

Role of World Trade Organisation and Its Dispute Resolution Mechanism

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Abstract - *Dispute settlement understanding of WTO is playing good role in resolving the disputes on international level between the members of the WTO. WTO Agreement of dispute settlement system is very efficient and results are quite predictable. The system is not only benefitting the developed countries but it is equally beneficial to the developing countries as most of the complaints are filed by the developing countries and get very satisfactory result in it. With the passage of time as we are moving towards development, WTO will face lots of new challenges so the reforms are required whenever the circumstances want for it. Thus the WTO which has taken a complete shape after a long time of discussion and struggle from 1947 to 1995 has lot of importance as the GATT 1947 was not complete document because a need of a separate international trade organisation was felt. Dispute Settlement Understanding under WTO Agreement is really a new way of thinking, a new way of solutions, and a new way to dispute resolution which organised the scattered elements and fulfil the scarcity of separate International Trade Organisation.*

INTRODUCTION

On 1st January 1995, the world trade organisation was established. On the same date it came into operation. WTO has no. of functions and WTO dispute settlement system is one of them which have lot of utility and efficiency regarding the importance and solving the disputes. Total of 454 disputes were taken before WTO during the time from 1st January 1995 to 31st December 2012.¹ Every fifth case solved amicably by the help of consultation and it has resulted that 183 reports were before dispute settlement panel and 109 reports are before appellate body.²

The dispute settlement system of WTO is a very effective system which preserves the rights and obligations of the members of the WTO agreement. In the international trade there are lot of uncertainties and insecurities WTO dispute settlement system provides security and predictability to the members of the WTO agreement. WTO dispute settlement provides every facility of consulting between opposite parties, penal, appeal etc. and other than this reasonable compensation is given to the aggrieved parties. Every step of the dispute resolution under the dispute settlement system of WTO has some aim and objective to secure the rights and obligation of members to the agreement.

ORIGIN OF WTO

To know the origin of WTO first we have to look towards the history of formation of GATT 1947. In December 1945 United States invited few countries which were allies at the time of Second World War to form a multilateral agreement for the reduction of tariffs on trade in goods. In February 1946 United Nations Economic and Social Council made a resolution in which a conference was to be called to prepare a charter for 'International Trade

¹ PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION, 157 (3rd ed., 2013).

²*Id* at 157.

Organisation' (ITO). In February 1946 committee for preparation of draft was established and in the same year after eight months met in London. By the October 1947 the negotiators had concluded an agreement but the ITO could not be prepared with GATT.

From 1947 to 1995 provisions of GATT are applicable through PPA and for the ITO charter negotiations were completed in 1948 successfully but it never came in force.³ For the successful control different rounds of conferences were held first was in Geneva in 1947 second was in Annecy in 1949 third was in Torquay in 1951 fourth was in Geneva in 1956 fifth was in Dillon from 1960-1961 these rounds focused on the tariff reduction whereas after Kennedy Round from 1964-1967 negotiators focused on the non-tariff barriers because it was the big problem and GATT was not able to solve it easily so in 1986 Uruguay Round started and realise to reform the GATT 1947.

In 1990 Renato Ruggiero (Italian Trade Minister) gave the idea of setting up an International Organisation for trade and after few months Canada proposed it with the name "World Trade Organisation" similarly European Union gave the name as "Multilateral Trade Organisation" after that in November 1991 European Community, Canada, Mexico Drafted jointly as "*Agreement Establishing the Multilateral Trade Organisation*" but the United States were not in favour of it even though other nations were eager to finalise it eventually United States put a Condition to change the name as "World Trade Organisation" because it was first proposed by Canada which was ultimately accepted and WTO agreement was signed in Marrakesh in April 1994 and came into force on 1st January 1995.

OBJECTIVES AND FUNCTIONS OF WTO

Preamble to the WTO agreement sets out the whole objectives of the WTO which was finalised in the Uruguay Round (1986-1993). After having several modifications, a lot part of preamble is taken from GATT. Thus improving living standards, security employment, encouraging trade, and the optimal use of resources are some of the basic objectives of WTO.⁴ The preamble of WTO emphasis upon trade, production, sustainable development and development of least developed countries.⁵

WTO agreement provides five functions in Article III according to which the first and important function is, "to facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and also to provide framework for the implementation, administration and operation of the Plurilateral Agreements", second function is "to provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference", the third and fourth function of are very relevant to this paper which deals with "Rules and Procedure Governing the settlement of disputes in Annex 2 of this Agreement"

³*Id.* at 77.

