

## Challenges Faced by Vietnam and Other Developing Countries in Participating in the WTO Dispute Settlement System (DSS)

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### **Abstract**

*The World Trade Organization (WTO) is currently experiencing a crisis in its dispute system, driven by an increasing number of disputes, escalating complexity of case law, and the ongoing blockade by the United States of Appellate Body appointments since 2016. This blockade has resulted in significant delays in the WTO's litigation process, disproportionately affecting developing countries - majority members of the WTO - due to the substantial financial costs associated with pursuing litigation. This study aims to analyze the challenges faced by Vietnam and other developing nations in navigating the WTO dispute system. Employing a qualitative methodology, this research will draw on primary sources including legal documents, official WTO reports, and governmental statements. The findings are expected to highlight the limitations of current WTO regulations, the inadequate support from the Advisory Centre on WTO Law (ACWL), and the financial obstacles that deter developing countries from participating actively in the Dispute Settlement System.*

**Keywords:** WTO, Dispute Settlement System, Vietnam, Participation

### **INTRODUCTION**

On January 11, 2007, Vietnam officially became the 150th member of the World Trade Organization (WTO). This event marks a significant achievement, attributable to the progressive reforms and strategic policy directions of the Party and the state. Membership in the WTO has opened up numerous economic and investment opportunities for Vietnam through the elimination of tariff and non-tariff barriers, thereby enhancing trade cooperation among member countries. Moreover, lower tax rates confer considerable benefits on the economies of developing nations like Vietnam by enabling governmental resource allocation for maximal economic value (Jones, 2004). Furthermore, accession to the WTO has facilitated the use of its dispute settlement mechanism by Vietnam and other member states, allowing for the peaceful resolution of trade conflicts and effective enforcement of trade commitments - a prospect that seemed unattainable before its membership. The critical inquiry pertains to whether Vietnam can fully leverage the advantages of the WTO's dispute settlement mechanism, the challenges it and other developing nations face in this context, and strategies for more effective utilization of this mechanism by developing countries.

### **THE ESTABLISHMENT AND DEVELOPMENT OF DISPUTE SETTLEMENT SYSTEM**

The inception of the first intergovernmental international organization, the League of Nations, was a pioneering initiative that laid the groundwork for the establishment of the International Trade Organization (ITO), the precursor to the General Agreement on Tariffs and Trade (GATT) and the WTO. The ITO was initially proposed during the Bretton Woods Conference, aimed at curbing the beggar-thy-neighbor policies by restraining nations from engaging in protective trade measures (Koul, 2005). Such policies, often termed policies of impoverishment, involve a country attempting to maximize its own economic benefits at the expense of others through protective measures like tariffs and quotas, thereby detrimentally affecting its trading partners (Geisst, 2013). The critique of these policies was famously articulated by Adam Smith in "The Wealth of Nations," where he argued against protectionist and mercantilist practices. According to Smith, such approaches, akin to a zero-sum game, could provoke trade wars and impede economic growth, whereas free trade would promote collective prosperity (Coulomb, 1998).

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Echoing Smith, David Ricardo critiqued trade protectionism for diminishing national competitiveness. Through his analysis of trade interactions between Portugal and England concerning wine and cloth, Ricardo deduced that trade was mutually beneficial (Ricardo, 2015). Similarly, Richard Cobden posited that free trade extends beyond job creation to fostering international peace, as it promotes amicable relations among nations (Bright, 1869). Despite the strong theoretical support for free trade underpinning the ITO proposal, it failed to materialize due to the U.S. refusal to ratify the agreement. Consequently, GATT 1947 was established as an interim protocol to regulate trade by removing barriers. Nevertheless, GATT encountered difficulties in resolving trade disputes due to its consensus-based decision-making process, wherein resolutions required unanimous approval, thereby allowing any dissenting member or powerful nations to obstruct proceedings. To address these limitations, the WTO was founded after the Uruguay Round of negotiations (1986 - 1994), featuring a refined dispute settlement system (DSB). The DSB is regarded as the most significant achievement of the Uruguay Round, effectively mitigating the adverse effects of international trade disputes through a unique decision-making protocol termed "negative consensus," which presumes the adoption of reports unless unanimously vetoed by WTO members (Van den Bossche, 2017). This mechanism significantly reduces power imbalances among member nations, thereby enhancing the functionality and fairness of the international trade system.

