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The WTO Dispute Settlement Process

Without a means of settling disputes, the rules-based system would be worthless since the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed {or rejected} by the WTO's full membership. Appeals based on points of law are possible.

The Dispute Settlement System of the WTO – overview

The dispute settlement mechanism which came into being with the World Trade Organisation {WTO} in 1995 is one of the cornerstones of the organisation. It gives all 144 Members of the WTO confidence that the commitments and obligations negotiated and agreed will be respected. It does not impose new obligations, but it does enforce those already agreed.

Without a means of settling disputes, the rules-based system would be worthless since the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed {or rejected} by the WTO's full membership. Appeals based on points of law are possible.

However, the point is not to make rulings. The priority is to settle disputes, through consultations if possible. By July 2000, 32 out of 203 cases had been settled "out of court", without going through the full panel process.

As under the GATT 1994, practice under the WTO Agreement reveals that parties can negotiate mutually agreed solutions to dispute without resorting to any form of third party intervention. Particularly over the last eighteen years, however, a large proportion of disputes has led to the establishment of a panel. Only rarely in the 50-years' experience of the GATT {now WTO} have alternatives forms of dispute resolution, such as mediation, conciliation, good offices or arbitration, been used.[1]

The original provisions for the dispute settlement process are contained in Articles XXII and XXIII of GATT 1947, GATT 1994 respectively[2]. These have been clarified and amplified further in the Uruguay Round of multilateral trade negotiations and have also been made more effective. WTO Members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements. The relevant agreement is the *Understanding on Rules and Procedures Governing the Settlement of Disputes* {*Dispute Settlement Understanding*, the "DSU"}[3], which forms Annex 2 to the WTO Agreement[4] and which represents the first extensive, negotiated agreement reforming and revitalising the GATT dispute settlement system.[5] The DSU preserves much of the legacy of the GATT system that evolved overtime from the sparse foundation provided by Articles XXII and XXIII of the GATT. Beyond preserving past GATT practice, however,

the DSU also contains certain remarkable innovations that take the system in a more judicialised direction. While past modifications were made to the system on an incremental, case-by-case basis, an impressive feature of the DSU is that it is the product of extensive multilateral negotiations.

The dispute settlement system established under the DSU represents a significant change from the past 1947 system. The DSU introduces an integrated dispute settlement mechanism that applies across a range of approximately twenty major substantive agreements and enables all of the relevant provisions relating to a matter in issue between parties to a particular dispute to be considered in resolving that dispute between these parties, including third parties.

The procedure for settling disputes which existed under the old GATT had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement[6] introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasises that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year – 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent {e.g. if perishable goods are involved}, then the case should take three months less {12 months}.

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling – any country wanting to block a ruling has to persuade all other WTO Members {including its adversary in the case} to share its view.

The DSU ensures the primacy of WTO law in all forms of dispute settlement: even mutually agreed solutions and arbitration awards must be notified to the DSB[7] and must be in compliance with WTO Agreement.

Of all of these developments, one of the most significant is the establishment of the Appellate Body {pursuant to Article 17 of the DSU} to hear appeals from panel reports. It is clear that the Appellate Body, as a quasi permanent, standing tribunal has an important impact not only on individual cases by determining the outcome of those cases, but also in encouraging the development of WTO jurisprudence and practice now as well as in the future.[8]

Coverage

The dispute settlement process covers the WTO Agreement[9], GATT 1994, other agreements on goods, services, the DSU itself and the multilateral agreements. Some of these agreements have some special provisions, either modifying some elements of the DSU or making some additional provisions. In respect of the multilateral agreements, the applicability of the dispute settlement process will be in accordance with the decisions which may be taken by the parties to these agreements.

