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The Uncertain Future of WTO Dispute Settlement

An Appraisal of the February 2024 Consolidated Text Resulting from the Molina Process on Dispute Settlement Reform

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The Uncertain Future of WTO Dispute Settlement: An Appraisal of the February 2024 Consolidated Text Resulting from the Molina Process on Dispute Settlement Reform

Peter Van den Bossche[1]

1. Introduction

For more than two decades, the WTO dispute settlement system was the 'jewel in the crown of the WTO'. Today, however, the system is in an existential crisis and a mere shadow of what it once was. This paper will not look back on the past success of the WTO dispute settlement system, nor will it discuss past efforts, which started as early as 1998, to further improve it.[2] This paper will also not dwell on the causes and the severity of the current crisis of WTO dispute settlement or on the EU initiative to limit the damage and secure rules-based WTO dispute settlement among willing Members.[3] This paper first deals with how the discussions on the reform of the WTO dispute settlement system were conducted in 2023 and early 2024 in the run-up of the 13th WTO Ministerial Conference in February/March 2024, and then critically assesses the proposed changes to the WTO dispute settlement system reflected in the Consolidated Text of a draft Ministerial Decision on Dispute Settlement, submitted to the General Council on 14 February 2024.[4] The paper focuses, in particular, on the proposed changes regarding alternative dispute resolution and arbitration, panel proceedings, compliance, guidelines for adjudicators, procedures to discuss legal interpretations, Secretariat support, transparency, accessibility, technical assistance, capacity building and legal advice, and the periodic review of the implementation of the reform agenda.

2. The Molina Process

In June 2022, thirty months after the crisis of the WTO dispute settlement system became acute, the Ministerial Conference of the WTO 'recognize[d] the importance and urgency of addressing' the 'challenges and concerns with respect to the dispute settlement system' and 'commit[ted] to conduct discussions with the view of having a fully and well-functioning dispute settlement system accessible to all Members by 2024.'[5] In the months immediately preceding and following the latter commitment, the United States, which had previously shown no interest in reviving the WTO dispute settlement system, convened a number of mostly bilateral meetings 'to understand Members' expectations regarding the operation of the dispute settlement system'.[6] During these meetings, Members reportedly 'identified and discussed more than 230 interests'.[7] With these expressed interests as a starting point, Mr Marco Molina, the then Deputy Permanent Representative of Guatemala to the WTO, initiated in February 2023, at the request of a number of key WTO Members, informal discussions on dispute settlement reform

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[2] 'Marrakesh Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Adopted on 15 April 1994'; WTO Ministerial Conference, 'Ministerial Declaration Adopted on 14 November 2001, WT/MIN(01)/DEC/1' (20 November 2001) para 30.

[3] WTO, 'Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, JOB/DSB/1/Add.12' (30 April 2020).

[4] WTO General Council, 'Special Meeting of the General Council on 14 February 2024, Report by H.E. Mr Petter Ølberg, Chairman of the DSB, JOB/GC/385 Dated 16 February 2024' Annex 1.

[5] WTO Ministerial Conference, Twelfth Session, 'MC 12 Outcome Document, Adopted 17 June 2022, WT/MIN(22)/24 Dated 22 June 2022' para 4.

[6] 'Report by the Convener of the Informal Reform Discussions – Mr. Marco Molina of Guatemala (Hereinafter '2024 Molina Report')' para 1.13. This report was included in the report by the Chair of the DSB to the WTO General Council on 14 February 2024, referred to in n 4.

[7] ibid.

(hereinafter 'the Molina Process'). Note that Molina never got from the DSB an official mandate as the facilitator of the reform discussions or convener of the related meetings.[8] Molina did, however, report on the ongoing discussions to the DSB every two months and at these DSB meetings, many Members stated that 'they saw great value in this process', 'recognized that the informal process has achieved significant progress so far', and 'commended Mr Marco Molina for his outstanding leadership in this informal process'.[9]

In response to Molina's invitation 'to propose ideas and conceptual approaches that could potentially address the interests identified', Members tabled more than 70 proposals based on which 'interest-based conversations' were started among the Geneva-based dispute settlement experts of Members.[10] Between February 2023 and February 2024, Molina convened 'more than 350 meetings, including 110 plenary sessions open to all WTO Members, as well as numerous small-group and bilateral meetings'.[11] In total, 145 of the then164 WTO Members participated in these meetings.[12] While Molina confidently stated that 'Members have had ample opportunities to share their views'[13], not all Members agreed. In July 2023, the African Group signalled unease with the Molina Process and called for›the commencement of an effective and inclusive multilateral process on dispute settlement reform' which would 'facilitate the participation of developing and least-developed countries, including delegations with limited resources'.[14] The African Group voiced concerns regarding, in particular, the pace of the scheduled meetings and the limited time to consult with capitals and regional groupings.[15] In September 2023, Indonesia voiced similar concerns when it observed that 'many Members from developing countries and LDCs, who inherently do not have a dedicated delegate for the dispute settlement reform issue, experience difficulties in fully and effectively participating in the informal discussion due to conflicting schedule between such discussion and other formal meetings or negotiations.'[16] In November 2023, Egypt, India, and South Africa also voiced concerns regarding the pace and format of the Molina Process.[17] These are, unfortunately, concerns that especially the least-developed country Members have, and rightly expressed, in the context of many WTO discussions or negotiations.

Attached to the Report that Molina presented at the General Council meeting on 14 February 2024, ie, two weeks before the Ministerial Conference in Abu Dhabi (MC13), was the seventh revision of the consolidated text of a draft Ministerial Decision on Dispute Settlement (hereinafter 'the Consolidated Text'). In his report to the General Council, Molina noted that in the reform discussions, 'significant progress has been achieved' and that the seventh revision 'reflects Members' collective understandings and expectations regarding the system's operation.' The latter statement creates the impression that this latest version of the Consolidated Text has consensus support. This is, however, not the case. Two days before Molina presented his report, Bangladesh, Egypt, India, Indonesia, and South Africa (hereinafter

[8] Also note that the WTO Secretariat was not directly involved in the Molina Process.
[9] (n 4) para 1.6. Note that shortly after presenting his report to the General Council on 14 February 2024 and a few days before the start of the Ministerial Conference meeting in Abu Dhabi on 26 February 2024, Molina was summarily fired by his government. No reason was given for his removal, but professional jealousy was reportedly what motivated this most unfortunate and unwarranted action.
[10] (n 6) para 1.14, 1.15 and 1.22. For an explanation of the 'interest-based approach' to the dispute settlement reform discussions adopted by Molina, see paras 1.15 to 1.20. Note, in particular, that according to Molina, 'an interest-based approach offers the key advantage of reducing power imbalances and fostering inclusive dynamics, allowing every Member to contribute meaningfully. By centring discussions around interests and concerns rather than leverage, this approach ensures fairness and equality for all Members, regardless of their size or status. This commitment to valuing every perspective equally ensures that our collective pursuit of optimal solutions remains untainted by external factors.' (para 1.19).
[11] ibid 1.29. Molina also had bilateral meetings with Members whenever requested (ibid).
[12] ibid 1.30.
[13] ibid 1.29. Note in this regard that 'each iteration of the text reflects feedback received from the plenary sessions, to which all Members are invited to participate' and that 'the changes introduced into each iteration resulted from conversations and understandings reached during those plenary sessions.' See ibid, para 1.25. Note also that 'if delegates are unsure about certain aspects of the text or they need to consult with their Capitals, we leave the discussion and revisit issues at the following plenary session.' See ibid, para 1.28.
[14] 'Communication from the African Group on Dispute Settlement Reform, JOB/DSB/5 Dated 13 July 2023' 2.
[15] ibid.
[16] 'Communication from Indonesia, Dispute Settlement Reform Discussion: A Thought on the Process, JOB/DSB/6 Dated 19 September 2023' para 2.3.
[17] 'Joint Communication from Egypt, India, and South Africa, Reflections on the Reform of the WTO Dispute Settlement System, JOB/DSB/7 Dated 24 November 2023' para 5. This communication includes additional critical comments that the informal process allowed for in-person participation in Geneva, and not for online participation by capital-based experts and that the composition of the drafting groups had not been made public.

