COMMENTARY ON THE DRAFT TEXT OF THE INFORMAL DISCUSSIONS ON DISPUTE SETTLEMENT REFORM (AS PROVIDED UNDER WTO DOCUMENT JOB/GC/385)

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Contents

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Overall Observations About the Draft Text and Its Status

- The informal discussions on WTO dispute settlement reform are considering a draft text containing 10 elements that include: alternative dispute settlement proceedings and arbitration, panel proceedings, appeal/review mechanism (text not available yet), compliance, guidelines for adjudicators, procedures to discuss and review legal interpretations, secretariat support, transparency, accessibility with respect to technical assistance, capacity building and legal advice, and accountability mechanism.

- **The process of drafting this text has been criticized by developing countries.** For example, a communication by India, Egypt and South Africa notes that
  - o '[t]he drafting process deviates substantially from the accepted practice at the WTO. The process hampers the ability of delegations that cannot actively participate in the process, from following the evolution of and contributing to the formulation of the consolidated zero text…' (WTO document JOB/DSB/7).
  - o The same communication points out that '[t]he themes being discussed at present under the "informal discussions" were not intended to be a comprehensive listing of concerns of the whole membership. They were a prioritization, for further discussion, of some of the interests that had been raised during the US-led process. For instance, Special and Differential Treatment, which had been raised as an interest by several countries, was not listed as a theme for further discussion'.

- **Special and differential treatment (SDT) is absent from the text except in minor places** that repeat unoperational language from the Dispute Settlement Understanding (DSU) or refer to capacity building. Issues of importance to developing countries like the appeal function and accessibility in its broader sense (covering third-party rights, retaliation and litigation costs, among other elements) are either not addressed or not sufficiently addressed.

- The text seems to aim at **expanding and normalizing alternative dispute resolution (ADR)**, to position conciliation, mediation and arbitration as potential substitutes to the panel and appeal stages. This would be problematic and counter to how these elements were designed into the DSU. It is important to consider the systemic implications if there is more reliance on ADR and arbitration as norms rather than exceptions under the dispute settlement system.

- Certain proposed elements would facilitate **an expanded role and discretion for adjudicators** in the proceedings. The draft text also proposes **establishing a new mechanism** pertaining to review of the legal interpretations produced in dispute settlement decisions and another pertaining to the review of the operation of the dispute settlement system, with a focus on the implementation of the proposed reforms. These two suggested mechanisms carry systemic long-term implications and might not be conducive to the interests of developing countries and their role in relation to the dispute settlement function (see more detailed discussion in the relevant sections below).

- The **elements proposed under the draft text of the informal discussions vary in nature and potential legal relationship with the DSU**: some would add clarificatory language to what exists in the DSU and others would amend the DSU. Thus, the legal instruments to adopt such proposed elements would necessarily vary.

Regarding the Preambular Section

- Generally, the preamble lacks reference to the DSU core principles of predictability, security, and preservation of rights and obligations. It also lacks reference to special and differential treatment, although the streamlining of SDT has been a longstanding interest and ask for the majority of the WTO Members from among developing countries and least-developed countries (LDCs).

- The preamble speaks of operation of the dispute settlement in a 'manner consistent with the interests of the Members'. This concept is fluid and seems to imply that primacy is being accorded to consistency with the interests of Members, and not to consistency with the underlying rules of the DSU and WTO covered agreements. This approach does not account for the fact that Members' interests vary and might sometimes clash. The dispute settlement system ought to operate in a manner consistent with principles and rules as agreed and reflected in the DSU.

- The language 'Recognizing the contribution of other organizations, including the Advisory Centre on WTO Law (ACWL),…' introduces vague references, as it is not clear what 'other organizations' are referred to besides the ACWL.

Regarding Title I: Alternative Dispute Resolution Procedures and Arbitration

- The approach adopted in this section seems aimed at **increasing the reliance on ADR and arbitration**. This does not necessarily provide added value for developing countries nor contribute to addressing their accessibility issues or enhancing their ability to secure the preservation of their rights. Besides, the way ADR is weaved into other elements of the text, such as compliance, risks adding to the complexity of the process, rather than facilitating the processes of dispute resolution.

