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THEORY AND PRACTICE OF THE WTO DISPUTE SETTLEMENT MECHANISM

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ABSTRACT :

In recent times several developments such as the issue of food security and election of Donald Trump as president of the USA have led to fear that the world's leading power and its counterparts may adopt protectionist policies. Such developments will culminate into a conflict of interests among the WTO members. Any conflict of interest will put extra pressure on the WTO Dispute Settlement Mechanism. In the light of these developments, it would be useful to see how the WTO Dispute Settlement Mechanism functions. The paper has three goals. First, it traces the evolution of the Dispute Settlement Mechanism since the General Agreement on Tariffs and Trade to the World Trade Organization. In this process, it highlights major continuities and changes that took place in the process of succession from GATT to WTO. Second, it underlines the structures and details the process of the dispute settlement under the WTO. Lastly, it explicates the functioning of the mechanism over the period.

KEYWORDS : *dispute settlement mechanism, appellate body, consultation, conflict of interests, developing countries.*

INTRODUCTION:

One of the key assumptions of Political Realism is that international organisations (IOs) reflect the contemporary distribution of power in the international system. The IOs are established by the most powerful state or hegemon of the system. And unlike the liberalism that assumes that even after the end of the hegemony leadership role is taken over by k-states, Realism believes that with wax and wane of the hegemonic position, the institutions established by the hegemon declines. International trade and financial regimes reflect the role of the hegemon in establishment and decline of regimes. The World War I (1914-1919) broke the Gold-Sterling Regime established during British hegemony in the late 19th century because in the post-war scenario Britain was no more in a position to hold it further. After the first world war, not only defeated but also victorious faced severe economic crises. This crisis became very serious in late 1920's, which is well known as the great depression (1929-1933). In such crises situation, states adopted protectionist policies, which further exacerbated the situation. Even the United States of America, which was in a position to take leadership role did not do so but imposed Smoot-Hawlery tariffs which imposed 38-52 percentage extra duty over goods coming from outside. The unwillingness of US to accept the leadership role and establish a new regime further worsened the situation.

David Easton, a noted political scientist, has famously argued that new and innovative ideas do not emerge in the peaceful and stable environment but a conflicting, turmoil and crises driven situations. It is true not only in post-war II era with the establishment of General Agreement on Tariffs and Trade (GATT) but also for the establishment of World Trade Organisation (WTO) in the post-cold war era. In post-cold war world, due to

globalisation and proliferation of liberal ideology in the form of 'centrality of economics' again preceded over 'centrality of politics,' which dominated the international system during the cold war. Due to liberalisation, privatisation, and proliferation of free trade, market forces became predominant. In such situation, the prospect of not only cooperation but also for conflict became prominent. Therefore, to deny the prospect of conflict and proliferation of cooperation through 'negotiated agreement,' world entered into a rule-based system well known as World Trade Organisation.

The WTO has a unique and effective dispute settlement mechanism to settle the disputes occurring among member states. This paper seeks to explore and analyses the historical evolution of DSM, continuity, and change, procedures of settling the disputes, and empirical evidence of the use of the Dispute Settlement Mechanism. To demonstrate the working of the WTO dispute settlement mechanism, the first section of this paper demonstrates how dispute settlement mechanism evolved in international trade since post war II. It traces the evolution of the international trade dispute settlement mechanism from Havana Charter to WTO. The second section demonstrates 'continuity and change' taking place over times. In the third section, it discusses the dispute settlement procedure in WTO. In the last section, it gives some empirical evidence of the use of WTO dispute settlement mechanism in the first decade (1995-2004).

Historical Evolution of the Dispute Settlement Mechanism in GATT/WTO

Historical evolution of the dispute settlement system in the WTO can be traced back to International Trade Organisation (ITO), although it cannot come into existence because the US Congress refused to approve it. Chapter VIII of Havana Charter contained specific provisions governing the settlement of disputes. In the Charter, members are called upon to "give sympathetic consideration to written representation or proposals by other members who consider that benefits are occurring to them from co-activity nullified or impaired by the activity of other members" (Zimmermann 2006: 40). This nullification can be a consequence of any or set of followings: breach of obligation under the charter, the application of measures not in the conflict with the Charter, the existence of any other situation.

