The Rhetoric of Sovereignty in the WTO: How Sovereignty can Impact State Conduct in the Dispute Settlement Framework

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I. INTRODUCTION

Sovereignty as it is understood in the modern day, dates back to the development of individual states, and became most apparent in practice by the time that the Peace of Westphalia treaties were signed in 1648. It was promulgated by the writings of scholars such as Machiavelli, Bodin, and Hobbes, and was etched in the teachings and practice of the world following World War II, with the desire to ensure an understanding of the importance of territorial restrictions between states. The notion is defined in Black’s Law Dictionary, and is understood as “the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.”

This definition makes a significant distinction between “internal sovereignty,” which delineates the relationship between a state and its people with regards to internal affairs, and “external sovereignty,” which focuses on the relationship between several states, and highlights the importance of territorial independence.

The aforementioned distinction is integral to the understanding of sovereignty within the framework of the World Trade Organisation (WTO), as it highlights the core aspects of statehood that could lead to disparity in the actions of member countries when faced with compliance to organization rules, and rulings

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2 Id.
3 Sovereignty, BLACK’S LAW DICTIONARY (3d. Ed. 1933) (emphasis added).
of the Dispute Settlement Body (DSB). It also highlights the importance of power to sovereign states, which when applied in the context of the WTO, hinges on the desire of nations to reap the benefits of bilateral and multilateral trade agreements by giving up some sovereignty to the WTO on paper, while seeking to maintain their full right to make trade decisions unilaterally in practice.

Furthermore, the distinction emphasizes that by relinquishing sovereignty in trade relations and allowing the WTO to influence aspects of trade that could affect the market, the populace may develop adverse perceptions regarding strength of their own government. This effect on popular sovereignty could ultimately cause a nation to struggle to maintain its legitimacy. Within the trade milieu in particular, critics of the organisation would argue that it is more important to focus on the financing of sunrise and sunset industries within one's own territory, rather than seek to implement the more efficient comparative advantage model, which can be perceived as aiding the progress of other nations' economies to the determinant of indigenous economies. Therefore, this paper will provide a preliminary examination of the rhetoric of sovereignty in argumentation within WTO tribunals, while highlighting a few discrepancies in the notions of sovereignty to which varying countries subscribe when on trial at WTO level. It will also consider whether the actions discussed represent a desire to maintain power unilaterally, while still benefitting from the free trade agenda promulgated by the WTO.

In order to do this, I will briefly introduce the WTO's current dispute settlement mechanism, and shed light on some of the vices of its previous system. This is valuable to the analysis, as it creates an awareness of the system that seeks to 'police' adherence to free trade principles. I will then discuss a few member state case studies from the WTO Tribunal, analyse some pre-trial actions and arguments

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5 See generally Dispute Settlement System Training Module: Chapter 3: WTO Bodies Involved in the Dispute Settlement Process, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm (last visited Dec. 11, 2013) [hereinafter Dispute Settlement Ch. 3].

6 See id.


8 Dispute Settlement System Training Module: Chapter 1: WTO Bodies Involved in the Dispute Settlement Process, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm (last visited Dec. 11, 2013) [hereinafter Dispute Settlement Ch. 1].
at trial, and share a number of key reactions to the Tribunal rulings from the perspective of developed and developing nations. This will serve to provide an initial insight into the effect that the desire to maintain sovereign authority has on the countries, and the efficacy of the tribunal system.

I will then proceed with a discussion of the direct effect of judicial activism on sovereign prerogatives, and how this acts a drawback to the sovereignty of countries, as its very existence and performance casts doubt on member countries’ ability to act as sovereigns on trade matters. Following the discussion, this paper will make apparent some difficulties that the dispute settlement body faces in tackling disputes between member nations. It will also promulgate an initial assertion that as member nations seek to retain their sovereign authority within the framework, and argue that the dispute settlement body within the WTO seems to struggle to exert proper adjudicatory power over them. Finally, it will show how these issues have led to the disparity between the treatment of the stronger developed nations, and that of the less influential developing ones.

