

REPORT ON THE WORKSHOP ON

DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANISATION

The West Bengal National University of Juridical Sciences (WBNUJS) and the NUJS Law Review had the privilege of hosting a three day long conference on dispute settlement in the World Trade Organization (WTO) in collaboration with the United Nations Conference on Trade and Development (UNCTAD) and the Ministry of Commerce, the Government of India commencing 16th November, 2009.

The conference aimed at disseminating information on the emerging and ever evolving aspects of international trade law. It sought to facilitate an in-depth understanding of the procedures, nuances and politics at play in the WTO dispute settlement process. The biggest strength of the conference was undoubtedly the panel of eminent experts who addressed the participating students. The members of this panel were Ms. Chitra Radhakishun, Mr. Abhijeet Das, Mr. Folkert Graafsma, Mr. Samir Gandhi and Mr. Rahul Rai. The participants were also humbled by the esteemed presence of His Excellency Mr. A.V. Ganesan, former chairman of the Appellate Body of the WTO. The participating students were a vibrant mix of undergraduate and post-graduate students pursuing law, economics and other trade related degrees across a number of universities in Eastern India.

The conference began with the opening ceremony on 16th November, 2009 where the members of the panel were introduced to all the participating students in the presence of Hon'ble Justice Aniruddha Bose of the Calcutta High Court. This was followed by an introductory session moderated by Ms. Radhakishun who gave the participants an overview of the various dispute settlement bodies at the multilateral and regional level for international and trade law. Given that

most participants had only elementary knowledge of this branch of law, Ms. Radhakishun's inputs provided a sound foundation from which to begin. All participants were given a WTO training module and further referred to the WTO website for further information. She further explained the two forms of jurisdiction under the dispute settlement process, namely, *ratione materiae* and *ratione personae* and undertook a detailed navigation of the information and research opportunities available online. The session was interactive, with many students volunteering to share further information on certain topics.

Next, Mr. Abhijit Das from the Ministry of Commerce, the Government of India, dealt with certain essential questions about the significance of multilateral trade bodies like WTO and the need for an efficacious dispute settlement process for the same. He emphasized on tracing out the historical course that international trade jurisprudence had taken from the years of the GATT to the Marrakesh Agreement establishing the World Trade Organisation. With a view to foster an enhanced understanding of the role played by the WTO, the participants were informed about the objectives of the WTO as enshrined in the preamble of the Marrakesh Agreement and its key instruments and functions. Considerable time was devoted to provide an understanding of the principles of non-discrimination, the rules of market access and unfair trade that are considered to be of pivotal import under the WTO regime. This was followed by a brief description of the sources of WTO law namely, the agreement establishing the WTO and other principles of international and municipal law. The students were referred to the training module for statistics giving the year wise and country wise break of the disputes that have been resolved through the WTO system hitherto. Some unique features of the WTO mechanism such as the existence of an appellate body, objective findings and the need for a negative consensus among others were discussed. The discussion then progressed to a more specific outline of the dispute settlement

procedure with a timeline for the resolution of a typical dispute. He gave a brief account of the rights of third parties in WTO disputes. A recurring theme in the talk was the role that India has played in WTO dispute settlement, particularly in textile and auto disputes, highlighting both its successes and failures. A brief mention was made of the important role played by countries such as India and China to represent the interests of developing country members in the Uruguay and Doha rounds of trade negotiations. He also pointed out several policy changes in the attitude that the Indian government has adopted with respect to the dispute settlement process. Such adept inter-disciplinary linkages between trade law and social sciences such as international relations and politics fostered a greater interest among the participants and ensured a pragmatic understanding of the dispute settlement process.

In the sessions that followed on the next day, Mr. Folkert Graafsma guided participants through a step by step look of dispute settlement process using a more detailed and technical approach than previous sessions. The stages, i.e. the consultation stage, the panel stage, the adoption of panel reports, the appellate review and the process of implementation by the winning member. He started by explaining the concept of anti-dumping through examples such as the Bed Linen case and the WTO jurisprudence that was in place to combat the same. This was followed by a critical appraisal of the manner in which consultation proceedings were conducted to arrive at a mutually agreed solution in the dispute settlement process. After this, Mr. Graafsma progressed to undertake a study of the next step i.e. the constitution of panels. The procedure prescribed under Art. 6.2 of the DSU was explained in light of the need to draft a precise request containing the terms of references to be submitted before the DSB. An in-depth study of the provisions governing the qualifications and number of panelists in each case, the need for a negative consensus and the nuances governing the drafting of the terms of references was undertaken in

