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THE IMPACT OF POLITICAL DECISIONS WITHIN THE WTO DISPUTE SETTLEMENT SYSTEM: POLITICAL NEGOTIATIONS WITHIN ADJUDICATION

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Abstract

It is traditionally contended that politics and law are two separate domains of international relations among the main actors, states. As opposed to this thinking, international relations of the twenty-first century have been characterized by the continuing interaction of law and politics. As the main actors and participants in international law, states played and still play significant roles in this development. The growing sense of nationalism within states and the concomitant consequence of prioritizing their respective national interests led to the use, by these states, of international law as an instrument of justification. When international law is used this way, politics, and law inevitably confluence to serve the interests of those states with strong national objectives that they seek to achieve in any way possible. International trade has become very essential in international relations more than ever while it at the same time is affected by the political decisions of states at different levels. When the World Trade Organization was established (January 1, 1995), its first aim was to institutionalize the international trade relation among states so that more trade liberalization and integration would be achieved. It has been doing a remarkable job in working towards a more integrated world through its laws, systems, and institutions. The WTO Dispute Settlement System, with its establishing agreement (Dispute Settlement Understanding) and adjudicating bodies, is such a crucial system of the WTO with a good reputation in the past two decades. It has a complex procedure consisting of both political negotiation and adjudication in the judicial process. This paper limits itself to examining how political decisions by Member states within the WTO affect the WTO dispute settlement system's progress to 'judicialization' of its adjudication process.

Keywords : *adjudication, international law, international trade WTO, law, politics, states*

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I. INTRODUCTION

International law, simply understood as a set of rules that countries agree to follow in their relations with each other, has evolved through time. Although there is no world government with the authority of establishing a set of international law principles backed by sanction just like the way domestic laws come into effect, international law still plays a significant role in shaping the relationship between states. International law, except its binding function in international society, has “*the communicative function, the function of embodying shared understandings of international society and the justifying and*

legitimizing function".¹ The peaceful coexistence of states is realized only when nations are willing to coordinate and accommodate their interests. International law, to fulfill its communicative function, sets the rules for states on how to communicate and regulates their relations. The second of the listed above presupposes the communicative function and serves to create shared ideas among the global community taking into account the diversity of the needs of the international society.² Regarding the third, the justifying and legitimizing function, states tend to use international law to justify their actions and deny the legitimacy of the actions of the opposing state.³ It is this third and last function of international law which is the subject matter of the present article in specific reference to WTO's dispute resolution system.

Even if the concept of the rule of law has been adopted at the national level, making state actors bound by their domestic laws, the core principle of the rule of law, "according to which all actors are equal before the law" was not given effect at the international level until recently.⁴ In other words, states were not equally bound by international law principles and there were states whose sovereignty rights were much broader than others. The absence of an 'international' judiciary with the mandate to provide the institutional safeguard forcing states to comply with their international legal obligations rendered the principle of "equality before the law" under international law almost ineffective. Since "the more powerful states were able to do as they pleased while the less powerful states had to suffer what they must", there was no legal guarantee "that like cases of breaches of international law would be treated alike."⁵ The institutionalization of international law was necessary to bring states together and limit the exercise of their sovereignty rights in favor of the rule of law at the international level.

The era of globalization witnessed the dramatic growth of the significance of international organizations in international relations. Martin and Simmons (2002) emphasized that international organizations became common phenomena of international life following the growth in treaty arrangements among states, the deepening of regional integration efforts in different parts of the world, and the gradual institutionalization of international politics.⁶ Among

¹ Onuma Yasuaki "International Law in and with International Politics: The Functions of International Law in International Society" *EJIL* 14 (2003): 130.

² *Ibid.*, 134.

³ *Ibid.*, 136.

⁴ Achim Helmedach and Bernhard Zangl, "Dispute Settlement Under GATT and WTO: An Empirical Enquiry into a Regime Change" in *Constitutionalism, Multilevel Trade Governance And Social Regulation (Studies in International Trade Law)* Christian Joerges and Ernst-Ulrich Petersmann eds. (Hart Publishing, 2006), 85.

⁵ *Ibid.*

⁶ Lisa Martin and Beth Simmons, "International Organizations and Institutions," in *Handbook of Inter-*

many international organizations, the United Nations facilitates international diplomacy, the World Health Organization coordinates international public health and protection, and the World Trade Organization (WTO) monitors and regulates international trade among states.⁷ WTO in general and its dispute settlement system, in particular, emerged in the 1990s as a full-fledged and organized international system to integrate international trade to achieve more liberalization.