'the BEIIS Group') had voiced their concern that the 'far-reaching changes' proposed in the reform process 'would fundamentally alter the nature of the dispute settlement system of the WTO' and 'undermine interests that we, as developing countries, including LDCs, have identified as essential in a reformed WTO dispute settlement system'.[18] The BEIIS Group noted that 'concerns and reservations that have been raised by us in the course of the ongoing discussions have not been recorded' and that the Consolidated Text 'presents a misleading view and suggests that there is convergence on the majority of the issues in the text.'[19]

While the Consolidated Text does not (yet) reflect a consensus among Members regarding WTO dispute settlement reform, its most important shortcoming is that it does not even address the issue that triggered the current crisis, namely the functioning of the Appellate Body. While Molina states that 'significant progress has been made', there were 'conceptual differences among Members regarding the operation' of the 'appeal or review' mechanism and, therefore, work on other issues was 'prioritized'.[20] The Consolidated Text contains a placeholder title, 'Appeal/Review Mechanism', with the text '[Work in Progress]'. As the BEIIS Group stated, 'the central interest that motivated Members to engage in this informal exercise, ie, the restoration of the Appellate Body, has not been addressed.'[21] Be this as it may, the Consolidated Text arguably represents, as Molina reported to the General Council on 16 February 2024, 'the most optimal calibration' of interests 'achievable until today in most of the areas under consideration'.[22] At its session in Abu Dhabi in February/March 2024, the Ministerial Conference recognised 'the progress made' through the Molina Process 'as a valuable contribution to fulfilling our commitment' of 'having a fully and well-functioning dispute settlement system accessible to all Members by 2024'.[23] One may expect that, notwithstanding the lack of consensus support, the ongoing WTO dispute settlement reform process will build on the proposed changes reflected in the Consolidated Text. These proposed changes therefore deserve and require careful attention and critical assessment as do the objections and concerns expressed by the BEIIS Group.

3. Alternative Dispute Resolution Procedures and Arbitration

Title I of the Consolidated Text deals with alternative dispute resolution procedures, and in particular good offices, conciliation and mediation (Chapter I), and arbitration (Chapter II). This title is by far the longest and most detailed title of the Consolidated Text, but arguably also the least important for the future of WTO dispute settlement.

9¡7¡.Good.Offices?Conciliation.and.Mediation

From its initiation, the WTO dispute settlement system provided in Art 5 of the DSU for the possibility of settling disputes through methods other than adjudication, ie, diplomatic methods such as good offices, conciliation and mediation. Virtually no use was made of these alternative dispute resolution methods.[24] Chapter I of the Consolidated Text seeks to facilitate the use of these procedures by setting out standardised rules. A detailed discussion of these rules is beyond the scope of this paper, but a few general comments deserve to be made. First, while under Art 5 of the DSU, recourse to alternative dispute resolution procedures must be preceded by a formal request for consultations (which makes the existence of a dispute public knowledge), the Consolidated Text allows for recourse to these procedures before the initiation of consultations. Such recourse shall be confidential unless the parties agree

[18] 'Joint Communication from Bangladesh, Egypt, India, Indonesia, and South Africa, Dispute Settlement Reform: Reflections on Substantive Issues, (Hereafter: "BEIIS Group Communication"), JOB/DSB/8, Dated 12 February 2024' para 2. Note that in para 1.50 of his report to the General Council on 14 February 2024, the DSB Chairperson referred to this Communication but merely to note that it contained the 'reflections on some substantive issues' of five Members.
[19] ibid 3.
[20] (n 6) para 1.37.
[21] (n 18) para 4. As the BEIIS Group stated: 'we believe that the central focus of the reform efforts should be aimed at prioritizing the restoration of the Appellate Body. The discussion on the intricacies of the review standards should be considered once there is consensus on the structure of the two-tier system, with the Appellate Body at the core'. See ibid, para 6.
[22] (n 6) para 1.21.
[23] WTO Ministerial Conference, Thirteenth Session, 'Ministerial Decision on Dispute Settlement Reform, Adopted 2 March 2024, WT/MIN(24)/37, Dated 4 March 2024'.
[24] Peter Van den Bossche and Werner Zdouc, The.Law.and.Policy.of.the.World.Trade.Organization¿Text?Cases?.and.Materials (5th edn, Cambridge University Press 2021) 198, fn 147.

otherwise.[25] While it may be useful to allow for this explicitly, Members were of course, always free to do so. Second, prior to any recourse to alternative dispute settlement procedures, pursuant to the Consolidated Text, a Member may – and is encouraged to – request any other Member information regarding any measure by the latter Member affecting the operation of a covered agreement.[26] While the DSB Chairperson is to be copied, such request (as well as the response thereto) shall remain confidential. Again, it is unclear whether this adds anything to what Members can already do, and indeed do, at present. Third, the Consolidated Text sets out in considerable detail rules on, inter alia, the initiation and termination of alternative dispute settlement procedures[27], the notifications to the DSB[28], and the appointment of a good officer, conciliator, or mediator.[29] In addition, three appendices to Chapter I provide for the rules of procedure for mediation and consultation. The provision of such detailed rules facilitates the recourse by Members to consultation and mediation, as disputing Members could and would fall back on these rules and would no longer have to worry about coming to an agreement on them.[30] Finally, a comment on the use of terms. The Consolidated Text defines the terms conciliation and mediation, and from these definitions, it follows that a mediator 'may offer advice or propose solutions for the parties to consider', while a conciliator may not do so.[31] As these terms are commonly understood and used, the opposite is the case.[32] It is unclear why it was considered necessary to deviate from the ordinary meaning of these terms. Overall, the provision of detailed rules on alternative dispute resolution procedures is to be welcomed, even though it is all but certain that this will trigger an increased use of these procedures.

9¡8¡.Arbitration

Chapter II of Title 1 deals with arbitration proceedings under Art 25 of the DSU. This article provides WTO Members with the possibility to opt for arbitration rather than adjudication by a panel and the Appellate Body. Before the current crisis of the WTO dispute settlement system, there was only one instance in which Members had recourse to Art 25 of the DSU to resolve (one aspect of) a dispute between them.[33] Since 2020, Art 25 of the DSU has been the legal basis for the Multi-Party Interim Appeal Arbitration Arrangement ('MPIA'). MPIA provides Members who are MPIA parties appellate review despite the paralysis of the Appellate Body and ensures legally binding resolutions to disputes. Art 25 of the DSU set out, however, the bare bones of the arbitration procedure. Chapter II provides for Model Rules of Procedure for Simplified Arbitration and sets out rules on the terms of reference of the arbitrator, the composition of the arbitrator, third parties, the timeline, suspension, submissions and hearings, information before the arbitrator, confidentiality, mutually agreed solutions, secretarial support, and the arbitration awards.[34] It is somewhat ironic to refer to these rules as rules for 'simplified arbitration'. There is nothing simple to this arbitration procedure, but having these rules presumably simplifies Members' recourse to arbitration as they decide to apply these model rules of procedure. The most remarkable feature of these model rules of procedure for simplified arbitration is the timeline rule. An arbitrator is to issue its award within 90 days following the announcement of the composition of the arbitrator.[35] It is hard to imagine that it would be possible to deal with any dispute of some complexity within that short a timeframe. In any case, the model rules for arbitration are a welcome addition to the rules on WTO dispute settlement.

