



Trade Hot Topics

Dispute Settlement at the WTO: How Did We Get Here and What's Next for Commonwealth States?

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1. Introduction

By 10 December 2019, the number of judges (or Appellate Body members) serving on the Appellate Body – the final appeal court of the World Trade Organization (WTO) – had dwindled to just one, well short of the full complement of seven envisaged under the rules establishing the court (the Dispute Settlement Understanding or the DSU) or the three required to hear a given appeal. Still, by operation of a special rule of appellate procedure (Rule 15 to be precise), judges who had already commenced stayed on to complete the few remaining cases in the docket, with a bare-bones secretariat providing legal and technical support.

It was not until the final report of the Appellate Body was issued on 9 June 2020² that the certainty of the Appellate Body's demise finally materialised, signalling the end of an era in dispute settlement that began in 1995 when the Appellate Body emerged as one of the innovations accompanying the establishment of the WTO. Less certain, however,

are the consequences of the loss of the Appellate Body for dispute settlement and the legitimacy of the WTO, at a time of increasing unilateralism by some WTO members and a fragile world economy plagued by the unforeseen COVID-19 pandemic.

This issue of *Trade Hot Topics* examines the current state of WTO dispute settlement with a focus on repercussions for Commonwealth countries. Specifically, it begins by outlining the dispute settlement profile of Commonwealth states, and then turns briefly to the history of the Appellate Body, highlighting its successes and the criticisms it attracted, as well as the reasons for its demise. This is followed by a discussion of the technicalities of one proposed option to temporarily fill the void left by the Appellate Body's absence, assessing its merits and explaining what it might portend for participating and non-participating members. It concludes with recommendations for the consideration of Commonwealth states as they seek to define and promote their dispute settlement interests in the current WTO environment.

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² Appellate Body Report, *Australia — Tobacco Plain Packaging (Honduras) / Australia — Tobacco Plain Packaging (Dominican Republic)* (WT/DS435/AB/R, WT/DS441/AB/R). See https://www.wto.org/english/news_e/news20_e/435_441abr_e.htm.

2. Profile of Commonwealth members

With the exceptions of The Bahamas³ and three Pacific small island developing states, all Commonwealth countries are WTO members. That said, their interests at the WTO – and in dispute settlement in particular – differ profoundly, ranging from among the WTO's most active users of dispute settlement both as complainants and respondents (e.g., Canada, Australia and India) (see González and Jung, 2020); to those which are less active but still influential either because of their market size, their participation in dispute negotiations or their interests as third parties in disputes (e.g., Malaysia, South Africa and Singapore); to those who rarely, if ever, bring or defend cases (e.g., LDCs and small states) (see Nottage, 2014). The United Kingdom (UK) presents a special case since, despite its important trade interests, it has hitherto been represented in WTO disputes by the European Commission. As it formally left the EU on 31 January 2020, with a transition period until the end of December 2020, this situation will now change.

It is fair to say then that the offensive and defensive agendas of Commonwealth countries in dispute settlement are not homogeneous and, on the contrary, reflect those of a broad cross-section of the WTO membership.

3. History and benefits of the Appellate Body

The Appellate Body emerged at the same time as the WTO was founded, at the conclusion of the Uruguay Round in 1995. In a series of recent papers, Hoekman and Mavroidis⁴ catalogue some of the motivations of the DSU's drafters when they decided to create new procedures to replace the non-automatic, consensus-based, single-tier structure for dispute settlement under the GATT (the WTO's predecessor). Key participants in the discussions were the United States (US), the European Union (EU), Canada, Australia, South Korea, Japan and Brazil. Interestingly, it was the US that requested reforms to the

non-binding GATT system (under which there was no right to panel and a losing party could block adoption of a report), while the EU preferred to keep intact its diplomatic character. For the US, which had increasingly resorted to unilateralism, only a strong dispute settlement system would persuade it to give up its 'nuclear option' of unilateral enforcement through its so-called 'Section 301' legislation.⁵

Only belatedly in the negotiations did Canada first propose the concept of an appeals board, as a 'fast-track procedure' to be completed within 30 days. Although not many details had been worked out, no one objected to the proposal: its acceptance would not upset the overall compromise, and some – like Japan and Korea – expressed enthusiasm for the added layer of review (Hoekman and Mavroidis, 2019).

