
DISPUTE SETTLEMENT MECHANISM UNDER WORLD TRADE ORGANISATION: PRACTICE AND PROCEDURE

Aditya Behera, LL.M, Intellectual Property and Trade Law, Christ Deemed to Be University

ABSTRACT

In the international arena, there are many ways to resolve disputes, including exhaustion of local remedies, International Court of Arbitration, Stock Home Arbitration, Singapore Arbitration, International Center for Settlement of Investment Disputes (ICSID) and other arbitrations. But the fact is still that arbitration procedure begins with the consent of the parties that grant arbitration jurisdiction and, or assist the agency in arbitration. The world is moving towards globalization and the nature of international agreements in a globalized world whether multilateral, plurilateral or other forms are of great significance. With the advent of WTO, a global adjudication mechanism for goods emerged. But when the dispute mechanism is analyzed along with various arbitration awards after careful examination, it was found that there was inconsistency in the decision-making.

The nature of international trade conflict and international dispute resolution is different depending on whether the country concerned is a WTO member and if they use the multilateral WTO dispute settlement mechanism. If a country is not a WTO member, according to general international law, it has no right to the market and supply and have no right to require an independent third party to make a ruling on its international trade disputes. Therefore, if the investment of domestic enterprises is at risk as its trading partners decided to restrict access to their foreign markets, a negatively affected country can neither claim that its rights have been violated nor invoke international dispute settlement mechanism for the purpose of compulsory trade. On the contrary, if the same trade dispute occurs among WTO members, trade restrictions may prove to be inconsistent with the WTO laws and binding decisions on trade restrictions must be revoked. As removal of such trade restrictions tends to increase economic welfare, and the governments know that the GATT/WTO dispute settlement procedures can promote each other yielding beneficial results and can help the government to eliminate domestic protectionist pressure.

INTRODUCTION

The WTO dispute settlement mechanism has become one of the most important and widely used international courts. In the 23 years since the establishment of the WTO, it has received more than 576 complaints, involved more than 320 matters, and passed 310 expert panel and appellate body reports. In comparison, the list of litigation cases submitted to the International Court of Justice (ICJ) since 1946 totals about 115, and the advisory proceedings totals about 26. In addition to its high utilization rate, the system is also effective in complying with rulings. Although many WTO disputes are highly controversial and political, members recognize that, overall, the benefits of this procedure outweigh the benefits of specific cases. They are worried, and in most cases, unfavourable decisions can be implemented against them without the complainant having to resort to retaliatory measures. Members are willing to use and abide by the system as expected, demonstrating their confidence and confidence in the WTO's effective settlement of disputes. On the other hand, some high-profile cases have tested both the WTO's institutional capacity to deal with controversial issues and the determination of its members in the multilateral system.

But despite this, the use of DSU reveals procedural gaps, especially during the disputed compliance phase. The failure to coordinate the DSU retaliation procedure with the compliance team's procedure, as well as the lack of explicit mechanisms for lifting trade sanctions when the defending member believes it is meeting its WTO responsibilities in the case, are examples. To bridge these gaps, the disputing parties negotiated a bilateral agreement that permitted the retaliation and compliance team procedures to proceed in the proper order, as well as a new dispute mechanism to seek the annulment of punitive measures that were judged to be illegal. The WTO dispute settlement system is under strain, partly as a result of its own success, and the Doha Round of multilateral negotiations has not reached its goal even 15 years later. WTO members have raised more than once in the Dispute Settlement Body (DSB) that the most pressing issue in dispute settlement is the delay in the expert group stage procedures. This shortcoming is at least partly due to the secretariat's lack of legal resources to staff the many teams that are being established, which face increasingly complex disputes.