To fully understand the dispute settlement process, three elements, as given below, have to be consulted:

Articles XXII and XXIII of GATT 1994, which contain some procedural matters and important substantive provisions laying down the preconditions for starting the dispute settlement process;

the DSU; and

the provisions on consultation and dispute settlement in the relevant agreement which is the subject matter of the particular dispute.[10]

2.1 Articles XXII and XXIII of GATT 1994

The original purpose of dispute settlement, as set out in Articles XXII and XXIII of the GATT 1994, was the prompt and mutually acceptable resolution of disputes by the parties, including thorough means such as consultations, conciliation, good offices and mediation. Article 3 of the DSU pays homage to prior practice under Articles XXII and XXIII of the GATT 1947, and recognises the primary objective of achieving a satisfactory settlement of the matter between the parties in accordance with their rights and obligations under the WTO Agreement. Article 3.7 of the DSU states explicitly, “A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred”.

Article XXII of GATT 1994 provides for consultation between Members with respect to any matter affecting the operation of an agreement. If no satisfactory solution is reached, a Member may request that a consultation should be held jointly by the Members with any other Member. In actual practice, a Member would generally resort to the process of dispute settlement if consultations do not succeed.

Article XXIII of GATT 1994 lays down conditions which must be satisfied before a Member resorts to the dispute settlement process.

These are:

any benefit accruing to the Member under a particular agreement is being nullified or impaired, or

the attainment of nay objective of the agreement is being impeded,

as a result of:

a} the failure of another Member to carry out its obligations under the agreement [Article XXIII.1{a} of GATT 1994]; or

b} the application by another Member of any measure,

which conflicts with the provisions of the agreement [Article XXIII.1{b} of GATT 1994, or

which does not conflict with the provisions of the agreement [Article XXIII.1{b} of GATT 1994]; or

c} the existence of any other situation [Article XXIII.1{c} of GATT 1994].

Thus, primarily what is essential is that either some benefit accruing to a Member is nullified or impaired, or the attainment of some objective of the particular agreement is impeded. These situations could occur by some action of a Member, by the failure of a Member to take some action, or in any other way.[11]

Violation cases

If the nullification or impairment of a benefit is caused by a Member failing to carry out its obligations under the agreement [Article XXIII.1{a} of GATT 1994], or applying a measure which conflicts with some provision of the agreement [Article XXIII.1{b} of GATT 1994, {first part}], the situation occurs because of the violation of some provisions of the agreement. Such situations are commonly called "violation cases".[12]

Non-violation cases

When, on the other hand, a Member applies a measure which does not conflict with the agreement [Article XXIII.1{b} of GATT 1994, {second part}] and yet causes the nullification or impairment of benefits, it is doing so without violating the provisions of the agreement. Such situations are commonly called "non violation cases".

I will now pay attention to clarification of some terms mentioned in the paragraphs above.

Nullification or impairment

Article 3.8 of the DSU provides that in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to Member against whom the complaint has been brought to rebut the charge.[13]

Failure to carry out an obligation under the agreement, application of a measure conflicting with the agreement

In these violation cases, it is necessary to show that there is some provision in the agreement that creates the obligation which a Member has failed to carry out or which conflicts with a measure taken by a Member. In this process, the establishment of the following elements is necessary:

a} existence of an obligation in the relevant agreement; and

b} failure of a Member to carry it out;

or

c} a Member has taken a measure; and

d} there is a provision in the relevant agreement which conflicts with the measure.

In this connection, it is relevant to mention that a number of panels in the past have considered the possible occurrence of a "violation" merely by the existence of a legislation, even when no measures might have been taken in pursuance of the legislation. These panels held the view that the mere existence of a "violating" provision in the legislation would constitute a "violation" only if the relevant "violating" measure was mandatory in the legislation. If there was a provision of discretion on the part of the implementing authorities, the mere existence of such a provision would not have been considered a "violation".

However, the situation has changed since the coming into force of the WTO Agreement. Now, Members are required to bring their laws and procedures into conformity with the provisions of the WTO agreements. Hence, if there is a provision in the legislation which conflicts with any provision of these agreements, this obligation would be considered to have been violated. As a result, the mere existence of a "violating" provision in the legislation would amount to a "violation", irrespective of the fact whether it is a mandatory or a discretionary provision.

Non-violation nullification or impairment

The non-violation cases of nullification or impairment can best be explained by giving some specific example.

