

2023

# Rethinking WTO Dispute Settlement

**CONFERENCE REPORT**

Ottawa, 24-26 May 2023

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## Conference Report

Between May 24-26, 2023, over forty experts on the World Trade Organization (WTO) gathered at the University of Ottawa in Canada's capital to discuss the current state and future reform of WTO dispute settlement. The convened experts were academics, practitioners, diplomats as well as former trade negotiators, panelists, Appellate Body members and WTO officials. They came from all parts of the globe and with varying disciplinary and professional perspectives.

This report summarizes the content of their deliberations. It was drafted by the organizers who take full responsibility for any errors or omissions.

## Acknowledgements

This conference took place on the traditional and unceded territory of the Algonquin Anishinaabe people, who are the traditional guardians of this land. We pay respect to all Indigenous people in this region, from all nations across Canada, who call Ottawa home. We acknowledge the traditional knowledge keepers, both young and old. And we honour their courageous leaders: past, present, and future.

This conference was made possible through the financial support of Canada's Social Science and Humanities Research Council (SSHRC), the Max Planck Institute Luxembourg for Procedural Law, the University of Ottawa Faculty of Law, and the Hyman Soloway Chair in Business and Trade Law. We also gratefully acknowledge the logistical support of the University of Ottawa Centre for International Policy Studies and the Canadian Council on International Law. We thank Bennett Jones for sponsoring the conference dinner.

We are indebted to our team and assistants, in particular, Leon Seidl, Akshaya Venkataraman, Haneen Faisal, Danielle Du Maresq and Lisa Irimescu for their hard work and dedication in preparing and organizing this conference and for their preparatory work to this report. We also thank Professor Krzysztof Pelc for co-sponsoring the funding application and for his substantive input and participant survey.

Ottawa, 1 August 2023.

## Introductory Note

The World Trade Organization (WTO) is a member-driven institution. The recent negotiation successes at the 12<sup>th</sup> WTO Ministerial Conference in June 2022 and the subsequent flurry of activities to re-establish a “fully and well-functioning dispute settlement system” that is “accessible to all Members” by 2024 attest to the high level of engagement by the WTO membership.<sup>1</sup> The organization’s member-driven nature also underscores that WTO reform is a political rather than technocratic process. Finding appropriate policy solutions for the many challenges facing the multilateral trading system is not primarily an engineering exercise of optimizing rules or procedures. It is about balancing and accommodating interests of sovereign states and custom territories within a diverse membership.

At the same time, we believe there is merit in supporting and assisting WTO Members in this task by “crowdsourcing” the intellectual labor that is required for lasting and successful reforms. The timeline for dispute settlement reform is ambitious. Technological, social, and environmental change further adds pressure to deliver timely solutions. Yet, even the most well-sourced WTO Members find it challenging to stay abreast of all the issues competing for their attention. We, therefore, invite Members to leverage the global reservoir of past and current trade practitioners and academics to broaden the pool of ideas from which Members can draw, to help evaluate the implications of different reform proposals and to inform deliberations on specific issues through empirical, conceptual, or economic analysis.

Compared with other inter-governmental processes, such as the reform of investor-state dispute settlement (ISDS), where the exchange of ideas has broadened, it is our impression that intellectual engagement with WTO reform has narrowed. In investment law, an “Academic Forum on ISDS” was created in 2018 to provide input to United Nations Commission on International Trade Law (UNCITRAL) Working Group III deliberations.<sup>2</sup> The Academic Forum has since produced bibliographies, webinars, empirical research, background papers and side events to infuse inter-state negotiation with useful background materials. Taken together with broader academic research and the activities and training of non-governmental organizations, states have an unprecedented wealth of information on ISDS reform at their disposal. Conversely, intellectual engagement with WTO reform has narrowed. As readers and editors of academic journals, we observe a decline in interest in WTO matters and a smaller pool of commentators as compared to the two previous decades. This comes at a time of fundamental transformation of trade relations. Today, we need broader, deeper, and more creative engagement with trade issues than ever before.

In May 2023, we hosted an international and interdisciplinary gathering of seasoned WTO negotiators, government officials with experience in WTO dispute settlement, trade law practitioners, and WTO expert academics in Ottawa to help reinvigorate intellectual engagement with WTO reform and dispute settlement. Its objective was not to formulate specific recommendations. It instead sought to highlight, organize, and take stock of ideas that have been percolating in academia and

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<sup>1</sup> World Trade Organization, *MC12 Outcome Document*, WTO Doc WT/MIN/(22)24--WT/L/1135.

<sup>2</sup> PluriCourts Centre of Excellence, *Legitimate Roles for Investment Tribunals* (last visited 6 July 2023), online: <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/>

practice. A summary of these discussions, together with a bibliography, is provided in this report. In our view, three areas, in particular, create opportunities for intellectual crowdsourcing in support of WTO reform.

1. **Comparative institutional design.** We note the striking similarity of challenges faced by states across various international institutions. For example, the costs and duration of adjudication, the selection of adjudicators, and the role of prior decisions – these considerations feature not only prominently in WTO dispute settlement reform but have been pre-occupations of states in reforming investor-state dispute settlement for many years. Despite important differences between international institutions, we see significant room for learning and cross-fertilization on these and other fronts. No institutional design is perfect. Yet, incorporating lessons learned from other fields can help identify design choices, highlight design trade-offs, and evaluate the impact of design decisions. Academics and practitioners have a role to play in bringing new and unfamiliar cross-institutional learning opportunities to the attention of trade negotiators.
2. **Data and Empirics.** Academics and practitioners can provide states with the data they need to make evidence-based decisions. Gathering information on the negotiation history of a particular clause, on innovative provisions in hundreds of free trade agreements or on empirical trends in WTO deliberative or dispute settlement practice requires significant time and resources. Trade policymakers and negotiators can tap into the research and data gathered through past scholarship and analysis and can direct academics and practitioners toward the issues worth studying in the future.
3. **Conceptual and legal analysis.** The demands of practice can make it challenging for trade negotiators to dedicate the time needed to fully consider the consequences or trade-offs flowing from specific design choices. For the same reasons, a legal problem may not receive the attention it warrants. Expert practitioners and academics can provide analytic depth on complex issues and assist trade negotiators in thinking through their problems and solutions.

This report is an invitation for WTO experts from practice and academia to contribute their thoughts on the future of world trade and for WTO Members to take these views into consideration. WTO Members are the ultimate decision-makers. We are convinced that they can make better decisions if they can tap into more ideas.

The below resources may provide a step in that direction. They are meant to be illustrative rather than exhaustive. Our workshop brought together participants from across the world. Yet, despite our best efforts to ensure a diversity of views and participants, some perspectives may still be missing or be over- or underrepresented. Given diverging views on most issues discussed, the summary does not recommend, endorse, or reject any points raised but merely seeks to summarize and organize them concisely. We hope this effort, together with future ones like it, will help reinvigorate and broaden intellectual engagement with the world trading system, which notwithstanding its imperfections, is a collective achievement worth preserving.

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## Table of Contents

I. <b>Executive Summary</b> .....	6
II. <b>On Disagreements and Trade-offs</b> .....	8
III. <b>Cross-Cutting Issues</b> .....	11
(a) Institutional and negotiation history colours thinking around reform options .....	11
(b) Domestic politics impacts how WTO Members engage in the system .....	12
(c) Institutional culture shapes institutional output.....	13
(d) Comparisons and links to other institutions and legal systems .....	14
(e) Technology can support engagement and drafting.....	15
IV. <b>Dispute Settlement</b> .....	15
(a) Current concerns related to WTO dispute settlement.....	15
(b) Proposed Reforms.....	18
(c) Role of specific actors in dispute settlement.....	21
V. <b>Deliberative Mechanisms</b> .....	24
(a) Importance of deliberative mechanisms .....	25
(b) Challenges relating to deliberative mechanisms .....	25
(c) Proposed Improvements .....	27
VI. <b>Alternative Dispute Resolution</b> .....	29
(a) The Role of Alternative Dispute Resolution .....	30
(b) Potential Benefits and Challenges of Alternative Dispute Resolution .....	31
(d) Recommendations for Promoting Alternative Dispute Resolution .....	33
VII. <b>Conclusion</b> .....	34
VIII. <b>Addendum</b> .....	35
Annex A: Conference Program .....	35
Annex B: Compilation of Literature.....	40

# I. Executive Summary

More than 40 international WTO experts gathered in Ottawa, Canada, in May 2023 to “Rethink WTO Dispute Settlement.” Given the diversity of viewpoints, no consensus on recommendations for reforming the WTO dispute settlement system (WTO DSS) emerged. Abstracting from the in-depth discussions around specific reform proposals, five takeaways stood out to organizers.

