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# Global Future Council on International Trade and Investment

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## Strategic Brief for Trade Ministers on the WTO Dispute Settlement Mechanism

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The World Trade Organization (WTO) dispute settlement mechanism has been called the crown jewel of the multilateral trading system. This [Global Future Council on International Trade and Investment](#) agrees. The greatest success of the mechanism is so vast in scale that it passes unnoticed: almost all trade across the world occurs every day without dispute. This is in no small part because all WTO Members have agreed to binding and adjudicated rules. For business, the bottom line is the valuable certainty of access to markets, goods and services.

The WTO dispute settlement system – a rare example of an international adjudication system “with teeth” – did not appear, fully formed out of nowhere in January 1995. It built on decades of dispute resolution by the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT). Contemporary WTO dispute settlement arrangements were specifically designed to respond to governments’ dissatisfaction with how the GATT dealt with – or failed to deal with – trade disputes. We believe that it is in all WTO Members’ interests to remain invested in, and engaged with, the dispute settlement system – and to work to improve it where they feel it is falling short.

### Why governments created the WTO dispute settlement mechanism

As the GATT procedures for addressing disputes evolved after 1947, mediation by working parties of trade diplomats gave way to increasingly rules-based adjudication by panels of independent experts. One feature of the GATT dispute resolution remained constant: a “positive consensus” principle that meant any country – even those targeted by a complaint – could block every step of the process, from the establishment of a panel to the adoption of panel reports and the authorization of retaliatory measures in the event of non-compliance.

Nonetheless, the system worked better than one might imagine in these circumstances, at least in the GATT’s early decades. Countries exercised restraint, perhaps for fear of ending up on the wrong end of a veto themselves. Many panel reports went on to be adopted and implemented. Yet the GATT dispute system had serious shortcomings. Delays were common, since it was easy for complainants to hold up proceedings. The prospect of vetoes and delays dissuaded governments from bringing GATT challenges in the first place, even if their commercial interests were harmed by measures that went against agreed rules. These shortcomings were amplified in the 1980s, as the number of blocked panels and unadopted reports increased, notably for disputes on newer issues such as subsidies that were at that time covered by a “plurilateral” code among a sub-set of countries. Dissatisfaction with the GATT dispute resolution spurred countries to solve trade irritants outside the rules-based system, typically through unilateral action or bilateral agreements that ignored third-party interests.

From the 1970s onwards, multiple governments began to press for reforms to the GATT dispute settlement process. These efforts came to fruition during the [Uruguay Round](#) of trade talks held between 1986 and 1994. Improving the GATT dispute settlement procedures was identified as one subject for negotiation from the start. Seven-and-a-half years of talks delivered the WTO complete with a Dispute Settlement Understanding (DSU), which applied to merchandise trade along with other issues to be covered by the global trade body, such as services, farm subsidies and intellectual property rights. Under the newly agreed arrangements, no individual country could block the establishment of a panel, or subsequent steps. The system remained member-driven in that all rulings had to be adopted by Members, but positive consensus gave way to “reverse consensus”. Instead of each country wielding a veto over

the adoption of a panel report, all Members would need to agree to reject adoption of a ruling. To ensure consistency in panel rulings, it set up an appeals process for Members – the Appellate Body.

The DSU provides guidance on timings for several of the steps in the process. Added together, disputes would take around nine months from panel composition to report adoption without appeal, and just over a year with appeal, in line with the deadlines in United States' Section 301 of the Trade Act of 1974 procedures. In addition to placing all parties on a common timeline and playing field, WTO dispute rules on information disclosure and transparency make information about disputes publicly available. This makes it possible for firms that stand to be indirectly affected by a particular dispute – because they are from a third country, or upstream or downstream from the industry involved – to assess potential disruption and prepare responses.

### **More disputes, more countries, more compliance – and a few safety valves**

Members have used the WTO dispute settlement mechanism with far greater frequency than its GATT predecessor. In the 47 years before the GATT was folded into the WTO, a mere 101 cases were completed (although some 300 disputes were filed). The WTO was barely past its twentieth anniversary when the 500th request for consultations was registered. By way of comparison, the International Court of Justice has dealt with 165 since 1946, while [25 cases](#) each have been brought to the International Criminal Court since 2002 and the International Tribunal for the Law of the Sea since 1997.

Many WTO disputes have been settled “out of court” through consultations. Still, as of the end of 2014, 201 dispute panel reports had been [adopted](#). However, fully two-thirds of these went on to be challenged in the Appellate Body, a far higher proportion than its architects had expected. Four-fifths of panel decisions have been [upheld](#) on appeal.

Appellate Body rulings have been lauded by some experts for striking a careful balance between commercial concerns and other considerations such as environmental protection and public health. Even among countries that have separate trade deals with each other, the WTO remains, in the words of several analysts, “the privileged forum for solving trade disputes”. Others, however, have criticized some of its decisions for legal misinterpretation or stepping beyond the rulebook.