WTO as a global trading system represents the confluence of three distinct areas of theory and practice: law, economics, and politics.⁸ Although this topic is beyond the scope of this article, it's noteworthy to mention that these three factors have each played a certain role in bringing countries with different levels of economic development and political power together to work towards the creation and maintenance of a rules-based regime with reduced barriers to trade.⁹ WTO works for the implementation of the various agreements which member states have signed and undertaken as a single package for the realization of free trade and effective liberalization. These agreements cover various and wide issues which are very essential to WTO members to the extent that the members are very sensitive to any interpretation or application of these WTO agreements. That is why disputes are expected to occur very frequently. Every WTO member considers the WTO agreements in terms of their own priorities and policies. As a result, they do not always agree on deciding whether one way or another is the correct way of applying WTO rules. The WTO has developed a system that deals with settling disputes among its members regarding their multilateral agreements.

Given the significance of international trade in the contemporary world on the one hand, and states' growing tendency to justify their actions through international laws and agreements, on the other hand, assessing how the WTO seeks to balance between legality and politics within its dispute settlement system helps to catch up with what the next trend is in international trade law. This study is primarily normative research which is focused on the study of WTO Agreements, more specifically WTO's Dispute Settlement Understanding (DSU) and other relevant instruments to do a comprehensive analysis of the extent to which politics and law are in confluence in WTO's DSS. The research also adopts a historical approach to briefly assess how the regulation of

national Relations, Walter Carlsnaes, Thomas Risse, Beth A. Simmons, eds. (Thousand Oaks, CA: Sage Publications, 2002), 192.

⁷ SUNY Levin Institute, "International Law and Organizations, A Project of SUNY Levin Institute: 2", <https://www.globalization101.org/uploads/File/Inter/interall.pdf> (Accessed on 8 August 2019).

⁸ Craig van Grassek, *The History and the Future of the World Trade Organization* (Geneva: WTO Publications, 2013), 3.

⁹ *Ibid.*

international trade evolved and the potential linkage that might exist between the legal evolution and WTO's current status. To cover the practical aspect of the confluence of law and politics within WTO in general and the dispute resolution in particular, and reflect on the possible implication of such influence on WTO's journey to more judicialization, the study uses case approach and thereby discusses relevant cases which are believed to show the real picture.

The study is a library-based one involving a survey of the literature. Relevant WTO legal texts; Panel and Appellate Body Reports of specific cases are explored as primary sources. Relevant books, scholarly articles, and working papers are also examined as secondary sources with the view to assess the extent to which politics is influencing WTO's DSS and the possible implications of such influence on the system's effort to attain more judicialization. Moreover, the internet and relevant websites are also utilized as secondary sources in this study.

The article has four sections and the first section is all about introductory remarks regarding globalization and the resultant changes which have and still are affecting the state-to-state relations in various sectors. The second section addresses how WTO came into the picture in the regulation of international trade; then the third section explores WTO's DSS, how political decisions by member states have impacted the adjudication process of the WTO both at the consultation and post-decision or execution stage; whether adjudication through pure legal reasoning is necessary and attainable under the current WTO dispute resolution framework. It also discusses what implication of this influence on the effort of WTO's adjudication process to attain more judicialization. The fourth section makes concluding remarks based on the discussions made in the previous sections.

II. REGULATION OF INTERNATIONAL TRADE UNDER THE WTO

Historically two major interests of states created a paradox whose resolution would result, among others, in the emergence of a multilateral trading order regulated by international law. The first interest is related to the sovereignty of states which enable them to have the authority of deciding their fates, whereas the second interest is the need for international cooperation whereby countries needed to put restrictions on the exercise of their sovereignty rights. Grasstek (2013) stated that "*international law needed to be devised and respected, including the forms and norms of diplomacy, protocol, treaties, conferences and eventually the establishment of international*

organizations” to regulate such international cooperation among states and ensure that these states still had their sovereign authorities.¹⁰ It was during this process of developing comprehensive bodies of international law through the signing of treaties and agreements that states began to institutionalize trade relations among themselves so that more trade liberalization and integration would be achieved.

Despite various efforts, it was impossible for states to reach an agreement to establish an international organization for the regulation of international trade until the 1990s which was the time when the WTO was created. The WTO is thus the result of this long-term process which can be taken as a major step for the economic regulation of international trade which was essentially structured within the General Agreement on Tariffs and Trade (GATT) since 1947. Nevertheless, the competition between states’ sovereignty on the one hand, and their desire to create a global order where their sovereign powers are compromised to some extent on the other hand has been and still is a challenge for the establishment of an independent body of international law to which states are fully committed regardless of their national interests and political goals.

Eight rounds of tariff negotiations were held during the GATT 1947 years (between 1947 and 1994): Geneva (1947), Annecy (1949), Torquay (1950-51), Geneva (1956), Geneva (1960-61) - also known as the Dillon Round, the Kennedy Round (1964-67), the Tokyo Round (1973-79) and the Uruguay Round (1986-94).¹¹ The Uruguay Round is regarded as the largest trade negotiation in history not only because it covered almost all sectors of trade but also because 123 states took part in the negotiation process.¹² Most importantly, it was during this round that the creation of WTO was finally made possible when an agreement was signed by ministers from most of the 123 participating governments at a meeting in Marrakesh, Morocco in 1994.¹³ Following the signing of a deal, WTO came into being in 1995.