By the time the negotiations concluded, one solitary provision – Article 17, along with its numerous sub-paragraphs – had been inserted into the DSU, setting out parameters for the operation of the Appellate Body as well as its institutional and jurisdictional limits. Important features of the appeal system included: (i) strict time lines (including a 90-day overall time frame for appeals); (ii) delimitation of appeal issues to matters of legal interpretation and application – as opposed to factual review – arising from panel reports; (iii) a standing body of seven part-time Appellate Body members who were to be 'broadly representative' of the WTO membership; and (iv) a legal secretariat of career lawyers to assist the judges. The first slate of judges drafted the working procedures that further elaborated the day-to-day operations of the Appellate Body.

Since then, in its 25 years of operation, the Appellate Body has generated an impressive volume of case law (over 100 appeal reports adopted and an appeal rate of over 65 per cent⁶); contributed to formalising dispute settlement at the WTO; and brought consistency to trade law jurisprudence. The Appellate Body has also succeeded in its

3 The Bahamas is currently in the process of acceding to the WTO.

4 See Bernard Hoekman and Petros C. Mavroidis (2019) Burning Down the House? The Appellate Body in the Centre of the WTO Crisis WTO Crisis, *EUI Working Papers*, RSCAS 2019/56 Robert Schuman Centre for Advanced Studies Global Governance Programme-353, Section 2; see also generally, Bernard Hoekman and Petros C. Mavroidis (2020) Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?, *EUI Working Papers*, RSCAS 2020/06 Robert Schuman Centre for Advanced Studies Global Governance Programme-381.

5 As Hoekman and Mavroidis explain, the US was 'disappointed with the impossibility of enforcing dispute settlement outcomes in the realm of farm trade (the European Union would routinely block panel rulings that were adverse to its interests), and the lack of progress in integrating services trade and protection of intellectual property rights into the GATT framework' and therefore took justice into its own hands through 'Section 301', 'Special 301', 'Super 301', that is, legislation through which the US administration would enforce its 'rights' unilaterally, that is, without observing GATT Articles XXII and XXIII (Hoekman and Mavroidis, 2019), p. 5.

6 See for instance, WTO, Dispute Settlement Statistics, https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm.

aims: providing an effective second-tier level of review to standardise and bring 'predictability and security' in international trade relations; securing the enforcement of obligations by filling in the interstices of the incomplete WTO 'contract'; and providing the necessary safeguard against governments' wanton renegeing on negotiated commitments.

Yet its track record is not perfect. It is often stated that dispute settlement – and the Appellate Body – has not delivered for the smallest WTO members, who struggle to access and effectively utilise the system given their human and financial (cost) limitations and the lack of enforceability of decisions (see Nottage, 2014). In a 2014 study featuring the performance of Commonwealth small states and LDCs in WTO dispute settlement, it was noted that, up to that date, these states participated as complainants and defendants in under 1 per cent of cases. Sadly, little if anything has changed in Commonwealth small state and LDC participation since the publication of that paper.⁷

4. Concerns with dispute settlement and the Appellate Body

Inevitably, as time elapsed and more and more cases were decided, there were some who questioned whether the Appellate Body was operating as intended and meeting the needs of its expanded membership.⁸

The impetus for the first set of formal reform efforts come from a 1994 Ministerial Decision, which had mandated a review of the DSU (the DSU Review) to be completed by the end of 1998.⁹ The discussions were not successful, and were thereafter subsumed within the broader Doha negotiations, under a mandate to 'improve and clarify' the DSU by 2004. That multilateral process continues to this day.

In the context of the DSU Review, core topics being discussed include: (i) mutually agreed solutions; (ii) third-party rights; (iii) strictly confidential information; (iv) sequencing; (v) post-retaliation; (vi) transparency and amicus curiae briefs; (vii) time frames; (viii) remand; (ix) panel composition; (x) effective compliance; (xi) developing country interests, and (xii) flexibility and member control.¹⁰ Most DSU Review proposals do not call into question the basic architecture of the system, including the Appellate Body.

5. The US' complaints bring appeals to a halt

The US has for a long time now complained of 'overreach' by the Appellate Body, with its disapproval manifested in proposals on 'flexibility and Member control' in the context of DSU Review, and in statements at meetings of the WTO's Dispute Settlement Body (DSB).