- The proposition seems to **alter the current sequence and interaction between mechanisms under the DSU, particularly between ADR and consultations**. The proposed language provides that 'Members may, at any time, including before the initiation of consultations under Article 4 of the DSU, agree to voluntarily undertake any procedure pursuant to Article 5 of the DSU regarding matters between them related to the covered agreements referred to in Article 1.1 of the DSU' (para. 2 under section II on general principles).

- Article 5 of the DSU provides that 'Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree'. Article 1 of the DSU mandates that the provisions of the DSU apply to 'disputes brought pursuant to consultation and …'. Generally, Members 'become party to a dispute' upon notification of consultations on a certain matter to the Dispute Settlement Body (DSB) and the relevant Councils and Committees, as mandated under Article 4 of the DSU. The WTO website provides that 'Disputes are initiated through a request for consultations addressed to the member (or members) whose measures are being challenged'.[1] Thus, **it is implicit in the design of the DSU that ADR kicks in post initiation of consultations**. In contrast, the proposed text on ADR does not speak of 'parties to a dispute' invoking good offices, conciliation and mediation, but refers to 'Members' generally. In terms of legal effect, **this would be amending the DSU**.

- **Language pertaining to LDCs does not provide anything new** in comparison to existing practice as per Article 24.2 of the DSU (para. 3 under section II on general principles).

On transparency of the ADR procedures

- **The approach to transparency of ADR measures:** Para. 5 under section II of the informal text provides that 'Unless the parties agree otherwise, and except for the notifications provided pursuant to the provisions in Section V, the procedures undertaken pursuant to Article 5 of the DSU and this Chapter, including any advice or proposed solution, shall be confidential'. The whole procedure is to be kept confidential, including request to use the ADR procedures. Parties are encouraged to circulate the information to the rest of the Membership, but that should be upon the agreement of both parties (para. 19 under section V).

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

- **Under section V, there is no obligation to circulate the information about invoking the procedures to the DSB, but rather only to the DSB chair for statistical purposes, coupled with the obligation to keep this information confidential. This lack of adequate transparency carries potential effect on the availability of information, because the proposed text does not require that action under ADR be notified to the DSB and the relevant Councils and Committees.** Lack of transparency is not helpful as it suppresses knowledge of which areas disputes are emerging in. It could also give rise to opportunities for utilizing ADR requests to put pressure on smaller Members, especially if pursued by Members with bigger economies and more resources.

- Other paragraphs relevant for transparency considerations include the following:
  - Para. 13 under section IV provides that 'The Secretariat shall keep the request and the fact that the request has been made confidential, unless the parties agree to notify the DSB pursuant to Section V'.
  - Para. 18 under section V provides that 'In this notification, the Parties shall specify the procedure undertaken and indicate *whether the DSB Chairperson may circulate the notification to the DSB*' (emphasis added).
  - Para. 22 under section V provides that 'In this notification, the Parties shall state the reason for the termination and *indicate whether the DSB Chairperson may circulate the notification to the DSB*' (emphasis added).
  - Mutually agreed solutions are to be notified. Para. 20 under section V provides that 'The parties shall notify any mutually agreed solution reached as an outcome of the procedure undertaken to the DSB and the relevant councils and committees, where any Member may raise any point relating thereto'.

- There is a proposition that ADR proceedings be financed by the WTO budget (i.e., Members' contributions), even while the invocation of the ADR proceedings might not be made public. This could also give rise to opportunities for abuse of ADR.
  - Para. 27 under section VI states that 'The expenses of conciliators or mediators, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration'.
  - This invokes collective support of the ADR procedures by the whole Membership that contributes to the budget. At the same time, no transparency about invoking the procedures is built into the proposal, except at the stage of notification of 'mutually agreed solutions'.
  - This could potentially mean that any abuse of the ADR procedures could put a high strain on the WTO budget even as Members would not be able to follow when these mechanisms are invoked, by whom and in relation to what issues, besides the general statistical data that would be recorded by the secretariat.

