RESOLVING DISPUTES UNDER WTO: A DISPUTE SETTLEMENT MECHANISM

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ABSTRACT:

The Dispute Settlement Understanding (DSU) has been the flagship of the World Trade Organization (WTO), proclaimed as the most important pillar of the rules-based WTO system. The developing countries, in particular, had expected that the new dispute settlement process would help the weaker trading partners in enforcing the rights and obligations under the various WTO agreements. In fact, the supposed benefits of such an effective dispute settlement system were one of the main persuasive factors for several developing countries to agree to the Uruguay Round agreements. Though the DSU has brought about some degree of predictability and efficiency in the resolution of disputes, the utility of the system in actual operation has fallen far short of the initial expectations and euphoria. Furthermore, in some respects, it has operated against the interests of the developing countries.

This paper first considers issues relating to the philosophy of dispute settlement – what approach works best, it further reviews the operation of the WTO dispute settlement system to date and discusses several proposed reforms, such as the establishment of a permanent panel body and various ways to improve the effectiveness of remedies in cases of noncompliance with WTO decisions

Keywords: Dispute Settlement Body, public international law, reforms needed, trade disputes, Uruguay Round

RESEARCH METHODOLOGY

There are two kinds of Research. A. Doctrinal or the Traditional Research. B. Non-Doctrinal or Empirical Research. This topic is covered under first category of research.

This research project is be based on qualitative data, including secondary sources of information, such being, accessing the books available in the researcher's library and browsing on all the available online search engines provided by the college.

INTRODUCTION

The WTO agreements provide extensive rights and impose many duties on its Members and their conduct of international trade. A key issue is how the WTO enforces those rights and duties. A critical part of any enforcement mechanism is an effective system to resolve disputes over what the rules mean and whether they have been broken in a specific case. This is essential to promote compliance with those rules. Without such a system, an elaborate structure of rights and duties means little.

The WTO Dispute Settlement Mechanism (DSM) is a novelty in International law in so many respects.

Although it is an improvement on the old GATT dispute settlement mechanism, it is quite different in nature from other international mechanisms available for resolving international disputes between States. Unlike other mechanisms, the rules and procedure of this mechanism, especially the provisions relating to the appellate body, follow the principles of common law rater than civil law. This mechanism is a blend of diplomacy, negotiation, mediation, arbitration, and adjudication. It is neither fully judicial nor completely a non-judicial mechanism.

The main aim of the Dispute Settlement Mechanism of the WTO is to secure a positive solution to a dispute. Through this mechanism the WTO seeks to provide legal certainty to producers and exporters around the globe that foreign markets remain open to them. Creating a rule-based, fully-fledged international organization and an effective dispute settlement mechanism has provided this certainty. Indeed, a mechanism for resolving trade disputes under the DSU is vital for enforcing the rules and therefore for ensuring that trade flows smoothly.

Developing countries need access to foreign markets if they are to reap the benefits of globalization. Multilateral negotiations under the World Trade Organization (WTO) play a pivotal role in facilitating market access.[1] Yet, throughout the global economy, pressures for protectionism abound, threatening to roll back these gains. As a result, the WTO's dispute settlement mechanism is widely seen as one of the most critical – and successful – features of the trade regime.

Using this mechanism, WTO member-states can shine the spotlight of international legal scrutiny on the protectionist practices of their trading partners.

OVERVIEW OF THE MECHANISM

The main aim of the dispute settlement mechanism of the WTO is to secure a positive solution to a dispute.[2] Through this mechanism the WTO seeks to provide legal certainty to producers and exporters round the globe that foreign markets remain open to them, This certainty has been provided by creating a rule-based, fully-fledged international organization and an effective

[1] For example, the largest developed countries have tended to reserve their deepest concessions on agriculture, a sector of central interest to many developing country exporters, for the multilateral forum, not bilateral trade agreements.

