

Critical Analysis of WTO Dispute Settlement Mechanism

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“The WTO has one of the most impressive records in global economic governance, by promoting trade liberalization and economic development

—Anna Lindh

International summits and organizations like WTO take decisions, which will bind us, and if we are not present in such summits, we may be hurt by the decisions taken.

—Narendra Modi

Abstract

The disputes settlement system of the World Trade Organization with the appellate body as its ‘center piece’ has long been considered by those involved in international trade. Globalization creates a demand for international rule-making and the WTO remains the forum for creating binding and enforceable international trade rules. The WTO, therefore, needs an effective decision-making system capable of resolving diverging interests. This paper explores and discusses “The rights and obligations under WTO agreement are enforce through dispute settlement process”. The Dispute Settlement Understanding (DSU) is often seen as one of the most important achievements in the World Trade Organization (WTO) Agreement. While the GATT also contained provisions for conflict resolution the DSU contains a number of innovations. In particular, it is generally seen as being superior to its predecessors in terms of the clarity of its provisions, concerning procedural matters, and its provisions establishing a monitoring, scheme to overview implementation. Recently, however, criticism has been voiced concerning the possibilities for poorer countries to take full advantage of the system.

Keywords

WTO, Applicant Body, Dispute Settlement, GATT, Globalization

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Introduction

World Trade Organization is an intergovernmental organization. Which provides all the rights of obligation under the WTO agreement to settle the dispute that arises between the countries. The Goods agreement on Tariff and Trade (GATT) is replaced by the World Trade Organization (WTO) by Marrakesh agreement signed by 123 members of WTO in Uruguay round table conference on 1st Jan. 1995. The WTO has 164 members and 25 observer governments. Liberia becomes the 163rd member on 14th July, 2016 and Afghanistan became the 164th Member on 29th July, 2016. In May 2020, Director-General Roberto Azevedo announced that he would step down on 31 August 2020. As of October 2020, a nomination and selection process is currently underway with eight candidates and the final selection is expected on 7 November 2020 with the consensus of 164 member countries. WTO members made history on 15 February 2021 when the General Council agreed by consensus to select Ngozi Okonjo-Iweala of Nigeria as the organization's seventh Director-General. Dr. Okonjo-Iweala will become the first woman and the first African to be chosen as Director-General on March 1, 2021.

As trade expands in volume, in the numbers of products trade, and in the number of countries and companies trading, there are more opportunities for trade disputes to arise. The WTO system helps resolve these disputes peacefully and constructively.

Dispute settlement is regarded by the WTO as the central pillar of the multilateral trading system, and as a "unique contribution to the stability of the global economy". WTO members have agreed that, if they believe fellow members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally.

The operation of the WTO dispute settlement process involves case-specific panels appointed by the Dispute Settlement Body (DSB), the Appellate Body, The Director-General and the WTO Secretariat, arbitrators, and advisory experts.

Meaning of WTO

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. It is an organization for trade opening. It is a forum for governments to negotiate trade agreements. It is a place for them to settle trade disputes. It operates a system of trade rules. Essentially, the WTO is a place where member governments try to sort out the trade problems they face with each other.

Definition of WTO

According to Cambridge Business English Dictionary, the World Trade organization: an official organization that deals with agreements for buying and selling goods and services between countries.

Among the functions stated above, the very important function of WTO is the administration of the WTO dispute settlement system, as stated in Article 3.2 of the Dispute settlement understanding. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The prompt settlement of disputes under WTO agreements is essential for the effective functioning of the WTO and for a initiating a proper balance between the rights and obligations of members. The WTO dispute settlement system serves;

- To preserve the rights and obligations of Members under the WTO agreement ; and
- To clarify the existing provisions of those agreements.

Preserving the Rights and Obligations of WTO Members:

The DSU favors solutions mutually acceptable to the parties to the dispute provided that they are consistent with the WTO Agreements (Article 3.7 DSU). Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements must be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto (Article 3.6 DSU).

Article 7-01: Unfair Trade Practices

The Parties confirm their rights and obligations relating to the application of antidumping and countervailing duties under the WTO Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade of 1994 and the WTO Agreement on Subsidies and Countervailing Duties.

Article 7-02: Standards, Technical Regulation and Conformity Assessment Procedures

The Parties confirm their rights and obligations relating to standards, technical regulations, and conformity assessment procedures under the WTO Agreement on Technical Barriers to Trade.

Article 7-03: Sanitary and Phytosanitary Measures

The Parties confirm their rights and obligations relating to sanitary and phytosanitary measures under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

Article 7-04: Services

The Parties confirm their rights and obligations relating to trade in services under the WTO General Agreement on Trade in Services (GATS).

Article 7-05: Intellectual Property

The Parties confirm their rights and obligations relating to intellectual property

rights under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIP's).

