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Reformation of Dispute Settlement Mechanisms for International Trade Organizations: Ensuring Developing Country Interests

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Abstract: Regional Trade Agreements (RTAs) are frequently advantageous for developing countries and can help them prepare for future trade opportunities provided by the World Trade Organization (WTO). Developing countries face a dilemma when disputes occur within an RTA; the WTO Dispute Settlement Body (*DSB*) tends to be too costly and inaccessible, while RTA dispute settlement mechanisms (DSM) tend to be underdeveloped and immature. In order to minimize the cost of dispute resolution and better safeguard the interests of developing nations and regional trade agreements, which are frequently more beneficial to developing countries, this paper describes why and how the WTO should change its dispute settlement procedures. It also argues that these systems should be established to make the WTO's dispute resolution mechanisms more effective.

Keywords: Dispute Settlement *Mechanisms*, Regional Trade Agreements, WTO, Developing Countries

1. Introduction

The General Agreement on Tariffs and Trade (GATT) was an international trade agreement signed in 1947 by 23 states, including Canada [1]. Later, GATT was replaced by the World Trade Organization (WTO) for its framework failed to guarantee service quality and defend intellectual property rights. The GATT framework's failure was multi-perspective but was most notably due to it lacking a constituent basis and a legalized Dispute Settlement Mechanism (DSM) [2]. As a result, the WTO was formed in 1995 and has attracted 164 member states to join for having a much more effective framework. The WTO was formed to create a sustainable multilateral system that could encourage worldwide free trade and become the mediator of tariffs and a platform assisting in eliminating all sorts of trade barriers. Some of the core principles and goals of the WTO include reciprocity, non-discriminatory, and trade liberalization. In terms of differences, the new WTO covers not only issues related to trade and tariffs but also services and intellectual properties, which helps ensure the stability of trade activities and reduces investment risks; the WTO also has a separate Dispute Settlement Body (DSB) that is way more automatic and efficient compared to the GATT DSM[3]. In addition, Judicialization in international dispute settlement procedures (IDSPs) made WTO's DSB much more automatic and coherent in enforcing state compliance [2,3]. For states, another way to ensure equitable and steady development is to join regional trade agreements

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(RTAs). RTAs are trade agreements in a given area to promote regional commercial activities. Common examples of RTAs include the European Union (EU), the Regional Comprehensive Economic Partnership (RCEP), and the Association of Southeast Asian Nations (ASEAN). RTAs can be signed in numerous forms, including economic unions, preferential trade areas, and free trade areas. Therefore, RTAs can often be a friendlier choice for developing countries when they attempt to open up a broader market.

When disputes occur within an RTA, states could go to the WTO DSB or their RTA DSM, but neither is helpful. Although some scholars consider the WTO IDSPs to be a success, it is worth noticing that the WTO IDSPs have often been accused of being unfriendly against developing economies for being too expensive; member states with lower income tend to either avoid participating in disputes or are simply unable to access the dispute settlement system. Some RTAs would have their DSM but tend to be immature and underdeveloped.

The following sections of this paper will compare commercial and developmental opportunities offered by WTO and RTAs to developing countries before pointing out flaws in both systems and providing possible solutions.

2. RTAs and WTO: Their Impacts on Low-Income States

RTA does not necessarily equal mean member welfare [4]. The essential mechanism of an RTA is trade diversion, and eliminating tariffs between certain countries could create more trade opportunities. This is true on the first sign, as it gives countries in the special bloc treatment. However, this also indicates harm to non-bloc members, which are also essential to the country's economy. If a trade partner outside of the treaty is harmed, it causes inefficiency in the global economy and could eventually end up harming members within the RTA [5]. With the two impacts brought by an RTA, the harms and benefits of an RTA would often cross out each other. Yet, certain conditions could ensure an RTA is welfare-enhancing [6]. As long as a union's formation has no effect on trade with non-bloc members, it would have a positive impact. There is welfare-enhancing as long as outside trade and investment remain constant and the RTA creates more trade opportunities.

