Accessible and Inclusive Dispute Resolution

May 2024

Operationalizing the results of MC13 through a complementary conciliation and mediation facility within the WTO

At MC12, Ministers committed "to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024." Members spent much of 2023 in informal sessions doing so. Deep and broad discussions led to an ambitious "Chair's Text".

At MC13, Ministers instructed officials "to accelerate discussions in an inclusive and transparent manner" to achieve the objectives set forth at MC12.

A thorough review of the Chair's Text, including on alternative dispute resolution, confirms that the optimal framework for most matters of trade concern, *especially* for developing and less developed Members, would be a strengthened **conciliation and mediation** facility as a **complementary** procedure. The Chair's Text is an important first step in the right direction.

This paper proposes a concrete and realisable path forward **within the WTO**, including strengthened institutions and a realistic work programme.

Accessible and Inclusive Dispute Resolution

OPERATIONALIZING THE RESULTS OF MC13 THROUGH A COMPLEMENTARY CONCILIATION AND MEDIATION FACILITY WITHIN THE WTO

CONTENTS

EXECUTIVE SUMMARY

At MC12, Ministers committed "to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024." Members spent much of 2023 in informal sessions doing so. Deep and broad discussions led to an ambitious "Chair's Text".

At MC13, Ministers instructed officials "to accelerate discussions in an inclusive and transparent manner" to achieve the objectives set forth at MC12.

In the past, concerns about "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, in fact, resulted in greater participation of developing countries in WTO dispute settlement, but access concerns persist. This is because *access* is inextricably linked to the structures of formal dispute resolution *and* endemic governance, institutional, and capacity challenges facing less developed and developing countries.

One way to address "access" and inclusiveness of procedures is to reconceptualize those procedures root and branch. "Access" to WTO dispute resolution should not necessarily involve more *litigation* by more Members through the *formal* dispute settlement mechanism. Rather, to enhance access, Members should consider operationalizing *non-adversarial* approaches to the resolution of matters of trade concern that could be effective in addressing a significant subset of concrete commercial and trade problems within shorter timelines than formal litigation.

Conciliation and mediation feature prominently in current thinking on international commercial dispute resolution. Indeed, the ICSID mediation framework entered into force on 1 July 2022; the WIPO, the ICC, and the Singapore International Arbitration Centre have recently elaborated or strengthened their mediation frameworks.

Within the WTO, conciliation and mediation have been part of the WTO dispute settlement framework since its inception, in the form of Article 5 of the DSU. They have rarely been used; Article 5 has never been invoked.

This is in part because 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. As well, for the Article 5 mechanism to be engaged, a Member must already frame a matter of trade concern in a context of a *formal* dispute by making a request for Consultations. This could well inhibit bilateral recourse to

conciliation and mediation, which are by definition voluntary and generally considered to be non-adversarial.

Earlier versions of this discussion paper proposed an independent facility outside the WTO that would enhance access to less developed and developing countries to the *full* range of dispute resolution options within the framework of the WTO. This was a pragmatic and not a principled position. (That is, the point was not to be outside the system; rather, it was considered that consensus would be difficult to arrive at within the WTO on the range of proposed reforms.)

Discussions with delegates, experts, the Secretariat, and Member officials suggest that a path forward may well be possible *within* the WTO. This will require both imagination and institutional flexibility. The time has come to test Member resolve in this respect.

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 and that Members have not yet determined to bring to a formal dispute. A specialized conciliation and mediation facility 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, within the framework of the WTO, by:

- developing and defining the modalities and principles governing *conciliation and mediation*, derived from Member and international practice, to ensure collaborative win-win solutions through non-adversarial procedures;
- devising model modular rules for use by Members *seeking conciliation and mediation* without the need for *ad hoc* negotiations, as has been the rule for past mediation efforts, or multilateral consensus; and
- employing innovative means for prior *vetting* and *training* of mediators and conciliators, and publishing their names and credentials for use by Members.

I. INTRODUCTION

In the Thirteenth Session of the Ministerial Conference of the WTO, Ministers acknowledged[1] the "progress made [...] as a valuable contribution to fulfilling our commitment"[2] and instructed officials "to accelerate discussions in an inclusive and transparent manner" to achieve the objectives "set forth at MC12". There,[3] Ministers had committed themselves "to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."

This was principally in respect of the ongoing crisis of the Appellate Body,[4] but not exclusively so.[5] The question of "access" by developing and least developing countries to the dispute settlement mechanism of the WTO is as old as the institution itself.

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."[6]
- 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."