II. BACKGROUND

The idea that belonging to any supranational organisation requires members to give up a portion of their sovereignty to the international body at the helm of the organisation’s activities is not a foreign notion in the business of international relations. In fact, this very idea is integral to the functionality and legitimacy of the dispute settlement mechanism of the WTO (particularly the Dispute Settlement Body, the Panels, and the Appellate Body) because unlike courts, their validity and jurisdiction stems from the mere fact that through membership, countries are bound by the Dispute Settlement Understanding (DSU) which creates and empowers the entire framework. The DSU calls for “[p]rompt compliance with the recommendations and rulings of the Dispute Settlement Body…” and explains that this is “essential in order to ensure effective resolution of disputes to the benefit of all the members.”

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9 See generally, Dispute Settlement Ch. 3 supra note 5.
11 Id. art. 21.1.
Arguably, nations agree to forfeit portions of their sovereignty to supranational organisations because the world has become increasingly interdependent, and is seen to favour the harmonisation of countries and their activities based on a firm belief in the merits of globalisation. Additionally, it is believed that the maintenance of constructive relationships between countries is both advantageous and necessary in order to minimize opportunity costs, while increasing welfare and GDP for each state based on the notion of comparative advantage. However, it is well known based on the early writings of scholars, such as Hobbes, that sovereignty is a power that nations desire to maintain and utilize effectively in order to ensure that they have the freedom to act as a stand-alone on the world’s stage, while maintaining the required legitimacy that is required to enforce law within their borders. It goes without saying that a state that is deemed to be entirely subject to the control or influence of external organisations could lose the power of enforcement within its own territory, and among its peer nations.

John H Jackson, sheds light on what is the balance between the unconstrained judicial activism and judicial restraint of the appellate body. In theory, such activism could lead countries to unilaterally withdraw from the WTO. This assertion implies that member countries desire to maintain their full sovereignty, and by some measure, retract the mandate that they have given to the organization via membership. Conversely, it is also argued that judicial activism within the WTO is a necessary component of the legitimacy of its dispute settlement body which should be embraced, rather than lead countries to exit the organization. This is because when a body is given the power to act in a certain capacity, it owes a duty to act impartially and without deference to any organ from which its power springs. For example, arbitrators are selected and empaneled to adjudicate fairly,

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13 Sovereignty, supra note 7.
regardless of which party to the dispute selected them. Evidently, those countries that oppose such judicial activism enough to contemplate withdrawal, also believe that that its practice constrains their sovereign ability to withdraw. For example, a group of Caribbean banana producing countries, which were rather disappointed with the outcome of the EC Bananas dispute in 1997, reportedly threatened to withdraw from the WTO, but did not do so. \textsuperscript{17} These tensions make evident the importance of sovereignty to member states in international relations, but also show the difficulties that countries face in holding fast to their sovereign authority on international matters.

There is a sense that developing countries have a stronger concern for their sovereignty within the WTO because they are not as powerful as the developed nations, and cannot advance their interests on the international scene economically and militarily.\textsuperscript{18} Therefore, they argue that they do not hold sovereignty within the framework, and use the discourse of sovereignty as a tool to influence the dispute mechanism procedure.

Developing a clear understanding of the actions of countries before the WTO Tribunal in reference to the coveted ‘sovereign authority’ requires a basic grasp of the organization’s dispute resolution system as this will aid in showing the strengths and weaknesses of the system. It will also shed light on the system’s loopholes, which leave room for states to act unilaterally as sovereigns - and the growth and development that the system has undergone to date.

