

THE WTO DISPUTE SETTLEMENT PROCEDURE AND THE PARTICIPATION OF THE DEVELOPING COUNTRIES

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The World Trade Organizationⁱ –WTO- legal order has an advanced dispute settlement system – compared to other mechanisms in international public law. It integrates diplomatic and non diplomatic stages and arbitration procedures with an efficient implementation of rulings.

The WTO dispute settlement was created as a response to the need to improve and complement articles XXII and XXIII of GATT 1947ⁱⁱ. The General Council, acting as the Dispute Settlement Body –DSB- plays a fundamental role to secure implementation of the rules and procedures, as stated in the Understanding on rules and procedures governing the Settlement of Disputesⁱⁱⁱ –DSU.

The system implemented from 1995 through the DSU aims to secure the rights of the Members under agreements covered by the WTO. Members recognize that one function of the DSU is to preserve their rights and obligations as well as the recognition that the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements^{iv}. In addition, with the purpose of constraining Members discretion to apply unilateral sanctions, the mechanism contemplates previous authorisation from the DSB for the imposition of compensatory and retaliatory measures.

371 disputes were submitted to the WTO between January 1st 1995 and February 7th 2008. Members have been highly engaged. From 1995 to April 23rd 2007, 134 disputes were submitted by developed Members against other developed Members whereas 86 were against developing Members. On the other hand, developing countries submitted 80 disputes against developed Members and 57 against developing Members^v.

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The United States, the European Communities, Canada and Japan are the most active Members among developed countries. Brazil and Argentina in South America, Mexico and Guatemala in Central America and India and Korea in Asia are the most active developing countries.

Mexico, Brazil and Argentina, among others, have designed their own institutional infrastructure and increased their specialized staff to manage WTO controversies. Nevertheless, it is important to highlight that developing and least developed countries have faced implementation of the DSU with scarcity or even complete lack of financial and human resources. The international cooperation plays a key role in this issue, through capacity building aimed to reduce inequality in the implementation of the DSU and the use of the system.

One characteristic of the DSU is its search for acceptable solutions for its Members. It is neither in the articles nor in the spirit of the mechanism to issue a 'condemnatory sentence'. 'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute' (article 3.7 DSU). It indicates explicitly that the use of the procedure 'should not be intended or considered as contentious acts' (article 3.10 DSU). In addition, it establishes a need for 'the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member' (article 3.3 DSU).

Another distinctive element of the procedure is its preference for mutually agreed solutions rather than the setting up of the *quasi legal* stage^{vi} (the privilege for diplomatic or negotiation mechanisms among the parties was inherited from GATT 1947^{vii}). However, if a mutually agreed solution cannot be reached and a Panel is established, the option of restarting negotiations remains existent throughout the procedure.

In addition, special rules have been incorporated for different cases, such as the intervention of least developed countries (article 24 DSU), the composition of the Panel in a dispute between a developed and a least developed country (article 8.10 DSU), and the acceleration of the proceedings in urgency cases, including those which concern perishable goods (article 4.9 DSU).

It is essential to indicate any dispute must be based on international trade and can only be submitted under the DSB by Members of the WTO. The rules and procedures to solve the disputes are well established in the DSU and must be founded on any covered agreements^{viii}.

The dispute settlement mechanism is a significant contribution from the Uruguay Round negotiations. The choice of numerous Members to defend their interests successfully under the system is proof of its acceptance and efficiency. The Panel and Appellate Body reports include the findings, resolutions and recommendations to be put into practice by the party that loses the case. Crucially, implementation of a ruling must respect the agreed timetable (an innovation introduced in the DSU).

The DSB authorization for compensation, suspension of concessions or retaliatory measures implies the imposition of constraints to the unilateral actions of more powerful Members and, at the same time, stresses the temporary nature of such measures. These measures do not authorize the persistence of the infraction - the main aim of the mechanism is to secure a positive solution to a dispute.

Even if the imposition of retaliatory measures (which were imposed arbitrarily in many cases before 1995) depends on the authorization of the DSB to prevent unilateral actions of powerful Members, it is imperative to recognize the existence of asymmetries among the parties in a dispute. This is evident in those cases where the successful complainant is a developing country and the respondent a developed country, with the latter refusing to apply the rulings after the DSB determines an infraction has occurred. For example in the dispute *European Communities- Bananas*^{ix} the US, Honduras, Guatemala, Ecuador and Mexico were complainants. Even when the reports confirmed the infractions by the EC, the EC refused to implement the rulings. In this situation, the DSB authorized the imposition of retaliatory measures by the complainants. However, only the US was able to impose them, because of the lack of power of the developing countries involved. Therefore, the disparity in the development level among the parties in the dispute can frustrate the expectations of a developing country to make a powerful Member follow its obligations under the WTO, given its lack of resources to impose retaliatory measures until the rulings are implemented.

