

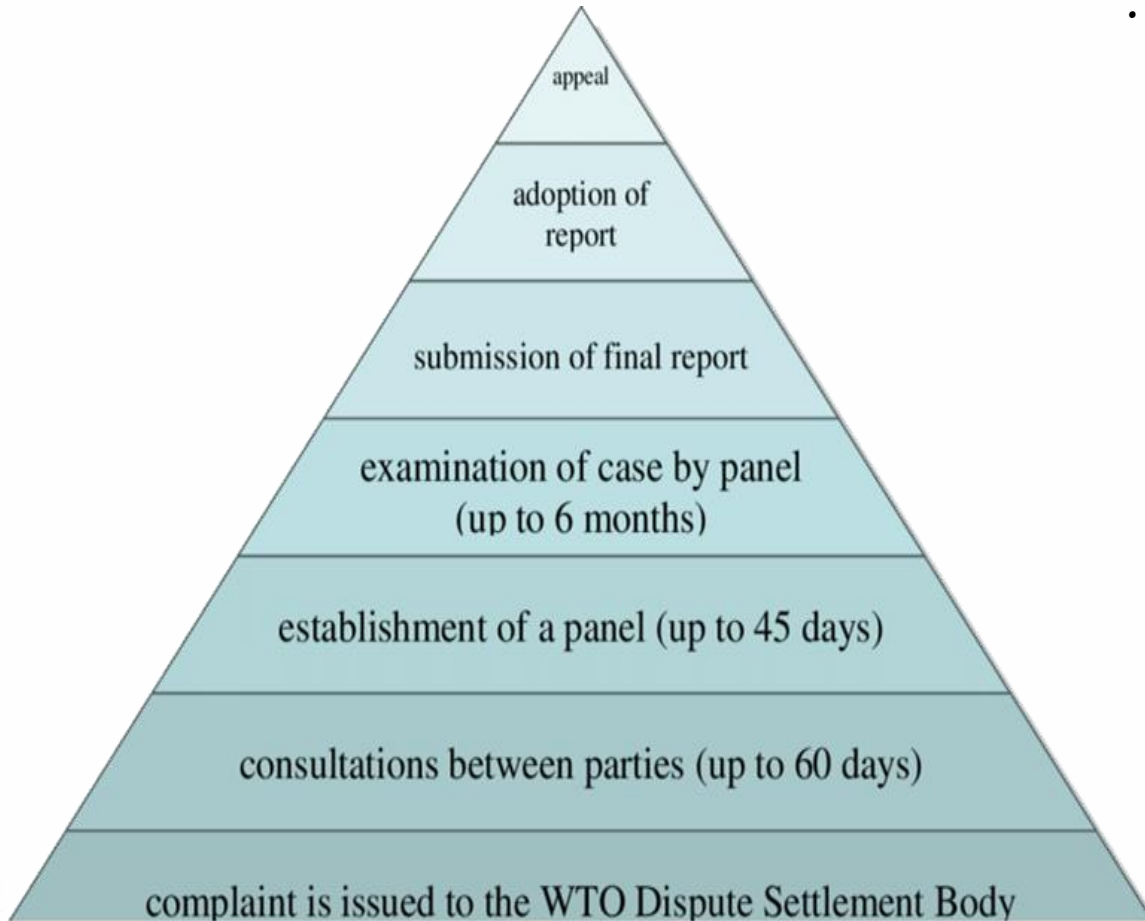


# Dispute Resolution in a Fragmented World: The Legitimacy Gap in Global Trade Law beyond the WTO

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# WTO Dispute Resolution System



- *The members of the WTO Dispute Settlement Body (DSB) are representatives of all WTO member governments.*
- It is binding as it consists of a split-level process (*The Panels and The Appellate Body*)
- High compliance rate and rule-oriented approach
- From **1995 – 2019** it addressed over **500 disputes**, and consistent jurisprudence
- A coordinated dispute resolution pathway allowing different trade blocs and countries to address trade and associated issues at any point in time
- Dispute resolution system provides multilateral oversight and appellate review in ensuring predictability and legitimacy
- Unlike the **GATT** system that allows a consensus rule, this system negates the “**Consensus Rule**” a ruling is adopted automatically except every single member votes to reject it, implying virtually certain adoption
- Checkmate geopolitical crises that may extend into regional trade wars or global trade wars.

