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DISPUTE SETTLEMENT PROCEDURE WITHIN WTO

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ABSTRACT
This article provides detailed information on the procedure and process of dispute resolution in the World Trade Organization's dispute settlement body. Also, specific features of conflict resolution in this organization are highlighted. In addition, the issues of how to resolve disputes in the WTO and dependence on international documents are discussed.

Keywords: DSB, Appellate Body, good offices, mediation, terms of reference, conciliation, Penal, third parties.

INTRODUCTION

Admittedly, World Trade Organization, officially commenced operations in 1995, is becoming more considerable and reliable throughout the world due to its solid system and equal treatment. The intergovernmental organization functions in a supranational scope, especially, administrates trade agreements, makes forums for trade negotiations, performs dispute resolution processes, revises internal trade policies as well as makes its non-binding (as a recommendation) decisions. Without a doubt, WTO includes 164 members formally, which is because one of the most comprehensive dispute settlement procedure has already been established and more than 600 disputes have been settled so far. In this research, we are to explore how the settlement body works in detail.

Analysis of dispute settlement in the WTO Panels

When looked on Annex 2 of WTO Agreement, Dispute Settlement Understanding of WTO (legal text) provides special specific norms related to the process explicitly. The Dispute Settlement Body is merely constructed to supervise these norms and processes according to Article 2. Article 3 lists some general rules need to be observed by parties: to affirm adherence to the principles for the management of disputes, to respect recommendations and rulings of DSB (Dispute Settlement Body), to inform DSB immediately in a reasonable period after or within the process of settling any dispute by consultation procedure and dispute resolution provisions of WTO. [1]

When it comes to the consultation itself, a mutual agreement between members are inevitably crucial for WTO, even the most critical aim of the DSU. It is because if any disagreement arising from infringements of members is not solved by consultation, the DSU has to establish a panel, which takes a great deal of time, consideration as well as demands too much money. According to Article 8.11 of DSU, all expenses, including travel and other additional expenditures on terminals, shall be covered by the WTO budget. [2] Thus, DSB always makes an effort to settle the disputes without Panel, costing extortionate. On the other hand, resolution of any dispute by mutual agreement of parties is considered to be a main point of WTO's goals as negotiation is pretty preferable than binding rulings of DSB (Most obligor members predominantly tries not to perform the obligations within the rulings). All such requests for consultations are to be submitted to the DSB and the Councils and Committees by the complaining party. Any consultation request must be made in a written form and provide relevant reason, incorporating specificity of infringement and legal rationale of it. Article 4.3 provides that when a consultation request is submitted properly and related to a relevant agreement in question, the Member which received the request, if otherwise not mutually agreed, has to reply to the request in no more than 10 days after receiving that and go into consultations in good faith in a span of maximum 30 days after its receipt by that country, so as to reach a interactively satisfactory decision. [3] As mentioned above, Members should get in consultations within the frame set, otherwise the party, which is complaining, potentially requires the DSB to make up a panel to resolve the problem. Additionally, parties are able to make an agreement to set a special span for consultations which might be more or less than the general periods. There is a 60-day restriction on consultation to be made which means that unless the dispute is settled in that period, the complaining party can request DSB to establish a penal. Additionally, if negotiation and consultation seem useless to resolve the dispute within the span in question, an opportunity to call upon a penal is provided to the party complaining before the end of 60 days. [4]

When a case is reasonably urgent, incorporating fragile products or the ones having perishability at some level, Members are to come into consultations in maximum ten days after the request receipt. In case the consultations have been fruitless to resolve the problem in a period of 20 days following the date of its receipt therein, the right of the party to request a panel to be established is provided, pursuant to Article 4.8. Incidentally, one of the biggest difference between GATT 1947 and 1994 is that there was not such a complicated and detailed dispute resolution system covered in 1947 as opposed to that of 1994 specifying all stages of the procedure, such as partaking of third states in procedures. [5] According to Article 4.11, if any Member other than

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negotiating parties deems that it has relevant interest to the consultations, accordingly, part one of Article 12 of GATT 1994, 12.1 Article of GATS, or the provisions, corresponding the participation of them, in other related dealings, such Member might inform the Members in the dispute and the DSB, in no more than 10 days after the circulation request for consultations provided in the Article mentioned above, of willingness to be added in the consultations. If the Members which are covered by the dispute, find the request reasonable and agree so, the third parties might be joined to the procedure. In this case they are also obliged to notify the DSB as immediate as possible. [6] But the third parties may encounter some obstacles during the process of getting into this if either party complains about that participation, which ought to be reasonable.

