

THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WORLD TRADE ORGANIZATION: CONTINUITY AND CHANGE

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Abstract

There is a level of anxiousness to devise means of correcting the lapses existing under the current mechanism of settlement of international trade disputes through the Dispute Settlement Understanding of the World Trade Organization. This anxiousness not only intensifies the culture of fear about the unfair practices under the Dispute Settlement understanding processes, but they also increase demands for pressurizing the World Trade Organization to respond. This paper is therefore aimed at presenting a review of the problems inherent in the settlement of trade disputes using the Dispute Settlement Understanding processes. It raises the pertinent issue of continuity and change with respect to this Dispute Settlement Understanding. It is hereby argued that the Dispute Settlement Understanding is deficient and so, the processes and procedures adopted under it should be amended towards achieving the best result. It cannot be over emphasized that anything short of the best result would negatively affect not only the economies of the disputing states but the global economy as a whole. The method adopted in this research is mainly doctrinal. It has been found that with the increasing vulnerability of developing countries within the global economic politics, more attempts should be made towards protecting them in trade disputes involving them and the developed countries. This paper concludes that, if this Dispute Settlement Understanding should subsist, there is need to improve upon it.

Key Words: Trade Disputes, Dispute Settlement Understanding, Amendment

1. Introduction

The Dispute Settlement Understanding was created as part of the World Trade Organization Agreement during the Uruguay Round of meetings of the General Agreement on Tariffs and Trade. It provides strict time frames for the dispute settlement process and establishes an appeal system to standardize the interpretation of specific clauses of the agreements. It also provides for the automatic establishment of a panel and automatic adoption of a panel report to prevent nations from stopping action by simply ignoring complaints.¹ It strengthened rules and procedures with strict time limits for the dispute settlement processes aimed at providing ‘security and predictability to the multilateral trading system’ and achieving ‘a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements.’²

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¹ See, Rubenstein, K & Schultz, J, Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO, *St. John's Journal of Legal Commentary* 11 (1996) p. 278.

² See generally, Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding), Art. 3, paras 2 and 7.

These innovations introduced under the Dispute Settlement Understanding of the World Trade Organization, notwithstanding, this paper posits that the current realities require some improvements in the mechanism of settling international trade disputes under the Dispute Settlement Understanding in order to pave way for a stronger and more stable economies of the disputants and by extension, the global economy.

2. The Dispute Settlement Understanding

The Dispute Settlement Understanding of the World Trade Understanding is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding. It constitutes Annex 2 of the World Trade Organization Agreement, which sets out the procedures and rules that define today's dispute settlement system. It should however be noted that, to a large degree, the current dispute settlement system is the result of the evolution of rules, procedures and practices developed over half a century under the General Agreement on Tariffs and Trade, 1947.³ The Dispute Settlement Understanding, formally known as the Understanding on Rules and Procedures Governing the Settlement of Disputes, created the Dispute Settlement Body, consisting of all World Trade Organization members, which administers dispute settlement procedures.⁴ The basic stages of dispute resolution covered in the understanding include consultation, good offices, conciliation and mediation, a panel phase, Appellate Body review, and remedies.⁵

The coverage and application of trade disputes under the Dispute Settlement Understanding of the World Trade Organization is expressed under Article 1 of the Dispute Settlement Understanding as follows:

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 ... this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

By and large, the agreements referred to above are international agreements involving countries and not individuals. Thus, the members of these agreements are member states or member governments of the World Trade Organization, which can take part either as actual parties or as third parties. The point sought to be made here is that international trade disputes under the Dispute

³ See WTO Dispute Settlement System Training Module. Available at <https://www.wto.org/english/tratop_e/dispu_e/disp-settlement_cbt_e/intro1_e.htm> accessed on June 22, 2018.

⁴ Rubenstein, K and Schultz, J, Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO, *loc. cit.*

⁵ Dillon Jr & Thomas J, The World Trade Organization: A New Legal Order for World Trade? *Michigan Journal of International Law* 16 (1995), p. 375.

