INDIA’S STANCE AT THE WTO SETTLEMENT PROCEEDINGS AS A THIRD PARTY

By- Rashmi Shukla

### The dispute settlement system of the World Trade Organization (WTO) has resolved hundreds of landmark and heated trade, economical and commercial tensions between states since its inception in the year 1995. The procedural nature of these settlements is such that, one or more member country files a challenge against an economic policy of another member state hence becoming the complainant, while the other member state that has allegedly contravened any provision of the WTO regime and treaty commitments acts as the defendant. However, unlike other dispute settlement mechanisms where the two parties get a decision or reach a conclusion thereby putting an end to the dispute, the same doesn’t work similarly in the WTO regime.

### WTO works on a multilateral cooperation between economies and non-discriminatory treatments is a substantial cornerstone of the same, therefore, along with the defendant(s) many other countries have a substantial interest in a dispute and the outcome of the same and thereby join as third parties, the same is usually done to influence and monitor the proceedings. These third parties, mostly, outnumber the original parties as well. This participation in the proceedings has a two-fold purpose; firstly to protect the substantial economic interest of themselves and secondly as a mechanism of diplomatic dialogue and to piggy ride on the benefits being acquired by the parties to the dispute.

This third party participation is of critical importance to the WTO function, as a matter of fact, WTO members indulge into reciprocal commitments and obligations and this can be done fairly only by adhering to the principle of non discrimination. By third party intervention, these participants prevent the parties to the dispute to enter into any under hand dealings and discriminate against other members and thereby maintain the equilibrium.

Accordingly, some observers insist that the role of third parties should be amplified, contending that they give WTO judicial bodies a broader perspective that results in verdicts reflecting the wider interests of the membership as a whole.[[1]](#footnote-2) While some of the scholars argue that third parties further complicate and delay the dispute settlement, making it more costly.[[2]](#footnote-3) Almost every research on the judicial decision making reflects that third parties intervention affect verdicts,[[3]](#footnote-4) on the same line, many scholars argue that the WTO judicial bodies carefully weigh third-party testimony in deciding a case.[[4]](#footnote-5)

Third party intervention not only influence the strategy in rendering a legal verdict of the judicial body but also influence the negotiations even before a ruling is issued. As Stasavage opined, third parties have a tendency to prompt the negotiating parties to a dispute to posture and make them reluctant to retreat from original position even when a deal may otherwise be reached prior to ruling.[[5]](#footnote-6)

It can therefore be well contemplated that by increasing the stakes of the pretrial negotiations, third parties state significantly reduce the situation of early settlement in the form of a trade liberalizing regime negotiation prior to WTO ruling.[[6]](#footnote-7) It is well established that political pressure plays a significant role in judicial pronouncements in any international judicial decision making and therefore the role of third participants in WTO dispute settlement is of utmost importance.[[7]](#footnote-8)

This article concerns itself with the participation of India as a third participant during the year 2014-16, the pattern of participation of India and the economical and diplomatic significance of the same.

The WTO process for dispute settlement initiates with a request for consultation in which both the parties put forth their objections and contentions, thereby the parties are expected to negotiate and approach a mutual solution. Most of the cases are resolved during this stafe only however the others proceed to constitution of an ad hoc tribunal, which the WTO refers to as the “panel”.

Typically, there are two stages of testimony, where the parties can still negotiate a settlement prior to the decision. Only 1/3rd of the WTO cases approach the way to a legal verdict and if not withdrawn or resolved, the panel issue final report which can further be appealed by both the sides, then going to the Appellate Body level, the conclusion of the dispute is then made by adoption of the reports and giving binding legal effect.

Article 10 of the WTO’s Dispute Settlement Understanding (DSU) allowed third party states to submit written or oral testimony before panels during the first round and to receive submission of the main parties, which is otherwise confidential to outside non participants. If there is an appeal, then Article 17 of the DSU provides rights at the Appellate Body stage.

Article 4.11 if the DSU stipulated that members that wish to join in consultation must have some “substantial trade interest” in the matter, members can also claim a “systematic interest” in a dispute that is the formalizing concerns for the interpretation of agreement or legislation of WTO laws.

If consultation fails, then Article 10.2 formulates third party intervention before a panel and the criteria is “substantial interest” rather “substantial trade interest”.

Chad Bown’s empirical work finds that

1. Countries having large exports which is directly and significantly affected by the policy in dispute are more likely to become co-complainants.
2. Countries with moderate exports in the market that is disputed and are not directly affected by the policy are likely to become third parties.
3. Countries that are small, poorer, dependant of foreign aid or trade agreements are least likely to be a part at all.[[8]](#footnote-9)

India has been a founding member of both General Agreement on Tariffs and Trade (GATT) and WTO and adhered to the rules and guidelines in the sphere of International Trade. In a time when most of the developing nations were reluctant to approach the Dispute Settlement Body (DSB) for ascertaining the rights and economical sanctions due to the lack of technical and legal competence and the expenses involved, India since the very inception was an active participant and user of the DSU at both WTO and the GATT.