- **For the sake of transparency, it should not be left to the parties to decide whether to circulate the notification to the DSB. Circulation to the DSB should be made mandatory.**

On involving stakeholders in ADR

- While consultation with experts during panel proceedings has been provided for under the existing provisions of the DSU, consultation with stakeholders has not been envisaged under the DSU. Under the proposed text, consultation with relevant experts and stakeholders is envisioned in ADR proceedings (see, for example, Appendix 1, para. 3). The text also provides that 'The mediator shall consult with, and obtain the consent of, both parties before seeking the assistance of, or consulting with, relevant experts and stakeholders'.

Lack of attention to special and differential treatment

- In the appendices, there are strict timeframes set for the procedures under mediation and conciliation, with no consideration of SDT or flexible timeframes in cases where a developing country or LDC invokes these mechanisms or is a party to such procedures.

Regarding Title II: Panel Proceedings

On assistance from the secretariat and the DSB chair in composing and recomposing the indicative list

- The role of the DSB chair assisted by the secretariat in assessing Members' nominations (under Appendix I, paras. 2, 3, 4, 5) is designed in a way that effectively gives power to the DSB chair, assisted by the secretariat, to put a judgment on the nominations. This could effectively relay certain nominations to something akin to a 'blacklist', thus potentially marginalizing those nominations.

Overall comments on streamlining panel processes (chapters III and IV under Title II)

- The text introduces a new categorization of cases and refers to 'standard, complex, or exceptionally complex' disputes. This sets new categories on which various elements of the proceedings might hinge. Indeed, the definition of the terms 'standard, complex, or exceptionally complex' and who has the discretion to decide which case falls in which category will carry significant implications for the related procedures. This is a new practice. The text provides that 'The panel shall reconsider the level of complexity of the dispute at the request of a party'; thus one party to the dispute can give a mandate to the adjudicators to decide on the complexity of the case, irrespective of the position of the other disputing party (para. 4 under chapter IV). This gives ample discretion to the panel to decide on the complexity of the case and could create procedural challenges for developing countries and LDCs.

- The proposed approach to **setting procedural restrictions (for example, word and time limits, requirement to submit all evidence in first written submission) could have differentiated impact on Members depending on the capacity and resources** available to the disputing parties, and thus developing countries could be left in a disadvantageous position as a result of the set limits. **No special and differential treatment** is currently envisioned in this regard (for example, exemptions for developing countries or LDCs upon request).

On submission of evidence

- 'The parties shall be required to submit all evidence, except evidence for the purposes of rebuttal, in their first written submissions. The panel may grant an exception if a party shows good cause' (para. 2 under chapter III). This, coupled with the time and word limitations, puts a strain on low-resourced delegations from among developing and least developed countries. SDT ought to be integrated in this practice along with a reference to exception for a 'good cause'.

On advance written questions by panels

- The text provides that 'This is without prejudice to the panel's decision to ask questions at any time. However, the panel is encouraged to pose all questions before the end of the substantive meeting of the panel with the parties'. This approach seems to be highly demanding especially on developing countries if new questions are raised in the midst of a meeting that are not linked to or do not stem from the written questions, and answers are required in that meeting. This would mean that representatives of the party will have to intervene even without preparation on that specific question. If this is not adjusted, it might be useful to specify that such questions should be based on or related to the written questions.

On word and time limits (chapter IV)

- As noted earlier, **there will be differentiated impact of such limits and restrictions depending on the capacity and resources available to the disputing parties**, potentially putting developing countries at a disadvantage. Yet, there is no SDT envisioned under the current text. Given the implications of such limits on the effectiveness of developing countries to prepare and argue a case, it is important to insert an opt-out mechanism for developing countries.

- The text gives ample discretion to the panel to decide on the complexity of the case, which is the basis for deciding on the related limitations, despite the requirement to consult parties to the dispute and the indicative list of issues to be considered.

- Under para. 4 of this chapter, there is reference to 'procedural fairness' as among the indicative elements for the panel to consider. This is a broad concept which could potentially encompass special consideration for smaller and developing countries, yet it does not guarantee that.

- It is recommended to explicitly include a recognition that developing countries or LDCs parties to a dispute may request exemption from the limits to be proposed by the panel.

On adherence to timeframes

- The approach to timeframes is based on categorizing cases according to a nomenclature based on the complexity of the case (standard, complex, and exceptionally complex). This approach would be a new practice and is designed in a way that gives ample discretion to the panel to decide on the complexity of the case. This section would effectively amend timeframes for panel reports.

