

Dispute Settlement Process under DSU:
Various Steps in DSU Process
&
Practical Insights
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STRUCTURE

- INTRODUCTION TO THE DSM
- INSTITUTIONS INVOLVED IN DSM
- VARIOUS STEPS IN DSU PROCESS
- PRACTICAL INSIGHTS ON BASIC PROCEDURES UNDER THE DSU

INTRODUCTION-I

- Dispute Settlement Mechanism (DSM) is a central element in providing security and predictability to the multilateral trading system
- This is ensured by the principle of reverse consensus at three crucial stages of the system:
 - when a dispute panel is established,
 - when its report is adopted, and
 - when the Complaining Member is authorized to retaliate on account of non-compliance by the Member Concerned

INTRODUCTION-II

- The current system is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, generally called the DSU
- Its origin lies in Articles XXII and XXIII of the GATT, and is the result of the evolution of rules, procedures and practices developed over the 50 years of the life of GATT

INTRODUCTION-III

- WTO's treaty terms, like most other multilaterally negotiated treaty terms, are not a model of clarity; many contain broad principles that may apply differently in different cases, or may contain a political compromise (constructive ambiguity) necessary to conclude the negotiations
- While the WTO Agreement (Article IX:2) gives exclusive authority to Members to interpret treaty provisions, that seldom happens due to the need for consensus
- Hence, panels and the Appellate Body interpret treaty terms for specific disputes

INTRODUCTION-IV

- “Customary rules of interpretation of public international law” is the accepted rule of treaty interpretation, contained in Articles 31-33 of VCLT
- This means good faith interpretation, in accordance with the ordinary (dictionary) meaning of the terms of the treaty, in their context and in the light of its object and purpose
- Sometime other customary principles of international law are also referred to in pleadings

INTRODUCTION-V

- The primary objective of DSM is neither to make rulings nor to develop jurisprudence, but to settle a dispute
- Preference given to mutually agreed solution between the Parties
- Parties can defer panel/Appellate Body work at any stage to settle bilaterally
- Panel/Appellate Body reports in themselves have no legal status; they have to be adopted by the DSB to acquire legal status
- Basis in the Member-driven nature of the WTO

INTRODUCTION -VI

- Prompt settlement of disputes the main function of the DSU
- Through DSU, WTO members have agreed to resort to multilateral settlement of disputes rather than unilateral determination of rights and obligations
- No need for separate declaration or agreement for the panel/Appellate Body to acquire jurisdiction; jurisdiction comes from Members having signed the WTO {How is that different from ICJ and UNCITRAL arbitration matters?}

STEPS IN DSU PROCESS

- WTO dispute settlement can be divided into five major stages –
 - consultation
 - establishment of panel, conduct of panel proceedings and issue of its report
 - appeal to Appellate Body, its proceedings and issue of its report,
 - adoption of panel/AB reports by DSB
 - implementation/compliance/surveillance

each step is governed by specified timeframes
set forth in the DSU

CONSULTATION

- Request for consultations should be responded to within 10 days
- Member consulted should enter into consultations within 30 days
- Need to accord sympathetic consideration to representation made in consultation
- Consultations are confidential
- Other members having substantial trade interest in the matter may seek to join in the consultations
- Mandatory 60-day consultation period (in case of emergency, 20 days)

PANEL

- If consultations fail, complaining party has a right to request establishment of a panel; reverse consensus at the second request
- Other Members may become third parties
- Three (or five) member Panel, selected by Parties, failing which, the DG
- Standard ToRs; make findings of fact and law
- Interim review
- Report in 6-9 months;
 - advance report to parties;
 - final report in all three WTO languages
- Adopted, if not appealed, within 60 days

APPELLATE BODY

- 3 AB members hear appeal
- Appeal limited to issues of law covered in the Panel report and legal interpretation developed by it
- Appellate Body can
 - make Findings and Conclusions
 - Uphold, modify or reverse the findings and conclusions of panels
 - No remand authority, but it may “complete the legal analysis”
- AB must issue report within 90 days
- Adoption – Panel/AB reports are adopted by DSB through reverse consensus within 30 days