What is new, however, is the US' decision to link its longstanding concerns with the Appellate Body to the selection process for its judges; specifically, using its veto at the DSB to block new appointments.¹¹ A confluence of factors has led to the current recalcitrance of the US, including the 2016 election of President Trump to the White House and his appointment of Robert Lighthizer as the US Trade Representative (USTR), a known proponent of WTO dispute settlement reform.¹²

The main concerns the US has with the Appellate Body's alleged 'overreach' have been represented as follows:

- Disregard for the 90-day deadline for appeals under Article 17.5 of the DSU
- Application of Rule 15 of its Working Procedures to extend the terms of office of Appellate Body members whose terms have expired, for the

7 For example, the Appellate Body ruled in favour of Antigua and Barbuda against the US in a case involving access to the latter's market in cross-border gambling and betting services. Despite winning on the merits, and although WTO authorised Antigua and Barbuda to retaliate against the US through suspension of its TRIPS obligations, there has still not been a successful outcome for Antigua and Barbuda. (Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, modified by Appellate Body Report, WT/DS285/ AB/R ('*United States – Gambling*')).

8 Hoekman and Mavroidis attribute some of the objections to the results of the 'zeroing' cases, involving methodologies for calculating duty margins under the Agreement on Anti-Dumping (Hoekman Mavroidis, 2019).

9 In 1994, GATT Contracting Parties adopted a decision at their Ministerial Conference in Marrakesh, Morocco to complete a full review of dispute settlement rules and procedures under the newly-created WTO within four years after the entry into force of the Agreement Establishing the World Trade Organization. Members were to take a decision at that time on whether to continue, modify or terminate such dispute settlement rules and procedures.

10 For a comprehensive discussion, see Robert McDougall (2018b), *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, *Journal of World Trade*, 52(6), pp. 867–896.

11 Under the rules of procedure of the DSB, decisions regarding appointments require consensus – or an absence of objection – among the WTO membership, failing which there can be no renewal of the judges' 4-year terms or selection of new ones. See US Statement at the DSB meeting of 27 August 2018, available at: <geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_Stmt_as-delivered_fin_public.pdf>

12 This is at least the perception that is widely held in the news media. See for instance Politico (2017) *The man getting ready to take on the WTO*. Available at: <https://www.politico.com/agenda/story/2017/02/robert-lighthizer-wto-000304/>.

purpose of completing appeals to which they were assigned

- Issuance of ‘advisory opinions’ on issues unnecessary to resolve a dispute
- Review of facts and of domestic law *de novo*
- Treatment of its prior reports as binding precedent.¹³

As an immediate response to the continued blockage of appointments, Ambassador David Walker (New Zealand) was tasked with facilitating an informal process to address these concerns and revitalise the selection process to fill vacancies at the Appellate Body. A total of 12 proposals were submitted, reviewed and discussed. A number of Commonwealth countries including Australia, Canada, New Zealand, India, the UK (as part of the EU), and the African Group, participated in and provided proposals for those discussions.

A key outcome of the Informal ‘Walker Process’ was a draft General Council decision based on points of convergence identified in the informal consultations.¹⁴ WTO members considered the Draft Decision at the meeting of the General Council in December 2019, just in time for the expiration of the terms of two of the remaining Appellate Body members. Among the points noted in the Decision was a combined view that the Appellate Body had, in some respects, not been functioning as intended under the DSU.¹⁵ In an effort to appease US concerns, the Decision was drafted in sections addressing (i) transitional rules for outgoing Appellate Body members; (ii) the 90-day time frame for appeals; (iii) the meaning of municipal law; (iv) advisory opinions; (v) precedent; and (vi) ‘overreach’ in the interpretation of the WTO Agreements. Also set out was a process under the DSB to establish, in consultation with the Appellate Body, a mechanism for regular dialogue between WTO members and the Appellate Body where members could express their views on issues unrelated to specific cases.

The US objected to the adoption of the Draft Decision on the ground that it failed to address the ‘fundamental question’ of ‘why Appellate Body [felt] free to disregard the clear text of the agreements’.¹⁶

Consequently, the General Council could not adopt the Draft Decision, and the US continues, to this day, to block the selection process.

6. Requiem for the Appellate Body

As well intentioned as the Walker Process was, it could not stem the fall of the Appellate Body. As of 10 December 2019, only one Appellate Body member remained on the Appellate Body; and on 9 June 2020 the Appellate Body issued its last report.

This situation raises deep systemic concerns, including that WTO members, having effectively been stripped of a right to appeal, no longer have a way to correct legal errors in panel reports. Not only does this endanger consistency across panel decisions. More disturbingly, it means that panel decisions can be rendered unenforceable: a losing member can now simply ‘appeal’ unfavourable panel reports under the provisions of the DSU to a non-existent Appellate Body, thereby suspending the dispute indefinitely. Without a legal fix to preclude this treaty-based right that still exists under the current DSU, adoption of reports can be forestalled by a party ‘appealing into the void’.