[1] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/37.pdf&Open=True
[2] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/385.pdf&Open=True
[3] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W16R1.pdf&Open=True
[4] In their joint communication, India, Bangladesh, Indonesia, Egypt, and South Africa observed:

> The central interest that motivated Members to engage in this informal exercise i.e., the restoration of the Appellate Body, has not been addressed.

https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/DSB/8.pdf&Open=True
[5] There were no "access" issues to the Appellate Body process *as such*; the full paragraph identifies a larger and more systemic concern:

> We acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.

Ibid., at para. 4, emphasis added.
[6] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm.

Indeed, the first case in the WTO was a challenge brought by Brazil and Venezuela against the United States;[7] this is a forum where the island nation of Antigua and Barbuda, with a GDP of less than $1.5 billion,[8] could challenge a US measure and win.[9]

The WTO also acknowledges that "developing country Members wanting to avail themselves of the benefits of the dispute settlement system face considerable burdens."[10] These "burdens" are manifold and not easy to resolve through technical changes to the rules, special and differential treatment, technical assistance, or even comprehensive and long-term capacity-building.

In this sense, "access" to the "*compulsory* multilateral dispute settlement system" is largely only notionally "equal".[11]

Engaging the formal dispute settlement system is not simply a matter of capacity, resources, or internal governance or institutional 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 the type that would not normally pass that triage stage for *formal* dispute resolution.

The DSU sets out two other dispute settlement mechanisms:

---

[7] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm.
[8] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.
[9] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.
[10] *Ibid*.
[11] 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

- "arbitration" under Article 25, which is a litigation procedure and has its own challenges;[12] and
- "Good Offices, Conciliation and Mediation" under Article 5, which has never been invoked.[13]

The 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"[14] entered into force on 1 July 2022.

This paper starts with the premise that the *formal* 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. It explores why the Article 5 mechanisms have not functioned. It proposes a **conciliation and mediation facility** as a complementary dispute settlement framework for a large class of trade irritants, and in particular for less developed and lower-income developing countries. It sets out how such a facility might be made operational within the existing framework of the WTO.

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.

Part II identifies the challenges of a "fully-functioning" WTO dispute settlement framework for developing and less developed countries. Part III explores conciliation and mediation as possible complementary dispute resolution mechanisms for the vast bulk of trade and commercial disputes. Part IV explores how the mechanism could be operationalized within the WTO.

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

[13] 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.

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

II. MANAGING FORMAL WTO DISPUTE SETTLEMENT

A complex and lengthy process

Binding dispute settlement through a mechanism with mandatory jurisdiction and automatic "adoption"[15] of quasi-judicial findings was one of the key innovations[16] of the Uruguay Round. It continues to be essential to the full functioning of the WTO.[17] And because the WTO remains central to global trade,[18] we can expect the WTO dispute settlement mechanism (DSM) to stay relevant to its regular users,[19] whether it continues as a two-stage process – through a reformed Appellate Body or other appellate mechanisms[20] – 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 domestic decision-making related to the management of matters of trade concern before they become trade *disputes*. This is because a trade dispute requires considerable resources on the part of governments and private sector interests alike,[21] and may well have an impact on diplomatic relations between parties. Even functioning exactly as intended and respecting all deadlines, formal dispute settlement is complex[22] 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 of disputes 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.[23] These challenges are exacerbated for developing and less developed countries.

---

[15] https://twitter.com/GenevaTradeLaw/status/1154714525444259842.
[16] https://twitter.com/GenevaTradeLaw/status/1204700456422907904.
[17] 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.
https://twitter.com/GenevaTradeLaw/status/1118067690298585088;
https://twitter.com/GenevaTradeLaw/status/1118137168789213187.
[18] Not just as a multilateral framework, but also – and critically – as the foundation for almost all other trade agreements.
[19] 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
[20] https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176.
[21] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm.
[22] See Annex I.
[23] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

The WTO identifies at least four barriers to the participation of developing and less developed Members in dispute settlement:

1. lack of specialized resources;
2. complexity of WTO law and dispute settlement procedures;[24]
3. length and uncertainty of WTO disputes, *even in the case of effective implementation*;[25] and
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.[26]

There will be a class of trade disputes between a class of Members that will require, and that will result in, formal dispute settlement; to identify the challenges of the mechanism 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. And, using the same metrics, it also explains at least in part why most Members of the WTO have not engaged the formal dispute resolution mechanism.

---

[24] 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*.

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

[26] 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*]

In this light, *access* to dispute settlement procedures need to be reconceived: this is not just about more cases, but *complementary* procedures that make it possible for developing and less developed Members that have been left out of the dispute settlement framework to participate in the process. Reviving or operationalizing flexible non-adversarial procedures will also provide an *additional* mechanism for all Members in respect of those disputes that, in their view, remain of concern but that do not require recourse to formal dispute settlement.