RTAs and WTO have the common goal of trade liberalization, but while RTAs are preferential, the WTO always tries to ensure the interest of all nations. However, as the number of small RTAs consisting of less than ten members globally has faced a boost since 1993, it may seem like harm to the WTO's goal for global free trade since as not only are RTAs discriminatory, but they also create boundaries between regional trade groups when countries diverge trade opportunities from each other [7].

However, not only does the WTO not forbid RTAs, but RTAs were also already allowed in Article V and Article XXIV of GATT [8]. This is because RTA’s nature tends to be developing country friendly.

RTAs can be formed for many reasons, with the most apparent principle being reciprocal exchanges, that all states within the treaty are ensured to benefit from the alliance [9]. For developed countries, an RTA can help prepare for future strategic alliances. Developing countries could either join an RTA for more political influence by binding themselves to another stronger country or seek a safe entrance to larger trade markets. In other instances, a country may attempt to make domestic reforms harder by joining an RTA, and by imposing more restrictions, the country could prevent fundamental reform.

In this case, RTAs are a safe entrance for developing countries as they gradually enter the larger global market. Recent research has demonstrated that, if unprepared, free trade can be devastating for developing states, including halting industrial development, stagnating poverty reduction, and causing infant industries to compete with developed ones [10]. On the way to becoming developed

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nations, low-income countries would need an adaptation period to prepare before embracing the more significant market outside the RTA.

The Association of Southeast Asian Nations (ASEAN) is a perfect example. The ASEAN political and economic union comprises ten countries from southeast Asia, including Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. Since its formation in the late 1960s, it has managed to help its members solve numerous problems that, to all appearances, seemed insoluble and achieved incredible economic growth within the region. It has been generally accepted as one of the most successful RTAs throughout the world. ASEAN has a GDP of $2.5 trillion, making up 3.4 per cent of the world's GDP. In 2016, the region's GDP growth was 4.6 per cent, higher than the global average of 3.2 per cent. This makes ASEAN the fifth most considerable economic body globally, expected to become fourth by 2030. As ASEAN has been achieving remarkable results, it is also worth noticing that most of its member states are developing countries. The ASEAN started an anti-communist political and economic union formed during the cold war. Developed countries such as Singapore joined ASEAN in favour of ASEAN's goal to create a strong, prosperous, and rules-based international community. Nevertheless, after the cold war, ASEAN was known for its principle of ensuring a "zone of peace, freedom, and neutrality" —— "ZOPFAN." [11]. Although the ASEAN started with its sole purpose being to stop the spread of communism, it allowed Communist Vietnam to join when political conflicts started to settle down within Southeast Asia. As ASEAN has been achieving remarkable results, it is also worth noticing that most of its member states are developing countries.

In further advance, ASEAN signed a free trade agreement with China in 2010, called the ASEAN-China Free Trade Area (ACFTA). Yang and his team have built a model analyzing the trade creation and diversion brought by ACFTA in considering agricultural raw materials, manufactured goods, chemical products, and machinery products [12]. In general, ASEAN and its free trade agreement with China positively impact the region with sustainable economic development.

ASEAN has a combined GDP of $2.5 trillion, comprising 3.4 per cent of the world's GDP. In 2016, the region's annual average GDP growth was 4.6 per cent, and ASEAN exceeded the global average of 3.2 per cent. This makes ASEAN the fifth most considerable economic body globally, expected to become fourth by 2030 [13].

3. Dispute Settlement Mechanisms

As this would be a better choice for developing nations, dispute settlement is where the real dilemma occurs. Dispute settlements between countries are essential in upholding the member states' rights and obligations. As explained in the introduction section, although countries get to choose to either go to the DSM within the RTA or the WTO DSB, neither are good options.

Once again, we will use ASEAN as an example. The ASEAN DSM was created in 2004 after a dispute in 1995 when Malaysia was charged with breaching Singapore's rights by forbidding policy related to petrochemical imports [14]. Singapore attempted to resolve the issue through the WTO DSB, alleging Malaysia violated its rights under GATT. However, WTO's consultation was not satisfying before Singapore revoked its panel request and privately resolved the issue with Malaysia. Even with a functioning DSM, countries in ASEAN still often avoid using it. In the case of the Philippines suing Thailand in which a violation of Article X of GATT results in an unfair cigarette procedure treatment, even when both the Philippines and Thailand are members of the ASEAN, they both decided to use the WTO DSB four years after the ASEAN DSM was created.

