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WTO disputes can be resolved faster, please

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International law is not known for being quick or effective. Cases can drag on for years, have limited legal force, and are infamous for noncompliance. Until recently, the World Trade Organization (WTO) dispute settlement process had served as a beacon of hope for being one of the fastest and most effective international dispute settlement systems in the history of the world.

It may still hold that title, but it has slowed down considerably. Cases take much longer to complete today than they did at the start of the WTO in 1995.These delays have undermined the WTO's usefulness as a way to resolve trade disputes. Today, with the process so much slower, governments can have a three-year or longer "free pass" to implement illegal protectionist measures while litigation drags on. Even the most obvious violation of the rules can take a long time to adjudicate. For the rule of law to work, there must be some degree of timeliness in the litigation process.We are in the midst of a major crisis in WTO dispute settlement, as the United States has challenged various aspects of the Appellate Body's operation and possibly its very existence. Although this crisis will be difficult to resolve, perhaps raising such fundamental issues offers an opportunity to think about a broader reform agenda. A key element of such reform should be finding ways to make dispute settlement faster and more effective. The adoption of reforms toward that end could be a positive step forward at a time when much of the world trading system is moving backward from trade liberalization and the rule of law.

The Big Slowdown in WTO Dispute Settlement

The WTO Dispute Settlement Understanding (DSU) sets out tight time frames for each stage of the litigation process. In its early years, WTO dispute settlement stayed close to those time frames. For a variety of reasons, many of those time frames have been abandoned. This section describes the formal timeline for a WTO dispute and provides data on how actual practice has diverged from the requirements.

DSU Time Frames for WTO Disputes

WTO dispute settlement has a number of key time frames built into it, with minimum and maximum periods for certain stages of the dispute as well as overall limits for the panel and appellate process.A WTO dispute begins with a formal request for consultations. A complainant can only move to the next stage, which involves a request for the establishment of a panel, after 60 days have elapsed from the consultations request.

When a party does request a panel, it must place its request on the agenda of a Dispute Settlement Body (DSB) meeting, which requires 10 days' notice. The responding party is allowed to block the request at the first DSB meeting where it is on the agenda, but at the second meeting the panel will be established.

Once the panel has been established, panelists must be appointed. The parties may be able to agree on panelists, but if they cannot do so after 20 days, either party may request that the WTO director-general compose the panel. Panel composition must take place 10 days after this request.[3]

After the panel has been composed, the litigation begins. As part of this process, there will generally be two rounds of written submissions, two panel meetings, and written questions from the panels to the parties. There is flexibility with the scheduling of each of these steps, but generally there are maximum periods set for the process as a whole. Article 12.8 of the DSU says, "the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months." And Article 12.9 says, "[i]n no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months."

A panel will issue an interim report to the parties, who then can offer comments.[4] The panel then issues the final report to the parties in the language in which the litigation was conducted. After translation into the other official WTO languages, the report is circulated to WTO members.

After circulation, within 60 days, the panel report will be adopted by the DSB or appealed.[5] If it is appealed, Article 17.5 states that "[a]s a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report." But it also says that "[i]n no case shall the proceedings exceed 90 days." In the event of an appeal, a 30-day adoption period applies.[6]

After adoption of the panel report and/or Appellate Body report, WTO members will be granted a reasonable period of time to comply with an adverse ruling.

WTO Dispute Time Frames in Practice

There will always be some variation in the time frames that WTO litigation follows, depending on the complexity of the case, scheduling issues faced by the parties, and the workload of panelists in their normal jobs, among other factors. Nevertheless, comparing the first 10 WTO panel reports to the most recent 10 WTO panel reports (as of this writing) provides a clear illustration of how cases take much longer today than they did at the start of the WTO in 1995. Time frames between panel establishment and circulation of the panel report to the public for the first 10 cases ranged from 226 to 455 days.[7] By contrast, today's figures are around twice as long: time frames between panel establishment and circulation of the panel report to the public for the most recent 10 cases ranged from 365 to 1,117 days.

Similarly, with appeals, the first 10 ranged from 57 to 114 days (with 7 of them being completed in 68 days or less). A fair comparison with today is difficult because of the Appellate Body crisis that has resulted in a reduced number of Appellate Body members. However, if we count 10 cases beginning in January 2015, before the crisis emerged, we see a range of periods from 117 to 170 days.[9]

There are a number of possible explanations for this change: parties may be making a greater number of claims in cases these days; the wide-ranging jurisprudence that developed over the years makes litigating and judging more complex; and the WTO litigation culture has become more legalistic as the role of private lawyers has grown. Regardless of the reasons, the change in WTO litigation has been clear: it takes much longer for parties to have their complaints litigated today.