Diverging ideal points and problem definitions operated in the background

1. Participants appeared to operate with different goalposts when considering WTO reforms. These ideal points included (1) improving the status quo, (2) restoring the pre-2019 WTO DSS, (3) returning to the original intent of Uruguay Round negotiators, and (4) reinvigorating the virtues of the pre-WTO era. Relatedly, attendees also seemed to have different problem definitions, including whether the current WTO DSS challenges (1) are limited to the US or are systemic in nature, (2) stem from too much law or too much politics, (3) are rooted in a passive membership or an activist Secretariat and Appellate Body (AB), (4) can be addressed informally or require formal amendments, and (5) are procedural or substantive in nature. Given these divergences, a shared vision of problems and goals may need to precede reform deliberations.

Trade-offs and interdependencies characterized discussion on specific reforms

2. Vigorous debate and divergent viewpoints suggested that no perfect reform exists; rather, a multiplicity of reform packages appeared possible, each with advantages and drawbacks. Evaluating reform trade-offs will require exploring the interdependencies of design features. Reforms that appear unattractive or unnecessary in a two-tier WTO DSS could be crucial for ensuring the success of a one-tier system. Akin to dials on a radio, reformers will need to calibrate different institutional settings in tune with each other to turn noise into signals.

A wealth of ideas, but no silver bullet on reforming WTO DSS

3. Decades of scholarship and Dispute Settlement Understanding (DSU) reform negotiations have produced a wealth of WTO DSS reform ideas. Yet, the above-noted disagreement on ideal points and “problem definitions” exacerbated by reform interdependencies made any consensus

Support for deliberative mechanisms, including but not limited to dispute prevention

Training needed to encourage alternative dispute resolution (ADR)

among participants on recommendations elusive beyond perhaps technical fixes to well-defined problems such as undue delays. Much of the discussion revolved around higher-level issues, including (1) the goals of the system (legal predictability vs pragmatic problem-solving), (2) the importance of law and lawyers, (3) feedback loops between WTO Members and adjudicators, and (4) the role of adjudicators and the Secretariat. WTO experts can produce empirical data and comparative perspectives and contribute creative solutions to specific reform concerns. However, absent clear marching orders from governments on the problems to be solved and goals to be achieved, expert-led input is bound to lack direction.

4. Participants almost uniformly saw merit in strengthening deliberation at the WTO, including through Specific Trade Concerns (STCs). While this may have the ancillary benefit of avoiding or narrowing formal disputes, attendees stressed other advantages of STC-like mechanisms for (1) transparency and surveillance, (2) policy learning and best practices, (3) regulatory convergence and (4) economic diplomacy.
5. Participants noted an uptake in the interest of ADR in neighbouring fields of commercial, tax and investment dispute resolution. In contrast, mediation and conciliation provisions remain scarcely used in the WTO. Participants attributed this in part to an institutional culture focused on litigation. As one participant noted, "if you google 'dispute settlement', the WTO is the first thing that comes up." Training and awareness-raising may help overcome hesitations.



## II. On Disagreements and Trade-offs

“There is no institutional nirvana.”

From 24 May to 26, 2023, more than 40 international experts on WTO dispute settlement gathered in Ottawa, Canada, under Chatham House Rules to “Rethink WTO Dispute Settlement.”<sup>3</sup> This summary, created by the conference organizers, reflects major themes raised during the deliberations. It does not attribute views to any participant, and the organizers alone are responsible for the accuracy, presentation, and curation of this content.

The below summary contains no recommendations. Conference attendees often voiced varying views on the causes, nature and scale of current challenges facing WTO dispute settlement and vigorously debated possible solutions. This propensity to disagree likely mirrors varying perceptions of WTO dispute settlement reform held by other WTO experts across the world.

While this report, therefore, offers no magical solution – indeed, as one participant put it, “there is no institutional nirvana”, that is, no perfect institutional reform when it comes to WTO dispute settlement – this summary can help advance current efforts on two fronts. It helps (1) map disagreements and (2) provide structured reflections on the trade-offs involving possible reform paths.

On disagreement, different anchor points seemed to have colored participants’ perceptions of current problems and reform proposals. For example, attendees frequently invoked historical comparisons to motivate their analysis. According to the Uruguay Round negotiators present at the conference, WTO dispute settlement as envisaged by treaty negotiators differed from the WTO dispute settlement practice that later emerged: for instance, recourse to the AB was thought to be exceptional during the Uruguay Round negotiations, but in WTO practice, more than two-thirds of panel reports were appealed.<sup>4</sup> With varying historical ideal points serving as mental

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<sup>3</sup> Max Planck Institute Luxembourg for Procedural Law, *Rethinking WTO Dispute Settlement* (24 May 2023), online: <https://www.mpi.lu/news-and-events/2023/may/24/rethinking-wto-dispute-settlement>.

<sup>4</sup> Pauwelyn, Joost & Weiwei Zhang, “Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload” (2018) 21:3 *Journal of International Economic Law*.

anchors, participants disagreed on how best to diagnose problems and evaluate reforms. Should WTO Members return to the pre-2019 WTO dispute settlement, should they return to the vision motivating negotiators in the early 1990s or some other ideal point?

Perceptions similarly differed as to the type of problem currently facing WTO dispute settlement. Participants pointed to (1) procedural challenges – length of proceedings, number of claims per dispute; (2) substantive challenges – outdatedness or vagueness of WTO rulebook; (3) systemic challenges – the interplay between dispute settlement and negotiations, Members versus WTO organs, lawyers versus trade negotiators; (4) equity challenges – power imbalances and lack of effective participation by all Members and (5) political challenges – lack of a willingness to engage on reforms or geopolitical tensions. These problem definitions are not mutually inclusive, but they create a risk that reformers talk past each other.

To the organizers, this diversity of viewpoints (other examples can be found in the summary below) provides an important insight: consensus on reforms presupposes at least a rudimentary agreement on ideal points and problem definitions. Otherwise, it is challenging to focus the debate or benchmark reform options.

As important as mapping disagreements in WTO reform is the need to recognize the trade-offs and interdependence between reform options. One participant likened the reform effort to building a hanging mobile: one extra weight here requires a counterbalance there. No element exists in isolation, and there are many ways to produce an equilibrium. In that image, the effort to reform WTO dispute settlement, to borrow from WTO jargon, literally involves much “weighing and balancing.”

A useful illustration of these interdependencies is the proposal supported by some attendees to strengthen WTO Members’ involvement at the interim panel report stage. Prior to publishing a panel report, panels circulate draft reports to disputing parties as per DSU Article 15. Engagement by the parties has been lacklustre, in part because they tended to reserve their comments and criticism of the report for a later appeal. If that appeal stage were absent, parties

would have an incentive to engage with and potentially seek rectification of parts of the report. The example illustrates that the merits and drawbacks of one reform often crucially depend on other design features, here the availability of an appeal.

Trade-offs were highlighted in relation to other design features as well. Participants noted that STCs can help resolve disagreements over technical regulations and prevent formal disputes. At the same time, some attendees pointed out that the enthusiastic use of such deliberative instruments stems in part from their informality and detachment from formal dispute settlement. Integrating more deliberative mechanisms into the dispute settlement pipeline may thereby risk undermining their use and utility.

To be sure, not all possible reform options involve highly complex trade-offs. Establishing panels at the first rather than second dispute settlement body (DSB) meeting or imposing page limits for written submissions, together with other procedural tweaks, were widely seen as low-hanging fruit reforms by attendees. However, most broader reform options were perceived to give rise to complex trade-offs. Participants noted frequently that WTO dispute settlement evolved differently than intended. This further underscores the need to identify, anticipate and address trade-offs as reforms are crafted to mitigate the risk of unintended consequences.

Where does this leave efforts to “Rethink WTO Dispute Settlement”? First, since consensus on reforms is unlikely to emerge absent an agreement on the core problems and the future direction of travel, it is important to flesh out what a “fully and well-functioning dispute settlement system” that is “accessible to all Members” means. As our Conference illustrated, it is challenging to agree on reforms when one disagrees on the nature of the problem. Second, there are many possible reform combinations, each involving different trade-offs. Thinking through these trade-offs seems crucial both to identify a balanced reform matrix and to ensure the lasting success of reforms.

