

Specialised Course on Select
World Trade Organization Issues
SESSIONS ON: THE WTO DISPUTE
SETTLEMENT SYSTEM UNDERSTANDING
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STRUCTURE

Part 1-The WTO Dispute Settlement Mechanism: An Overview

- INTRODUCTION TO THE DSM
- BASIC TENETS OF THE DSM
- STAGES IN DSM
- INSTITUTIONS INVOLVED IN DSM

Part 2 – Dispute Settlement Process under the DSU: Practical Insights

- PRACTICAL INSIGHTS ON BASIC PROCEDURES UNDER THE DSU
- CASE STUDIES
- PRACTICAL INSIGHTS ON SUBSTANTIVE ISSUES

INTRODUCTION-I

- An agreement is not worth more than the paper it is written on if it can not be enforced
- For an international agreement, enforcement can not be ensured through national courts and other enforcement instruments/agencies; it needs an international agreement between the parties, an agreement that binds them under international law
- WTO Dispute Settlement Mechanism (DSM) serves that purpose

INTRODUCTION-II

- 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-III

- 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
- It is the ‘crowning glory’ of the WTO because ‘it bites’

BASIC TENETS-I

- Although parties to the WTO are governments, its rules protect rights of economic operators in our economies
- They need predictability of market access and the relevant economic policies
- It comes from the (relatively) rapid resolution of disputes (strict timelines) and strict enforcement through (threatened or actual) imposition of trade sanctions

BASIC TENETS-II

- The potential for a dispute arises when a WTO Member adopts a policy or measure that another Member considers inconsistent with its WTO obligations
- While the preferred option is a mutually agreed solution, in its absence the complaining party is guaranteed a rule-based procedure to challenge the measure
- If the complainant prevails, the preferred option for the defendant is withdrawal of the measure, since not doing so will invite multilaterally authorized sanctions

BASIC TENETS-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 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

BASIC TENETS-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

BASIC TENETS-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

BASIC TENETS-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?}

STAGES IN THE DISPUTE SETTLEMENT MECHANISM

- WTO dispute settlement can be divided into five major stages – consultation, panel, Appellate Body, adoption and implementation/compliance: each is governed by specified timeframes set forth in the DSU
- Consultation – Once a complaint has been filed, there is a mandatory 60-day consultation period
- Panel – If consultations fail to result in a mutually satisfactory solution, the complaining party has a right to seek establishment of a panel to adjudicate the case and make findings of fact and law; this right is exercised by reverse consensus at the stage of the second request to establish a Panel
- Panels must issue their reports in 6-9 months

STAGES IN THE DISPUTE SETTLEMENT MECHANISM

- Appellate Body – Issues of law covered in the Panel report and legal interpretation developed by it may be appealed before the Appellate Body
- AB must issue report within 90 days
- Adoption – Panel/AB reports are adopted by DSB through reverse consensus; DSB has other roles too
- Implementation/Compliance – 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, a decision taken by reverse consensus. Level of retaliation is subject to arbitration.

INSTITUTIONS INVOLVED IN THE DISPUTE SETTLEMENT MECHANISM

- Dispute Settlement Body – Political body comprised of all 156 Members that oversees operation of dispute settlement system, including formation of panels, adoption of panel/AB reports, authorization of retaliatory measures, and surveillance of cases for which compliance not yet achieved

DSB is assisted by the Legal Affairs and Council Divisions of the WTO Secretariat

- Panels – Ad hoc 3-person adjudicatory bodies established for each dispute

INSTITUTIONS INVOLVED IN THE DISPUTE SETTLEMENT MECHANISM

- WTO Secretariat – Assists in composition and operation of panels, provides technical assistance, reports to the DG
 - Appellate Body – Composed of seven members serving four-year terms, renewable once
- Three of the seven AB members serve on one case
- Appellate Body Secretariat – Assists Appellate Body, is separate from the WTO Secretariat and reports to the AB, not the DG

Practical Insights on Basic 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
- If no agreement is reached within 60 days, complainant may seek establishment of a panel. It actually takes about 150 days on average from request for consultations to panel establishment
- Establishment of panel at the 2nd request automatic (reverse consensus)
- Any WTO Member having a substantial interest in a matter before a panel can become a third party

Practical Insights on Basic 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
- Third parties normally allowed only in a special session of the first hearing
- Some panel/AB hearings have been opened for observation to the public after consent of the parties as a transparency measure
- Panel expected to issue report within 6 months; maximum 9 months

Practical Insights on Basic Dispute Procedure-III

- Panel Report to be adopted within 60 days of circulation unless appealed
- Takes average 41 days from circulation of panel report to appeal or adoption
- Right to appeal limited to only issues of law and legal interpretation
- Deadline 60-90 days
- Appellate Body report, along with panel report as modified by the AB, adopted within 30 days by DSB. Average 24 days
- Adoption automatic

