TRADE LAW BRIEF
Making Trade Law Simple

India at Dispute Settlement Understanding

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Any judicial law enforcement system benefits the weak more than the strong because the strong would always have other means to defend and impose their interests in the absence of a law enforcement system.

Introduction

In the 15-year period 1995-2009, the World Trade Organisation (WTO) members have initiated on an average about 27 disputes each year under the provisions of the Dispute Settlement Understanding (DSU). Of the 402 cases filed up to the end of 2009,[1] roughly half were eventually settled directly between the parties following the consultations mandated by the DSU, without going into litigation. The vast majority of the remaining cases were settled satisfactorily through litigation. Also during this period, developing countries have been complainants in more than 45 percent of all cases, and respondents in more than 42 percent of the cases.

Since DSU is rule-based, it can ease deal even major politically sensitive cases and also aid in protecting the smaller less powerful WTO members. For instance, on December 15, 2009 the European Union (EU) concluded agreements with US and Latin American banana producing nations to bring to an end the longest running dispute in the WTO. The dispute concerned the preferential treatment that the EU gave to the import of bananas from African, Caribbean and Pacific (ACP) countries.

As of December 31, 2009, 402 disputes had been brought to the WTO, of which:

- 84 appear to have been resolved bilaterally (no outcome notified to the WTO)
- 95 were resolved bilaterally (outcome notified to the WTO)
- 23 were resolved bilaterally after a panel was established but before the panel was composed
- 14 are currently the subject of active consultations between the parties
- 186 went into litigation

Source: WTO Annual Report, 2010

Considering these positive developments, the Director-General of WTO Pascal Lamy opined that this advancement is surely a vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes in other areas of international political or economic relations.

India's Participation in Dispute Resolution

India has been a founding member of both General Agreement on Tariffs and Trade (GATT) and WTO and is strictly adhering to WTO rules while conducting international trade. When most of the developing countries were diffident to approach Dispute Settlement Body (DSB) to ascertain their rights due to the huge expenses involved and lack of technical and related competence, India from the beginning was an active user of the DSU at both the GATT and the WTO.

In GATT Disputes

India was a frequent user of the GATT dispute settlement system. It got engaged in disputes as early as 1948 (*India – Tax rebates on exports*, GATT/CP.2/SR.11) and filed its first complaint against Pakistan at the GATT in 1952 on matter relating to export fees on Jute (GATT/L/41). However, in the later case, the chairman of the contracting parties successfully made the parties to agree on a basis for negotiation, which ultimately culminated in the signing of a long term agreement on jute exports to India in the year 1953.

Then after a long period of absence from the scene, the country became actively engaged in GATT dispute settlement in the 1980s. During that period, it brought four complaints against Japan, US and the European Communities (EC) and answered two complaints brought against it by the US. Still, in the entire history of GATT, i.e. from 1947

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to 1994, only one panel report was adopted on August 24, 1948 involving India. This happened in the *India – Tax Rebates* case, which was not only the first case in GATT in which India was involved but also the first GATT case to deal with the reference in Art 1:1 to Art III, paragraphs 2 and 4. In this case Pakistan initiated the dispute by complaining that India violated Article 1:1 by denying tax rebates on exports to Pakistan. The Chairman while ruling in Pakistan's favour asserted that the most-favoured-nation (MFN) principle contained in Article 1:1 is applicable to any advantage, favour, privilege or immunity granted with respect to internal taxes.

In WTO Disputes

India is one among the most active developing country users of the WTO dispute settlement system. Cases brought by and against India are almost equal in numbers till date (as of September 2010) given that it participated in the dispute settlement mechanism (DSM) 19 times as complainant and 20 times as respondent. All the more it has participated as a third party in 63 disputes, thereby gaining useful experience in WTO dispute settlement as well as getting an opportunity to influence the WTO jurisprudence in ways that protect its trade interests and support its interpretation of the WTO rules.