The Agreement Establishing the World Trade Organization usually referred to as the WTO Agreement and alternatively, as the Marrakesh Agreement, is an agreement adopted as a legal instrument to implement the results of the Uruguay Round and to establish the World Trade Organization. The Agreement serves as a framework for future multilateral trade negotiations

¹⁰ *Ibid.*

¹¹ World Trade Organization, “GATT Bilateral Negotiating Material by Round,” accessed 12 August 2019, https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm

¹² World Trade Organization, “The Uruguay Round” WTO, accessed 12 August 2019, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm..

¹³ *Ibid.*

and comprises general provisions on the WTO's organization, membership, decision-making, etc.¹⁴ All the other multilateral WTO Agreements are recognized as Annexes to and integral parts¹⁵ of this Agreement making membership to the WTO a single-package deal where a state desiring to become a member of the WTO has to agree to be subject to all the multilateral agreements annexed to the WTO Agreement.

Article I of the WTO Agreement establishes the WTO as an international organization with its main objectives¹⁶ explained in the preamble of the Agreement. The WTO as an institution is structured at different levels including the Ministerial Conference, the General Council, the Dispute Settlement Body (DSB), the Trade Policy Review Body (TPRB), specialised councils, committees, working groups, and working parties. It incorporates judicial, other non-political bodies, and the WTO Secretariat. The Ministerial Conference is the highest body of the WTO with various powers granted to it.¹⁷ The General Council is the second highest body of the WTO with far-reaching functions such as assuming full powers of the Ministerial Conference whenever the latter is not in session¹⁸, carrying out management activities within the WTO, functions of dispute settlement¹⁹, and trade policy review.²⁰

The General Council, composed of ambassador-level diplomats, is one of WTO's political institutions acting as three different bodies depending on the functions it gives, meaning when the General Council administers the WTO dispute settlement system, it serves as the DSB²¹ and when it administers the WTO trade policy review mechanism, it stands as the TPRB.²² Thus, it is plausible to state that the General Council, the DSB, and the TPRB are the same body, the latter two being mere emanations from the former even if both the DSB and the TPRB have developed their own respective Rules of Procedures taking into account the special features of their responsibilities.²³

One of the essential functions of the WTO is the administration of the dis-

¹⁴ METI, "Overview of the WTO Agreements" METI, Accessed on 12 August 2019, <https://www.meti.go.jp/english/report/downloadfiles/2011WTO/2-00Overview.pdf>.

¹⁵ Article II (2) of the WTO Agreement.

¹⁶ See also Article III of the WTO Agreement on the functions of the WTO.

¹⁷ Article IV (1), Article VI (2) and Article X of the WTO Agreement are instances of the authorities of WTO's Ministerial Conference.

¹⁸ Article IV (2) of the WTO Agreement.

¹⁹ Article IV (3) of the WTO Agreement.

²⁰ Article IV (4) of the WTO Agreement.

²¹ Article IV (3) of the WTO Agreement.

²² Article IV (4) of the WTO Agreement.

²³ Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 4th ed. (Cambridge: Cambridge University Press, 2017), 133,134.

pute settlement system.²⁴ The DSB, being political in nature, is a body at the highest level of the WTO's dispute settlement system. However, WTO's DSS also has judicial and quasi-judicial bodies which are the standing Appellate Body and the ad hoc dispute settlement panels respectively.²⁵ These bodies operate based on the provisions of WTO's Dispute Settlement Understanding with the objective of providing security and predictability to the multilateral trading system.²⁶

III. THE WTO DISPUTE SETTLEMENT SYSTEM: POLITICAL NEGOTIATIONS WITHIN THE ADJUDICATION PROCESS

Although WTO's dispute settlement system was based on the dispute settlement system of the GATT 1947 which was primarily a power-based system of dispute settlement through diplomatic negotiations, it evolved into a rules-based system of dispute settlement through adjudication.²⁷ Hence, the WTO dispute settlement system is taken as a step forward in the effort of transforming the settlement of international disputes to progressive 'judicialization'.²⁸

Judicialization of WTO's dispute settlement process understood for the purpose of this article as the process of bringing the system under the remit of law by diminishing the impact of politics, begun when WTO adopted the DSU on 1st January 1995. When WTO's rule-based system of adjudication replaced GATT 1947's diplomacy-oriented power-based system, this new dispute settlement mechanism was praised because it "puts an end to the law of the jungle, where might is right. Rules are the weak's best guarantee for the future."²⁹ Because WTO's dispute settlement mechanism is strictly binding empowered with complex decision-making procedures, WTO member states are obliged to rely on its adjudicating bodies and judicial means to solve their trade-related disputes covered under WTO agreements. It is relatively very effective in bringing member states under the rule of law when compared to its predecessor, GATT 1947.

