WTO Dispute Settlement System: The “Crown Jewel” in the Fog

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Outline

• Introduction
• Key features of the dispute settlement system
• The nature of the disputes and the disputants
• The ongoing crisis
The WTO deals with the rules of trade between nations.
It was established in 1995 (replacing the GATT) and currently has 164 Members.
Its functions include: facilitating the implementation of WTO agreements; providing a forum for negotiation; providing technical assistance to developing countries; and resolving trade disputes.
The Dispute Settlement System (DSS) is the judicial arm of the WTO.
Key Features of the Dispute Settlement System

- Jurisdiction: compulsory, exclusive, and contentious (CEC)
- Access/standing: only WTO Members
- Remedies: only prospective remedies (no compensation for damages)
  - Withdrawal of the inconsistent measure
  - Compensation and retaliation
- Prompt settlement of disputes (Art 3.3 DSU)
- Preference to mutually agreed solutions (Art 3.7 DSU)
- Different methods of dispute settlement: consultations/negotiations, adjudication, arbitration, good offices, mediation and conciliation
Key Features

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.

DSU Art 3.2
Institutions

Legal Affairs Division and Appellate Body Secretariat
The Dispute Settlement Body (DSB)

- Composed of all WTO Members
- Establishes panels, appoints ABMs, adopts Panel/AB reports; monitors compliance with Panel/AB decisions, authorizes retaliation, etc.
- Takes decisions by ‘reverse consensus’!
Panels

- First instance
- Works on ad hoc basis
- Established by the DSB
- Composed of three qualified individuals appointed by the parties or by the WTO Director-General
- Independent and impartial!
**Appellate Body**

- Appellate review
- Permanent body
- DSU Art. 17(1) “shall be composed of **seven** persons, **three** of whom shall serve on any one case”
- ABMs are appointed for the term of four years (renewable only once)
- Broad representation of the WTO membership
- Independent and impartial!
Dispute Settlement Process

- Consultations (Art. 4)
- Panel established by Dispute Settlement Body (DSB) (Art. 6)
- Terms of reference (Art. 7)
  Composition (Art. 8)
- Panel examination
  Normally 2 meetings with parties (Art. 12),
  1 meeting with third parties (Art. 10)
- Interim review stage
  Descriptive part of report sent to parties for comment (Art. 15.1)
  Interim report sent to parties for comment (Art. 15.2)
- Panel report issued to parties
  (Art. 12.8; Appendix 3 par 12(j))
- Panel report issued to DSB
  (Art. 12.9; Appendix 3 par 12(k))
- DSB adopts panel/appellate report(s)
  including any changes to panel report made by appellate report (Art. 16.1, 16.4 and
  17.14)
- Implementation report by losing party of proposed implementation within 'reasonable period of time' (Art. 21.3)
- In cases of non-implementation parties negotiate compensation pending full implementation (Art. 22.2)
- Retaliation
  If no agreement on compensation, DSB authorizes retaliation pending full implementation (Art. 22)
  Cross-retaliation:
  same sector, other sectors,
  other agreements (Art. 22.3)
- Possibility of arbitration on level of suspension procedures and principles of retaliation (Art. 22.6 and 22.7)
- Dispute over implementation:
  Proceedings possible including referral to initial panel on implementation (Art. 21.5)
- Appellate review
  (Art. 16.4 and 17)
- Review meeting with panel upon request (Art. 15.2)
- Export review group (Art. 13; Appendix 4)
- During all stages
good offices, conciliation,
or mediation (Art. 5)
Number of Disputes
(as of 30 Sept. 2018)

Requests for consultations: 566

Source: own compilation
Number of Disputes
(as of 31 December 2017)

Source: WTO website
Findings of WTO Inconsistency

No violation
11%

At least one violation
89%

Source: Van den Bossche (2018)
Compliance with Recommendations and Rulings

No compliance
15%

Compliance
85%

Source: Van den Bossche (2018)
The Nature of the Disputes

Agreements at Issue

Source: Van den Bossche (2018)
The Nature of the Disputes

- US – Gambling
- EC – Bananas III
- US – Aluminum and Steel
- Australia – Tobacco Plain Packaging
- EU – Seal Products
- India – Solar Cells
Disputants

Complainants

<table>
<thead>
<tr>
<th>Income Level</th>
<th>No of cases initiated</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>115</td>
</tr>
<tr>
<td>EC / EU</td>
<td>100</td>
</tr>
<tr>
<td>Canada</td>
<td>38</td>
</tr>
<tr>
<td>Brazil</td>
<td>31</td>
</tr>
<tr>
<td>Mexico</td>
<td>24</td>
</tr>
<tr>
<td>India</td>
<td>23</td>
</tr>
<tr>
<td>Japan</td>
<td>23</td>
</tr>
<tr>
<td>Argentina</td>
<td>20</td>
</tr>
<tr>
<td>Korea</td>
<td>17</td>
</tr>
<tr>
<td>China</td>
<td>15</td>
</tr>
</tbody>
</table>

Source: Van den Bossche (2018)
Disputants

**Respondents**

<table>
<thead>
<tr>
<th>Income Level</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upper Middle Income</td>
<td>19%</td>
</tr>
<tr>
<td>Lower Middle Income</td>
<td>19%</td>
</tr>
<tr>
<td>Other High Income</td>
<td>14%</td>
</tr>
<tr>
<td>EU</td>
<td>19%</td>
</tr>
<tr>
<td>US</td>
<td>24%</td>
</tr>
<tr>
<td>Low Income</td>
<td>5%</td>
</tr>
</tbody>
</table>

**Table: No of cases defended**

<table>
<thead>
<tr>
<th>Member</th>
<th>No of cases defended</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>134</td>
</tr>
<tr>
<td>EC / EU</td>
<td>99</td>
</tr>
<tr>
<td>China</td>
<td>39</td>
</tr>
<tr>
<td>India</td>
<td>24</td>
</tr>
<tr>
<td>Argentina</td>
<td>22</td>
</tr>
<tr>
<td>Canada</td>
<td>22</td>
</tr>
<tr>
<td>Korea</td>
<td>16</td>
</tr>
<tr>
<td>Brazil</td>
<td>16</td>
</tr>
<tr>
<td>Japan</td>
<td>15</td>
</tr>
<tr>
<td>Mexico/Indonesia</td>
<td>14</td>
</tr>
</tbody>
</table>

*Source: Van den Bossche (2018)*
The Ongoing Crisis

- The number of Members has reduced from seven to three
  - Heavy case load and short timeframes
- Deadlock in the appointment and reappointment process
- Complaints against the Appellate Body
  - Judicial activism
  - ABMs serving after the expiry of their terms
  - Advisory Opinions (*Obiter Dicta*)
“The WTO, World Trade Organization, was set up for the benefit for everybody but us. They have taken advantage of this country like you wouldn’t believe.... As an example, we lose the lawsuits, almost all of the lawsuits in the WTO.... Because we have fewer judges than other countries. It’s set up as you can’t win. In other words, the panels are set up so that we don’t have majorities. It was set up for the benefit of taking advantage of the United States.”

Donald J. Trump (25 October 2017)
Thank you!

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- Popular blog - [http://worldtradelaw.typepad.com/](http://worldtradelaw.typepad.com/)
- Case Summary - [http://worldtradelaw.net/](http://worldtradelaw.net/)
- Popular podcast – Trade Talks