

## DSS and challenges for developing countries: Recommendations to Uzbekistan as a developing member state of the WTO

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**Abstract:** World Trade Organisation is an international organization that regulates trade between nations. The trade is ruled by the regulations of WTO Agreements that are negotiated and signed by nations and ratified by member states' parliaments. The main aim of the organization is to make favorable conditions for trade among the nations. It is the only organisation that is run by member states which makes the WTO unique. As the subjects of the organization are trade, agreements, and states there are misunderstandings, misinterpretations, and conflicts. Furthermore, as the main actors in the organisation are the governments disputes also refer to government-to-government. For this reason, the organization solves the disputes concerning agreements inside by its own Dispute Settlement Body and statutory regulation named Dispute Settlement Understanding that has key points. Additionally, to accomplish the aim of the organization it establishes special provisions for developing and least developed states. Despite this mentioned governments face several obstacles. This paperwork is aimed to highlight the challenges that developing states face and provide advice for Uzbekistan in case of being a member as a developing state and taking part in dispute settlement mechanisms.

**Key words:** WTO, Dispute Settlement Body, mechanism, Dispute Settlement Understanding, developing states, favorable condition, trade of goods, services, TRIPS.

Abbreviations

AB Appellant Body

EC European Community

US United States

DSB Dispute Settlement Body

DSS Dispute Settlement System

DSU Dispute Settlement Understanding

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

TRIPS Trade-Related Aspects of Intellectual Property Rights

WTO World Trade Organization

UN United Nations

USTR United States Trade Representative

### **Introduction**

The WTO and DSS of the organization are rule-based systems, not power-based. However, developing states and their constituents are at a disadvantage in front of DSB despite WTO's

perspective on trade liberalization and enforcement. Developed states such as the US and the European Community (EC) are advanced with financial independence, well-qualified lawyers, and support from private law firms and trade organizations. In this case, questions arise about how developing countries can manage and on what they can rely on as developing countries are significantly different in terms of finance which they can invest in dispute settlement process in case of conflicts. Furthermore, the quantity and quality of governmental specialists and the role of law vary in the domestic system.

After investigation three primary issues were found as the main obstacle to developing states in a DSS:

- Constraints of legal knowledge and practical experience;
- Restrictions of financial endowment;
- Political and economic pressure by market power states;

### Defining developing states

From a systematic point of view, the WTO does not give a definition of developed and developing countries. In practice, the states themselves declare their own status and join the organization. However, the group of countries listed as least developed countries based on the description noted in the UN document. Mainly the status of the country is owned by its capacity, specifically how powerful the country is, how great trades it is involved and how it can influence the trade market on a global scale. In practice, DSS does not satisfactorily operate when it comes to the classification of states as Pakistan, Hong Kong, Malaysia, and South Africa have declared themselves as developing states in one line with China, India, Brazil, and Argentina<sup>1</sup>.

Such classification has led to controversy over the years as their power, influence on the global market, and scope of trade significantly differ. Furthermore, in some cases, states do not expressly note their own status which leads to ambiguity when it comes to utilization of WTO procedures<sup>2</sup>. In some cases, the other party may show objection to the status of the states as it gives some privileges. Especially when the states are the major players in specific fields relating to specific agreements and measures<sup>3</sup>.

The usage of such status influences the participation of the state in the dispute resolution process, too. There is a phenomenon that DSS works in favor of more powerful and developed states as they own greater budgets that can be invested in the army of lawyers and pursue trade problems. However, the main aim of DSU was the creation of a fair environment among the WTO DSS where all members equally can bring complaints that will be fairly investigated.

Practically, if we look at the quantitative data provided by the WTO Overview document issued in 2005, developed states are more active and confident in depriving the cases against other states

<sup>1</sup> [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>2</sup> World Trade Organization - Dispute Settlement, Dispute DS252: 'United States – Definitive Safeguard Measures on Imports of Certain Steel Products' accessed 10 september 2023 44 WTO, Accession of the People's Republic of China (2001) accessed 10 september 2023 Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds252\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm)

<sup>3</sup> In the Korea-Beef case, EU objected on the issue about consideration of Korea as a developing state relating to Agreement on Agriculture. Additionally, during Uruguay round of negotiations US declared that some states are not longer have to be considered as developing countries and use privileges for the purpose of subsidies and Countervailing measures.

