Analyse the World Trade Organization’s Dispute Settlement Understanding (WTO’s DSU)
GENERAL INTRODUCTION

The World Trade Organisation (WTO) regulates trade amongst members. It has a framework for negotiation and completing trade agreements. It also has a dispute mechanism aimed at enforcing compliance to WTO agreements. 1 The Uruguay Round of 1986-1994 on previous trade negotiations has piloted the Doha Round which gives room for equal participation. However, the rounds controversial causing great disagreement especially amongst exporters of agricultural goods and primitive farmers depending on subsistent methods. 2

Most dispute settlement procedures under the General Agreement on Trade and Tariffs (GATT) and the World Trade Organisation (WTO) stemmed from previous dispute settlement behaviour and were later codified in 1966, 1979, 1982, 1989, and 1994 as a result of their short comings. 4 The compulsory jurisdiction in the WTO Understanding on Rules and Procedures governing the settlement of disputes (DSU) guarantees interpretation of existing provisions of agreements according to customary rules of Public International law (Article 3.2 Dispute Settlement Understanding) and provides quasi judicial powers to World Trade Organisation dispute settlement bodies. 5

1. Figure 1 MAP-WTO FOUNDING MEMBERS AND OTHER MEMBERS

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1 www.wikipedia.org
2 Ibid.
3 www.wto.org
5 Ibid, p. 38.
6 www.wikipedia.org, WTO original members in dark green and later members in light green.
The World Trade Organisation has a membership of 153 and some 30 non members on the wait. This total make up about 95% of total world trade. In 1994, WTO members agreed on the Understanding on Rules and Procedures governing the settlement of disputes known as the Dispute Settlement Understanding (DSU) and annexed to the Marrakesh text (Final Act) of 1994. The Dispute Settlement process of the WTO include the DSB panel, the Appellate Body, the WTO Secretariat, Arbitrators, Independent Experts, Specialised Institutions, Council and the office of the Director General.

The WTO which replaced General Agreement on Trade and Tariffs broadens and improved the Rules and Procedures for the settlement of Disputes contained in the Dispute Settlement Understanding (DSU).

According to Pawarit Lertdhamtew,

“One of the more controversial and contentious issues among WTO members with respect to WTO dispute settlement is the issues of amicus curiae briefs submitted to the panel or the Appellate Body by Non-Governmental Organisations (NGOs) or other entities that are not a party or third party to the dispute. Specifically, the amicus curiae submissions enable those players to provide information on different aspects of the dispute to enable the panel or the Appellate Body in proceedings to decide the matter appropriately. However, the question of the admissibility of amicus curiae briefs in WTO proceedings is highly unclear. As the Appellate Body has observed neither the DSU nor the Working Procedures specifically address this issue.“

The Amicus Brief introduced in the WTO-DSU enables the Panel and Appellate Body to decide matters appropriately and seen by Article 3.2 of the DSU as a central element endorsing security obligation for members under WTO agreements.

For Robert E.Hudec,

“The success of the World Trade Organisation dispute settlement system is based on three main factors.

- The World Trade Organisation (WTO) dispute settlement system represents a vast improvement over GATT dispute settlement system.

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1 [www.wikipedia.org](http://www.wikipedia.org)

2 Ibid.

3 Ibid.

4 Thailand’s Law Journal 2009, issue 2; vol. 12.


5 Ibid
• The new system has produced a rich body of ever-expanding jurisprudence—both with respect to procedural rules and the substantive obligation under the various World Trade Organisation agreements.

• Lastly, there is broad-base confidence in the system on the part of World Trade Organisation members as evidence by its frequent use by developed and developing countries.\(^1\)

Robert E.H went further to say:

“Under GATT, decision making was slow and could even delay for years. It also permitted contracting parties to block the establishment of panels as well as the adoption of panel reports because all had to be achieved through consensus. The GATT system was more responsive to the strong than the interest of the weak. These weaknesses helped the drafters of the Dispute Settlement Understanding to make improve on the new system. Under the Dispute Settlement Understanding procedure, it is no longer possible for parties to block the establishment of panels or the adoption of reports unless there is a positive consensus to do so. Whereas under GATT one needed a consensus in order to establish a panel or adopt a report, under WTO, one needs a consensus against doing so”\(^1\)\(^2\)

WTO now has 27 provisions governing dispute settlement in general, which are contained in the DSU and several special rules found in other WTO agreements as opposed to Articles xxii and xxiii under GATT.\(^2\) This has provided for a more rules based than power based participation. The establishment of the Appellate Body—creating the automatic right, without leave, to appellate review forms a major evolution in the DSU process.\(^3\) The number of cases to date and especially from developing countries is an indication.