Settlement Understanding are those trade disputes between countries concerning their rights and obligations under the covered agreements of the World Trade Organization.⁶

3. Parties in the Dispute Settlement Understanding

The only participants in the dispute settlement system are the member governments of the World Trade Organization, which can take part either as actual parties or as third parties. The World Trade Organization Secretariat, World Trade Organization observer countries, other international organizations, and regional or local governments are not entitled to initiate dispute settlement proceedings in the World Trade Organization. The Dispute Settlement Understanding sometimes refers to the member bringing the dispute as the ‘complaining party’ or the ‘complainant’. No equivalent short term is used for the ‘party to whom the request for consultations is addressed.’ In practice, the terms ‘respondent’ or ‘defendant’ are commonly used.⁷

4. Procedures under the Dispute Settlement Understanding

The dispute settlement procedures consist of three broad processes:⁸

- a. Consultations,
- b. Panel and, if requested, Appellate Body Review; and
- c. If needed, implementation.

These three processes are explicable in the five stages below:⁹

4.1 First Stage: This stage called consultation stage takes about 60 days. Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the World Trade Organization Director-General to mediate or try to help in any other way.

4.2 Second Stage: The second stage is the panel stage. It takes about 45 days for a panel to be appointed, plus 6 months for the panel to conclude its assignment. If consultations fail, the complaining country can ask for a panel to be appointed. The country ‘in the dock’, that is, the defendant or respondent country can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel). Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel’s report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to be overturned. The panel’s findings have to be based on the agreements cited. The panel’s final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months. The agreement describes in some detail how the panels are to work. The main stages are:

A. Before the First Hearing: Here, each side in the dispute presents its case in writing to the panel.

⁶ See Article 1 of the Dispute Settlement Understanding of the World Trade Organization, 1994.

⁷ See WTO Dispute Settlement System Training Module. Available at https://www.wto.org/english/tratop_e/dispu_e/dispu-settlement_cbt_e/intro1_e.htm accessed on June 22, 2018.

⁸ See generally, Shedd, DT, Murrill, BJ & Smith, JM, Dispute Settlement in the World Trade Organisation: An Overview, Congressional Research Service (CRS) for Congress, United States of America, November 26, 2012.

⁹ See generally also, WTO, Understanding the WTO: Settling Disputes. Available at https://www.wto.org/english/thewto_e/whatis_e/displ1_e.htm accessed on April 01, 2018.

- B. **First Hearing:** Hearing begins with the case of the complaining country and then the responding country will present its defence. Here, the complaining country (or countries), the responding country, and those that have announced that they have interests in the dispute, make their case at the panel's first hearing.
- C. **Rebuttals:** The countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- D. **Experts:** If one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
- E. **First Draft:** The panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.
- F. **Interim Report:** The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
- G. **Review:** The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.
- H. **Final Report:** A final report is submitted to the two sides and three weeks later, it is circulated to all World Trade Organization members. If the panel decides that the disputed trade measure did break a World Trade Organization agreement or an obligation, it recommends that the measure be made to conform to World Trade Organization rules. The panel may suggest how this could be done.
- I. **The Report Becomes a Ruling:** The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation - they cannot reexamine existing evidence or examine new issues. Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of World Trade Organization membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. The Dispute Settlement Body has to accept or reject the appeals report within 30 days and rejection is only possible by consensus.

4.3 Third Stage: The third stage is the panel proceedings which is provided under articles 12, 15 and appendix 3 of Dispute Settlement Understanding. Here, once the panel is constituted, it hears written and oral arguments from the disputing parties. After considering these presentations, it issues the descriptive part of its report containing facts and argument of the disputing parties. Taking into account any comments from the parties, the panel then submits this portion of the report, along with its findings and conclusions, to the disputants as an interim report. Following a review period, a final report is issued to the disputing parties and later circulated to all World Trade Organization members. A panel must generally provide its final report to disputants within six months after the panel is composed, but may take longer if needed; extensions are common in complex cases. The period from panel establishment to circulation of a panel report to World Trade Organization members should not exceed nine months. In practice, panels have been found to take more than 13 months on average to publicly circulate reports.