### III. Cross-Cutting Issues

The Conference focused on the state and possible reforms relating to three themes (1) formal WTO adjudication, (2) deliberative mechanisms and (3) alternative dispute resolution. Each of these items has a dedicated section in this summary. However, we find it useful to first highlight cross-cutting elements that surfaced across the three themes.

#### (a) Institutional and negotiation history colours thinking around reform options

Conference attendees stressed the salience of the negotiation history and historical context when considering the present state and future reform of WTO dispute settlement.

Evolution toward  
a legalistic  
system

There was much discussion around the original purpose of the dispute settlement process and its evolution into a more legalistic system. It was posited that the initial goal of WTO dispute settlement was to assist parties in reaching mutually acceptable solutions, as reflected in DSU Article 3.7, and maintain fair trading relationships. Some participants argued that, over time, the dispute settlement process became too legalistic. Claims brought by Members increased in length and complexity, representation through lawyers, including private law firms, became commonplace, and appeals, originally conceived as exceptional corrective, became the norm. To restore balance and return to the original intent of the Uruguay Round negotiations, some attendees suggested a greater role of and control by the WTO membership in dispute settlement, including through economic diplomacy, interpretive declarations, or ADR.

A member-driven  
system out of  
control?

Other participants, however, recalled that the WTO remained a member-driven organization. In contrast to investor-state arbitration, where private investors bring claims, WTO Members have significant control over the process by deciding what cases to bring, what cases to settle and how to litigate disputes. Indeed, many challenges of the current system could be attributed to the actions or omissions of the WTO Members, both individually and collectively. Given the agency Members possess in dispute settlement and beyond, these attendees

pushed back against the notion that dispute settlement has become “out of control” and stressed instead that an abdication of control by members was at the heart of current challenges.

Learning from  
the past

Part of the discussion also centred on changes that have occurred since the inception of the General Agreement on Tariffs and Trade (GATT). For example, participants compared the current selection process for panelists at the WTO to the GATT. In the GATT, Members chose prominent panelists, while during the WTO, lower-level trade diplomats were frequently selected as panelists. The shift was said by some attendees to have impacted dispute settlement. Consequences may have included a more prominent role of the Secretariat and a greater tendency to appeal. The question was raised how different selection practices, for example, by nominating more prominent or experienced panelists or a revamping of the roster to trigger more roster-appointments, would affect the process. History was also examined in relation to potential reforms. Discussion about the need for an appeal instance centred on understanding the reasons behind the two-stage process. In sum, historical context and comparisons were often invoked. However, these historical analogies rarely pointed to clear reform directions and were sometimes fashioned into conflicting propositions.

#### (b) Domestic politics impacts how WTO Members engage in the system

Several participants pointed to the need to consider domestic political concerns when reflecting on reform options.

Domestic  
audiences matter

It was pointed out, for example, that one reason for the wide use of appeals was the need for governments to be seen by domestic stakeholders as exhausting all litigation options. It was suggested that this made it easier to subsequently “sell” the need to comply with adverse rulings to domestic constituencies. In the same vein, it was pointed out that WTO Members made little use of the DSU’s ADR provisions because these provisions were not perceived as equally compelling to domestic stakeholders. Conversely, the absence of stronger engagement by developing countries in WTO dispute settlement was attributed in part to the lack of input from domestic

stakeholders. Understanding dynamics at the WTO, in the eyes of some of the attendees, therefore required looking beyond Geneva into what motivated (or discouraged) domestic constituencies.

### (c) Institutional culture shapes institutional output

Professional cultures and intra-institutional dynamics at the WTO were another recurring theme in the discussions. Participants discussed the impact of institutional culture on decision-making processes, policy implementation, and overall organizational performance. The discussion suggested that understanding and working with institutional culture was crucial for effective change management.

Lawyers versus  
trade diplomats

One recurrent dimension related to the relative importance of and relationship between lawyers and diplomats. Lawyers and the prominence of private law firms were seen by some attendees as adding complexity to dispute settlement and legalizing the process. The workload for panelists has increased significantly as a result. Trade diplomats, conversely, were perceived by some as being more pragmatic. While lawyers were said to seek predictability, diplomats were said to seek practicability. At the same time, participants also recognized the importance of a rules-based system administered by lawyers to guard against power-based diplomacy. It was also pointed out that the shadow cast by law helped states settle or avoid disputes. Professional cultures therefore clearly shaped some participants' perceptions about the WTO; at the same time, the debate suggested that distinctions based on professional background could give rise to generalizations.

Adjudicators and  
the Secretariat

The institutional interplay between panelists and the WTO Secretariat was also discussed at length. The Conference highlighted how international civil servants supported WTO adjudication. Empirical research was cited that this support, at times, extended to Secretariat staff drafting decisions.<sup>5</sup> The discussion centred around different models to structure the interaction between panelists and the

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<sup>5</sup> Pauwelyn, Joost & Krzysztof Pelc, "Who Guards the 'Guardians of the System'? The Role of the Secretariat in WTO Dispute Settlement" (2022) 116:3 *American Journal of International Law*.

Secretariat. On the one hand, the importance of a competent Secretariat was stressed. It served as guardian of institutional memory and helped level the playing field against a backdrop of Members and panelists with varying legal knowledge or experience. On the other hand, some attendees warned of mandate creep with the Secretariat playing a too prominent role in adjudication. Participants further differentiated between the panel stage and the Appellate Body stage, with members of the latter being selected for their trade law expertise and independence, which lessened the need for an active Appellate Body Secretariat. Overall, the relationship between secretariats and adjudicators emerged as a salient point in considering reforms.

(d) Comparisons and links to other institutions and legal systems  
Throughout the conference, attendees drew frequent parallels or made distinctions between the WTO and other fields of international law.

Comparison with other courts and tribunals  
When discussing the interaction between the Secretariat and panelists, for example, participants noted alternative models referring to other courts and tribunals. Some pointed to the International Court of Justice (ICJ), where assistants are assigned to adjudicators.

Links with investor-state dispute settlement  
Some attendees also drew parallels with investor-state dispute settlement (ISDS). Pointing to the absence of a centralized appellate instance in ISDS and a plurality of dispute settlement options and designs, ISDS was seen as a prism of how trade dispute settlement may evolve in the absence of an Appellate Body. More generally, similarities between WTO and ISDS reform were noted, including concerns over delays, costs, coherence, the role of precedent and review instances.

Interaction with other international regimes  
Participants also noted the importance of broadening the focus beyond the WTO. Some recalled how Members discussed the same trade concern, for example, food labelling, in multiple fora, including the WTO's Technical Barriers to Trade (TBT) Committee. Others addressed linkages between trade and labor in the context of the International Labour Organization (ILO). Practice and dispute settlement under preferential trade agreements was also mentioned

at varying points. Participants seemed to broadly share the view that cross-institutional comparisons, learning and interaction were important ways to reflect on WTO dispute settlement.

(e) Technology can support engagement and drafting

The use of technology was a final recurring key theme in the discussions. Participants discussed the potential benefits and challenges associated with the use of technology in various contexts.

Enhancing transparency, attendance, and research via technology

Technology was discussed in relation to making existing mechanisms like STCs more effective through integrated databases on such concerns. Similarly, hybrid meetings involving remote participation from experts from the national capital could make deliberations more targeted and effective. It was argued by participants that transparency and databases, as well as collaboration with academic institutions involved in data collection, could further augment the role and importance STCs, advance transparency and surveillance, and prevent disputes.

Using generative artificial intelligence to draft legal text

Technology was also identified to assist with legal drafting. One attendee, confronted with a draft clause on the role of precedent in WTO dispute settlement, wanted to congratulate “the genius who wrote it.” The clause had been written by OpenAI’s GTP-4. The episode underscored the capabilities of the latest generation of artificial intelligence to create first drafts of legal texts, which may be particularly useful for countries facing resource constraints.

## IV. Dispute Settlement

The Conference examined the current state of the WTO’s dispute settlement system before proceeding to a consideration of reform options.

(a) Current concerns related to WTO dispute settlement

Participants expressed concern over the impasse in the appointment of AB members, which rendered the DSU’s appeal stage defunct and



Current impasse

allowed Members to veto panel reports by appealing them into the void. In contrast to the letter of the DSU, WTO dispute settlement is currently neither automatic nor compulsory, nor does it involve a two-stage process.