WTO's DSS is seen as a reflection of the victory of law over politics as a system more fully subjects powerful developed countries to the rule of law in

²⁴ *Ibid.*, 102.

²⁵ *Ibid.*, 139.

²⁶ Article 3 (2) of WTO's Dispute Settlement Understanding.

²⁷ van den Bossche & Zdouc, *The Law and Policy of WTO*, 296

²⁸ *Ibid.*

²⁹ Don Moon, "Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data", *International Interactions* 32:3 (2006): 201, 202. <https://doi.org/10.1080/03050620600837841> (Accessed on 02 May 2020).

their international economic relations.³⁰ The process, however, is complicated in that most international relations are governed by politics whereby international law is claimed to serve as an instrument to cover the political decisions made by the most powerful states. International trade is not free from this problem and the WTO system is criticised for incorporating rules and agreements whose contents are advantageous and more favourable to developed countries but unfavourable to developing countries.³¹ Hence, when the adjudicating bodies of WTO's dispute settlement system give legal interpretations and judicial decisions based on these WTO Agreements, it is unlikely for them to prevent power disparities among member states and "produce more equitable outcomes".³² Moreover, the Panel and the Appellate Body focus more on achieving WTO's liberalization policy in their decisions whereby giving purely judicial decision is compromised.

A. WTO'S DISPUTE SETTLEMENT SYSTEM

The WTO dispute system has taken the experience of dispute resolution under the GATT 1947 as a basis for its development.³³ Article 3.1 of the DSU has referred to the two provisions of GATT 1947 on dispute settlement (Article XXII and XXIII) and declared adherence to them. Since there were only two provisions on GATT 1947 dealing with dispute settlement, there were many gaps and shortcomings in the resolution system. For instance, it was only when findings and conclusions of panels were adopted by consensus by the GATT council that they became legally binding. Thus, a single party, typically the party having lost the case, could simply vote against the decision which is unfavourable to it and prevent the decision from becoming legally binding upon it.³⁴ Hence, there was a need to transform the rules on dispute settlement to ensure they cope up with the system's progress and members' expectations.

The Understanding on rules and procedures for the settlement of disputes (DSU) came as a result of the Uruguay Round negotiation on the WTO dispute settlement system. The DSU remedied the major shortcomings of the GATT dispute settlement system. WTO's DSS neither requires consensus for the adoption of panel reports nor does it enable a single member to prevent the

³⁰ *Ibid.*, 201.

³¹ *Ibid.*, 223.

³² *Ibid.*, 201, 202.

³³ World Trade Organization, "Historic Development of the WTO Dispute Settlement System", Dispute Settlement System Training Module, accessed 13 August 2019, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm.

³⁴ van den Bossche & Zdouc, 167.

adoption.³⁵ Hence, unlike GATT's system, one Member opposing the adoption of the report is not sufficient, nor is a majority. Instead, a consensus against the adoption by all Members represented at the relevant DSB meeting should be reached to reject or not to adopt the panel report.³⁶ The vote of one single Member is sufficient enough to secure the adoption of the panel report.³⁷

Dispute settlement is one of the major functions of WTO as per Article III (3) of the WTO agreement. Moreover, Article 3.2 of the DSU provides that WTO's dispute settlement is an essential element to provide security and predictability to the multilateral trading system. The WTO dispute settlement has two major purposes: preserving the rights and obligations of members under the various WTO agreements and clarifying the existing provisions of those agreements.

Since WTO's establishment in 1995 and the adoption of the DSU, 595 disputes were brought to the WTO for resolution and with over 350 rulings issued³⁸ making the WTO dispute settlement system the most active of all currently operating international dispute settlement systems involving states as parties.³⁹ From the total disputes brought to the WTO as of 2016, one-fifth of the cases were resolved without recourse to adjudication through other ways such as consultations.⁴⁰ Moreover, there is a relatively high rate of compliance by respondents in most disputes as they had withdrawn or modified a WTO-inconsistent measure when required to do so.⁴¹

Article 1(1) of the DSU provides that the WTO dispute settlement system has jurisdiction over disputes between WTO members arising in relation to the covered agreements. The covered agreements are referred to in Appendix 1 of the DSU and they include the WTO agreement, the GATT 1994, and all other multilateral agreements on trade in goods, the GATS, the TRIPS agreement, the DSU, and the plurilateral agreement on Government procurement.

