

LL.M. IV SEMESTER
Subject: International Trade Law
(Business Law Group)
Paper Code: L-4004

Topic: Settlement of disputes under World Trade Organization

Introduction

The Dispute Settlement Understanding (DSU) is often seen as one of the most important achievements in the World Trade Organization (WTO) Agreement. While the GATT also contained provisions for conflict resolution, the DSU contains a number of innovations. In particular, it is generally seen as being superior to its predecessors in terms of the clarity of its provisions concerning procedural matters and its provisions establishing a monitoring scheme to oversee implementation. Recently, however, criticism has been voiced concerning the possibilities for poorer countries to take full advantage of the system.

Renato Ruggiero, former WTO director general, called the dispute settlement procedure the WTO's most individual contribution to the stability of the global economy. No review of the achievements, of the WTO would be complete without mentioning the Dispute Settlement System which is in many ways the central pillar of the multilateral trading system. The new WTO system is at once stronger, more automatic and more credible than its GATT predecessor. This is reflected in the increased diversity of countries using it and in the tendency to resolve cases out of court before they get to the final decision 19 out of 71 cases so far. The system is working as intended as a means above all for conciliation and for encouraging resolution of disputes rather than just for making judgments. By reducing the scope for unilateral actions, it is also an important guarantee of fair trade for (less powerful countries). Without enforcement, the rules based system would be worthless. The WTO's procedure underscores the rule of law and it makes the trading system more secure and predictable. It is clearly structured, with flexible timetables set for completing a case. A panel makes first rulings. Appeals based on points of law are possible. All final rulings or decisions are made by the WTO's full membership. No single country can block these.

Under the GATT system, the establishment of panel to adjudicate the dispute and the adoption of the panel report could be done only by the consensus of the Members. This provision of positive consensus often led to the blockage of the settlement procedure either at the stage of establishment of panel or at the stage of adoption of panel report. This was one of the main causes of the failure of the GATT system in the settling trade disputes in a time bound manner.

The above mentioned flaw can be best understood with the help of two cases. In 1988, the US imposed sanctions against imports from Brazil under Super 301 Trade Act of 1974 on the

ground that Brazil has failed to give patent protection to pharmaceutical products produced by US companies. Brazil filed a complaint against the US stating that their step was GATT illegal and requested for a dispute settlement panel in this regard. The US blocked the constitution of the panel by using its influence for over six months. The US, however, lifted the sanction after a bilateral understanding with Brazil. In the Canned fruit case the US brought a complaint against the European Communities (EC) with respect to their programme of subsidizing domestic producers. A panel was established in this regard in June 1982. The panel gave its decision in favour of the US in 1983. The panel report, however, could not be adopted due to EC's oppositions. The US withdrew the report from the GATT agenda after it reached an agreement with the EC. There are many such instances where either the panel could not be established or the report was not adopted due to inherent ambiguity in the GATT dispute settlement system. In majority of these cases the parties reached a settlement, with scant attention to the legal process. To address this issue, the provision of negative consensus is introduced in the DSU. This means that under the new system panel report shall be adopted automatically unless it is rejected by consensus.

Similar provision is for the establishment of the panel. In simple words, before the Uruguay Round, consensus was needed at each stage of the dispute settlement process, while at the WTO consensus against each stage of the process is needed. Furthermore, under the GATT system, aggrieved parties could legally invoke their domestic laws (for example Super 301 of the US) by successfully blocking the multilateral process. Thus, the basic philosophy of the multilateral trading system (i.e. to check unilateralism) could not be fulfilled in its entirety under the GATT system. On the contrary, under the WTO system, the blockage of panel report is next to impossible and hence the threat of aggressive unilateralism is minimum. Also, there is a time frame for each and every stage of the legal process. Thus, delaying tactics as adopted by some members in the past, is virtually impossible under the new system. In effect, the principle of negative consensus means that a wronged member can expect to receive compensation within a year to eighteen months (twelve months maximum, on appeal and nine months normally).

Central Role in the Security and Predictability of WTO Multilateral Trading System

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system resulting from the Uruguay Round (Article 3.2 DSU). Its aim is to secure a positive solution to a dispute. The purpose of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") is to provide for an efficient, dependable and rule-oriented system to resolve, within a multilateral framework disputes arising in relation to the application of the Marrakesh Agreement Establishing the World Trade Organization. Throughout this description, the Marrakesh Agreement Establishing the World Trade Organization, including its annexes, will be referred to as the "WTO Agreement", whereas the agreements composing it will be referred to as the "WTO agreements".

The DSU promotes the use of a multilateral system of dispute settlement in place of unilateralism in the resolution of trade conflicts (Article 23.1 DSU). This multilateral system is based on the principles for the management of disputes developed under Article XXII and XXIII of GATT 1947, as further elaborated and modified by the DSU (Article 3.1 DSU).

Rule-Based System

The WTO dispute settlement mechanism is a rule-oriented system where recommendations and rulings must aim at achieving a satisfactory settlement in accordance with the rights and obligations of the Members under the WTO Agreement (Article 3.4 DSU). As a result all solutions to matters formally raised under the consultation and dispute settlement provisions of the WTO agreements must not nullify and impair benefits accruing to any Member under those agreements (Article 3.5 DSU)

Under the DSU the “players” in a dispute settlement process are subject to certain rules aimed at ensuring due process and unbiased recommendations and rulings. For instance, there must not be any ex parte communications with the panel or Appellate Body members concerning matters under consideration by the panel or the Appellate Body (Article 181 DSU).

Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1, 3 December 1996, the “Rules of Conduct”) are applicable to panel members, Appellate Body members, experts assisting panels arbitrators, Secretarial staff and members of the Textile Monitoring Body, referred to as “covered persons.”

Under the Rules of Conduct, covered persons are required to be independent and impartial, to avoid direct or indirect conflicts of interest and to respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, in order to ensure that the integrity and impartiality of that mechanism is maintained. In particular the covered persons are required to disclose the existence or development of any interest, relationship or matter that he or she could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to that persons’ independence or impartiality. Such disclosure has to include information on financial, professional and other active interest as well as considered statements of public opinion and employment or family interests.

If it is not possible to reach a mutually agreed solution, the first objective of the dispute settlement system is normally to secure the withdrawal of the measures concerned if they are found to be inconsistent with the WTO Agreement (Article 3.7 DSU).

The prompt settlement of situations in which a Member considers that benefits accruing to it directly or indirectly under the WTO Agreement are being impaired by measures taken by

another member is essential to the effective functioning of the WTO; and the maintenance of a proper balance between the rights and obligations of its Members (Article 3.3 DSU).

Efficiency is achieved through detailed procedural provisions, including provisions, which allow a party to move forward with the case even in the absence of agreement of the other party (e.g. Article 4.3 or Article 6.1 DSU).

The procedures for disputes settlement, which are laid down in the DSU, have many features, which make it quasi-judicial in nature. First, there is assured access to these procedures. Second, there is near automaticity in decision-making in all key issues related to settlement of individual disputes. Third, firm time limits are stipulated for each stage of the process. And finally, there is provision for appellate review.

Exclusive Application of WTO Rules on Dispute Settlements

The WTO dispute settlement provisions are composed of a set of internationally agreed rules to which WTO Members must have recourse where they seek redress of the effects of measures of other WTO Members under the WTO agreements (Article 23.1 DSU), i.e. when they allege.

- (i) a violation of obligations or other nullification or impairment of benefits under the agreements; or
- (ii) an impediment to the attainment of any objective of the agreements.

When a Member seeks redress of the effects of measures of other Members under the WTO Agreement, it must not determine that any of the situations under (i) or (ii) above exists except through recourse to dispute settlement in accordance with the rules and procedures of the DSU. It must make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or in an arbitration award rendered under the DSU (Article 23.2(a) DSU). It has also to respect the relevant procedures under the DSU with respect to the implementation of recommendations and rulings and suspension of concessions or other obligations (Article 23.2(b) and (c) DSU).

Uniform application to all WTO Agreements

Subject to certain conditions and exceptions, the DSU is applicable in a uniform manner to disputes under all of the WTO Agreements. The rules and procedures under the DSU apply to all disputes brought pursuant to the consultation and disputes settlement provisions of the WTO agreements listed in Appendix 1 DSU subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements (Article 1.2 and Appendix 2 DSU). To the extent that there is a difference between the rules and procedure of the DSU and the special and additional rules and procedures the latter prevails (Article 1.2 DSU).

The DSU is, in principle applicable to disputes under any of the WTO agreements, taken individually or in combination (Article 1.1 DSU). The list of the agreements to which the DSU applies is contained in Appendix 1 DSU. They are referred to as the “covered agreements” in the DSU. The DSU is applicable to the resolution of disputes under the Marrakesh Agreement Establishing the World Trade Organization, as well as all the agreements annexed thereto subject, for some of them, to special or additional rules and procedures contained in Appendix 2 DSU. Many matters brought before the DSB include alleged violations of more than one covered agreement. In *European Communities – Regime for the Importation, Sale and Distribution of Bananas, complaint by Ecuador, Guatemala, Honduras, Mexico and the United State (WT/DS27)*; for instance, the matter included alleged violations of GATT 1994, the import Licensing Agreement the Agreement on Agriculture, the TRIMs Agreement and the GATS.

The covered agreements include the Plurilateral Trade Agreements contained in Annex 4 to the Marrakesh Agreement Establishing the World Trade Organization (Appendix 1 DSU). However, the applicability of the DSU to the Plurilateral Trade Agreements is subject to the adoption of a decision by the parties to each of these agreements setting out the terms for the application of the Understanding to the individual agreement, including any special and additional rules or procedures (Appendix 1 DSU). The Committee of the Agreement on Government Procurement took such a decision. The Committee on Trade in Civil Aircraft has adopted no such decision.

Preserving the Rights and Obligations of WTO Members

The WTO dispute settlement system serves to preserve the rights and obligations of Members under the WTO Agreement and to clarify the existing provisions of the WTO Agreement in accordance with customary rules of interpretation of public international law (Article 3.2 DSU). This is without prejudice to the rights of Members to seek authoritative interpretation of provisions of a WTO agreement through decision-making under the WTO Agreement (Article IX: 2 Marrakesh Agreement unsuccessful attempts to consult have been made. The DSU contains rules and procedures to be followed by WTO Members for both.

The DSU favours solutions mutually acceptable to the parties to the dispute provided that they are consistent with the WTO Agreements (Article 3.7 DSU). Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements must be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto (Article 3.6 DSU). For an example of notified solution see: *Korea – Measures Affecting the Shelf-Life of Products, complaint by the United States (WT/DS5)*, where the parties notified a mutually acceptable solution to the DSB consultations and adjudications.

Complaint by more than one Member

More than one Member may request the establishment of a panel related to the same matter, in which case a single panel may be established to examine these complaints (Article 9.1 DSU). In United States – Import Prohibition of certain Shrimp and Shrimp Products, complaint by India, Malaysia, Pakistan and Thailand (WT/DS58), the DSB decided to establish one single panel, dispute the separate request made by India once a panel had already been established at the request of the other Members. If more than one panel is established to examine complaints related to the same subject matter, the same persons are required to the greatest extent possible to serve as panelists on each of the separate panels and the timetable for the cases was to be harmonized (Article 9.3 DSU). In European Communities Measures Affecting Meat and Meat products (Hormones), for instance, the complaint of Canada (WT/DS48) and that of the United States (WT/DS26) were reviewed by two separate panels composed of the same individuals.

For further queries you may reach us via..

E-mail –vikasrathimrt@gmail.com

Mob - 9058459666

Dr. Vikas Kumar

Assistant professor of Law

ILS, CCSU Campus, Meerut