# Dispute Resolution Crisis 2019 - 2026



- Over **598 Disputes** were brought to the WTO by 2019 of which over **350** got to the panel stage and at least **130** were taken to the appellate body before the appellate paralyzed since **December 2019**
- The U.S. stated that the appellate body has exceeded its authority, deviating from its original mandate. The complaint was formalized on March 1, 2019 in the Trade Policy Agenda and the 2018 Annual Report
- The U.S. Blockade of appointments has not relented as it is still very firm since 2019 even till date in the second administration of Donald Trump
- Reform talks ongoing (e.g., WTO Reform Week Dec 2025, U.S.A. submission Dec 2025) but divisions persist



- There are also concerns on the failure of the Appellate Body (AB) to meet with the 90-day limit for issuing the rulings as set out in the Dispute Settlement Understanding. For example the **India-Agricultural Product (DS430) report was issued in 271 days**
- Despite the WTO not formally recognizing preceding decisions as in common law systems, the AB has tended to rely on previous decisions rather than an innovative system
- The U.S. used its veto power to block the appointment and reappointment of AB members
- As of January 2026, the multilateral appellate function remains non-operational, pushing members towards alternatives
- No consensus panel reports issued but appeals **“into the void”**

# The legitimacy Gap in Dispute Resolution



There are three anchor pillars that support legitimacy in dispute settlement which are

- **Input Legitimacy:** Inclusive participation and representation of all members (major focus on developing countries) ensuring the interests of affected parties are reflected in the governing norms. Drawbacks arise from perceived dominance of powerful states, lack of access for non-state actors in state-to-state systems like the WTO, asymmetry in legal capacity between developed and developing countries affecting ability to initiate or defend cases
- **Procedural Legitimacy:** Structured around transparency, fairness, consistency, impartiality and appellate review arising from the quality of the process. Drawbacks arise from inconsistencies in rulings across tribunals, lawmaking by judges in the WTO-AB, criticisms of secrecy in Investor-State Dispute Settlement (ISDS) arbitration
- **Output Legitimacy:** Developed and orchestrated around consistency, predictable and fair outcomes in compliance with broader societal goals. Drawbacks arise from lengthy delays in arriving at resolutions, perceived bias towards trade/ investment goals, weak enforcement of rulings against powerful states, legally correct but socially unjust outcomes

There exist a huge gap when alternatives are not in perfect sync with the expectation of the WTO objective.

## Legitimacy Gap in Dispute Resolution arises from

- Lack of appellate review: This present the risk of erroneous or inconsistent rulings
- Forum shopping and parallel proceedings
- Perceived Bias (e.g. ISDS criticized as favoring investors)
- Reduced transparency and public access in some **Preferential Trade Agreements(PTA)**
- Unequal impact: Developing countries often sidelined in mega-regional design
- Fragmentation risk cohesiveness of trade pattern jurisprudence hence making the rule of law in global trade non-effective

# Implications of Legitimacy Gap on Global Trade



## Governance & Institutional Efficacy

- **Paralysis of the Negotiating Function (Doha Round Failure):** members relying on regional (Comprehensive and Progressive Agreement for Trans-Pacific Partnership - CPTPP), bilateral deals and fragmented trade rules rather than the WTO
- **Crises in Dispute Settlement System:** Power shifts back towards unilateral coercion as seen in tariff wars
- **Erosion of the Rule-Based System:** Increased use of protectionist measures under dubious “*national security*” justifications
- **Decline in Ruling Compliance:** The core value of the WTO (predictable enforcement) dwindles over the long term as losing parties often ignore and delay implementation of the DSB rulings as the cost of non-compliance appear low.