4.4 Fourth Stage: This stage involves the Adoption of Panel Reports/Appellate Review and it is provided under articles 16, 17 and 20 of Dispute Settlement Understanding. Within 60 days after a panel report is circulated to World Trade Organization Members, the report is to be adopted at a Dispute Settlement Body meeting unless a disputing party appeals it or the Dispute Settlement Body decides by consensus not to adopt it. Article 17(6) of the Dispute Settlement Understanding limits appeals to ‘issues of law covered in the panel report and legal interpretations developed by the panel’. Within 60 days of being notified of an appeal (extendable to 90 days), the World Trade Organization Appellate Body must issue a report that upholds, reverses, or modifies the panel report. The Appellate Body report is to be adopted by the Dispute Settlement Body, and unconditionally accepted by the disputing parties, unless the Dispute Settlement Body decides by consensus not to adopt it within 30 days after circulation to members. The period of time from the date the panel is established to the date the Dispute Settlement Body considers the panel report for adoption is not to exceed 9 months (12 months where the report is appealed) unless otherwise agreed by the disputing parties.

In conducting their work, the World Trade Organization panels and the Appellate Body are guided by article 3(2) of the Dispute Settlement Understanding, which provides that the World Trade Organization dispute settlement system ‘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’, adding that ‘recommendations and rulings of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the covered agreements.’

4.5 Fifth Stage: This stage is about implementation of Panel and Appellate Body Reports. It is contained under article 21 of Dispute Settlement Understanding. Thus, in the event that the World Trade Organization decision finds out that the defending member has violated an obligation under the World Trade Organization agreement, the member must inform the Dispute Settlement Body of its implementation plans within 30 days after the panel report and any Appellate Body report are adopted. If it is ‘impracticable’ for the member to comply immediately, the member will have a ‘reasonable period of time’¹⁰ to do so. The member is expected to implement the World Trade Organization decision fully by the end of this period and to act consistently with the decision after the period expires.¹¹ Compliance may be achieved by withdrawing the World Trade Organization inconsistent measure or, alternatively, by modifying or replacing it.¹²

5.0 Problems with Dispute Settlement Understanding

¹⁰ Under the Dispute Settlement Understanding, the ‘reasonable period of time’ is: (1) That proposed by the Member and approved by the Dispute Settlement Body; (2) In the absence of approval, the period mutually agreed by the disputants within 45 days after the report or reports are adopted by the Dispute Settlement Body; or (3) Upon failure of agreement, the period determined through binding arbitration. Arbitration is to be completed within 90 days after adoption of the reports.

¹¹ See Appellate Body Report, *United States-Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, paras. 153-158, WT/DS322/AB/RW (August 18, 2009).

¹² *Ibid*, para. 154.

Unfortunately, the Dispute Settlement Understanding has not been the comprehensive dispute settlement mechanism its framers had hoped to create.¹³ It has been identified that some problems exist with the Dispute Settlement Understanding in its current state, and the remedies to these problems may not come easily. Having discussed the current aspects and procedures of the Dispute Settlement Understanding, this paper will now examine the problems with these procedures and suggest how the dispute settlement system under the World Trade Organization can operate in a more effective and efficient manner. These problems are discussed below.

5.1 Lack of Transparency in the Proceedings.

One major problem with the Dispute Settlement Understanding is the lack of transparency in dispute settlement proceedings. Dispute Settlement Body panels are conducted in private, so no other parties with an indirect interest in any given dispute can observe, read, or in general know what steps led to the panel report. The reasoning behind such secrecy in the proceedings is founded in the underlying principles of mediation and compromise that defined dispute settlement based on the Understanding on Rules and Procedures Governing the Settlement of Disputes under the World Trade Organization Agreement, whereby the process is not meant to appear like a court trial or litigation. In any event, the Dispute Settlement Understanding under the World Trade Organization operates more like litigation, at least once it gets beyond the consultations stage. Since Dispute Settlement Understanding proceedings are more like a judgment than a negotiated compromise, these proceedings are supposed to be open to the public.