As a complainant, India had 7 cases under consultations, lost one case, obtained mutually agreed solutions in three cases, compliance proceeding completed in two cases, authorisation to retaliate granted in one case, implementation notified by respondent in 3 cases and in 2 cases mutually acceptable solution on implementation was reached.

As a respondent, out of 20, India won one case, lost 5 cases, got mutually agreed solutions in 6 cases and one case is suspended, while the rest are in limbo. Interestingly, a major chunk of the disputes in which India was involved relates to challenges concerning measures restricting exports of products like textiles & clothing, shrimps and steel, which are some of the country's major exports.

Out of the 19 disputes initiated by India, a few disputes have also led to landmark decisions. For instance, the *US-Shrimp* (DS58), which was brought by India, Malaysia, Pakistan and Thailand in 1996 ultimately turned out to become one of the most important cases in WTO jurisprudence. India and other complainants had challenged the US law that prohibited the import of shrimp unless the shrimp exporting country obtained a US certification that the shrimp was harvested with sea-turtle-friendly devices. The appellate body (AB) held that the US law fell within the purview of the environmental exception of GATT Article XX(g)[2], but that the manner in which the law was applied constituted a means of arbitrary and unjustifiable discrimination within the meaning of the chapeau of Article XX. This decision recognised for the first time in GATT or WTO history that environmental protection is one of the objectives of the world trading system, and marked a viable path for balancing trade interests with environmental concerns within the WTO legal framework.

Another landmark case brought by India is *EC-Tariff Preferences* (DS246). This dispute between India and the EC stemmed from an EC Regulation which awarded tariff preferences to a closed group of 12 beneficiary countries (11 Latin American countries and Pakistan) on the condition that they combat illicit drug production. India brought the claim alleging that the Drug Arrangements were inconsistent with GATT Article I:1[3] and unjustified by the enabling clause.

The AB found that the drug arrangements regime followed by the EC was inconsistent with the enabling clause because it does not clearly set out the objective criterion that, if met, would allow a developing country to be included by the drug panel in the list of beneficiaries that are affected by the problem. This lack of objective criterion clearly identified by the drug arrangements programme pursued by the EC made the AB finally conclude that the drug arrangements programme of the EC was inconsistent with the enabling clause.

Likewise, *EC-Bed linen* (DS 141) dispute dealt with the imposition of definitive anti-dumping duties by EC on cotton type bed linen from India. This long and hard battle attracted lot of global attention since India attempted to apply the principle of zeroing in determining the margins of dumping. India asserted that EU had acted inconsistently with the provisions of the Anti-dumping Agreement by counting negative dumping amounts as zero for certain types of bed linen, when calculating the overall weighted average dumping margin for the like product, bed linen.

This EU method, according to India, would lead to a higher dumping margin than was envisaged by the Anti-dumping Agreement. This contention was accepted both by the panel and the AB, which concluded that the EC acted inconsistently with the provisions in establishing dumping margins on the basis of a methodology which included treating negative price differences as zero.

This has resulted in a series of disputes popularly known as the 'zeroing disputes' which have gradually chipped off all forms of zeroing as WTO incompatible, and led to a situation in the ongoing Doha Round of trade negotiations where only one country (US, and partly New Zealand, on a limited aspect of the issue) is pitted against the entire WTO membership in removing zeroing from the WTO lexicon.

As a third party, very recently India joined in the following two disputes – *US-Shrimp (DS 404)* and *Philippines — Taxes on Distilled Spirits (DS396/DS403).* In the former case, Vietnam challenges several aspects of the anti-dumping duties the US is levying on certain kinds of frozen Vietnamese shrimp, including Washington's use of zeroing. The case also marks Vietnam's first use of the WTO dispute settlement system since it joined the global trade body in 2007.

In the later case, the DSB established a panel January 2010 to examine the EU's complaint concerning the Philippines' current Excise Tax regime on distilled spirits, which has been in place since 1997. India has joined the dispute as a third party along with China, Chinese Taipei, Mexico, Thailand, Australia and the US.