<u>Regarding Title IV: Compliance</u>

- The proposed text amends timeframes set in the DSU.
    - o For example, the DSU provides in para. 21.3 a detailed procedure for determining 'a reasonable period of time' for compliance, which the proposed text amends.
    - o The proposed text sets that 'reasonable period of time for implementation shall be (six) months following adoption of the report' if good offices, conciliation or mediation are declined.
    - o The DSU, in contrast, does not provide such specification besides that the 'guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances' (para. 21.3(c) of the DSU).

- Compliance is intrinsically connected to the deterrence linked to the possibility of retaliation. This is a systemic, fundamental issue under the DSU, where the problem facing small developing countries and LDCs persists, and will ultimately impact compliance even if ADR is added to the mix of tools that can be invoked at the compliance level.

<u>Regarding Title V: Guidelines for Adjudicators</u>

Under chapter I on treaty interpretation

- Paragraph 1 provides that '…Consistent with Article 32 of the Vienna Convention, an adjudicator may have recourse to supplementary means of interpretation to determine the meaning in such circumstance, or to confirm the meaning resulting from the application of Article 31'. Article 32 of the Vienna Convention pertains to 'Supplementary means of interpretation' (in case of ambiguity, obscurity, manifestly absurd or unreasonable result). Yet, in the WTO there is no official negotiating

history of the Uruguay Round negotiations. It is not clear what 'supplementary means' as referred to in this paragraph would encompass.

- Para. 2 provides that 'A complaining party bears the burden of establishing a *prima facie* case that another party has acted inconsistently with a commitment under the WTO Agreement. In so doing, the complaining party must ***demonstrate the existence of a commitment in the text of the covered agreements that encompasses the action or inaction claimed to be inconsistent*** [emphasis added]. … If the adjudicator finds the complainant has made out a *prima facie* case of the existence of a commitment, then in the absence of effective refutation of that claimed meaning, the adjudicator must apply the commitment to the facts of the dispute. If the adjudicator finds that the complaining party has not made out a *prima facie* case of the existence of a commitment, or has not demonstrated that the commitment encompasses the allegedly inconsistent action or inaction, then the adjudicator shall conclude that the complaining party has not made out a claim of breach'.
    - This language would add a layer of requirement for the complaining party (to prove the existence of a commitment) which is not in the current practice when it comes to bringing a case under the DSU.
    - If the above provision is made applicable at the panel stage and the panel decides that no clear commitment exists, then it would prevent the complainant from litigating further on this matter.
    - It is not clear what a determination that no commitment exists under the text of a certain provision would mean to other Members' obligations under the same provision.

Under chapter II on focusing on what is necessary to resolve the dispute

- Para. 1 provides that 'Adjudicators shall focus on what is necessary for the resolution of the dispute, including through the exercise of proper judicial economy'.

- Are the adjudicators supposed to decide on 'what is necessary' to resolve the dispute? How would this impact on the outreach by the panel?

- On judicial economy: While WTO panels had practised judicial economy in the past, it is important to consider its implications on the ability to appeal and raise issues at the appeal level. Issues discarded at the panel level as 'not necessary to resolve the dispute' might not be able to be raised at the appeal level.

- The impact of practices by the WTO secretariat (such as through the 'issues papers' that are prepared for adjudicators as well as the role of the secretariat in drafting reports) on the adjudicators should be accounted for.

- Para. 3 provides that 'In order to keep the focus on what is necessary to resolve the dispute, a panel may propose that the parties focus on certain claims or exclude certain claims at any stage of the proceedings before the issuance of the final panel report'. Para. 4 provides that 'The proposal by the panel is not legally binding, and it is up to each party to the dispute to agree with it. *The fact that the party to the dispute does not agree with the proposal shall not prejudice the consideration of the case or the rights of the parties*' (emphasis added).
    - This language leaves it unclear what would happen if one disputing party agrees with the suggestion of the panel and another does not. If this is the case, would rejection of the proposal by the panel be considered as 'prejudice' to the 'consideration of the case or the rights of the parties'?