## Equity & Development

- **Perpetuation of North-South Inequalities:** Resistance to new issues until old grievances are addressed, creating negotiation deadlocks
- **Marginalization of Least Developed Countries (LDCs):** Trade rules are increasingly catering to the interests of major economies putting LDCs far behind
- **Inadequate Policy Space for Development:** Erosion of support for the WTO in the developing world, perceived as a constraint on their growth and development
- **Questioning of the “Single Undertaking”:** Increased calls for more flexible, variable resolution approaches but with increased fragmentation risks.

# Recommendation on WTO Dispute Resolution Pathways



## Immediate Reforms

### Functionality Restoration

- Address generic and specific U.S. concerns while preserving opportunities for binding multilateralism such as **90-Day Rule**: addressing concerns on procedural overreach, **Obiter Dicta Issue (Judgement)**: address issues necessary to resolve dispute-avoiding unnecessary commentary on member's laws, **Stare Decisis (Precedents)**: prior AB panel reports while being informative do not serve as precedent for future cases, **Transition Rule (AB Members' Terms)**: Members must not involve in cases after term expiration or eviction from a specific case
- Strengthening and enhancing the adoption of the Multi-Party Interim Appeal Arbitration Arrangement (**MPIA**) while exploring permanent plurilateral appeal mechanisms

## Medium Term Reforms

### System Reformation

- Instituting a reformed two-tier system with a permanent appellate tribunal replacing the Ad-hoc part-time AB with a permanent, professional tribunal, limiting appeals to issues of law and legal interpretation, preventing *de facto* re-litigation of facts, automatic adoption with an **Opt-Out** preventing a single losing party from blocking adoption.
- Implementation of Greater Member Control & Flexibility through political oversight valve which members can issue a **non-adoption opinion** on an appellate report seeming overreaching. Adopting an Alternative Dispute Resolution that formally promote mediation, conciliation and good offices within the WTO secretariat reducing further burden on the adjudicative system.

