Studying The Settlement of disputes in International Trade
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ABSTRACT: The WTO's Dispute Settlement Understanding (DSU) evolved out of the ineffective means used under the GATT for settling disagreements among members. Under the GATT, procedures for settling disputes were ineffective and time consuming since a single nation, including the nation whose actions were the subject of complaint, could effectively block or delay every stage of the dispute resolution process. It remains to be seen whether countries will comply with the new WTO dispute settlement mechanism, but thus far the process has met with relative success.

Key words: GATT, WTO, settlement of disputes, International Trade

INTRODUCTION

Many trade diplomats, environmentalists and scholars have expressed concern regarding the magnitude of decision-making power allocated to the World Trade Organization (WTO) dispute resolution panels and the WTO Appellate Body. Frequently, such non-tariff trade barriers are the inadvertent consequence of well meaning attempts to regulate to ensure safety or protection for the environment, or other public policy goals. In other cases, countries have been suspected of deliberately creating such regulations under the guise of regulatory intent, but which have the effect of protecting domestic industries from open international competition, to the detriment of the international free-trade regime. While trade diplomats and scholars have expressed pride at the Uruguay Round achievement of more binding and more "law-oriented" dispute resolution, the same group and a variety of non-governmental organizations (NGOs) and other commentators question the jurisdictional scope of dispute resolution.

This Article is intended to outline a more realistic and nuanced view, based on law and economics analytical techniques. It is intended to suggest the reasons why dispute resolution could be the appropriate place to determine these issues. Conversely, it is intended to suggest away to predict when these issues might better be determined through more specific legislative action. This Article seeks to begin to delineate the role of dispute resolution in the international trade law system. The General Agreement on Tariffs and Trade (GATT) was a multilateral agreement regulating international trade. According to its preamble, its purpose was the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis." (Baldwin, 1952) It was negotiated during the United Nations Conference on Trade and Employment and was the outcome of the failure of negotiating governments to create the International Trade Organization (ITO). The DSU was designed to deal with the complexity of reducing and eliminating non-tariff barriers to trade. A non-tariff trade barrier can be almost any government policy or regulation that has the effect of making it more difficult or costly for foreign competitors to do business in a country. In the early years of the GATT, most of the progress in reducing trade barriers focused on trade in goods and in reducing or eliminating the tariff levels on those goods. More recently, tariffs have been all but eliminated in a wide variety of sectors. This has meant that non-tariff trade barriers have become more important since, in the absence of tariffs, only such barriers significantly distort the overall pattern of trade-liberalization. GATT was signed in 1947 and lasted until 1994, when it was replaced by the World Trade Organization in 1995. (Bhagwati et al. 1983.)

The WTO's strengthened dispute resolution mechanism was designed to have the authority to sort out this "fine line between national prerogatives and unacceptable trade restrictions" Several of the supplemental agreements to the GATT created during the Uruguay Round, such as the SPS Agreement, sought to specify the conditions under which national regulations were permissible even if they had the effect of restraining trade. The
United States, perhaps more than any other country, has found itself on both sides of this delicate balance. In 1988, it was the United States who pushed for strengthening the Dispute Settlement provisions of the GATT during the Uruguay Round, in part because Congress was not convinced that, "the GATT, as it stood, could offer the United States an equitable balance of advantage." (Brecher, 1974) The concern was that formal concessions granted to U.S. exports going into other countries would be eroded by hidden barriers to trade. On the other hand, the United States harbors reservations in regards to its sovereignty, with much of the negative reaction to the WTO itself centered around the concern that U.S. laws and regulations may be reversed by the DSU panels or the Appellate Body.

