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FUNCTIONALITY OF THE DISPUTE SETTLEMENT SYSTEM: A WORLD TRADE ORGANIZATION'S (WTO) APPROACH

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ABSTRACT: *There is no doubt that the continued trade interaction between States is bound to give rise to disputes. In this respect the provisions of Article 3.2 of the Understanding on Rules and Procedures Governing Settlement of Disputes provides that the dispute settlement system of the [World Trade Organization] is a central element in providing security and predictability of the multilateral trading system as presented in the Results of the Uruguay Round of Multilateral trade Negotiations in 1999. This study is a probe into the functionality of the Dispute Settlement System. The paper describes the WTO dispute settlement system highlighting its objectives and its effectiveness. The study further looks into the bodies involved during the processes identifying their procedural roles. The implementation process and the Surveillance Stage is further examined to establish the System's effectiveness. The author deems this paper relevant as it gives insight of how the Dispute Settlement System works.*

KEYWORDS: Dispute Settlement, World Trade Organization, Complainant, violation.

INTRODUCTION

The Dispute Settlement Understanding (DSU) emphasises that the utilization of the system by members 'should not be intended or considered a contentious act' and calls for the participation in good faith in the process (DSU, 1999, Article 2 (10)). This ensures that members do not engage in diplomatic conflicts that may ordinarily call for the use of measures and counter-measures where trade disputes arise outside the ambit of the WTO (Cezary, 2002). It has been argued by some scholars that the effective compliance with its provisions is a matter of treaty obligation (Jackson,1995).

The WTO dispute system has been extensively termed as 'the central pillar to the multilateral trading system' (Jackson,1995). It is thus proper to assume that the dispute system is the heart of the multilateral trade system (Lazonaszka, 2008).

LITERATURE UNDERPINNING

The WTO Dispute Settlement Process (DSP)

The DSP is made up of three major bodies namely the Dispute Settlement Body (DSB), the Dispute Panel (DP) and the Appellate Body (AB) (DSU, 1999, Article 2 (1)). The DSB is mandated 'to establish Panels, adopt Panel and Appellate Body Reports, maintaining surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the Covered Agreements (DSU, 1999, Article 2 (1)).

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Objectives

It ensures that the rights and obligations of States are preserved in accordance with the Covered Agreements (CAs) (DSU, 1999, Article 3(2)). Its purpose is also to clarify the provisions of the various CAs in accordance with customary rules of interpretation of public international law (DSU, 1999, Article 3(2)).

Its functions are similar to those served by municipal judicial system that includes giving effect to the legal rights and duties donated to parties by the law and the interpretation of such laws (Schoenbaum, 1998). It is paramount to note that the recommendations and rulings of the DSB are not intended to add or in any way diminish the rights and obligations embodied in the Covered Agreements (Schoenbaum, 1998, p. 14). It is now trite knowledge that any institution serving the purpose of a judicial system does not in any way create rights and duties but merely mandated to give effect to the rights and duties pronounced within the laws (DSU, Article 3 (92)). This clearly eliminates the strict application of the precedent system within the WTO dispute system (DSU, 1999, Article 3 (92)).

Subject Matter

The DSP is intended to cover situations where a State considers that a benefit accruing to it directly or indirectly under the CAs is being impaired by measures taken by another State. There is a rebuttable presumption that an infringement of an obligation by a State causes an adverse effect on the economies of other Contracting Members (Booysen, 2002 & DSU, 1999, Article 3 (92)).

It is paramount to note that the presumption does not in any way shift the burden of proof bestowed upon the Complainant to substantiate their claims. This issue was given prominence by the AB in the *US-Measures affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R,1997) where the AB confirmed that a party who raises a claim is bestowed with the onus of proof in support of that claim to effectively sustain the presumption of the truth of that claim. The burden of proof will subsequently shift to the other party to disprove the same.

The effectiveness of the dispute system can only be enhanced by systems that strive for the prompt resolution of disputes (DSU, Article 3 (3)). The recommendations and rulings of the DSB must be aimed at achieving a satisfactory solution to such disputes (DSU, Article 3 (4)). It is imperative to strike a proper legal balance between the rights and obligations of the parties to the conflict without impairing the benefits contained in the Covered Agreements (Booysen, 2002, p.832).

