Mediating Trade Disputes

19 September 2022

Operationalizing the results of MC12 on access to WTO dispute resolution

Most proposals for the reform of the dispute settlement mechanism of the WTO concentrate on the *formal* process.

The optimal framework for most Members – especially, but not uniquely, developing and less developed Members – and most matters of trade concern would be a strengthened **conciliation and mediation** framework, as an alternative or parallel procedure.

GenevaTradeLaw.com proposes an 'off-campus' facility as an early harvest element of reform to ensure the relevance of dispute settlement to *all* Members.

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OPERATIONALIZING THE RESULTS OF MC12 ON ACCESS TO WTO DISPUTE RESOLUTION

CONTENTS

EXECUTIVE SUMMARY

In the past, concerns about developing and less developed Member access to the WTO dispute settlement mechanism have been addressed, at least in part, by establishing an international organization – the Advisory Centre for WTO Law – to provide advisory and litigation services to developing and less developed countries. This has resulted in greater participation of some developing countries in WTO formal dispute settlement, but access concerns persist. This is because access and use are inextricably linked to the structures of formal dispute resolution *and* endemic governance and capacity challenges facing less developed and developing countries.

Of course, access to WTO dispute resolution should not necessarily involve more *litigation* by more Members. This paper encourages Members to enhance access and inclusiveness by operationalizing third-party *non-adversarial* approaches to the resolution of matters of trade concern.

Conciliation and mediation, already provided for in Article 5 of the DSU, feature prominently in current thinking on international commercial dispute resolution.

The ICSID mediation framework entered into force on 1 July 2022; the WIPO, the ICC, and the Singapore arbitration centre have recently elaborated or strengthened their mediation frameworks. Conciliation and mediation have been part of the WTO dispute settlement framework since its inception; they have rarely been used. Indeed, there are, as yet, no rules, no structures, no transparency in the choice or qualification of mediators, and no agreed principles on which conciliation or mediation would take place. Given the consensus rule, this situation is unlikely to change within the WTO. As well, for the Article 5 mechanism to be engaged, a Member must already frame a matter of trade concern in a formal dispute by making a request for Consultations. This already would inhibit bilateral recourse to conciliation and mediation, which are by definition voluntary.

This paper argues that **a new, independent facility outside the WTO** would serve an important function in enhancing access to less developed and developing countries to the *full* range of dispute resolution options within the framework of the WTO. Such a facility would also permit *other* Members, including current active users of the WTO dispute settlement mechanism, to seek to resolve at least some of their matters of trade concern through third party non-adversarial mechanisms. Indeed, a record number of Matters of Trade Concern before the Council for Trade in Goods, and hundreds of outstanding Specific Trade Concerns before other committees, have been raised by both developing and developed countries. These are trade and commercial disputes that are *not* resolved through diplomacy or WTO committees; Members have

determined not to bring them to a formal dispute. A conciliation and mediation mechanism that can be invoked outside the context of a formal dispute would help Members resolve those concerns, and reduce both tensions and pressure on the formal WTO dispute resolution framework.

It would do so by:

- devising model rules for use by Members *seeking conciliation and mediation* without the need for consensus by *all* Members for multilateral rules, or negotiations for *ad hoc* ones;
- unlike the current system of panel selection, prior vetting and *training* of mediators and conciliators, and publishing their names and credentials for use by Members; and
- developing *conciliation and mediation principles* to ensure collaborative win-win solutions rather than adversarial winner-loser outcomes.

INTRODUCTION

The WTO website sets out three propositions in relation to developing countries and dispute settlement:

- "A compulsory multilateral dispute settlement system is itself a particular benefit for developing country and small Members."[1]
- It is a system "to which all Members have equal access".
- It is a system "in which decisions are made on the basis of rules rather than on the basis of economic power."

The WTO acknowledges that "developing country Members wanting to avail themselves of the benefits of the dispute settlement system face considerable burdens."[2] These "burdens" are manifold and not easy to resolve through technical changes to the rules, special and differential treatment, technical assistance, or capacity-building. In this sense, "access" to the "*compulsory* multilateral dispute settlement system" is, therefore, largely only notionally "equal".[3]

Engaging the "compulsory" dispute settlement system is not simply a matter of capacity, resources, or internal governance structures.

In deciding whether to launch a formal dispute, *each* Member conducts extensive substantive, political, and policy triage that takes into account the economic impact of a matter of trade concern, the impact of a formal dispute on bilateral relations, systemic considerations, expected implementation, capacity to retaliate, and the like; most matters of trade concern do not pass the triage stage to become a trade "dispute". This is true both for Members that are active participants in WTO dispute settlement and for developed countries that do have the resources to engage the system but do not do so. It can be reasonably argued that, independently of the burdens they face, for most developing and least developed countries, matters of trade concern that affect them are likely the type that would not normally pass that triage stage.

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[1] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm.

[2] *Ibid*.

[3] The use of the system is highly concentrated:

WTO Member	Number of Disputes Initiated
USA	124
EU	110
Canada	40
Brazil	34
Japan	28
Mexico	25
India	24
China	22
Argentina	21
Korea	21

The DSU sets out two other dispute settlement mechanisms: "arbitration" under Article 25, and "Good Offices, Conciliation and Mediation" under Article 5. The first has its own challenges[4] and, in any event, it remains a litigation procedure; the other has never been used.[5]

That apparent lack of interest in conciliation and mediation is not unique to the WTO. It was not until **2018** that ICSID turned its attention to "a new set of mediation rules"; its **first** "institutional mediation rules designed specifically for investment disputes"[6] entered into force on 1 July 2022.

This paper starts with the premise that the formal – or "compulsory" – dispute settlement mechanism of the WTO is an essential element of the multilateral rules-based international trading system. It demonstrates that, for all its benefits, litigation – either as formal dispute settlement or under Article 25 – is not optimal for most matters of trade concern and most WTO Members. It explores why the Article 5 mechanisms have not functioned. It proposes a **conciliation and mediation facility** as the best alternative dispute settlement framework for a large class of trade irritants and for most Members – in particular less developed and lower-income developing countries – and how it might be made operational.

Such a facility is *particularly* relevant at a time when the formal dispute settlement framework of the WTO is under unprecedented stress, but not exclusively so; it is also particularly *timely* given the "unprecedented" results of MC12.

MANAGING FORMAL WTO DISPUTE SETTLEMENT

A complex and lengthy process

Binding dispute settlement through a mechanism with mandatory jurisdiction and automatic "adoption"[7] of quasi-judicial findings was one of the key innovations[8] of the Uruguay Round. It continues to be essential to the full functioning of the WTO.[9] And

[4] On the use of Article 25 for appellate procedure, see for example: https://twitter.com/GenevaTradeLaw/status/1154663031424651265.

