
Chapter 6 RESOLVING TRADE DISPUTES: THE WTO'S DISPUTE SETTLEMENT MECHANISM

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6.1 Introduction

Any international agreement's effectiveness is largely dependent on its capacity to be enforced, particularly in cases where a signatory default on their commitments. The practical value of the promises made in these agreements is increased by an effective dispute resolution process. In order to guarantee that all Members of the WTO fulfil their commitments under the WTO Agreement, the WTO established the current dispute settlement mechanism during the Uruguay Round of multilateral trade negotiations.

Many consider the WTO dispute settlement mechanism to be one of the major accomplishments of the Uruguay Round. Since the WTO Agreement went into effect in 1995, Members have used the dispute settlement system more often, which has quickly gained practical significance.

Three primary categories of complaints can be filed through the WTO dispute settlement process: "violation complaints," "non-violation complaints," and "situation complaints."³⁸⁷ Of them, complaints about violations are the most frequent; lawsuits based on the nullification of non-violations or the damage of trade benefits are rare. Remarkably, no "situation complaint" has resulted in an Appellate Body or panel report under Article XXIII:1(c) addressing the existence of any other circumstance under GATT 1994.

Violation Complaint:

A violation complaint can be filed under WTO distress. The complainant claims that a benefit to which the complainant is entitled under these agreements is rendered nullified or impaired as a direct or indirect consequence of this failure or breach. To put it plainly, a violation complaint is an official accusation that a member of the WTO has violated its obligations pertaining to trade, with potentially dire implications for the complainant's interests or benefits under the applicable agreements. By using defined procedures and legal mechanisms, the dispute settlement process seeks to address and remedy these alleged infractions.

Non-Violation Complaint:

When a member's activities are in compliance with the WTO Agreement's express rules but may nevertheless undermine trade commitments or frustrate the Agreement's goals, a non-

³⁸⁷ WTO, Legal Basis for a dispute, *available at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p2_e.htm (last visited on February 22, 2022)

violation complaint is the recourse available under the WTO system. Due to its complexity and potential loopholes, the WTO Agreement may permit certain acts by its members that, although compliant, may impede the benefits that other members anticipate. In cases where a member's advantage is compromised by actions in line with the WTO Agreement, the non-violation complaint functions as a corrective measure to reestablish equilibrium. Additionally since it is regarded as an extraordinary remedy, the complainant must provide a thorough rationale that addresses the application of a measure, the existence of an agreed benefit, and the nullification or damage of that advantage.

Situation Complaint:

The purpose of a situation complaint, as outlined in WTO Article XXIII:1(c), is to handle macroeconomic emergencies such as widespread depressions, significant unemployment, or problems with the balance of payments. Members can report issues regarding circumstances not covered by other provisions, such as the nullification or impairment of a benefit, through this complaint procedure. It has only been used in the past seldom and calls for a thorough explanation from the complainant. The panel report is subject to the regulations and processes of the WTO's Dispute Settlement Understanding (DSU), while the report's adoption and execution adhere to the more traditional dispute settlement guidelines. The clause that permits one member to obstruct decisions in the DSB by impeding a favourable consensus in scenario complaints has not been used by any member as of yet.

All three types of complaints violation, non-violation, and situation—are included by the TRIPS Agreement, demonstrating the complexity of dispute resolution. Interestingly, for the first five years after the WTO Agreement's formation, non-violation and circumstance complaints were barred under Article 64.2 of the TRIPS Agreement.³⁸⁸ This temporary ban ended in 1999, but despite further discussions, the TRIPS Council's subsequent meetings were unable to provide formal recommendations.

There have been no concrete cases of non-violation or situation complaints brought under the TRIPS Agreement as a result of the ongoing controversy surrounding this issue. Due to the impasse in the talks, the Fourth Ministerial meeting in 2001 decided to prolong the moratorium, which sparked further disputes in the sessions that followed. The main focus of these negotiations is how to define the parameters and process for filing these kinds of complaints,

³⁸⁸ WTO, Types of dispute in the TRIPS Agreement, *available at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s5p1_e.htm (last visited on March 2, 2022)

but agreement is still difficult, leaving non-violation and situation complaints in the TRIPS Agreement without a clear status.

6.1.1 Introduction to Dispute Settlement Mechanism

The Dispute Settlement Body (DSB) of the World Trade Organisation is essential to managing dispute settlement. The DSB is made up of a Chairman and delegates from each WTO member country.³⁸⁹ It has the power to create panels, approve reports, and approve retaliatory actions in case of noncompliance. During disagreements, the WTO's Director-General and Secretariat assist in conciliation or mediation. There are several phases to the conflict settlement process. The first is consultation, in which nations attempt to settle differences through direct dialogue. The complaining nation may ask the WTO Director-General to mediate if that proves fruitless. Next, a Panel is established, and it renders a decision or set of recommendations in six months (or three months in emergency situations). The point of this system is not to pass the judgement but to settle dispute with consultation if possible.³⁹⁰

Managing a growing number of conflicts does not always mean that law and order is failing. The WTO attributes the increase in conflicts to both the expansion of global trade and the more stringent regulations negotiated during the Uruguay Round. The rise in claims filed with the WTO is seen to indicate that people's confidence in the system's efficacy is growing.

6.2 Working of DSB

First Stage (Consultation): In the first stage there is a period of 60 days in which countries try to talk to each other and try to reach a settlement if possible. If countries involved are not able to reach any solution they can request WTO Director General to mediate or try to help in any other way.³⁹¹

Second Stage (Panel): If talks between the Nations fail, the complaining country can ask for a Panel to set up. The role of the Panel is to give recommendations or rulings. The report of the Panel can be rejected by consensus in the Dispute Settlement Body but the conclusions of the

³⁸⁹ WTO, Introduction to WTO Dispute Settlement System, *available at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s2p1_e.htm (last visited on March 2, 2022)

³⁹⁰ *ibid*

³⁹¹ WTO, Understanding the WTO: Settling Disputes, *available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited on March 2, 2022)

Panel are difficult to overturn.³⁹² The Panel can give report within a period of six months and in the case of urgency it can give within three months.³⁹³

Dispute Resolution Timeframe: The approximate timeframes for each stage of the dispute settlement process within the World Trade Organization are indicative and subject to flexibility. Conflicts can also be settled unilaterally by the parties at any time. Prior to the first hearing each party to the dispute can present their case in writing. The complaining country or countries, responding country or those who have legitimate interest in the dispute can make their case in Panel's first hearing.³⁹⁴ Rebuttal chance is given to the countries involved in the issue. If any technical or scientific matters are referred to the panel, the panel take the advice of the experts or appoint an expert review group.³⁹⁵

- **Final Panel Report to WTO Members:** The final panel report is distributed to all WTO members three weeks after it is submitted to the parties. If the Panel is of the opinion there has been violation of any WTO obligation or law, it would suggest how to make it right.

- **Adoption of Report by Dispute Settlement Body :** In the event of no appeal, the report is adopted by the Dispute Settlement Body within 60 days, resulting in a roughly one-year period without an appeal.³⁹⁶

- **Appeals Report :** The appeals report may take an extra 60-90 days in the event of an appeal. If any party is not satisfied with the outcome of the Panel, it can later make an appeal.³⁹⁷ Unlike panels whose members are appointed on case to case basis, the Appellate body is a fixed organ whose main role is to review of legal issue. The review is subject to strict deadlines which should not be exceed more than sixty day and in exceptional cases not more than ninety days.³⁹⁸ In case the Appellate Body reaches to a conclusion that there has been violation of WTO

³⁹² WTO, The Process – Stages in a typical WTO Dispute settlement case, *available at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm (last visited on March 19, 2022)

³⁹³ WTO, Understanding the WTO: Settling Disputes, *available at* (https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited on March 19, 2022)

³⁹⁴ Ibid

³⁹⁵ WTO, Dispute Settlement in the World Trade Organisation by Integrated Database of Trade Disputes for Latin America and Caribbean, *available at* (<http://datd.cepal.org/soluciones/iTemplate-OMC-explicacion.pdf> (last visited on March 19, 2022)

³⁹⁶ WTO, Understanding the WTO, what we do, *available at* https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm (last visited on March 19, 2022).

³⁹⁷ WTO, Dispute Settlement Activity-some figures, *available at* https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited on March 19, 2022)

³⁹⁸ Dispute Settlement in the World Trade Organisation by Integrated Database of Trade Disputes for Latin America and Caribbean, *available at* (<http://datd.cepal.org/soluciones/iTemplate-OMC-explicacion.pdf> (last visited on March 6, 2023)

obligation, it recommends member concerned to bring the measure into conformity with that obligation.³⁹⁹

- **Dispute Settlement Body approves Appeals Report:** In the event that an appeal is filed, the Dispute Settlement Body approves the appeals report within 30 days.

- **Total Time Including Appeal:** Approximately one year and three months may be needed for the complete process, which includes an appeal.

Process for Resolving Disputes: All WTO members make up DSB, which is in charge of resolving disputes. The DSB forms panels to review cases, decides whether to accept or reject panel recommendations, oversees their execution, and has the authority to permit reprisals for non-compliance.