5.2 The Questions of Precedents and *Stare Decisis*.

There is this notion that the doctrines of precedent¹⁴ and *stare decisis*,¹⁵ are not application under the Dispute Settlement Understanding of the World Trade Organization.¹⁶ Precedent is a decided case that furnishes a basis for determining later cases involving similar facts or issues.¹⁷ *Stare decisis* is a Latin phrase meaning, ‘to stand by things decided’. It is a doctrine under which it is necessary for a court to follow earlier judicial decision when the same points arise again in

¹³ Sean, PF, The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes, *Pepperdine. Dispute Resolution Law Journal* (2001) vol. 2, issue 1, p. 99 - 100. Available at <<http://digitalcommons.pepperdine.edu/drlj/vol2/iss1/4>> accessed on December 05, 2017.

¹⁴ The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to anew ruling by the same tribunal, or by those which are bound to follow its adjudication, unless it be for urgent reasons and in exceptional cases. See William ML, et al, *Brief Making and the Use of Law Books*, 288 (3d ed. 1914). Cited in Garner, BA, Schultz, DW, *et al* (eds), *Black's Law Dictionary*, *op. cit.*, p. 1414.

¹⁵ In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only principle on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts. See William ML, et al, *Brief Making and the Use of Law Books*, 288 (3d ed. 1914). Cited in Garner, BA, Schultz, DW, *et al* (eds), *Black's Law Dictionary*, *op. cit.*, p. 1195.

¹⁶ See Dispute Settlement Understanding panel report in *India-Patent Protection for Pharmaceutical and Agricultural Products* affirmed that the doctrine of *stare decisis* does not apply to Dispute Settlement Body panel decisions.

¹⁷ Garner, BA, Schultz, DW, *et al* (eds), *Black's Law Dictionary*, (7th edn, United States of America: West Publishing Co., 2009) p. 1195.

litigation.¹⁸ Regardless of the similarity between a present dispute and a prior dispute heard by a panel, the current Dispute Settlement Understanding panel can hold and recommend exactly the opposite of what was held in the past. Because panels are not bound by decisions of previous panels relating to or substantively identical to issues at hand, the deterrent effect is greatly mitigated upon the World Trade Organization member against whom a complaint has been lodged. Thus, parties will only acknowledge or attempt to acknowledge a Dispute Settlement Understanding panel or Appellate Body holding as binding when that decision is favorable to those parties' own self-interests.¹⁹

5.3 Lack of Clarity of Complaints

At the consultations stage of the Dispute Settlement Understanding, there are problems with the degree of clarity required in requesting consultations. Articles 4, 6 and 7 of the Dispute Settlement Understanding are to the effect that the parties requesting panels should fully explain the basis of their complaints. Thus, once claims go to a panel, parties cannot revise them at a later time.²⁰ However, the current Dispute Settlement Understanding fails to state how clear complaints shall be during the consultations stage. This is a substantial shortcoming of the entire Dispute Settlement Understanding process. It is therefore, fundamentally unfair to a party that presents a complaint without being fully informed since the party would be barred from amendment of his complaint upon the discovery of new facts.

5.4 Tendency of Abuse of Discretion in Refusal of *Amicus* Briefs.

An *amicus* brief is a written statement or a document setting out the legal and factual contentions or arguments as well as authorities in their support, presented by a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter of the dispute. Based on the decision in *United States-Import Prohibition of Certain Shrimp and Shrimp Products* ('U.S. Shrimp'), where the original Dispute Settlement Understanding panel held that Article 13 allowed only the parties to the dispute to submit briefs in support of their positions, the prevailing notion was that Dispute Settlement Understanding panels were prohibited under Article 13 from even accepting *amicus* briefs from interested third parties.²¹ The Appellate Body reversed the panel, but only to the extent that future panels had the discretion to accept, consider, or reject *amicus* party briefs as opposed to being prohibited from exercising this discretion. The '*U.S. Shrimp*' decision does not require panels to accept briefs, as many commentators initially believed. The decision merely grants discretion to the panels in deciding whether or not to accept *amicus* briefs. The Appellate Body relied on the provision of Article 11 of Dispute Settlement Understanding in determining that the panels could consider outside information in deciding disputes.²²

¹⁸ *Ibid*, p. 1414.

