

Dispute settlement reform: The informal process and the way forward after MC13

Kinda Mohamadieh

22 February 2024

The systemic importance of dispute settlement reform for developing countries

The outcome document of the WTO's 12th Ministerial Conference (MC12) in 2022 provided, under paragraph 4, a mandate "to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024". This mandate is intrinsically connected to the mandate provided under paragraph 3 of the outcome document to improve all the WTO's functions, including the dispute settlement function, through work to be conducted by the WTO General Council and its subsidiary bodies.

The WTO's dispute settlement system is recognized in Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU) as a central element in providing security and predictability to the multilateral trading system. Its functioning is essential for fulfilling the core mandate of the WTO, as set in the Marrakesh Agreement, to develop an integrated, more viable and durable multilateral trading system. Reform of this pillar of the WTO functions carries long-term implications for the functioning of the organization and the evolution of the application of WTO law.

The historical demands of developing countries

Developing countries have a longstanding interest in reforming the WTO's dispute settlement function. They have been seeking reform since the 2001 Doha negotiating mandate that included an agreement by the WTO Members for "negotiations on improvements and clarifications of the Dispute Settlement Understanding".¹ Many developing countries had pointed out that they have not been active participants in the dispute settlement system not because they have never had occasion to want to enforce their rights or enforce the obligations of other Members, but because of structural difficulties in the system.²

¹ Doha Ministerial Declaration, WTO document WT/MIN(01)/DEC/1, 20 November 2001, para. 30, available at: https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#dispute

² Submission by the African Group, TN/DS/W/15, 25 September 2002.

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

Published by Third World Network Berhad (198701004592 (163262-P))

Address: 131 Jalan Macalister, 10400 Penang, MALAYSIA

Tel: 60-4-2266728/2266159

Fax: 60-4-2264505

Email: twn@twnetwork.org

Website: www.twn.my

The contents of this publication may be republished or reused for free for non-commercial purposes, except where otherwise noted. This publication is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.

In the context of the unresolved Doha mandate on dispute settlement reform, developing countries and least developed countries (LDCs) had raised multiple issues of both procedural and substantive nature, including:

- the development fundamentals in the operations of dispute settlement, including special and differential treatment across the entirety of the process;
- equitable access to the dispute settlement mechanism;
- affordability and legal costs;
- facilitating participation of developing countries and LDCs as third parties;
- enforcement of findings and recommendations, including collective retaliation;
- satisfactory compensation including cash compensation in some cases involving developing countries;
- procedures related to measures already held inconsistent with a covered agreement;
- the need to shorten timeframes especially in trade remedy cases while giving developing countries the requisite special and differential treatment;
- disciplining inputs by the WTO secretariat and its role in the proceedings;
- other procedural issues at various stages from consultation to panel proceedings and appeal, as well as technical assistance and capacity building.³

The restoration of the Appellate Body as a gateway issue for broader dispute settlement reform

Effective reform of dispute settlement can be realized only if the system is functional in its entirety. In December 2020, a number of developing countries, including the African Group, India and Cuba, had clearly opined that “a sine qua non for strengthening the WTO system is the restoration of the Appellate Body”.⁴ They added that “[t]his is an urgent priority since without such a system the rationale for negotiating new rules or to undertake reforms remains questionable”.

The majority of WTO Members, particularly developing countries including LDCs, have continued calling for the restoration of the standing Appellate Body. However, some delegations are starting to speak of restoration of the functioning of a two-tier system more generally, rather than restoration of the Appellate Body specifically. While a two-tier system could encompass a standing Appellate Body, it could also be built around a different model of appeal. The latter could possibly include appeal through ad hoc panels whose jurisdiction depends on case-by-case consent of the parties to the dispute. A two-tier system could also include a model built around a standing Appellate Body but without compulsory jurisdiction over all cases, thus providing the option for disputing parties to either opt in or opt out of appeal on a case-by-case basis. These models would be a major departure from the current practice and have deep systemic implications for the future of the WTO.

Replacing the role of the standing Appellate Body and its compulsory jurisdiction over all appealed cases with one of the models mentioned above will be akin to ‘system change’, whereby power politics will become more prominent in the application and enforcement of WTO rules. Where power dynamics come to play a bigger role, developing countries that already face challenges in bringing cases forward due to resource constraints might find that powerful, economically stronger Members are even less incentivized to negotiate or engage constructively in dispute resolution.⁵ Under a model based on a non-compulsory dispute settlement mechanism, or if Members were able to refuse to participate, recognize or accept the jurisdiction of the Appellate Body, other Members might be prevented from accessing an effective remedy. This will generally leave economically weaker Members with more limited recourse to seek redress for trade law violations, while tilting the balance in favour of more influential Members.

