Symposium Introduction: The WTO's Dispute Settlement Reform and Developing Countries

By:

Clair Gammage
Priscilla Vitoh
Donatella Alessandrini

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Dispute settlement at the World Trade Organisation (WTO) is in urgent need of reform. For nearly two decades, the USA had accused the Appellate Body of judicial overreach and action against the institution escalated under both the Obama and Trump administrations. In November 2022, the quasi-judicial system that has long been referred to as the 'jewel in the crown' of the WTO lost its appellate function as the term of its final Member, Dr Hong Zhao, expired. With the US refusal to reappoint members to the Appellate Body, the WTO's dispute settlement system has been slowly asphyxiated. The WTO's two-tier dispute settlement system was designed to ensure that Members had access to transparent, independent and timely decision-making.

With dispute settlement reform as a focal point for the WTO's thirteenth Ministerial Conference (known as 'MC13') agenda in February 2024, this symposium problematises the existing crisis and articulate possible alternatives in an era of 'deglobalisation'. Our contributors offer their expert insights into dispute settlement reform with developing countries at the centre of their analysis and evaluate the mechanisms that have been implemented or proposed with a view to imagining alternative possibilities in the lead up to MC13.

The story of developing country representation and participation in the WTO and its dispute settlement system is one of presence and absence, of inclusion and exclusion. Although the dispute settlement crisis has dominated much of the discourse on the future of the WTO and is the focus of our symposium, this crisis cannot be viewed in isolation from other intersecting issues such as self-declaration and 'special and differential treatment'. However, in respect of reforming dispute settlement, there has been a united front among developed and developing countries in the WTO. As recently as 19 September 2023, a communication requesting that the Dispute Settlement Body (DSB) reinstates the selection processes to replace the Appellate Body Members was issued collectively by a handful of developed countries and over 90 developing countries in the WTO. Nevertheless, the options for addressing the dispute settlement have been limited for developed and developing countries alike.

In the absence of a fully functioning Appellate Body, some decisions have been 'appealed into the void' which, in effect, enables the panel's decision to be disregarded until a functioning appellate mechanism is reinstated. To date, the DSB has received notifications for appeal in 29 cases and there is a growing sense of frustration among Members that there is not practical way to enforce the panel's recommendations. Members are now looking for other ways to seek an effective remedy including changing national or regional legislation to permit the use of unilateral measures. For example, the United Kingdom amended section 15 of the Taxation (Cross Border Act) 2018 in the wake of the WTO crisis to enable it to take 'appropriate' measures in response to international trade disputes that might otherwise be appealed into the void. Furthermore, in July 2023, the EU Commission launched consultations into the use of the Enforcement Regulation in the Indonesia nickel export case. The Enforcement Regulation may give the EU an alternative legal route for

retaliation against Indonesia but perhaps more significantly it sends a political message 'that "appeals into the void" are void' particularly when powerful trading partners are concerned, as not all members will be able to retaliate, therefore entrenching further divisions.

In the early days of the Appellate Body crisis, to ensure that the appellate review of panel decisions could continue in the absence of a functioning Appellate Body, the EU proposed an arbitral mechanism pursuant to Article 25 Dispute Settlement Understanding - the Multi-Party Interim Arbitration Arrangement (MPIA). The MPIA is a voluntary arrangement and, to initiate arbitration under this arrangement, both parties to the MPIA must submit a joint notification to the WTO's Dispute Settlement Body. At the time of writing, 26 of the 164 WTO Members have signed up to the MPIA consisting of a mixture of both developed countries and developing countries.

On 21 December 2022, the first and only decision of the MPIA to date was issued in the Frozen Fries anti-dumping dispute brought by the EU against Colombia. If Colombia does not comply with the arbitral panel's findings, then the EU can request authorisation to implement countermeasures at the WTO. From its inception and by its design, the MPIA was intended to be a 'stop gap' measure until the WTO membership could either breathe life back into its own Appellate Body or create a new mechanism. Nevertheless, and as the compelling submission from *Kholofelo Kugler* and *Gaone Morgan* illustrates, notwithstanding the perceived success of the MPIA, this is not a viable substitute for the Appellate Body. Kugler and Morgan show the judicial value of the MPIA in the absence of the functioning Appellate Body. However, they urge global south countries to continue to advocate for change within the WTO so that a solution with 'democratised benefits' can be found to the current impasse.

Other WTO Members have tabled alternatives to the MPIA, including the UK's proposal for a 'sunset clause' and the US proposal for an appellate mechanism with non-compulsory jurisdiction. *Ohio Omiunu* and *Suzzie Onyeka Oyakhire* explore the geopolitical underpinnings of the US proposals and highlight the inherent risks this proposal poses to the WTO's systemic legitimacy. Building on this narrative, *Clair Gammage* and *Franziska Sucker* focus on the dangers that an opt-in model of dispute settlement will present for developing countries and

argue that, notwithstanding the deficiencies of the current system, non-compulsory jurisdiction is not a viable alternative.

Developing countries have existed on the periphery of the WTO's judicial system since its creation. While the majority of WTO Members are developing countries, there are notable trends in the participation of that system. For example, developing countries in Asia and South America are more prolific users of the two-tier system than African countries. South Africa is the only African country to have submitted a case as a complainant to the WTO dispute settlement system and, while two Appellate Body Members have been representatives of African countries (South Africa and Mauritius), the absence of African voices in the WTO dispute settlement space remains of real concern. *Priscilla Vitoh* and *Timothy Masiko* offer compelling insights into representation, diversity, participation and inclusion. In doing so, they also highlight the danger of silence and absence in the system. In her contribution, Priscilla Vitoh demonstrates how the lack of representation in the DSB can lead to bias in judicial decision-making. For the WTO to progress in an equitable and fair manner, Vitoh argues that the Members must build a dispute settlement mechanism that promotes pluralism: the WTO needs a two-tier system that reflects the diversity of its Members while fostering gender diversity. *Timothy Masiko* demonstrates the importance of capacity building and knowledge exchange to enable developing countries to engage in all aspects of WTO reform in a meaningful way.

It is interesting to note that there have been efforts to address the representation gap that has long plagued the WTO's dispute settlement system in the MPIA's structure. For instance, the MPIA has a standing pool of 10 arbitrators and formally, at least, the pool is broadly representative of its membership base. Of the 10 arbitrators, five represent global south countries (Mexico, Chile, Brazil, Colombia and China) and four are women. Already, this is proportionately better than the WTO's Appellate Body which had just five women representatives out of 27 AB members that have served from its creation in 1995 until the expiry of its final member's term in 2020. However, it is important to remember that the MPIA is not intended to act as a replacement for the Appellate Body – it is a temporary, not permanent, measure. A resolution to the dispute settlement crisis is needed to avoid further fragmentation of the international trade system.

What, then, is the way forward and how can developing countries influence policy decisions at MC13 in respect of dispute settlement reform? Enrique Prieto-Rios and Mauricio Salcedo-M demonstrate the stark choices facing developing countries as the WTO's existential crisis deepens: to maintain the status quo; to engage in collective action and rally for reform; or to withdraw from the organisation altogether. In their contribution, they illustrate how the existing legal architecture of the WTO treaties, including reliance on Article XXV GATT and Article XXIII.2 GATT, could be used to strengthen collective action by developing countries. Prieto-Rios and Salcedo-M argue that developing countries need to challenge the disruptive discourses of both developed countries and those of other powerful Global South countries, like China, and that the power for change ultimately lies in collective action.

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