4. Panel Proceedings

Title II of the Consolidated Text deals with panel proceedings. It introduces changes regarding the establishment of panels (Chapter I) and the composition of panels (Chapter II), as well as changes to

[25] Consolidated Text, Title I, Chapter I, paras 2 and 5.
[26] ibid, paras 9 to 12.
[27] ibid, paras 13 to 17.
[28] ibid, paras 18 to 22.
[29] ibid, paras 23 to 27.
[30] Consolidated Text, Title I, Chapter I, Appendices 1 to 3.
[31] Consolidated Text, Title I, Chapter I, para 1. See also Appendices 1 and 2 to Chapter I of Title 1 of the Consolidated Text.
[32] John Merrills and Eric De Brabandere, Merrills".International.Dispute.Settlement (Seventh Edn, Cambridge University Press 2022).
[33] US - Section 110(5) Copyright Act, Recourse to Arbitration under Article 25 of the DSU, WT160/ARB25/1, dated 9 November 2001.
[34] Consolidated Text, Title I, Chapter I, Appendix 1.
[35] ibid, para12.

streamline the panel process (Chapter III) and ensure the conciseness of panel reports and adherence to the time-frame (Chapter IV).

0¡7¡ Establishment.of.Panels

Regarding the establishment of panels, Art 6.1 of the DSU currently allows the respondent in a dispute to prevent the establishment of a panel when the request for such establishment is for the first time discussed in the DSB as a decision on panel establishment then still requires consensus among Members. It is only when the request for a panel is on the agenda of the DSB for the second time that the decision on the establishment is taken by reverse consensus and thus cannot be blocked by the respondent. In almost all disputes to date, respondents have prevented a panel from being established when the request for establishment is on the agenda of the DSB for the first time, thus prolonging the time it takes to settle a dispute. Pursuant to Chapter I of the Consolidated Text, Members would agree not to exercise their right under Art 6.1 of the DSU to prevent the establishment of a panel when the request for establishment first appears on the agenda of the DSB.[36] This is not a new idea; panel establishment by reverse consensus at the first DSB meeting has been proposed before.[37] But, as in the past, it is objected to by some Members, and now by the BEIIS Group, because: (a) such 'expedited' establishment would 'constrain the flexibility of Members to explore potential amicable solutions to resolve their disputes'; and (b) it would 'effectively reduce the time available, particularly for the responding party' and thus 'adversely impact the ability of developing countries including LDCs to access the dispute resolution system'.[38] Regarding (a), there is little evidence that Members have indeed used – with any success – the period between the first and the second DSB meeting to reach a mutually agreed solution. Regarding (b), it is clear that preventing the establishment of a panel allows the respondent additional time to prepare its defence. Such additional time is always welcome, especially for developing country Members, but could also be provided for during the panel process.

0¡8¡ Panel.Composition

Chapter II of Title II concerns the panel composition, and in particular who can be panellists and how panellists are appointed. Pursuant to Art 8.3 of the DSU, citizens of the parties or third parties to a dispute can only serve as panellists when the parties agree to this. Under Chapter II, Members would agree that citizens of a third party, who are not (or have not been in the past two years) affiliated with the government of any party or a third party may be nominated by the WTO Secretariat to serve as panellists.[39] However, parties may oppose such nominations.[40] When the WTO Director-General is requested to appoint the panellists, Members may object to the appointment as panellist of a citizen of a third party.[41] It appears that the proposed change hardly alters the current state of play. Also, as stated by the BEIIS Group, this proposed change is among those changes that are not really required as the existing provisions of the DSU 'can adequately address Members' interests'.[42]

Of more importance is the proposed 'upgrading' of the WTO Secretariat's 'indicative list' of individuals that may serve as WTO panellists. Pursuant to Art 8.4 of the DSU, Members may periodically suggest names of individuals for inclusion on this list and, upon approval by the DSB, those names shall be added to the list. The purpose of the indicative list is to assist in the selection of panellists, but it is generally recognised that this list has been of limited usefulness, arguably because Members have not been sufficiently selective in suggesting potential panellists and the DSB in approving them. In order to support the maintenance of a 'meaningful' indicative list, a Member would, as proposed by the Consolidated Text, be 'encouraged to nominate' for inclusion in the indicative list up to three citizens and one non-citizen, possessing 'significant relevant experience'.[43] In addition, individuals nominated to the indicative

[36] Consolidated Text, Title II, Chapter I.
[37] (n 24) 316.
[38] (n 18) para 4.
[39] Consolidated Text, Title II, Chapter II, para I.1 and fn 19.
[40] Consolidated Text, Title II, Chapter II, fn 20. This right of a party to oppose nominations by the WTO Secretariat is stated in Art 8.6 of the DSU, albeit that a party should only oppose nominations 'for compelling reasons'.
[41] Consolidated Text, Title II, Chapter II, para I.2.
[42] (n 18) para 4.
[43] Consolidated Text, Title II, Chapter II, paras II.1 and II.3. Para II.4 explains what constitutes 'relevant experience', ie experience as a legal practitioner in the field of international economic law or experience (presumably as a non-lawyer) relating to the subject matter of the WTO agreements. Academics in the field of international economic law and policy are only to be considered if they

list must possess high ethical standards and the ability to effectively communicate, orally and in writing in English, French, or Spanish.[44] Interestingly, the Chairperson of the DSB, with the support of the WTO Secretariat, is mandated to check nominations made by Members to ensure that nominated individuals meet the qualification requirements referred to above.[45] If the Chairperson would be of the opinion that the nominated individual does not meet these requirements, the Chairperson may recommend the nominating Member not to nominate that individual.[46] The nominating Member may decide to proceed with the nomination, but in that case any Member, at its request, may be informed by the Chairperson, in confidential consultations, which nominated individual the Chairperson recommended not to be nominated.[47] Note that the DSB is to approve the inclusion of an individual on the indicative list by consensus. To keep the indicative list updated, it will be recomposed every four years.[48] As to the use to be made of the indicative list, the Consolidated Text states that the WTO Secretariat is 'encouraged to use the indicative list in proposing nominations for the panel'.[49] If the WTO Director-General is requested to compose a panel, the parties may agree that they each submit to the Director-General a list of at least 30 individuals on the indicative list. The Director-General is to appoint the panellists based the overlap between the two lists. [50]

The BEIIS Group has criticised the changes proposed regarding the panel composition, particularly those relating to the qualifications of individuals nominated to the indicative list and the nomination of non-citizens to the indicative list. According to the BEIIS Group, these changes 'upset' 'the delicate balance between "the independence of the members, a sufficiently diverse background and a wide spectrum of experience", as specified in Article 8.2 of the DSU'.[51] The BEIIS Group notes that the Consolidated Text does not address concerns raised by developing countries, including the concern that the indicative list must be representative of the WTO membership in terms of geography, levels of development and legal systems, and the concern that the qualification criteria should be sufficiently flexible to enable capacity constrained developing country Members to make nominations for inclusion to the indicative list.[52] The BEIIS Group objects to the emphasis on technical expertise in the qualification requirements. Although it may indeed be a challenge for developing country Members to nominate citizens with the required technical expertise, it is unclear how they would benefit from nominating citizens who do not have technical expertise. Also note that, while they were perhaps speaking for all developing countries, the members of BEIIS Group definitely have many citizens with the required technical expertise.

