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WTO Dispute Settlement Reform – An Issue That Goes Beyond the 14th Ministerial Conference

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A. Background

In the Uruguay Round of trade negotiations, the United States (US) was one of the most prominent demandeurs of a dispute settlement mechanism (DSM) that is effective, timely, transparent, equitable and reasoned. This resulted in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It captured these elements and established an automatic two-tiered binding dispute resolution mechanism with strong enforcement provisions. However, in due course, the US started criticising the Appellate Body (AB), the appeal stage of the mechanism. It observed that the AB was not interpreting treaty text in alignment with its understanding, during the negotiation,of the treaty terms, and that it was practicing judicial overreach.[1]

The US has been blocking appointments to the AB since 2016, rendering it dysfunctional by 2019 when it was unable to constitute a three-member Division to decide appeals.Majority of the WTO membership made various efforts to address US concerns, but the US is not satisfied. In parallel, other Members have been requesting the Dispute Settlement Body (DSB) of the WTO to initiate the selection process of AB members every month for six years now. However, the US has continued to block it.

Dispute Settlement (DS) reform has been on the table in the WTO since its inception as a standalone issue; several useful improvements and clarifications have been suggested by Members. However, the issue has also been embroiled in the larger effort to rebalance issues in favour of developing countries, and to revive the negotiating function of the WTO,with Members leveraging various reform issues and other demands for a balance they consider necessary for a way forward.

During the last two WTO Ministerial Conferences (MCs), Ministers have instructed their officials to conduct discussions on DS reform with the view to having a fully functional dispute settlement system accessible to all Members. During the December 2025 meeting of the General

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Council (GC) of the WTO, the Facilitator for WTO reform summarised that many Members believe that deeper institutional reforms of the WTO will have limited value without a functional dispute settlement system. The chairperson of GC also observed that Members know that a reformed WTO is a WTO with a reformed dispute settlement mechanism. The chairperson of DSB stated that while there is broad recognition of the difficult context surrounding DS reform, many Members support the resumption of this work after MC14 when the time is right, and all Members are ready.[2]

This policy brief discusses the background and current state-of-play on DS reform in the run up to MC14 and analyses the options before the membership.

B. A Brief History

The binding dispute settlement mechanism enshrined in the DSU was aptly referred to as the 'crown jewel' of the WTO. However, the signatories being aware that the new system may need to be reviewed after seeing it in practice, agreed to review the DSU by 1998 and decide whether to continue, modify or terminate it. The Members could not agree to any recommendations by MC3 at Seattle in 1999. In MC4 at Doha in 2001, a negotiating agenda on improvement and clarification of DSU was established as part of the Doha Development Agenda (DDA). Based on the proposals received from Members, the negotiations were undertaken under a dozen thematic areas. Even though the dispute settlement negotiations were outside the single undertaking, as the Doha Round stumbled, these negotiations also could not progress.

In April 2022, the US commenced an'interest based' (rather than 'position based') discussion on DS reform outside the WTO. These discussions have gradually been formalised in the WTO by facilitators reporting them in the DSB and the GC. Eventually the Ministers recognised them as part of the efforts towards having a fully functional DSM. These discussions have resulted in two set of texts (a) the Draft Consolidated Text[3] (hereafter DCT) that contains textual suggestions for a Ministerial Decision on DS reform on several issues but not accessibility and special and differential treatment (S&DT) for developing countries, and the issue of appeal, and (b) Progress Report of Technical Work[4] (hereafter PRTW) that also has a collection of reform proposals and some textual suggestions on these remaining issues.

C. Analysis of the Current Draft Texts

The Process

The initial discussions were conducted by the US Mission and later were steered by the Deputy Chief of Mission of Guatemala Ambassador Marco Molina, who on his own responsibility started preparing a text based on these proposals and discussions. Several developing countries expressed discomfiture at the pace, participation, and inclusivity of these discussions and Molina's summarisation of the sense of the house. They also expressed the view that their concerns and reservations had not been faithfully recorded, while appeal and accessibility were not addressed at all.

Nevertheless, the DRT was presented at the GC meeting held just before MC13. Post MC13, the process got formalised by the GC appointing Ambassador Usha Chandnee Dwarka-Canabady of Mauritius as the facilitator. She focused the discussions on the remaining issues of appeal and accessibility; the results (PRTW) being annexed to the GC Chair's statement at December 2024 meeting. Not much has happened since.

