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An Analytical Approach to Resolution of WTO/EU Bodies Involved in the Dispute Settlement Process

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Abstract – The present Union of Europe or better known as European Union a Union of Member States of Europe encompassing Economic and Political Union (to an extent) comes through Maastricht Treaty in 1992. The provisions of Maastricht treaty were much widened by later day treaties of Amsterdam, Nice and Lisbon. Europe has for the first time a Parliament of its own, a Monetary Union giving birth to Euro as Common currency, European Central Bank, Fiscal consolidation and free movement of trade and services. This all is regulated by European Union Law, which includes Trade laws through directives and regulations monitored by European Commission. Trade disputes among member states are resolving through Dispute Settlement Board (DSB). The trade disputes can be put in three categories one among member states within EU, secondly dispute between Member state of EU and Non Member states and third dispute arising out of non EU investor and Member of EU where EU is signatory to multilateral treaty and provisions of which has been violated by Member state. EU dispute settlement mechanism is largely based on WTO provisions and provisions of GAAT. In this article a study has been done on these disputes particularly where EU directives and Regulations are in conflict with Constitutional and Local Law of Member states.

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INTRODUCTION

The DSU has appointed several bodies within the WTO/EU dispute settlement mechanism to deal with the settlement of disputes among WTO/EU Members. These bodies are comprised of the DSB, panels, the AB, the Director-General and the WTO/EU Secretariat, arbitrators, independent experts, and several specialized institutions. Because there are various procedural matters that impact the legitimacy of the WTO/EU dispute settlement system, understanding the structure of the WTO/EU dispute settlement structure is important in framing the discussion of its legitimacy (De Ville, 2012; Bown, 2014; Goldstein, 2008; Dalhuisen, 2010; Goldstein, 2008).

Despite the successful achievements of the European Union (EU) accompanied with World Trade Organization (WTO) in reducing tariffs and non-tariff barriers in international trade, the EU has continued to face a legitimacy crisis (Peterman, 2013; Baker, 2012; McGuire, 2011; McGovern, 2014). New changes in the structure of international law coupled with historical, theoretical, structural reasons pertaining to establishment and evolution of the General Agreement on Tariffs and Trade (GATT) and subsequently the EU have raised serious concerns about the legitimacy of the EU. Globalization has brought about with it new challenges for international organizations as their mandate expands and infringes on what has always been seen as matters of internal domestic sovereignty (Bomber et al., 2012; De Ville, 2012; Robinson & Gibson, 2011; Brown, 2014). The rise of democratic principles has challenged the broad authority afforded to some international organizations and has called into question the accountability of those international organizations to their stakeholders (Poletti & De Bièvre, 2014; Van den Bossche & Zdouc, 2013; Monjon & Quirion, 2010).

DISPUTE SETTLEMENT BODY (DSB)

The DSB, as the representative of the political organ of the WTO/EU, is involved in the adjudicatory function of the organization. The DSB is composed of representatives of all WTO/EU Members. Article IV: 3 of the WTO/EU Agreement requires the General Council to “discharge” the responsibilities of the DSB as provided for in the DSU. The DSB is in charge of administering the DSU rules and procedures and has “the authority to establish panels, adopt panel and AB reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions as well as other

obligations under the covered agreements." (Van den Bossche & Zdouc, 2013; Goldstein, 2008; Dalhuisen, 2010)

In order to guarantee that the decisions of the DSB do not exceed its mandate, decisions are to be taken by consensus. However, as discussed above, in the three distinct instances of establishing panels, adopting the AB or panels' findings, and authorizing retaliation, the reverse consensus rule applies and the decisions are considered to be adopted by consensus in the absence of an objection by all DSB members. In practice, the principle of automatic adoption has given the panellist, and to an even greater degree the AB, significant power that could impact the rights and obligations of WTO/EU Members. The findings of panels or the AB are *not per se* binding. In order to bestow binding authority on the findings, the decisions have to be adopted by the DSB. Such process was designed to reach to a balance between the political and adjudicatory organs of the WTO/EU (Poletti & De Bièvre, 2014; Monjon & Quirion, 2010; Horn et al., 2010; Goldstein, 2008). Under the GATT legal system, the ability of any Contracting Party to block the adoption process was considered a significant obstacle to adopting panel reports.

The adoption process under the GATT was part of the equilibrium that existed between the political and legal functions of the WTO/EU.

In other words, in order to reach a binding decision, all Contracting Parties including the party ruled against had to accept the findings of a panel. The adjudication process was mainly considered a tool that was leveraged in political negotiations between Contracting Parties. Therefore, the political organ of the GATT could practically control the decisions generated by the legal organ of the GATT (Horn et al., 2010; Monjon & Quirion, 2010; Poletti & De Bièvre, 2014). The reverse consensus principle implemented by the WTO/EU changed the adoption process by establishing a quasi-automatic adoption mechanism. Although blocking the adoption process under the reverse consensus principle is still technically feasible, it has proven to be next to impossible in practice. Although WTO/EU Members have opportunity to express their concerns or views on findings, the findings of panels and the AB are ultimately binding on parties of the disputes upon adoption of the decision by the DSB. Another responsibility of the DSB is to "maintain surveillance of implementation of rulings and recommendations." Any Member can raise the issue of implementation at any time in the DSB. The issue of implementation is placed on the agenda of the DSB six months following the date of establishment of the reasonable period of time. The issue of implementation shall remain on the DSB's agenda until the issue is resolved. At least 10 days before such DSB meeting, the Member complained against is required to provide the DSB with a written status report of its progress in the implementation rulings and recommendations (Monjon & Quirion, 2010; Horn et al., 2010; Dalhuisen, 2010). Surveillance by the DSB and providing status reports to the DSB can impose political pressure on the non-complying party to bring its measures into compliance with WTO/EU laws.

The credibility of the WTO/EU dispute settlement system relies to a great extent on the implementation of the decisions by the WTO/EU Members. Therefore, WTO/EU Members attempt to enforce the rulings and recommendations of the DSB in order increase its credibility and legitimacy.

THE DIRECTOR-GENERAL AND THE WTO/EU SECRETARIAT

The Director-General of the WTO/EU may be involved in the dispute settlement system. For example, the Director-General, in an *ex officio* capacity, may offer his good offices, conciliation, or mediation to assist Members in settling disputes. Furthermore, the Director-General convenes the meetings of the DSB. If the parties cannot agree on the composition of a panel within 20 days, it is the Director-General who appoints panel members upon the request of either party, and in consultations with the Chairman of the DSB and the Chairman of the relevant Council or Committee. The Director-General can also appoint the arbitrator(s) for the determination of the reasonable period of time for implementation of rulings and recommendations, if the parties cannot agree on the period of time and on the arbitrator (Monjon & Quirion, 2010; Goldstein, 2008; Horn et al., 2010; Poletti & De Bièvre, 2014).

The staff of the WTO/EU Secretariat, who report to the Director-General, have an obligation to assist Members with respect to dispute settlement at their request, to conduct special training courses, and to provide additional legal advice and assistance to Member countries in matters relating to dispute settlement. Furthermore, the Secretariat assists parties of the disputes in composing panels by proposing nominations for panellists to hear the dispute, It assists panels once they are composed, and provides administrative support to the DSB (Monjon & Quirion, 2010; Horn et al., 2010).

In his study paper Dr Alaistair Young of University of Glasgow (2013) providing an interesting insight into EU Trade Barrier regulation. According to him the EU has two principal mechanisms for deciding which trade barriers to pursue and how: the Trade Barrier Regulation (TBR) and the 'non-procedure' of the 133 Committee. The TBR roughly parallels the Section 301 provisions of the US. It provides a legalistic mechanism through which European trade association or firms can raise foreign trade barriers formally with the Commission. The Commission is then under a legal obligation to investigate and to propose action if the barrier is causing harm and if it is in the 'Community interest' to do so. The Commission is in the driving seat, but is obliged to consult the member governments, represented in the advisory TBR Committee. The TBR Committee can refraction its

dislikes to the Council. The Council requires a qualified majority (a super majority) to block the Commission's proposed action. As of 30 June 2004 this had not happened. As of 30th June 2004 there had been 21 TBR complaints. Of these only one has been rejected, although others have been discouraged before they have been brought formally. Eight of the TBR complaints have led to WTO complaints.

Two other TBR complaints led to the EU joining other WTO complaints as a third party Given that TBR complaints account for less than 13 percent of the EU's WTO complaints, the 133 Committee route is clearly important. This route is not governed by any specific legislation, but is derived from the trade policy powers rooted in the 1957 Treaty of Rome. The Commission again takes the lead, but under this route it consults with the Council's 133 Committee of trade experts. Although there is some ambiguity about the legal requirements, in practice the Commission does not proceed with a WTO Complaint unless it has the support of a qualified majority of the 133 Committee. As of 30 June 2004, the Council had approved all of the Commission's proposals to initiate formal WTO complaints. It clearly reflects that EU Trade dispute mechanism has failed to meet its objectives. (2013) Journal of University of Glasgow Department of Politics (April 2013) Pg 6-9.

In 1996 the US and Canada consulted the World Trade Organization (WTO) about the ban, with the WTO ruling in 1997 that the EU's beef ban was not based on scientific evidence. This is evident of a mechanism failure of EU dispute mechanism system and as well as of EU law and policy governing resolution of such disputes.

Jacqueline M. Nolan-Hale, (2012) civil justice systems are having their share of troubles in Europe as costs and delays associated with courts and the litigation process have significantly impacted citizens' access to justice. As a result of multiple, systemic problems in accessing justice, the alternative dispute resolution (ADR) movement have experienced a steadily growing presence in both civil and common law jurisdictions. Over the last two decades, the European Union (EU) has intentionally promoted mediation and other forms of ADR to advance access to justice goals and has done so with a high degree of intensity. Of all the ADR processes, mediation in particular, is at the forefront of EU discussions about access to justice and efficient dispute resolution. The shift toward mediation suggests that in many respects, mediation is capturing the access to justice movement. A Mediation Directive issued in 2008 by the European Parliament and the Council enhanced its prominence as an access to justice vehicle in the EU. The Directive required Member States to implement structures to support mediation of cross-border commercial disputes in the EU by May 2011.