Emergence of WTO and Adjudicatory Mechanism

Creation of World Trade Organization

The WTO was born from the long-delayed negotiation of the General Agreement on Tariffs

and Trade in 1947, and after the International Trade Organization ended in failure in 1947. Different methods of handling trade disputes produce different treatments from time to time. Finally, the World Trade Organization (WTO) was established and started operations on January 1, 1995. It is the newest of all the main international intergovernmental organisations, yet it is often regarded as one of the most powerful in the age of economic globalisation. It has also been one of the most controversial and contested international organizations¹. The WTO's most successful element is its dispute resolution mechanism. Some of the WTO Dispute Settlement Mechanism's cases have sparked heated public debates and received broad media attention. The case, for example, the first dispute is related to European Union's preferential import regime for bananas², the second dispute is concerned European Union's import ban on meat from cattle treated with growth hormones³, third case is United States import ban on shrimp harvested with nets not equipped with turtle excluder devices⁴, fourth dispute on the United States' special tax treatment of export-related earnings⁵, the fifth dispute on a French ban on asbestos⁶, and most recently & last dispute on the United States' safeguard measures on steel.⁷

Functions of the WTO:

Article III of the WTO delineate following functions:⁸

¹ A. K Koul, *GATT/ WTO law, economics and politics* 1-2(Satyam Books, New Delhi 1st ed,2005)

² World Trade Organization, (2010) European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes by the United States (WT/DS27), In *Dispute Settlement Reports 2008* (World Trade Organization Dispute Settlement Reports). Cambridge: Cambridge University Press. European Communities - Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”), complaint by Ecuador, Guatemala, Honduras, Mexico and the United States (DS27).

³ European Communities - Measures Concerning Meat and Meat Products (Hormones) (WT/DS26/15, WT/DS48/13): Award of the Arbitrator under Article 21.3(c) of the DSU. (2001). In World Trade Organization (Ed.), *Dispute Settlement Reports 1998* (World Trade Organization Dispute Settlement Reports, pp. 1833-1850). Cambridge: Cambridge University Press. EC Measures concerning Meat and Meat Products (Hormones) (“EC – Hormones”), complaints by the United States (DS26) and Canada (DS48).

⁴ UNCTAD Dispute Settlement WTO, Overview, United Nation, page no.6, United States – Import Prohibition of Certain Shrimp and Shrimp Products (“US – Shrimp”), complaint by India, Malaysia, Pakistan and Thailand (DS58).

⁵ Ibid, United States – Tax Treatment for “Foreign Sales Corporations” (“US – FSC”), complaint by the European Communities (DS108).

⁶ J.K Mittal and K.D Raju, *WTO and India A critical study of its first decade* 9-37, (New Era Law Publication, New Delhi,2005). European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Containing Products (“EC – Asbestos”), complaint by Canada (DS135).

⁷ Simon Lester and Bryan Mercurio, *World Trade Law Text, Materials and Commentary* 73, (Universal law publishing co. pvt.ltd, Delhi 2010)

⁸ Art.III WTO Agreement, p.10.

1. To facilitate the implementation, administration and operation of the WTO Agreement and the multilateral and plurilateral agreements.
2. The other function is of negotiating type. A distinction is made between negotiations for WTO shall provide forum.
3. To administer the arrangement for settlement of disputes this may arise between members and for the review of trade policy.
4. Finally, the WTO is to coordinate with international monetary fund and World Bank for achieving greater coherence in global policy making.

Institutional Structure of the WTO:⁹

The WTO consists of the following bodies:

Ministerial Conference:

The Ministerial Conference is the supreme WTO body. The Ministerial Conference is composed of minister-level representatives of all Members, which shall meet at least once every two years¹⁰. The Ministerial Conference has decision-making powers on all matters under any multilateral WTO agreement. However, ministerial meetings do not meet frequently. Since 1995, the Ministerial Conference has held 10 sessions and each session lasts only a few days: Singapore (1996), Geneva (1998), Seattle (1999) and Doha (2001). The next ministerial conference will be held before the end of 2020. The Ministerial Conference is a major media event, so the political leaders of WTO members are focused on the current challenges and the future multilateral trading system. The "Ministerial Conference" provides a much-needed biennial opportunity for the WTO and its actions to provide political leadership and guidance.