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.[27]

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.[28] 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 these are cases that survive the rigorous triage that takes place in trade and foreign affairs ministries in all active[29] 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.[30] This means:

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

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

[29] *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.

[30] 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.

- 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; 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.[31]

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. A simple diagram helps illustrate the point:

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.

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

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. Developing countries benefit from the support of intergovernmental organizations such as the ACWL[32] or counsel engaged by private interests, but many developing countries and most least developed countries do not have the *governmental* recourses necessary for effective decision-making in and management of a WTO dispute.[33]

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.[34] Rather, formal dispute settlement requires:

- identifying the trade law issues raised by a commercial problem;

[32] https://www.acwl.ch/.
[33] 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.
[34] "Diagnosis of the problems affecting the dispute settlement mechanism", contribution by Mexico, 16 July 2007, TN/DS/W/90, at 5.

- 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 developing and less developed 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[35] 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 case because there have been only about 600 formal disputes launched by Members in over twenty-five years of operation covering hundreds of trillions[36] 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.[37] This

---

[35] https://tradeconcerns.wto.org/en
https://www.wto.org/english/news_e/news22_e/good_14jul22_e.htm

[36] 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.

[37] 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.

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.**[38]

A simplified taxonomy of "matters of trade concern" could help clarify the reach of both diplomacy and formal dispute settlement[39]:

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
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,[40] generally arising out of political or protectionist	Formal dispute settlement (three years of litigation through various stages, with

[38] 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

[39] 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

[40] 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 […]

	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	implementation likely at the end of the second round of cases)

This paper addresses[41] levels 3 and 4 matters of trade concern.[42] It is hypothesized[43] that for these types of disputes, conciliation and mediation might well form a viable path to the resolution and settlement because third-party non-adversarial processes:

- represent an *escalation* from bilateral diplomacy without plunging the parties into *legal* and *juridical* procedures and engagements; and
- can be valuable in itself in clarifying issues of a commercial nature, and focussing minds and attention on the most salient problems that are capable of resolution, rather than win-loss findings of legal violation.

The presence of a disinterested third-party can in principle help disputing parties:

- correct, to some extent, an imbalance of power between them in a purely diplomatic context;
- establish an agreed or common understanding of the underlying facts that could form the basis of settlement negotiations;
- identify potential win-win solutions that may not be apparent to them, given each party's incomplete information about the other's position, or given parties' entrenched focus on "rights" or "legal positions" rather than "solutions" and "interests"; and
- provide a degree of external pressure on responding countries – in the form of a credible solution with some authority behind it – that may help them to overcome internal blockages to a negotiated outcome.

[41] 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.

[42] 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.

[43] I'm grateful to Professor Andrew Lang of the University of Edinburgh for invaluable insight in elaborating this section.

III. CONCILIATION AND MEDIATION IN THE WTO

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.[44]

It has been argued that "Mediation is the continuation of negotiations by other means."[45] 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.[46] Mediation[47] is an *ad hoc* procedure 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[48] – as to make it more susceptible to settlement;[49] or
- benefitting from a third-party's expert and considered recommendations for a compromise settlement or a mutually acceptable solution.[50]

The DSU

Mediation is a standard feature of international diplomacy.[51]

Article 5 of the Dispute Settlement Understanding ("DSU") reflects this by setting out "Good offices, conciliation and mediation" as "procedures that are undertaken

---

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

[45] 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.

[46] *Ibid*., at 4.

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

[48] *Ibid*., at 5.

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

[50] *Ibid*., at 6.

[51] *Ibid*., at 1.

voluntarily if *the parties* to *the dispute* so agree."[52] "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[53] 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.[54]

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.

Paraguay[55] proposed to make recourse to Article 5 mandatory "in disputes involving developing country Members, and at the request of any of the parties." Jordan[56] and

---

[52] Emphasis added.

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

[54] 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.

[55] TN/DS/W/16, 25 September 2002.

[56] TN/DS/W/43, 28 January 2003.

Haiti[57] 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,[58] 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.[59] 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.

[57] TN/DS/W/37, 22 January 2003.
[58] TN/DS/W/17, 9 October 2002.
[59] "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.[60]

In 2006, the OIE provided further elaboration on its mediation facility.[61] 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.[62]

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."[63]

In 2014, the SPS Committee agreed on an informal mediation mechanism to reduce food safe, and animal and plant health friction.[64] The procedure,[65] 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".[66] 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.[67] 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."[68]

Non-adversarial dispute resolution remains underdeveloped and unrealized in the WTO.

---

[60] *Ibid*., at 8.
[61] "OIE dispute mediation process", G/SPS/GEN/731.
[62] *Ibid*., at 1.
[63] *Ibid*.
[64] https://www.wto.org/english/news_e/news14_e/sps_10sep14_e.htm
[65] G/SPS/61.
[66] *Ibid*., at 2.
[67] *Ibid*., at 3.
[68] *Ibid*.

