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# *IMPASSE* AT THE WTO DISPUTE SETTLEMENT BODY: THE SLOW DEMISE OF MULTILATERALISM?

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*The Dispute Settlement Body (DSB) of the World Trade Organization (WTO) is unquestionably the most elaborate rules-based system to be established in the post-World War II era, internationally. The DSB has helped maintain the smooth running of the multilateral trading body for over two decades through its 'rule of law' approach to dispute settlement. The Appellate Body (AB), which the WTO relies on heavily for its full functionality, is as of December 2019 not functional, which effectively deprives all Member States of their legal right to appeal the findings of a Panel's decision. While various factors are attributable to the current impasse at the WTO vis-à-vis the AB, one underlying factor, which the authors of this article view as fundamental, is the proliferation of regional trade agreements (RTAs), which developed countries have come to strongly rely upon. This article will seek to demonstrate that there is a direct connection between i) the action of withdrawing support for the AB by the United States (US), and thereby creating a stalemate at the DSB (although being a leading/founding Member State of the multilateral trading system), and ii) the proliferation of RTAs promoted by developed country Member States (in particular, the US);*[1] *or, in the alternative, examine the question: is there a direct connection between the RTAs of the US and the AB crisis?*

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The authors would like to express their gratitude to Dr. Francis Grimal for taking his time to go through an earlier draft of this article and offer his insightful suggestions, from which, needless to say, they benefitted.
[1] The authors of this article hold the view that mega-Regional Trade Agreements [RTAs] do undermine the very existence of the World Trade Organization [WTO], as they divert a substantial volume of trade away from the WTO's multilateral trade platform, thereby subjecting the trade so conducted to a different rule book, which could be more favourable to a select few countries — mostly developed country Member States — that are in an advantageous position within that particular RTA.

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## I. INTRODUCTION

The dispute settlement system (DSS) is perceived both as a jewel in the crown of the WTO,[2] and as the "backbone of the multilateral trading system."[3] The reputation and the authority of the DSB has now been clearly undermined through the actions (and inaction, in some sense) of one of the developed country Member States that was instrumental in the founding of the multilateral trading system. It is hard to believe that a founding Member State, *i.e.*, the US, which was at the forefront of the creation of the WTO and the General Agreement on Tariffs and Trade (GATT) before that, is responsible for the *impasse* in the DSB. It is essential

[2] *See* PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION 294 (5th ed. 2018); Thomas Bernauer et al., *Dispute Settlement System: Analysis and Problem, in* THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 485, 485-506 (Martin Daunton et al. eds., 2012) (The statement is often credited to Renato Ruggiero, the first Director-General [DG] of the WTO).
[3] Press Release, Michael Moore, WTO's Unique System of Settling Disputes Nears 200 Cases in 2000 (June 5, 2000), https://www.wto.org/english/news_e/pres00_e/pr180_e.htm.

that one understands the dynamics of the situation that Member States find themselves in before determining the reasons for the *impasse*. The US played a pivotal role in the creation of a 'binding DSS for the trading system', during the negotiations leading to the establishment of the WTO's DSS. As Hillman notes, it was "arguably the high-water mark for multilateralism and multilateral rules."[4]

There is no doubt that there was a marked shift in US trade policies during the Presidency of Donald Trump, notably towards trade disputes before the WTO and more particularly in its complete withdrawal of support to the AB of the DSB through the blockage of the appointment of new AB members. Additionally, in 2017, President Trump announced that the US government would not necessarily be bound by rulings of WTO Panels and the AB, which effectively means that when a Panel and/or the AB render rulings that go against the interests of the US, the US would not be obliged to comply with them.[5] Through this conduct, the authority of the DSB as the arbiter of international trade disputes before the WTO came to be undermined. Political analysts will be quick to point out that it is likely due to a 'populist' leader being in power at the time that such an event occurred.

But taking a closer look at the events and the rhetoric that has been employed, one will notice that it could also be due to a feeling of self-sufficiency and a feeling of 'fatigue' prevailing in some quarters of the international political spectrum brought about by 'globalisation'. The authors of the current study opine that beyond the above speculations/assumptions, the principal reason that a founding Member State has brought about the stalemate at the top-tier of the DSB is the confidence that the country's requirements (met through international trade conducted under the aegis of the WTO) could be achieved through its involvement/participation in RTAs and that continued membership of the WTO is viewed as superfluous. Some commentators refer to this as the 'hegemony of developed nations'.[6] The current study will seek to demonstrate that the primary influence on the actor has been its membership in RTAs and that the other factors are only secondary.

This article is divided into three parts, with Part II analysing the governance of the AB with regards to the reappointment of judges and how the actions taken, or inaction on the part of the Member States, have led to the crippling of the DSS of

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[4] Jennifer Hillman, *Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?,* 111 AM. J. INT'L L. 364 (2017) [hereinafter Hillman].

[5] OFF. OF THE U.S. TRADE REPRESENTATIVE [USTR], NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2017) [hereinafter USTR Report].

[6] *See* Robert Gilpin, *Three Models of the Future*, 29(1) INT'L ORG. 37 (1975); Fred H. Lawson, *Hegemony and the Structure of International Trade Reassessed: A View from Arabia*, 37(2) INT'L. ORG. 317 (1983); Johan Lindeque & Steven McGuire, *The United States and Trade Disputes in the World Trade Organization: Hegemony Constrained or Confirmed?,* 47(5) MGMT. INT'L. REV. 725 (2007).

the WTO. Part III presents a critical analysis of the advantages and disadvantages of pursuing a dispute before the WTO's dispute settlement and before the RTAs, the jurisdiction of the WTO *vis-à-vis* the RTAs, and the outcomes of the US complaints before the DSB and other forums. Part IV demonstrates the difficulties faced by developing country Member States due to the *impasse* at the DSB and concludes with suggestions and the way forward.

## II. PART II

### *A. Governance, Composition of the AB & Reappointment of Judges*

The WTO emerged in 1995 as a rules-based multilateral forum for conducting international trade. It was formed after several rounds of trade negotiations during the GATT regime. The WTO's governance is a perfect example of a member-driven governance model that relies on high efficiency, integrity, and the desire to achieve the common goal of the institution as set out in the WTO Agreement and well captured in its Preamble. As Petersmann notes, the parliaments of the Member States, while granting approval to the 1994 WTO Agreement and adopting legislations to that effect, restricted the trade policy powers vested in their respective government executives to implement and modernise the WTO rules.[7] One cannot assume that these powers include the authority to paralyse the WTO legal order, of which the DSS is a part. For instance, Article 3 of the Lisbon Treaty requires the European Union's (EU) external policies to contribute to "the strict observance and development of international law."[8] On the other hand, Article 21 of the Treaty on European Union (TEU) requires the EU to "support democracy, the rule of law, human rights, and the principles of international law."[9] Neither the TEU nor the Lisbon Treaty vest the EU institutions with unbridled powers to

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[7] *See* Marrakesh Agreement Establishing the World Trade Organisation art. XVI:4, Apr. 15, 1994, 1867 U.N.T.S. 154 ("Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements") [hereinafter Marrakesh Agreement]. Ernst-Ulrich Petersmann, *Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System*, *in* THE APPELLATE BODY OF THE WTO AND ITS REFORM 15-41 (Chang-fa Lo et al. eds., 2020) [hereinafter Petersmann].

[8] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 (It entered into force on January 1, 2009 and is the international agreement that amends the two treaties forming the constitutional basis of the European Union [EU]).

[9] Treaty of European Union (Consolidated Version), Treaty of Maastricht, Dec. 24, 2002, O.J. (C 325) 5 (It is one of the primary Treaties of the EU, forming the foundation of the EU, containing the basis of the EU's aims, objectives, and purpose; the governance of its institutions; and the rules on external, foreign, and security policy).

violate any international treaties approved by the parliaments of the EU Member States.

Likewise, the US Constitution does not allocate authority to terminate treaties made pursuant to the Treaty Clause or as congressional-executive agreements.[10] Trachtman notes that all modern treaties of the US are made as congressional-executive agreements (including the WTO Agreement) into domestic laws, and that the Congress has not vested the President with executive powers to unilaterally withdraw from the WTO Agreement, or destroy the WTO legal order and DSS.[11] Trachtman also observes that, at times, the US Presidents have claimed inherent foreign policy powers to withdraw from international agreements.[12] One can, as an example, cite the unilateral US withdrawal (under President Trump) from the Joint Comprehensive Plan of Action (JCPOA), or Iran Nuclear Deal, as it is referred to, on May 8, 2018. Petersmann, on the other hand, notes that such constitutional constraints have not thwarted WTO diplomats from engaging in illegal power politics to undermine the functioning of the AB in blatant violation of the WTO's dispute settlement rules, *i.e.*, the Dispute Settlement Understanding (DSU).[13] The US trade diplomats have vetoed the appointment of WTO AB members on several occasions, with reasons ranging from being 'biased' to being 'unpatriotic'.[14]

The United States Trade Representative (USTR) has frequently criticised or rejected proposals for the appointment of AB members over the years. Presented below are a few instances:

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[10] Joel P. Trachtman, *Power to Terminate US Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Glass Half Empty*, 51(3) INT'L. LAW. 445 (2017).