0¡9¡ Streamlining.the.Panel.Process

Chapter III of Title II concerns the streamlining of the panel process, particularly the submission of evidence, the timing of the filing of submissions and the meetings with the panel. The Consolidated Text proposes that a panel shall require, as part of its working procedures, the parties 'to submit all evidence, except evidence for the purpose of rebuttal, in their first written submission.[53] This is already since long a requirement set out in the working procedures of most, if not all, panels and therefore does not amount to much of a change. Regarding the timing of submissions, Art 12.6 of the DSU currently provides for sequential filing of the first written submissions and simultaneous filing of rebuttal submissions. The Consolidated Text proposes that both the first and the rebuttal submissions be filed sequentially.[54] As this allows the respondent an opportunity to respond more adequately to the arguments of the complainant as they evolve in the course of the proceedings, such change should be welcomed. With regard to the meetings of the parties with the panel, the Working Procedures, as set out in Appendix 3 of

have the relevant experience described in para II.4 (see ibid, para II.5). For further details on the experience required, see ibid, fns 23 to 27.
[44] ibid, para II.6.
[45] Consolidated Text, Title II, Chapter II, Appendix I, para 2.
[46] ibid, para 4.
[47] ibid, paras 4 and 5.
[48] Consolidated Text, Title II, Chapter II, para II.9.
[49] ibid, para II.15.
[50] ibid, paras III.1 and III.2. If the overlap provides less than three individuals, the Director-General shall complete the panel composition.
[51] (n 18) para 12.
[52] ibid 13.
[53] Consolidated Text, Title II, Chapter III, para 2. Note that the panel may grant an exception if a party shows good cause. See ibid.
[54] ibid, para 3.

the DSU, currently provide for two substantive meetings of the panel with the parties. The Consolidated Text proposes that, unless one of the parties request otherwise, only one substantive meeting shall be held.[55] One wonders how likely it is that a party will often forego the opportunity to make its case to the panel a second time. Lastly, in order to improve the efficiency of the panel proceedings, the Consolidated Text proposes that a panel shall send written questions to the parties and third parties in advance of the meeting(s) with them.[56] It shall do so at least 10 days before the relevant meeting, but with the understanding that the panel remains entitled to ask additional questions at any time.[57] Again, similar to the proposed change regarding the submission of evidence discussed above, also the advance sending of written questions is already done by many panels. However, explicitly requiring panels to do so would nevertheless be useful.

While acknowledging the need to streamline panel proceedings, the BEIIS Group comments that one should evaluate whether the proposed changes do not make the panel proceedings more onerous for developing countries.[58] It notes that flexibility in the panel proceedings is 'of particular importance to developing countries' and that 'the changes proposed could be indicative, rather than mandatory'.[59]

0¡0¡ Conciseness.and.Timeframe.Adherence

Chapter IV of Title II deals with word limits for written submissions, time limits for oral submissions and a timetable for panel proceedings, taking into account the complexity of the dispute.[60] It is explicitly stated that a panel is expected to 'enforce' these word and time limits and 'ensure' strict adherence to timeframes'.[61] The Consolidated Text distinguishes between standard, complex and extraordinarily complex disputes and sets out different word and time limits for each kind of dispute. For example, the parties' first written submission in a standard dispute shall not exceed 30'000 words; in a complex dispute 48'000 words; and in an extraordinarily complex case 90'000 words.[62] The time limits for parties' oral submissions shall not exceed 60 minutes in standard disputes, 90 minutes in complex disputes and 120 minutes in extraordinarily complex disputes.[63] The Consolidated Text states explicitly that it is expected that 'the majority of disputes will normally fall into the standard category.'[64] It is for the panel to determine whether a dispute is complex or extraordinarily complex.[65] A panel will, however, only do so at the request of a party and the requesting party successfully demonstrates that it is impossible to adequately present its case within the limits for standard disputes.[66] A dispute shall only be considered as extraordinarily complex in 'truly exceptional circumstances'.[67]

The Consolidated Text also provides for timeframes within which a panel must issue its report in standard, complex and extraordinarily complex disputes. In standard disputes, the timeframe shall not exceed nine months, in complex disputes, twelve months; and in extraordinarily complex disputes, 18

[55] ibid, paras 4 and 6. Note that the party requesting a second meeting should explain the rationale behind its request and identify the selected issues on which the meeting should focus. Such second meeting must be held no later than three weeks after the filing of the first written submission, and may be held in person, via a virtual platform or in a hybrid format. See ibid, paras 6 and 7.
[56] Consolidated Text, Title II, Chapter III, Advance Written Questions by Panels, para 1.
[57] ibid, paras 1 and 2.
[58] (n 18) para 8.
[59] ibid.
[60] Consolidated Text, Title II, Chapter IV, para 1.
[61] ibid.
[62] ibid, para 2(a) for standard disputes, para 5(a) for complex disputes, and para 6 for extraordinarily complex cases. For the word limits for rebuttal submissions and third-party subsidies, see ibid. Para 8 and 9 set out word limits for requests preliminary rulings and responses thereto, and parties' comments on the panel's interim report. Note that with regard to the word limits set out in para 2, the panel may apply flexibility by setting limits up to 35% higher. With regard to the word limits set out in paras 5, 8 and 9, this flexibility is limited to 25%. See ibid, para 10. Where written submissions are provided in French or Spanish, the above word limits shall be increased by 15%. See ibid, para 11.
[63] ibid, para 2(b) for standard disputes, para 5(b) for complex disputes, and para 6 for extraordinarily complex cases. For the time limits for third party oral subsidies, see ibid. For oral submissions, panels enjoy the same flexibility as for written submissions. See ibid, para 10.
[64] ibid, fn 37.
[65] ibid, para 3. In determining the complexity of a dispute, a panel shall take, inter alia, into account the complexity of the analysis required to determine a breach or a defence, the amount of expert and other complex evidence and the complexity of the measures at issue. See ibid.
[66] ibid, fn 37.
[67] ibid.

months.[68] To ensure compliance with applicable timeframes, the panel and the parties shall follow the detailed, standardised timetable for standard and complex disputes set out in Appendix 1 to Chapter IV of Title II.[69] Most interestingly and innovatively, in case a panel fails to meet the applicable timeframes, the Chairperson of the DSB 'shall issue a public communication to the concerned panellists and Secretariat staff, reminding them about the critical importance of adhering strictly to time-frames'.[70] This amounts to a public shaming and may well prove to be an effective way of ensuring compliance with the timeframes. Moreover, panellists participating in multiple disputes showing a pattern of repeated delays shall be backlisted and no longer proposed as panellists by the WTO Secretariat.[71] Note, however, that the naming and shaming of panellists for failing to adhere to timeframes, will make it more difficult to find well-qualified adjudicators willing to accept an appointment as panellist.[72]

The BEIIS Group objects to giving panels the authority to determine the nature of a dispute (standard, complex or extraordinarily complex) and inviting parties to limit their claims as this 'shifts the locus of control over the panel process away from the disputing parties to the panel.[73] Pursuant to the BEIIS Group, these changes dilute or render ineffective the 'Member-driven nature of the WTO'.[74] Also, the proposed changes make no attempt to accommodate the diversity of national circumstances, and in particular those of developing country Members.[75] According to the BEIIS Group, 'when seen holistically', the changes proposed in the Consolidated Text 'make the dispute settlement process more onerous, complex, and difficult in actual practice for Members'.[76] It is not clear why this would be the case. The proposed changes regarding word and time limits for parties' submissions and the timeframe for the panel proceedings should make disputes less complex and extensive, and thus the dispute settlement process less, not more, onerous. However, the categorisation of disputes as standard, complex or extraordinarily complex brings undoubtedly 'subjectivity' into the panel proceedings[77], and the word and time limits are to a large degree arbitrary. The latter is probably unavoidable and mitigated by the flexibility granted to a panel to adjust the limits.