[5] In *Thailand – Cigarettes from the Philippines*, WT/DS371 the parties agreed to a bilateral process involving a "Facilitator". This was not a formal use of Article 5, and took place under rules negotiated bilaterally. See: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm and in particular: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/371-44.pdf&Open=True.

[6] https://icsid.worldbank.org/services/mediation-conciliation/mediation.

[7] https://twitter.com/GenevaTradeLaw/status/1154714525444259842.

[8] https://twitter.com/GenevaTradeLaw/status/1204700456422907904.

[9] For all the hagiography surrounding the creation and the functioning of the Appellate Body, it is often forgotten that it was a compromise that made it possible for the negotiators to agree to a mechanism that was mandatory, automatic, and binding. These features of the mechanism, and *not* an appellate mechanism itself, were the principal objectives of the negotiators.

because the WTO remains central to global trade,[10] we can expect the WTO dispute settlement mechanism (DSM) to stay relevant to its regular users,[11] whether it continues as a two-stage process – through a reformed Appellate Body or other appellate mechanisms[12] – or a modified panel procedure.

Even the most active users of the WTO DSM consider that formal dispute settlement is not optimal for *all* matters of trade concerns: multi-pronged triage is an essential part of the decision-making process before a matter of trade concern becomes a trade *dispute*. This is because a trade dispute requires considerable resources on the part of governments and private sector interests alike.[13] Even functioning exactly as intended and respecting all deadlines, formal dispute settlement is complex[14] and time-consuming; despite the admirable record of most Members in implementation, the settlement of a not-insignificant number of formal disputes remains uncertain. A small number drag on with no real prospect of a satisfactory settlement – not just in terms of implementation, but *real and effective* withdrawal of concessions to rebalance, at least in some measure, the denial of benefits.[15] These challenges are exacerbated for certain developing and least developed countries.

The WTO identifies at least four barriers to participation in dispute settlement:

1. lack of specialized resources;
2. complexity of WTO law and dispute settlement procedures;[16]
3. length and uncertainty of WTO disputes, *even in the case of effective implementation*;[17] and

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https://twitter.com/GenevaTradeLaw/status/1118067690298585088; https://twitter.com/GenevaTradeLaw/status/1118137168789213187.

[10] Not just as a multilateral framework, but also – and critically – as the foundation for almost all other trade agreements.

[11] For information as to the regular users, see Reich, Arie, "The effectiveness of the WTO dispute settlement system: A statistical analysis", EUI Working Papers, 2017, at 5. https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1

[12] https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176.

[13] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm.

[14] See Annex I.

[15] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

[16] This has four components:

- treaty interpretation, including relationship with public international law;
- jurisprudence, including lateral impact of findings on apparently unrelated subject matter areas;
- the procedures and, in particular, questions related to competence and jurisdiction; and
- the interplay of these elements in formulating and advancing a litigation *strategy*.

[17] The *length* of a WTO dispute has two possible effects on the willingness or the ability of a Member to launch and administer it: first, it is not a given that the same experts will be able to follow the case for the disputing Members for the duration of the case; and second, at the of a long process, it is not clear that the winning complaining Member will get the liberalizing relief it seeks. This is particularly the

4. structure of dispute settlement, in which impugned measures continue for the duration of the dispute, including the implementation phase.

To this we could add – at least in certain cases – lack of effective recourse in the event of failure to implement.[18]

There will be a class of trade disputes that will require recourse to formal dispute settlement; to identify its challenges is not to question the relevance, importance, or – indeed – the centrality of the WTO DSM to the multilateral framework. Rather, this background explains the relative *restraint* of even the most active user-Members of the WTO in launching formal disputes, effectively limiting the WTO DSM to the most intractable matters of trade concern.

The proposed facility would be *complementary* to existing processes and deal with the rest.

The mediation rules complement ICSID's existing rules for arbitration, conciliation and fact-finding, and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings.[19]

Launching and managing a WTO dispute

According to the WTO, a panel was established in almost 60% of the 598 cases launched up to 31 December 2020, giving rise to almost 200 distinct panel reports and 125 appeals.[20] That is, 40% of consultations brought under the WTO Agreement do not proceed further, and almost one-third of established panels do not result in a panel report. And

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case in respect of those measures that are justified by an exception. See for example, *US – Gambling* and *EU – Seals*.

[18] This, in turn, has four components:

- "Compensation" is the trade-liberalising alternative to implementation. The fact that it must be offered on MFN basis reduces its attractiveness to the complaining party as effective resolution. The fact that an offer of compensation is usually in respect of sectors other than the one subject to the dispute makes it doubly unattractive to the complaining Member.
- Retaliation, when the right is exercised, is a blunt instrument that reduces welfare all around, with no discernible impact on a Member's willingness or capacity to fully implement. The *Airbus-Boeing* cases illustrate this point perfect. Alternatively, it does little to address the interests or the needs of the affected sector.
- Retaliation rights that threaten to choke off trade altogether are not practically exercisable.
- Where there is a perceptible imbalance in economic power between the disputing parties, implementation outcomes tend to reflect that balance rather the legal findings. [*US-Gambling*]

[19] https://icsid.worldbank.org/services/mediation-conciliation/mediation.

[20] https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

these are cases that survive the rigorous triage that takes place in trade and foreign affairs ministries in all active[21] participants in WTO dispute settlement.

That "triage" *starts* with the assessment by a Member of the potential WTO-inconsistency of the measures of another Member and includes cost-benefit analysis of litigation that any potential litigant engages in. After that, the analysis gets complex, reflecting the fact that *states* and not private interests conduct and manage WTO disputes. To ensure that a decision is fully informed, trade officials try to put the matter of trade concern in its proper commercial, policy, and political perspective.[22] This means:

- To understand a trade problem and how it affects the country – before deciding what to do with it – trade policy officials must embark upon a series of consultations inside the government and with affected industries.
- A trade issue arises typically because of adverse or potential impact on jobs or profits; this, in turn, gives rise to a political dimension, requiring additional analysis and consultations, and adding another layer of complexity to the management of a WTO dispute.
- No matter how carefully it is managed, a trade dispute will have a disruptive impact on a Member's diplomatic relations with the adversary.
- Once a trade dispute is launched, choosing which arguments to advance is not simply a matter of winning or losing the case at hand, but must also include systemic and strategic considerations, including cross-sectoral effects.
- In the event of a "win", planning must include non-implementation, compensation, and retaliation as possible outcomes, each of which will have its own attendant trade, economic, and social policy, and political challenges.
- Certain Members or disputes may involve "cost-sharing" between governments and private interests; this is open to *some* sectors or industries, but not to all, giving rise to internal equity issues or concerns.
- Launching a case for one sector or industry could well be used by other sectors or industries as a "precedent" for launching disputes in *their* sectors or industries; a

[21] *Ibid*. According to the WTO:

> During that period, 51 WTO members initiated at least one dispute, and 60 members were a respondent in at least one dispute. In addition, a total of 90 members have participated as third party in proceedings between two or more other WTO members. Overall, a total of 110 members have been active in dispute settlement, as a party or a third party.