[11] *Id.*

[12] *Id.*

[13] *Id. See also* Fox Bus., *Trump: Companies Aren't Going to Leave the US Anymore*, YOUTUBE (Dec. 6, 2017), https://www.youtube.com/watch?v=isaVmobdgsc&t=1s&ab_channel=FoxBusiness (It is also to be noted that President Trump, since assuming office in 2017, had repeatedly criticised the functioning of the WTO in colourful language. He had referred to the WTO Agreements as "the terrible WTO Agreements". While being interviewed by Luo Dobbs on Fox Business in October 2017, President Trump remarked that the WTO "was set up for the benefit of everybody but us … . They have taken advantage of this country like you wouldn't believe … As an example, we lose the lawsuits, almost all of the lawsuits in the WTO … Because we have fewer judges than other countries. It's set up as you can't win. In other words, the panels are set up so that we don't have majorities. It was set up for the benefit of taking advantage of the United States.").

[14] JAE SUNDARAM, WTO LAW AND POLICY: A POLITICAL ECONOMY APPROACH 659 (2022).

i. 2003-2011: The reappointment of AB members from the US, Merit Janow and Jennifer Hillman, was *not* put forward by the USTR for a second term on the grounds that they were not sufficiently aggressive in defending the US position and elected not to write dissenting opinions.[15] As a result, both judges of the AB were to serve only one term — Merit Janow (2003-2007) and Jeniffer Hillman (2007-2011);
ii. 2013: The appointment of trade law specialist, Professor James Gathii (a tenured professor at Loyola University, US), which was proposed by Kenya, was turned down immediately by USTR for ambiguous reasons;[16]
iii. 2016: The US blocked the consensus in the WTO for filling the AB vacancies for reasons relating to the then ongoing transition in the US political leadership;
iv. 2016: The US administration, under President Obama, started ramping up the pressure on the WTO by politicising the reappointment of the Korean judge Suen Wha Chang to the AB, criticising him as having an anti-US bias.[17]
v. 2017: The replacement of AB members Hyun Chong Kim (Korea), Ramirez-Hernandez (Mexico), and Peter Van den Bossche (Belgium) was vetoed by the USTR on grounds of 'systemic' legal concerns about, *inter alia*, Rule 15 of the AB Working Procedures as elaborated by the AB in conformity with Article 17.9 of the DSU and practised in WTO dispute settlement practises since 1996.[18]
vi. 2018: The USTR blocked the reappointment of AB member Shree Baboo Cheitan Servansing (Mauritius) due to 'systemic concerns'.[19]

The dispute settlement mechanism (DSM) comprises a two-stage process. When parties are not able to reach a settlement over a complaint, the first stage of the process is triggered, i.e., the complaints are presented to a Panel, which then proceeds to hear both sides and deliver its findings as a report. The appeal process, the second step, is triggered when the Panel report is not adopted and challenged

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[15] Peter Jan Kuijper, *From the Board: The US Attack on the WTO Appellate Body*, 45(1) LEGAL ISSUES ECON. INTEGRATION 1 (2018).
[16] Petersmann, *supra* note 7.
[17] Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111(2) AM. J. INT'L. L. 225 (2017) [hereinafter Dunoff & Pollack]; Andreas Falke, *Interregionalism and the Trump Disruption: The Transatlantic Trade and Investment Partnership: A Postmortem*, *in* INTERREGIONALISM AND THE AMERICAS 109-126, 122 (Gian Luca Gardini et al. eds., 2018).
[18] Kuijper, *supra* note 15.
[19] Tom Miles, *World Trade's Top Court Close to Breakdown as US Blocks Another Judge*, REUTERS BUS. NEWS (Sept. 26, 2018), https://www.reuters.com/article/us-usa-trade-wto-judge/world-trades-top-court-close-to-breakdown-as-us-blocks-another-judge-idUSKCN1M621Y.

before the AB, the final arbiter of any trade dispute that comes before the WTO. It is this second stage of the process that has been crippled by the unilateral actions of the US.

Due to US blockage of the procedure for meeting the legal obligations under Article 17 of the DSU, three out of seven positions of the AB Judges had fallen vacant by the end of 2017. Article 17 reads as follows, "[a] standing [AB] shall be established by the DSB. The [AB] shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case."[20] By July 2019, only three members of the AB remained, and by December 2019, there was just one member left of the AB.[21]

It is the Chair of the DSB who initiates the process of reappointment of AB members to determine if a sitting member is desirous of serving for a second term. In the event that the answer is in the affirmative, the Chair then begins the consultation process with all WTO Member States. Although a formal renomination is not required, any Member State of the WTO can block a reappointment. What we are witnessing through the *impasse* at the AB is the Member-driven WTO governance being abused by a Member State, *i.e.*, the US, to serve its own ends. As Petersmann notes, President Trump's insistence on 'bilateral deals' and his moto 'America first' caused a disruption of the foundations of multilateralism and challenged the insight of 'constitutional economics' that underpins the WTO Agreement.[22] This disregard was well captured by the false US claims before the WTO General Council in its meeting of May 9, 2018 that, "the [AB] not only has rewritten our agreements to impose new substantive rules we Members never negotiated or agreed but has also been ignoring or rewriting the rules governing the [DSS], expanding its own capacity to write and impose new rules."[23] What we witnessed was a fundamental disregard for customary international law.

Under Trump, the US delegation repeatedly sought to justify its actions by stressing that they were guided by their desire to ensure that the AB performs the institutional role assigned to it in the agreement negotiated in the Uruguay Round, which is echoed in the text of the DSU. The AB, as the final arbiter, discharges its functions "in accordance with customary rules of interpretation of public

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[20] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 U.N.T.S. 401 [hereinafter WTO DSU]

[21] Petersmann, *supra* note 7.

[22] *Id.*

[23] *Id.*

international law."[24] It is this functionality of the AB that the US criticised as found wanting and repeatedly argued that the AB had not abided by its terms of reference; and that the "AB has in various ways acted as if it were a principal instead of an agent, as it is required to do as per Article 3.2 of the DSU."[25]

Hoekman and Mavroidis note that while the US has been the principal actor in forcing the AB into crisis, others have played along. Hoekman and Mavroidis take the position that the other Member States ought to have addressed the situation head-on by pushing for majority decisions invoking Article IX.1 of the Agreement Establishing the WTO.[26] Article IX.1 reads as follows:

> The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[27]

Several WTO members, instead, submitted proposals in anticipation of a situation where the AB becomes defunct. The EU, which has one membership and comprises of several Member States, did put forth the proposal that WTO Member States consider an AB *à la carte* invoking Article 25 of the DSU as 'legal scaffolding', where two disputing parties would consent to the establishment of a body that would act as an appeals board.[28] Hoekman and Mavroidis opine that none of the measures suggested by the Member States actually address the issue raised by the US, i.e., that the AB doesn't operate as intended when the WTO entered into force in 1995. The indication is that the inaction, or hesitancy, on the part of the developed country Member States stems from the growing discontent with multilateralism and the failure to achieve progress in the reform of the WTO

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[24] *See* WTO DSU, *supra* note 20, at art. 3(2).
[25] Bernard Hoekman & Petros C. Mavroidis, *Burning Down the House? The Appellate Body in the Centre of the WTO Crisis* (Eur. U. Inst., Robert Schuman Ctr. Advanced Stud., Glob. Governance Programme, Working Paper No. RSCAS 56, 2019).
[26] *Id.*
[27] Marrakesh Agreement, *supra* note 7, at art. IX.1.
[28] *Id.*

through consensus. Dunoff and Pollack suggest that the WTO's problems are like the dilemmas faced by other international courts as they seek to balance three virtues — judicial independence, judicial accountability, and judicial transparency — which cannot all be maximised at the same time.[29] In their view, the WTO's problems are partly a function of the desire of the US for greater judicial accountability, which comes at the expense of judicial independence, which is sought after by other Member States. Hillman takes the position, alongside Dunoff and Pollack, that judicial independence should be favoured over the other two virtues.[30]

### *B. 'Impasse' in the Appointment of the Director-General (DG) of the WTO*

In May 2020, DG Roberto Carvalho de Azevêdo, who succeeded Pascal Lamy in 2013, announced that he would be stepping down from his position on August 21, 2020.[31] This announcement set in motion the quest to find a suitable successor for Roberto de Azevêdo. The selection of the DG is by consensus, with all 164 Member States required to approve a candidate. Prospective candidates to fill the vacancy — eight in number — came from both developed and developing Member States with varied backgrounds and experiences.[32] The following candidates had applied for the position of DG of the WTO: *i. Dr. Jesus Seade Kuri (Mexico), ii. Dr. Ngozi Okojo-Iweala (Nigeria), iii. Mr. Abdel-Hamid Mamdouh (Egypt), iv. Mr. Tudor Ulianovschi (Moldova), v. Ms. Yoo Myung-Hee (Republic of Korea), vi. Dr. Amina C. Mohamed (Kenya), vii. Mr. Mohammad Mziad Al-Tuwaijri (Kingdom of Saudi Arabia), and viii. Dr. Liam Fox (United Kingdom)*. In October 2020, after extensive negotiations amongst the Member States of the WTO, the field was narrowed down to two candidates, viz., Dr. Ngozi Okojo-Iweala (Nigeria) and Ms. Yoo Myung-Hee (Republic of Korea).

