



The WTO Dispute settlement: Jewelry of the Crown?

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Questions to be addressed

- ▶ What is international dispute settlement, or international adjudication? why we need it? To what extent do we need it?
- ▶ How the trade disputes can be solved? What facilities/access we have? What facilities we do not have?
- ▶ How effective the current system is? What are the latest development in the field?

Two-Day Guided Tour

▶ Day I : foundational introduction

The evolution of DS at the WTO: where does the WTO DSM come from?

The basics of the WTO DS: how to litigate at Geneva?

▶ Day II : advanced assessment

The DS at the WTO system: success, crisis and plans ahead

The WTO DS at international adjudication: pluralism and forum shopping

The context: the rise of international adjudication

- ▶ Major international adjudicators: ICJ, ECHR, EUCJ, WTO, ITLOS...
- ▶ Common feature shared among International adjudicators/courts and tribunals
 - adjudicators BASED ON the treaty system
 - Independent third-party adjudicators: ad hoc panel vs. permanent institutions
 - Legal adjudication vs. diplomatic negotiation
- ▶ The foundation of establishment: states' consent (why states agree to do so?)
 - With more certainty;
 - With more accurate timeframe.
- ▶ “Operation handbook”: mandate

Statute of International Court of Justice; WTO Dispute Settlement Understanding;

The Origin of WTO Dispute Settlement

FROM GATT 1947 TO THE WTO

The Origin from the GATT 1947

- ▶ No specific legal document except Article XXIII:2 GATT (Nullification or Impairment)
- ▶ the very early years: rulings of the Chairman of the GATT Council
- ▶ later: working parties composed of representatives from all interested contracting parties (GATT members)
- ▶ Finally: panels made up of three or five independent experts
- ▶ structural weakness of GATT panels: positive consensus decision making
 - Losing party can block the adoption of the report;
 - Short term vs. long term interests of the losing party;
 - Negative impacts: not bringing the dispute by the complainant; panel's concern over blockage

Institutions of WTO dispute settlement

Political institutions (DSB) + adjudicatory institutions (1st + 2nd trials)

Dispute Settlement Body (DSB)

WTO General Council with “another hat”

System administration

establishment of panels

adoption of reports and

authorization of compensation

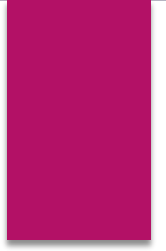
Two-tier system: ad hoc panel + the Appellate Body

“Operation manual”: Dispute Settlement Understanding (the WTO DSU)

From the GATT 1947 to the WTO: major change of dispute settlement

- ▶ Establishment of the appeal mechanism
 - Permanent organ/institution
 - 7 members/judges in total
 - 3 members for each “chamber”
- ▶ Negative consensus
 - Wide application to most major issues: adoption of the report; authorization of compensation
 - Blockage agreed by the entire membership
- ▶ Enforcement of the reports/judgments
 - Enforcement being monitored by the DSB
 - Available “**compensations**”

The Basics of WTO DSM



General aim and purpose

- ▶ Article 3.2 DSU

The dispute settlement system of the WTO is a central element in **providing security and predictability to the multilateral trading system**. The Members recognize that **it serves to preserve the rights and obligations of Members under the covered agreements**, and **to clarify the existing provisions of those agreements** in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The job of the panel: what does the panel do and how to do it

- ▶ Jurisdiction: what dispute could the panel/WTO dispute settlement adjudicate?

Article 23 DSU

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they **shall** have recourse to, and abide by, the rules and procedures of this Understanding.

MEANING: **exclusive** and **compulsory** jurisdiction

- ▶ Standard of review: how dispute could be adjudicated?

Article 11 DSU

“...Accordingly, a panel should make an objective assessment of the matter before it, including **an objective assessment of the facts of the case** and **the applicability of and conformity with the relevant covered agreements,...**”

MEANING: **fact finding** and **legal analysis** based on **objective assessment**

The job of the AB: what does the AB review and how to review it

- ▶ Scope of appeal: what matter could be reviewed from the panel report?

Article 17.6 DSU

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

NO fact finding review function.

- ▶ Outcome of appeal: what can be the result of appeal?

Article 17.13 DSU

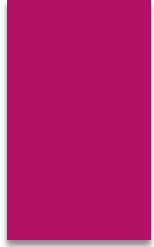
The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

NO power to remand.