Despite its promising progress since WTO's creation, the Dispute Settlement System's relative success is not free from criticisms. There are claims that WTO has not been able to mitigate the imbalance between its adjudicating bodies with the relatively effective legal decision-making process and its

³⁵ World Trade Organization, "The Process – Stages in a Typical WTO Dispute Settlement Case" WTO, accessed 13 August 2019, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s4p1_e.htm.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ WTO, "Dispute Settlement", https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (Accessed on 02 May 2020)

³⁹ van den Bossche & Zdouc, *The Law and Policy of WTO*, 165.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

political bodies with ineffective political decision-making tendencies.⁴²

B. CRITICISMS IN THE AFTERMATH OF PROGRESS OF THE WTO DSS

WTO's DSS is part of a system whose membership is open only for states and its access made available only to WTO member countries. International organizations, non-governmental organizations, associations, companies, or individuals are automatically excluded from having access to WTO dispute settlement. States, by their nature, give politically-motivated decisions either in their international relations with other states or in executing their national policy objectives, and they justify their decisions using international law and safeguarding of public interest, respectively. Since trade relations among states became essential owing to globalization, almost all states are very sensitive to measures taken by another state and which affect trade. The state taking the measures justifies its action based on the WTO Agreements while the other side claims that the measures are not in line with their agreement denies the validity of these justifications. This is where the politicization of the WTO rules starts to take place whereby members seek ways to achieve their national policy objectives based on international law or WTO Agreements.

Despite attempts made to strike a balance between the relative successes and well-functioning of the dispute settlement system with its adjudicative bodies on the one hand, and the existence of consensus-based political decision-making at the WTO on the other, it is improbable to think of the dispute settlement system totally free from the involvement of politics. To begin with, the DSU instructs that members should adhere to consultation with each other as a diplomatic way of dispute settlement before applying for the establishment of a panel.⁴³

The WTO dispute settlement system prefers members to resolve their dispute through consultations, resulting in a mutually acceptable solution, rather than through adjudication. If a Member considers that the preconditions for resorting to the dispute settlement process have been fulfilled, it has to start the process of consultation.⁴⁴ WTO's jurisprudence also reaffirms the provisions of the DSU about the requirement of consultation.⁴⁵ It turns out that con-

⁴² Thomas A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (Cameron May, 2005), 81.

⁴³ Article 4 of the DSU.

⁴⁴ Article 4(3) of the DSU.

⁴⁵ For instance, the Appellate Body in *US – Upland Cotton* case observed that “Articles 4 and 6 of the DSU set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel”- World Trade Organization, *Dispute Settlement Reports*, Vol. 1, 2005 (Cambridge University Press, 2007), 107.

sultations are not a matter of choice but are obligatory preconditions before requesting the establishment of a panel. If consultations do not resolve the dispute within sixty days after the request for consultations, the complainant may request the DSB to establish a panel.⁴⁶ The DSB may refuse to establish the panel if the mandatory procedure of consultation of the DSU as clarified by the WTO jurisprudence is neglected by a member if this member directly requests for the establishment of a panel.

As part of the pledged adherence to Articles XXII (Consultation) and XXIII (Nullification or Impairment) of GATT under the DSU, Article 4.5 of the DSU underlines the importance of consultation among member states in their effort to achieve mutually satisfactory arrangements and solve their trade disputes without the need to resort to other actions under the DSU. WTO does not differ from GATT's system in its basic objective of dispute settlement process as both systems emphasize resolution and consistency with the underlying rules.⁴⁷ Hence, the two GATT Articles as well as Article 4 and 5 of the DSU share a common goal in that they all give recognition for the need to follow "consultative procedures and pre-panel settlements" by parties, provided all are presumed to act in good faith.⁴⁸

Disputing parties are required to consider requests for consultation regarding disagreements over cover agreements and engage in consultative mediation which may take place simultaneously with a panel process.⁴⁹ Pursuant to Article 5.5 of the DSU, consultative mediation presupposes agreement of the parties and takes place in the form of good offices, conciliation, or mediation. The discretion of parties to engage in consultations at any time before or during the panel proceedings coupled with the confidentiality of the process enabled states to use diplomacy to resort to diplomacy when deemed necessary. This is one instance of the political negotiation-oriented elements within WTO whereby Member states seek resolution under the rubric of diplomacy instead of rules.

Since WTO's establishment in 1995, there have been several disputes that have been subjects of much controversy and which gave rise to considerable public debates attracting much media attention. The 'EC-Bananas III' case, one of WTO's most fervent trade conflicts, was concluded in 2012 when the disputant parties notified WTO that they have reached a mutual agreement

⁴⁶ Article 4 (7) of the DSU.

⁴⁷ Saadia M. Pekkanen, "Sword and Shield: The WTO Dispute Settlement System and Japan," *The Japanese Economy* 28 no. 5, (2000): 6. <https://doi.org/10.2753/JES1097-203X28053> (Accessed on 02 May 2020)

⁴⁸ *Ibid.*, 25.

⁴⁹ *Ibid.*

following confidential consultations that took place while the case was being entertained by WTO's adjudicating bodies.⁵⁰ The issue of this case concerned the adoption of a Common Market Organization for bananas by the European Communities (hereinafter EC) in 1993. Complainant states alleged that "*the EC's regime for importation, sale and distribution of bananas is inconsistent with GATT Articles I, II, III, X, XI and XIII as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS.*"⁵¹ The import regime consisted of various measures for the importation, distribution, and sale of bananas whose application allegedly affected bananas imported from third countries to the exclusion of 12 African, Caribbean, and Pacific ("ACP") countries which either have traditionally exported bananas to the European Communities or that were not traditional suppliers of the EC market.⁵²

It is not clear how parties reached an agreement and what the terms of their agreement are regarding the measures taken by the respondent. Before this notification was made to WTO's DSB by the parties, the EU was said to only have made cosmetic alterations to its illegal banana regime ignoring the core WTO rulings on the issue at hand.⁵³ The confidentiality of consultation procedures under WTO's DSU has enabled both parties to keep their agreements secret leaving the question of whether WTO rules under the covered agreements were complied with by the parties or not unanswered. This case is a sound example to show that members would be unable or unwilling to comply in specific cases under WTO dispute settlement decisions; they instead might set aside the decision and deal with the issue politically (diplomatic ways).

In the contemporary world legal order, it seems almost impossible to think of a purely law-based legal process with no attachment to politics of any form. That is why some scholars like the proponents of the Critical Legal Studies movement, a movement "*marked by a rejection of the belief that legal argument can or should be an enterprise distinct from political argument*",⁵⁴ seek to re-strengthen political control of WTO dispute settlement and to weaken its adjudication character. The CLS school of thought strongly advocates that

⁵⁰ World Trade Organization, "DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas," WTO, accessed 3 May 2020, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm.

⁵¹ World Trade Organization, "Summary of DS27," accessed on 03 May 2020, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_imp_test_e.htm#summary.

⁵² WTO, "EC-Bananas III (DS27) Summary" WTO, accessed on 03 May 2020 https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds27sum_e.pdf

⁵³ Helmedach & Zangl, "Dispute Settlement Under GATT," 105.

⁵⁴ David Andrew Price, "Taking Rights Cynically: A Review of Critical Legal Studies," *Cambridge Law Journal* 48, no. 2 (July, 1989): 271.

legal arguments of such an international law system should not be seen distinct from political arguments. Instead, the judicial decisions of the dispute settlement system have to be based on the assumption that legal reasoning is the result of not just written rigid rules but mainly based on social, political, institutional, experiential, and personal factors. This is true regardless of whether the decision-maker expressly admits it or rather denies the impact of these factors on the decision and tries to justify the final outcome based on rules that have been objectively and rationally found and applied to unequivocal facts.

If strict judicial procedures were sufficient enough by themselves to make a legal system effective without being backed by the necessary political support, it would have been very easy for the WTO dispute settlement system to achieve 100% compliance. Despite WTO's complex DSS and stringent procedural rules, the effectiveness of the outcomes of the process and the practical impact of the principle of 'equality before the law' among states under WTO's trade regime are significantly influenced by the political will of member states. Here, it is worth discussing the two related cases concerning subsidies given to Airbus and Boeing: 'EC and Certain Member States- Large Civil Aircraft (2011) ('Airbus')' and 'US- Large Civil Aircraft (2012) ('Boeing')'. On 6 October 2004, the United States requested consultations with the Governments of Germany, France, the United Kingdom, and Spain, and with the European Communities EC concerning measures affecting trade in large civil aircraft.⁵⁵ The US claimed that the EC and its member states were subsidizing Airbus in a manner that is inconsistent with GATT 1994 and SCM Agreement.

Kienstra (2012) reiterated that even before a formal request for consultation was made to the WTO,

*“the US and EC increasingly scrutinized subsidies provided by their counterpart to its respective aircraft manufacturer. The conflict over subsidies, which had persisted between the two since the inception of Airbus in 1970, reached a head in 2004 when the US initiated dispute resolution process at the WTO over subsidies provided by EC to Airbus.”*⁵⁶

Then the EU responded to the US's claims by filing a parallel complaint claiming that the US provided unlawful subsidies to Boeing. The dispute reached ahead in 2010 and 2011 when the WTO ruled that both Boeing and Airbus had collected millions in unlawful assistance of different forms. Boeing got

⁵⁵ WTO, “DS316: European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft,” WTO, accessed on 26 October 2019, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm.

