



Developing Countries Position in WTO Dispute Settlement Framework: An Analysis through Case Study

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ABSTRACT

: WTO dispute settlement system which is based on dispute settlement understanding is considered as one of the laudable achievement of WTO .Dispute settlement understanding provides rules which are equally applicable on the all the member states of WTO.Still the empirical studies showed that developed states remained by large the major users of the dispute settlement process while the developing states mostly remain at a disadvantage position against the developed state in dispute settlement process.The reasons given for disadvantage position of the developing states are the numerous practical barriers considered to be the consequence of the rules of the DSU which is argued to work against the developing states in dispute settlement process. This raised the question of equality of member states on WTO platform irrespective of there economic strength. However in this article the institutional and behavioral approaches are applied on the case studies involving and behemoth states on to give the analysis regarding the presumption of the disadvantageous position of developing and small states on WTO dispute settlement forum. The article conclude , how the small states can successfully utilized the rules of WTO dispute settlement framework and through employing specific strategies and tactics it can win its interest against the developed state.

KEY WORDS: WTO, DISPUTE, SETTLEMENT, TRADE, DEVELOPING, GATT.

1. INTRODUCTION

The settlement of trade disputes remained the major concern of all the states in the multilateral trading system. Earlier the states showed dissatisfaction towards the GATT dispute settlement procedure .The major issue that was highly criticized in that procedure was that the settlement process was too lengthy and the penal reports were susceptible to blocking by the losing party from being enforced [1].In the Uruguay round of negotiations GATT dispute settlement procedure was taken up as a major issue of concern by all the member states. The Ministerial declaration given at the opening of the Uruguay round read as:

‘In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations’ [2]. The successful achievement of the Uruguay round of negotiation was the replacement of the GATT with WTO. The most prominent feature of the WTO is dispute settlement process which was made reformed and efficient compared to GATT settlement procedure which has under half a century of its existence it has processed only 101 dispute settlement cases .This number is quite less in comparison to dispute cases which has been received by WTO Dispute settlement body .In first eighteen years it has received 25 complaints per year [3]. The reason was the attempt to make the entire process highly judicialized.

2. DISPUTE SETTLEMENT UNDERSTANDING:

Adoption of the Dispute settlement understanding (DSU) is one of the major achievements of the Uruguay round of the negotiation. DSU is one of the many annexures to the agreement which has established WTO. The WTO dispute settlement system (DSS) is based on DSU is claimed to be one of the most sophisticated in international law, functioning like a court of international trade where the disputes are settled by applying the rules of law under the umbrella of compulsory jurisdiction and non-observance of the decisions may be followed by the sanctions[4].Andreas F. Lowenfield regarded it as ‘*themoost complete system of international dispute settlement in history*’[5].

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The DSU provides the WTO members with a systematic procedure, based on rules and regulations for the settlement of disputes. It covers the disputes arises in regards to obligations undertaken by the members states under WTO, disputes concerning previous GATT agreements and issues which may question the operation of the dispute settlement system as well[6].

2.1 DISPUTE SETTLEMENT PROCEDURE:

Under the DSU the task for settling the dispute is given to the dispute settlement body (DSB).The composition of the Dispute settlement body consist of all the representatives of the WTO members. The ex officio authority is not given to any separate entity for reporting and initiating the complaints against the member country rather the member state itself can launch a dispute. This make the system highly decentralized [7].The legal challenges that can be launched to initiate the dispute settlement process can be grouped three in numbers. First is the ‘violation complaint’ which report that a certain measure adopted by the WTO member is not in consistent with its obligations under the WTO agreements .Secondly the ‘non-violation’ complaint wherein the complainant state take up a plea against the member state conduct due to which it has suffered a lost in trade opportunities. Thirdly a ‘situation complaints’ not covered in any of the previous two forms of complaints. However at a moment there is no case law that fall in the category of the ‘situation complaint’ [7]. Therefore its precise nature is not known. Article 1 of the DSU make it specific that complaints can only be filed against the measures adopted by the members states it does not include the measures adopted by the ministerial conferences or any of the committees of the WTO[6].