India filed its first complaint in 1948 in the famous *India-Tax Rebates* case. India as a third party is one of the most active developing nation of the WTO.

In this article, an analytical study has been done about India’s participation as a third participant in the Dispute Settlement under the WTO over the year 2014-16. For a better understanding, a comparative analysis of China and Brazil’s participation during the past three years was also done.

*The data has been retrieved from the official website of WTO; may access here: https://www.wto.org/english/tratop\_e/dispu\_e/dispu\_by\_country\_e.htm*

It was observed that during the above mentioned years, Brazil was a third party to 47 cases, out of which 14 reached beyond the consultation and constitution of panel stage and Brazil made significant written submission to all of the disputes, making significant legal as well as economical comments therein. On the other hand, China was a third party to 42 disputes during the above mentioned years out of which 19 reached the adjudications stage, china made significant oral or written submission to 12 of the matters.

On the contrary, India participated in a total of 47 cases, of which 24 cases went beyond the consultation and constitution of panel stage. However, of these 24 cases, India made written or oral submission to only 5 cases; despite the fact that it was observed that Brazil, India & China were parties to the same disputes, the participation of the three was significantly difference. The question that arises is regarding the factor that affect a country’s participation and indulgence in these practices, is it only the economical interests or also diplomatic relations that governs the participation of a state as a third party in WTO settlement process.

To understand the same, a detailed study of the 5 cases, in which India made written or oral submission, is done here which may show a clearer picture as to the background of possibilities of India’s intervention.

The first case was, United *States — Countervailing Duty Measures on Certain Products from China* – DS 437, on July 14,2014, the WTO panel issued two reports in cases *United States – Countervailing Duty Measures on Certain Products from China & United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India.* The case was regarding unregulated and violative imposition of countervailing duties on certain products being exported by the India & China. It is pertinent to note that in the dispute between China & US, India acted as a third party and in the dispute between India & US, China acted as a third party participant and made substantial claims regarding the same.

India contended to have systematic interest in the issues raised by China in the issue and intervened to provide view for the proper interpretation and application of the SCM agreement. India’s arguments were regarding the term “public body” and the use of “adverse facts available” standard used by the United States. The panel considered the arguments and a decision was rendered by the panel in favor of China.

It is to be observed that India had systematic interest in the view that similar issue was being raised by India in a similar case. Moreover, it is well known that one of the major benefit of becoming a third party is to receive the benefits from pre-litigation settlements while not having to bear the cost of litigation, third parties can piggy back the benefits on the cost of complainant’s litigation, becoming third parties provides the right to be a part of the otherwise confidential and private negotiation prior to the litigation process.

Another factor is a rather diplomatic stance, if there is no third party intervention; the two parties are likely to approach mutual conciliations and settlements. This is beneficial to the membership, however also creates a risk of discriminatory treatment wherein the parties to the litigation will get some underhanded benefits to the detriment of other member nations.

So, in this case, whereby India assured to make its point being heard and supported in front of the panel while at the same time ruled away the possibility of China and US having any private negotiation by participating as a third part.

It can therefore safely be presumed that third party intervention is not simply a legal strategy but more of a diplomatic and political intervention by countries to assure the benefit of their economy.

In the case of *United States – Certain Country of Origin Labelling (COOL) Requirements – DS 384*

India made submission and contended to have systematic interest in the proceedings. India, firstly made significant submission contending that resource constraints, especially in regard to developing countries, should be considered to be “exceptional circumstances” for altering the time-periods and must be considered to be the same in future appeals as well. This way, India paved way for easier accommodation of such request by it in future.

Further, India did not take any stand on the factual stance of the country since it was of little to no relevance to Indian market and instead, contested on the issue of Article 21.5 proceedings which was in regard with the scope of a panel request in Article 21.5 proceedings

The panel took into view India’s contention that Article 21.5 proceedings should not be limited to evaluation of implementing measure but rather should be extended to a complete consideration of legal and factual backdrop of implementation of the measure as well.

It can therefore be noted that despite being a developing nation, India makes it a point to shape the jurisprudential approach of the WTO settlement process, asserting its presence and interest as a global market economy.

In the case *Philippines – Taxes on Distilled Spirits – DS 403*

Wherein, the issue in dispute was regarding the excise tax measure of Philippines being inconsistent with principle of national treatment.[[9]](#footnote-10) The EU and US argues that it created a hierarchy system of tax levy wherein lower rate of taxation was applied on spirits made from specific raw materials which are produced in Philippines, thereby, giving undue advantage to domestic products while imposing separate taxation on spirits prepared by raw material requirements which were not of Philippine, thereby, violation the principle of national treatment.

India made submission regarding the interpretation of the term “like products” & “directly competitive & substitutable” products.

The Indian delegation contended that “*we have also a somewhat similar experience as regards classification of India's 'whisky' produced from molasses which is sugar based, when exported to the EU. Whereas the whisky produced and exported by the EU and US is largely malt or cereal based. As in the case of Philippines, the EU has not recognised our molasses based whisky as 'whisky' for the purpose of imports in the EU. The underlying reasons given for non-acceptance of recognition of molasses based 'whisky' as whisky by the EU is on the ground of the raw material used for production. As argued by Philippines, the use of raw material has the effect on the product's properties. In our view, this should be an important factor to determine the 'like product' in this dispute”[[10]](#footnote-11)*

In this case, India raised question as to the interpretation of WTO provisions while at the same time took a diplomatic stance by clearing the determination of differentiated taxation of goods, regarding which India was facing an issue with EU not considering their ‘whisky’ among the same category on the basis of similar classification as made by Philippine, so, in such a situation, despite not handling a litigation itself, India made its legal as well as diplomatic stance stronger.

Lastly, *US- Upland Cotton Case* was regarding a dispute between US & Brazil regarding subsidies on cotton production being provided by US to cotton producers, USA being largest trader of cotton. India participated as a third party, though, US and Brazil approached on a mutually agreed condition of US investing in Brazil’s cotton study institute, thereby, not revoking the offensive measure as well. The WTO mandates that all the solutions reached upon during consultation must be in consistency with the WTO commitment and must not impair benefits accruing to any other member and nor should impede any objective of the WTO agreements.[[11]](#footnote-12)

With a clear analysis of the above mentioned cases and seeing the number of cases that India is a third participant too, even though not taking part in any formal procedural by making any written or oral submission it can be concluded that India take a rather diplomatic stance at the forum of WTO dispute settlement. At the consultation stage, India has a substantive presence in many cases, thereby, not leaving an opportunity to take advantage of any benefit that might be negotiated.

It can, therefore, be legitimately concluded that despite having an elaborate dispute settlement unit and procedures, till date, the WTO remains to be a diplomatic institution. Even though the rulings are considered to be binding, the perception of the members and the political influence of the participating parties shape the impact of rulings. While absence of third parties makes it a simplistic legal procedure of the winner benefiting and loser being harmed, the third party intervention makes it a diplomatic channel of economic and legal preferences of several actors.

However, while contesting for a permanent membership of UN and being one of the fastest growing economies in the world, it is time that India can notch up its stance and be an active participant in the evolving legal scenario of the WTO settlement process as well. A meagre number of 5 cases over a period of 3 years as a substantial participant puts the research at a contemplative juncture wherein the question upon India’s view of the WTO settlement arises, is it merely a diplomatic forum or a genuine judicial entity for settlement of disputes.

1. Chi Carmody, “Of Substantial Interest: Third Parties under GATT,” Michigan Journal of International Law 18, no. 4 (1997); Zhu Lanye, “The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports,” Temple International and Comparative Law Journal 17, no. 1 (2003), 235; Duane W. Layton and Jorge O. Miranda, “Advocacy before World Trade Organization Dispute Settlement Panels in Trade Remedy Cases,” Journal of World Trade 37, no. 1 (2003), 95–96. [↑](#footnote-ref-2)
2. See, for example, WTO Documents TN/DS/W/38, TN/DS/W/25, and TN/DS/W/41. [↑](#footnote-ref-3)
3. See Karen J. Alter, “European Governments and the ECJ,” International Organization 52, no. 1 (1998); Geoffrey Garrett, R. Daniel Keleman, and Heiner Schulz, “The European Court of Justice, National Governments, and Legal Integration in the European Union,” International Organization 52, no. 1 (1998); Laurence R. Helfer and Anne-Marie Slaughter, “Why States Create International Tribunals: A Response to Professors Posner and Yoo,” California Law Review 93 (May 2005). [↑](#footnote-ref-4)
4. Allan Rosas, “Joinder of Parties and Third Party Intervention in WTO Dispute Settlement,” in Friedl Weiss, ed., Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals (London: Cameron, May 2000); James McCall Smith, “WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings,” World Trade Review 2, no. 1 (2003). [↑](#footnote-ref-5)
5. David Stasavage, “Open-Door or Closed-Door? Transparency in Domestic and International Bargaining,” International Organization 58, no. 4 (2004), 682. [↑](#footnote-ref-6)
6. (the original article) [↑](#footnote-ref-7)
7. Clifford J. Carrubba, Matthew Gabel, and Charles Hankla, “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice” (Manuscript, Emory University, Atlanta, Ga., 2006). See also R. Daniel Kelemen, “The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU,” Comparative Political Studies 34, no. 6 (2001); Geoffrey Garrett and James McCall Smith, “The Politics of WTO Dispute Settlement” (Manuscript, UCLA, 2002). [↑](#footnote-ref-8)
8. Chad Bown, “Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders,” World Bank Economic Review 19, no. 2 (2005). [↑](#footnote-ref-9)
9. Article III.2, GATT 1994. [↑](#footnote-ref-10)
10. Case citation [↑](#footnote-ref-11)
11. Article 3.5, Dispute Settlement Understanding. [↑](#footnote-ref-12)