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WTO Dispute Settlement and Intellectual Property Disputes: Tracing the Trends and Implications

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ABSTRACT: Instead of a set of non-binding General Agreement on Tariffs and Trade (GATT) mechanisms, the Marrakesh agreement, the founding treaty of the World Trade Organization (WTO), instituted a binding framework for global trade disputes. WTO integrates a diverse array of dispute resolution mechanisms, both judicial and extrajudicial, along with essential authority to address trade and business matters, especially intellectual property disputes. Although this mechanism is relatively new, it has demonstrated an increasing number of IP matters being resolved. Involvement of major economies, good faith of the countries to implement and rectify actions, and speedy disposal of IP conflicts are commendable achievements of this body. However, it also poses some inevitable challenges of power imbalances, dependency on party bona fides and limitations in enforcement forces. With the proliferation of IP rights consciousness and its importance in world trade, this article uncovers how the WTO dispute settlement mechanism is navigating through the IP field. It assesses how effectively the WTO resolves disputes raised before it and what impacts the dispute settlement mechanism are making. This paper examines the role of WTO assessing the system's strengths and weaknesses. It initially builds upon the basis by detailing the dispute settlement mechanism to resolve trade disputes, particularly IP ones. The discussion then changeovers to a case study approach to assess the mechanism's role, followed by a critical analysis. Lastly, the paper scrutinizes the encounters prevailing in the system and tends to find probable actions required to unravel them for improvement.

KEYWORDS: World Trade Organization (WTO), Dispute Settlement Body (DSB), dispute resolution, Intellectual Property (IP), TRIPS Agreement

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I. INTRODUCTION

The World Trade Organization (WTO) is an international institution established in 1995 following the Uruguay Round negotiations and the subsequent Marrakesh agreement to govern the trade among the nations. Before the WTO was established, businesses were governed by the General Agreement on Tariffs and Trade (GATT) signed in 1947, a framework limited to reducing tariffs and promoting trade. Acknowledging the limitations of the GATT over the years to be limited to goods only excluding services and intellectual property and lack of proper framework embodying dispute settlement mechanisms a formal international trade organization, WTO was established.[1] Through the Uruguay round negotiations (1986-1994) of the GATT, the Marrakesh agreement came out expanding the trade rules on intellectual property, inter alia. The agreement incorporated multilateral treaties such as GATT 1994 on goods, the General Agreement on Trade in Services (GATS) on services, and Trade-Related Aspects of Intellectual Property Rights (TRIPS) on intellectual property under the auspices of WTO. The world trade got a binding dispute settlement framework after that replacing the non-bonding GATT mechanisms. As a promising instrument of its nature, the WTO incorporates various dispute settlement mechanisms, both judicial and extra-judicial, to solve issues regarding trade and business and vests proper authority in them. Although relatively new, this mechanism has been demonstrated to be very effective in involving major economies and providing prompt solutions to trade-related problems including transboundary intellectual property disputes. However, it is a matter of great interest to assess how effectively the WTO is resolving these disputes, how the mechanisms in place are working, and what impacts they are making. This paper embodies the approach to examine the role of WTO assessing the system's strengths and weaknesses. At first, it lays the foundation by detailing the dispute settlement mechanism to resolve trade disputes, particularly IP ones. The discussion then transitions to a case study approach to assess the mechanism's role, followed by a critical analysis. Finally, the paper analyzes the challenges prevailing in the system and probable actions required to solve those for improvement.

[1] World Trade Organization, "The GATT years: from Havana to Marrakesh", online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm>.

II. METHOD

This study adopts a doctrinal research methodology, which is particularly appropriate for examining issues situated within the framework of international trade law. In this context, the research relies on both primary and secondary sources. Primary data is derived from international treaties and case law that form the legal foundation of the World Trade Organization (WTO) dispute settlement mechanism. Secondary sources include scholarly articles published in trade law journals, official WTO reports and website publications, books authored by leading experts, and conference proceedings, all of which provide interpretive insights and contextual perspectives. To some extent, it takes recourse to different numbers of IP disputes from the DSB website to explore the trends and reflections of the system.

III. THE WTO DISPUTE SETTLEMENT PROCEDURE AT A GLANCE

The dispute settlement mechanism of the WTO incorporates parties of the dispute including third parties, a Dispute Settlement Body (DSB) established under the Dispute Settlement Understanding (DSU)[2], an appellate body, independent experts and arbitrators, and some specialized institutions including WTO secretariat. The DSB comprises representatives from all of the WTO members and is mandated to oversee the dispute settlement process under the DSU. When any party makes a complaint before the DSB, it establishes a panel to address the matter and takes every step to implement the decision after adjudication. It also supervises the implementation and takes retaliatory actions for incidents of noncompliance. It also adopts the appellate body reports when a panel decision is appealed against and the appellate body makes a further decision.