⁴ WORLD TRADE ORGANISATION, *The WTO Agreement Series, AGREEMENT ESTABLISHING THE WTO*, 1(Oct. 30, 2015, 9:42PM), https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf

⁵*Id.*

and “The Trade Policy Review Mechanism in Annex 3 of this Agreement” respectively, lastly the final function of WTO Agreement that to achieve the greater coherence with the help of International Monetary Fund(IMF) and with the International Bank for Reconstruction and Development(IBRD) and with other affiliated agencies to make the economic policies on global level. The above functions of WTO are very appropriate and in favour of world community which provide a definite direction to the trade on international level. Now we will here comprehensively deal with the third function which is related to the settlement of disputes and analyse the role of WTO in solving the disputes between the members of agreement to WTO.

WTO DISPUTE SETTLEMENT MECHANISM

Every time a power cannot govern a system effectively and efficiently. To maintain the certainty and predictability we require some set of rules which give a direction and ensure transparency in the system with establishment of stability. The most significant achievement of negotiation of Uruguay Round was the preparation of Dispute Settlement Understanding (DSU) which contains 27 Articles and four appendices and we can refer it the “jewel in the crown” of WTO.⁶ The specific feature of DSU explain the compulsory jurisdiction upon the dispute settlement body which has been explicitly defined in Article 3(2) as to “*clarify the provisions of the WTO Agreements in accordance with the customary rules of interpretation of public international law*”.⁷

DSU and Its Applicability

According to the Article 1.1 all the rules and procedures will be applied at the time of settling of dispute and Article 1.2 makes the idea of coverage and applicability more limpid. Thus from the above article there is no conflict in any situation regarding the coverage and its applicability. The rule is very unequivocal and provides the certainty and predictability of the fate of dispute for the governing rules.

Dispute Settlement Body (DSB)

Dispute settlement body is made under Article 2 of the DSU for executing the rules and procedures given under DSU. The General Council of WTO acts as DSB but the DSB has separate chairman and its procedure is conducted separately. DSB has powers to setup a penal, taking report from penal & appellate body, sanctions on the failure of complying the rules of DSB and other supervisory powers for maintenance & implementation of ruling and recommendations. According to Article 17, the appellate body of DSU has seven members whose tenure is of 4 years. The Appellate Body divides all the cases in three divisions and each members must do work in cooperation and coordination of each other with the activities of World Trade Organisation.⁸ The WTO system continues the panel system of GATT 1947 and according to which members are selected by WTO but these members’ works in panel in individual capacity not in the representative capacity.⁹

⁶AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND GATT, 49(2nd ed., 2010).

⁷*Id.*

⁸ KOUL, *supra* note 7, at 52.

⁹ KOUL, *supra* note 7, at 52.

Process of Dispute Settlement Understanding

Process of DSU is a very long process but every stage of the process has the scope of the settlement of dispute because every stage is made with such a view that penal try to resolve the dispute as soon as possible at the early stages here we will deal with the stages like consultation, panel, appellate review, implementation, compliance and compensation/retaliation. In very few cases it happens that all the stages are covered otherwise dispute is tried to settle in the very beginning.

(1) Consultation

The first stage of the dispute settlement process under DSU is consultation. Articles 4 of the DSU deals with it, in the consultation process parties have great scope of resolving disputes confidentially. DSU does not say anything about that how the consultation should be guided so it becomes very convenient to the party to solve the disputes after discussing and considering every part of dispute without any unnecessary burden, parties feel free in such kind of consultation process.

Process of consultation begins when one member requests the other member regarding the disadvantages or harm occurred on him due to the violation of rules which are the basis of basic substance of agreement then consultation becomes an opportunity to both the parties to resolve the dispute peacefully without any prejudice. Members can exercise their rights easily in the consultation process and reach to the conclusion by settling the dispute which is the main objective of the Dispute Settlement Understanding. Members often try to solve the problem by mutual consultation it saves the time and money because in the adjudication the members do not feel free as they feel in consultation thus it is a good stage which has the first place in the process of DSU.

Consultation may be either ‘multilateral’ or ‘bilateral’, at the designation of the complainant.¹⁰ The DSU also states that some special emphasis must be given on the problems of developing countries for consultation.¹¹

(2) Panels

If the parties fail to resolve the dispute in consultation stage then complaining party may move to the next stage to form a panel and may request to DSB through agenda of DSB meeting. Members have power to block the request in the first meeting if it does not happen then the request is heard in second meeting, the request may also be blocked here also by consensus among members. Complaining member may withdraw its request of forming panel otherwise the member has a right to have a panel if the requested for the same. If the both the parties decide not to have a panel then no panel will be formed.

