

An Analysis of the Merits and Demerits of the World Trade Organization's Dispute Settlement Mechanism System and the Disadvantageous Position of Developing Countries in it

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Abstract: On January 1, 1995, world trade ushered in a new era. An organization used to establish, modify, and enforce rules governing international trade - the World Trade Organization (WTO) - was born.^[1] The WTO is the world's largest international economic organization and so far, as many as 164 members have joined.^{[1],[2]} The WTO covers a wide range of areas, mainly including trade in goods, services, intellectual property, and other fields.^[3] Various trade disputes would arise in the complicated trade process and naturally, resolving disputes has become one of the core activities of the WTO. The WTO Dispute Settlement Mechanism (DSM) is regarded as the central pillar of the WTO and a unique contribution of the WTO to global economic stability.^[4] Generally speaking, DSM is excellent and successful. It provides a reliable trading platform for all members of the world and a guarantee for the free, fair, and predictable flow of trade.^[5] But on the other hand, nothing is perfect, DSM also has some criticisms, and there is also a certain degree of inequality in the treatment of members with different development levels. This article aims to analyse the merits and demerits of the WTO's DSM and to explain that, although the DSM was originally set up to benefit the weaker countries, in practice developing countries remain at a disadvantage.

Keywords: World Trade Organization; WTO; Dispute Settlement Mechanism; DSM; Inequality; Developed Countries; Developing Countries

1. Advantages of DSM

The current DSM was created during the Uruguay Round and is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes (abbreviated as 'DSU').^[6] The DSM consists of two types of institutions. One is quasi-judicial, such as panels, Appellate Bodies, and arbitrators; the other is political dispute resolution institutions, like the WTO Secretariat, and several other specialized Institutions, etc.^[7] Each institution performs its duties to ensure the accurate and orderly progress of dispute resolution procedures. Among them, the role of the Appellate Body is particularly important. If DSM is described as a crown, then the Appellate Body is the jewel in the crown.^[8] The WTO DSM system plays a vital role in the global economy. The following mainly introduces and analyses the advantages of DSM.

1.1 Effectiveness and efficiency

Firstly, the DSM is effective in terms of how often the dispute resolution system is used by member states, both in comparison to the former GATT and to other international legal mechanisms. With over 600 cases handled in the 26 years since its inception, the DSM is also probably the world's busiest international dispute resolution system.^[9] On the one hand, compared to the previous GATT, the current DSM has been used more frequently. The original mechanism was slow and prone to deadlock, resulting in low usage of the DSM under the GATT system.^[10] On the other hand, compared to other national dispute systems, such as the International Criminal Court (30 cases since its official opening in 2002)^[11] and the International Tribunal for the Law of the Sea (29 cases since its establishment and entry into force in 1994)^[12]. From the perspective of the number of DSM systems being used, the advantages of DSM are obvious and more outstanding.

Secondly, since the WTO stipulates the principle of compulsory consultation beforehand, which is an effective way to resolve disputes. If both parties can directly reach an agreement during the negotiation stage and resolve disputes quickly, compared with lengthy and complicated litigation procedures, this method saves both parties' costs and judicial resources. In addition, even if an agreement cannot be reached during the negotiation process, the focus of disputes can be narrowed.^[13] For example, in a tort case, it is found that the dispute between the parties is over 'the time to assess the size of the damage'; or in a contract dispute, it is shown that the parties simply misunderstood a particular term of the contract. As stated by the Appellate Body in the Mexico-Corn Syrup^[14] case, through the exchange of information and opinions at the negotiation stage, the scope of disputes between the two parties can be effectively narrowed. Clear negotiation is of great benefit to the complainants, defendants, as well as the whole DSM system.

Thirdly, the DSM imposes strict time limits to resolve disputes more effectively and reduce the loss to the complainant. There are timeframes at almost every stage of dispute resolution, and some people even say that such a short time limit is harsh.^[15] For example, in the consultation phase, members are required to respond within 10 days and to enter into good faith consultation within 30 days (see Article 4.3 of the DSU); about the panel procedure, the DSU requires a panel report to be issued within nine months and in some urgent cases within a shorter period (see Article 12.8 and 12.9 of the DSU); in the appellate process, DSU also stipulates that the Appellate Body shall issue a report within 90 days (see Article 17.5 of the DSU). Therefore, at least in theory, which effectively urges the parties and institutions to actively participate in dispute resolution.

