Why Compulsory Jurisdiction Must be Non-Negotiable

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October 9, 2023

Dispute settlement reform is a priority for World Trade Organisation (WTO) Members as the thirteenth Ministerial Conference (known as 'MC13') in February 2024 rapidly approaches. With no sign of consensus among the Members of what a functioning dispute settlement must look like there is a growing feeling in Geneva that the WTO's crisis is reaching a tipping point: 'it is reform or die'.

While the United States (US) continues to hold the ace card when it comes to resolving the crisis for the reasons outlined in the blog by Ohio Omiunu and Suzzie Onyeka Oyakhire, there has been no public documentation issued by the US to date that outlines its current proposals for reform. Rather, we have become aware of the proposals that have been discussed at the informal discussions through leaks in Geneva. Accordingly, following decades of accusations of 'persistent (judicial) overreaching' by the Appellate Body and the inconsistent (or, simply, unfavourable) standard of review applied in disputes,

the US is seeking a system that permits carve outs and that enables parties to a dispute to only progress to an appellate stage if both parties agree to do so. This position aligns with the flexible approach to dispute settlement that the US has been pursuing since 2002 when it advocated for a dispute settlement system that would enable Members 'to reject specific aspects of reports that hinder settlement or do not accurately reflect the obligations that were agreed on by the negotiators.'

In a blog published in July 2023, Professor Rob Howse puts forward that an appellate review mechanism can play a 'meaningful systemic legitimacy function' even if the US does not accept the compulsory jurisdiction of the DSB. In short, Howse echoes the US proposals that have been leaked in Geneva and suggests that in exchange for a new Appellate Body being appointed, the US (and presumably any other Member that might seek to make such a claim) could be accommodated by a waiver that enables it to avoid the jurisdiction of the Appellate Body altogether or to consent to the Appellate Body's jurisdiction subject to reservations. This approach, which is used in the International Court of Justice (ICJ), enables states to refuse the compulsory jurisdiction of the court but, as Howse points out, this does not necessarily diminish the significance of ICJ judgments and advisory opinions as constituting part of international law.

We argue that the proposal to redesign the WTO's two-tier system to have non-compulsory jurisdiction and to remove the right to appeal unless both parties to the dispute agree to appellate review will not only mark a backward step for the WTO, eroding the gains that have been made in developing the jurisprudence of the WTO, but it will bring significant risks for developing countries.

Why Non-Compulsory Jurisdiction must be a 'No Go' for Developing Countries

The cornerstone of the WTO's dispute settlement system is its binding nature, which constitutes a 'central element in providing security and predictability to the multilateral trading system' (Article 2 Dispute Settlement Understanding (DSU). Thus, one of the main purposes of the system is to provide 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). For that purpose, Members have at their disposal a range of different remedies including mutually agreed

solutions as well as dispute resolution at the bilateral, regional, and multilateral levels. If Members were able to block the decisions of the panel or Appellate Body or to refuse to participate, recognise or accept the jurisdiction of the dispute settlement body (DSB), other Members might be prevented from accessing an effective remedy. In fact, even with a compulsory system we have seen that the refusal of more powerful and economically stronger Members (such as the US) to participate in dispute resolution proceedings, particularly when they anticipate unfavourable outcomes, leaves economically weaker Members with limited recourse to seek redress for trade law violations. It fundamentally undermines the rule of law and draws into question the system legitimacy of the DSB. A non-compulsory dispute settlement mechanism could exacerbate this problem by encouraging some Members to violate or bend the applicable trade rules without consequences. Moreover, such unpredictability is disadvantageous for long-term investment and trade decisions, which might particularly affect developing countries, seeking to attract foreign investments. Thus, a non-compulsory system might tilt the balance in favour of more influential Members, undermining one of the WTO's primary objectives to provide a level playing field, especially for smaller and economically weaker Members. If power dynamics play an even larger role, developing countries, which already face challenges in bringing cases forward due to resource constraints, might find that powerful, economically stronger Members are even less incentivised to negotiate or engage constructively in dispute resolution.

Non-compulsory dispute settlement is likely to deepen the existing fragmentation of the multilateral system. There had been a steady increase of bilateral trade dispute settlement in the lead up to the WTO's dispute settlement crisis and the weaponization of bilateral measures, such as the initiation of the Section 232 (national security) investigations under the US Trade Expansion Act 1962 as amended, has escalated since the US blocked the reappointment of Appellate Body Members. As recently as June 2023, the US has reached an agreement with India to end six of their ongoing disputes at the WTO and to resolve future disputes bilaterally so that they do not have to use the WTO's dispute settlement system. This would merely push developing countries to the fringes of the system and away from its core where legal interpretation and norm development takes place.