1 Robert E. Lighthizer (2020); Report on the Appellate Body of the WTO; available at https://ustr.gov/issue-areas/enforcement/us-views-functioning-wto-dispute-settlement-system

2 https://www.wto.org/english/news_e/news25_e/gc_16dec25_255_e.htm

3 JOB/GC/385

4 JOB/GC/DSR/5

5 The Ministerial Conference can decide by two-thirds or three-fourths votes to amend several other agreements of the WTO, but not DSU

6 Amendments to agreements on trade in goods, TRIPS, and certain parts of GATS can take effect only after respective Members accept them as they alter rights and obligations.

7 Peter Van den Bossche (2024); The Uncertain Future of WTO Dispute Settlement; WTI Working Paper No. 2/2024.

8 Peter Van den Bossche and Werner Zdouc (2021); The Law and Policy of the World Trade Organization: Text, Cases, and Materials; Cambridge University Press

9 For example, see Simon Lester (2012); The Development of Standards of Appellate Review for Factual, Legal and Law

Legal Form

DCT is presented in the form of a Ministerial Decision. Those proposals which can be characterised as an authoritative interpretation of existing DSU provisions by the Members can be approved under Article IX:2 of the Marrakesh Agreement Establishing the WTO (WTO Agreement). However, several proposals in the text amount to amendments of DSU provisions. They would require a consensus[5] decision in consonance with the amendment provisions in Article X of the WTO Agreement. Still other proposals in the text may not require either an authoritative interpretation or an amendment, and could be considered as procedural improvements that can be approved by the DSB. The procedural improvements in the appeal process may be decided by the GC/DSB or, as the case may be, by the Appellate Body, in consultation with DSB Chair and DG, WTO.

So, legitimate tools are available to legalise any reforms that Members may agree to by consensus. These reforms do not require formal acceptance by Members and can start applying immediately upon approval by the Ministerial Conference.[6]

Implications of DCT and PRTW under consideration

A Title-wise examination of DCT, a 37-page document shows that it elaborates in detail what would constitute the procedures for dispute settlement, primarily focusing on alternative means of dispute settlement through good offices, conciliation and mediation; elaborating panel procedures in greater detail than in the current DSU and working procedures; and some elements of built-in review of reports of the panels and their consequences on the way trade is conducted. PRTW is a 52-page document dealing with accessibility and cost of funding, and appeal/review contains a set of reform ideas, their objectives and observations gleaned from the views expressed by Members.

The sense that one gets by reading through the two documents is that there is a movement towards:

a. elaborating procedures in greater detail; and
b. increasing member-control including through multiple stages where parties can take control of the flow of procedures towards a mutually acceptable outcome.

The two documents are of recent origin; February and December 2024. Therefore, not much literature has emerged examining them in detail. However, in available literature, views vary from lack of much added value to existing provisions, procedures and practices on the one hand, to making procedures more cumbersome and making unimplementable suggestions on the other. One commentator has called DCT a mixed bag of good, ill-conceived, futile and unnecessary changes.[7] While much space is devoted in DCT to alternate dispute settlement mechanisms, it is noteworthy that not much use has been made of even the existing provisions.[8]

On the issue of appeal, addressing the US concerns is key to find a way forward. Ambassador David Walker of New Zealand was appointed as facilitator for AB reforms to assuage the concerns of the US in 2019 and came up with a draft GC Decision that addressed most of the concerns. However, the US did not agree, otherwise a solution could have been found six years back.

Literature has examples of the dilemma faced by experts who examine the role of the AB. Although the AB has strictly adhered to the requirement of interpretating treaty terms in accordance with Articles 31-33 of the Vienna Convention on Law of Treaties, there are unanswered questions of its role emanating from the treaty terms themselves.

Application Questions in WTO Dispute Settlement; 4(1) Trade, Law and Development, Vol. IV, No.1. See also Holger Spamann (2004); Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Analysis; Journal of World Trade, 38(3)

[10] Report by the Consultative Board on The Future of the WTO (2004), available on WTO website

[11] Movsesian, Mark L., "The Sutherland Report and Dispute Settlement" (2005). Faculty Publications. 103. https://scholarship.law.stjohns.edu/faculty_publications/103

[12] See https://wtoplurilaterals.info/plural_initiative/the-mpia/

[13] See his blog of the European Journal of International law, available at https://www.ejiltalk.org/author/kpelc/

[14] GAO, Henry (2021); A rule-based solution to the Appellate body crisis and why the MPIA would not work; Legal Issues of Economic Integration; Available at: https://ink.library.smu.edu.sg/sol_research/3279

For example, to what extent is an appeal adjudicator to weigh in on the 'objective assessment' principle enshrined in Article 11 DSU that was taken from the pre-WTO days when a single stage dispute settlement mechanism prevailed. Its applicability in a two-stage mechanism may, therefore, require review.