III. AN INTRODUCTION TO WTO DISPUTE RESOLUTION

The Dispute Settlement Understanding (DSU)\textsuperscript{19}, which is formally called the Understanding on Rules and Procedures governing the Settlement of Disputes, exists in order to establish rules and regulations to adjudicate disagreements arising under the Covered Agreements of the Final Act of the Uruguay Round.\textsuperscript{20} All member nations of the WTO are subject to the rules, and cannot reserve the right

\textsuperscript{17} Bossche & Zdouc, \textit{supra.} note 15.
\textsuperscript{19} DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226.
to opt out, as some consent-based systems of international law condone. The DSU created and empowered the Dispute Settlement Body (DSB) consisting of representatives from all WTO member states. It acts as the final arbiter or adjudication system within the dispute settlement framework, and also establishes strict timeframes for the dispute settlement process. It also creates an appeals system that sets the standard for the interpretation of substantive provisions of the covered agreements. These rules and procedures have been implemented in order to provide “...security and predictability to the multilateral trading system...” and attain “...a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements.” The stages of dispute resolution covered include consultation, good offices, conciliation and mediation, a panel phase, appellate body review, and remedies. The earlier stages of consultation, good offices, conciliation and mediation are the customary approaches to the resolution of conflicts in public International Law making them generally accepted diplomatic means to the settlement of disputes. Therefore, the pacific nature of international organizations, acts in favor of the sovereign prerogative of individual member states.

The current dispute settlement procedure, known as the Dispute Settlement Understanding (DSU), was conceived based on the ineffectiveness of the prior dispute resolution method under the GATT, which failed to create an appropriate enforcement mechanism for the adoption arbitrated outcomes by parties to arbitrated disputes. “Under GATT, procedures for settling disputes were ineffective

26 See generally DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226
and time consuming since a single nation, including a the nation whose actions were the subject of the complaint, could effectively block or delay every stage of the dispute resolution process.”27 This hindrance on the former dispute settlement process shows the extent to which countries sought to maintain their sovereignty, and the lengths to which they would go in order to achieve their goals. As the DSU was designed to create a definitive process under which member countries can be held accountable for their actions, it is clear that it invariably aimed to reduce the sovereignty of countries within the organization, as its very existence acts as a check on member countries that seek to implement policies or regulations that will make it arduous for foreign entrants to engage in business within a given country. The DSU creates exceptions28, for barriers that are put in place in order to ensure that the goods brought into their countries meet specified standards, for example safety or environmental protection standards. It is not completely ludicrous to believe that some countries disguise their commitment to protectionism under the creation of barriers that force compliance with certain environmental standards and safety regulations. This practice is anticipated in the substantive provisions of the covered agreements, e.g., the chapeau to Article XX under the GATT 1994,29 but regardless of its mention, member nations are still seen to have applied the provisions loosely when their implemented measures are shown to constitute arbitrary or unjustifiable discrimination against other states. It is also interesting to note that the wording suggests that discrimination is considered appropriate as long as it is justifiable, and this could lead member countries to adopt measures for arbitrary reasons and then seek a dignified means to justify it. Such a loophole

28 DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226
29 General Agreement on Tariffs and Trade (GATT) art. XX (the chapeau) (entered into force Jan. 1, 1947), available at https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . .”)
simply leaves too much power in the hands of member states, and could create a clear avenue for abuse of a system that is seeking to encourage free and fair trade.

The DSU was created as an authority in dealing with these borderline situations, and detailed supplemental agreements such as the Sanitary and Phytosanitary Measures (SPS) were created during the Uruguay round in order to specify the instances under which such regulatory action was permitted, even if they did restrict trade. Article 3.2 of the Dispute Settlement Understanding states that the function of the new framework under the WTO is “…to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law…”

The stringency of the new system was sought by the United States in 1988 when it pushed for the strengthening of the dispute settlement provisions (under the GATT) during the Uruguay Round, in part because its congress was not convinced that the GATT as it stood could offer the necessary “equitable balance of advantage” to the United States. In other words, the U.S. was concerned that formal concessions granted to U.S. exports going into other countries would be eroded by hidden barriers to trade and therefore sought to act in order to preserve and promote its own sovereign authority to act in the trading environment of member countries. Unsurprisingly, many other member countries hold this same concern. The true surprise exists in the fact that regardless of this concern, the U.S. and other member nations try to maintain their own sovereignty on such issues by using the same hidden barriers that they claim will be used against them. The case of Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef [hereinafter Korea Beef Case] provides a salient example of a nation’s approach to applying the WTO rules, and its desire to reap the benefits of a free trade organisation, while imposing restrictions on its fellow trading partners in its own jurisdiction.

