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ABSTRACT

The 'crown jewel' of the World Trade Organization (WTO) — the dispute resolution mechanism — is facing a crisis. The US obstruction to new appointments in the WTO's Appellate Body (AB) has frozen the appeals process and brought the mechanism to a halt. Until such crisis is resolved, New Delhi will need to explore other means for resolving its current and future trade disputes. This paper outlines interim solutions that India can employ in the absence of a recourse to a functional AB. It evaluates these options against qualitative parameters that are key to a successful dispute resolution mechanism and which can enable India to defend its priorities as a developing country.

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INTRODUCTION

In the past four years, the United States (US) has been posing obstructions to new appointments to the Appellate Body (AB) of the World Trade Organization (WTO). Washington has frequently criticised the AB's functioning, alleging "judicial overreach"—which it believes has resulted in unfavourable rulings for the US in its trade disputes. Such obstruction has caused the appeals process to cease functioning, bringing the dispute resolution mechanism—WTO's 'crown jewel'—to a halt. Pending appeals in trade disputes will no longer be heard, while the resolution of future trade disputes can be blocked indefinitely by simply appealing "into the void".[1] The AB crisis could not have come at a more difficult time, amidst disruptions in the global supply chains as the COVID-19 pandemic has forced countries to impose comprehensive export bans and restrictions. There is potential for more trade disputes to arise in the future.

India has three pending appeals before the WTO,[2] with the US and Japan; it is also facing new complaints from other countries like Brazil (See Annex). Out of 56 disputes involving India since 1995, the country has appealed or cross-appealed rulings in 12.[3] Most of India's appeals—as either complainant or respondent—have been in cases with the US (See Annex). This underscores the importance of the appellate mechanism for India, reliant as it is on the rules-based trading system to settle intractable disputes with major trading partners.

Given the impartial and rules-oriented nature of the WTO's dispute settlement system (WTO DSS), and its role in ensuring the stability and predictability of the trading system, India strongly supports it[4] and has put forth proposals to address the issues raised

by the US.[5] Until the crisis is resolved, however, New Delhi must explore other ways of resolving its trade disputes, both the current ones and any others that may be forthcoming. After all, unresolved trade disputes can lead to the imposition of unilateral trade sanctions and frustrate harmonious relations between countries. It is imperative to find other avenues for dispute resolution to avoid the possibility of trade disputes escalating to political conflicts and, consequently, damaging exporters, businesses and industries.

This paper seeks to outline interim solutions that India should explore to resolve its trade disputes, without a functional AB. These solutions are 'interim', in keeping with the Indian government's official position of working on the revival of the AB. The paper evaluates these options against key parameters for a successful dispute resolution mechanism and which can enable India to defend its priorities as a developing country. It determines which solutions and options would be most favourable to India.

INTERIM SOLUTIONS TO RESOLVE TRADE DISPUTES: DISCUSSION AND EVALUATION

In WTO parlance, a 'trade dispute' arises when one country claims that another is violating a trade agreement or commitment. These disputes can include, imposition of tariffs or anti-dumping duties, and violation of basic principles such as most-favoured-nation treatment. The WTO DSS contains a mix of diplomatic and adjudicative methods to resolve disputes. The process comprises three phases: consultations (bilateral negotiations); adjudication (panel and appellate body proceedings); and implementation (including countermeasures). The rules and procedures for each stage are detailed under WTO's Dispute Settlement Understanding (DSU). The current incapacity of

the AB affects the second leg of the adjudication process (appeals) at the WTO DSS.

A benefit of adjudication is that it promises familiarity, binding outcomes, an enforcement mechanism, and consistent rules for future behaviour.[6] The involvement of a neutral third party to adjudicate disputes preserves impartiality, and the seriousness and finality of the process can provide a permanent solution to a dispute. At the same time, the DSS is criticised for being costly, too "legalistic" in its interpretation of obligations (without, say, accommodating developing country interests) and lengthy. There are also concerns that the contentious and adversarial nature of adjudication can heighten hostilities between nations.

A successful dispute resolution mechanism, in its institutional capacity, should be above power politics, transparent, impartial, accessible, cost-friendly and provide effective means of implementation. While these characteristics are closer to the advantages associated with judicial methods, the unique nature of international disputes calls for the need to evaluate two other characteristics— flexibility and confidentiality. India can benefit from mechanisms that are flexible, which allow it to protect its concerns as a developing country.[7]

To differentiate and evaluate various 'interim' options, this paper adopts nine qualitative parameters as an analysis toolkit. This methodology helps identify the strengths and weaknesses of each option, and provides a framework to assess their suitability to India. The parameters include qualities associated with adjudication (existence and impartiality), as well as those found in diplomatic methods of dispute resolution (such as flexibility and confidentiality).

(See Table 1) Each of these qualities are desirable to the international dispute resolution processes and can benefit parties, depending on the nature of dispute.

Table 1: Defining parameters to evaluate Interim Solutions

Parameter	Definition
Existence	Whether the mechanism is permanent or ad hoc.
Legally Binding	Whether the outcome is legally binding on parties.
Impartiality	Objectivity of process, and absence of prejudice towards one or more parties. Should not be susceptible to power politics.
Political significance	Importance ascribed to mechanism by governments, which directly or indirectly indicates the sustainability of the system and the solutions arising from it.
Transparency	Openness in the mechanism that gives public and other stakeholders access to proceedings and relevant documents. This allows for accountability and assurance that representatives are faithfully representing the interests of their constituencies.
Flexibility	Includes procedural flexibility, i.e. freedom to adopt procedure that both parties agree to, and negotiation flexibility, which refers to any action taken to facilitate movement towards a mutually acceptable agreement.
Confidentiality	Discussions take place in a discrete manner, and contents of documents are not disclosed to the public and cannot be used as evidence in legal proceedings.
Cost	These include costs incurred towards participating in the mechanism and proceedings; for instance, for developing countries the costs are steep for hiring private legal counsels for WTO disputes.
Implementation	Mechanisms to monitor implementation of outcome, and hold parties accountable to their commitments.

Source: Adapted from Greenpeace International, Adelphi Research, Friends of the Earth Europe, "Is the WTO the only way?", Briefing paper, October 1, 2005, https://www.foeeurope.org/sites/default/files/publications/is_the_wto_the_only_way.pdf.