Apart from this, there may be good offices, conciliation and mediation undertaken at any stage until the final ruling of a penal (article 5.1). Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. [7] They may begin at any time and be terminated at any time. 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. The third parties, voluntarily desire to assist with the dispute between the complaining parties, is merely on benefit from the settlement in two ways: firstly, they may require (it does not mean that the complaining parties are obliged to fulfill) some privileges as a response to their assistance; secondly, those exercise of the third states can probably be advantageous for external political image of the country, which are trying to settle disputes peacefully and fairly. [8]

As noted above, unless the parties are not able to resolve the dispute by means of consultation, they demand a panel to be established in a written form. In Article 6 said: If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel. [9] The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

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After that, the parties are allowed to assign terms of reference as they want so as to specify the process and the agreement covered therein. It is possible to encounter a 20-day restriction to submit terms of reference of the parties in Article 7.1. In case parties cannot decide what terms of reference to be implemented, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. [10] If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB (Article 7.4). Ad hoc chance to choose and submit the terms of reference is given in order to preclude disagreements related to the process (the terms of reference that the Chairman provided might be controversial to that of the parties). [11]

The next stage of resolving a dispute is composition of Panel, which Article 8 of DSU displays. As an expository and demystified context, juries in Panel have to have specific experience beforehand as one of the following:

1) Well qualified governmental or non-governmental individuals;
2) Representative of a member state to have partaken in resolution of a case covered in GATT 1947;
3) Representative to the Council, Secretariat or Committee of any covered agreements;
4) Senior trade policy official of a Member.

Penal tends to be composed of 3 to 5 persons as a general rule Member are permitted to appoint one individual for the panel. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel. In addition to this, a special norm comes here: In case the parties were not able to make a deal about the panelists in maximum 20 days after the date of the panel establishment, in accordance with the request of one of the parties, the Director-General is obliged to display the panel composition by assigning experienced individuals that the Director-General finds far profitable and possessing special skills which can be helpful to settle the dispute appropriately and promptly by commenting and implementing relevantly, having consultations in terms of this with the dispute parties. [12] The DSB Chairman is to provide the Members with information about the internal process and formation of the panel composition within 10 days following the time a request is received by the Chairman. (Article 8.7). WTO provides developing and less developed countries with some privileges in particular terms as in this case. Pursuant to Article 8.10, if the case is between a tremendously developed and a merely developed country and in case the latter country requests

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formally, the panel has to accept minimum one individual from the least developed country. [13]

Regarding panel procedures, the panel shall be sufficiently flexible in order to make quality reports that do not lays a point for parties to appeal it, provide the schedule of processes within 7 days following the panel composition, fix specific restrictions on dates for submitting written form of complaints and others under Article 12. On the account of need to make the procedures more productive, the periodical span of the panel conduction including the time from the panel composition and selection of referential terms of the panel are arranged to the moment in which the panel reveals the decisive ruling for the parties concerned, should not be over 6 months generally. If the case is reasonably urgent, incorporating having a great deal of perishability, the maximum time limit for issuing the final report should be 3 months for the panel owing to the possibility of losing importance of the resolution for the complaining party if the panel deems that resolving the dispute is impossible for it in such a period of 6 months, or three months in case of urgency, the panel has an obligation to alert the DSB in a written form giving the rationale for the procrastination as well as the amount of the additional time in which settling the case is adequate for it. [14] However, it should be noted that the fixed period from the panel establishment to the reveal of the final report is never allowed to get over 9 months. It occurs when the dispute is vastly wide incorporating so many details to be resolved but in most cases it is weird to meet that kind of length, there might be privileges for developing countries (Article 12.10). [15]

Intriguingly, sometimes the panel may suspend process by a request of one party for maximum 12 months. Unless this suspension does not extend more than a year, the panel authority for establishment temporarily fails.

After the sequence of contrary documentations and arguments taking place orally, the expository parts of its relevant draft report ought to be issued to the dispute parties by the panel the panel. In a fixed binding period by the panel, the comments for the report should be submitted by the parties in a written form. After the deadline of the fixed time period to receive comments by the dispute parties, the panel is to determine a temporary report to the dispute parties, composed of not only expository notes, but also conclusions of the panel. In a time span fixed by the panel itself (usually longing for up to 14 days), a request in which the panel is demanded on reviewing the case from scratch or the specific points before its determinacy to the Members concerned might be submitted by a party. If a party so requests, the panel is obliged to set a meeting that the dispute parties should take part in and revise all the fragile or unreasonable points specifically displayed in the comments above. Unless comments

are submitted by one of the parties in the fixed period, that temporary report ought to be deemed the final report and circulated as quick as possible to all member states. [16]

If there is no complaint about the panel's report and request a meeting in 20 days after its reveal, the Chairman is to turn it into implementation within 60 days after the report is released except: a decision made by a party about to appeal the case to the Appellate Body together with informing the DSB or the Dispute Settlement Body, in turn, decides based on consensus refuse to adopt that report. If either party uses the right of appealing, that final report cannot be deemed for implementation by it.