When any dispute is placed before the WTO dispute settlement body, it is initially referred for consultation among the parties. If the consultation cannot settle disputes within 60 days of such submission, the parties may request the establishment of a panel. The interests of the parties, including that of the third

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, by World Trade Organization (Marrakesh, Morocco: World Trade Organization, 15 April 1994) online: <https://www.wto.org/english/docs_e/legal_e/dsu_e.htm> Marrakesh Agreement Establishing the World Trade Organization.

parties are given the utmost priority during the panel process.[3] The panel assists the DSB in reaching a mutually satisfactory solution. Each party submits written statements which are immediately transmitted to the panel and the opposite party or parties within the deadline fixed by the panel.[4] When the parties fail to come up with a mutually satisfactory solution or succeed in doing so, in both situations the panel submits its findings in the form of a written report to the DSB though the contents and length of the reports vary. Panel reports are not adopted until 20 days after being circulated to the parties to give them sufficient time to consider them. After 60 days of such circulation, the report is adopted by the DSB unless any party communicates its intention to appeal against it or the report is suspended by the DSB through consensus. The appellate body is supposed to submit a report within 60 days and once an appellate body report is circulated, it will be adopted within 30 days. Within the next 30 days of such adoption, the concerned members are required to notify DSB of their intention to implement the recommendations and rulings of the panel immediately or within a reasonable period. The DSB will monitor all the actions of implementations and will put the matter if raised by the parties as an issue on DSB meetings after six months from the notification of reasonable time and keep discussing it until resolved. The parties may agree to provide compensation instead of full implementation and if they fail to do so or do not implement the obligations, the other party may retaliate on the same sector involving the dispute, or on any different sector involving the same parties, or actions under other agreements between the parties.[5]

A. Intellectual Property Disputes Under the WTO Dispute Settlement Body

Disputes among the state parties of the WTO regarding any intellectual property are mandated to be resolved through the DSB of the WTO. These disputes are mainly under the TRIPS, an international instrument that sets the minimum standard to be maintained by the states for the protection and enforcement of IP rights. This treaty came out as a WTO instrument and was

[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)*, by World Trade Organization (World Trade Organization, 15 April 1994) art 10.
[4] *Ibid* art 12.
[5] *Ibid* art 22(3).

negotiated during the 1986-94 Uruguay Round.[6] Member states of the WTO are obliged to arrange effective enforcement mechanisms to enforce IP rights within their jurisdiction under this agreement in a fair, equitable, and prompt manner while also incorporating international cooperation.

The provisions of TRIPS are regarded to be the reflections of two preceding treaties, the Paris Convention[7] and the Berne Convention[8] of 1883 and 1886 respectively which are also regarded to be the foundation of international IP law. Both of the instruments provided diplomatic measures, e.g., negotiation, and also permitted resorting to the International Court of Justice (ICJ) regarding the disputes.[9] After establishing the World Intellectual Property Organization (WIPO), alternative dispute resolution (ADR) mechanisms were introduced through the WIPO Arbitration and Mediation Centre. The massive progress in the line of IP dispute settlement approaches was the establishment of WTO and the adoption of TRIPS under its auspices. TRIPS provided the enforceability of IP rights through the WTO's dispute settlement understanding (DSU) and DSB as the mandated authority to address disputes, administer the entire process, provide amicable settlements, and ensure their enforcement. How DSB operates through panels has been discussed already. Once the panel report is notified, the responsibility reverts to the DSB to monitor enforcement and apply measures if the parties fail to fulfill their obligations. DSU brought IP matters under compulsory jurisdiction of the dispute settlement body and provides a more structured and obvious framework than the voluntary dispute settlement under GATT settings.

If we analyze the data of the IP disputes brought before DSB so far, several significant aspects come forward. The first one is subject matters of those disputes which embody certain types of IP rights. Most of the disputes presented are regarding the classical IPs such as copyright and related rights, patents, trademarks, and others, and less from industrial designs, undisclosed information, or comparatively advanced IP rights. One reason might be the

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[6] Adrian Otten, "The TRIPS Negotiations: An Overview" in Jayashree Watal & Antony Taubman, eds, *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations* (Geeva: World Trade Organization, 2015) 59 at 59–70.

[7] *Paris Convention for the Protection of Industrial Property*, United Nations Treaty Series 1883, 828 UNTS 305 Adopted 20 March 1883, entered into force 7 July 1884, revised 14 July 1967.

[8] *Berne Convention for the Protection of Literary and Artistic Works*, United Nations Treaty Series 1886, 1161 UNTS 3 Adopted 9 September 1886, entered into force 5 December 1887, revised 28 September 1979.