To take a recent example, in *DS464: United States—Antidumping and Countervailing Measures on Large Residential Washers from Korea*, the total time between the request for consultations (August 29, 2013) and the end of the implementation period (December 26, 2017) was more than four years. The most time-consuming periods in the process were the 779 days between panel establishment and the circulation of the panel report to the public (it was 630 days between panel composition and circulation to the public); the 141 days between the notice of appeal and the circulation of the Appellate Body report; and the 15 months set by the arbitrator for implementation.[10]

Possible Areas for Reform

Shortening the WTO dispute settlement process would be of great value. At the same time, there were reasons for the delays in the process that led to the long time frames. Thus, any changes could be politically contentious. What follows are suggestions for a number of areas where time frame reductions might be possible.

At the start of the process, the time frame set aside for consultations is something carried over from the more diplomatic approach during the General Agreement on Tariffs and Trade (GATT) era. Of course, governments are always free to consult in advance of litigation. However, it may be desirable to allow governments the option of going straight to a panel request, as there are many disputes where formal consultations are unlikely to produce a resolution. In disputes where this option is taken, notice of perhaps 30 days could be required before the filing of a panel request. This notice could include the same information that is currently included in a request for consultations.

Next, before a panel is established, there are two related events that can slow the process down. First, establishment must take place at a DSB meeting. Second, at the first DSB meeting where establishment has been requested, the responding party can block establishment. The process could be streamlined by removing the ability to block the first panel request or even by allowing every panel request to lead directly to the appointment of panelists without a formal establishment step at the DSB. (Of course, DSB meetings could still provide a forum to talk about the disputes at this stage.)

With regard to panel composition, the time frames for party agreement on composition and composition by the director-general are fairly short, but each one could be reduced by a few days. In many disputes, it takes the parties a long time to agree on panelists. Sometimes this reflects a hesitancy on the part of the complainant to move ahead with the process, but usually it is a consequence of the difficulty of securing agreement by the parties on who the panelists ought to be. The parties should be encouraged to speed up this process.

Turning to the litigation stage in dispute settlement proceedings, there is only so much shortening that can occur. Litigation requires the presentation of arguments and evidence, which

means written submissions and hearings. But there are some areas where change is possible. For example, instead of always having two panel meetings, one panel meeting could be the norm, and a second meeting could be held on an exceptional basis (as is the case in Article 21.5 compliance proceedings); panel meetings could be held over secure video calls rather than in person in Geneva; or there could be page limits for parties' written submissions.

A more systemic way to improve the efficiency of the panel process would be to rely on a standing body of panelists rather than continuing to draw panelists on an ad hoc basis in each dispute largely from the diplomatic community or broader trade-law community. Currently, most panelists have full-time jobs, and they have to fit in their panel work around their other work. It would be helpful if at least the panel chairs were full-time adjudicators. Establishing a standing body of panel chairs would continue to allow other panelists to be chosen from among the many other people in the world who meet the qualifications in DSU Article 8.1, thus making available a broad choice of expertise in disputes that are increasingly very highly specialized.

Shifting back to the litigation itself, one easy way to cut time from the process would be to remove the interim review stage. This stage largely consists of pointing out typos and grammatical errors, relitigating arguments that parties lost, and occasionally convincing the panel to slightly revise or, on rare occasions, reverse its conclusion. So long as there is an appeals process, this step does not add much to the resolution of disputes.

The process could also be shortened by permitting the circulation of the panel report once it is issued to the parties in the language in which the proceeding was conducted, which would allow for the immediate filing of an appeal. Circulation in the other official WTO languages after translation has been completed would take place later.

In addition to the litigation process, there is also the problem of the length of the reasonable period of time granted for implementation pursuant to DSU Article 21.3. This provision states: "If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so." Yet the word "immediately" in Article 21.3 has sometimes been overlooked.

If the parties to a dispute cannot agree on a reasonable period of time for implementation, then the reasonable period of time is determined through arbitration under Article 21.3(c) of the DSU. This provision states: "In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances."

In a long series of Article 21.3 arbitrations, arbitrators have frequently referred to "particular circumstances" that justify a longer period for implementation. On average, the length of time granted for implementation in these arbitrations has been 11 and a half months.[12] In our view, generally, a period of 6 months to one year should be long enough to navigate the domestic political processes that are needed to implement WTO rulings and recommendations.

Recommendations

As part of the transition from the GATT to the WTO, there was a shift to a more legalistic dispute settlement culture. Nevertheless, there are diplomatic elements to the system that remain, and some of these should be preserved, such as the DSB's formal role in establishing panels and

adopting panel reports. It is important to emphasize the value of settlements and not steer every trade dispute toward contentious litigation. At the same time, procedural delays that serve no diplomatic purpose simply undermine the process.

With that in mind, we propose the following ideas for reform:

Eliminate the consultations requirement. Encouraging consultations is important because settling disputes is usually the best solution. However, a requirement that consultations occur before there is a panel request may be excessive in some instances. For example, the governments involved might have already raised and discussed the issue in a WTO committee. Or they might have directly spoken outside the context of the formal trade agreement. Provided notice is given to the responding party setting out the measures at issue and the claims of inconsistency of those measures with WTO obligations, complaining parties should have the option of requesting the establishment of a panel without first engaging in formal consultations under the DSU.

Eliminate the ability to block the first panel request. Diplomacy and settlement are valuable, but the ability to block the first panel request does not appear to contribute much to either. It only delays the beginning of the dispute settlement process. Governments can always talk and settle, but forcing them to take several extra weeks to establish a panel has a marginal impact. This provision, left over from the GATT, takes up more time without adding much value.

Eliminate the second panel meeting. The DSU provides for two meetings of the panel with the parties. At a time when communication was difficult, these meetings were useful. In the 1970s, if a GATT panel had follow-up questions for the parties after the first meeting, compiling written questions and conveying them to the parties was a major task. Today, by contrast, coordinating such questions and getting answers from the parties is fairly easy. For that reason, we think the second panel meeting could be eliminated.

Eliminate interim reviews. For cases where the information is available (some panels have not reported the relevant information), the average time between the issuance of the interim report and the issuance of the final report is about 48 days.[13] There is a lot of variation in that period — some interim reviews go quickly, while some take longer. Nevertheless, an interim review does not add much value to the process, and eliminating this step is worthwhile. At the least, the interim review meeting with the panel could be eliminated, and the scope of the review could be restricted to pointing out important factual errors made by the panel. Relitigating legal issues and correcting typographical errors is not worth this effort.

Establish permanent panel chairs. At a time when WTO disputes are becoming ever more complex, it makes sense to continue allowing the option to choose the majority of panelists from among experts in specialized fields, such as intellectual property or food safety. At the same time, the quality of the dispute settlement process is likely to be enhanced and the speed of the process accelerated when WTO panels are chaired by those with experience in the WTO dispute settlement system. Moreover, choosing experienced panel chairs is also likely to help ensure the security and predictability of the system. For these reasons, a standing body of panel chairs is needed.

Shorten compliance periods under DSU Article 21.3. WTO members and Article 21.3 arbitrators should adhere to the wording of the DSU. As a rule, WTO members should comply

with WTO rulings and recommendations immediately. Only "[i]f it is impracticable to comply immediately with the recommendations and rulings" should they do otherwise. Mere political inconvenience should not be considered evidence of immediate compliance being impracticable. Moreover, where Article 21.3 arbitration is needed to determine a reasonable period of time for implementation, the guideline of no more than 15 months should be treated as an outer limit, with a shorter time frame chosen whenever possible. Generally, where panel and Appellate Body rulings and recommendations cannot be implemented immediately, a period of six months to one year should suffice.

Together, these reforms would help shorten the WTO dispute settlement process considerably, although the impact of some aspects, such as permanent panel chairs, is difficult to quantify. Referring to the example of *U.S.—Washing Machines* as noted above, reforms to the dispute settlement process should aim to reduce the total time between the filing of the complaint and the end of the implementation period to two and a half or three years instead of the more than four years and four months that it actually took. The complexity of WTO litigation today compared with what was anticipated in 1995 means that the original DSU time frames may not be achieved, but a significant improvement is possible nonetheless. To some extent, the culture of the litigation process will be crucial to these efforts, as the mindset of the panelists, the secretariat, and the members themselves will affect how much can be achieved.

Conclusion

The Trump administration has caused a crisis by raising questions about the role of the Appellate Body. The political axiom "never let a crisis go to waste" may be appropriate here. With so much attention on WTO dispute settlement, it is worth directing that attention at a pressing problem: WTO disputes take too long, which means that protectionism stays in place longer than it should. An important step toward correcting this flaw is to adopt the reforms proposed above to speed up the process.

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