Practical Insights on Basic Dispute Procedures-IV

- 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 Basic Dispute Procedures-VI

- 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-VII

- 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

CASE STUDY 1: EC – Bed Linen-I

The Legal Case – procedural matters

- Certain claims (Art.3.4 and 6 ADA) inadmissible as not mentioned or wrongly mentioned in panel request – Art.6.2 DSU
- Evidence submitted from verbatim reports of consultations, and certain confidential information from EC investigation in a different case not admissible

CASE STUDY 1: EC – Bed Linen-II

The Legal Case-substantive matters

- Determination of normal value (Art.2.2.2)
- Zeroing (2.4.2)
- Consideration of all imports in injury determination (3.1, 3.4 and 3.5)
- Non-consideration of all injury factors(3.4)
- Failure to examine accuracy and adequacy of evidence (5.3)
- Failure to establish Industry Support(5.4)
- Failure to explore constructive remedies (15)
- Inadequate public notice (12.2.2)

CASE STUDY 1: EC – Bed Linen-III

Decisions (procedural)-briefly

- An *amicus curiae* brief received, circulated to parties, not considered by the panel
- India's claims under Art.6 ADA (on evidence) dismissed as not mentioned in panel request
- India's claim on Art.3.4(all relevant economic factors in injury analysis) not rejected as it was mentioned
- Panel declined to exclude evidence from consultations as it was helpful in 'objective assessment (Art.11 DSU)
- Declined to exclude confidential evidence from other EC investigations as EC had consented, even if at a late stage

CASE STUDY 1: EC – Bed Linen-IV

Decisions (substantive)-briefly

- EC did not act consistently with 2.2.2 ADA as all options are equal in hierarchy, and that excluding sales outside the ordinary course was a permissible interpretation; AB reversed panel's finding on 2.2.2 (ii) and found violation
- EC violated 2.4.2 by using 'zeroing'
- EC did not act inconsistently with 3.2, 3.4 and 3.5 in injury determination, but violated 3.4 in not considering all injury factors
- No violation of 5.3, 5.4 and 12.2.2
- EC violated 15 as exporters were willing to provide price undertakings

CASE STUDY 1: EC – Bed Linen-V

Compliance panel

- India challenged the measures taken by EC to comply through a compliance panel (Art.21.5 DSU)
- Panel ruled in EC's favour on injury determination, reversed by AB on appeal
- Other claims of India rejected

CASE STUDY 1: EC – Bed Linen-VI

Timelines and Implementation

- Original panel request – 7.9.1999
- Adoption of panel/AB reports by the DSB – 12.3.2001
- Time from panel establishment to adoption – 16½ months
- Establishment to RPT determination – 18 months
- Compliance panel/AB process took 12 months (May 2002 to April 2003)
- Length of RPT 5 months 2 days
- Total time taken to get redressal – 4 years

Short Case Study 2: EC-GSP Case: Burden of Proof - I

- The general rule of burden of proof is that one who asserts a claim has the burden to establish it
- The general rule of burden of proof for exceptions is that the defending party raises the exception as well as proves that it meets the requirements of an exception
- In cases where one provision permits behaviour that would otherwise be inconsistent with an obligation in another provision, the complaining party bears the burden of proof *only where one of the provisions suggests that the obligation is not applicable to the said measure*

Short Case Study 2: EC-GSP Case: Burden of Proof - II

- The Appellate Body agrees that the Enabling Clause is an exception to the MFN Clause
- But, according to the Appellate Body since the Enabling Clause has a *special status* and Members are *encouraged* to deviate from the MFN Clause, the complainant must raise the exception while the defendant will still have the burden of proving it
- Appellate Body noted that a WTO objectives may well be pursued through measures taken under provisions characterized as exceptions

Short Case Study 2: EC-GSP Case: Burden of Proof - III

- It is not clear what else in the WTO has such a *special status* and what else Members are *encouraged* to do [environmental protection? RTAs? Public morals? international standards developed outside the WTO?]
- It would be very difficult for a complainant to foresee an exception as a defense - there is no requirement in the WTO to notify measures taken based on an exception. Also, since the defense would be based on policy choices and consequent regulatory mechanisms, complainant would grope in the dark to identify the specific exception provision

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
- If satisfactory outcome is expected, 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

- 292 panels requests made out of 430 complaints: 67.9%
- About two-third of Panel reports are appealed
- In more than 88% cases, complaining Party is able to obtain a determination that violation of at least one substantive WTO obligation occurred
- DSB monitors compliance, and ensures it unless 'winning' Party allows it to fall off the agenda
- Threat of retaliation works as much as actual retaliation, which is minimally resorted to
- Thus, a 'working' dispute settlement mechanism

Practical Insights on Substantive Issues in a Dispute-IV

- 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
- 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



Thank you

Questions welcome