[9] *Paris Convention for the Protection of Industrial Property*, *supra* note 7 art 28; *Berne Convention for the Protection of Literary and Artistic Works*, *supra* note 8 art 33.

country's lacking in transboundary businesses regarding advanced IPs to accrue disputes from that project slow pace in worldwide development of advanced IP rights. As the record shows, the first case before the dispute settlement body was placed on 10 January 1995, just a few days after its establishment on 1 January 1995.[10] However, no panel was required to be formed as the parties mutually resolved it. The first panel was established on 8 May 1995 in the second case between the United States and Venezuela.[11] The first dispute placed before DSB regarding IP was in February 1996.[12] However the first panel to deal with TRIPS obligations was established in 1999 marking all the disputes before that having resolved mutually through consultations.[13] As of December 2024, around 44 cases on TRIPS were placed before the DSB which is almost 11% of the total 631 cases filed.[14] However, this number is not exhaustive and serves only as an approximate value for analytical purposes as acknowledged on the DSB website.[15]As we analyze cases coming up with panel reports, we cannot ignore to highlight some remarkable points:

1. Amicable Settlement at any stage of the dispute

It is already mentioned that the dispute settlement under the WTO follows a structured process beginning with consultation between the involved parties. Parties have the freedom to choose an adjudicator, time, or place of the discussion at their convenience. Notably, the scope of this amicable settlement remains open at all stages of the dispute even after the formation of the panel or during appellate proceedings. In around 116 cases overall, a mutually agreed solution is notified in almost 18% cases filed so far showing the widespread use of resorting to amicable settlement of the parties.[16] This number includes solutions mostly before a panel is established. It also includes a solution before the panel report is circulated, in the appellate stage or even

[10] *Malaysia — Prohibition of Imports of Polyethylene and Polypropylene*, 1995 World Trade Organization (WTO) Dispute Settlement Body.
[11] *United States — Standards for Reformulated and Conventional Gasoline*, 1996 World Trade Organization (WTO) Appellate Body.
[12] *Japan — Measures Concerning Sound Recordings*, 1996 World Trade Organization (WTO) Dispute Settlement Body.
[13] *DS50 India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 1997 World Trade Organization (WTO) Dispute Settlement Body.
[14] World Trade Organization, "WTO | dispute settlement - Dispute settlement activity — some figures", online: <https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm#story>.
[15] *Ibid.*
[16] *DS50 India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, *supra* note 13.

in the implementation stages. The number is significant even in IP prospectus as it bears all the advantages of resolving disputes amicably, for example, preserving party relationships. In **Measures Affecting the Grant of Copyright and Neighbouring Rights**[17], the US requested consultations with the European Commission and Ireland regarding measures in respect of Ireland's alleged failure to grant copyright and neighboring rights under its law contending that this failure violated obligations under articles 9-14, 63, 65, and 70 of TRIPS. A panel was established following the US's request. However, in 2000, even after the panel was composed, the parties notified the DSB that they had reached a mutually satisfactory solution. There are multiple instances where the parties choose an amicable solution themselves even after the dispute was placed to an appeal stage. A prominent example is the case of **Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights**[18], where Qatar brought a case against Saudi Arabia for its alleged failure to provide adequate protection of intellectual property rights. The issue involved the proprietary right of beoutQ in Saudi Arabia, a broadcasting entity of the proprietary content of beIN, a global sports and entertainment company headquartered in Qatar. The Panel found that Saudi Arabia had acted inconsistently with TRIPS article 42 by taking measures that, directly or indirectly, had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals. It also found inconsistency with the first sentence of TRIPS article 61 to "provide for criminal procedures and penalties to be applied" to the operations of beoutQ. Saudi Arabia appealed against the decision. But after one year of such proceedings, it suspended the appellate proceedings and entered into the Al-Ula Declaration, a mutually agreed solution. This remarkable flexibility to go for informal discussions and consultations make DSB a unique forum for countries preserving autonomy and not being imposing.

2. Involvement of Major Trading States:

Another great achievement of the DSB can be said to be the consistent participation of global powers. World's major trading powers frequently come

[17] *Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights*, 1998 World Trade Organization (WTO) Dispute Settlement Body.
[18] *United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, 2017 World Trade Organization (WTO) Dispute Settlement Body.

together and discuss matters of big bucks, resorting to DSB proceedings that mark the system to be very effective. States like China, the USA, the EU representing around 40% of world trade are often seen to adopt the DSB as a platform to resolve IP disputes.[19] Not only involvement but mutually agreeable solutions are also reached in most of the cases with a consequent implementation of the suggestions. For instance, in the case of **China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights**[20], the United States requested consultations with China regarding issues of IP protection. The issues included firstly, China's criminal law and related supreme people's court interpretations which establish thresholds for criminal procedures and penalties for infringements of intellectual property rights; Secondly, China's regulations for customs protection of intellectual property rights and related implementing measures that govern the disposal of infringing goods confiscated by customs authorities, and thirdly, article 4 of China's copyright law which denies protection and enforcement to works that have not been authorized for publication or distribution within China. The Panel found that Chinese actions violated TRIPS in two issues where it was exempted from liability in another issue. While the criminal measures exclude some copyright and trademark infringements from criminal liability if the infringement falls below numerical thresholds this fact alone was not enough to find a violation because article 61 does not require members to criminalize all copyright and trademark infringement. The panel did not endorse China's thresholds but concluded that the factual evidence presented by the United States was inadequate to show China's liability. Regarding the second issue, the panel found that the customs measures were not subject to TRIPS articles 51 to 60 to the extent that they apply to exports. For imports, although the auctioning of goods is not prohibited by article 59, the panel concluded that China's customs auction of these goods was inconsistent with the article because it permits the sale of goods after the simple removal of the trademark in more than just exceptional cases. Lastly, while China has the right to prohibit the circulation and exhibition of works, as acknowledged in article 17 of the Berne Convention, this does not justify the denial of all copyright

[19] *Key statistics and trends in international trade 2024*, by United Nations Conference Trade and Development, COinS (Geneva: United Nations, 5 June 2025) at 9–10 online: <https://unctad.org/system/files/official-document/ditctab2025d2_en.pdf>.