[2] B Hoekman and M Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* (Oxford, Oxford University Press, 1995); MJ Trebilock and R Howse, *The Regulation of International Trade,* 2nd end (London Routledge, 1999); JH Jackson et al, *Legal Problems of International Economic Relations: Cases, Material and Text* (Minnesota, West Publishing, 2002); A Lowenfeld, *International Economic Law* (Oxford, Oxford University Press, 2002); DLM Kennedy and JD Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert E Hudec* (Cambridge, Cambridge University Press, 2002).

dispute settlement mechanism. Indeed, a mechanism for resolving trade disputes under the DSU is vital for enforcing the rules and therefore for ensuring that trade flows smoothly

PROCEDURE FOR DISPUTE SETTLEMENT:

The dispute settlement process was meant to promote fairness and equality and sustainable development towards the developing countries. The dispute settlement process changed from diplomatic to a legalized process and from power-based to rule-based procedure.[3]

The DSB has authority to create dispute settlement panels, to adopt panel and appellate body reports, to maintain surveillance of the implementation of the rulings, it can also authorize retaliations if the rulings are not adhered to by virtue of Article 2.1 of the DSU.

The WTO Dispute Settlement Understanding (DSU) is composed of 27 Articles and 4 Appendices. It covers agreements which include: the WTO Agreement, its multilateral trade agreements for goods, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and four plurilateral trade agreements which cover Civil Aircraft, Government Procurement, Dairy and Bovine Meat.[4] There are also special or additional applications of the DSU rules.[5]

The Dispute Settlement System (DSS) of the WTO comprises of the Dispute Settlement Body (DSB), the Dispute Settlement Panels (DSP) and the Appellate Body (AB). The DSB could be regarded as a political institution within the WTO; while the DSP and AB are the judicial-type of institutions.[6]

Trade disputes are settled among WTO member countries through the following methods:

i. *Consultation/Negotiation between Parties:* If a WTO Member requests consultations with another Member under a WTO agreement, the latter Member must enter into consultations with the former within 30 days. If the dispute is not resolved within 60 days, the complaining Member may request a panel.[7]

ii. *Good offices, Conciliation and Mediation:* This is a voluntary procedure that is undertaken where the parties to the dispute agree to it. Proceedings and the position taken by the parties are confidential and without prejudice to the rights of either party in any further proceeding.[8] Interestingly, a large proportion of cases are successfully resolved during consultations; 46% of all disputes brought to the WTO end at this stage, and three-quarters of those yield at least partial concessions from the defendant.[9] If consultations do not result in a mutually satisfactory solution, the complainant can request a panel proceeding, marking the start of the formal litigation stage.

iii. *Arbitration:* This is a suitable method of settling disputes where the relevant issues for determination are clearly defined by both parties.[10]The parties to the arbitration select

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[3] Kim Van der Borght ,'The Review of WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate' 14 (1999) 14 AMUILLR 1224

[4] Article 1.1, Appendix 1 Dispute Settlement Understanding (DSU)

[5] Article 1.2, Appendix 2 DSU

[6] Peter Van Den Bossche The Law and Policy of the World Trade Organization (2nd edn, Cambridge University Press 2008) 235

[7] Article 4, Dispute Settlement Understanding (DSU)

[8] Article 5 DSU

[9] These and the subsequently cited figures on WTO dispute participation, escalation, and outcomes, are derived from the dataset on WTO disputes maintained by the authors, as updated and reported most recently in Busch and Reinhardt (2003).

[10] Article 21.3(c), 22.6, 25 DSU

arbitrators or, if they cannot agree on an arbitrator, the Director-General may appoint one on their behalf.

iv. *Adjudication by Panels and the Appellate Body:* The request for a panel must be made in writing; identifying the specific measure at issue and giving a brief but clear summary of the complaint sufficient to present the problem.[11] Panels are comprised of three to five persons, agreed to by the parties on a case-by-case basis. There are typically two rounds of testimony, including from other countries (third parties) that notify the WTO of a "substantial" interest in the case. The panel then circulates an "interim report," offering both sides an opportunity to comment and seek clarification. The complainant and defendant can still negotiate a settlement at this point.

In fact, another 13% of all cases end at this stage before a ruling is rendered. If not, the panel issues its final report, which is then adopted by the WTO, unless one of two things happens. First, the two sides can agree not to adopt the panel report, although to date this has not happened. Second, one or both sides (but not third parties) can appeal the panel's report, which happens frequently.

Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues. Three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO memberships hear each appeal. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

The Dispute Settlement Body has to accept or reject the appeals report within 30 days— and rejection is only possible by consensus.

v. *Implementation and enforcement of the recommendations and rulings adopted by the DSB:* Where a WTO decision finds a defending member in violation of an obligation under a WTO agreement, the member must inform the DSB of its implementation plans within 30 days after the panel report and any AB report are adopted. If it is 'impracticable' to comply immediately, the Member will have a 'reasonable period of time' to do so.

OPERATION OF THE DISPUTE SETTLEMENT PROCESS

The operation of the WTO dispute settlement process involves the DSB panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions.

The General Council discharges its responsibilities under the DSU through the DSB, Like the General Council; the DSB is composed of representatives of all WTO Members. These are governmental representatives, in most cases diplomatic delegates who reside in Geneva (where the WTO is based) and who belong to either the trade or the foreign affairs ministry of the WTO Member they represent. As civil servants, they receive instructions from their capitals on the positions to take and the statements to make in the DSB. As such, the DSB is a political

[11]Articles 6 to 20 of the DSU

body.

The DSB is responsible for administering the DSU, i.e. for overseeing the entire dispute settlement process.

The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements. In less technical terms, the DSB is responsible for the referral of a dispute to adjudication (establishing a panel); for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing "retaliation" when a Member does not comply with the ruling.

The DSB meets as often as is necessary to adhere to the time-frames provided for in the DSU. In practice, the DSB usually has one regular meeting per month. When a Member so requests, the Director-General convenes additional special meetings. The staff of the WTO Secretariat provides administrative support for the DSB.

OVERALL ASSESSMENT OF THE MECHANISM

It has been submitted generally that the DSB has worked well and contributed to strengthening the rules-based system of the WTO. While around 300 cases in total were referred to the old GATT dispute settlement mechanism during the entire 47 years of its existence, more than 400 cases had already been referred to the DSB of the WTO in the first 15 years of its existence. This demonstrates a growth in confidence in the dispute settlement mechanism of the WTO. Because of the flexibility offered by the DSU, well over 100 cases have been settled or defused as a result of bilateral consultations. This quasi-judicial characteristic of the DSB, combining political flexibility and legal integrity, makes this a unique process for settling international disputes peacefully. Some of the cases decided by the DSB have had far-reaching implications, involved billions of dollars, and received prominent treatment in the media.[12]

However, critics have pointed put a trade-liberalization bias of the DSB in its consideration of the cases referred to it. Of course, since the DSB is part of the WTO structure designed to promote trade liberalization it seems natural for the DSB to have this bias. After all, it is supposed to apply and interpret WTO law – which is pro-trade liberalization, This inherent limitation of the DSB is not conducive to making it a body capable of balancing trade concerns with other legitimate concerns, required to promote international justice. The *Tuna-Dolphin I and II*[13] *and Shrimp-Turtle*[14]cases could be cited as examples of such trade bias.[15] Various proposals have been made to reform the DSB in line with the statements made in the Doha Declaration of 2001, to correct this bias.[16]

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[12] See for an overview of the operation of the WTO since its inception, SP Subedi, The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the "Level Playing Field"? (2006) 53(2) *The Netherlands International Law Review 273-96*

[13]GATT Panel Roport on *United States – Restrictions on Imports of Tuna,* 18 February 1992, GATT BISD (39th Supp) at 205 (1993) and (1994) 33 ILM 839

[14]*United Nations – Import Prohibition of certain Shrimp and Shrimp Products,* Appellate Body Report, WTO/DS58/AB/R, circulated on 12th October 1998

[15] These are of course some commentators who have suggested that *Shrimp-Turtle II* has gone too far against trade liberalization

[16] See generally, W Weiss, Reforming the Dispute Settlement Understanding' in H Hohmann (ed), *Agreeing and Implementing the Doha Round of the WTO* (Cambridge, Cambridge University Press, 2008) 269-93

