
THE DISPUTE SETTLEMENT UNDER THE WORLD TRADE ORGANISATION-OUTLOOK OF DEVELOPING COUNTRIES

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ABSTRACT

Trade between the nations is very much essential for the development of economy of every country and it helps consumers of different countries to enjoy the benefits of availability of variety of goods. Whenever trade takes place in international level, disputes are bound to arise and to settle them, there must be a dispute settlement system and mechanism and a body to manage and regulate international trade. To settle the trade disputes that are arising in international level, there is dispute settlement body formulated under WTO with certain procedures like consultation, panel process and the Appellate Body procedures. While deciding the disputes, Developed Countries play a major role and the Developing Countries and the Least Developed Countries (LDC) suffer by losing the disputes against the Developed Countries. The Developing Countries face numerous problems and the decisions given by the dispute settlement body were not implemented properly by the Developed Countries so the Developing Countries cannot enjoy the fruits of their winning.

The Developed Countries often impose technical barriers and the Developing Countries find it difficult to comply them. Even though there is fixed timeline for the settlement of trade disputes, when the Developing Countries won the dispute against a Developed Country, the Developed Countries drag the implementation of decision given by the dispute settlement panel and the Appellate Body. At present, the Appellate Body of the WTO is not functioning because of lack of members and many disputes are pending. There should be reformation in the dispute settlement system of WTO and equality must be maintained in decision making and implementation process.

Keywords: Trade, WTO, Disputes, Appellate Body, Developing Countries, LDC.

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I. Introduction:

Dispute settlement system is mandatory for any institution or establishment to settle differences that arise between the parties. Under the World Trade Organisation, there are agreements concerning trade and service matters including intellectual property rights and disagreement between the parties while conducting trade transactions will lead to the invocation of the dispute settlement mechanism. Any member country, developed, developing or least developed can file a dispute before the DSB for seeking justice.

The process and procedures laid down under the Dispute Settlement Understanding must be followed by all the disputants and decisions will be given by the panel. Further, appeal can be made by the parties provided they are not satisfied with the panel judgement. The Appellate Body will decide the master by referring to the facts and evidence submitted before the panel. The after effects of the final ruling create considerable scope for the discussion because final ruling may not be implemented properly on time in a prescribed manner by the parties. If the dispute is won by a developing country, it has to wait for a long duration even after the reasonable time gets over for the implementation of the decision by the developed countries. If the developed country wins the dispute against any developing or Least Developed Country, then the implementation should be done within a reasonable time and if not, retaliation or other penalty will be imposed on them.

II. Developing Countries and International Trade

The word developing country is not defined exactly under the World Trade Organisation. Generally it may be understood that they are not fully developed economies and are on the path of economic progress and classified accordingly.² The major categories of economies are divided into three divisions³ such as developed countries, developing countries and the Least Developed Countries.⁴ Under GATT and WTO, the definition and the interpretation of a developing country is dependent upon self selection but the LDC is noted and specified by the

² Linimose Nzeriuno Anyiwe and Eghosa Osa Ekhator, "Developing Countries and the WTO Dispute Settlement Resolution System: A Legal Assessment and Review", *Journal of Sustainable Development Law and Policy* Vol. 2 Issue No. 1, Afe Babalola University, 2013, p.126.

³ *Ibid* at p. 122.

⁴ D N Dwivedi, *International Economics-Theory and policy*, (New Delhi: Vikas Publishing House Pvt. Ltd., 2013) p.243.

UNO.⁵

As per the Human Development Index, which is a metric used to analyse the status of a country as developed or developing, the main parameters are economic growth, health status, life expectancy of people and level of education and the quality of life which the people are leading.

Most of the countries of the world are still not able to move away from the production and export of primary commodities to manufactured goods. Primary commodities may not bring much income to the country and markets for such commodities are relatively stagnant and low.⁶ The developing countries economy mostly focused on the primary sector.⁷ A few among the advanced developing countries like Brazil, Malaysia, China, India, Korea, etc have been shifting their production and export from primary commodities to manufacturing commodities. They have focused on resource-based and labour intensive production along with skill and technology intensive commodities for export to achieve expansion of market in world trade.⁸ Some developing countries still utilise cheap and unskilled labour for production.⁹

Participation in international trade increases foreign exchange of exporting countries and trade development enhances mutual trade relations between the countries. It is not only the developed countries but also the developing and the Least Developed Countries which participate in international trade and it is also one of the objectives laid down by the WTO rules for the economic development of every member nation.

