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WHY DEVELOPING COUNTRIES ARE AT DISADVANTAGE POSITION IN WTO DISPUTE SETTLEMENT MECHANISM

Muhammad Waqas

Department of Law Abdul Wali Khan University Mardan, KPK, Pakistan

Author email: vickey4yours@yahoo.com

Abstract

The Dispute Settlement Board of WTO aims to solve the disputes of WTO members regarding international trade. Dispute settlement process involves the parties and third parties to a case, and it operates through the DSB panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions. Although the dispute settlement mechanism provides opportunities to the developing countries to seek remedies if they are aggrieved by any other country, yet there are certain challenges for the developing countries to participate effectively in DSM. The study finds out the challenges that caused the role of developing countries less significant in the WTO dispute settlement process. Moreover, several recommendations have also been made for making the role of developing countries more effective.

Key words: Dispute settlement board; developing countries; WTO; dispute settlement process

Introduction

The Dispute Settlement Board of WTO plays a very important role in the settlement of disputes of WTO. Dispute settlement process involves the parties and third parties to a case, and it operates through the DSB panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions. These operating bodies of WTO dispute settlement process are either political institutions (DSB), or quasi-judicial institutions (panels, Appellate body, and arbitrators).

The Dispute Settlement Mechanism (DSM) of WTO is a rule based system (Torres, 2012). In the rule-based system there is no room for a country that is economically more developed to impose its decisions on other countries but the country with the soundest legal arguments to defend their claim will eventually prevail. This signifies that all the member countries of WTO participate in dispute settlement mechanism on the same footing. as in the cases involving Ecuador And the European Union, or Antigua and Barbuda against the United States, or Costa Rica against the United States or even between developed countries, as in the case of New Zealand against Australia.

Although the dispute settlement mechanism provides opportunities to the developing countries to seek remedies if they are aggrieved by any other country, yet there are certain challenges for the developing countries to participate effectively in DSM. There is a general pinion about DSU that it works more in favour of the economically stable members, having enough resources to hire and produce their own competent lawyers to pursue trade problems, which in fact is a very costly and difficult job for the developing member states to do (Abbott, 2007).

Methodology

This study is based on documentary research. First, both print and electronic media were utilised in carrying out this study. Secondly, authoritative texts were used extensively in order to gain sight into the jurisprudence of WTO dispute settlement mechanism (DSM).

Lastly, the internet was extensively used in giving a comparative analysis of participation of countries in the Dispute Settlement Mechanism (DSM).

Challenges faced by developing Countries

This study focuses on the disadvantageous role of developing countries in WTO dispute settlement process. No doubt, it was the aim of the Dispute

Settlement Understanding (DSU) to establish a fair system in which every member should be given opportunity to come up with complaints as an aggrieved party. The principle objective of WTO law was that every member state should be equal before the law and should be entitled to equal opportunities without any discriminations and illegal pressure or influence that may affect the Dispute Settlement process should be discouraged (Abbott, 2007). However, at the same time developing countries face many challenges to ensure their effective participation in the mechanism.

Developing countries face seven primary challenges in order to participate in the WTO dispute settlement system.

These challenges are:

1. conservatism of developing states in handling of international matters
2. Institutional confrontation.
3. Access of the developing states to the WTO legal system is very costly.
4. Developing states are under political and economic pressure from the developed states.
5. Delay in dispute settlement process.
6. Discriminatory behaviour of panels and appellate body.
7. No proper remedy for developing states.

Conservatism of developing states in handling of international matters

The dispute settlement process of WTO is comprised of several stages. These stages of dispute resolution are referred to as “naming, blaming and claiming” (Felstiner *et al.*, 1980) an aggrieved state must actively perceive their injury, figure out who is responsible for that injury and utilize resources to claim compensation. The United States and EU have developed formal mechanism for identifying trade barriers and making WTO complaints. In US the task carried out by United States Trade Representative (USTR) and in EU the EC Trade Commissioner is assigned for WTO. Both hold cabinet level position. However, in contrast to the developed states the developing states have adopted the conservative diplomatic system for international trade. Although the developing states are giving more importance to trade, many developing states have assigned the task to an ambassador or an official of ministry of foreign affairs who handle the matters of both WTO and the United Nations. Even if a developing state has assigned a separate body for the matters of WTO, it holds lowest position in governmental hierarchy.

Institutional confrontation

Another barrier in the way of developing countries participation in WTO dispute settlement is institutional confrontation. In developing countries, many ministries are involved in filing a claim in WTO. Usually there is less institutional coordination in developing states. In many developing countries an approval from the office of the Attorney General is needed in order to file litigation/claim in WTO. An exchange of formal letters between different ministries takes place which is in fact time-consuming. Moreover, sometimes the ministries come under external pressure especially when the party to the dispute is US or EU. Such pressure usually refrain developing states from claiming any remedy. Even if they do not refrain, a greater delay can be created that may effects the litigation. Most of the time the claim become time barred.

Access to the WTO legal system is very costly

The second major problem for the developing states to actively participate in the WTO dispute settlement process is that it is very expensive for them to take legal assistance to defend their rights. Considerable human and financial assistance is needed to file WTO litigation. Since developing countries usually have smaller export sector, they participate less frequently in WTO dispute settlement process and thus prefer to work with private law firms or legal services organisation of WTO instead of developing their own legal expertise to handle WTO complaints.