Similarly, there is a blurring of the issues of fact and law in arriving at a resolution of the matter, thus raising questions about the competence of appeal adjudicators to examine factual matters, particularly interpretation of municipal laws and action.[9] Further, in a critique of the Sutherland Report[10], a view has been expressed that substantive gap-filling by adjudicators is a cause for concern. DSU Article 3.2 provides adjudicators the mandate to 'clarify' existing provisions in the WTO agreements in accordance with customary rules of interpretation of public international law. The unanswered question is whether it gives them the authority to supplement WTO treaty provisions with other sources of international law.[11] Thus, while WTO members may wish to clarify treaty terms as per their understanding either through an authoritative interpretation or a broader DS reform, that responsibility may not be handed over to appeal adjudicators. Either way, it is argued, they cannot, and should not, undermine the foundational principles on which the WTO is based.

Perhaps it is in keeping with these thoughts that the proponents of MPIA offered a solution that offers an appeal option in the absence of a functional AB that follows as closely as possible the existing procedures for appeal.

D. MPIA

The Multi-Party Interim Appeal Arbitration Arrangement (MPIA), formally notified to the WTO in April 2020, is an interim procedure for hearing appeals in the absence of a functional AB, closely following the provisions in DSU Article 25 that deals with arbitration and DSU Article 17 dealing with appeals. The initial MPIA parties selected 10 adjudicators in 2020; three of whom have been replaced in 2025.

In a case, parties may decide to agree to invoke MPIA appeal procedures within 60 days of panel establishment by the DSB, or notify such agreement when the panel issues interim report to the parties. Before the final panel report issue date, parties write to the panel to suspend the issuance of the report and MPIA appeal process is invoked. Like in the case of AB, three adjudicators constitute a 'Division' to address an appeal, and the collegiality among all 10 adjudicators is practiced. The award of MPIA adjudicators is final and binding on parties, and enforcement procedures follow the DSU provisions mutatis mutandis.

Only two cases have been decided through the MPIA procedures among the MPIA parties so far; a third was between a MPIA party and a non-party. In two ongoing disputes among MPIA parties, in one case panel has been established but suspended, and in the other case consultations commenced in 2021 but no Article 25 notification has been filed yet. MPIA notification were filed in eight other cases, but the disputes got withdrawn, settled or lapsed, so ended without a MPIA appeal. While the MPIA is functional for its parties, it may also be noted that some of the parties like EU, Brazil and Japan have erected domestic legislations/regulations to take corrective/retaliatory action against appeals into the void.

Since the MPIA is an interim arrangement, it is difficult to envisage it as a permanent solution replacing the AB. Thus, even in the event of restoration of AB being unlikely in the WTO in the near future, several WTO Members may not join the MPIA and give credence to a temporary solution and making

[15] See letter dated 5 June 2020 by the US Ambassador to the WTO addressed to the WTO Director General.

[16] Brian McGarry and Nasim Zargarinejad (2023); Tracing the Powers of WTO MIPA Arbitrators; McGill Journal of Dispute Resolution, Vol. 8, No. 2

restoration of the AB even more difficult. Also, they may decide on a case-by-case basis whether to resort to Article 25 arbitration for an appeal, whether using MPIA procedures or otherwise.

The literature analysing the pros and cons of MPIA is scarce. The Geneva Trade Platform[12] has a website providing the facts and procedures for MPIA appeal mechanism as well as links to some literature. The range of views on MPIA therein is instructive. On the one hand, Krzysztof Pelc,[13] Lester B. Pearson Professor International Relations at Oxford University says that the ingenuity of MPIA consists in importing the authority of the existing agreement into an informal opt-in mechanism. On the other hand, Henry Gao of the Singapore Management University says that with its many constitutional and practical defects, MPIA would probably create more problems than it sought to remedy, with the main ones being the creation of a bad precedent of an extra-WTO appeal framework, as well as a false hope that deflates the political will among WTO Members to find a proper solution.[14]

Criticising MPIA, the US Ambassador stated that it incorporates and exacerbates some of the worst aspects of the Appellate Body's practices.[15] Initially opposed to use of WTO infrastructure or personnel for MPIA proceedings, the US appears to have drawn down on that opposition.It is noteworthy that the MPIA arbitrators in their first ever award took a stand that appears to be deferential to the US position on the interpretation Article 17.6 (ii) of the Anti-Dumping Agreement of the WTO, even though neither party filed a claim on it or questioned the panel's ruling on this provision.The MPIA arbitrators in the second award have been innovative, interpreting Article 1.1 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights to mean that it seeks to establish "national systems" for the effective and adequate protection of intellectual property rights in "each and every Member", even though IPR provisions have territorial application determined through national level legislation.