In regard to Appellate Body, it should be comprised of seven individuals who can be assigned for four years and appointed again once, meaning that each person in the Appellate Body can serve there for 8 years at most (Article 17). In general, the procedures cannot be exceeded 2 months after the notification of either party to appeal the case to the Appellate Body to the time the AB releases its report to the Members. In terms of setting the schedule, account of the conditions in article 14 should be taken by the Appellate Body relevantly. If the AB deems that the report may not be provided in a couple of months, the DSB is to be informed by the AB in a written form about the rationale for the deferment as well as the possible precise period in which the juries can perform and submit it entirely. The proceedings can never be over 90 days at all. The obligations in the temporary revise section of the panel should be assigned to the Appellate Body as well. The DSB should adopt the report of the AB together with the dispute parties are also to accept it unconditionally if the DSB makes a decision based on consensus about adopting that report in maximum 30 days after its release to all Members. [17]

According to Article 19, at the time it becomes known that there is a lack of conformity within a claim, a penal or an Appellate Body shall recommend parties to bring the case into conformity as immediate as possible since cannot diminish or add to rights or obligations of the parties at all.

If otherwise not agreed to by the dispute parties concerned, the span, ranging from the time when the panel was established by the DSB consensus to the date of the consideration of the DSB of the report made by the panel or Appellate Body for adoption, ought not to get over 9 months [19] only if the panel report is not appealed or a year if appealed. If the panel or the Appellate Body made an effort, according to Article 12 or Article 17 relevantly, in order to lengthen the previously fixed period to provide the report, there may be added some time in accordance with the restrictions [20].

Following that, the case is brought to a final stage – implementation. As article 21 of DSU provided: a meeting shall be commenced by the DSB in which the adoption of the report of the panel or Appellate Body and hardships within the implementation by the losing party are widely discussed [21]. The losing party has to give relevant and trustworthy essences and intentions so as to gain some privileges given by consensus. If the party could not fulfill the requirements of the report in question, it might be given a precise reasonable period of time to do so [22]. The reasonable period of time can be in various formations depending on the allowance of the other dispute party or parties. Firstly, the span that the losing party proposed taking all possible measures into consideration, may be approved by the DSB and can become the reasonable time[23]. Secondly, that period can be fixed by the dispute parties that decide mutually in a period of at most 45 days following the recommendations and rulings are revealed. Unless the parties to the dispute was able to reach a final conclusion by a mutual agreement, they are welcomed to lodge the dispute, concerned about the reasonable time, to the arbitration that makes a binding decision in no more than 90 days following the recommendations' and rulings' adoption. The arbitration should focus on the maximum time limit of 15 months to perform the obligations under the report so the arbitration report should rule that those performance shall be made within that span. But in some critical cases, the exception may be neglected [24].

When the losing party cannot meet the obligations having a binding authority for it, the winning party can use a means of retaliation in order to be compensated respectively [25]. Regarding what to apply against the losing party, the winning party may undertake the measures below:

(a) generally, the complaining party shall initially search for concessions to suspend with respect to the familiar sector as the one that the panel or the AB has detected a violating actions in;

(b) when the winning party deems that it is impracticable to implement such measurements to reach a goal as desired, the party is allowed to suspend other concessions within other sections. However, it should be noted that those suspensions are taken from the agreements within that the violation was occurred;

(c) if the party finds that the two forms of suspension are useless to make obligations fulfilled and get compensated, the winning party might seek to suspend measures under another agreement respectively.

As a conclusion for that procedure, there are adequately various advantageous aspects of the whole process together with a little breaking of them in it. For example, in the case of the USA - anti-dumping and countervailing measures on large residential

washers from Korea [18] it is possible to see lack of adherence to the norms of the DSU:

1) August 29, 2013 – consultations required by Korea but the other party did not enter the consultations within the time fixed above;
2) December 5, 2013 – panel establishment was demanded after almost 100 days as maximum period for consultations is 60 days. In spite of several requests from Korea, the DSB continually procrastinated to establish a panel;
3) January 22, 2014 – panel established with a deferment for a little time since it ought to be established in at most 30 days following the request to do so. Thus the DSB was late for more than 15 days;
4) June 20, 2014 – panel composed, which was by far the longest delay that after the establishment, panel composition should be performed in no more than 30 days. However, the DSB delayed it for about 3 months showing lack of competent judges as an essence of that deferment;
5) March 11, 2016 – circulation of the report occurred after longing for more than a year and a half, which should have taken at most 9 months;
6) September 7, 2016 – circulation of the Appellate Body report requiring almost 6 months to be prepared but duration of this process shall not be over 90 days.

Summary

Additionally, when look at the entire duration of the case review, although the maximum limited period of reviewing a case, beginning from the establishment of a panel to circulation of the AB report, is 15 months with additional spans, that case went through the period of more than 2.5 years.

For this reason, number of juries involved in the DSB should inevitably be increased owing to such a high number of disputes. If the judges are interactively enough, the norms concerned about the specific dates would not be broken. It would be absolutely great if each Member appoints 10 well-qualified juries for the sake of the DSB, which potentially preclude the problems, mentioned above, to raise.

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