DSU provide two phases of adjudication. The phase is known as bilateral consultation. It involves only the complainant and the defendant member state. The purpose is to achieve ‘a mutually satisfactory solution’[6]The complainant party has to request the dispute settlement body (DSB) for consultation with the defendant member state [6].In consultation phase other WTO members can join as co-complainants as well provided the defendant accepts there request [6]. Beside consultation the Mediation rule is also given under the DSU to the parties which can be utilized during any stage of the dispute settlement process[8] Second phase of adjudication is known as multilateral phase which involve penal procedure and establishment of the Appellate body as a last stage for the settlement of the dispute [7]. The complainant party can request the establishment of the penal when parties did not reach any settlement during the consultation stage [6]. Establishment of the penal can be regarded as a first instance court. Penal is the ad hoc body and its composition is based on the choice of the parties to the dispute however in case of disagreement between the parties the director general then made the appointment of the panelists [6]. Before the penal other WTO members can request to appear as third parties to give their views on the issue before it provided there request is allowed [7]. Similarly the non- government organizations who are not the members of the WTO can appear as amici curies to give its views on the dispute [6].The function of the penal is to draw a final report on the issues for the consideration of the DSB which has to settle the dispute between the parties. The working procedure for the penal is given in DSU rules which required that penal has to accept written and oral submissions on both legal and factual issues presented by the parties [6]. Beside that the panelists at its own can investigate on the matter before it by using its discovery powers [7]. The report prepared by the penal for consideration of the DSB will be adopted unless there is a consensus against it. The matter can go to the appellate body if any of the party to the dispute conveys to the DSB its intention to appeal against the report [6]. The Appellate body is the last instance court composes of seven judges whose appointment is made for four terms. The appeal is heard by a bench of three penal judges [8] which can only consider the issues of law and legal decision of the penal [8]. It is empowered to ‘uphold, modify or reverse ’the report of the penal but it lacks the power to remand the matter to the penal. Unless there is consensus against the adoption the Appellate body report is automatically adopted. [6]The defendant have to implement the judgment of the Appellate body in instance of the acceptance of the original complaint immediately or within the implementation period when granted through mutual agreement or arbitration[7].The issue Regarding the implementation of the judgment is lack of sufficient guidance in the reports of the appellate body. Though the panel is required to make recommendations for implementing the decision [6]but party is not under the obligation to follow instead it can chose its own form of compliance ,since the recommendations made are not legally binding [7]Under the DSU when there is disagreement of the parties regarding compliance with the final judgment in such situation the compliance penal has to conduct the active surveillance and to report accordingly though the reports are appealable as well.[8]If a member state failed to implement the decision of the penal then the complainant party can request the suspension of the concession[6].The complainant party shall first suspend concession in same ‘sector of trade’ in which a violation was established. [6]If suspension is granted the complainant party can raise its duties to a level equal in value to the damage it has suffered as result of the defendant illegal practice. [7]Thus suspension of the concession shall be equal to the value of the damage inflicted.[7]DSU authorized the complainant party to retaliate in a worst scenario where the defendant party refuse to compensate or withdraw the offending measure. Retaliation must be proportionate to the violation measure

Retaliation can be objected by the offending state and is subject to arbitration decision which is binding on the parties. The arbitration can determine whether retaliation is proportional, complaining party retaliating in the 'same sector, different sector of the same agreement or different agreement', [6] As far the right to retaliation of the injured party is concerned, the system contemplates it only in extreme circumstances. Retaliatory measures were hardly employed for instance in 1950 prior to the Uruguay round under the GATT regime in only one complaint the Dutch as a complainant party was allowed to make use of the retaliation remedy against U.S. [9] Even under the reformed WTO dispute settlement system the use of retaliation remedy remained minimum. The total no of instances in which the complainant was given a right to retaliate counts just 17 in the year 2012, and in only 1 out of total 25 complaints filed in the year 2011 [9]. The members authorized to retaliate preferred not to employ it rather they rely on other options like compensation in the form of reducing tariffs [9].

After discussing the salient features of the DSU which has given a highly judicialized system for the dispute settlement in multilateral trading system, the next part of the article will turn to the discussion whether this system works effectively for all the members' states of the WTO irrespective of its economic strength and influence in the multilateral trading system.

3. ASSESSING DEVELOPING STATES POSITION REGARDING DISPUTE SETTLEMENT PROCEDURE:

The WTO 'DSU' provides developed and developing WTO member countries with same rules and procedures. It is based on the guiding principle of 'Equality before law' to provide all the WTO member states with fairer opportunities rather than a system where the power politics could or did influence the outcome. [10] This rule-of-law system seems more important for developing countries which typically lack the market size to exert much influence through more power-oriented trade diplomacy [11]. Lester through his study showed that in the last fourteen years, since the establishment of WTO dispute system, the developed countries such as US and European Communities are the major users of WTO 'DSS' whereas the developing countries (forming more than 70% of WTO total membership) have not participated actively in WTO litigations [12] Some scholars commented that developing countries could not effectively utilize the WTO 'DSS' against the developed countries due numerous practical barriers. The difficulties commonly acknowledged are complexity and cost of the system, lack of representation on the panel, and matter of capacity. For instance the statistics shows that from 1995 to 2012 26 out of the 36 members who have initiated the dispute settlement process by bringing complaints had dedicated mission in WTO. [13] Further relative lack of legal expertise in WTO law, constrained financial resources [14] limited observance of special and differential treatment provisions [15] and greater sensitivity to retaliatory remedy [16] restricted the use of the litigation by the developing and small states countries.