Dr. Ngozi Okojo-Iweala won the support of the Member States from the Caribbean, Africa, the EU, China, Japan, and Australia but not the support of Washington, which favoured the appointment of Ms. Yoo Myung-Hee as the DG.[33] In the event that the US maintained its opposition to the appointment of Dr. Ngozi Okojo-Iweala, the Constitution of the WTO allows for a vote to be

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[29] Dunoff & Pollack, *supra* note 17.
[30] Hillman, *supra* note 4.
[31] *DG Azevêdo Announces He will Step Down on 31 August*, WTO NEWS (May 14, 2020), https://www.wto.org/english/news_e/news20_e/dgra_14may20_e.htm#:~:text=This%20August%2C%20I%20will%20complete,news%20reports%20about%20my%20decision.
[32] *Candidates for DG Selection Process 2020*, WTO NEWS (2020), https://www.wto.org/english/thewto_e/dg_e/dgsel20_e/dgsel20_e.htm.
[33] Larry Elliott, *US Blocking Selection of Ngozi Okonjo-Iweala to be Next Head of WTO*, GUARDIAN (Oct. 28, 2020), https://www.theguardian.com/world/2020/oct/28/us-blocking-selection-of-ngozi-okonjo-iweala-to-be-next-head-of-wto.

taken among its Member States. But the special meeting of the WTO's General Council to seek a vote to appoint the DG was thrown into further disarray as the appointment meeting was postponed without any further details.[34] The appointment of the DG of the WTO was postponed due to opposition from one Member State of the WTO.

It was not until February 2021, after President Biden succeeded President Trump, that Dr. Ngozi Okojo-Iweala's appointment gained the US' 'blessings', and a new WTO DG was appointed after a gap of over six months.[35] The action of the US, under Trump, to block the appointment of a new DG is akin to its stance taken in freezing the appointment of judges to the AB, leading to its paralysis.

Without undermining the logic of Dunoff and Pollack's perspective on 'judicial accountability',[36] it is imperative to note that there is more to the US' role in the current impasse at the WTO DSB that transcends its desire for judicial accountability. From the examples highlighted and discussed above, it is clear that the US, for years, has been quite vocal in its dissatisfaction with the WTO DSB. Its continuous attempts to influence the appointment of AB members are sufficient evidence that the US seeks to control trade dispute adjudication in its favour. While his predecessors were more diplomatic in managing this dissatisfaction, Trump's foreign policy saw the US take a more stringent approach. Even though it was under Trump that the final blow was struck, his successor, President Biden, has retained most of Trump's trade policies and has done very little to get the AB functional again.[37] Whereas, during his presidential campaign, Biden made it clear that his foreign policy would rest firmly on multilateralism and on the resumption of office as the US' 46th President, there was no indication that the WTO would be left out.[38]

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[34] Richard Partington, *Appointment of WTO Chief in Doubt after Key Meeting Cancelled*, GUARDIAN (Nov. 8, 2020), https://www.theguardian.com/world/2020/nov/08/appointment-wto-chief-doubt-meeting-cancelled-ngozi-okonjo-iweala.

[35] *History is Made: Ngozi Okonjo-Iweala Chosen as Director-General*, WTO NEWS (Feb. 15, 2021), https://www.wto.org/english/news_e/news21_e/dgno_15feb21_e.htm.

[36] Dunoff & Pollack, *supra* note 17.

[37] James Bacchus, *Biden and Trade at Year One: The Reign of Polite Protectionism* (CATO Pol'y Analysis Paper, No. 926, Apr. 04, 2022).

[38] Alexander Kentikelenis & Erik Voeten, *Biden Promises to Embrace Multilateralism Again. World Leaders Agree*, WASH. POST (Dec. 16, 2021), https://www.washingtonpost.com/politics/2020/12/16/biden-promises-embrace-multilateralism-again-world-leaders-agree/; Robert Howse, *Appointment with Destiny: Selecting WTO Judges in the Future*, 12(3) GLOB. POL'Y 71 (2021). *See also* Alexander Kentikelenis & Erik Voeten, *Legitimacy Challenges to the Liberal World Order: Evidence from United Nations Speech, 1970-2018*, 16 REV. INT'L. ORG. 721 (2021).

It would seem that his appointment of a new US representative to the WTO, Ambassador Katherine Tai, in 2021, was a step in that direction, but it remains in doubt whether President Biden's administration is really interested in getting the WTO to become fully functional again.[39] In 2021, Ambassador Kai and her deputy, Maria Pagan, stated their commitment to the representation of the US government to see the WTO succeed.[40] However, they have continued to emphasise that the DSB needs reforms and also insisted that the appointment of new AB members would depend on these reforms.[41] Hence, to date, no appointments have been made, and every attempt to resuscitate the AB continues to be blocked by the US.[42]

During the WTO DSB meeting in March 2022, Mexico, for the 52nd time, proposed to commence a selection process for the appointment of new AB members, but yet again the US blocked the process, reiterating its "systemic concerns with the [AB]".[43] Even more concerning is the fact that the US has neither commenced plans for reforms nor welcomed new proposals for reforms. The US stated that, "[a] true reform discussion should aim to ensure that WTO

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[39] Sarah A. Aarup, *All Talk and No Walk: America Ain't Back at the WTO*, POLITICO (Nov. 23, 2021) https://www.politico.eu/article/united-states-world-trade-organization-joe-biden/.

[40] Press Release, Office of the USTR, Ambassador Katherine Tai's Remarks as Prepared for Delivery on the World Trade Organization (Oct. 2021), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tais-remarks-prepared-delivery-world-trade-organization#:~:text=We%20all%20recognize%20the%20importance,fairer%2C%20more%20inclusive%20global%20economy; Ana Swanson, *US Renews Its Support for Trade Group It Once Made a Punching Bag*, N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/2021/10/14/business/economy/trade-wto-katherine-tai.html.

[41] Press Release, Office of the USTR, Opening Statements of María L. Pagán and Christopher Wilson Before the Senate Finance Committee as Prepared for Delivery, (Oct. 2021) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/opening-statements-maria-l-pagan-and-christopher-wilson-senate-finance-committee-prepared-delivery; Office of the USTR, Remarks by Ambassador Katherine Tai During the Opening Session of the WTO 12th Ministerial Conference (June, 2022), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/june/remarks-ambassador-katherine-tai-during-opening-session-wto-12th-ministerial-conference; Wash. Int'l Trade Ass'n [WITA], *Ambassador Katherine Tai on the Indo-Pacific Economic Framework and the Administration's Trade Agenda* (June 6, 2022), https://www.wita.org/event-videos/tai-ipef-video/.

[42] *Members Continue Push to Commence Appellate Body Appointment Process*, WTO (Mar. 28, 2022), https://www.wto.org/english/news_e/news22_e/dsb_28mar22_e.htm [hereinafter WTO News]; Andy Bounds, *The WTO's Lonely Struggle to Defend Global Trade*, FIN. TIMES (June 13, 2022), https://www.ft.com/content/f81e4abe-cf53-485c-afbf-1b3870872384.

[43] WTO News, *supra* note 42.

dispute settlement reflects the real interests of members and not prejudge what a reformed system would look like … ".[44] Considering recent commitments to commence reforms of the WTO,[45] Mexico again proposed to commence the selection process, for the 57th time, of new AB members at the WTO DSB meeting in June 2022, but this initiative was blocked by the US once more.[46] These occurrences indicate that President Biden's administration has turned a blind eye to the impasse created by his predecessor. This attitude stands as compelling evidence to justify the arguments which we advance in this article. Without mincing words, it appears that the WTO comes last, while it is the Free Trade Agreements (FTAs) that come first in the current US international trade agenda. This assertion is justified by the fact that Mexico, on behalf of 123 WTO Member States, has continued to emphasise that, "[the US'] concerns about certain aspects of the functioning of the [AB] cannot serve as pretext to impair and disrupt the work of the DSB and dispute settlement in general, and that there was no legal justification for the current blocking of the selection processes."[47]

## III. PART III

### *A. Dispute Settlement: WTO vis-à-vis RTAs*

The most frequently accessed international DSM for state-to-state disputes has been the DSB of the WTO.[48] The DSB has, for over two decades, helped maintain the smooth running of the business of the multilateral trading body. With the marked shift in US trade policies under President Trump, notably towards trade disputes, and more particularly in its complete withdrawal of support to the AB of the DSB through the blockage of the appointment of new AB members,[49] the authority of the DSB as the arbiter of international trade disputes has been undermined. The AB, starting from December 2019, has closed its doors for business, thereby effectively depriving the Member States of their right to appeal a Panel's ruling. The key segment of the rules-based multilateral trade organisation, i.e., the AB, now stands paralysed. The AB, which the multilateral trade body relies

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[44] *Id.*

[45] *See* World Trade Organisation, Ministerial Declaration of 22 June 2022, WTO Doc. WT/MIN(22)/24 WT/L/1135 (2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf &Open=True.