A. Case Study: The Korean Beef Case

Although this case was brought before the dispute settlement body using the policies stated in the GATT, it remains instrumental in gaining an understanding of member states inherent desire to maintain sovereignty, and skirt the rules to which

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31 DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226 at art. 3.2.
32 Abels, supra note 30, at 491.
33 Suranovic, supra note 27.
they voluntarily subscribed in order to develop their own indigenous economy. In this case, the U.S. accused Korea of implementing protectionist measures that constrain the opportunities for the sale of imported beef by confining its sales to specialized stores (otherwise known as the dual retail system), and also by limiting the manner of its display. The U.S. also argued that Korea imposed a price increase on sales of imported beef, limited import authority to “super groups” and the Livestock Producers Marketing Organization (LPMO), and provided domestic support to the indigenous cattle industry in large amounts that led Korea to exceed the measure of support which had been reflected in its schedule. The U.S. claimed that all the adverse conditions created by Korea only applied to imported beef, and that their actions denied indigenous treatment to foreign produced beef. The Panel concluded that the support that Korea offered to the domestic industry amounted to domestic subsidies, and it that went contrary to the Agreement on Agriculture, Articles II, III, XI, and XVII of the GATT 1994, and Articles 1 and 3 of the Import Licensing Agreement. Following the panel’s findings, an appeal, and the report of the appellate body, the Dispute Settlement Body made some recommendations to the Korean government, which asked for reasonable time to implement. Here, although some of the actions that Korea engaged in were deemed legal in accord with the agreements, it seems that their separation of the domestic and imported meat signals an inherent desire to differentiate the types of beef in the face of consumers. The price mark-up is particularly problematic because it does not allow the market to dictate the price, as is the regular commercial model under free trade agreements. Therefore, this case highlights the innate desire of nations to engage in free trade with other

36 Id.
37 Id.
38 Id.
40 Bhala & Gantz, supra note 34.
countries, but also exposes their desire to retain benefits and advantages for their own countries and at the expense of the other trading nations.

IV. DIFFICULTIES FACING THE WTO DISPUTE SETTLEMENT MECHANISM

From the above case study, a few preliminary conclusions can be drawn. The mere fact that the covered agreements governing the trading policies of WTO countries create rules that can easily be abused by member nations, suggests that the measures implemented are not stringent enough, and that the system can be blamed for the member nations ability to outwit the rules because of the loopholes in the aforementioned covered agreements in a bid to retain their sovereignty.

In terms of dispute settlement, it seems that the WTO struggles to implement a scheme that deals with the intent to, or action that serves to contravene the laws stipulated in the covered agreements, or the outright contravention of these laws. Therefore, countries are seldom held wholly accountable for their actions. There is a stark contrast between the WTO dispute settlement method, and court proceedings that do not condone party influence. This contrast stems from the sources of their power and legitimacy. Whereas dispute settlement mechanisms within supranational organizations are products of state consent whose sovereignty is derived from the power given to the adjudicating body by each state, courts gain sovereign status from of their constitutional empowerment as the judicial arm of government. Due to the nature of international law, and supranational organizations receiving their legitimacy through their member states, it is extremely difficult for them to hold member states to account and assert authority through enforceable decisions the way court can. Instead, such dispute settlement mechanisms are resigned to recommendations lacking enforceability.