On April 20, 2010, the DSB also agreed to refer the US complaint over the same measures to the panel established in relation to the EU's complaint. Those third parties (including India) who had reserved their rights in relation to the EU dispute were automatically accorded third party status in respect of the US dispute.

India has also been a frequent user of the service rendered by Advisory Centre on WTO Law (ACWL), a law firm set up with the help of WTO for the benefit of developing countries. However recently, in some cases the country has started using Indian law firms for its representation in the panels and the AB. This was the case in the last two disputes, one by the US against India on additional duties on wines and spirits (DS 360) and the other by India against the US on customs bond directives of the US administration in respect of anti-dumping duties on shrimp imports (DS 345). It has also used the services of international experts relevant to particular disputes, such as engaging Professor Frederick Abbot of the Florida University in its ongoing consultations on the issue of confiscation of generic medicines by the EU.

As Panellists and AB Members

From India, there have been so far seven panellists and one AB member who served twice consecutively from 2000 - 2008. Generally, a panel of three, composed on an *ad hoc* basis, decide dispute settlement cases. Panellists may be governmental or non-governmental individuals and may include trade policy experts, persons who have served on or presented a case to a panel, former WTO Secretariat personnel, and international trade law professors. Around 200 different individuals from 45 different WTO members have acted as panellists with Australia, India, New Zealand and Switzerland being the most frequent panellist nationalities. AB is composed of seven permanent AB Members who are selected by the WTO members and who serve a four year term, which is renewable once.

At DSU Review and Negotiations

The review of the DSU was initiated in the DSB of the WTO in 1997, which was later incorporated into the Doha Round of negotiation during the fourth Ministerial Conference of the WTO. These negotiations are now taking place in the Special Session of the DSB and are ongoing and have not been completed though it was initially slated to be completed in the year 2003.

Similar to other negotiating issues at WTO, India from the beginning has demonstrated keen interest in the negotiations on DSU and is an active participant along with other developing countries. These countries joined together and have been reiterating their objective for a development oriented review of the dispute settlement procedures under the Doha Development Agenda. Also it submitted the first discussion paper in the DSU review during the period 1998-99, dealing with all stages and several horizontal issues of the dispute settlement process.[4]

DSU requires Members to notify the DSB and other relevant WTO bodies of any mutually agreed solutions in respect of matters formally raised under the WTO dispute settlement procedures. It does not, however, prescribe any time period by which such solutions should be notified or the details that the notification should contain. If the parties do not notify the mutually agreed solutions promptly and in sufficient detail, the other Members would not get the opportunity to assess the impact of such solutions on their trade.

Thus on consultations stage, India proposed to set a timeframe for the notification of mutually agreed solutions. It stated in its proposal that the terms of settlement of mutually agreed solutions on matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified within 60 days from the date of such agreement and in sufficient detail to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

While on panel stage, India voiced her concerns about due process and equal opportunities to examine and rebut arguments and comment on documentary evidence. She therefore sought to give the complainant and the defendant three to four weeks each, in sequential manner, for making the first and the second submissions to the panel. In order to have clear terms of references for panels at an early stage, India suggested that the complaining party make all its claims in the first written submission, and that no claim should be entertained that had not been presented in the first written submission.

India also proposed to amend the provisions on the adoption of panel reports so as to provide 60 days after circulation of panel reports to Members before they are considered in the DSB. On appellate review, India proposed to increase the period of time between the circulation of AB reports to Members and their consideration in the DSB to 30 days. It called for improved transparency with regard to the constitution of AB divisions and further proposed to extend the time-frame for appellate review from 60 to 90 days.