[46] *Türkiye States Intention to Implement Findings in Pharmaceuticals Dispute with EU*, WTO NEWS (Aug. 29, 2022), https://www.wto.org/english/news_e/news22_e/dsb_29aug22_e.htm.

[47] WTO News, *supra* note 42.

[48] Peter Van den Bossche, *The Appellate Body of the World Trade Organization*, *in* THE CONTRIBUTION OF INT'L AND SUPRANATIONAL COURTS TO THE RULE OF LAW 176-202 (Greet De Baere & Jan Wouters eds., 2015).

[49] USTR Report, *supra* note 5.

on heavily for its full functionality, is now in a major crisis. While various factors are attributable to the current *impasse* at the WTO *vis-à-vis* the AB, one underlying factor, which the authors of this article view as fundamental, is the proliferation of RTAs, which developed countries, such as the US, have come to strongly rely upon. The question we must, therefore, consider is whether there is a direct connection between the US-engineered *AB crisis* and the US' reliance on its RTA memberships. Yet, it is imperative to first understand how RTAs undermine the WTO, at least as it concerns trade dispute settlement.

The debates on how the proliferation of RTAs negatively impacts the WTO are perennial and inseparable from the international trade discourse. For the purposes of this study, RTAs include FTA, Preferential Trade Agreements (PTA), and RTAs (e.g., the African Continental FTA (AfCFTA), the Southern Common Market (MERCOSUR), the United States-Mexico-Canada Agreement (USMCA), the Association of Southeast Asian Nations (ASEAN), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), etc.). The unchecked growth of RTAs promoted by developed country Member States has brought in its wake a number of complications hitherto unknown in the law and politics of international trade. It is argued here that the developed country Member States seek to control the multilateral trade outside the WTO-watch. One such problem is the conflict and overlap of jurisdictions between the WTO DSM rules and the RTA DSM rules. Although the broader issue relating to jurisdictional overlap of the WTO and the RTA DSM rules is outside the remit of this article, it is imperative to address how the jurisdictional overlap has influenced the *impasse* at the WTO *vis-à-vis* the AB.

The factors that influence the creation of RTAs in the post-WTO era go beyond international trade and regional cooperation to include trade policy and political economy. When states come together to form an RTA, there are particular benefits in view for each member state, but these benefits are mostly unevenly distributed. This is often the case in situations where some countries with vibrant domestic markets adopt safeguard measures that constitute barriers to imports from other member countries.[50] Under these circumstances, it becomes quite difficult for affected member countries to strengthen their competitive export advantage within and outside the trade bloc.[51] Notably, such situations are likely to occur in RTAs because not all Member States would have come to the negotiating table with equal bargaining power; with the developed countries in such RTAs normally retaining the ultimate power not only to control the trade flow and policies, but also to use the forum to a reasonably large extent. This development has been made possible,

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[50] Craig R. MacPhee & Wanasin Sattayanuwat, *Consequence of Regional Trade Agreements to Developing Countries*, 29(1) J. ECON. INTEGRATION 64-94 (2014).
[51] *Id.*

arguably, because in the post-WTO era, WTO rules serve as the benchmark to develop new rules (with higher standards/thresholds) to strike RTAs. In effect, the implication is that trade dispute settlement would be handled politically to arrive at a win-win (or at least a no-victor-no-vanquished) result rather than following strict legal norms. Although rules-based, outcomes could be influenced by a dominant contracting party in RTAs. This is akin to the practise prevalent during the GATT-era, when dispute settlement was not rules-based and outcomes were influenced by developed countries,[52] for instance, the case of *United Kingdom Waivers — Application in Respect of Customs Duties on Bananas*.[53]

As Alter and Hooghe rightly note, a major development in regionalism following the proliferation of RTAs is the rise of regional mechanisms "with a remit to adjudicate economic disputes."[54] As such, the RTA's DSM rules, as a platform, transcend a commitment to use legal means in settling trade disputes to include a commitment to uphold certain politico-economic values.[55] Hence, dispute settlement in regional mechanisms is often diplomatic, employing the options of negotiation, mediation, conciliation, and arbitration, and resorting to adjudication only in extreme circumstances. The rationale for this construct, as captured in Alter and Hooghe's concept of 'the judicialization of politics',[56] is that the disputing parties may retain control of the process in such a way to bargain for a mutually acceptable resolution that is devoid of external control. Alter and Hooghe explain the 'judicialization of politics' as referring to a situation where bargaining takes place in the shadow of potential litigation, with each side supporting their cause *via* legal claims while simultaneously, explicitly or implicitly, suggesting that a failure to respect legal agreements may trigger litigation.[57]

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[52] *See* William J. Davey, *Dispute Settlement in Gatt*, 11(1) FORDHAM INT'L L. J. 51, 89-90 (1987), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1169&context=ilj&httpsredir=1&referer=.

[53] Report of the Panel, *United Kingdom Waivers — Application in Respect of Customs Duties on Bananas*, L/1749 (Apr. 11, 1962) GATT (unadopted).

[54] Karen J. Alter & Liesbet Hooghe, *Regional Dispute Settlement Systems*, *in* OXFORD HANDBOOK OF COMPARATIVE REGIONALISM 538, 538-558 (Tanja A. Börzel & Thomas Risse eds., 2016) [hereinafter Alter & Hooghe]; Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2(1) J. INT'L DISP. SETTLEMENT 241 (2011); Gary Goertz & Kathy Powers, *Regional Governance: The Evolution of a New Institutional Form* (Wissenschaftszentrum Berlin für Sozialforschung, Discussion Paper No. SP IV 2014-106, 2014).

[55] Alter & Hooghe, *supra* note 54.

[56] *Id.*

[57] Ran Hirschl, *The Judicialization of Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 256 (Robert E. Goodin ed., 2011) [hereinafter Hirschl].

So, when a trade dispute arises between RTA members, under this construct, RTAs are able to consider various conjoining factors to reach a resolution or compromise, as the case may be, without having to utilise a WTO-model of dispute settlement which imposes obligations and allows parties to enforce the rulings. For example, the ASEAN Charter emphasises dialogue, consultation, and negotiation as the bedrock of its DSM, referring only the unresolved disputes to the ASEAN Summit, the organisation's highest political decision-making body.[58] The EU also traditionally favours a political consensus-based DSM as opposed to resorting to arbitration and tribunals.[59] While mediation and conciliation mechanisms constitute the precepts of the Economic Community of West African States' (ECOWAS) regional arbitration forum,[60] MERCOSUR employs "arbitral panels, whose rulings can be appealed to a Permanent Review Tribunal".[61] In the China-Nigeria BTA, Nigeria has always welcomed Foreign Direct Investment (FDI) through tariff-jumping as an alternative to initiating WTO proceedings against China for trade-related offences.[62] It is argued, however, that in some instances, it is the burden of bearing the cost of raising a legal dispute and the absence of legal expertise that influences the choice of an RTA's DSM.[63] That notwithstanding, it is evident that regionalism has allowed trading partners to create their own legal alternatives.[64]

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[58] Ass'n of Se. Asian Nations [ASEAN] Charter, art. 22 & 26; Locknie Hsu, *ASEAN Dispute Settlement Systems*, *in* THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 382-410, 384 (Sanchita Basu Das et al. eds., 2013).

[59] Tim Graewert, *Conflicting Laws and Jurisdictions in the Dispute Settlement Process of Regional Trade Agreements and the WTO*, 1(2) CONTEMP. ASIA ARB. J. 287, 290 (2008).

[60] U.N. Conf. Trade & Dev. [UNCTAD], *Regional Integration and Non-Tariff Measures in the Economic Community of West African States (ECOWAS)*, 28 UNCTAD/DITC/TAB/2018/1. Another solution used by the ECOWAS Commission is to informally send a letter to a Member State involved in the infringement of a Community provision, with a view to sensitise the Member State on the importance of implementing the provision. According to the Commission, this approach has proved to have a deterring effect on certain policies or practices.

[61] Alter & Hooghe, *supra* note 54.

[62] High tariffs tend to induce foreign direct investments [FDIs] by encouraging investors to jump the 'tariff-wall' — both the tariff and non-tariff barriers. Tariff-jumping FDI allows a foreign firm to establish production facility within a foreign country, through FDI or licensing, and thereby avoid high tariffs. *See* Hamid Beladi et al., *Tariff Jumping and Joint Ventures*, 75(4) S. ECON. J. 1256 (2009).

[63] Gerhard Erasmus, *Alternative Dispute Settlement Procedures for Trade-related Disputes in Africa*, TRALAC: PERSP. AFRICA'S TRADE & INTEGRATION BLOG (Oct. 1, 2018) https://www.tralac.org/blog/article/13527-alternative-dispute-settlement-procedures-for-trade-related-disputes-in-africa.html.