The Chair's Text

On 14 February 2024, the Chair of the DSB submitted a report to the General Council setting out the results of the informal discussion process for DSU reform that had been launched the year before. The report included a detailed explanation of the process and outcomes by the Convenor of the informal process, as well as a proposed text for a Ministerial Decision.

The process

In respect of the process, the Convenor noted that:

> I would like to recall that the process that I am facilitating is not the traditional negotiations based on positions. The informal dispute settlement process follows a solution-oriented, interest-based, bottom-up approach.[69]
>
> An interest-based approach offers the key advantage of reducing power imbalances and fostering inclusive dynamics, allowing every Member to contribute meaningfully. By centering 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.[70]

At the same time, the process continued to adhere to the traditional approach of Members to DSU reform negotiations:

> During the informal process on dispute settlement reform, we have adhered to the principle that nothing is agreed until everything is agreed.[71]

The substance

In this section, I will focus on Title I: "Alternative Dispute Resolution Procedures and Arbitration", Chapter I: "Good Offices, Conciliation and Mediation".

The Chapter starts with a definition of the procedures in the title. Of note:

> *conciliation* means the participation of an impartial and independent third person, known as a "conciliator" to facilitate and assist dialogue between the parties with a view to reaching a mutually agreed solution;

[69] JOB/GC/385, above, at para. 1.12.
[70] *Ibid*., at para. 1.19.
[71] *Ibid*., at para. 1.21.

> *mediation* means the participation of an impartial and independent third person, known as a "mediator", to facilitate and assist dialogue between the parties with a view to reaching a mutually agreed solution, and who may offer advice or propose solutions for the parties to consider.

Under "General Principles", the Text clarifies that the procedures are, unlike Article 5, available "before the initiation of consultations under Article 4 of the DSU." The next section sets out a hortatory "Request for Information" procedure, providing for a 30-day timeframe in which to do so. Under Paragraph 13, the procedure may be initiated through a written request:

> Any Member may make a request to another Member to use any procedure pursuant to Article 5 of the DSU, with respect to any measure affecting the operation of any covered agreement taken within the territory of the latter. The request shall be submitted in writing and shall give reasons for the request, including identification of the measures at issue and an indication of the concerns of the requesting Member.

The next section establishes a notification framework.[72] Section VI sets out the appointment procedures for mediators and conciliators. There is reference to an indicative list adopted by the DSB or, potentially, appointment by the Director General. Appendices 1 and 2 set out model rules of procedure for conciliation and mediation.

Assessment

Throughout this paper, reference has been made to "complementary" rather than "alternative" dispute resolution. In a real sense, mediation and conciliation complement and re-enforce *formal* dispute resolution, providing a full suite of procedures, rather than serving as an "alternative" to the dispute resolution mechanism. As well, the literature, state practice, and the practice of international organizations such as ICSID generally provide that "conciliation" is an expert-driven exercise and mediation as facilitated bilateral diplomacy. These are, however, issues of nomenclature. The challenges of the proposed approach are of a bigger order of magnitude, of which there are at least four.

First, and most important, the proposed procedures appear to be based on a *theoretical* model of *adversarial* dispute resolution:

---

[72] Paragraph 18:

> For the purpose of collecting statistical information for the Accountability Mechanism under Title X, the parties shall jointly notify the DSB Chairperson of their agreement to undertake a procedure pursuant to Article 5 of the DSU and this Chapter, in writing, no later than five days following the date of their agreement.

- Section III: "Request for information" ignores the fact that, if state practice to date is any guide, recourse to dispute resolution necessarily comes after diplomatic engagements in the course of which parties will have exchanged information as well as legal positioning. It is doubtful in the extreme that in the context of what ought to be a *non-adversarial* procedure, a formal request subject to a deadline would be conducive of cooperation.
- Section IV: "Initiation [] of procedures" compounds the problems of Section III by turning what ought to be a *bilateral* and *non-adversarial* procedure, sought and consented to by *both* parties, as essentially a *complaint*.

By following the patterns of formal dispute resolution, Sections III and IV constitute a category error on the part of the proponents.

Second, elements of the draft appear to have benefited from neither from the near-thirty years of experience of the parties in the WTO nor the established and *consistent* practice of Members at the forefront of "alternative" dispute resolution options and models. Section VI: "Appointment of good officer, conciliator or mediator" is a particularly instructive example.