Is the WTO DSS in "crisis"?

Participants diverged on how to characterize the current situation. Some noted that the WTO was not currently in a situation of "crisis." While there were problems, such as the functioning of the AB, the dispute settlement system continued to operate between most Members, including through the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). It was furthermore remarked that in contrast to investment arbitration, states decided on the usage of the mechanism giving them control over the process. The impact of the current situation therefore depended in large part on how Members use (or do not use) their de facto veto over panel reports. Finally, attendees noted that compared to other international tribunals, the WTO was an anomaly with its universal, automatic, and compulsory dispute settlement system. The United States, it was said, was generally reluctant to submit to international dispute settlement. The current blockage of the AB by the United States, rather than an aberration, could be seen as aligning the US' participation in the WTO with its position vis-à-vis other international courts whose compulsory jurisdiction it did not accept.

Link to WTO's notification and negotiation crisis

Multiple participants also tied the current dispute settlement challenges to the WTO's broader institutional difficulties related to limited negotiation successes and a poor notification record. They relatedly stressed that the functioning of the WTO should not be reduced to dispute settlement. Substantive rules and institutional reforms needed to keep pace with evolving challenges were seen as connected to dispute settlement.

Procedural inefficiencies

Aside from these high-level concerns, attendees referenced specific procedural challenges that impeded the efficient function of WTO dispute settlement. They noted the length of submissions, complexity of claims and duration of proceedings, which had grown over time, as examples of concerns.

Concerns for  
developing  
countries

Constraints on developing states in the current WTO system were also highlighted. Concerns were raised about the capacity of developing countries to afford legal fees, have the technical expertise to identify issues and participate fully in negotiations. It was noted that in small missions, government officials struggled to attend all pertinent meetings. Views were shared that developing countries face accessibility issues and institutional barriers to participation in the dispute settlement system. The role of the Advisory Centre on WTO Law (ACWL) was noted as crucial in helping to alleviate these concerns. It was also noted that low trade flows helped explain why some developing countries participate less actively in dispute settlement and that many least developed states traded predominantly under the Generalized System of Preferences (GSP). Other barriers to developing country participation which were discussed included a lack of domestic mechanisms for the private sector to communicate trade-related grievances, communication channels between Geneva and the capital, fear of disadvantages in the GSP and lack of capacity for retaliation. Attendees also discussed the role of self-declaration and the need for objective criteria to determine developing country status.

Importance of  
evidence-based  
analysis

Participants stressed the need to consider data when evaluating the current state of WTO dispute settlement. One attendee highlighted, for example, that over 90% of cases that resulted in WTO dispute settlement decisions have historically ended with the complainant winning at least a portion of the claim.<sup>6</sup> These win rates are significantly higher than those in other legal fields, such as ISDS. That suggested, according to some, that WTO Members tended to move predominantly strong cases to panels, which respondents, despite the odds, were unwilling to settle. Conversely, it suggested that many disagreements, including those involving weaker claims, are resolved through other means and never make it to third party adjudication. This data, it was argued, underscored the need for compulsory dispute settlement as a complement to alternative dispute resolution. More generally, it was noted that data and evidence were important to properly diagnose the challenges facing WTO dispute settlement.

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<sup>6</sup> On winning statistics, see Hoekman, Bernard, Henrik Horn & Petros C Mavroidis, "Winners and Losers in the Panel Stage of the WTO Dispute Settlement System" in Joel P Trachtman & Chantal Thomas, eds, *Developing Countries in the WTO Legal System* (Oxford: Oxford University Press, 2009).

(b) Proposed Reforms

Scope of reforms

The future of the WTO's dispute settlement system was a central theme of the discussion. A principal question was the scope of needed reform. Should it (i) focus solely on dispute settlement reform; (ii) combine dispute settlement reform and changes to substantive rules; (iii) or result in a complete overhaul of the institution? There were concerns raised related to dispute settlement reform playing into the hands of those seeking to stall the process and keeping negotiation resources away from other important agenda items.

Aim of reforms

There was some debate on the specific goals pursued by a dispute settlement reform. Some suggested that reform should prioritize two critical issues: (i) compulsory jurisdiction via the right to a panel and final decisions; (ii) and expeditious resolution of disputes. There was some consensus that the process should facilitate reaching definitive findings and creating predictable trading relations. Both goals may be facilitated by an appeals stage. However, there was also an emphasis that reforms should not make dispute settlement more complicated or lengthy but rather contribute to finding swift, positive solutions.

Whether reforms require DSU amendments

There was some debate on whether meaningful reforms would require an amendment to the DSU. Reference was made to earlier proposals circulated by Canada to alter informal dispute settlement practices without the need to reform the DSU. However, it was noted that Members were divided on what reforms require DSU amendments and what do not. At the same time, participants also stressed the options and flexibility already embedded in the rules. Participants referred to underutilized procedures such as authoritative interpretations and voting. They also cited the MPIA for its creative use of flexibilities inherent in Article 25 of the DSU. It was noted that such flexibilities could be extended further to universalize the MPIA, for example, by allowing countries to link a general acceptance of MPIA Article 25 arbitration to country-specific carve-outs for certain types of disputes or subject matters. This could turn the MPIA into a permanent, universal feature while providing Members with the ability to opt out under pre-defined circumstances.

Limiting the number of claims or length of submissions

A range of specific reform options were debated to reduce delays and complexities in WTO DSS. Some of them envisaged disciplines to limit the volume of claims in WTO dispute settlement. WTO Members were said to bear some responsibility for long submissions as they often expect rulings on all aspects of their claims. The involvement of law firms was argued by some to influence the number of claims, too. While some attendees cautioned against Members relying too much on private lawyers as it could favour a litigation culture, others stressed that the presence of private lawyers was essential and beneficial to the system, especially where governments could not afford large legal departments. It was noted that some responsibility for the high number of claims was also shared by the panels and the AB resulting from vague interpretative guidelines. The need for simpler interpretations, and more flexibility on precedent, was voiced by some. There was mention of potential page limits on submissions and the possibility of setting word limits and margin requirements. Alternatively, Members could be nudged to limit their submissions by linking submission length to adjudication delays. It was cautioned that Members should be able to argue their point. Different levels of case complexity could thus give rise to different guidelines on claims or the length of submissions. Recent practice on imposing submission limits in the first MPIA case was mentioned with approval. The introduction of practice notes and a statement of best practices was also debated. There was some consensus that small, pragmatic tweaks to the system could yield efficiency gains.

Preparatory conference stage

The discussion also reflected on other mechanisms that would limit the issues at an early stage premised on the argument that dispute settlement processes have become more complex over time, with a significant number of new claims – often resulting in a longer and costlier process. A preparatory conference stage to narrow down issues early in the dispute settlement process was discussed. Participants also pointed to summary judgements in different domestic and international legal orders. Aside from reducing the number of claims, such a mechanism could also help filter frivolous claims that are “manifestly without merit”. Such proposals raised several questions related to member autonomy, when and how such a mechanism would be invoked, its notification when it would be

brought into play, its form, and the influence it would have on the timetable of the dispute settlement process.

Different tracks  
for different  
disputes

Other proposals suggested that the current dispute settlement system would benefit from the introduction of categorizing disputes by their nature to create different dispute settlement tracks. A small claims procedure was suggested. In addition, it was noted that highly technical cases revolving around rules of origin, intellectual property, and services might be better adjudicated if they received a different categorization than less technical disputes. In light of the peculiar nature of trade remedies and national security determinations, it was suggested that these disputes could be adjudicated differently. Participants suggested that there could be a different standard of review when assessing quasi-judicial decisions of domestic agencies, such as trade remedy determinations.

Standard of  
review

Relatedly, it was debated if varying standards of review in dispute settlement were desirable. The discussion centred on the general standard of review applicable to WTO panels, the standard articulated in Article 17.6 of the Anti-Dumping Agreement, and the standard for appellate review, which could be circumscribed further in future reforms (e.g., by limiting appeals to “manifest errors of law”). The Conference noted existing debates about the standard of review in the context of trade remedies, which made offering protection to domestic industries more difficult. It was also noted that standard of review controversies were common across courts and tribunals citing the ICJ. Generally, the standard of review was seen as an important design variable whose adjustment required careful reflection in reform efforts.