Hence, the WTO dispute resolution process involves three primary phases: (i) discussions between the involved parties; (ii) examination by panels and, if necessary, by the Appellate Body; and (iii) the execution of the decision, encompassing potential retaliatory measures should the losing party fail to implement the ruling.

6.2.1 Implementation of the DSB Decisions

The implementation phase begins after thirty days post adoption of the report by the DSB. The member concerned can ask the DSB for the implementation of the report.⁴⁰⁰ The role of DSB will be to see whether the proper implementation takes place or not. The original panel can be re-appointed to check whether the proper measures as stated under the report are being taken or not. As of 31 December 2023, arbitrators have determined the period for implementation in 53 disputes⁴⁰¹

6.3 Cases handled by DSB

In case a party does not want to adopt the report, the parties to the case shall enter into negotiations with a view to developing mutually accepted compensation.⁴⁰² The last step if these negotiations fail then a party may request authorisation from DSB to suspend the member

³⁹⁹ Article 19(1) of the DSU by WTO, *available* at https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited on March 6, 2023)

⁴⁰⁰ Article 21(3) of the DSU by WTO, *available* at https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited on March 6, 2023)

⁴⁰¹ Article 21(5) of the DSU by WTO, *available* at https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited on March 6, 2023)

⁴⁰² Article 22(2) of the DSU by WTO, *available* at https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited on March 19, 2023)

concerned of concessions or other obligations under the WTO Agreement.⁴⁰³The complaining party can consider suspension of concession from the same sector or obligation from another covered agreement (Cross-Retaliatio)n⁴⁰⁴

From the inception of WTO, till 31st December, 2023 a total of 621 requests for consultation were circulated to the WTO membership.⁴⁰⁵ During this period 53 members initiated at least one dispute and 61 members were a respondent at least one dispute. In addition a total of 90 members have participated as third party in proceedings between two or more members.⁴⁰⁶Overall 111 members have been active in dispute settlement as a party or a third party.

6.3.1 Request for Consultations

Disputes within the WTO are initiated through formal requests for consultations, where the complaining member invites the member whose measures are contested to engage in discussions aimed at resolving the dispute without further litigation. These requests are distributed to all WTO members. From the establishment of the WTO on January 1, 1995, until December 31, 2023, a total of 621 requests for consultations were circulated among WTO members.⁴⁰⁷ During this period, disputes were initiated by 53 WTO members, and 61 members were named as respondents in at least one dispute. Additionally, 90 members participated as third parties in proceedings involving two or more other WTO members. In total, 111 members actively engaged in dispute settlement, either as a party or as a third party.

⁴⁰³Article 22(2) of the DSU by WTO , *available* at https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited on March 19, 2023)

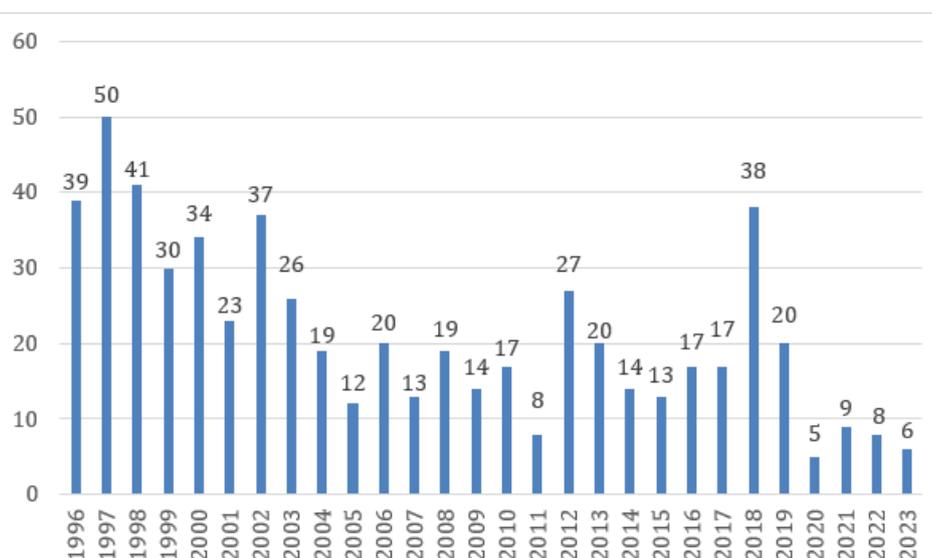
⁴⁰⁴Article 22(3) of the DSU by WTO , *available* at https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited on March 19, 2023)

⁴⁰⁵WTO, Dispute Settlement Activity-some figures , *available* at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited on March 19, 2023)

⁴⁰⁶ *ibid*

⁴⁰⁷WTO, Dispute Settlement Activity-some figures, *available* at https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited on March 19, 2023)

Bar Graph 6.1 Request for consultation (1995-2023)



6.3.2 Original Panel and Appellate Body Proceedings

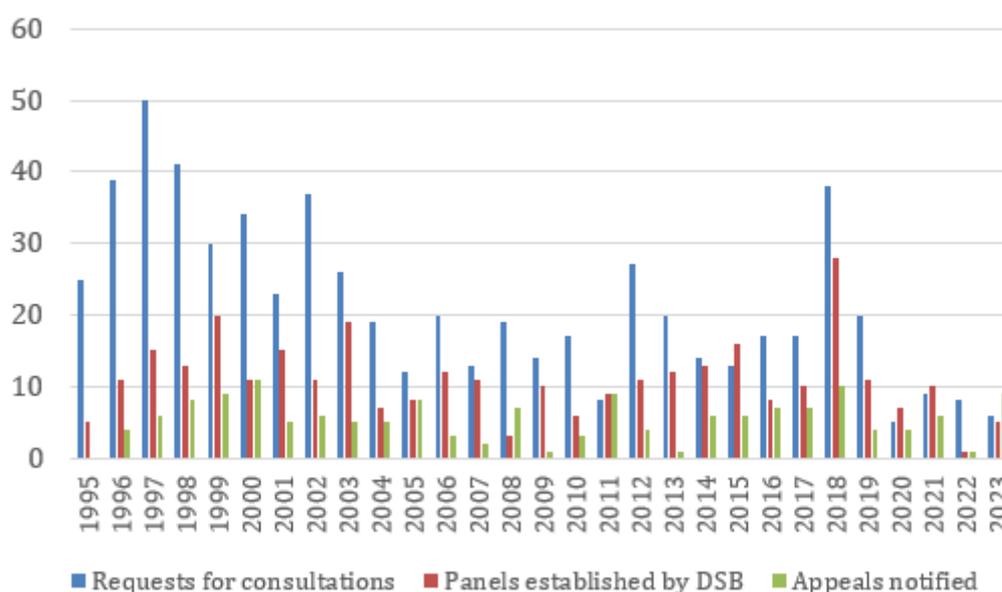
As of December 31, 2023, panels were established for 372 disputes, which accounts for 60% of all disputes initiated. Out of these, panel reports were issued for 290 disputes. Notably, not all established panels resulted in reports as parties sometimes settle their disputes even after a panel is set up. Subsequently, appeals were filed in 191 disputes following the circulation of panel reports in the original proceedings, constituting 66% of such cases.⁴⁰⁸

Since December 2019, the Appellate Body has been unable to form Divisions comprising three members to hear further appeals. This is due to the expiration of terms of existing Appellate Body members who have not been replaced. As of December 2023, 30 appeals in various proceedings are pending before the Appellate Body, awaiting the appointment of new members to proceed further.⁴⁰⁹

⁴⁰⁸ WTO, Dispute Settlement Activity-some figures, *available at* https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited on March 19, 2023)

⁴⁰⁹For the purpose of this chart and without the prejudice to any legal implication that may be attached to use certain term “dispute” refers to a matter identified by a distinct “DS” number. Where several members have made a joint complaint in a single document this is counted as one dispute.