WTO though succeeded in providing a multilateral framework to all the member states still many studies showed that this largest accomplished framework for multilateral trade is discriminatory towards developing or small member states. Small states are those states which are 'low to middle income and import less than one percent of the world trade'. [17] As these states cannot perform well in trade negotiations and trade litigation while using the WTO platform. Trade negotiations and trade litigations are not inseparable. It is commonly argued that the developing states lack bargaining leverage because of weak economic strength thus cannot exert its bargaining power in trade negotiations with the developed states within the WTO institutional structure. [18] Similarly in trade litigation matters it cannot defend its right well in dispute against the developed member states. [18] Scholars who rely on the traditional bargaining theory claim that states with limited resources like, financial, economic, political, market and human resources cannot success against the developed states [19] Scholars supporting 'institutional school of thought' claimed the rules and procedure of the institutions must be followed by the developing state that can give bargaining leverage to them against the developed states [20] However against this argument Clegg points to the weakness of the institution to enforce its own rules which result in, limiting their benefit to small states which make its position weak against the developed states [21] Though the behavioral theory maintained that the small state by using the types of tactics and strategies can perform well against the developed states [20].

In the following section I would discuss the Institutional and behavioral approach theories that give better explanation how the developing states by making use of the institution rules and procedures and by using tactics and strategies can avoid its disadvantaged position due to certain limitation discussed above in WTO dispute settlement system and can well exert its rights against the developed states properly. The Banana case and Antigua case is appropriate to be analyzed in the context of the above discussion to analyze how the developing and small states can despite its lack of resources and weak economic strength can exert its right well and achieve a winning position against the developed state.

4. INSTITUTIONAL AND BEHAVIOURAL APPROACHES:

Institutional and behavioral approaches can best explain the position of the developing and small states in WTO dispute settlement process. Scholars supporting the institutional theory showed that the WTO has set up a level playing field through its frame work of the dispute mechanism in which all the members irrespective of its size and economic power can challenge any trade measure in violation of the agreements. At the same time they also highlight the limitation of the WTO dispute settlement mechanism regarding the implementation of the penal ruling when it involved a larger state [22].

Other group of scholars while relying on the same approach gives different findings regarding the position of the small states involved in litigation against the developed state. To them their chances of success are minimum .For instance the Banana case which almost runs for a decade. To them the Institutional structure of the WTO let to the ‘marginalization of small states[21]For instance the ruling in favour of the Antigua by the Appellate body could not be implemented by the U.S in the required time reflecting the inability of the WTO institutional frame work when it involved the large member states [21]. This shows the inbuilt weakness of the institution for small states to ‘enforce its trade rules and obligation’ against the large state [23]. It means institutional framework alone cannot make the position of small members states strong .What matters is how they behave to accomplish the specific goals by employing tactics and strategies to effectively use the rules in its favour as on WTO platform for trade litigation as well as negotiation [22]. Banana dispute and Antigua-US GAMBLING cases are two very important cases in WTO case study literature. Both the cases involved the small states against the hegemons EU and US. These case studies can deny the presumption that developing or small states are always at the disadvantageous position in WTO dispute settlement system. These cases are analyzed in the light of institutional and behavioral approaches.

4.1 BANANA CASE:

In WTO case history banana dispute is considered one of the longest cases which almost run for 17 years (1991-2008).The case involved the small ACP states of St Lucia, St Vincent, Dominica and the Grenadines against U.S South and Central American states. The preferential access to EU banana regime offered to ACP states by the EU was challenged by the U.S and South and Central American states.ACP attempted at its best to ensure that the alternative banana regime shall not offered the high market price and offered the same level of access as were previously allowed to EU market .ACP states after a prolong litigation succeeded in maintaining a preferential access banana regime [24].Banana case is a clear example how the small states can achieved the wining position to protect there interest against any harsh trade measures by the developed states .ACP states wanted to protect its national interest and has well litigated its case by using the tools which proved to be effective for protecting its right. The effectives tools utilized by the ACP states were the clarity of its national interest and goals, keeping the support of other WTO members, and well framing of its case worked for them as effective tools for exerting its rights in litigation against the developed states [24].These strategies can also be effectively employed by other small and developing states for wining its interest in dispute settlement process