### **WTO'S DISPUTE SETTLEMENT SYSTEM: EXISTING PROBLEMS**

Since its inception in 1995 until 2022, the World Trade Organization (WTO) has handled approximately 615 disputes requiring consultation, with more than 367 cases resolved by the Panel and about 124 cases adjudicated by the Appellate Body (WTO, 2023a). This data underscores the critical role the WTO has played in resolving international trade disputes. However, the organization is currently facing more challenges than ever before. One significant issue is the overburdened dispute settlement system, exacerbated by an increasing number of disputes and the growing complexity of cases, coupled with a regulatory cap of only seven judges. According to an appellate body report, the number of cases submitted to the panel and the appellate body surged from 94 between 1995 and 2000 to over 300 between 2009 and 2022 (WTO, 2023a). Moreover, these disputes are increasingly complex, involving multiple parties and requiring scientifically collected evidence, especially in cases related to the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) agreements. For instance, in the dispute between Australia and Indonesia regarding various measures related to trademarks, geographical indications, and packaging requirements for tobacco products and packaging (DS467), approximately 40 members participated as third parties (WTO, 2018). Typically, appeals are processed by the Appellate Body, and it takes between 60 to 90 days to deliver the Appellate Body Report to WTO members (WTO, 2018). However, due to the increased workload and complexity of disputes, the Dispute Settlement Body (DSB) has become inefficient and delayed. Initially, from 1995 to 1999, most disputes (over 60%) were resolved within two years, with no case extending beyond four years. Yet, from 2007 to 2011, delays grew increasingly severe, with up to four cases taking four years to resolve (Reich, 2018). This has led to frustration among WTO members due to the time and significant financial costs involved in pursuing a case, particularly for developing countries. Between 1995 and 2017, more than 84 developed countries utilized the appeal mechanism, compared to only 71 developing countries. Similarly, since joining the WTO in 2007, Vietnam has initiated only five cases as a plaintiff - DS404, DS429, DS496, DS536, and DS504 - and participated in 33 as a third party (WTO, 2023b). Of these, Vietnam prevailed in only two cases as a plaintiff: one concerning anti-dumping measures on frozen warm-water shrimp involving the United States (DS404) and another related to Indonesia (DS496). Notably, Vietnam has filed lawsuits against the United States in four out of five cases. Despite over 15 years of membership, Vietnam has struggled to effectively utilize this system.

### **CHALLENGES OF VIETNAM AND DEVELOPING COUNTRIES IN PARTICIPATING IN THE WTO'S DISPUTE SETTLEMENT SYSTEM**

There are numerous reasons why developing and least developed countries exhibit limited participation in the global trading system. One such reason is the delay in the WTO dispute settlement process, which may deter these countries from initiating cases. However, the central issue likely resides in the complexity of the

regulations. WTO procedures are intricate, leading to significant legal expenses as lawsuits progress. This complexity explains why least developed countries have seldom engaged as litigants in the Dispute Settlement Body (DSB) since their accession to the WTO (Van den Bossche, 2017). An illustrative example is the case of India - Anti-Dumping Measures on Batteries from Bangladesh, which was initiated by Bangladesh in 2002. This case highlights that developing and least developed countries are less active than developed countries in utilizing the dispute settlement system, despite comprising two-thirds of the 164 WTO members.