Bar Graph 6.2 Original Panel and Appellate Body Proceedings (1995-2023)



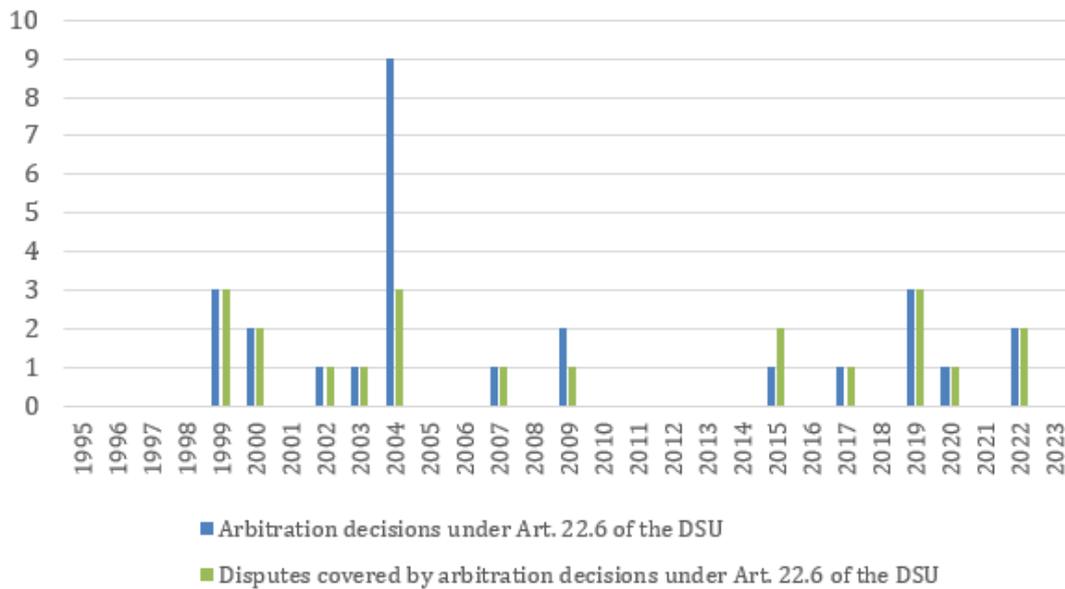
6.3.3 Suspension of Obligations

If the required compliance is not achieved within the reasonable period for implementation, and the parties fail to reach an agreement on compensation, the complaining party may be granted temporary authorization to partially suspend its obligations under the agreements concerning the concerned member, also known as "retaliation." In instances where the parties disagree on the extent of retaliation, arbitration is used to determine the acceptable level of obligation suspension. Thus far, in all cases where authorization for retaliation was sought, the matter was referred to arbitration.⁴¹⁰ Article 22(3) of the DSU provides that the complaining party may seek suspension of concessions with respect to the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment of its rights. If that is not practicable or effective, it may seek suspension under the same agreement; failing which it may seek suspension in other sectors under another covered agreement.

However, it's important to note that in most instances, compliance is attained before reaching this stage of the proceedings. As of 31st December 2023, there have been 40 disputes where arbitration was initiated to establish the permissible level of retaliation, out of which 21 cases have resulted in at least one arbitration decision.⁴¹¹ Number of Arbitral Decision in relation to suspension of obligation (Article 22.6 of DSU)

⁴¹⁰ WTO, Dispute Settlement Activity-some figures, *available at* https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm (last visited on June 6, 2024)
⁴¹¹ WTO, Suspension of Obligation under, Under Dispute Settlement Activity, *available*

Bar Graph 6.3 Number of arbitral decisions on the level of suspension of obligations (Article 22.6 of the DSU)



6.4 India’s Participation in Dispute Settlement Process of WTO

India, a significant WTO participant, has actively participated in numerous dispute settlement procedures inside the body. India has so far lodged 24 complaints with the WTO as a complainant in an effort to resolve trade-related disputes with other WTO members. India, on the other hand, has responded to 32 cases, proving its commitment to resolving disputes using the recognised WTO channels.

Further demonstrating its commitment to aiding in the settlement of disputes involving other WTO countries, India has played a crucial role as a third party in 180 cases. India has filed 1 complaint in connection to the TRIPS Agreement as a complainant. India, however, has been a respondent in 2 TRIPS-related disputes. India's active participation as a third party in 12 TRIPS-related disputes further shows its dedication to maintaining the ideals of fair trade and intellectual property protection on a global scale. India contributes significantly to the multilateral trading system by participating in trade disputes as both a respondent and a third party, demonstrating its willingness to address and contribute to their resolution.

at https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm last visited on June 6, 2024)

6.4.1 India as a Complainant in TRIPS related cases

1. DS408: Seizure of Generic Drugs in Transit

India filed a complaint on May 11, 2010, initiating consultations with the European Union (EU) and the Netherlands. The complaint addressed the repeated seizures, based on patent infringement grounds, of generic drugs from India transiting through Dutch ports and airports to third-country destinations.⁴¹²

The case discusses key TRIPS Agreement articles addressing intellectual property rights. Articles include compliance with conventions (Article 2), innovation promotion (Article 7), public health measures (Article 8), exclusive patent rights (Article 28), unauthorized use conditions (Article 31), fair enforcement (Article 41), and civil judicial procedures (Article 42).

Issues Raised: India alleges inconsistencies, both in general and as applied, with EU and Netherlands' obligations under GATT 1994 and various TRIPS Agreement provisions. Specific violations include Articles V and X of GATT 1994, and TRIPS Articles 2, 28 (read with Article 2), 41, 42, and 31 (read with the August 2003 Decision on TRIPS and Public Health).

Case Progression:

- **Consultations Requested (May 11, 2010):** India raises concerns about the seizures of generic drugs, citing violations of GATT 1994 and TRIPS Agreement provisions.
- **Joining Consultations (May 28 - May 31, 2010):** Brazil, Canada, Ecuador, China, Japan, and Turkey express interest in joining the consultations.
- **EU Acceptance of Joining Requests:** The EU informs the DSB of its acceptance of joining requests from Canada, China, Ecuador, India, Japan, and Turkey.

This dispute underscores the intricate balance between IPR, public health considerations, and international trade, emphasizing the need for fair & equitable procedures in enforcing IPR. The case involves multiple countries & highlights the complexities associated with the transit of generic drugs through international ports & airports.

Current status: In consultations on 11 May 2010

⁴¹² WTO, DS408: European Union and a Member State — Seizure of Generic Drugs in Transit, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds408_e.htm (last visited on June 6, 2024)

6.4.2 India as Respondent in TRIPS related cases

1.DS50: USA v. India

The case emerged from the United States' concerns about India's compliance with the TRIPS Agreement regarding patent protection for pharmaceutical and agricultural chemical products. The dispute, initiated through consultations in July 1996, focused on India's alleged failure to provide adequate patent protection.⁴¹³

Key TRIPS Agreement articles include Article 27, outlining patent eligibility criteria; Article 65, permitting delays in TRIPS implementation, beneficial for developing nations; & Article 63, stressing transparency in IP laws and decisions.

Issues Raised: The core issues revolved around India's alleged non-compliance with critical TRIPS Agreement obligations:

- **Non-compliance with Article 70.8(a):** India was accused of failing to fulfil its obligations under this article, which necessitates the provision of means for filing patent applications from the date of the WTO Agreement's entry into force.
- *Article 70.8(a): Mandates that, if a Member fails to provide patent protection for pharmaceutical and agricultural chemical products, it must establish a means for filing patent applications, apply patentability criteria, and ensure patent protection from the grant of the patent.*
- **Violation of Article 63(1):** India was alleged to have breached Article 63(1), which deals with transparency. The accusation was centered on India's purported failure to establish a mechanism ensuring the preservation of novelty and priority in patent applications for pharmaceutical and agricultural chemical inventions.
- *Article 63(1) and (2): Demands transparency through the publication or public availability of laws and regulations, facilitating notification to the Council for TRIPS.*

Case Progression:

- **Panel Establishment (November 20, 1996):** The DSB established a panel, with the European Communities as third-party participants.

⁴¹³ WTO, DS50: India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm (last visited on June 6, 2024)

- **Panel Report (September 5, 1997):** The panel found India in non-compliance with Article 70.8(a) and Article 63(1) but did not address Article 63(2).
- **Appellate Body Decision (December 19, 1997):** The Appellate Body upheld the panel's findings on Articles 70.8(a) and 70.9 with modifications but ruled that Article 63(1) was not within its terms of reference.
- **DSB Adoption of Reports (January 16, 1998):** Both the Panel and Appellate Body reports were adopted, marking the official acceptance of their findings.

Implementation Period (April 16, 1999):

- Parties agreed to a 15-month implementation period starting from the adoption of the reports. India assured compliance with the DSB's recommendations during this period.

Post-Implementation Concerns:

- On January 14, 1999, the United States requested consultations regarding India's Patents (Amendment) Ordinance, 1999, expressing concerns about its implementation. The DSB meeting on April 28, 1999, saw India presenting its final status report on implementing the DSB's recommendations.

In essence, the case highlights the intricate challenges in balancing IPR, especially in the pharmaceutical and agricultural sectors, & the importance of transparent & compliant regulatory frameworks under the TRIPS Agreement.

2.DS79: European Communities v. India

The case comes from concerns raised by the European Communities (EC) regarding India's compliance with the TRIPS Agreement, specifically related to patent protection for pharmaceutical and agricultural chemical products. The complaint, filed on 28/4/1997, focused on India's alleged deficiencies in providing patent protection & exclusive marketing rights (EMR).⁴¹⁴

The case examines key TRIPS Agreement provisions. Article 27 sets patent eligibility requirements. Article 65 offers transitional solutions, aiding developing nations in TRIPS implementation. Article 70 includes clauses on EMR and patent protection. EMR are granted under Article 70.9, while Article 70.8(a) mandates patent application mechanisms.

⁴¹⁴ WTO, DS79: India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds79_e.htm (last visited on April 16, 2024)

Issues Raised: The core issues raised by the EC included India's alleged non-compliance with TRIPS Agreement obligations in relation with Article 70.8(a): Failure to establish a legal basis preserving novelty and priority for product patent applications and Article 70.9: Failure to institute a system for granting EMR.

