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THE ROLE OF THE WTO IN RESOLVING TRADE DISPUTES: A COMPARATIVE ANALYSIS OF WTO DISPUTE SETTLEMENT AND COMMERCIAL ARBITRATION

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ABSTRACT

In an era marked by increasing globalization, trade disputes have become inevitable. The mechanisms for resolving such conflicts are pivotal for sustaining economic cooperation and legal certainty. This research proposes to examine the role of the World Trade Organization (WTO) Dispute Settlement Body (DSB) in resolving international trade disputes, juxtaposed against the framework of commercial arbitration. While the WTO DSB is widely regarded for its structured and enforceable adjudication process, commercial arbitration offers a flexible and private resolution method, often preferred in corporate circles. The comparative analysis seeks to highlight the strengths and limitations of both mechanisms with a view to proposing hybrid models that could enhance global trade governance. The World Trade Organization (WTO) plays a pivotal role in maintaining the stability and predictability of the global trading system through its Dispute Settlement Mechanism (DSM). In recent years, however, the mechanism has come under scrutiny due to procedural delays and the paralysis of the Appellate Body. In parallel, commercial arbitration has emerged as a preferred mode for resolving trade-related conflicts, especially in the private sector. This research aims to critically examine the effectiveness, efficiency, and enforceability of WTO dispute resolution vis-à-vis international commercial arbitration. Through a comparative lens, this study will evaluate the procedural architecture, stakeholder satisfaction, and institutional legitimacy of both mechanisms. Ultimately, it seeks to explore whether these mechanisms are complementary or competitive in the broader context of international trade governance.

Keywords: WTO, Dispute Settlement Body, Commercial Arbitration, Trade Disputes, International Trade Law, Alternative Dispute Resolution, Legal Framework, Enforcement, Confidentiality, efficiency, confidentiality, cost-effectiveness, business relationships, enforceability, legal framework, dispute resolution

CHAPTER-1: OVERVIEW OF TRADE DISPUTE MECHANISMS

In an increasingly interdependent world economy, disagreements among trading partners are not just inevitable—they are routine. Whether stemming from tariff impositions, subsidy practices, or regulatory measures that affect market access, trade

disputes can pose serious challenges to economic diplomacy and international legal order. As countries strive to safeguard their commercial interests, the demand for structured and credible mechanisms to resolve such conflicts becomes paramount. Historically, the resolution of international trade disputes has transitioned from power-based diplomacy to rules-based systems. Under the General

Agreement on Tariffs and Trade (GATT), dispute resolution was largely diplomatic, relying on consultations and mutual understanding. However, this system lacked enforceability, as member states could block panel reports they did not favor. The establishment of the World Trade Organization (WTO) in 1995 brought with it a revolutionary change through the introduction of a binding and quasi-judicial dispute settlement system, governed by the Dispute Settlement Understanding (DSU)¹²⁶⁴. The WTO's dispute resolution process is unique in its structure and international legitimacy. It encompasses a sequence of formal procedures including consultations, panel hearings, appellate review, and the implementation phase. Importantly, decisions issued by WTO panels and its Appellate Body carry binding legal authority, distinguishing it from the earlier GATT framework and from most private arbitration mechanisms¹²⁶⁵. This has made the WTO a cornerstone in the enforcement of international trade norms. Nevertheless, the WTO system is not without limitations. Its state-to-state model inherently excludes private actors, and its procedures—though robust—are time-consuming and resource-intensive. Moreover, the recent paralysis of the WTO Appellate Body due to geopolitical tensions, particularly the refusal by certain members to approve the appointment of new judges, has cast a shadow on the organization's long-term credibility as a neutral dispute settlement forum¹²⁶⁶. Against this backdrop, commercial arbitration has gained popularity as a flexible and confidential alternative, particularly for businesses engaged in cross-border transactions. Unlike the WTO's public and procedural approach, arbitration permits disputing parties to customize their procedures, select neutral arbitrators, and maintain privacy over proceedings and outcomes. Institutions

such as the International Chamber of Commerce (ICC) and rules like those of UNCITRAL provide a well-recognized legal infrastructure for commercial arbitration, which is enforceable globally under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958¹²⁶⁷. What distinguishes arbitration in the trade context is its ability to offer prompt resolutions, especially when compared to the often protracted timelines of WTO litigation. This timeliness, coupled with enforceability and confidentiality, has encouraged many multinational corporations to include arbitration clauses in their commercial contracts as a default resolution method¹²⁶⁸.