National security  
measures

Participants debated how to best deal with national security measures in formal dispute settlement, with opinions diverging widely. The effectiveness of litigation around security concerns was contested by some, while others viewed it as an expression of the system working as designed. Some favored automatic rebalancing of trade concessions once national security was invoked, others called for renegotiation, while again others pointed to non-violation complaints as a middle-ground solution for dealing with security concerns. On the latter, other attendees cautioned that conditions for non-violation

are too onerous to be met successfully and that, in any case, it would seem extreme for Members to “have to pay” for invoking an exception. The discussion illustrated the difficulty in finding common ground to address security measures in formal WTO adjudication.

Link to  
alternative  
dispute  
settlement

Proposed reforms to potentially limit the number of formal disputes also centred on alternative mechanisms such as STCs and ADR. The Conference highlighted the frequent use of STCs under the Sanitary and Phytosanitary (SPS) and TBT Agreements, having proven effective in resolving trade issues and preventing formal disputes. It was noted that statistics indicate only about 10% of STCs proceed to formal dispute, and the annual SPS Committee Report 2022 suggested that 57% of STCs get resolved through the process.<sup>7</sup> It was also highlighted that ADR mechanisms under Article 5 of the DSU were seldom used, raising questions about obstacles deterring Members from utilizing them. In contrast to STCs that can be triggered unilaterally Article 5 ADR requires mutual agreement of the disputing parties.

In sum, the discussion on procedural reforms of the dispute settlement system spurred numerous proposals and lively debates, though there was admittedly limited consensus on many of the reforms suggested.

#### (c) Role of specific actors in dispute settlement

Aside from specific procedural reforms, the interaction of different actors in dispute settlement featured prominently.

WTO as member-  
driven  
organization

The role of WTO Members in the dispute settlement process was discussed at length. Participants emphasized the need for Members to actively participate in the reform process and to commit to the principles of the multilateral trading system. They also highlighted the importance of Members’ compliance with the rulings of the dispute settlement system. The Conference stressed how the WTO is a member-driven organization, and proposals put forth for reform should reflect this fact. As such, any reforms to the current dispute

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<sup>7</sup> World Trade Organization, *Report (2022) on the Activities of the Committee on Sanitary and Phytosanitary Measures*, WTO Doc G/L/1443.

settlement system should improve the status quo rather than require wholesale change, which may not be accepted by Members.

Improving  
feedback loops  
between  
Members and  
adjudicators

A core recurrent theme related to how to implicate the membership more deeply in questions of interpretation and how to improve the feedback loop between adjudicators and the membership. It was noted that existing mechanisms for authoritative interpretations were ineffective. The role of enhancing accountability was raised, for example, through an annual session between the AB and the DSB to discuss decisions and jurisprudence or through other informal channels whereby frequent users of the system would provide adjudicators with feedback. It was noted that many other feedback mechanisms had been proposed over the years. There was recognition that the independence of adjudicators should be respected, but equally that the feedback loop between Members and adjudicators needs improving. Further, it was debated if there is a need for some level of automaticity in involving Member's input on systemic questions of interpretation. A mechanism for collecting concerns if multiple Members disagree with a repeated interpretation was raised. Referral to the General Council was also suggested, as was a remand process where legal questions were brought back to contracting parties for discussion and potential interpretations or amendments. The authority to remand within the dispute settlement process and the possibility of panels remanding to domestic authorities were also discussed. Interim panel reports were also flagged as opportunities to gather feedback from disputants, especially in a situation where reports could not be challenged before an appeal instance. In general, there was a shared sense that dialogue between Members and adjudicators was important.

Role and  
involvement of  
the Secretariat

The role of the Secretariat was discussed at length and proved to be a salient and controversial issue. Some attendees proposed moving the Secretariat from the back-end to the front-end of dispute settlement, where it could provide indications to Members about the likelihood of success in disputes to reduce the burden on the DSS through Secretariat-facilitated ADR. However, it was noted that this proposal would be highly controversial and require substantial reform of current processes. The possibility of the Secretariat being less

involved in dispute settlement and more involved in the notification system was also raised, with the recognition that Members may be resistant to expanding the role of the Secretariat. Some speakers also noted trade-offs and tensions between the Secretariat's roles. More involvement in research and reporting may require less involvement in dispute settlement assistance or a clearer separation of staff working in different roles. The Conference found agreement in defining the role of the Secretariat as evolving—from being involved in drafting reports based on panel instructions to being an active participant in deliberations. It was posited that this might be beneficial due to the Secretariat's expertise, but it was also suggested that it could potentially sideline the role of panelists. The Secretariat's role in drafting DSS reports was found to be beneficial in creating coherent jurisprudence and assisting panels in producing well-written reports, though such a role was framed as being less appropriate at the appeal stage. It was suggested that panelists should take ownership of their findings and that the Secretariat should assist while not becoming overreaching. At the appellate level, it was stressed that overreach should be avoided as the AB functioned more like a court and that appointed members were responsible for developing consistent case law.

#### Selection of panelists

Determining the role and requirements of panelists in the reform process was another salient issue. Concerns were raised about the background and qualifications of the panelists, which in WTO practice, in contrast to the GATT era, often involve mid-level government officials, not all of which have legal expertise. Some participants noted that the absence of a fully functioning appeal stage made it important to strengthen the panel stage, including by selecting more high-profile panelists. Another issue debated was whether the Secretariat played a too dominant role in selecting panelists. Some attendees stressed that the Secretariat was not choosing panelists but assisted in the process, operating within the guidelines provided by parties. Disputing Members, however, frequently refused to agree on panelists, forcing the Secretariat to play a more active role in suggesting panelists. In response, several proposals emerged to improve the selection of panelists. One involved a strike and rank approach where each party would strike and rank members from a list followed by lists then being reconciled.



Such an approach would have the benefit of giving parties a greater role in the appointment process. Other suggestions sought to strengthen appointments from the roster that Members submitted. Participants noted that considerations that go into adding names to rosters often differ from considerations that motivate the selection of panelists once a dispute arrives. One proposal put forth was for Members to nominate several candidates for a panel, and that some of these should be non-nationals (e.g., a 50/50 quota).

Participants stressed the widely held perception of judicial independence of WTO adjudicators. In contrast to empirical research on other courts that frequently identified instances of nationality-based or political bias, it was noted that empirical research on the WTO generally found evidence of biases only in the very rare cases of dissenting opinions.<sup>8</sup> Given the importance of judicial independence, it was suggested that future reforms should attempt to preserve this high level of judicial independence.

The Conference made clear that the roles of different actors in the WTO system and their interaction requires revisiting. Yet no consensus solutions emerged on how this was best to be achieved.

## V. Deliberative Mechanisms

The Conference next discussed deliberative mechanisms at the WTO with a special focus on STCs that could be discussed in WTO Committees. Participants stressed the virtues of deliberative mechanisms, explained their significance beyond dispute resolution and prevention, and suggested reforms to further strengthen the mechanism.

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<sup>8</sup> Pauwelyn, Joost & Krzysztof Pelc, *Are WTO Rulings Biased? The Role of Institutional Design in Protecting Judicial Autonomy* (2023) (pre-publication), online: <https://ssrn.com/abstract=4480161>.

### (a) Importance of deliberative mechanisms

The Conference highlighted the importance of deliberative mechanisms in the WTO's operations. The relationship of STCs with the dispute settlement process was a common thread leading to nuanced assessments.

Function of  
deliberative  
mechanisms

Mechanisms like STCs, it was argued, helped narrow down disagreements and prevent disagreements from becoming formal disputes. Additionally, four broad functions of STCs were identified: they serve to (i) advance economic diplomacy by clarifying misunderstandings, resolving differences and minimizing trade impact of domestic regulations; (ii) create a dialogue between scientific, technical, and regulatory experts with a view to resolve disagreements; (iii) streamline and harmonize regulatory perspectives including by fostering cross-fertilization between the WTO and other organizations; and (iv) build coalitions of Members with similar trade interests.

Importance of  
STCs

There was some consensus that STCs' salience derives from the informal dialogue they generate. It was debated that Members use committees not only to resolve technical issues but also to flesh out political questions and to scope room for collaboration. One case highlighted was the STC against Chile for food labeling, where the committee's discussions led to a resolution that maintained the health measure while making implementation easier for importers. The growing number of STCs was also raised as an example of their increasing salience – since 1995, over 1000 STCs have been raised in various WTO Committees.<sup>9</sup>

### (b) Challenges relating to deliberative mechanisms

The Conference identified several challenges to the effective functioning of deliberative mechanisms.

