

WTO DISPUTE SETTLEMENT MECHANISM: AN EVOLUTION OF DISPUTE SETTLEMENT

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This paper is an attempt to familiarize the reader with the understanding of WTO Dispute Settlement Mechanism. It traces the roots of this dispute settlement process, trying to chalk out the evolution of this scheme. It is an effort to provide a perspective to the reader about Dispute Settlement Understanding. Researcher has elucidated the entire process of dispute settlement under WTO schematically in a sequential manner. This paper endows insights into role and responsibilities of various dispute settlement bodies. Researcher has thrown light over the various challenges in front of this dispute settlement mechanism. In the end, the researcher would recommend the course of action for better functioning of dispute settlement.

INTRODUCTION

The World Trade Organization was established and became operational on 1st January 1995. It is youngest of all major international intergovernmental organisations and yet it is arguably one of the most influential in these times of economic globalisation. During the Uruguay round, the negotiators were receptive to the suggestion, first made by Professor Jackson, to use the Uruguay Round as an occasion to found a new 'World Trade Organisation'.¹ The idea of new trade organisation was taken up in FOGS negotiation. When the Draft Final Act of Uruguay round was issued in 1991, it contained a proposal for a new 'Multilateral Trade Organization'.² Finally, the Uruguay Round Ministerial Meeting met on 15th April, 1994 at Marrakesh and adopted Marrakesh Declaration establishing World Trade Organisation³. The WTO exists to 'facilitate the implementation, administration and operation as well as to further the objectives' of WTO

¹ RESTRUCTURING THE GATT SYSTEM, JOHN H. JACKSON, 38-41, (1990).

² THE WORLD TRADE ORGANIZATION LAW, PRACTICE AND POLICY, MITSUO MATSUSHITA et al. 10 (3RD Ed. 2015).

³ GUIDE TO THE WTO AND GATT ECONOMICS LAW AND PRACTICE, AUTAR KRISHEN KOUL, 29 (Ed. 2005) .

agreements.⁴ Apart from the general purpose, the WTO has to perform four specific tasks: (1) to provide a forum for negotiations among the members both as to current and any future agreements; (2) to administer the system of *dispute settlement*; (3) to administer the Trade Policy Review Mechanism; (4) to cooperate with IMF and the world bank, the two other Bretten Woods institutions.⁵

The WTO dispute settlement system works very much like a court for regulating international trade. The main object of WTO dispute settlement system is to ensure that there is a prompt and immediate settlement of disputes among the WTO members with respect to their rights and liabilities under WTO law.⁶ *The Dispute Settlement system of the WTO is a central element in providing security and predictability to the multi-lateral trading system.*⁷ From its inception, the WTO dispute settlement mechanism has been very busy; more than eighty cases were filed in the first two years, and more than 400 cases had been filed at the time of writing.⁸

HISTORY OF WTO DISPUTE SETTLEMENT

The GATT 1947 in the legal technical sense did not conceive any specific procedure for dispute settlement mechanism.⁹ The first draft text for a *dispute settlement understanding* was completed by the GATT 1947 Secretariat in September 1990 and after some discussion in the negotiation group, resulted in a chairman's text, which was forwarded to the Trade Negotiations Committee in October of the same year.¹⁰ The GATT only contained Article XXII¹¹ and Article XXIII¹², neither of which explicitly mentioned anything about the dispute settlement nor provided detailed provisions to handle disputes. An important forward was achieved by the **Dunkel Draft** which had been elaborated by the chairman, Arthur Dunkel, and submitted on 20th December 1991 in an attempt to push the negotiations forward.¹³ This Dunkel Draft contained two documents: an Understanding on Rules and Procedure Governing the Settlement of Disputes under

⁴ WTO Agreement, Article III: 1.

⁵ Ibid. Article III.

⁶ THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, PETER VAN DEN BOSSCHE, 171 (Ed.-2008).

⁷ WTO Dispute Settlement Understanding Article III: 2.

⁸ Supra 2, 83.

⁹ THE GATT AND INTERNATIONAL ECONOMIC ORGANISATIONS, KENNETH W. DAM. 352 (1997)

¹⁰ STEWART (ed.) II, 2779.

¹¹ Article XXII: I require each party to afford other contracting parties adequate opportunity for consultation with respect to any matter affecting the operation of GATT.

¹² Article XXIII: I, a complainant must show that either (i) benefits accruing to him under the GATT are being nullified or impaired; (ii) attainment of any objective of GATT is being impeded.

¹³ The Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20th December 1991.

Article XXII and XXIII of the GATT and “Elements of Integrated Dispute Settlement System”¹⁴. WTO legal order is based on array of separate agreements which have retained a certain degree of autonomy.¹⁵ Dispute Settlement Understanding is one of those agreements and contains general rules on dispute settlement mechanism. **Integrated dispute settlement system** which applies to all of the agreements has been established through article 1.1 of the Dispute Settle Understanding.

