung and Mamdouh, 2018). However, there is no conceivable equivalent under the GATT that could allow for the extension of a similarly broad range of disciplines, governing, for instance, investment- or visa-approval procedures. Hoekman and Sabel argue (2021) that, depending on the type of issue, open plurilateral agreements can be the preferred avenue for trade governance (even compared to multilateral negotiations), especially where the problem is to reduce the trade costs of regulatory heterogeneity. Cooperation on regulatory matters does not necessarily require a large critical mass, cross-issue linkages or the type of reciprocity that is a basic feature of market access negotiations. Therefore, these authors argue that open plurilateral agreements may be a path forward in addressing some of the sources of current trade conflicts such as industrial subsidies that are perceived to distort the competitive landscape and international collective action problems (e.g. decarbonization of economic activity).

### *3.4 WTO members' views on plurilateral agreements*

WTO members are divided over the appropriateness or legitimacy of plurilateral agreements in case the entire WTO membership cannot manage to negotiate new multilateral rules in the WTO framework. The EU is one of the main proponents of open plurilateral agreements as a 'second best option' to multilateral trade governance. It is a member of all recent JSIs and the European Commission has advocated for the use of "open plurilateral agreements" in its recent Trade Policy Review from 2021 (European Commission, 2021). The Commission recognises that the integration of closed plurilateral agreements on the basis of Article X:9 and Annex 4, which requires consensus among the WTO members, "has been perceived to be an insurmountable difficulty, even if the rights of non-participants were not diminished by the plurilateral commitments taken by a group of WTO members". The EU therefore prefers open plurilateral agreements through integrating the additional commitments in the participating members' schedule of commitments, although the Commission identifies several disadvantages about this option (e.g. not every additional commitment fits neatly into a schedule of commitments, cf. *supra*). The Commission therefore called for a reflection on how

to create an easier path for plurilateral agreements to be integrated in the multilateral architecture (European Commission, 2021). The EU favours an inclusive approach to open plurilateral agreements that facilitates participation by developing countries and allows them to decide whether they wish to join the agreement, leaving the door open for them to join in the future. The Commission has identified certain principles that plurilaterals should comply with in order to be incorporated into the WTO framework. In line with what has been proposed by several authors (discussed below), the Commission has made clear that these principles should relate to openness to participation and future accession by any WTO member, facilitation of the participation of developing countries, transparency of the negotiating process, as well as means of protecting the existing rights of non-participants while avoiding free-riding.

A number of developing countries, led by India and South Africa, have challenged however the legitimacy of plurilateral agreements. In a Communication from 18 February 2021 on the recent Joint Statement Initiatives (e-commerce, services domestic regulation, investment facilitation, MSMEs), India and South Africa raised several objections against the plurilateral JSI format, regardless of the fact that it creates obligations only for signatories and additional rights for all.[51] These two countries consider the plurilateral initiatives an assault on the binding force and fundamental principle of multilateralism, as well as strategy to circumvent the consensus rule and the WTO rules on amendments. India and South Africa contest the legality of open plurilateral agreements through integrating additional commitments in the schedules of concession of participating WTO Members. They argue that the only permitted plurilateral agreements are those authorised by Article X:9 and Annex 4 of the WTO Agreement, and that therefore all new plurilateral agreements are to be reached "exclusively by consensus" of WTO members. If this would not be possible, India and South Africa claim that the agreement than needs to be pursued outside the WTO framework (as was envisaged for the TISA), or by amending the WTO Agreements (a process that requires a majority vote of two-thirds of the members (Article X.1), and a process that, so far, has not been used).

The resistance from India and South Africa against the recent JSIs is by some considered as a move to hold these agreements hostage for concessions on subjects dear to their own commercial interests, such as waivers on intellectual property rights. Moreover, India and South Africa's legal objections against the recent JSIs are criticised (Hufbauer, 2021) as they rely only on the "exclusively by consensus" rule in Article X:9. However, this procedure applies only to agreements added to Annex 4, whereas the recent JSIs are open plurilateral agreements to be integrated in the participating members' schedules (see for example the services domestic regulation agreement) – and not to be added to Annex 4 of the WTO Agreement.

### *3.5 Outlook: governance principles for future plurilateral agreements*

There is a broad consensus that plurilateral agreements in the WTO are an appropriate tool to circumvent stalemates in multilateral rulemaking, allowing groups of WTO members to move forward on regulating or liberalising key trade-related issues without being held hostage by a minority of WTO members. However, the legitimacy of WTO plurilateral agreements depends on ensuring the principle of openness and inclusiveness so that any interested WTO member has the opportunity to participate in negotiations and decide whether or not to join the agreement immediately once the agreement enters into force, or at a later stage.

[51] WTO, 'The legal status of 'Joint Statement Initiatives' and their negotiated outcomes', WT/GC/W/819, 19 February 2021.

In order to encourage and facilitate the full integration of plurilateral agreements in the WTO framework, several authors have tried to identify key principles or conditions that such agreements need to meet. The WTO Agreement does not specify in detail how plurilateral agreements should be launched or negotiated, except that that WTO members can add or delete agreements by consensus[52] (Zampetti, Low and Mavroidis, 2022). The proposed conditions for governing plurilateral agreements aim to reconcile the principle of inclusiveness with the protection of the rights of non-participants and the possibility for participants to assume commitments that go beyond WTO rules without free riding. Such a governance framework for new plurilateral agreements could address the concerns of non-participating WTO members and facilitate their integration into the WTO framework (e.g. Annex 4). Bercero suggests enshrining these conditions in a "framework decision" to be adopted by a Ministerial Conference and to be added to Annex 4 (Bercero, 2020). Although a case-by case decision would still be needed to incorporate a specific plurilateral agreement in the WTO framework, such a ministerial decision "would provide the framework to consider such request and make it more difficult for a country to block consensus if the conditions are fulfilled" (Bercero, 2020). Hoekman and Sabel on the other hand propose to include a set of principles governing future plurilateral agreements in a common "Reference Paper" to be incorporated in each new open plurilateral agreement that is negotiated (e.g. in the schedules of participating WTO members) (Hoekman and Sabel, 2021).[53]