Notably, a shift to compulsory jurisdiction and appellate review at the WTO was, in principle at least, a positive outcome of the Uruguay Round negotiations given the challenges faced by developing countries and LDCs during the GATT era with non-compulsory jurisdiction. Scholars and practitioners of international trade law will be all too familiar with the long-running bananas dispute between the then European Communities ('EC', now the 'European Union') and a group of developing countries in Latin America that saw two panel reports vetoed by the then EC. The then EC's banana import regime was challenged as being discriminatory and in violation of GATT principles and the extended litigation and the difficulty in reaching a resolution, partly due to the consensus-based decision-making process of the GATT, was resource intensive, which placed further strain on the limited resources of the participating developing countries. A non-compulsory DSB will reintroduce similar challenges, where powerful nations could essentially veto or avoid unfavourable outcomes, and thereby shield sensitive sectors from scrutiny, potentially at the expense of developing countries.

Moreover, a shift to a non-compulsory jurisdiction would not address the alleged existing inefficiencies in the DSB process like protracted timeframes for dispute resolution that exceed the rules set out in the DSU, the (unofficial) reliance on past decisions as de facto precedent and allegations of judicial overreaching. Nor would it address the unwillingness or reluctance of Members to adopt the Appellate Body's recommendations. Non-compliance has been a fly in the ointment since the early days of the DSB and an infamous case of outright non-compliance is the *US-Gambling dispute*, in which the US was found to be in violation of WTO rules. To date, and in spite of Antigua and Barbuda being granted permission to cross-retaliate against the US' non-compliance, the recommendations of the Appellate Body have not been upheld. For small island nations like Antigua and Barbuda, the cost of this litigation has been far-reaching with their economies significantly affected. For the US, which has maintained that its law is in compliance, there has been no real or negative impact on their economy neither from the dispute nor from their non-compliance. A non-compulsory system might exacerbate this problem.

What Developing Countries can do to reduce the risks

It is the relative success of the Multi-Party Interim Agreement (MPIA), which is discussed in the blog by Kholofelo Kugler and Gaone Morgan, and its growing membership that must serve as a warning shot to the US that there is more than one way forward for the WTO. However, expansion of the MPIA model could also serve as a stumbling block to dispute settlement reform if the US decides to exit the WTO altogether by triggering Article XV:I of the Marrakesh Agreement. However, there are practical policy interventions that developing countries and LDCs can adopt to counter the hegemonic narrative of the US in respect of dispute settlement reform.

First, we propose that developing countries must unequivocally reject the opt-in model of dispute settlement proposed by the US. A non-compulsory system could inevitably deepen the fragmentations and inequalities? in an already pluralist multilateral system and this will be detrimental to the WTO's objective to integrate developing countries into the global economy. If Members frequently opt out of dispute settlement processes, it could undermine trust in the multilateral/ WTO system, and this in turn is likely to prompt Members to seek out dispute resolution through bilateral, plurilateral or regional agreements instead where they expect to find a more favourable outcome. This type of forum shopping will deepen fragmentation of the system and marginalise smaller, less influential Members. If the WTO's DSB were to adopt a non-compulsory jurisdiction similar to the ICJ jurisdiction, it could pose significant risks for developing countries, primarily by exacerbating existing power imbalances, increasing uncertainty in the trade environment, and reducing the efficacy and credibility of the WTO itself.

Second, we suggest that developing countries advocate for increased resources and capacity building from the WTO and the Advisory Centre for WTO Law to enable them to effectively engage with the dispute settlement system. While there has been some debate about the appropriateness and utility of third party funding for WTO disputes, financing the dispute process remains one of the most significant obstacles for developing countries and LDCs. If the existing two-tier system cannot be revived, then there may be some merit in pursuing a permanent mechanism based on the MPIA, but its systemic legitimacy will be contingent on the ability of the WTO Members to address the other factors that have constrained engagement with the WTO's dispute settlement system including costs.

Third, developing countries should continue to work collectively and collaboratively with one another and with developed countries because there is strength in numbers. Not the least, even though the US proposals may be 'akin to the desires of a proverbial emperor with no clothes', the dispute settlement system can hardly be reformed without the consent of the US. However, we are living in a 'deglobalizing' and multi-polar world and there will be no meaningful dispute settlement reform if China does not show a willingness to progress on matters that are at the root of the US' intransigence against the WTO. While there is a need for the WTO membership to address issues relating to the right to regulate, especially in respect of national security exceptions, there are broader developing countries issues, including the controversial principle of self-declaration and the distortive nature of China's state capitalism, that have been raised by the US as undermining the WTO's systemic legitimacy. China could, for example, indicate a willingness to engage in discussions about its status as a 'developing country' and follow in the steps of other countries, like South Korea, in renouncing that status. To do so would, of course, mean the loss of special and differential treatment for China but it would come with significant gains for the rest of the developing country membership, notwithstanding the heterogeneity of the group. In sum, developing countries must be prepared to engage with these broader issues if there is to be progress on dispute settlement reform. As the WTO approaches MC13, and as argued in the blog by Enrique Prieto-Rios and Mauricio Salcedo-M, developing countries must unite to advocate and lobby for a fully-functioning, fair and transparent dispute settlement system DSB that upholds the spirit of the Uruguay Round bargains

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