At times, it appears that member states, particularly the U.S., fear that the WTO can compel a member country’s internal legislative system “to abandon health and environmental standards” if they are at odds with international trades rules. Furthermore, developed nations are concerned that they lack power to veto decisions within WTO dispute settlements, particularly as the dispute settlement body is composed of a representative of all member countries who each have an equal say regarding the acceptance or rejection of panel reports. However, it seems

41 See generally Suranovic, supra note 27 (discussing the structure of settlement disputes in the WTO).
42 Sovereignty, supra note 7.
that these bodies do not have the authority to force states into taking any particular action within the WTO dispute settlement regime. Instead, recommendations are made, which do not completely strike down the actions of states, but only require marginal amendments or more proof for their esteemed position.\footnote{DSU, 1869 U.N.T.S. 401, 33 I.L.M. 1226} It is clear that the diplomatic enforcement approach that the Dispute Settlement Body (particularly the appellate body) abides by is a lacklustre attempt to grapple with disagreements within the Organisation. This is evident because balancing to the regulatory goals of member states with the internal market disciplines set out in the covered agreements is ineffective, and in doing this, the DSB gives too much room for member states to advance their own protectionist agenda while laying claim to a desire to create a strong system of regulation.

It is understandable that states perceive the judicial activism of the panels and appellate body to be quite severe considering the fact that they vote in secret, require decisions to be rendered within established time frames, and act independently without underlying loyalty to any member state. These factors contribute extensively to the perception of judicial activism within the WTO because their implementation shows the supranational organisation, which derives legitimacy from the member nations, acting in a higher capacity that separates it from the source of its power.\footnote{See generally Stone, supra note 16 (discussing judicial activism).} Therefore, the member nations believe that this could have the cumulative effect of eroding their sovereignty within the organisation. Outside of the framework, states subscribe to the business of settling their disagreements directly with other countries in time of dispute. This correlates with the ideas of Adam Smith, which he detailed in \textit{The Wealth of Nations}.\footnote{See generally Adam Smith, \textit{The Wealth of Nations}, (1776).} Smith, who was a scholar of Economic theory and practice, discussed what he felt was the appropriate response to trade disputes on an international level. Smith believed that if a country imposed restrictions on the exports of its trading partner, then that country reserved the right to retaliate and impose restrictions on their imports accordingly.\footnote{Justin Hoffman, \textit{Should Trade Disputes be Handled in The World Trade Organization or in a Unilateral Way?}, AMERICAN UNIVERSITY (Nov. 10, 1999), http://www1.american.edu/projects/mandala/TED/smith/hoffmann.htm.} His belief was that unilateral action, or the threat of such action was the most effective means of trade dispute settlement.

While this argument can be understood as rational human instinct in an economic context, it seems to suggest that countries are better off maintaining their sovereignty in trade relations and acting alone, which will invariably see some...
countries perform better (though at high comparative costs), and others decline rapidly. Interestingly, the WTO dispute settlement mechanism seems to agree with Smith to some extent, as it does not include a formal enforcement mechanism (in contrast to other alternative dispute resolution systems), and allows countries to retaliate as a last resort.

The ideas behind both Adam Smith’s belief in retaliation, and the provision that allows for such action the DSU, are similar in that they both believe that to be an option available to both parties to a dispute. Yet, while Smith believes that option to be a viable step which should be taken if such action is warranted, the dispute settlement framework would not uphold retaliation as the go-to method of dispute settlement, and would aim to ensure that member nations do not act in such a manner. Like Jean Baptiste Say, the WTO believes that the costs that a country inflicts upon itself when it retaliates are high, and that imposing such a sanction could create a power-play within the organisation, as no country will wish to back down, thereby creating a disincentive to lift the sanctions.

Beyond this reasoning, the fact remains that the creation of such a measure, even as a last resort, suggests that the WTO dispute settlement framework creates an environment where member states can act unilaterally against one another. This could be viewed as the WTO’s unintentional commitment to ensuring that countries do not feel that they have been stripped of their sovereign power. The use of the term ‘unintentional’ is to draw attention to the fact that the WTO dispute settlement mechanism believes itself to be a rigorous system, where each member nation has equal rights to bring complaints, and equal obligations to accept the results. In fact, it prides itself on the changes that it has adopted following the overly flexible GATT, arguing that it settles disputes largely on the rule of law, rather than in adherence to simple power politics.