Drawing on the proposals of these authors (e.g. Bercero, 2020; Hoekman and Sabel, 2021; Mamdouh, 2021), the following governance principles for future plurilateral agreements can be identified:

- Membership of a plurilateral agreement should be voluntary.
- Plurilateral agreements should be negotiated within the WTO framework and open to participation by any interested WTO member. The WTO Secretariat should support and facilitate the negotiations and ensure their transparency vis-vis all WTO Members.
- The participation by developing countries should be encouraged, including through the coordination of support for capacity building and technical assistance. Moreover, plurilateral agreements should provide for flexibilities and transitional periods allowing developing countries to participate in a gradual way.
- There should be support by a significant group of WTO Members (critical mass) for a plurilateral agreement. However, the required threshold should not be quantified in an explicit way as to leave scope for case-by-case consideration.
- Plurilateral agreements should be open to accession by any member that is ready to accept the same commitments as the original members. An accession procedure specifying the requirements and procedures to be followed by WTO members that aim to join the agreement at a later stage should be provided.
- Transparency needs to be guaranteed towards non-participants through the negotiation and implementation of the agreement. For example, non-participants should be able to attend meetings of relevant committees as observers. This would facilitate the accession of non-participants at a later stage.[54]

[52] Art. X:9 WTO Agreement.
[53] The authors note that there is a precedent for this in the GATS Reference paper on basic telecommunications, which is included in the GATS Schedules of the participants.
[54] Hoekman and Sabel refer for example to compliance with WTO requirements pertaining to publication of information of measures covered by the agreement; a notification mechanism for participating members regarding the implementation of the agreement; and annual reporting requirements to the WTO General Council on the implementation of the plurilateral agreement (Hoekman and Sabel, 2021)

- The agreement may not limit the existing rights of non-participants under the WTO Agreement.
- A plurilateral agreement needs to specify whether – or under which conditions - it envisages recourse to WTO dispute settlement mechanisms for enforcement procedures. Different views exist on this point. Bercero argues that non-participants may not bring claims against participants that are based on the provision of the plurilateral agreement (Bercero, 2020). He argues that this would not be in breach of the MFN provisions in the WTO agreement, but rather the logical consequence of the fact that a plurilateral agreement cannot confer rights or impose obligations on non-participants. Hoekman and Sabel on the other hand prefer a more case-by-case approach, as they consider that the DSU may not be the most appropriate instrument to support the implementation of agreements that go beyond disciplining the use of discriminatory policies (e.g. an agreement pertaining to regulatory regimes, such as data adequacy), or if the agreement would include mainly non-binding or best endeavours commitments. They propose therefore alternative conflict resolution procedures for plurilateral agreements about regulatory matters (they refer for example to the expert advisory group process that was incorporated in the FTA, discussed above). Moreover, they also suggest a consultation and conflict resolution mechanism for non-signatories of plurilateral agreements in cases where they perceive that incumbents do not live up to the agreement's principles.

## 4. Conclusion

Defenders of the multilateral trading system saw in the outcome of MC12 a sign that the WTO is still alive, even if the specific outcomes of the meeting left several of its members disappointed. The reform process launched at this occasion still needs to take shape, although several members have already made specific reform proposals on specific issues – or expressed in a clear way their concerns about key functions of the WTO.

Most of the WTO reform proposals developed by WTO members or WTO experts have focused on the dispute settlement issue. The concerns of the US about the WTO's dispute settlement function are well known. Specific proposals or initiatives such as the reform proposal submitted by the EU, the MPIA or the 'Walker Principles' have therefore aimed at addressing explicitly the US concerns about the WTO's DSM and the AB. However, also under the Biden administration the US continues to block the appointment procedure for new AB members and refrains from submitting detailed reform proposals. This paper argues that the different reform proposals that (i) aim to strengthen the 'dispute-resolution function' of the DSM and (ii) guarantee the US' 'policy space' to deploy its trade remedy instruments to tackle Chinese trade-distortive practices could entice the US to a meaningful discussion on dispute settlement reform. However, as long as the US refuses to engage in a detailed and concrete discussion on WTO dispute settlement reform and to submit specific reform proposals, it remains very unlikely that a "fully and well-functioning dispute settlement system" will be in place be 2024, as pledged by the WTO members at MC12.

The growing practice to rely on plurilateral agreements in the context of the WTO to establish new trade-related rules is not welcomed by all WTO members. Plurilateral negotiations raise in each case a range of legal and political questions and challenges, including transparency issues during the negotiation process, questions about sufficient

‘critical mass’, the risk of ‘free riding’, and linkages with other negotiation interests across subjects. Moreover, integrating plurilateral agreements in the WTO framework must ensure that outcomes do not prejudice existing rights and obligations of non-participants. There is a broad consensus that plurilateral agreements in the WTO are an appropriate tool to circumvent stalemates in multilateral rulemaking, allowing groups of WTO members to move forward on regulating or liberalising key trade-related issues without being held hostage by a minority of WTO members. However, the legitimacy of WTO plurilateral agreements depends on ensuring the principle of openness and inclusiveness so that any interested WTO member has the opportunity to participate in negotiations and decide whether or not to join the agreement immediately once the agreement enters into force, or at a later stage.

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