4.2 ANTIGUA –US GAMBLING SERVICES CASE: It is the first case which deals with internet gambling services. The Antigua case is unique in the sense that a small state has challenged the behemoth U.S. Although japan and costa Rica has also been involved in a litigation against the US for putting a ban on its net industries and has sought compensation from the U.S. But Antigua case is unique due to its small size in population , economic indicators, share of the world trade and in world imports of goods and services it account for only 0.2 percent as compared to 30.2 percent of U.S and for wining a ruling in its favour and resisted a high build up pressure from the U.S [22].

Antigua started online gambling and betting services as a new industry to boost its economy. Within two years it becomes the second largest employer industry in Antigua [25]. Started from 1999 to 2007 this industry contributed much in state economy as revenue generated from this industry reached 546 million US dollar and approximately accounted for 52 percent in global gambling business[26]Jay Cohen a US citizen took advantage of Antigua blooming industry and started World Sports Exchange in Antigua with his partners. His company attracted huge US based customers [27].Cohen was charged in 1998 for violating the US wire Act which banned the use of wire communication and telephones for making wages. Cohen fought his case and was charged guilty by the Second Circuit of the US Court of Appeals. He was fined and sentenced for 21months.His conviction make him the first person charged under the wire Act [27]. However the wire Act was found to be in conflict with the US commitments under the GATTS to liberalize trade in services [22] Antigua in March 2003 brought a complaint against US under the dispute settlement system claiming that US violated its commitment under the GATT trade in services.DSB of WTO established a panel in June 2003 for hearing the dispute. The panel on 24 March 2004 gives its ruling against

the US for prohibiting the foreign gambling and betting services thus violating its commitment to free trade for online gambling and recreational services under the GATT [22].

WTO rules allow the member states to have access to information regarding the other member states trade policies .Open access and information regarding states trade policies is essential as it avoid potential conflict[22] GATT Article 3 required the member's states to publish international agreement, domestic laws or regulations that may cause any impact on trade in services[28] It is further stated in the same article 'Any member may notify to the council for trade in services any measure, taken by any other member, which it considers affects the operation of this agreement'[28]. This rule prevent the states to disregard its trade commitment , reinforces WTO rules , helps the member states to avoid the trade violation efficiently in an informal manner thus limiting the use of the formal dispute settlement process[29].The institutional rules of WTO allow all the member states irrespective of its size and power to obtain information about member states international agreements and domestic laws and regulations was effectively used by Antigua to make evident the US violation of its commitment under the GATT. The legal argument put forth by Antigua was building on the legal interpretation of the phrase 'other recreational services'. Antigua argues that the phrase includes gambling and betting as well. [22]DSB penal accepted the legal interpretation of the phrase 'other recreational services' under the GATT Subsector 10.D .The DSB Ruling in accepting the legal interpretation of the phrase recreational services to include gaming and betting explicated by the Antigua has a good significance for the similar future GATT cases [22].

US in its defense claimed that US Wire laws aimed at protecting the public morals. It referred to Article 24 of the GATT where the states can make use of the discriminatory trade measures 'necessary to protect public morals or maintain public order' [22]. Antigua defeated the public moral defense. It argued that US banned the foreign internet gambling and betting services on public moral ground though it has not banned its own domestic gambling service providers on the same ground. Antigua demonstrated successfully that by use of the public moral defense the US is discriminating against the foreigner gaming service industry for protecting its economic interest only [22]. Whereas the same article provides that public moral ground cannot be used for restricting the trade among the states [22]. Antigua assertive strategy led the rulings in its favour while the US failed to maintain its defense altogether [22]. The ruling in various stages of litigation in Antigua favor suggest that despite of its small size Antigua was able to win in Penal and Appellate stage against the US .However the failure of the US to abide by its commitment under the GATT highlight the serious issue of actual compliance with the final rulings of the litigation.

5. CONCLUSION:

The discussion above give us analysis that though the position of the developing or small states are vulnerable in WTO dispute settlement system but it would be undue to say that these states are subject to failure in its attempt to litigate against the developed states. The institutional and behavioral approaches gives a good insight as how the small states can make its position strong against by relying on the WTO framework rules and used of tactics and strategies it can gain a winning position in contrast to the extreme approach which believed developing states are always in a disadvantage position in WTO dispute settlement process.

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