

WTO'S DISPUTE RESOLUTION IN MULTILATERAL
TRADING
SYSTEM: INDISPENSABLE OR OPTIONAL?

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Because conflict is inherent in human society, much effort has been expended by men and institutions in devising ways of resolving the same. With the progress of civilization, physical combat has been ruled out and instead specific means have been evolved such as recourse to the good offices of a disinterested third party, whether thus be a court or a private individual or individuals.¹

WTO'S DISPUTE RESOLUTION: THE JEWEL IN THE CROWN
OF THE WTO

Last May 28, 2019, the World Trade Organization Dispute Settlement Body bid farewell to Peter Van den Bossche, a former appellate member of the dispute settlement body. He had served in the WTO dispute settlement appeals for nine-years. In his farewell speech, Van den Bossche made remarks regarding the importance

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¹ *Chung Fu Industrial v. Court of Appeals*. 206 SCRA 545. 1992.

of dispute resolution in multilateral trading system. Despite admitting that it needs improvement, he gave emphasis on the success and importance of the said body particularly its role in the world of trade. He expressed this: “At the core of a well-functioning multilateral trading system is an effective dispute resolution mechanism.”² He further asserts that it has progressively developed since the 1940s and it has served the world well. Van den Bossche exclaimed that dispute resolution has “allowed hundreds of millions of people to escape from poverty and has bought continued prosperity to many others. It has also been instrumental in keeping trade and broader economic disputes from boiling over and escalating beyond control.”

The WTO dispute settlement system is unique among international mechanisms for the resolution of the disputes between sovereign states, which Van den Bossche claims to be the most used state-to-state dispute resolution mechanism, making it the “*jewel in the crown of the WTO*,” and a source of envy in the other fields of international law. However, despite the high success of the use of settlement dispute for the past few years that even Van den Bossche had highlighted in his speech as “close to miracle”,³ some countries around the world question the effectivity of the system and if such is still successful in resolving trade disputes between states.

Recently, controversies arose as the United States of America had questioned the appellate body and even blocked the appointment of new members. The USA further questioned the alleged “overreach” by the appellate body, the 90-day timeframe for appellate review, the appellate body’s review of factual findings, including findings on the meaning of domestic law and the transition rules for outgoing Appellate Body members. Likewise, many proposals to reform the system was made in the Dispute Settlement Understanding (DSU) review in 1998 and 1999, and later on the Doha Round negotiations on DSU Reforms. Despite these proposals, no success was achieved on those occasions. However, Van den Bossche emphasized that the proposals were focused more on further strengthening the system and not abolishing it. Hence, several issues herein are raised on whether the WTO Dispute Settlement Body is truly an indispensable mechanism in the success of a multilateral trading system or it is just an option that will not hamper the whole WTO as a system if dispensed with.

² Van den Bossche, Peter, “Farewell Speech of Appellate Body member Peter Van den Bossche.” World Trade Organization. May 28, 2019. https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.

³ Supra note 2.

DISPUTE RESOLUTION: ITS STRENGTH AND VALUE

Over the years, the settlement of both legislative and judicial issues had utilized for alternative means of resolving dispute. It gained popularity and its use grew as conflict arises cross border due to globalization.

Dispute resolution is a mechanism that provides for a rapid and effective means of settling disagreements on whether a country has acted in conformity with its obligations.⁴ Normally, a dispute between countries arises when one state does not act based on the agreement it signed or on the legal obligations it contracted.

Former WTO Director-General Pascal Lamy exclaimed in 2009 that the WTO dispute resolution is considered as the “Jewel in the Crown” of the organization.⁵ According to the WTO, there are almost 500 disputes that were lodged in the WTO and the organization had already issued almost 350 rulings, making the WTO as one of the most active international dispute settlement mechanisms which states utilize.⁶ States might be encouraged to use dispute settlement in resolving their issues since the process can be fast, effective, and mutually acceptable to both parties.⁷

First, settlement dispute is fast, such that it truncates the period that parties will have to battle in court. Approximately, the WTO Dispute Settlement body can settle a case within 1 year and 3 months, which is shorter than a judicial battle. Both parties will immediately get a binding decision, as opposed to going to the judicial courts that would take years to settle.

Second, this can also be, economically, a much friendlier option since it will save so much resources for the parties. It is effective because it has a set of rules or guidelines that it uses in the settlement of disputes. The success of this mechanism

⁴ European Commission. http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/index_en.htm. Last accessed: July 15, 2019

⁵ Arie Reich. *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis*. 2017 < http://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1 >

⁶ World Trade Organization. https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. Last accessed: July 15, 2019

⁷ World Trade Organization. https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm. Last accessed: July 15, 2019

were proven to be effective if used and utilized properly by the parties. When one battles inside the court, parties would have to shell out more resources like money and manpower to make sure to get a favorable decision. Since there is a shorter time frame in the resolution of these disputes, it will likewise reflect on the resources that parties might be compelled to shell out.

