

*An Overview of Procedural Aspects of International Trade Dispute Resolution under the WTO System**

by

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Abstract

The Dispute Settlement System (DSS) under World Trade Organization (WTO) is a central element in providing security, transparency and predictability to the international trade. The multilateral trading disputes are administered by the Dispute Settlement Body (DSB). There are some legal phases involved for the settlement of trade disputes relating to trade in goods, services and intellectual property rights under WTO. WTO trade regulation system is more effective, equitable, fast and exhaustive as compared to the International Court of Justice and old GATT system. Despite all the facts, there are some inherent weaknesses in the system, which are necessary to eliminate for the promotion of International Trade and Sustainable Development of member countries.

1. Introduction:

Dispute system is an integral part in the smooth working of the various multilateral trade agreements entered into as a result of the Uruguay Round of trade negotiations because it gives confidence to the member states of the WTO that its complaints on the Notification and Infringement of its rights under the covered agreements will be addressed by an impartial Tribunal.¹

The WTO dispute settlement framework is set out principally in the Understanding on Rules and Procedures Governing the settlement of disputes.² The Dispute Settlement Understanding establishes a single integrated legal structure for conflict resolution in relation to the various trade agreements under the Uruguay Round relating to trade in goods, services and intellectual property rights.

2. Jurisprudence of the WTO Dispute Resolution Mechanism:

The Jurisprudence of Dispute Resolution Mechanism under the Multilateral Trading System (MTS) aims at removing the friction in the actual working of the Multilateral Trade Agreements (MTA), which in turn aim at free flow of trade and commerce amongst the contracting countries, raising of standards of living, ensuring full employment and expanding production of trade in Goods, Services and Intellectual

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¹ WTO Dispute settlement and developing countries by MB Rao and Manjula Guru at p xiiiv

² See Arts XXII and XXIII of GATT 1994; and the Understanding. See also in conjunction with the Understanding, rules of Conduct for the Understanding on Rules and Procedure Governing in the Settlement of Dispute WT/DSB/RC/W/1 (November 1996); and Working Procedures for Appellate Review , WT/AB/W/3 (February 1997). Also see, International Economic Law by I.H. Qureshi

Property Rights. This system seeks the maximum use of the world resources with the objectives of economic prosperity and sustainable development of the member states.³

It also provide level playing fields for developing, least developed and developed countries. It is worthwhile to note that WTO dispute settlement machinery provides security, predictability and transparency in the world trading system.⁴ It preserves the rights and obligations of the members as stated in the WTO code. This is a measure which brings the use of unilateral measures deployed by States.

3. Historical Analysis of Dispute Resolution Framework under The GATT:

The legal mechanism for international trade resolution of disputes were centered in Articles XXII and XXIII of GATT, although there are a number of other provisions sprinkled throughout the GATT that relate to resolution of disputes, or renegotiation or compensation of obligations.⁵

Article XXII of GATT merely provides for consultation, on any matter regarding GATT, when any contracting party requests it. It is a simple but sometimes very useful provision. It is worthwhile to note that the core provisions of GATT concerning dispute settlement are provided in Article XXIII.⁶

The old GATT dispute settlement system had discrepancies due to which the system was not working effectively and in smooth manners.⁷ Delays in processing complaints, formation of panels, implementation of decisions mainly due to blockage of panel reports and inability to respond to developing country interests and complaints.

Dispute Settlement Body And Its Jurisdiction:

Article 2 of the DSU establishes the Dispute Settlement Body DSB, which is the collectivity of WTO Members acting in their dispute settlement capacity and has a role parallel to that of GATT counsel in the pre- WTO multilateral dispute settlement arrangements.⁸

It is pertinent to mention that the Dispute Settlement Body (DSB) has the sole authority to establish panels, experts, review group and to accept or reject the panels and appellate body reports, maintain surveillance of implementation of rulings and recommendations under the covered agreements and has a power and authorize suspensions of concessions

³ WTO Dispute settlement and developing countries by MB Rao and Manjula Guru at p xix

⁴ rt.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in GATT, The Result of the Uruguay Round of Multilateral Trade negotiations (1994), (hereinafter referred to as ‘the Understanding’)

⁵ See Jackson, world trade and law of GATT, chapter 8

⁶ Jackson, the world trading system, chapter 4

⁷ See generally Dispute settlement and Developing countries by MB Rao & Manjula Guru at p 9

⁸ The Regulation of International Trade 2nd edition by Michael J.Trebilcock and Robert Howse at p 60

and other obligations under the covered agreements.⁹

The DSB is responsible for the administration of the dispute settlement rules and procedures under the Understanding.¹⁰

