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Introduction to the WTO Dispute Settlement System

Importance of the Dispute Settlement System in the WTO

The WTO Agreement[1] is a treaty negotiated by dozens of countries over the seven-year span of the Uruguay Round of multilateral trade negotiations. It comprises agreements setting out a delicate and carefully achieved balance of rights and obligations for WTO members in respect of a vast array of measures affecting trade, such as tariffs, internal taxes, subsidies, sanitary and phytosanitary measures, intellectual property rights, and services, to name but a few. Some of these agreements were negotiated and concluded in successive rounds throughout the lifespan of the General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO. Others build on and further elaborate previously negotiated agreements. Except for the plurilateral agreements,[2] the WTO Agreement was adopted by the WTO members as a "single undertaking". This means that in agreeing to be bound by the WTO Agreement, WTO members must accept the entirety of the WTO Agreement and may not pick and choose among the constituent trade agreements. In so agreeing, WTO members consider the balance of negotiated rights and obligations across the entirety of the WTO Agreement.

An agreement is the expression of the common intention of the parties. The larger the agreement and the number of the parties, the more challenging it is to arrive at a text that captures that common intention. Compromises in concept and in text are not only inevitable,

[1] In WTO law, reference may be made either to the "WTO Agreement" or the "WTO agreements". The term "WTO Agreement" refers to the *Marrakesh Agreement Establishing the World Trade Organization* and its annexes: multilateral and plurilateral trade agreements (as appropriate), the text of the GATT 1947, and understandings, decisions and other instruments concluded during the Uruguay Round. The *Marrakesh Agreement* is a short agreement containing sixteen articles that set out the institutional framework of the WTO as an international organization. However, the term "WTO agreements" refers only to the agreements contained in the annexes to the *Marrakesh Agreement*.

[2] *See* the section concerning plurilateral trade agreements on page 46.

but necessary to allow such large-scale negotiations to conclude. The WTO Agreement is not immune from such compromises. Once adopted, even a good-faith implementation of a clear legal text in the domestic law of parties with a variety of legal traditions and massive differences in economic and social development could result in divergent and inconsistent application of the negotiated agreement, and disagreement between parties in respect of such divergences. In this sense, disputes between WTO members in respect of both the scope of negotiated rights and obligations and the application of disciplines in specific instances are part and parcel of the normal functioning of such a complex treaty.

Most, if not all, treaties envisage some sort of system for the amicable settlement of disputes between parties. An effective dispute settlement system seeks, as a primary objective, to safeguard the negotiated balance of rights and obligations, thus not only increasing the practical value of commitments that parties undertake in an agreement, but also – and crucially – preserving the integrity and legitimacy of the agreement. The robust dispute settlement system of the WTO, built on the experience of the GATT in the four decades preceding the establishment of the WTO, does that, and more. Its mandatory jurisdiction mitigates the imbalances between stronger and weaker players by having all disputes settled on the basis of rules rather than power relations. Timely and structured dispute resolution helps to reduce the detrimental impact of unresolved international trade conflicts. A permanent, standing Appellate Body provides for continuity and consistency in the interpretation and application of rights and obligations.

Against this background, it is not surprising that the WTO dispute settlement system has, in a little over twenty years, become one of the most dynamic, effective and successful international dispute settlement systems in the world. There are, of course, many different benchmarks to measure effectiveness and success. The following considerations, however, are instructive:

(a) over 500 disputes[3] have been launched, of which 295 have gone forward to adjudication by panels (and possibly the Appellate Body).[4] In the words of Director-General Roberto Azevêdo, "[i]t is

[3] There were 514 requests for consultations by 1 December 2016.