Finally, to improve the efficiency of dispute resolution, the DSM system has replaced the previous 'positive consensus' with a 'reverse consensus'. In the GATT DSM, it was based on that any party could veto the progress of the process, especially the respondent party, as a means of delaying and reneging on the decision.^[16] In the long run, this approach has led disputants to bypass the GATT and instead enter into separate bilateral agreements - to the possible detriment of third parties.^[16] In contrast, the current DSM adopts a reverse unanimity principle, meaning that as long as not all members are opposed, then the decision is adopted, and since at least one party will not veto it (i.e. the winning party), the adoption of the DSM decision is quasi-automatic.^[17] This approach breaks the deadlock under the original GATT model and, combined with strict time limits, greatly enhances the efficiency of dispute resolution.

1.2 Security and predictability

Firstly, the DSM, unlike the previous GATT system, is more fair and secure as it is rules-based rather than power-based.^[18] Disputes must be settled based on established rules, that the rules are open and transparent, and that the same set of rules applies to both strong and weak countries, which effectively reduces the imbalance of power between different countries. Equality before the rules will make each participating country, especially the small and weak ones, feel more secure in the trade process.

Secondly, panelists and Appellate Body members are independent and impartial, not affiliated with any government, free from any relevant interest, discrimination, or bias, and therefore more trustworthy.^[19] The requirement of independence appears more than once in the WTO's rules. According to the DUS, the Rules of Conduct, and the Working Procedures for Appellate, the Appellate Body members (and the panelists) should be independent and impartial. Based on statistics, 'independent' and 'independence' are found seven times in the Code of Conduct for WTO Dispute Settlement Officials.^[20] Indeed, an independent and impartial quasi-judicial body is a necessary guarantee for the highest-quality decisions to be given.^[21]

Finally, panels and the Appellate Body have certain powers to clarify and interpret provisions, while allowing for greater predictability of cases. Because of the large number of members involved in world trade, the wide variation in the basic circumstances of each member, and the complexity of individual cases, it would be unrealistic to develop a detailed and specific set of legal provisions for the WTO.^[22] The current WTO agreements are principled and general, and in many respects require case-specific interpretation and clarification. There are two kinds of interpretation types, one is through the Ministerial Conference and the General Council, whose interpretations have universal effects.^[23] The other is that the panel and the Appellate Body could interpret the provisions in an interpretation method that is compatible with the practice of national law.^[24] At the same time, to prevent excessive interpretation, the DSU emphasizes that judicial activism is opposed and that the system

must not increase or decrease the rights and obligations of members.^[25] Moreover, although the interpretation of the Appellate Body has only a case-by-case role, however, the principle of precedent is still allowed and common in the same type of cases and serves as a reference for subsequent cases. Such a precedential role increases the predictability of dispute resolution, especially when compared to arbitration - litigation allows for judicial precedent, whereas arbitration does not.^[26]

1.3 Accessibility and enforceability

First, the WTO's DSM has a wide range of jurisdictions. The DSM can be resorted to whenever a WTO member believes that another member has violated an agreement or commitment reached in WTO agreements. The scope of the 'agreements' is broad and currently comprises about 60 agreements and decisions.^{[27],[28]} An easy-to-access DSM system not only allows the complainant to defend their rights but also gives the defendant a platform for defense.

In addition, if a member state is not a party to the dispute, it may also join in the dispute as a third party, and the threshold for joining is relatively low. Under Article 10 of the DSU, any member state that has a substantive interest in the dispute can become a third party in the panel and appellate proceedings. A third party also enjoys the rights of hearing, submitting opinions and opinions, and accepting written documents.^[29] In comparison, the scope of the rights of a third party in the appellate review is greater than that of the panel proceedings.^[29] Third-party participation is widely used, which greatly increases the ways for members to participate in disputes.

Furthermore, even if one is not a WTO member, it can still participate in disputes indirectly by presenting *amicus curiae* briefs, also called 'friends-of-the-court briefs'.^[29] Although the involvement of companies, individuals, social groups, etc. in disputes has aroused widespread criticism, the regime was approved in the Appellate Body's ruling, which held that the Appellate Body has the discretion to accept or not accept *amicus curiae* submissions.^[29]

The last and most important point is the enforce ability of the DSM. The effective mechanism increases the actual fulfillment of the obligations and the commitments of the signatory member states.^[30] If the rules remain only on paper and cannot be enforced, the authority of the rules will be greatly diminished.^[31] For example, under Article 21 of the DSU, when the report of the panel and/or the Appellate Body is adopted, first the defendant should take action immediately or within a reasonable period, and in most disputes, the defendant will respect the decision made by the DSM.^[32] If the defendant fails to do so, there are two ways for the plaintiff to adopt, namely compensation and retaliation. Theoretically, both options would protect the plaintiff's rights.