Lastly, it is mutually acceptable for both parties since they agree to be part of the dispute resolution process. Parties are given the option to choose the arbitrators who will preside over their dispute; these arbitrators are considered as third-party individuals who are said to be of utmost reputation in their fields and have great knowledge about like issues. The consensus by the parties on these matters makes it easier for the decision to be binding and effective.

Through dispute resolution, economic development can be foreseen and can be achieved. States will be able to trade not only with other states but also with private entities. Parties will mutually feel safer since there is a mechanism available in case dispute arises.

Additionally, dispute resolution is confidential and parties are adequately protected. It is a rule that the issues raised and presented before the panel of arbitrators would only be known to all the parties in the case. The panel of arbitrators are bound by the confidentiality rule once they have been chosen. All evidence presented are protected and cannot be used against any of the parties outside the case. This makes dispute resolution a safe place for parties to argue the issue at hand and resolve it based on the merits of the pieces of evidence offered before the arbitrators. It should be noted that what is settled are issues pertaining to trade, which, parties uphold with high regard. Hence, the confidentiality aspect of dispute settlement makes it viable for parties to settle their disputes.

Due to the salient features and uses of dispute settlement, several states have resorted to this mechanism in resolving their trade disputes. The WTO gives much credence and pride to the WTO Dispute Settlement for the cases that had been lodged, heard, and resolved over the years have flourished.

DISPUTE RESOLUTION: ITS WEAKNESS AND DOWNSIDE

Despite the popularity of WTO dispute resolution, the mechanism and the body governing it had been facing several backlashes from several member states. There had been a call for reform to the rules and regulations that the body uses. Some commenters mentioned that the system is too flawed and that having it is no longer essential. Furthermore, there are questions regarding the independence and fairness of the administering body. Recently, Donald Trump had been openly criticizing the members of the same, questioning their legislative and quasi-judicial powers in resolving the trade disputes.⁸ The USA is one of the member states which use its membership with the WTO, and over the years, actively used the WTO dispute resolution system to resolve its trade disputes with other countries. As of March 2019, the US has a record of 124 cases as complainant, 155 cases as respondent, and 155 cases as third party,⁹ making it one of the countries which actively participate in the dispute resolution of the WTO. It should be noted that USA is one of the leaders in the world economic trade. Hence, its questioning the reputation of the WTO dispute resolution can impact how other member states view its importance. This can pose a great problem in the credibility of the decisions to be rendered by arbitrators.

Despite suggestions that dispute resolution can save money and resources for parties, dispute resolution is not economically friendly for developing countries. The dispute resolution conducted at WTO is not cheap for third world countries; these countries usually become invincible to third parties and will just choose to remain silent rather than afford the remedy.¹⁰ This become disadvantageous knowing that the remedy can only be available to all states but can be hampered due to external factors like money. A true effective mechanism should be available to all members states, despite of its economic standing in the community of nations. More so, it should protect those states that need to be shielded from more powerful states. The scale of protection should yield towards these developing countries that opted to use WTO's dispute resolution in order to have a level playing field with the opposing country. What is the point of having such body if, ultimately, it will only truly cater to a few?

⁸ Robert McDougal. *Crisis in the WTO. Restoring the WTO Dispute Settlement Function*. 2018 <https://www.cigionline.org/sites/default/files/documents/Paper%20no.194.pdf>

⁹ World Trade Organization. https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. Last accessed: March 11, 2020

¹⁰ Global Governance. *Is WTO Dispute Settlement Effective*. April – June 2004. p. 207-225 https://www.jstor.org/stable/27800522?seq=1#metadata_info_tab_contents.

Lastly, the WTO dispute resolution can sometimes be influenced by the relations among and between states, making the system less effective.¹¹ For instance, the infamous “bananas and beef issue”, which was known as the United States and European Union Trade War, caused delays in the resolution of the case. Hence, instead of helping in efficiently resolving the case, the WTO dispute settlement body hampered the speedy negotiation among the parties due to the need to exhaust the remedies available for both parties.

These are only a few of the disadvantages and downsides of the being subjected to dispute resolution, which commenters raised over the years. As mentioned in by Van den Bossche, reforms had been raised over the years to solve these problems but with no avail of accomplishment.

WTO'S DISPUTE RESOLUTION: INDISPENSABLE OR OPTIONAL?

The statement of Van den Bossche is strong and assertive. His statement strongly detests the statements of the United States and the latter's move to obstruct appointments of new members of dispute resolution body. Weighing in on the pros and cons of dispute resolution, Van den Bossche made a worthy point that such mechanism is necessary in order to have an efficient and well-functioning multilateral trading system. The very essence of dispute resolution is the assurance that the rules set forth when WTO was created can be enforced. Dispute resolution is said to be the “central pillar” of the multilateral trading system.¹² One can conclude that dispute resolution is indispensable. It is a mechanism that is necessary and essential, in order to make sure that the system will effectively work and protected.

In a sovereign state, one of the ways to safeguard the laws and regulations of the country is to make sure that there is an efficient and well-functioning judiciary who will be able to help interpret and to resolve whatever issues that may arise. This is good sign that a state is sovereign, and it makes sure that the laws and regulations of the country is well protected and implemented.