[4] This is the total number of disputes for which panels were established as of 1 December 2016. Since some of these disputes may have joint panel proceedings, the number of disputes that have gone to a panel exceeds the number of panels established. For example,

unquestionably one of – if not **the** – most active international adjudicatory systems in the world. And it still operates faster than any other";[5]

(b) the very existence of the dispute settlement system helps WTO members to resolve disputes without having to resort to adjudication;[6]

(c) there is a high compliance rate in adjudicated disputes;[7]

(d) the WTO dispute settlement system is remarkably faster than its international counterparts, with an average time frame for WTO panel proceedings of around eleven months;[8]

(e) WTO disputes are not just numerous; they are very diverse in terms of the legal and factual issues encountered. So far, disputes have involved measures dealing with issues as varied as internal taxes, tariffs, custom rules, domestic regulations in areas such as human

in *Australia – Tobacco Plain Packaging*, a single panel was established to deal with five separate complaints.

[5] *See* Director-General Roberto Azevêdo's speech to the Dispute Settlement Body on 28 October 2015 (www.wto.org/english/news_e/spra_e/spra94_e.htm). *See also* Director-General Roberto Azevêdo's speech to the Dispute Settlement Body on 26 September 2014 (www.wto.org/english/news_e/spra_e/spra32_e.htm).

[6] For almost half of the disputes initiated at the WTO, it has not been necessary to proceed beyond the preliminary phases of the adjudicative process; i.e. only 295 disputes, out of 514 initiated thus far, have proceeded to the panel composition phase. In some cases where there have been decisions by the DSB to establish a panel, the dispute has been settled before the actual constitution of the panel. In other cases, panels remain in the composition stage.

[7] The WTO dispute settlement system has a remarkable record of compliance with the decisions (recommendations and rulings) taken by panels and the Appellate Body and adopted by the DSB. With few exceptions, parties consistently comply with such decisions.

[8] This average has been calculated excluding the time it takes to compose a panel and translate reports into the three official WTO languages (English, French and Spanish). The average time frame in the International Court of Justice (ICJ) is four years, that of the European Court of Justice (ECJ) is two years and that of the International Centre for Settlement of Investment Disputes (ICSID) is three and a half years. Regional dispute settlement mechanisms also take longer on average than the WTO. For example, proceedings under NAFTA's Chapters 20 and 11 take three and five years, respectively. It is true that some WTO proceedings have taken longer than eleven months and, in recent years, the average time frame for a panel process has been closer to a year. Two high-profile cases, *EC and certain member States – Large Civil Aircraft* and *US – Large Civil Aircraft (2nd complaint)*, have taken several years to go through the system, but they are exceptional cases. Moreover, with respect to appellate proceedings, the average time frame from the date of appeal to the circulation of the Appellate Body Report is approximately 102 days. In the case of compliance proceedings under Article 21.5 of the DSU, the average time from the referral of the matter to the circulation of the final report is approximately eight months.

and animal health, environment, services, intellectual property, etc. While some disputes relate to very technical issues of little interest to the general public,[9] others have dealt with politically sensitive issues that have attracted considerable public attention. This has been the case especially with disputes concerning trade and the environment, such as *US – Shrimp*, *US – Tuna II (Mexico)*, *Brazil – Retreaded Tyres*, *EC – Seal Products*, *Canada – Renewable Energy / Feed-in-Tariff Program* or *India – Solar Cells*; trade and human health, such as *EC – Hormones*, *EC – Asbestos*, *EC – Approval and Marketing of Biotech Products*, *US – Clove Cigarettes*, *Australia – Tobacco Plain Packaging*, *Russia – Pigs* or *Korea – Radionuclides*; consumer protection, such as *US – COOL* and *US – Tuna II (Mexico)*; and major industries, such as the lengthy disputes in *EC and certain member States – Large Civil Aircraft* and *US – Large Civil Aircraft (2nd complaint)*; and

(f) WTO disputes are not only diverse in subject matter, but increasingly diverse in terms of the members engaged in dispute settlement. To date, 106 members have engaged in the dispute settlement process in some capacity, and forty-two developing country members have been involved in dispute settlement as a disputing party.

By any measure, the WTO dispute settlement system has proven to be a success in its short life.

