TRIPS, WTO and IPR - How Effective is the Dispute Settlement Process?

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WTO’s Dispute Settlement Board
The World Trade Organization (WTO) with a membership of 153 sovereign countries belonging to various levels of economic and human development is bound to face various issues while implementing globally harmonized trade order as stipulated under its mandate. Resolution of contentious issues is bound to be cumbersome, complex and often at times infructuous. The Uruguay Round of trade talks had considered impact of possible disputes on maintaining an equitable global trade order and under Article IV: 3 set up a Dispute Settlement Board (DSB) under the aegis of WTO. The objective of this system is to resolve issues multilaterally rather than unilaterally by one member against another.

The method of working of the DSB has also been clearly defined and like in the case of all WTO’s terms of operations decisions are taken through a consensus approach. If any member adopts a policy or violates any of the WTO rules which affect another member (s) the matter is referred to the DSB which in turn nominates an expert panel to consider all factual and legal issues involved and makes a recommendation to the WTO. Any appeal on the decision of the WTO on the matter may be referred further to an appellate body.

The final rulings are then adopted by the world body and suitable measures are suggested to compensate the damage done to the aggrieved party. Unlike in the case of alleged infringement of process patents under TRIPS where the onus of proof rests with the defendant rather than the plaintiff, in the case of dispute settlement, the burden of proof is with the applicant and not with the respondent. WTO may also provide legal help, particularly to members who are unable to mobilize it due to their poor economic and technical development status. In order to avoid undue and protracted delays in the complex disputes settlement process itself, timelines have been stipulated for all critical steps involved. Generally, in no case would the total time required to settle a dispute exceeds 9 to 12 months without appeal and 15 months with appeal. However, considering the time sensitive nature of many disputes even such time frames could be unacceptable.

Nature of Disputes
Any matter which falls under the purview of WTO mandate, to ensure a harmonious global trade order can be the subject matter for a dispute to be referred to the DSB. Every member has an equal right to appeal to the DSB for resolution in his favour if he feels aggrieved by the action or inaction of another member. There are no direct payments for filing disputes; however there could be substantial expenditure connected with a dispute since services of experts including legal personnel; administrative overheads and prosecution expenses could be unaffordable to many developing, particularly, least developed countries. The types of disputes which have come up before the DSB have ranged from issues on tariffs, customs, imports, taxes, counterveiling duties, anti-dumping measures, quantitative restrictions to trade, sanitary and phytosanitary standards, intellectual property instruments governed by TRIPS Agreement including patents, trademarks, copyrights, geographical indications, data protection (trade secrets), Government procurements have all been issues where major disputes have arisen during the last decade and a half. The complainants and respondents have been mostly from the developed countries, such as, US, European Commission, Japan,

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Canada, Australia and New Zealand. In a few cases some of the developing countries including India, China, Brazil, and Argentina, Cuba have also got involved particularly in matters related to tariffs, market access for their products, anti dumping duties and agricultural issues. India’s involvement with the DSB has been restricted to being a defendant in matters related to anti-dumping measures and quantitative restrictions on imports of agricultural products, textiles and some industrial products. As a complainant, India has disputes against European Union and Brazil on safeguards on imports of certain items, against US and European Union on import duties and tariff preferences and against Poland on automobile imports, etc.

**Performance of the Dispute Settlement Board**

Even though on paper, it would appear that the system is equitable and fair to all members of the WTO, when it comes to practical implementation of various provisions including the dispute settlement system, several discrepancies and deficiencies surface. For example, developing and least developed countries lack resources and skills required to recognize violations of their rights under the WTO rules and take effective and timely action. Secondly, while the DSB appears to function as a legal redressal institution, a Court or a tribunal, in actual practice, it has very little powers to enforce any of its rulings on the member violating the dictates of the GATT. There is also no provision to appeal to a higher court of justice such as International Court of Justice. That by itself limits its legitimacy as an agency which is capable of resolving bilateral issues.

In addition, if no compensation is agreed upon by both parties, as dictated by the Board’s ruling, the complainant’s only recourse is to request WTO to suspend any concessions such as those originally granted to that country on tariffs or if that fails even impose sanctions. Sanctions may be imposed on items in a different segment of the same Agreement or if that is not relevant even in an unrelated Agreement. However, impact of sanctions against a mightier country being marginal if any, may not be strong enough reason for an economically strong country to accede to a DSB’s ruling. In fact in majority of cases, disputes in spite of clear rulings establishing violation against a member, have been settled bilaterally through negotiations mostly favourable to the stronger member and in such cases no tangible benefits accrue to a politically and economically weak member state.

If at the end of the process, issues are unresolved and parties do not come to a negotiated settlement, the dispute is kept pending as part of the pending Agenda until it is settled.

The world body by itself does not bring in the issue of violation or non-compliance of any of the WTO provisions by any member and initiate action. It is also a fact that only Governments of member countries have access to the system and neither individuals nor corporations have the right to file disputes with the WTO. It is for these reasons that in spite of the fact that there are over 60 Agreements under WTO and 153 member states, there have been only around 500 disputes registered with the WTO over a period of the last 15 years. These disputes cover as many as 150 different issues connected with various agreements administered by the world body. It is also surprising that of the 153 members of the WTO, not more than thirty members have ever been a party to a dispute either as an applicant or as a defendant.

In general, developing countries have been rather reticent in filing disputes against other members. Around 15% of all disputes have been between two major powers, the European Community and the United States.

Even though India has every reason to be aggrieved on many issues in her dealings with other member countries, notably the US and European Union in the matter of raising disputes, the Indian Government by and large has been very conservative in the matter of filing disputes. The reasons are that most of the issues affect individual corporations or even sectors of industry and since they are not entitled to directly file complaints and the Government does not consider them of national importance to warrant complaints, no applications are made to WTO.

**Conclusion**

WTO has in recent times bypassed a number of its own dictates. The Inter-Ministerial meets have been overlooked after the Hong Kong meet, many of the mandated review processes including those on the dispute settlement system have not taken place, the fate of the DOHA round is still hanging in a balance and its role in some of the emerging issues such as global fair trade, food scarcity, economic melt down, climate changes and other crises are still unclear. More than all these, evidence of substantial benefits to
members through freer trade among them through the
WTO’s polices, guidelines and practices is still
largely empirical. In the words of Peter Sutherland,
the first Director General of WTO, ‘the whole future
of WTO is inextricably bound to the success of
dispute settlement process’. In actual practice, the
process, so very vital for the success of the
multilateral trading system has not been used as a
beneficial measure by the majority, most notably the
developing countries. Only less than half of the cases
filed have been resolved in some fashion with most of
them through independent negotiations outside the
WTO. About a quarter of all cases are still pending
for resolution. The objectives were laudable and
promised much to ensure fair trade practices between
all members. However, in the final analysis going
by the record to date, it is doubtful whether,
considering the high costs of maintaining the system
(around $ 200 mio per year), developing countries
which constitute the bulk of membership have
benefitted from the system. The reasons could be
resources constraints, perceived or real poor
bargaining power or lack of technical skills to utilize
the system. Whatever be the reason, it once again
reinforces the concern about legitimacy, fairness and
effectiveness of WTO’s dispute settlement system.