For instance, a Member has negotiated tariff concessions with another Member, resulting in the binding of the tariff on a product. The Member, after having bound the tariff, grants a subsidy to the domestic industry producing a like product. The subsidy which has been granted is not prohibited by the disciplines governing subsidies. The domestic industry, helped by the subsidy, raises its production substantially, with the result that the export prospect of the Member which had negotiated the tariff concessions has dropped significantly. At the time the negotiation for the tariff concession took place, there was no anticipation that such a subsidy would be granted. In this situation, the exporting Member can validly claim that the benefit which was given to it by the tariff binding on this product has been nullified or impaired by the granting of the subsidy by the other Member.

Thus, the main elements to be determined in non-violation cases are: the existence of a benefit, subsequent action by a Member by which the benefit is constrained, and the existence of a reasonable expectation that the competitive conditions would not be upset.[14]

2.2 Procedure for dispute settlement process

Settling disputes is the responsibility of the Dispute Settlement Body {the “DSB”} - the General Council in another guise.[15] The DSB is the central body responsible for administering the rules and procedures of the DSU; it has authority to establish panels, adopt panel reports and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions or other obligations under the covered agreements {“retaliation”}. Unlike the previous GATT system, which was characterised by several dispute settlement systems with a different body having legal authority over each agreement, the WTO regime allows for one mechanism to deal with a particular dispute between Members. It enables parties to a dispute to have all claims under the applicable agreements dealt with at the same time by the same panel. The provisions relating to standard terms of reference allow parties on both sides of a dispute to raise issues under any relevant covered agreement.[16]

Not only does the DSB have the authority to act within the scope of its powers, but pursuant to Article 2 of the DSU, it also has certain duties. The DSB must inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements. The DSB must meet as often as necessary to carry out its functions within the time frames provided in the DSU. Where the rules and procedures of the DSU provide for the DSB to take a decision, it must do so by consensus.[17]

2.2.1 Consultation

The process of dispute settlement starts with a consultation between the Members involved in the issue. If a Member considers that the preconditions for resorting to the dispute settlement process, as mentioned above, have been fulfilled, it has to start the process of consultation.

The request for consultation has to be made to the Member against whom the Member initiating the process has a grievance. The request must be made in writing and must contain the reasons for the request, clearly identifying the measures which are at the cause for grievance. An indication of the legal basis for the complaint also has to be given. Simultaneously, this request has to be notified to the DSB, the relevant Committee and the relevant Council by the Member that is making the request for consultation.[18]

The Member to whom the request is addressed must accord sympathetic consideration to the request and must afford adequate opportunity with respect to the consultation.

The responding Member must reply to the request within 10 days of receiving the request, except if the requesting Member and the responding Member mutually agree on a longer period.

In cases of urgency, for example, those concerning perishable goods, consultation must be held within 10 days of the receipt of the request.

If these time limits are not adhered to, the Member initiating the process may proceed with a request to the DSB to establish a panel.[19]

The consultation should be carried on in good faith. The objective of the consultation is to arrive at a mutually satisfactory solution of the dispute. The Members should attempt to obtain a satisfactory adjustment of the matter.

The consultation is without prejudice to the rights of any Member in any further proceedings. The implication is that if a Member has made an offer during the consultation and the consultation does not ultimately succeed, the Member concerned is free to withdraw the offer. The consultation process is confidential.

During consultation Members should give special attention to the particular problems and interests of developing country Members.

If the consultation has not succeeded in settling the dispute within 60 days of the receipt of the notice for consultation by the responding Member, the complaining Member may proceed to request the DSB for the formation of a panel. A request for a panel may be made even within the 60-day period, if the consulting parties jointly consider that the consultation has failed to produce a solution. In cases of urgency, for example, cases concerning perishable goods, the time limit is 20 days.[20]

If any other Member considers that it has a substantial trade interest in the particular consultation, it should give notice to the consulting Members and also to the DSB within 10 days of the date of circulation of the request for consultation regarding its desire to join the consultation. If the Member to whom the request for consultation was made agrees that this Member has a well-founded claim regarding substantial interest, the Member expressing its desire will be included in the consultation. If the request is not accepted, the Member concerned is free to make a request for a separate consultation in accordance with the procedure for initiating a consultation.[21]

2.2.2 Panel Process

As has already been mentioned above, the DSU makes a significant departure from the past process of dispute settlement as specific time schedules have been introduced to various stages, and the decision-making process has been made efficient at all relevant stages ranging from the formation of the panel to the final implementation of the deciisons.

However, it is not clear in what manner the deadlines at various stages are to be inforced. Ultimately, this depends on the moral responsibility of the members of the panel to adhere to the time schedules. The DSB does not have any specific authority to enforce the deadlines.

Formation of the panel

We have stated above that if consultations fail, the complaining party can ask for a panel to be

appointed. The Member requesting the DSB for the formation of a panel must make such a request in writing and must give the following information in the notice:

an indication as to whether or not a consultation was held;

the specific measures which are at issue;

a brief summary of the legal basis of the complaint which should present the problem clearly.

When a request for forming a panel is made by a Member, it will be placed on the agenda of the DSB. The DSB must decide to establish a panel, at the latest, at the meeting held immediately following the one in which the request first appeared on the agenda. Thus, the matter cannot continue to be considered beyond two meetings of the DSB. The panel will not be formed only if the DSB, at this second meeting, decides as such by "consensus".[22]

There is an additional provision for speeding up the formation of the panel. If the Member proposing the formation of the panel so requests, a meeting of the DSB must be convened for this purpose within 15 days of the request, provided that a notice of the meeting is given at least 10 days in advance.

Normally, standard terms of reference are used by the DSB while forming the panel. Thus, the panels have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

the examination of the issues raised by the complaining Member;

giving findings which will assist the DSB in making recommendations or in giving its rulings on the issue in question.

2.2.2.2 Composition of the panel

Normally, a panel consists of three members. The parties to the dispute have, however, the option to have a five-member panel, but they must reach an agreement on this issue within 10 days of the establishment of the panel.

Nominations to the panel are proposed initially by the Secretariat of the WTO, and the parties to the dispute accept them except if they have compelling reasons not to. In cases where no agreement is reached on the composition of the panel within 20 days of the date of the establishment of the panel, either party to the dispute may request the Director-General of the WTO to make nominations. The Director-General will make the nominations in consultation with the Chairmen of the DSB and the relevant Council or Committee, and after consulting the parties to the dispute.[23]

The members of the DSB have to be promptly informed about the composition of the panel. In cases where the Director-General has made the nominations, the Chairman of the DSB has to inform the Members about the composition within 10 days of receiving the information.

When a dispute is between a developing country Member and a developed country Member, the

panel must include at least one member from a developing country {which is a Member of the WTO}, if the developing country Member which is a party to the dispute so requests.

Who can become a panelist? Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement.[24] Panelists can also become those who served as representatives in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Panelists are expected to function in their individual capacities and not as representatives of governments or of any organisation.[25]

2.2.2.3 Functioning of the panel

Right in the beginning, the panel will formulate a timetable for different stages of the working of the panel.

Any Member {of course, other than the parties to the dispute} having a substantial interest in the matter being considered by the panel may notify the DSB about its interest. These third parties will have the opportunity to be heard by the panel and to make written submissions to it.

The initial written submissions will first be provided by the complaining party and then by the responding party. However, the panel may decide, after consultation with the parties to the dispute, that the initial written submissions will be given simultaneously by the complaining party and the responding party. The subsequent written submissions will be given simultaneously.

In the first substantive meeting with the parties, the case will first be presented by the complaining party and then by the responding party. All third parties which have notified to the DSB their interest in the dispute will also present their views.

Written rebuttals will be submitted by the parties after this first substantive meeting. In the second substantive meeting with the parties, oral rebuttals will be made. The responding Member has the right to make its rebuttal first, and then, the complaining Member will follow.

All presentations, rebuttals and statements will be made in the presence of the parties. The third parties which have notified their interest may remain present throughout the first substantive meeting of the panel with the parties.

The deliberations in the panel and the documents submitted to it have to be kept confidential. The parties to the dispute may, however, disclose their own positions to the public, if they so wish. When a party to the dispute submits a confidential version of its submission, it must also provide a non-confidential summary, if so requested by a Member.

With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, the panel may request an advisory report in writing from an expert review group.

Generally, the panel has to issue the final report to the parties to the dispute within six months of the date of the final agreement on the composition of the panel and the terms of reference. In cases of urgency, including those related to perishable goods, the panel must aim to reduce this period to three months. If the panel considers that it cannot issue the report within this prescribed period, it

must inform the DSB, giving the reasons and also an estimate of the additional period needed. In no case should the period exceed nine months.

If the complaining party so requests, the panel may suspend its work for a period not exceeding 12 months. The authority of the panel will lapse after this duration of suspension.

2.2.2.4 Report of the panel

Descriptive part

After considering the written submissions, oral arguments and rebuttals, the panel will prepare the descriptive sections of its draft report containing the facts and arguments, and give it to the parties. The parties may give their comments in writing within the time set by the panel {two weeks}. This report does not include findings and conclusions.

Interim report

After that, the panel will issue an interim report containing the descriptive sections and also its findings and conclusions. A party may submit a written request for reviewing some specific aspects of the interim report within the time prescribed by the panel for this purpose {one week}. The panel will hold a meeting with the parties on the issues raised in the written comments, if there is a request for such a meeting by a party.

Final report

After such a meeting, or if no comment is received from any party during the prescribed period, the final report of the panel will be prepared. If there had been comments on the interim report, the discussion of the arguments made at the interim review stage will be included in the final report. The final report is submitted to the parties to a dispute and three weeks later, it is circulated to all WTO Members.

Coverage of the report

In its report to the DSB, the panel must include the following:

an objective assessments of the facts of the case;

an examination of the applicability of the relevant provisions of the relevant agreement;

an evaluation as to whether the measures under consideration are in conformity with the provisions of the agreement; and

any other findings which may help the DSB in its consideration of the issue and in making recommendations or in giving rulings.

If the panel decides that the disputed trade-measure does break a WTO Agreement or an obligation, it recommends that the measure be made to conform to WTO rules. The panel may suggest how this could be done.

2.2.2.5 Consideration in the DSB

A minimum of 20 days is to pass between the circulation of the panel report to Members and the consideration of the report by the DSB. Members who have objections to the report have to give written reasons for their objection which have to be circulated at least 10 days prior to the meeting of the DSB in which the report is going to be considered.

If a party to the dispute has not notified the DSB about its decision to go for an appeal, the DSB has to adopt the report within 60 days of the date of circulation of the report to Members, except if it decides by consensus not to adopt a report.[26] If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.

There is a further time limit. The time taken from the establishment of the panel to the consideration of the panel report for adoption by the DSB shall not exceed 9 months {12 months in total}. [27]

2.2.2.6 Appeal process

Appellate Body

The appeal is considered by the Appellate Body. It is a standing tribunal established by the DSB pursuant to Article 17 of the DSU. It is composed of seven persons who are required to be persons of recognised authority, with demonstrated expertise in law, international trade and the subject of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO.

The Appellate Body sits in divisions of three Members to hear individual cases. Appellate Body Members are appointed for a four-year term, and each Member may be reappointed once.

The Appellate Body Members are part-time. They are required by the DSU to be available at all times and on short notice. Therefore, although they may have other responsibilities, those responsibilities may not conflict with their duties as Appellate Body Members nor prevent them from being available on short notice to serve on particular cases.

Paragraph 9 of Article 17 of the DSU provides for the Appellate Body to draw up its own *Working Procedures*[28], in consultation with the Chairman of the DSB and the Director-General, which are then communicated to the WTO Members for their information. The *Working Procedures* provide much of the detail concerning the Appellate Body's functioning. Part I of the *Working Procedures* deals with matters pertinent to the internal functioning of the Appellate Body; Part II sets out the procedures and timeframes for appeals.[29]

Process

As has been mentioned above, the parties to the dispute have the right to appeal against the panel report. The third parties which have indicated their interest in the dispute do not have such a right.

However, after the appeal process has started as a result of the move of any of the parties to the dispute, the third party Members may make a written or oral submission to the Appellate Body.

The appeal must be limited to issues of law covered in the panel report and to legal interpretations developed by the panel.

The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Generally, the appeal process must not take more than 60 days from the date a party to the dispute notifies its decision to appeal against the panel report. When the Appellate Body considers that it cannot give its report within this prescribed time, it must inform the DSB and give an estimate of the additional time required. In any case, the process must not take more than 90 days.

Unlike the case of the consideration of the report of a panel by the DSB, there is no specific minimum time limit for the report of the Appellate Body to be with Members before it is taken up for consideration in the DSB. The report of the Appellate Body will have to be adopted by the DSB within 30 days of its circulation to the Members, except if the DSB decides by consensus not to adopt it. As explained earlier, there is hardly any chance of such a negative consensus; hence, the report, in reality, will have to be adopted within the time period specified.

In cases where an appeal has been made, the time taken from the establishment of the panel to the consideration of the report of the Appellate Body for adoption in the DSB shall not exceed 12 months {15 months in total}.[30]

2.2.2.7 Implementation of ruling or recommendation

Even once the case has been decided, there is more to do before trade transactions {the conventional form of penalty} are imposed. The priority at this stage is for the losing “defendant” to bring its policy into the line with the rulings or recommendations. The DSU stresses that prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report. It must state its intention to do so at a DSB meeting held within 30 days of the report’s adoption. If complying with the recommendation immediately proves impractical, the Member will be given a reasonable period of time to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country {or countries} in order to determine mutually acceptable compensation – for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining party may ask the DSB for permission to impose limited trade sanctions {suspend concessions or obligations} against the other side. The DSB must grant this authorization within 30 days of the expiry of the reasonable period of time unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it was not effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be affective.

In any case, the DSB monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.[31]

2.2.2.8 Good offices, conciliation, mediation and arbitration

In the DSU, there is a provision {Article 5} of the Director-General of the WTO offering good offices, conciliation or mediation in disputes. It may be requested by any party to a dispute, but can be effectively undertaken only if both parties to the dispute agree to use this procedure. It may begin at any time and be terminated at any time as well. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process is on. In this process, the objective is to assist the parties to settle the dispute “out of court” in a way which is satisfactory to both.

An alternative course in the dispute settlement process is arbitration. It will be entered into if the parties to the dispute agree to adopt it. In such cases, the parties have to notify the Members well ahead of the actual commencement of the arbitration. Any other Member may join the process only if the parties which have initiated it agree.

The parties have to agree to abide by the arbitration award. The award will be notified to the DSB where any Member will have the opportunity to raise any point. If a Member considers that it has been adversely affected by the award, this is the occasion to raise it.

The implementation process of the award will be along the same lines as that for the recommendation and ruling of the panel.

As has been mentioned above, during the past years, a large number of disputes has led to the establishment of a panel and only rarely in the 50-years’ experience of the GATT {now WTO} have alternatives forms of dispute resolution, such as mediation, conciliation, good offices or arbitration, been used.[32]

Conclusion

It can clearly be seen what a significant step has been done in the dispute settlement process which came into force with the WTO in comparison with the old system which existed under the GATT. The WTO dispute settlement mechanism gives Members the assurance that commitments and obligations negotiated and agreed upon will be respected and enforced. This is why Members, including the EU, are increasingly making use of the mechanism. That indicates that they trust the system , which is very important.

Cases are no longer just between the big trading partners; developing countries have indicated cases against major trading partners and among themselves, which strengthens the basic WTO principles of respect of mutual benefits and obligations.

With the working procedures now codified, the system has become much more efficient, automatic and transparent than was the case under the GATT. The WTO system can deal with complex cases involving an assessment of many different provisions contained in several Agreements. In most cases that led to the DSB recommendations, the losing party has complied. This shows Members' commitment to abide by the rules.