Functions, Objectives and Key Features of the Dispute Settlement System

The rules governing dispute settlement in the WTO are, in large part, set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding and abbreviated as "DSU". Found in Annex 2 of the WTO Agreement, the DSU builds on rules, procedures and practices developed over almost half a century under the GATT 1947.

[9] Such technical issues include, for example, certain procedural aspects of anti-dumping investigations, tariff classification and customs valuation, and issues pertaining to members' schedules of concessions. *See*, for instance, Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*; *EC – Selected Customs Matters*; Panel Report, *Russia – Tariff Treatment*.

Providing Security and Predictability to the Multilateral Trading System

A central objective of the WTO dispute settlement system is to provide security and predictability to the multilateral trading system (Article 3.2 of the DSU). Although international trade is understood in the WTO as the flow of goods and services between members, such trade is typically conducted not by States, but by private economic operators. *Predictability* is a signal requirement of the market. Market actors need stability and predictability in the governing laws, rules and regulations applying to their commercial activity, especially when they conduct trade on the basis of long-term transactions. Commercial relations either grind to a halt or become very expensive in the absence of a stable legal framework, or where the law governing those relations swings with abandon from case to case. *Security* is the measure of members' confidence in the ability of the WTO dispute settlement mechanism to determine accurately the will of WTO members when negotiating and agreeing to be bound by the WTO Agreement. This is particularly sensitive in a context where national policies found inconsistent with the WTO Agreement affect serious matters of industrial and strategic policies, involve hundreds of millions of dollars in trade or governmental expenditure, and have an impact on thousands, if not tens of thousands, of jobs.

To achieve these objectives, the DSU provides a framework for a fast, efficient, dependable and rules-oriented system to resolve disputes involving the application of the provisions of the WTO Agreement. By reinforcing the rule of law, the dispute settlement system makes the international trading system more secure and predictable.[10] Where non-compliance with the WTO Agreement has been alleged by a WTO member, the dispute settlement system provides for a resolution of the matter through independent findings rendered by quasi-judicial bodies and confirmed by the political organs of the WTO. This resolution must be implemented promptly.

[10] WTO rules are "reliable, comprehensible and enforceable" (Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 31). The need to ensure security and predictability in the WTO dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160). Accordingly, panels are expected to follow the Appellate Body's conclusions in earlier disputes, especially where the issues are the same (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

Preserving the Rights and Obligations of WTO Members under the WTO Agreement

The WTO dispute settlement system is only open to disputes concerning the rights and obligations resulting from the provisions of the WTO Agreement. All disputes concerning the application of the agreements listed in Appendix 1 of the DSU (Article 1.1 of the DSU) may be brought before the WTO dispute settlement mechanism. In the DSU, these agreements are referred to as the "covered agreements".[11]

This means that WTO members cannot bring to the WTO dispute settlement system disputes concerning the rights and obligations encompassed in legal provisions outside the covered agreements. It is often the case, for example, that regional trade agreements (RTAs) incorporate most-favoured-nation (MFN) and national treatment clauses that are very similar to Articles I and III of the GATT 1994. Even if the wording of the provisions reflects that of the relevant WTO provision, disputes concerning the application of the RTA provisions cannot be brought to the WTO dispute settlement system. The same is true for other international treaties as they are not part of the covered agreements.

Typically, a dispute arises when one WTO member adopts a measure that another member considers to be inconsistent with the obligations set out in the WTO Agreement or nullifies or impairs benefits arising from them. In such a case, the latter member is entitled to invoke the procedures and provisions of the WTO dispute settlement system in order to challenge that measure.

If the parties to the dispute do not manage to reach a mutually agreed solution, the complainant is guaranteed a rules-based procedure in which the merits of its claims will be examined by independent adjudicators (panels and the Appellate Body). If the complainant prevails, the desired outcome is to secure the removal of the inconsistency with the WTO Agreement. Compensation and countermeasures (the suspension of concessions or other obligations)[12] are available only as secondary and temporary responses to a violation of the WTO Agreement (Article 3.7 of the DSU).

