

A Few Thoughts on MC13

Dispute Settlement

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The Basis for Discussions

- Paper submitted by the Facilitator, Marco Molina-Tejeda
- JOB/GC/385 of 16 February 2024
- The outcome of negotiations between all stakeholders

Divide my Comments

- Technical Issues
- Policy-Oriented Points

Technical Issues

Strong Points

- There is a document (in and of itself a plus point) Kudos to Dr Molina
 - How many really expected that much?
- Mediation reinforced:
 - crucial in times of crisis (need to persuade)
 - Like paragraph 31 (cannot use information in other processes)
 - Why not merge 5+25 DSU?
- Panel process
 - Like nominations of non-nationals

Weak Points

- Panel process
 - Precedent: how can courts function otherwise?
 - Title VI: "backdoor" remedy could give panels the wrong incentives
 - Qualifications: empty shell (why discuss it?)
 - Appointments by DG are problematic: members only should appoint
 - Page limits on submissions could impair right of defense
 - Include limits on panel reports, yes

Omissions

- No discussion on remedies
 - Bargaining power does matter
 - And WTO is a contract across unequal parties
- More of a discussion on who should serve as “judge” / role of Secretariat
 - Current situation far from ideal
- Do we need appeal review?
 - Certainly a divisive issue, EU, China and many others in favor
 - Realpolitik issues, US attitude
 - Legal policy issues, Mavroidis (2022); Sykes (2024)

Policy

Is this Document a Basis for Agreement by End of 2024?

- Time dimension
 - Judging by revealed preferences, US is not moving before elections; might be moving in the wrong direction after the elections as well
- Is there future in compulsory third-party adjudication?
 - Assuming we want to keep a multilateral regime
 - It is the first best, but cloth should be cut to the size of the dress
 - Either some re-balancing is necessary (e.g., ex ante removal of XXI)
 - Or, ICJ optional clause could prove the end compromise