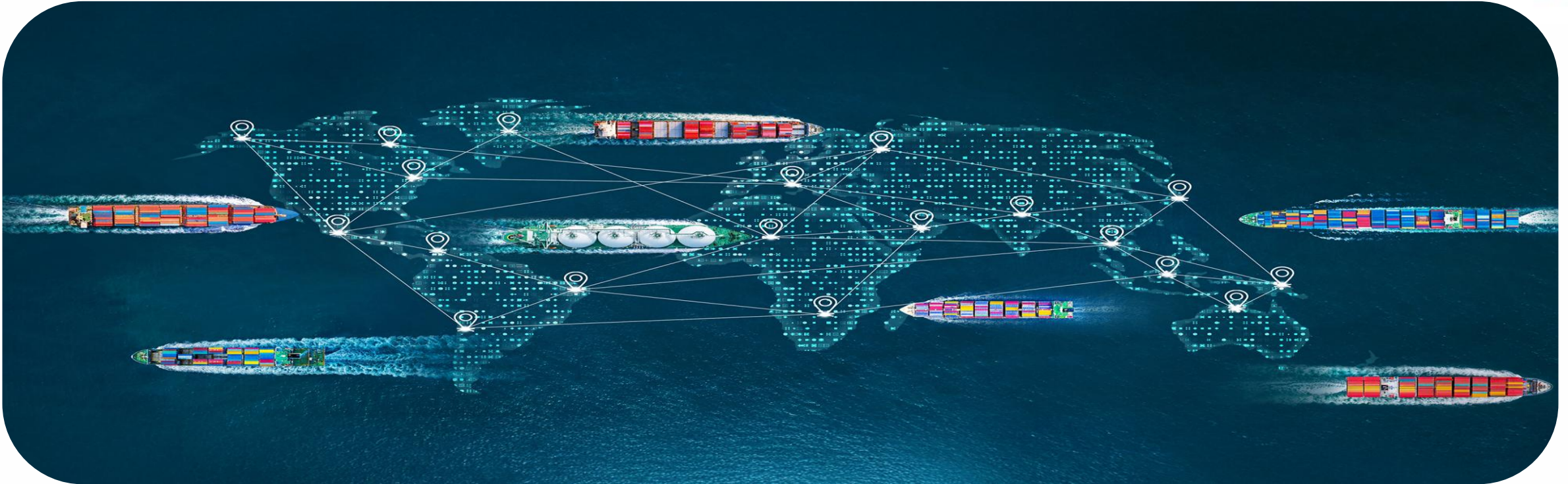
## Long Term Reforms

### Systemic Pathways

- Re-link dispute settlement to the negotiation function as **WTO-AB made laws as negotiations were stalled**. Creating a formal legislative response mechanism to enhance the accountability of the law makers and a time-bound negotiation to clarify or amend the rule.
- Enhancing transparency and third-party participation through open hearings as a default to foster transparency and trust, structured amicus Curiae briefs ensuring the system hears diverse perspectives without being overwhelmed.
- Special & Differential (S&D) treatment in dispute settlement through tailored procedures for least developed countries such as longer timelines, enhanced legal support, different remedy structures for disputes ensuring the procedural playing field is leveled

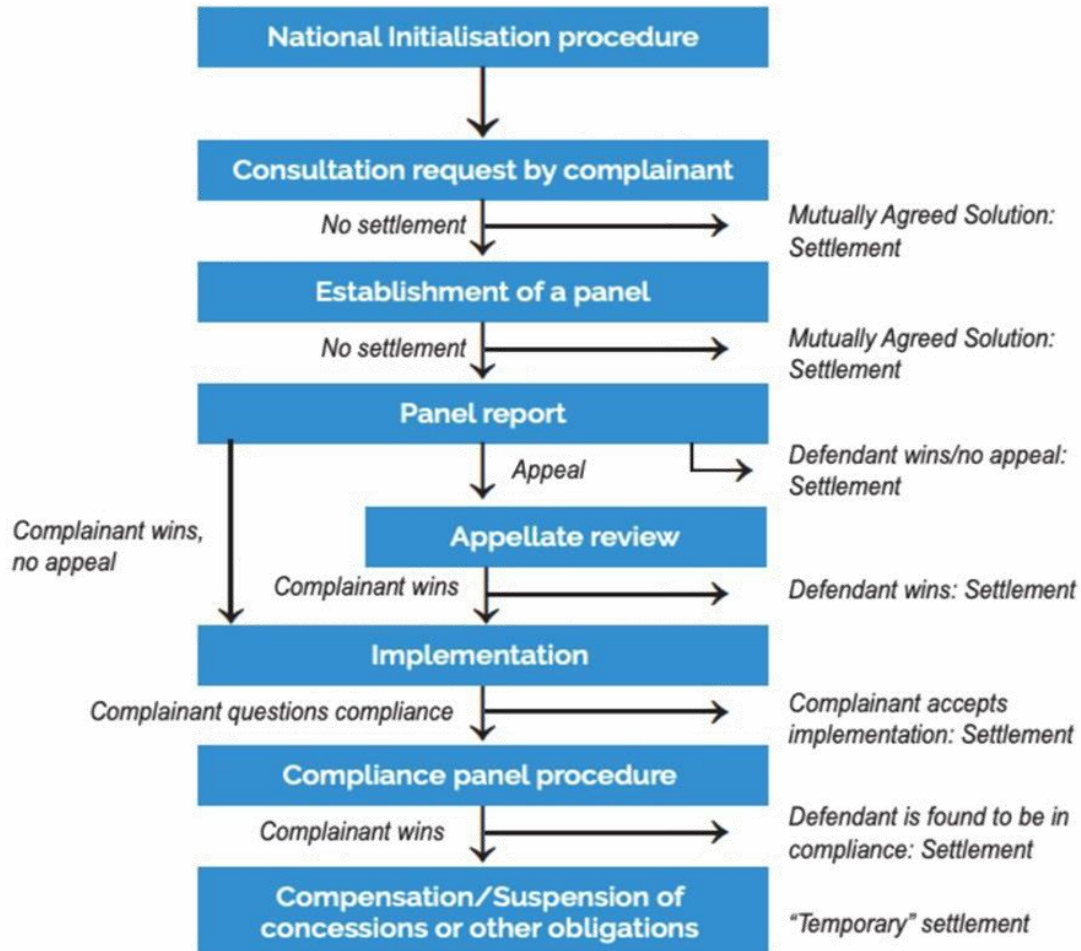
# Fragmentation of Global Trade Governance