In summary, the DSM is notable both in comparison to the former GATT system and to other international organizations. It is argued that the DSM has provided a good environment and platform for international trade and is a successful model for international dispute resolution. However, the system is far from flawless and has suffered much criticism.^[9] The next sections will describe and analyse the main drawbacks of the DSM.

2. Disadvantages of DSM

2.1 Time-consuming and high cost

'Justice delayed is justice denied.' Probably the most criticised aspect of the DSM is its serious delays in practice, resulting in the rights of the complainant not being truly protected. As mentioned above, the DSU stipulates strict time limits. However, according to a set of statistical analysis data, the average duration from 2007 to 2011 was about 28 months, and the duration of litigation has been steadily increasing for a long time.^[33] Even the WTO Secretariat and Appellate Body have admitted that they cannot comply with the timetable set by DSU. There are many reasons, such as the complexity of the case, the need for consulting experts, the scheduling of various issues, and the translation of long legal documents.^[33] The adverse consequences of time-consuming are significant. Not only does it reduce member participation, but it also is contrary to the DSM's fundamental principle of prompt dispute resolution.

The direct consequence of the time delay is that the loss expands. The total cost to the complainant is high. Firstly, the member itself resorted to the DSM because its entitlements had been damaged. However, the dispute could not be resolved promptly and was left in limbo for a long time, with that loss growing. Secondly, at the same time, the complaining party also needs to bear the related human and material resources and legal service costs, etc. Due to the WTO trade transnational, cross-linguistic, uncommon, and other factors, resulting in a high degree of legal professionalism and experience required of the parties, and therefore the corresponding fees are expensive. Finally, the losses incurred between the time the DSM decision is adopted and the time it is performed or enforced by the respondent party cannot be recovered. In summary, if the costs already outweigh the benefits, then no country will be willing to enter the DSM any longer.

2.2 Imprecise rules and over interpretations

DSM is rule-oriented, but due to the imprecise content of DSU, many provisions need to be interpreted, and which is heavily dependent on panels and the Appellate Body. Originally, there are two ways of interpretations, either by the Ministerial Conference or the General Council or by panels and the Appellate Body. However, the conditions and procedures for the former are strict and complex. For example, the proportion required for the amendment of provisions involving the rights and obligations of members is three-quarters, which is hard to achieve.^[34] It is the difficulty of this approach that has led members to abandon it in favour of panels and Appellate Body interpretations.

Every coin has two sides, and so does the ‘independence’ of quasi-judicial bodies, especially the Appellate Body. The Appellate Body lacks proper supervision and checks and balances. On the one hand, if the Appellate Body makes an interpretation that exceeds the scope of its authority, according to the principle of reverse consensus, the decision made by the Appellate Body is almost automatically effective - that is, it is not subject to scrutiny by the legislature, and no member can control it. On the other hand, due to the precedent principle, if the initial interpretation has exceeded the discretionary scope, the implications of subsequent cases are pernicious.

The problems caused by the lack of supervision of the Appellate Body are serious. An influential example is the *Shrimp-Tortoise*^[35] Case. The Appellate Body’s interpretation of the terms exceeds the expectations of the parties to the establishment of the agreement, and nobody can prevent it from doing so; another similar case is the *Australia-Automotive Leather*^[36] case. The panel and the Appellate Body ignored the agreement reached by the two parties and the third party and made explanations contrary to the original intention. Some scholars think that it is acceptable to use reasonable interpretation methods for the vacant parts of the rules, but excessive interpretation must not be allowed.^[37] In particular, there should be no objections to some common-sense, consensus issues.^[37]

It is because of the problems with the DSM that the Appellate Body, considered to be the jewel in the crown, is paralysed - the Appellate Body currently has no members, and there are even fears that this will jeopardise the survival of the WTO as a whole.^[38] Although the US has been criticised for being the initiator, it can be indicated that the mechanism itself does have some structural flaws.^[39] Moreover, on 24 January 2020, the EU and 16 other member states set up an ad hoc appellate arbitration arrangement- Multi-Party Interim Appeal Arbitration Arrangement (MPIA), a contingency measure to address the stagnation of the Appellate Body.^[40] But this is a temporary solution and cannot replace the Appellate Body in the long term.

2.3 Unsatisfactory compliance and enforcement

Firstly, the scope of compliance or implementation by the respondent is inadequate, which is less than the damages suffered by the complainant. For a start, during the dispute resolution process, the plaintiff’s losses are increasing while the respondent continues to unjustifiably profit due to the lack of protection from ‘interim measures’ (e.g., property preservation); secondly, the plaintiff’s losses are not remedied after winning the case, from the time the report is adopted to the time of actual performance; and finally, the high costs of legal services, etc. are not included in the compensation. In other words, in the WTO’s DSM, the costs of violation are disproportionately low for the offending party, and the aggrieved party is not sufficiently protected, and these problems are particularly evident in developing countries.

In addition, there is no consensus on the specific requirements for implementation.^[41] Generally, respondents are expected to comply immediately or in a reasonable period, but even if they do not, the interim remedies (compensation and retaliation) offered by DSM are sometimes less effective. This is because some small and weak countries do not have the capacity to implement these measures. Moreover, although retaliatory measures are required not to exceed entitlements, this lacks a yardstick.^[42] Inappropriate retaliation and cross-retaliation may instead lead to more serious trade disputes.

3. The disadvantageous position of developing countries in DSM

The merits and demerits of the DSM seem to exist, with uniformly good or bad effects for all participating countries. However, between developed, developing, and least developed countries (which are largely absent from the WTO and are therefore not mentioned below), there are differences in the actual impact. These advantages may be better enjoyed by developed countries, while these disadvantages affect developing countries more. While the DSM was generally favourable to weaker countries at its creation, which means that developing countries were supposed to be the presumed beneficiaries.^[43] However, this has not been the case in practice, and many criticisms and proposals for reform have been made to the WTO by developing countries.^[43] The following section focuses on the detrimental position of developing countries in the DSM and the reasons for it, i.e. their difficulties in participating equally and effectively in the DSM and the increase in inequalities in the DSM process (third party participation, *amicus curiae*, etc.).

On the one hand, the most direct impact factor is the high cost in terms of time and money of participation in the DSM, which directly and severely reduces the participation of developing countries. As mentioned above, the cost of participating is high and the time delay will strengthen the difficulty of small and weak countries to defend their rights, leading them to be more inclined to compromise with the country that violates the agreement (usually a powerful country).^[44] Furthermore, even if developing countries can afford the costs and win the case, the DSM remedy system is overly dependent on economic sanctions. As powerful countries, they are less dependent on trade, and they are better able to withstand retaliation. This is because, in some areas of trade, developing countries simply do not have the capacity to retaliate, or do not retaliate enough to pose a threat to developed countries. In general, therefore, the participation of developing countries is much lower than that of developed countries.

On the other hand, three special regimes in the DSM process have different implications for countries at different levels of development. The first is third-party participation in proceedings, where developing countries have fewer opportunities to make their voices heard because of their limited economic power and the small number of delegations. The second is the *amicus curiae* system, a rule that has been criticised for having become a tool for developed countries to interfere in cases and exert political influence, exacerbating inequalities between countries along with third-party bodies. The third is the private counsel mechanism, which is generally considered to facilitate effective participation in litigation in developing countries, but the frequency of private counsel in developing countries is low due to the high cost of professional legal services. Although the WTO has established a legal aid system, overall, the use of the system is in short supply, so the role of legal aid in helping is restricted.^[45]

In addition to the main reasons mentioned above, many other reasons are affecting the position of developing countries, such as political and economic pressure exerted by developed countries on developing countries outside of disputes. Admittedly, the disadvantaged position of developing countries is not entirely caused by the DSM, as the country's voice also depends on its economic power. If a country's economy cannot be improved, then many fundamental problems are difficult to solve. Hence, the DSU itself aims to achieve equal access for all countries and has made some special policies and preferences for developing countries. However, the ideal is rich, but the reality is a somewhat bleak one, developing countries are still in a disadvantaged position in the DSM.

Conclusion

The creation of the WTO was a feat of world trade, of which the DSM is one of its most important achievements. Whether compared with the previous GATT or with other international legal mechanisms, the system has generally been a successful model. It is effective and efficient, secure and predictable, accessible and enforceable, and has created a great environment for members to trade in. However, there are some criticisms of the system. For example, the actual timescales are much longer in practice, the costs of participation are too high, the Appellate Body is over-explained, and there are shortcomings in compliance and implementation. At the same time, the Appellate Body has been suspended as a result, and the interim measure, MPIA, is available, although it is not a long-term solution. Moreover, the DSM remains the arena of the developed countries, and developing countries are still in a disfavourable position. Although the DSU provides for special and preferential treatments for developing countries and was originally intended to make developing countries the beneficiaries, the reality is that developing countries are disadvantaged due to high costs, lack of legal capacity, fear of the power of the developed world, etc. All in all, the DSM has been an overall success, but the system still has some shortcomings, especially regarding the situation in developing countries. These should be improved, for example by imposing certain penalties on institutions or parties that delay, by using the General Council to oversee the Appellate Body, by strengthening legal aid and financial support for weaker countries, by refining specific requirements for implementation, etc. But Rome was not built in a day and the DSM will continue to improve and become better.

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