### **Shortage of Legal Expertise and Financial Burdens**

Vietnam and other developing countries encounter numerous obstacles in accessing the WTO's dispute settlement mechanism. A significant challenge is the lack of legal resources, particularly experts in WTO law and the absence of specific WTO regulations to assist developing countries. Prior to its WTO membership, Vietnam was involved in a U.S. anti-dumping case regarding its shrimp exports in 2002 (Ca Mau Provincial People's Committee, 2014). At that time, as a non-member, Vietnam could not bring the case to the WTO. The U.S. International Trade Commission accused Vietnam of dumping shrimp, harming the U.S. domestic industry, and imposed anti-dumping duties, severely affecting Vietnam's export sector and the Mekong Delta's farmers. The Vietnamese government contended that these actions were inconsistent with WTO rules, and in 2010, after three years of membership, Vietnam brought the issue to the WTO. The preparation for this case revealed a general lack of understanding among Vietnamese businesses regarding international trade law and anti-dumping measures. The process involved two years of extensive legal preparations, supported by the Vietnam Association of Seafood Exporters and Producers (VASEP) and the Vietnam Chamber of Commerce and Industry (VCCI) (Thai, 2005). Additionally, the necessity of hiring international law firms, due to the dearth of skilled domestic experts and the complexity of WTO regulations, led to legal fees estimated at 2 million USD per lawsuit (Thai, 2005). The total cost of the DS404 case remains undisclosed due to confidentiality agreements, but it is estimated to be no less than 2 million USD, illustrating the significant financial challenges faced by developing countries like Vietnam in navigating the WTO system, in contrast to the resources available to developed nations. Moreover, many Vietnamese companies faced difficulties in providing data as evidence due to the complex language requirements, further complicating their participation without expert assistance and modern technological support (Cong, 2010). The absence of such support complicates data analysis necessary for WTO proceedings, leading to potential financial losses.

### **Ambiguity and Complexity of WTO Provisions**

According to the WTO agreement, “special and differential treatment” (S&D) provisions are to be provided to developing countries according to established guidelines (Matsushita et al., 2015) with the aim of promoting the participation of these countries in the dispute settlement mechanism. However, the S&D provisions are not entirely feasible due to their ambiguity and lack of specificity in application. Developed countries are encouraged to protect the interests of developing members (Articles 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8); to consider flexibly the circumstances of developing countries (Article 2.12); to provide technical assistance (Article 27.2); and to take into account the special circumstances of least developed countries (Articles 24.1, 24.2)<sup>2</sup>. The vagueness of these provisions is exemplified in Article 4.10, which advises developed members to “should give special attention” to developing members during consultations. Yet, in the EC - Commercial Description of Scallops case (DS07), Chile, acting as a third party, requested consultations to clarify Articles 3.7, 4.2, and 4.5 of the DSU<sup>3</sup>. However, these consultations were disregarded by the dispute settlement body without explanation, whereas a similar panel was constituted at the request of Canada. Consequently, Chile believed that it suffered from discriminatory treatment that impacted its legitimate interests under Article 4.10. Moreover, the term “should” suggests a voluntary rather than a legally binding obligation, and the phrase “give special attention” also lacks clarity. Thus, developing countries including Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe proposed changing “should” to “shall” to reflect a

<sup>2</sup> WT/COMTD/W/219 – Special and differential treatment provisions in WTO agreement and decision. Noted by the Secretariat.

<sup>3</sup> WTO Meeting Minutes - WT/DSB/M/7

binding obligation, rather than a mere voluntary commitment<sup>4</sup>. Clearly, there is a significant disparity between WTO regulations in theory and their application in practice, preventing developing countries from fully benefiting from the S&D provisions, despite these terms being stipulated as an important part of the WTO agreements. Another issue with the S&D provisions lies in Article 27.2 of the DSU, which assigns the WTO Secretariat the responsibility to “providing legal advice in accordance with the requirement in Article 27.2 to any developing country Member which requests it in the event of that Member being involved in the dispute settlement process”<sup>5</sup>. However, the WTO Secretariat has only two independent part-time consultants on this task<sup>6</sup>. This means that the assistance is very limited; as a result, it may not be able to meet the rising needs of developing countries concerning the dispute settlement procedures as expected.