General Council:

The General Council is composed of ambassador-level diplomats and normally meets once every two months¹¹. All WTO members are represented on the General Council. Except for ministerial sessions, the General Council meets in the WTO headquarters in Geneva, as do all

⁹ https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm

¹⁰ WTO Agreement, p.10, Art.IV:1

¹¹ Ibid, Art. IV:2

other WTO entities. The General Council is in charge of the WTO's day-to-day operations and many of its activities. When the Ministerial Conference is not in session, the General Council exercises all the powers of the Ministerial Conference. The General Council, in addition to the Ministerial Conference's authorities, also undertakes various responsibilities that have been specially given to it. The General Council is responsible for the adoption of the annual budget and the financial regulations¹². The General Council's responsibilities also include dispute resolution and trade policy assessment.

Dispute Settlement Mechanism

The WTO dispute are usually trade related between the nations whether related tariff, dumping, Most-Favoured Nation, National Treatment, Quantitative Restriction as the case may be. The jurisdiction is derived from different data and details including from contracts and treaties. Usually, the jurisdiction can be general or compulsory.

Means of Settlement:

The World Trade Organization's (WTO) dispute settlement system allows for multiple options for resolving disputes. The DSU allows for the settlement of disputes through consultations (Article 4 of the DSU); through good offices, conciliation and mediation (Article 5 of the DSU); through adjudication by *ad hoc* panels and the Appellate Body (Articles 6 to 20 of the DSU) or through arbitration (Article 25 of the DSU)

The Dispute Initiation Stage:

The initiation stage of WTO dispute settlement is governed by national laws. Although it is not part of the DSU, the issue of dispute initiation is useful for the overall positioning and understanding of the procedure in the context of a larger trade policy. A feature of the WTO dispute settlement mechanism is that only the government can enter the WTO dispute settlement mechanism in terms of dispute initiation. Private economic factors such as exporters, importers and consumers have no right to lodge complaints. More generally, private parties do not have standing at the WTO as has been pointed out above.¹³

The Consultation Stage:

The goal of DSU is to allow relevant members to resolve their disputes in a manner consistent

¹² Ibid, Art. VII: 1-3, p.11.

¹³ William J. Davey, "The WTO dispute settlement mechanism," *IPL & LTRP* 12(2003).

with the WTO Agreement (Article 3.7 of the DSU). Therefore, bilateral consultations between the parties are the first stage of formal dispute resolution (Article 4 of the DSU). They give both parties the opportunity to discuss the matter and find a satisfactory solution without resorting to litigation (Article 4.5 of the DSU). Only after such mandatory consultations have failed to produce a satisfactory solution within 60 days may the complainant request adjudication by a panel (Article 4.7 of the DSU).¹⁴ Even when consultations have failed to resolve the dispute, it always remains possible for the parties to find a mutually agreed solution at any later stage of the proceedings.¹⁵ So far, most of the disputes in (WTO) have not continued after consultations, either because a satisfactory solution was found, or because the complainant decided not to pursue the matter further for other reasons. This shows that consultation is often an effective means of dispute settlement in the WTO, and the adjudication and enforcement tools in the dispute settlement system are not always necessary. Together with good offices, conciliation and mediation¹⁶, consultations are the key non-judicial/diplomatic feature of the dispute settlement system of the WTO.