Generally panels are formed on ad hoc basis which consists of three members and this may increase up to 5 if both the parties agree for it. Panellists always work in their individual

¹⁰ SIMON LESTER AND BRYAN MERCURIO WITH ARWEL DAVIES AND KARA LEITNER, World Trade Law, 158-159 (2010)

¹¹*Id.*

capacity and there is no suggestion or influence from parties.¹² On the suggestion of Secretariat parties can mutually select the panellists. It is all depend on the parties to agree with suggestion or not as if suggestions are of compelling nature in the eyes of members they may refuse to accept the suggestions. If the parties are not satisfied with the composition of the panel then they may within 20 days of its formation request to the Director General to determine the composition. Director General then decided the composition after consulting the members, chairman and other relevant division of the Secretariat. In no. of cases of WTO director General decides the composition of panel. After formation of panel the proceedings start according to the complaint set out in the panel request which assist the DSB in settling out.

All the panellists in the panel examine the complaint from every angle of facts of the case and on the basis of written submission given by the parties through the evidentiary value and legal aspects. Panel tries to settle the matter by consensus if it is not possible through consensus then majority decides the matter, dissenting and concurring opinion are also taken in consideration.

After taking in consideration all the evidences the panel concludes the matter and prepare an “interim report” which is given to the parties for further improvement in the quality of report then the parties comment on the interim report after that a final report is prepared and given to the parties and all other members. The final report is circulated to public in other languages also generally the procedure take six months but after circulation it takes nine months but in practicality it is a procedure of more than a year and other things depend on the nature and complexities of the dispute.

After circulation of final report the parties can go for appeal then another stage of settlement process ‘Appellate Review’ starts. If the parties don not go for appeal then the report is set to the adoption and DSB adopt the report. After adoption the report has legal force and its violation will be compensated by responding party. Adoption may also be set aside by consensus including winning party.¹³

(3) Appellate Review

Article 17 of the DSU is devoted to Appellate Review. According to the Article 17.1 “A *standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals form panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.*”¹⁴

Article 17.2 advocates that “*The DSB shall appoint persons to serve on the Appellate Body for a four year term, and each may be reappointed once. However, the terms of the three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they*

¹²*Id.* at 159.

¹³*Id.* at 160.

¹⁴Guohua et al., *supra* note 9, at 193.

arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term."¹⁵

Article 17.3 says that *"The Appellate Body shall comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any dispute that would create a direct conflict of interest."*¹⁶

Generally the appealing procedure complete in sixty days but if it is not possible to give the report in sixty days then Appellate Body informs in writing to the DSB for the reasons of delay and fix the date for it. In no reason the time may be extended above ninety days limit but in practicality it taken generally ninety days sometimes even more than that. Every process is done with full confidentiality and with consultation of Chairman and Director-General of DSB.

(4) Implementation

Implementation is the most important part because without implementation of the decision of panel or the Appellate Body there is no use of the efforts made by the DSB and members. Now here two questions arise what should be done to achieve the implementation and when it is to be achieved. When the DSB or the Appellate Body adopted a report it becomes the rulings of it and then the parties are governed by it any violation of these recommendations and ruling may bring the members to the harsh consequences. Here WTO agreement on DSU has created a great system of adoption of report.

Though the DSU try to implement the rulings very quickly but it may be impractical and in this regard Article 21.3 provides three ways for calculating reasonable time for effective implementation is the proposal of time and approval of DSB for the same, second is the agreement on implementation period within forty five days of ruling adoption and lastly is the case where neither option is possible in such cases period is decided by arbitration.¹⁷

First the member concerned show their intention to the DSB for implementing the report after that the above three procedures are followed. In the third procedure a written submission is given to the arbitrator after that the arguments are presented before the arbitrator and then he determine the reasonable time according to the guidelines mentioned in the DSU, and time may be longer or shorter depending on the circumstances of dispute.

Monitoring is also an important aspect other than the time framework. DSB will keep an eye on the losing party and party have to give the regular status report through the continuation of the proceedings. For ensuring compliance losing party actively participate in compliance

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Lester et al., *Supra* note 13, at 162.

mechanism.¹⁸ On the basis of reasonable time the member can delay the process and evade its obligation.

