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Dispute Settlement Mechanism under GATT

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ABSTRACT

GATT Dispute Settlement has its own objective. It provides an orderly mechanism for deciding whether a Member has complied with its obligations under the Covered Agreements and an obligation, if a Member is found to be in breach, to 'bring the measure into conformity' with the relevant agreement, in effect to remove the offending measure. That is a process more akin to civil litigation in domestic systems, not to a criminal law process where the objective is to identify a wrongdoer and provide for punishment for the wrong.The GATT's Dispute Settlement Body, with its Panel and Appeal stages, functions much more like a court, part of the effort to create a system of dispute resolution more rule based than power based. Appellate body rulings are the final word in trade disputes. Member States found to be in violation of one or more articles are expected to bring its legislation and actions into conformity with their WTO obligations. If an offending member fails to respond appropriately, the Dispute Settlement Body can authorize the injured Member to levy retaliatory tariffs. This paper aims to explain the stages under dispute settlement mechanism under GATT.

Keywords: *Appellate Body, WTO, Dispute Settlement Body, Pane*

I. INTRODUCTION

It is important that disputes should be settled timely and in a structured manner. The WTO Agreement1 came into force by 1, January 1948. The dispute settlement system soon gained practical importance as more and more Members frequently resorted to using this system.

In the 1930s, after the collapse of international trade, the need was felt to establish a new international economic institution. After World War II, it was recognized that an international trade organization which would supply the institutional framework for world trade was a necessary complement to the Bretton Woods institutions. When the ITO failed to come into being, the General Agreement on Tariffs and Trade (GATT)2 which was designed to operate within the context of the ITO, emerged to fill the gap in international institutions

The provisions governing the settlement of disputes in GATT have their historic origin in the Charter of the IT0. The GATT dispute settlement system has been developed through

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amendments based on customary practices and adopted by the GATT Council. The failure to establish the ITO invoked Article XXIX of GATT which required the Contracting Parties to decide whether to amend, supplement or retain the GATT provisions.3

The conference held at Geneva in 1947 covered three major parts in which the last two parts dealt with the constitution of GATT4. GATT was devoid of an organisational structure. Still it specified that all of the contracting parties would meet in certain circumstances to take actions. The contracting parties met towards the end of every year. GATT Council was established to deal with the issues arising between those annual meetings. The contracting parties delegated all their powers, except the power to grant waivers to the Council. But its decision could be appealed to the Contracting Parties, acting as a group. There was no provision for a Secretariat in the General Agreement; still a GATT Secretariat existed and it consisted of several hundred persons. A Director General headed it. The dispute settlement mechanism has been focused here, a detailed analysis of the last two rounds, i.e.. the Tokyo Round and the Uruguay Round are significant for this study

1 the World Trade Organization (WTO) is an international institution that oversees the global trade rules among nations.

2 The General Agreement on Tariffs and Trade (GATT), signed on Oct. 30, 1947, by 23 countries, was a legal agreement minimizing barriers to international trade by eliminating or reducing quotas, tariffs, and subsidies while preserving significant regulations

3 In 1953 the GATT Contracting Parties formally decided to review the GATT provisions. Such review was based on the significance of GATT as the only international framework regulating the liberalization of world trade.

4 GAIT is composed of 37 Articles and a number of explanatory understandings and addenda. This section reviews a few selected articles that are of key environmental importance.

Tokyo Round

The Tokyo Round of Multilateral Trade Negotiations (1973-1978) resulted in a major expansion of the activity and competence of GATT5, this time not through amendment to the treaty text but through introducing a series of separate instruments, known as Codes, each of which was technically a stand-alone treaty. One of the most important achievement of the Tokyo Round was the codification of procedures pertaining to dispute settlement activities which were developed and applied through customary practice in the pre-Tokyo Round period.The Tokyo Round adopted the "Understanding Regarding Notification, Consultation,

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Dispute Settlement and Surveillance" (hereinafter the 1979 Understanding), as a central procedure for dispute settlement. The Tokyo Round also adopted some complex and technical agreements dealing with unfair trade, designed to establish new mechanisms through which governments and international bodies could manage trade through creation of independent committees. The last attempt at developing a more responsive dispute settlement procedure was in 1989 when the "GATT Dispute Settlement Rules and Procedures", (hereinafter the 1989 Improvements) was adopted. The 1989 Improvements has been considered as I the first step towards a legalistic reform as it added more legal substance to the system basically by restatement of the customary practice. It also raised, for the first time, the possibility of settling GATT disputes through binding arbitration

Disputes Settlement Stages The Dispute Settlement Body is primarily responsible for settling trade disputes among the Member Countries. The DSU6 lays down the procedures and stages of resolving the disputes. The General Council, while handling the disputes, is called as the Disputes Settlement Body. The main stages of the dispute settlement process are Consultation, / Establishment of panel / examination of arguments by the panel.

These processes can be further detailed as follows:

5 The GAIT came into force by Geneva Protocol of August 1947

6 The DSU, which constitutes Annex 2 of the WTO Agreement, sets out the procedures and rules that define today’s dispute settlement system

Stage I–

Bilateral Consultations:

Before invoking Article XXllI7 to settle a dispute, a contracting party had to consult the matter bilaterally with the other. Only if the concerned parties failed to reach a mutually satisfactory solution, recourse to dispute settlement procedures were called for. This preference for bilateral consultations was attributed to the GATT's insistence on diplomacy as a tool to resolve disputes. Thus if a matter was forwarded to the GATT Council under Article XXIII or Article XXIII, the disputantshad to make it clear that consultations took place under Article XXII8 or Article XXII.Failure to yield any positive result during the consultation phase might force a party to seek good offices of the Director General to mediate on the differences between the parties. Developing countries were encouraged to use the good offices of Director General to settle disputes. If the conciliatory efforts too failed, the dispute would goo the panel stage. The complainant had to send a written communication to the Director General indicating the subject, the Articles to be involved, and also state whether it

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required the establishment of a working party or a The Council at its next meeting decided on the establishment of a panel9.