¹¹ *Supra* note 8, at 2.

¹² World Trade Organization. https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm. Last accessed: July 15, 2019

Likewise, in human right and development, it is said that one of the important ways to preserve human rights is to make sure that there is a well-functioning judiciary. As they say, an existing law is lifeless if there would be no authority who would effectuate the provisions of the law.¹³

Akin to a sovereign state and human rights, the field of trade is no exception. The WTO was created due to the demands of cross-border economic transactions between states and private individuals. The on-going globalization of the economies of various states should bring to the table a call or initiative for the rules and regulations within the WTO to be safeguarded. As more trade transactions take place each day, more issues are raised. If these issues are to be resolved only through judicial action, difficulty in trade relations between states will arise.

The lack of dispute resolution can hamper trade relations among states due to the difficulty of going to court and of enforcement. WTO Dispute Resolution leads to a faster resolution of the case lodged before it. In a span of 1 year and 3 months, there can be a decision rendered for both parties. This saves both time and money of the state concerned. Since states use public funds, it is only proper that state representatives ensure that resolution is speedy and the use of public funds is efficient.

Without dispute resolution, enforcement of the ruling can be difficult, especially on the part of the losing party. However, through the WTO dispute resolution body and the Uruguay Round agreement among the states, rulings can be automatically adopted unless a unanimous decision be made that such ruling be rejected.¹⁴ Through this process, a losing state would need to convince other WTO members that the decision needs to be reversed in its favor, or that the same be rejected.

Such dispute resolution can also declutter the clogged case dockets of member states. For instance, in the Philippines, the Philippine Supreme Court had adopted and encouraged the use of dispute resolution within its jurisdiction to declutter the

¹³ Fordham International Law Journal. The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective. 2002, Volume 26, Issue 3 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1883&context=ilj>>

¹⁴ *Supra* note 11 at 4.

dockets of local courts. Aside having their usual workload of cases, judges may lack expertise on the issues that will be raised. In contrast, parties in a dispute resolution can be easily select who will rule on their dispute. Dispute resolution then is an integral part of the WTO, which caters to the need of effectively implementing the rules and regulations of WTO.

WTO'S DISPUTE RESOLUTION: FLAWED

Despite being considered as one of the most successful bodies that hear trade disputes, the WTO's dispute resolution system is flawed. This is the reason why a lot of legal scholars would usually write on topics assessing its effectivity and suggesting ways on how to improve it. This argument is also raised by Donald Trump, drawing much flak to the WTO Dispute Resolution system and appellate body.

One of the flaws of the system is the “unanticipated deficiencies in the WTO Legal Framework.”¹⁵ This is evident since there are no precise and determinate interpretations of the obligations of parties which are similarly situated. Normally, there are overlaps or even conflicting rulings made by the arbitrators. This is a glaring flaw especially since one of the purposes of the WTO is to have predictability in the trade system to make sure that economies of countries are secured and trade relationships are maintained.

Another example of a flaw in the system is the situation when WTO adjudicators exceed their mandate. This is where the US made a proposal of having a more flexible and member controlled Dispute Settlement Understanding.¹⁶ However, several countries do not agree with this proposal, pointing out that this proposal will only be much beneficial to the USA and not for the WTO system.

¹⁵ *Supra* note 8 at 2.

¹⁶ *Id.*

SAVING WTO'S DISPUTE RESOLUTION

The WTO's Dispute Resolution system is flawed. Even then, appellate body member Van den Bossche admitted the need to address to these flaws of the system in his farewell speech. This calls for an update on the rules and regulation of the body or, better yet, for the reformation of the system. The flaws of the system can mean that it needs to be updated for it to cater to the pressing issues brought forth by the dynamic trading systems brought about by globalization. As a trade system evolves, so do the rules and regulations that govern it. WTO's dispute resolution works though but needs some tweaks and improvements in its implementation and enforcement.

The timely settlement of dispute and a structured manner is an important part of the trade system. It helps maintain the harmonious trade relations between states. It gives parties peace of mind that there is an available mechanism in case disputes arise. It gives parties an alternative option prevents bargaining deadlock, which can cause trade wars among states.¹⁷ Considering how trade relations are growing each day, it will be difficult if we drastically forget this option of resolving trade disputes among states. The very essence of dispute resolution in trade is to avoid the effects of unresolved trade disputes which can cause unwanted effects not only to the parties in dispute but also to the other member states, both susceptible to suffering collateral damage.¹⁸

Finally, the dispute resolution system of the WTO mitigates both the conflict and imbalance among the signatory states of the WTO. This will help smaller countries get better chances in its trade dispute with another state rather than letting power rule over for the resolution of the dispute.¹⁹

The WTO Dispute Resolution System might be flawed, but at the end of the day, it is still a mechanism ensures that member states will have a well-functioning multilateral trading system.

¹⁷ World Trade Organization. https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm. Last accessed: July 15, 2019

¹⁸ Supra note 16.

¹⁹ Supra note 16, at 19.