Part I: Interim Solutions within the WTO

a. Article 5 of the Dispute Settlement Understanding: good offices, conciliation and mediation

Under Article 5 of the WTO's Dispute Settlement Understanding (DSU), parties can agree to voluntarily undertake "good offices, conciliation or mediation" to resolve trade disputes. These options can be invoked "at any time" — even when adjudication is ongoing at the WTO. This aligns with the spirit of Article 3.7 of the DSU, which provides that "[a] solution mutually acceptable to the parties to a dispute" is preferred. In line with this, the inclusion of this provision indicates the drafters' desire to promote negotiated solutions over adjudicative ones.[8]

Each of these terms refers to different mechanisms. "Good offices" normally consist of providing logistical support to help the parties negotiate in a productive atmosphere. "Conciliation and mediation" involves the direct participation of a neutral third party in the discussions and negotiations. In conciliation, the third party facilitates fact-finding and enquiry; in mediation, the third party plays a more active role and contributes to the discussions, and may even propose solutions to the parties.[9] On the question of a neutral third party, the DSU suggests the WTO Director General (WTO DG) may offer good offices, conciliation or mediation with a view to assisting Members to settle their dispute.[10] The proceedings under this provision are confidential, and do not result in legal conclusions but help in reaching an agreement.

In practice, Article 5 has never been formally invoked; indirectly, it has been used in two cases (See Table 2).

Table 2: Article 5 of the Dispute Settlement Understanding in practice

Type of Process	Description
Mediation: in case of *EC- Tuna* in 2002 by complaint of Philippines and Thailand	In EC-Tuna, the Deputy Director General was nominated to mediate the dispute. The conclusions of the mediation were confidential, however there were indications that the mediation reached an amicable outcome based on the advisory opinion of the mediator.[11]
Good offices: Requested *separately* by Colombia and Panama in EU-Bananas dispute in 2007	In EC-bananas, the dispute concerned importation regime for bananas implemented by the European Communities. When good offices was requested, the first attempt was not successful. However, a second attempt led to a positive solution between parties. The good offices consultation was completed by 2003 and resulted in a mutually agreed solution.[12]

Source: Authors' own

Given the lack of practice of invoking Article 5, a 2001 communication from the WTO DG clarifies its procedure on requests, logistics and the role of the DG.[13] The WTO DG (or a Deputy DG, if assigned) acts in their *ex officio* capacity to provide good offices, mediation and conciliation—implying that they will handle proceedings directly. The DG recommended that members should attempt to settle disputes as often as possible without resort to panel and Appellate Body procedures. Communications from Jordan and Paraguay have also advocated for making Article 5 mandatory — as this is a less costly method for developing countries and LDCs which are unable to bear the high cost of adjudication.[14]

Similar to negotiations, these methods can help parties settle their dispute in a more flexible, expeditious, confidential and less costly manner. The voluntary, non-binding and informal character of the proceedings ensure control by the parties over the dispute and focus on mutually beneficial solutions that strengthen relationships among the parties.[15]

Out of the three mechanisms, mediation, according to analysts, can be an important intermediate stage in dispute resolution.[16] Usually, parties move directly from consultations (bilateral negotiations) to adjudication. Here, mediation can be an intermediate stage – via the involvement of a neutral third party to defend trade interests. Developing countries also believe that mediation can help accommodate core development and equity concerns. WTO members like Paraguay, Haiti and Jordan have proposed making mediation mandatory in disputes involving developing or least developing countries.[17] There have also been proposals to institutionalise the process in the WTO and introduce the service of professional mediators who employ alternative dispute resolution techniques.

Susskind and Babbitt,[18] in their research paper on mediation, provide an overview of factors that can lead to an effective mediation process, or else impede it (See Table 3).

Table 3: Factors that can affect the mediation process

Factors contributing to effective mediation	Obstacles to effective mediation
Parties must realise that they are unlikely to get what they want through unilateral action	Obstacles arising from one party: can include misinterpreting interests, miscalculating interests, and domestic forces that can shape a government's stand
Alternatives to agreement must involve unacceptable economic or political costs	Obstacles on relationship between the disputants, where one or both get caught in escalation traps
Government representatives must have sufficient authority to speak for their countries and to commit to a course of action	Obstacles related to mediation effort, such as when "timing" is appropriate for settlement
The Mediator must be acceptable to all sides	

Source: Compiled from Lawrence Susskind and Eileen Babbitt, "Overcoming the obstacles to effective mediation of international disputes", in Mediation in International Relations Multiple Approaches to Conflict Management, ed. Jacob Bercovitch and Jeffrey Z. Rubin (New York: Palgrave Macmillan, 1992): 30-51.

A problematic aspect of this mechanism is the role given to the WTO DG to act as the neutral third party in the disputes. While the WTO DG is supposed to be impartial and neutral, analysts have argued that successive WTO DGs have historically shown a bias against the global South and have explicitly aligned with the US on a number of issues.[19] Since the previous WTO DG Robert Azevêdo resigned in May 2020, this important posting remains vacant until a new appointment is announced. With a new election underway, discussions are rife on the immense responsibility facing the future head of the organisation. The new WTO DG has to steer the organisation through the ongoing AB crisis and a world economy reeling under the COVID-19 pandemic, and they must also be a candidate who is agreeable to both the US and China.

In such a case—and with limited material available on Article 5 practice—it is difficult to ascertain if the WTO DG could fulfil its role as a neutral third party in disputes involving major powers. This is particularly relevant for India, since majority of its disputes involve the US or the EU (37 out of 56). The Article 5 procedure may be a viable option for India with regards to its disputes involving smaller countries, but not for those with major powers such as the US, EU or even China. In this context, recommendations to introduce the service of professional mediators (not associated with the WTO secretariat) can be proposed by New Delhi before the WTO. This can formalise the process and allow India to approach it to resolve trade disputes with major partners.

Article 5 in practice has hardly been invoked, and India has itself never opted for it. There are various factors for successfully conducting good offices, conciliation and mediation. It is argued that the greater the direct involvement of the opposing parties in the process of finding a solution to their differences, the greater the likelihood of a satisfactory and lasting outcome.[20] On the other hand, an amicable settlement is possible only when both parties are interested in a rapid resolution of dispute. Today, as the post of the WTO DG remains vacant, this option remains unviable.

b. Agreement to not appeal Panel reports

In March 2019, Indonesia and Vietnam entered into an understanding regarding a dispute on Indonesia's safeguard duties on iron and steel products.[21] They agreed that in the absence of a functioning Appellate Body the panel report (the first stage of adjudication at the WTO) would not be appealed, and will be considered as binding.[22] South Korea and the US have made a

similar "no appeal arrangement" concerning their dispute on anti-dumping measures on oil country tubular goods from Korea.[23] If such a mechanism is agreeable to countries, "no appeal arrangements" could be employed on a larger scale and agreed to in advance by multiple member states.[24] This method can be particularly suitable for disputes that rely on legal clarification and interpretation of WTO rules and obligations. Further, if the US is willing to enter into such agreements, this will increase the relevance and political significance of the mechanism for India.