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<sup>9</sup> OECD/WTO, *Facilitating Trade through Regulatory Cooperation: The Case of the WTO's TBT/SPS Agreements and Committees* (Paris/Geneva: OECD Publishing/WTO, 2019), online: <https://doi.org/10.1787/ad3c655f-en>.

Diversity of procedures and nomenclatures

Participants highlighted the lack of a common nomenclature across committees. STC practice was rooted in the practice of the TBT and SPS committees, but similar practices existed in other committees as well. This diversity of practices and the lack of centralized data gathering made it challenging to monitor and study the role of STCs.

Varying approaches by Members

The importance of understanding what drives WTO Members, their motivations and vulnerabilities for the effective resolution of trade disputes was stressed. Participants noted the diversity of Members' approaches to STCs. Some Members actively notify most of their technical regulations and actively bring STCs, while others do not. Lacklustre notifications by Members and a lack of transparency were raised as major concerns. It was also highlighted that there is a need for technical expertise in handling STCs, especially for developing countries. While it was noted that the ACWL already assisted countries with handling STCs, it was suggested that this workstream could be further strengthened as STCs gain importance.

Complexities around STCs

The increasing complexity of trade issues, the diversity of Members' interests, and the lack of transparency in decision-making processes were also noted. It was argued by some attendees that the TBT and SPS Agreements have not evolved to reflect modern realities, where issues often fall into the jurisdiction of multiple committees. Participants also noted the difficulty of differentiating between major and minor issues, highlighting that not all STCs are alike. The discussion at the Conference cited empirical research on STCs raised in the SPS and TBT Committees between 2005 and 2018. The study found that 38% of STCs were raised only once. Interestingly, 68% of all formal disputes citing the SPS and TBT Agreements originated in the committee, indicating that Members were gauging reactions from peers and potential third parties in the committee prior to escalating disputes.<sup>10</sup>

There was a lively debate on the role of STCs in addressing security concerns through a proposed committee on security. Such a

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<sup>10</sup> Manak, Inveer. *Enforcing International Trade Law in the World Trade Organization's Committees: Courting Third Party Opinion*. Georgetown University, 2019. On STCs in the TBT Committee, see e.g., Holzer, Kateryna. "Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee." 14:3 *Global Trade and Customs Journal* (2019).

STCs in the context of security concerns

committee might operate under stricter secrecy and disclosure requirements than other bodies to allow for the sharing of confidential information.<sup>11</sup> Security was seen by others as a cross-cutting issue that would likely require the attention of several existing committees rather than a dedicated committee.

Interplay between informal and formal deliberations

Participants noted the division of labor between formal and informal problem-solving meetings. The latter may be used to create a record of an issue, while informal meetings are often required to solve it. The involvement of experts from the capital, as well as private actors in discussions, was seen as crucial for effectively addressing disagreements over technical issues. Participants stressed that the conditions under which STCs work well should be studied to generate lessons learned.

### (c) Proposed Improvements

To address the challenges posed by increasing the use of STCs, attendees proposed several improvements.

Enhancing the opportunities for deliberations

Participants noted the need to create opportunities for deliberative processes to work. It was suggested that there could be trade-offs between transparency and deliberation, especially since problem-solving discussions may need to happen informally without a record. At the same time, attendees noted the need for inclusiveness of deliberations and for strengthening the capacity of Members to participate effectively in these processes. Technology was seen as a means to involve capital representatives more cost-effectively.

More data and streamlined procedures across committees

The Conference discussed ways to further enhance the STC system. It highlighted the need to develop a common nomenclature across committees. To enhance the STC process, it was proposed that there are opportunities for more cross-committee work, longer sessions on topics and thematic sessions involving invited experts. There were also suggestions to improve the STC database and promote collaboration with academic institutions on data collection. It was

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<sup>11</sup> Lester, Simon, and Inu Manak. "A Proposal for a Committee on National Security at the WTO." *Duke J. Comp. & Int'l L.* 30:267 (2019).

proposed that technology, particularly AI, could facilitate this by making information more accessible.

Role of trade  
policy review  
mechanism

Participants also emphasized the link between STCs and other peer-review mechanisms, such as the Trade Policy Review (TPR). Reforms that leverage the TPR to improve notifications and enhance surveillance may bring more measures to the attention of Members and into committees. It was also noted that the Secretariat may assist Members in this respect. While Members may be reluctant to give the Secretariat a surveillance mandate, it was said that the Secretariat, as part of its analytical work, could help compile information that assists Members in notification and peer review.

Role of  
deliberations in  
relation to  
dispute  
settlement

Vigorous debate and a diversity of viewpoints characterized discussions around the role of committees and their output, especially as they relate to dispute settlement. Some attendees saw STCs as an informal and effective way of alternative dispute resolution. It was hypothesized by some that disputes might arise more often from measures not discussed in committees, suggesting that better notification systems and deliberative mechanisms might prevent formal disputes. Others agreed that the role of committees should be seen as a first step and a forum for initial discussions and minor adjustments but did not view them as linked to formal dispute settlement. There was the suggestion that committees might provide interpretive guidance on the legal principles of WTO law. Some participants pushed back against a formal or interpretive role of committees, suggesting that it would undermine their informal problem-solving nature. More generally, the institutionalization of STCs within the dispute settlement architecture was seen by several as overemphasizing the contentiousness of issues and discouraging the use of the instrument.

Categorizing  
STCs

It was suggested that STCs could be categorized to differentiate between important and minor issues. It was highlighted that a balance must be maintained between formal and informal resolutions to ensure that issues are not signaled to be more serious than they are. To support this aim, there was the suggestion to create “mini STCs” to facilitate technical bilateral discussions.

Broadening the use of STCs

The Conference debated if STCs can be universalized or if they are more appropriate for regulatory and technical issues. It was proposed that using STCs for sensitive issues, such as security, may help generate solutions through informal deliberations. The discussion also related to the possible application of STCs to other areas, such as trade and environment. While there was general support for the role of deliberative mechanisms across WTO agreements, the debate around the categorization of STCs suggested that any generalization of STCs practices would likely need to be accompanied by a degree of differentiation by issue or economic area.

Learning from preferential trade agreements

The Conference also discussed the process of STCs and dispute settlement in the framework of preferential trade agreements. Reference was made to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), where parties had debated when issues should go to committees and when they should go to dispute settlement. Participants noted that this varied between issue areas citing SPS/TBT, labor, and environment chapters. They also stressed that the CPTPP, for example, in its SPS chapter, allowed parties to first go to committees and then take the issue to dispute settlement without losing a significant amount of time. Reviewing practices under preferential trade agreements was seen as useful for generating lessons learned for multilateral reform on how STCs and dispute settlement inter-operate.

The discussions and debates on STCs demonstrated that attendees viewed them generally favourably. While participants noted links between STCs and dispute settlement, in particular, dispute prevention, the discussion illustrated that deliberative mechanisms have multiple objectives and play a significant role above and beyond dispute settlement.

## VI. Alternative Dispute Resolution

The Conference also considered alternative dispute resolution mechanisms, broadly defined as any procedure other than formal adjudication and deliberative committee work, that could assist in

preventing and resolving disputes. This included mediation and conciliation procedures but also forms for peer review or arbitration. Overall, it was concluded that ADR and formal dispute settlement are substitutes but could complement each other. Participants also noted that there is a rich literature on ADR, including outside the WTO context, which may inform future deliberations.

#### (a) The Role of Alternative Dispute Resolution

The Conference recognized the potential salience of ADR mechanisms in the WTO, given the challenges facing the traditional dispute settlement system. It was noted that ADR mechanisms, such as mediation and arbitration, could provide more flexible and efficient ways to resolve trade disputes.

Limited use of existing ADR mechanisms and its causes

Participants noted the limited use of ADR in WTO practice thus far despite the provisions for ADR in WTO's DSU, notably Article 5. This was attributed to the availability of a fairly effective formal dispute settlement. It was suggested that governments find it difficult to justify recourse to ADR to their constituents compared to DS. It was also noted that WTO Members were socialized to prefer adjudication over mediation. Concerns about ADR in part centred on the role of lawyers in the process. It was discussed how the presence of lawyers could impact the exploration of informal solutions without legal restrictions.