Article 7-06: Dispute Settlement

No Party may have recourse to dispute settlement under Chapter X (Institutional Provisions and Dispute Settlement Procedures) for any matter arising under this Chapter.

Dispute Settlement Process

The Operation of the WTO dispute settlement process involves the Dispute Settlement Body the panels and the Appellate Body, the parties, and the WTO secretariat. The General Council discharges its responsibilities with respect to dispute settlement through the Dispute Settlement Body, which is composed, of representatives of all WTO members. Panels and the Appellate Body are the entities in charge of adjudicating the dispute. The former is composed of experts selected on an adhoc basis. The latter is a permanent group of seven experts in trade issues and trade law in charge of reviewing the legal aspects of the reports.

Complaint by more than one Member

More than one Member may request the establishment of a panel related to the same matter, in which case a single panel may be established to examine these complaints (Article 9.1 DSU). If more than one panel is established to examine complaints related to the same subject matter, the same persons are required to the greatest extent possible to serve as panelists on each of the separate panels and the timetable for the cases was to be harmonized (Article 9.3 DSU).

Who can take part in consultations?

Each Member undertakes to accord sympathetic consideration to, and afford adequate opportunity for consultation regarding, any representation made by another Member concerning measures affecting the operation to any WTO agreement (Article 4.2 DSU). Consultations have a number of functions. They allow parties to clarify the facts of the matter, thus dispelling misunderstandings as to the actual nature of the measure at issue. They may allow parties to find a mutually satisfactory solution, and if no solution is found at that stage permit them to take stock of the issues, which were no solved through consultations.

Third Parties to the proceedings before the panel and the Appellate Body

The complaining and the responding Members are the main parties to the disputes. Other Members have an opportunity to be heard by panels and to make written submissions as third parties, even if they have not participated in the consultations.

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeal report
30 days	Dispute Settlement Body adopts appeals report
Total = 1 year 3 months	

The task of panels: Review the fact and arguments submitted by the parties to a particular dispute

Where the Members concerned cannot find a mutually agreed solution through consultations, the DSB must, at the request of a party to the dispute, establish a panel of three to five independent trade experts appointed on an ad hoc basis. The panel must review the factual and legal aspects of the case and submit a report to the DSB. It must make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability, of and the conformity of challenged measures with, the relevant covered agreements, and make such findings as will assist the DSB in making its ruling or recommendations (Article 11 DSU).

Panelist selection process

The selection of panelists is made to ensure the independence of panel members, a sufficiently diverse background, and a wide spectrum of experience (Article 8.2 DSU). Citizens of WTO Members whose government are parties to the dispute or third-parties as defined in the DSU may not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise (Article 8.3 DSU) Panelists may be selected from an indicative list maintained by the Secretariat. WTO Members may periodically suggest names to be added to the list upon approval by the DSB (Article 8.4 DSU). When a dispute is between country members and a developed country member, the developing country member may request that the panel include at least one panelist from a developing country member (Article 8.10 DSU).

Appointment of panelists

Panel deliberations are confidential. Reports of panels are drafted without the presence of the parties to the dispute, in the light of the information provided and the statements made.

Appeals

Appeals have to be based on points of law such as legal interpretation – they cannot reexamine existing evidence or examine new evidence, three members of a permanent seven-member. Appeal Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership hear each appeal. Members of the Appellate Body have four-year terms. The appeal can uphold modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. The dispute settlement body has to accept or reject the appeals report within 30 days – and rejection is only possible by consensus.

Appeals are limited to issues of law covered in the panels report and legal interpretations developed by the panels (Article 17.6 DSU). The appellate body must address, but also limit its review to, each of the issues of law covered by the panel report and the legal interpretations developed by the panel which was appealed during the appellate proceeding (Article 17.6 and 12 DSU). The Appellate Body may uphold, modify or reverse the legal findings and conclusions of panel (Article 17.13 DSU).

The task of the Appellate Body: a review of appeal the issues of the law addressed by panels

If a party files an appeal against the report of the panel; the Appellate Body shall review the issue of the law addressed by the panel and confirm or modify its findings (Article 17.6 DSU). In Brazil – Measures Affecting Desiccated Coconut, complaint by the Philippines (WT/DS22), the Appellate Body upheld both the findings and legal interpretations of the panel. In contrast, in Japan – Taxes on Alcoholic Beverages, complaint by the European Communities (WT/DS8) Canada (WT/DS10) and the United States (WT/DS11), the Appellate Body affirmed the panel's conclusions but pointed out several areas where it considered the panel had erred in its legal.