In terms of use, the biggest exporters tend to be among the most frequent initiators – and targets – of disputes. Thus, while the United States and the European Union were dominant early players in WTO dispute settlement, China, India and other large emerging economies have increasingly featured. Smaller developing countries have also started to use the dispute settlement system to protect their interests – including against other developing countries.

The lines between “winning” and “losing” WTO disputes can be blurry given that panellists can accept some claims within a case while dismissing others. Nonetheless, evidence suggests that WTO Members do not pursue cases frivolously. Complainants “win” on around [two-thirds](#) of their

claims, broadly speaking – with the US and the EU doing a bit better than other countries – while respondents fend off only about one-quarter of claims – here, too, the US and the EU do slightly better than average.

Members' DSU [compliance rate](#) has been estimated at over 90%. Although the DSU formally requires compliance, as a practical matter the choice to adopt compliance measures rests in the hands of individual Members. In instances where rulings threaten critical political sensitivities, the system in effect includes “safety valves”, albeit for a price. For instance, the EU has not opened its market to hormone-treated beef, even though the scientific evidence it presented to justify an import ban was found wanting in the dispute process. It has instead compensated the complainants through a combination of retaliatory tariffs and additional market access for untreated beef. In an analogous manner, the US was able to protect cotton subsidies and export credit guarantees that had been deemed WTO-incompatible by striking a deal with Brazil, the complainant, to finance technical assistance and research in the Brazilian cotton sector.

### **WTO dispute settlement has real shortcomings – but they are political more than legal**

While the WTO dispute settlement system has, on balance, been a great success, Members have reasonable cause to be dissatisfied with some aspects of its functioning. Disputes typically take longer than originally foreseen. Instead of six months between the establishment of a panel and the issuance of a report, the [mean duration](#) is over 15 months. Compliance panels take nearly three times longer than the three-month period initially stipulated.

These delays should be looked at in context. Roughly [two-thirds](#) of the disputes brought to the WTO are resolved at consultation stage, although this trend has fallen over the years. Increasingly complex cases, coupled with Members' desire to ground their claims as thoroughly as possible while aligning themselves with past Appellate Body rulings, has resulted in a vastly increased volume of evidence and expert input for panellists to consider. Placing limits on the length of submitted materials, as some Members' national court systems do, together with expanding the capacity of the WTO secretariat to support dispute panels, could help the WTO better meet Members' demand for its adjudication processes.

Speed aside, the WTO's approach to ensuring compliance with its rules has become unbalanced. It was designed to rest on three pillars. One: regular committees and monitoring, where Members could notify and scrutinize policies and nip potential irritants in the bud. Two: the formal DSU, for when diplomacy did not suffice to address differences. And three: negotiations, to update the WTO rulebook so that it continues to conform to economic realities.

The first pillar would benefit from more timely notification and better engagement in WTO committees. But the third pillar has not kept up with the first two. WTO rules for the most part date back to 1995. Gaps have opened up between the WTO rulebook and the realities of 21st-century commerce. These gaps can be overstated; many of the practices behind contemporary trade spats are in fact very similar to the 1980s-era trade distortions that the system was designed to tackle.

Nevertheless, the DSU, the WTO's judicial branch, has been asked to adjudicate matters that should properly be addressed by the WTO's legislative branch, which is to say, through negotiation. On issues such as subsidies, dumping and safeguards, panels and the Appellate Body have arguably been used as a substitute for negotiations. The absence of progress on addressing issues such as global steel overcapacity has placed additional pressure on the dispute system.

As for concerns about WTO dispute settlement processes and practices, the logical – but underutilized – forum for addressing them is the [DSU Review](#), a built-in process for adjusting the rules through which negotiations have continued, off and on, since 1998.

## Don't ditch the DSU – re-engage to improve it

For any large economy, acting unilaterally to pursue trade policy goals will sometimes look more attractive than working within the constraints of international rules. But living and trading in a multipolar world economy make unilateralism unlikely to be effective, even as a tactical measure. In the 1980s the US accounted for about a quarter of world imports. Today, that share is around 13% – less than the EU's, and not very much more than China's, which as recently as the 1990s [accounted](#) for little more than 2% of world trade.

When multiple economies can wield realistic unilateral threats, unilateral action – with its prospect of retaliation – becomes less appealing for all. Rules-based dispute resolution, meanwhile, is more likely to serve everyone's overall interests. This is true both for the biggest economies and for smaller countries, from Colombia to Switzerland to the Republic of Korea, whose economic models rely on predictable open markets. And it is especially true for businesses, since the DSU's guidance on the scale and nature of retaliatory measures limits the risk of unpredictable and escalating barriers to the movement of goods and services.

A DSU that is paralysed or marginalized might deliver short-term “wins” to a few groups, but at considerable cost to all Members' long-term political and economic objectives. All WTO Members have an interest in a DSU that functions smoothly and effectively. The challenges facing the DSU today are political, more than legal. Addressing them requires political engagement, and cooperation, both within the WTO and elsewhere. Unilateral action cannot achieve governments' goals, nor those of business.

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