A benefit here is that it preserves a members' right to all the facilities and procedures of the WTO DSS, i.e. consultations, panel proceedings and implementation. A dispute will be decided in a familiar setting, within the framework of WTO agreements, rules and regulations – thereby preserving the impartiality of the system. The parties would have recourse to implementation and monitoring of decisions, as well as fair procedures during the course of the dispute. Developing countries, like India, will be entitled to benefits under special and differential treatment, as well as legal assistance from the Advisory Centre on WTO Law (ACWL). A negative aspect of this method is that the 'no appeal' provision means panel decisions will be binding, regardless of the outcome. There is little incentive for the defendant to enter into such an agreement. If the complainant loses, the measure stays; if the defendant loses, it has no option to file for an appeal.[25]

How many countries would be willing to adopt and adhere to panel reports? McDougall, an independent trade law expert, argues that the "no appeal agreement" overlooks the issue posed by implementing bad panel reports. Panel proceedings are the first stage of the WTO's adjudicative process. Statistics show that between

1995-2018, nearly two-thirds (67 percent) of all panel reports were appealed.[26] India's own statistics are lower: it has appealed or cross-appealed panel reports in only 21 percent of its disputes (12 out of 56) since 1995.

To be sure, over the years, certain issues have been highlighted with reference to panel proceedings. Panelists are mostly low- or mid-level trade officials or retired officials; many are not lawyers and few have trial advocacy experience. [27] Therefore, the legal advisers at the WTO Secretariat remain crucial in providing research support, orienting panel reports and motivating them through extensive reasons and citations of authority. Transparency is lacking in this process, and many feel that the panelists do not have sufficient independence from the WTO insider community.[28] In this regard, the appellate mechanism acts to check and balance the legal questions and reasoning adopted in panel proceedings.[29]

While this method retains the benefits of implementation and legally binding outcomes, this mechanism could still be costly and lengthy as opposed to other alternatives. It also reduces flexibility for parties in terms of outcomes to dispute settlement — which can be all the more worrying if the panel has erred in interpreting the law. The dispute resolution process could be unsatisfactory for the losing party, if it believes that it has been wronged on legal grounds and reasoning. Moreover, this system will reverse the DSS to the pre-WTO era of dispute settlement, as it existed under the 1947 General Agreement on Tariffs and Trade (1947 GATT). Under the 1947 GATT system, there was no right to appeal—a factor which discouraged many to approach the mechanism to resolve trade disputes. While the WTO DSS has received close to 600 disputes, the 1947 GATT in its 48 years of existence received only 127 complaints, out of

which merely three cases involved India.[30] Without the appellate process, India would be unable to appeal adverse panel rulings, as it has frequently done so in its disputes (See Annex). Further, with three pending appeals and several ongoing disputes,[a] it may not be beneficial for India to forgo the appeals process and enter such arrangements.

c. Separate system for trade remedy appeals

Trade remedy measures are defence tools that governments of a WTO member can employ when unfair trade practices or sudden import surges cause or threaten to cause material injury to their domestic industry.[b]

It has been argued that many of the concerns of the US are based on the approaches employed by the AB in adjudicating trade remedy disputes, particularly involving the US.[31] Some of these concerns appear cogent. The standard of review envisioned for trade remedy disputes in the WTO is substantively different from other disputes. For instance, the Anti-Dumping Agreement provides for a different standard of review under Article 17. Such a standard requires the WTO Panels to give deference to the domestic authority's evaluation, if the text of the agreement "permits" of such an interpretation, even if other interpretations are possible. Further, Article 17.5 provides that if the domestic authority's evaluation is unbiased and objective,

a India is a respondent in seven complaints instituted in 2019.

b These include anti-dumping measures, anti-subsidy or countervailing measures and safeguard measures. The WTO disciplines on these measures are contained in three separate Annex 1 A agreements, read with Articles VI, XVI and XIX of the GATT 1994.

and involves a proper establishment of the facts, such an evaluation is not to be overturned (even though the Panel might have reasoned differently).[32]

Despite the unique standard of review (which provides less latitude to even the Panels in making their factual analysis), the Appellate Body allegedly assumed the role of reviewing (and overturning) the decisions of the investigating authorities. For instance, in a series of cases, the AB has struck down the practice of "zeroing" employed by the US administrative authority in determining dumping. American trade remedy lawyer, Terrence P. Stewart, has estimated that the WTO issued nearly five times the number of trade remedy decisions against the US than against any other Member.[33] Stewart argues that the WTO's present approach threatens the US trade remedy system and may erode confidence in the WTO.[34] This concern has resonated with those expressed by many other academics and trade remedy lawyers.

In the above backdrop and due to continued US disengagement in resolving the crisis, experts are suggesting the creation of a different mechanism altogether for trade remedy appeals. Such an approach would involve creating a separate AB for trade remedy appeals or bifurcating the current AB into two—one for trade remedy disputes and the other for non-trade. Former AB Member, Prof. Jennifer Hillman has suggested this approach as a possible alternative ("the rules appellate body"), using two reasons. First, it would divide the workload between the two appellate bodies and ensure adherence to the 90-day timelines for deciding on appeals (particularly given that trade remedy cases in the WTO almost constitute half of all cases). Second, such an Appellate Body could be supplemented with individuals (and even additional Members) having a strong

background in trade remedy law. This is likely to make the entire review process more reliable, effective and expeditious.

Overall, a separate AB for trade remedy cases has emerged as a possible alternative, mainly as a last bet by countries to save the multilateral trading system, by persuading the US, that continues to disengage on this issue. Ironically, it is being proposed by strict advocates of the current appellate system, who would not have raised such a proposal had the US engaged. Therefore, in some ways, it is a measure of last resort. Not only would this approach fragment the appellate system and raise complexities because of overlapping subject matters,[35] it also entails the complex and painfully elongated process of amending the Dispute Settlement Understanding. Moreover, this approach falls short of addressing the entirety of US concerns.