The consultation request formally triggers a dispute in the WTO and opens the application of the DSU. In many cases, officials in the capital or the Geneva delegations of relevant members have informal discussions on this matter before formal WTO consultations. However, even if consultations are conducted in advance, it is still necessary for the complainant to go through the consultation procedures stipulated in the DSU as a prerequisite for further litigation in the WTO. The complaining Member addresses the request for consultations to the responding Member, but must also notify the request to the DSB and to relevant Councils and Committees overseeing the agreement(s) in question.¹⁷ The respondent (i.e., the Member to whom the request for consultations is addressed), is obliged to accord sympathetic consideration to, and afford adequate opportunity for, consultations.¹⁸ Consultations typically take place in Geneva and are confidential,¹⁹ which also means that the (WTO) Secretariat is not involved. The fact that they take place behind closed doors also means that the details of what happens there aren't revealed to any subsequent panel assigned to the case. Unless otherwise agreed, the respondent

¹⁴ The parties to a dispute can depart from the requirement of consultations through mutual agreement under Article 25.2 of the DSU, p.371 if they resort to arbitration as an alternative means of dispute settlement.

¹⁵ Ibid.

¹⁶ These forms of "alternative" dispute settlement are voluntary and provided for under Article 5 of the DSU, p.357.

¹⁷ DSU Art.4.4, p.356

¹⁸ DSU, Art.4.2, p.356.

¹⁹ Ibid, Art.4.6

has ten days to respond to the request and 30 days to conduct good faith negotiations after receiving the negotiation request. If the respondent fails to meet any of these deadlines, the complainant may immediately proceed to the adjudicative stage of dispute settlement and request the establishment of a panel.²⁰ Where the respondent conducts consultations, the complainant can submit a request for the establishment of an expert group within 60 days of receiving the consultation request at the earliest, but if the negotiation fails, the negotiation fails. However, the consultation stage can also be concluded earlier if the parties jointly consider that consultations have failed to settle the dispute.²¹ In practice, the parties to the dispute usually allow themselves far more than the minimum period of 60 days.

Good offices, Conciliation, and Mediation:

The DSU provides that the parties to a dispute may agree voluntarily to employ good offices, conciliation and mediation as procedures that are undertaken voluntarily if the parties to the dispute so agree²². Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.²³ When good offices, conciliation, or mediation are engaged into within 60 days of receiving a request for consultations, the complaining party must wait 60 days before asking the appointment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute²⁴. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds²⁵

The Appellate Process

The Appellate Body is made up of seven members who are appointed by the DSB for four-year periods. The Appellate Body hears appeals of panel reports in divisions of three, although its

²⁰ Ibid, Art.4.3

²¹ Ibid, Art.4.7

²² Ibid, Art.5:1, p.357

²³ Ibid, Art.5:2, p.357

²⁴ Ibid, Art.5:4, p.357

²⁵ Ibid, Art.5:5, P.357

rules provide for the division hearing a case to exchange views with the other four Appellate body members before the division finalizes its report²⁶

Generally speaking, the Appellate Body tends to rely heavily on the rigorous textual interpretation of the WTO clauses involved, emphasizing that treaty interpreters must consider the usual meaning of relevant terms in accordance with the context of the relevant terms and the purpose of the relevant terms. Agreement (required in Article 31 of the Vienna Convention on the Law of Treaties), and the clause must not be construed as making it meaningless. The Appellate Body stated that it needed to respect the due process and procedural rights of members in the dispute settlement process, but in general, it recognized that the panel has considerable discretion, which led it to ultimately reject most procedural/due process rights.²⁷

A panel report can be appealed by both the complainant and the defendant. Third parties do not have the right to appeal a report but they may make written submissions to and be heard by the Appellate Body in the course of an appeal if they had previously notified the DSB of their substantial interest during the panel stage.²⁸ The job for appeal lies with a permanent organ, the Appellate Body. It consists of seven persons, three of whom work on any case.²⁹ Appellate Body members shall have demonstrated expertise in law, international trade and the subject matter of the multilateral trade agreements. They are appointed for a four-year term which is renewable once.³⁰

It is advised that member states make their trade measures consistent with the WTO agreement if the expert panel and/or the appeal body determine that a country's trade measures are inconsistent with its commitments under any multilateral trade agreement. Although the expert panel or the appellate body is free, they make recommendations on how to achieve this consistency. They rarely use this power because they obviously do not want to interfere with the policies of member governments. The member whose trade measure has been found to be in violation of WTO obligations shall communicate to the DSB how it plans to implement the DSB recommendations.³¹

²⁶ Rule 4(3)

²⁷ Peter Van Den Bossche, *The Law and Policy of the World Trade Organization*

²⁸ DSU, Art. 17.4, p.364, See also Rules 24 and 27 of the Working Procedures for Appellate Review

²⁹ *Ibid*, Art. 17.1, p.364.

