

World Trade Organization -Dispute Settlement Mechanism- A Critical Study

¹ Kshamaa ,Research Scholar, Chanakya National Law University & M.B.L. National Law School of India University

ABSTRACT

"There has been a slowdown in the imposition of new trade restrictive measures by G-20 economies over the past five months". However, "at a time of continuous economic difficulties, trade frictions seem to be increasing". He urged G-20 governments "to redouble their efforts to keep their markets open, and to advance trade opening as a way to counter slowing global economic growth. ¹

Establishment of World Trade Organization (WTO), unleashed the potential of free trade at international platform. The undoubtable reason behind it is, it's having support of 157 countries as its member²; it acts as a forum for all the member countries' government for negotiation of trade agreements and it also settles trade disputes by acting as a global tribunal for trade related dispute settlement with effective implementation and enforcement system. The statement given by Pascal Lamy, clearly depicts the importance of effective and efficient Dispute Settlement Mechanism (DSM) in the contemporary world. The article attempts to discuss how 157 Members of WTO attempts for promotion of "Agreements and World Trade, Conducive to Healthy Overall Development" and minimize "Anti Overall Development, Agreements and World Trade" by negotiating and establishing rules, with understanding of the connection between role of "WTO", "Globalization" and "Freedom" for economic development along with the overall development in above context; in addition to this understanding the WTO Dispute Settlement Mechanism as a global tribunal in international trade is underscored in this article in order to understand the system and the article will also attempt to have A Critical Eye On Aim Of The WTO Dispute Settlement System by giving A Thorough Eye On Achievement Of This Aim And The Issues And Challenges That The System is Encountering In Practical Application With Respect To Adoption Of WTO Dispute Settlement System And Compliance Of WTO Decisions with the help of case data interpretation.

Keywords:

World Trade organization (WTO), Dispute Settlement Understanding (DSU), Dispute Settlement Body (DSB), Dispute Settlement Mechanism (DSM), International Rule of Law, Globalization, Freedom, Free Trade, Appellate Body (AB), The General Agreement on Tariffs and Trade (GATT), Consultation, Dispute Panel, Panel Proceedings, Panel Reports, Implementation, Appellate Reviews, Compliance Panel, Compensation and Suspension of Concessions, Multilateral Dispute Settlement, Sequencing, Retaliation, Americanization, Economic Growth, Agreements and World Trade, Conducive to Healthy Overall Development, Anti Overall Development, Agreements and World Trade.

"Without a means of settling disputes, the rules-based system would be worthless because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case." ³

¹ Director-General Pascal Lamy, in his report on G-20 trade measures issued on 31 October 2012, said http://www.wto.org/english/news_e/news12_e/igo_31oct12_e.htm as visited on 31st October 2012 at 9:30PM

² As on 12th August 2012 at http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

³ "Trading Into the Future," <http://www.wto.org> as visited on 1st July 2011 at 6PM.

INTRODUCTION

The work of World Trade Organization (WTO) increases global trade. Role of increased global trade is inseparable in increasing the global economic growth. Increased growth plays a very vital role for the process of overall global development. Freedom is “both...the primary end and...principal means of development”⁴. The Nobel Prize winning economist Amartya Sen has well established the connection between the three “the WTO”, “globalization”, and “freedom”. In addition to the above I would emphasize on promotion of “Agreements and World Trade, Conducive to Healthy Overall Development” and minimizing “Anti Overall Development, Agreements and World Trade”. The Dispute Settlement System’s overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side effects — because this is important for economic development and well-being. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be ‘transparent’ and predictable.

WTO – A FORUM FOR NEGOTIATION OF TRADE AGREEMENTS

At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations. Its main substantive agreements encompass the GATT 1994 (an updated version of the GATT 1947), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Intellectual Property Rights (TRIPS). GATT and GATS ban (to a large extent) non-tariff barriers to trade in goods and services while the TRIPS (a rather short text which complements other international treaties in the field) protects a number of different intellectual property rights. A wealth of supporting agreements concerns, inter alia, subsidies, dumping and anti-dumping and technical issues of trade. All of these agreements can be signed by an entering member state only as a package and all of the rules are binding, even if some agreements, including notably the GATS, leave room for exempting certain areas from their application.