World Trade Organization - Dispute Settlement, Dispute DS161: 'Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef' accessed 10 September 2023, Agreement on Subsidies and Countervailing measures accessed 10 September 2023

(Appendix 1, Table 1). However, it should be noted that these numbers include the consultation process of DSS that is frequently faced. In practice 2 of the three requests end up in the first stage of DSS, without establishing the Panel that is the second stage of the process. Even in the request for consultation developed states are more active than developing countries (appendix 1, table 2). The same can be seen in the panel reports and complaints made by developed states (Appendix 1, Table 3). However, quantitative data presents that developing states are becoming more active and confident in bringing complaints, not only against developing or least developed states but against developed countries too, showing the advancement inside the states and organizations. But still, the US and EU are the major actors in WTO and DSS<sup>4</sup>.

Around the system of WTO and DSS, there are many discussions and analyses of the rare participation of developing states in dispute settlement processes or predictions that are proved with evidence. That can be sorted as capacity constraints that include a lack of human resources, skilled and acknowledged specialists as well as native English speakers as hearing are conducted mainly in English. Next is a financial constraint that developing states sometimes can not afford and finance all the expenses of the dispute settlement process, specialists, experts as well and attendance of all meetings. Last but not least, can be noted as a power constraint that developed, and the main actors of the organization own the status.

### Capacity challenge

For successful use of DSS of the WTO, the member states must reasonably mark the perspective injury that can influence the trading sphere of the country, enhance the cost-effective mechanism of the possible damage, and muster financial and non-financial resources to settle the legal claim in a favorable way. In some legal works of literature, this technique is called “naming, blaming, and claiming”<sup>5</sup>. The participation of the state in the dispute settlement system shows the level of readiness of the member to practically use knowledge of trade injuries, their causes, consequences, and relation to the law of WTO. If the state lacks experience and has little budget for hiring the lawyers and bringing the claim, it is ineffective even to identify and prioritize the claim for their economy and trade. In the eyes of officials and experienced states the claim will not be transferred to the legal action as it is not worth the litigation cost, remedy, and political risk.

The major influencers of the organization developed states such as the US and EC have established formal and practical legal rules to establish international trade barriers, identify their impact and importance, and sort out the resources for the WTO DSS. They have mobilized data through international coordination and collaboration with private sectors, specifically private law forms. Developed and larger developing states have already taken big steps towards networking with private law firms but, little and new developing member states are facing several challenges on this issue. These challenges include international bureaucratic hurdles, where officials think the developing state has a limited background on trade dispute settlement systems, lack of financial and informational support from the state and private sectors, lack of experience, legal experts, and language barriers<sup>6</sup>.

<sup>4</sup> [https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)

<sup>5</sup> William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 LAW & SOC'Y REV. 631 (1980-81).

<sup>6</sup> Tussie, Diana and Delich, Valentina *The Political Economy of Dispute Settlement: a case from Argentina* Latin American Trade Network (workingpaper 33, October 2004) available at [https://warwick.ac.uk/fac/soc/pais/research/csgreen/papers/library/the\\_political\\_economy\\_of\\_dispute\\_settlement\\_a\\_case\\_from\\_argentina.pdf](https://warwick.ac.uk/fac/soc/pais/research/csgreen/papers/library/the_political_economy_of_dispute_settlement_a_case_from_argentina.pdf)

For instance, developing states give less attention to WTO matters rather than developed states. While the US has the United States Trade Representative (USTR) and EC's own EC Trade Commissioner that deals with WTO issues and holds a cabinet-level position, developing states give lower importance to international trade issues within the governmental hierarchy. Mainly developing states own one diplomatic mission for WTO and UN matters that is led by the foreign affairs ministry officials. For giving the importance the states can try to establish separate "head of mission" for WTO matters that deals with trade issues in the ministry but they can not hold the rank of ambassadors, resulting lower level of position in the governmental bureaucracy.

