# 1. INTRODUCTION, OBJECTIVES, METHODOLOGY AND LIMITATIONS OF STUDY

## INTRODUCTION

1.1 The World Trade Organization (WTO) is the multilateral international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their Parliaments. The WTO's core functions are to provide a forum for negotiating trade agreements, a forum for monitoring the trade regimes of its members and finally, a forum for settling trade disputes.

1.2 When a WTO member considers that another member has taken recourse to a trade policy measure which in its opinion, is a violation of any provision of the WTO agreements, this measure forms the basis of claims that are referred to a 'dispute' at the Dispute settlement body (DSB) of the WTO. A dispute may either be about violation a member's rights or it may be a denial of a benefit assured under the WTO disciplines; these are referred to as non-violation complaints.

1.3 All WTO members can take recourse to the multilateral system of settling disputes within that organization. This would then imply that they shall also abide by the laid down procedures strictly.

1.4 Dispute settlement in the WTO is under the aegis of the Understanding on Rules and Procedures Governing the Settlement of Disputes and is commonly known as the

DSU or the DSM[1]. It provides the legal setting for resolving trade related conflicts and also allows imposition of retaliatory measures in the event of non-compliance of a ruling.

1.5 The DSB consists of all member nations of the WTO and administers the DSU. It nominates "Panels" to adjudicate the disputes and it also possesses the right to either accept or reject the findings of the Panels. It also has the responsibility for monitoring the implementation of the eventual rulings.

1.6 While a similar system existed under the General Agreement on Tariffs and Trade (GATT), which was the predecessor to the WTO, it was vastly different in so much as it did not specify deadlines and cases dragged on endlessly and inconclusively. The main difference between the dispute settlement under earlier GATT and now the WTO is adoption by members of the 'Doctrine of Reverse Consensus', i.e., in order to prevent establishment of a panel or adoption of the case reports, there has to be a consensus amongst the entire membership.

1.7 The GATT practice of "consensus for adoption" allowed any one member to block adoption of reports which was tantamount to having gone to court for nothing.

1.8 In the DSU, reverse consensus exists at 3 stages in DSU procedures: second request for establishment of Panels, adoption of Panel/AB Reports and retaliation, which is authorization to suspend concessions equivalent to what the offending member has cost the complainant post adoption of the dispute reports.

1.9 While the procedures followed in the Panels/ AB deliberations are akin to a court, the DSM prefers that countries settle the dispute amongst themselves. Formal consultations under the provisions of the DSU are the first stage. Even when the case has

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[1] DSM is DSU plus GATT Articles XXII And XXIII and the various dispute related decisions contained in the BISD, plus dispute provisions of all other WTO agreements (e.g. in particular, ASCM, ADA, TRIPS).

[2] https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

progressed to other stages, consultation, negotiation and mediation remain an option for resolving the dispute.

1.10 When a member requests for the establishment of a Panel it realizes that this process raises the media-glare of the dispute and makes it more difficult to settle the matter by negotiation. Thus the architects were fully aware the mechanism was not always the best option for the members and they say in Article 3.7 of the DSU:

> *"Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure, which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures."*[2]

[2] https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

## Panels

1.11 The logical sequence to consultations is the formation of a Panel, but all consultations are not necessarily followed by a request for a Panel. Threat of action may be more powerful than the action itself and may lead to a successful resolution of the dispute at the consultations stage.

1.12 A Panel is a three-member body selected from a list or a roster established by the Members and only has individuals that have been nominated by Member countries of the WTO. Panel members are selected either by mutual consultation or if Members fail to agree, nomination by the Director General of the WTO.

1.13 A Panel takes the assistance of the WTO Secretariat for legal, procedural and technical support regarding the case. They are at liberty to obtain qualified legal opinion from legal experts. The DSB may also allow a third party to be a part of the proceedings until a certain stage. Such a third party can only be a member country. However, any such third party should have substantial trade interest in the proceedings of the panel.

## Burden of Proof

1.14 Article 3.8 of the DSU states that: *"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."* [3]

[3] ibid

1.15 Moreover, the Appellate Body, the highest "judicial" body at the WTO, has stated that: "…the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption. In the context of the GATT 1994 and the *WTO Agreement,* precisely how much and precisely what kind of evidence will be required to establish such presumption will necessarily vary from measure to measure, provision to provision, and case to case"[4]

**Appeal**

1.16 After the Panel decision either of the parties has the right to appeal against the ruling of the Panel. It is very frequently seen that both the sides appeal against the Panel decision. However, the appeal necessarily has to be based on only the points of law and/or the legal interpretation of the ruling and as such, no request for any fresh evidence or re-examination of earlier evidence is entertained at this stage.