On term of appointment of AB Members, India proposed that in order to maintain and enhance the dignity of the high office that the AB members hold, and in order to ensure that the AB members do not have to depend upon WTO Membership for securing a second term, it is proposed that all future appointments of AB members (i.e. any appointment which would be effected on or after January 01, 2004) should be for a non-renewable fixed term. It is felt that this non-renewable fixed term should be six years. This approach would promote an atmosphere conducive for impartial and independent functioning of the AB. Currently, DSU provides for the appointment of a standing AB comprising seven persons wherein the DSB shall appoint persons to serve on the AB for a four-year term and that each person may be reappointed once.

With regard to implementation, India called for a solution to the problem of an uneven distribution of retaliatory power between developing countries on one hand and developed countries on the other. Specifically, India suggested limiting the right of developed countries to retaliate against developing countries to countermeasures under the same agreements in which a violation may have occurred, while allowing developing countries to get relief through joint retaliation by the entire membership of the WO against the wrongful defendant.

The Indian proposal also dealt extensively with the provision on special and differential (S&D) treatment of developing countries. India deplores the general character and lack of specificity in many S&D provisions. As there was no way to ensure that such S&D treatment would be accorded to developing countries in practice, India suggested replacement of the word 'should' by 'shall' in such provisions, as well as specific guidelines to ensure rigorous implementation.

Further on it proposed that in a dispute in which the complaining party is a developing country Member and the other party, which has failed to bring its measures into consistence with the Covered Agreements is a developed country Member, the complainant shall have the right to seek authorisation for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements.

India further proposed to differentiate between developing and developed countries when it comes to implementation. For disputes involving developed and developing countries, India wishes to increase the maximum time period for implementation from 15 months to 30 months in the case of developing country defendants. Moreover, India sought to give developing countries additional time to implement the commitment if due to circumstances beyond the control of a developing country and in spite of country's best endeavour, the developing country is unable to complete action within the implementation period. By contrast, India proposed a 30 day time-frame for the compliance panel procedures in cases against developed countries without any further procedural requirement.

It also urged the developed countries to make less aggressive use of the dispute settlement system against developing countries to prove there aggression to domestic constituencies, arguing that dispute settlement proceedings should not be initiated where the trade effect on developed countries was only marginal. It also argued in favour of giving developing countries extra time for the preparation of submission and rebuttals, and a longer reasonable period of time for implementation which should be thirty months in the case of developing country defendants.

Additionally, India expressed concern regarding the cost of litigation before the WTO panels and the AB, which is prohibitively high. It proposed a need to provide special and differential treatment to the developing country Members in disputes against developed country Members. It stated that if a developed country Member is found to be in violation of its obligations under the WTO covered agreements in a dispute brought by a developing country Member or if the developed country Member failed to prove its claims against a developing country Member in a dispute brought by it, the panel or the AB should determine reasonable amount of the legal costs and other expenses of the developing country Member, to be borne by the developed country Member.

Stand on Amicus Curiae Briefs

During the Uruguay Round negotiations, the question of providing for the possibility of *amicus curiae* submission in the dispute settlement system of the WTO was considered in the Informal Group on Institutional Issues. In November 1993 one delegation put forth an informal negotiating proposal to the effect that the panels may invite interested persons (other than parties or third parties to the dispute) to present their views in writing. As there was overwhelming opposition to the proposal, the proposal was not incorporated in the DSU.

After establishment of the WTO, the issue of *amicus curiae* briefs came up in *US-Import Prohibition of Certain Shrimp and Shrimp Products* dispute (DS58). The AB dealt with it as the US appealed the panel's ruling rejecting consideration of *amicus curiae* briefs.

Generally, the mandate of panels and the AB is to clarify the provisions of the WTO covered agreements in accordance with customary rules of interpretation of public international law (Article 3.2 of the DSU). In this case, however, the AB did not refer to any textual or dictionary meaning to clarify the word 'seek'. Rather it referred to the 'thrust' and 'context' of various Articles of the DSU to state that the word 'seek' in Article 13 (Right to seek information) of the DSU could mean acceptance of unsolicited *amicus curiae* briefs by the panels.