[20] *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, World Trade Organization (WTO) Dispute Settlement Body.

protection in any work. China's failure to protect copyright in prohibited works is therefore inconsistent with article 5(1) of the Berne Convention as incorporated in article 9.1, as well as with article 41.1, as the copyright in such prohibited works cannot be enforced. After this thorough decision, China informed the DSB that it intended to implement the DSB recommendations and rulings and that it would need a reasonable period to do so. Consequently, both parties notified the DSB of the procedures agreed upon under articles 21 and 22 of the DSU in 2010. This example underscores the effectiveness of DSB as a platform where large-scale business interests are being protected by the active involvement of the states.

Another incident can be **European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs,**[21] where the parties were the USA and the European Communities (EC). In 1999, the US requested consultations with the EC in respect of the alleged lack of protection of trademarks and geographical indications (GIs) for agricultural products and foodstuffs. The US contended that EC Regulation 2081/92, as amended, does not provide national treatment for geographical indications and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication hence inconsistent with the EC's obligations under TRIPS, including but not necessarily limited to Articles 3, 16, 24, 63 and 65 of TRIPS. Regarding the national treatment principle, the panel found that the equivalence and reciprocity conditions regarding GI protection under the EC regulation violated the national treatment obligations under TRIPS article 3.1 and GATT article III:4 by according less favorable treatment to non-EC nationals and products, than to EC nationals and products. About the relationship between GIs and trademarks, the panel initially concluded that the EC regulation was inconsistent with article 16.1 as it limited the availability of trademark rights where the trademark was used as a GI. However, the Panel ultimately found that the regulation, based on the evidence presented, was justified under article 17, which permits members to provide exceptions to trademark rights. At the DSB meeting in 2006, the EC fully implemented the DSB's recommendations and rulings by adopting a new regulation.

[21] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, 2005 World Trade Organization (WTO) Dispute Settlement Body.

Also in **China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers**[22], the European Communities claimed that several Chinese measures were adversely affecting financial information services and foreign financial services suppliers in China. Such measures include no fewer than a dozen legal and administrative instruments that empower the "Xinhua News Agency", the State news agency in China, to act as the regulatory authority for foreign news agencies and foreign financial information providers and they are not allowed to directly solicit subscriptions for their services in China. The European Communities claim that Xinhua News Agency has only designated the China Economic Information Service (CEIS), a branch of Xinhua, as an agent and it has made the renewal of foreign financial information suppliers licenses conditional upon the signature of agent agreements with CEIS. The European Communities considers that the measures at issue are inconsistent with China's obligations under various provisions of the GATS, TRIPS, and China's Protocol of Accession. However, On 4 December 2008, China and the European Communities informed the DSB that they had reached an agreement concerning this dispute in the form of a memorandum of understanding. This massive participation brings not only the resolution of significant IP disputes in businesses and diplomatic relationships but also influences IP compliance worldwide.

International law as a soft law mechanism is less interested in assessing domestic legislation of sovereign states and is not expected to be welcomed by the countries either. However, WTO legislations are perceived to be more empowering in the sense that it ensures domestic mechanisms not to be less favorable to any IP protection provided by international standards. WTO dispute settlement procedures are often seen to assess the legality of domestic legislation when those are found to be inconsistent with the obligation of the states under an international treaty. This approach is appreciable for strengthening the efficacy of international obligations of states which usually have a softer tone when the question of enforcement comes. In the **United States — Section 110(5) of US Copyright Act**[23], several provisions of the US Copyright Act were declared to be inconsistent with its obligation under international law. The European Communities contended that section 110(5)

[22] *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, 2009 World Trade Organization (WTO) Dispute Settlement Body.
[23] *United States — Section 110(5) of US Copyright Act*, 2000 World Trade Organization (WTO) Dispute Settlement Body.

of the US Copyright Act permits, under certain conditions, the playing of radio and television music in public places without the payment of a royalty fee. According to the community, this statute is inconsistent with US obligations under article 9(1) of TRIPS, which requires members to comply with articles 1-21 of the Berne Convention. The dispute centered on the compatibility of two exemptions provided for in this section. The first and so-called "business" exemption allows the amplification of music broadcasts, without authorization or a payment of a fee, by food service and drinking establishments and by retail establishments provided some size limitations and secondly "homestyle" exemption which allows small restaurants and retail outlets to amplify music broadcasts without an authorization of the right holders and the payment of a feet. The panel found that the "business" exemption did not meet the requirements of article 13 of TRIPS and was thus inconsistent with articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention as incorporated into TRIPS by article 9.1 as a substantial majority of eating and drinking establishments and close to half of retail establishments were covered by the business exemption. However, the "homestyle" exemption met the requirements of the articles considering some limits imposed on the beneficiaries of the exemption, permissible equipment and categories of works as well as the practice by US courts. The declaration not only strongly declared violation from a world super power, but also showcased the US's commendable commitment to implement the decision effectively.