Stage II – Establishment of panel

The Council, following the GATT practice, emphasised on diplomacy. But if the complainant insisted, a panel was normally formed in the next session. The Chairman of the Council, in consultation with the disputants, decided on the composition of the panel. A panel consisted of three or five members, usually selected from permanent governmental delegations in Geneva. Members were expected to be impartial. At least one member from a developing country was selected for dispute between a developing and a developed country. A panel was normally constituted within thirty days from the decision to establish the panel.

A panel consisted of a chairman and two or four other members; but the opinion and conclusion of each member counted equally. There were also moves to "professionalise" panels by bringing

7 Article 23 GATT.

8 Article 22, GATT

9 A panel is a body constituted to investigate matters raised in the complaint under Article XXIII; and working party is established under Article XXII. It is the Council that is supposed to decide, which body is to be constituted to settle the issue. However, the practice hitherto existed show that if a complainant insists on the creation of a panel, it is normally granted neutral technical experts from outside as panel members. But never had a panel been constituted entirely of outside experts. The panel proceedings were confidential in nature. However, contracting parties having substantial interest in the issue at stake had a right to be heard by the panel. For its proper functioning, the panel could seek advice or assistance from the Secretariat. And the panel secretary from Secretariat played a crucial role by doing all the research and analysis necessary to help the panel understand the economic facts and arguments of the case.

Stage III – Examination of arguments by the panel

After the first organisational meeting of panel, it expected to receive written submission by the parties. These submissions were kept confidential. The complainant had the burden of proving the case. After receipt of written submission, panel conducted a hearing with the parties to the dispute to receive their oral arguments. A panel might also listen to the arguments of third parties. After the receipt of written and oral submissions, the panel

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examined the case and was said to prepare a report based on the findings and conclusions on the case. (However, it might not issue a report, if' the complainant withdrew from the case.) The panel submitted the report to the parties of the conflict. The report should continue to be kept confidential and panel would continue to encourage the parties to reach a mutually satisfactory solution. When the deadline for a bilateral dispute settlement elapsed, the panel submitted its report to the Council for adoption. The Council decided on the basis of consensus. However, the parties to the dispute could block the Council's adoption of a panel report. But the Council should never establish a new panel to re-examine the matter; nor did there exist an appellate body.

If a panel report was not adopted, it would not be regarded as a precedent by subsequent panels

And if the recommendations were not implemented within a reasonable period of time, he Council could authorize the suspension of concession. This panel system evolved over four decades during the GATT history was codified as Understanding on the Rules and Procedures Governing the Settlement of Disputes incorporated as Annex 2 of the WTO Agreement. This will be discussed in the next chapter in detail.

Remedies:

Three kind of remedies were authorized by GATT law and GATT customary practice viz., (i) cessation of illegal measures, (ii) compensation, and (iii) retaliation.

Objective:

The basic objective of GATT was to liberate international trade by reducing tariff rates and dismantling trade barriers. The major principles that guided GATT's operation were the most favoured nation principle10, and the principle of non- discrimination11." In GATT history, there have been eight sets of multilateral trade negotiations aimed at reducing trade barriers

II. HYPOTHESIS

The hypotheses were identified to draw major conclusions of the study.

➢ The DSB process has worked effectively to bring about most satisfactory results

➢ The time frame for settlement of disputes laid down by the Dispute Settlement Body is overshot in most of the cases.

Hypothesis Analysis

Effectiveness of the Dispute Settlement System can be gauged by the checking at what stage

a dispute gets resolved. Thus if the process of consultation (first stage of the Dispute Settlement Mechanism- DSM) results in resolution of a dispute, then it is the most effective result. In the order of dispute settlement stages, if the dispute leads to the stage of retaliation (last stage of Dispute Settlement Mechanism), then it is to be considered as an ineffective result to the process of dispute settlement.

Here the level of satisfaction is viewed from the perspective of the complainant and this is judged by the decision going in favour of the complainant when a dispute is raised. It is also important at the same time, that the decision has to be based on the merit of the case and the legal terms of reference raised by the aggrieved party (here it is the complainant). 'Most satisfactory' results mean a dispute getting settled in favour of the aggrieved party.

Within the purview of Articles 12.8 and 12.9 of the DSU by including the time elapsed between the date of composition of a Panel and the date on which the Panel issues its final Reports to the parties.

10 Most-favoured-nation (MFN): treating other people equally Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

11 without discrimination — a country should not discriminate between its trading partners (giving them equally "most- favoured-nation" or MFN status); and it should not discriminate between its own and foreign products, services or nationals (giving them "national treatment");

The study places emphasis on to extreme cases which took more time for the issue of Reports. A major weakness of the DSB process and Appellate Review is that things still take too long time. Most of these studies have raised concerns on the unnecessary delay in the Panel Process.

III. CONCLUSION

The GATT 1947 dispute settlement system was, short and anti-legalistic. However, the various changes introduced over a period of nearly five decades added muscles to the meager rules enshrined in the framework of Articles XXII and XXIII. The system, which initially adopted as a power-oriented model, was flexible and realistic enough to response to the timely need for change as well as to codify the customary practices of the past. The main object of settling disputes in GATT system is the withdrawal of inconsistent measures.

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Article XXIII does not recommend for compensation. It was a voluntary measure granted on a temporary basis, where withdrawal of disputed measures was impracticable.

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