Havana Charter stipulated four stages of the dispute settlement. In the first stage, states can resolve their disputes through consultation between/among them, or through arbitration. It will be binding only for those parties which are in conflict, but not for other members or ITO. It was a compulsion for parties to inform ITO about the outcomes (ART.93). In the case of failure at consultation level, members can refer this matter to Executive Board (EB) of the ITO, which shall investigate the matter. After an investigation, it can take any of the following actions: matters does not call for any action, recommend a further consultation with members level, refer the matter to arbitration. In the case of breach of rules, it can request the members concerned to take necessary actions to confirm the Charter.

If any matter is referred to Executive Board, then it has the authority to bring it to the conference at any point in time. If EB makes any decision, action or recommendation and members ask to bring those decisions to the conference, then EB has to do so. Because the conference is a 'political appellate review mechanism' so it can confirm, modify or reverse the decisions. If there is any question of legality involved in the issue, then it can be reviewed by International Court of Justice (ICJ). The ICJ's decisions will be binding for ITO. "The charter for an ITO adopted in March 1948 at UN Conference on Trade and Employment in Havana, Cuba had a legalistic DSM" (Srinivasan 2005:4). If any country doesn't agree with the decision, she is free to withdraw from the ITO. Despite such provisions, ITO didn't come into existence.

Next step to the evolution of DSM is GATT, which came into force by the 'Protocol of Provisional Application' (PPA) on 1st January 1948. The GATT avoided even the inclusion of term 'dispute' (Matsushita 2006: 105) and devoted only a few paragraphs to DSM (Art. XXII and XXIII). Some scholars argued that there were multiple dispute settlement mechanisms in GATT, but formal are those who expressed in two articles, XXII and XXIII. The purpose of establishing GATT was to promote free trade through reducing tariffs. Here disputes often occur when a state or group of state take such actions which neglect (in original nullification or impairment) the benefits of entering into the agreement. "Nullification or Impairment can occur due to any of three reasons" (Matsushita 2006:105). First, failure of parties to carry out their obligation under the Charter may lead to a conflict. Second, the application of measures by a party regardless of whether the measures are conflicting with the GATT.

Lastly, the existence of any other situation that is troublesome.

If any State thinks that any action taken by other states is nullifying or impairing her interests, then she should, first of all, try to reach 'satisfactory solution through consultation' (Art. XXII.2). In GATT consultation was a prerequisite to invoke the multilateral GATT process. At the beginning of GATT, disputes were taken by the diplomatic process. Firstly they were dealt at 'semi-annual meetings' of Contracting Parties (CP). Later they would be brought to 'inter-sessional-committee' of CP's. And in the end, it was referred to 'Working Party,' composed of the complaint, respondent, and neutral members. The main problem with the working group was that it was dealing with several disputes within 'single working group.' The working group remained until 1952.

After 1952, the term working group was replaced by the term 'Pannel.' This Panel was composed of three to five members. Two significant changes occur in Panel from working for the group. First, neither the disputing parties nor the major powers were part of the Panel. Second, instead of working as a representative of their governments, the Panellists had to work in their capacity i.e. as a panellist. So for the functioning of Panel is concerned, disputing parties would be heard by Panel, but Panel will draft it's report in their absence. The draft report would be discussed with the parties, and the final report would prepare for the submission to CP's.

Under GATT procedure, Panel used to report to the general counsel. It was a standing body of GATT. There was no such provision in GATT but developed through practice. If council approved the Panel report by 'consensus,' then the report will be binding on all contracting parties. Consensus stands for absence of negative votes in the decision-making process. It was a major hurdle in GATT system, and prospect for blocking was a significant defect in GATT's procedure.

From GATT to WTO: Continuities and Changes

Political and economic issues cannot be understood in isolation to each other. When ITO and GATT were established, the political and economic scenario was very different from that of the post-cold era, when WTO was established. When ITO and GATT were negotiated world politics was dominated by very few developed countries, and issues of primary concern were post-war reconstruction and reduction of tariff barriers to facilitate free trade respectively in the political and economic realm. With the passes of time, new actors and issues emerged, which led to a demand for substantial change in the present system. Due to decolonisation, many countries got independence. They had distinct problems in comparison to developed one have. Beyond these, non-state actors were also getting importance. These non-state actors were important because they were most affected at least in the economic realm. In term of new issues in 1970's environment, the proliferation of means of transportation and communication, emerging issues like trade in services and intellectual property rights were getting importance. In particular context of 1980's "debt crises, recession and US trade deficit put GATT system under stress" (Zimmermann 2006: 52). To tackle these problems changes in present DSM was needed.

