

REFORMING THE DISPUTE SETTLEMENT MECHANISM OF WTO: CHALLENGES AND PROSPECTS

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Abstract

The WTO dispute settlement (DS) mechanism provides an enforceable means for members to resolve disputes over WTO commitments and obligations. The WTO has processed more than 600 disputes, and the significant traders, including the EU, China and the United States, have been active users of the system. Many WTO members consider the DS mechanism an important milestone, and an enforceable DS process was a priority negotiating objective for the United States, the EU and others in the Uruguay Round negotiations. But recently, some members, most notably the United States, asserted that it has procedural shortcomings and has exceeded its mandate in deciding certain cases. It is argued that WTO needs to negotiate new rules and adopt reforms to continue its role as the foundation of the trading system. Members have been unable to reach a consensus for a new comprehensive agreement on trade liberalisation and rules to date. While global supply chains and technology have transformed global trade and investment, WTO rules have not kept up with the pace of change. Many countries have turned to negotiate free trade agreements outside the WTO and plurilateral agreements involving subsets of WTO members. Further, the US Administration's actions to unilaterally raise tariffs under U.S. trade laws and to impede the functioning of the DS system have further undermined the WTO's credibility. In this perspective, the reforms of the DS are one component of the WTO reforms, including future negotiations. This paper attempts to address the key areas of reform and challenges thereof in the WTO to improve the working of the DS system.

Keywords: WTO, Dispute Settlement, International Trade, Multilateralism.

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INTRODUCTION

The creation of the World Trade Organization (WTO) and its dispute settlement system is a significant development in the history of international trade. Since the inception of WTO in 1995, the dispute settlement system, established by the Dispute Settlement Understanding (DSU), has played a leading role in the global trading arrangement. The dispute settlement system of the WTO is the key feature of the International Trade System by which trade disputes among the member states are adjudicated. However, WTO members have raised considerable dissatisfaction and frustrations concerning the WTO dispute settlement system for the last few years. The United States has refused to approve nominations to fill vacancies on the appellate body (AB) since 2018. All appointments in the AB require unanimous agreement among WTO members.¹ So, The WTO's appellate body, which adjudicates trade disputes among member countries, practically ceased functioning from December 2019 amid disagreements regarding the appointment of new judges to the AB. Given these worrying realities, it is imperative to undertake a comprehensive reformation of the dispute settlement system of WTO to remain relevant and to ensure its role in the global trading arrangement. This paper contributes to the discussion of the current limitations of the existing dispute settlement system of WTO. To that end, this paper categorically outlines the deficiencies in the WTO dispute settlement mechanism and present crisis and some possible solutions to resolve both the immediate procedural deadlock and the long-term systemic concerns.

DISPUTE SETTLEMENT MECHANISM OF WTO

Article IV of the WTO agreement creates a Dispute Settlement Body (DSB) in line with the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).² Every WTO member is, by default, a member of the DSB. The jurisdictions of the DSU, as described in Appendix 1 to the DSU, are disputes arising from the WTO agreement,

¹ John Mo, *International Commercial Law*, New York: LexisNexis Butterworths, [Sixth edition] 2015), p.624

² World Trade Organization (WTO), "Agreement Establishing the World Trade Organization," available at: <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> (accessed on July 13, 2021)

GATT 1994, GATS, the TRIPS agreement, the DSU, and the plurilateral trade agreements.³ To make the WTO trade agreement functional, DSB plays a vital role in assisting the members in settling the disputes among them. DSU provides consultations, good offices, conciliation or mediation, and panel proceedings to resolve the conflicts. In the first place, the members are urged to settle their disputes by consultation or negotiation. Parties get 60 days to resolve their differences by themselves.⁴ If they cannot come to any solution, they can resort to the use of good offices, conciliation, and mediation. To avoid unnecessary conflict between the contracting members, the DSU stresses consultation.⁵ If the consultations fail the members are referred to a panel in the next stage. In this panel proceeding, the panel of three persons makes a report containing findings and recommendations on the particular dispute to the DSB.⁶ The panel is not a permanent tribunal. DSB maintains the list of the panel members. DSU allows interested third parties to participate in the panel process, and they are granted the opportunity to make oral and written submissions to the panel.⁷

Endorsement of DSB is necessary to enforce the panel report. If the parties do not wish to appeal against the panel findings, then the DSB can proceed to accept the panel report, or it can be rejected by consensus. This *negative consensus mechanism* is a unique feature of the DSU, in contrast to the provisions of the GATT.⁸ In the GATT regime, any country could veto a panel report at the implementation stage without the parties having any choice or right to appeal. When the panel report suggests that a country violates its WTO obligation, then there are three options:

³ WTO, "WTO Dispute Settlement Understanding - Legal Text," Appendix 1, available at: <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> (accessed on July 15, 2021)

⁴ Ibid, Article 4.

⁵ Ibid, Article 3.

⁶ Ibid, Article 12.

⁷ Ibid, Article 10.

⁸ Jumoke Oduwole, "WTO Dispute Settlement Understanding Remedies Reforms: An African Perspective," *SSRN Electronic Journal*, Vol.11, 2012, available at: <<http://www.ssrn.com/abstract=2119857>> (accessed on July 13, 2021)