In my opinion, parties to a dispute could take better advantage of using the current provisions of the DSU which offer alternative forms of dispute resolution. Even when the case has progressed to other stages, good offices, conciliation or mediation are still possible. However, these alternative forms can be effectively undertaken only if both parties to the dispute agree to use this procedure.

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http://trade-info.cec.eu.int/europa/2001newround/19.htm;

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[1] J. Cameron, K Campbell: Dispute Resolution in The World Trade Organisation, London 1999, p. 29;

http://trade-info.cec.eu.int/europa/2001newround/19.htm;

http://www.wto.org/english/res_e/doload_e/tif.pdf

[2] Articles XXII and XXIII were already present in GATT 1947 *{General Agreement on Tariffs and Trade}*. While GATT no longer exists as an international organisation, the GATT agreement lives on. The old text is now called "GATT 1947". The updated version is called "GATT 1994".

[3] *The Dispute Settlement Understanding* {DSU} is a horizontal WTO agreement. It sets up procedures for solving disputes which may arise among WTO Members in the implementation of the different WTO Agreements {GATT, other agreements related to trade in goods, GATS, TRIPS}.

[4] Agreement Establishing The World Trade Organisation

[5] B.L. Das: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 398.

[6] The Dispute Settlement Understanding – DSU

[7] The Dispute Settlement Body {see chapter 2.2}.

[8] J. Cameron, K Campbell: Dispute Resolution in The World Trade Organisation, London 1999, p. 32;

http://www.wto.org/english/res_e/doload_e/tif.pdf

[9] i.e., the Agreement Establishing the World Trade Organisation

[10] In this paper, I will focus only on the first two elements.

[11] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 399-400.

[12] For example, if a Member impairs the benefit flowing out of its tariff binding by imposing an internal charge on an imported product

[13] See B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 401:

“However, the experience in the past has been that this presumption is extremely difficult to rebut.”

[14] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 402-403.

[15] The DSB includes representatives of all WTO Members.

[16] J. Cameron, K Campbell: Dispute Resolution in The World Trade Organisation, London 1999, p. 32

[17] The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

[18] The relevant Committee is the Committee which monitors the agreement of which is the subject matter of the dispute. The relevant Council for subject matters related to goods is the Council for Trade in Goods, for those related to trade and services, the Council for Trade in Services, and for those related to trade-related aspects of intellectual property {TRIPS}, the Council for TRIPS.

[19] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 406-407.

[20] In cases where the subject of consultation is a measure taken by a developing country Member, the parties to the dispute may decide to extend these time limits. If the time limit has elapsed in such cases and the consulting parties do not agree among themselves that the consultation has concluded, the chairman of the DSB will consult the parties and decide whether to extend the period of consultation and, if so, the duration if the extended period.

[21] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 407- 408.

[22] The provision for a decision by consensus is prescribed in Article IX of the WTO Agreement which says that the body concerned shall be deemed to have decided by consensus if no Member present at the meeting formally objects to the proposed decision. Thus, a ‘negative consensus” – a consensus not to form a panel, is almost impossible, since the Member interested in the formation of the panel will certainly stop such a consensus. Hence, it is near a certainty that the panel will be formed.

[23] It has to be noted that this procedure only happens rarely.

[24] or its predecessor agreement

[25] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 410;

DSU, Article 8.1.

[26] There is no possibility of such a negative decision by consensus, as it will require the agreement also of the Member that benefits from the report. Hence, in actual practice, the report of the panel will certainly get adopted within the time period mentioned.

[27] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 411-413;

http://www.wto.org/english/res_e/doload_e/tif.pdf

[28] *Working Procedures for Appellate Review*, in effect 15 February 1996. A revised and consolidated version of the *Working Procedures* was issued on 28 February 1997.

[29] J. Cameron, K Campbell: Dispute Resolution in The World Trade Organisation, London 1999, p. 36-37.

[30] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 415-416.

[31] http://www.wto.org/english/res_e/doload_e/tif.pdf

[32] B.L Das.: The World Trade Organisation: a guide to the framework for international trade, London 1999, p. 421.

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