Mathias Rose (2009), in his paper on Bilateral Disputes between EU and Russia pointed out that over the past years a series of disputes between EU Member States and Moscow have significantly affected EU –Russian Relations and exposed sharp internal differences between EU Member states in their approach towards Russia. The common law relating to trade disputes of Member states are in direct conflict between EU Law and Policy. The problem arises where land locked countries transport their goods through third countries who are also member of EU to Russia. This brings EU trade law relating to trade disputes in picture while such member states contend that trade is direct between such nation and Russia a non EU Member state the trade dispute be governed by common law of their country or bilateral agreement between Russia and such country. While EU law contended all intra trade which includes transportation attracts EU Law.

Wouters Jan, Idesbald Goddeesris, Bregt Natens , Filip Ciouritz, 2013 in their working paper indicated five areas of disputes which comprise of Labour standards and GAAT mode for liberalisation, Intellectual Property Protection and generic medicines, subsidized agricultural and dairy sector, shared values and trade negotiations, efficient trade negotiations and Transparency. The EU law concerning Transparency and decision by European Court on the matter has come under sharp criticism of civil society and parties to dispute requiring a revisit to matters relating to disclosure norms in a trade dispute between EU and Non EU states.

CONCLUSION:

Dispute resolution mechanism has been a major stumbling block among EU member states for several centuries. European nations from first peace conference in Hague to Lisbon treaty special emphasis has been laid on negotiations among states and evolving consensus before incorporating it in EU dispute resolution mechanism. Significant progress has since been made with WTO and GAAT provisions working as ground rules in evolving a Trade and Commercial dispute mechanism in Europe. The investor – state dispute resolution which often form part of cases before permanent court of Arbitration usually involve deviation from bilateral and multilateral treaties from investor point of view while some time EU trade directives and regulations runs contrary to not only national laws but also constitutional laws of member states. This has come out as major challenge before EU Commission. The paper highlights the entire commercial and trade dispute resolution in that gamut and tries to seek answers for the same.

REFERENCES

De Ville, F. (2012). European Union regulatory politics in the shadow of the WTO: WTO rules as frame of reference and rhetorical device. Journal of European Public Policy, 19(5), 700-718.

Bown, C. P. (2014). Trade Policy Flexibilities and Turkey: Tariffs, Anti-dumping, Safeguards and WTO Dispute Settlement. The World Economy,37(2), 193-218.

Goldstein, J. L. (2008). The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO. Princeton University Press.

Dalhuisen, J. H. (2010). Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law. Hart. El-Agraa, A. M. (2011). The European Union: economics and policies. Cambridge University Press.

Baker, B. K. (2012). Settlement of India/EU WTO dispute re seizures of in-transit medicines: why the proposed EU border regulation isn't good enough.

McGuire, C. J. (2011). Marine Mammals and International Trade: Balancing Social Conscience with Trade Obligations–A Summary and Update on the World Trade Organization Seal Products Dispute. International Environmental Law, 13(2), 13-17.

McGovern, E. (2014). International trade regulation (Vol. 2). Globe field Press.

Bomberg, E., Peterson, J., & Corbett, R. (Eds.). (2012). The European Union: how does it work?. Oxford University Press.

Robinson, D., & Gibson, C. (2011). Governing Knowledge: Discourses and Tactics of the European Union in Trade-Related Intellectual Property Negotiations. Antipode, 43(5), 1883-1910.

Poletti, A., & De Bièvre, D. (2014). Political mobilization, veto players, and WTO litigation: explaining European Union responses in trade disputes. Journal of European Public Policy, (ahead-of-print), 1-18.

Van den Bossche, P., & Zdouc, W. (2013). The law and policy of the World Trade Organization. Cambridge University Press.

Monjon, S., & Quirion, P. (2010). How to design a border adjustment for the European Union Emissions Trading System?. Energy policy, 38(9), 5199-5207.

Horn, H., Mavroidis, P. C., & Sapir, A. (2010). Beyond the WTO? An anatomy of EU and US preferential trade agreements. The World Economy, 33(11), 1565-1588.

Jacqueline M. Nolan-Hale,(2012) Is Europe Headed Down the Primrose Path with MandatoryMediation? North Carolina Journal of International Law and Commercial Regulation,Vol. 37, 2012 Fordham Law Legal Studies Research Paper No. 2010615

Wouters Jan, Idesbald Goddeesris, Bregt Natens , Filip Ciouritz,2013 Some Critical Issues in EU India Free Trade Agreement Negotiations Leuven Centre for Global Governance Studies Working Paper No.102 –February 2013