In pursuant to the DSB panel decision in **Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights**[24] Ireland passed new legislation (Intellectual Property Act 1998) and amended its existing copyright law(the Copyright and Related Rights Act 2000) in conformity with TRIPS. In the **United States – Section 211 Omnibus Appropriations Act of 1998**[25], the appellate body of the DSB declared the impugned section of US Omnibus Act to be violative of the national treatment and most-favored-nation obligations under TRIPS and Paris convention for the protection of industrial property because it limits right holders' effective access to and availability of civil judicial procedures. Following the notification of the understanding

[24] *Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights, supra* note 17.
[25] *United States – Section 211 Omnibus Appropriations Act of 1998*, 2000 World Trade Organization (WTO) Dispute Settlement Body.

between the parties, the United States provided status reports on its progress in the implementation of the DSB recommendations.

In **Indonesia – Certain Measures Affecting the Automobile Industry**[26], the European Commission, Japan, and the US requested consultations with Indonesia concerning Indonesia's National Car Programme. The allegations were the exemption from customs duties and luxury taxes on imports of "national vehicles" and components thereof and related measures that violated Indonesia's obligations. The panel found that Indonesia violated articles I and II:2 of GATT 1994 but that the complainants failed to demonstrate Indonesia's violation of articles 3 and 65.5 of TRIPS. Indonesia indicated its intention to comply with the recommendations of the DSB within the time permissible under article 21 of the DSU, and by issuing a new automotive policy in 1999.

3. Interpretation of the Treaties

A very significant aspect of the decisions of WTO dispute settlement is that it makes vital interpretations of the treaties in question. While resolving intellectual property disputes, the panel gives thorough interpretations of different articles, provisos, and appendices of TRIPS. In **India – Patent Protection for Pharmaceutical and Agricultural Chemical Products**[27], the USA requested consultation challenging the mailbox rule of India alleging the absence of patent protection for pharmaceutical and agricultural chemical products in and consequent violation of TRIPS articles 27, 65, and 70. The Panel found that India has not complied with its obligations under TRIPS provisions mentioned. However, on appeal, the appellate body upheld the Panel's findings with modifications. The body rejected the panel's use of a "legitimate expectations" (of members and private right holders) standard as a principle of interpretation for TRIPS. It based its conclusion on the following: (i) the protection of "legitimate expectations" is not something that was used in GATT practice as a principle of interpretation, and (ii) the Panel's reliance on the VCLT article 31 for its "legitimate expectations" interpretation was not correct because the "legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The body clarified that the process

[26] *Indonesia – Certain Measures Affecting the Automobile Industry*, 1998 World Trade Organization (WTO) Dispute Settlement Body.
[27] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 1997 World Trade Organization (WTO) Dispute Settlement Body.

of treaty interpretation should not include the "imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.

Not only interpretation, but the DSB also works to defend, safeguard, and protect the rights given in the treaties. Under the Canadian Patent Act, the regulatory review provision (sec. 55.2(1)) and stockpiling provision (sec. 55.2(2)) allowed general drug manufacturers to override the rights conferred on a patent owner in certain situations. The panel concluded that the stockpiling provision was inconsistent with article 28.1 as it constituted a "substantial curtailment of the exclusionary rights" granted to patent holders. However the panel found that Canada's regulatory review provision was justified as an exception under art.30 by meeting all three cumulative criteria. The exceptional measure (i) must be limited; (ii) must not "unreasonably conflict with normal exploitation of the patent"; and (iii) must not "unreasonably prejudice the legitimate interests of the patent owner", taking account of the legitimate interests of third parties. The panel's proposition was that the word 'and' demands fulfilment of all the three criteria together to fall under an exception and not just any of them.[28]

In line with the above finding, in the **US Copyright case**[29] It says:

> Article 13 of the TRIPS Agreement requires that limitations and exceptions to exclusive rights (1) be confined to certain special cases, (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder. The principle of effective treaty interpretation requires us to give a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of the conditions to 'redundancy or inutility'. The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the article 13 exception being disallowed.[30]

[28] *Canada — Patent Protection of Pharmaceutical Products*, 2000 World Trade Organization (WTO) Dispute Settlement Body.
[29] *United States — Section 110(5) of US Copyright Act*, *supra* note 23.
[30] *Ibid* at para 6.97.

The Panel in **Saudi Arabia – Intellectual Property Rights**[31] elaborated the scope of article 42 of TRIPS. This article provides that *Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement*. The Panel interpreted the terms as: '[m]aking something available means making it 'obtainable', putting it 'within one's reach' and 'at one's disposal' in a way that has sufficient force or efficacy'; therefore, 'the ordinary meaning of the term 'make available' suggests that 'right holders' are entitled under article 42 to have access to civil judicial procedures that are effective in bringing about the enforcement of their rights covered by the agreement'.

B. Assessment of the Current Scenario

Under the WTO provisions, as of July 2025, as published and updated on the WTO website, there have been 44 complaints filed in the DSB relating to the interpretation and application of TRIPS. Amongst these 44 complaints so far, in 13 cases the panel report has been published and around 45% of cases were resolved in the consultation stage and did not move to the panel.[32] Among these 13 cases, only four were appealed (e.g. India Patents Case 1998 and Canada Patent Terms Case 2000 resulted in an appellate body report).[33]

Interestingly, around 50% of cases related to IP are brought by the USA. which is a good indicator of major economies' involvement in this mechanism. At the same time, it raises the concern as to whether this mechanism predominantly serves the interest of powerful IP exporting countries and whether the developing countries equally possess the same capacity to defend against them. This settlement procedure is usually found to be very efficient and time-saving. From consultation to the final disposal, the whole process is designed to be completed within one year without appeal and within one year three months with appeal.[34]

However, there are incidents where this timeline exceeded significantly which we have discussed in the assessment section of this article. Now for example, Indonesia's experience shows that this timeline is often not respected. In the

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[31] *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights*, 2021 World Trade Organization (WTO) Appellate Body.

[32] World Trade Organization, "Current status of disputes", online: <https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm>.

[33] *Ibid.*

[34] World Trade Organization, "A unique contribution", online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>.

case regarding the Importation of Horticultural Products, Animals, and Animal Products[35] the process took much longer than expected. It also happened in the case on Safeguards for Certain Iron or Steel Products[36] which started in 2015 and is still not officially resolved, even though Indonesia has already applied the safeguard measures. These examples suggest that we should take a more balanced view before deciding whether the WTO dispute system is truly effective and efficient.

1. Success of the consultation process

The DSU sets out the rules and procedures of consultation designed to reach a consensual decision so that there are no hard feelings between the member states although there is existing concern about the dominance of powerful countries in the consultation process.

The following cases shall exemplify the significance of the consultation process in the DSB.

In **Brazil measures affecting patent protection situation**[37] the United States (US) complained about Brazil's newly made Industrial Property Law as it established a 'local working' requirement for the exclusive enjoyment of patent rights. According to this stipulation, a patent will be subject to compulsory licensing if not 'worked' in the territory of Brazil. The US argued that only local manufacturing and production companies and not by the imported goods of the patented subject matter could fulfill that requirement and that Brazil's "local working" requirement risks compulsory licensing of the products in case of non-fulfillment of the criteria. It was contested by the US that such interpretation is inconsistent with Articles 27 and 28 of TRIPS, and Article III of the GATT 1994 by limiting patent rights illogically. Within one year of such a complaint, the DSB established a panel and within five months of the consultation, the US and Brazil came to a consensus.

[35] World Trade Organization, "DS478: Indonesia — Importation of Horticultural Products, Animals and Animal Products", online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds478_e.htm>.
[36] World Trade Organization, "DS496: Indonesia - Safeguard on Certain Iron or Steel Products", online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds496_e.htm>.
[37] World Trade Organization, "DS199: Brazil — Measures Affecting Patent Protection" (1 June 2001), online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm>.

In the case of **European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programmes**[38] the US requested consultation with the European Communities about the state of enforcement mechanism regarding intellectual property rights in Greece. The US argued that a substantial number of TV stations in Greece regularly broadcast copyrighted motion pictures and television programmes without the approval of the owners of copyright. The US contended that effective remedies against copyright infringement do not appear to be provided or enforced in Greece in respect of these broadcasts. The US suspected a possible breach of the obligations under the Articles 41 and 61 of TRIPS. For such a complaint, there existed a tension between two powerful stakeholders of international trade. However, on 20 March 2001, they reached a peaceful mutual decision through the dispute settlement mechanism of the WTO.

Also in **Japan — Measures Concerning Sound Recordings**[39] the US requested consultation with Japan. This was the first case to take resort to WTO Dispute Settlement for Intellectual Property Rights Concern. The US argued that the copyright regime in Japan for sound recordings is not in conformity with, inter alia, TRIPS article 14 which provides for the protection of performers, producers of phonograms and broadcasting organizations. Even before the establishment of the panel, on 24 January 1997, the parties through mutual consultation came to a satisfactory solution.

2. Success of the Adjudication Process

WTO Dispute Settlement Understanding provides for settlement of disputes by adjudication as well. If consultations fail to resolve the dispute, the complainant may take resort to the adjudication by a panel. The rules and procedures for adjudication by a panel and the appellate body are set out in the understanding.

In **India — Patent Protection for Pharmaceutical and Agricultural Chemical Products**[40] the European Community (EC) requested a consultation with India regarding the alleged absence of patent protection for pharmaceutical and

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[38] World Trade Organization, "DS124: European Communities — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs" (21 December 2000), online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds124_e.htm>.

[39] *Japan — Measures Concerning Sound Recordings*, *supra* note 12.

[40] *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 1998 World Trade Organization.

agricultural chemical products and the absence of mailboxes and providing exclusive marketing rights for such products. The EC argued that such absence is violative of article 70, paragraphs 8 and 9, of TRIPS. The EC applied to establish a panel. After its establishment, the panel held that India was in breach of article 70.8(a) of TRIPS as they failed to prove their legal basis which substantially protects novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions. The DSB also found that India was not in compliance with article 70.9 of TRIPS as they failed to establish a system for the grant of exclusive marketing rights.

In **Canada – Patent Protection of Pharmaceutical Products**[41] the European Community argued that Canada's patent law is inconsistent with TRIPS as the legislation did not grant full protection to patented pharmaceutical inventions for the entire duration of the term of protection as envisaged by articles 27.1, 28, and 33 of TRIPS. Later, the EC applied for the establishment of a panel and the panel was established on 1 February 1999. The panel held that the so-called regulatory review exception was consistent with article 27.1 of TRIPS and was covered by the exception in article 30 of TRIPS and thus consistent with article 28.1 of TRIPS. On the other hand, the so-called stockpiling exception under Section 55.2(2) was found to be not covered by the exception in article 30 of TRIPS. Due to the stockpiling exception in the law, business competitors were permitted to produce and stockpile patented goods during a certain period before the patent expired. However, the goods could not be sold until after the patent expires. The panel decided that the stockpiling exception substantially curtailed the exclusionary rights of the patent owners under article 28.1 of TRIPS.

C. Identifying Shortcomings and Ways to Move Forward

Like many other instruments of International law, WTO dispute settlement understanding and its ancillary mechanisms are largely dependent on the good faith and consent of the member states. Among 639 cases filed so far in DSB, 185 cases are still in consultation, which means that no panel has been established and no withdrawal or mutually agreed solution has been notified yet in these cases.[42] Interestingly it includes disputes requested for consultation

[41] *Canada – Patent Protection of Pharmaceutical Products*, *supra* note 28.
[42] World Trade Organization, *supra* note 32.

as early as the establishment of DSB itself. For example, Korea — Measures Concerning the Testing and Inspection of Agricultural Products is one of the earliest cases filed in April 1995 immediately after DSB was established. However, no update is available in the DSB record about the progress of the case except for the request for consultation back in 1995. [43] Nearly half of the cases still in consultations are more than 20 years older now with zero progress or no update that throws a strong credibility issue on DSB's efficacy. It also reiterates that only the party's good faith can proceed or stop a proceeding before DSB and undermines WTO as a driving force. Procedural complexities are often seen to decelerate the overall effectiveness and efficiency of the whole apparatus.

WTO dispute settlement includes an appellate body to hear appeals from the reports of the panel which is composed from time to time in response to the requests of the parties. It can modify, uphold, or reverse the panels' decisions and propose reports for the dispute settlement body to adopt. However, the appellate body is currently in a paralyzed condition and cannot accept any review application since November 2020 when the term of the last sitting appellate body members expired.[44] As a result, at least 32 cases are pending before the appellate proceeding as of July 2025.[45]Attempts to form a new appellate body have been fruitless due to a lack of consensus among the parties. A multiparty interim appeal arbitration arrangement has been taken for the time that needs to work in full swing. There are even situations when parties are seen to lose interest in the dispute settlement process after the panel is formed in response to their request.

In **Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging**[46], Ukraine requested consultations with Australia on 13 March 2012 concerning certain Australian laws and regulations that impose trademark restrictions and other plain packaging requirements on tobacco products. On 2 June 2015, the panel suspended its proceedings in response to Ukraine's request supported

[43] *Korea, Republic of — Measures Concerning the Testing and Inspection of Agricultural Products*, 1996 World Trade Organization (WTO) Dispute Settlement Body – Panel.

[44] World Trade Organization, "Appellate Body", online: <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm>.

[45] *Ibid.*

[46] *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, 2020 World Trade Organization (WTO) Appellate Body.

by Australia. The Chair of the panel noted that the panel's authority shall lapse after 12 months of the suspension of its work. On 30 May 2016, under article 12.12 of the DSU, the panel's jurisdiction lapsed because it had not been requested to resume its work within the 12 months following the suspension of the panel proceedings. The panel formed was suspended also in the case of **China — Certain Measures Concerning the Protection of Intellectual Property Rights**[47] as per the parties' request. Sometimes parties resolve through mutual approaches, sometimes the issue gets obsolete, and sometimes no update of the impugned issue is found in these cases. When the recommendations and rulings of the panel cannot be implemented otherwise, the deprived parties can retaliate by suspending trade concessions or obligations, the ultimate enforcing force in the WTO. But in a scenario where a developing country with a small domestic market is incapable of imposing sufficient political or economic loss to a business giant and lacks the required force to ensure compliance, often questions the efficacy of WTO DSB for developing countries. The retaliatory actions can sometimes be more harmful to the aggrieved developing countries rather than the non-compliant powerful country.