Case Progression:

- **Panel Establishment (October 16, 1997):** The DSB established a panel after a second request by the EC, with the United States reserving third-party rights.
- **Panel Report (August 24, 1998):** The panel found India in non-compliance with Articles 70.8(a) & 70.9, leading to the DSB adopting the report on 22/8/1998.
- **Implementation Period:** India, at the DSB meeting on 21/10/1998, expressed the need for a reasonable time to comply and agreed on an implementation period corresponding to a similar dispute.
- **Final Status Report (April 28, 1999):** India presented its final status report on DS50 & DS79 implementation, disclosing the enactment of legislation to meet DSB recommendations.

6.4.3 India as a third party in TRIPS related cases

1. DS54 USA v Indonesia

This case is also known as "Indonesia — Autos," originated from objections raised by the United States concerning Indonesia's National Car Programme. This initiative granted exemptions from customs duties and luxury taxes on imports of "national vehicles" and their components. The dispute garnered attention from multiple complainants, including the European Communities and Japan, who aligned with the US. They argued that Indonesia's measures violated commitments under various agreements, such as GATT 1994, the TRIMS Agreement, SCM Agreement, and TRIPS Agreement.⁴¹⁵ India joined as a third party to the case not only to show support to the US, but also to protect the interest of Indian companies doing business in Indonesia

The case deals with key TRIPS Agreement articles addressing patent availability without discrimination (Article 2), exclusions from patentability (Article 3), trademark protection

⁴¹⁵ WTO, DS59: Indonesia — Certain Measures Affecting the Automobile Industry, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds59_e.htm (last visited on April 16, 2024)

requirements (Article 20), & concerns regarding transitional arrangements (Article 65), particularly for developing countries

Relevant Agreements:

The legal intricacies of this case involve a nexus of crucial articles and agreements:

- **GATT 1994 (General Agreement on Tariffs and Trade):** Various provisions were invoked, including those related to national treatment (Art. I:1, III:2, III:4, III:5, III:7).
- **TRIMs (Trade-Related Investment Measures) Agreement:** The case referred to Articles 1, 2, and 3 of the TRIMs Agreement, addressing concerns related to investment measures impacting trade.
- **SCM (Subsidies and Countervailing Measures) Agreement:** Allegations of violations of Articles 1, 2, 3, 6, 27, and 28.2 of the SCM Agreement were made, highlighting subsidy-related issues and countervailing measures.

Issues Raised:

The specific concerns presented in this case revolved around:

- **National Treatment:** The complainants argued that Indonesia's National Car Programme breached the principle of equal treatment for nationals in terms of IP protection, with limited exceptions allowed under specified conventions.
- **Other Requirements:** Emphasis was placed on the issue of unjustifiable encumbrance on trademark use in trade, stressing the importance of a fair & non-restrictive trade environment.
- **Transitional Arrangements:** Given the mention of Article 65 of the TRIPS Agreement, apprehensions were raised about delays in implementing TRIPS provisions, particularly concerning developing countries.

Case Progression:

The legal dispute underwent a comprehensive progression:

- **Consultations Requested:** The complaint was initially raised on October 8, 1996.
- **Panel Requested and Established:** Following multiple requests, a panel was established on June 12, 1997, examining disputes collectively.

- **Panel Report Circulated and Adopted:** The panel's findings, circulated on July 2, 1998, led to adoption by the DSB on July 23, 1998.
- **Arbitration Award:** An arbitration award determined a reasonable implementation period, expiring on July 23, 1999.
- **Implementation of Adopted Reports:** Indonesia informed the DSB on July 15, 1999, of the issuance of a new automotive policy on June 24, 1999, effectively aligning with DSB recommendations and rulings.

2. DS199 USA vs Brazil

Also known as "Brazil Patent Protection," emerged from concerns raised by the US regarding Brazil's industrial property law of 1996 and related measures. Specifically, the focus was on provisions establishing a "local working" requirement for the enjoyment of exclusive patent rights. This requirement, effective since May 1997, mandated that exclusive patent rights could only be enjoyed if the patented subject matter was locally produced, excluding importation. The United States contended that such a requirement contradicted Brazil's obligations under Articles 27 & 28 of the TRIPS Agreement & Article III of the GATT 1994.⁴¹⁶ Since India has good relations with US and to show support, it did joined as a third party to the case.

The legal complexities of the issue centred on important clauses of the TRIPS Agreement. Patent eligibility standards, including inventive step, industrial applicability & novelty, are outlined in Article 27. Article 28 provided specifics about exclusive rights of patent.

Issues Raised: The primary issue in contention was Brazil's "local working" requirement, which mandated that a patent would be subject to compulsory licensing if the subject matter was not produced within the territory of Brazil. The U.S. argued that this requirement, specifying local manufacturing as the sole fulfilment, was inconsistent with Brazil's obligations under TRIPS Agreement Articles 27 and 28, as well as GATT 1994 Article III.

Case Progression:

- **Consultations Requested:** The United States initiated consultations with Brazil on May 30, 2000.
- **Panel Requested and Established:** The DSB established a panel on February 1, 2001, with several countries reserving third-party rights.

⁴¹⁶ WTO, DS199: Brazil — Measures Affecting Patent Protection , *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm (last visited on May 22, 2024)

- **Mutually Agreed Solution:** On July 5, 2001, the parties involved notified the DSB of a mutually satisfactory solution to the matter, concluding the dispute.

6.5 China's Participation in Dispute Settlement Process of WTO

As a significant participant in global commerce, China has taken an active part in a number of WTO dispute settlement proceedings. China has been a complainant in 23 lawsuits and a respondent in 49 instances under the DSB. Furthermore, China has taken part in 193 cases as a third party, reflecting its keen interest in the settlement of disputes involving other WTO members. The significance of IP issues in international commercial relations is highlighted by the fact that China has been named as a respondent in 4 cases involving TRIPS-related infringements. Additionally, China has actively participated as a third party in 9 TRIPS cases, demonstrating its significant interest in supporting and influencing the resolutions of intellectual property rights issues. China's extensive participation in WTO dispute resolution mechanisms demonstrates its commitment to resolving trade disputes through recognised channels, and its participation as both a respondent and a third party emphasises its commitment to upholding the fundamentals of fair and rules-based international trade.

6.5.1. China as a Complainant in TRIPS related cases

1. DS615 China vs US

China lodged a case titled "United States measures on certain Semiconductor & other products, & related services and technologies" on December 12, 2022. The dispute revolves around trade restrictions imposed by the US on semiconductor chips & associated technologies, impacting China's access to advanced computing and supercomputing capabilities. The case alleges violations of international agreements, like GATS, the TRIPS Agreement & GATT 1994.⁴¹⁷

This dispute revolves around Article 28 of the TRIPS Agreement, which describes the exclusive rights granted by a patent, including rights like assignment, transfer, and licencing as well as the prohibition against third parties acting without the owner's permission.

Issues Raised by China:

National Security and WTO Dispute Settlement:

⁴¹⁷ WTO, DS615: United States — Measures on Certain Semiconductor and other Products, and Related Services and Technologies, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds615_e.htm (last visited on May 22, 2024)

- The U.S. restrictions on semiconductor exports raise questions about the interpretation & application of international trade agreements, especially concerning national security matters.
- China argued that despite the U.S. agreeing to consultations, the challenged measures pertain to national security, thus falling outside the WTO dispute settlement purview.

Export Control Regime Concerns:

- China highlighted deficiencies in the U.S. export control regime, specifically the Export Administration Regulations (EAR).
- Allegations include excessive scope, unilateral controls, and complexities in navigating the system, affecting international trade.

Abuse of Export Controls:

- China accused the U.S. of exploiting its export control regime to impede the scientific & technological progress of other WTO Members, particularly targeting China.
- Concerns centered on disruptive measures impacting the global semiconductor supply chain.

Interim Final Rule and Related Measures:

- Criticism is directed at the U.S. Interim Final Rule, implemented on 7/10/2022 tightening controls on semiconductor-related items destined for China.
- Accusations include extreme, discriminatory, & trade-restrictive practices, disrupting normal international trade.

Case Progression:

Pending Dispute and Correspondence:

- The case remains pending, with ongoing correspondence between the parties.
- Both sides continue to engage, highlighting the complexities inherent in resolving disputes involving cutting-edge technologies & IP within the WTO framework.

Legal Basis of Complaint:

- China asserts violations under GATT 1994, TRIMs Agreement, TRIPS Agreement, and GATS.
- Specific grievances include procedural deficiencies, excessive use of security exceptions, and nullification or impairment of benefits accruing to China.

Reservations for Additional Claims:

- China reserves the right to introduce additional claims and legal matters during consultations, underscoring the evolving nature of the dispute.

In summary, this case underscores the challenges in navigating the intersection of trade limitations, national security concerns, and the enforcement procedures of international agreements, notably the TRIPS Agreement. The pending status & ongoing correspondence indicate the intricate nature of resolving disputes involving advanced technologies within the WTO system.

6.5.2 China as a Respondent in TRIPS related cases

1. DS362 USA v China

TRIPS Agreement compliance is the main point of contention in the disagreement between the United States and China on "Measures Affecting the Protection and Enforcement of IPR". Since it was filed on April 10, 2007, the lawsuit had brought attention to US concerns about China's protection and implementation of IPR.⁴¹⁸

The dispute between the United States and China, centered around compliance with the TRIPS Agreement regarding the protection and enforcement of intellectual property rights. Initiated on April 10, 2007, this case underscored the United States' concerns about China's practices in safeguarding and implementing IPR.