Of course, irrespective of what happens with appeals, WTO members retain their right to use other (non-binding) dispute settlement options – that is, alternative dispute resolution (ADR) mechanisms – like good offices, conciliation and mediation (under Article 5 of the DSU), and arbitration (under Article 25 of the DSU). This option is available in addition to or in lieu of the panel and appeal processes and is considered by many to be a more expeditious means of resolving disputes (leading to lower fees). Nonetheless, there has been limited uptake of ADR owing to its voluntary nature (parties have to agree to use it) and the perception that it is sub-standard (Nottage, 2014). One commentator also notes that many potential users seem unaware that there is a *right* provided to developing countries under Article 3.12 of the DSU to invoke special 1966 Procedures¹⁷ in lieu of standard panel procedures in any dispute against a developed country and that Article 24.2 of the DSU provides that the WTO Director-General must

13 See for instance US Statement at the WTO General Council Meeting of 23 July 2019.

14 The Draft General Council decision presented to the General Council at its 9–11 December 2019 meeting is contained in document WT/GC/W/791.

15 WT/GC/W/791, fourth preambular recital.

16 WT/GC/M/181, para. 5.103.

17 The Decision of 5 April 1966 on procedures under Article XXIII provides for the Director-General of the WTO, in matters involving developing countries, to use his good offices to facilitate the settlement of a dispute.

offer good offices, conciliation and mediation in any dispute involving an LDC. The commentator highlights that, despite its underutilisation, the track-record of ADR is impressive, leading in one situation to the resolution of a 20-year-old dispute in just 2 years.¹⁸

7. MPIA as a single possible solution

The real risk of panel decisions being rendered unenforceable, as well as the destruction of the two-tier system of appeal, has led a group of members to initiate a proposal first mooted by WTO practitioners,¹⁹ and then announced as a bilateral solution,²⁰ to use DSU Article 25 arbitration procedures to replace – and mimic – the now defunct appeal process.²¹

The proposal was taken up by 19 WTO members who formally announced the Multiparty Interim Appeal Arbitration Agreement (the MPIA) to the DSB on 30 April 2020.²² Since the original announcement, three more WTO members have signed up to the MPIA, bringing its current total membership to 22,²³ five of which are Commonwealth countries (in bold): **Australia**, Benin, Brazil, **Canada**, China, Chile, Colombia, Costa Rica, Ecuador, the EU (including the **UK**), Guatemala, Hong Kong (China), Iceland, Mexico, **New Zealand**, Nicaragua, Norway, Pakistan, **Singapore**, Switzerland, Ukraine and Uruguay.

By design, the MPIA provides an ‘interim’ regime for appellate proceedings for ‘as long as the Appellate Body is not able to hear appeals’. It is, therefore, expressly without prejudice to finding a lasting solution to the appeal crisis. Its drafters aim to safeguard two important aspects of the WTO’s dispute settlement system – its binding character and the two-level adjudication process – while also ensuring independence and impartiality in appeals. Any WTO member may join at any point.

The MPIA framework is divided into three main parts: the overarching institutional arrangement; the procedures for the conduct of MPIA appeals

(Annex 1); and the system for selecting a ‘pool’ of arbitrators (Annex 2).

First, under the institutional arrangement section, participating members give their consent to use the MPIA as a basis for settling future appeals among themselves. This part sets out the aims of the MPIA; the procedures for joining and withdrawing from it; the duties and responsibilities of the arbitrators selected to serve under it; and how, procedurally, it will operate alongside the other aspects of the dispute settlement procedures, including panel proceedings.

Second, Annex 1 to the MPIA provides for default procedures to be used by the participating members – although parties can mutually agree to depart from these procedures in a specific dispute. In effect, the MPIA process utilises the arbitration process under Article 25 of the DSU as a receptacle to replicate the main features of the existing WTO appeal process. It thereby mimics the original system’s time frames for completion of appeals; the scope of the appeals and the powers of arbitrators; the process for selecting the Division to settle appeals; the overall decision-making process; and the rights of third parties. The MPIA, however, needs some adjustments to ensure that the new procedures can be effectively grafted onto existing ones. For instance, participating members must notify an agreement to arbitrate under the MPIA 60 days after panels are established; and must request that panels suspend their work after they have issued their interim reports, so that an appeal arbitration can begin without the risk that the panel report will be adopted while the appeal is pending.

