

DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANISATION

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Abstract: World Trade Organisation is an international organization that regulates trade between nations. The trade is ruled by the regulations of WTO Agreements that are negotiated and signed by nations and ratified by member states' parliaments. The main aim of the organization is to make favourable conditions for trade among the nations. It is the only organisation that is run by member states which makes the WTO unique. As the subjects of the organization are trade, agreements, and states there are misunderstandings, misinterpretations, and conflicts. Furthermore, as the main actors in the organisation are the governments disputes also refer to government-to-government. For this reason, the organization solves the disputes concerning agreements inside by its own Dispute Settlement Body and statutory regulation named Dispute Settlement Understanding that has key points. This paperwork is aimed to demonstrate the nature and scope of jurisdiction of the Dispute Settlement Mechanism of the WTO, its key features, institutions in DSB, and special regulations of Dispute Settlement Understanding for developing states.

Key Words: WTO, Dispute Settlement Body, mechanism, Dispute Settlement Understanding, developing states, favourable condition, trade of goods, services, TRIPS.

Abbreviations

AB Appellant Body

DSB Dispute Settlement Body

DSS Dispute Settlement System

DSU Dispute Settlement Understanding

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

TRIPS Trade-Related Aspects of Intellectual Property Rights

WTO World Trade Organization

WTO

The controversies of the theory and practice in the fields of law, economics, and politics forced the world to think about one international organization and regulating law that helps the states to accompany a multilateral trading system that does not breach the boundaries of politics, but the same time helps to develop economics. All these three systems are required to be developed in order to establish an all-around trading system.

Politically, all the states are sovereign and have a full right and will to control their own destiny, however, the best practice of sovereignty, to be recognized by other states is to enter into international relations and bind friendship interrelation. For this, the countries need to respect and recognize the norms, protocols, treaties, and legal documents that are on an international level.

Economically, in the past countries were not in the willingness to open their own boundaries and put them free from charges. Authorities did not liberalize their own market unless they vividly were sure about the individual advantage of their country on the economic scale. Correspondingly, positive arguments in favor of an open market were advanced in the late eighteenth and early nineteenth centuries. At that time wealth was still seen as interchangeable with power and countries aimed to increase exports and decrease imports to manage the trade beneficially for their own economy. Frequently, authorities were persuaded that open markets and free trade would enhance the economy at the international level by cooperating with rule-based states and trade systems.

Legally, it was considered the power of the states played the dominant role in the establishment of the rules and norms between the states. Furthermore, a more powerful state was it could derive self-interest more loudly without the possibility of controversy. However, the modern world and the enhancement of international law have changed the ideas and enhanced rules and norms that provide judicial equality to other states such as developing and undeveloped countries on the exercise of power.

Advancements in each sphere led to the creation of an international organization that regulates trade. The controversy of the theory and the practice were aimed to be controlled by the legal document of GATT 1947 that pushed for the creation of WTO.

DSS

WTO encourages international trade of goods, services, and trade-related aspects of intellectual property rights. In a such great auditory, it is hard to collect every single member in one place without conflicts or misunderstandings of the agreements. So WTO has an operational system of dispute settlement that is considered the most prolific state-to-state dispute settlement system(DSS). WTO DSS has its own way of resolving disputes in a friendly manner and in the period between 1995 and 2016 one-fifth of 566 disputes were resolved by way of consultation, without the need for adjudication. Consequently, WTO DSS is considered a more effective and active way of resolving disputes than GATT DSS. The attractive side of DSS of the WTO is the successful use of the system by not only developed countries, but also developing and small developing countries. This system which has been operating since 1 January 1995, is the result of 15 years of experience taken from trade disputes which were resolved by the context of GATT 1947. The GATT 1947 contained only 2 articles regarding dispute settlement, specifically articles XXII and XXIII, that were in vogue in the context of procedures and remedies. However, Article 3.1 of DSU directly refers to the GATT in the context of dispute settlement and states:

“Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947 and the rules and procedures as further elaborated and modified herein”.

That results in the strongest experience in resolving disputes by diplomatic negotiations and through rules-based adjudication. The WTO dispute settlement system was the result of

negotiations of the Uruguay Round and provided a legal document referred to as Dispute Settlement Understanding (DSU). Even though, the cases resolved by the DSU caused much media attention, controversy, and public debate, especially cases considering public health, environment, public morals, and national interests the system is found the more practical cause of its nature that will be elaborated hereinafter.

Nature and scope of jurisdiction

Nature of Jurisdiction

The main figures of the WTO are the states, so the disputes brought to the DSB are the cases that refer to government-to-government. Consequently, the mechanism is

- Compulsory: the parties are bound to accept the jurisdiction of WTO DSB as by being part of the organization they directly show their acceptance and consent to the jurisdiction of DSS.
- Exclusive: according to article 23 of DSU parties are obliged to bring any cases and disputes that arose in the context of WTO agreements to the WTO DSB. DSU ensures the exclusivity of the system and protects the organization and parties from unilateral conduct.
- Contentious: the DSB does not provide advisory opinions.

Scope of jurisdiction

The WTO dispute settlement system questions not only cases where conflict arises based on the dispute, additionally DSB deals with measures that are breached. Article 1.1 of DSU identifies the scope of jurisdiction of WTO DSS. It refers:

The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements').

Correspondingly, the scope is range and wide as Appendix 1 of the DSU includes WTO Agreements, the GATT 1994, all multilateral agreements on trade in goods, GATS, TRIPS Agreement as well as the plurilateral Agreement on Government Procurement. As measures under the WTO also range from sanitary measures, measures concerning subsidies, custom duties, and market access for services, and IP rights enforcement measures, sometimes it becomes difficult to find boundaries of the scope of application. Furthermore, hardness is because of the undescribed term of measure, specifically the term measure(s) noted in DSU over 25 times, but there is no concrete definition of it. But there is a general understanding that notes that:

[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.

Key features

The main aim of the DSS of the WTO is to keep the balance between the rights and obligations of the member states and in case of presence, promptly solve the disputes under the law of organization for providing security and predictability to them. DSB and system is the most important part of the organization that provides security and predictability of the multilateral

trading system. The importance of this body in the organization is built over the years up to date due to its features that are:

- Single body: previously each GATT agreement was its own dispute settlement system with its own jurisdiction that can question specific disputes subject to the specific agreement. However, DSU questions all disputes subject to covered agreements of member states and provides a single DSS. Some disputes in case of the presence of differences in the rules and procedures of the DSU can apply additional rules and procedures under the covered agreement for dealing with specific particularities of the case.
- Range of methods: The dispute settlement system of the organization offers various methods of solving conflicts between members. The frequently used, main ones and the stages are consultation and adjudication respectively. Adjudication is referred to the panel body and can be appealed to the Appellant Body that ruled under articles 6 to 20 of DSU. Additional ways of dispute settlements are arbitration and good offices conciliation and mediation. However, in case of deciding the solving the case under Article 25 agreement of additional provisions and acts are required.
- Multilateral system: one of the main aims and objectives of the dispute settlement system is to solve the conflicts between member states through multilateral procedures of DSU instead of using one single action.
- Acceptable solutions: DSS starts solving dispute through consultations or attempt to consultation. The system prefers to solve conflicts through negotiations rather than adjudication. This attempt justifies with time and cost advantages of the system which helps to keep friendly relationships longer. Additionally, the result of consultation is also compulsory and mutually acceptable.
- Remedy: According to DSU, three remedies are available in case of breach of WTO law or agreements. One of them is the withdrawal of the WTO inconsistent measure that is a final remedy, and the other two are considered temporary remedies. They include compensation and suspension of obligation. However, none of them can be used as an alternative to each other.

Institutions

Regarding the conditions of the disputes, agreement between parties, and their preferences the dispute can be subject to one or other institution. Mainly WTO DSS is divided into parts: political institutions that include a Dispute Settlement Body that plays still important role in the system and judicial type of institutions that include a panel and Appellant Body. Depending on the terms and conditions the dispute can also require the intervention of the institutions, bodies, and people to the settlement of the dispute.

- Dispute Settlement Body: in short DSB can be described as an alter ego of the General Council of the WTO. In case the parties are willing to solve the dispute through the General Council of the organization they can address DSB, as the General Council has a right to establish a chairman, rules, and procedures attached to the solving of specific disputes in the boundaries of DSU. Furthermore, DSU defines the rights and obligations of the DSB stating:

Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

However, all the decisions are made by consensus, and even the General Council is in priority.