[64] Alter & Hooghe, *supra* note 54.

In this regard, Hirschl, while discussing the judicialization of politics, notes that in the realm of international dispute settlement — pertaining to foreign investment, financial services, and antidumping — the RTAs, comprising the North American FTA (NAFTA), MERCOSUR, and ASEAN, have all established quasi-judicial DSMs for their membership.[65] In fact, the formation of mega-RTAs, like the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP), has raised concerns as to how an increasing or decreasing number or types of disputes litigated before the DSB could substantially impact the future of the WTO,[66] and undermine its international standing as the arbiter of international trade disputes arising from multilateral trade. In effect, while WTO's multilateralism has helped in accessing new markets and promoting globalisation, RTAs have promoted a newer model that helps to significantly reduce the reliance on WTO's rules-based system of dispute settlement.

*B. Jurisdiction: WTO vis-à-vis RTAs*

As of 1995, only forty-three of today's RTAs were in force, and the majority did not have judicialized DSSs. But with the emergence of the WTO in 1995 and numbers rising to 226 by 2012, about 70% of the RTAs now have diplomatically-influenced judicialized DSSs.[67] The choice of alternative DSSs in the RTAs shows that the proliferation of RTAs has led to the emergence of several new and alternative DSMs for trade partners. The problem with these alternative constructs, however, arises when a Member State of the WTO looks beyond the dispute settlement provisions of an RTA and approaches the WTO for redress. Ordinarily, it is assumed that any trade dispute amongst members of an RTA is to be considered 'internal' and thereby subject to the DSM of that particular RTA. But this is often not the case at all times. With an emphasis on the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of its members, Article 3.3 of the DSU permits any Member State to approach the WTO's DSM for resolution on any trade measure adopted by another Member State which directly or indirectly affect any rights of the former. Notably, this legal right is not barred by a complainant's membership in an RTA, provided that the issue in dispute is covered by WTO laws, irrespective of whether proceedings had already been initiated at the regional level, as was the case in

[65] Hirschl, *supra* note 57.

[66] Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, 8(1) GLOB. POL'Y. 107, 107-112 (2017) [hereinafter Bown].

[67] Claude Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements: Innovative or Variations on a Theme?* (WTO Staff Working Paper, No. ERSD-2013-07, 2013) [hereinafter Chase et al.].

*Mexico — Soft Drinks*.[68] In this case, Mexico had invoked the WTO panel to refuse to utilise its jurisdiction and requested the WTO to shift the dispute so that it could be dealt with based on the preference of the NAFTA arbitral panel. This resulted in confusion as to which forum had the judicial powers to rule over the dispute — the DSM of the WTO or NAFTA.

The rationale for this approach can be understood from two perspectives. Firstly, as the AB highlighted in the *US — Tuna II (Mexico)* dispute,[69] there are multilateral implications for relegating jurisdiction to the DSS established under an RTA; as such, the compulsory and automatic jurisdiction of the WTO's DSMs under Articles 3.8 and 23 of the DSU is imperative to cater to the interests of Member States at large and to avoid multiplicity of disputes. Secondly, it is to ensure that the WTO does not jeopardise its commitment to protect the developing and least-developed country (LDC) Member States from the highhandedness of their developed country RTA partners.[70] It is pertinent to highlight here that Paragraph 1 of the Agreement Establishing the World Trade Organization charges the WTO to engage in 'positive efforts' that are designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.[71] Based on this rationale, amongst others, the WTO's DSM can be considered to establish its powers over an RTA's DSM.

Consequently, RTAs have often viewed the WTO's DSM as a flagrant threat to the viability of RTA DSMs. The inclination is that the developed economies that lead some RTAs consider the DSM of the WTO as constituting a formidable challenge to the powers of RTAs in general, and as a detriment to the developed economies that prefer regional dispute resolution because of its advantages — political or economic, as the case may be.[72] Although most RTAs have a formal DSM built

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[68] Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/R (adopted Mar. 24, 2006) [hereinafter Panel Report, Mexico — Taxes on Soft Drinks], as modified by Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006) [hereinafter AB Report, Mexico — Taxes on Soft Drinks].

[69] Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/RW/USA (adopted June 13, 2012).

[70] George Bermann & Petros C. Mavroidis, *Developing Countries in the WTO System*, *in* WTO LAW AND DEVELOPING COUNTRIES 1 (George Bermann & Petros Mavroidis eds., 2007).

[71] Marrakesh Agreement, *supra* note 7, at ¶ 1.

[72] Robert McDougall, *Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution*, RTA EXCHANGE, GENEVA: INT'L CTR. TRADE & SUSTAINABLE DEV. [ICTSD] & INTER-AM. DEV. BANK [IDB] (2018); Yenkong Ngangjoh-

into their treaties, such as 'choice of forum' and 'exclusive forum' clauses,[73] the increasing number of disputes adjudicated before the WTO's DSB (of which 25% of the cases could have been addressed regionally) suggests that the WTO's DSM attracts more confidence than that of an RTA's.[74] Since 1995, disputes between Canada, Mexico, and the US top the chart, despite the existing adjudicative provisions made available in NAFTA.[75] In most of these disputes, the US has appeared as the respondent and has lost a good number.

It is interesting to observe that members of pre and post-1994 RTAs have chosen the WTO's DSM to resolve their bilateral and regional trade disagreements, yet it is fallible to agree completely with Marceau,[76] who suggests that it is the legitimacy of the WTO's DSM that drives the choice-making process of a challenging Member State. Arguably, bringing a claim before the WTO's DSM rather than an RTA's DSM does not rid the latter of its legitimacy, nor does it affirm or reaffirm the legitimacy of the former. A challenging party in a dispute would normally seek redress from a judicial forum that is most likely to guarantee the success of its claim, as it makes rational sense to do so. Moreover, Article 3.7 of the DSU encourages a complaining member to evaluate whether raising a dispute before the DSB would be fruitful, before initiating proceedings. As a result of this construct, the powers of the DSM of an RTA to address disputes internally are often undermined by a complainant's choice of jurisdiction, which can potentially result in unfavourable outcomes for the respondent. It can be argued that in some instances, when complaining members approach the WTO's DSM with a complaint that should ordinarily have been brought before a DSM of an RTA, such cases are not presented in good faith and thereby violate the Article 3.10 provision of the DSU, which requires a Member State to initiate proceedings in good faith.

For instance, in *Peru — Agricultural Products*, when Guatemala initiated proceedings against Peru,[77] the former had violated its good-faith obligation under the FTA

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Hodu, *'Regional Trade Courts' in the Shadow of the WTO Dispute Settlement System: The Paradox of Two Courts*, 28(1) AFR. J. INT'L & COMP. L. 30-49 (2020).

[73] Chase et al., *supra* note 67.

[74] Gabrielle Z. Marceau, *The Primacy of the WTO Dispute Settlement System*, 23 QUESTIONS INT'L L. 3 (2015) [hereinafter Marceau].

[75] Bown, *supra* note 66.

[76] Marceau, *supra* note 74.

[77] *See* Panel Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/R (adopted July 31, 2015) [hereinafter Panel Report, Peru — Agricultural Products], as modified by Appellate Body Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015); *see also* Panel Report, *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WTO Doc. WT/DS312/R (adopted Nov. 28, 2005) [hereinafter Panel Report,

entered into between the two countries in 2011, where Guatemala had agreed to Peru's Price Range System (PRS) from 2001, which permitted the use of variable levies. That notwithstanding, the AB favoured Guatemala, disregarding what was permissible under the Peru-Guatemala FTA,[78] as it did not concern performance of the covered Agreements of the WTO. The AB's decisions in *EC — Export Subsidies on Sugar* and the Panel's decision in *Korea — Certain Paper*,[79] even suggest that the DSB of the WTO was willing to ignore facts and assume that, "members engage in dispute settlement in good faith,"[80] thereby making the threshold for determining good-faith extremely high.[81] The AB in *EC — Export Subsidies on Sugar* confirmed that the DSU does not limit WTO Member States' right to bring actions before the DSB, although Member States are obliged under Article 3.10 of the DSU to engage in dispute settlement procedures in good faith.[82]

Against this backdrop, it is quite impossible to ignore criticisms of the DSS, highlighting the WTO's violation of Article 3.7 of the DSU, which stipulates that "… [a] solution mutually acceptable to the parties to a dispute … is clearly to be preferred …".[83] From an RTA's point of view, the argument is that under the WTO's DSS, it is difficult to achieve a mutually acceptable solution in cases where a party disagrees with the WTO's jurisdiction to hear a case, especially where the issue in dispute is RTA-related and could potentially result in a different decision depending on which settlement forum is elected. Although members have the right to the choice of forum, there is a potential that the problem of multiplicity and/or duplicity of litigation may arise either at the same time or on appeal. Examples to consider are the *Mexico — Soft Drinks*,[84] and *US — Softwood Lumber*,[85] where the

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Kora — Certain Paper]; Panel Report, *China — Measures Affecting Imports of Automobile Parts*, WTO Doc. WT/DS339/R (adopted Jan. 12, 2009), upheld and as modified by Appellate Body Report, *China — Measures Affecting Imports of Automobile Parts*, WTO Doc. WT/DS339/AB/R (adopted Jan. 12, 2009).