(5) Compliance Review

Parties can use the jurisdiction of penal of DSU they are in dispute and under Article 21.5, a request can be made for the same.¹⁹ In case procedure has not been followed as per the rules and regulations then the matter may be sent to compliance then Compliance Penal will deal with situation.²⁰

Article 20.5 clearly says that “Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within ninety days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.”²¹

Thus it is a very transparent time bound procedure of DSU which provide not only the settlement of dispute but even after that its implementation and compliance. Discussion for the compliance mechanism may be different but it resembles like the original proceedings but it is different in some respect as it deals with the compliance.²²

(6) Compensation and the Suspension of Concession

Members to the WTO agreement is bound by different procedures and rulings If any members fails to comply with the ruling and procedure established in the agreement and it harm the benefit and rights of other member then the winning member can say for the compensation or may suspend the concession to the respond party.

(i) Compensation

Here the compensation does not mean any monetary loss or remuneration but it is just a compulsion on the member to comply with all the rulings and procedures decided in agreement. When any member fails in it will give compensation to the other party on its request. Here compensation means the relaxation in the trade in the market of other country, reduction in the tariffs and other reliefs in trade. In DSU full implementation of rules is the primary objective so such type of compensation is imposed to attain the basic objective of full implementation of agreement between the members and compensation is agreed between the parties in the very beginning in the case of any failure in future. Thus every procedure and provision of DSU is very convenient to both the parties to the dispute. Here the compensation

¹⁸*Id.* at 163.

¹⁹ WORLD TRADE ORGANISATION, *The Process- Stages in a Typical WTO Settlement Case*, (Nov. 1, 2015, 03:20PM), https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s7p2_e.htm

²⁰*Id.*

²¹ WORLD TRADE ORGANISATION, *Understanding on Rules and Procedures Governing the Settlement of Dispute*, (Nov. 1, 2015, 03:46PM), https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

²²*Supra.* Note 22.

is prospective not retrospective. Compensation is not imposed on the past harm of the winning party but it is prospective and just to implement the procedure like binding force of time frame (reasonable time subject to DSU provisions), implementation of full ruling and terms agreed between the parties.

(ii) Suspension of Concession or Other Obligation

Similar to the compensation if after the expiry of reasonable period and within twenty days of it the member fails to comply with the rulings of the DSB then the winning party request to the DSB to suspend the concession. After this, the DSB shall grant the authorisation to suspend the concession within thirty days of the expiry of the reasonable period unless the matter is taken to further arbitration. After the decision of arbitration the DSB will take decision of suspension.

It is just a retaliation of failure of ruling if the party fails then to attain the objectives of DSU suspension of concession is taken by complaining party. Suspension of concession may be with regard to the sector in the same agreement. If the suspension of concession in another sector in the same agreement is not possible and the situation become serious enough then it can be done by another covered agreement under Article 22.3(c).

Some Aspects for Jurisdiction and access under WTO

WTO has three type of jurisdiction (1) compulsory (2) exclusive (3) contentious (not advisory). If a member request for panel to resolve the dispute before the DSB in meeting then a panel will be formed. As a matter of law a respondent member has no choice but to accept the jurisdiction of WTO in resolving the dispute under dispute settlement system and same concept make it a compulsory jurisdiction, second is the exclusive jurisdiction of WTO dispute settlement system as if the parties seeking the remedies from WTO then they should have to follow all the rules under DSU, and lastly the contentious jurisdiction as the WTO unlike the International Court of Justice or the International Tribunal for the Law of Sea has only contentious jurisdiction not the advisory jurisdiction.²³

Only the members to the WTO can access the jurisdiction of its dispute settlement system. Members have right to bring the disputes on WTO platform and initiate the proceeding. No company, Non-governmental organisation, any International Organisation, Industry Association or company have right to use the WTO dispute settlement system but the disputes of companies, NGOs, industrial association has indirect access to WTO through the Government, so the presence of companies, industrial organisation cannot be denied that lobbying is done to by them to bring the case on WTO platform by the members and they are the main force behind it.²⁴

Thus the whole system of WTO is full of key features and provides a better, efficient and predictable dispute settlement system with full hope justice without any nuisance and any despair. Complete system is very clean and transparent and provides a hope of settlement at every stage like consultation, panel, appellate review etc. and it is all due to the strong and reformative system of WTO which had taken a shape after a long wait of almost five decades.

²³BOSSCHE & ZDOUC, *Supra*.note 1, at 160-162.

²⁴*Id.* at 178.