In addition to the specific challenges and problems this option poses, it also carries the risk of fragmenting the multilateral trading system, beyond repair. The eminent international trade law scholar, late Prof. John H. Jackson has noted, "important as the economic result of the international trade obligations are, the political results are equally important. For example, will the system help nations resolve the disputes more peacefully than in the past?"[36] Considered from this angle , this option raises certain challenges, as they existed during the 1947 GATT era.[37]

The WTO Dispute Settlement System is considered as one of the most sophisticated dispute settlement systems in international law. It will require major compromises by its advocates to negotiate any solution which risks fragmenting the system. While the option may seemingly address certain US

concerns, its efficacy depends upon a complex series of multilateral negotiations, and relentless efforts towards achieving a consensus based on a single undertaking, while addressing each Member's concerns – a process which has remained rather elusive. Therefore, this alternative may not be the most pragmatic one in the present scenario.

d. Multi-Party Interim Arbitration Agreement: Arbitration under Article 25

This alternative is based on an interim arrangement entered into by 16 WTO Members including the European Union.[38] It came into force on 8 April 2020 and replaces the AB for the signatories while it remains inoperative. The arrangement involves reviewing panel findings through arbitration by mutual consent of Members under Article 25 of the Dispute Settlement Understanding. The MPIA Arrangement provides for "agreed procedures for arbitration under Article 25" and requires that the arbitration may only be initiated if the Appellate Body is unable to hear an appeal, a situation which would be deemed to arise if there are fewer than three Members.

Despite the intent of the Participating Members to keep this mechanism close to the WTO Panel and Appellate Body Structure, there are a few differences. First, certain adjustments have to be made in the Panel procedure to facilitate the administration of the appeals procedure. For instance, under the MPIA, the Panel Reports cannot technically be adopted by the Dispute Settlement Body if a review (here, appeal) is to be conducted under Article 25 by the Arbitration Panel. This is largely because initiation of an arbitration under Article 25 cannot by itself suspend the adoption of a panel report. Therefore, to technically facilitate arbitration under Article 25 as an appeal, the complainant party would be required to suspend

the panel proceedings under DSU Article 12.12, which implies that the panel report would not be adopted as usual.[39] Thus, for every panel report to be appealed under the MPIA mechanism, parties will have to go through this technical formality repeatedly.[c] Second, the support structure under the MPIA would be different from the WTO secretariat, as the costs would accrue only to the signatories. The individuals and support staff working under the MPIA would be answerable only to the appeal arbitrators.

Another difference is the ad-hoc nature of the mechanism. It permits parties to depart from the procedures provided in the agreement in any particular dispute by mutual agreement. Additionally, regarding monitoring and compliance procedures, while the rules provide that arbitration awards under Article 25 can be subject to the surveillance of the DSB (DSU Articles 21 and 22 apply *mutatis mutandis*[d]), it is not clear what recourse the DSB would exercise to enforce an unadopted panel report/arbitration appeal.

The MPIA mechanism is likely to be based on the substantive and procedural aspects of Appellate Review under Article 17 of the DSU with all its core features including impartiality and independence, and would even include timely disposal of appeals. At the same time, it would involve added costs for the participating states, which will be a huge burden for developing countries. Moreover, the developing

c The relevance of this technicality is only normative.

d Mutatis mutandis is the latin phrase used to compare two or more things to convey that although changes will be necessary in order to take account of different situations, the basic point remains the same. "Mutatis Mutandis", Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/mutatis-mutandis.

countries would not be able to avail the services of the Advisory Centre for WTO Law (ACWL), which provides its advisory and support services to developing countries and LDCs exclusively on WTO-related matters.

While many developing countries such as China, Brazil, Mexico, Colombia, Guatemala are parties to the MPIA, India is not. In this context, it may be noted that India was part of the proposal in 2018 to reform the AB.[40] Practical, strategic and ideological factors explain India's absence from the MPIA. First, as already pointed out, some of the most significant trade disputes of India are with the US and therefore, India's participation in the MPIA would only result in partial gains.[41] Second, and most important, despite the MPIA signatories' insistence on saving the AB, the interim arrangement runs the risk of rendering it dormant and eventually infructuous. The former AB Member Jennifer Hillman calls the MPIA alternative "bad", which would amount to "giving up the Appellate Body".[42] India has been a staunch advocate of multilateralism and as such, apprehensions over a defunct AB going into permanent exile is of serious concern.[43]

The first appeal to go into limbo was filed in December 2019 by the US, in its dispute with India. Another of India's disputes (GSP) may soon be brought before the AB, again in limbo. Therefore, while India is already facing the brunt of a dysfunctional AB, the MPIA alternative may not be of much practical value to India.

Part II: Interim solutions outside the WTO

a. Bilateral negotiations

Negotiations can help guarantee the following: [44]

- Flexibility of the procedures;
- Control over the dispute by the parties;
- Classified nature allows for free and honest discussion;
- Freedom to accept or reject a proposed settlement;
- Avoiding 'winner-loser-situations' with their repercussions on the prestige of the parties; and
- Limited influence of legal considerations [45] which allows for inclusion of political, social, environmental and ethical interests.[46]

Transparency and openness is usually not associated with negotiations; yet opacity can in turn fuel speculation and attract publicity, and diminish the government's freedom and flexibility in decision-making. Publicity mobilises different constituencies who may oppose the trade deal on economic or ideological grounds,[47] expose negotiators to critique and compel them to behave in a manner to please the crowds.[48] With an audience, representatives have a greater incentive to 'posture' by adopting uncompromising bargaining positions and may be reluctant to retreat from initial claims.[49] This can restrict the negotiating space and lead to breakdown of talks. For instance, New Delhi's withdrawal from the Regional

Comprehensive Economic Partnership (RCEP)—a mega regional trade deal—came in the backdrop of widespread criticism from small manufacturers and farmers, who opposed India's participation in the agreement.[e]

There are other risks inherent in negotiations. Bilateral ad hoc solutions often reflect the relative power of the countries, rather than the merits of their case. Much depends on the readiness and goodwill of the parties and the kind of bargaining strategies that they may use. For instance, the US used different bargaining strategies in its disputes on similar products (automobiles and autoparts) vis-à-vis Japan and South Korea. These were termed as "value claiming" and "value creating" strategies, respectively.[50] While "value claiming" strategies comprised public threats, frequent deadlocks and did not result in a durable agreement, "value creating" strategies were more integrative, avoided threats and led to mutually beneficial outcomes. In other words, the hardline approach taken by the US with Japan was due to pressure from domestic constituents.