However, arbitration too has its critiques. The flexibility it offers can sometimes lead to inconsistency in awards, and the lack of appellate mechanisms raises concerns about the finality of potentially flawed decisions. Additionally, the private nature of arbitration can result in a lack of transparency, which is particularly problematic when disputes involve public interest or regulatory concerns¹²⁶⁹.

CHAPTER-2: STRUCTURE AND FUNCTIONING OF THE WTO DISPUTE SETTLEMENT SYSTEM

The World Trade Organization (WTO) Dispute Settlement System is often hailed as one of the most structured and reliable international legal mechanisms for resolving trade-related conflicts. Established under the Dispute Settlement Understanding (DSU) of 1995, it provides member states with a formal process to challenge trade measures they believe violate WTO agreements¹²⁷⁰. At the core of this system lies a multi-tiered process, beginning

¹²⁶⁴ World Trade Organization, *Understanding the WTO: Settling Disputes*, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (accessed April 2025).

¹²⁶⁵ Raj Bhala, *Modern GATT Law: A Treatise on the Law and Political Economy of the General Agreement on Tariffs and Trade and Other WTO Agreements* (Sweet & Maxwell, 2nd edn., 2013), pp. 963–967.

¹²⁶⁶ Robert Howse, *The Appellate Body Crisis: Time to Rethink the Foundations of the WTO Dispute Settlement System*, CIGI Papers No. 215 (2020).

¹²⁶⁷ UNCITRAL, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status (accessed April 2025).

¹²⁶⁸ David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, Cornell University Institute on Conflict Resolution (1998).

¹²⁶⁹ Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd edn., 2021), pp. 3175–3182.

¹²⁷⁰ World Trade Organization, *Understanding the WTO: The Dispute Settlement System*, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (accessed April 2025).

with consultations, where disputing parties are encouraged to negotiate directly for a solution. If consultations fail within 60 days, the complaining party may request the establishment of a dispute settlement panel, comprising independent experts who assess the legal claims and issue findings based on WTO rules. Once the panel issues its report, either party can appeal the decision before the Appellate Body, a standing body of seven legal experts. The Appellate Body reviews legal aspects of the panel's findings but does not reassess facts. Its decisions are final and must be adopted by the Dispute Settlement Body (DSB), which includes all WTO members.

One of the distinguishing features of this system is the “negative consensus” rule—panel and appellate reports are adopted automatically unless all WTO members, including the winning party, agree to reject them. This provision prevents deadlocks and ensures enforcement, making it unique among international dispute mechanisms. If the losing party fails to comply with the ruling within a “reasonable period of time,” the prevailing party may request retaliatory trade measures or compensation. These mechanisms are designed to ensure adherence and restore balance in trade relations, though they are often controversial¹²⁷¹. Despite its procedural strengths, the system has recently faced a crisis. Since 2019, the Appellate Body has been paralyzed due to the blocking of judicial appointments by certain member states, particularly the United States. This has led to delays and has raised concerns about the WTO's capacity to enforce rules impartially and efficiently in the future. In practice, the WTO's dispute settlement mechanism has dealt with over 600 cases, covering a wide range of sectors including agriculture, services, and intellectual property. It has contributed to legal predictability and reinforced the rule of law in international trade. However, to remain effective, reforms—especially to the Appellate

Body—are essential for restoring full functionality and confidence in the system.