¹⁹ Sean, PF, *The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes*, *op. cit.*, p. 108.

²⁰ *Ibid*, p. 104.

²¹ *Ibid*, p. 105.

²² The said provision of Article 11 of Dispute Settlement Understanding states thus: '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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.'

Following on the said provision of Article 11, the Appellate Body claimed that the Dispute Settlement Understanding panels are authorized to consider all 'relevant' information. But, it is not clear how far the panels may go in arriving at this 'relevant' information. This paves way for the possibility that a panel could be unfairly swayed, fully at its discretion, based upon the non-definition of the extent and nature of the Appellate Body's application of Article 11.²³

5.5 Problem of Enforcement of Decisions

Related to lack of precedent in Dispute Settlement Body panel and Appellate Body reports is the question of enforcement of decisions of the Dispute Settlement Body panel and Appellate Body reports. The World Trade Organization, despite the countermeasures and compensation provisions set out in the Dispute Settlement Understanding, has no means by which to actually force a non-compliant member country into complying with panel reports. This essentially means that a country does not have to comply with a World Trade Organization Dispute Settlement Understanding decision if, all things considered, they would be worse off for complying than not complying and accepting the sanctions.²⁴

5.6 Developing Countries have less Bargaining Power in the Institution of Countermeasures

Developing countries constitute weaker members of the World Trade Organization as opposed to the developed countries such as United States of America that constitute the stronger members. There is a wide variation of levels of sophistication across the membership of the World Trade Organization countries. Such disparity in the countries naturally leads to a disparity in bargaining power. An unfortunate consequence of this disparity in bargaining power is that countermeasures will only truly be successful when a stronger member initiates them against a weaker member. When a stronger member initiates the suspension of concessions against a weaker member, such suspension could likely have a dire effect on that weaker member. In contrast, a weaker member initiating countermeasures against a stronger member is likely to be met with non-compliance. The stronger member will not be terribly affected by the countermeasures imposed upon it by the weaker member, and will likely proceed with its offending practices. There are also 'retaliation' concerns associated with any weaker member taking action against a stronger member, as there are many areas of international relations not governed by the World Trade Organization.

Sean²⁵ cited a scenario used by Pauwelyn²⁶ in his article where, for example, Estonia wants to invoke countermeasures against the United States in response to unfair trade practices, but is also highly dependent upon the United States for development aid. Estonia is thus put in the dilemma of whether to simply accept and deal with the unfair trade practices the United States of America employs against it, or to institute countermeasures and risk retaliation in the form of less or even

²³ Sean, PF, *The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes*, *op. cit.*, p. 106.

²⁴ *Ibid.*

²⁵ *Ibid.*, p. 109.

²⁶ See Pauwelyn, J., *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 94 *Am. J. Int'l. L.* 335. 335 (2000).

no development aid. Such aid is not under the jurisdiction of the World Trade Organization and the United States of America could freely suspend such aid without fear of countermeasures.

6 Means of Improving on the Dispute Settlement Understanding

The possible means of improving on the settlement of international trade disputes under the World Trade Organization using the Dispute Settlement Understanding, include:

1. Full disclosure of complaints during the consultation stage,
2. Presentation of amicus briefs during panel considerations,
3. Participation in dispute settlement process of the World Trade Organization.