The dispute settlement system is founded on an integrated agreement, the Dispute Settlement Understanding (DSU). Its roots lie in the panel practice for the discussion – and arbitration – of trade disputes which developed in almost 50 years from 1947 on under the GATT. The system has become much more legalistic since the establishment of the WTO. It allows applications by member states against other member states, if benefits from the treaty are impaired or nullified. In practice, states only attack infringements of other states. After compulsory consultation, there is a first instance in which an ad hoc built panel reviews the case. After two rounds of written submissions the panel submits an intermediate report. The parties are invited to comment and thereafter, a final report is issued. The report – if not appealed – becomes binding after a political body, the Dispute Settlement Body, adopts it. In so-called violation cases, which form the vast majority of cases, there is automatic adoption, unless the DSB rejects it unanimously.

The parties have the right to an appeal in law. The second instance is set before a standing Appellate Body which consists of seven members. The appeal can be only brought against the legal interpretations and findings of the first instance panel. But, in the *Wheat Gluten* decision (WT/DS166/AB/R), the Appellate Body considered the panel’s review of the facts to have been an error in law. That way some control over the collection and assessment of the facts is exerted by the Appellate body

⁴ Amartya Sen, *Development as Freedom* (New York: Random House, 1999), xii.

These documents provide the legal ground rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives. "Agreements and World Trade Conducive to Healthy Overall Development" means economy plays as lifeblood for the overall development and promoting free trade definitely aids to this lifeblood. Hence, it implies to the formation of the agreements removing trade barriers as well as for promoting the agreements to safeguard nature, protect human intellectual property rights etc helps development of a healthy form of trade environment. Imposing certain restriction is also necessary in order to maintain the long term goal of healthy development. Here comes the role to minimize "Anti Overall Development, Agreements and World Trade", which implies to making agreements to minimize the harmful effects of trade of goods or services that are highly inconducive for overall development like Anti-Dumping Law etc. and world trade which are Anti Overall Development in nature. So corollary, it can be said that where countries have faced trade barriers and wanted them lowered, the negotiations have helped to open markets for trade. But the WTO is not just about opening markets, and in some circumstances its rules support maintaining trade barriers — for example, to protect consumers or prevent the spread of disease which are not conducive for overall development.

DISPUTE SETTLEMENT MECHANISM UNDER WTO

WTO rules matter because they are enforced in a strong dispute settlement system. Unlike the International Court of Justice (ICJ) with its contested jurisdictional phase, the WTO panels have automatic and compulsory jurisdiction.⁵ a panel's oral hearing and then release of its reports typically occur within about a year, which is a rapid timetable for international adjudication. The decision of the panel may be appealed to Standing Appellate Body, which usually decides its cases within sixty ninety days. After a panel issues its report is then adopted by the Dispute Settlement Body (DSB), and a losing defendant government is expected to carry out the decision, which may involve repealing or withdrawing a measure that violates WTO rules. As of early 2005, about 87% of adopted panel reports had found a violation.⁶

If the scofflaw government does not comply, then the complaining government may impose sanctions. For Example, in European Communities- Hormones, Canada and the United States have imposed trade sanctions against Europe since 1999 because the Communities refused to alter their domestic standard for meat safety.⁷ The WTO's system of rapid adjudication followed by the imposition of sanctions, when needed, does not exist anywhere else in the multilateral system.⁸

Moreover, and not the least, it is worthy adding to this imposing list is indispensability of an independent judiciary that respects the rule of law as an essential element of both development and freedom. A respect for intellectual property rights, a respect for the obligation of contract, a respect for the rule of law in all its

⁵ See Understanding on Rules and Proceedings Governing the Settlement of Disputes [DSU]. Arts. 6.1, 7.1. This advantage of avoiding arguments over jurisdiction can be contested. See Appellate Body Report, United States-Anti-Dumping Act of 1916, WT/DS136, 162/AB/R (adopted 26 September 2000), par. 54, N. 30.

⁶ See online worldtradelaw.net <http://www.worldtradelaw.net/dsc/database/violationcount.asp>

⁷ See Lori M. Wallah, 'Accountable Governance in the Era of Globalization: The WTO, NAFTA, and international Harmonization of Standards' (2002) 50 U. Kan. L. Rev. 823 at 843-5; see also Michael Trbilcock & Julie Soloway, 'International Trade Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body under the SPS Agreement' in Daniel L.M. Kennedy & James D. Southwick, eds., *The Political Economy of International Trade Law: Essay in Honour of Robert E Hudec* (Cambridge: Cambridge University Press, 2002) 537 at 557.5

⁸ James Bacchus, 'Groping Toward Grotius: The WTO and the International Rule of Law' in James Bacchus, ed., *Trade and Freedom* (London: Cameron May, 2004) 451 at 463.

manifestation by impartial and independent judiciary is a prerequisite everywhere to the right kind of "globalization". The WTO Dispute Settlement Mechanism was designed, inter alia to secure 'international rule of law' within international trade and provide all members with opportunities to exercise their rights under multilateral trade agreements.