Advisory Centre on WTO Law, an international legal services organisation, also provides legal assistance to the developing countries. However, the developing countries have to pay the prescribed fee to the centre in order to obtain legal assistance from the Centre. The advisory Centre provides assistance to the developing countries to defend their WTO rights in at less than market rates (Annex II, 1999).

Political and economic pressure from the developed state

Another main challenge for the development countries participation in WTO dispute settlement process is that they are under pressure of the powerful countries like US and EU. Such practice undermines the value of dispute settlement by due process of law. The developed countries use extra legal pressure on the developing countries whenever there is dispute regarding trade matters. In consequences, the developing countries faith in the efficiency of legal system of WTO degrades.

Delay in dispute settlement process

The dispute settlement process of WTO is a rule-based system, usually takes much time. The aggrieved country has to pass through several stages in order to claim its right. The relief granted through dispute settlement

system is very much delayed. It takes about thirty months to come up with a conclusion. The delay in the process greatly affects the interests of the developing countries who have a small range of export product and thus cause irreparable damage to them.

Discriminatory behaviour of panels and appellate body

A new emerging challenge the developing countries face is the unjust and discriminatory behaviour of panels and appellate body. Most of the time, the rulings of the panels and appellate body enhances the obligations of developing states and rights of the developed states respectively.

In Indonesia car subsidy case, Indonesia argued that they are giving subsidies on domestic cars as it is allowed by the Agreement on Subsidies. However, the panel find out that such practice is the violation of Agreement on Trade-Related Investment Measures (TRIMs). The final decision of the panel was that such practice couldn't be allowed, although it is permissible by one agreement yet it has violated another agreement. (Das, 1998)

Similarly another case was that of US. The panel find out that certain provision of the US law was not in conformity with the WTO agreement. The panel did not take any action against US and opine that US administration had sent an undertaking that this provision of law should not be used in contravention of obligations under WTO agreement (United States — Sections 301–310 of the Trade Act 1974, 2000). Although it is a clear violation of Article XVI.4 of Marrakesh Agreement which says that "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", the panel turned it a deaf year.

The two cases show the discriminatory behaviour of the panels while dealing with developing and developed states respectively.

No proper remedy for the developing state

Another most important challenge for the developing states to participate actively in the dispute settlement process is that if they are aggrieved by the act of any developed state, the only remedy available for them is to retaliate against the developed state which is practically impossible for them. The developing states usually deter from the economical and political pressure of the developed states, which make the retaliation impossible.

Moreover, even if the panel award remedy in the form of corrective actions by the erring country, it do not apply retrospectively. It means that the remedy only prohibit the erring state to stop doing any wrong

practice, it do not compensate the aggrieved for the time period they suffered due to the mal-practice of the erring state.

Conclusion and Recommendations

It is concluded from the above discussion that developing countries face several challenges to participate in WTO dispute Settlement process. The disadvantageous role of developing countries in dispute settlement involves various factors. These factors are either internal or external. The internal factors include little knowledge of developing countries about WTO law and less coordination among the internal bureaucracy. The illegal pressure by the developed states and the discriminatory behaviour of the panels and appellate body constitutes the external factors that affect the role of developing countries in WTO dispute settlement.

Some recommendations are made in order to enhance the role of developing states in WTO dispute settlement.

1. The developing countries should improve their internal legal capacity to claim their WTO right without taking any external legal assistance.
2. The General Council should give guide lines to the panels and appellate body in cases of conflict between two agreements. The panels and AB should not be given free hand to decide which agreement is more binding.
3. When any action of developed country harms the developing country, the erring developed country should compensate the aggrieved developing country from the time they suffered due to the offending action of the developed country.
4. The panel should determine the cost paid by the erring developed country to the aggrieved developing country.
5. When the remedy awarded by the panels or appellate body is the retaliation by the aggrieved country against the erring developed state, all the members should retaliate against that erring state. There should be a proper mechanism for the joint retaliation.

References

- Abbott R (2007) Are developing countries deterred from using the WTO dispute settlement system. *Participation of Developing Countries in the DSM in the Years 1995–2005, I*. Retrieved from: R Abbott - Participation of Developing Countries in the DSM in the ..., 2007 - beta.ecipe.org
- Annex II (1999) Advisory Centre on WTO Law. Retrieved from: http://www.acwl.ch/e/documents/Annex_II.pdf

Das BL (1998) Development: Serious implications of Indonesia car panel report Retrieved from www.sunsonline.org/trade/process/lookup/1998/08310098.htm

Felstiner WL, Abel RL and Sarat A (1980) Emergence and Transformation of Disputes: Naming, Blaming, Claiming, *The Law & Soc'y Rev.* 15, 631. Retrieved from: <http://heinonline.org/HOL/LandingPage?handle=hein.journals/lwsocrw15&div=36&id=&page=>

Torres R (2012) Use of the WTO Trade Dispute Settlement Mechanism by the Latin American Countries Dispelling Myths and Breaking Down Barriers. Retrieved from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001440

United States — Sections 301–310 of the Trade Act 1974 (2000). **Dispute Settlement: DISPUTE DS152** Retrieved from: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm