Embracing Representation and Diversity in the WTO Dispute Settlement Processes

By:

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The World Trade Organization (WTO) stands as a cornerstone of the global trade architecture, fostering cooperation and negotiation among its diverse membership. At the heart of its operations lies the Dispute Settlement Mechanism (DSM), a rules-based system designed to ensure fair resolution of trade disputes. However, as a rules-based system for global trade, DSM faces a challenge of representation of its diverse parts encompassing regional disparities, differences in legal traditions, and gender imbalances that impinge on its ability to serve the needs of all its members and maintain its legitimacy. This blog post critically examines these issues and proposes strategies to enhance diversity and representation within the DSM, bolstering its legitimacy and ability to fulfil its overarching objectives.

One glaring challenge facing the DSM is the unequal representation of WTO member countries across regions. The WTO was billed as a new era of global

trade devoid of the rancour that attended Global North and South economic relations, especially in the decades before the WTO. The use of consensus rather than ballots or voice votes in the decision-making process and the presumption that all members agree unless they formally object to an adopted rule or measure are some of the markers of the new era of a consensus-driven organisation promoting world trade. Nonetheless, despite adopting consensus as a rule-making procedure, different countries within the WTO have different capacities, levels of influence and options and exert unequal weight over the rule-making process.

Various influences and options hold unequal sway in the rule-making process, with consensus often mistaken for unanimous agreement, particularly during drafting, detailing, or implementing specific rules or measures. Where weaker countries lack the capacity to withstand the backlash from a formal dissent that holds the process hostage, consensus can lead to self-imposed silence. Thus, historically, decisions made within the organisation have often been dominated by the interests of powerful economies, sidelining the concerns of smaller and less-developed nations. The imbalances in the rule-making process of the WTO require careful attention to the dispute resolution process as a second-tier arena within which better representation can lead to a more equitable balance of the interests within the organisation.

In this area, too, the rules on Dispute Settlement Boards (DSBs) and Appellate Body Members (ABMs) pose some unique challenges for weaker states, minorities and other marginalised groups. Article 8 of the WTO's Dispute Settlement Understanding (DSU) delineates three qualifying categories for dispute panel membership: individuals who have presented cases or previously served on a panel, those with experience as state representatives under the General Agreement on Tariffs and Trade (GATT) or its predecessor agreements, and individuals with a background in teaching or publishing on international trade or policy. An analysis of the interpretation and application of the Article 8 criteria reveal interesting trends in representation at the WTO.

Of the 246 distinct individuals who have served on 161 panels between 1995 and 2015, Creamer and Godzimirska report that 4% come from the Middle East and North Africa (MENA), 4.7% from Sub-Saharan Africa (SSA) and 5.2% from South Asia. The data further shows there are also disparities within regions. For

instance, apart from one appointment from Morocco, all MENA appointments have gone to Egypt and Israel. Similarly, apart from one appointment from Mauritius and Zambia, all SSA appointments have gone to South Africa alone. Dispute panel membership representation distribution between and within regions suggests that larger and relatively more developed economies within the developing world have a disproportionate share in WTO representation. It also suggests a resource challenge on the part of poorer countries who do not control enough international trade to make investing in WTO representation worthwhile. Data shows that 22.5% of appointed panellists are from Europe and Central Asia, 24.6% from Latin America and the Caribbean, and 31% from East Asia and the Pacific. Creamer and Godzimirska also highlight that Article 8(3) of DSU) limits United States (US) and Canadian representation on panels due to their frequent participation in disputes as direct or third parties. Nonetheless, the US consistently maintains a presence on the Appellate Body since nationality restrictions do not come into play at that level.

To ensure better regional representation along the Article 8 criteria, the WTO could invest in educational opportunities such as scholarships, fellowships and other funded placements for talent across the developing world – especially in unrepresented countries) to increase contact with the organisation and broaden the pool of eligible candidates from underrepresented regions. This approach is critical given that 153 of the 161 panels constituted between 1995 and 2015, were composed of at least two persons with previous work experience with the WTO. This proactive approach addresses the current imbalance and contributes to a more equitable and effective dispute resolution mechanism within the global trade framework.

Another issue pertains to the diversity in legal traditions among WTO member countries. Legal systems vary significantly, encompassing common law, civil law, and hybrid systems (a mixture of common law and civil law). Regarding the differences in legal traditions, Creamer and Godzimirska note a bias towards candidates from countries with hybrid legal systems for the Appellate Body. At the level of the DSBs, candidates from Civil Law countries are the most preferred group, followed by candidates from Common Law countries. At the Appellate Body level, panels composed of members from mixed legal systems are more likely and frequent than those from either Civil or Common law traditions combined. To address this issue the WTO must embrace legal

pluralism and adopt mandatory panelling rules that require every three-member panel to have a member from at least one of the three main legal traditions to ensure better representation along the lines of legal tradition.

Embracing legal pluralism in the WTO would enhance fairness and equity within the organization, specifically by ensuring that the legal traditions and perspectives of Global South countries are adequately represented in dispute settlement proceedings. To achieve this, the WTO can establish a comprehensive database of qualified panellists from diverse legal backgrounds, particularly from Global South countries. Additionally, the WTO should consider offering technical assistance, financial support, and capacity-building initiatives to developing countries, ensuring they have a sufficient number of qualified prospective panellists who can participate effectively in WTO dispute settlement proceedings.

Another significant challenge facing the WTO is the gender imbalance within the DSM, which raises a critical issue for significant concerns about the organisation's commitment to equality and diversity in representation. Although Article 8(2) of DSU encourages diversity and representation, it has no specific rules requiring gender balance on Dispute Settlement Boards (DSBs) or ABMs. The organisation has seen an underwhelming representation of women among dispute panellists and ABMs, limiting the range of experiences and viewpoints within the decision-making process. Creamer and Godzimirska report that in their twenty-year study, only 31 women have served as panellists in the WTO's DSM, with only 11 panels out of 161 being a majority women panel.

At the AB level, women have shared just 18% of 27 appointments thus far. Another study also found that when women are included in the DSM, there is a 10% higher chance of dispute parties being unsatisfied with the outcome. Although the reasons for this are not fully understood, the study gives possible explanations, such as perceptions of reduced authority or competence for women in trade disputes and the possibility that women's presence signals broader changes in the DSM. While these studies are limited in scope, the importance of gender diversity within contexts such as DSM remains without question.

One approach involves setting targets for gender representation within the DSM and tracking progress toward achieving these goals. The DSU should also be revised to require at least one female and other gender minority member on every multi-member panel to transcend the organisation’s gender problem. Such a measure will make women’s or female participation in the DSU a norm and not an event to be noted and criticised. Additionally, the WTO could establish mentorship and training programs that empower women to participate more actively in trade dispute resolution.

The DSM of the WTO is an important pillar within the global trade landscape, yet its efficacy grapples with the complexity of representation and diversity challenges. Regional disparities, diverse legal traditions, and gender imbalances collectively undermine the DSM's legitimacy and credibility. To tackle these hurdles, the WTO must adopt a comprehensive strategy that embraces equitable regional presence, incorporates a spectrum of legal perspectives, and actively fosters gender diversity. Striking a balance between qualification and representation is imperative to avoid compromising effectiveness for diversity. While minorities within the organisation possess the competence for DSM roles, many remain untapped due to a lack of outreach or resources. To genuinely achieve consensus, the organisation's commitment must extend to every member's involvement, bridging gaps and acknowledging that true unity requires meeting everyone where they stand.

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