5. Compliance

Title IV of the Consolidated Text deals with the reasonable period of time (hereinafter 'RPT') given to respondents to comply with the recommendations and rulings of an adjudicative report adopted by the DSB. Pursuant to Art 21.3 of the DSU, a Member of which a measure has been found inconsistent with its WTO obligations has, if it is impracticable to comply immediately, a RPT to do so. Art 21.3 does not define what a RPT is, but leaves it to the parties, to the DSB or to an arbitrator to agree on, or determine, what it is in a given dispute.[78] The Consolidated Text, however, proposes a different approach.[79] First, to secure a mutually agreed solution to the dispute – which is, as stated in Art 3.7, clearly to be preferred – the Consolidated Text proposes that the parties, upon request of the complainant, shall engage regarding compliance in consultations 'at the level of minsters or designated senior officials' within 30 days following the adoption of the report.[80]. If the respondent declines to engage in such consultations, the

[68] ibid, paras 13, 14 and 16 respectively. Note that the timeframe runs from the date of issuance of the working procedures following the organisational meeting to the date of issuance of the final report to the parties. See ibid.
[69] ibid, para 15. In consultation with the parties, the panel may modify certain parts of these standardised timetables. See ibid. In case of force.majeure, ie, an unforeseen event beyond the control of the panel and the parties that prevents the conduct of panel work, the panel may, following consultations with the parties, suspend the proceedings as long as the unforeseen event continues to prevent the conduct of panel work. See ibid, para 17.
[70] ibid, para 21.
[71] ibid.
[72] For non-governmental experts the remuneration is modest, and the opportunity costs are often high. Government officials are not paid for panel work, which often comes on top of an already demanding workload.
[73] (n 18) para 22.
[74] ibid 20.
[75] ibid 9.
[76] ibid 10.
[77] ibid.
[78] See Art 21.3 (a), (b) or (c). An arbitrator determining the reasonable period of time under Art 21.3(c) is given as a guideline that this period should not exceed 15 months from the adoption of the report by the DSB.
[79] Note that Title IV does not apply to arbitration awards issued pursuant Art 25 of the DSU. Parties, when entering into an arbitration agreement, may, however, agree to apply the provisions of this Title. See Consolidated Text, Title IV, para 7. This is surprising because pursuant to Art 25.4 of the DSU, Art 21 of the DSU applies, mutatis.mutandis, to arbitration awards.
[80] Consolidated Text, Title IV, para 2. Parties are also 'encouraged' to engage in alternative dispute settlement (hereinafter 'ADR') procedures on compliance. See ibid, para 3. These ADR procedures are the good offices, conciliation and mediation procedures

RPT shall be six months from the date of adoption of the report by the DSB.[81] Second, if the parties do not agree on the RPT within 45 days of the adoption of the report and if neither party requests arbitration to determine the RPT, the RPT shall be nine months from the date of adoption of the report.[82] Third, if a party requests arbitration on the RPT, the arbitrator shall determine the RPT within 90 days after the date of the request and shall, in determining the RPT consider that the period 'may be shorter or longer than nine months, depending upon the particular circumstances in the Member concerned, but shall not exceed 15 months'.[83] The arbitrator is, however, explicitly reminded of the 'principle of prompt compliance as expressed in Article 21of the DSU'.[84]

The BEIIS Group strongly objects to the proposed changes regarding the RPT, arguing that these changes would 'substantially shorten' the RPT and 'do not take into account the different legal and political systems of Members or provide sufficient S&DT for developing countries, including LDCs'.[85] The latter criticism may appear, at first glance, not justified since the Consolidated Text explicitly allows arbitrators to take 'the particular circumstances in the Member concerned' into consideration when determining the RPT.[86] However, as the BEIIS Group notes, 'historically, the ask of developing countries, including LDCs, has been for a minimum RPT of 15 months'.[87] The Consolidated Text would cap the RPT at 15 months[88] and would thus restrict the flexibility currently available under the Art 21.3 of the DSU. This is to the detriment of developing country Members in particular.[89] By penalising the refusal to engage in consultations in this way, the Consolidated Text does indeed break new ground. The question is, however, whether this strong 'encouragement' to engage in consultations is actually contrary to the interests of developing country Members.

6. Guidelines for Adjudicators

Title V of the Consolidated Text sets out guidelines for adjudicators and, in particular on treaty interpretation (Chapter I), obiter dicta (Chapter II) and the precedential value to be given to past reports (Chapter III).

❷7¡ Treaty.Interpretation

On first reading, the two-paragraph chapter on treaty interpretation appears to state the obvious and is therefore totally unremarkable and harmless. This is, however, not the case. In the first four lines of the first paragraph, the Consolidated Text recalls that Art 3.2 of the DSU requires WTO adjudicators to interpret the covered agreements in accordance with customary rules of interpretation of public international law and that thus Arts 31, 32 and 33 of the Vienna Convention on the Law of Treaties are to be applied.[90] This is obviously correct. What is interesting, however, is that in the following nine lines of this paragraph, there is no further elaboration or clarification of the general rule of interpretation set out in Art 31. The following nine lines are about the supplementary means of interpretation.[91] The importance given to the supplementary means of interpretation, and in particular the preparatory work, ie, the negotiating history, of the WTO agreements is a clear, but misguided concession to the United States, which has often criticised the Appellate Body for not giving more importance to the negotiating history of agreements, and in particular the negotiating history of the agreements on trade remedies.[92] The problem is that there is no agreed negotiating history – no travaux.préparatoires adopted by the parties to the

provided for in Appendix 4, Chapter I, Title I of the Consolidated Text,›Supplementary.Rules.for.Procedures.Undertaken.Pursuant.to. Title.IV.(Compliance)".

[81] ibid, Title IV, para 4. The same is the case when the respondent declines to engage in ADR procedures. See ibid.

[82] ibid, para 5.

[83] ibid, paras 6, chapeau, and 6(a). The 'particular circumstances' referred to include the need for a legislative change and the special situation of developing or least developed country Members. See ibid, para 6(b).

[84] ibid, para 6(c).

[85] (n 18) para 25.

[86] See Consolidated Text, Title IV, para 6(a).

[87] (n 18) para 26.

[88] See Consolidated Text, Title IV, para 6(a).

[89] The BEIIS Group also objects to what it refers to as 'an element of mandatory Alternate Dispute Resolution (ADR) into the process, since refusal to engage in ADR would result in an RPT of 6 months'. See (n 18) para 25.

[90] Consolidated Text, Title V, Chapter I, para 1.

[91] ibid.

[92] ibid, para 2.

negotiations – of the WTO agreements.[93] Those who wish to rely on the negotiating history, usually rely on their own negotiating positions and papers. The invocation of the negotiating history then often becomes shamelessly self-serving. This disproportionate attention to supplementary means of interpretation of this first paragraph of Chapter I is unfortunate.

The second paragraph of the chapter on treaty interpretation has nothing to do with treaty interpretation, but with the burden of proof – or perhaps not really with that either. It starts by stating the obvious, namely that a complaining party bears the burden of establishing a prima.facie.case that another party has acted inconsistently with an obligation under the covered agreements.[94] It is only in the following sentences that it becomes clear why this paragraph is part of the Consolidated Text. Again, this reflects a misguided attempt to address a concern of the United States, namely that WTO adjudicators find inconsistencies with obligations not to be found in the covered agreements. To this end, this paragraph requires adjudicators to determine, first, whether the complainant has made a prima.facie case of the existence of the obligation invoked, and only then, in the absence of an effective refutation by the other party, apply that obligation to the facts. Is this requirement, however, at all necessary? Does an adjudicator not always first establish whether the obligation invoked exists before applying it to the facts?

❷8¡ Obiter.Dicta

The second chapter of Title V is entitled 'Focus on What is Necessary to Resolve the Dispute'. The first two paragraphs of this chapter primarily repeat language that was also used in the 2019 Draft General Council Decision on the Functioning of the Appellate Body and in the 2020 Multi-Party Interim Appeal Arbitration Arrangement.[95] Adjudicators should only make findings that will assist the DSB in making its recommendations and rulings and should limit their reasoning to what is necessary to support their findings.[96] In other words, adjudicators should avoid obiter.dicta, or, as the United States confusingly calls it, advisory opinions. While the Appellate Body occasionally said more than strictly speaking had to be said, the reality is that WTO adjudicators have been more than happy to exercise judicial economy and not rule on more than is needed. It is the complainants that bring a multitude of claims in what could often be a simpler case. The third paragraph of this chapter recognises this reality by authorising adjudicators to invite parties to focus on certain claims or even to exclude certain claims.[97] Such invitations are, however, not binding. It remains to be seen how many complainants will voluntarily give up on some of their claims. The BEIIS Group observes in this regard that the Consolidated Text 'constrains the autonomy of disputing parties to fully explore all facets of their dispute.'[98]