Key Issues Raised by the United States:

Absence of Criminal Procedures and Penalties:

- The United States raised concerns about China's lack of criminal procedures and punishments for commercial-scale counterfeiting and piracy, falling short of

⁴¹⁸ WTO, DS362: China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm (last visited on May 22, 2024)

obligations outlined in Articles 41.1 and 61 of the TRIPS Agreement. Article 41.1 addresses enforcement measures through the establishment of quick remedies and deterrent measures without trade barriers, while Article 61 requires the implementation of criminal procedures & penalties for intentional trademark counterfeiting or copyright piracy on a commercial scale.

Confiscation of Infringing Goods:

- Issues were raised regarding Chinese customs releasing infringing goods into commercial channels, allegedly violating commitments under Articles 46 and 59 of the TRIPS Agreement. Although Article 59 deals with giving competent authorities the authority to order such acts in accordance with the guidelines provided in Article 46, Article 46 deals with permitting the destruction or disposal of infringing items without payment.

Criminal Procedures for Unauthorized Reproduction/Distribution:

- Concerns were expressed by the US regarding the extent of criminal procedures & penalties for the wilful & commercial-scale infringement of IPR

Denial of Copyright Protection:

- The complaint addressed issues of denial of copyright protection to creative works not authorized for publication or distribution within China, raising concerns under multiple TRIPS Agreement clauses.

Case Progression:

- On September 25, 2007, the DSB initiated a panel, with various countries reserving third-party rights. The panel was constituted by December 13, 2007, following the United States' request on December 3, 2007.
- An anticipated delay in completing the work was informed on July 16, 2008, citing the case's intricacies. The final report was expected by November 2008.
- On 26 January 2009, the panel report was distributed to Members. The panel's findings declared that China's Copyright Law, particularly the initial sentence of Article 4, contradicted its obligations under Article 5(1) of the Berne Convention (1971), as integrated by Article 9.1 of the TRIPS Agreement, and Article 41.1 of the TRIPS

Agreement. Article 4 provides “ Works the publication and /or dissemination of which are prohibited by law shall not be protected by this law”⁴¹⁹

- The panel ruled on the inconsistency of Customs measures with Article 59 and found the US did not substantiate the inconsistency of criminal thresholds under Article 61.

Even after the DSB endorsed the panel report on March 20, 2009, there were talks and notifications about the findings' implementation that followed. China communicated to the DSB its plan to carry out the recommendations, and a fair timeframe was decided upon.

2.DS372: European Union vs China

This case exemplifies the challenges encountered in enforcing the TRIPS Agreement, specifically concerning China's regulations impacting financial information services and foreign financial information suppliers in international trade disputes. Initiated by the European Union in March 2008, the complaint targets Chinese policies affecting foreign entities providing financial information services within China.⁴²⁰

Key Articles of TRIPS Agreement dealt in this case are Article 1, which requires members to implement TRIPS provisions with flexibility, and Article 39, which focuses on preventing unfair competition by requiring members to take reasonable precautions to protect undisclosed information.

Issues Raised by the European Union:

Regulatory Authority of Xinhua News Agency:

- Legislative and administrative measures grant regulatory authority to China's state news agency, Xinhua News Agency.
- Xinhua oversees international news agencies and financial information providers, impacting review and approval processes.

Restrictions on Foreign Providers:

- Regulatory framework allegedly prohibits foreign providers from conducting direct business with Chinese consumers.

⁴¹⁹ Daniel Gervais, China Measures affecting the Protection and Enforcement of the Intellectual Property Rights WT/DS362/r by, *available* at <https://www.jstor.org/stable/40283658> (last visited on July 7, 2024)

⁴²⁰ WTO, DS372: China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers, *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds372_e.htm (last visited on July 7, 2024)

- Subscription services severely restricted, requiring exclusive agreements with Xinhua's branch, China Economic Information Service (CEIS).

Violation of International Commitments:

- Allegations of violating GATS, TRIPS Agreement, & China's Protocol of Accession commitments.
- Specifically, concerns raised regarding the exclusive agent requirement for international financial information suppliers.

Case Progression:

Global Concerns:

- The inclusion of the US in consultations underscores global apprehension about the raised issues.

Resolution Attempts:

- On December 4, 2008, China and the European Union informed the DSB about an agreement through a Memorandum of Understanding.
- Withdrawal or termination of the dispute signals an attempt to resolve issues through mutual understanding.

The case sheds light on the intricate relationship between intellectual property rights, trade in services, and legal frameworks. It highlights the nuanced challenges in applying the TRIPS Agreement within the dynamic landscape of international trade, emphasizing the need for careful consideration of IP concerns in financial information services.

3. DS 542 USA vs. China

The dispute between the United States and China, encapsulated here, delves into the intricate challenges associated with enforcing the TRIPS Agreement, specifically addressing concerns related to IPR. Originating from negotiations with China in March 2018, the US expressed apprehensions about policies governing IP protection, leading to a dispute marked by legal intricacies.⁴²¹

⁴²¹ WTO, DS542: China — Certain Measures Concerning the Protection of Intellectual Property Rights *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm (last visited on July 7, 2024)

Key Articles of the TRIPS Agreement include Article 3, which mandates equal treatment for nationals of member countries regarding IP protection & Article 28.

Issues Raised by the United States:

- Negotiations prompted by concerns about China's IPR protection policies.
- Alleged discrepancies with the TRIPS Agreement citing Articles 3, 28.1(a), 28.1(b) & 28.2
- Global interest in consultations, with participation from China Taipei, Japan, the European Union, Saudi Arabia, and Ukraine.

Case Progression:

- Establishment of a panel with jurisdiction which expired on June 9, 2021, highlighting the case's complexity. Panel hearings suspended and reopened multiple times, showcasing cooperation between the United States and China.
- Suspension commencing on June 8, 2020, in accordance with **Article 12.12** of the Dispute Settlement Understanding (DSU).
 - **Article 12.12 of DSU:** Permits the suspension of the panel's work at the request of the complaining party for up to 12 months. The lapse of authority due to prolonged suspension led to the discontinuation of the panel's activity.

This case exemplifies the challenges inherent in upholding the TRIPS Agreement & navigating the complexities of international IP conflicts. The intricate legal processes, coupled with the suspension & eventual lapse of the panel's jurisdiction, underscore the difficulties in reaching a conclusive resolution and implementing effective IP laws on a global scale.

4. DS549 EU v China

On June 1, 2018, the European Union initiated a dispute with China, citing concerns about specific measures China had implemented regarding the transfer of foreign technology into its borders. The European Union contended that these measures were not in compliance with various provisions outlined in the TRIPS Agreement (specifically, Articles 3, 28.1(a), 28.1(b), 28.2, 33, 39.1, and 39.2), GATT 1994 (Article X:3(a)), and China's Protocol of Accession (Paragraphs 2(A)(2) of Part I).⁴²²

⁴²² WTO, DS549: China — Certain Measures on the Transfer of Technology, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds549_e.htm (last visited on June 27, 2024)

The main provisions of the TRIPS Agreement that are under discussion in this case are Article 3, Article 28, Article 33, which establishes a minimum 20-year term of protection; & Article 39, which protects confidential information from unfair competition.

Case Progression:

- Japan, the United States, and Chinese Taipei expressed interest in joining the consultations. The European Union subsequently revised its request on December 20, 2018, providing additional details about the problematic measures. These measures included regulations related to Chinese-Foreign Equity Joint Ventures, New Energy Vehicle Production Enterprises, Foreign-invested Crop Seed Enterprises, & the Administration of Import and Export of Technologies.
- The European Union argued that these regulations were inconsistent with the relevant provisions of the TRIPS Agreement and China's Protocol of Accession. They claimed that these regulations incorporated commitments made during China's accession to the WTO, and certain provisions were incompatible with the specified articles of the TRIPS Agreement. Additionally, the EU alleged that China applied these measures in a manner inconsistent. The case is still before the Panel.

5. DS611 European Union v. China

The European Union lodged a complaint against China on February 18, 2022, highlighting concerns about measures impacting the protection and enforcement of IPR. The dispute revolves around alleged breaches of the TRIPS Agreement (Articles 1.1, 28.1, 28.2, 41.1, 44.1, 63.1, 63.3) & Section 2(A)(2) of China's Accession Protocol.⁴²³

The main articles of the TRIPS Agreement that are discussed in this case are Article 1, Article 28, Article 41, which requires enforcement procedures, Article 44, which permits injunctions, and Article 63, which ensures transparency through information sharing and publication.

Issues Raised by the European Union:

1. China's failure to publish specific judicial decisions, allegedly violating its obligations under Article 63.1 of the TRIPS Agreement.
2. China's refusal to supply information about three requested Judicial Decisions, supposedly infringing its duties under Article 63.3 of the TRIPS Agreement.