However, this might be premature, and not as evident as the organisation makes it out to be. Instead, there are clear indications that the WTO has deviated from the theoretical notion of judicial activism that is inherent in letter of the DSU, to a watered-down adjudication system in practice, so as to ensure that the comfort of the countries within the system with regards to sovereignty, still remains. It is quite odd that member nations still seek to retain more of their sovereignty within the system, even though so much of it lies with them. This solidifies the idea that

49 Id.
no portion of a states’ sovereignty is deemed immaterial, and displays the intrinsic need for states to remain all powerful at all times.

V. DISCUSSION OF JUDICIAL ACTIVISM IN CONTEXT: NON-STATE ACTORS WITH CASE EXAMPLES

Non-state actors such as anti-globalization advocates and doctrinaire free traders are of the opinion that judicial activism exists within the WTO dispute settlement mechanism, and they would argue that the system (vis-à-vis the appellate body) impedes upon the sovereignty of member nations by upholding arbitrary decisions.  

An example propagated by the anti-globalization advocates is the *European Communities (EC) - Measures Concerning Meat and Meat Products (Hormones)* [hereinafter European Beef Hormone Case] in which the European Community (now European Union) imposed a ban on meat products that did not adhere to certain sanitary requirements, developed based on consumer anxiety within the union and scientific evidence which the panel and appellate body considered unsatisfactory. These advocates argued that the ban imposed by the EC should have been upheld, as the decision made by the union was based on the popular opinion and will of the EC citizenry. Similarly, the free trade absolutists argued that in the *United States — Import Prohibition of Certain Shrimp and Shrimp Products* [hereinafter Shrimp Turtle Case], the appellate body should have upheld the ban, rather than claim that it could have been in accord with the agreement provision had it been implemented for animal preservation, rather than as a discriminatory measure.  

In that case, Washington banned the import of shrimp from countries that did not require the use of fishing methods that were safe for endangered sea turtles. Their argument was based on the idea that the appellate body’s ruling in this case was inconsistent with a prior decision made under the GATT system,

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51 Id.
53 Esserman & Howse, *supra* note 50.
54 Id.
which condemned a ban on tuna imports from countries that did not safeguard dolphins.\(^{55}\)

On reflection, it seems that these interest groups are overstating the authority that the dispute settlement body possesses to comment on these matters, by viewing it as the judicial activism inherent in state or federal court procedure. While there are some questions as to the validity of the DSB’s decisions based on the aforementioned examples, it seems that the panels and appellate body have shown the WTO’s inclination to evade over-involvement in the internal regulatory affairs of member nations, and instead ask nations to submit clear proof of the reasons for their actions, or to make their regulations align entirely with the specific trade agreement in question. This desire is apparent in the European Beef Hormone Case, whose merits are discussed in more detailed below.

A. **Case Study: European Hormone Case**

In this case, the panel dealt with the import restrictions that the European Union placed on beef treated with growth hormones.\(^{56}\) From the perspective of the EU, the trade barriers were put in place in order to ensure that safety standards were met, and not simply to prevent other member nations from gaining competitive advantage. The Union further explained that its actions were in compliance with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).\(^{57}\) The SPS allowed member nations to ban or restrict imports in the event of improper sanitary measures being taken. With the backdrop of the mad cow disease that affected livestock across the world, it seemed that the measures were not completely unforeseen or unnecessary. Though, the United States and other third party countries that supported the case being brought against the EU, argued that their actions constituted protectionist behaviour. This was against the precepts of Articles III or XI of the GATT 1994, Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement and Article 4 of the Agreement on Agriculture.\(^{58}\)

\(^{55}\) *Id.*


\(^{58}\) *Id.*
The key issue was therefore a matter of divergent views about appropriate policy approaches to risk management and assessment, and the legal status of the 'precautionary principle'. The panel found that insufficient scientific evidence existed to prove that EU’s unilateral action was not a protectionist measure, and explained that their actions were inconsistent with Articles 3.1, 3.3, 5.1 and 5.5 of the SPS Agreement. However, this finding did not lead to a clear ruling on the next course of action for the EU. Instead, the panel left a wide variety of compliance options open to the EU such as technical changes in the policy specifics, and suggested that more complete scientific evidence would justify the ban.