❷9¡ Precedential.Value.of.Past.Reports

Finally, Chapter III of Title V deals in one, somewhat convoluted paragraph with the issue of precedent. As is well known, the United States has been for many years on a crusade against precedent in WTO dispute settlement – which does not prevent it from invoking all the case law it agrees with and insisting that adjudicators follow that case law. The sole paragraph of this Chapter starts out by stating what is undisputed, namely that WTO reports have no precedential value, meaning that they do not have binding force in a subsequent dispute.[99] What is problematic with the rest of this paragraph is, on the one hand, what it does not say, and on the other hand, what it does say. What it does not say is that the ultimate purpose of WTO dispute settlement, as stated in Art 3.2 of the DSU, is to bring security and predictability to the international trading system and that therefore there is a legitimate expectation of WTO members that the same legal issue will be decide in the same way in subsequent cases.[100] The omission of any

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[93] Van den Bossche and Zdouc (n 24) 209.
[94] Consolidated Text, Title V, Chapter I, para 2.
[95] WTO General Council, 'Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand) on 15 October 2019, JOB/GC/222, Dated 15 October 2019, Annex with the Draft General Council Decision on the Functioning of the Appellate Body, under the Heading "Advisory Opinions"' 6; (n 3) para Annex 1, para 10.
[96] Consolidated Text, Title V, Chapter II, paras 1 and 2.
[97] ibid, paras 3 and 4. Note paragraph 4 explicitly states that 'the fact that a party to the dispute does not accept the invitation shall not prejudice the consideration of the case or the rights of the parties'.
[98] (n 18) para 18.
[99] Consolidated Text, Title V, Chapter III, para 1.
[100] Note that the 2019 Draft General Council Decision of the Functioning of the Appellate Body, JOB/GC/222, dated 15 October 2019, p 6; and the 2020 Multi-Party Interim Appeal Arbitration Arrangement, JOB/DSB/1/Add.12, dated 30 April 2020, p 1, state that the 'consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members'.

reference to the ultimate purpose of the WTO dispute settlement system is undoubtedly deliberate and quite unfortunate. What the paragraph on precedent says is that while an adjudicator may refer to previous reports to the extent she/he considers the analysis in such reports 'persuasive', each adjudicator must in each dispute 'develop its own interpretation' of the WTO provisions at issue.[101] The paragraph concludes with the instruction to adjudicators that they 'may not presume that an interpretation of the covered agreements in a WTO dispute settlement report is persuasive.'[102] This is not how international adjudication – or for that matter any adjudication – works. Adjudicators build on the hard work done, and lessons learned by, previous generations of adjudicators. An adjudicator does not start afresh in each case with the interpretation of the relevant provisions. Also, the parties in a case will invoke the case law that supports their arguments, and the adjudicator will thus start by considering the invoked case law. No adjudicator – except perhaps those with a dangerously big ego – will start out on a case with the presumption that her/his learned colleague-adjudicators, who ruled on the interpretation of a provision earlier, got it wrong and that the work needs to be done all again. The instruction in the last sentence of this paragraph is thus misguided, if not foolish.

7. Procedures to Discuss Legal Interpretations

Title VI of the Consolidated Text deals with discussions among WTO Members of legal interpretations adopted by WTO adjudicators, particularly, the discussion in relevant WTO bodies (Chapter I) and the discussion in the Advisory Working Group (Chapter II).

❸¡7¡ Discussion.in.Relevant.WTO.Bodies

If the chairperson of a WTO body determines that an adjudicative report or arbitration award to be relevant, or at the mere request of any Member, this report or award will be put on the agenda of the next meeting of this body.[103] This will give Members an opportunity to discuss 'at the expert level' 'the technical and policy implications' of the legal interpretations adopted.[104] Be that as it may, it is surprising that, to support this discussion 'at the expert level', it is considered necessary to instruct the Secretariat to circulate 'a summary document of the adjudicator's interpretive findings that should not exceed one page'.[105] One would expect that experts would need, if anything, much more than a one-page summary. Also, when engaging in this discussion in the relevant WTO body, Members are prohibited to discuss dispute-specific facts or the implementation of the DSB's recommendations.[106] One may expect that the parties to the dispute, and other Members, will find it very challenging, if not impossible, to restrain themselves in this way. In any case, it is not clear whether this proposed change really adds something that is not yet possible under the current rules.

❸¡8¡ Advisory.Working.Group.

Chapter II of Title VI provides for the establishment of an Advisory Working Group, which will be composed of all WTO Members and operate under the auspices of the DSB.[107]. The Advisory Working Group is to be a new mechanism for WTO Members 'to discuss, build consensus and provide guidance on legal interpretations developed by adjudicators'.[108] Any Member may request a discussion by the Advisory Working Group[109], but as explicitly stated this mechanism 'is expected to be used rarely'.[110] The Advisory Working Group 'shall not relitigate disputes or function as an [appeal/review] mechanism'.[111] The outcome of the discussion in the Advisory Working Group may take the form of: (1) a draft recommendation, adopted by consensus, for the adoption of an authoritative interpretation by the

[101] Consolidated Text, Title V, Chapter III, para 1.
[102] ibid.
[103] Consolidated Text, Title VI, Chapter I, para 1.
[104] ibid, para 2, chapeau.
[105] ibid, para 2(a).
[106] ibid, para 2(c).
[107] Consolidated Text, Title VI, Chapter II, para 2.
[108] ibid, paras 2 and 3.
[109] ibid, para 6, chapeau. Such a request can, however, only be made after the RPT for implementation in the dispute concerned has expired. See ibid, para 6(b).
[110] ibid, para 4.
[111] ibid.

Ministerial Conference or General Council; (2) a recommendation, adopted by consensus, that the legal interpretation shall not be considered as persuasive and can therefore not be referred to by WTO adjudicators in support for their reasoning; or (3) a record of Members' diverging views about the interpretation.[112] Important to note is that the outcomes of discussions in the Advisory Working Group 'shall not have any retroactive effect' on the disputes in the context of which the legal interpretation at issue was adopted.[113]

Regarding this new mechanism to discuss legal interpretations adopted by adjudicators, the BEIIS Group expresses the concern that this change will 'have a far-reaching impact on the practice of the dispute resolution system' and is 'being proposed without rigorous, evidence-based analysis in the specific context of the WTO dispute settlement system'.[114] This is not the first time that a proposal to establish a political body or an expert group to assess legal interpretations adopted by WTO adjudicators. A similar proposal was already included in the 2005 Sutherland Report.[115] Unlike earlier proposals, the current proposal is more specific and detailed, in particular with regard to the possible outcomes. However, it is not clear why there is a need for a new mechanism. Discussions on legal interpretations adopted by WTO adjudicators can already occur in the DSB or any other WTO body. What is it that the Advisory Working Group would allow Members to do that they currently cannot do yet? Also, it is unlikely that, if established, this mechanism shall be 'used rarely' and will not be used to 'relitigate' disputes. Members may be expected to use all means at their disposal to challenge any legal interpretation that is unamicable to them. Finally, except in very unusual cases, the outcome of discussions in the Advisory Working Group will be a mere record of diverging views. Is this useful?

8. Secretariat Support

Title VII of the Consolidated Text deals with the WTO Secretariat staffing to support the work of WTO adjudicators (Chapter I) and the responsibilities of these adjudicators in light of the support provided by the Secretariat (Chapter II).

❹7¡ Secretariat.Staffing.to.Support.Adjudicators".Work

Art 27.1 of the DSU states that the WTO Secretariat shall have 'the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support'. The WTO Secretariat plays a more important role in supporting WTO adjudicators than registries or legal secretariats of other international dispute resolution systems. The Consolidated Text states in this regard that in order 'to ensure high-quality support by the Secretariat'[116], Members expect that the Secretariat staff has 'appropriate subject-matter expertise'.[117] As the footnote explains, this sub-matter expertise 'could be relevant committee experience, other experience drawn from the appropriate Secretariat Division, or other practical subject-matter expertise such as relevant government or private sector experience'.[118] The Secretariat lawyers assisting WTO adjudicators are among the very best WTO law experts and one must therefore wonder why it was considered necessary to refer to Members' expectation of subject-matter expertise of Secretariat staff. Perhaps some Members wish to convey in this way their 'aversion' for lawyers with general international law expertise and/or an academic (rather than a government/private practice) background.