The effectiveness of the DSB depends on the remedy actually received by the aggrieved party at the end of the day. There are doubts as to the effectiveness of the WTO rulings because some of the more powerful States have not internalized the WTO framework. There have been difficulties in implementing certain panel and appellate body rulings and in bringing the laws of such powerful States into conformity with WTO rules, especially if it involves enacting new legislation in order to comply with the WTO ruling. The risk here is that some of the more powerful States would use the WTO whenit suits them and disregard it when their own vital interests are at stake

The DSB adopts the international law approach of persuasion, designed to encourage States to participate in the regime created rather than award huge amounts of compensation to the States, which are victims of violation of international trade law[17]. In other words, in most of the WTO cases the losing State is required to comply with the WTO rulings by making its laws consistent with its WTO obligations. This works if the impact of the dispute is limited to the State as a collective entity.

However, when individual interests are involves, the mere promise by a losing party of compliance with WTO obligations in the future may not be satisfactory for the individual business parties – whether natural or juridical – who may have suffered huge financial losses as a result of the breach of WTO law in the first place. Only when non-performance continues can a losing party demand 'compensatory measures'. As highlighted in a report prepared by the Consultative Board to the Director General of the WTO and entitled *The Future of the WTO,* the stick applied in the WTO system is curbing future market access rather than the 'cheque in the mail' approach.[18] Even when compliance is not forthcoming, and compensatory measures are not agreed, the fallback is 'suspension of obligations' or the so-called 'retaliation' by the aggrieved party with the authorization of the DSB.

ROLE OF PUBLIC INTERNATIONAL LAW IN WTO TREATY INTERPRETATION

Whether the WTO legal regime is a fully self-contained body of trade rules or a part of public international law, and to what extent rules and principles of public international law could be taken into account in interpreting the rules of WTO law, have been issues, which have been debated both within and outside the WTO. While many scholars such as Pauwelyn[19] argue that WTO rules are part of the wider corpus of public international law, others such as Trachtman,[20] take a more cautious approach. For instance, Trachtman argues that 'WTO negotiators in 1994 did not intend other international law to be used as potential defences to WTO obligations' Citing the decisions of the WTO Appellate Body in the *Hormones and Poultry*[21] cases, he asserts that

[17] It has generally been regarded that is it's a *lex specialis* exception to the usual rules of State responsibility
[18] P Sutherland et al, *The future of the WTO: AAddressing Institutional Challenges in the New Millennium* (Report by the Consultative Board to the Director-General Supachai Panitchpakdi) (Geneva, WTO, 2004)
[19] J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 AJIL, 535-52
[20] J Trachtman, 'Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law' (2004) 98 AJIL 855-61
[21] *Hormones and Poultry* WT/DS48/AB/R

The clear and general practice of international tribunals is to limit the scope of applicable law to that specified in their particular mandates. In the case of the DSU, its affirmative mandate is clearly and repeatedly limited to WTO law; the 'covered agreements'. Therefore, the only law that WTO panels and the Appellate Body are authorized to apply (directly) is WTO law[22]

Although, it can be submitted that nothing in the DSU precludes WTO panels from applying certain principles of public international law in deciding cases before them, the WTO agreements, resulting from substantial political negotiation focusing on the creation of a separate and specific legal regime, don not contain any explicit provisions concerning the relationship between WTO rues and the rules of public international law. Nevertheless, it also is clear that WTO agreements were not designed and do not cover all aspects of the process involved in settling a trade dispute between States. Therefore, it can be submitted that international law, especially that concerning the interpretation of treaties contained in the 1969 Vienna Convention on the Law of Treaties, would apply to the interpretation of WTO treaties by WTO panels and the Appellate Body.

POSSIBLE REFORMS OF THE DISPUTE SETTLEMENT SYSTEM

The greatest challenge now facing the WTO is the further integration of developing countries into the multilateral trading system. With the erosion of tariffs and the greater use of non-tariff barriers to trade— product standards, investment requirements, environmental and social standards, and competition policies—there will be a need to ensure that countries' interests can be pursued and protected.