III WTO and the Developing Countries

Whenever free trade is promoted, it is more beneficial to the developed countries rather than developing countries. Developing countries basically require trade protectionism for the progress and protection of their nascent or infant industries and manufacturing units.

⁵ Roman Grynberg, The WTO incompatibility of the Lome Convention trade provisions, Asia pacific school of Economics and Management Asia pacific press, 1998, available at <https://crawford.anu.edu.au/pdf/wp98/sp98-3.pdf> (last visited on 25th September 2020) p.12.

⁶ Davinder Kumar Madaan, "WTO and the Developing Countries", *India Quarterly*, July-December 2000, Vol. 56, Issue No. 3, Sage Publications, Ltd, available at <https://www.jstor.org/stable/45073233> p.56.

⁷ L D Mamodia, *International Trade-Financial Approach*, 1st ed., (Jaipur: Perfect Books, 2009) p. 44.

⁸ D N Dwivedi, *International Economics-Theory and policy*, (New Delhi: Vikas Publishing House Pvt. Ltd., 2013) p.243.

⁹ Rubens Ricupero, "Preface-on Developing Countries and World Trade-Performance and prospects", Yilmaz Akyuz, (Ed.,), (*Geneva-UNCTAD, Malaysia-Third World Network*, (London & New York-Zed Books, 2003) p. xvi.

Developed countries maintain very high tariffs even on agricultural products which has a negative impact on the agricultural development of the developing countries. Tariff protection is a must for developing countries in the initial stage including in the agricultural sector.¹⁰

All the member countries of WTO can resolve their trade disputes by submitting their grievances before the DSB of the WTO. The developing countries constitute the major portion of the membership of WTO. There is special and differential treatment given to the members of developing countries, but during the time of settlement of any trade dispute, this treatment does not take the form of providing enhanced substantive rights, rendering obligations and granting the period of transition.¹¹ It gives the members of developing countries some additional procedures or privileges or accelerated deadlines.¹² The very existence of a multilateral trade dispute settlement system is a benefit for the developing and Least Developed Countries. The system provides for equal access to all the members irrespective of their economic status. Decisions are made not on the basis of economic power but based on rules and principles interpreted in the WTO Law.¹³

The developing countries are characterised by different economic and social situations. There may be highly sophisticated people with all the facilities on the one hand and the poor who suffer from hunger and poverty with economic and social ailments on the other. Developed nations also consist of people who suffer out of poverty yet they are more capable of coming out of the vicious circle by combating them. Whatever the nature of the trade policy formulated by the domestic governments and under the WTO, it should contribute to economic development and poverty alleviation. Human rights obligations must also be fulfilled by the state. The WTO rules even provide for certain special clauses and treatment for the developing countries. It is biased in favour of developed countries and the developing countries are hardly supported by it through its policies.¹⁴

¹⁰ Dr. M Lakshmi Narasaiah, *World Trade Organisation and the Developing Countries*, 1st ed., (New Delhi: Discovery Publishing House, 2001) p. 49.

¹¹ Andrew D. Mitchell and Tania Voon, "Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?", *Global Governance*, July–September 2009, Vol. 15, Issue No. 3, Brill publications, available at <https://www.jstor.org/stable/27800763> (last visited on 5th April 2019) p. 344.

¹² Gabriel Moens and Peter Gillies, *International Trade and Business-Law Policy and Ethics*, 2nd ed., (New York: Routledge Cavendish-Taylor and Francis Group, 2006) p. 368.

¹³ Moonhawk Kim, "Costly Procedures: Divergent Effects of Legalisation in the GATT/WTO Dispute Settlement Procedures", *International Studies Quarterly*, Vol. 52, Issue No. 3, September 2008, The International Studies Association, available at <https://www.jstor.org/stable/29734255>, p. 661.