DISPUTE SETTLEMENT UNDERSTANDING

International trading system necessarily requires, ‘rule based system’ that brings stability and predictability to the system.¹⁶ The same has been introduced in WTO dispute settlement mechanism through *Dispute Settlement Understanding (DSU)*. DSU contains 27 Articles totalling 143 paragraphs plus four appendices making it perhaps the most significant achievement of the Uruguay Round negotiations.¹⁷ Article 1 of the DSU explains the scope of agreements on which the DSU can be exercised. Article 2.1 of the DSU establishes the Dispute Settlement Body (DSB).¹⁸ The Dispute Settlement body has been entrusted with the task of administering the DSU’s rules and procedures. The DSB has the authority to establish dispute settlement panels, adopt panel, appellate Body reports, maintain surveillance of implementation rulings and if necessary to authorise members to suspend concessions and other obligations.¹⁹ Jurisdiction of the WTO dispute settlement understanding has also been explained through various articles of DSU. *Compulsory Jurisdiction*²⁰ as have been mentioned under Article 23.1 of DSU states: “When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have to, and abide by, the rules and procedures of this understanding”. Furthermore, *Exclusive Jurisdiction*²¹ states that “Members will have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations”. Lastly *Contentious Jurisdiction* has been interpreted in *US-Wool Shirts and Blouses*, where the appellate body interpreted that Article 3.2 of DSU is not meant to encourage either the Panels or Appellate body to ‘make law’ by clarifying existing

¹⁴ Ibid. T.1-T.6.

¹⁵ WTO- INSTITUTIONS AND DISPUTES SETTLEMENT, MAX PLANCK, 272 (Rudiger Wolfrum and Peter-Tobias Stoll Ed. 2006).

¹⁶ THE CRUMBLING INSTITUTIONS OF THE LIBERAL TRADING SYSTEM, JOHN H. JACKSON, 98-101 (1978).

¹⁷ Supra 3, p. no. 45

¹⁸ Dispute Settlement Understanding, Article 2.1.

¹⁹ WORLD TRADE LAW, SIMON LESTER, et al. 153 (2012).

²⁰ Dispute Settlement Understanding, Article 23.1.

²¹ Ibid.

provisions of WTO agreement.²² Concept of nullification and impairment means, “ A WTO member claiming that another member failed to observe its obligations under the General Agreement on Tariffs and Trade (GATT), according to its article XXIII: 1, assert that this failure resulted in *nullification or impairment* of a benefit accruing to it under GATT.²³ The three Institutions are essential for proper adjudication so disputes under WTO: Dispute Settlement Body, panels and at appellate level to the appellate Body.

STAGES OF DISPUTE SETTLEMENT UNDERSTANDING

The DSU process consists of a number of procedural stages as follows: Consultations, Panel, Appellate review, implementation, compliance and compensation/retaliation.²⁴

Consultation- Dispute Settlement at WTO always starts with consultation or at least an attempt to consultation.²⁵ WTO members are required to have sympathetic consideration to and afford an opportunity for consultation to another party.²⁶ A request for consultation, giving reasons for the request, must be submitted in writing and must identify two things:

- the measure at issue; and
- the legal basis for the complaint.²⁷

If the consultations are successful and lead to a mutually agreed solution to the dispute, this solution must be notified to DSB.²⁸

Panel Proceeding: - Panels are quasi-judicial bodies, in a way tribunals, in charge of adjudicating disputes between Members in the first instance.²⁹ When consultations are unsuccessful, the complainant may request for the establishment of a panel. Procedure to be followed by the panel has been mentioned in Appendix 3 to DSU. Article 12.1³⁰ directs a panel to follow the working procedures contained in appendix 3. After the first written submissions of the parties have been filed, the panel holds its first substantive meeting with the parties. It is only at this meeting that Panel asks complainant to present its case and at the same time asks defendant to put out its point of view.³¹ The Composition of Panel should be composed of well-qualified governmental and/or non-governmental individuals,

²² Supra 6, p. no. 181.

²³ See, INTERNATIONAL TRADE LAW AND GATT/WTO DISPUTE SETTLEMENT SYSTEM. ERNEST-ULRICH PETERSMANN, 125 VOL. 11 (1997).

²⁴ Supra 19, p. no. 154.

²⁵ Dispute Settlement Understanding, Article 4

²⁶ Dispute Settlement Understanding, Article 4.2

²⁷ Dispute Settlement Understanding, Article 4.4

²⁸ Dispute Settlement Understanding, Article 3.6

²⁹ A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 21 (2004)

³⁰ Dispute Settlement Understanding Article 12.1.