The majority of the participants, as complainants or respondents in the DSB, come from developed countries and their organizations. For instance, the United States accounts for approximately 20% of cases, while around 18% are initiated by the European Commission (now the European Union). On the other hand, developing countries have filed roughly 40% of the cases which is a promising indicator of their engagement with the system. However, 30% of these cases have been concentrated among fewer than 10 developing countries, including China, Brazil, Argentina, India, Korea, and Mexico.[48]

To achieve universality and effectiveness in the true sense, the WTO DSB must be utilized by all members, ensuring equitable access and participation in the process. Arbitration and adjudication through a neutral third party other than diplomatic settlement should be encouraged to minimize the power relationship between developed and developing countries. The procedure is often criticized as being unnecessarily complicated and expensive to be a great

[47] *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, 2018 World Trade Organization (WTO).

[48] World Trade Organization, "Index of disputes issues", online: <https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm> Percentages of the preceding paragraph are roughly calculated by the author reflecting the data from this website.

deterrent to avail the system. Also, the developing and the least developed countries may lack the necessary expertise to navigate the complex procedures involved. Therefore existing less procedural measures like mediation, conciliation, good offices, etc. should be made more sought after.

Another point that demands improvement is the enforcement of the recommendations and rulings of the panels. There is a great concern about suspending trade concessions and its impact on developing country economies. Fear of jeopardizing trade relations with superior states may hinder the developing countries from seeking formal settlement through the DSB. Therefore less procedural settlement should be encouraged so as not to harm those countries' image and protect others' interests. Power balance should be ensured in the DSB by taking empowering measures for developing countries, such as choosing the location of the settlement according to the preferences of those countries.

WTO DSB provides for a more generalized system irrespective of domestic situations. There are several other bilateral or multilateral agreements that govern dispute settlement mechanisms among the parties sometimes bypassing WTO mechanisms. e.g Belt and Road initiative of China has its own mechanism. In fact, due to the regional characteristics, WTO dispute settlement mechanism cannot perfectly solve the intellectual property disputes among the countries along the routes[49] Therefore better coordination is required between or among WTO mechanism and regional ones. It is more important when the matters involve major trading countries like EU or USA.[50]

IV.CONCLUSION

Even though the dispute settlement mechanism of the WTO is relatively novice, it has shown a very promising involvement in resolving intellectual property disputes within a short period of 30 years. Being a more structured and impartial process of dispute resolution, it has enhanced effectiveness in exercising IP rights while being less hostile to the states. This mechanism has facilitated in resolving complex IP issues promptly while promoting cross

[49] Li Ma, *Research on the Dispute Settlement Mechanism of Intellectual Property in International Trade Under the Belt and Road Initiative* (Atlantis Press, 2019).

[50] Hui Tang, "The The role of WTO dispute settlement mechanism in trade conflicts: : A focus on China's experience" (2025) 4:4-Ext Revista de Direito Internacional e Globalização Econômica 203–210.

border IP protection and great adherence to international trade norms. It underscores the importance of a dispute settlement mechanism balancing fair competition throughout the world market. As the IP regime continues to evolve, it is showing hope that the WTO's dispute settlement mechanism will remain a cornerstone for upholding and preserving IP rights. However, it is not free from all the obstructive challenges to avail the procedure and implement the outcome. More inclusive procedures need to be emphasized and the implementation of the recommendations and concerns of the states should be addressed. Powerful states are still interested in resorting to the DSB either in good faith or for protecting businesses' interests, which need to be utilized to make the system effective. Incentives for politically and economically inferior states should be provided to uphold its universal nature. So far recommendations made by different DSB panels are commendably respected, however, it should have the same efficacy when one of the parties is a developing state. More innovative enforcement mechanisms should be brought into the light so that a mere economic dispute does not turn into a diplomatic threat to the relationship among the states. At present, Panel members are appointed in a case by case basis. Instead of that there should be fixed panel members ensuring proper representation of developing countries. Fixing a more convenient venue and making the procedures less costly and understandable can be emphasized as measures for empowerment. The mechanism need be to modernize to fit with every dispute to properly address capacity building of developing nations. In addition to retaliatory actions, monetary compensation or collective actions by other WTO members as remedies can mitigate power imbalance and favor developing countries. At the same time, jurisdictional conflicts between the WTO dispute settlement mechanism and regional trade agreements must be addressed carefully to avoid inconsistencies. Since institutional evolution happens, DSB is expected to be more vigilant and actively engaged in the dispute settlement process to empower each party equally.

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