In this sense, all the advances that can still be made to consolidate the objective of 'prompt compliance' of the rulings will provide a higher credibility and level of participation for developing countries.

However, the existence of asymmetries among the Members of the WTO has to be considered beyond the inclusion of rules that recognize explicitly the differences in development levels and include special and differential treatment. The WTO and developed countries have much to do on this subject: to increase their efforts to build human resource capacity in developing countries in order to avoid further widening of inequalities in their ability to draw on the system. In the past decade, universities in Argentina and Brazil have established interesting initiatives designed to disseminate information and educate students about the WTO rules and, in particular, the dispute settlement mechanism.

Therefore, the multilaterally agreed rules are instruments to further integrate countries into international markets. However, it is necessary to leverage these rules with the impact they have in the economic growth and development of the each country.

The current revision of these legal instruments - after 10 years of use - (for instance the revision of the DSU) is very important to prevent the recurrence of crisis or the abandonment of negotiation rounds. Additionally, it is imperative to evaluate and design strategies to overcome conflicts which threaten to lead to opposite positions in the negotiations, such as in agriculture. Evidently, the current legal frame in the WTO has improved the former existent in the GATT era. However, there is still much work to be done to make the system respond to the requirements and interests of the majority of the WTO Members, given that two-thirds are developing countries.

ⁱ To find more about the system created by the Marrakesh Agreement, see: Avila, A. M.; Castillo Urrutia, J.A. and Díaz Mier, M.A., (1994), *Regulación del Comercio Internacional tras la Ronda Uruguay*, TECNOS, Madrid; Culot H.(2005)., « Soft law et Droit de l'OMC », in *Revue Internationale de Droit Economique*, t.XIX, N. 3 , Editions de Boeck Université, Belgique, Díaz Mier (1996), *Del GATT a la Organización Mundial del Comercio*, Serie Economía Actualidad, Editorial Síntesis, Madrid, Jackson J. (1997), *The World Trading System-Law and Policy of International Economic Relations*, 2nd ed., Cambridge (MA), Londres, MIT Press.

ⁱⁱ For a revision of the dispute settlement procedure between 1948-1994 see Montaña Mora M.(1997), Chapter II in *La OMC y el reforzamiento del sistema GATT*, Mc Graw Hill, Madrid. It includes analysis of articles XXII and XXIII and the evolution of the system after the Tokio Round, as well as the Ministerial Declaration of 1982, the 1984 CONTRACTING PARTIES Decision, the Ministerial Declaration of 1986, the 1988 GATT Council Decision and the 1989 CONTRACTING PARTIES Decision.

ⁱⁱⁱ See Agreement Establishing the World Trade Organization, Articles III. 3 and IV.3.

^{iv} See DSU article 3. 2.

^v See 'Update of WTO Dispute Settlement Cases' Document WT/DS/OV/30 April 25th 2007.

^{vi} Pérez Gabilondo, José Luis (2004), analyses the coexistence of *Diplomatic Oriented* and *Rule Oriented* measures in the DSU in *Manual sobre Solución de Controversias en la Organización Mundial del Comercio (OMC) Principios+procedimiento+Práctica Argentina*, Universidad Nacional de Tres de Febrero Editions, Buenos Aires, pp. 54.

^{vii} Regarding the diplomatic procedure for dispute settlement during GATT 1947 see Hudec, R.(1970) "The GATT legal system: A Diplomat's Jurisprudence" in *Journal of World Trade*, num 4, pp. 615-655. Regarding the reasons because of the European Communities did not agree to negotiate a dispute settlement system which would not include power-oriented or diplomatic approach see Montaña Mora, op. Cit, chapter III, footnote n°8, pp.101.

^{viii} However, as stated in article 1 of the DSU, some multilateral agreements such as Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Agreement on Textiles and Clothing (ATC), Agreement on Technical Barriers to Trade (TBT) and others mentioned in Apendix 2 of the DSU, establish special or additional rules and procedures. If there is a conflict between the additional rules and procedures and those in the DSU, article 1.2 indicates that the additional rules and procedures shall prevail.

^{ix} See WT/DS27.