Regarding continuity, there are few similarities between GATT and WTO. In the case of GATT and ITO, the first step towards the settlement of the dispute was consultation among disputants. If disputants cannot reach a mutually acceptable conclusion, then they can ask for Panel. Such procedure is also available in WTO. Here also, if parties fail to reach mutually acceptable decisions then they can ask for Panel. If we look at ITO, the WTO's dispute settlement mechanism is closer to ITO rather than GATT. The ITO's proceedings of ICJ can be compared to WTO's Appellate body; both were concerned only with 'question of legality.'

First change which occurs in WTO's DSM was its decision-making procedure. In GATT, decisions in General Council were taken by consensus. But when the debate over decision-making procedure was going on in Uruguay Round, the US and the EU have very different opinions. The US was favouring 'automatic adoption' while EU wished to maintain present consensus rule. Ultimately a new type of decision-making procedure was adopted. The new type of decision-making procedure works on the 'principle of automaticity' and/or 'negative consensus.' These refer to a situation in which draft will be automatically adopted if all parties do not disagree. Even one party says that draft should be adopted then the draft will be adopted. This new procedure was adopted to eliminate the problem of blocking when Dispute Settlement Body (DSB) considers the issue.

The second change occurred in nature of the Dispute Settlement Mechanism. The GATT DSM was 'single-stage' where consultation fails to reach conclusion parties can request for Panel. The panel was a first and last institution where disputes can be appealed. WTO DSM is 'multi-stage.' If any party does not satisfy with Panel

decision, then she can appeal it to Appellate Body. The AB only considers those issues with which 'question of legality' is supposed to be involved.

The third major change was regarding time. In the case of GATT dispute settlement mechanism, no time frame was fixed, within which dispute should be settled. But in WTO there is a fixed time frame for every stage, within which dispute should be solved. For instance for consultation 60 days, for the establishment of Panel 45 days and six months for the function of Panel. Thus, overall 12 months and in the case of appeal to the Appellate Body it takes fifteen months to complete the process. The mechanism is very effective in settling disputes, particularly concerned with perishable goods. Except these, in GATT there was multiple DSM, but in the case of WTO there in uniform DSM. Every dispute may be related with GATT, GATS or IPR must be brought before WTO DSM. Nature of DSM under GATT was political while under WTO is politico-legal.

The Dispute Settlement Procedure under WTO

Rational behind the creation of WTO DSM is to reduce the prevalence of opportunism and unilateral retaliation by creating the presumption that action by a country to change the negotiation terms of a deal will result in compensation. Thomas L. Hungerford has argued that a DSM may create the incentive for members of a trade agreement to deliberately generate the disputes because they know that disputes will be solved. The DSM provides an objective forum where disputes can be discussed, and excessive retaliation can be avoided. Simultaneously, the DSM can help address one form of contractual incompleteness that is inherent in WTO, by interpreting the contracts, filling the gaps on specific matters where the treaty is silent and granting an exception or modifying certain aspects of the discipline.

According to Art. III(3) of WTO agreement, dispute settlement is one of the major function of WTO. Annexe 2 of the Marrakesh Agreement laid down the rules in dispute settlement. WTO DSM is a multi-staged process. So for dispute initiation is concerned only the governments have the right to do so. It is unique in the sense that non-state actors are mostly affected by the trade measures, but they have no right to begin the case against the state. If any state under WTO thinks that policies of any state may be domestic or foreign is violating the non-discrimination principle of WTO and causing substantial material damage to her products, then she can decide to bring the dispute before WTO. Once the dispute is brought before WTO, it may have to go through following stages if it is not solved at an earlier stage.