CHAPTER-3: COMMERCIAL ARBITRATION AS AN ADR TOOL IN TRADE

In the landscape of international trade, commercial arbitration has emerged as a preferred dispute resolution method for private entities engaged in cross-border transactions. Unlike state-centric mechanisms such as the WTO's Dispute Settlement System, arbitration is contract-based and allows businesses to settle disputes without the involvement of national courts or international state-driven forums¹²⁷². Arbitration offers several distinct advantages. It is flexible, enabling parties to customize procedures, choose their arbitrators, and select governing law and venue. This control over the process makes arbitration particularly attractive in commercial settings where time, expertise, and confidentiality are key priorities. Moreover, arbitration proceedings are private, ensuring that sensitive business information does not become public—a crucial factor for corporate entities concerned about reputation and competitive strategy¹²⁷³.

A cornerstone of arbitration's appeal lies in its global enforceability. The New York Convention of 1958, ratified by over 160 countries, mandates that arbitral awards be recognized and enforced across borders, provided certain procedural norms are met. This international consensus gives parties confidence that arbitration outcomes will have legal weight, regardless of jurisdiction. Several well-established institutions administer commercial arbitration, such as the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), and Singapore International Arbitration Centre (SIAC). These bodies offer institutional rules, logistical support, and vetted panels of experts, contributing to procedural uniformity and trust in the system.

¹²⁷¹ WTO, *Dispute Settlement: Retaliation and Compensation*, available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (accessed April 2025).

¹²⁷² Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd edn., 2021), pp. 5–7.

¹²⁷³ Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Oxford University Press, 6th edn., 2015), p. 109.

Despite these benefits, arbitration is not without its limitations. Critics point to the lack of an appellate mechanism, which means parties, must accept the finality of the arbitral award, even if significant legal errors occur. Additionally, the cost of arbitration—especially with top-tier arbitrators and high-value disputes—can rival that of court litigation. There are also concerns about the inconsistency of rulings and potential bias where arbitrators are perceived as favoring repeat clients¹²⁷⁴. Another challenge is the opaque nature of arbitration. Because awards are often confidential, there is no evolving body of public jurisprudence, which can hinder legal development and consistency in trade law. For disputes involving public interest, such as environmental or labor issues, this secrecy may undermine accountability. Nonetheless, arbitration continues to thrive in international trade, particularly in investment contracts, cross-border supply chains, intellectual property licensing, and infrastructure agreements. Its adaptability makes it an essential component of the broader Alternative Dispute Resolution (ADR) framework, providing a practical alternative to the rigidity of state-based dispute systems like the WTO.

CHAPTER-4: COMPARATIVE ANALYSIS OF WTO AND ARBITRATION MECHANISMS

Both the WTO Dispute Settlement Mechanism (DSM) and commercial arbitration serve as pivotal tools for resolving trade-related conflicts. However, they are fundamentally different in structure, scope, and application. This chapter undertakes a comparative assessment, highlighting their respective advantages and limitations, to better understand how they address the needs of different stakeholders in global commerce.

1. Legal Nature and Jurisdiction: The WTO DSM is public law-oriented and applies only to disputes between sovereign states. Its jurisdiction is tied to violations of WTO agreements, and private entities cannot initiate

cases directly¹²⁷⁵. Conversely, commercial arbitration is a private law mechanism, primarily used by corporations to resolve disputes arising from contractual obligations, and is accessible to any party with a valid arbitration agreement.

2. Procedural Framework: WTO dispute settlement follows a multistage process—consultation, panel, appellate review, and compliance evaluation—with timelines and legal rigor built into the Dispute Settlement Understanding (DSU). In contrast, arbitration offers a flexible, party-controlled process where the procedural rules, language, venue, and even the arbitrators can be decided mutually by the parties involved.

3. Transparency vs. Confidentiality: The WTO process is relatively transparent; panel reports, hearing schedules, and legal findings are often public. This openness strengthens legal predictability and democratic accountability. Arbitration, by nature, is confidential, which benefits business secrecy but can hinder jurisprudential development and public oversight—especially in disputes affecting public policy or regulatory standards¹²⁷⁶.