The WTO dispute settlement system has jurisdiction over any dispute between WTO members arising under any of the covered agreement as per Article 1.1 of the DSU. The object of a dispute is viewed in legal terms depending on the content of the agreement.\(^4\)

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\(^1\) Robert E. Hudec, International Trade Law.

\(^2\) Ibid.

\(^3\) www.wto.org, WTO analytical index: Guide to WTO Law and Practice—Understanding on Rules and Procedures Governing the Settlement of Disputes Appendixes 2 to the DSU on special or additional dispute settlement rules and procedure.

\(^4\) Ibid, Annexes to Article 1.1 of the DSU.
Article 31(1) of the Vienna Convention says a treaty must 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.’ ¹ The Appellate Body emphasized that the provisions of the Marrakesh agreement must be read in line with public international law, customary international law and treaty agreements. ²

2. DISPUTE SETTLEMENT PROCESS

Appendix I of the WTO Dispute Settlement Rules – Articles 1-27 governs the rules and procedures in the settlement of disputes. These ranges from the administration of disputes in relation to rules and procedures as per Article 2. Members resolve to strengthen consultations–Article 4. The use of the Good office of the Secretary General in the form of Conciliation and Mediation by parties concern –Article 5. The establishment of panels–Article 6. The right to confidentiality–Article 14. Interim review stage and adoption of Panel Report–Articles 15 and 16. Appellate review by the standing Appellate Body, procedure for review, adoption of report–Article 17. Communication with the panel or Appellate Body and Recommendation–Articles 18 and 19. Time- frame for the DSB and surveillance of implementation of recommendations and ruling–Articles 20 and 21. Compensation and the suspension of concessions–Article 22. Arbitration–Article 25 and Article 26(1), (2) which deals with non-violation of complaints of the type described in paragraph 1(b) of Article XXIII and 1(c) of GATT 1994. ³

Figure 2 World Trade Organisation Partial working organigram

¹ Vienna Convention, Article 31(1) p. 12.

² Agreeing and implementing the Doha Round of WTO by Harald Hohmann Ch. 13, p.294.

³ WTO Dispute Settlement Understanding (DSU), a detailed Interpretation; Appendix I –P. 343-369 by Yang Guphua, Bryan Mercurio and Li Yongjie (Kluwer LAW International).

⁴ WTO in Perspective by Razeen Salley: Trade Politics 2nd Ed. By Brian Hocking and Steven McGuire.
3. A REPRESENTATION OF DISPUTE SETTLEMENT PROCESS

Consultations (Article 4)

Panel Established (Article 6)

Terms of Reference and Composition (Article 7, 8)

Panel Examination (Article 10, 12)

Interim Review Stage

Report sent to parties for comment (Article 15)

Panel Report

Sent to parties and DSB (Article 12)

DSB Adopts panel/Appellate reports

Including changes to panel report made by Appellate Board (Article 16, 17)

Implementation (Article 21)

Compensation

In cases of non-implementation pending full implementation (Article 12)

Retaliation (Article 22)\(^1\)

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\(^1\) Trade Politics, 2\(^{nd}\) By Brian H. and Steven M. Chap. 8, p.121; fig. 8.1 (understanding the WTO dispute settlement process) by Donna Lee.
• The process begins when a member believes it is a victim of violation of World Trade Organisation trade rules and request consultations. This stage is best described as the diplomatic phase involving bilateral consultations to try to solve the dispute. WTO work in the back at this stage providing ‘good office, consultation and mediation’ and functional information on the legal context of the dispute in order to encourage settlement. 1

• In the second phase, the Dispute Settlement Body creates a panel to settle the dispute. 2

• The third stage involves information gathering, mediation, and reporting over a period of between six and nine months. The Panel meets with the parties to the dispute including third parties to hear arguments and where necessary collect information from external bodies (Article XI). 3

• In the fourth stage, the panel submits its report which must then be adopted by the DSB within sixty days unless one of the parties makes an appeal or unless the DSB decides by a consensus not to adopt (Article XVI:4). Only parties to the dispute and not third parties can appeal the panel report. Appeals are also limited to issues of law covered in the panel report (Article XVII: 6). Appellate review within 60-90 days (Article XVII: 1). Appellate review is adopted by the DSB and must be ‘unconditionally accepted’ unless there is a consensus in the Dispute Settlement Board not to adopt (Article XVII: 14). 4

• The last and final stage is the DSU process. The Dispute Settlement Board acts to ensure compliance with the report or authorizes some means of compensation. The DSB scrutinizes compliance with the recommendations of the report and in case of non compliance, and then Article XXII of the DSU gives the plaintiff the right to demand compensation, retaliation against the offending member. See case of United States of America against the European Union over beef hormones where the DSB rules in favour of the USA in May 1998 and because of non compliance by the EU, DSB authorized retaliatory tariffs worth $116.8. 5

4. **THE EFFECTIVENESS OF THE DSU IN DISPUTES RESOLUTION.** 1

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1 Trade Politics 2nd ed. By Brian Hocking and Steven McGuire (Understanding the WTO dispute settlement process- The judicialisation of dispute settlement by Donna Lee) p. 122.