The aim of reaching a positive solution to a dispute must be in accordance with the various Covered Agrements (DSU, 1999, Article 3 (7)). This means that parties cannot agree to a solution that would be inconsistent with the provisions of the Covered Agreements (Mavroidis & Van Sicle, 1997).

Consultation Stage

This process has been the subject of extensive debate especially in regard to its justification and its effectiveness. Consultation is an effective instrument designed to elicit some reaction from the Respondent Country and the absence of an effective response entitles the Complainant to proceed to put in a request for the establishment of a Panel (Macrory, Appleton & Plummer,

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2005). A request for consultations amounts to a clear indication of the intention of the Complainant to publicly challenge the Respondent with the potential risk of attracting the attention of other stake holders including NGOs, other members and private companies.

The Procedures place the parties in control by providing for an informal setting with a view of achieving amicable settlement rather than the same merely being a preliminary procedure immediately before the Panel Proceedings (PPs) (Macrory, Appleton & Plummer, 2005). This is confirmed by the fact that the DSU does not require the involvement by the DSB or other WTO bodies during consultations. However, the participation of third parties through 'good offices', mediation or conciliation, is only possible through the consent of the principal parties to the dispute (DSU, 1999, Article 5(1).

The consultations are meant to be confidential hence there are no formal records of the process (Macrory, Appleton & Plummer, 2005). This fact is further exemplified by the Panel constant decisions declining to consider the adequacy of consultations and recognizing that what happens during consultations is a matter of diplomacy, and is thus not subject to Panel review (Macrory, Appleton & Plummer, 2005).

The Consultation Process(CP) is designed to promote amicable settlement with a view of avoiding further litigation through the Panel process (Macrory, Appleton & Plummer, 2005). This is clear from the provisions of the DSU where it is provided that:

> In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this understanding, members should attempt to obtain satisfactory adjustment of the matter (DSU, 1999, Article 4 (5)).

The CP was given prominence by the Appellate Body in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup from the United States* (WT/DS132/AB/RW, 2001) Where it was stated that:

> Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, *reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU.* Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and limit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties as well as to third parties and to the dispute settlement system as a whole.

The parties are motivated to fully participate in the CP in good faith since the success of the process eliminates the possibility of a costly and prolonged litigation process. The possibility of appeals against the decisions of the Panel further raises the risks of additional costs that can easily burden the delicate economies of Developing Countries.

The process further preserves the privacy of the issues involved whereas in the Panel stage the matters raised are made public. Other parties may prefer to settle with a view of avoiding any condemning decision from the Panel that may form a basis of precedent that may be a basis of similar claims from other Contracting members (Contracting Members) (Macrory, n.d., p. 1204-1205). On the other hand parties may be motivated to consult for purposes of preventing rulings on specific legal issues that they may prefer to remain as 'uncharted territory'(Macrory, n.d., p. 1204-1205).

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The CP may also serve the purpose of highlighting the facts and clarifying in great detail the legal issues forming the basis of the dispute. Parties have the option of calling for further particulars in relation to some specific facts to facilitate settlement. This was well captured by the Panel Report in *Korea – Taxes on Alcoholic Beverages* (WT/DS75/R, WT/DS84/R, 1998) where it was stated that:

> Indeed, in our view, the very essence of consultations is to enable the parties gather correct and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the Panel.

In a nutshell, the Panel was merely stating that where consultation fails, the information obtained will assist in making a clear case in the Panel Stage.

There are instances where parties may be tempted to consider CP as a 'pre-trial discovery' process (Hyun Chong, 1999). In such instances, the requesting party uses the process to aggressively collect further particulars for use during the Panel stage. This eliminates the possibility of candidness for fear of further equipping the other party with information that may be effectively used against them during the PPs (Hyun Chong, 1999). The unfortunate use of the Consultation Process as a preliminary stage for collection of further particulars for the PPs greatly undermines the clear purpose of the entire DSU (Macrory, n.d., p.1205). The practice eventually institutionalizes the strategic withholding of pertinent information prompting the call for the Panels to insist on further particulars where specific information was not supplied during the CP. This issue was captured by the AB in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50/AB/R, 1997) where it was stated that:

> The claims that are made and the facts that are established during consultations do much to shape the substance and the scope of the subsequent Panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the Panel, then that party should ask the Panel in that case to engage in additional fact-finding.