6. 1 Full Disclosure of Complaints during the Consultations Stage

One of the problems with the Dispute Settlement Understanding is on the issue of how much parties must disclose during the consultations stage. The only fair remedy to this problem requires that complaining parties should fully disclose the basis of their complaints at the initial consultations stage. Such a requirement will bring about two substantial changes in the current dispute settlement process. First, the emphasis on full disclosure during the initial stages of Dispute Settlement Understanding will help to ensure due process to all parties involved, which will only heighten the fairness and integrity of the proceedings. Second, such disclosure will improve the efficiency of the system as a whole. With full disclosure of the complaining party's dispute, more disputes will be resolved and disposed of in a fair and timely manner before even reaching the panel stage.²⁷ Therefore, requiring parties to disclose the entire basis of their dispute will improve the overall Dispute Settlement Understanding process as it will definitely produce a quicker result at the consultations stage.

6. 2 Presentation of Amicus Briefs during Panel Considerations

Since *amicus* briefs allow an interested party to be represented, the World Trade Organization should provide more of an opportunity for interested parties to be heard in disputes through *amicus* briefs. Fairness demands that parties with both direct and indirect interests in a dispute should be given the chance to present their positions in support of their respective legal and factual contentions or arguments. In many cases, the panel's decision will, at the very least, affect those parties, who could potentially bear the burden of the panel's decision.²⁸ Permitting the presentation of *amicus* briefs in addition to the briefs submitted by the actual parties to the dispute will enhance full disclosure of facts in the dispute and ensure that interested parties have the opportunities to protect themselves. This will equally ensure a final resolution of the dispute because everybody's interest would be accommodated and no party would come up later to canvass that his interest was not taken care of.

6. 3 Participation in Dispute Settlement Process of the World Trade Organization

The Dispute Settlement Understanding excludes individuals or organizations who are not actual parties or third parties to a dispute before the Dispute Settlement Body from both making and even

²⁷ See Horlick, GN & Butterson, GR, A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations, 31 *L. & Pol'y Int'l Bus.* 573, 579 (2000). Cited in Sean, PF, The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes, *op. cit.*, p. 110.

²⁸ See Stewart, TP & Karpel, AA, Review of the Dispute Settlement Understanding: Operation of Panels, 31 *L. & Pol'y Int'l Bus.* 593, 607 (2000). Cited in Sean, PF, The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes, *op. cit.*, p. 110.

attending the oral arguments. The problem with this provision is that it excludes non-governmental organizations, interested parties, and other individuals from being a part of a decision that will bear directly upon their day-to-day operations. It is inherently unfair to deny an organization or individual the opportunity to be heard when a decision rendered could have such dire consequences.²⁹ Allowing interested parties to attend the oral arguments and participate in the argument process is key to creating a more comprehensive and fundamentally fair dispute settlement process under the World Trade Organization. Making the deliberations under Dispute Settlement Understanding open to everyone who is interested will help the process gain the trust of the people who are subjected to its jurisdiction, and enhance transparency in the Dispute Settlement Understanding process.³⁰

7. Findings

The first pertinent finding is that notwithstanding the measures put in place to guide against the suppression of developing countries by the developed countries under the World Trade Organization, there still exist a strong disparity in trade between these strong and weak countries, particularly as it relates to the application of countermeasures and retaliation under the Dispute Settlement Understanding. For example, a weak country such as Gambia withdrawing its concessions as a countermeasure or in retaliation against a strong country such as China will just be wasting its time and doing more harm to its economy than not embarking on the said countermeasure or retaliation.

Secondly, the doctrines of precedent³¹ and *stare decisis*,³² are principles devised in the justice system to ensure equity and fair play in the administration of justice. The two doctrines are simply saying that ‘what is good for the goose is also good for the gander’. If that is the case, it then means that a decision taken in a particular matter should be substantially maintained in a subsequent similar matter in order to ensure consistency in decision making. A situation whereby these doctrines are neglected under the Dispute Settlement Understanding of the World Trade Organization, as observed above, is not fair to weaker parties at all as that implies that the stronger

²⁹ For example, one of the major reasons why environmental protestors thwarted the WTO "Millennium Round" in Seattle stemmed from their adverse reaction to a DSU panel report that struck down a U.S. restriction on trading with countries that did not adequately protect Sea Turtles. See Murphy, S. D., Collapse of Efforts to Launch Millennium Round of Multilateral Trade Negotiations, *94 Am. J. Int'l L.* 375, 378 (2000). Cited in Sean, PF, The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes, *op. cit.*, p. 112.