ADR outside the trade law context

The Conference considered how other international organizations implemented ADR mechanisms, such as the World Intellectual Property Organization (WIPO) and the Organization for Economic Cooperation and Development (OECD). At WIPO, private parties can directly engage with the organization, with mediation playing an increasing role. The OECD uses peer review mechanisms and arbitration for its tax Base Erosion and Profit Shifting (BEPS) project. It was also emphasized that mediation receives increased attention across different international law areas. Mention was made of the 2019 Singapore Convention on Mediation in relation to commercial disputes. Participants also made reference to the importance of mediation in state-to-state and investor-state arbitration disputes and reforms. It was noted that these mechanisms exist in different policy

and institutional contexts. However, attendees also saw scope for cross-institutional learning.

ADR in trade-related areas

Participants also pointed to recent developments in areas adjacent to the WTO. It was said that the experience of the ILO may inform efforts at the WTO in managing case volume and technical expertise using alternative dispute resolution. Attendees also noted the rapid response mechanism on labor in the United States-Mexico-Canada Agreement (USMCA), which has the potential to raise the stakes in addressing labor rights violations. Integrating labor rights into the current WTO dispute settlement mechanism was seen as complex due to challenges of technical expertise and private actor involvement, though ADR could provide valuable lessons from trade adjacent areas. Participants also pointed to recent developments in Free Trade Agreements (FTAs) like the Comprehensive Economic and Trade Agreement (CETA), Korea-EU, and CPTPP, highlighting the growing interest in ADR. It was proposed that the structure and provisions for ADR in the DSU could be made more elaborate, potentially mirroring the recent advancements in FTAs.

#### (b) Potential Benefits and Challenges of Alternative Dispute Resolution

Benefits of ADR

Participants highlighted several potential benefits of ADR. These include the possibility of achieving win-win outcomes, preserving relationships among Members, and reducing the time and cost of dispute resolution. They also noted that ADR could help to address some of the criticisms of the traditional dispute settlement system. The discussion highlighted the benefits of ADR, including speed, lack of binding precedent, and the potential to facilitate outcomes. Mediation and conciliation, in particular, were seen as providing flexibility to Members to disaggregate what a dispute was really about, going beyond rights and obligations to the ultimate interests at stake. A reference was made to the conciliation proceedings in a case between Australia and Timor Leste under the United Nations Convention on the Law of the Sea (UNCLOS), a dispute which, despite being about border demarcation, was really about resource use and access. The conciliation helped address underlying grievances holistically, flexibly, and creatively.



Downsides of  
ADR

The Conference discussion identified several challenges to implementing ADR in the WTO. These included the need to ensure the enforceability of ADR outcomes and the potential for power imbalances among Members that affect the fairness of ADR proceedings. In that vein, the Conference discussed how developing countries do not frequently use ADR methods like mediation due to challenges relating to confronting larger entities like the United States and European Union. It was noted that ADR might be finetuned to help manage power asymmetries and abuses, but it may not be suitable for all topics, especially those involving much private involvement. It was also perceived that an ADR-facilitated settlement was often harder to explain to a domestic audience than a ruling. Finally, it was noted that Members lacked familiarity with ADR. The difficulty of explaining agreed solutions, the risk aversion of officials and the lack of experience among lawyers and trade diplomats with ADR may have hindered the widespread use of the mechanism.

Benefits of ADR  
relating to  
compulsory  
dispute  
settlement

There was consensus that ADR should not replace adjudication but could complement binding dispute settlement on specific issues. Some attendees of the Conference posited that ADR might be seen as an attractive solution for disputes where the primary goal is just to settle. In the context of the MPIA, it was suggested that ADR could help resolve issues. It was highlighted that areas such as safeguards and standards could be suitable for ADR because they addressed distributive issues and regulatory concerns. The example of the EC-Bananas case was noted, and it was argued by some that the case illustrated that mediation might be a preferable choice in some situations, especially when the outcome of a formal dispute is uncertain or the dispute is intractable.

Drawbacks of  
ADR relating to  
compulsory  
dispute  
settlement

There was the suggestion that the appropriateness of ADR in the overall WTO architecture may be limited. In domestic lawsuits, settlements are common, sometimes under pressure from judges, a dynamic not present in the WTO. Participants also noted that an advantage of formal dispute settlement consisted of creating interpretations that guide all Members. ADR offered no similar advantage. More generally, some attendees cautioned that ADR was unlikely to help resolve current challenges in WTO dispute settlement

given that current tensions were about how and by whom rules should be interpreted, a question ADR does not address.

#### (d) Recommendations for Promoting Alternative Dispute Resolution

To promote the use of ADR in the WTO, several measures were suggested.

Improving Article 5 architecture

There was some consensus that the existing Article 5 of the DSU is underutilized. It was recognized that there is a need for more structured and elaborate provisions to address the challenges faced by governments in utilizing mediation. The question of enforcement, representation and stakeholder involvement was also raised and the need to address these issues in future amendments.

Mediation within committees

One recommendation for ADR was for mediation within committees. There was a suggestion that internationally recognized mediators and experts from international organizations could assist committees to prevent fragmentation of international law and address current gaps in the WTO's services.

Educating Members and stakeholders about ADR

It was suggested that the WTO should actively promote the benefits of ADR to its Members and encourage them to consider ADR as a first option for resolving disputes through targeted education programs. These could include providing training and support to Members to build their capacity to engage in ADR, developing clear rules and procedures for ADR, and establishing a dedicated ADR body within the WTO. It was stressed that it is important to involve stakeholders and educate private firms on the value and lower costs associated with mediation. Further, it was highlighted that educating trade officials, the Secretariat, stakeholders, and the business community about the value of ADR is crucial. This was suggested to combat reluctance to use the process and unfamiliarity with its use within the current WTO dispute settlement system. The importance of competent mediators was also stressed, and specialization in mediation was emphasized.

## VII. Conclusion

The Conference provided a platform for exploring pressing themes in rethinking the WTO dispute settlement. It discussed formal adjudication, deliberative mechanisms, and ADR. The current state and future direction of the dispute settlement mechanism were discussed at length with a view to identifying reforms to address issues of efficiency, transparency, and inclusivity. Deliberative mechanisms were hailed for their capacity to facilitate dialogue and coalition-building, yet the need for their modernization in light of current realities and complexities was underscored. The potential of ADR in offering a flexible and efficient dispute resolution was discussed, yet its underutilization due to various reasons necessitates further exploration. The Conference also highlighted cross-cutting issues and challenges. Divergence of opinions among stakeholders, varying analogies, institutional and cultural dynamics, trade-offs in decision-making and the interdependence of reform options made it challenging to agree on reform recommendations. These discussions signify a broader need for consensus-building around problem definitions, trade-offs, and reform combinations. WTO dispute settlement needs to adapt to the contemporary demands and realities of global trade while maintaining the virtues that have allowed it to effectively resolve trade disputes for two and a half decades. In the end, this will require concerted effort, ongoing dialogue, and a shared commitment to the principles and objectives that underpin the WTO.

## VIII. Addendum

### Annex A: Conference Program

#### Rethinking the WTO Dispute Settlement System

##### Concept

Over the past two years, the absence of the Appellate Body has undermined the WTO dispute settlement where first-instance panel reports can be appealed into the void due to a non-operational Appellate Body. Faced with the blockage of the adjudication system, however, several Members have shown an unprecedented sense of innovation both to manage the dispute processes differently and to improve governance mechanisms in committees preceding the dispute settlement process. This sudden openness to alternative settlement models is of considerable scientific interest, with real implications for global trade policy in the years to come.

This conference is part of the same search for alternative models and new approaches to revitalize the DSS, which is also reflected in the WTO Members' commitment to a "fully and well-functioning dispute settlement system" "accessible to all Members" by 2024, as stated in the Geneva Ministerial Declaration of June 2022. Meeting such ambitious targets in the next two years and dealing with the DS crisis cannot be done in isolation from other mechanisms that improve the management of disputes, reduce their occurrence, or address the roots of the tensions that lead to disputes. This is the case with Specific Trade Concerns (STCs), a process developed in committees, councils and other bodies. Other processes such as the good offices, conciliation, mediation, investigation, and other ADRs can also be used instead of or together with adjudication. This symposium brings together international experts who will explore these new avenues for resolving disputes with a particular focus on three themes: STCs developed in the WTO policy (and governance) committees, Alternative Dispute Resolution mechanism (ADR) including Mediation and the classic Dispute Settlement System (DSS).