[22] A sample list of questions is set out in Annex II. See also Payosova's observation (at 5):

> The research question is also based on an assumption that there are some "missing disputes", i.e. cases in which formal dispute settlement proceeding is not initiated for political, economic, cultural or other reasons.

Payosova, Tetyana, "Mediation in the Future WTO Dispute Settlement Governance", Harvard Law School, 2018 (on file with author). See also Payosova, Tetyana, "Re-designing the WTO Mediation Mechanism", in Manfred Elsig, Rodrigo Polanco and Peter van den Bossche (eds), *International Economic Dispute Settlement. Demise or Transformation* (Cambridge University Press, 2021), pp. 97-137.

rigorous triage framework and limited recourse to the WTO DSM would also deal with a potential public choice problem.

> **Also related to that is how the government wants to be seen by the productive sector as well as internationally, as a country that will be tough with any problem that its private sector may face or more inclined to negotiate and look for agreed solutions?[23]**

In this sense, formal disputes are only the most visible tip of a vast iceberg of ongoing trade issues between Members of the WTO that get triaged for "other means" of settlement; these matters of trade concern are hidden from sight but, in many cases, no less challenging for Members to resolve.

Structural barriers to developing country participation in WTO disputes

The expertise to properly assess the various dimensions of a trade dispute and to manage it through its lifecycle does not reside in a single person, or even a single government department. In most regular users of WTO DSM, highly trained bureaucracies put together teams of subject matter experts, trade policy specialists, and trade counsel that are, in turn, supported by counsel and analysts hired by affected private interests.

[23] A WTO Ambassador, commenting on the proposal.

Developing countries benefit from the support of intergovernmental organizations such as the ACWL[24] or counsel engaged by private interests, but many developing countries and most least developed countries do not have the *governmental* resourses necessary for effective decision-making in and management of a WTO dispute.[25]

This is not just a question of trade *litigation* counsel: where there is a strong enough commercial interest, counsel can be found to litigate it.[26] Rather, formal dispute settlement requires:

- identifying the trade law issues raised by a commercial problem;
- translating the commercial problem and the trade law concerns into a trade policy framework – including gathering the information necessary to examine and analyse it;
- developing a strategy that takes into account the policy and political dimensions of a trade dispute; and
- supporting a trade dispute, once it has been launched, over its three-year timeframe.

All of this imposes costs that few LDC or even developing country ministries are capable of bearing or willing to accept. And so, although the *right* exists for each Member of the WTO to challenge the trade-distorting and potentially WTO-inconsistent measures of any other Member of the WTO, and even though the institutional support might also be found to *litigate* a case, as a practical matter, most Members are simply not in a position to exercise that right effectively.

Addressing matters of trade concern

The question of resources and the challenges facing developing and least developed countries, as important as it is, obscures a deeper and more basic feature of WTO dispute settlement: the vast majority of matters of trade concern[27] simply do not belong in formal dispute settlement *regardless* of whether there are counsel to litigate or governmental resources to manage the case.

We know this to be the case because there have been only about 600 formal disputes launched by Members in over twenty-five years of operation covering hundreds of

[24] https://www.acwl.ch/.
[25] See also valuable research on developing country and least developed country positions on this issue in Pham, Hansel T., "Developing countries and the WTO: the need for more mediation in the DSU", 9 Harv. Negot. L. Rev. 331.
[26] "Diagnosis of the problems affecting the dispute settlement mechanism", contribution by Mexico, 16 July 2007, TN/DS/W/90, at 5.
[27] https://tradeconcerns.wto.org/en
https://www.wto.org/english/news_e/news22_e/good_14jul22_e.htm

trillions[28] of dollars of international trade. At a minimum, the size of a given commercial interest is a key, if not a determining, factor in whether the matter should or would be pursued through years of litigation; as we have seen, state interest, diplomatic considerations, regional and cultural factors, international reputational profile, and domestic political and policy considerations (among others) have an impact on turning a matter of trade concern into a trade dispute.

Just as there are matters that will inevitably end up in formal dispute settlement because of their particular profile, there are matters of trade concern that are at once unlikely to be settled through bilateral diplomacy *and* not given to formal dispute settlement.[29] This does not mean that the matter goes away on its own, or that Members necessarily channel – or should channel – such matters through formal dispute settlement.

The Council heard a record high of 44 trade concerns on measures maintained or newly introduced by 31 members, three of which were raised for the first time.[30]

A simplified taxonomy of "matters of trade concern" could help clarify the reach of both diplomacy and formal dispute settlement[31]:

Severity	Nature	Likely outcome
1	Matters of trade concern of small value in respect of non-critical sectors or trade policy issues, generally arising out of routine misapplication of measures	Bilateral diplomatic settlement

[28] The value of global trade reached a record level of $28.5 trillion in 2021. That's an increase of 25% on 2020 and 13% higher compared to 2019, before the pandemic. https://unctad.org/news/global-trade-hits-record-high-285-trillion-2021-likely-be-subdued-2022#:~:text=%E2%80%9COverall%2C%20the%20value%20of%20global,the%20COVID%2D19%20pandemic%20struck.

[29] See comments of Jan Bohanes on the presentation given by the author in a course of a Webinar on this subject: https://aric.adb.org/rcipod/trade-dispute-resolution-in-asia-and-the-pacific-insights-and-policy-challenges.

[30] The measures at issue,

> encompass a wide range of sectors (e.g. agricultural, information technology, fisheries, forestry and food products) as well as specific products, such as air conditioners, apples, cheese, cosmetics, energy drinks, instant coffee, mobile phones, pears, plain copier paper, pulses, tyres and steel.

https://www.wto.org/english/news_e/news22_e/good_14jul22_e.htm

[31] Canada's Justice ministry has developed a matrix for legal risk management that is conceptually useful in highlighting the kind of analysis that would be deployed. https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/08/lrm-grj/p2.html

2	Matters of trade concern of important value in respect of sectors of economic value to the complaining Member, but less intractable for the offending Member	Bilateral diplomatic settlement
3	Matters of trade concern of important value in both economic and trade policy terms to both Members, but not significant enough to justify a trade dispute	Persistent failure to resolve through either diplomacy or discussion in Committee
4	Matters of trade concern of significant value in respect of critical sectors or trade policy issues, generally arising out of political or protectionist objectives in the offending Member and affecting the interests of smaller developing or least developed Members	▪ Persistent failure to resolve through either diplomacy or discussion in Committee ▪ Unlikely to be resolved through litigation because of disparity in economic power
5	Matters of trade concern of significant value in respect of critical sectors or trade policy issues,[32] generally arising out of political or protectionist objectives in the offending Member and affecting the interests of regular users, Members with significant economic and diplomatic clout, or Members supported by significant private economic interests	Formal dispute settlement (three years of litigation through various stages, with implementation likely at the end of the second round of cases)

This paper addresses[33] levels 3 and 4 matters of trade concern.[34]

[32] With the caveat that certain issues might be *too important* to submit to WTO dispute resolution. See Payosova (2018) (at 5): "controversies dealing with novel issues or certain political questions may be too sensitive to be subject to the binding adjudication process". Canada did not [...]