ENFORCEMENT, IMPLEMENTATION AND RETALIATION:

After The implementation of decisions is also foreseen in the DSU. According to Article 22 DSU, the winning party may "suspend concessions". That means that, for example, tariffs for certain products imported from the losing state can be raised. The level of concessions suspended shall not exaggerate the level of trade which is subject to detriment due to the measure found to be illegal in the decision. Article 22.6 DSU provides for a procedure to set this level. Article 21.5 DSU installs a procedure in which a dispute over the correct implementation of a decision can be resolved. The DSU provides for Appellate Body (AB) review of Panel reports, panels to determine if a defending Member has complied with an adverse WTO decision by the established deadline in a case, and possible retaliation if the defending Member has failed to do so. Automatic establishment of panels, adoption of panel and appellate reports, and authorization of a member's request to retaliate, along with deadlines and improved multilateral oversight of compliance

Use of the DSU has revealed procedural gaps, particularly in the compliance phase of the dispute. These include a failure to coordinate DSU procedure for requesting retaliation with procedure aimed at the removal of trade sanctions in the event the defending member believes it has fulfilled its WTO obligations in a case. To overcome these gaps, disputing Members have entered into bilateral agreements permitting retaliation and compliance panel procedures to advance in sequence and have initiated new dispute proceedings seeking the removal of retaliatory measures believed to have outlived their legal foundation. WTO Members have been negotiating DSU revisions in the currently stalled Doha Development Round.

CRITICAL EYE ON AIM AND ACHIEVEMENTS OF WTO DISPUTE SETTLEMENT SYSTEM

The article also attempts to discuss briefly the significance of Dispute Settlement Process, its uniqueness and achievements among all global tribunals. To date 451 complaints have been filed under Dispute Settlement Understanding (DSU), with nearly one half involving the United States as a complainant or defendant. The WTO dispute settlement system as a global tribunal has proven, thus far, to be both highly effective and highly efficient in achieving the overriding aim of the Member of the WTO in establishing the system. That aim "is to secure a positive solution to a dispute,"⁹ Since January 2008, only about 136 of the nearly 369 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995.¹⁰ So it can be drawn from the above fact that most of the international trade disputes that are brought to the attention of the WTO are resolved in a "positive solution" without formal consultations. Most of the disputes that result in formal consultations are resolved without formal establishment of a dispute settlement panel.¹¹ Furthermore, almost all of the trade disputes that are addressed by a panel, and if appealed, by the Appellate Body, results in what all of the

⁹ Article 3.7, WTO Understanding on Rules and Procedures Governing the settlement of Disputes (the "Dispute Settlement Understanding"), which is one of the "covered agreement" of the treaty.

¹⁰ http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ1_e.htm

¹¹ To be more precise, the Legal Affairs Division of the WTO Secretariat reports that, thus far, a panel has been established in only about 40percent of the disputes in which there has been a request for consultations.

WTO Members that are parties to those disputes agree is a “positive solution” within a reasonable period of time after the adoption of the dispute settlement reports by the WTO Dispute Settlement Body.

There are many reasons for the shining success of the WTO dispute settlement system in its first few years. The WTO has built on the cumulative success of the GATT. The WTO has also benefited from the continued commitment of the Members of the WTO to the continued success of WTO dispute settlement. Moreover, by achieving a “positive solution” in so many difficult disputes, the WTO has laid the foundation for continued success by reinforcing the belief among WTO Members that more such difficult disputes can be resolved through the WTO in a “globalizing” world economy where effective and efficient international dispute settlement is solely needed.

The most important reason for the success of the WTO is the uniqueness of the WTO dispute settlement system as global tribunal. Alone among all the global tribunals in the world, and, indeed alone among all global tribunals in the history of the world, the WTO dispute settlement system is unique in two significant ways.

First, the WTO has compulsory jurisdiction. All WTO Members have agreed-upon the WTO treaty to use the WTO dispute settlement system exclusively to resolve their entire treaty related dispute with other members. They are subject to WTO dispute settlement. And, second, the WTO makes rulings that are upheld. The Members of the WTO comply with rulings in WTO dispute settlement because there can be consequences for them, if they do not comply with WTO ruling, can face significant economic consequences through the loss of the benefits of previous trade concessions by other WTO Members. The potentially high price of these possible consequences encourages compliance with WTO rulings.

The Members of the WTO have enhanced the historic force of this uniqueness by the strength of their common commitment to the international rule of law resulting in Appellate Body of WTO. Appellate Body is not part of the global “judiciary” that is confronting “globalization.” WTO dispute settlement is, technically, a “quasi-judicial” system. Rulings and recommendations in dispute settlement are subject to adoption by the Members of the WTO by means of the WTO’s unique rule of “reverse consensus.”¹²

ISSUES AND CHALLENGES

Along with this article gives a critical eye on various issues and challenges in the path of effectiveness and efficiency of WTO Dispute Settlement System. Despite this high success WTO Dispute Settlement System it is prone to “Americanization”, “Prevention of developing Country Members wanting to avail themselves of the benefits of the dispute settlement system”, “Sequencing” and “Retaliation” etc. The WTO dispute system is also not in coordination with politics in several ways. One is that the judicial functions of the WTO are carried out more quickly and smoothly than the legislative functions. In the first ten years of the WTO, eighty-two disputes reached a final decision.¹³In contrast, the output from new trade negotiations over the

¹² More specifically, the reports containing the rulings and recommendations of WTO panels and the WTO Appellate Body in WTO dispute settlement are subject to adoption by the Members of the WTO when sitting in their capacity as the WTO Dispute Settlement Body. Such reports are adopted and thereby made binding by a so-called “reverse consensus” in which a report will not be adopted only if all the Members of the Dispute Settlement Body agreed by

¹³ This figure was derived by counting adopted panel/Appellate Body decisions in original cases, hereby not counting separately the panel created under DSU. Art. 21.5. Parallel cases are counted as one and sequential cases are separately counted.

same time period has been meager. Furthermore, no use has been made of the 'authority to adopt interpretations' granted to the WTO Ministerial Conference and General Council.¹⁴ This situation has led to concerns about an imbalance between WTO politics and adjudication. Another problem is that the use or threat of trade sanctions puts pressure on governments to comply with WTO decisions even when a government has to bent normal legislative processes. For example, following a threat of sanctions by Europe and Japan, the United States Congress moved to eliminate the contested 1916 Act by inserting the repeal during a meeting of a House- Senate conference, closed to the public, even though the repeal had not been included in either the House or Senate bills that were slated to be reconciled in the conference.¹⁵

Another problem is the ability of the Appellate Body to interpret ambiguous provisions of WTO law has raised concerns about the legitimacy of having those decisions made by judges who are not directly accountable to elected officials.¹⁶ Although the WTO General Council can adopt interpretations that would correct a controversial decision by the Appellate Body, actually, the WTO's practice of decision-making by consensus such corrective interpretations nearly impossible to achieve.

The Appellate Body has often used its interpretive power to adopt balancing tests for the application of rules. For example, with regard to GATT's public policy exceptions, the Appellate Body held that the 'common' interests or values pursued need to be weighed in conjunction with the effectiveness of the measure in achieving those ends and the trade restrictiveness of the contested measure.¹⁷ Such triple-factor balancing arrogates a great deal of discretion to the Appellate Body. As Richard Steinberg has aptly observed, however the Appellate Body has significant constraints in its ability to deviate from the expectations of Members.¹⁸

CONCLUSIONS

Corollary, the conclusion can be drawn that despite several problems that are being faced by WTO Dispute Settlement Mechanism, the system has proved itself one of the most effective and unique among all global tribunals in the history of the world.

¹⁴ See WTO Agreement, art. IX:2

¹⁵ Christopher S. Rugaber, 'Tariff Bill Delayed in Senate After Several Provisions Added in Conference' (2004) BNA International Trade Reporter 1664. The repeal of the 1916 Act is the only occasion since the advent of the WTO in which the United States has altered a federal law in a manner expected to achieve compliance with an adverse WTO decision. In my view, this repeal had to be achieved through backdoor legislation. The Congress was unlikely to act with public transparency through the normal Congressional processes via the committees of legislative jurisdiction.

¹⁶ See Donald Mc Rae, 'What Is the Future of WTO Dispute Settlement?' (2004) 7 J. Int'l Econ. L. 3 at 13-14.

¹⁷ European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (12 March 2001), WT/DS135/AB/R) AT PARA. 172 (Appellate Body Report) [Korea-Beef].

¹⁸ Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 Am. J. Int'l L. 247. Among the constraints that Steinberg points to are a 'veto' by 'powerful members' of candidates to serve on the Appellate Body, the operation of the Appellate Body 'in the shadows of threats to rewrite DSU rules that would weaken it and of possible defiance of its decisions by powerful members', and the ongoing receipt of information by the Appellate Body 'on the preferences of powerful members, helping it to avoid political pitfalls'.