The Formation of an RTA DSM would require large amounts of resources, including but not limited to money, international law scholars, and even authority, all of which developing countries may not have. Even after creating such a system, countries must be convinced that the RTA dispute

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settlement body is reliable. Likely, the ASEAN DSM will never be used if member states do not trust it. ASEAN members still doubt the credibility of the ASEAN DSB's judgment, as ASEAN does lack international trade law experts.

Although when the GATT dispute settlement system was replaced with the new Dispute Settlement Body of WTO, dispute settlement already became much more efficient, and the consultations were already much more effective, the WTO DSB may not be as friendly as imagined [15,16]. True that countries have equal rights in accessing the DSB, some of the least-developed countries still face many constraints. These constraints are not necessarily legal restrictions but are the ability to make a move, as Gregory Shaffer has described as "constraints of legal knowledge, financial endowment, and political power, or, more simply, law, money, and politics." It is already hard for some of these least-developed countries to mobilise available resources. We are now discussing even more severe issues such as inflation, lack of professionals, and diplomatic experience.

On the other hand, the WTO's judgments tend to lean against the rich side of the lawsuit; rich countries can sort of "bury" their opponents just through evidence finding [17]. Maybe the word evidence finding sounds wholesome, but it can become costly. The general cost of WTO litigation is already very high, could be from $100,000 to $1,000,000 with a $250 to $1000 per hour fee, and it may cost up to 10 million dollars if the case is complex. Thus, some countries choose not to use the WTO DSM simply because it is too expensive.

4. Possible Solutions

For the benefit of developing countries, there are two possible solutions to the problem: we could either encourage RTAs to develop better DSMs or let WTO reduce the cost of litigation. However, essentially, the core idea is to help increase the accessibility of low-income nations to DSMs and encourage them to protect their rights.

In many RTAs, the majority of the member states would be developing nations with comparatively fewer resources, so it is essential for developed countries bounded by these conventions to assist in the process of DSM creation. There are two ways developed nations could help create an independent DSM within the RTA. First, they could provide resources, such as funds, jurists, and international trade experts. Developing countries may not have much capital, so the obligation falls onto developed members. Second, they should frequently use the DSMs as examples to prove to other nations that the DSM within the RTA could work and is credible. With greater international authority, developed countries would more likely convince members of the RTA to use the system.

As for enhancing the WTO DSB, one popular opinion is to create a minor claim procedure, which is a path for solving significant disputes less seriously with less time [16]. The cost of a lawsuit is increased mainly because WTO's system is slow and inefficient. Adding a minor claim procedure provides less significant lawsuits than others and a cheaper dispute settlement. Developing countries would also have the opportunity to use the WTO DSB for rights protection.

A good start would be to limit the pages of party submission and a shorter decision from the WTO. In addition, as William Davey suggests, a set of non-essential procedures from the current system would be excluded to reduce the time cost. Specific modifications may include reducing the times of DSB meetings from two to one before establishing a panel and adhering to submission deadlines. Some other possible methods, as suggested by Nordström and Shaffer, include limiting the number of oral hearings [18]. Additionally, Nordström and Shaffer suggested getting rid of the strict confidentiality rules in the current WTO lawsuit system for the minor claim procedure so that by creating a more transparent system, we would be able to allow a timelier result of the consultation. The WTO can also create a database categorizing past cases into cases that could be

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dealt with through the minor claim procedure and cases that could represent a resolved predecessor, both of these would be significantly helpful for initiating a small claim procedure system within the WTO DSB.

5. Conclusion

The WTO Dispute Settlement Body (DSB) was a purposeful system for international trade affairs. However, as trade dispute settlement mechanisms in the WTO are often inaccessible for developing countries, the WTO should reform its DSB by adding a minor claim procedure to lower the cost of dispute settlement and thus better protect developing country rights and regional trade agreements, which are often more favourable to developing countries and should establish more effective dispute settlement systems. Moreover, developing nations are an unignorable part of the global economy, and improving current dispute settlement mechanisms around the world, would effectively help with their development.

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