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- Proliferation of preferential trade agreements (PTAs) not restricted to CPTPP, RCEP, AfCFTA, USMCA, EU FTAs
- More than **350 PTAs** are notified to WTO
- Drift from multilateral to plurilateral/regional/bilateral rules
- Existing risk of overlapping obligations and conflicting jurisprudence
- Fragmentation aligns more with the geopolitical shifts rather than WTO concepts of centrality

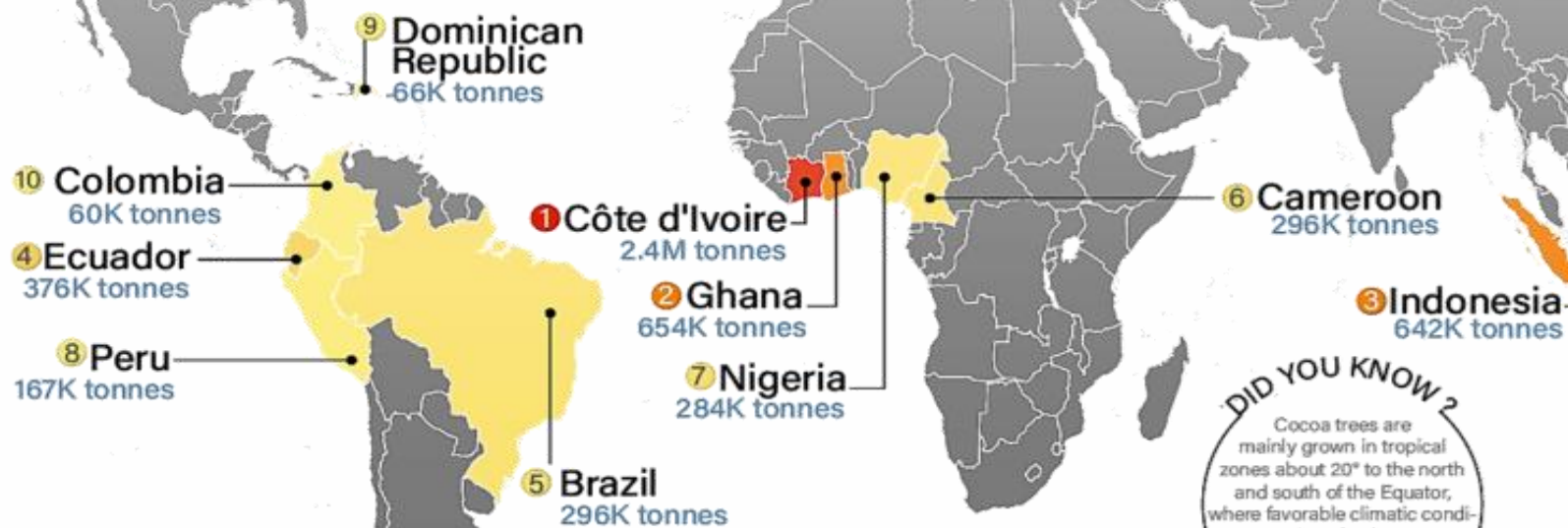
# Resolving Disputes beyond the WTO



- State-to-State mechanisms in the PTAs (USMCA Chapter 31, CPTPP Chapter 28)
- Multi-Party Interim Appeal Arbitration Arrangement (MPIA): Effective in over 20 member countries as temporary WTO resolution pathway
- Investment Treaty Arbitration also known as the Investor-State Dispute Settlement (ISDS) across Investment Chapters (Chapter 11 of NAFTA, ICSID, UNCITRAL rules)
- Adhoc Interstate arbitration and bilateral forums whereby parties agree to arbitrate dispute under forms like PCA or UNCITRAL through selecting arbitrators and mandate definition
- Diplomatic and Political Approaches: Mediation and Good Office such as (Article 5 of the DSU, ICC, PCA). Political agreements such as G7, G20 or dedicated like EU-China High-Level Economic and Trade Dialogue
- Sector-specific or Issue-specific For a such as the WIPO, IMO), ICAO and National Courts.
- Despite the mechanisms addressing the void, they are very divergent in the scope and design



# The World's Top 10 Cocoa Producing Countries



**DID YOU KNOW 2**  
Cocoa trees are mainly grown in tropical zones about 20° to the north and south of the Equator, where favorable climatic conditions for the cultivation of cocoa trees are available.

# Overview of Cocoa Exporting Nations



- The cocoa despite being a global commodity is heavily concentrated within specific regions as pertaining to production and processing and not as concentrated as such as pertaining to distribution and consumption.
- About ~70% of the Global Cocoa is produced and exported from **West Africa** which consist of **Cote d'Ivoire, Ghana, Nigeria and Cameroon**. Major secondary producers are **Latin America (Ecuador, Brazil, Peru), South-East Asia (Indonesia)**.
- The processing capital of the world is **West Africa** (Ivory Coast), and to some extent **South-East Asia** (Indonesia, Malaysia), **Europe** (Netherlands), and **Latin America** (Ecuador)
- The export price of the raw commodity is about **\$4,500** per ton and the small holder farmers are not able to cover their costs or making significant returns on the high risk they have incurred in production as they earn only about **\$2,500 - \$3,000** as a larger share of the cocoa commodity is mopped up by aggregators, cocoa boards and cocoa councils.