¹⁴ Sarah Joseph, "Trade to Live or Live to Trade", Mashhood Baderin and Robert Mc Corquodale (Eds.,),

IV Role of Developing Countries under WTO

Even though developing countries and the Least Developed Countries (LDCs) were not the major players in policy making during the GATT and the WTO regime, they have accepted and adopted the discipline of WTO laid down in the Uruguay Round. After the Uruguay Round they followed the binding force of the tariff and participated in multilateral trade agreements along with systematization in domestic policy made in the light of WTO like subsidization, commitments relating to intellectual property rights, different areas of services etc.¹⁵ The developing countries and the LDCs faced challenges to meet the requirements of the multilateral trading system. They had to abide by the trade rules and agreements and commitments of trading partners, exercise of trading rights in the export market, implementation of trade obligations, bringing transparency and stability in trade regime, entering into trade negotiations and other policy obligations under international trade. During the initial stages, most of the countries have suffered due to lack of institutional infrastructure, financial and human resources to face the challenges.¹⁶

There are instances under the World Trade Organisation that the developing country members won the dispute and forced the developed nations to withdraw the measures inconsistent with the provisions of WTO agreement. At the same time, even after winning the disputes, the developing countries could not realise the victory and later mutually resolved the issue. In spite of getting an authorization for retaliation, retaliating against a developed economy is a difficult task for the developing countries and facing retaliation in the form of suspension of concessions and increased tariffs by the developed economies also creates a setback in international trade.¹⁷

V Dispute Settlement System and Treatment for Developing Countries

During consultation, as per Article 4.10 of the DSU, special attention should be given to the developing countries but such special concerns are not operating rather they are declaratory in

Economic, Social and Cultural Rights in Action, (Oxford: Oxford University Press, 2006) p. 395.

¹⁵ Nottage and Hunter, Developing countries in the WTO Dispute Settlement System, Working Paper No.2009/47, University of Oxford, Global Economic Governance Programme, 2009, p.13.

¹⁶ Gary N. Horlick, "The WTO and Developing Countries", Proceedings of the Annual Meeting, American Society of International Law, March-April 2006, Vol. 100, Cambridge University Press-American Society of International Law, available at <https://www.jstor.org/stable/25660097> (last visited on 5th June 2020) p. 222.

¹⁷ Susan Esserman and Robert Howse, "The WTO on Trial", *Foreign Affairs*, Council on Foreign Relations, January-February, 2003, Vol. 82, Issue No. 1, available at <https://www.jstor.org/stable/20033434> p. 137.

nature. Under the Dispute Settlement Understanding, it is not specifically mentioned as to how special attention is to be given and in what area such special attention is to be extended. If any issue is invoked/raised by a developing country member the DSB should take special care and concern with surveillance on such matters as per Article 21.7 of the DSU.¹⁸ This has not been exercised by any developing country till date.

Special and Differential Treatment

As narrated in the preamble of the agreement establishing the WTO, to achieve a better standard of living and equality in international trade, support must be extended to facilitate those countries who are not developed yet or countries which are at the verge of development. As GATT was not so successful in achieving such standards and in performing multilateral trade agreements, WTO has laid down certain provisions to make the rules and agreements favourable to the developing countries and the LDCs.

Usually under the WTO, no discrimination can be made between the member countries of the WTO and it is envisaged that in Most Favoured Nation treatment and equal treatment for the goods produced within the country and goods produced outside the country which are imported into the country will be treated equally. This is laid down under the National Treatment principles of WTO. In addition, some special provisions applied to the developing and the Least Developed Countries in international trade and various ministerial conferences of the WTO have proposed such provisions, especially under the Doha Ministerial Conference which has been mandated to examine the same by the Committee on Trade and Development.¹⁹ During the Bali Ministerial Conference for receiving and for analysing the implementation of such provisions, a mechanism for the same was established.²⁰

Flexibility Provisions for the Developing Countries

There are certain flexibility provisions for the developing countries in relation to economic and

¹⁸ Esrat Jahan, "Developing Countries Participation in the WTO Dispute Settlement System", *International Journal of Law, Humanities and Social Sciences*, Vol. 4, Issue No. 6, October 2020, p.18.

¹⁹ Esrat Jahan, "Developing Countries Participation in the WTO Dispute Settlement System", *International Journal of Law, Humanities and Social Sciences*, Vol. 4, Issue No. 6, October 2020, p.18.

²⁰ Christophe Bellmann, "The Bali Agreement: Implications for Development and the WTO", *Open Edition Journals*, 2014, available at <https://doi.org/10.4000/poldev.1744> (last visited on 5th January 2019).

commercial policy instruments and their application. In relation to the agreement on agriculture, there are certain provisions which provide some flexibility for the developing countries on economic and commercial policy instruments.