This organizational structure does not mean that the officials or trade issues concerning the WTO have been marked low and given less importance. In practice, it is seen that the officials dealing with WTO issues became the country's foreign ministers immediately and enhanced the state's position in the organization<sup>7</sup>. The studies showed that the organization gives more attributes to more influential actors of the state or international organization rather than specialists in one specific matter. In this case, specifically, experts in the trade dispute settlement process hardly achieve high rank in the organization and governmental level as the dispute settlement process is time-consuming and diplomatic success is not ranked looking at the positive ending of international litigation. This directly influences the continuity of the diplomatic rotation system, which results in the moment of officials to unrelated posts. Consequently, the organization and the states suffer from the lack of powerful officials and expertise, who can influence the decisions specifically in the litigation process<sup>8</sup>.

Furthermore, developing country officials suffer from national encouragement in questions of capital. For instance in order to promptly and accurately follow the complex WTO rules, laws, and structure the state missioners must attend all WTO meeting that takes place in Geneva. For instance, every year WTO involves over 2800 meetings that encourage over 70 WTO working groups including councils, specialists, and lawyers. It is hard for the state to afford and finance all these flights for the missions, resulting in lower practicality of the understanding of the organizational structure of the WTO and its laws<sup>9</sup>.

Rare attendance at the office in Geneva and less active at the events can influence the strength of the words. Their decisions and views can be undermined by more active figures of the organization in dispute settlement. Many developing states cause of their weaker position need the approval of the general's office attorneys or the submission of the case by the third-party member states that are more powerful in order to file a claim. This process is time-consuming and involves a complex

<sup>7</sup> Brazil's past two ambassadors to the WTO (Celso Lafer and Celso de Amorim) became the country's foreign minister immediately following their Geneva posting.

<sup>8</sup> Suspa

<sup>9</sup> See Gary Sampson, Trade, Environment and the WTO: The Post-Seattle Agenda 24 (2000). As Sampson, the former Director of the WTO's Trade and Environment Division, notes, the Egyptian delegation to the WTO has estimated that there were 2,847 meetings in the WTO in 1997, or an average of 10 meetings per working day. (citing Communication from Egypt, High Level Symposium on Trade and Development, mimeo WTO 17 March 1997). In consequence, many countries' representatives simply do not attend or keep up with developments in most WTO committees. Developing countries may lack the capacity to attend meetings in Geneva scheduled for their express benefit. As reported by a WTO official interviewed by Braithwaite and Drahos, "We set up a Subcommittee with a Chair and a Secretary who turned up for the first meeting on trade needs of LDCs [least developed countries]. No LDCs came. No developed countries came. No one came. Not one country showed up. If it had been telecoms, the chamber would have been packed [with special interests and states pushed by telecom interests]." John Braithwaite and Peter Drahos, *Global Business Regulation* 196 (2000). Many WTO members do not even maintain permanent offices in Geneva because of a lack of resources, and others have a staff of only a few people for all WTO and Geneva-based UN matters. As of May 2004, twenty-four WTO members and nine WTO observers did not have permanent missions in Geneva. Available at

[https://johnbraithwaite.com/wp-content/uploads/2016/04/2009\\_John-Braithwaite-and-Peter-Dra.pdf](https://johnbraithwaite.com/wp-content/uploads/2016/04/2009_John-Braithwaite-and-Peter-Dra.pdf)

format of the exchange of formal letters between the states, their ministries, and officials. The third-party states can guard themselves from external political pressure that causes the delay or even cancellation of the case. The formation of the documents through such a complex process requires much time that can result in the passing of the submission deadlines<sup>10</sup>.

Cause of such reasons Geneva-based officials can show discouragement resulting in the reduction of incentive to bring a case to DSB. In case of presence major and important trade dispute the case may suffer from a lack of details, facts, data, and experience.

Furthermore, the WTO law is different from other spheres of law such as public international law that is used to be educated in the developing states. The WTO law is not a subject in most developing countries which results in the lack of legal experts in specific spheres within the governmental and private law organizations. So, members of diplomatic groups that are part of WTO dealings are non-lawyers, which makes it difficult to address some issues concerning the WTO and cases.

Last but not least, language is also a matter of importance. There are three official languages of WTO: English, French, and Spanish where English predominates. This puts other members of the organization whose primary language is not English at a big disadvantage, even native speakers of Spanish and French. Experience has shown that initially, the panel audience tries to translate the case which is tiring and time-consuming, additionally, it is not the fact that panelists will be in a full introduction of the case. What is more, at any minute of the hearing the panel may decide to continue the hearing of the case in English which puts the parties and non-English speaking states at a disadvantage, decreasing the effectiveness of participation<sup>11</sup>.

### **Financial challenge**

The second big challenge that was found for developing countries is the financial difficulties of investing litigation process in the WTO. The dispute settlement mechanism in the organization is itself too expensive and developing states face financial challenges as they own few resources to spend on legal assistance concerning WTO law and rights.

In comparison with large and developed states developing countries face much higher costs in the litigation process. As the size of the budget and economy of the developing countries differs from developed ones, investing WTO litigation process and expertise can seem less important to the government compared with other socioeconomic needs. Additional to relative costs developing states face higher absolute expenses in DSS for the separate cases. As they participate in the dispute settlement process much less than developed states, developing states are at a disadvantage from the WTO economy. For instance developed states, namely the US and EC have participated in the litigation process as a party in around 98% and as a third party in 86% WTO cases<sup>12</sup>. Thanks to active

<sup>10</sup> The consultants assisting sub-Saharan African countries mentions that many developing countries in order to litigate a case need to authorize the documents and they need to be undertaken by the Attorney General offices. For this complex process of exchange of documents need to be taken place between Ministry of Trade in Geneva and claiming states, then documents need to be approved for the consistency with foreign policy by The Attorney General's office and the Ministry of Foreign Affairs. All these process results the delay of the deadline.

<sup>11</sup> Argentina and Chilean Price Bands 2002

[https://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case1\\_e.htm](https://www.wto.org/english/res_e/booksp_e/casestudies_e/case1_e.htm)

<https://wtocenter.vn/chuyen-de/15724-case-study-1-dispute-settlement-between-developing-countries-argentina-and-chilean-price-bands>

<sup>12</sup> Chad P Bown and Bernard M Hoekman *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector* Journal of International Economic Law 8(4), 861–890 doi:10.1093/jiel/jgi049. 14 November 2005 available at <https://www.chadpbown.com/wp-content/uploads/2019/01/Bown-Hoekman-JIEL-2005.pdf> accessed 10 September 2023

attendance in the litigation process and much experience such countries face few start-up costs of DSB which means they spend much less budget for preparation and litigation of the case.

### Political challenge

The next one of the major challenges that developing countries face is political pressure from developed and powerful states that use the law to undermine the aim of objective trade dispute resolution. Powerful states can use the power for their own benefit in non-power-based and unfair terms. Developing and small developing countries may not challenge the trade measure only cause of a fear of losing some tariff benefits or foreign aid when the state is needed. In practice, it was seen in the relationship between the US and African countries, when they wanted to represent the complaint to WTO on US. The trade minister of Africa had received a document on thousands of pages from the US embassy that “shortly” described the reasons how they could lose food aid in the AIDS epidemic<sup>13</sup>. Such cases and political tactics are a reason for untruth developing countries to the legal system of the WTO. The practice of such tactics is not surprising as in the domestic market the private companies and the state face such situations, too. For instance, in domestic trade and contractual disputes, the private organizations that are advanced with market power are advanced with explicit and implicit threats. To avoid such pressure the state needs a better strategy to cope with the threats.