Member's can be represented by private lawyers in panel¹¹ and appellate proceedings.¹² The private lawyers can only appear as the part of member's delegation. They must be responsible to government they are representing, and respect the confidentiality of the proceedings.¹³ The assistance of private council is accepted practice¹⁴ for seeking legal advice and involvement in written proceeding. NGO's cannot bring proceedings at WTO. They can only make written submission in disputes between member.¹⁵ It is the discretion of the dispute settlement panel to decide whether accept or reject the submissions.¹⁶

4. Constitutional Phases for International Trade Dispute Resolution under WTO:

Phase-I Consultation Stage¹⁷

Prior to taking any other actions the countries in dispute have to negotiate to each other to see if they can settle their differences by mutual understandings. If the negotiations have been failed to resolve the dispute within 60 days.¹⁸ They can also request the WTO Director General to mediate or try to help in any other alternative way.¹⁹

At this stage the Director General may act in an ex officio capacity offer good offices conciliation or mediation with the view to assisting members to settle a dispute.²⁰

Phase-II Panel's Formation and Working Mechanism:

The request for the establishment of a panel shall be made in writing by complaining

⁹ See DSU article 2.1

¹⁰ Articles 2 of the Understanding

¹¹ See Korea-Taxes on Alcoholic Beverages; Panel Report (1998) and Report of the Appellate Body (1999).

¹² See European Communities-Regime for the Importation, Sale and Distribution of Bananas; Report of the Appellate Body (1997). See also R.S.J Martha, "Representation of Parties in WTD" (1997) 31 J.W.T.

¹³ See Korea-Taxes on Alcoholic Beverages; Panel Report (1998) and Report of the Appellate Body (1999).

¹⁴ See European Communities-Regime for the Importation, Sale and Distribution of Bananas; Report of the Appellate Body (1997). See also R.S.J Martha, "Representation of Parties in WTD" (1997) 31 J.W.T.

¹⁵ United States-Import Prohibition of Certain Shrimp and Shrimp Product; Report of the Appellate Body (1998). Also see International Economic Law by Asif H. Qurashi at p. 292 See also for e.g. S. Charnovitz, "Participation of Non-Governmental Organizations in the WTO" (1996) 17 (1) University of Pennsylvania Journal of International |Economic Law; and D.C Esty, "Non-Governmental Organizations in the WTO: Co-operation, Competition, or Exclusion", (1998) 1 Journal of International Economic Law, also see International Economic Law by I.H Qureshi

¹⁶ See Article 13 of the Understanding; and United States-Import Prohibition of Certain Shrimp and Shrimp Product; Report of the Appellate Body (1998)

¹⁷ The Regulation of International Trade 2nd edition by Michael J.Trebilcock and Robert Howse at p 60

¹⁸ See Article 4 DSU

¹⁹ See generally DSU article 5

²⁰ See DSU article 5.6

party which shall comprises of that the consultation were held, identify the specific issues and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.²¹

The country in dock can block the formation of the panel once but when the DSB meets for a second time the appointment can no longer be blocked provided that there is a consensus against appointing the panel.²²

It is pertinent to mention that panelist shall be well qualified governmental or non governmental individuals. These individuals having a sufficient diverse world trade experience and a wide spectrum of international law and policy.²³

After the formation of the panel each side in dispute presents its case in writing to the panel. The complaining country, the responding country and those that have announced they have an interest in dispute make their case at the panel's first hearing. After that the countries involved submit written rebuttals and present oral arguments at the panel's second meeting. An expert review group is appointed for expert opinion when there is involvement of scientific and technical matters.²⁴ The panelist submitted a factual and argument report for further discussion to the both parties. After the completion of the process interim report is submitted by the panel based on findings and conclusions.²⁵ And the reasonable time of one week is given by the panel to the parties in dispute for review. The statutory period for the process of review is not allowed more than two weeks at the end a final report is submitted to the parties in dispute and it is also circulated to all the WTO members²⁶

Phase-III

Adaptation of Panel Reports:

The statutory mechanism for the adaptation of the panel reports is provided in article 16 of DSU where the panel report shall not be considered for adaptation by DSB until 20 days after the date they have been circulated to the contracting parties.²⁷ Where the member countries having any objections to the panel's reports they submitted their objections in appropriate manners which should be in written form.²⁸ In DSB meeting the members have statutory right to fully participate and record their point of view.²⁹ After the completion of above mentioned procedures the report is adopted within 60 days