⁴²³ WTO, DS611: China — Enforcement of intellectual property rights, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm (last visited on June 27, 2024)

Case Progression:

- On March 4, 2022, Canada, Japan, and the United States expressed interest in joining the consultations. On December 7, 2022, the EU requested the establishment of a panel, deferred by the DSB on December 20, 2022. The panel was established on January 27, 2023, with various countries reserving their third-party rights.
- On July 4, 2023, the EU and China agreed to arbitration procedures, providing a framework for an Arbitrator to decide on any appeal from a final panel report, should the Appellate Body be unable to hear such an appeal under the DSU.

Case status: Still under Progression.

6.5.3 China as a Third Party in TRIPS related cases

1. DS526 Qatar v Saudi Arabia⁴²⁴

The case, titled "United Arab Emirates Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of IPR," originated from a complaint filed by Qatar on July 31, 2017. Qatar expressed concerns regarding the impact of the United Arab Emirates' (UAE) measures on trade in goods, services, and IPR. One of the reasons that China did agree to step in as a third party to the case is that it has good economic ties with Qatar.

The dispute revolved around the interpretation and application of several pivotal articles from the TRIPS Agreement. These included provisions ensuring non-discriminatory and equally advantageous IP protection (Articles 3 & 4), mandating effective enforcement procedures against infringement (Article 41), (Article 42), & imposing criminal procedures for trademark counterfeiting or copyright piracy (Article 61).

Issues Raised: Qatar's complaint contended that the UAE's measures were inconsistent with the following provisions:

- **GATT 1994:** Articles I:1, V:2, X:1, X:2, XI:1, and XIII:1.
- **GATS:** Articles II:1, III:1, III:2, III:3, and XVI.
- **TRIPS Agreement - Articles 3 and 4:** Pertaining to national and MFN treatment.

⁴²⁴ WTO, DS526: United Arab Emirates Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm (last visited on June 27, 2024)

The specific concerns included the perceived violation of non-discrimination principles in trade & the alleged failure to provide equal advantages for IP protection. Qatar challenged the compatibility of the UAE's measures with these key international trade agreements.

Case Progression:

- **Consultations Requested:** Qatar initiated consultations with the UAE on 31/7/ 2017.
- **Panel Requested and Established:** Qatar requested the establishment of a panel on 6/10/2017. The DSB established the panel on 22/11/2017, with several countries reserving third-party rights.
- **Panel Lapsed:** The authority for the panel lapsed on 16/1/2022, as no request to resume its work was made. The UAE confirmed the end of proceedings in a communication on 18/1/2022 under the terms of the Al Ula Declaration signed on 5/1/2021.

6.6 India and China as a Third Party

In instances where India and China have participated as third parties in the DSB cases provided, data pertaining to their involvement or specific arguments in these cases is not available. This lack of information is particularly notable in cases where the disputes have either lapsed, been suspended, or withdrawn. In such circumstances, the absence of detailed records hinders a comprehensive understanding of India and China's positions, interventions, and contributions to the resolution of these disputes within the WTO framework. It is important to note that the limited availability of data on their involvement in these specific cases may be attributed to the confidential or sensitive nature of certain aspects of dispute settlement proceedings or other reasons related to the specific cases themselves.

1.DS114: European Communities (EC) v. Canada

The case, titled "Canada — Pharmaceutical Patents," originated from a complaint filed by the European Communities (EC) on December 19, 1997. The dispute involved concerns about the alleged lack of protection of pharmaceutical inventions by Canada under its Patent Act. The EC argued that Canada's legislation was incompatible with its obligations under the TRIPS Agreement, specifically Articles 27.1, 28, and 33.⁴²⁵ One of the reasons that India and China did join as third party to the case as it has good economic relations with EC.

⁴²⁵ WTO, DS114: Canada Patent Protection of Pharmaceutical Products, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm (last visited on June 27, 2024)

The case addresses key TRIPS Agreement articles: Article 27 ensures patent availability across all fields, emphasizing non-discrimination; Article 28 grants patent owners exclusive rights and mandates a 20-year protection term under Article 33.

Issues Raised: The EC's complaint focused on the perceived inadequacies in Canada's legislation, particularly related to the full protection of patented pharmaceutical inventions throughout the stipulated duration. Specific challenges included the so-called regulatory review exception (Section 55.2(1)) and the stockpiling exception (Section 55.2(2)) within Canada's Patent Act.

Case Progression:

- **Consultations Requested:** The EC requested consultations with Canada on 9/12/1997
- **Panel Requested and Established:** After a deferral in November 1998, the DSB established a panel on February 1, 1999, following a second request by the EC. Several countries reserved third-party rights.
- **Panel Report and DSB Adoption:** The panel report, circulated on 17/3/2000, found the regulatory review exception consistent with TRIPS but deemed the stockpiling exception inconsistent with Article 28.1. The DSB adopted the panel report on 7/4/2000.
- **Implementation of Adopted Reports:** Canada, citing Article 21.3 of the DSU, informed the DSB on 25/4/2000, of the need for a reasonable period to implement recommendations. With no mutually agreed solution, arbitration determined a six-month period, ending on 7/10/2000. Canada reported implementation at the DSB meeting on 23/10/2000.

2. DS174 European Communities v USA

The case, is titled as "European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs," originated from a complaint filed by the United States on June 1, 1999. The dispute involved the alleged lack of protection of trademarks and geographical indications (GIs) for agricultural products and foodstuffs in the EC. The U.S. contended that EC Regulation 2081/92 did not provide national treatment for GIs and did not offer sufficient protection to pre-existing trademarks, raising concerns about

compliance with TRIPS Agreement obligations.⁴²⁶ One of the reasons that India and China did join as third party to the case as it has good economic relations with EC.

A number of important TRIPS Agreement articles are challenged in this case, including Article 1.1's requirements for effective implementation and Article 2.1's requirements for conformity with the Paris Convention. Articles 3.1 and 4 provide national and MFN status for intellectual property rights. Article 16.1 provides exclusive rights to trademarks, however Article 20 highlights the unrestricted use of trademarks. Articles 22.1 and 22.2 protect GI, and Article 24.5 protects trademark rights. Article 41.1, 41.2, & 41.4 provide specifics on the enforcement methods; Article 42 does not require a review of an acquittal in a criminal case involving IP. Article 44.1 clarifies the requirements of resource distribution. Articles 63.1 & 63.3 specify the requirements for transparency, while Article 65.1 permits transitional arrangements.

Issues Raised: The complaint by the United States highlighted several concerns:

- Lack of national treatment for GIs under EC Regulation 2081/92, hindering foreign nationals' access to the EC's GI protection system.
- Limitations on access to EC GI procedures and protections for foreign nationals, potentially violating most-favoured-nation treatment principles.
- Potential inconsistency of the EC Regulation with various TRIPS Agreement articles, including Articles 1, 2, 3, 4, 16, 20, 22, 24, 41, 42, 63, and 65, as well as Articles I and III:4 of the GATT 1994.

Case Progression:

- **Consultations Requested:** The US initiated consultations with the EC on 1/6/1999.
- **Panel Requested and Established:** Following additional consultations, the U.S. & Australia separately requested the establishment of a panel on 18/8/2003. The DSB established a single panel on 2/10/2003 with several countries reserving third-party rights.
- **Panel Report Circulated:** The Panel report was circulated on March 15, 2005, and subsequently adopted by the DSB on April 20, 2005.

⁴²⁶ WTO, DS174: European Communities Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm (last visited on June 27, 2024)

- **Implementation of Adopted Reports:** The EC stated its intention to implement the DSB's recommendations, agreeing to a reasonable period of 11 months and 2 weeks, expiring on April 3, 2006. The European Communities declared full implementation on April 21, 2006, while the United States and Australia expressed disagreement, urging revisions to the newly promulgated regulation.

In its defence, India focused on the idea of "treatment with regard to protection" as defined by TRIPS Agreement Article 3.1. It said that nationals of other WTO members need to be treated equally when it comes to GIs they apply for, regardless of where they live. Additionally, India emphasised that GIs residing in third countries may apply directly to be registered, & it stated that it was not aware of any objections made under the EC regulations.

On the other hand, China drew attention to the meaning of "nationals" & criticised the TRIPS Agreement's unfair treatment of EC member states and third countries. Concerns were also expressed by China regarding differences in inspection regimes & ambiguous verification and publication processes.

3.DS290: Australia vs. European Communities

The case, is titled as "European Communities — Protection of Trademarks and Geographical Indications," stemmed from a complaint by Australia regarding concerns about the protection of trademarks and geographical indications (GIs) for agricultural products and foodstuffs in the European Communities (EC). The dispute centered around alleged inconsistencies of EC Regulation 2081/92, as amended, with the TRIPS Agreement.⁴²⁷ One of the primary reasons that both the countries did joined as third party to the case was to protect their economic interest.