Regarding Title VI: Procedures to Discuss Legal Interpretations

Chapter I on discussion of reports in relevant committees

- Should the chairpersons of relevant committees be the only party authorized to determine if an adjudicative report contains interpretations relevant to the work of the committee and worth discussing in the committee? It is important that the Members be able to make such a determination as well. It is important to keep the reference to the ability of a Member to add the issue to the agenda of the relevant committee.

- The restriction that the addition can be made only to the agenda of the first formal meeting of the committee after the adoption of the report and not to future meetings may create a hindrance especially for smaller delegations.

Chapter II on advisory working group

- This section aims at establishing a new mechanism under the DSB entitled 'the advisory working group'. Para. 3 provides that 'The Advisory Working Group is a mechanism for WTO Members to discuss, build consensus and provide guidance on legal interpretations developed by adjudicators'.

- There is ample discretion for the DSB chair in appointing the chair of the working group. Para. 5 provides that '[a]fter consulting with WTO Members, the DSB Chairperson shall appoint the Chairperson of the Advisory Working Group and define the Chairperson's terms of office'. This means that the appointment does not require the consensus of the Membership.

- It is important to consider the eventual functioning of the proposed working group and the related systemic implications:
    - Who will actually utilize this group? What capacities are needed for meaningful participation in this group? Will devleoping countries and LDCs be able to participate on an equal footing?
    - What role will the proposed guidance that the working group will produce play in future decisions on the concerned provisions?
    - Will the guidance from this advisory group be expected to be used as supplementary material in the interpretation of the concerned provisions?
    - What if many Members do not have the capacity to effectively participate in this additional mechanism and thus cannot get their views reflected in the guidance to be produced? Will the guidance in such cases still be considered a legitimate source for the adjudicators to refer to?
    - On what basis will the discussion in the working group be held? Is it on the basis of requests/ questions by Members? What influence would those Members initiating the requests have, especially since they would be framing the angle of the discussion on the concerned provisions and related legal interpretations?
    - Issues of capacity and effective participation of developing countries and LDCs will be a challenge.

Regarding Title VII: Secretariat Support

- Para. 1.b under chapter II of this title provides that 'Members expect adjudicators to draft their reports with the support of the Secretariat staff as appropriate'. This tends to normalize the drafting by secretariat staff of the reports rather than disciplining that practice.
    - The formulation of this paragraph ought to be revised and broken down. For example, an alternative approach could be: 'Members expect adjudicators to draft their reports. Support of the Secretariat staff may be provided as appropriate and in accordance with the following guidelines….'

- Para. 3 under chapter II also seems to normalize the exercise pertaining to 'issues papers'. It is worth recalling that the rise of the role of the WTO secretariat across a number of functions in both panel and Appellate Body (AB) proceedings (including through provision of 'issues papers') has been linked to several aspects of the AB's eventual conduct that were criticized by the Membership.
    - o For example, Pauwelyn[2] refers to the secretariat practice of providing the AB members with a detailed memo laying out the possible courses of action (the so-called 'issues paper') before they even meet to discuss the case.
    - o The role of WTO staff in preparing such detailed 'issues papers' and regularly drafting the final rulings has been linked to the 'inclination to write rulings that are ambitious and expansive in scope', which in turn is linked to some Members' critique of '(i) activist interpretations that go "beyond the text"; (ii) advisory opinions on issues not necessary to resolving the dispute; and (iii) an expansive position on "legal issues" subject to AB review (e.g. including panel findings on the meaning of domestic law)'. This is in turn linked to the breaking of the 90-day time limit for issuing reports and the rise of situations where AB members had to continue working on appeals even after their terms ended.
    - o While AB members come and go, the secretariat is a permanent actor and came to be described as 'the guardian of the system'. Such influence brings the role of the secretariat and its staff to the centre of the issues that need to be considered when rethinking the dispute settlement system or how it operates.

Regarding Title VIII: Transparency

Overall comments on transparency

- It is important to keep in sight the main objective of increasing transparency and to design the reforms accordingly. Is the aim one of contributing to better understanding of the proceedings among Members, in order to enhance their capacities to follow how decisions are taken? If so, then extensive changes to the working methods agreed under the DSU might not be needed.