❹8¡ Responsibilities.of.Adjudicators.and.Scope.of.Support.Provided.by.Secretariat.Staff

[112] ibid, para 13. The outcomes shall be circulated as an unrestricted WTO document and included in the WTO.Analytical.Index. See ibid, para 15. The record of diverging views shall include: '(i) the number of the Members that expressed the views during the discussion, (ii) the Members that supported or did not support the interpretation discussed and (iii) their reasonings'. See ibid, para 13(c).
[113] ibid, para 14. The validity or the implementation of the recommendations and rulings adopted in these disputes shall not be affected. See ibid.
[114] (n 18) para 4.
[115] The.Future.of.the.WTO¿Addressing.Institutional.Challenges.in.the.New.Millennium ¿Report.by.the.Consultative.Board.to.the.Director_General.Supachai.Panitchpakdi (World Trade Organization (WTO) 2004) para 251.
[116] Consolidated Text, Title VII, Chapter I, para 1, chapeau.
[117] ibid, para 1(a).
[118] ibid, fn 68.

Chapter II addresses an issue that has been the subject of considerable debate in recent years, namely the appropriate role of the Secretariat staff in WTO dispute settlement. In particular with regard to panel proceedings, it has been suggested that it is the Secretariat staff, rather than the panellists, who decide cases.[119] As already stated above, the Secretariat undoubtedly plays a very important role in WTO dispute settlement. There is, however, an important, but often poorly understood, difference between 'holding the pen' in a case and 'deciding a case'. The former is what the Secretariat staff does; the latter is what the panellists do (or should do). This is an effective and appropriate division of responsibilities. Addressing concerns about the role of the Secretariat staff, the Consolidated Text finds it necessary to state explicitly that 'adjudicators shall have full responsibility for decision making'[120]; that 'Members expect adjudicators to draft their reports with the support of the Secretariat staff as appropriate'[121]; and that 'adjudicators shall draft the conclusion section of their reports'.[122] If the Secretariat staff is requested to assist in drafting, they shall do so 'on the basis of written instructions by the adjudicators'.[123] The BEIIS Group rightly comments on the proposed changes regarding the responsibilities of adjudicators and the role of the Secretariat that 'attempting to strictly delineate' the assistance provided by the Secretariat 'may have an impact that is opposite to the desired effect'.[124]

9. Transparency

Title VIII of the Consolidated Text deals with the transparency of WTO dispute settlement, which has been a controversial issue since long. Transparency has two dimensions, namely transparency vis-à-vis WTO Members (Chapter I) and transparency vis-à-vis the general public (Chapter II). While there is now – at least in disputes between developed country Members – a high degree of transparency in WTO dispute settlement proceedings, this transparency is not provided for in the DSU. Regarding written submissions of the parties, Art 18.1 of the DSU states that these submissions 'shall be treated as confidential' be it that a party is 'not precluded from disclosing statements of its own positions to the public'. Regarding meetings of WTO adjudicators with the parties, the Working Proceedings for Panels state that 'the panel shall meet in closed session'[125], and Art 17.10 of the DSU states that 'the proceedings of the Appellate Body shall be confidential'. As the BEIIS Group observes, the relevant changes proposed in the Consolidated Text 'completely inverted' 'the default positions on transparency' envisaged in the DSU, and thus 'raises grave concerns'.[126]

❺7¡ Transparency.vis_à_vis.WTO.Members

The Consolidated Text proposes that parties' written submissions shall be made accessible to Members 'promptly after their filing' if the parties agree to this, and, otherwise, no later than seven days after the circulation of the report.[127] Parties are explicitly 'encouraged to agree that the Secretariat provides access to their written submissions promptly after their filing'.[128]

The Consolidated Text also proposes that, if the parties to the dispute agree, the Secretariat shall make the substantive meetings with the parties accessible for observation by Members 'through real-time onsite closed-circuit broadcasting or any other modality decided by the parties'.[129] If parties do not agree

[119] Joost Pauwelyn and Krzysztof Pelc, 'Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement' (26 September 2019) <https://papers.ssrn.com/abstract=3458872> accessed 23 August 2024.
[120] Consolidated Text, Title VII, Chapter II, para 1(a).
[121] ibid, para 1(b). Secretariat staff is instructed to be 'responsive to (1) the parties' submissions and (2) specific requests of the adjudicators'. See ibid, para 2(a). Also, to ensure that the Secretariat is responsive to the parties' submissions, the Consolidated Text requires that it shall not provide the panellists with issues papers before the first written submissions of the parties has been received. See ibid, para 3. This is a somewhat bizarre requirement as one can hardly imagine that issues papers would ever be written before the first written submissions have been received.
[122] ibid, para 1(c). Note, however, that the Secretariat staff is instructed to provide the necessary editorial support. See ibid, para 2(c).
[123] ibid, para 2(b).
[124] (n 18) para 32.
[125] DSU, Appendix 3, para 2.
[126] (n 18) para 16.
[127] Consolidated Text, Title VIII, Chapter I, Section I, para 1. At the request of a party, this may be delayed until after the adoption by the DSU of the report. See ibid.
[128] ibid, Section I, para 3 and Section II, para 3.
[129] Consolidated Text, Title VIII, Chapter I, Section II, para 2(a).

to this, the Secretariat shall make the substantive meetings accessible to Members 'via on-site viewing of an audio-visual recording no later than seven days after the date of circulation of the report'.[130]

The Consolidated Text notes with regard to access to written submissions and to substantive meetings that the proposed changes are 'to support Members' capacity-building efforts'.[131] The BEIIS Group recognises that 'transparency is important in a Member-driven organisation, especially for greater capacity building'.[132] The BEIIS Group's opposition is therefore presumable more focussed on transparency vis-à-vis the general public, which indeed has always a much more controversial issue that transparency vis-à-vis Members.

❺8¡ Transparency.vis_à_vis.the.general.public

More controversial than transparency vis-à-vis Members is the transparency vis-à-vis the general public. Regarding the latter, the Consolidated Text proposes that the Secretariat shall publish the non-confidential version of written submissions on the WTO website no later than seven days after the circulation, of the report.[133] While this would indeed make available to the general public submissions which currently remain confidential, the executive summaries of the submissions which are attached to the publicly available report arguably already ensure sufficient transparency.

The Consolidated Text also proposes that, if the parties to the dispute agree, the Secretariat shall make the substantive meetings with the parties accessible for observation by the public 'through live broadcasting, recording to be made available few days after the substantive meeting of the panel with the parties, or any other modality decided by the parties, such as … in-person observation'.[134] If parties do not agree to this, the Secretariat shall make the substantive meetings with the parties accessible for observation by the general public 'via on-site viewing of an audio-visual recording or viewing of an audio-visual recording made available to the general public via an electronic system' no later than seven days after the date of circulation of the report.[135]

Finally, note that the Consolidated Text also proposes that the Secretariat shall make the timetable of WTO dispute settlement proceedings publicly available on the WTO website no later than seven days after the circulation of the timetable to the parties.[136]

As the BEIIS Group notes, developing country Members 'had raised concerns about the asymmetrical ability of external stakeholders, particularly commercial interests, to influence or pressure the dispute proceedings'.[137] These concerns are not reflected in the Consolidated Text.