Under Article XVIII of the GATT 1994,²¹ the provision to regulate and control the import level by a developing country is based on the quantity or value of the goods allowed and permitted for the reason that the developing countries can maintain their financial status and to formulate their own plans for economic development. Such import restrictions are also allowed with certain conditions like they should not lead to serious threat or decline in the financial reserves. And if the member country has inadequate financial resources to achieve some reasonable increase in its financial reserves, import restrictions may be allowed.

Transition period for the Developing Countries

Under agreement on Agriculture, reduction commitments can be made applicable by the developing country members and they have flexibility for 10 years and it is available for the developed countries only for six years. Subsidised exports and reduction in volume of exports can be maintained by the developing countries. But LDCs have no reduction commitments.

The developing country members of WTO are provided certain special provisions under the Subsidies and Countervailing Measures agreement, which provides 8 years tenure on prohibited export subsidies to phase out or to withdraw and again transitional period of 5 years for the developing countries and for the LDCs 7 years to withdraw or to discontinue such subsidies. But during such transitional periods countries cannot impose restrictions on use of imported goods as against domestic products.²² Such prohibition by virtue of Article 3.1 (b) of SCM Agreement does not make it applicable.²³ With regard to the application of provisions under the TRIPs agreement, the developing countries are provided 5 years time of relaxation from the date of enforcement of such provisions.

²¹ Article XVIII: Governmental Assistance to Economic Development. Recognition of the position of developing countries and their need for derogations from some trade measures with respect to the GATT Articles, including the support of Infant Industries and remedying Balance of Payments problems.

²² Subsidies and Countervailing Measures-Overview, Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), available at https://www.wto.org/english/tratop_e/scm_e/subs_e.htm

²³ Article 3.1. Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

Technical Assistance to the Developing Countries

To strengthen the capacity and trade credibility of the developing and the Least Developed Countries, developed countries and the international institutions should come forward to extend technical assistance. There are provisions laid down for providing technical assistance to the developing countries through the technical cooperation programmes extended by the WTO Secretariat.²⁴ Such technical assistance can be granted to certain areas like Sanitary and Phyto-Sanitary Measures, Customs valuation agreement, Technical Barriers to Trade agreement, pre-shipment inspection, Trade Related Aspects of Intellectual Property Rights, Dispute Settlement Mechanism, etc.²⁵ Whenever such assistance is requested it will be granted based on the conditions suitable to the agreement between the countries. Even though technical assistance is extended, there are constraints in the developing countries and the LDCs especially in the physical infrastructure and human skill along with the institutional lacunae which lead to poor implementation of technical assistance.

VI Conclusion

While implementing the agreements on different disciplines under WTO, developing countries have experienced difficulties and faced numerous challenges. Even agreements on safeguards, Sanitary and phyto-sanitary agreements, subsidies and countervailing measures, anti-dumping agreements, Technical Barriers to Trade, Agreement on Trade Related Aspects of Intellectual Property Rights, etc, are required to be implemented by every member country irrespective of its financial status and credibility. To adopt such agreements, member countries face financial constraints and other technical issues, but being signatories to the WTO, it was inevitable for all the member countries to follow such rules laid down under the WTO. For the developing countries and for the LDCs, there will be a transition period granted to comply with the rules of WTO.

Most of the developing countries take up the role of third parties in the dispute settlement system as they themselves cannot fight any dispute against other strong powers. There are high chances for disputes arising in international trade because violation of any Article or provisions

²⁴ Sarah Joseph, *The WTO and the Right to Food, Blame it on WTO? A Human Rights Critique*, (the UK: Oxford University Press, 2013) p. 66.

²⁵ Technical Cooperation—Examples of provisions for differential and more favourable treatment of developing countries, available at https://www.wto.org/english/tratop_e/devel_e/teccop_e/s_and_d_eg_e.htm.

under the agreements of World Trade Organisation will be questioned by the member countries and there will be opposition for the same. Trade relationships between the countries are broad because trade in goods, services and intellectual property takes place based on their own specific agreements. Even after fighting a dispute, countries proceed further with trade activities with the complainant or respondent nation.²⁶ For the developing countries there is a provision for legal assistance, yet it is debatable because assistance is provided in filing the dispute and process to be followed, but when in fact a dispute is initiated, they may not give legal advice required to win the case. That is why developing countries have to establish an efficient legal expert group on WTO law. There is also a need to fight for the cause of developing countries together.

²⁶ Developing countries in World Trade Organisation dispute settlement, available at, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm.