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World Trade Organisation's Dispute Settlement - An Indian Perspective

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In the years of 1995, The World Trade Organization's (WTO) Dispute Settlement System (DSS), was established and used to resolve trade-related issues between WTO member nations. Any solution to the current issue is likely to necessitate the negotiation of far-reaching institutional and structural adjustments among WTO members in this environment; a review of India's experience with the DSS is both current and useful. This article discusses the many procedural and substantive challenges that member states have faced throughout the years regarding India's disputes before the DSS. It examines reform ideas that are critical from India's standpoint as a developing country.

Keywords: *wto, dispute settlement, legal controversy, us shrimp case.*

INTRODUCTION

The only international organisation that deals with international trade regulations are the World Trade Organization (WTO). At its core are the WTO accords, which were drafted, signed by the majority of trade countries worldwide, and approved by their parliaments. Making trade as easy, predictable, and unrestricted as possible is the aim. It serves as a venue for negotiating trade agreements, resolves trade disagreements among its members, and aids developing nations' needs. The WTO's dispute settlement mechanism has been established as one of the most reliable and enforceable regimes among the existing international tribunals and bodies.

The implementation of the Dispute Settlement Understanding (DSU), which altered the earlier GATT-based structure, made several improvements possible, which form the foundation of its legality.

The WTO's meaningful to the multilateral trade system's main tenet, dispute settlement, is the stability of the world economy. If there was no method to settle disputes, the rules-based system would be less effective since they could not be followed. The WTO approach places a strong focus on the rule of law and raises the stability and predictability of the trading system. The system is built on well-defined rules and has deadlines for resolving cases. First decisions are taken by a panel and approved (or disapproved) by the entire membership of the WTO. There is a chance for legal appeals. Around 350 decisions have been made by the WTO's International Dispute Settlement mechanism since 1995, and 601 issues have been presented before it.[1] Agreements that have been broken are at the basis of WTO disputes. Members of the WTO have committed to using the multilateral system to resolve disputes rather than taking unilateral action if they believe other members are violating trade laws. That requires following established protocols and respecting decisions.

The General Agreement on Tariffs and Trade (GATT) and the World Trade Organization both have India as a founding member (WTO), and it follows WTO standards carefully while conducting international trade. When most poor countries were hesitant to approach the Dispute Settlement Body (DSB) to determine their rights due to the high costs and lack of technical and associated expertise, India was an early adopter of the DSU at both the GATT and the WTO. In this paper, an attempt has been made to discuss the evolution of the modern dispute settlement method. Its mechanism and it's Indian prescriptive.

GATT to WTO:

The International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) are two financial institutions that were founded as a result of the Bretton

[1] World Trade Organisation <https://www.wto.org/> accessed 09 December 2022

Woods Conference, which took place in July 1944. (More commonly known as the World Bank).[2] Less than a month after the GATT was established, on November 21, 1947, the Havana Conference on the International Trade Organization (ITO) officially began. The ITO was founded by the Charter, which also set the fundamental rules for global trade and other economic matters. It was suggested that the ITO would be designated as a specialised UN agency. The World Trade Organization claims the draught ITO Charter was described as "ambitious" on the website. It went beyond international trade rules to include Employment rules, commodities agreements, and restrictive business practices are just a few examples of International trade and investment, as well as services. However, Bretton Woods' attempt to establish a similar institution to govern international trade failed. Nonetheless, a provisional accord in the form of the GATT emerged, which lasted from 1947 to 1994 before being replaced by the modern trade organisation, the World Trade Organisation (WTO).

EVOLUTION OF THE DISPUTE SETTLEMENT MECHANISM: GATT TO WTO

The GATT 1947's initial version of Article XXIII described the most fundamental procedures for resolving disputes. If a contracting party (the term for the signatories to GATT 1947) considered that any of the GATT 1947 provisions were being broken, they could use this procedure. The agreement's advantage was being revoked or jeopardised, and the achievement of any goal was being jeopardised. [3]The agreement's goal was being hampered as a result of –

- Another contractual party acting in violation of its GATT commitments, or
- Another contractual party's doing any action, or whether in a dispute with the first GATT provisions, or
- The presence of any other circumstance.

Uniquely, Article XXIII permits nullification and impairment even in the absence of a GATT rule violation. As a result, there is a possibility of non-violation. As differences arose in the early years, the flesh was added to the skeleton that had been given, which is referred to as

[2] Ellen Terrell, *Bretton Woods Conference & the Birth of the IMF and World Bank* (February 2021)
[3] William J Davey, 'Dispute Settlement in GATT' (1987) 11 Fordham Int Law Journal

nullification or impairment. For resolving conflicts, Article XXIII and more complex processes were developed.1947 was a pivotal year in the GATT's history. [4]Working groups focused on mediation and compromise rather than adjudication. The conclusions and suggestions made by the working four parties were the outcomes of a negotiation process, hence they occasionally fell short of the standards for objectivity and impartiality. The need to establish a procedure that was quasi-judicial in nature led to the adoption of the panel system. To hear all complaints submitted to it by the Contracting Parties, a Complaints Panel was established in 1952. The Contracting Parties began appointing ad hoc committees to address specific issues after discontinuing the appointment of standing panels for each Session in 1955.[5]

The first significant move toward more judicial dispute resolution procedures in GATT 1947 was the change from working parties to panels. The customary practice of dispute settlement evolved gradually until 1979, except for the adoption in April 1966 of special procedures for situations in which a developing country brings a dispute against a developed country, without any explicit decision being made by the Contracting Parties (GATT 1966). Some of the insights generated in these procedures foreshadowed the improvements that would be contained in the WTO's DSU some three decades later.[6]

The panel was given a strict deadline of sixty days to produce its findings, and the defendant contracting party was given a deadline of thirty days to report compliance (ninety days). In the middle of the 1960s, there was a groundswell of support for international action to help poor nations with trade and development. This led to the founding of the special process. The UN Conference on Trade and Development (UNCTAD) and the addition of Part IV to GATT 1947 were both the results of the same phase.

The initiative to codify the conventional practice of dispute settlement during the Tokyo Round discussions was the next milestone. Despite the progressive development in GATT's dispute resolution procedures over time and the definition of customary practice in 1979, it had severe

[4] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organisation and Dispute Settlement* (Kluwer Law International Ltd London 1997) 72-82
[5] *Ibid*
[6] Pao-Li Chang, *The Evolution and Utilization of the Gatt/WTO Dispute Settlement Mechanism* (2002)

flaws, primarily due to the GATT's practice of consensus decision-making. As a result, each contractual party has the potential to oppose any important decisions about complaints, such as the creation or composition of a panel, approval of a panel report, or authorization of retaliatory suspension of concessions.[7]

In the DSU, all of these flaws were rectified. In December 1988, The Uruguay Round's mid-term review, held in Montreal, kicked off the reform process by agreeing to set time restrictions for the consultation stage and to create panels automatically for the dispute that remained unresolved within these time limits. A Decision of the Contracting Parties (GATT 1989) initially put these improvements into place temporarily, but they were later made permanent by being incorporated into the DSU.[8]

DISPUTE SETTLEMENT IN THE WTO AND INDIA

Since 1995, India has filed 20 Dispute Settlement complaints, 15 of which are against developed country members. The EC-Anti-Dumping Unbleached Cotton Fabric (DS140), EC-Restrictions on Rice Imports (DS140), and EU-Seizure of Generic Drugs (DS 408) have all been in discussion for more than a year (DS 134). Three cases—US-Wool Coats (DS 32), Poland-Automobiles (DS 313), and EC-Anti-Dumping Steel Products (DS 313)—were resolved amicably (DS 19). India won seven out of the eight cases but lost one, United States-Rules of Origin (DS243). India has an 88% success rate.

It can be argued that in every case when India got legal violation decisions in its favour, the rulings and recommendations were fully executed. In the US-Shrimp Turtle case, which was brought by India, Malaysia, Pakistan, and Thailand, the US import ban on shrimp and shrimp-related products from countries that don't use nets with turtle excluder mechanisms was at issue. The Appellate Body determined that the US policy met the requirements for consideration

[7] Donald M McRae, 'General Agreement on Tariff and Trade' (*UN*, 2021) <*https://legal.un.org/avl/ha/gatt/gatt.html#:~:text=Part%20IV%20of%20GATT%201947,Thus%2C%20they%20sought%20preferential%20arrangements*> accessed 15 December 2022

[8] *Ibid*

as an exemption under Article XX(g) of GATT 1994 because endangered animal species may be regarded as exhaustible natural resources.

In the US-Shrimp Turtle case, which was brought by India, Malaysia, Pakistan, and Thailand, the US import ban on shrimp and shrimp-related products from countries that don't use nets with turtle excluder mechanisms was at issue. The Appellate Body determined that the US policy met the requirements for consideration as an exemption under Article XX(g) of GATT 1994 because endangered animal species may be regarded as exhaustible natural resources.[9] Only one case involving the United States' rules of origin for managing the quota system it upholds under the WTO Agreement on Textiles and Clothing was lost by India. In its complaint, India claimed that the US's convoluted rules of origin for textile and apparel products—where the standards for determining origin vary between related goods and manufacturing processes—served trade policy objectives and went against the letter and spirit of Articles 2(b) and (c) of the WTO Agreement on Rules of Origin.[10]

The panel determined that India had failed to establish that the pertinent US legal provisions conflicted with the requirements of Article of the WTO Agreement. India did not appeal the panel's decision. While India has an 88 percent success rate in achieving a favourable judicial judgement in disputes and a 100 percent record of ensuring compliance with these rulings in terms of numbers, the substantive results in some of these instances have been less than satisfying.

ROLE OF PANEL AND APPELLANT BODY IN DISPUTE SETTLEMENT MECHANISM

The DSB convenes a panel to hear and adjudicate a dispute at the request of a complaining party. The DSB does this through a mechanism known as reverse consensus. As a result, under the new WTO DSU regime, the formation of a panel is "automatic." Three people who are not citizens of the Members involved in the dispute typically make up panels. Trade diplomats or government officials are frequently among these individuals. Panelists include academics and

[9] Gregory C Shaffer & Ricardo Melendez Ortiz, *Dispute Settlement at The WTO* (Cambridge University Press 2010)
[10] Biswajit Dhar & Abhik Majumdar, 'Learning from the India –EC GSP dispute: the issues and the Process' in regory C. Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at The WTO* (CUP 2010)

practising lawyers regularly. The panel's terms of reference are set by the request for the formation of a panel, which identifies the measure in question as well as the allegedly violated clauses of the covered agreements. Panels are responsible for making an impartial assessment of the situation, it takes into account both an objective evaluation of the relevant facts and the implementation and observance of the relevant covered agreements. Reports of dispute resolution panels could be challenged before the Appellate Body.[11]

The Appellate Body is a permanent, standing international body, unlike panels. It consists of seven individuals who are referred to as Members of the Appellate Body. Members of the Appellate Body are appointed by the DSB for four-year periods that are renewable. The only party with standing to file an appeal is the complaining or responding party. Appeals are only permitted about legal issues covered by the panel's report or its legal interpretations. The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel that were appealed. The role of these is as follows:

Providing access to adjudication to WTO members: The World Trade Organization's (WTO) Dispute Settlement Framework is a government-to-government system for resolving disputes about WTO Members' rights and duties. As a result, only governments have access to the WTO to file and adjudicate their disputes. Individual rights, whose claims must be endorsed by their respective governments to get the proper locus to present their case before the WTO, are not covered by the framework.[12] Standing becomes important when it comes to the rights of third parties, NGOs, and other intergovernmental entities, which will be explored in the section below.

Exercising Compulsory Jurisdiction: The WTO Dispute Settlement System has mandatory jurisdiction. According to Article 23.1 of the DSU, a complaining Member shall report any dispute arising under the covered agreements to the WTO dispute settlement system. It is

[11] David Palmeter & Ors, *Dispute Settlement in the World Trade Organisation Practice and Procedure* (3rd edn, Cambridge University Press 2022)
[12] World Trade Organisation <https://www.wto.org/> accessed 10 December 2022

important to note that the WTO Dispute Settlement System only has contentious jurisdiction; it lacks any advisory jurisdiction.

Applying the relevant applicable law: Although the DSU limits Panels and AB's jurisdiction, there is no such restriction on applicable legislation. Panels and AB are directed by Article 3.2 of the DSU to explain the existing provisions of those agreements "by customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".[13] As a result, it appears that the use of a comprehensive body of public international law and its application before the WTO DSB are at odds. When, conflicts arise involving 'other branches of public international law,' such as a breach of the GATT commitment to comply with Regional Trade Agreement norms or other international health and environmental standards, the problem is exacerbated.

The *three predominant* views in light of this academic controversy include:

- Because the universe of WTO-related international law was not exhausted. In April 1994, broad public international law continues to be relevant. This viewpoint is supported by cases such as the **US-Gasoline decision**, which affirms that the WTO does not exist in a clinical vacuum.[14]
- Broad conflicts involving public international law may not be adjudicated from the funnel of applicable law due to the WTO's restrictive jurisdiction clause.
- Others, having a more moderate stance, believe that in the event of a dispute between Public International law and WTO law, the latter should prevail. The argument is based on a combined reading of the DSU's Articles 3.2 and 19.2. Another public international law has also been pled before the WTO as a viable defence for GATT violations, such as in the **Argentina footwear (EC) case**, where the violation stemmed from compliance with

[13] Appellate Body Report, United States, 'Standards for Reformulated and Conventional Gasoline' WT/DS2/AB/R, Adopted 20 May 1996, DSR 1996:I, 3
[14] *Ibid*

a parallel obligation under an international treaty, i.e. MERCOSUR.[15] According to scholars, other harmonisation rules, such as the prevalence of a specialised principle or one that applies later in time, may also be effective in resolving such disputes.

STANDARD OF REVIEW

Article 11 of the DSU mentions the standard of review clause. The clause goes like this: "Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[16] The Panels and the AB are frequently asked to assess a domestic government probe. For instance, An investigation is necessary before the implementation of safeguards, anti-dumping, countervailing tariffs, and SPS measures. The review of the bill is separated into two phases when a matter like this is brought before a panel. The first is the type of investigation conducted by domestic authorities. In this situation, it's important to ask: Did they take into account the relevant evidence? Did they adhere to the correct procedures? The second stage of the examination deals with the substantive issue of whether the legislation is justified on its merits.[17]

As a result, the standard of review remains a contentious subject. The question is whether the WTO's adjudicating authorities should perform a de-novo evaluation of the issue or give regard to the states' policy rationales.

"EC-Hormones in this regard clarified that the standard of review is neither de novo nor total deference but that of objective assessment of fact."[18]

Furthermore, specialised WTO Agreements such as the Anti-Dumping Agreement include standard review sections. Panels and AB are usually not required to adjudicate matters such as

[15] Appellant Body Report, Argentina, 'Safeguard Measures on Imports of footwear' WT/DS121/AB/R, Adopted 12 January 2000, DSR 2000:I, 515
[16] Dispute Settlement Understanding, art 11
[17] Alexis Goh, 'The WTO Dispute Settlement System' (2001) Ausml Int'l Lj 208, 230
[18] Appellate Body Report, 'EC Measures Concerning Meat and Meat Products (Hormones)' WT/DS26/AB/R,WT/DS48/AB/R, ADOPTED 13 FEBRUARY 1998, DSR 1998:I, 135

whether dumping, harm, or causation occurred under the unique standard of review. Rather, their job is limited to ensuring that the relevant authorities have complied with the WTO agreement's international commitments. Panels are not required to engage in new and independent fact discovery under such articles of specialised WTO agreements, but may review the value/weight attributed to those facts and whether it was done in an unbiased and objective manner.

According to academic research, the conflict between neutrality and expertise is particularly obvious in situations involving significant judgement by national authorities. How should a panel or the AB evaluate these options? Domestic authorities are much more equipped to evaluate them since domestic conditions are seen as being significant.[19] The same is true for choosing a method and making inferences; domestic authorities are more likely to have these skills than adjudicating bodies since they have an advantage in terms of time, money, and contextual knowledge.[20] Due to the complex scientific issues involved in the SPS Agreement (Sanitary and Phytosanitary Measures), there is a great deal of scepticism when committees or ABs do a de novo assessment.

DISPUTES RAISED AGAINST INDIA

India has been the subject of 18 disputes brought by developed countries. Six of them are still undergoing consultation, while the authority to form a panel in one has expired. Five of the remaining 11 cases were settled through negotiation or to everyone's satisfaction. India was successful in one instance but failed in the other five. The Indian Patents Act of 1970, which had allowed the nation's pharmaceutical industry to flourish for the previous 25 years, had to undergo significant adjustments as a result of the TRIPS Agreement. It was one of the nations that utilised the 10-year transition time for patent disclosure provided to emerging nations.[21]

The United States, Australia, Canada, New Zealand, Switzerland, and the European Commission lodged complaints against India in 1997, claiming that the quantitative constraints

[19] John A, 'Standard of Review in WTO' (2004) 7 Int'l Econ Law J
[20] *Ibid*
[21] Biswajit Dhar & Abhik Majumdar (n 10)

imposed for balance-of-payments considerations did not correspond to the number of monetary reserves. Justify these limits by GATT 1994 Article XVIII B. Another challenging aspect was that India has kept its quantitative import limitations in place for a long time. These limits had to be maintained for another four decades for it to be possible sector must adapt to new competition conditions brought on by the dramatic drop in oil prices Tariffs are being reduced.

The USA pursued the issue and eventually won a judgement in its favour. India arranged with five of the complainants to take away the limitations by March 2003. By April 1, 2001, India had to take off quantitative limits imposed for balance-of-payments considerations. The final set of complaints from the US and the EU focused on India's initiative to domesticate the production of vehicles through local content and export balancing standards. This was a significant part of India's program to support the growth of domestic industries. India must lift all trade and indigenization barriers in response to the AB verdict.

The five instances in which India obtained unfavourable rulings were all challenging, and each one prompted the government to make significant policy adjustments. Despite this, India has announced implementation in all of these cases with no further problems. The complainants didn't require any assistance to file a complaint with the Department of Justice or to seek permission to retaliate. India demonstrated a stronger commitment to multilateral trading. It has a different system than its developed-country counterparts.

WTO rules against India’s export subsidies and upholds US claims The US had taken India to the WTO's dispute resolution process on March 14, 2018, over New Delhi's export incentive programs. These schemes were allegedly damaging American businesses, according to the US. The three members of the dispute resolution panel decided that many terms of the WTO's subsidies and countervailing measures (SCM) agreement were broken by India's export promotion programs. Article 3.1 of the WTO's SCM agreement states that developing nations with a gross national income of $1,000 or less are not permitted to offer export subsidies. India has a per capita income of more than $2,000, in contrast. Not all of this is against India. India found some solace in the panel's rejection of US arguments that the SCM agreement's main

provisions are violated by export-oriented schemes' exemption from central excise duty on domestically bought items.

CONCLUSION

In defending industrialised countries' rights against emerging nations, the DSU has performed better. A mutual settlement was reached in 23 of the 64 cases brought by industrialised nations against developing nations, while the complainants won in 39 of the remaining 41, for a 95 percent success rate. In 35 of them, the implementation processes have been finished, and all of them have implemented the decisions and recommendations. In reality, 29 circumstances resulted in rapid implementation alerts, with only two requiring compliance procedures.

India prevailed in seven of the eight contentious cases in which industrialised nations were the target of its complaints, and the conclusions and recommendations in each case were all fully or partially implemented. The fact that the AB's decisions in the cases rendered India's success more of a form than a substance has limited the satisfaction with the conclusions in two of the seven instances (US-Shrimps Turtle and EC-Tariff Preferences). Of the six challenged objections made by wealthy nations, India lost five of them. Each of the 23 occurrences resulted in important policy adjustments on the side of the government, and none of them was straightforward. India has nevertheless announced that all of these cases will be implemented without further issues.

India showed a greater dedication to the multilateral trading system than its peers in wealthy nations. Special and unequal treatment in DSU has shown to be of little help to poor countries. The biggest challenge facing poor countries in safeguarding and defending their rights in WTO disputes is a lack of human and financial resources. The WTO secretariat's capacity to provide such support has been constrained by the general need that it maintains impartiality toward Members who are involved in legal disputes.