### **Limitations in Using ACWL's Legal Advisory Services by Vietnam and Developing Countries**

In 2001, the Advisory Centre on WTO Law (ACWL), an independent organization from the WTO, was established to provide legal advice and training on WTO law and dispute settlement procedures to developing countries. However, Vietnam only joined this organization in 2009, whereas the shrimp dispute began in 2002. By 2016, Vietnam had successfully consulted the ACWL in only one case: Indonesia - Safeguard on Certain Iron or Steel Products (DS 496) in 2015 (ACWL, 2023). According to the establishment agreement of the ACWL, members must contribute to the ACWL's Endowment Fund after joining the organization, regardless of whether they are developed or developing countries (Article 6.2). The minimum contributions to this fund range from \$50,000 to \$300,000, depending on the country classification. Specifically, countries in Group A are required to contribute \$300,000, Group B \$100,000, and Group C \$50,000. Currently, Vietnam falls into Group B according to the ACWL's classification of developing countries (ACWL, 2023). Furthermore, it is noted that the membership fee is totally distinguished from the fees for using legal services. This means that members have to pay extra charges in case they wish to utilize the legal services provided by ACWL (Article 6.3). In general, ACWL provides three types of services: (1) legal advice on WTO law; (2) support in WTO law Dispute Settlement Proceedings, (3) seminar on jurisprudence and other training activities<sup>7</sup>. Accordingly, the fee for services in terms of legal advice, which is considered as a free service of this center, is offered free of charge for members and least developed countries with a number of fixed hours, determined by the Management Board. Developing countries not members of the center are required to pay in the range of 250 - 350 USD<sup>8</sup> per hour for using this legal advice services, depending on their category: A, B or C. Notably, in the phase of dispute settlement proceedings, no countries are exempt from the fee services, regardless of their level of development. As a result, the membership fee and legal service fee could be a burden on developing members and LDCs because most of them lack of adequate financial resources. In fact, these countries are seeking a better solution for their participation in the DSS, which could help them to alleviate their financial worry rather than increasing the burden of costs on their shoulders. Although the legal services offered by ACWL are considered to be cheaper than the market price, it seems to prove too costly for its users, especially LDCs. The charges in dispute settlement proceedings are shown in the table 1 as follows:

**Table 1: Free - range per hour for using legal services in dispute settlement proceedings (Source: ACWL Decision2007/7, 2007)**

| Category          | CHF per hour |
|-------------------|--------------|
| Category A Member | 324          |
| Category B Member | 243          |
| Category C Member | 162          |

<sup>4</sup> WTO Negotiations on the Dispute Settlement Understanding, *Special and Differential Treatment for Developing Countries: Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe* (2002), TN/DS/W/19.

<sup>5</sup> World Trade Organization - DSU – Article 27 (Practice)

<sup>6</sup> Ibid

<sup>7</sup> Annex IV, Schedule of Fees for Services Rendered by the Center, the Agreement Establishing the ACWL.

<sup>8</sup> Annex IV, Agreement establishing the Advisory Centre on WTO Law

|                         |    |
|-------------------------|----|
| Least developed country | 40 |
|-------------------------|----|

**Table 2: Maximum charges for a complainant or respondent (in Swiss francs) (Source: ACWL Decision2007/7, 2007)**

|                   | Consultations | Panel Proceedings | Appellate Body Proceedings | Total   |
|-------------------|---------------|-------------------|----------------------------|---------|
| <b>Category A</b> | 47,628        | 143,856           | 85,212                     | 276,696 |
| <b>Category B</b> | 35,721        | 107,892           | 63,909                     | 207,522 |
| <b>Category C</b> | 23,814        | 71,928            | 42,606                     | 138,348 |
| <b>LDCs</b>       | 5,880         | 17,760            | 10,520                     | 34,160  |

Several noteworthy features are highlighted in the Table above. First, as can be seen from the Table 2, the charges to the phase of panel proceeding is by far the most expensive one (143,856 for category A; 107,892 for category B; 71,928 for category C and 17,760 for LDCs), followed by the charge to AB proceedings. Clearly, this cannot be seen as an affordable price for developing countries and LDCs, while there is no certainty that the lawsuits will be entirely successful. In fact, there are few disputes that developing countries receive legal assistance from ACWL in the dispute settlement proceedings. According to the report of ACWL in 2023, between 2001-2023, it was estimated that there are 71 cases that developing countries received support provided by ACWL (as complainant and respondent), while the disputes initiated by developing countries under WTO were recorded 216 out of 564 cases of the disputes initiated in this period<sup>9</sup>.