- There is little or no structured financing or hedging structure in place for the small holder farmers managing a significant portion of the farms where majority of the global cocoa is sourced from
- There are differential treatments in the international tariffs and levies placed on cocoa and related commodities: Raw cocoa beans tariff is close to or **0%** in developed markets, semi-finished cocoa derivatives such as cocoa butter, cocoa cake and cocoa liquor have tariff up to **15%**, the final consumable chocolate or related products have tariffs and special duties charged on international transactions up to **30%**
- The current market mechanism and structure is positioned to discourage value addition and further processing in west Africa where majority of the cocoa is sourced and produced from.
- There are further restrictions arising on sustainability regulations and market access barriers such as **EUDR, TRACE**, several **“Non-Child Labour”** compliance certification requirement
- Significant asymmetric power dynamics as about **3 firms** account for ~60% of global cocoa processing: Cargill, Barry Callebaut and Olam while about **5 firms** are major chocolate manufacturers: Mars, Mondelez, Nestle, Hershey, Ferrero

# Resolution Pathways on Cocoa and Derivative Trade



## Alternative Dispute Resolution Pathways within the WTO Framework

- **Article 25 Arbitration (MPIA Model):** Cocoa majorly producing and exporting regions can institute a **Cocoa Trade Understanding (CTU)** for robust mutual agreement, bind signatories to use specific arbitration modalities in addressing sector-specific disputes. A classical case is Ecuador and EU adopting the MPIA model for addressing fine cocoa geographical indications and origin disputes
- **Plurilateral Agreement on Sustainable Cocoa:** Negotiating a “**Sustainable Cocoa Agreement**” with built-in dispute resolution pathway, addressing issues on price stabilization mechanisms and technical assistance for cocoa major players, ensuring the agreement is binding only on willing members (A critical mass approach)
- **Enhanced Use of WTO Committees:** The WTO Agriculture Committee can be structured to address regular and specific trade concerns on cocoa, WTO Technical Barriers to Trade (TBT) committee can be positioned to dialogue on sustainability regulations prior to implementation. All of these allow for political solutions without formal litigation