³¹ Dispute Settlement Understanding, Para. 5, Appendix 3.

including persons who have served on or presented a case to a panel, served as a representative of a member or of a contracting party to GATT 1947 or as a representative to the council or Committee of any covered agreement or its predecessor agreement.³² The task of the Panel is to investigate thoroughly the facts of the dispute, taking into account the terms of the particular agreement alleged to be breached and panel must consult both the parties to the dispute in order to gain the fullest understanding possible of the problem and should encourage them to reach a mutually acceptable solution, if at all shall have recourse to such information.³³ The process followed by the Panel is completely **confidential** thereby meaning that meetings are done in 'closed doors' and no formal records are taken of the meetings.³⁴ The period in which a panel must conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the final report is issued to the parties, shall as a general rule, not exceed six months.³⁵

Appeals: - Either side can appeal a panel's ruling. Each appeal is heard by three members of permanent seven member appellate body set up by the Dispute Settlement Body and broadly representing the range of WTO membership.³⁶ The appeal can uphold, modify or reverse the panel's legal findings and conclusions.³⁷ Normally the appeals should not last more than 60 days with an absolute maximum of 90 days.

Implementation: - Article 21 of the DSU provides an elaborate mechanism of surveillance of implementation of recommendations and rulings of panels and appellate body reports and accordingly once the report is accepted, DSB is empowered to monitor whether or not its recommendations have been implemented.³⁸ Non-implementation of the panel report/appellate body report may result into further arbitration. If the respondent fails to implement the recommendations and rulings adopted by the DSB correctly within the reasonable period of time agreed by the parties or determined by an arbitrator. The respondent will at the request of the complainant enter into negotiations with the latter party in order to come to an agreement on mutually acceptable compensation.³⁹

The following *chart*⁴⁰ gives us a proper understanding of Dispute Settlement Mechanism at WTO:

³² WTO DISPUTE SETTLEMENT PROCEDURES, 8 (2nd ed. 2003)

³³ AN ANATOMY OF WORLD TRADE ORGANIZATION, KONSTANTINOS ADAMANTOPOULOS, 62 (1997)

³⁴ GUIDE TO DISPUTE SETTLEMENT, PETER GALLAGHER, 33 (2002)

³⁵ Dispute Settlement Understanding, Article 12.8

³⁶ WTO ITS BENEFITS, MISUNDERSTANDINGS, AGREEMENTS, POLICIES FOR DEVELOPING COUNTRIES, R.K. RANGACHARI, 41 (1ST Ed. 2005)

³⁷ WTO CONCEPT CHALLENGES AND GLOBAL DEVELOPMENT, N.K. JAIN, 86 (2008)

³⁸ Supra 3, p.no. 60

³⁹ Supra 5, p. no. 305

⁴⁰ Supra 35, p.no. 10

<p>Consultation with each other (Article 4)</p>	
<p>Panel Established by DSB (Article 6)</p>	
<p>Terms of Reference (Article 7) Composition (Article 8)</p>	
<p>Panel Examination Normally 2 meetings with parties (Article 12) 1 meeting with third parties (Article 10)</p>	
<p>Interim review stage, descriptive part of report, sent to parties for comment (Article 15.1) Interim report sent to parties for comment (Article 15.2)</p>	
<p>Panel Report Issued to parties (Article 12.8; Appendix 3 par 12(j))</p>	
<p>Panel report issued to DSB (Article 12.9; Appendix 3 par 12(k) and 17)</p>	
<p>DSB adopts panel/appellate report(s) including any kind of changes to panel report made appellate report (Article 16.1, 16.4 and 17.14)</p>	
<p>Implementation report by losing party of proposed implementation within 'reasonable period of time' (Article 21.3)</p>	
<p>In cases of non-implementation parties negotiate compensation pending full implementation (Article 22.2)</p>	
<p>Retaliation, If no agreement on compensation, DSB authorizes retaliation pending full implementation (Article 22) Cross-retaliation;</p>	

same sector, other sector, other agreements
(Article 22.3)

At all stages the WTO Director General is available to offer his good offices, to mediate or to help achieve conciliation.

CHALLENGES FOR DISPUTE SETTLEMENT AT WTO

In spite of being an efficient and effective method of dispute resolution, WTO Dispute Settlement mechanism still faces some Challenges and Legal issues. Some of them have been discussed below briefly. There is predicament between the fact finding and confidentiality issues that regularly arises during WTO proceedings.⁴¹ The WTO has not developed a substantial body of rules dealing with methods of proof, fact finding, admissibility and weight of evidence.⁴² Article 11 and Article 13 giving powers to panels to seek information would not be of any use, if the members do have a legal duty themselves to respond by providing the relevant information which has been asked for.