4. Enforceability of Outcomes: WTO rulings are enforced through a unique state-centered mechanism: if the losing state fails to comply, the winning state may request authorization to impose retaliatory trade sanctions. However, enforcement is dependent on state cooperation and political will. Arbitral awards, on the other hand, are widely enforceable under the New York Convention in over 160 countries, giving them direct legal weight in national courts¹²⁷⁷.

5. Scope of Application: While the WTO DSM handles treaty-based trade disputes, arbitration covers a broader range of commercial issues, including intellectual property, investments, and licensing. Arbitration

¹²⁷⁵ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 4th edn., 2017), p. 213.

¹²⁷⁶ Catherine A. Rogers, *Transparency in International Commercial Arbitration*, *University of Kansas Law Review*, Vol. 54 (2006), pp. 1305–1309.

¹²⁷⁷ UNCITRAL, *New York Convention (1958)*, available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (accessed April 2025).

¹²⁷⁴ Thomas Schultz and Robert Kovacs, *The Rise of a Third Generation of Arbitrators?*, *Arbitration International*, Vol. 28, Issue 2 (2012), pp. 161–186.

is also suitable for mixed legal systems and hybrid contracts, making it more versatile in a diversified trade ecosystem.

6. Speed and Cost: Arbitration is generally faster and more cost-effective, particularly in high-value, time-sensitive commercial matters. WTO cases, although structured, often take longer, especially when appellate review and compliance phases are invoked. However, arbitration's cost advantage can diminish in complex cases with elite arbitrators and large legal teams.

7. Accessibility and Inclusivity: The WTO system is state-exclusive, limiting its accessibility to governments. This can be a barrier for private businesses seeking redress in intergovernmental disputes. Arbitration, in contrast, is inclusive of private actors, enabling companies, joint ventures, and even investors to seek relief directly¹²⁷⁸.

CHAPTER-5: CASE STUDIES AND EMPIRICAL EVIDENCE

To meaningfully compare the WTO Dispute Settlement Mechanism (DSM) and commercial arbitration, it is crucial to examine real-world applications. Through selected case studies, this chapter explores how each system operates in practice—highlighting their effectiveness, procedural challenges, and practical outcomes.

1. WTO Case: United States – Shrimp (DS58): This case involved a U.S. ban on shrimp imports caught without turtle-excluder devices, which was challenged by India, Malaysia, Pakistan, and Thailand. The WTO ruled that although environmental protection is a legitimate goal, the U.S. enforcement method was discriminatory and violated Article XX of the GATT¹²⁷⁹. The Appellate Body's reasoning affirmed the need for balancing trade rules with environmental obligations, establishing a benchmark for trade-environment interplay.

This case demonstrated the moral legitimacy of the WTO system, showing how it can uphold sustainable development principles while enforcing trade law. However, the prolonged dispute timeline highlighted the need for faster compliance mechanisms.

2. WTO Case: European Communities – Bananas III (DS27): The European Union's preferential treatment for banana imports from former colonies was challenged by the U.S. and several Latin American nations. The WTO ruled in favor of the complainants, finding that the EU's regime discriminated against Latin American exporters and breached the Most-Favored Nation (MFN) principle under the GATT. This case showcased the WTO's strength in addressing systemic trade distortions, but it also illustrated its political vulnerability—compliance took nearly a decade, and interim retaliations strained diplomatic relations¹²⁸⁰.

3. Commercial Arbitration Case: BG Group v. Argentina (UNCITRAL, 2007) In this investment arbitration case, a British investor sued Argentina under a Bilateral Investment Treaty (BIT), claiming that regulatory changes post-2001 financial crisis breached their contract. The arbitral tribunal awarded \$185 million to the investor, holding that Argentina had failed to provide fair and equitable treatment. This case revealed the efficacy of arbitration in providing swift and enforceable remedies to private investors, especially in politically sensitive contexts. Yet, it also exposed the criticism that arbitration may override national regulatory autonomy in times of crisis.

4. Commercial Arbitration Case: Chevron v. Ecuador (PCA, 2011): Chevron initiated arbitration against Ecuador, alleging judicial delays and denial of justice in environmental litigation. The tribunal found in favor of Chevron and awarded significant damages, reinforcing the pro-investor stance of many arbitral

¹²⁷⁸ David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes*, Cornell University Institute on Conflict Resolution (1998).

