

INTERNATIONAL ARBITRATION: LAW AND PRACTICE UNDER DISPUTE SETTLEMENT UNDERSTANDING

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ABSTRACT

WTO disputes can be resolved through the arbitration process under Article 25 DSU. An Article 25 DSU arbitration can be initiated at any stage of a dispute, including on appeal from a panel decision. It produces decisions that are binding on the parties and are enforceable in the same way as panel and Appellate Body decisions adopted by the DSB.

The objective of this study is to outline the main features of the dispute settlement mechanism by the arbitration process under DSU.

This research will discuss the WTO dispute settlement system through the arbitration process, outlining its main features and functions. It will analyze the details of compliance with recommendations made through the process. It will then study the drawbacks of the process and will examine the arbitration process through whether the DSU had a successful outcome.

Keywords: Dispute Settlement Understanding, DSU, World Trade Organisation, WTO, GATT, Dispute Settlements Body, DSB.

INTRODUCTION

The World Trade Organisation (WTO) was founded in 1995 and its principle aim was to assist the governments across the world to find solutions to the problems arising from international economic interdependence (Krueger, 1998). The establishment of the WTO was the culmination of a number of institutional failures, like the failure of the International Trade Organisation (ITO) and also the failure of the General Agreement on Tariffs and Trade (GATT). With an institutional reform and wide scope for trade rules, the WTO incorporated new agreements and core principles to strengthen the world trading order.

The WTO was created in 1994 in order to replace the GATT, which was a less structured framework of agreements that regulated international trade since 1948. WTO is deemed to be the most important organisation to govern world trade as its decisions are taken by representatives of its 162 member states whose trade represents 95% of that carried out (Fergusson, 2008). The WTO is held to be the only organisations where the scope of the institution is the regulation and promotion of trade at an international level. Its purpose is to liberalize trade or regulate it and thus sustain global economic growth. Through acting as a forum for negotiation its intention is to provide the mechanism by which governments can settle their disputes and sort out trade problems (Horn et al., 1999).

One of the key purposes for establishing the WTO was the role it would play in dispute settlement. One of the agreements which made up the WTO provision was made for dispute settlement under the heading 'Understanding on rules and procedures governing the settlement of disputes (DSU). Although similar rules preceded these in GATT, the dispute settlement procedures of the DSU are different from its predecessor and not simply a continuation the old rules.

The main change that occurred as a result of DSU was the creation of a Dispute Settlement Body (DSB) and a standing Appellate Body (AB). The DSU comprises of a body representing all members that administers the dispute settlement procedures. As such, these members supervise the negotiation of the settlement of disputes, it appoints the panel to resolve the disputes and it decides whether to accept or reject the AB or panel's decisions. Further, the DSU ensures that rulings are implemented through monitoring and can authorise punitive measures in the event that rules are not complied with. If a dispute does arise, the procedure that is followed is that a request is made by one of the parties for the other party to enter into consultations. If this fails, a number of other dispute settlement procedures, such as mediation, can be initiated. If these should fail, then the aggrieved party can request that a panel is established to look into the matter. Such a panel would investigate the dispute and produce a report detailing recommendations on the case. Once these recommendations have been adopted by the DSB, these become binding. The adoption of the recommendations is automatic unless any of the member states raises any contention on this issue.

RESULT AND DISCUSSION

The WTO Dispute Settlement System

Since its inception, around 400 complaints have been filled through the WTO dispute settlement system. The aggrieved parties often reach a satisfactory solution wherein they resort to mutual consultations in accordance with the WTO Agreements. In case such satisfactory solutions are not achieved through consultation, the panels, the AB and the DSB are supposed to resolve the conflict in an amicable manner. If a Member State feels that its stand is impaired by the measures available, then it is entitled to bring a matter before the Dispute Settlement System (DSU Art 23.1). Further, the DSB makes recommendations only when the benefits are found to be restricted by the adoption of these measures (DSU Art 19.1). The WTO has therefore two roles, primarily legislative and judicial. The former relates to the WTO as an international organisation where its members are signatories, the legislative role is limited to the conduct of trade between the Member States. The judicial role refers to the dispute settlement provisions of non-compliance of the WTO agreements.

Any international agreement in order to be successful needs the consent of its members and its authority and obligations are upheld paving the way for a uniform settlement of the disputes. The previous failures of the international trade order paved the way for the establishment of a practical mechanism to settle the disputes among the member states. The Uruguay Round agreed upon a settlement system that focused on compliance of its members. It stated that a dispute settlement system that looks into all the aspects of trade related disputes is the main aim of WTO. With its focused aim to deal with trade disputed, since its inception the dispute settlement system has become an important feature of the WTO. It has been able to settle disputes effectively and ensure that the negative economic effects of trade conflicts are avoided

and the power to ensure that the disputes are resolved by means of a neutral third party and the decisions are fair and acceptable to all the aggrieved parties.

The aims of the dispute system are laid down in Articles 3(2) and 3(7) of the DSU. According to Article 3(2):

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system, the members recognize that it serves to preserve the rights and obligations of members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”.

Article 3 (7) states:

“To secure the withdrawal of the measures concerned if these are found to be inconsistent with the provision of any covered agreement”.

Dispute settlement under WTO is based on a similar procedure that has been applied since GATT 1947. The DS under the GATT advocated two methods to settle disputes, either the diplomatic channel of negotiations or the adjudication process by judicial settlement or arbitration (Bossche, 2009). The novel aspect of the DSU is the informal consultations that are initiated between the parties and the decisions are held through informal consultations with inputs from independent experts. Further, the DSU introduced another concept of right to appeal in case there is any dissatisfaction from the parties.

Salient Features of the Dispute Settlement System

The DSU system lays down a detailed process to settle disputes that arise between WTO members. Solving the problem between parties through the Consultations or negotiations is the preferable outcome and is the first step to finding the solution to the dispute. The second step is to resort to adjudication. Provisions for these are set down in Art 4 of the DSU. According to Art 4 the period that the members need to be clear at due to the 10 days of member should reply within it and the 30 days for consultations in good faith. In the case that the consultations fail to find a solution within 60 days the complaining party may request the establishment of a panel. Further, the complainant party may request the panel within 60 days if the other party considered that the consultation (DSU Article 4.7).

The WTO dispute settlement system can be automatic because of the way it operates on the basis of reverse, or negative, consensus. We should also note that once the Dispute has been initiated the settlement process can only be halted with the consent of all parties involved (Yerxa & Wilson, 2005). The automatic principle is one feature which has is new to the settlement process and is not a factor inherited from GATT procedures. Instead GATT principles functioned on the basis of a consensus being reached; the procedure did not require all of the parties to agree (Yerxa & Wilson, 2005).

A notable feature of the WTO settlement system is that it is compulsory to follow the decisions reached once they have been adopted (Bossche, 2009). According to Article 23 (1) there is an obligation for the disputing party to follow disputes through the settlement system. In addition to this the parties have accepted the WTO dispute settlement system as holding jurisdiction over the matter. Article 23 (1) DSU states:

“Both ensure the exclusive of the WTO vis-a-vis other international fora and protect the multilateral system from unilateral conduct”.

Another feature of the DSU is that it provides a single fully coherent mechanism by which disputes covered under the agreement can be resolved *“The Appellate Body stated in Guatemala-Cement1 that Article 1.1 of the DSU established an integrated dispute settlement system which applies to all the covered agreements (World Trade Organisation, 1997).”* This extends to dispute settling issues which are particular to several types of covered agreements (Bossche, 2009). Article 1.2 of dispute settlement system states:

“The rules and procedures of this understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this understanding. The rules and procedures of this understanding shall also apply to the consultation and settlement between members...”

The Dispute Settlement Process

The fundamental premise of the system remains the same as it was under GAAT and is based on the idea that all actions must be made in order to preserve the rights of its member states. The function of the WTO is therefore to reach a swift resolution to disputes in instances where its members feel their rights are not being observed (DSU Article 3.2).

According to Article 3 (7) a consultation is the first step in this system. However, if the consultations fail to solve the problem the complaining party is entitled to request a panel to adjudicate on the matter up to 60 days following the unresolved consultation (DSU Article 5.1) In addition to consultation there are other steps that can be taken to resolve the dispute. According to Article 5 (1) conciliation and mediation can be undertaken voluntarily in the event that the parties agree. Both parties have a right to resort to these at any time during the proceedings (DSU Article 5.2). Moreover, conciliation and mediation may be given by the Director-General (DSU Article 5.6).

Pursuant to Article 25 of DSU it is also possible for parties go the Arbitration *“The Arbitration is one of way to solve problems or disputes between. There is a Model law on International Commercial Arbitration was adopted on 2006”*, as an alternative way to solve their problem. However, in order to go to arbitration they must first agree to do so (DSU Article 25). While the panel report details the findings and the recommendations it is only when it is adopted by the DSB that it becomes binding. This point is stipulated in article 11 of the DSU that the panel can only assist the DSB in making a recommendation. The report must be adopted within the following 60 days but not earlier than 20 days, unless a notification has been sought by the party to the dispute whereby the DSB has been made aware of the decision to appeal or in a circumstance where the DSB by consensus decided not to adopt the report.

The recommendations made by the panel cannot be adopted in the event that one of the parties decides to appeal through the AB. In that case, the DSB will only adopt the recommendations of the panel after the appeal has finished (DSU Article 16.4). If neither party makes an appeal the DSB is compelled to adopt the recommendation is made in the report unless a consensus is reached within the DSB to refuse to do so. It is not common for disputes to reach the panel stage. It is held to be something of a last resort and is only followed in the event that neither party can find an acceptable resolution (World Trade Organisation, 1999). Although it is rarely used, the right to appeal against a panel’s decision is available to both parties. However,

the appeal can only be heard on a point of law such as an interpretation they evidence should not be allowed to be re-examined neither should anything new be introduced to the case.

The body to hear the Appeals is known as the Appellate Body (AB), reappointed every four years this body comprises of seven members who are said to be representative of the WTO membership. The AB acts as the second state in the DSU where in the appeal is heard by the members having authority in the field of international trade having expertise in international trade. Further, such members should be free from any association to the governments of the member states.

Issue of Compliance and Implementation

The obligation to comply with the ruling and recommendation of the dispute settlement body is implied in the wording of lots of DSU articles. Emphasising the implementation and rather declining recourse to alternatives as permanent measure.

Article 19 (1) stated that:

“Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendation, the panel or Appellate body may suggest ways in which the member concerned could implement the recommendations (DSU Article 21)”

The Article distinguishes between recommendations and suggestions. As already stated above, a recommendation must be issued in case a finding of inconsistency has been pronounced (Matsushita et al., 2006) Compliance with the recommendations is necessary so that effectiveness of the resolution of disputes can be established. Article 21 (1) states that:

“Prompt compliance with recommendation or ruling of DSB is essential in order to ensure effective resolution of disputes to the benefit of all members”

A notable feature of the dispute system is the complex system of mechanisms by which the DSB ensures that its recommendations are implemented (Fukunaga, 2006). A panel is available by which a complainant can raise issue if they feel that the recommendations are not being implemented correctly (DSU Article 21.5). The remedies available to the complainant are that compensation can be sought from the offending party or authorisation can be given by the DSB to suspend the obligations the complainant may have to the other party (DSU Article 22).

Even though we must emphasise that the primary purpose of the WTO dispute settlement system is to settle disputes and not to ensure compliance we must note that members are permitted not to implement the recommendations made or that the parties can follow another course of action to that recommended Fukunaga, mentioned;

“The DSB recommendations also have a legal effect in the domestic sphere, the DSB recommendations need to be implemented ultimately in the domestic legal process”.

The recommendations once accepted by the board can thus be considered to be binding (Jackson, 1997). However there remains a good deal of scepticism about the binding nature of the recommendations (Bello, 1996).

Article 21(6) stipulates that concerns over implementation of recommendations can be brought to attention at the DSB any point following their adoption. This issue is then set on the agenda of the DSB and remains so until it is resolved. Prior to each meeting of the DSB the member involved must provide a status report detailing the progress on the implementation of the recommendations (DSU Article 21.6).