- ▶ Who is conducting the review: the selection of the AB members/judges

Article 17.3 DSU

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO.



Interpreting the WTO agreements



Interpreting the WTO agreements

▶ Article 3.2 DSU

The Members recognize that it serves... to clarify the existing provisions of those agreements in accordance with

customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations

provided in the covered agreements.

▶ Customary rules of interpretation of public international law: **Articles 31 – 32 Vienna Convention on the Law of Treaties**

▶ No adding or diminishing members' rights and obligations

- Division between judiciary and legislator
- Defining the boundary of the delegated authority in treaty clarification

Articles 31 – 32 VCLT

▶ Article 31, GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with **the ordinary meaning** to be given to the terms of the treaty in their **context** and in the light of its **object and purpose**.
2. The **context** for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

▶ Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, **in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 : (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.**

Evolutionary interpretation: *US – Shrimp*

▶ What is evolutionary interpretation

- the meaning of the term in the agreement might evolve over time since the time when the term was written into the agreement;
- Interpreting negotiated terms not based on their meaning at the time of negotiation, but rather on evolving perception of the contemporary concerns of the international community

▶ Why evolutionary?

- The text of GATT dates back to 1947;
- Significantly changing and changed circumstances (international, domestic, social, cultural, environmental...)

▶ *US – Shrimp* case

- Whether "exhaustible natural resources" Article XX (g) covers living renewable resources, e.g. turtles
- The term exhaustible natural resources were crafted more than 50 years ago and must be read in the light of contemporary concerns of the community of nations about the protection and conservation of the environment which was also mentioned in the preamble of WTO Agreement as an objective.

Compliance of unfavorable reports

SANCTION?
COMPENSATION?
ENFORCEMENT?

What if you lose the case?

Hierarchized solutions for WTO disputes

- ▶ General aim of DSM is to **secure a positive solution to a dispute**
- ▶ Most preferred: **mutually acceptable solution**
- ▶ 2nd best: to secure the **withdrawal of the inconsistency**
- ▶ 3rd option when immediate withdrawal is impossible: **compensation**
- ▶ Last resort: **retaliation**

What if you lose the case?

Hierarchized solutions for WTO disputes

- ▶ Final remedy vs. temporary remedy
 - Final remedy/ultimate solution of a WTO dispute: mutually agreed solution + removal of the inconsistency;
 - Temporary remedy applies while pending for the final remedy.
- ▶ Compensation: **mutually acceptable compensation by the end of reasonable period** (Article 22 DSU)

Voluntary (the complainant is free to accept or reject); forward looking (prospective only not retrospective)

- ▶ Retaliation: **the very last resort** (Article 22 DSU)
 - The right of the complainant to suspend its concession or other WTO obligations towards the respondent
 - In the same sector or another sector under the same agreement or under another covered agreement

Enforcement “Drama”

Brazil Cotton case

- ▶ Competition between U.S. and Brazil on exports of cotton products;
- ▶ U.S. Subsidy scheme on cotton products
- ▶ Unfavorable WTO reports against U.S.

US Gambling case

- ▶ Antigua was banned from providing online gambling services into U.S.
- ▶ U.S. ban on online gambling was found in violation of WTO

What if you lose the case?

To sum up

- ▶ Legal effect of adopted reports: *de jure* vs. *de facto*
Binding between disputants vs. establishing precedence
- ▶ Immediately compliance vs. Reasonable period of time for implementation (Article 21.3 DSU)
- ▶ Surveillance of enforcement by the DSB (Article 21.6 DSU)
- ▶ Compensation or retaliation: temporary/not preferable measures available after the reasonable time of implementation (Article 22.3 and 22.6 DSU)
- ▶ Disagreement on the compliance (Article 21.5 DSU)
 - Not uncommon to have different opinion between disputants on the compliance
 - Compliance panel: recourse to the original panel

Perfect or damaged jewelry?