[33] There are different ways to classify trade irritants between Members. Payosova, for example, identifies the following four categories as candidates for mediation:

> (i) cases, in which formal complaints were filed but were eventually settled; (ii) controversies, where no formal complaints (requests for consultations) were filed due to relative efficiencies considerations; (iii) controversies that fall in the grey area of WTO rules; and (iv) experience with the non-violation and situational complaints.

Op. cit., at 22.

[34] Payosova identifies a different class of non-litigated cases: "Apart from financial and administrative obstacles, some countries may prefer settling disputes through mediation because of their traditional culture and religion." Payosova (2018), *op. cit.*, at 18.

Cases where disputing parties have reached an impasse in their negotiations, but are still speaking and willing to have a third party neutral assist them in negotiating.[35]

It has been argued that "Mediation is the continuation of negotiations by other means."[36] This observation, clear on its face, hides a multitude of complexities: negotiations take place between friendly as well as antagonistic parties; they are shaped by "the context and characteristics of the situation", which includes not just the subject matter of the specific underlying dispute, but also national attitudes, conduct, and geopolitical considerations, among other variables and considerations.[37] Mediation[38] is an *ad hoc* process that enables parties to a dispute to *extend* their existing "conflict management" framework, through a voluntary process and the intermediation of a third party, with the objective of:

- changing the dynamics of bilateral negotiations;
- benefitting from the mediators' ideas, knowledge, and experience;
- affecting the dispute in such a way – for example, by reducing or removing one or more of the problems of a negotiating framework[39] – as to make it more susceptible to settlement;[40] or
- benefitting from a third-party's expert and considered recommendations for a compromise settlement or a mutually acceptable solution.[41]

Mediation in the WTO

The DSU

Mediation is a standard feature of international diplomacy.[42]

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[35] https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html

[36] Jacob Bercovitch, "The Structure and Diversity of Mediation in International Relations", in J. Bercovitch and J. Rubin, eds., *Mediation in International Relations* (Hampshire: Palgrave MacMillan, 1992), at 3.

[37] *Ibid.*, at 4.

[38] See Annex III for a taxonomy of alternative dispute resolution.

[39] *Ibid.*, at 5.

[40] *Ibid.*, at 4-5.

[41] *Ibid.*, at 6.

[42] *Ibid.*, at 1.

Article 5 of the Dispute Settlement Understanding ("DSU") reflects this by setting out "Good offices, conciliation and mediation" as "procedures that are undertaken voluntarily if *the parties* to *the dispute* so agree."[43] "The dispute" refers to the "matter" identified in a "Consultation request" pursuant to Article 4. The reference to the agreement of "the parties" and the inclusion of the word "voluntarily" means that unlike Articles 4[44] and 6, involvement in the Article 5 procedure is not mandatory.

Article 5 provides the following:

- GCM "proceedings" and positions taken by disputing parties must be "confidential";
- positions taken by disputing parties are "without prejudice to the rights of either party in any further proceedings under these procedures";
- when the parties engage GCM within 60 days after the receipt of a consultation request, the complaining party must refrain from requesting the establishment of a panel for 60 days (unless the parties "jointly" consider that the process has failed to settle the dispute); and
- the Director-General may, *ex officio*, offer good offices, conciliation or mediation.

Of note, Article 5 does not define "good offices, conciliation and mediation" ("GCM"); there are no rules or procedures elaborated in respect of these mechanisms. Because it already structurally follows a "request for Consultations", the WTO GCM is engaged *after* a Member's preliminary assessment of another Member's violation of its WTO obligations, a "triage" as to the engagement of formal dispute resolution, and the launch of the formal mechanism. These factors explain – at least in part – why GCM has not been formally used to date.[45]

Mediation and DSU reform

Early in the DSU reform negotiations a number of developing and least developed Members proposed reforms to strengthen good offices, conciliation, and mediation.

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[43] Emphasis added.

[44] *Brazil — Measures Affecting Desiccated Coconut*, WT/DS22/AB/R.

[45] Payosova (2018), *op cit.*, at 5:

> [M]ediation was used in 2002 to assess whether the preferential tariff treatment of canned tuna from ACP countries by the European Communities unduly impaired legitimate interests of the Philippines and Thailand.

However, the three WTO Members "explicitly indicated that they do not consider the matter subject to mediation as a dispute and merely relied on procedures similar to those envisaged in Article 5 of the DSU". See: Payosova (2021), at 98; WTO General Council, *Request for Mediation by the Philippines, Thailand and the European Communities*, WT/GC/66, 16 October 2002.

Paraguay[46] proposed to make recourse to Article 5 mandatory "in disputes involving developing country Members, and at the request of any of the parties." Jordan[47] and Haiti[48] made similar proposals. Paraguay's proposal would impose a 90-day maximum on the procedure and add the following paragraph to Article 5:

> 7. The use of the procedures under this Article as a means of promptly settling trade disputes that arise between Members and *of maintaining the balance between the rights and obligations of Members* shall be encouraged. [emphasis added]

Paraguay did not explain how making mediation mandatory or linking conciliation and mediation directly to the "balance of rights and obligations" of Members renders the procedure more effective at resolving disputes.

In a narrower proposal,[49] the LDC Group referred to the "due restraint" clause of Article 24.1 and sought to remove the procedural qualifier "upon request by a least-developed country Member" from Article 24.2:

> In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made.

It is not clear the extent to which the exercise of this qualifier is or would be a problem for a least developed country.

Other mediation frameworks

In 2003, the World Organization for Animal Health (the OIE) presented a paper to the WTO to address "some apparent misunderstandings" about its standards.[50] The paper set out, in its concluding section, its "in-house procedure for dispute mediation":

> Subject to the agreement of both parties, disputing countries can request mediation by a panel of independent experts selected by the Director General of the OIE. This process has several advantages, as it is not as resource-demanding as the formal WTO process and allows for technically based solutions. At the end of the process, the recommendations from the panel are communicated by the Director General to both parties.

[46] TN/DS/W/16, 25 September 2002.
[47] TN/DS/W/43, 28 January 2003.
[48] TN/DS/W/37, 22 January 2003.
[49] TN/DS/W/17, 9 October 2002.
[50] "Implementing the Standards of the OIE", G/SPS/GEN/437.