In the study of international organisations, the structures and institutions of the concerned organisations are considered to be crucial. But before proceeding to various stages let us have a look at institutions which are involved in the WTO dispute settlement process. First, such institution is Dispute Settlement Body, which is a political body consisting member states. It is identical with General Council of GATT. It establishes Panel, adopts Panel and Appellate Body reports, supervises the implementation, and if necessary, it authorises the sanctions to comply with DSM decisions. It is little different with GATT General Council in the sense that it has its chairman and follows the separate procedure from GATT. The second institution is Panel, which reflects the continuation of GATT system. The Panel is composed of three to five members, who are well-qualified governmental or non-governmental persons. These persons are selected from a roster and work in their capacity rather than representative of their countries. The third institution is Appellate Body. It is composed of seven persons appointed by DSB for four years and renewable terms. Those persons who are renowned in international law and trade and not affiliated with governments can be appointed to the appellate body. The primary function of AB is to review the Panel's ruling, particularly in any legal question concerned area. The WTO dispute settlement mechanism follows a procedure that has four stages.

STAGE I: CONSULTATION

If complaining party once decides to enter into the WTO dispute settlement mechanism, then she has to enter into mandatory consultation between disputant and consultant. The complaint accuses the defendant of adopting such actions due to those benefits of the complaint is being nullified of impaired. These are a violation of WTO principles. Here complaining party has right to request defendant to enter into consultation to find out a mutually acceptable solution. It is necessary for complaining party to request in writing. Such consultation request must be notified before DSB. Under the WTO Agreement defendant is obliged to answer within ten days and enter

into consultation within 30 days. But in the case of perishable goods defendant has to enter within 20 days. In WTO provision at any stage, the third party can participate if she thinks that she has some substantial interests in that dispute. Director General of WTO can use good offices reconciliation and mediation on request of disputants.

Stage II: The Panel

If consultation fails and disputants are unable to reach a mutually acceptable agreement, then a complaint can ask for Panel to be appointed. An Even defendant cannot reply within ten days or consult within 30 days in general and in the case of perishable goods 20 days complaint can ask for Panel. The DSB establishes the Panel and determines its composition. Simply three to five members can be in a Panel. Parties have right to object to the names of the panellists.

On the beginning of the Panel, before the first hearing, each side presents its case before the Panel in writing. In the first hearing complaint, defendant and others who are interested in the case can make their case before the Panel. During the hearing, the concerned parties may raise any technical or scientific question. If any party raises such questions, the Panel has the authority to appoint an expert or, if necessary, a group of experts to advise. After hearing Panel submits its descriptive section, without findings and conclusion to each party, giving them two weeks to comment. After submission by disputants and review, Panel submits its interim report to each side with one week of time for review. In the end, Panel submits final reports to two parties and three weeks later to all DSB members. If Panel finds that defendant guilty it can recommend that measures be taken to conform to WTO rules. The report will be binding unless DSB rejects it within 60 days with consensus.

Stage III: Appellate Body

Either side can appeal to Appellate Body. Sometimes both sides do so. Appeals have to base upon the point of legal interpretation. The AB does not reexamine the existing evidence or new issues. For example who has the primary responsibility to burden the proofs. AB is set up by DSB and broadly represents all membership. The Panel can uphold, retain or modify or reverse the decisions of Panel. AB normally does not take more than 60 days, but in absolute case, it can take 90 days. The DSB has the right to accept or reject the appeal report with consensus within 30 days.

Table 1: The Life-Cycle of Disputes.

Year / Level	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Consultations	28	51	50	41	34	42	24	37	26	19	12	20	13	19	14	17	6
Panels	5	11	15	13	20	11	15	11	19	7	8	12	11	3	10	6	8
Disputes covered	9	11	22	15	23	12	16	18	25	7	8	14	14	5	13	7	12
Appeals	0	4	6	8	9	11	5	6	5	5	11	3	2	8	1	3	4

Source: Torres 2012.

On the basis of the table, certain trends trend and pattern can be identified. The 1990s was a golden period for consultation. The highest number of consultation per year reached to 51 in 1996. But in the twenty-first century, the figure started declining. But a high number of cases continued reaching at the panel level till 2003. After that, it shows a gradual decline. Regarding appeal, Table shows that most of the cases did not reach the level of appeals. The highest figure is 11 marked in 2000 and 2005. After 2005, not any appeal reached over five with the only exception of 2008.