As such, Freidl Weiss argues that diplomatic solutions are often "puzzling, fragmented, flawed, full of loopholes, and difficult to understand, respect and obey".[51] For instance, bilateral trade deals can be difficult to monitor and implement. On 15 January 2020, the US and China entered into a phase one trade deal to resolve their outstanding trade disputes.[52] The deal — where China committed to buying US$200 billion worth of American goods and stamp out

e The Regional Comprehensive Economic Partnership (RCEP) is a proposed agreement between the member states of the Association of Southeast Asian Nations (ASEAN) and its free trade agreement (FTA) partners—Australia, China, Japan, New Zealand and South Korea.

intellectual property theft — seeks to set up a "Bilateral Evaluation and Dispute Resolution Arrangement" to ensure implementation of the agreement. It will receive and evaluate complaints, and includes an appeals process that can go to the offices of the US trade representative (USTR) and the vice premier of China. Since there is no involvement of an impartial third party, there is little to ensure the independence and objectivity of national trade representatives while examining disputes. If no consensus is reached, more tariffs will be put in place[53] — a move that can further escalate trade tensions.

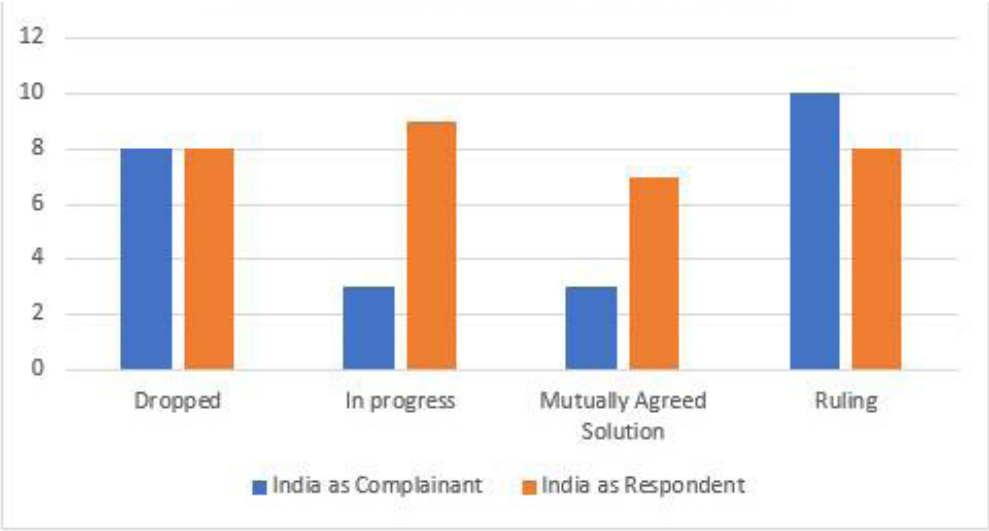
To be sure, the hybrid mechanism of the WTO dispute settlement has negotiations (in the form of consultations) as a part of the WTO DSS. As of December 2018, 40 percent of all WTO disputes were either settled or dropped at the consultation stage, while the rest proceeded to adjudication.[54] For India, out of 56 cases, the disputes went beyond the consultation stage in 22 cases.[55] (See Figure 1) Consultations have been useful in resolving India's disputes in *Argentina—Pharmaceuticals* (DS 171) and *India-Quantitative Restrictions*, where India arrived at mutually agreed solutions with Australia, Canada, New Zealand, Switzerland and the EC.[56]

However, given the confidential nature of these proceedings, there is little evidence, whether empirical or anecdotal, on how consultations operate and what their outcomes are. Further, with the option of litigation available to parties (especially the defendant who may be interested in keeping a dispute pending), consultations often remain artificial and formal, and are conducted in only two hours.[57] It is important to note that the option of consultations and negotiations are open to parties at any stage of the WTO DSS—even when a dispute has gone all the way to an appeal. Research points

out that diplomatic channels remain open (even when adjudication is ongoing) and legal recourse—between friends and adversaries alike—is opted for those cases where the dispute is intractable.[58]

For India to see where negotiations can be useful, it would be important to consider factors such as state of bilateral relations, the complexity of the dispute, the size of the economy, the importance of the market and the possible imbalances in bargaining power. The ongoing negotiations between India and the US for a trade deal aims to iron out a litany of disputes, including India's Generalized System of Preferences (GSP) status and the US' unilateral steel and aluminium tariffs. Progress on the trade deal has floundered for various reasons.[59] In February this year, Robert Lighthizer, the

Figure 1: India's disputes outcomes (1995-2020)



Source: Authors' own. Compiled from "Disputes by member", World Trade Organization, accessed September 12, 2020, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

USTR, canceled his visit to India, while talks remain stalled as the US gears up for the November 2020 presidential elections. Nonetheless, Lighthizer has reiterated the USTR's official position, and lamented that the WTO DSS incentivises litigation over negotiation to resolve trade disputes.[60] Depending on the outcome of the November elections, the US may continue to lean towards negotiation to resolve bilateral trade disputes with India. However, while this method promises flexibility and control, its susceptibility to politics and the absence of monitoring mechanisms can frustrate the achievement of fruitful outcomes.

b. Establish a dispute settlement system without the US

For countries that wish to preserve the WTO DSS, a key priority while envisioning an alternative method is to set up a mechanism that brings the least amount of disruption to the status quo. Prof. Pieter Jan Kuijper of the University of Amsterdam, has proposed the launch of a negotiation group called the "Real friends of Dispute Settlement" to draw a treaty that sets up an alternate appellate review or dispute settlement procedure — without the US — with as little changes to the existing mechanism.[61] It would contain a procedure only for appellate reviews, or even a complete dispute settlement procedure, based on existing provisions of the DSU. The following are some of the logistical and functional aspects of this dispute settlement system:

- Sitting members of the AB would join, and new members would be appointed to fill the vacancies

- Costs would be defrayed by new members

- Should members agree, the new mechanism could also be used to resolve disputes from other regional trade agreements.