- Negotiators ought to avoid changes that would eventually open avenues for pressures on WTO Members and the adjudicators.

- The propositions under this title would amend major procedural rules and ways of working under the DSU; for example, see the rules under Articles 14, 17.10 ('The proceedings of the Appellate Body shall be confidential'), 18 ('Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute'), and paragraph 3 of Annex 3. Thus, they would require fulfilling the amendment procedures of the DSU.

Transparency measures vis-à-vis WTO Members and third parties

Regarding access to all submissions submitted in any dispute via electronic system

- The wording under para. 4 – '…in accordance with any working procedures adopted by the adjudicator for the protection of confidential information' – gives ample discretion to the adjudicators in crucial aspects pertaining to the conduct of the proceedings, while limiting the role of the disputing parties in deciding on such crucial matters. Confidentiality issues should remain an issue that concerned Members decide on.

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[2] See comment by Joost Pauwelyn, https://ielp.worldtradelaw.net/2019/09/a-few-thoughts-on-the-role-of-the-wto-secretariat-in-wto-disputes.html. See also Joost Pauwelyn and Krzysztof Pelc, 'Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement' (September 2019), available at https://ssrn.com/abstract=3458872 or http://dx.doi.org/10.2139/ssrn.3458872. Reference is made to the role of the secretariat in presenting issues papers, questions to parties, internal deliberations, drafting of reports etc.

- This is unlike the principal working methods reflected under the DSU, which puts such decisions in the hands of concerned Members. For example, Article 13.1 of the DSU provides that 'Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information'.

- Thus, this language giving discretion to the adjudicator should be replaced by procedures which ensure that measures taken under this section are 'in accordance with the agreement among the disputing parties' or 'as requested by the disputing parties'.

Regarding observation of hearings by Members which are not third parties

- There are ample differences in the implications resulting from the different means for observation of hearings by Members proposed in the text (i.e., via live broadcasting or an audio-visual recording to be made electronically available a few days after the substantive meeting of the panel with the parties; or on-site viewing of an audio-visual recording no later than 7 days after the date of circulation).
    - o If the substantive meetings of the adjudicator with the parties are captured through audio-visual recordings that are circulated, then who has access to these recordings cannot be fully controlled. A recording can be disseminated/accessed beyond the concerned WTO Members.
    - o Also, there is a difference between providing on-site observation of the meetings (such as in a separate room with live broadcast), whereby who is in the broadcasting room is controlled, versus circulating a recording or broadcast, which can be disseminated to parties beyond the WTO Members, such as industry and corporate representatives.

- **Wide access to the content of the substantive meetings of the adjudicator with the parties could eventually be a source of pressure on both the adjudicators as well as the involved Members, as their positions could be monitored by commercial parties with vested interests and they could eventually come under pressure in that regard**. Generally, the decision on such access to the substantive meetings should be kept in the hands of the disputing parties, to be decided on a case-by-case basis.

Regarding transparency measures vis-à-vis the general public

- The propositions under this sub-section would amend the DSU, as noted above under the overall comments on transparency.

<u>Regarding Title IX: Accessibility with Respect to Technical Assistance, Capacity Building and Legal Advice</u>

- It is crucial that developing countries underline that the proposed language which is focused solely on capacity building, technical assistance and legal advice does not exhaust the issues central to accessibility, and that they reserve their right to submit additional elements that they consider core to addressing accessibility.

- Generally, the proposed language seems focused on clarifying Article 27 of the DSU which pertains to 'Responsibilities of the Secretariat', which shows that its scope is very limited and does not address the comprehensive notion of accessibility.

- Paras. 2, 3 and 4 give guidance to the secretariat but do not provide any guarantees that the capacity building will respond to the needs of the concerned Members, because they do not expand the direct influence of the concerned Members on the selection of which type of capacity building is undertaken and how that is done.

- Under para. 4, it would be useful to explicitly clarify that the choice and designation of experts under this paragraph and Article 27.2 of the DSU shall be undertaken by the concerned Member, and specify that the terms of reference and scope of tasks of the referenced legal experts are to be decided by the concerned Member recipient of the support.

