POLICY PAPER
November 2021
The World Trade Organization (WTO) is diminished amid international political and economic tensions.
• Institutionally, the WTO has long been moribund as a forum for global trade liberalisation.
• The Appellate Body (AB) is inoperative following sustained US pressure, with trade disciplines increasingly sidestepped or ineffective.

In this paper we assess three possible avenues for the future development of international trade dispute settlement and the broader multilateral trade order, centred around (1) the status quo, (2) increased plurilateralism, and (3) multilateral trade institution reform.

Each option features a mix of short and long term advantages and disadvantages, including in the case of (3) significant political challenges that should not be underestimated. Notwithstanding these, however, we recommend the long-term pursuit of staged multilateral institutional reform, prioritising dispute settlement arrangements.

Executive Summary

The World Trade Organization (WTO) is diminished amid international political and economic tensions.
• Institutionally, the WTO has long been moribund as a forum for global trade liberalisation.
• The Appellate Body (AB) is inoperative following sustained US pressure, with trade disciplines increasingly sidestepped or ineffective.

In this paper we assess three possible avenues for the future development of international trade dispute settlement and the broader multilateral trade order, centred around (1) the status quo, (2) increased plurilateralism, and (3) multilateral trade institution reform.

Each option features a mix of short and long term advantages and disadvantages, including in the case of (3) significant political challenges that should not be underestimated. Notwithstanding these, however, we recommend the long-term pursuit of staged multilateral institutional reform, prioritising dispute settlement arrangements.

Political and economic tensions amongst the major trading powers have become increasingly marked in recent years, particularly between the US and China. Longstanding US dissatisfaction with the Appellate Body also came to a head during the Trump administration, rendering the AB non-functional in late 2019. Signalling the continuation of US concerns both about the WTO and the broader WTO regime, the Biden administration has indicated it intends to maintain Trump’s block on AB appointments. In short, the continued relevance of the multilateral trade regime is in question.

Critically, in the years since the WTO’s establishment, successive attempts to promote further multilateral trade liberalisation have been hindered by the challenges of forging consensus across the WTO membership, compounded more recently by increasing US-China tensions and the rise of populist nationalism. As the world economy and associated trade patterns have evolved, moreover, substantive gaps – including in areas such as digital and data - and weaknesses in the original WTO agreements have become increasingly apparent.

Set against this backdrop, the AB’s decline has further weakened the WTO. The effective disappearance of the AB – judicialised trade dispute settlement having been a longstanding cornerstone of the WTO – has accordingly called into question not only the suitability and sustainability of global trade rules, but also the regime’s associated institutions.

There are sound policy reasons for the WTO’s institutional commitment to decision making by consensus amongst its members. This commitment, however, makes it challenging to sustain – let alone advance – trade liberalisation in a multilateral setting, as well as to address the more specific US concerns that have given rise to the AB crisis.
We set out below three possible avenues for the future development of international trade dispute settlement and the broader multilateral trade regime. These are assessed by reference to the following criteria:

1. The extent to which each option depends on obtaining widespread support across the WTO membership.
2. The extent to which each option will enable effective, sustainable dispute settlement.
3. The impact of each option on the WTO and multilateral trade governance more broadly.

Option 2 and Option 3 are each broken down into two sub-options, which may be pursued separately. We ultimately recommend Option 3, sequencing its sub-options. While pursuing this option requires “rebooting” the WTO’s legislative function – with the attendant difficulty of forging consensus across a disparate WTO membership – it is the only option that holds out the prospect of developing a functioning, sustainable global trade regime.

### POSSIBLE AVENUES

<table>
<thead>
<tr>
<th>OPTIONS</th>
<th>DESCRIPTION</th>
<th>CRITERIA</th>
<th>RECOMMENDED</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Option 1: Status quo</strong></td>
<td>Do nothing: adapt to ‘new normal’</td>
<td>None</td>
<td>No</td>
</tr>
<tr>
<td><strong>Option 2: Plurilateralism</strong></td>
<td>Option 2a: Plurilateralism outside WTO</td>
<td>Varying by agreement</td>
<td>For some</td>
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<td></td>
<td>Option 2b: Plurilateralism within WTO</td>
<td>Majority or supermajority of WTO membership</td>
<td>For some</td>
</tr>
<tr>
<td><strong>Option 3: Institutional reform</strong></td>
<td>Option 3a: Revisit DSU/AB</td>
<td>Consensus</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Option 3b: Revisit WTO agreements</td>
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### OVERVIEW

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OPTION 1:
Status quo. US maintains block on appointment of AB members. AB remains inoperative.