On appeal, it was found that while the prohibition was inconsistent with articles 3.3 and 5.1 of the SPS agreement, it was not incongruent with articles 3.1 and 5.5 of the same agreement. The case lingered on for an extended period following requests by the European Communities to submit the determination of “a reasonable period of time” for implementation of the recommendations and rulings, to arbitration. The mere fact that either party can seek such redress from an external system (though it acts within the dispute settlement system noted under the DSU) shows the extent of the sovereignty that member countries maintain within the dispute settlement framework. This highlights the weakness of the system that exists in contrast to the power of the individual nations (particularly the developed countries) and invites the question: have they truly given up any of their sovereign authority through membership of the organisation?

VI. THE PLIGHT OF DEVELOPING COUNTRIES

Developing countries, in particular, had expected that with the implementation of the DSU, the dispute settlement mechanism would aid the weaker nations in enforcing their rights and obligations under the various WTO agreements. Remarkably, the benefits accruing to the new system was the major reason that countries had agreed to the Uruguay Round. However, it seems that the desired effects have not come to fruition in the manner that was hoped. The dispute settlement process is extremely expensive for developing countries (e.g. high legal fees), meaning that they are hardly able to engage in the process even when they believe they have been wronged within the framework. The cost of the procedure diminishes the promptness and willingness of developing countries to

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59 European Hormone Case, supra note 54.
60 European Hormone Case Summary, supra note 55.
61 Id.
62 Esserman & Howse, supra note 49.
initiate the dispute settlement method and exercise their rights within the organisation, as a developed country would.\textsuperscript{63}

Also, the relief granted by the dispute settlement system takes many years to implement because the member countries often request lengthy periods of time within which to comply with the recommendations, notwithstanding the already lengthy panel and appellate procedure. This could mean that even if developing countries do assert their rights under the auspices of the WTO dispute settlement body, the developed nations will remain advantageous because they have some power to delay the dispute settlement period.\textsuperscript{64} Arguably, the mechanism gives too much sway to those who already possess much of the economic leverage in trade relations. This seems to take away from the developed nations who need it the most, effectively stripping them of their sovereignty within the dispute settlement process of the WTO and trade relations as a whole. The WTO dispute settlement regime operates under the pretext that all states are equal, and therefore sovereign in the same way. However, it is well known that sovereign power is affected by the capacity of member states to assert their prerogatives - an area in which developing countries are severely lacking. Furthermore, the remedy of retaliation that is available to member nations under the DSU is not particularly attractive to developing nations because there is a natural hesitation to take such a step against a developed nation that could be of assistance to the country in times of economic and political difficulty. This shows that regardless of its efforts, the DSU has not created the balance of power that was hoped for following the Uruguay Round. Instead, it seems to have reinforced the status quo with regards to the sovereign status of developed nations over that of developing ones.

A. \textbf{Case Study: Indian Pharmaceuticals}

This reinforcement is better understood when considering the effect of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement on the Indian pharmaceutical industry.\textsuperscript{65} In the words of Dr. Hira of Aid Research and Control Centra (ARCON), “WTO/TRIPS stands for a re-colonisation of the economically weak countries. The patent right is an obstacle in the fight against the

\textsuperscript{63} Raghavan, \textit{supra} note 18.

\textsuperscript{64} Id.

AIDS epidemic. These economic rules of the game are partly to blame for the fact that people are dying.” 66

Many share this view and argue that the TRIPS agreement acts against developing countries, while working in favor of developed nations. In the view of the developing nations such as India, the patent system under the TRIPS will work against the development of cheaper pharmaceutical medicines, which will effectively compete with the outrageously priced drugs that are developed and sold by the “Big-Pharma” such as Novartis. India believes that the developed countries want to have a continued advantage over their country and countries alike, who are growing their economies by making medicines akin to those of developed countries. Doing so while creating jobs and driving down the price of medicine. India’s drug industry is unique in that for 30 years, it did not recognize pharmaceutical patents, as was its sovereign right prior to WTO membership.67 Therefore, it was able to develop the budding industry without high costs. However, its WTO membership in 1995 constrained that sovereignty, and required India to change its patent policy. It maintained in its new system protections for patients and generic manufacturers68, which suggests that even developing countries make considerations that enable them to maintain sovereign authority in the face of challenges.