Paragraph 24 requires ("shall") agreement within a certain time-frame. It then sets out a number of options, the first two of which are:

> a. pre-established list of conciliators and mediators, which the DSB may adopt at any time;
>
> b. the indicative list maintained under Article 8.4 of the DSU; …

The prospects of consensus agreement on a list aside, the question remains whether the indicative list has ever been used *as such* for panel selection – and why the drafters would consider that more multilaterally agreed lists would be more useful for ADR purposes. As well, considering that conciliation and mediation are essentially voluntary enterprises, paragraph 25 appears at best redundant:

> Unless the parties agree otherwise, a conciliator or mediator shall not be a citizen of, or affiliated with, either party.

More important, though, paragraph 25 connotes a continued attachment – based on a fundamental category error – to the existing formal framework that is at odds with both the character and function of ADR mechanisms.

Third, as will be seen in the next section of this paper, the qualifications – and required training – of conciliators and mediation should follow from their functions, which are fundamentally different from adjudication. (For which panelists do not get training in any event.) This is why a three-line "definition" is inadequate to the task of identifying

the *parameters* of each function,[73] and why we should expect more from an appointment procedure than being on the DSU Article 8.4 indicative list.

Finally, the model rules of procedures set out in Appendices 1 and 2 are a good start. However, they are both too much and not enough. *Too much* in the sense that what are essentially *bilateral*, *informal*, and *voluntary* procedures should not be multilateralised in the form of a negotiated model rules of procedure. *Not enough* because, in fact, such rules of procedures do not reflect the full set of circumstances in which conciliation or mediation may be required or sought.

This is the first time the organization and its negotiators have spent any time meaningfully negotiating a framework for complementary non-adversarial dispute resolution and they should be commended for their efforts. The outcome of the multilateral process underlines, however, the need for a specialized centre of excellence.

---

[73] See for example Rambod Behboodi, "Dispute Resolution in the Textiles Sector", at 59:

> Traditional *mediation* has the potential of locking in and exacerbating existing power imbalances (the *impartiality* and *neutrality* of a mediator can give a patina of respectability and credibility to an otherwise flawed process). In some instances, however, combined with expedited arbitration, mediation has the potential of reducing contentious issues and therefore the costs of arbitration and its impact on ongoing business relations.
>
> Expert intermediation – or, in modern parlance, *conciliation* – offers three significant benefits:
>
> - sectoral experts tend to be more sensitive to – or, at any rate, more aware of – built-in imbalances in business relationships,
> - unlike mediators, conciliators may offer solutions based on their own expertise and sectoral knowledge; properly structured, conciliation as a framework can offer basic correctives to these imbalances, and
> - like mediation, conciliation preserves business relationship; unlike mediation, by offering potential correctives to the relationship, it may help deepen and strengthen those relationship. [highlight added]

https://sustainabletermsoftradeinitiative.com/wp-content/uploads/2023/01/Study-of-Dispute-Resolution-in-the-Textiles-Sector-by-Rambod-Behboodi.pdf

IV. A NEW WTO FACILITY TO OPERATIONALIZE CONCILIATION AND MEDIATION

Framework considerations

Any proposal aimed at operationalizing "conciliation and mediation" must be based on at least the following eight broad considerations:

- Members engage in diplomatic discussions to address trade irritants across the range of their trade relations, and conciliation and mediation are merely extended form of diplomacy;
- some trade irritants are, however, intractable – for political, systemic, or economic reasons – and their settlement (however defined) requires recourse to binding adjudication (however elaborated);
- in respect of some trade irritants, *the prospect of litigation* is an important incentive for settlement;
- 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;[74]
- 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.

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.[75]

[74] Behboodi, Rambod, "The *Aircraft* Cases: Canada and Brazil", [2001] CYIL 387, at 390.
[75] https://icsid.worldbank.org/services/mediation-conciliation/mediation.

Characteristics

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

1. Inspired by the examples of the Enhanced Integrated Framework[76] and the Standards and Trade Development Facility,[77] the CMF would be housed as an administratively independent framework within the WTO.
2. The *primary* objective of conciliation and mediation is to address diplomatically unresolved matters of trade concern that do not make their way to formal dispute resolution – the "missing disputes". A successful CMF would eventually "facilitate settlement of a larger share of disputes in a pre-litigation stage and relieve the burden on the WTO adjudicating bodies."[78]
3. Under the CMF, conciliation and mediation could be engaged *before* a request for consultation crystalizes multilaterally[79] (and therefore publicly) the legal contours of a single trade irritant for either party.[80] Because it would be outside the framework of a "matter", the CMF could potentially address multiple trade irritants in the bilateral relationship.
4. The focus of "settlement" for matters of trade concern through the CMF would not be "nullification and impairment."[81] The WTO Agreement forms an important background to any resolution, but the CMF would concentrate on the trade and commercial interests of the parties as against their broader diplomatic, economic, and political relations in arriving at win-win solutions.
5. There is no need for an institutionally agreed rules of procedure. Under the CMF, the parties engaged in conciliation and mediation are and remain masters of the process. The value-added of a CMF would be the expert development of *modular* model rules that participating Members may adopt by agreement. Specific modules could include,