## Regional & Bilateral Pathways

- **Africa Continental Free Trade Area (AfCFTA) Protocols:** The AfCFTA can structure a framework to create a unified African position on cocoa trade. Through active AfCFTA engagements, regional value chains can be developed to reduce sole dependency on the European Union and the U.S.A markets. AfCFTA can also come as a strong block with collective bargaining power in trade negotiations
- **Economic Partnership Agreement (EPA) Review Mechanisms:** Understanding that the EU-West Africa EPA consists of consultation mechanisms which can be strengthened with independent arbitration clauses and reforms.

# Resolution Pathways on Cocoa and Derivative Trade



- **Bilateral Mediation Facilities:** Institution of functional and operational joint technical committees not restricted to the Cote d'Ivoire-Ghana Cocoa Initiative (CIGCI) Collaboration also known as the **Cocoa OPEC** established in 2018. Enhancing more Producer-Consumer Country Dialogues such as the EU-Cote d'Ivoire-Ghana trilateral agreement models.

## Innovative Market-Based Solutions

- **International Cocoa Agreement (ICA) Revival:** Prior ICAs (1972 – 2012) developed by International Cocoa Organization (ICCO) had price stabilization mechanisms, modern versions could further consist of concerns around price bands, buffer stocks, sustainable pricing formula among others. Dispute mechanisms can consist of independent panel of cocoa economists and trade experts.
- **Commodity-linked Special Drawing Rights (SDRs):** These could be structured around sustainable cocoa production, automatic stabilization mechanisms suitable to address price fluctuations and volatilities among other issues.
- **Multistakeholder Arbitration Panels:** These panels should consist of representatives from the government, industry and an independent chair. There should also be increased commitment to the implementation on sustainability premiums or pecks as well as increased incentives to enhance commitment to improve the standard of living for players across the cocoa value chain.

# Recommendation on WTO Dispute Resolution Pathways



## Immediate Reforms *Stability Positioning*

- **Formalization of the Cote d'Ivoire-Ghana Cocoa Pact:** Transitioning from price coordination to comprehensive trade policy coordination. Establishing joint legal team for trade dispute preparedness
- **Leveraging the MPIA:** Reforming the *Multi-party Interim Appeal Arbitration Arrangement*. Strategically enhancing precedents for agricultural commodity disputes
- **WTO Reform Advocacy Coalition:** Lead a coalition of commodity-dependent developing countries. Intensive effort to push further for AB restoration with special procedures for commodity disputes

## Medium Term Reforms *System Reformation*

- **Diversify Export Markets & Products:** expansion into the Asian markets with fewer sustainability barriers, investment in domestic processing across Africa to shift from ~30% to attain up to ~50%.
- **Develop Alternative Dispute Resolution Protocols:** Institution of the *Cocoa Trade Conciliation Service* under the International Cocoa Organization. Binding existing and future arbitration based on *FAO/UNCTAD* principles.
- **Reinforced Defense System via Digital Traceability:** Proactive climate change compliant frameworks through regional digital systems to capture relevant farm and origin sourcing data. Utilizing data to counter unjustified barriers and enhance sustainability practices

## Long Term Reforms *Systemic Pathways*

- **COCOA OPEC with Dispute Resolution Function:** Institution of a functional Organization of Cocoa Exporting Countries (*OCEC*). Institution of price stabilization funds and facilities to address all forms of trade disputes.
- **Permanent Agricultural Commodities Panel:** Increased advocacy for specialized structures across several ADR pathways suitable to address perishable / tropical goods. Expected procedures for time-sensitive commodity disputes
- **Link to Climate Finance:** Position sustainable cocoa production as a climate mitigation. Increase access to green climate fund for compliance costs with trade regulations.

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154



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