1.17 The appeals are preferred before the Appellate Body (AB), which is a seven-member permanent body of experts. These experts are recommended and nominated by Members of the WTO and chosen by consensus. These members have 4-year terms and they are essentially independent individuals with an international standing in the matters of trade and international law and also not affiliated with any Government.

1.18 The appeal process should finish within 60 days and only in extreme cases should it take 90 days. The AB can take a decision either to reverse the position findings or to

[4] Appellate Report, *United States –Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, at 335.

modify it or to uphold it. Within 30 days of circulation of an AB decision, the dispute settlement body has to adopt the final report of the AB, unless of course the entire membership of the WTO forms a reverse consensus, i.e., all agree not to accept it.

**Action to be taken**

1.19 It is upon the WTO member that has been found to violate the WTO agreements to act on the Panel or AB's decision and modify its own trade measures to bring its disputed action in compliance with its WTO obligations. "Prompt compliance with recommendation or rulings of the DSB is essential in order to ensure effective resolution of dispute to the benefit of all members".

1.20 The country has to, within 30 days, state its intention of compliance clearly and if it is not possible 'a reasonable period of time' can also be granted. This will be determined mutually by the concerned parties if the DSB approves, or to be determined through arbitration.

1.21 Further, a "losing" party also has the option to once again enter into negotiations with the complaining member to determine a mutually accepted 'Compensation' till the time that the rulings and recommendations of the DSB are implemented in letter and spirit. If no satisfactory 'Compensation' is agreed upon, nor the reasonable period of time for the respondent/losing member (in this instance) and the Member has not implemented the rulings and recommendation, a request can be made to an arbitrator i.e. the original panel where possible, to decide the reasonable amount of time to implement the rulings and recommendations of the DSB.

1.22 Once that reasonable period of time has passed, and the respondent has implemented the rulings and recommendations, then that is the end of the matter. However, if the complainant alleges that the rulings have not been implemented, then the same original panel may be requested to determine if the implementation has happened or not. However, there is a drafting error in the DSU due to which there is a time lag and sequencing problem in the DSU between this mechanism and the one for requesting retaliation i.e. "suspension of concessions".

1.23 This sequencing problem led to a near meltdown of the WTO in the "bananas" dispute between the EU and the United States and led to the shutting down of the WTO's offices for full one day before this matter was resolved through negotiations and the creation of *ad hoc* sequencing mechanism.

1.24 At present, what happens is that while in principle, the sanctions are to be imposed in the same sector as the dispute, they could be imposed in a different sector covered by the same agreement and again, if impractical, action can be taken under any other agreement. This may appear strange but the idea is to reduce the chances of actions moving into unrelated sectors, nonetheless, it allows the action to be effective.

**WTO Dispute Settlement Legality**

1.25 Despite the DSU saying there is no value of precedent, and that the panel is aimed at settlement of 'the matter' between the parties, and not to create any jurisprudence. Due to the large number of WTO panel and AB decisions every year since 1995, the body of interpretative material is growing rapidly and Panels and the Appellate Body often cite

principles of public international law as well as the Vienna Convention on the Law of Treaties in their decisions.

1.26 The WTO dispute settlement mechanism operates on the common law and the civil law model and refers to the decisions of other panels in which similar arguments and facts have been cited and therefore adds on to the cases in which panels and the Appellate Body have generally agreed upon. The broad principles set forth in the WTO Agreements and GATT 1947 operate in specific ways and the panels are not formally bound by prior decisions or interpretations. The principles of WTO law are evolving and since it operates by consensus members continue to agree upon new concepts and principles, keeping the basic principles the same.

**Support for Lesser-developed members**

1.27 Since its establishment in 1995, the DSM has been consistently used resulting in new interpretations, derivations and in some cases creation of laws and understandings. Consequently, WTO law has increasingly become complex over the past 20 years. While most developed countries have the in-house legal expertise and the financial wherewithal that enable them to understand WTO law and to participate fully in the WTO legal system, most developing countries and certainly the least developed countries (LDCs) do not.

1.28 The lack of capacity has serious implications for the WTO as an organisation, as increasingly the lesser-developed members could get alienated from the processes of WTO leading to a situation similar to what existed in the GATT days. To address this situation, in 2001, the Advisory Centre for WTO Law (ACWL) was created with the

objective is to provide the Least Developed Countries (LDC) and developing country members of the WTO with adequate legal capacity to help them to understand fully their rights and obligations under WTO law. It provides free advice and training on all aspects of WTO law, as well as assistance in WTO dispute settlement proceedings, to developing countries and LDCs that are Members of, or are in the process of acceding to, the WTO.

1.29 Since its establishment in 2001, the ACWL has provided these countries with free legal opinions, has conducted annual training courses for Geneva-based delegates, and has trained lawyers as part of its Secondment Programme for Government lawyers. In addition, it has assisted developing countries and LDCs in WTO dispute settlement proceedings at modest fees. Thus, it has become an organisation that pools the collective experience of developing countries and LDCs in WTO legal matters and makes that expertise available to each of those countries.