Several important articles of the TRIPS Agreement, each addressing a different facet of IPR, are at issue in the dispute under review. Members can adopt more extensive protection without going against the terms of the agreement by following the guidelines outlined in Articles 1, 2, 3, and 4. In the meanwhile, national treatment, MFN treatment, & extra requirements pertaining to trademarks and geographical indications are the main topics of Articles 10, 16, and 20. Protecting geographical indicators and preventing deceptive usage are two areas in which Article 22.2 is very important. Furthermore, Article 24.5 outlines transitional mechanisms to guarantee that actions do not jeopardise eligibility for trademark registration. Article 41 and

⁴²⁷ WTO, DS290: European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm (last visited on June 27, 2024)

Article 42 also address fair and equitable proceedings, offering civil judicial procedures for the enforcement of intellectual property rights. Article 63.1 & Article 63.2 both specify obligations for transparency. Article 63.3, which mandates that laws, rules, and rulings pertaining to intellectual property rights be published or made available. Last but not least, Article 65.1 addresses transitional measures and the execution of TRIPS requirements once the WTO Agreement comes into effect.

Issues Raised: The complaint raised several issues related to EC Regulation 2081/92:

- Lack of immediate and unconditional national treatment for other WTO members' right holders and products concerning GI.
- Limitations on the protection of GIs & access to EC procedures for nationals of other WTO members.
- Alleged inconsistency with specific TRIPS Agreement articles, including those related to national treatment, MFN treatment, & protection of GI.

Case Progression:

- **Consultations Requested:** Australia initiated consultations on April 17, 2003.
- **Panel Requested and Established:** The United States and Australia requested the establishment of a panel, leading to the creation of a single panel on October 2, 2003, with several countries reserving third-party rights.
- **Panel Report and DSB Adoption:** The Panel's report, highlighting concerns about EC's GI Regulation, was adopted by the DSB on April 20, 2005.
- **Implementation of Adopted Reports:** Despite indications of full implementation by the European Communities, Australia and the United States contested, urging revisions to the newly promulgated regulation. The matter continued for resolution.

4. Australia before DSB

The issues DS434, DS435, DS441, DS458, and DS467 involve Australia's laws pertaining to geographical indications, trademarks, and plain packaging for tobacco products. These examples highlight the complex interplay between the TRIPS Agreement, Technical Barriers to Trade (TBT) Agreement, and GATT 1994, highlighting a larger issue with the application and interpretation of international trade agreements.⁴²⁸

⁴²⁸ WTO, Dispute Settlement: The Disputes, *available at*

One of the reasons that India and China did join as the third party to the case is that both of the countries want to protect the interests of their native companies doing business with Australia by any means.

- **DS434: Ukraine v. Australia**

In 2012, the Ukrainian government contested Australia's tobacco laws, claiming they were inconsistent with GATT 1994, TRIPS, and TBT. Ukraine's primary grievances pertain to:

- ❖ Australia's Tobacco Plain Packaging Act 2011 and its implementing Tobacco Plain Packaging Regulations 2011: These regulations prescribe plain packaging for tobacco products, restricting the use of trademarks.
- ❖ The Trade Marks Amendment (Tobacco Plain Packaging) Act 2011: This Act introduces changes to trademark laws, further impacting the branding of tobacco products.

Ukraine argues that these measures, within the context of Australia's broader tobacco regulatory regime, may be inconsistent with several provisions of international trade agreements, TRIPS Agreement, TBT Agreement, & GATT 1994.

But in 2015, the case was suspended, and it expired in 2016. The absence of a definitive ruling highlights possible weaknesses in guaranteeing prompt resolution and calls into question the DSU's enforcement procedures.

- **DS435: Honduras v. Australia**

Honduras filed a lawsuit against Australia's plain packaging requirements in 2012. The dispute's global impact was demonstrated by the large number of third parties involved. In June 2020, the Appellate Body upheld Australia's policies, highlighting their compliance with TBT and TRIPS requirements. But given the pressing nature of public health issues, the prolonged hearings raise questions about the efficacy of conflict resolution procedures.

Outcome: In June 2020, the Appellate Body upheld Australia's measures, aligning them with TRIPS and TBT provisions. Despite the extended proceedings, the decision favored Australia.

- **DS441 Dominican Republic v. Australia**

In 2012, the Dominican Republic expressed concerns regarding Australia's trademark restrictions & plain packaging legislation. 2020 saw the Appellate Body confirm Australia's adherence to TRIPS & TBT. The difficulties in negotiating the complicated network of

https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (last visited on June 27, 2024)

international trade agreements are highlighted by the complexity of these conflicts & their delays.

Outcome: In 2020, the Appellate Body affirmed Australia's compliance with TBT and TRIPS. The disputes' complexity, coupled with delays, revealed challenges in navigating international trade agreements.

- **DS458: Cuba v. Australia**

In 2013, Australia's trademark and clear packaging regulations were contested by Cuba. In 2018, the panel concluded that there was no discrepancy with GATT 1994, TRIPS, or TBT. The thoroughness of the dispute resolution procedure is called into doubt, nonetheless, by the lack of conclusions on some claims owing to a deficiency in reasoning.

Outcome: The panel, in 2018, found no inconsistency with TRIPS, TBT, or GATT 1994. However, the absence of findings on some claims due to a lack of argumentation raised questions about the process's comprehensiveness.

- **DS467: Indonesia v. Australia**

Indonesia began contesting Australian trademark, simple packaging, and geographical indication rules in 2013. In 2018, the panel maintained Australia's policies. Questions concerning the veracity of charges in such intricate instances are raised by Indonesia's failure to substantiate a number of its assertions.

Outcome: In 2018, the panel upheld Australia's measures. Indonesia failed to provide evidence supporting several claims, highlighting challenges in substantiating complaints in complex cases.

- **China's and India's role in series of Australia case :**

India didn't actively participate in the conflicts. But China's engagement in the Australian cases focused on trademark use, contextual analysis, the TRIPS Article 20 "unjustifiably" criterion, and a thorough examination of tobacco control policies. China's remarks emphasised the need of taking larger policy aims into account as well as the subtleties in interpreting international accord

While India did not submit any arguments in any form, China had different views and presented them.

The following are the case's principal Chinese-related points:

- **Alternative Measures in China Regarding Rare Earths:** China contended that as it had already implemented similar measures, the alternative measures put out by the complainants were invalid. The panel acknowledged this but said that China had not provided an explanation for why other options, such raising resource taxes or tightening pollution regulations, could not be taken into account.
- **Article 2.2 of the TBT Agreement provides contextual analysis.** China, endorsing Australia, stressed how crucial it is to take into account the challenged measure within the framework of an all-encompassing strategy. It made the case that changing one component of an all-encompassing policy for another could harm the policy as a whole and that the context should be taken into account when analyzing under Article 2.2 of the TBT agreement.
- **Validity of Proposed Measures:** China argued that, even if a proposed measure is a modification of an existing measure, it may nevertheless be a valid alternative. A proposed measure can be taken into consideration even if it already exists in the replying Member in a different form, as the Appellate Body noted while observing that alternative measures are hypothetical and need not exist in the Member.
- **China's Perspective on Trademark Use:** China said that a trademark is "encumbered" in situations where its use is forbidden. It proposed a more expansive meaning of the words "in the course of trade" that included commercial activity, disagreeing with Australia's restrictive view.
- **"Unjustifiably" Standard in Article 20 (*Article 20: Focuses on the requirements for the protection of trademarks, preventing unjustifiable encumbrance on their use*).** of TRIPS Agreement: China emphasised that the word "unjustifiably" is used in Article 20, rather than concepts like "necessary" and "least restrictiveness." The argument put forth was that the criteria outlined in Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 are not equivalent to those of "necessary" and that the threshold of "justifiable" is lower.
- **Analysing the Deficit in Tobacco Plain Packaging (TPP) Measures** China recommended a comprehensive analysis of the variables, taking into account the significance of the policy objective, the measure's contribution to the objective, and the degree of encumbrance. It made the case that the Panel ought to concentrate on how trademark regulations support the goal of tobacco control.

- Claims under TRIPS Agreement Article 24.3 (*Article 24.3 In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement*): China said that Article 24.3 relates to Geographical Indications (GIs) that have higher levels of protection already in place in a Member. It was underlined that a Member cannot lessen pre-existing protection by forbidding the use of GIs if that protection includes the freedom to use GIs.
- In brief, China's contentions centre on the meaning of certain terms, the applicability of suggested substitute measures, the circumstances surrounding the implementation of measures, and the TRIPS Agreement's Article 20 "unjustifiably" standard.

In conclusion, these cases underscore the challenges in harmonizing public health objectives with international trade obligations. The extended timelines and, in some cases, lack of conclusive decisions raise concerns about the efficiency and enforcement of dispute resolution mechanisms in addressing complex, multifaceted disputes involving global public health concerns and intricate legal questions.

5. DS567: Qatar v Saudi Arabia

The case involved a complaint by Qatar against Saudi Arabia, addressing alleged failures in providing adequate protection of IPRs held by or applied for entities based in Qatar. The dispute was centered around specific articles of the TRIPS Agreement, namely Articles 3.1, 4, 9, 14.3, 16.1, 41.1, 42, & 61.⁴²⁹ Both India and China have good relations with Qatar and in order to show support along with safeguarding the economic interest both the countries joined as third party to the case.