³ See, for example, submissions by the African Group (TN/DS/W/15, 25 September 2002), Brazil (TN/DS/W/45/Rev.1, March 2003), China (TN/DS/W/29, January 2003), Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe (TN/DS/W/18, October 2002), Jamaica (TN/DS/W/21, October 2002), LDCs (TN/DS/W/17, October 2002) and India (TN/DS/W/5, May 2002).

⁴ See WT/GC/W/778/Rev.3 (December 2020), para. 5.1.

⁵ Clair Gammage and Franzika Sucker, “Why Compulsory Jurisdiction Must Not be Negotiable”, available at: <https://www.afronomicslaw.org/category/analysis/why-compulsory-jurisdiction-must-be-non-negotiable>

This will undermine a cornerstone of the WTO's dispute settlement system, which is its binding nature that constitutes a "central element in providing security and predictability to the multilateral trading system" (Article 2 of the DSU) and in providing an effective remedy to Members who bring a dispute with the aim "to secure a positive solution to a dispute" (Article 3.7 of the DSU). This would fundamentally undermine the rule of law and call into question the systemic legitimacy of the dispute settlement regime. Overall, such conditions will deepen the existing fragmentation of the multilateral system.

The ongoing "informal discussions" on dispute settlement reform and their limitations

The current "informal process" on dispute settlement reform stretches out of a US-led process held on this subject matter. Overall, this informal process significantly departs from the usual practice at the WTO and raises systemic and procedural issues, particularly because most developing countries are unable to fully and effectively participate in the discussions given the methods of work adopted thus far.

The informal process is not based on multilateral, Member-driven, consensus-based procedures. Its facilitator was not chosen through a multilateral, inclusive selection process and thus is not formally mandated by the WTO Members. Due to the way the process has been organized (including how meetings were configured and held, agendas decided, and substantive discussions pursued), multiple challenges emerged in regard to inclusivity, transparency and accountability of the process towards the WTO Membership. It can be noted that the advancement of the work is not recorded in official written WTO reports that are accessible to all Members, as is usual practice. Development of a consolidated negotiation text has been pursued although there are no written formal substantive submissions by Members.

Developing countries have raised procedural concerns and asked for commencement of a formal multilateral process, preferably conducted by the General Council and/or the Dispute Settlement Body (DSB) and guided by the DSB Chair.⁶ These calls have been marginalized, although the MC12 mandate on reform of the WTO provided that this work shall be conducted by the General Council and its subsidiary bodies and be "Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues".⁷

Attempts to portray the informal discussions on dispute settlement reform as a successful, inclusive process are attempts to normalize the informalization of the WTO processes, which will be a setback for inclusive processes and for effective participation of the delegations of developing countries including LDCs. Under WTO practice, informal processes have always been seen as only a complement to formal negotiating processes that could provide additional opportunities of interaction and exchange of views among Members. Informal processes are not supposed to be a substitute for formal processes nor a space for developing or negotiating text.

Some broad observations on the informal discussions text

A draft text has been circulated by the informal facilitator covering 10 issues including alternative dispute settlement proceedings and arbitration, panel proceedings, appeal/review mechanism (text not available yet), compliance, guidelines for adjudicators, procedures to discuss and review legal interpretations, secretariat support, transparency, accessibility with respect to technical assistance, capacity building and legal advice, and accountability mechanism. These issues stem from a list of issues discussed by a group of countries that had participated in US-initiated informal discussions, although that list was not intended to be a comprehensive list of the concerns of the whole WTO Membership.

⁶ See: African Group submission WT/GC/W/892, Indonesia's submission JOB/DSB/6, and submission by Egypt, India and South Africa JOB/DSB/7.

⁷ MC12 outcome document WT/MIN(22)/24, WT/L/1135.

The process of drafting this text has been criticized by developing countries. A communication by India, Egypt and South Africa notes that “[t]he drafting process deviates substantially from the accepted practice at the WTO. The process hampers the ability of delegations that cannot actively participate in the process, from following the evolution of and contributing to the formulation of the consolidated zero text ...”. The same communication points out that “[t]he themes being discussed at present under the ‘informal discussions’ were not intended to be a comprehensive listing of concerns of the whole membership. They were a prioritization, for further discussion, of some of the interests that had been raised during the US-led process. For instance, Special and Differential Treatment, which had been raised as an interest by several countries, was not listed as a theme for further discussion”.⁸

Special and differential treatment is generally absent from the text except in minor places that repeat un-operational language from the DSU or refer to capacity building. Issues of importance to developing countries like accessibility in its broader sense (covering third-party rights, retaliation and cross-retaliation, litigation costs and enforcement, among other elements) are either completely unaddressed or not sufficiently addressed.

The text seems to aim at expanding and normalizing alternative dispute resolution (ADR), to position conciliation, mediation and arbitration as potential substitutes to the panel and appeal stages. This would be counter to how these elements were designed into the DSU and could potentially raise systemic implications if there is more reliance on ADR and arbitration as the norm rather than exception. Furthermore, certain proposed elements would facilitate an expanded role and discretion for adjudicators in the proceedings and would normalize certain practices by the WTO secretariat that have been linked to several aspects of Appellate Body practices criticized by the Membership, such as the “issues papers” drafted by the secretariat.

The draft proposes new mechanisms, such as setting up a working group to review legal interpretations produced in dispute settlement decisions and another pertaining to the review of the operation of the dispute settlement system. These carry systemic long-term implications and might not be conducive to the interests of developing countries and their role in relation to the dispute settlement function.

The gateway issue of restoring the functioning of the Appellate Body has not been effectively addressed. The draft text does not provide language in this regard. Instead, a discussion on standards of review has emerged, although such a discussion on the intricacies of how the appeal function would be put into practice should only come in light of an agreement on the structure of the two-tier system and the fate of the Appellate Body. The current proposals seem to aim at narrowing the prospects of appeal by introducing novel concepts and standards to the appeal function. It is important to recall that the issue of standard of review was highly controversial during the Uruguay Round negotiations that led to the adoption of the DSU, as it is central to the functioning of the appeal mechanism rather than a mere detail. Not surprisingly, negotiators did not succeed in agreeing on a general standard of review applicable to all covered agreements during the Uruguay Round.

Overall, the elements proposed under the draft text of the informal discussions vary in nature and potential legal interaction with the DSU. Some elements would add clarificatory language to what exists in the DSU and others would amend the DSU. Thus, the legal instruments to adopt such proposed elements would necessarily vary.

Issues of importance at MC13 and the way forward post MC13

- It is important that the pursuit of the mandate to reform the dispute settlement system be undertaken in the formal multilateral fora. Informal processes such as the one held thus far are not supposed to substitute for multilateral formal negotiations. ***At MC13, it is important that Ministers launch the multilateral formal negotiations under the Dispute Settlement Body.***

⁸ See JOB/DSB/7.

- Text-based negotiations, especially on an issue of such fundamental importance for the multilateral trading system, should be undertaken in the multilateral formal space, based on Members' text-based submissions, and with formal record-keeping of the negotiations. The work undertaken under the informal discussions could contribute as one input into the formal negotiations rather than the basis of the formal negotiations. ***At MC13, it is important to avoid adopting language that refers to the work undertaken under the informal process as the basis for continuation of further work on dispute settlement reform. Rather, the language should take note of that work as one contribution to the way forward.***
- It is of utmost importance that reform of the dispute settlement system mainstream effective and operational special and differential treatment throughout the whole operation of the system. This ought to include effectively enhancing accessibility through addressing elements beyond technical assistance and capacity building. Issues of importance in this regard include facilitating the participation of developing countries and LDCs as third parties, addressing legal costs and preparation of a case, securing compliance with decisions, and addressing enforcement through effective compensation and retaliation. ***At MC13, it is important that Ministers instruct officials to work on outstanding issues, including the appellate review mechanism and accessibility issues concerning developing countries including LDCs.***
- The principles of full, effective and equal participation, enabled through transparency and inclusivity, are central to any meaningful negotiating process and require that discussions and/or negotiations be held in meetings open to all delegations, supported by a multilaterally mandated chair or facilitator, while paying explicit attention to methods of work that enable the participation of developing countries and LDCs (including in regard to format and pace of work and access to information). ***At MC13, it is important to recognize the significant challenges that have faced developing countries and LDCs in actively participating in work undertaken outside the WTO subsidiary bodies and to recall the principles reflected in para. 3 of the MC12 outcome document (i.e., Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues).***
- The door should remain open for Members to present their concerns and submissions in regard to reforming the dispute settlement system, particularly on issues of concern to developing countries and LDCs such as accessibility, which have been marginalized in the informal discussions.
- A push for an early harvest at MC13 of an outcome on some of the issues addressed under the informal process text would fragment the process and could potentially mean that issues of concern to developing countries and LDCs, including the restoration of the Appellate Body, will be rolled over into the future without effective resolution.

Kinda Mohamadieh is a legal advisor and senior researcher with the Third World Network.