¹²⁷⁹ WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998).

¹²⁸⁰ Pauwelyn, Joost, *Enforcement and Countermeasures in the WTO: Rules Are Rules – Toward a More Collective Approach*, American Journal of International Law, Vol. 94 (2000), pp. 335–347.

forums¹²⁸¹. However, critics argued that the decision failed to adequately consider indigenous rights and environmental justice, sparking global debate on transparency and public interest in arbitration.

5. Empirical Insights: Usage Trends and Institutional Preferences: Empirical studies indicate that over 600 disputes have been brought before the WTO since 1995, with most resulting in compliance or negotiated settlements. In contrast, arbitration cases—especially in the investment and energy sectors—have seen a surge in volume, owing to the speed, privacy, and enforceability of arbitral awards. A 1998 Cornell University survey found that 87% of Fortune 1000 corporations had used arbitration or mediation to settle disputes, reflecting the corporate sector's strong preference for ADR over litigation or intergovernmental dispute mechanisms. The case studies clearly demonstrate that WTO DSM ensures rule-based discipline in state conduct, while arbitration excels in resolving private, contractual, or investor-related conflicts. However, both systems face limitations—WTO in enforcement delays and political gridlock; arbitration in public transparency and balance of power. Together, they provide valuable, if context-specific, mechanisms for trade dispute resolution.

CONCLUSION:

In the evolving landscape of international trade, both the WTO Dispute Settlement Mechanism (DSM) and commercial arbitration play indispensable roles in addressing conflicts. While the WTO system ensures multilateral discipline and promotes a rules-based international order, its procedural rigidity and reliance on state-driven enforcement limit its responsiveness—especially amid the current deadlock of the Appellate Body. On the other hand, commercial arbitration offers flexibility, privacy, and procedural autonomy, making it highly attractive for private sector actors and

investor-state disputes. However, its confidentiality, lack of appellate review, and potential inconsistencies in rulings raise concerns about fairness, especially in cases involving public interest.

The comparative insights drawn throughout this study reveal that neither system is flawless; rather, they are complementary. WTO dispute settlement brings legal legitimacy and predictability to state-to-state trade relations, while arbitration ensures quicker, enforceable outcomes for private parties and mixed contracts. To enhance global trade governance, there is a growing need to integrate the strengths of both systems—combining the WTO's institutional legitimacy with arbitration's adaptability. Such a hybrid approach can bridge the gap between public and private interests in a rapidly globalizing economy.

SUGGESTIONS:

1. Reform the WTO Appellate Mechanism
To address the institutional crisis, WTO members must reach a consensus to revive and reform the Appellate Body, possibly through rotational panels, fixed-term appointments, or interim appellate mechanisms.
2. Promote Hybrid Models (Med-Arb or Arb-Med)
Encouraging procedures that combine mediation and arbitration can offer the best of both worlds—consensual resolution with the option of binding enforcement if needed.
3. Enhance Transparency in Commercial Arbitration
Arbitration institutions should adopt protocols that allow for optional publication of awards and anonymized summaries, especially in cases involving regulatory or public policy issues.
4. Establish a Global Trade ADR Body
A neutral, treaty-based institutional forum that offers a menu of ADR services—mediation, expert

¹²⁸¹ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23.

determination, arbitration—could serve both public and private stakeholders in cross-border trade.

5. Strengthen Capacity-Building for Developing Countries
Technical and financial assistance should be offered to equip developing countries with the legal expertise needed to navigate both WTO litigation and complex arbitration processes.
6. Adopt Technology-Enabled ODR Systems
Integrating online dispute resolution (ODR) platforms into trade-related dispute mechanisms can increase accessibility, reduce costs, and expedite timelines, particularly for SMEs.
7. Foster Legal Synergy
Legal frameworks should recognize WTO rulings and arbitral awards as mutually reinforcing instruments, especially in matters where commercial and treaty obligations intersect.