> While this process is confidential and non-binding, should the case eventually result in a formal dispute at the WTO, the documentation from this mediation may be released by either party for use by the WTO.[51]

In 2006, the OIE provided further elaboration on its mediation facility.[52] The paper observes that:

> The OIE mechanism is a strictly science-based approach to finding solutions through mediated bilateral consultation. In contrast, the WTO dispute settlement process is rather based on legal provisions. The role of the OIE is to help the parties find a resolution of their differences strictly based on scientific elements and with facilitation by OIE experts.[53]

Of note, as of 2006, the mechanism had been used twice: by Japan and the United States, and by the EU and the United States. In the latter case, according to the OIE, the "mediation mechanism was effective in facilitating technical discussions that assisted in significantly narrowing initial differences."[54]

In 2014, the SPS Committee agreed on an informal mediation mechanism to reduce food safe, and animal and plant health friction.[55] The procedure,[56] limited to SPS measures, is integrated into the WTO framework in that a "request for consultations" by one Member to another in respect of a measure must be copied to the Chair of the SPS Committee and the Secretariat. As well, it provides for the Chair of the SPS Committee to serve as "the Facilitator".[57] The "schedule, format and place of meetings", as well as terms and conditions of technical expert involvement and third party participation would be agreed between the Facilitator and the consulting Members.[58] The procedure provides that the consultations should not exceed 180 days. Of note, the Chair "will report the general outcome of the Consultations to the Committee."[59]

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[51] *Ibid*., at 8.
[52] "OIE dispute mediation process", G/SPS/GEN/731.
[53] *Ibid*., at 1.
[54] *Ibid*.
[55] https://www.wto.org/english/news_e/news14_e/sps_10sep14_e.htm
[56] G/SPS/61.
[57] *Ibid*., at 2.
[58] *Ibid*., at 3.
[59] *Ibid*.

A NEW FACILITY TO OPERATIONALIZE CONCILIATION AND MEDIATION

Framework considerations

Any proposal aimed at operationalizing "conciliation and mediation" must be based on six premises:

- *some* trade irritants are intractable – for political, systemic, or economic reasons – and their settlement (however defined) requires recourse to binding adjudication;
- developed countries and larger developing countries have sophisticated diplomatic networks and trade policy bureaucracies that they use to mitigate or resolve most matters of trade concern;
- as the OIE experience demonstrates in a narrow context, even Members with both extensive diplomatic services and deep and broad experience in formal dispute settlement have found recourse to mediation-type facilities useful in addressing economically sensitive and politically challenging matters of trade concern;[60]
- for almost all LDCs and low-income developing countries, and in respect of a significant subset of matters of trade concern of advanced economies, formal dispute settlement is impracticable, not feasible, or suboptimal;
- for all Members, conciliation and mediation has the potential to reduce friction in respect of a relatively large subset of matters of trade concern that are irritants but that do not justify the expense and the pressures of formal dispute settlement; and
- "mediation" is essentially an *interest*-driven exercise rather than a legal or a jurisprudential one.

[60] Behboodi, Rambod, "The *Aircraft* Cases: Canada and Brazil", [2001] CYIL 387, at 390.

Mediation offers a party-driven approach to dispute settlement. The mediator's role is to facilitate the parties' negotiations, for example, by helping each party to identify its interests, overcome barriers to settlement, and develop possible settlement options with the parties.[61]

Characteristics

In the light of the foregoing, a functional and effective conciliation and mediation facility (CMF) should have the following characteristics:

1. The primary objective of conciliation and mediation would be to address diplomatically unresolved matters of trade concern – the "missing disputes". A *successful* CMF could eventually be used to "facilitate settlement of a larger share of disputes in a pre-litigation stage and relieve the burden on the WTO adjudicating bodies."[62]
2. The "settlement" of matters of trade concern would take place not just in the context of alleged violations or even non-violation nullification and impairment,[63] but also – and importantly – as against the broader diplomatic, economic, and political considerations and interests between the parties.
3. Conciliation and mediation must be available *before* a request for consultation multilaterally[64] (and therefore publicly) crystalizes the *legal* contours of a trade irritant for either party.[65] (Members would have the right to engage in conciliation and mediation at all other times as well.)
4. Given Members' inability to effect any meaningful reforms to the dispute settlement mechanism of the WTO, rather than seeking a "plurilateral agreement to be negotiated by interested WTO Members",[66] model rules of procedure would be

[61] https://icsid.worldbank.org/services/mediation-conciliation/mediation.
[62] Payosova (2018), *op. cit.*, at 6.
[63] *Ibid.*, at 5.
[64] In some jurisdictions, "mediation" comes *after* the launch of litigation, but as a *mandatory* part of the process – with the courts determining when and how it must be used. https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html
[65] This would also address one of the "inherent flaws" of Article 5 identified by Payosova:

> Moreover, mediation is inherently locked into the formal litigation mechanism. This does not meet the needs of WTO Members that may prefer to discuss bilaterally and with the assistance of an expert mediator those trade matters that may have not yet evolved into a full-fledged dispute in the WTO setting. For this very reason, the formal mandatory consultations under Article 4 of the DSU, although undeniably useful as a preliminary stage to the binding litigation, arguably do not address the "not-yet-disputes" or "grey area" trade matters.

Ibid., at 26 and 29. See also Payosova (2021), at 99.
[66] *Ibid.*, at 7.

developed by an *off-campus* CMF to be agreed, or adopted with modifications, by the parties.[67]

5. The intermediation of the WTO Secretariat in the Article 5 procedure might well be one of the reasons for the reluctance of Members to engage it.[68] In any event, as indeed the LDC Group noted in its proposal, the role of the Secretariat with respect to technical assistance to developing and least developed Members in the context of dispute settlement is complex. Finally, *conciliation* and *mediation* may well require going beyond the four corners of the WTO Agreement (for example, relying on regional trade agreements or international financial institutions) for which the WTO Secretariat is not ideally suited.[69] For these reasons alone, an *off-campus* CMF would likely be more effective in helping resolve trade irritants.
6. An off-campus CMF would have considerable flexibility in maintaining and proposing a roster of mediators.[70] The objective of conciliation and mediation is to identify, based on a global understanding of the interests at stake, "viable and innovative win-win solutions"[71] to the parties. This may require the involvement of seasoned trade diplomats with experience in and knowledge of the region, or subject matter experts, or eminent persons.[72]
7. The CMF would serve as counterparty between disputing Members and the mediators, and could provide venue and secretariat services on cost recovery basis. It would, however, require both launch and core financing, and diplomatic support, in four stages:
    a. Initial set up
    b. Commitment by one or more developed countries to use this mechanism in respect of trade irritants between them and a (smaller) developing Member
    c. Commitment by one or more developed countries to finance mediation of trade irritants between low-income developing Members, or between less developed Members
    d. Commitment by one or more developed countries to finance training, outreach, and advice in respect of the implementation of mediation and resulting agreements

[67] This would address another "inherent flaw" identified by Payosova: "Article 5 of the DSU does not provide a ready-to-use mediation mechanism and thus current mediation procedure is not sufficiently developed and precise." *Ibid.*, at 26. See also Payosova (2021), at 99.
[68] *Ibid*.
[69] Payosova refers to "specialized background in diplomatic mediation in addition to the understanding of international trade". *Ibid*., at 27.
[70] Payosova refers to the 2001 Communication of the Director-General setting out procedural steps for mediation to be handled by the Director-General or, subject to approval by the parties, by a designated Deputy Director-General, with the necessary assistance provided by the WTO Secretariat. No other options in terms of possible mediators are provided. *Ibid*., at 28. This is suboptimal, to say the least.
[71] *Ibid*., at 32.
[72] See Behboodi, *op. cit*.