2 Ibid, p. 123.

3 Ibid.

4 Ibid.

5. **Improvement of the DSU process over the GATT**

- Decision making by “negative consensuses”.
- Time limits introduced at every stage of the process.
- Automatic establishment of panel.
- Automatic adoption of Appellate Report.
- Standard terms of reference for panels and Appellate Reviews.
- Creation of an appeals process.
- Strengthening of the implementation of Reports.
- Provision of compensation and retaliation measures in the event of non-compliance. 1

Isikeli Mataitoga says;
“Under the WTO system the blockage of panel reports hardly occurs and hence the threat of “aggressive unilateralism” has been minimised. There is also a timeframe for each and every stage of the legal process”. He went further that;
“Delaying tactics which were a feature of the General Agreement on Trade and Tariffs system are now virtually impossible under the WTO system. In effect, the principle of ‘negative consensus’ means that a wronged member can expect to receive compensation within a year to eighteen months”. 2

Important to the WTO dispute settlement system is the introduction of Appellate Review of panel decisions. This has enhanced the enforcement of all commitments and ensures greater confidence in the quality of legal finding. 3

**SOME CASES**

- The India-Quantitative Restrictions on India BOP restrictions under Article XVIII: B of the GATT 1994. 4

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1 Trade Politics 2nd Ed. By Brian Hocking and Steven McGuire (The WTO Dispute Settlement process by Donna Lee) p. 125.

2 Isikeli Mataitoga, WTO/DSU a developing country perspective.

3 Ibid.

The Appellate Body on Guatemala-Cement on the relationship between Article 17 of the Anti-Dumping Agreement and the Rules and Procedures of the DSU. ¹

India-Patent (US) on the interpretation of various provisions of the TRIPS agreement. ²

Article 1.1 of the DSU has established an integrated dispute settlement mechanism applicable to all agreements under Appendix 1 to the DSU. ³ This means all arrangement between member states which fall within these arrangements will be dealt with in the DSU. The DSU has established a framework where members seek redress where another member has failed in her obligation and within which remedies for the breach can obtained. ⁴ The Dispute Settlement Understanding has been a success and serves as a guide for the interpretation of WTO obligations with a high rate of compliance. ⁵

The success of the Dispute Settlement Understanding has been a great relieve to member countries because it sets a clear change of direction in relation to the Old GATT process where the stronger party to a disputes determines the tune of the procedure and time frame.

However, despite the now flexible nature on the operation and functioning of the Dispute Settlement Understanding, there are still however some short comings with relation to developing countries. For these countries, the cumbersome process embodied with too much expertise demand is not cost effective; this is because

1. The whole procedure demands a lot of human resource in terms of experts and infrastructure which are lacking,

2. The huge financial burden that goes in hiring foreign experts and logistic at times may frustrate or delay a procedure,

3. Lack of important information and coordination is also a great problem.

¹ www.wto.org WTO analytical index: Dispute Settlement Understanding - Understanding on rules and procedures governing the settlement dispute.

² Ibid.

³ Ibid.

⁴ Agreeing and implementing the Doha Round of the WTO  by Harald Hohmann (Reforming the DSU by Wolfgang Weiss) Ch. 12, p. 269 and 270.

⁵ Ibid, p.270.
Conclusion

The diagram above represents on percentage in relation to complaints by member states and regional organizations. This is an indication on the confidence building in the WTO-DSU system. Although The United States of America and the European Union form a greater chunk percentage wise, the continues growing number of complaints from developing countries is an indication of greater participation. To the World Trade Organisation, these are positive signs as to its credibility and confidence building on both sides of the geographical distribution. This makes Article 3.2 of the Dispute Settlement Understanding of prime importance and even considered as the “central element” in providing security obligations under the World Trade Organisation agreements. Any violation complaint under any Article of GATT 1994 can now be directed against anything that might violate those provisions. In this case, the Panel will assess violation and invoke jurisdiction to redress the situation.

1 VIKAS NANJUNDAPPA MAHENDRA. Emle Thesis on Law and Economics August 10th, 2009
2 www.wto.org
3 Ibid.
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