As a nod to the US, the MPIA includes a number of innovations: support staff to arbitrators are ‘answerable... only to appeal arbitrators’; arbitrators are permitted to ‘streamline procedures’, including through the imposition of page and time limits and deadlines, and suggestions that claims questioning the objectivity of panels’ factual assessments

18 Nottage, 2014, p. 28, referring to the WTO *EC-Bananas* dispute.

19 Scott Andersen, Remy et al. (2017) Using Arbitration Under Article 25 of the DSU to Ensure the Availability of Appeals. CTEI Working Paper 2017-17. Available at: <graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2017-17-.pdf>

20 In July 2019, the EU and Canada notified the DSB of the interim appeal arbitration agreement that would apply in future disputes between them, in circumstances where the Appellate Body was unable to hear appeals due to an insufficient number of ABMs. A subsequent proposal between the EU and Norway was notified in October 2019.

21 Article 25 – entitled ‘Arbitration’ – allows parties to mutually agree procedures for dispute settlement, establishes the bindingness of the awards by arbitrators, and engages the full enforcement and implementation procedures under Articles 21 and 22 of the DSU once awards are rendered.

22 The full text of the MPIA, including its Annex 1 and 2, is available here: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf

23 That number is 50 if the EU, its 27 member states and the UK are counted individually.

should be excluded; and arbitrators should confine review to matters necessary to resolve a dispute.

Finally, the MPIA establishes a system for selecting the pool of arbitrators from which the division of three arbitrators per case will be composed. Each of the 22 members nominates one candidate to a pre-selection committee comprising the WTO Director-General and other Chairs of relevant WTO committees (Chairperson of the DSB, and the Chairpersons of the Goods, Services, TRIPS and General Council). The pre-selection committee's job is to 'screen' the nominees for selection by the participating members, who must agree to a final list of ten arbitrators by a process of 'consensus'. Notably, current and past Appellate Body members are excluded from the pre-selection screening process and are automatically eligible for selection. Arbitrators must possess the same qualifications and competences as the Appellate Body members. However, unlike the appellate system, where seven judges are chosen for a period of four years, renewable once, on the basis of broad geographic representativeness, under the MPIA, ten arbitrators are to be chosen on the basis of an 'appropriate overall balance'.

8. Reactions to the MPIA proposal

Since its formal announcement, a few developments have taken place to operationalise the MPIA. For instance, the procedure for appointing the pool of ten arbitrators has begun, with meetings of the selection committee already convened. Discussions on the budgetary allocation for the MPIA have also taken place.

The jury is still out on how the MPIA will fare, but there is no shortage of debate.²⁴ With an uptake so far of less than a quarter of the membership – excluding the US, India, South Africa, Japan, and the ACP – its proponents will have to launch a more ambitious lobbying campaign if the proposal is to enjoy widespread legitimacy.

At the moment, the criticisms seem to be of a technical or political nature. As it is an untested procedure to date, some remain doubtful about the real prospects for its use.²⁵ Some question how 'representative' it will be, given that only the initial

participating countries will have a hand in selecting arbitrators; some fear possible fragmentation of the case law and the legal status of MPIA decisions vis-à-vis future or previous WTO jurisprudence; and some are unclear about how the MPIA affects the balance of rights and obligations under the DSU.²⁶

The US has come out against the scheme, highlighting the MPIA's potential to entrench, rather than resolve, problems with the appeal system, and questioning whether budgetary allocations for the MPIA could be justified given its limited membership. The US has therefore made it clear that it has no intention of joining the MPIA, at least at this point in time. In addition to some of the technical issues highlighted above about the systemic impact of the MPIA on dispute settlement, at a meeting of the DSB on 29 June 2020, South Africa raised a number of issues with the MPIA including: whether the mechanism of Article 25 of the DSU is the proper vehicle for a broad multilateral effort like the MPIA; the likelihood of the MPIA becoming a default 'permanent' system, by stealth, without an express decision to do so by the broader membership; lack of attention in the MPIA to developing country concerns, including how the MPIA will affect issues of costs, access and representativeness for African countries; concern that the MPIA will distract from the energy for resolving the Appellate Body impasse (as well as the ongoing Walker Process); and a general lack of clarity – and agreement – on how the MPIA will be funded from the WTO budget.

Although there have been rumblings among delegates in the corridors of the WTO, and some statements in the DSB meetings have been made on the MPIA, other non-participating members have been slower to publicly declare their hand. Their reticence is likely to derive from one or a combination of the reasons highlighted above as well as others, including: preference for a 'wait-and-see' approach as to how the system will work before committing to it; fear of the consequences of engagement for their relations with the US; the longstanding concerns with dispute settlement and the WTO reform more generally; and general antipathy towards fixing a system that has yielded very few tangible results for them.

24 For a flavour of the ongoing debate on the MPIA, see recent blog entries the International Economic Law and Policy Blog hosted at www.worldtradelaw.net e.g. at <https://ielp.worldtradelaw.net/2020/06/india-south-africa-and-the-mpia.html>.

25 One dispute in the pipeline that uses the MPIA to settle an appeal is *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico* (WT/DS524/5).

26 See for instance Jan Yves Remy (2020) What the new Appeal-Arbitration System Might Mean for the Future of WTO Dispute Settlement. Available at: <https://shridathramphalcentre.com/cure-or-curse-the-new-appeal-arbitration-system-in-wto-dispute-settlement/>

9. Way forward

As it is the only option on the table, there is a real chance that the MPIA will – or may – become the default option for many countries for years to come. For this reason, a country that opts not to formulate a position on the MPIA as an appeal alternative – or on dispute settlement generally – does so at its own risk. It would also be a mistake for countries with a limited participation in dispute settlement to think they can ‘sit this one out’. The view that such states have little at stake is exaggerated at best, and belies the interest that all countries have in the clarification of rules and their enforcement, even when they are not directly involved in litigation, since they can ‘free-ride’ on the coattails of those with greater litigating experience, deeper pockets and more direct trade interests.

While the loss of the Appellate Body may not precipitate a descent into anarchy or a complete ‘breakaway’ from the rules-based system as some might fear (McDougall 2018a), its impact should not be underestimated. COVID-19 is exacerbating a tendency by world powers to revert to beggar-thy-neighbour measures taken in self-interest, and the EU has even proposed that countries in a dispute with it that choose to ‘appeal into the void’²⁷ might be subjected to EU countermeasures.²⁸ There is also the not inconsiderable issue of the ongoing US–China ‘trade war’. The spat regarding dispute settlement only exacerbates US criticisms of Chinese participation in the WTO and makes a US compromise on the MPIA – of which China is part – even less likely.²⁹ Simmering trade tensions between the US and EU, the latter being another key MPIA member, also casts doubt on the political viability of the MPIA as a solution for all, at least for now.³⁰

Against the current background, it is in the interests of all Commonwealth countries to contemplate the future of dispute settlement in the light of their individual and collective interests. Being an established sub-grouping of states with diverse trade interests, the Commonwealth forum might

provide fertile ground for dialogue and formulation of solutions among its members that could serve as a model for advancing the conversation on dispute settlement at the WTO.

In any such discussion, a fundamental point of departure must be whether members want to preserve a system of binding dispute settlement. For those that do, the current situation that tolerates the possibility of ‘appealing into the void’ presents a major threat. A priority would be to find a workaround to current DSU rules that would lead to automatic adoption of panel reports. They could also seriously consider joining the MPIA – which has the added advantage of retaining appeal review – but, for many, it only serves as an effective, long-term solution insofar as the most litigious sign on. Failing that, the unfair consequence of being part of the MPIA is to bind some countries to comply with decisions, while leaving many free to act unilaterally.

A second issue to confront directly is the massive elephant in the room for many Commonwealth states – the US. Many developing countries still rely on the largesse of, and trade relations with, the US and might fear consequences if they join the MPIA. They are unlikely to proceed with the MPIA option if they consider that it would endanger their prospects with the US under the current Trump administration, or if they are not convinced that there is some clear advantage to them to sign on.

For countries that have not yet signed up to the MPIA, all options are now on the table. One option worth pursuing by Commonwealth states is the formulation of a template that would provide for a more flexible or ‘à la carte approach’ to dispute settlement that defies the one-size-fits-all approach that has typified dispute settlement to date, and is adapted to the needs of the specific litigants and subject matter of the dispute. Such an approach would look anew at all the procedures available under the DSU – including ADR procedures of good faith, mediation, conciliation and arbitration, as well as the more traditional

27 In at least one dispute, the US appealed a panel report to a non-existent Appellate Body. See *United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India: Recourse to Article 21.5 of the DSU by India* (WT/DS436/RW and WT/DS436/RW/Add.1) For more discussion see <https://ielp.worldtradelaw.net/2019/12/the-us-appeal-in-ds436.html>.

28 Under this proposal, if the EU won a panel ruling but its trading counterpart refused to allow an effective appeal, the European Union would calculate damages in the form of quotas and tariffs. (<https://www.businesslive.co.za/bd/world/europe/2019-12-12-eu-moves-to-reclaim-trade-authority-after-us-cripples-wto/>). See also <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2091&title=Commission-reinforces-tools-to-ensure-Europes-interests-in-international-trade>.

29 The US has accused China of flouting WTO rules, whether through its alleged subsidisation of its state-owned enterprises, its self-designation as a developing country, or its alleged disregard of intellectual property rights.

30 The US recently announced a tax on French goods in response to the digital tax imposed by France. See Politico (2020) USTR announces duties on \$1.3B in French goods in tax dispute, <https://www.politico.com/news/2020/07/10/french-tax-ustr-356628>

panel procedures – and use them at different stages of the dispute, even allowing for use of MPIA procedures on an ad hoc basis (that is, without formally signing up to the MPIA but adopting the procedures in Annex 1). Being dependent on the complicity of members, a tailor-made approach to disputes would minimise the legitimacy issues dogging the current system and allow countries to choose procedures more attuned to their needs and sensitive to their resource constraints. Such an approach would depend on the goodwill of the parties to follow through on any agreement made ex ante, and the Achilles' heel would still be enforceability. However, this risk is neither less or more than what the current system offers.

There is also the reality – and opportunity – that COVID-19 has brought to the fore: that is, the conduct of online dispute settlement proceedings. With face-to-face meetings and interactions currently impractical, the option of moving DSB meetings and panel proceedings (including the filing of documents,³¹ oral hearings of the parties, and panel deliberations) to online platforms has become a real possibility. A virtual format has the ability to make the settlement of disputes a more accessible process for a wider group of stakeholders, who can now remain at home and participate in disputes. Not only does that translate to cost savings for disputing parties, but equally for the WTO since the huge amounts spent on panellists' travel to the WTO Secretariat in Geneva, and their accommodation while there, can be avoided. The result would undoubtedly be a shift in the centre of gravity for dispute resolution away from just Geneva since more stages of the process – consultations, ADR options, panel proceedings and even eventually meetings of the DSB – might be conducted online. While cybersecurity and confidentiality issues would have to be addressed, one positive outcome of COVID-19 may well be to usher in new possibilities for a more inclusive and participatory dispute settlement system.

Regardless of one's view about how precisely to formulate next steps, one thing is certain: the present moment allows Commonwealth countries to reimagine dispute settlement in a way that meets the needs of all its members. They should take advantage of it.

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31 The WTO online registry has been an ongoing project for many years and has become a reality in recent times.

International Trade Policy Section at the Commonwealth Secretariat

This Trade Hot Topic is brought out by the International Trade Policy (ITP) Section of the Trade Division of the Commonwealth Secretariat, which is the main intergovernmental agency of the Commonwealth – an association of 54 independent countries, comprising large and small, developed and developing, landlocked and island economies – facilitating consultation and co-operation among member governments and countries in the common interest of their peoples and in the promotion of international consensus-building.

ITP is entrusted with the responsibilities of undertaking policy-oriented research and advocacy on trade and development issues and providing informed inputs into the related discourses involving Commonwealth members. The ITP approach is to scan the trade and development landscape for areas where orthodox approaches are ineffective or where there are public policy failures or gaps, and to seek heterodox approaches to address those. Its work plan is flexible to enable quick response to emerging issues in the international trading environment that impact particularly on highly vulnerable Commonwealth constituencies – least developed countries (LDCs), small states and sub-Saharan Africa.

Scope of ITP Work

ITP undertakes activities principally in three broad areas:

- It supports Commonwealth developing members in their negotiation of multilateral and regional trade agreements that promote development friendly outcomes, notably their economic growth through expanded trade.
- It conducts policy research, consultations and advocacy to increase understanding of the changing international trading environment and of policy options for successful adaptation.
- It contributes to the processes involving the multilateral and bilateral trade regimes that advance more beneficial participation of Commonwealth developing country members, particularly, small states and LDCs and sub-Saharan Africa.

ITP Recent Activities

ITP's most recent activities focus on assisting member states in their negotiations in the World Trade Organization and various regional trading arrangements, undertaking analytical research on a range of trade policy, emerging trade-related development issues, and supporting workshops/ dialogues for facilitating exchange of ideas, disseminating informed inputs, and consensus-building on issues of interest to Commonwealth members.