Stage IV: Implementation

In the case of the impracticability of immediate compliance wth the Panel or AB reports, the defendant is given a 'reasonable period' to do so (Art. XXI.3). If the respondent fails to act within this period complaint has right

to get compensation. If both parties do not come at agreed compensation, then the complaint may request authorization to DSB. The DSB can suspend equivalent concession of the defendant the country as retaliation. This authorization is automatic.

The magnitude of retaliation is decided by the DSB, generally on the basis of Panel recommendation. Although the retaliation is temporary, yet it can take time until defendant brings its measures into compliance. If retaliation is not feasible in a certain condition, a member may ask for authorization of concessions under another agreement. Retaliation works until the respondent brings its majors into compliance with DSB rulings.

The Functioning of the WTO Dispute Settlement Mechanism

The WTO entered into force on 1st January 1995. In GATT from 1948 to 1994 total 278 cases were filed. Out of 278, 110 led to a legal ruling by Panel. Others were settled before the report was produced. Out of 110, Panel found that 88 cases were of violation. Until December 2004 total 324 consultation request were filed to WTO. This number shows that new system is more used than that of GATT. The difference between GATT and WTO is due to two reasons. First is the difference in membership. In the case of GATT, the membership was less than 50 while in the case of WTO Is more than 150. Second is the difference in some issues which are being dealt. In the case of GATT, it was only trade and tariffs while in the case of WTO services and intellectual property rights also have been included.

The number of complaints increased sharply in first three years and was at a zenith in 1997, but in a new century, some consultation dropped sharply approximately 28 annual. During this period a minimum number of consultation was 19 in 2004. During this period difference between consultation and Panel report is high which shows that disputes were solved in the initial stage. The number of Appellate Body report was at the highest level in 1999. Such happened because almost every Panel report circulated was appealed. All these happened because of 'trade wars' in bananas, hormone beef and foreign sales corporations.

So for the users of the system are concerned presently not only developed states are actors as usually happened in the case of GATT. In terms of users, continuity and change can be observed. Although the US and EU were main users, however, nowadays developing countries are also participating. These states are not only filing cases against developed states, but cases are also being filed against them. So for less developed countries are concerned, their participation is still marginal. During reviewed period only Bangladesh was an alone state which filed a case. Now not only high-income countries but also middle-income countries are playing a major role in dispute settlement process.

Table 2: Main users of the DSM, 1995-2011.

Members	Complaint	Respondent	Third Party
United states	97	113	86
European Union	84	70	104
Canada	33	16	71
Brazil	25	14	64
Mexico	21	14	55
India	19	20	67
Argentina	15	17	31
Korea	15	14	58
Japan	14	15	106
Thailand	13	03	48
Chile	10	13	26
China	08	21	78
Guatemala	08	02	20
Australia	07	10	59

Source: Torres 2012, page 5-6.

So for issues are concerned goods still dominant in WTO dispute settlement mechanism. The most probable reason behind this may be multiple-sub-issues are concerned with like Agreement on Subsidies and Countervailing Measures, Agreement on Anti-dumping and Agreement on Agriculture. Beyond goods, intellectual property and trade in services are also important. Around 25 cases have been brought about IPR within examined period.

CONCLUSION

The WTO dispute settlement mechanism is an example of succession in the international organisations. It shows one of the best examples of inheritance in international organisations. During such succession, the new organisations get something from its paternal organisations as well undergoes change to better suit the environment. The GAAT-WTO case is not an exception. The WTOs succession from the GATT shows not only institutional adaptation (from ITO to GATT and WTO) but also how with the change in the distribution of power in the international system provided stimulus to incorporate new institutions and issues. Decolonization and consequent increase in a number of states, the emergence of new issues such as intellectual property right, agriculture, and services, and technological revolution, have led substantial change in the structure and procedure of the World Trade Organization. Consequently, the WTO dispute settlement mechanism had to go under substantial chance. When blocking becoming a problem in itself rather than providing a solution to problems, as was the case with the GATT, framers of new world trade law and institutions brought substantial change to suit the new changing environment.

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