

## **Effectiveness of dispute settlement mechanism in WTO – Some issues**

By **Manoj Gupta**

Last week when USA raised the issue of continuing subsidy in relation to civil aircraft from the EU, even after the adoption of the panel and appellate body's report (DS316) concerning the same by the WTO Dispute Settlement Body (DSB), the question of effectiveness of the remedies available to the countries when the decisions of the DSB are not honored, arose again. This write-up discusses various aspects concerning the 'Undertaking on Rules and Procedures Governing the Settlement of Disputes' in the WTO and effectiveness of its implementation.

### ***DSU and remedies available thereunder***

Dispute Settlement Undertaking (DSU) or the Undertaking on Dispute Settlement is a fundamental instrument for ensuring effective functioning of the multilateral trading system as sought to be promoted by the WTO. It works on the principle that the member countries should not take unilateral actions against each other without trying to settle their trade-related disputes among themselves. The objective of DSB, however, is not adjudication but prompt settlement. Various agreements between the countries (Anti-dumping Agreement, Agreement on Technical Barriers to Trade, etc) also provide that if a member-country feels that the trade regulating mechanisms of another country are not in line with a particular article of relevant agreement, the aggrieved country can approach WTO and if consultations fail, seek setting up of Dispute Settlement Panel to adjudicate whether the disputed mechanisms violate some provisions.

Articles 19, 21 and 22 of the DSU provide the procedure for time-bound working of the panel or the appellate body and for implementation of their reports by the member-countries. Article 19 of the Undertaking states that if the panel finds that measures are inconsistent with certain agreement, then it shall recommend to the member concerned to bring such measures in conformity with the provisions. Article 21, while acknowledging the fact that prompt compliance is essential in order to ensure effective resolution of the dispute, provides that members should implement the panel or appellate body's recommendations within a specified time-frame and in case of dispute relating to time for implementation, go for arbitration to decide the implementation time. Further, as per Article 21.5, if the member is not satisfied with the measures taken on the recommendations, it can further seek dispute settlement and constitution of the panel. Article 22 further provides for compensations and sanctions, with the authorization of DSB, in case the recommendations of the panel are not implemented. Again an arbitrator can be appointed to look into the fact whether the sanctions suggested are in line and level with the provisions.

The provisions under the DSU lay down clear time-lines for every stage, but this schedule is rarely followed. Moreover, there are numerous ways by which implementation of the recommendations can eventually be postponed while the loss to the concerned member-country continues<sup>1</sup>.

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<sup>1</sup> Even if the party raising the dispute wins, the recommendations are largely prospective.

## ***GATT v. DSU of WTO***

While both GATT dispute settlement and the new DSU are handicapped by delays and uncertainty, it can be said that the dispute settlement provisions in the WTO are a shade better than those available under GATT before establishment of WTO. The new provisions provide for setting up of compliance panel (Article 21.5), which was absent in the earlier GATT provisions<sup>2</sup>, but the effectiveness of the same is diluted to a large extent mainly due to the time involved to reach that stage.

### ***Effectiveness of DSU provisions***

#### *Justice delayed is justice denied*

As discussed earlier, enormous time taken to effectively oppose controversial provisions of member-countries and implement recommendations of the panel or the appellate body is a major drawback. For example, in DS103 the consultations were sought on 8-10-1997 but after the usual round of panel and appellate body reports, reports of the panel and the appellate body under Article 21.5 and then second recourse to panel and appellate findings under Article 21.5, agreement was reached between the parties only on 9-5-2003. In DS174 while consultations were requested on 1-6-1999, the panel report was circulated only on 15-3-2005. In DS207 consultations were sought on 5-10-2000 but compliance report of the appellate body under Article 21.5, with the finding of non-compliance, came only on 7-5-2007. There are a number of disputes where even the first panel report came after 3 years from commencement of consultations (e.g. US COOL) which, in effect, calls for looking into the effectiveness of the provisions.

Most recently, Ambassador of Antigua and Barbuda on 17th December 2011, in the 8th session of the WTO Ministerial Conference, stated that even 8 years after they brought the dispute regarding US measures affecting cross border supply of gambling and betting services in the WTO (DS285), they are yet to receive full justice even though the reports of the panel and appellate bodies were in their favour.

#### *Sanctions how far effective*

The reports/recommendations in this case (DS285 – Gambling) called/approved sanctions against the U.S., but as per the words of the Ambassador of Antigua and Barbuda “*That remedy, which might have been appropriate had the case been between the European Union and the United States, calls into question whether the dispute settlement mechanism of the WTO can find innovative solutions that fit the peculiar circumstances of individual cases*”. As can be seen, sanctions are effective only when the member bringing dispute to the WTO is equally economically sound and has the potential to provide some kind of equally balanced measures in case of non-implementation of the recommendations. The DSU provides some relief for the developing and the least developed countries but to what extent the goal has been reached is doubtful.

Sanctions are frequently used in the UNO to compel compliance with international law and here, in WTO also, the main objective of the sanctions is to induce compliance, but the old and outdated law of “eye for an eye” or the “mirror punishment” does not serve the purpose

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<sup>2</sup> Presently the threat of sanctions can only be avoided by consensus vote of DSB which is difficult as no appellant would vote against self.

for two reasons. First, when the opponents are economically dissimilar and secondly imposing sanctions against another country may in turn harm the economy of appellant. Resorting to the same measure (imposing trade restrictions) or authorizing similar measures would not remove or compensate the loss already caused. The DSU authorizes the same but the WTO objective of “rule-based trade” and “trade without restrictions” is practically not met.

### *Looking forward*

On the question of delay in setting up of the panel and in implementation of their reports, WTO should take up the issue more seriously<sup>3</sup> and if necessary even amend the Undertaking to put a time line for completion of various stages of the process. On the implementation part the DSU provides for some sort of settlement but to make the provisions more effective, the Dispute Settlement Undertaking should also have some penal provisions before the member-countries eventually go for imposition of sanctions. This would put in place some mechanism, under the authority of the WTO, to monitor implementation of the panel or appellate body’s recommendations and would also provide for adequate deterrence against such non-implementation. To put it shortly in the words of the Ambassador of Antigua and Barbuda “*If innovative solutions are not found, cases like these can only serve to undermine the credibility of the WTO itself, an outcome that we should all do everything to avoid*”.

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<sup>3</sup> Moreso, considering the slow-down in major economies, the number of disputes is expected to rise.