### Uzbekistan and DSB

Currently, Uzbekistan is not a member of the WTO but the state is going to this, however, as there is no membership it is difficult to talk about the settlement of the dispute with the participation of the country. Considering the economic condition of the states there is a high potential that Uzbekistan will become on the list of developing member states of the organisation<sup>14</sup> that can greatly benefit in case of dispute. Furthermore, taking into account the abovementioned loopholes in the system several recommendations can be made for being better prepared for participation in DSB:

- At the same time, when the authorities harmonize the legal framework of the state with the rules and regulations of the WTO, it should not be forgotten about DSU. Where there are relations and trade there is a high potential for the presence of disputes. So, the legislation of Uzbekistan should be ready to accept the DSU regulations and respond correspondingly and fairly to the advantage and for the benefit of the state. Additionally, the law of the state should foresee the remedies and enforcement conditions for developing states in case of dispute.
- One of the limits of developing new member states is the lack of WTO specialists. For this Uzbekistan should prepare specialists not only in the GATT, GATS, TRIPS, and other agreements of the organization for organizing a better trade environment but also in DSU regulations and the DSB process for attending to procedures successfully. For this Uzbekistan can regularly attend the WTO Chairs Programme as it was done in May 2022 with the participation of The University of World Economy and Diplomacy (UWED)<sup>15</sup>. Furthermore, for practical experience specialists from Uzbekistan can attend open cases as a listener in the cases of developing states.

<sup>13</sup> Gregory Shaffer and Yvonne Apea *Institutional Choice in the General System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights* Journal of World Trade, lead article, vol. 39:5, pp. 977-1008, Dec. 2005 available at <file:///C:/Users/USER/Downloads/SSRN-id871240.pdf>

<sup>14</sup> Interview with Lee Taeho *WTO accession definitely helps Uzbekistan's economic reforms* available at <https://kun.uz/en/news/2023/09/18/wto-accession-definitely-helps-uzbekistans-economic-reforms-exclusive-interview-with-lee-taeho>

<sup>15</sup> High-level event marks Uzbek university joining WTO Chairs Programme [https://www.wto.org/english/news\\_e/news22\\_e/chair\\_23may22\\_e.htm](https://www.wto.org/english/news_e/news22_e/chair_23may22_e.htm)

- In addition to the abovementioned reform in the case of specialists Uzbekistan should educate lawyers and the young generation to the WTO law in general. The absence of special faculties and subjects in the sphere of WTO law creates a loophole for specialists too. It can be solved by way of creating educational programs with the help of international specialists who can visit the state and teach national lawyers and students about the system, procedure, and the law of WTO.
- In case of the born of a dispute after Uzbekistan's membership to the organization, the state may suffer from the abovementioned drawbacks, specifically, lack of experience and expertise. For this reason, it would be good to begin cooperation with the state with private international law firms and organizations for procedural matters and teaching programs. Furthermore, the state can encourage national private sectors, specifically private law firms the cooperate with international law firms that attend in WTO cases and own concrete experience.
- To create a good reputation in the organization it is advised to attend the meetings of the organization. Correspondingly, it requires a huge budget from the country, but for the implementation of rules and regulations in a better way and faster acceleration in line with the better reputation with the commentary of an active member of the organization the country should try to invest the working group for the presence in meetings. This will help to create a familiar picture of the state for Chair members.
- Last but not least, in the occasions of dispute there is a high potential of falling under the political and economic pressure from other state and their followers. For this reason, it is highly recommended to comprehend international relations with other member states and international organizations. On this occasion, the state can feel secure relying on other member states that are economically and politically strong. With the support of fellowship states Uzbekistan also can feel secure, safe, and confident in case of disputes.

### Conclusion

The dispute settlement mechanism of the WTO differs from other institutions that deal with problem-solving between two parties. As the main actors of the organization are governments the subjects of DSS are also states that own specific status. This status gives some privileges to the states in different conditions, but even they can not save them from possible challenges. For this reason, it is important to know loopholes in every status beforehand and be ready for any occasion with financial and intellectual resources.

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