²¹ See generally DSU article 6

²² See DSU article 6.1 & 6.2

²³ See DSU article 8.2

²⁴ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm

²⁵ See DSU article 15

²⁶ See generally DSU article 12

²⁷ The legal texts: The results of the Uruguay Round of Multilateral Trade Negotiations Published by the WTO secretariat edition 2002, at p 365 para 1, article 16, DSU

²⁸ See article 16.1 DSU, The Dispute Settlement Procedure 2nd edition at p 15 Published by the WTO secretariat

²⁹ See article 16.3 DSU

unless there is no appeal³⁰

Phase-IV

Appellate Review Body:

A standing appellate body is established by DSB appellate body hears appeal from the panel cases.³¹ The appellate body consists of seven members, three of whom serve on any one case.³² These members appointed for four years term and representative of WTO membership.³³ These members having expertise in law, international trade law and subject matter of the covered agreements particularly³⁴

Appeal based on points of law such as legal interpretations developed by panel.³⁵

Appellate body has the power to uphold modify a reversely legal findings and conclusion of panel.³⁶ The dispute settlement body has to accept or reject the appeals within 30 days³⁷

5. Enforcement Process:

Within 30 days of the adaptation of panel or appellate body report the losing party must inform the DSB of the steps it intends to take to implement the recommendations and rulings adopted. Where immediate compliance is impracticable, a member have a reasonable period of time to bring itself into conformity³⁸

A reasonable period of time may be determined by the DSB on the basis of proposals from the losing party. It is worth while to note that compensations and suspension of concession are available to the aggrieved party if the panel or appellate body report is not implemented with a reasonable period of time. Compensation is a voluntary alternative to implementing a ruling suspension of concessions requires authorization by the DSB, subject to a number of conditions and criteria listed in 22.3 and related provisions of this Article³⁹

6. Arbitration as a Alternative Means:

Expeditious arbitration as a mean to settle the international trade dispute is provided

³⁰ See article 16.4 DSU

³¹ The legal texts: The results of the Uruguay Round of Multilateral Trade Negotiations Published by the WTO secretariat edition 2002, at p 366 para 1, article 17.1, DSU

³² See article 17.1 DSU, The Dispute Settlement Procedure 2nd edition at p 15 Published by the WTO secretariat

³³ Legal Problems of International Economic Relations 4th edition by John H. Jackson, William J. Davey and Alan O. Sykes, Jr. at p 264

³⁴ See generally article 17.3 DSU

³⁵ See generally article 17.6 DSU

³⁶ See article 17.13 DSU

³⁷ See article 17.14 DSU

³⁸ The Regulation of International Trade 2nd edition by Michael J. Trebilcock and Robert Howse at p 79

³⁹ Ibid

under the article 25 of dispute settlement understanding which can facilitate the solution of certain disputes that concern issues are clearly defined by both parties. Arbitration shall be subject to the mutual agreement of the parties. Arbitration shall be subject to the mutual agreement of the parties. The arbitration award is binding on the parties to the dispute. The arbitration award is notified to the DSB and the counsel or committee of relevant agreement⁴⁰

Table*: Constitutional Time Framework to Settle a Dispute under the WTO

Time Period	Stages
60 days	Consultations, mediation, etc.
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final pane report to WTO members
60 days	Dispute settlement body adopts report (if no appeal)
Total = 1 year	(without appeal)
60 – 90 days	Appeals report
30 days	Dispute Settlement body adopts appeals report
Total = 1y 3 m	(with appeal)

* Source: http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm

Conclusions and Proposals:

In conclusion, the World Trade Organisation (WTO) Dispute Settlement System (DSS) provide a constitutional framework for the resolution of dispute in the field of international trade⁴¹ in goods, services and intellectual property rights.

There has been a general improvement in the system as a whole and system is more effective as compared to International Court of Justice (ICJ) and any other organization.

Following are the proposals:

- There is need to increase institutional capacities.
- Co-ordination at multiple levels public, private levels, members with similar concerns and development organizations etc.
- There is need to restrict the consideration of amicus curie brief.
- Need to provide special time frames and legal assistance for developing and least developed countries.
- Special and differential treatment (S & DT) provisions should be enforced with their letter and spirit.
- Panel proceedings should be held publicly.
- Easy excess to the reports by public and NGOs.

⁴⁰ The Dispute Settlement Procedure 2nd edition at p 25 Published by the WTO secretariat

⁴¹ International Economic Law by Asif H.Qureshi at p 313