Jan Kuijper argues that the "ambush killing of the Appellate Body falls outside normal circumstances",[62] and this justifies extraordinary decisions (which are legal) but that countries would normally not take under normal circumstances. Pascal Lamy, a former WTO DG (2005-2013), has also said that it would be prudent for countries to think of a new trade organisation minus the US "in order to avoid the 'my way or the highway' blackmail that has become the American president's signature negotiating style".[63]

However, many have criticised the proposal put forward by Kuijper. A 2018 research paper[64] says that it "lacks both political and legal underpinnings" and will, in turn, "be the admission of a complete failure of the WTO dispute settlement system". In terms of practicality, it is also noted that such an extraordinary measure would require wide support and long timeframes.[65] A larger concern is that with such a system, WTO disputes would leave the 'WTO turf', and this would "enlarge the abyss to the point of no return".[66]

There are also concerns about the political significance of such a system, particularly for India. The US is India's largest trading partner, in goods and services combined.[67] Out of India's 56 disputes before the WTO, 19 have involved the US as either a complainant or respondent. An alternative dispute resolution mechanism that excludes the US will not help India resolve its biggest trade disputes. The geopolitical fallout for India, as it seeks to strengthen its economic, trade and strategic partnership with the US, would be massive. Any progress on the proposed US-India trade deal, which aims to negotiate contentious issues like tariffs on steel and

aluminium products and the GSP, would be stalled indefinitely.[68] Further, keeping the US out of the mechanism means that it will become a free-rider in a rules-based trading system, that makes others subject to enforceable dispute settlement but not itself.[69] A mechanism such as this will tear into the fabric of multilateralism and permanently upend the rules-based multilateral trading system that has been in existence since 1995. If joining a political solution to the AB crisis outside the WTO means its end, it may not be in India's best interest to participate in this option.

c. Dispute Resolution under Regional Trade Agreements

The last two decades have witnessed the 'spaghetti bowl effect'[f] in the Regional Trade Agreements (RTAs) across the world. There are 305 RTAs notified to the WTO as of September 2020.[70] The cumulative number of notifications of RTAs in force is 492 (based on separate counting of goods, services and accessions).[71] Most of these agreements include their independent dispute settlement mechanisms, with detailed provisions.

Given the availability of alternative dispute resolution procedures in their trade agreements, this part examines whether or not there exists a possibility of resorting to such alternative dispute settlement procedures. Until now, much of the discussion on dispute resolution under RTAs has been focused on its interplay with the WTO dispute

f The term "spaghetti bowl effect" denotes the phenomenon of increasing number of free trade agreements among countries, which gradually has been supplanting the multilateral trading system. It was initially used by Jagdish Bhagwati, "US Trade Policy: The Infatuation with Free Trade Agreements" in J. Bhagwati and A. Krueger, *The Dangerous Drift to Preferential Trade Agreements,* (Washington, DC: AEI Press, 1995).

settlement mechanism, particularly due to overlapping jurisdictions. While the issue has been interpreted by the WTO adjudicators,[72] and also examined deeply by scholars,[73] the relevance for the present purposes is strictly from the perspective of examining whether or not RTA dispute settlement procedures can serve as a viable alternative to WTO adjudication.

At the outset, it may be clarified that despite the availability of WTO Panels, the question of resorting to RTA dispute settlement, as a possible alternative outside the WTO, has been considered for two reasons. First, absent the appellate mechanism, RTA dispute settlement offers more certainty for countries, by assuring them that complaints would not end up in legal limbo, pursuant to the panel's decision. Importantly, where Members have included fork-in-the-road provisions specifying that once a dispute has been initiated in a particular forum (say the WTO), the alternative forum (here, the RTA mechanism) cannot be resorted to, RTAs are the only possible alternative (to prevent the case from going into limbo).[74] Second, while an enforcement mechanism may be available in RTAs (where included), the enforcement mechanism of the WTO is likely to be legally crippled (while generally much more efficacious), because of an indefinitely pending appeal.

Based on the substantive nature and extent of the dispute settlement provisions incorporated, RTAs can be categorised into different kinds.[78]

Table 4 Number of Regional Trade Agreements signed by select countries[75]

Country	Number of RTAs
United States	20[76]
European Union	45[77]
China	15
Canada	14
India	16
Brazil	9
Japan	17
Mexico	22

Source: Authors' own

Froese categorises RTAs into four types based on the nature of their dispute settlement mechanisms:

- the first category does not include any provisions on dispute settlement;
- the second category includes dispute settlement by consultations only (i.e. no recourse to judicial means);
- the third category includes agreements with basic arbitration provisions, usually accompanied with an external mechanism to deal with such disputes. This category usually incorporates a forum shopping clause because of reference to an external mechanism; and

g Most RTAs that include panel procedures for dispute settlement include fork-in-the-road provisions to address the conflict of jurisdiction issues.

- the fourth category comprises agreements that carve out a full-fledged dispute settlement chapter which incorporates detailed rules on panel composition, timelines, and fork-in-the-road or forum shopping provisions.[g]

Aside from the lack of a permanent institutional structure, as well as the costs and time involved, other factors determine whether or not a country can resort to dispute settlement under an RTA: how many RTAs a country has with substantive dispute settlement procedures, and second, whether a country has RTAs with the countries it has actively litigated against, at the WTO.

Table 5. Dispute Settlement Procedures in India's RTAs

India's Regional Trade Agreements	Whether or not includes a dispute settlement procedure	Form and key features of dispute settlement mechanism
India-ASEAN Agreements[79]	✓	Detailed procedure on dispute resolution (including arbitral panels) and enforcement, (including suspension of equivalent concessions) has been provided in a separate Annex.
Asia Pacific Trade Agreement (APTA)	×	
India-Chile PTA	✓	Detailed procedure on dispute resolution (including arbitral panels) and enforcement, (including suspension of equivalent concessions) has been provided in a separate Annex.
Global System of Trade Preferences among Developing Countries (GSTP)	✓	Amicable settlement and review by Committee Enforcement mechanism by suspension of equivalent concessions has been provided in case of nullification and impairment of benefits.