[76] https://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm
[77] https://www.wto.org/english/tratop_e/dtt_e/dtt-stdf_e.htm
[78] Payosova (2018), *op. cit.*, at 6.
[79] 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
[80] 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.
[81] *Ibid.*, at 5.

for example, number of hearings, nature of hearings, engagement of experts, and the like.[82]

6. *Conciliation* and *mediation* may well require a global examination of the relations between the participating parties – for example, their other trade and economic arrangements – that would go outside the expertise or, indeed, the mandate of the WTO Secretariat.[83] For these reasons, as well as to enhance flexibility, consideration might be given to CMF within the WTO that would be outside the existing reporting and staffing framework of the WTO.
7. A quasi-independent CMF under the rubric of the WTO could well rely, in addition to flexible staffing arrangements, on term limits for its management, and an independent budget funded by donor countries.
8. The CMF should, as an expert entity, have the responsibility to **identify, maintain, train, and propose a roster of mediators and conciliator**.[84] 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"[85] 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.[86]
9. A quasi-independent CMF could also serve as counterparty between disputing Members and mediators; when used by developed and high-income developing countries, it could indeed be run on cost recovery basis. It would 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
10. 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).[87]

[82] 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.
[83] Payosova refers to "specialized background in diplomatic mediation in addition to the understanding of international trade". *Ibid*., at 27.
[84] 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.
[85] *Ibid*., at 32.
[86] See Behboodi, *op.cit*.
[87] See also Payosova (2021), at 105-106.

11. A hard cap would be imposed on the duration and costs of mediation, subject only to the express request of parties to extend the time limits and to accept responsibility for cost-overruns.
12. 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

WTO Members, in fulfilling the MC12 mandate, would grant the CMF three principal functions:

- *Provision of mediation and conciliation services to the Members of the WTO in respect of disputes related to the WTO Agreement.*

  To this end, following broad consultation with WTO Members, other instances of arbitration and mediation, and the trade community at large, the CMF will:

  - develop modular 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 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; and
  - develop training modules for staff, mediators, and other interested persons.

- *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 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

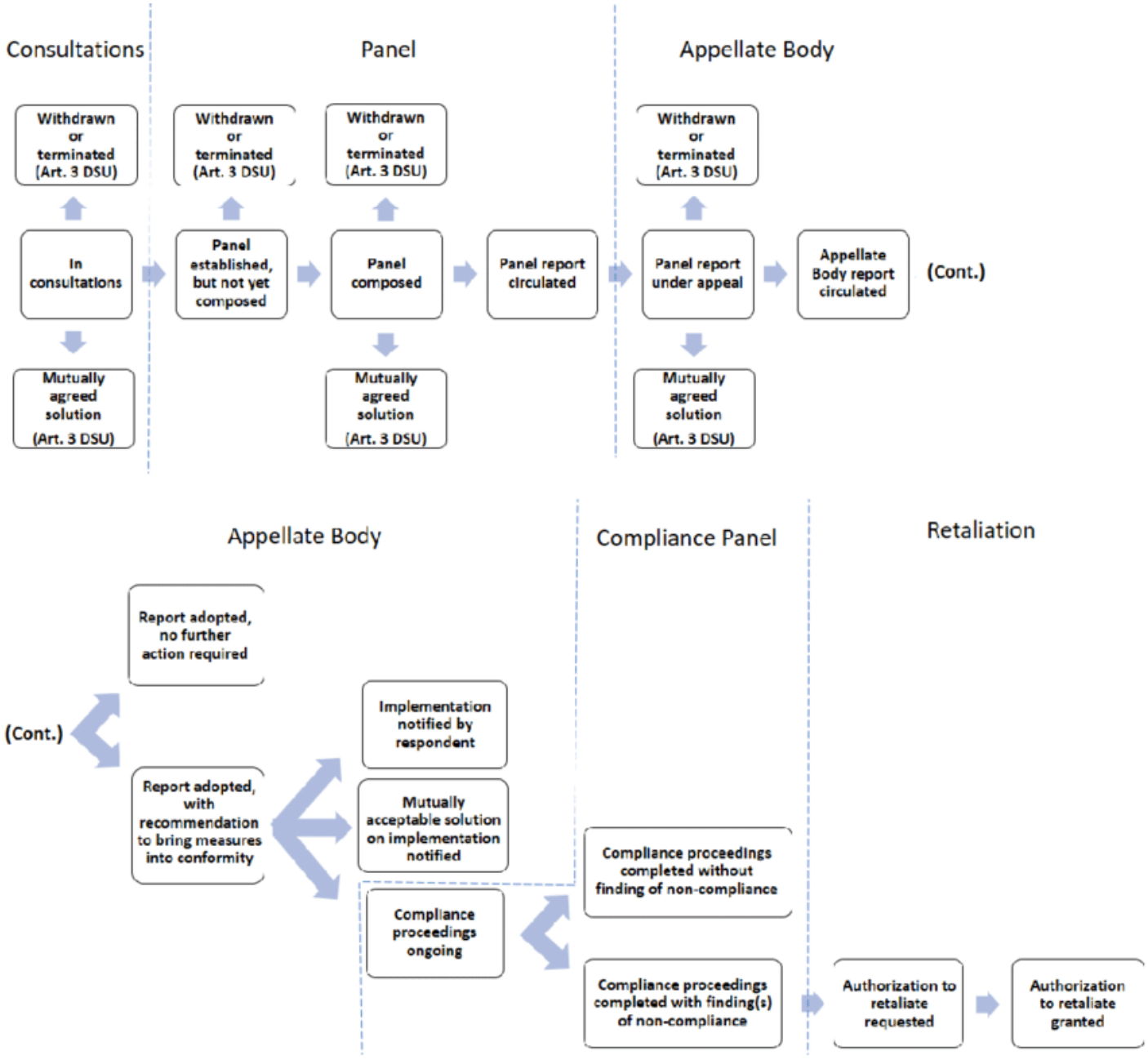
and offer capacity building on mediation and conciliation in sessions devoted to dispute settlement; and