⁵⁶ Jeffrey D. Kienstra, “Cleared for Landing: Airbus, Boeing, and the WTO Dispute over Subsidies to Large Civil Aircraft,” *Northwestern Journal of International Law & Business* 32, no. 3 (2012): 569.

assistance from government contracts for defence and space business as well as tax breaks whereas Airbus secured the assistance in various ways including through aid to launch aircraft programmes that were repayable on delivery.⁵⁷

These two cases involved top officials of both the US and EC countries and have been on-going for the past 15 years, becoming the two biggest and complex cases WTO handled to date.⁵⁸ These disputes, which some parties claim to be ‘cases which serve to remind WTO members that the Dispute Settlement System still works’, have been termed as ‘long-running, high stakes and fact-insensitive’ disputes.⁵⁹ In 2019, the DSB authorized the US to impose countermeasures on EU goods and services up to a value of USD 7,496.623 million annually in line with a WTO arbitrator decision.⁶⁰ Regarding the response claim made by the EC against the US, the complainant has been reported to have filed an appeal on 6 December 2019 against the findings of the compliance panel.⁶¹

These complex and intertwined cases are still going on and are taking longer to be solved not just because the WTO lacks the professional ability to entertain such cases but because the parties involved are head-to-head with each other and continue to subsidize the companies at issue when the WTO is working to settle their disputes. The disputing parties consider WTO DSS not just as a mechanism for ensuring respect for WTO rules or multilateral trade arrangements, rather they use it as an instrument for achieving their national economic objectives and political interests by ensuring the superiority of their companies in the market and making use of the platform to make sure that they are advantageous in any way possible.

Another WTO case that clearly shows how WTO’s complex procedural rules can be manipulated by Members for their interest by taking advantage of DSU-recognized mechanisms such as confidential consultations before or during the panel proceedings is the *US - Clove Cigarettes Case*.⁶² Following the adoption of a Control Act banning the production and sale of Clove ciga-

⁵⁷ *Ibid.*, 570, 571.

⁵⁸ van den Bossche & Zdouc, *The Law and Policy of WTO*, 167.

⁵⁹ Peggy Hollinger, ‘What is at stake in WTO ruling on Airbus-Boeing trade dispute?’, *Financial Times* (October 2, 2019), accessed 24 November 2019, <https://www.ft.com/content/de3f9c12-e3a0-11e9-9743-db5a370481bc>.

⁶⁰ World Trade Organization, ‘Members Give US Green light to Impose countermeasures on EU in Aircraft Subsidy Dispute’ WTO accessed 2 November 2019, https://www.wto.org/english/news_e/news19_e/dsb_14oct19_e.htm.

⁶¹ World Trade Organization, ‘European Union appeals second compliance panel ruling in Airbus dispute,’ Accessed 7 December 2019, https://www.wto.org/english/news_e/news19_e/ds316oth_06dec19_e.htm.

⁶² WTO, ‘DS406: United States — Measures Affecting the Production and Sale of Clove Cigarettes,’ WTO, accessed on 13 August 2019, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm.

rettes except for menthol cigarettes by the US in 2009,⁶³ Indonesia requested consultations with the US claiming that the act contained provisions that were inconsistent with the US's obligation under WTO covered agreements. The US claimed the Act was meant to be to reduce youth smoking in the country. Indonesia, one of the top producers of clove cigarettes imported to the US, claimed that the measure was inconsistent with WTO's non-discrimination principle as it accorded a less favorable treatment to imported clove cigarettes than the one accorded to like domestic cigarettes. Because the Act adopted still allowed the production and sale of menthol-flavored cigarettes, Indonesia further alleged that the measure was more restrictive than necessary to fulfill a legitimate objective.⁶⁴

The WTO Panel found that, because menthol-flavored and clove-flavored products are 'like products' and the ban at issue only restricts the production and sale of clove-flavored ones, the specific section under US's Control Act is inconsistent with the national treatment obligation in Article 2.1 of the TBT Agreement.⁶⁵ However, although the ban treated clove cigarettes less favorably than menthol-flavored cigarettes, the panel ruled that held that it was consistent with the TBT Agreement as Indonesia failed to demonstrate that it was more trade-restrictive than necessary to satisfy the legitimate objective of reducing youth smoking.⁶⁶ While upholding most findings of the panel, the Appellate Body found "*that the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia*".⁶⁷ Overall, Indonesia won the case as it was finally found that the policy was discriminatory because the law still allowed for the sale of menthol cigarettes (menthol cigarettes are mainly produced within the US). On 3 October 2014, the two nations notified the WTO that they have reached a mutually agreed solution⁶⁸ which would enable the US to keep the discriminatory ban. Indonesia opted to negotiate with the US and further set up a framework to resolve several trade disputes between them.⁶⁹

This case is very significant to show how states can manipulate the WTO

⁶³ US, Family Smoking Prevention Tobacco Control Act of 2009

⁶⁴ WTO, "DS406: ANNEX A, Executive Summaries of the First Written Submissions of the Parties," accessed 13 August 2019, https://www.wto.org/english/tratop_e/dispu_e/406r_a_e.pdf.