IMPLEMENTATION

- Responding party usually given a reasonable period of time (RPT) to bring its measures into compliance with WTO obligations
- Compliance can be adjudicated before a compliance panel
- Failure to comply can lead to authorization of retaliation by DSB
- Level of retaliation is subject to arbitration
- DSB meets every month for surveillance of ongoing unimplemented disputes

Practical Insights on Dispute Procedures -I

- A dispute starts with notification of a request for consultation by the complainant. This event is mostly preceded by intense informal bilateral efforts at resolution
- It actually takes about 150 days on average from request for consultations to panel establishment
- Any WTO Member having a substantial interest in a matter before a panel can become a third party
- Third parties normally allowed only in a special session of the first hearing

Practical Insights on Dispute Procedures-II

- Normally 2 written submissions and 2 hearings are conducted in each case
- Panel also asks oral and written questions from parties and third parties
- Some panel/AB hearings have been opened for observation to the public after consent of the parties as a transparency measure
- Takes average 41 days from circulation of panel report to appeal or adoption

Practical Insights on Dispute Procedures-III

- The complying party is given a reasonable period of time (RPT) to implement DSB decisions, if implementation cannot be 'prompt'.
- Normally not more than 15 months. Average RPT 305 days.
- Surveillance of implementation starts 6 months after RPT is established. The complying party has to report progress every month until full compliance is achieved.

Practical Insights on Dispute Procedures-IV

- If there is a disagreement as to whether there is compliance, the matter can be referred to a compliance panel
- Shorter time frames for compliance panel proceedings, but appeal lies
- Authorization to retaliate can be sought independent of whether there is agreement on compliance. To avoid legal crisis, parties generally enter into a bilateral sequencing agreement

Practical Insights on Dispute Procedures-V

- If implementation is not achieved, possibility of compensation or retaliation as temporary measures until implementation
- Retaliation authorized by DSB automatically once the level of nullification or impairment is agreed to or adjudicated
- Level determined by arbitration. Took 279 days on average
- Retaliation normally within the same sector in which violation was found. Exceptions exist (Bananas, Cotton, Gambling, Byrd)
- Retaliatory duties lifted after compliance

Practical Insights on Substantive Issues in a Dispute-I

- Eventual objective being satisfactory settlement of a dispute, the complaining Party must think through the possible outcome of a Panel/AB consideration on the rights it feels have been impaired
- If responding Party may have recourse to another permissive provision of the WTO agreements, or the timelines of a measure are shorter than the expected time taken under DSM, such a satisfactory outcome may be elusive
- Parties must also consider political and security aspects of the measure that may oblige consideration of factors beyond economic or trade imperatives

Practical Insights on Substantive Issues in a Dispute-II

- Even where satisfactory outcome is expected, impact on trade relations may be considered; cost of the dispute compared to expected benefits may be assessed
- Consultation stage requires more political and diplomatic skills, panel stage onwards it is more legal
- Third Party interests matter, particularly in cases having horizontal implications
- Developing countries have some cheaper alternatives to engaging costly international trade law firms: Article 27.2 of DSU and ACWL

Practical Insights on Substantive Issues in a Dispute-III

- Encourage enterprises to contact Trade/Commerce Ministry if they believe any measure in destination country is WTO-inconsistence
- Consultation stage can be leveraged to solve dispute
- Sufficient analysis of the cost and benefit of litigation necessary before launching duties
- Seek ACWL legal opinion – its free!
- All equal in DSU; might is not right, but compliance a challenge against those who have the might, and other than trade interests in a measure

Practical Insights on Substantive Issues in a Dispute-IV

- All measures at issue and relevant WTO provisions must be stated in Panel request
- Arguments on claims must be stated fully and comprehensively, keeping in view:
 - Relevant WTO provisions violated and impugned measure(s) must be duly connected
 - Order of analysis should be anticipated based on jurisprudence
 - Burden of proof must be duly discharged



Thank you

Questions welcome