³⁰ *Ibid*, Art. 17.2, p.364.

³¹ Thomas A. Zimmermann, "Negotiating the review of the WTO dispute settlement understanding," *IL&P* 65 (2003)

Conclusion

Compared with the negotiation model under GATT, one of the main features of WTO is its "rule-based" dispute settlement mechanism, which is non-binding in nature. The WTO's settlement mechanism is based on a ruling model, so it is more appropriate, automatic and binding. The WTO dispute settlement system has slowly but gradually evolved into a highly legal adjudication body, which will continue to be upgraded to resemble domestic courts in the future. Its great success in adjudicating trade disputes has affected the multi-party trading system in unexpected ways, and it has made a great contribution to the gradual development of international trade law through its significant precedents accumulated since 1995. More than 590 complaints have been filed during the entire process.

Despite the success of the dispute settlement body, the WTO dispute settlement procedure has some theoretical and institutional flaws, and the system is no longer defensive. One of the serious allegations against the system is that DSB is busy with judicial radicalism and is generating rights and obligations that violate Article 3, paragraph 2 of the DSU. It is said that the WTO expert group is "making laws" as if they are the spiritual guardians of trade and/or other terms entering the legislative field, although this condemnation has been rejected by those involved in the operation of the system. The fact remains that the WTO is dominated by industrial countries such as the United States and the European Community. The wealthy and developed countries control large amounts of international trade. In order for developing countries to become a force to develop their economic capabilities within the framework of the WTO, they need to exert their influence more effectively. Developing countries and least developed countries constitute the majority of WTO members. Therefore, it is necessary to encourage developing countries to participate more actively in the WTO sector.

The WTO's DSU provisions also give developing nations and LDCs with special and distinctive treatment. Developed countries are more likely to benefit from the legalization system by resorting to disputes. In particular, the structure of the rules/procedures regarding remedial measures is to support them. In this regard, most developing countries are hesitant to file a lawsuit and participate in the dispute settlement system as a third party. For the developing countries' ability to actively participate, there are a lot of obstacles such as costs and uncertain benefits for joining the dispute settlement mechanism. Small countries with limited exports, but whose litigation costs are more or less independent of the financial interests involved in the dispute, face unique issues under the WTO's present dispute settlement

mechanism. Therefore, small member states may find that the cost of seeking legal requirements is too high.

The legal and technical support of the WTO Secretariat is expected to strengthen the ability of developing countries to eliminate all difficulties of fully participating in the WTO. The effective dissemination of WTO information and greater transparency are essential to ensure that members continue to participate and be informed. However, WTO consultations and negotiations need to be arranged and organized to promote the full participation of developing countries, and no activities are excluded. Therefore, within the framework of the DSU negotiation, developed countries support initiatives aimed at giving developing countries better access to the system and providing them with necessary training and technical assistance. It is also obvious that when it comes to disputes between WTO members of developing countries, the WTO's dispute settlement mechanism is not smooth. India is no exception, and the general indifference adopted by the panel of experts and appellate bodies. India needs to be more cautious in the future and needs to coordinate with like-minded groups in order to take some concrete steps in the increasingly complex economic environment of the modern world to protect its own interests in the WTO system. Indeed, what is extremely disturbing is that institutions/institutions established to achieve "justice", while resolving trade disputes, tilt the balance to the weaker side, thereby adversely affecting the basic principles of justice, fairness and reasonableness.