

## The WTO Dispute Settlement Impasse: What is happening?

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The WTO's Understanding on Dispute Settlement (DSU) provides World Trade Organisation (WTO) members with a legal framework for resolving trade disputes that arise between them when implementing WTO agreements. With the establishment of the WTO in 1995 this aspect has become a prominent feature of multilateral trade governance and has been used extensively. Since 1995, 621 disputes have been brought to the WTO and over 350 rulings have been issued.

On 11 December 2019, the Appellate Body (AB) of the WTO ceased to function, as the terms of two of the three remaining judges necessary to decide appeals of panel reports came to an end. This situation resulted from the United States blocking the appointment and reappointment of AB members, leading to the paralysis of the dispute settlement system.<sup>1</sup>

The US's main concern is about "judicial overreach"; that WTO rules are interpreted in a manner that creates new obligations for WTO members and makes US trade remedies less effective. The US also complains that the system is dominated by lawyers and judicial activism, rather than trade policy experts.<sup>2</sup>

The absence of the AB from the WTO dispute settlement system means that an essential feature of the multilateral trade regime embodied in the WTO, is in limbo. An appeal by the losing party in a WTO trade dispute against a panel report decided in favour of the winning party will remain unresolved and unenforceable, since there is no AB to hear new appeals.

The WTO membership has been trying for some time now to resolve this matter, which is again on the agenda in the run-up to MC13, which takes place from 26 to 29 February in Abu Dhabi. At the WTO's 12th Ministerial Conference,<sup>3</sup> members were mandated to conduct discussions to have a fully

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<sup>1</sup> Cottier, T. 2021. Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review, *Journal of International Economic Law*, 24(3), pp. 515–533. doi:<https://doi.org/10.1093/jiel/jgab024>

<sup>2</sup> Ibid.

<sup>3</sup> It took place from 12-17 June 2022 at WTO headquarters in Geneva.

functioning WTO dispute settlement system in place by 2024. This is unlikely to happen, there is serious disagreement among the Members, and the discussions are still informal. One group of delegations wants the informal discussions to be formalised as quickly as possible while another wants this to be done at MC13. A third group believes this should be done at the first Dispute Settlement Body (DSB) meeting after MC13, and a fourth has indicated a preference for doing so sometime in the future when the text of a dispute settlement reform agreement is complete.<sup>4</sup>

When the AB is not operational the WTO dispute settlement system cannot function as designed. Rulings by panels are not binding on the members involved in such disputes if one of the parties to the dispute in question lodges an appeal. Presently, if there is an appeal, the dispute is in effect on hold indefinitely and members can't get authorisation from the DSB retaliate. But members can choose not to appeal. They can also agree alternative steps for conducting appeals by arbitration.

Article 25 of the DSU Provides as follows:

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes and securing the benefit of legal certainty to all WTO Members.<sup>5</sup> In some circles, there is renewed interest in arbitration as a means to settle disputes in a binding manner. Since July 2020, the Multi-Party Interim Appeal arrangement (MPIA) is in operation. It is a stop-gap solution in the absence of an operational WTO AB and allows participants to benefit from an appeal process in the WTO dispute settlement system.<sup>6</sup> The MPIA must be individually invoked in each case between MPIA parties. When a case involving two MPIA parties arises, the parties submit a joint notification to the WTO's DSB under Article 25 of the DSU.

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<sup>4</sup> WTO, 2024. *Members updated on progress in dispute settlement reform talks in run-up to MC13*.

<sup>5</sup> Art 21.1 DSU.

<sup>6</sup> Pauwelyn, J. 2023. The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New? *World Trade Review*, 22(5), pp. 693–701. doi:<https://doi.org/10.1017/S1474745623000204>

The first MPIA award was handed down in [\*Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands\*](#). The WTO Panel ruled against Colombia’s imposition of anti-dumping duties on frozen fries from the EU. On appeal, the MPIA arbitrators reversed one of the Panel’s findings and upheld three.<sup>7</sup> Colombia informed the DSB that while it disagreed with some of the findings, it intended to comply with the arbitrators’ award<sup>8</sup> and agreed to implement their recommendations by 5 November 2023.<sup>9</sup>

In this instance, the MPIA succeeded in preserving the rights of WTO Members. However, the larger issue remains unresolved and countries such as the US are not MPIA members. The MPIA became effective on 30 April 2020<sup>10</sup> and ensures that the participating WTO members continue to benefit from a functioning two-step dispute settlement system in the WTO, including the availability of an independent and impartial appeal stage. Any WTO member may join. Presently, the EU and 22 other WTO members are participants in this arrangement to the WTO.

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<sup>7</sup> The arbitrators noted that although the EU had failed to establish that Colombia acted inconsistently with Art 5.3 of the Anti-Dumping Agreement, it succeeded in proving that Colombia acted inconsistently with Art 6.5 of the Agreement, that the EU’s claim under Art 2.4 fell within the Panel’s terms of reference, and that Colombia acted inconsistently with Arts 3.1, 3.2, 3.4 and 3.5 of the AD Agreement.

<sup>8</sup> WTO, 2023. *Panels established to review EU complaints regarding Chinese trade measures*.

<sup>9</sup> Choi, B. 2023. *Three Years of the Multi-Party Interim Appeal Arbitration Arrangement: An Interim Evaluation of Arbitration as a Means to Appeal WTO Panel Reports*. Kluwer Arbitration Blog.

<https://arbitrationblog.kluwerarbitration.com/2023/08/11/three-years-of-the-multi-party-interim-appeal-arbitration-arrangement-an-interim-evaluation-of-arbitration-as-a-means-to-appeal-wto-panel-reports/>

<sup>10</sup> European Commission, 2020. *Interim appeal arrangement for WTO disputes becomes effective*.