**The Vocation and Function of WTO Dispute Resolution**

The WTO dispute resolution process begins with a requirement of consultations. If Consultations are unsuccessful, the complaining state may request the establishment of a three person panel to consider the matter. The panel issues a report which may be appealed to the Appellate Body. The panel report, as it may be modified by the Appellate Body, is subject to adoption by the Dispute Settlement Body (DSB) of the WTO. Adoption is automatic unless there is a consensus not to adopt the report. What is the vocation of WTO dispute resolution? There are several answers. Panels determine the facts. They determine those facts that are relevant under the applicable law, so that they must determine the applicable law and relevant facts concurrently and interactively. Interestingly, because of a design flaw in the DSU, the Appellate Body has no right of remand. Therefore, the Appellate Body is constrained where it determines to apply law for which the panel has made no findings of fact. (Bhagwati et al. 1969)

**The Origin Of The Wto Dispute Settlement Mechanism: The Gatt System And Its Evolution**

The WTO dispute settlement mechanism only constitutes a part of the general world trade reform initiated through the Uruguay Round but has been none of its key issues. The new system can be regarded as a reaction against the inefficiency of the past one regarding the binding effect of decisions made by the GATT council. The new one is aimed at building a new relationship between WTO members based on a more equal status through a unique application of the rule of law.

**Overview Of The Dispute Settlement Understanding**

The Dispute Settlement Understanding (DSU), formally known as the Understanding on Rules and Procedures Governing the Settlement of Disputes, establishes rules and procedures that manage various disputes arising under the Covered Agreements of the Final Act of the Uruguay Round. All WTO member nations-states are subject to it and are the only legal entities that may bring and file cases to the WTO. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO members, which administers dispute settlement procedures. It provides strict time frames for the dispute settlement process. And establishes an appeals system to standardize the interpretation of specific clauses of the agreements. It also provides for the automatic establishment of a panel and automatic adoption of a panel report to prevent nations from stopping action by simply ignoring complaints. Strengthened rules and procedures with strict time limits for the dispute settlement process aim at providing "security and predictability to the multilateral trading system" (Baldwin, 1960) and achieving "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements." The basic stages of dispute resolution covered in the understanding include consultation, good offices, conciliation, mediation, a panel phase, Appellate Body review, and remedies.

First stage procedure: Consultations and panel report The first stage procedure can be described as the most diplomatic one. If a dispute is to be settled, all non-contentious means should be used to avoid a deadlock and the parties always have the possibility of reaching an acceptable solution through mediation, conciliation or arbitration. Innovations for the first stage procedure are mainly twofold: precise time limits and reshaping of procedures regarding competence, expertise and impartiality of the experts. Consultation is the first step of the dispute settlement. Consultation is a preliminary requirement to the establishment of a panel of experts," illustrating once again the importance of the conciliation procedure. When one party requires consultations. The other one has ten days to reply and thirty days to implement them. Consultations are not only a formal requirement but allows a better analysis of the admissibility of the case and frames its legal basis. For instance. If the request is too vague or not sufficiently determined a redefinition of the case can be requested. This happened in a case involving Brazil and Canada regarding the financial programmed of aircraft products Consultations also allow the participation of third countries to the procedure, provided the parties to the dispute on their involvement (veto power). Third countries must however a substantial trade interest in order to be involved in such a consultation.
Consultations cannot be used to delay the dispute settlement. If the deadliness is reached without a mutually acceptable solution. The panel mechanism can be activated.

Consultation

A member-country may request consultations when it considers another member-country to have "infringed upon the obligations assumed under a Covered Agreement." If the respondent fails to respond within ten days or enter into consultations within thirty days, the complaint "may proceed directly to request the establishment of a panel." (Bhagwati and Srinivasan, 1969)

Conciliation and Mediation

Unlike consultation in which "a complainant has the power to force a respondent to reply and consult or face a panel," (Brecher and Choudhri, 1982) good offices, conciliation and mediation "are undertaken voluntarily if the parties to the dispute so agree." No requirements on form, time, or procedure for them exist. Any party may initiate or terminate them at any time. The complaining party may request the formation of panel, "if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute." Thus the DSU recognized that what was important was that the nations involved in a dispute come to a workable understanding on how to proceed, and that sometimes the formal WTO dispute resolution process would not be the best way to find such an accord. Still, no nation could simply ignore its obligations under international trade agreements without taking the risk that a WTO panel would take note of its behavior.