The DSU does not include any express rule concerning the burden of proof in panel proceeding. The concept of burden of proof generally has two important aspects in any judicial or quasi-judicial system: (i) who should “loose” the dispute if the facts remain unclear? (ii) What level of Proof suffices for a panel to establish a fact?⁴³ Precisely how much and what kind of evidence will be required to establish a presumption that what is claimed is true varies from measure to measure and case to case.⁴⁴

Article 11 of DSU states that a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements which requires panel to treat pieces of evidences produced before it objectively and not distort or ignore.⁴⁵ The panel should follow “Due process of law”.⁴⁶ As to the establishment of the facts of in a case, there should be a an objective assessment that should be followed, which has been understood as mandating

⁴¹ KEY ISSUES IN WTO DISPUTE SETTLEMENT, THE FIRST 10 YEARS, RUFUS YERXA & BRUCE WILSON, 191 (2nd ed. 2006)

⁴² WTO LITIGATION PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT, J. WAINCYMER 530 (2002)

⁴³ Supra 29, p. no. 105.

⁴⁴ Appellate Body Report, US- Wool Shirts and Blouses, p. no. 335

⁴⁵ Supra 2, p. no. 106

⁴⁶ Chile-Price Band System, Appellate Body Report.

neither a *de novo review* i.e. the complete repetition of the fact finding conducted by national authorities not total deference to domestic authorities.⁴⁷

The DSU requires a request for the establishment of a panel to indicate “whether consultations were held, identify the specific measures at an issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”⁴⁸ In *Turkey- Textiles*⁴⁹, Turkey claimed that the request for the establishment of the panel was insufficiently precise in terms of the measures at issue and product coverage of such measures.⁵⁰ Turkey claimed that India had not even indicated a broader grouping of products, but limited itself to a generic reference to “a broad range of textiles and clothing products”.⁵¹ There has to be a precision in the panel formation after consultation has taken place. There has to be narrowing down of the exact goods and services in dispute for the purpose of the formation of Panel for adjudication of dispute.

WTO DISPUTE SETTLEMENT IN COMING FUTURE

Like in any other system of separation of powers and ‘checks and balances’ among legislative, administrative and judicial governance institutions, it is important for the future evolution of the WTO dispute settlement system that the WTO rule making bodies, administrative bodies and also civil society continue to scrutinize and criticize future legal findings of WTO panels, the Appellate Body and WTO arbitrators.⁵² The following shows the future challenges for WTO judges: (I) The increasing importance of contextual and functional methods of international treaty interpretation and the controversies about the relevance of non-WTO rules of international law for interpreting WTO rules; (II) The legal obligation of all the WTO Members to comply with all their international legal obligations in good faith; the limited jurisdiction of WTO dispute settlement bodies; the limited scope of applicable rules of international law in WTO dispute settlement proceedings and the increasing judicial clarification of the “basic principles” underlying this multilateral trading system’ as a potentially open minded source of WTO law to be clarified through WTO practice.⁵³

Another challenge which needs to be addressed in future involves the lack of incentives for swift compliance, which can be observed while tracking the progress of a case along the existing DSU timeline. Assuming, charitably, that the losing Member finds out on the day

⁴⁷ EC-Harmones, Appellate Body Report, para 117.

⁴⁸ Dispute Settlement Understanding, Article 6.2.

⁴⁹ Turkey Textiles, Panel Report, 1996

⁵⁰ INDIA AT THE WTO DISPUTE SETTLEMENT SYSTEM, RAVINDRA PRATAP, 71 (2004)

⁵¹ Ibid.

⁵² THE WTO IN THE TWENTY FIRST CENTURY, YASUHEI TANIGUCHI et al., 45 (2007)

⁵³ Dispute Settlement Understanding, Article 3; Id. 44

the Appellate Body decision is released that it has been acting inconsistently with a WTO agreement, it has already spent at least fifteen months in the state of inconsistency, but probably more since it would be unlikely for a member to request consultations on the first day of the existence of inconsistency.⁵⁴

The WTO system for resolving trade disputes between WTO members has been a remarkable success in many respects. However, there is much scope of improvement in the current system. As the time goes on, WTO dispute settlement system will face often more and more 'jurisprudential' issues many of which have often been faced in national legal system and we may see concepts expressed through terms like, standing, justiciability, or ripeness or mootness.⁵⁵ The main challenge to the WTO dispute settlement system is however, not its improvement but the dangerous imbalance between the WTO's highly efficient judicial arm and its far less effective political arm.⁵⁶

⁵⁴ THE WTO AND INTERNATIONAL TRADE LAW/DISPUTE SETTLEMENT, PETROS C. MAVROIDIS & ALAN O. SKYKES, 636 (2005).

⁵⁵ THE WORLD TRADE ORGANIZATION, CONSTITUTION AND JURISPRUDENCE. JOHN H. JACKSON, 97 (1998)

⁵⁶ *Supra* 6, p. no. 316