- active users of WTO dispute settlement and other WTO Members to seek their support for, promote their use of, non-adversarial dispute settlement.

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

- Strong users of formal dispute settlement that have an interest in reducing pressure on the system, or are open to non-adversarial dispute settlement in trade matters
- Advanced economies with strong trade-dispute *triage* frameworks and an interest in non-adversarial 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 ADR

In very general terms, ADR[1] "refers to the different ways people can resolve disputes without a trial."[2] At this level of abstraction, ADR would also include bilateral negotiations,[3] 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.[4]

Again in broad terms, six types of institutionalized ADR can be identified[5]:

- Arbitration
- Conciliation
- Mediation
- Neutral evaluation
- Neutral fact-finding

---

[1] "Alternative Dispute Resolution". In this context, "alternative" does not mean "in the place of". Rather, the term is used to distinguish non-adversarial modes from litigation.

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

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

[4] 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.

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

- Customary dispute resolution

Arbitration

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

- 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[6]; 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,[7] private-state,[8] and private-private disputes; it is deployed for both transboundary and domestic dispute resolution.[9] It may be entered into voluntarily by both parties before domestic courts; it may be mandatory for a

[6] 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

[7] 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

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

[9] APEC, above.

defendant (upon the request of a plaintiff), with choice of forum (court or arbitration) left to the plaintiff,[10] or mandatory for both parties.[11]

Conciliation

"Conciliation" and "mediation" are sometimes used in the same framework,[12] and sometimes they are so used interchangeably.[13] The differences between "conciliation" and "mediation" appear to be contextual[14] or institutional[15] rather than conceptual. At the same

---

[10] 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.

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

[12] 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.

[13] 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

[14] 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/

[15] "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.

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,
  - propose potential solutions for consideration by the parties,[16]
  - serve as subject matter experts,[17]
  - issue neutral "evaluations" of the matter before them,[18] or
  - make recommendations.

Mediation

"Mediation" is a voluntarily[19] *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

[16] "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

[17] "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".

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

[19] 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

> voluntarily reaching their own mutually acceptable settlement of issues in dispute.[20]

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
4. a willingness on the part of the parties to the resolve the disagreement and *to continue the relationship*.[21]

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"[22] and gaining a global understanding of the parties' relationship.
- The mediator encourages parties to explore options they not had not been previously contemplated,[23] or propose such options.[24]
- 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:

---

[20] https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html
[21] *Ibid*.
[22] *Ibid*.
[23] https://www.law.cornell.edu/wex/mediation
[24] It has been suggested that this function is more in line with the tasks of a conciliator.

> 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.[25]

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."[26] 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-confrontational and willing to actively listen to the evaluator's opinions."[27] 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."[28]

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.[29] However, the structure or modalities of the process could also be useful as a "reality check" outside the framework of ongoing litigation:[30] 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."[31]

---

[25] Highlight added.
https://www.wipo.int/amc/en/mediation/what-mediation.html
[26] https://www.mediate.com/neutral-evaluation-an-effective-adr-process/
[27] *Ibid*.
[28] https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/eval.html
[29] https://www.buildingdisputestribunal.co.nz/early-neutral-evaluation/early-neutral-evaluation-model-clause/
[30] Justice Canada, *supra*: "in a private context, it may be triggered as soon as a deadlock arises in connection with the dispute."
[31] *Ibid*.