From the perspective of the complainant, the WTO dispute settlement system provides a mechanism through which the complainant can obtain

[11] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 13. *See* footnote 1 in Chapter 1. *See also* the section on the notion of "covered agreements" on page 46.

[12] *See* the sections dealing with compensation and countermeasures on pages 139 and 141 respectively.

an independent rules-based determination of its rights and the respondent's obligations in respect of a given measure, and a multilateral forum within which to resolve its bilateral trade dispute (Article 23.1 of the DSU). From the perspective of the respondent, the system provides protection from a unilateral determination of violation and sanctions, and the respondent has the opportunity to defend the measure before independent adjudicators as not violating an obligation, or to justify it under the exceptions available in the covered agreements (Article 23.2(a) of the DSU). In this way, the WTO dispute settlement system serves to preserve all members' rights and obligations under the WTO Agreement (Article 3.2 of the DSU).

To achieve its objectives, the WTO dispute settlement system is required to interpret and apply the provisions of the WTO Agreement in accordance with customary rules of interpretation of public international law (Article 3.2 of the DSU).[13] In practice, this is done by the adjudicators of the dispute settlement system (panels, the Appellate Body, and arbitrators). In doing so, the recommendations and rulings made by these adjudicators may not "add to or diminish the rights and obligations provided in the covered agreements" (Articles 3.2 and 19.2 of the DSU). Indeed, the objective of dispute settlement is to ensure the correct interpretation and application of provisions of the negotiated agreements, and not to obtain benefits that have not been negotiated.

Clarification of Rights and Obligations through Interpretation

A dispute typically arises where, in the view of a complainant, a particular set of facts gives rise to a breach, by a respondent, of a legal requirement contained in a particular provision of the WTO Agreement. To establish that the respondent has acted inconsistently with its WTO obligations, a complainant must (i) prove the existence of the set of facts it alleges; and (ii) demonstrate that the provision at issue creates an obligation that the respondent, given the facts, is not fulfilling. Like most municipal laws of general application, the provisions of the WTO Agreement are often drafted in broad terms so as to be of general applicability and to cover a multitude of individual cases; it is neither practical – nor, indeed, possible – to foresee and regulate all specific cases that may arise in WTO members' jurisdictions. As well, like all

[13] *See* the section concerning the rules of interpretation on page 7.

other international agreements – and not a few municipal laws – the WTO Agreement is a text forged in compromise; it is the result of arduous and contentious negotiations between dozens of countries with divergent interests and different legal traditions. To make compromise possible, negotiators sometimes reconcile diverging positions by agreeing to a text that can be understood in more than one way. This means that applying legal provisions to a given set of facts is not always straightforward. Adjudicators must first determine the meaning of the legal provision at issue before they can apply it to the facts as they have been established.

At a most basic level, in determining the meaning of a treaty provision, the adjudicator seeks to give effect to "the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances*".[14] The DSU specifically provides that this be done "in accordance with customary rules of interpretation of public international law" (Article 3.2 of the DSU). Certain elements of these rules have been codified in the Vienna Convention on the Law of Treaties (VCLT), such as those set out in Articles 31, 32 and 33 of the VCLT.[15] Panels and the Appellate Body must, in interpreting and

[14] Arnold Lord McNair, *The Law of Treaties* (Clarendon Press, 1961), p. 365. Emphasis in original. *See also* Appellate Body Reports, *EC – Chicken Cuts*, paras. 175–176.