Selected Recent Meetings/Workshops Supported by ITP

29 January 2020: Looking to LDC V: A Critical Reflection by the LDV IV Monitor (in partnership with the OECD Development Centre and the Centre for Policy Dialogue, Bangladesh) held at Marlborough House, London, United Kingdom.

28 January 2020: Roundtable Discussion on Trade Shocks in the Commonwealth: Natural Disasters and LDC Graduation (in partnership with the Enhanced Integrated Framework) held at Marlborough House, London, United Kingdom.

11 October 2019: Tapping the Tourism Potential of Small Economies: A Transformative and Inclusive Approach (WTO Public Forum) held in Geneva, Switzerland in collaboration with the WTO and the UNWTO.

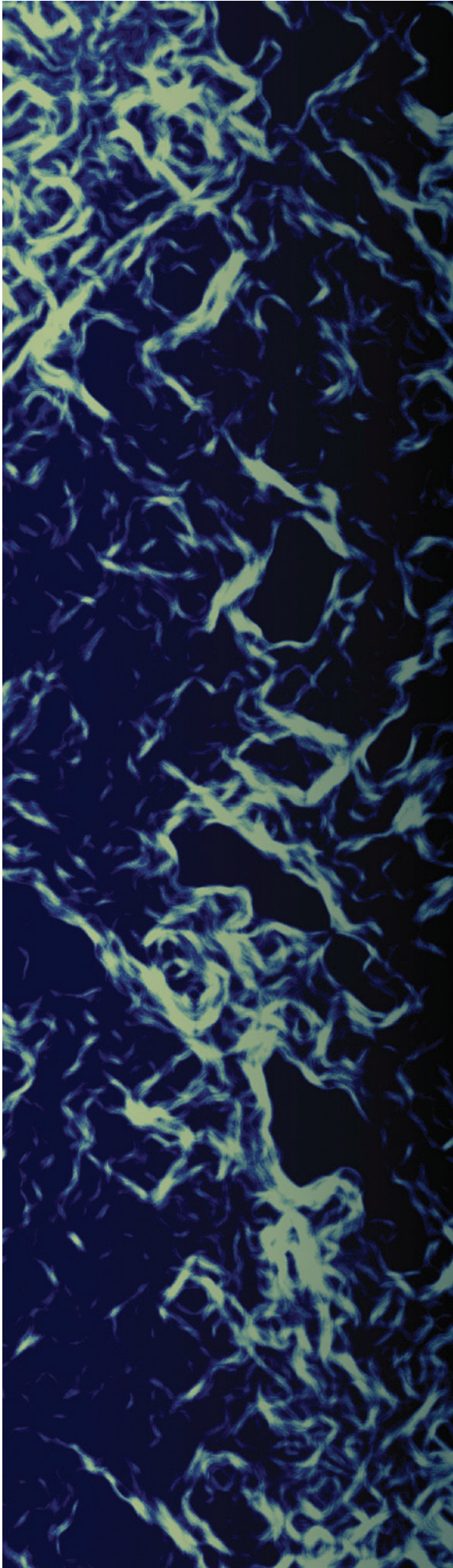
10 October 2019: Commonwealth Trade Ministers Meeting held at Marlborough House, London, United Kingdom.

26–27 September 2019: 12th South Asia Economic Summit XII: Shaping South Asia's Future in the Fourth Industrial Revolution held in Colombo, Sri Lanka in collaboration with The Institute of Policy Studies of Sri Lanka.

26 June 2019: Launch of the Commonwealth Publication 'WTO Reform: Reshaping Global Trade Governance for 21st Century Challenges,' held in Geneva, Switzerland.

28–30 May 2019: Harnessing Trade Policy for Global Integration: Commonwealth Consultation for the Asia-Pacific Region held in Singapore in collaboration with the Institute of South Asian Studies, National University of Singapore.

4 April 2019: The Digital Economy: The Case of the Music Industry held in Geneva, Switzerland in collaboration with UNCTAD and the Government of Indonesia.



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Trade Hot Topics

ISSN: 2071-8527 (print) ISSN: 2071-9914 (online)

Commonwealth Trade Hot Topics is a peer-reviewed publication which provides concise and informative analyses on trade and related issues, prepared both by Commonwealth Secretariat and international experts.

Series editor: Brendan Vickers

Produced by Trade, Oceans and Natural Resources Directorate of the Commonwealth Secretariat

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