the workshop. Considerable time was also spent in facilitating an understanding of the standard of review to be adopted by the panels, once constituted, in order to ensure an objective assessment of the dispute at hand in light of the provisions of the DSU. Mr. Graafsma also made participants privy to some of the controversies regarding judicial activism by panelists and the need for observing the norms of judicial economy in disposing off the disputes that come before them. He further explained the rules of conduct for panelists, the provisions to ensure their independence and impartiality, the need to avoid conflicts of interests and the mechanism in place for respecting confidentiality. At this stage, the role of the secretariat in disputes relating to anti-dumping and countervailing duties was also examined. Next, the rules of legal interpretation under Article 3.2 of the DSU, Articles 31 and 32 of the Vienna Convention on the Law of Treaties and the standards of evidence required at the panel stage were taken up for consideration. Case studies such as Canada- Aviation were used to explain the how provisions incorporated in the DSU were put in use at the panel stage. Mr. Graafsma also explained the norms governing the manner in which the panel reports were to be drafted and the possibility of giving separate opinions through cases such as Australia- Leather and India- Patents. Finally the various steps in the panel proceedings and the special provisions for developing member nations were taken up for consideration.

In the session to follow, Mr. Graafsma discussed the process of appellate review in the dispute settlement process. He described the appellate body as a *de facto* Supreme Court for international trade. After having laid the foundation by describing the various norms governing the qualifications, term and mode of appointment of judges in the Appellate Body and the details of the appellate process, Mr. Graafsma ventured into the specific powers of the Appellate Body with respect to ability to re-examine facts and appreciation of evidence before discussing some

leading cases. A lot of significance was given to the extent of review that may be exercised by the Appellate Body and the constraints within which its members are expected to operate. The participants were enthused by a debate between the panelists about whether the names of judges giving dissenting or separate opinions should be declassified. Another area of great interest in this session was the legality of soliciting amicus curiae briefs at the stage of appellate review and the persistent opposition that India has had to the same. Finally, Mr. Graafsma informed the participants about a debate that was gathering momentum in the Doha Round of trade talks with respect to making the proceedings of the Appellate Body public through a live video telecast. Finally, Mr. Graafsma undertook a detailed analysis of the process of implementation by the losing member.

On the next day, the Mr. Samir Gandhi and Mr. Rahul Rai from ELP (Economic Laws Practice) built on the strong theoretical foundations that had been laid by Mr. Graafsma on the previous day by narrating their litigation experiences at the WTO. They focused the attention of the participants on the details of the proceedings in *India - Certain Taxes and Other Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities*. In an interactive session with all the participating students, they gave us a fairly detailed look at the various complexities that characterized the case where the EC entered into consultations with India because of some restrictions on retail sale applied by the Indian State of Tamil Nadu which *allegedly* adversely affected the export of wines and spirits in a manner that was inconsistent with Articles III:2, III:4 and XI of GATT 1994. Not only did their practical expertise and professional involvement in the said case make this interaction contribute towards providing an adept understanding of the practical ground realities but also illustrated the significance of variables such as political considerations and international relations that have an important

bearing on the resolution of such trade disputes. A brief question answer session followed with some questions further investigating the cases that Mr.Graafsma, Mr. Gandhi and Mr. Rai had provided and others focussed on the extent of the role played by political considerations in this entire system. The inputs provided by His Excellency Mr. A. V. Ganesan made for a remarkably interesting and informative presentation.

Mr. Ganesan's presence was indeed awe-inspiring for the participants and the other panelists alike. He enriched the conference highlighting his experiences when deciding cases on the Appellate Body. He explained the manner and time frame within which the cases are heard by the Body, the manner of presentation of submissions and arguments made as well as the questions and details that it requires from the member-countries before it, the discussion among the members of the Appellate Body which ensues post-submissions and finally the drafting and presentation of the opinions of the members. He elaborated further on the dissenting and separate opinions as well as the surrounding debate regarding anonymity of the members making them. His insights into the politics of panel selection, presentation by the member-countries and actual nuances of practice before the WTO dispute settlement bodies, being out of his own experiences, could never have been acquired from the best of scholarly writings.

The conference finally came to an end on 18th November, 2009 with the closing ceremony taking place that evening. The chief guest of the occasion was the Hon'ble Justice Sanjeev Banerjee of the Calcutta High Court. He began the proceedings of the closing ceremony by sharing a few thoughts on the initiative that had been taken by UNCTAD, the Ministry of Commerce, the Government of India, WBNUJS and the NUJS Law Review in organizing a conference that ignited young minds in the direction of international trade law and the importance and relevance of the same in a globalised world. He commended the effort arguing that it was imperative that

special emphasis be given to WTO Dispute settlement in legal education. This was followed by inspirational words of reflection by Ms. Chitra Radhakishun and Mr. Vibhuti Shankar from UNCTAD as well as feedback by students' representatives. The conference then came to an end with a vote of thanks delivered by one of its editors, on behalf of the NUJS Law Review as well as the University.

It would indeed prove to be a difficult task to capture the success of this conference in a report of such nature. It must, however, be noted that the conference accomplished the task it had set out to and sowed the seeds for nurturing future actors in the arena of international trade dispute resolution at the WTO. Every participant present would have found it truly enriching and insightful.