Among others, Alan Yanovich, a former Counsellor at the AB Secretariathas expressed

Key elements about MPIA and its parties

1. It provides for abandonment of the MPIA procedures in the event that the AB is revived.
2. Withdrawal from MPIA is possible simply by a notification to the DSB.
3. Third parties can participate only if the parties agree.
4. Broader member control has a diminished role as DSB does not adopt MPIA awards.
5. It is unclear whether the non-appealed recommendations of the underlying panel will have any legal effect if they are not addressed in the award.
6. It is unclear whether and what precedential or persuasive value an MPIA award has.
7. Application of provisions relating to determination of reasonable period of time, level of nullification or impairment of rights by infringing measures and other compliance related procedures in Articles 21 and 22 of DSU has been seen to be invoked in the first dispute where an MPIA ward has been notified to the DSB, even though not adopted, putting into question the legal certainty of these procedures.
8. Non-MPIA parties can enter into an MPIA like agreement at any time, and there is no clarity whether non-MPIA adjudicators can also be a part of the Division. In one case, a non-MPIA party accessed the procedures in a dispute, where only two of the adjudicators were from the MPIA list, and a third was chosen from outside. This brings flexibility of operation to the system.
9. If any WTO Member joins MPIA now, it does not appear to have any recourse to select MPIA adjudicators.

the view that the MPIA has indulged in the same interpretative activism that the AB has been accused of by the US. Brian McGarry and Nasim Zargarinejad were prescient in concluding three years back that MPIA has carried along the alleged defects of the AB.[16] In sum, adopting the MPIA appears to be, at best, a Hobson's Choice for the WTO Members.

E. The Way Forward for DS Reform

Going by the latest available schedule of MC14 sessions, it appears that the Ministers are not going to negotiate DS reform; a session is planned only for an update on DS reform by the DSB Chairperson.In any case, the draft textsare far from a stage where they could become a good basis for a negotiated outcome on DS Reform as of now. It is likely, therefore, that the Ministers will instruct that discussion continue at the official level until MC15.

Hence, developing countriesmust continue to engage in the ongoing work with the understanding that closely following the discussion and participating actively in it is necessary to protect their interests as the texts and reform proposals evolve into their next stages. This requires a collective voice of the Global South to call for an inclusive process for the discussions after MC14; recognition of the scarce resources in their Geneva based Missions as well as capitals and deciding meeting schedules accordingly, and giving the deserved credence to the developing country concerns in the evolving texts. It also requires developing country Members to get intoissue-based coalitions and work together to optimise their scarce resources. Since MPIA is not a permanent solution, and cannot replace a legally binding process of the kind the WTO Members have benefitted from during the last 30 years of its existence, the systemic interest of all WTO Members, including developing countries, lies in restoring the permanent appeal mechanism of AB with relevant guidance against judicial activism.

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MPIA seeks to replicate the Appellate Body, but its arbitrators are chosen by a limited group rather than through broad geographical representation embedded in the WTO system, and it alters the existing balance by introducing binding arbitration outside the DSB framework.

Professor (Dr.) Sheela Rai, Professor of Law, National Law University Odisha.

It is in doubt that MC14 is in a position to take any substantive decision on dispute settlement reform, given the limited progress achieved so far, and the systemic nature of dispute settlement provisions.

Mr. Anwarul Hoda, Former Deputy Director General, WTO

I consider that having a two-tier and binding dispute settlement system as before is desirable. This is something that gives stability and predictability to the system with also the parties to the dispute getting satisfaction that their submissions have received adequate hearing at two levels.

Ambassador V. S. Seshadri, Former Vice Chairman, RIS.

India should not compromise on preservation of a standing Appellate Body, stand for orthodox principles of treaty interpretation under the Vienna Convention on the Law of Treaties, and reject generalized deferential standards of review across disputes, such as extending Anti-Dumping Agreement Article 17.6 type deference to all areas of WTO law.

Professor Prabhash Ranjan, Professor and Vice-Dean (Research), Jindal Global Law School

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