With reference to developing countries it has been argued that the DSB should improve surveillance of implementation as a number of specific problems have been identified with cases that involve these (Petersmann, 2003). The Article 21 (1) emphasised that the party can compensate and the suspend concessions made as a temporary measure when recommendations and rulings are not implemented within a reasonable time. Nevertheless, these are not preferable to the proper implementation of the recommendations. Such measures are implemented so as to speed up implementation of the recommendations, relying on punitive measure such as these to settle disputes can result in being counterproductive for the complainant (DSU Article 21 (1) and Article 22 (8)).

Drawbacks of the Dispute Settlement System

The 10th Ministerial Conference on WTO marked the completion of two decades of the multilateral institutions. There have been many issues that plague the international organisation. Post-Nairobi there have been few substantive programmes that could get all the members of this international order and the Doha Development Agenda, which was the lifeline of WTO, not been able to meet the objective of just and equitable trading system. All this together with the drawbacks of the DS System, it can be said that there is definitely a concern in engaging the 162 members to benefit from international trade.

The Role of Developing Countries and DSU

It is of the utmost importance that developing countries gain access to the world market if they are to reach the economic standards enjoyed in developed countries. The WTO plays a very important role in negotiating access for these countries this is despite pressure from already developed countries with protectionist ideas. Dispute settlement is a crucial aspect of the trade agreement system in order for these countries to compete on an equal basis with their stronger rivals. In the past many of the developing member states have used this dispute system to great effect (Busch & Reinhardt, 2004). The special situations that arise with developing countries is recognised by the DSU and additional procedures and legal assistance is available to them (Available on the WTO website). These are available throughout the dispute settlement and implementation process.

Article 21 (2) states that:

“Particular attention should be paid to matters affecting the interest of developing countries member with respect to measures which have been subject to dispute settlement”

As it can be seen from this Article that in the dispute settlements special consideration should be given to any matters that might have an impact on developing countries. Article 21 (7)

emphasised that in the case of the matter raised between developing country members, the DSB shall pay attention to the future consequences arising from any recommendation made.

Article 21 (8) states that:

“If the case is one brought by a developing country member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country members concerned”.

It should be noted however that these provisions are not mandatory and should be regarded more as recommendation for consideration that should be undertaken by the examining panel (Pham, 2004).

Losses Accrued While a Complaint is Under Consideration

There is a difficulty in that when a complaint is under consideration, the party making the complaint do not have recourse to provisional measures that protect its interests in the interim period. It is obliged for the process to be carried out in full and a dispute settlement carried out in its entirety can take a considerable amount of time. The disadvantage then of engaging in the process equates to the economic damage done to the complainant in the interim. The preceding point is important as there is no compensatory system in place for the successful party to recoup damages for either legal expense or economic loss incurred. This would disadvantage smaller and less wealthy organisations as the legal expenses render them incapable of retaliation should the losing party fail to adhere to its obligations.

Appeals Body Crisis

The Appellate Body (AB) ideally consists of seven members including the Chairman. But on 10th December 2019, this body went into crisis as two out of its three remaining members' four-year terms came to an end (Rathore & Bajpai, 2020). The scholars dive into this crisis and try to anatomize what led to such a deadlock, and what international trade factors have influenced what is happening now in the dispute settlement mechanism. Also, how much Donald Trump the previous President of the United States (2016-2020), is responsible for this crisis shall be addressed (Rathore & Bajpai, 2020).

There is a deeper crisis in the looms within WTO, in addition, the DSU.WTO members will lose their right to appeal against the decisions of the WTO panels if this crisis is not resolved immediately and this will endanger the future of the organization (Rathore & Bajpai, 2020). If the US keeps blocking appointments of members to the Appellate Body, then this would result in member countries of WTO opting for alternative means. This includes adopting panel reports and appointing another body to resolve their disputes for them. Members can opt not to appeal the decision at all or they might seek to resolve the issue by adopting panel reports (Rathore & Bajpai, 2020).