US experience demonstrates how vital the dispute settlement system is for opening up markets and warding off protectionist measures. Developing countries will need to be prepared to face the coming challenges, from an institutional and substantive standpoint. Several of them are already well placed to improve their ability to meet these challenges directly.

The major problem of developing countries is lack of legal assistance in WTO. The Advisory Centre on the WTO Law should be strengthened to provide quality legal assistance to developing countries. It was created in 2001 to create a level playing ground for developing countries to be abreast of their rights and obligations under the WTO Agreement. The amount charged for this service may be too exorbitant for poor countries, legal assistance should be provided free to the poor countries who cannot afford it or in the alternative a trust fund should "be established to help finance the costs of retaining external experts."[23]

It is also further debatable whether the DSB is capable of ensuring a level playing field and thereby delivering justice in the broader sense of the term, or ensuring fairness and justice in the narrow sense of applying and interpreting the existing body of law as objectively, independently and impartially as possible. Although the dispute settlement mechanism of the WTO is an inter-governmental mechanism available only to WTO member States, the time has come to look at the possibility of allowing non-State actors an opportunity, under certain narrowly defined conditions, to bring a claim to the WTO against a State. The actual victims of a distorting measure adopted by a WTO member are often non-State actors – companies and other business

[22] ibid

[23] Kim Van der Borght ,'The Review of WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate' 14 (1999) 14 AMUILLR 1232

organizations but the WTO dispute settlement mechanism does not allow them any access to it. This state of affairs somehow does not look satisfactory in a world where the stated aim has been to achieve greater legitimacy, transparency and democracy in the conduct of international relations.

Moreover, the WTO may need to work closely with other agencies in the international community to provide the necessary support to those who cannot by themselves acquire specialist legal or other technical services. Useful initiatives and proposals in this regard are already underway. All WTO members should lend their support to such endeavors. Tighter time limits must be included so as provide relief faster. There should be provided more effective remedies, so as to improve prompt implementation. A permanent panel body should be constituted which could allow significant time savings. There is a need for increased transparency, expanded third party rights and remand power for the Appellate Body.

CONCLUSION:

The dispute settlement mechanism of the WTO is a new technique for settling international trade disputes. Purely as a trade body, the WTO has done well and simply as a quasi-judicial mechanism for settling technical trade disputes, the DSB too has done reasonably well. Although many problems still exist, with its recently acknowledged special concern about developing countries' particular needs and interests, it has brought about many positive and favorable changes to developing member countries' status. From the perspective of equality, weaker states now possess a relatively better environment and more power to defend their WTO interests through this new dispute settlement system.

However, developing countries still do not enjoy a really neutral playing field where they can really trade equitably and efficiently with developed states. Though the DSU provisions are not biased literally, developing countries are not able to fully take advantage of the DSM in practice, even if certain provisions are supposed to favor them in principle. The analysis of the experiences of developing nations throughout the evolution of the dispute settlement procedure demonstrates the particular challenges developing nations have faced under the GATT procedure and then under the WTO DSM. Since the large increase in their GATT membership in the 1960s, developing nations have supported a strong dispute settlement procedure to ensure a better level of compliance by all nations. Their participation in the dispute settlement process has gradually changed from fairly insurmountable difficulties in bringing claims and enforcing rulings (through lack of economic and political influence) to a situation where confidence in the renovated system is apparent through increased use and reliance on a structure of legal and procedural disciplines ensuring a degree of certainty.

Since they do not have adequate financial and legal expertise resources, they can hardly bear the high costs of settling disputes through the DSM. Because of the unevenness of political power between developed states and developing countries, the latter group is in a disadvantageous position in the DSM given the political pressures they may suffer outside the WTO. The developing countries' lower status is also due to their inadequate capability to enforce the dispute settlement results, even if the outcomes are favorable to them. Furthermore, the real practical effects of the DSU provisions regarding developing countries also need further examination.

Thus, in the practice of the DSM, developing countries are not enjoying a really equal status as developed states do.

In sum, it can be said that the goal of developing countries in the evolution of the dispute settlement is no different from that of the developed nations: a better level of compliance with obligations.

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