There is no denying the fundamental purpose of the CP in shaping the substance of the dispute. This aspect comes into effect where upon discovering more facts a party wisely chooses to disregard the part of its claim that stands no reasonable success in the Panel stage. However, it is paramount to note that a party has the liberty of amending its particulars of claim in the course of or after consultation (Macrory, n.d., p. 1206).

Initiation of the Consultation Process (CP)

The engagement in the CP is the first mandatory requirement under the Dispute System (DS) (Dispute System**,** 1997)**.** The obligation to consult is explicitly cemented in the GATT 1947 where it was provided that each contracting party shall '...afford adequate opportunity for consultation...' (Article XXII:1, GATT, 1947) The GATT 1947 further provides that in the CP:

> The contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any party thus approached shall give sympathetic consideration to the representations or proposals made to it (GATT 1947, Article XXIII:1).

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The Process is further given emphasis by the DSU which adopts the spirit of the GATT 1947 and provides that:

> Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement... (DSU, 1999, Article 4.2).

It is important to note that there are instances where a party may not be obligated to engage in consultation for instances under the Agreement on Textiles and Clothing which permits a party to initiate PPs immediately after the recommendations from the Textiles Monitoring Body (Agreement on Textiles and Clothing, Article 8(10)).

The recipient of a request for consultation is obliged to put in a response to explain its position. This point was emphasised by the Panel in the *Brazil – Measures Affecting Desiccated Coconut* where the Panel stated that:

> The Philippine's request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system...In our view, these provisions [DSU, Articles 4.6 and 4.2] make clear that *Members' duty to consult is absolute,* and is not susceptible to the prior imposition of any terms and conditions by a Member (WT/DS22/R, 1996).

This Statement is a confirmation that the obligation to engage is absolute and the breach of the same by either party amount to a violation of an absolute right. The DSU permit's a party whose rights of consultation have been violated to request the establishment of a Panel within ten days where there is no response from the Respondent or alternatively within thirty days where a party puts in a response but shows no commitment to consult (DSU, 1999, Article 4(3)). A party in violation in effect waives its rights to consult and undermines the possibility of an amicable settlement that can be facilitated by the CP.

However, the noble donation of consultation rights by the DSU has no backing of an effective enforcement system in the event of violation. The only remedy available in the event of a violation is the request for the establishment of a Panel on a priority basis. The Panel can only pronounce a declaration to the effect that a party is in breach of its duty to consult. There is no further consequential arising from that breach similar to those legal consequences that attaches to the Panel ruling that a party is in violation of its trade commitments. This lack of an effective enforcement amounts to a confirmation that the rights in regard to consultation are merely procedural and not substantive.

In instances where developing countries are the principal parties to a dispute the DSU provides that 'during consultations Members should give special attention to the particular problems and interests of the developing Country Members (DSU, Article 4(10). The wording of the provisions only demands that the Members 'should' give special attention. This confirms that the language adopted is merely permissive rather than mandatory weakening the provisions in the process (Macrory, n.d., p. 1229).

This denies a developing member the opportunity of invoking the provisions effectively. It is also worth noting that the Panels have always shied away from the opportunity of reviewing the substance of the consultation process. This accordingly undermines the effectiveness of

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the 'special attention' (DSU, Article 4(10)) clause of the DSU only leaving a developing country with a mere hope that a developed country will be touched by enough sense of justice to give due consideration to the more difficult position of developing member during consultation. The weak position of the developing countries eliminates the possibility of a meaningful consultation process and more often than not they are compelled to request for the establishment of a Panel.

Panel Process

A complaining party is required to request for the establishment of a Panel in writing to the DSB. The request must indicate clearly the specific measures forming the basis of the dispute with a brief summary of the legal issues (DSU, Article 6(2)). The requirement received attention from the AB in *Guatemala – Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico* (WT/DS60/AB/R, 1998) where it stated that the requesting party has 'to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.'

The DSB is obligated to establish a Panel upon receiving such a request unless a decision dictating otherwise is arrived at on the basis of a consensus (DSU, Article 6(1)). This is because the requesting party can successfully veto the decision against such establishment of a Panel (Booysen,n.d). The Panel is mandated to examine the matters forming the basis of the dispute with guidance from the provisions of the CAs and to pronounce its findings that will facilitate effective recommendations by the DSB (DSU, Article 7(1)). In *Guatemala Case* (WT/DS60) the AB was called upon to give the proper meaning of the phrase 'matter' where the AB concluded that:

> the word 'matter' has many ordinary meanings, the most appropriate of which in this context is 'substance' or 'subject matter'. Although the ordinary meaning is rather broad, it indicates the 'matter' is the substance or subject-matter of the dispute (p.71).

The Panel is only limited to examine the specific provisions of a Covered Agreement(CA) forming the basis of the dispute noting that the DSU is in itself a CA (DSU). The nature of the terms of reference for a Panel was dealt with by the AB in the *EC-Measures Concerning Meat and Meat Products (Hormones)* where it was Stated that:

> Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a Panel freely to use arguments submitted by any of the parties or to develop its own legal reasoning to support its own findings and conclusions on the matter under its consideration. A Panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute (At 59 par.156).

A Panel that is further mandated permits it to deal with any question arising from any international law relevant to the dispute (Schoenbaum, n.d. p. 653).

Appellate Body

The DSU donates specific appellate jurisdiction to a permanent AB (DSU, Article 17(1)). The AB constitutes seven members who have no affiliation to any government and are experts in international trade law (DSU, Article 17(3)). An appeal is only heard and determined by three

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members of the AB (DSU, Article 17(1)). In view of the ever increasing workload of the AB, it has been suggested that its size should be increased (Shoyer & Solovy, 2000). The general quality of the legal reasoning of the AB reports has been regarded as high (Hathaway, 2000). In spite of the expected criticism against some of the AB's decisions, it has fairly succeeded in obtaining the respect of the international community (Booysen, n.d, p. 844).

The AB can only entertain appeals emanating from parties to the Panel report (DSU, Article 17(4)). A party can only lodge an appeal on the basis of issues of law and the legal interpretations adopted by the Panel (DSU, Article 17(6)). The terms of appeal were highlighted by the AB in the *Korea – Taxes on Alcoholic Beverages* (WT/DS/75/1) where it Stated that:

> In European Communities –Hormones...we Stated: 'Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a Panel report and legal interpretations developed by the Panel...

The AB has the mandate of upholding, modifying and reversing the legal findings and conclusions of the Panel (DSU, Article 17(13)). The AB has the discretion of setting aside the findings of the Panel and substituting the same with its own findings. This was confirmed in the *Australia – Measures affecting Importation of Salmon* (DSU, Article 17(35)) where it was Stated that:

> In certain appeals, when we reverse a Panel's finding on a legal issue, we may examine and decide an issue that was not specifically addressed by the Panel, in order to complete the legal analysis and resolve the dispute between the parties.

It is important to note that the analysis adopted by the AB must be premised on the facts as pronounced by the Panel at the first instance (DSU, Article 17(36)). The AB will then proceed to tender its recommendations to facilitate compliance by the violating party (DSU, Article 19(1)) and may choose to include suggestions on specific ways of implementing its recommendation. It has been argued that the inability of the AB to remand cases back to the original Panel suggests faults in the system (Shoyer & Solovy, p. 689).

Implementation and Enforcement

The end of the litigation process is marked by adoption of the Panel report as modified by the AB, as the case may be, and eventual adoption by the Dispute Settlement Body (DSB). The adoption is coupled with a demand for the party found in breach of a CA to introduce the relevant changes with a view of complying with its international trade commitments. It is essential that the violating party acts with urgency to conform in accordance with the DSU provisions that provides that 'prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all members' (DSU, Article 21(1)).

The DSU clearly provides that 'the Panel or Appellate Body may suggest ways in which the member concerned could implement the recommendations' (DSU, Article 19(1)). However, in some instances where the steps to be taken to achieve compliance are obvious; the Panel and AB reports may not give any recommendations or suggestions. Such instances include matters that relates to discriminatory taxes or tariffs where it is obvious that compliance can be achieved by eliminating the offending taxes and lowering the tariffs.