With this crisis left unresolved, the US has already moved further away from multilateral trade to negotiating bilateral trade deals with some of its neighbours and trading partners like Mexico, Canada, and China. Other countries have also started to give more attention to regional or multiregional trading blocs like OBOR, SCO, ASEAN, and CPTPP. This does not bode well

for the future of the WTO as it will sink and with it the dream of a free and fair global multilateral trading system (Rathore & Bajpai, 2020).

The media announced, Joe Biden became the president of US 2020. Joe promises to build a new American economy; I think the crisis of the DSB will going to end (Alsharqawi & Younes, 2020).

Compensation and Retaliation

According to Art 22 in case of a failure to implement the recommendations within the stipulated time period, the DSU offers temporary remedies like compensation and suspension of WTO obligations. These temporary remedies will be in operation until the party applies in full the earlier recommendations. Retaliation under WTO accords two kinds of punitive actions; one is the increase of customs duties and the imposition of quantitative restriction. The second is the use of prohibitory measures against the erring party and such an action has to be in acceptance of the rules of international law.

However, if the parties have not agreed upon a reasonable amount as compensation, the complainant member can approach the DSB to impose sanctions on the other member. Such sanctions have been seen as discriminatory as it gives power only to the complaining bodies. Sanctions take the form of suspension of concessions and reduction of import quota (Bossche, 2009). The adherents of free trade see this as a block on the principle of free trade. They argue that compensation and retaliation would amount to the adverse reasons for the establishment of the WTO.

RESULT AND CONCLUSION

The WTO has evolved into a prominent international that sought to achieve the objective of fair trade in the world. In an era of rapid industrialization and globalization, the WTO has an important role to play in the international arena. One of the key features of the WTO and its functioning was to give substantial space to the members of the developing countries so that they would be able to enjoy the benefits of flexible trading and the industries are prevented from facing heavy competition. In this regards it should be noted that there has been a negative approach to the DS system from the perspectives of the developing countries. It has been noted that the least developed countries are absent and have made few appearances as any party in the dispute settlement process (Bown & Hoekman, 2005). One of the reasons for this absence could be attributed to the fact that least developed countries are less likely to be involved in trade and export raw commodities which being unprocessed are less likely to create the problems that lead to disputes. Second reason attributed for the lack of presence of the developing countries is the political cost factor. For e.g., Bangladesh was the first least developing country to initiate a dispute in the WTO (Europe Commission, 2004). Where it sought to initiate a dispute settlement proceeding against India for the anti-dumping measure against import of batteries from Bangladesh.

Another aspect to be considered is the cost measures of engaging in dispute is sometime very costly that it may dissuade members from following this route. Further, the timer period required to get before the Appellate Body is also quite high and cumbersome. There is also a general notion that in the event of a developing country seeing any disputes against the developed countries, it has been found that the developing countries are reluctant the developed

country would be able to put more funding into its legal effort. This then brings in a negative aspect of the DS Body if all the members countries cannot enter the process. This can result in damage to the aims and objectives of the DS Body. A further problem is that in a situation where countries that do not benefit from the system are unlikely to allow others to benefit which then results in a higher instance of non-compliance. There have been suggestions to impose heavy fines rather than simply imposing more stringent trading restrictions. Further, it should be noted that if developing countries do not receive the full benefit they are entitled to as signatories to the WTO then the entire agreement may become undermined. In the absence of fairness with the DS Body will result the failure of the WTO as an international trade organisation.

However, in spite of all the drawbacks it can be said that though there are many failures and drawbacks for the current system, the DS Body have been able to carry out its objectives rather in a positive manner. The system needs to be strengthened in order so that the imminent danger of being taken over by undemocratic and unjust powerful interests. In this regard, the WTO should promote negotiations with respect to all aspects to trade.

While theoretically article 25 arbitration seems to be a viable alternative past practice and wealth of experience and knowledge developed under WTO ordinary dispute settlement mechanism would prevent utilization of such an alternative. However, WTO members should not shy away from utilizing article 25 arbitration. The dispute settlement mechanism as a whole including article 25 arbitration is not only about disputes; it is an evolving body of international trade law principles.

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