- ▶ Forward-looking compensation

Basic public international law principle on state responsibility: stop the wrongful act + reparation for the injury caused

- ▶ Time consuming

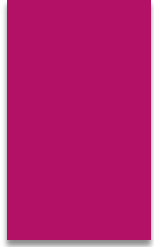
Longer period for dispute settlement: a three-year or longer “free pass” to implement illegal protectionist measures while litigation drags on

- ▶ Developing country disadvantage when winning a case over economic power

Pillar industry with lasting injury from foreign country with no space to retaliate

- ▶ Private sector non-involvement

No attention paid to the traders and producers that have suffered; cross sector retaliation makes no economic sense



Dispute Settlement at the WTO system

SUCCESS, CRISIS AND PLANS
AHEAD

De facto precedent

- ▶ Common law system: grant de facto authority to the previous judgments
- ▶ The previous AB reports are treated with binding effects, particularly the interpretation of the WTO rules
- ▶ De facto vs. de jure
- ▶ US – Stainless Steel (Mexico) (2008)

absent 'cogent reasons', an adjudicatory body will resolve the same legal question in the same way in a subsequent case

Judge-made procedural issues

▶ Participation of private legal counsel

- Question arises in *EC – Bananas*: whether private legal counsel may represent disputing party?

- in the GATT practice prior to 1995, only government officials could represent parties and third parties.

▶ Amicus Curiae brief

1. Question arises in *US – Shrimp*: Whether the panel and the Appellate Body have the authority to accept and consider written briefs from individual companies or organizations.
2. Article 13 DSU to seek information and technical advice;
3. Article 12 DSU to develop their own working procedure.

Legitimacy challenges: judicial overreach of the AB

- ▶ 2018 November 12 major members : European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico
- ▶ Time limits of 90 days
- ▶ The meaning of domestic law as law or fact

Treatment of domestic (or 'municipal') law as a legal issue subject to Appellate Body review

- ▶ The issue of precedent

The Appellate Body “Crisis”: from the surface

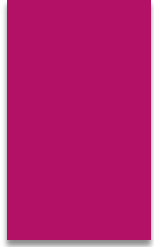
- ▶ The selection of AB members: positive consensus
- ▶ THREE AB members are required for each appeal
- ▶ Each member has four-year office term
- ▶ US’ blockage of nomination of AB members started in 2016
- ▶ The office of the last AB member expired in 2020; currently no AB members
- ▶ Now “appealing into the void”; previously more than 60% panel reports were appealed.

Interim solution for the crisis: Multi-Party Interim Appeal Arbitration Arrangement (MPIA)

- ▶ Legal Basis: Article 25 DSU
- ▶ Pool of ten standing arbitrators
- ▶ Original parties: European Union (EU), China, Mexico, Canada, Switzerland, Colombia, Singapore, New Zealand, Chile and Brazil
- ▶ Currently 26 WTO members are parties to MPIA

MPIA: temporary arrangement or trial of something new?

- ▶ Two finalised disputes; seven ongoing disputes (first report issued July 2022)
- ▶ As occurred in *Turkey —Pharmaceutical Products*, WTO Members (though not both MPIA participants) may also decide ad hoc, in one or more specific disputes, to enter into Article 25 appeal arbitration using all or part of the MPIA rules and/or pool of arbitrators.
- ▶ Consent confirmation case-by-case; procedural flexibility and reforms



WTO Dispute Settlement at international adjudication

PLURALISM AND FORUM
SHOPPING

Co-existence of int'l economic DSM

- ▶ Trade treaty - / agreement -/regime – specific DSM
- ▶ Separate jurisdictions; applying treaty - / agreement -/regime – specific rules; with or without access for private stakeholders
- ▶ Substantial similarity among applicable rules (on economic integration/free trade)

Forum diversion: dysfunction of the Appellate Body

- ▶ 24 notice for appeals (Sep 2018 – Dec 2021) not handled
- ▶ Canadian tariff quota : a tariff-rate quota over 14 dairy products
 - U.S. dairy complaint against Canada under the USMCA
 - CPTPP NZ vs. Canada

Forum shopping: serial/repeated litigations

EU anti-dumping duties on bedlinen

- ▶ EU – Bed linen, WTO
- ▶ Ikea Wholesales case, EUCJ

Canadian subsidies for softwood lumber

- ▶ Several WTO disputes between U.S. and Canada
- ▶ A number of NAFTA panels requested by U.S. lumber makers

Explaining serial disputes

- ▶ Common regulatory theme on economic integration and market access
- ▶ Discipline convergence among economic regimes
- ▶ Different access for private parties
- ▶ Different remedies offered at each forum

Plurality of fora for dispute resolution: Blessing or curse

Curse?

- ▶ Forum shopping
- ▶ Inconsistent decisions
- ▶ Repeated and serial proceedings

Blessing?

- ▶ Access to justice for a wider group of interested parties
- ▶ Repeated judicial elaboration of often disputed issues