1.30 ACWL has been created as an intergovernmental organisation, based in Geneva; it is independent of the WTO. It was created by an agreement separate from that establishing the WTO and has a membership different from that of the WTO. At present, 74 countries - roughly half of the membership of the WTO - are entitled to the services of the ACWL. The institutional structure of the ACWL consists of the General Assembly, the Management Board and the Executive Director. The General Assembly consists of the representatives of the Members of the ACWL and of the LDCs entitled to the services of the ACWL. It oversees the functioning of the ACWL, monitors the ACWL's finances and adopts the annual budget. The ACWL currently has 11 developed country Members and 32 developing country Members.[5]

[5] http://www.acwl.ch/organisational-structure/

1.31 The Management Board consists of six persons serving in their personal capacities: three nominated by the developing country Members, two by the developed country Members and one by the LDCs. In addition, the Executive Director serves ex officio on the board. The Management Board takes decisions necessary to ensure the efficient and effective operation of the ACWL, oversees the management of the ACWL Endowment Fund, and reports to the General Assembly. The Executive Director manages the day-to-day operations of the ACWL and represents it externally.

1.32 The ACWL is co-financed by its developed and developing country members. The ACWL's sources of financing are the revenues from its Endowment Fund, fees levied for support in dispute settlement proceedings, and voluntary contributions. The Endowment Fund was created from the contributions of both the developed and the developing country Members. At present, the ACWL's annual budgets are financed by voluntary contributions from the developed country Members. LDCs that are Members of the WTO or in the process of acceding to the WTO are entitled to the services of the ACWL without having to become Members of the ACWL or having to contribute to the Endowment Fund.[6]

**Effectiveness of the Present Structure of DSM**

1.33 The WTO dispute settlement system enforces trade rules effectively. It is also a fair system and respectful of members sovereignty. The dispute settlement mechanism of the WTO is a good feature and is also very effective and a great departure from the GATT. Till January 2017, 521 complaints have been filed in the WTO. The WTO Members who have most often used the DSM are – US; EC; Canada; Brazil; Mexico;

[6] http://www.acwl.ch/basic-documents/

India; Argentina; Korea; Japan; Thailand; Chile; China; Guatemala and Australia. Other than Guatemala, all the rest are big economies with fairly well developed resources at their command.

1.34 A vast majority of the WTO membership has never approached the DSM for resolution of its trade related grievances. This is a well known issues and examination of the relevant literature shows that seven major limitations of the DSM, as now existing, have been commonly identified:

(i) Identification and communication of trade barriers by the affected business entities to their government;

(ii) Lack of expertise within a WTO member's government on WTO law i.e., their ability to evaluate their legal rights and options;

(iii) Potential cost of participation in the formal dispute resolution process;

(iv) Fear of political or economic pressure on the part of developing respondent Members;

(v) Long duration of proceedings, followed by even longer periods for implementation;

(vi) Commitments covering part of developing country trade that are not covered by WTO Agreements and therefore enforceable in the WTO; and

(vii) Inability of developing countries to enforce DSB recommendations in their favour against stronger trade partners.

**Present Status**

1.35 Given the negotiated nature of the WTO agreements, including the DSU, negotiation for amending/ improving the system has been taking place. Actually, the 1994 Marrakesh Declaration itself mandates WTO member governments to complete a full review of the DSU by January 1999. They are directed to *inter alia* decide whether to continue, modify or terminate it. Consequently, the DSB started the review in late 1997, and held a series of informal discussions on the basis of proposals and issues that members identified. Many of the Members felt that improvements should be made to the Understanding despite the general shared conviction that the DSU has served them well since it started operating in January 1995.

1.36 However, as has been the bane of WTO negotiations, the DSB could not reach a consensus on the results of the review. The Doha ministerial in recognition of the pending review and noting the quantum work done during this review added a specific mandate for conclusion of the negotiations[7], and directed that *"negotiations should be based on the work done so far and on any additional proposals, with the aim of concluding an agreement by May 2003"*. The Doha Declaration further stated *"that these negotiations will not be part of the single undertaking i.e. that they will not be tied to the overall success or failure of the other negotiations mandated by the declaration.*

[7] Paragraph 30 of the Doha Ministerial declaration states *"We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter."*

*However it is understood that the DSU review will have to finish in time with the rest of the Doha package"*[8]. Thus, giving the DSU improvements a standalone status.