8. Mediation could be run initially on virtual platforms, but ideally it would be in person, location to be decided jointly (and not necessarily in Geneva).[73]
9. A hard cap would be imposed on the duration and costs of mediation, subject only to the express request of parties to extent the time limits and to accept responsibility for cost-overruns.
10. Mediation reports would be confidential unless a public version is requested by the parties, any redactions to be agreed between the parties and the mediator.

Mandate

The facility will have three principal functions:

- *Provision of mediation and conciliation services to the Members of the WTO in respect of disputes related to the WTO Agreement, and eventually to parties to regional trade agreements.*

  To this end, following broad consultation with WTO Members, other instances of arbitration and mediation, and the trade community at large, the CMF, through its Director and supported by counsel experienced in dispute settlement, will:

  - develop model mediation rules, subject to strict timeframes, for use by parties;
  - develop selection criteria for mediators and conciliators, put in place a regionally representative roster, and serve as contracting counterparty for the engagement of mediators;
  - ensure, to the extent possible, that model rules reflect existing multilateral and regional experiences; and
  - where agreed by the parties, provide Secretariat support for parties and mediators.

- *Ensuring a coherent and considered approach to state-to-state mediation on trade matters, one that responds to the needs of state parties seeking mediation.*

  This is a new function in and under international trade law. Following broad consultation with WTO Members, other instances of arbitration and mediation, other trade and regional agreements, and the trade community at large, the CMF, through its Director and in collaboration with academic institutions and private sector counsel specialised in dispute settlement, will:

  - in its first two years, engage in research and analysis of mediation models and modalities, and convene conferences, seminars, webinars, and other in-person and electronic sessions, to identify "best practices" for state-to-state trade mediation;
  - develop training modules for staff, mediators, and other interested persons; and
  - within four years, develop a certificate-granting programme for state-to-state trade mediation and conciliation.

[73] See also Payosova (2021), at 105-106.

- *Provision of advisory activities for officials of developing and least developed countries and consciousness raising for all other potential beneficiaries of state-to-state trade mediation.*

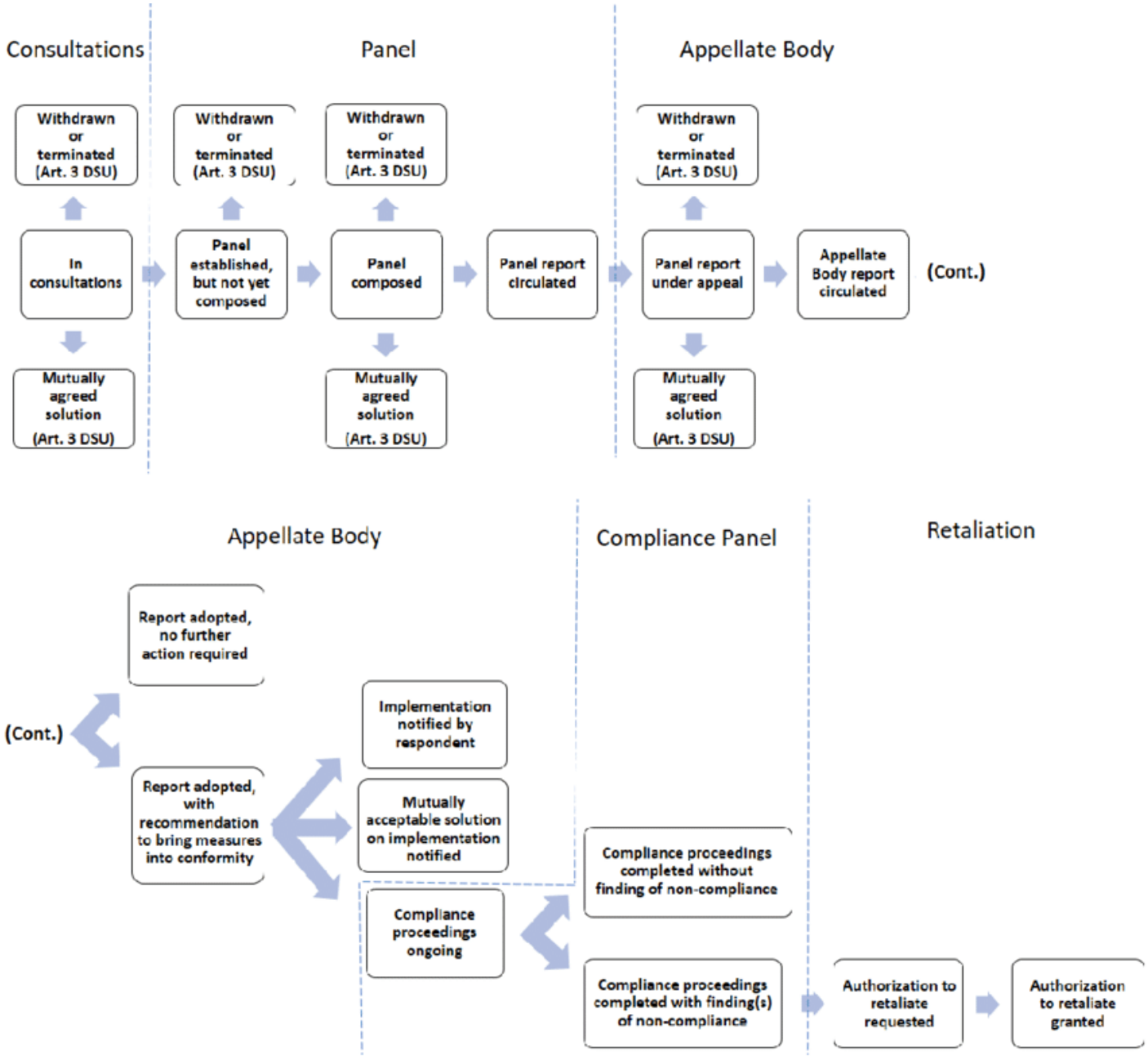
  To help WTO Members understand the benefits of mediation and conciliation and how to take advantage of this facility, the CMF will:

  - through its Director, engage with international organizations that provide capacity-building and technical assistance to developing and least developed countries on trade matters – such as the WTO, the ITC, and international financial institutions – to participate in and offer capacity building on mediation and conciliation in sessions devoted to dispute settlement;
  - to provide bespoke advice, upon request, to individual developing and least developed countries on pursuing mediation and conciliation in specific disputes; and
  - through its Director, to engage with active users of WTO dispute settlement and other WTO Members to seek their support for, promote their use of, alternative dispute settlement.

In carrying out its functions, the entity will focus on:

- Strong users of formal dispute settlement that have an interest in reducing pressure on the system, or are open to alternative dispute settlement in trade matters
- Advanced economies with strong trade-dispute *triage* frameworks and an interest in alternative dispute settlement
- LDCs and low-income developing countries with traditionally limited or no access to formal dispute settlement
- Regions where for cultural or geopolitical reason, formal dispute settlement has not been optimal

ANNEX I – FORMAL DISPUTE SETTLEMENT



ANNEX II – SAMPLE TRIAGE QUESTIONS

- What are the *commercial* interests at stake?
- What is the domestic *economic* importance of the commercial interests involved, either nationally, regionally or sectorally?
- What is the nature of commercial relations in other sectors or with respect to other products with the other country?
- What are the political, diplomatic and strategic implications of launching a trade dispute? The more sensitive the product or the industry is to the other country, the more likely that a trade dispute could cause diplomatic ripples.
- Where does the affected industry fit within Canada's overall industrial and trade policy?
- Even if commercial interests are relatively small, are there any systemic interests that compel us to bring a case? (Do we want to use this opportunity to get a useful precedent for future cases?)
- Alternatively, even if commercial interests are large, are there cross-cutting issues that would militate against bringing a case? For example, do we do the same thing as we are alleging?
- Even if you win, what do you win? (What is the likelihood of implementation? What are the political and economic considerations that have motivated the violation in the first place, and how are they likely to be dealt with?)
- What are the domestic political consequences of bringing or not bringing a case?

ANNEX III – TAXONOMY OF ALTERNATIVE DISPUTE RESOLUTION

In very general terms, ADR "refers to the different ways people can resolve disputes without a trial."[1] At this level of abstraction, ADR would also include bilateral negotiations,[2] rendering the concept *institutionally* unhelpful. This is because in the ordinary course, a contractual dispute does not end up in court the moment it arises: *formal* dispute resolution is typically preceded by attempts, on the part of disputing parties, to resolve the matter through negotiations *before* assuming the costs of recourse to formal or third party mechanisms.

For the purposes of this paper, a modified and workable definition of ADR would be:

> processes and techniques of conflict resolution that 1) involve recourse to third party assistance, and 2) fall outside formal means of resolution through direct governmental action.[3]

Again in broad terms, six types of institutionalized ADR can be identified[4]:

- Arbitration
- Conciliation
- Mediation
- Neutral evaluation
- Neutral fact-finding
- Customary dispute resolution

Arbitration

Arbitration is an *adjudicative* process driven in large part by the disputing parties. Common features are:

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[1] https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml

[2] https://www.dol.gov/general/topic/labor-relations/adr

[3] See https://www.law.cornell.edu/wex/alternative_dispute_resolution. The two modifications to the definition are essential for identifying the proper ambit of the study of ADR here:

1. "Negotiations" or "transactions" in themselves are part and parcel of normal commercial conduct and do not require institutional framing. ADR concepts *and institution* are useful when transactions do not materialise and negotiations fail.
2. All ADR is, in some form or another, either informed by, enabled, or enforced by some "governmental authority"; in a modern economy, there is no such thing as "outside governmental authority". At issue is the *nature* of that authority and the *scope* of its intrusion in bilateral settlement of disputes, not the existence of it.

[4] These can, in turn, batched under "facilitative", "evaluative", and "adjudicative", but the broader categories are not helpful for the

- arbitrators are typically selected by the disputing parties;
- it is an *adversarial* process;
- the costs of the arbitrators and venues are assumed by the disputing parties;
- "tribunals" are presided over by arbitrators that have quasi-judicial functions and authorities;
- rulings are *binding* upon the disputing parties and thus *enforceable* through domestic courts[5]; and
- rulings are *final*, in that except on narrow grounds, they are not subject to further appeal to domestic courts.

"Arbitration" is a widely-used mechanism in interstate,[6] private-state,[7] and private-private disputes; it is deployed for both transboundary and domestic dispute resolution.[8] It may be entered into voluntarily by both parties as an *alternative* to litigation before domestic courts; it may be mandatory for a defendant (upon the request of a plaintiff), with choice of forum (court or arbitration) left to the plaintiff,[9] or mandatory for both parties.[10]

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[5] See for example the US *Federal Arbitration Act*, 9 U.S. Code § 9:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

https://www.law.cornell.edu/uscode/text/9/9

[6] See for example *Understanding on Rules and Procedures Governing the Settlement of Disputes* of the WTO (DSU). In addition to the formal state-to-state panel process, the DSU provides for arbitration under Articles 21, 22, and 25.
https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

[7] ICSID: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf
UNCITRAL: https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration

[8] APEC, above.

[9] Investor-state disputes do not *require* that an investor to go through arbitration in all instances; where the conditions are met, the investor has the option of having recourse to international arbitration. See for example Article VIII of the bilateral investment agreement between Switzerland and the Philippines:

> 2. If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration.

Cited in *SGS Société Générale de Surveillance v. Republic of the Philippines* ICSID Case N° ARB/02/6.

[10] More common, as we have seen in *Heller*, in contracts of adhesion.

Conciliation

"Conciliation" and "mediation" are sometimes used in the same framework,[11] and sometimes they are so used interchangeably.[12] The differences between "conciliation" and "mediation" appear to be contextual[13] or institutional[14] rather than conceptual. At the same time, for both analytical and institution-building purposes it would be useful to maintain a distinction between the two modalities based on the nature and extent of a third-party's engagement in the resolution of the dispute.

In this context, "conciliation" may be defined:

- as against arbitration, as a *voluntary* process; and
- as against mediation, involving third party conciliators that *could* variously:
    - help clarify the issues,

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[11] See, for example, Article 5 of the Dispute Settlement Understanding of the World Trade Organization:

> *Good Offices, Conciliation and Mediation*
>
> 1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

[12] UNCITRAL Mediation Rules, Article 1(2): "Mediation under the Rules is a process, whether referred to by the term mediation, conciliation or an expression of similar import […]." Highlight added. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_mediation_rules_advance_copy.pdf

[13] See for example the important differences, in the context of family law, between conciliation and mediation:

Regulation	Mediators are regulated by the Code of Civil Procedure, 1908.	Conciliators are regulated by the Arbitration and Conciliation Act, 1996.
End Result	Mediation aims to reach an agreement between parties and it's enforceable by law.	Conciliation aims to come to a settlement agreement and it is executable as a decree of civil court.

https://fmacs.org.uk/is-there-a-difference-between-mediation-and-conciliation/

[14] "Background", *supra*:

> ICSID mediation envisions the appointment of 1 mediator or 2 co-mediators by agreement of the parties, with the default being one mediator appointed by party agreement. By contrast, ICSID conciliation envisions a 3-member conciliation commission with each party appointing one conciliator and the third, presiding conciliator appointed by agreement;
>
> [T]he role of the conciliation commission is to clarify the issues in dispute, whereas the role of the mediator is solely to assist the parties with reaching a mutually agreeable solution […].

At 4-5.

- propose potential solutions for consideration by the parties,[15]
- serve as subject matter experts,[16]
- issue neutral "evaluations" of the matter before them,[17] or
- make recommendations.

Mediation

"Mediation" is a voluntarily[18] *facilitated* bilateral negotiation:

> The intervention into a dispute or negotiation by an acceptable, impartial and neutral third party (with no decision-making power) to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.[19]

Mediation recognizes four core events in a given relationship:

1. the existence of an underlying relationship;
2. a disagreement as to the satisfactory performance by one side of an agreed term or condition of the relationship;
3. the breakdown of bilateral negotiations between the parties; and

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[15] "Unlike the conciliator who has an active role in the conciliation process (eg he can propose a solution to end the conflict) […]."
https://www.cmap.fr/faq/what-is-the-difference-between-mediation-and-conciliation/?lang=en

[16] "Implementing the Standards of the OIE", G/SPS/GEN/437:

> Subject to the agreement of both parties, disputing countries can request mediation by a panel of independent experts selected by the Director General of the OIE. This process has several advantages, as it is not as resource-demanding as the formal WTO process and allows for technically based solutions. At the end of the process, the recommendations from the panel are communicated by the Director General to both parties.
>
> [The] mediation mechanism was effective in facilitating technical discussions that assisted in significantly narrowing initial differences.

Although the paper refers to "mediation", the structure more closely resembles what the current literature would describe as "conciliation".

[17] https://viamediationcentre.org/readnews/MjAz/Difference-between-Mediation-and-Conciliation

[18] In some jurisdictions, "mediation" is a mandatory part of the formal litigation process. To the extent that this reduces engagement in formal litigation, the process could help reduce the burden on the courts. But this requires the engagement of the courts in the first place.
https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html

[19] https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html

4. a willingness on the part of the parties to the resolve the disagreement and *to continue the relationship*.[20]

The key features of mediation follow the function and the objective:

- Voluntary process *throughout*: the parties agreed to the rules, appoint the mediators, and select the venue.
- The mediator acts as a "facilitator" for the negotiating parties. This could involve "relationship-building or procedural assistance", although mediation remains fundamentally an informal process.
- Preparing for mediation involves a mediator "undertaking a comprehensive review of the issues"[21] and gaining a global understanding of the parties' relationship.
- The mediator encourages parties to explore options they not had not been previously contemplated,[22] or propose such options.[23]
- Confidentiality of the process is a key element of mediation – this is as between each party and the mediator, between the two parties, and externally.
- An agreement at the end of the process, *drafted by the parties*, that is enforceable as a contract as between them.

Finally, mediation is an *interest-based* procedure:

> In court litigation or arbitration, the outcome of a case is determined by the facts of the dispute and the applicable law. In a mediation, the parties can also be guided by their business interests. As such, the parties are free to choose an outcome that is oriented as much to the future of their business relationship as to their past conduct.[24]

Neutral evaluation

This is a process where "a neutral third party hears presentations by disputants of their positions, then provides them with his or her evaluation of the case."[25] This is a voluntary process, useful where the fact pattern is complex, the law is uncertain, and both parties and counsel acknowledge that an "early evaluation" would be useful in assessing whether to pursue costly and lengthy litigation. It has features similar to mediation and conciliation in that the parties "need to be invested in the process, be non-

[20] *Ibid*.
[21] *Ibid*.
[22] https://www.law.cornell.edu/wex/mediation
[23] It has been suggested that this function is more in line with the tasks of a conciliator.
[24] Highlight added.
https://www.wipo.int/amc/en/mediation/what-mediation.html
[25] https://www.mediate.com/neutral-evaluation-an-effective-adr-process/

confrontational and willing to actively listen to the evaluator's opinions."[26] Because there is an element of an adversarial process, however, *unlike* mediation the evaluator will not engage in *ex parte* discussions. For these reasons, the technique is "at mid-point between mediation and binding adjudication."[27]

Neutral evaluation was initially a way for courts to manage their caseload; in some jurisdictions it remains connected to disputes that are *already* in litigation or arbitration.[28] However, the structure or modalities of the process could also be useful as a "reality check" outside the framework of ongoing litigation:[29] where, despite the risks and uncertainties, at least one of the disputing parties is persuaded that litigation could be more effective than mediation, but has some doubts about the outcome, or the other side shows confidence for their side. To ensure that the parties are confident that evaluation provides a realistic assessment of their chances of success in litigation, the evaluator must be "an expert in the substantive area of the dispute."[30]

Neutral fact-finding

Neutral fact-finding is a narrower variation on neutral evaluation.[31] This involves investigation and analysis by an independent third party of a *factual* dispute – for example, of a threshold nature[32] – to make written findings.[33] This would be the case where there are disputes on meeting regulatory requirements in foreign jurisdictions.

Typically, the factual report is non-binding unless the parties agree to be bound by it.[34] Even where a disputing party is seriously considering proceeding to litigation or arbitration, neutral fact-finding "can help narrow the dispute and shape the discovery process, possibly encouraging settlement."[35]

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[26] *Ibid*.
[27] https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/eval.html
[28] https://www.buildingdisputestribunal.co.nz/early-neutral-evaluation/early-neutral-evaluation-model-clause/
[29] Justice Canada, *supra*: "in a private context, it may be triggered as soon as a deadlock arises in connection with the dispute."
[30] *Ibid*.
[31] "ADR in the Minnesota State Court System", at 3. https://www.mncourts.gov/mncourtsgov/media/scao_library/ADR/ADR_Info_Sheet.pdf
[32] http://www.adrprocesses.com/earlyNeutral.php
[33] "Minnesota", *supra*.
[34] Maryland Rules, Rule 17-102(k). https://govt.westlaw.com/mdc/Document/N22CFF090B79311DBB4ACEAAAE7EB7386?viewType=FullText&originationContext=documenttoc&transitionType=StatuteNavigator&contextData=%28sc.Default%29
[35] Mary Dunnewold, "What Every Law Student Should Know" (2009), 38(2) Student Lawyer. https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/what_every_law_student_should_know.pdf