⁶⁵ WTO, "DS406 Measures Affecting the Production and Sale of Clove Cigarettes", https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ The Hill, "US, Indonesia Settle Clove Cigarette-Dispute" accessed on 14 August 2019, <https://thehill.com/policy/finance/219755-us-indonesia-settle-clove-cigarette-dispute>.

DSS and make things work in their favour. Despite the decision by the DSB, the US refused to comply with the decision and kept the ban, it then agreed to negotiate with Indonesia. This is a political movement whose outcome is most likely influenced by the policies and priorities of the two governments rather than written rules. Political decisions play a very important role in the execution of most international laws and agreements as the interests at stake are very significant.

WTO's DSU has a quasi-automatic architecture that allows Member states to "*exact decisions on politically highly sensitive issues from the dispute settlement system.*"⁷⁰ Moreover, the Appellate Body has been criticized for its rulings on some trade remedy cases where it is alleged to have exceeded its authority and legislating instead of adjudicating by carefully examining Members' trade policy decisions.⁷¹ The criticism comes from the presumption that WTO's adjudicating bodies are biased towards trade liberalization.⁷²

Many scholars such as Hammond (2012) agree that WTO suffers from an institutional imbalance between its judicial branch and its political 'rule-making' branch.⁷³ This imbalance can be attributed to various factors including the fact that while WTO's adjudicating bodies have developed efficiently, its decision-making and rule-making systems have not progressed at the same pace.

The WTO DSS can be said to have, in the words of Zimmermann (2007),

*"...a codified procedure that combines elements of both political negotiation and adjudication. In the current mechanism, the political negotiation-oriented elements include, inter alia, mandatory confidential consultations, tactical elements during the panel stage (establishment of panels only at second meeting where the panel request appears on the DSB agenda, possibility to suspend the panel procedures upon complainant's request, interim review), and the subordination of the entire procedure to a "political" body, as the competence to adopt panel and Appellate Body reports rests with the Dispute Settlement Body."*⁷⁴

".... Rule-oriented elements include, inter alia, the conformity and notification requirements with regard to mutually agreed solutions; the right

⁷⁰ Thomas A. Zimmermann, "WTO Dispute Settlement: General Appreciation and the Role of India," in *WTO and Dispute Resolution*, K. Padmaja, ed. (Punjabgutta: The Ifcai University Press, 2007), 164.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Felicity Hammond, "A Balancing Act: Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes," *Trade Law and Development* (2012): 427.

⁷⁴ Zimmermann, 151.

to a panel (more generally: the removal of blocking possibilities in the process); the appellate review stage; and the prohibition of unauthorised, unilateral retaliatory action.'⁷⁵

The system in general is the outcome of the procedural interaction of elements of political negotiations on the one hand and judicial rules of adjudication on the other hand. Besides, since WTO's rule-making body has been in a deadlock for a quite long time now, the DSS may also succumb to judicial activism as a response to the evolving needs of WTO members and the necessity to deal with such demands. If this is the case and if WTO's rule-making branch continues to be in stalemate, the aim of WTO's DSS to attain more judicialization and less politicization is not far from being a mere wish whose possibility of becoming true is not in the near future.

IV. CONCLUSION

The WTO dispute settlement system has been operational for more than two decades now and it has achieved an unexpected success throughout these years. But, this doesn't mean the system was free from drawbacks and flaws. It has been criticized for structurally incorporating political procedures while its bodies work towards 'judicialization' through 'pure' legal reasoning. When the panel and the Appellate Body carry out their responsibility of giving judicial decisions based on the DSU for procedural rules and the WTO Agreements it seems almost impossible for these bodies to interpret these Agreements and legal instruments without the involvement of politics.

WTO's membership is open for all sovereign states and it is these states that have access to the WTO dispute settlement system. Because states, by their nature, give politically-motivated decisions either in their international relations with other states or in executing their national policy objectives, they manipulate international law to their advantage and justify their actions based on the safeguarding of public interest. Even if attempts are being made to strike a balance between the pressing interests of states on the one hand and the judicialization of WTO's DSS on the other hand, the system is highly influenced by the political moves made by states. The other important issue worth noting is the fact that the DSB is a political body that is responsible for leading WTO's DSS and adopting panel and Appellate Body reports. This in turn gives room for the mixing of politics with the judicial system of the organization.

⁷⁵ *Ibid.*, 152.

The paper has briefly discussed how regulation of trade evolved in the progress of international law, what the WTO Dispute Settlement System is, how political decisions influence the decisions given by the adjudicating bodies of the WTO, and what this means when examined in terms of WTO's journey towards more judicialization. The WTO dispute settlement system, a system with a codified procedure that combines elements of both political negotiation and adjudication, cannot be expected to develop an adjudicative system whereby judicial decisions are made based on pure legal reasoning without being influenced by political decisions.

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