- The proposed language does not provide any commitment towards funding to enable the enhancement of the capacity building, technical assistance and legal advice as proposed under this title. Para. 5 uses language that reflects intent rather than encompass a specific commitment. This means that budgetary limitations could hinder the fulfilment of the ambition reflected under this title.

- Under para. 7, it is not clear what the reference to 'relevant organizations' encompasses, besides the ACWL.

Regarding Title X: Accountability Mechanism

- The approach in this text seems to be one of setting an open-ended (in terms of timeline) new mechanism designed around the narrow approach to reform of the dispute settlement function unfolding under the current informal discussions. This is tantamount to setting in place a mandate to continue focusing on the issues that have been handled in the informal discussions, while other issues pertaining to dispute settlement reform remain marginalized. Explanation of why such an approach would be problematic and systemically damaging is outlined below.

Under subheading I on establishment of the accountability mechanism

- Para. 2 under this subheading states that '…Members will review the operation of the dispute settlement system, with a focus on the implementation of the elements of the Reforms listed in the Appendix to this Title, on the basis of the report by the DSB Chairperson referred to in paragraph 10'. These elements of reform do not reflect all concerns of Members, particularly those of developing countries and LDCs.
    - Having a closed list of reforms to be reviewed, based on two processes (the US-led process and the subsequent informal discussions), will mean continuous marginalization of the concerns of developing countries and LDCs that have not been attended to in the two processes.
    - In all cases, adopting such a systemic mechanism built around a closed list that is decided in a particular period of time would be inadequate because the review mechanism will capture only those issues of relevance at the time of drawing up the list and that delegations got to successfully reflect on. This will be detrimental to addressing issues and challenges that may arise in the future.

- Para. 3 under this subheading provides that 'To the extent possible, the review of the implementation of the Reforms shall be based on the factual and statistical information in the Appendix to this Title. This is without prejudice to the right of Members to express any views on the implementation of the Reforms or the operation of the dispute settlement system in general'.
    - The first part of this paragraph continues the narrow focus referred to above. This will not be adequate to capture the challenges 'of qualitative nature' that developing countries and LDCs face in regard to the dispute settlement function.
    - The second part of this paragraph refers to the normal practice that any Member can express any position through formal submissions under the formal bodies of the WTO such as the DSB. This reference here does not address the potential problems that might emerge from setting up and resourcing a new mechanism that is narrowly focused on a set of metrics emerging from the unrepresentative informal process.

- The second part of this paragraph is not enough to tackle the challenge outlined above, especially because this review mechanism will be operating based on reports by the secretariat and the DSB chair that primarily focus on the closed list of reforms listed in the appendix to the proposed text. This would mean that the primary attention will be focused on these matters covered in the reports, while any other issues that one or more Members might wish to raise might be marginalized or not accorded enough attention.

Under subheading II on inputs to the accountability mechanism

- The DSB chair has ample discretion under this section to appoint 'discussants' that have a broad and influential role in the proposed review, including 'guid[ing] the discussion on the issue(s) at the Accountability Mechanism Meeting' (see para. 9).

- Any exercise undertaken under such an accountability mechanism should be primarily led by the Members and not the DSB chair or appointed discussants.

- The dispute settlement function is a matter of crucial importance for all the Members, and all Members should be equally involved in driving forward a review thereof. A review mechanism pertaining to the functioning of the dispute settlement system should be designed in a way that explicitly enables the widest participation among Members and ensures that all perspectives are accounted for.

Under subheading III on action arising from the accountability mechanism

- This, read with the text under the previous subheadings, shows that this title on 'accountability' seems to aim at setting an open negotiation mandate pertaining to dispute settlement reform that is shaped or formulated around the main interests reflected in the ongoing informal process.

- Para. 13 indicates that the action to be taken by the DSB in this context 'shall not affect the rights or obligations of any Member with respect to previous recommendations or rulings of the DSB or previous arbitration awards notified to the DSB'. (Recommendations or rulings by the DSB are the decisions adopted by the DSB based on panel or AB reports.)
    - This paragraph does not speak of rights and obligations under the DSU. Thus, this section could be read as still giving an open-ended mandate to the DSB to take 'action' even if it has the effect of amending the DSU or to take decisions that could alter the practices under the DSU.