Arbitration

Members may seek arbitration within the WTO as an alternative means of dispute settlement "to facilitate the solution of certain disputes that concern issues that are clearly defined by both parties." Those parties must reach mutual agreement to arbitration and the procedures to be followed. Agreed arbitration must be notified to all members prior to the beginning of the arbitration process. Third parties may become party to the arbitration "only upon the agreement of the parties that have agreed to have recourse to arbitration." The parties to the proceeding must agree to abide by the arbitration award. "Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto." (Bhagwati, 1958)

In the entire forty-seven years of the GATT, only some 200 cases were disputed. In the first three years of the WTO, 118 complaints have been brought, dealing with eighty-three distinct matters. Nine of these cases have gone through the entire process, resulting in the adoption of appellate reports by the DSB. The increased use of the dispute settlement procedures under the WTO suggests that nations see value in the reforms that were implemented, and that they have increased confidence that other nations will abide by their trade obligations if the DSB finds them to be in violation of specific provisions.

Due to the wide range of topics addressed by the dispute settlement panels, it is difficult to make generalizations about the overall impact of the DSU. Nevertheless, a few early trends are evident. The majority of complaints have been brought by developed countries against other developed countries, with the next largest category being complaints by developed countries against developing nations. However, at least twenty-five complaints have been initiated by developing countries (Brock and Magee, 1978).

The empirical study of GATT/WTO disputes

It would be difficult to overstate the scholarly interest in GATT/WTO dispute settlement. Indeed, several legal journals routinely devote the bulk of their pages to this subject, as do an increasing number of journals in economics and political science. The vast majority of this literature is appropriately concerned with GATT/WTO jurisprudence; i.e., the interpretation and significance of the institutions’ dispute settlement rulings, and other theoretical aspects of the law. Very little of this literature, however, concerns the law’s actual effect on either domestic or international political behavior, and only a handful of studies have ever compared large numbers of cases in any systematic fashion. Against this backdrop, Hudéc’s Enforcing International Trade Law stands out as a roadmap for doing empirical work on GATT/WTO dispute settlement. The World Trade Organization’s (WTO) dispute settlement process is critical to the successful functioning of this international organization. With so many agreements included in the WTO Charter, having a successful mechanism for resolving trade disputes is crucial for the continuation of a rule-based international trading environment. The General Agreement of Tariffs and Trade (GATT), the predecessor organization to the WTO, was highly successful in substantially reducing tariff levels and making large strides toward the liberalization of the world trading system. (Brander James, Barbara, 1981) As an international organization comprised of multilateral agreements, the WTO continually requires the cooperation of its contracting Members (countries in the WTO membership). The support of these contracting members is essential.
to the continued operation of the WTO, especially support from Members with large economies such as the United States, the European Union (EU), and Germany. Recently, a few Dispute Settlement cases have reached completion and several issues have arisen as to the successful operation of the WTO's dispute settlement process. These include costs, compliance, time periods, and delay tactics. Delay tactics can be defined as actions by WTO member states that are intended to postpone rather than resolve a dispute. When a dispute is taken to the WTO Dispute Settlement Body (DSB), there are a series of stages it goes through including an Appeal process and a compliance period (Chapter II describes this process in detail). [Brander James A, Barbara S. 1981] Once the Appeal process is finalized, the losing party has a fixed time period during which they are to remove or amend the trade measure or measures found to be inconsistent with their obligations under the WTO.

CONCLUSION

Dispute settlement is regarded by the World Trade Organization (WTO) as the central pillar of the multilateral trading system, and as the organization's unique contribution to the stability of the global economy. A dispute arises when one member country adopts a trade policy measure or takes some action that one or more fellow members considers to be a breach of WTO agreements or to be a failure to live up to obligations. By joining the WTO, member countries have agreed that if they believe fellow members are in violation of trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally — this entails abiding by agreed procedures (Dispute Settlement Understanding) and respecting judgments, primarily of the Dispute Settlement Body (DSB), the WTO organ responsible for adjudication of disputes. A former WTO Director-General characterized the WTO dispute settlement system as "the most active international adjudicative mechanism in the world today.

REFERENCES