Neutral fact-finding

Neutral fact-finding is a narrower variation on neutral evaluation.[32] This involves investigation and analysis by an independent third party of a *factual* dispute – for example, of a threshold nature[33] – to make written findings.[34] 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.[35] 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."[36]

[32] "ADR in the Minnesota State Court System", at 3.
https://www.mncourts.gov/mncourtsgov/media/scao_library/ADR/ADR_Info_Sheet.pdf
[33] http://www.adrprocesses.com/earlyNeutral.php
[34] "Minnesota", *supra*.
[35] Maryland Rules, Rule 17-102(k).
https://govt.westlaw.com/mdc/Document/N22CFF090B79311DBB4ACEAAAE7EB7386?viewType=FullText&originationContext=documenttoc&transitionType=StatuteNavigator&contextData=%28sc.Default%29
[36] 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

APPENDIX I – BUSINESS PLAN

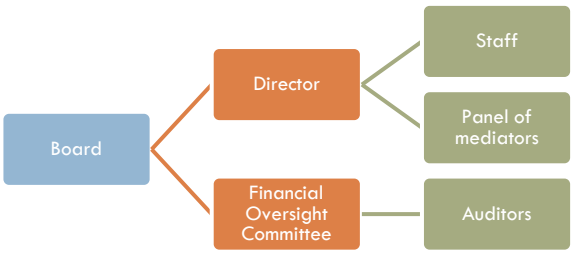
A new WTO-based structural framework

The CMF will be a centre of excellence housed *structurally* within the WTO and supervised by WTO Members, but staffed and budgeted through an independent framework. It will have a skeletal contract staff at the outset and will add incrementally to its complement as need arises and or in response to regional demand.

At least for the first eighteen months, it is expected that the Director and one Counsel will deliver the bulk of the activities of the CMF. For this reason, to ensure that the CMF will be able to carry out its functions, it is essential that the Director have broad and deep experience in trade diplomacy and dispute settlement, an impeccable professional reputation, extensive network among trade officials, and deep and recognized academic experience.

The CMF will be assisted in its task by a "dispute mediation board" (DMB) comprising a regionally and economically representative roster of dispute settlement experts, ideally with emphasis on trade or other economic issues, and ideally with experience in an international organization or diplomatic framework. The DMB will, in turn, establish:

- a financial oversight committee comprising donor representatives but with no operational involvement in the facility, and
- a permanent roster of regionally representative mediators, conciliators, and other experts, nominated upon application by the Director and appointed to the roster by the DMB following vetting and training.



Timeline for deliverables

It is expected that the CMF will be:

- in position to receive the first requests for mediation within the first 12-18 months; and
- fully operational two years after establishment.

Budget

Ethos

The CMF should be established and run on the basis of a strong ethos of compliance, transparency, and accountability, with the objective of partial cost-recovery for its conciliation, mediation, and educational activities. An external auditor reporting to an oversight board will provide additional and essential verification.

Revenues

The Business Plan envisages four sources of funding for the activities of the CMF:

- For developed and high-income developing Members, mediation services will be offered on cost-recovery basis[1]:
  - mediator honoraria[2] and disbursements[3];
  - cost of room and facilities (or cost-recovery if CMF facilities are used[4]);
  - cost-recovery in respect of secretariat support[5] for mediator; and
  - a standard administration surcharge.[6]
- Once modules are developed and verified, mediation training and capacity-building can be offered:
  - on cost-recovery basis for individuals or officials of developed and high income developed country officials; or

[1] For Lower Income and Least Developed Countries, a funding facility may be put in place.
[2] A standard rate to be set by the CMF in accordance with international practice.
[3] In particular, reasonable costs of travel in in accordance with standard practice of international organizations.
[4] At any rate, CMF facilities should not be more costly than similar commercial space available for use.
[5] The CMF will assume the remuneration package and recover costs on reasonable hourly basis.
[6] As discussed below, the overall administrative overhead is expected to be low. For normal contract pass-through, 13-18% appears to be in the range.

    - for low-income developing or least developed countries, through earmarked donor-country contributions, as part of general funded capacity building through international organizations, or private foundations.

- Director will have an ongoing responsibility to raise the profile of the CMF and, in particular, to ensure stable funding through ongoing fundraising.

Low-income developing and less developed Members will not be asked to pay for using the CMF's services. A separate funded account, managed by the CMF, might be necessary to cover their costs.