1.37 Since then more than 80 WTO members have presented a large body of proposals, each of which contains several suggested changes. The proposals cover virtually all stages of the dispute settlement mechanism as now existing. Some of the proposals address housekeeping issues while others seek to introduce new stages while still others suggest enhancing the special and differential treatment of developing and least-developed countries. Many these proposals are formal, while others are informal discussion papers, circulated more to float ideas and to evaluate possible support/ response of the larger membership. These are therefore not discussed in detail. A summary of the major proposals, without the details and document number/ notations, is placed as Annex A for information. While these proposals are fairly wide ranging, it may be noted that these proposals largely seek to improve the DSM as it presently stands. They largely are procedural proposals reflecting the experience of the member governments in using the DSM. No structural changes are proposed.

**OBJECTIVE AND RESEARCH QUESTIONS**

1.38 The DSM, as described above, is a member-to-member mechanism; economic/ business entities are not directly involved in the process of dispute settlement. An unfair trade measure implemented by a specific business entity in a WTO member by itself cannot be a 'measure at issue' in a WTO dispute. For a dispute, such a measure has to be taken by the members' government. This flows from the fact that the WTO Agreement is

[8] Paragraph 47 of the Doha Ministerial Declaration, available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

an inter-governmental agreement, not a contract between two international economic actors dealing with a traded product.

1.39 This reality places the role of business entities from participation in WTO DSM squarely outside the WTO. At best they can inform their government about the measure in another members state that is adversely affecting their trade, assist financially in mounting the dispute, and provide other background support. Of course, WTO Member governments are responsible for protecting the interests of their traders in the international trading system, and the WTO is the intergovernmental instrument to do so. Nonetheless, the adverse impact of a WTO incompatible measure is primarily on the business entities of the affected country. They directly face the loss in their businesses, including closure. *De facto* they are the main affected party in the DSM processes, they benefit from it and also suffer its limitations, but without any direct role in it.

1.40 Several proposals for improving the DSM are already on the table[9], these have been considered, analysed, amended, redrafted *ad nauseam.* It is not my intention to examine those and comment thereon or on the issues they cover.

1.41 Similarly, the DSM of the WTO provides it with teeth and this is precisely what makes it a unique inter-governmental organisation different from all others. The various issues relating to the DSM, as it exists have been extensively critiqued in a multitude if publications – right from legal journals reviews to think tank discourses. These are available in the public domain.

1.42 The objective of this study is to evaluate on the basis of case studies the impact of the DSM (including its limitations) on business entities of lesser-developed WTO members. A case or otherwise, based on conclusions drawn from the study, for

[9] Please see Annex A

establishment of WTO compatible mechanisms for inclusion and greater participation of individual business entities of the WTO member states in the DSM processes, is sought to be made. Therefore the relevant research questions sought to be answered are:

(i) Have the various initiatives of WTO Members to make the WTO DSM accessible to the lesser-developed country members' succeeded?

(ii) Is there a case to allow participation of the business entities of WTO members in the dispute resolution process, since they are the directly affected parties, suffering actual losses?

**METHODOLOGY**

1.43 The research primarily is a desk-based analysis of data and review of literature. The WTO website provides a comprehensive set of data and information about all the complaints considered under the DSM. The details of the complainants, the respondents, the third parties, the process and the trajectory of all of these disputes. This information has been collected, segregated, collated and presented in a structured manner with analysis of the same to see what kinds of disputes have been filed and by who. Do the filing of complaints have a pattern, are particular kinds of cases prevalent at specific times. etc. The question whether they just reflect the trade interest or do these complaints have intent and pattern beyond specific trade issues, is sought to be answered by a specific case study

1.44 From the available literature, case details of industries in lesser-developed countries (not those listed as the major users of the DSM) has been picked up and examined as to the impact on them of the DSM. Given that most studies look at specific

issues and have objectives different for that of this study, the conclusions reached in the publications/ documents of the various cases available have not been considered. Several documents and publications have been accessed from the WTO website for a comparative examination of secondary literature and to see the model of their analysis.

**LIMITATIONS OF THE STUDY**

1.45 Given the confidential nature of a dispute it is difficult to access the internal documents that would give an insight into the actual reason/ motivation for the course of action chosen. This is the main limitation faced - the absence of official/ verified documents to get information/ access to actual cases where adverse effect on an industry was obvious bit not documented. Decisions for not referring a matter to the DSM is always internal to a member government. The reasons and motivations can only be imputed from the data available. Therefore, various publically available descriptions of the cases have been examined to draw up/ conclude on the most likely scenario.

1.46 Regarding the data analysis as well, there are issues and limits since each dispute is unique. The facts, the implications, the results, the implementation everything has a political connotation in the WTO. Therefore any common template to analyse the dispute related data is difficult. Various other researchers have noted this limitation, as well. Attempt has been to collect the data and analyse them in a simple manner as the intent of the dissertation is not so much based on an intricate data analysis, but to look at options that would aid private business entities in getting involved in the DSM and benefitting from its processes.