##### Draft Programme

The conference will take place at the University of Ottawa between 24-26 May 2023. On the first evening on 24 May, a broad panel, open to the public, will inaugurate the conference and introduce the debate. The following two days will take place behind closed doors, with Chatham House conversations.

##### DAY 1 – Grad Student Workshop & Public Panel

Graduate Student Workshop (optional) - Current challenges in international trade law (2pm-4:30pm, 24 May 2023)

Successful graduate students selected based on a call for abstracts are invited to present their paper and receive comments from high-level participants.

**Public Panel - Navigating Stormy Waters: The Place of DS in Multilateralism** (Public Session – 5pm-7:30pm, 24 May 2023)

This public session will be organised as a panel discussion with 6 keynote speakers, who will address issues such as the challenges to multilateral trading system and reforms necessary to modernize the existing system and make it robust for a new multilateralism. This panel will be followed by a Q&A session which will hopefully generate a lively exchange with participants.

**Composition of Panel:** Henry Gao, Robert Howse, Joanna Langille, Mona Paulsen, Ricardo Ramirez, Meredith Lilly, and the moderator is Kristen Boon

### **DAY 2 and DAY 3: Chatham House Sessions**

**Day 2, Session 1 – Adjudication at the WTO DSS: Revisiting the core components** (25 May 2023, 8.30am – 10.30am)

The session will focus on the fundamental elements of WTO's two-tier DSS, and on the changes that may be necessary to allow this system to be fruitful again for Members. Issues to be discussed include whether the WTO DS needs to be compulsory and exclusive and two stage.

**Choice of questions that may be raised in the session:**

- Does Art. 23 DSU continue to be non-negotiable? Does the WTO DS need to be compulsory and exclusive?
- Have STCs and ADR been used in the context of dispute settlement in the past years? Could they be used further to reduce the number of disputes, the scope of specific disputes or instead of adjudication?
- Do panels really overreach?
- Is it possible to institutionalise mechanisms by the chair or others to narrow down issues (ICJ preparatory commission) resolution of dispute settlement of Members, prior to initiating the DSS process?
- Can we conceive of a system where some types of disputes must though mediation or other ADRs before going to DS?
- Can we conceive of a system where some disputes do not have an automatic appeal but others do?
- Is there an increased role for arbitration in the WTO DSS?
  - What lessons can be learnt from WTO Members use of dispute settlement in the recent years?

- Will the surfacing of various arbitration procedures under Article 25 DSU lead to problems in the future?
- Is there a need to harmonize standard of review between covered agreements (for example SPS in Hormones and AD in zeroing cases)
- What are the real concerns or constraints faced by developing countries in the use of the DS?

**Day 2, Session 2 – Institutional Mechanisms for avoiding disputes: WTO Committees and Specific Trade Concerns** (25 May 2023, 11.00am – 1.00pm)

The idea of this second session will be to explore how the institutional functions of the WTO, in particular, the specific trade concerns (STC) system used in many WTO bodies, notably the TBT and SPS Committees, can be universalised and enhanced across WTO subjects to resolve trade concerns and tensions without the need for formal adjudication. The focus will be on the types of tensions which would be better handled via deliberative mechanisms like STCs and the role of the WTO Secretariat in the use of STCs.

**Questions that may be raised in the session:**

- Under what circumstances do Members choose to raise a trade concern, or a dispute, or both? Do the circumstances vary by member, type of issue, or domestic pressures?
- What types of tensions would be better handled via deliberative mechanisms like the STCs mechanism?
- Do STCs in practice, help avoid, or reduce-formal adjudication?
- Should the use of STCs be institutionalised within the WTO DSS or would that harm both processes?
- Should the trade concerns process be developed in a more systematic manner in all WTO committees?
- What should be the role of the WTO Secretariat in the use of STCs?

**Day 2, Session 3 – Alternative Dispute Resolution, Other Mechanisms under RTAs and their place within the WTO** (25 May 2023, 2.00.pm to 4.00pm)

This session will explore how ADR mechanisms, and other new mechanisms under RTAs can contribute to, or be imported into WTO for resolving or reducing the scope of disputes before DS panels. In particular, this session will examine past experiences with ADRs (Bananas) in WTO including why neither mediation nor arbitration have been frequently used by WTO Members, experiences in international law, whether and how such softer mechanism could facilitate DS, whether some disputes more than others should be submitted to ADRs before being considered

in adjudication, and capacity constraints in the use of ADR mechanisms for WTO Members, particularly for developing and least-developed countries.

**Choice of questions that may be raised in the session:**

- Can we make an assessment of the RTAs new procedures for settling disputes and complaints to see what works and what does not?
- Why have neither mediation nor arbitration (Art. 25 DSU) been used by WTO Members?
- Can ADR mechanisms (such as good offices, conciliation, mediation etc) play a fruitful role within the WTO?
- Is there a role for the WTO Secretariat in facilitating ADR?
- Are there specific types of disputes for which exploring, using, or exhausting ADR mechanisms may be helpful?
- Are there capacity constraints in the use of ADR mechanisms for WTO Members, in particular for developing and least developed countries?
- What sort of incentives could be envisaged to encourage the use of ADRs?
- How can we envisage a mechanism that will reward those using STCs and ADRs? Maybe in allowing such parties to skip some of the steps in a formal adjudication process?

**Day 2, Session 4 – Adjudication at the WTO DSS: Strengthening the process and procedure**

(25 May 2023, 4.30.pm to 6.00pm)

The last session of the day, the second on DS adjudication will look at procedural aspects of the WTO DSS and how the various issues identified by Members in this regard can be resolved. The session will address the Role of the Secretariat in selecting judges and assisting adjudicators, reforms to the current adjudicator selection process, ways to improve the legitimacy and capacity of the system, and concerns on the standard of review, principles of interpretation and panel and AB process.

**Choice of questions that may be raised in the session:**

- What is/should be the role of the WTO Secretariat in WTO dispute resolution, particularly with respect to the following two areas:
  - (a) selecting panelists;
  - (b) assisting them in the drafting of reports?
- Should the WTO DSS process continue to include two instances in the future as well?
  - What are the arguments in favor and against?
  - What is wrong with a one-instance compulsory third party adjudication regime?
  - Should panelists be selected as per the current regime (Article 8), or should there be a reform in the current process? Has the time for permanent panelists come?

- Does the WTO dispute resolution, as it now stands, provide appropriate remedies to address successful challenges?
  - How much does the capacity and retaliatory powers of Members matter, and what can be done about, if it does matter a lot?
  - Do panelists/Secretariat possess sufficient expertise to address claims regarding the amount of retaliation?
  - How can the system be improved?
- How do you assess the standard of review that panels apply, as well as the manner in which they have implemented the VCLT?
  - Is there a case of non liquet, for example, regarding disputes where national security claims have been raised?
  - Are US concerns regarding the understanding of Article 17.6 Antidumping by the Appellate Body legitimate?
  - How do you assess panels' and the Appellate Body's preference for textualist interpretations?

**Day 3, Concluding Session – Preparing recommendations on a way forward for WTO DSS**  
(26 May 2023, 9.00 am to 1pm)

This concluding session will involve a stock-taking of the key issues discussed in the previous sessions. The main takeaways of the previous sessions will form the basis of a preliminary set of recommendations on DS reform, and how to improve STCs and ADR processes, to avoid formal disputes or reduce the scope of issues under adjudication.

The session will also include a collaborative brainstorming exercise around the trade-offs in WTO DSS reform. To test a set of institutional design theories, Professor Krzysztof Pelc (McGill) is planning to send an academic survey to WTO delegations after the Symposium to solicit views on various design options of a reformed DSS, and the core trade-offs underlying negotiations. In practice, this will be done through a conjoint experimental design that would let respondents choose between packages of rules, in a way that could identify those institutional design features that see most consensus, and those that generate the greatest division. Professor Pelc will present the survey design during the last session and finetune draft questions together with the participants in light of the debates and insights generated throughout the conference.



## Annex B: Compilation of Literature

Last updated: April 2023

- Document 1: [Ottawa Conference - External proposals on DS Reform](#)
- Document 2: [Ottawa Conference - WTO Internal DS Reform documents](#)
- Document 3: [Ottawa Conference - List of all reform related internal WTO Documents](#)