[78] *See* Panel Report, Peru — Agricultural Products, *supra* note 77, at ¶ 5.28.

[79] *See* Appellate Body Report, *European Communities — Export Subsidies on Sugar*, WTO Doc. WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (adopted May 19, 2005) [hereinafter AB Report, EC — Export Subsidies on Sugar]; Panel Report, Korea — Certain Paper, *supra* note 77.

[80] *See* Panel Report, Korea — Certain Paper, *supra* note 77, at ¶ 6.97.

[81] Marceau, *supra* note 74.

[82] *See* AB Report, EC — Export Subsidies on Sugar, *supra* note 79, at ¶ 312.

[83] *See* WTO DSU, *supra* note 20, at art. 3.7.

[84] *See* Panel Report, Mexico — Taxes on Soft Drinks, *supra* note 68.

[85] *See* Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004); Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc. WT/DS264/AB/R (adopted Aug. 31, 2004).

issues in dispute involved conflicting laws and jurisdictions of the WTO, NAFTA, and the US national courts at concurrent and different levels of litigation.

According to Davey and Sapir, such situations result in a breach of both the RTA and WTO obligations as one bars or attempts to bar the other from exercising its DSM duties.[86] The implication of this, as Bown argues, is the inevitability of conflicting, inconsistent, fragmented, and unfavourable judicial outcomes, the effect of which is an increase in policy uncertainty, impeding the ability of domestic policymakers to craft trade regulations consistent with their international obligations.[87] The US, in particular, claims to have been the most affected by this. Little wonder, the USTR's 'Report on the Appellate Body of the World Trade Organization' accused the AB of acting beyond its powers and altering members' rights and obligations "in ways that American policymakers had never intended when they signed up to the WTO".[88] The report, while accusing the AB of engaging in *ultra vires* actions and *obiter dicta* in its rulings, complains of the members of the AB taking away the WTO Member State's rights and of imposing new obligations in a manner that American policymakers had not intended when they joined the WTO initially.[89]

The US, which has PTAs with several developing countries and LDCs such as Mexico, Peru, Guatemala, and Singapore, has often been caught in the WTO-RTA dispute settlement problem. Amongst other things, the powers of the US to influence dispute settlement processes through its RTA DSM, as it were during the Guatemala labour dispute under the Dominican Republic-Central America FTA (*US — Guatemala Labour Law Case*)[90] — have been seriously threatened by the

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[86] William Davey & André Sapir, *The Soft Drinks Case: The WTO and Regional Agreements*, 8(1) WORLD TRADE REV. 5, 23 (2009).

[87] Bown, *supra* note 66.

[88] OFFICE OF THE USTR, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (Feb., 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[89] Chad P. Bown & Soumaya Keynes, *Why Trump Shot the Sheriffs: The End of the WTO Dispute Settlement 1.0* (Peterson Inst. Int'l Econ., Working Paper No. 20-4, 2020) [hereinafter Bown & Keynes (a)]; Chad P. Bown & Soumaya Keynes, *Why Did Trump End the WTO's Appellate Body? Tariffs,* PETERSON INST. INT'L ECON., TRADE & INV.: POL'Y WATCH (Mar. 4, 2020), https://www.piie.com/blogs/trade-and-investment-policy-watch/why-did-trump-end-wtos-appellate-body-tariffs.

[90] In the Matter of Guatemala — Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report of the Panel (Dom. Rep.-Cent. Am-U.S. FTA Arbitral Panel, June 14, 2017), https://ustr.gov/sites/default/files/files/agreements/FTA/CAFTA-DR/Guatemala%20Final%20Report%20of%20the%20Panel.pdf [hereinafter US —

compulsory and automatic jurisdiction of the WTO's DSM and the enforceability powers of the AB decisions. For example, the powers of the US government under Section 201 of the US Trade Act, 1947, to negotiate trade terms such as the Voluntary Export Restraint (VER) arrangement with bilateral and regional trade partners and enforce the same under regional DSMs have been left dormant in the post-WTO era. Section 201 empowers the government to grant temporary import relief by raising import duties or imposing non-tariff barriers on goods that injure, or threaten to injure, domestic industries producing like goods.[91] Meanwhile, protection of its domestic markets has been the core of the US' international trade policies and negotiations for decades.

### *C. US Complaints before the DSB, and their Outcomes*

It should be noted that most complaints against the US have been about its protective measures against imports. The US has "been involved as a party in over 60% of all cases brought before Panels and the [AB]."[92] Of the 141 disputes where the US has appeared as a respondent between 1995 and 2017, 12% of the cases constitute issues of bilateral and regional concern.[93] Over time, developed and developing economies, which include the US' regional and bilateral trade partners such as South Korea, Chile, India, Canada, and the EU, have repeatedly and successfully challenged the US' use of safeguard measures.[94] For instance, South Korea filed a complaint against US tariffs on colour televisions and semiconductors, and the parties, following consultations, agreed to a solution (*US — Colour Televisions*).[95] In 2000 alone, the US suffered huge losses from the EU's WTO litigation against fourteen US countervailing duty orders on steel products (Appellate Body Report *US Countervailing Measures Concerning Certain EC Products*),[96] followed by the EU and Japan's actions, which led to the repeal of the US Antidumping Act of 1916.[97] Also, in 2003, the AB accorded retaliatory rights to

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Guatemala Labour Law]; *See generally* Gerda van Roozendaal, *The Diffusion of Labour Standards: The Case of the US and Guatemala*, 3(2) POL. & GOVERNANCE 18 (2015).

[91] U.S. Trade Act of 1974, § 201, 19 USC §§ 2101-2497b.

[92] Supachai Panitchpakdi, *The WTO After 10 Years: The Lessons Learned and the Challenges Ahead*, WTO NEWS (Mar. 11, 2005), https://www.wto.org/english/news_e/spsp_e/spsp35_e.htm.

[93] Bown & Keynes (a), *supra* note 89, at 12.

[94] *Id.* at 11.

[95] Request for Consultation by Korea, *United States — Anti-Dumping Duties on Imports of Colour Television Receivers from Korea*, WTO Doc. WT/DS89/1 (July 16, 1997).

[96] *See* Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WTO Doc. WT/DS212/AB/R (adopted Jan. 8, 2003).

[97] *See* Appellate Body Report, *United States — Anti-Dumping Act of 1916*, WTO Doc. WT/DS136/AB/R, WT/DS162/AB/R (adopted Sept. 26, 2000); and Panel Report, *United*

Brazil, Canada, Chile, the EU, India, Japan, Korea, and Mexico after ruling that the US Byrd Amendment "is an illegal response to dumping and subsidisation".[98] This 'unpleasant' experience explains why the US frowns at the DSM of WTO and has been instrumental in the *impasse* of the AB.

The US' argument is that the overreaching powers of the AB have, over the years, opened the floodgates for the WTO members to challenge the US' international trade policies, even on issues that could otherwise be consensually resolved on regional or bilateral platforms. Notably, the AB has ruled against the US on virtually every US application of a safeguard measure, even on imports of goods such as brooms.[99] This has been particularly frustrating for the US, whose 'contract-based' dispute settlement approach has provided the opportunity to resolve trade disputes with regional and bilateral partners in ways distinct from the WTO's approach to dispute settlement amongst Member States. In 1996, for example, Mexico complained to the WTO against US anti-dumping duty on Mexican tomatoes.[100] In 1998, Canada complained against the US safeguard measures on the import of Canadian cattle, swine, and grain,[101] and in 1999, it requested a Countervailing Duty Investigation against the US concerning live cattle.[102] The Canadian cases did not get past the consultation stage at the WTO's DSM as the disputing parties had reached a resolution based on their regional partnership.[103] In the case of Mexico, the US was able to reach a VER deal with Mexico before the WTO panel reached a judgement.

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*States — Anti-Dumping Act of 1916, Complaint by the European Communities*, WTO Doc. WT/DS136/R (adopted Sept. 26, 2000).

[98] Press Release, US Byrd Amendment – WTO Says Eight WTO Members May Retaliate Against the US – Joint Press Statement by Brazil, Canada, Chile, the EU, India, Japan, Korea, & Mexico (IP/04/1055) (Aug. 31, 2004), https://ec.europa.eu/commission/presscorner/detail/en/IP_04_1055.

[99] Bown & Keynes (a), *supra* note 89, at 11.

[100] *See* Request for Consultations by Mexico, *United States — Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico*, WTO Doc. WT/DS49/1/G/ADP/D2/1/G/L/90 (July 8, 1996) (It was settled before reaching the Panel stage).

[101] *See* Request for Consultations by Canada, *United States — Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WTO Doc. WT/DS144/1/G/L/260/G/SPS/W/90/G/TBT/D/18/G/AG/GEN/27 (Sept. 29, 1998).