On 23 January 2017, the amendment to the WTO Trade-Related Aspects of intellectual property rights (TRIPS) Agreement marks, the first time since the organization opened in 1995 that WTO accords have been amended, and this change should secure for developing countries a legal pathway to access affordable remedies under WTO rules. Studies show that the WTO boosted trade, and that trade barriers

would be higher in the absence of the WTO. In **China-Intellectual property Right Case**, the panel found that while China's criminal measures exclude some copyright and trademark infringements from criminal liability where the infringement falls below numerical thresholds fixed in terms of the amount of turnover, profit, sales, or copies of infringing goods, this fact alone was not enough to find a violation because of Art. 61 does not require Members to criminalize all copyright and trademark infringement.

The WTO has highly influenced the text of trade agreements, of nearly all recent [preferential trade agreements (PTAs)]. Among the various functions of the WTO, these are regarded by analysts as the most important: It oversees the Implementation, Administration, and operation of the covered agreements. It provides a forum for negotiations and for settling disputes and for implementation. Additionally, it is WTO's duty to reviews and propagates the national trade policies, and to ensure the coherence and transparency of trade policies through surveillance in global economic policy-making. Another priority of the WTO is the assistance of developing, least-developed, and low-income countries in transition to adjust to WTO rules and disciplines through technical cooperation and training, administration and training, administration, and operation of the covered agreements. The world trade organization serves as the mediator between the nations when such problems arise. WTO could be referred to as the product of globalization and also to as the product of globalization and also as one of the most important organizations in today's globalized society.

Japan-Alcohol Case: the issue there was whether various alcoholic beverages were "like" shochu, a traditional Japanese drink that was allegedly receiving favorable tax treatment. The panel found that Vodka is "like" shochu since, in addition to its commonality of end-uses it shared with shochu most physical characteristics. By contrast, liqueurs and gin were not "like" shochu due to the use of additives ; rum was not "like" shochu because of the use of ingredients; and whisky and brandy were not "like" shochu because of appearance. On appeal, the Appellate Body upheld the panel's finding that vodka and shochu are "like", without offering any additional analysis of the "likeness" of products at issue.

European Communities-Asbestos Case: the measure at issue was France's ban on imported asbestos against certain domestic substitutes such as PVA, cellulose, and glass ("PCG") fibers. The appellate body laid emphasis on a comparison of the "group" of imported products to the "group" of "like" domestic products, rather than a comparison between an individual imported product and an individual "like" domestic products. It is a fairly strong indication by the Appellate body that it will not take an "individual" or "strict" like product approach.

European Communities computer Equipment case: the measure at issue was the European communities' application of tariffs on local area networks ("LAN") equipment and multimedia personal computers ("PCs") in excess of those provided for in the EC schedules through changes in customs classification. The appellate body reversed the panel's finding that the United States, as an exporting member, was not required to clarify the scope of the European communities' tariff concessions. The appellate body emphasizes the "give and take" nature of tariff negotiations and that members' schedules "represent a common agreement among all members", particularly in light of the fact that they are an integral part of the GATT, and thus found that clarification is a "task for all interest parties".

Argentina-Preserved peaches case: the measure at issue was Argentina's safeguard measures imposed, in the form of specific duties, on preserved peaches from all countries other than MERCOSUR states and South Africa.

The panel concluded that Argentina had acted inconsistently with the irrelevant provisions, as it had demonstrated in its determination a threat of serious injury, neither the relevant factors having a bearing on the domestic industry, nor the serious injury was clearly imminent so as to constitute a threat under the relevant articles.

Canada- Autos Case: the measure at issue was Canada's import duty exemption for imports by certain motor vehicle manufacturers, in conjunction with the Canadian value-added ("CVA") requirements and the production to sales ratio requirement, and the production to sales ratio requirements. The appellate body upheld the panel's finding that the duty exemption was inconsistent with the most-favored-nation treatment obligation under art. I:1 on the ground that art. I:1 covers not only de jure but also de facto discrimination and that the duty exemption at issue, in reality, was given only to the imports from a small number of countries in which an exporter was affiliated with eligible Canadian Manufacturers/importers. The panel rejected Canada's defense that Art. XXIV allows the duty exemption for NAFTA members (Mexico and the United States), because it found that the exemption was provided to countries other than the United States and Mexico and because the exception did not apply to all manufactures from these countries.

European communities-Hormones case: the appellate Body noted that panels enjoy "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case." **In India-Patents (US)**, however, the appellate Body cautioned panels as follows. "Although panels enjoy some discretion in establishing their own working procedure, this discretion does not extend to modify the substantive provisions of the DSU".

To be sure, Article 12.1 of the DSU says, panels shall follow a working

procedure in Appendix 3 unless the panel decides otherwise, after consulting parties to the dispute. Yet that is all it says. Nothing in the DSU gives the panel authority either to disregard or to modify other explicit provisions of the DSU. Article 12.2 of the DSU requires that panel procedures provide sufficient flexibility so as to ensure high-quality panel reports while unduly delaying the panel process. Since the working procedures contained in the Appendix 3 to the DSU are rudimentary, most appendix 3 to the DSU stipulates a proposed timetable for panel work. On the basis of this proposed timetable, the panel will fix the timetable for its work positively within a week of its composition. The panel at that time may decide on a detailed Adhoc working proceedings after consulting the parties to the dispute in the organizational meeting.

European communities-Banana III case: the Appellate Body found that “It is important that a panel request be sufficiently precise for two reasons; first it often forms the basis of the terms of reference of the panel pursuant to Article 7 of the DSU, and Second, it informs the defending party and the third parties of the legal basis of the complainant. The Appellate Body upheld the Panel’s finding that the allocation of tariff quota shares to some members not having a substantial interest in supplying bananas, but not to others, was inconsistent with art. XIII:1.

Critical Analysis of WTO Dispute Settlement Mechanism

The Critical analysis of the WTO dispute settlement system is that the complexity of the DSB has made it inaccessible for most developing and developed countries. That the lack of experience is often mentioned as a reason why developing countries cases to WTO members refrain from bringing dispute and to WTO’s DSB. Essentially, lack of experience and expertise in the WTO DSB and international trade law in addition to the high cost of attaining the relevant legal experience are frequently seen as causes for reluctance by developing countries to bring their trade disputes to the WTO. The particular problems in the term of the DSU faced by developing countries may be found within the following:

- Access to the WTO dispute settlement process “access to justice”.
- Fairness in terms of the procedures afforded to prosecute and defend cases in the panel and appellate processes of the WTO “procedural justice”.
- Fair and impartial panel and appellate decision “Quality of justice”.
- Realizing the justice dispensed through the panel and appellate processes “implementing justice”.

Critic contends that the smaller countries in WTO exercise very little influence in the dispute settlement of the developed countries. The poorest countries in the WTO system are almost completely disengaged from enforcement of their market access rights through formal dispute settlement litigation. It was observed by some

scholars that disputes filed by the USA and EU appear the designed policy changes more frequently under WTO. The reason for this difference was very well analyzed by a scholar and the reasons given by him for the poor performance of the LDC in WTO dispute settlement are the lack of legal and political capacity in international trade and the fear of political or trade reprisal of the LDCs. The reason for the low success rate of the LDCs is also analyzed in the same study and the reasons were pointed on the LDC concern regarding experts, the need to their experts for research and testimony to support their cases.

Conclusion

Hence, Dispute settlement is the central pillar of the multilateral trading system and the WTO's unique contribution be the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on closely defined rules, with timetable for completing a case.

Nations started understanding their rights and obligations under the WTO agreements. At present ignoring all the issues, the WTO DSB proceedings must be made in an impartial and more transparent manner keeping in view the economic progress and interest of the humanity rather than having 100% focus on Trade.

Suggestions

In May 2019, the chairman of the Appellate Body, **Ujala Singh Bhatia** said that if good solutions are to be found, the right questions must be asked. Members should carefully think about what kind of system they want, what its role and reach should be, and what core principles should govern its operation.”

- WTO disputes are often resolved by the arbitration method under Article twenty-five DSU. Article twenty-five DSU arbitration is initiated at any stage of a dispute, together with an appeal from panel adjudication. It produces decisions that are binding on the parties and are enforceable within the same manner as panel and appellate body decisions adopted by the DSB.

- The argument posited is that it is possible to reduce the number of days for consultations without affecting the intent of this phase for parties to reach a mutually agreed solution since they are free to extend their consultation beyond the 60 day period, provided it is mutually agreed.

- Transparency of the dispute settlement procedures is one of the points of discussion in which country positions differ the most. Proposal for early release of report or public access to party submission and panel, Appellate Body hearing have

been asked for in particular by the EC. In recent years WTO rulings have touched on sensitive public health and environmental concern.

- The terms of appointment of the appellate body, the EC proposed converting the Appellate Body mandate into a full-time appointment. Regarding the terms of appointment, a group of developing countries suggested changing the terms of appointment for AB members into non-renewable six-year terms, a proposal also brought by the EC. Through this removing any potential considerations related to reappointment, the proposal could further strengthen the independence of AB members and their capability to focus solely on legal considerations in their decision-making.

- There is a need to amend the DSU to clearly include financial compensation as one of the remedies. This new remedy should co-exist with current remedies, namely compensation and retaliation.

- Lastly, in theory, the WTO is a democratic organization, based on the principles of consensus and one member one vote, supported by a neutral secretarial and its purpose is to prompt trade policies at the WTO member to raise the standard of living for their members

Moreover, DSU reform must be done with the collective efforts of Developing and LDCs to be more effective.

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