India's Regional Trade Agreements	Whether or not includes a dispute settlement procedure	Form and key features of dispute settlement mechanism
India-Afghanistan PTA	✓	Dispute between parties-Amicable settlement through negotiations; Dispute between commercial entities-amicable settlement by nodal apex chambers; For disputes between commercial entities, Arbitral Tribunal if an amicable solution is not found.
India-Bhutan	×	
India-Japan	✓	Good Offices, Conciliation or Mediation; Arbitral Tribunals, and second resort to Arbitral Tribunal for implementation of award and suspension of concessions.
India-Malaysia	✓	Good Offices, Conciliation or Mediation; Arbitral Tribunals, including resort to arbitral tribunal for implementation of award and suspension of concessions.
India-Korea	✓	Good Offices, Conciliation or Mediation; Arbitral Tribunals, including resort to arbitral tribunal for implementation of award and suspension of concessions; Model Rules of Procedure for Arbitral Panels.
India-Singapore	✓	Good Offices, Conciliation or Mediation; Arbitral Tribunals, including resort to arbitral tribunal for implementation of award and suspension of concessions; Model Rules of Procedure for Arbitral Panels.
India-Nepal	×	

India's Regional Trade Agreements	Whether or not includes a dispute settlement procedure	Form and key features of dispute settlement mechanism
India-Sri Lanka	✓	Dispute between parties-Amicable settlement through negotiations Dispute between commercial entities-amicable settlement by nodal apex chambers, in the event of an amicable solution not being found, the matter shall be referred to an Arbitral Tribunal for a binding decision.
SAFTA	✓	Dispute Settlement procedure includes reference to Committee of Experts and Appeal to SAFTA Ministerial Council (SMC), which comprises of a Senior Economic Official nominee from each State
South Asian Preferential Trade Arrangement (SAPTA)	✓	Settlement by agreement
Southern Common Market (MERCOSUR)-India	✓	Adjudication by Joint Committee with provision for seeking advice of group of experts, where necessary. Provision for suspension of concessions Disputes in connection with anti-dumping and countervailing measures are exclusively governed by the WTO dispute settlement system.

Source: Authors' own

In this backdrop, and based on Froese's categorisation, the following part examines the viability for India of resorting to dispute settlement procedures under its RTAs. (See Table 5)

Applying Froese's categories of dispute settlement provisions, three of India's RTAs do not include any;[80] four provide for consultations only;[h] six provide for a detailed dispute settlement mechanism through arbitral procedures; and two carve out a unique approach, combining decisions by joint select committees[81] and a provision for suspension of concessions. Even as six of India's RTAs provide for a detailed dispute settlement procedure, India has never brought a complaint against these countries at the WTO. All the disputes initiated by India at the WTO are against countries with which it does not have any trade agreement.[82] On the flipside, all the disputes against India have also been initiated by countries with which it does not have any trade agreement, with the exception of one.[83]

Overall, while the evolving trends in RTAs suggest strengthening of the dispute settlement mechanisms of these agreements,[84] countries have rarely resorted to dispute settlement procedures outlined in RTAs.[85] For India, such an option appears practically meaningless. For developing countries generally, including India, there are various cost and time factors that make the WTO dispute settlement mechanism the most viable alternative. In fact, many of the developing countries that are active users of the WTO dispute settlement system have strengthened their legal capacities

h With two including arbitral procedures with respect to disputes between commercial entities, however, state-to state dispute settlement is through consultations only.

significantly. For all of these countries, such as China, India, Mexico, Turkey, and Brazil, the WTO dispute settlement system appears indispensable.

Table 6: Comparative Advantages and Limitations of Interim Solutions

		Solutions within the WTO				Solutions outside the WTO		
	WTO DSS	Article 5: Good offices, Conciliation and Mediation	Agreement to not appeal panel reports	Separate Trade Remedy Appeals System	Multi-Party Interim Arbitration Agreement	Negotiations	Establish a DS without the US	Regional Trade Agreements (RTAs)
Existence	+	-	+	0	+	-	0	-
Impartiality	+	0	0	+	+	0	+	+
Transparency	-	-	-	0	-	-	+	-
Confidentiality	-	+	+	+	+	+	-	+
Implementation	+	-	+	+	+	-	0	+
Legally Binding	+	-	+	+	+	-	+	+
Political Significance	+	0	+	+	+	0	-	0
Flexibility	-	+	-	-	-	+	-	+
Cost	-	+	0	+	0	+	-	-

+ = Good; - = Not good; 0 = Indifferent/Unclear

Source: Authors' own

CONCLUSION

The above analysis sought to evaluate interim solutions available to India for resolving its trade disputes. In line with the Indian government's position, the ideal scenario would be the revival of the WTO dispute settlement mechanism, as it provides an impartial and rules-oriented system for resolving trade disputes, helps maintain consistency in trade rules, and reduces fragmentation in an increasingly interconnected world. Although developing countries face challenges related to cost, time and access, they are better off with the WTO dispute settlement mechanism, than they would be if they were to take any other alternatives examined in this paper.

To be sure, the developing country members of the WTO are likely to suffer the brunt of the crisis, especially as countries like India, China, Brazil, Mexico and Turkey have become proactive litigants in recent years. Over the last 25 years (following the establishment of the WTO), these countries have carefully learned from a system that appeared to be more attuned to the positions of developed countries, nurturing their capacity to engage with the system in a meaningful manner. Moreover, the progress from a power-based multilateral framework dominated by a few large economies, to a rules-based trading system, has been long and is too valuable to compromise. Therefore, WTO Members must continue to work on breathing new life to the AB.

As such, the options discussed in this paper should only be seen as temporary solutions until the dispute settlement mechanism is revived. This paper recommends that rather than adopt a single approach — which focuses on one alternative — different

methods can be deployed for different disputes, based on their unique advantages and limitations. These alternatives are in the form of ad-hoc mechanisms to ensure continuity and predictability in the trading system.

For instance, diplomatic methods like negotiations can provide flexibility and confidentiality to parties — although they are not binding, are difficult to monitor, and influenced by power asymmetries between countries. Article 5 procedures can also provide mutually acceptable outcomes, in a shorter period and at lower cost—this will benefit India. However, it might be a tall order to expect the WTO DG (a position which lies vacant) to remain neutral in India's disputes with major countries, given the current politically charged environment. Such methods would be suitable for disputes with middle powers, smaller countries or close allies, or where there is indication (official or otherwise) that both parties are keen to resolve disputes.

An agreement to not appeal will benefit India by retaining access to WTO's DSS; however, it may not be in India's best interest to forego the option to appeal for disputes that it is facing as a respondent in 2019. Establishing a new DSS without the US can be termed as a 'nuclear option'; as a political solution, however, it is neither feasible nor desirable for India and the world.

The utility of a dispute settlement system within RTAs is a direct factor of how many RTAs a country has negotiated, how many of these agreements are with countries it is most likely to litigate against, and how many of them include an effective dispute settlement mechanism. Considering all of these factors, for India, the RTA

dispute settlement mechanism bears little value. With respect to the alternative of MPIA, India does not appear to be engaging for both practical and strategic reasons. The cases that are important for India have been appealed against at the WTO by the US and are in limbo. Further, India is opposing any interim solution that may send the AB in a permanent slumber.