B. CASE STUDY: KOREAN BEEF CASE

In the Korean Beef Case, one of Korea’s arguments for implementing measures that amounted to the separation of imported beef from local beef was that it was necessary under Article XX(d) of the GATT beyond any traditional enforcement mechanism. The reasoning for this was that Korea was aiming for a higher degree of enforcement of the Unfair Competition Act with regards to beef, than it was regarding other products. The appellate body did agree that WTO members possess the sovereign right to decide what enforcement level they wish to attain under their laws and obligations as long as they are consistent with their GATT-WTO obligations.69 However, the appellate body did not take kindly to Korea’s arguments that its dual retail system was necessary based on a lack of an

68 Id.
69 Bhala & Gantz, supra note 34, at 458-640.
adequate amount of policemen to check all the shops and ensure the high standards of enforcement on a daily basis. Korea believed that it needed the system because it wanted to attain a high degree of enforcement against fraud in the market for beef, but did not have the manpower to achieve this goal of consumer protection via the police and law enforcement systems in the country. The dual retail system therefore acted as their means to an end, and not simply a protectionist measure.70

The appellate body was right to reject this argument, as it is more sensible for Korea to improve its police capacity, or find some other way to meet its goals without overstepping the boundaries of its trade agreements. However, from the standpoint of the developing countries, such decisions emphasize the desire of the WTO to thwart the development of their economies and policy initiatives within the trading sector, thereby enforcing the status quo, which favours the developed world over the developing nations. In this argument, the power struggle is evident from both sides of the coin. Clearly, the less developed countries seek to cling to their sovereign status by creating policies that walk the fine line between compliance, and a subtle contravention of the rules. In so doing, they are able to retain membership of a trading organisation such as the WTO will be instrumental to their development, and at times, implement arbitrary rules that go unnoticed. Proof of this lies in the fact that Korea has been challenged in a similar situation regarding quantitative measures which violated GATT Article II(1)(b)71 by the U.S., Australia and New Zealand in 1989. Similarly, developed nations are quick to seek redress when they believe that protectionist actions are being carried out to their detriment, but also implement policies that effectively blur the line between acquiescence and infringement. An example of this is the U.S. Zeroing case where Mexico complained that the U.S. was calculating anti-dumping duties against foreign products arbitrarily. However, the U.S. argued (in accord with the lotus principle) that the WTO didn’t prohibit this, even though it seemed to be a protectionist move.72

70 Id.
71 Id. (discussing a case in which Korea’s import monopoly—the LPMO—effectively imposed a tariff surcharge, which could not be characterized properly as a mere quota rent, and which caused the total tariff to exceed Korea’s bound commitment).
Essentially, the aforementioned analysis shows that the very nature of the dispute resolution system favours the developed nations because it gives the member countries that are able to afford adjudication using the system, the freedom to express their sovereign authority, without providing the same recourse to developing countries that cannot afford to bring complaints before the system.

VII. CONCLUSION

The arguments detailed above have shown that the WTO has not developed an entirely effective method of carrying out its adjudicatory role in settling the disputes. Member states seem to exert their authority in the process, and seek to maintain sovereign status during times of dispute. It is necessary for the dispute settlement framework to address the loopholes therein, in order that the issues noted in this paper can be adequately resolved. Although creating a fair and transparent process for settling disputes is no easy feat in international relations, more could be done to create a balance of power between countries of different socio-political and economic status. Furthermore, greater consideration could be given to the language of the conventions governing the WTO and its dispute settlement regime, in order to prevent construction in favour of sovereign ideologies and retention of power. In so doing, the WTO dispute settlement structure could become a stronger and more resilient body, which can better adapt to the changing trade environment and foster closer working relationships between nations.