- Panels: panels are ad hoc institutions where the first step of adjudication begins. It is the contemporary body that will be established for solving specific disputes and dissolved after accomplishing the task. The main obligation of the body is to help DSB in discharging its responsibilities. For establishing the panel critically important document for WTO is required named panel request that defines the scope of dispute that will be used to notify the respondent and the third body about the nature of the case. This document is vital and must be sufficiently clear and sufficiently precise, as without the correct fulfillment of it the panel can be not established. Article 6.2 of the DSU requires the panel report to be in writing and indicate the presence of consultation, specific measures at issue, and briefly summarize the legal basis of the dispute. Providing reasons for the inconsistency of the WTO law to the present problem. In the next step, the composition of the panel occurs where 3 experienced, independent governmental and non-governmental individuals will be collected to solve the dispute. Correspondingly, the Secretariat of the WTO will help the panel on technical issues such as legal, historical, and procedural matters. In case of special occasions, such as the requirement of advice from specialists in specific areas panelists can get advice from experts. After the establishment of the panel within 20 days the parties agree on the terms and conditions, add new ones if needed, and start to comply with its duties under article 11 of DSU. After the finish of the case the panel submits a written report to the DSB where the findings of the fact, applicability of the relevant parts of the law, and the decision, specifically recommendations it made will be mentioned.
- The Appellant Body: mainly international dispute settlement mechanisms do not provide the opportunity to appeal the case after solving the dispute in specific terms, but WTO established the Appellant Body in February 1995 to hear appeals from panel's reports. The Appellate Body is a standing institution that consists of 7 members who are judges. Article 17 of DSU in the relevant part states the requirements of the members of AB. From the statute, it becomes clear that the persons must be experts in the field of WTO law who can solve the issue and legal interpretation of it that are provided in the panel report. Members are appointed by DSB for 4 years by consensus with the chance of being renewed once. The case will be heard and decided by members of 3 that are chosen by way of rotation. The decision in AB will be made by consensus, if it is not reached according to working procedures it will be decided by majority vote. Additionally, one of them selected among 7 holds the position of Chair who controls the overall direction of AB, internal functioning, and other duties if it is entrusted or agreed upon. Article 17 of DSU deals with the scope of AB cases. It notes that only parties to the dispute can appeal the case to the AB. Furthermore, it states in the relevant part:

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

This narrows the scope of application of AB and in case of non-existence of certain law or legal interpretation, the AB does not take the case, specifically if the subject of the case is the issue of fact.

AB can uphold, modify, and reverse the findings of the panel. When the AB agrees with the decision and procedural matters and the reasoning of the panel it upholds the case fully. If the institution agrees with the decision but not with the reasoning it modifies the case and the case is reversed when the body finds an incorrect solution to the case. Finally, the AB report will be provided to DSB as penal in written form.

- Other entities: as noted above in specific circumstances some experts in specific fields and technical support may be required. Such people are considered as additional entities who are involved in dispute settlement mechanisms. Additionally, arbitrators under relevant articles of the DSU Chair of the DSB and General Director are also official additional helpers of this process.

The process of the DSS is provided in Appendix 2

DSU for developing states

The authorities recognize the difference between developed countries and developing states and their possibilities. So to make a more equal and favorable nature of dispute settlement mechanism DSU contains some special provisions for developing states. Such rules can be found in article 3.12 which allows developing states to complain to developed states on treatment not less than them. Additionally, DSU is responsible for paying special attention to the needs and interests of developing countries. For this reason, developing country has a right to request a panelist who is also from developing states and can understand the problem and needs of it. In the context of time, the legislation allows the use of a longer period for the establishment of consultation in Article 12.10 of the DSU. In the same article, part 11 indicates that developing states are responsible for mentioning differential and more favorable treatment in the panel's report. Measures affecting the interest of developing states that was the result of a decision of dispute settlement must be also considered carefully and DSB if required must consider further attempt that would be appropriate for the Member States. Furthermore, the least developed countries also benefit from these advantages in legislation. Additionally, specific assistance was mentioned in articles 24 and 27 of DSU. It includes special additional legal advice on the matter of the case or the procedural sequence of the settlement mechanism.

Conclusion

The dispute settlement mechanism of the World Trade Organization differs from other institutions dealing with the solution of conflict between 2 parties. As the subjects of the organization are the states, the dispute settlement mechanism also deals with cases between governments even main actors are private entities or big enterprises. For this reason, it is important to understand key features and scope of jurisdiction of the mechanism with privileges that the DSS offers for developing states in order to accomplish the aim of the organization. The main purpose is to make an equal and favorable environment for trade all over the world.

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