[102] *See* Request for Join Consultations by Mexico, *United States — Countervailing Duty Investigation with respect to Live Cattle from Canada*, WTO Doc. WT/DS167/2 (Apr. 9, 1999).

[103] Press Release, Office of the USTR, USDA Announces Series of New Measures to Open Canadian Farm Markets (Dec. 4, 1998) (announcing an initial agreement between the United States [US] & Canada on removing trade restrictions on the trade of hogs, cattle, and wheat); Gantz, David A., *Dispute Settlement Under the NAFTA and the WTO: Choice of*

If nothing else, these examples portray the viability of the DSM of RTAs and suggest why it has always been the US' preferred tool to resolve trade disputes. The contention is that RTA DSM rules allow the disputing parties to resolve issues with little to no legal cost burdens, and very importantly, in time. The Canada and Mexico disputes, as aforementioned, were resolved through negotiations that lasted only a few months, compared to a WTO DSM, which witnessed the US government compensating Brazil with "$147 million annually for some years as it lacked the political will to comply with a ruling over its cotton subsidies".[104] Whether or not the DSM of RTAs accord respective parties the benefits and results that they had envisaged or wanted, is a separate subject for consideration. Nevertheless, it is conspicuous that dispute settlement in the former has allowed partners to resolve disputes without having to impose obligations or enforce rights. One can state, categorically, that the US is very particular about regaining control of its trade relationships through RTAs, which it was able to negotiate, and establishing its hegemony in both trade and geopolitics. This is especially true, as some of its safeguard measures (for which the AB had passed rulings that were 'unfavourable' to the US) predated the WTO, and the US had, before the introduction of the DSM at the WTO, managed to resolve ensuing disputes with trade partners.[105]

Arguably, it is the power of RTAs (under Article 24 of the GATT) to negotiate outside WTO terms that provided the US, under President Trump, with the opportunity to influence the *impasse* of the AB and regain control of trade disputes. The scheme is clear, while the US proceeded to negotiate and renegotiate regional and bilateral trade terms in its favour, it became imperative to cripple the WTO's DSM in such a way that the affected RTA trade partners were unable to approach the WTO for enforceable legal rulings. This position is demonstrated in the revised NAFTA and the US-Korea FTAs (KORUS FTAs), where Mexico, Canada, and South Korea, in the event of a trade dispute, will be unable to rely on enforceable judgments from the WTO and, as such, will have no choice but to settle for a regional or bilateral settlement mechanism. This will also affect other countries

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*Forum Opportunities and Risks for the NAFTA Parties*, 14(4) AM. UNIV. INT'L L. REV. 1025 (1999).

[104] Bown & Keynes (a), *supra* note 89, at 10.

[105] For examples of issues raised based on safeguard measures originating from §§ 202 & 203 of the U.S. Trade Act, 1974, see *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WTO Doc. WT/DS177/12 (Oct. 2, 2001) & *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/20 (Dec. 16, 2003). *See also* Steve Suppan, *NAFTA/WTO Conflict in Agricultural Trade*, INST. AGRI. & TRADE POL'Y (Apr. 3, 1996), https://www.iatp.org/documents/naftawto-conflict-agricultural-trade.

such as Argentina and Brazil, which had negotiated export quotas to avoid the US' 2018 tariff actions on steel and aluminium.[106]

Although some countries have initiated proceedings at the WTO and dispute settlement panels were set up between November 2018 and January 2019,[107] it is uncertain how enforceable and binding the Panel's ruling will be in the absence of a functional AB. This is because the WTO's DSM accords every Member State of the WTO with the opportunity to appeal a ruling of the Panel, and when the AB ceases to exist, such rulings may just be fated to end in limbo. To say the least, the renegotiation of NAFTA (which has been rebranded as USMCA), and KORUS FTAs, as influenced by the US has helped to bolster the narrative that some developing and least-developed Member States of the WTO may be willing to compromise on strict WTO rules while negotiating terms of an RTA. The implication of this preference is that the *impasse* at the WTO-DSB may lead to the formation of new RTAs, proliferating with renewed vigour and with a focus on finding an alternative to the WTO's DSM. It becomes imperative, therefore, to consider how the current *impasse* at the AB could negatively impact the WTO jurisprudence in general and the direct impact it can have on the developing country Member States, who rely on the multilateral trade body to steady their economies, in particular.

## IV. WHAT ARE THE IMPLICATIONS FOR DEVELOPING COUNTRIES AND LDCS?

As already noted, developing countries have, over time, preferred to settle trade disputes at the WTO level rather than opt for the RTA DSMs. At this juncture, the important question for consideration is whether the *impasse* at the DSB would provide developed countries with new opportunities to devise alternate ways to pressure developing countries and LDCs to follow strict, unfair trade rules and regulations through RTA-DSMs.

Answering in the affirmative, this is a possibility that cannot be easily discarded. Commenting on the disadvantage of RTA-DSMs, Karmakar argued that the emerging economies would be adversely affected to a great extent as they would lose the advantage of an equal voice and the ability to address domestic growth

[106] Simon Lester & Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST. POL'Y ANALYSIS NO. 874 (2019).
[107] Simon Lester, *Panels Composed in the Section 232/Retaliation Cases*, INT'L ECON. L. & POL'Y BLOG (Jan. 28, 2019), https://ielp.worldtradelaw.net/2019/01/panels-composed-in-the-section-232retaliation-cases.html.

concerns and sensitivities that the WTO's DSB offers.[108] For example, Articles 30 and 31 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) allow developing countries and LDCs some degree of flexibility to limit patent protection in the interest of the health concerns of their citizens, whereas US-led trade agreements are known for proposing stringent intellectual property protection.[109] As such, the power asymmetry modelled in US RTAs and their DSMs will neither be favourable nor be a fair option for developing countries and LDCs that are eager to partake in the trade agreements. The South African DG of the Department of Trade, Tshediso Matona, once remarked that:

> The US approach is not developmental …. When we engage in trade negotiations at the [WTO], we make the point that countries must open their economies to the extent that their economies are able to cope. We want to be able to phase in liberalisation, and exempt certain items. They [US] want free trade now and they want everything …. They have a template-based approach.[110]

Against this backdrop, it does suffice to say that, rather than truly fostering free trade, RTAs constructively make room for a managed trade regime in ways that dispute settlement may be designed to serve the special interests of protectionism that have long dominated trade policy in Western developed economies such as the US.[111] It is important, therefore, to construe this *impasse* as bearing "the risk of exacerbating the divergence between regional and WTO trade rules, [strengthening RTAs to] emerge as game changers in global trade governance."[112] It should be considered as nothing less than the US' strategy to bypass the WTO's consensus structure and rewrite the rules and principles of international trade in its favour but

[108] Suparna Karmakar, *Rulemaking in Super-RTAs: Implications for China and India* 9 (Bruegel Working Paper, No. 2014/03, 2014) [hereinafter Karmakar].
[109] *Id.* at 3-4.
[110] Michael Hamlyn, *US All-or-Nothing Position Derails Free Trade Talks*, BILATERALS ORG. (Nov. 16, 2006), https://www.bilaterals.org/?us-all-or-nothing-position-derails (Interestingly, in the post-Brexit trade negotiations between the US and the UK, President Trump is known to have commented that once there is a trade negotiation, everything must be on the table, *i.e.,* all sectors of a particular country are open for trade negotiation. This comment of the President was in response to a question if the UK's National Health Service [NHS] will be spared from the trade negotiations between the two countries).
[111] Joseph Stiglitz, *The Free-Trade Charade*, PROJECT SYNDICATE (July 4, 2013), http://www.project-syndicate.org/commentary/transatlantic-and-transpacific-free-trade-trouble-byjoseph-e--stiglitz.
[112] Karmakar, *supra* note 108, at 4.

to the detriment of developing and small economies.[113] As rightly noted by Lacarte-Muro (the first chair of the AB) and Gappah:

> The [AB] is an integral part of a rules-based, 'judicialized' [DSM] which ensures transparency and predictability. This system works for the advantage of all Members, but it especially gives security to the weaker Members who often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests.[114]

Due to the *impasse*, these rights and interests may become extinguished in RTAs "led by strong rule-oriented economies such as the US and the EU, which possess the necessary will and capability",[115] to enforce demands and concessions.

Acknowledging that hierarchy and power cannot be completely severed from international trade, the absence of a formidable WTO-DSB creates a platform for powerful trade partners to enforce their interests over a trade measure, to the detriment of their weaker counterparts.[116] According to Bown, this power asymmetry sometimes requires the weaker partners to "give up an increasing amount of their [trade] policy space,"[117] having negotiated unfavourable political concessions in reaction to threats of retaliatory sanctions.[118] This is achievable majorly because most RTAs adopt a diplomatic, power-oriented approach to dispute settlement.[119] To state it explicitly, RTA DSSs tend to foster the interests of developed countries because they employ their market power and economic strength as diplomatic leverage to negotiate and resolve trade disputes to their advantage over developing and small economies.[120] Whereas, the judicialized approach of the WTO-DSB provides a way to level the playing field by reasonably taking into consideration the economic problems and interests of emerging and small economies. Article 4.10 of the DSU states that "[d]uring consultations

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[113] Patrick A. Messerlin, *Keeping the WTO Busy while the Doha Round is Stuck*, VOXEU BLOG (July 29, 2012), http://www.voxeu.org/article/keeping-wto-busy-while-doha-round-stuck.
[114] Julio Lacarte-Muro & Petina Gappa, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 3(3) J. INT'L ECON. L. 395, 400 (2000).
[115] Karmakar, *supra* note 108, at 10-11.
[116] Heribert Dieter, *The Multilateral Trading System and Preferential Trade Agreements: Can the Negative Effects Be Minimized?* 15(3) GLOB. GOVERNANCE 393, 398 (2009).
[117] Bown, *supra* note 66, at 5.
[118] James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 148 (2000).
[119] JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 277, 278 (2000).
[120] James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421, 446 (2011) [hereinafter Gathii].

Members should give special attention to the particular problems and interests of developing country Members".[121] For example, Article 24 of the DSU states:

> At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving [an LDC] Member, particular consideration shall be given to the special situation of [LDC] Members . . . . Members shall exercise due restraint in raising matters under these procedures involving [an LDC] Member. If nullification or impairment is found to result from a measure taken by [an LDC] Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.[122]

What the third-party jurisdiction and procedures of the WTO-DSB offer for developing and emerging-economy Member States is the possibility of prevailing in trade disputes against developed economies on predatory and alike trade issues,[123] increasing the likelihood to gain better outcomes.[124] This advantage to developing countries and LDCs is what is now on the brink of extinction. Although Froese has argued that RTA-DSMs exist primarily to instil confidence in the durability of RTAs and to protect against the potentiality of conflict on issues concerning WTO-plus/extra,[125] the likelihood of LDCs losing their WTO-accorded advantages cannot be overlooked.

It is common knowledge that the WTO's commitment to LDCs, which allows the latter some level of flexibility in complying with WTO trade rules,[126] confers substantial advantages. This flexibility, which includes granting LDCs "a number of exemptions from various trade policy demands and extensions for implementing certain trade policy reforms",[127] is a 'generous' leeway that accounts for the non-

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[121] WTO DSU, *supra* note 20, at art. 4.10.
[122] *Id.* at art. 24.
[123] Peter Drahos, *Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution*, 41 J. WORLD TRADE 191, 193 (2007).
[124] Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, *in* NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 220 (John S. Odell ed., 2006).
[125] Marc D. Froese, *Regional Trade Agreements and the Paradox of Dispute Settlement*, 11 MANCHESTER J. INT'L ECON. L. 367, 385 (2014).
[126] Amitendu Palit, *Mega-RTAs and LDCs: Trade is not for the Poor*, 58 GEOFORUM 23, 25 (2015).
[127] Stefan De Vylder et al., *The Least Developed Countries and World Trade*, SIDA STUD. NO. 5 (2007), https://cdn.sida.se/publications/files/sida986en-the-least-developed-countries-and-world-trade.pdf.

participation of LDCs in WTO dispute settlement. In effect, LDCs are less bound by WTO rules and regulations compared to developing and developed countries. The WTO dispute settlement records show that, till date, no trade dispute has been initiated against an LDC at the WTO-DSB.[128] The trend suggests that LDCs have had no problems with international trade disputes, at least up to the levels of protection constituted by the WTO.[129] However, it cannot be conclusively said that the situation would remain unchanged.

With the *impasse* at the WTO-DSB, a possible effect would be a loss of the advantages that have been made available under the WTO flexibility-construct. The implication is that LDCs may become unable to enforce certain rights, such as market access, against protectionist practises by developed economies. What is reasonably foreseeable is a plunge into an era where LDCs may start engaging in trade disputes on issues they would normally not. This proposition is based on the premise that some developed countries may take undue advantage of the *impasse* to rid LDCs of the trade-rules flexibilities accorded by the WTO. For instance, the US and EU-led mega-RTAs that have never been able to enforce WTO-plus/extra provisions before the WTO's DSB,[130] may demand strict compliance from LDCs irrespective of whether they are regional trade partners or not. Under such circumstances, LDCs may have no option but to succumb to unfavourable trade practises at the multilateral level, to the extent of possibly triggering further underdevelopment. LDCs that are members of mega-RTAs are alike and may be able to negotiate certain trade concessions based on diplomatic ties or political-economic considerations even though the trade rules could be predatory. A perfect example of such concessions would be to allow dumping in exchange for FDIs. However, it remains that no matter the level of gains accrued under FDIs, they still cannot substantiate the degree of loss and damage that dumping would cause to an emerging and/or striving domestic market. To say the least, it is the LDCs that don't make it into mega-RTAs that would be completely disadvantaged, especially on WTO-plus/extra provisions. Little wonder, Mike Moore and Peter Sutherland (former DGs of the WTO) posited that, "[r]egionalism must never be seen as a substitute for the multilateral system. Because we know that the ones who will miss out the most from regional and bilateral agreements will be the smallest, the most

[128] WTO, WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES 1995–2020 (2021), https://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2020_e.pdf.
[129] *See* Sharmin Tania, *Least Developed Countries in the WTO Dispute Settlement System*, 60 NETH. INT'L L. REV. 375 (2013); Hunter Nottage, *Commonwealth Small States and Least Developed Countries in the WTO Dispute Settlement System* (Commonwealth Trade Pol'y Discussion Papers 2014/02, 2014).
[130] Bown, *supra* note 66; *See also* Henrik Horn et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33(11) WORLD ECON. 1565 (2010).

vulnerable, and the poorest";[131] and that "[e]veryone has an interest in the continued success of the WTO as an institution, but no group has a greater interest than the weak and the poor."[132]

## V. CONCLUSION

From the discussions above, it is clear that the US (as the economic and political pillar of a substantial number of viable RTAs) has justified the *impasse* of the AB by expressing a lack of faith in the WTO's DSS, criticising the twenty-seven-year-old organisation as one that cannot be completely relied upon for fairness and justice. There are two sides to the lack of faith in the WTO's DSM, *viz.,* i) either because the politico-economic system of an RTA's DSM is viewed as a better alternative as it results in the consensual settlement of trade disputes in comparison to the strict rules-based system of the WTO, or ii) because a declaration of loss-of-faith in the WTO's DSM is a golden opportunity to decapitate the legal powers of the WTO and return substantial powers to the RTA DSM. The second reason is more speculative, as any continuing *impasse* in the AB could gradually weaken the foundations of the multilateral trading system.

Either way, the efforts of the US leading to the *impasse* of the WTO's AB have not only potentially crippled what Panitchpakdi characterises as the most formidable legal institution in international law,[133] but have also unveiled the powers of developed countries to control world institutions by taking advantage of the proliferation of RTAs. Without mincing words, the US may have just handed RTAs the incontestable powers to take charge of trade disputes internally. Accordingly, it does make sense to construe the *impasse* at the DSB of the WTO as an attempt "to replace the rule of law in trade with the rule of power."[134] In as much as the WTO-DSB seeks to protect its economically frail members, it is impossible to overlook how the proliferation of RTAs and their alternative DSM (with the help of developed countries such as the US) endanger developing and least-developed economies. It is, therefore, of utmost importance that the AB be restored as soon as possible, the failure of which could mean the collapse of trade multilateralism. As a result, countries may have to look for solutions within RTAs,

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[131] Mike Moore, WTO/FORSEC Trade Policy Course for Pacific Island Countries, WTO (Mar. 5-9, 2001), https://www.wto.org/english/news_e/news01_e/fiji_e.htm.

[132] Peter Sutherland et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium,* WTO (2004), https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

[133] Supachai Panitchpakdi, *The WTO at Ten: Building on Ten Years of Achievements*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 8 (Giorgio Sacerdoti et al. eds., 2006).

[134] Jonathan Josephs, *WTO Chief: 'Months' Needed to Fix Disputes Body*, BBC NEWS (Dec. 10, 2019), https://www.bbc.co.uk/news/business-50736344.

which, in most cases, are not likely to be in the best interests of small economies. This approach could pave the way for a new *laissez-faire* approach to global trade. The potential effect would see trade dispute settlement return to the norm, as it were in the pre-1994 GATT system, thereby diminishing the value of the neoliberal economic order which the WTO has fostered for over two decades. Consequently, small economies (Rwanda, for example), whose confidence in neoliberalism has influenced their economic reforms,[135] are likely to lose faith in the viability of international institutions promulgated by the western world.

The current *impasse* also raises a much broader question: *what measures of reform are required to get the WTO-DSB fully functional again?* In all considerations for reforms, it is imperative that the rules of the AB be reformed in such a fashion that it is no longer possible for a Member State, through unilateral actions, to stymie the functionality of its DSM, disregarding the authority of the WTO to adjudicate upon legal disputes. For such a process to begin, it requires the cooperation of the Member States of the WTO, a clearer vision, the return of liberalism — which was instrumental in the creation of the GATT (and later, the WTO) — a change in leadership, and the abandonment of the 'beggar thy neighbour' policy.

[135] Gathii, *supra* note 120.