### **Recommendations for Vietnam and Developing Countries to Actively Participate in the WTO's Dispute Settlement System**

To overcome these difficulties, the Vietnamese government first needs to enhance the role of associations such as Vietnam Association of Seafood Exporters and Producers (VASEP) and Vietnam Chamber of Commerce and Industry (VCCI) to gain more financial and technical support during any disputes within the WTO. Additionally, Vietnam should leverage its membership in the ACWL to ensure that its lawyers and experts receive structured training from this organization through free seminars and internship programs. This could help address the current shortage of experts in WTO law in Vietnam. Moreover, the government should focus on technology development by encouraging innovation, digitizing databases, and learning management experiences and information storage processes from multinational companies and developed countries.

In terms of foreign affairs, Vietnam needs to actively participate in the WTO Ministerial Conferences (held biennially) to expedite the reform process of the Dispute Settlement System (DSS) and contribute to the restoration of the Appellate Body (AB), which has been paralyzed since 2019. Learning from member countries with extensive experience in the WTO dispute settlement mechanism, such as India, Brazil, and Thailand, is a viable solution that could help Vietnam optimize its resources. To achieve this, Vietnam could initiate alliances among developing countries focused on legal issues in WTO litigation. These alliances could also provide opportunities for legal experts in WTO law to enhance their skills, gain practical experience, and minimize potential risks when engaging in the WTO dispute settlement mechanism. Additionally, the government should support enterprises through clear and specific regulatory guidance to help them access and utilize the WTO's dispute settlement mechanism effectively, thereby safeguarding their legitimate rights in international trade and export activities.

On the part of the WTO, the organization should adapt its regulatory system to better address increasingly complex trade disputes swiftly and fairly. A primary focus should be reforming the Dispute Settlement Body (DSB), which is currently overloaded and understaffed. Consequently, the objectives of the Dispute Settlement Body (DSB) are not being met as expected, leading to a lack of interest among members in participating in this mechanism due to the financial burdens associated with litigation, as evidenced by Vietnam and other developing countries. Moreover, there should be encouragement and promotion of democratic mechanisms within the WTO to reduce the concentration of power among a small group of developed countries, as significant WTO negotiation activities occur behind closed doors (John, 2004); this could lead to mistrust and

<sup>9</sup> It is own calculation based on ACWL and WTO report in 2023

heighten skepticism about the transparency of this international organization. Achieving this would position the WTO as a successful coordinator of free trade activities, ensuring fairness and equality among member countries according to established principles. Not only should the WTO refine its procedures and regulations, but developed and developing countries should also act cautiously in applying trade protectionism policies or retaliatory tariffs for national security and interests, as this sets a precedent for other countries in the future. Additionally, as the world becomes increasingly interdependent, no country can afford to isolate itself and refuse to trade with external partners. Therefore, careful consideration of risk assessments in foreign policy using retaliatory tariffs or anti-dumping duties is necessary before implementation.

## CONCLUSION

Overall, since joining the WTO, Vietnam has achieved significant economic milestones. However, a major challenge remains in bridging the resource gap between Vietnam and developed countries within the WTO framework to enable more active participation by Vietnam and other developing countries in the WTO's dispute settlement mechanism. Enhancing the training of skilled legal experts and investing in modern data analysis tools can reduce transaction costs and alleviate financial burdens on national budgets when pursuing litigation under the WTO framework. Furthermore, Vietnam should view the WTO as a tool for integration rather than being wholly dependent on it. This means that Vietnam needs to develop economic policies aligned with WTO and global directions, increasing its role and reputation within the WTO. Finally, for the WTO to function as an effective international intergovernmental organization, it requires strong commitment and consensus among its members, particularly between developing nations and economic powerhouses. This would ensure that all WTO members have an equal opportunity to benefit from the multilateral trading system, regardless of their developmental status.

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