Thus, the AB announced in its interim ruling that it had accepted *amicus curiae* brief that was directly sent to it and promised to elaborate its reasoning in the final ruling. The AB, however, did not give any convincing reason for acceptance of *amicus curiae* briefs that were appended, but were endorsed only to the extent they concurred with, the US' appellant submission. This approach had attracted negative comments by a large number of Members.

US-Bismuth Steel (DS138) is another dispute, where the AB had dealt with *amicus curiae* briefs. In this appeal, the AB had received *amicus curiae* briefs directly from the interested US steel industry associations. Though the AB did not consider those briefs as relevant to the case at hand and thus did not take them into account, it, however, asserted that it had legal authority to receive and consider such submissions as long as there was nothing in the DSU or in the Working Procedures for Appellate Review explicitly prohibiting it.

It further pointed out that the provisions of the DSU have given it a broad authority to draw up procedural rules and therefore have a legal authority to decide whether or not to accept and consider any information that AB believes is pertinent and useful in an appeal. This view of the AB was also criticised by large number of Members at the DSB meetings.

The AB did not take into consideration Members views on this substantive issue as was evident in the *EC-Asbestos* case. In this case, the AB took a further step of soliciting *amicus curiae* briefs in the name of adopting procedures to deal with the appeal. This led the entire WTO Membership, excepting a few, to express dismay and disapproval of the AB developing its own working methods on an issue beyond its area of competence.

India in its proposal submitted to the special session on DSB stated that the Uruguay Round negotiators had clearly rejected the idea of acceptance of unsolicited *amicus curiae* briefs. Further adding that the dispute settlement system of the WTO is of intergovernmental character and allowing non-Members to participate and submit *amicus curiae* briefs would undermine this character.

If non-governmental entities were allowed to influence the process and outcome of disputes, it would severely erode the Member governments' authority and ability to participate effectively in the dispute settlement process. Further if the Member governments are required to respond to the submissions of the *amicus curiae* briefs, it would add to their obligations, beyond what was negotiated. Given the requirement of responding to such submissions within a prescribed time frame it would be burdensome to developing country Members in particular.

In addition, constraints of financial resources would prevent non-governmental entities in developing countries from effectively participating in the dispute settlement process even if *amicus curiae* briefs are permitted. It would also be a burdensome proposition to the WTO panels, the AB, arbitrators and the Secretariat, which are required to meet strict time schedules.

Therefore, India stressed the importance to put an end to this controversy, by clarifying the meaning of the word "seek" in Article 13 of the DSU.

Conclusion

While glancing through the India's use of the WTO dispute settlement system, we can see that the country was fairly active in all spheres; whether it is in the case of disputes or in the case of negations and reviews. On disputes, India has lost many cases but has equally won few important cases against its major trading partners, quite a few of which are considered as landmark decisions in WTO. About half of the cases in which India was a party were related to measures restricting textile and clothing exports, which is India's major export sector. In addition, EU and US have been the other party in most of these dispute, both of which are India's major export market. Regarding the types of measures that have been challenged, almost half of them have been trade remedy measures. This is consistent with India's negotiating position calling for the restrictions on use of trade remedies.

Overall, India has been able to make rather effective use of the WTO dispute settlement system to pursue issues that matter to it.

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Endnotes

1 WTO Annual Report, 2010

2 Article XX contains a number of general exceptions that could potentially apply to export restrictions imposed on raw materials and Art XX (g) applies to measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

3 GATT Article I:1 provides for WTO Members to accord Most-Favoured-Nation treatment to like products of other WTO Members regarding tariffs, regulations on exports and imports, internal taxes and charges, and internal regulations

4 K. Padmaja, WTO Dispute Settlement – General Appreciation and the Role of India, ICFAI University Press, 2007. Acces sible at <www.worldtradelaw.net/articles/zimmermanndsuindia.pdf>

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