Outcomes
- Appeals into the void: effective default to diplomatic dispute settlement at WTO.
- Potential abuse of WTO disciplines to mask protectionist policies.
- Erosion of WTO institutions.
- Diminished prospect of future global trade agreements.
- Shift by major trade blocs to bilateral/plurilateral regional trade agreements.

Likely costs
- Weak dispute settlement mechanisms.
- Unfairly advantages powerful states.
- Withering of WTO institutions.
- Weakened global trade disciplines.
- Increased systemic inefficiency reflecting legal fragmentation/proliferation of potentially inconsistent regional/bilateral regimes.

Likely benefits
- Short-term political and economic benefits of protectionism and appeasing nationalist forces.
- Major trading blocs able to publicly cast others as principally responsible for systemic dysfunction (e.g. US may blame China, EU/China may blame US).
- No need to seek widespread support.

OPTION 2:
Plurilateralism

Outcomes
- Plurilateralism outside WTO structures (Option 2a):
  - Commitments among fewer states likely to be further-reaching
  - Plurilateral dispute settlement arrangements permitted under WTO DSU (solves “appeals into void” for participating WTO members - see e.g. MPIAAA).
  - Dispute resolution mechanisms may be embedded in broader plurilateral agreements reducing reliance on WTO dispute resolution (see e.g. USMCA, EU).
- Plurilateralism within WTO structures via supermajority/majority voting (Option 2b):
  - Facilitate trade liberalisation among plurality of WTO states parties, building on existing (though limited) area-specific precedents e.g. 2012 Agreement on Government Procurement.
  - Addresses limitations of consensus decision-making.
- No changes to multilateral WTO dispute settlement arrangements:
  - DSU can only be amended by consensus (Art. X(8) Marrakesh Agreement).
  - Appealing into void remains an option in disputes over covered agreements involving a state not party to DSU-consistent plurilateral dispute settlement arrangement.

Likely Costs
- Fails to address appeals into void at WTO for disputes involving states not party to plurilateral arrangements.
- Encourages beggar-thy-neighbour policies for states not party to robust dispute settlement disciplines.
- Jeopardises advantages of multilateral trade regime:
  - Overlapping agreements could increase uncertainty/undermine confidence.
  - Likelihood of increased contracting around WTO given dispute settlement weaknesses.
  - Legal fragmentation/increased regulatory complexity - may impose costs on trading entities required to navigate multiple sets of (potentially inconsistent) rules.
- Risks provoking ire of powerful trading states if excluded from or challenged by plurilateral arrangements, inc. loss of MFN/national treatment.

Likely Benefits
- Deeper trade liberalisation amongst smaller groups of states inside and outside WTO structures.
- Potentially effective dispute settlement for some (but not all) WTO states parties.
- Policy incentives to push for consensus/near-consensus on “legislative” measures will persist even where not strictly required.
- US may participate in limited plurilateral initiatives alongside other principal trade actors (e.g. potentially inc. China, EU).
- Permits multispeed liberalisation (though concomitant costs of fragmentation/increased complexity).
**OPTION 3:**
Institutional reform (AB/DSU short term and WTO long term)

**Outcomes**
- Reform DSU to remove appellate “void” (Option 3a)
  - Addresses US dispute settlement-specific concerns.
  - DSU reform may result in less judicialised dispute settlement, with greater deference to / flexibility for state discretion than pre-2019 system.
  - Potentially requires additional (non-DSU) side-concessions to US and other states (e.g. re. antidumping).
- WTO overhaul (Option 3b)
  - Consolidated, updated multilateral trade bargain.
  - Potential to better reflect developments in traditionally “non-trade” areas and fora e.g. re. climate change/ environment, development, and labour as cross-cutting “level playing field” issues.
  - Potential to address scope for abuse of WTO disciplines via e.g. self-certification of development status, self-judging of covered agreement exceptions.
  - Side payments and issue linkage to enable consensus.
  - Strengthens legislative arm to relieve pressure on dispute settlement mechanism(s).

**Likely Costs**
- Consensus is needed for both stages
  - Challenging/complex to negotiate.
  - Option 3a slightly more straightforward as single issue-focused (c.f. 2014 Trade Facilitation Agreement) but still challenging to accommodate US and others’ positions.
  - Time consuming: will require careful management of negotiation process
- Trade-offs between different states’ demands.
- Potentially more deferential (but more effective) dispute settlement arrangements.

**Likely Benefits**
- Sustainable, global trade governance with effective dispute settlement arrangements.
- Multilateral trade regime better suited to 21st century global economy.
- Promotes global approach to trade to promote global living standards.
- Potential to align trade regime to support protection of global commons (e.g. climate change).
The multilateral trade regime is under unprecedented pressure. Both legislative and dispute settlement branches are dysfunctional, and there are limited institutional levers to ensure that WTO member states abide by their commitments. The status quo is unstable, moreover, and likely to further weaken global trade institutions and treaty commitments. Current trends suggest that matters are likely to deteriorate further before improvement becomes a realistic prospect.

Bilateral, regional or other plurilateral solutions will not substitute for a functioning system of global rules and institutions. Plurilateral endeavours within the WTO framework remain hampered by the weaknesses of the current dispute resolution system, principally the non-functioning Appellate Body.

Reforming the WTO regime presents significant challenges, which should not be underestimated. It is, however, the only avenue amongst those considered that has the longer-run potential to sustain (and potentially enhance) rule-governed global trade.

**For this reason we recommend Option 3.**

**Option 1** recognises that the status quo may hold attractions for many governments – and indeed, may for this reason be prevalent in the short-term. It is highly unlikely that the US will suddenly change tactics given the bipartisan nature of US concerns regarding the WTO and the AB. Equally, absent US concessions, there is little to suggest that other major trade powers (inc. China and the EU) will accede to US preferences on dispute settlement, development status self-certification and, in particular, trade defence.

This option may also prima facie appeal to constituencies who wish to “undo” the current global trade regime. It is, however, unlikely to result in the de facto restoration of the GATT-era status quo ante. Rather, should this course be sustained, WTO institutions and rules ultimately risk falling into desuetude with little to replace them on the multilateral front. While this may again appeal to some dominant trading powers or powerful trade blocs, this approach is likely to do little to foster trade amongst/across such blocs. More generally, this approach also risks an abandonment of rules-based global trade practices, signalling a return to beggar-thy-neighbour trade policies amongst trade blocs and a sustained rise in protectionism to the detriment of global living standards.

**Option 2** envisions two plurilateral pathways: one focused on developing broader non-WTO free trade agreements and/or new fora for trade adjudication via free-standing, DSU-consistent dispute settlement, and the other on seeking to revitalise the WTO by a shift to decision making within that institution by voting rather than consensus. The US or one or another major trade power may join plurilateral trade or dispute settlement arrangements. Overall, however, plurilateralism is likely to fragment global trade regulation, increase the costs of doing business across regions/regions, and breed resentment/criticism of “unfair” exclusionary and/or predatory trade practices.

Notwithstanding some benefits, and even while there are a number of examples of “successful” plurilateralism within the WTO, excluding some WTO members from core dispute settlement or trade rules amongst a subset of the WTO membership also risks substantively weakening the global trade regime and associated institutions, not least via fragmentation within the WTO itself. Moreover, because the WTO Dispute Settlement Understanding can only be amended by consensus, member states are required to either go without effective dispute settlement or join ad hoc plurilateral arrangements.

Plurilateralism may work, for some, in the short term – and indeed, may be the preferred short term option for trade powers seeking to dominate regional or forge bilateral arrangements. However, it is unlikely to substitute for a functioning global system of rules and accompanying dispute settlement arrangements. As with Option 1, Option 2 risks WTO institutions and rules falling into desuetude in the longer term, with an accompanying rise in legal fragmentation, costs of conducting cross-border/region trade and protectionist practices, a landscape potentially complicated by a “zombie” WTO in the background increasing (rather than moderating) uncertainty in global trade governance.

**Option 3** focuses on WTO reform within the constraints of consensus decision-making. Recognising the difficulty of revision of the WTO regime, this option has two stages.

The principal aim of the first element, Option 3a, is to prevent further deterioration in the overall WTO regime by enabling effective dispute settlement. This option centres around reforming the DSU to address US grievances about dispute settlement – especially in respect of the AB. Given the need for consensus across the WTO membership, this process is unlikely to be straightforward. There are, however, ongoing debates about plausible “landing zones” with the potential to identify a workable, efficient dispute resolution framework (perhaps borrowing from pre-WTO GATT arrangements) that would be minimally acceptable to all.

Other major trading powers (especially China and India) may be loath to make concessions to enable Option 3a in the near-term. As with the US and other major trading powers, however, these positions may rationally moderate as the costs of Options 1 and 2 become apparent over time.

Critically, US concerns about the WTO (and the concerns of other governments about US attitudes) go beyond dispute settlement, including broader “level playing field” issues such as trade defence. It is highly possible that absent the AB these broader concerns will in future manifest in conduct further weakening the residual elements of the multilateral trade regime, including (for example) increasing reliance on a de facto non-justiciable national security exception. While such measures may weaken the WTO, they may also highlight the value of more substantive reform to bridge US and others’ preferences.

Without holding out the prospect of addressing these further issues, moreover, attempts to revise dispute settlement arrangements are liable to be dismissed by the US and possibly other governments as addressing “symptoms” of global trade governance dysfunction rather than the “disease” itself.

There are, moreover, indications that the US may be open to the negotiation of a consolidated, updated set of core multilateral agreements with the potential to address broader “level playing
field” issues, of concern to the US and other states, as well as to update multilateral trade disciplines to address and reflect longstanding and emerging issues.

The latter may include, for example, development, digital services and data, as well as traditionally “non-trade” concerns (e.g. environment/climate change) where closer alignment between and balancing across trade and non-trade values may enable more effective global trade and cross-sector regulation. This endeavour – seeking to revitalise the WTO’s “legislative arm” – forms the core of Option 3b.

Obtaining buy-in from the broader WTO membership to this process is likely to be challenging and will require careful process management – reflecting that in a consensus-centred approach “nothing is agreed until everything is agreed”. Given both this and the potential short-term attractions of plurilateralism and the status quo, mustering sufficient political will across key trade constituencies to embark on such a process is itself likely to prove trying. The state of the global trade order may well deteriorate further before there is sufficiently widespread acknowledgment of the costs of Options 1 and 2 and accompanying readiness to reform WTO institutions and associated core agreements. Indeed, despite the drawbacks we have outlined, Option 2 may be the most likely mid-to long-term outcome.

The prizes on offer from Option 3, however, are also significant, including the prospect of mitigating some of the more deleterious cross-regime implications of plurilateralism (not to mention the status quo) and recalibrating the multilateral trade regime for 21st century global economies.

Designing a process, even if carefully staged, with a credible prospect of delivering Option 3b will not be straightforward. Proponents of this endeavour will need to carefully manage this process as well as stakeholder expectations – unrealistic expectations on the part of some governments as well as domestic/transnational constituencies having been a key factor contributing to the WTO’s current stasis. This endeavour may be facilitated, however, by successfully concluding an interim set of dispute resolution arrangements (per Option 3a), providing a worked example of how meaningful change may be achieved in a relatively well-defined, but non-siloable core trade issue, so opening the way and generating impetus towards 3b.

Options 1 and 2 may prove a boon to international trade lawyers. These avenues are also, however, likely to result in weakened global and national economic growth. Nor is there any guarantee that efforts to pursue Option 3a and b will succeed. Taken together, however, the two elements of this pathway hold out the best prospect of ensuring a global trading order fit for evolving – and hopefully thriving – 21st century economies.