The dispute centres on many important TRIPS Agreement clauses that cover important facets of IPR. With a few exceptions, Article 3.1 requires that nationals of WTO members be treated equally when it comes to intellectual property protection. Assuring most-favored-nation treatment, Article 4 mandates that benefits conferred in IP protection be provided to all nationals of the member countries. Members are required by Article 9 to abide by the terms of the Berne Convention. In addition, Article 14.3 accords broadcasting organisations the exclusive authority to stop unlawful activities, in accordance with the terms of the Berne Convention. The exclusive power of trademark owners to prohibit third-party usage is granted

⁴²⁹WTO, DS567: Qatar v Saudi Arabia -Measures concerning the Protection of IPR, *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm (last visited on June 27, 2024)

by Article 16.1. Effective measures against intellectual property infringements are required, as detailed in Article 41.1's enforcement processes. Similar to this, Article 42 requires just civil court processes for the enforcement of intellectual property rights. Lastly, Article 61 stipulates criminal procedures and sanctions, particularly when copyright piracy or intentional trademark counterfeiting occurs.

Issues Raised: Qatar raised concerns regarding Saudi Arabia's compliance with the specified articles of the TRIPS Agreement. The issues included alleged inconsistencies in the treatment of IPR, failure to provide necessary protection, & potential violations of National & MFN treatment principles.

Case Progression:

- **Consultations Requested:** Qatar initiated consultations with Saudi Arabia on 1/10/2018.
- **Panel Requested and Established:** Qatar requested the establishment of a panel on 9/11/2018. The panel was established on 18/12/2018 with several third-party rights reserved.
- **Panel Report Circulated:** The panel report was circulated on 16/6/2020.
- **Appellate Body Proceedings:** Saudi Arabia appealed certain issues of law and legal interpretations in the panel report on 28/7/2020.
- **Suspension of Proceedings:** In December 2021, Saudi Arabia suspended appellate proceedings, in line with the Al-Ula Declaration. Qatar agreed to the suspension.
- **Withdrawal/Termination:** On 21/4/2022, Qatar notified the DSB of the termination of the dispute, indicating that it would not seek adoption of the panel report.

6. DS583: European Union (EU) vs Turkey

The EU filed a complaint against Turkey, challenging various measures related to the production, importation, & marketing of pharmaceutical products. The dispute involved allegations of inconsistency with several agreements, including GATT 1994, TRIMs, & the Agreement on Subsidies & Countervailing Measures (SCM). Notably Articles III:4, X:1, X:2, X:3(a), XI:1 of GATT 1994, Article 2.1 of TRIMs, & Article 3.1(b) of SCM were cited.⁴³⁰ As

⁴³⁰ WTO, DS583: European Union (EU) vs Turkey — Certain Measures concerning the Production, Importation & Marketing of Pharmaceutical Products, *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm (last visited on July 7, 2024)

stated earlier since both the nations have good economic relations with EU, and both wanted to protect their economic interest against Turkey, both joined as third party to the case.

With an emphasis on IP protection, the case examines important provisions of the TRIPS Agreement as well as other relevant accords. Strictly speaking, Article 3.1 requires that all WTO members be treated equally in terms of intellectual property rights. Under specific circumstances, patents for inventions, goods, or methods are guaranteed by Article 27.1. Patent owners have the ability to assign, transfer, and licence their patents under Article 28.2. Members are required by Articles 39.1 and 39.2 to safeguard confidential information from unfair competition by establishing criteria for confidentiality.

- **Issues Raised:** The EU raised concerns regarding Turkey's measures, including a localization requirement, a technology transfer requirement, an import ban on localized products, & a prioritization measure. Alleged inconsistencies with various GATT 1994 provisions, TRIMs, SCM, & TRIPS Agreement articles, such as Articles 3.1, 27.1, 28.2, 39.1, & 39.2, were identified.

Case Progression:

- **Consultations Requested:** The EU initiated consultations with Turkey on 2/4/2019.
- **Panel Requested and Established:** The EU requested the establishment of a panel on 2/8/2019. The panel was established on 30/9/2019 with several third-party rights reserved.
- **Arbitration Award:** An arbitration award was issued on 25/7/2022, following agreed procedures for arbitration under Article 25 of the DSU.
- **Reasonable Period of Time:** On 10/1/2023, the EU and Turkey mutually agreed that a reasonable period of time for Turkey to implement the recommendations of the award would expire on April 25, 2023.
- **Implementation of Arbitration Award:** On April 25, 2023, Turkey informed the DSB that it had taken steps to comply with the arbitration award, including the publication of a new Drug Reimbursement Regulation & other related measures. The EU & Turkey also agreed on procedures under Articles 21 & 22 of the DSU.

The case illustrates the complexity of disputes involving IP, trade-related measures, & agreements governing subsidies & countervailing measures in the context of pharmaceutical products.

7. DS590: Korea v Japan — Measures Related to the Exportation of Products and Technology to Korea

The dispute arose when Korea, on September 11, 2019, initiated consultations with Japan concerning measures allegedly imposed by Japan on the export of fluorinated polyimide, resist polymers, hydrogen fluoride, and related technologies to Korea. These materials are integral in the manufacturing of smartphones, TV displays, and semiconductors. The key contention was Japan's licensing policies and procedures affecting these exports.⁴³¹

The case examines important provisions of the TRIPS Agreement and associated accords with an emphasis on IPR. With few exceptions, Article 3.1 guarantees that all WTO members get equal treatment with regard to IPR. Benefits awarded to nationals of one country must be extended to other Members in accordance with Article 4. To further strengthen control, Article 28.2 gives patent owners the ability to assign, transfer & licence their patents. These clauses provide equitable treatment for intellectual property & enable worldwide rights management.

Additional Agreements Cited:

- GATT 1994 Articles I, VIII, X, XI:1, XIII:1, XIII:5
- Trade Facilitation Agreement Articles 2, 6, 7, 8, 10
- TRIMS Agreement Article 2
- GATS Articles VI:1, VI:5(a)
- Agreement Establishing the World Trade Organization Article XVI:4

Issues Raised: Korea raised concerns about the alleged inconsistency of Japan's measures with various agreements. These included GATT 1994 provisions related to general and procedural aspects of trade, Trade Facilitation Agreement provisions, TRIMS Agreement regarding trade-related investment measures, TRIPS Agreement articles concerning national treatment, MFN treatment & rights of patent owners, GATS provisions, & the Marrakesh Agreement.

Case Progression:

- **Consultations Requested:** Consultations were requested on September 11, 2019.

⁴³¹ WTO, DS590: Korea v Japan — Measures Related to the Exportation of Products and Technology to Korea *available* at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds590_e.htm (last visited on July 27, 2024)

- **Panel Requested and Established:** Korea requested the establishment of a panel on June 18, 2020. The panel was established on July 29, 2020, with several third-party rights reserved.
- **Withdrawal/Termination:** On March 23, 2023, Korea formally notified the DSB of its decision to terminate the panel composition process and withdraw the complaint. This withdrawal was made without prejudice to Korea's stance on the factual and legal issues outlined in its initial panel request.

The termination marked the conclusion of the dispute between Korea and Japan over measures related to the exportation of specific products and technologies.

6.7 Conclusion

In WTO, DSB is a key player in resolving IPR disputes pertaining to the TRIPS Agreement. The following elements must be taken into account when assessing the DSB's effectiveness in this situation:

- **Active Participation:** The DSB has actively participated in settling IPR conflicts amongst WTO members. It has taken into account a number of complaints lodged by complainants against respondent nations regarding alleged TRIPS Agreement infringement.
- **Mixed Results:** The DSB's effectiveness in resolving IPR issues has produced a range of results. In some cases, the DSB has found countries to be non-compliant with TRIPS provisions, leading to the adoption of panel reports. In other cases, conflicts go unresolved for a variety of reasons, including the expiration of the panel's authority or continuous deliberations. Out of 23 cases referred about 6 cases were withdraw/terminated/suspended.
- **Mutually Agreed Solutions:** The DSB has occasionally helped the parties come to mutually acceptable solutions, demonstrating the importance of this board in promoting discussion and negotiation to settle issues.
- **Legal Interpretations:** By giving legal interpretations of the TRIPS Agreement, the DSB has played a crucial role in establishing a coherent jurisprudence by elucidating the reach and application of IPR laws.

- Duration of issues: The length of the proceedings may have an impact on how effectively the DSB resolves IPR issues. Some conflicts have dragged on for a while, which could affect how well they are resolved and how quickly rights are upheld.
- Importance of Compliance: The DSB's conclusions that TRIPS requirements were not followed highlight the significance of adhering to global intellectual property norms and the necessity of upholding IPR protection in order to preserve fair trade practices.
- Potential for Improvement: The DSB has been active in resolving IPR conflicts, although there is always space for improvement. The DSB's overall effectiveness might be increased by streamlining the dispute settlement procedure, guaranteeing prompt rulings, and resolving issues with enforcement.

In conclusion, the DSB's involvement in resolving IPR conflicts has been essential in protecting the TRIPS Agreement's objectives and guaranteeing ethical trading practices among WTO members. The mixed results and potential obstacles do, however, imply that ongoing attempts to better the dispute settlement procedure could further increase its efficacy and efficiency in defending intellectual property rights on a worldwide scale.