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In some instances, the measures required to achieve compliance may be ambiguous due to the complex nature of the dispute. Any dispute that relates to the consistency of measures adopted by the party attempting compliance is referred to the DSB that may include the original Panel where the same is viable (DSU, Article 21(5)). There is also a possible risk that a party found in violation attempts to comply but adopts measures that tends to maintain violation of the relevant agreement in a different way or affects its compliance with a different CA. The AB has confirmed that these questions may be resolved as part of the expedited compliance review. Articles 21(5) of the DSU provides that in the event that Members disagree as to whether measures taken to comply with Panel rulings are themselves WTO-consistent, that disagreement should be settled by resort to DSU procedures. Where possible, the matter is referred to the original Panel, which then has ninety days to resolve the matter. The DSU further addresses matters of expedited arbitration procedures should members disagree as to the level of proposed retaliation (DSU, Article 2(6).

Surveillance

A DSB meeting is held thirty days after adoption of a report, where the party found in violation will be required to State its intentions to implement the recommendations enumerated therein (DSU, Article 21(3). The provisions of Article 21(3) of the DSU allows the implementation of the recommendations within a 'reasonable period of time' to be determined by either the parties to the dispute upon approval of the DSB (DSU, Article 21.3(a)), by agreement of the parties within 45 days of adoption of the report (DSU, Article 21.3(b)) or by binding arbitration within ninety days after the adoption of the report by the DSB (DSU, Article 21.3(c)). In the event that the reasonable period of time is determined by arbitration, the guideline is that the time period shall not exceed fifteen months from the date of the Panel or AB Report.

The DSB monitors the implementation of the adopted rulings, and any member may raise the issue of improper implementation at any time before the DSB (DSU, Article 21(6)). The DSU directs the DSB to give special consideration to developing countries, both as Complainants and Respondents (DSU, Articles 21(7) & 21(8)).

Compensation and Suspension of Concessions

A Complainant has access to several remedies to respond to acts of non-compliance. The Complainant can engage the Respondent through negotiations. However, such negotiations are only sanctioned if the same is initiated before the lapse of the 'reasonable period of time' provided for compliance (DSU, Article 22(2).

The complaining party is mandated to take drastic measures that include seeking for authorization from the DSB for the suspension of concessions or other WTO obligations in regard to the Respondent where there is no amicable settlement as to the payable compensation within twenty days after the expiration of the 'reasonable period of time'(DSU, Articles 22(3)-(8).

The DSU has in place procedures that ensure that level of retaliation is proportional to the level of harm occasioned by the violating measures (Petersmann, n.d., pp. 192-193). The Complainant is first required to request authorization for the suspension of concessions or other obligations relevant to the sector most affected by the violating measures adopted by the Respondent (DSU, Article 22.3(a)). The Respondent is permitted to challenge any excessiveness of the retaliation by seeking the intervention of an Arbitrator pursuant to the

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provisions of Article 22(6) of the DSU (DSU, Articles 22(6)-(7)). The arbitration will be conducted within sixty days after the expiration of the 'reasonable period of time' by the original Panel, if available, or by an arbitrator appointed by the Director General (DSU, Article 22(6)). The Complainant cannot initiate suspension of any concessions during the course of arbitration (n.d 86). The arbitrator or Panel is mandated to establish whether or not the level of the suspension is equivalent to the level of nullification or impairment caused by the violation occasioned by the Respondent and the findings cannot be subjected to any appeal process (DSU, Article, 2(7).

The DSB is mandated to further adopt the decisions of the arbitrator or Panel unless it disagrees with the ruling pursuant to a consensus to that effect (DSU, Article 22(7)). The suspension of concessions is effective unless compliance is achieved by the Respondent or in the alternative an amicable settlement is arrived at by the parties (DSU, Article 22(8)). The DSB is required to maintain surveillance to ensure full and complete compliance with the ruling or recommendations (n 90).

CONCLUSIONS

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. The system to a large extent inspires confidence and provides an avenue for dispute settlements and thus averts recourse to hawkish means to deal with trade disputes.

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