³⁰ See generally, Sean, PF, The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes, *op. cit.*, p. 111.

³¹ The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to anew ruling by the same tribunal, or by those which are bound to follow its adjudication, unless it be for urgent reasons and in exceptional cases. See William ML, et al, Brief Making and the Use of Law Books, 288 (3d ed. 1914). Cited in Garner, BA, Schultz, DW, et al (eds), Black's Law Dictionary, *op. cit.*, p. 1414.

³² In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only principle on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts. See William ML, et al, Brief Making and the Use of Law Books, 288 (3d ed. 1914). Cited in Garner, BA, Schultz, DW, et al (eds), Black's Law Dictionary, *op. cit.*, p. 1195.

party will always have their way and can only resort to previous decisions when it is favourable to that stronger member.

8. Recommendations

In the light of the above findings, among others, the following recommendations are considered pertinent:

First and foremost, any aggrieved party of international trade should ensure that such grievance is reported immediately it occurs to pave way for the fastest response which is required for a successful settlement of such international trade disputes. This is because any slightest delay in resolving an international trade dispute has the tendency of making the dispute to escalate and quickly impacting negatively on the economies of the disputants and in turn the global economy.

Secondly, the Dispute Settlement Understanding should be amended to grant all interested parties a voice in the settlement proceedings. Since an interested party who is not allowed a voice can initiate a different proceeding after the settlement of the major component of the dispute, it becomes pertinent that in order to ensure that a final and conclusive resolution of the dispute is arrived at, all the interested parties must be allowed to present their cases in any reported matter. These interested parties may include private individuals, companies and non-governmental organizations, which though not having direct access to the dispute settlement system, may often be the ones most directly and adversely affected by the measures allegedly violating the World Trade Organization Agreement.

Also, the panel proceedings of the Dispute Settlement Understanding should be conducted in the open to pave way for a verifiable and credible outcome. By so doing, the doubts as to the fairness and reasonableness of the facts and arguments upon which the decision of the panel is arrived at would be cleared.

The World Trade Organization should devise a means of policing a non-compliant member country into complying with the panel reports under the Dispute Settlement Understanding. This is because, as already observed, the stronger members do not always feel bothered when it comes to such enforcement in the form of countermeasures or withdrawal of concessions by weaker countries against the stronger countries since it is the weaker member employing such measure that would bear the actual consequences in the long run.

It is further recommended that the doctrines of precedent and *stare decisis* should be instituted as parts of the lifeline of the Dispute Settlement Understanding of the World Trade Organization to always ensure that whatever is done to the goose shall be done to the gander too. This, of course, will make weaker countries to have more confidence in the outcomes of Dispute Settlement Understanding and not feel cheated or oppressed.

9. Conclusion

The processes incorporated under the Dispute Settlement Understanding of the World Trade Organization have been applauded but, as already shown by this research, these Dispute Settlement Understanding processes are currently seen as an albatross and so an inadequate mechanism for the settlement of international trade disputes owing to some identifiable deficiencies of the entire

processes. These deficiencies have been pointed out and some points have also been canvassed as remedies to those deficiencies. The specific problems associated with the Dispute Settlement Understanding of the World Trade Organization have now been brought to the fore, with strategies for developing an appropriate and improved mechanism of resolution of international trade disputes. Also, it is now clear that the gaps in the Dispute Settlement Understanding of the World Trade Organization have to be patched as it weakens the efforts being made to engender permanent peace and harmony in international trade, towards ensuring a stronger and more stable global economy, hence, if this Dispute Settlement Understanding should subsist, there is need to improve upon it. On a final note, it is hoped that the foregoing findings and recommendations, if reckoned with, will go a long way on improving the mechanism of settlement of international trade disputes under the World Trade Organization.