[15] The three provisions read as follows:

> **Article 31 General rule of interpretation**
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

applying the provisions of the WTO, start from these codified rules.[16] Other rules of interpretation in customary international law may also be relevant in this task.[17] The purpose of treaty interpretation, particularly under Article 31 of the VCLT, is to ascertain the *common* intentions of the parties, which cannot be done on the basis of "subjective and unilaterally determined 'expectations'" of *one* of the parties to a treaty.[18]

> **Article 32 Supplementary means of interpretation**
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
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> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.
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> **Article 33 Interpretation of treaties authenticated in two or more languages**
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

[16] Appellate Body Reports, *US – Gasoline*, p. 17 (Article 31 of the VCLT); *Japan – Alcoholic Beverages II*, p. 10 (Article 32 of the VCLT); *US – Softwood Lumber IV*, para. 59 (Article 33 of the VCLT). The concessions provided for in a WTO member's schedule are part of the terms of the treaty and, therefore, "the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the [VCLT]". Appellate Body Report, *EC – Computer Equipment*, para. 84.

[17] For instance, the principle of effective treaty interpretation. *See* page 11.

[18] Appellate Body Report, *EC – Computer Equipment*, para. 84. While the language above is derived from *EC – Computer Equipment* (a dispute concerning tariff concessions provided for in a member's Schedule), nearly identical language has been used in other disputes. For instance, in *Peru – Agricultural Products*, the Appellate Body rejected the view that a regional trade agreement negotiated between two parties could change the meaning of Article 4.2 of the Agreement on Agriculture. With multilateral treaties such as the WTO covered agreements, the "general rule of interpretation" in Article 31 of the VCLT is aimed at establishing the ordinary meaning of treaty terms reflecting the common intention of the parties to the treaty, and not just the intentions of some of

In accordance with these principles, the WTO Agreement is to be interpreted according to the *ordinary meaning* of the words in the relevant provision, viewed in their *context* and in the light of the *object and purpose* of the Agreement. The ordinary meaning of a term in a provision is to be discerned on the basis of the plain text.[19] The definitions of a term provided in dictionaries may well serve as a useful starting point.[20] The "context" includes the text of the treaty, including its preamble and annexes, as well as certain agreements and instruments relating to the conclusion of the treaty under certain circumstances.[21] Interpreting a provision in its context refers to the kinds of conclusions that can be drawn on the basis of, for example, the structure, content or terminology in other provisions belonging to the same agreement, particularly those preceding and following the rule subject to interpretation.[22] The "object and purpose" refers to the explicit or implicit objective of the agreement being applied, or, in some instances, it may refer to the purpose of the particular provision being applied.[23]

the parties. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted. *See* Appellate Body Report, *Peru – Agricultural Products*, para. 5.95.

[19] "Interpretation must be based above all upon the text of the treaty." Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11. *See also*, for example, Appellate Body Report, *US – Carbon Steel*, para. 62.

[20] In this respect, "while a panel may start with the dictionary definitions of the terms to be interpreted, in the process of discerning the ordinary meaning, dictionaries alone are not necessarily capable of resolving complex questions of interpretation because they typically catalogue all meanings of words". Appellate Body Report, *US – Gambling*, para. 164. *See also* Appellate Body Reports, *US – Softwood Lumber IV*, para. 59; *Canada – Aircraft*, para. 153; *EC – Asbestos*, para. 92; and *China – Publications and Audiovisual Products*, para. 348.

[21] *See* Article 31(2) of the VCLT in footnote 15 in Chapter 1. For instance, the Information Technology Agreement (ITA). Panel Report, *EC – IT Products*, paras. 7.376–7.383.

[22] Context is a necessary element of an interpretative analysis under Article 31 of the VCLT. Nonetheless, its role and importance in an interpretative exercise depend on the clarity of the plain textual meaning of the treaty terms. Where the meaning of treaty terms is difficult to discern, the determination of the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and, possibly, other elements considered "together with the context", as well as the tools mentioned in Article 32 of the VCLT. Appellate Body Report, *Peru – Agricultural Products*, para. 5.94.

[23] A treaty interpreter must first seek the object and purpose of the treaty in the words of the provision at issue, read in its context. In those instances where the meaning of the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, the treaty interpreter may have recourse to considerations regarding the object and purpose of the treaty as a whole. *See* Appellate Body Report, *US – Shrimp*, para. 114. *See also* Panel Reports, *US – Section 301 Trade Act*, para. 7.22; *India – Patents*