10. Accessibility, Technical Assistance, Capacity Building and Legal Advice

Art 27.2 of the DSU provides for 'legal advice and assistance in respect of dispute settlement to developing country Members', and Art 27.3 mandates the Secretariat to 'conduct special training courses' on dispute settlement procedures and practices. The Consolidated Text recognises the special needs of developing country Members for capacity building and technical assistance regarding dispute settlement, and instructs 'the Secretariat to undertake further or additional capacity-building work.[138] The Consolidated Text also requires the Secretariat to increase the number of experts appointed

[130] ibid, para 2(b). At the request of a party, this may be delayed until after the adoption by the DSU of the report. See ibid.
[131] ibid, para 3
[132] (n 18) para 15.
[133] Consolidated Text, Title VIII, Chapter II, Section I, para 1. At the request of a party, this may be delayed until after the adoption by the DSU of the report. See ibid.
[134] Consolidated Text, Title VIII, Chapter I, Section II, para 1(a).
[135] ibid, para 1(b).
[136] Consolidated Text, Title VIII, Chapter II, Section III, para 1.
[137] (n 18) para 15.
[138] Consolidated Text, Title IX, paras 1 and 2. This capacity-building work includes regional training programmes, internship and targeted secondment programmes for dispute resolution officials, a more focused young professionals programme and a chairs programme. See ibid. Regarding the costs, the Consolidated Text leaves open the question whether these costs should be covered by the regular WTO budget, or a separate funding mechanism to which Members could contribute on a voluntary basis. See ibid, para 5.

pursuant to Art 27.2 of the DSU to provide legal advice and assistance on dispute settlement and ensure that this advice and assistance is available in the three working languages of the WTO.[139] On the facilitation of access to the WTO dispute settlement system and on securing funds for litigation by developing country Members, the Consolidated Text notes that 'Members are committed to collaborating with relevant organizations', including the Advisory Centre on WTO Law ('ACWL').[140]

The BEIIS Group strongly encourages 'the enhanced implementation of capacity building and technical assistance in the area of dispute settlement'[141], but notes that while the Consolidated Text reflects 'a high degree of ambition to make changes in various areas', Title IX on 'Accessibility with respect to technical assistance, capacity building and legal advice'.is 'modest and restrained'.[142] The BEIIS Group demands that 'in addition to strengthening the existing S&DT provisions in the DSU, additional S&DT elements should be incorporated across the agreement, including provisions relating to accessibility and capacity-building needs that, inter alia, address high litigation costs'.[143] The Consolidated Text does not do so.

11. Accountability Mechanism

Finally, Title X of the Consolidated Text provides for the establishment of an accountability mechanism, ie, a mechanism for the periodic review by the DSB of the operation of the dispute settlement system and the implementation of the reforms set out in the Consolidated Text.[144] This review shall be, to the extent possible, be based on factual and statistical information, compiled by the Secretariat.[145] In advance of the periodic review by the DSB, its Chairperson shall circulate a report setting out the factual and statistical information and any views expressed by Members on implementation of the reform elements listed in the Appendix to Title X.[146] The Chairperson's report 'may contain recommendations of action to be decided by the DSB'.[147] The proposed accountability mechanism will undoubtedly allow for a better informed discussion on the operation of the WTO dispute settlement system and the reforms Members would decide on.

12. Conclusion

The Molina Process and the Consolidated Text on a draft Ministerial Decision on Dispute Settlement which emerged from it, were not successful in resolving the crisis of WTO dispute settlement. This is, first and above all, because no agreement could be reached on the issue of nature and scope of appellate review, ie, the issue that triggered the current crisis. Moreover, on many other issues, the proposed changes reflected in the Consolidated Text have less support than the Molina Report may lead one to believe. A group of influential developing countries, referred to above as the BEIIS Group, have expressed their disagreement or voiced grave concerns regarding many of the proposed changes.

At the 13th WTO Ministerial Conference in Abu Dhabi in February/March 2024, WTO Members took note of the work on dispute settlement reform done so far and instructed their officials 'to accelerate discussions in an inclusive and transparent manner, build on the progress already made, and work on

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[139] ibid, para 4. Since the 1990's, these experts included Prof. Ernst-Ulrich Petersmann (Germany) and Prof. Petros Mavroidis (Greece).
[140] ibid, para 7. Note that the BEIIS Group expresses the concern that 'the specific mention of individual non-WTO bodies such as ACWL may have the effect of further constraining development of multiple providers and constraining the options of countries with limited resources. BEIIS Group Communication, JOB/DSB/8, para 30.
[141] (n 18) para 29.
[142] ibid 30.
[143] ibid 24.
[144] Consolidated Text, Title X, Section I, para 1. The first Accountability Mechanisms Meeting of the DSB is scheduled for October 2026 and October of every second year thereafter. See ibid.
[145] ibid, para 3.
[146] ibid, para 10. The various steps in preparation of the report of the DSB Chairperson are set out in paras 5 to 9. Note that some of the reform elements have specific performance targets (eg establishment of panels at the first DSB meeting at which they are requested'). In that case, the review is 'based on' the relevant factual and statistical information. Where a reform element does not have a performance target, the relevant factual and statistical information will merely 'assist' Members to review the implementation of that reform element. See ibid, para 14.
[147] ibid, para 11.

unresolved issues' with the self-imposed end-of-2024 deadline in mind.[148] At the DSB meeting of April 2024, the DSB formalised the dispute settlement reform process and appointed Ambassador Usha Dwarka-Canabady of Mauritius as the facilitator of this process. Six co-convenors were appointed to assist the facilitator on specific issues. Experts of Members continue their technical work on the reform and, each month, Members meet at the level of ambassadors to discuss the progress made. At the July 2024 meeting, the co-convenors dealing with the issue of appellate review announced that they intend to share with Members in early September 2024 a draft document which they 'anticipate will be useful for structuring future discussions'.[149] Ambassador Dwarka-Canabady very diplomatically stated that the issue of appellate review 'might take a bit more time'.[150]

The proposed changes to WTO dispute settlement reflected in the Consolidated Text of February 2024 are a mixed bag of good, ill-conceived, futile and unnecessary changes. The good changes – many of which are long overdue – include the establishment of panels at the first DSB meeting, the upgrading of the indicative list, the sequential filing of rebuttal submissions, the furtherance of timely compliance, flexible word limits for written submissions, the improvement of transparency, the model rules of procedure for 'simplified' arbitration and the establishment of an accountability mechanism. The ill-conceived changes – most of which address long-standing grievances of the United States and are potentially harmful – include the guidelines for adjudicators regarding treaty interpretation and the precedential value of past reports, as well as the delineation of the role of the WTO Secretariat and the naming and shaming of adjudicators for exceeding the timeframes. The futile changes – which are unlikely to have much of an impact – include the possibility of having one rather than two meetings with the parties, the appointment of third-party nationals as panellists, and the establishment of the Advisory Working Group. The future will tell whether the detailed rules on alternative dispute resolution procedures also fall within this group of changes.
Finally, the unnecessary changes – which do not go (much) beyond what is already possible under the current rules or concern practices and features which are firmly established – include the timely submission of evidence, the time limits for oral submissions, and the requirement of appropriate subject-matter expertise of the WTO staff. Having said that, the Consolidated Text, with its gaps and imperfections, is nevertheless a 'tour de force' of, in particular, Molina, for which he deserves the greatest respect.

The (geo-)economic and (geo-)political realities of the twenty-first century are very different from those at the end of the twentieth century when the current WTO dispute settlement system was conceived. The dispute settlement system of tomorrow may thus have to be different from the system which served WTO Members very well for many years. However, any dispute settlement system worth having should be a rigorously rules-based system with compulsory jurisdiction, appellate review, impartial and independent adjudicators and timely legally binding and enforceable rulings, which provides security and predictability to the multilateral trading system. Unfortunately, assuming that the United States is willing to agree to any kind of binding international trade dispute resolution, this is not the system that it wants to see established. This makes resolving the current crisis very difficult. If no agreement on a 'fully and well-functioning dispute settlement system' can be reached, it is better to 'muddle on' with the current system supplemented with the MPIA than to accept a new system not worth having.

[148] WTO Ministerial Conference, Thirteenth Session (n 23).
[149] 'Facilitator, Co-Convenors Update Members on Dispute Settlement Reform Work, 18 July 2024' <https://www.wto.org/english/news_e/news24_e/disp_18jul24_e.htm> accessed 23 August 2024.
[150] ibid.