Methods that seek to set up completely alternate systems to dispute resolution—such as the MPIA or a forum that excludes the US—have their advantages and disadvantages. However, they may invariably push the WTO dispute settlement mechanism to the point of no return. Meanwhile, the suggestion to establish a separate appellate body for trade remedies could prove to be an essential bargaining chip in bringing the US back to the system — but this risks fragmenting the WTO DSS. The comparative analysis provided in Table 6 seeks to facilitate such debates and explore options on dispute resolution. With the possibility that more trade disputes could arise in the future — given the disruption of supply chains due to COVID-19 —India must work with countries to peacefully resolve its trade disputes and arrive at mutually beneficial solutions. ORF

ANNEX

Table 1: India's pending appeals and ongoing disputes before the WTO DSS

Pending Appeals			
Year	**Case name**	**Complainant**	**Respondent**
2016	Certain Measures Relating to the Renewable Energy Sector (DS 510)	India	United States
	Certain Measures on Imports of Iron and Steel Products (DS 518)	Japan	India
2018	Export Related Measures (DS541)	United States	India
Ongoing disputes			
Year	**Case name**	**Complainant**	**Respondent**
2016	Measures Concerning Non-Immigrant Visas (DS503)	India	United States
2018	Certain Measures on Steel and Aluminium Products (DS547)		
2019	Measures Concerning Sugar and Sugarcane (DS580)	Australia	India
	Measures Concerning Sugar and Sugarcane (DS579)	Brazil	India
	Measures Concerning Sugar and Sugarcane (DS581)	Guatemala	India
	Tariff Treatment on Certain Good in the Information and Communications Technology Sector (DS582)	European Union	India
	Tariff Treatment on Certain Goods (DS584)	Japan	India
	Additional duties on certain products from the United States (DS 585)	United States	India
	Tariff Treatment on Certain Goods in the Information and Communications Technology Sector (DS 588)	Chinese Taipei (Taiwan)	India

Source: Authors' own.

Table 2: India's past and ongoing appeals before the WTO DSS

Table 2.1: India as a Complainant				
Respondent	**Year**	**Name of dispute**	**Appeal notified by**	**Outcome for India (Favourable/ unfavourable/ mixed)**
European Union (EU)	1998	Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (DS141)	EU	Favourable
	2002	Conditions for the Granting of Tariff Preferences to Developing Countries (DS246)	EU	Favourable
Turkey	1996	Restrictions on Imports of Textile and Clothing Products (DS34)	Turkey	Favourable
United States	1996	Measures Affecting Imports of Woven Wool Shirts and Blouses from India (DS33)	India	Favourable
	2000	Continued Dumping and Subsidy Offset Act of 2000 (DS217)	United States	Favourable
	2006	Customs Bond Directive for Merchandise Subject to Anti-Dumping/ Countervailing Duties (DS345)	Both US and India appealed	Mixed
	2012	Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436)	Both US and India appealed	Mixed
	2016	Certain Measures Relating to the Renewable Energy Sector (DS510)	Both US and India appealed	Appeal is pending. Favourable outcome in panel ruling.

Table 2.2: India as a Respondent				
Complainant	**Year**	**Case name**	**Appeal notified by**	**Outcome for India (Favourable/ unfavourable/ mixed)**
European Union (EU)	1998	Measures Affecting the Automotive Sector (DS146)	India appealed, but withdrew it and there was only a short hearing.	Unfavourable
Japan	2016	Certain Measures on Imports of Iron and Steel Products (DS518)	Both India and Japan appealed.	Appeal is pending. Largely unfavourable outcome in panel ruling.
United States	1996	Patent Protection for Pharmaceutical and Agricultural Chemical Products (DS50)	India	Unfavourable
	1997	Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (DS90)	India	Unfavourable
	1999	Measures Affecting Trade and Investment in the Motor Vehicle Sector (DS175)	India appealed, but withdrew it and there was only a short hearing.	-
	2007	Additional and Extra-Additional Duties on Imports from the United States (DS360)	Both US and India appealed	Unfavourable
	2012	Measures Concerning the Importation of Certain Agricultural Products (DS430)	India	Unfavourable
	2013	Certain Measures Relating to Solar Cells and Solar Modules (DS456)	India	Unfavourable

Source: Authors' own

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72 *Appellate Body and Panel Report, Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTODoc.WT/DS308. On the issue of Panel's jurisdiction, the Appellate Body upheld the Panel's decision that under the DSU, it had no discretion to decline to exercise its jurisdiction in a case that had been properly brought before it.

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74 For example, Article 14.6 of India-Korea Agreement provides that "[o]nce dispute settlement procedures are initiated under Article 14.6 or under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 to the WTO Agreement, the forum thus selected shall be used to the exclusion of the other".

75 The number of RTAs is based on the WTO RTA database, however, wherever the official websites of countries indicate a different number, such number has also been indicated.

76 Free Trade Agreements, Office of the United States Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements.

77 The official EU website lists a total of 75 trade agreements, including economic cooperation agreements, which do not involve any tariffs elimination or reduction, and do not include any dispute settlement

provision. See European Union, Negotiations and Agreements, Current State of Play, Agreements in place, https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/. All of the 75 Agreements do not have a dispute settlement procedure.

78 Marc Froese, "Regional Trade Agreements and the Paradox of Dispute Settlement", *Manchester Journal of International Economic Law* 11, no. 3 (2014): 367-396. In 2014, when the Appellate Body crisis could not be envisaged to take the present form, Froese argued that while "WTO remains the primary insurance against the breakdown of trading relations", the dispute settlement mechanisms in FTAs "play a political role in securing the gains of regional and multilateral liberalization (real and potential) against the possibility of multilateral failure".

79 "Agreement on Dispute Settlement Mechanism under the Framework Agreement On Comprehensive Economic Cooperation between the Republic of India and the Association of Southeast Asian Nations", Ministry of Commerce and Industry, Government of India, https://commerce.gov.in/trade/ASEAN-India%20Dispute%20Settlement%20Mechanism%20Agreement.pdf.

80 This is also because the nature of RTAs themselves does not require any dispute settlement provision (more for political and practical reasons). For instance, bilateral trade between India and Bhutan happens on a tariff-free basis, therefore, this RTA merely provides for free passage and transit related issues, in addition to certain basic principles, ensuring predictability.

81 Decisions by Joint Select Committees would technically qualify as advanced negotiations or consultations rather than adjudication, as they do not involve third party adjudication.

82 India has been a complainant in 24 WTO disputes as of date. The countries against which India has been a complainant are the United States, the European Union, Turkey, Brazil, South Africa, Poland, Argentina.

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