

Dispute Settlement Mechanism in International Trade

Dr. Bipin Kumar
National Law University, Jodhpur

Outline

- ▶ Nature of the dispute settlement of the WTO
- ▶ Kinds of settlement of disputes under International trade law
- ▶ Rights and obligations of the WTO Members
- ▶ Dispute Settlement Understanding of the WTO
- ▶ Basic rules of WTO law and policy
- ▶ Weakness of the GATT system and Improvements by the DSU
- ▶ Purpose and objectives of the DSB
- ▶ Settlement of Disputes at WTO level
- ▶ Reforms in the DSU
- ▶ India and settlement of trade disputes
- ▶ Possible disputes

Methods of Settlement of disputes under International Trade

- ▶ Diplomatic
 - (a) Negotiation
 - (b) Good Offices
 - (c) Mediation
 - (d) Inquiry and fact finding
 - (e) Conciliation
- ▶ Legal: Arbitration and Courts
- ▶ ICSID
- ▶ DSU

Importance of the DSU to the WTO

- ▶ Backbone of today's multilateral trading regime.
- ▶ Created by Member governments during the *Uruguay Round* in the conviction that a stronger, more binding system to settle disputes would help to ensure that the WTO's carefully negotiated trading rules are respected and enforced.
- ▶ The system referred as the “WTO's unique contribution to the stability of the global economy”, is based on, but constitutes a major improvement over, the previous GATT dispute settlement system.

Structure of the DSU

- ▶ 27 Articles
- ▶ 4 Appendix
- ▶ Jurisdiction of the dispute
- ▶ Jurisdiction of the DSU

When a Dispute arise in WTO?

- ▶ A dispute arises when a WTO Member government believes that another Member government is violating a *WTO agreement* or a *commitment* that it had made in the WTO
- ▶ A special agreement is there in the WTO to solve the dispute
- ▶ The rulings, recommendations and judgements are binding on the parties

Weakness of the GATT, 1947 and Improvements by the DSU

- ▶ Positive consensus to negative consensus
- ▶ Introduction of the more precise and shorter time duration
- ▶ Independent review by the Appellate Body
- ▶ Prohibition of the unilateral measures
- ▶ Positive Integration of the individual agreements with DSU
- ▶ Introduction of the separate agreement on dispute settlement

Functions, objectives and key features of the DSU of the WTO

- ▶ DSU is the central element in providing security and predictability to the multilateral trading system
- ▶ Preserving the rights and obligations of the WTO Members
- ▶ Clarifications of rights and obligations thorough interpretations
- ▶ Mutually agreed solution as the preferred solution
- ▶ Prompt solution of disputes
- ▶ Prohibitions against unilateral determinations
- ▶ Exclusive and compulsory jurisdiction

Stages for settlement of the Dispute

- ▶ Bilateral consultations
- ▶ Formation of the Panel
- ▶ **Before the first hearing:** each side in the dispute presents its case in writing to the panel.
- ▶ **First hearing: the case for the complaining country and defence:** the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.
- ▶ **Rebuttals:** the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- ▶ **Experts:** if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
- ▶ **First draft:** the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.
- ▶ **Interim report:** The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
- ▶ **Review:** The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.
- ▶ **Final report:** A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. 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 with WTO rules. The panel may suggest how this could be done.
- ▶ **The report becomes a ruling:** The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

Kinds of the Complaints and remedies under WTO

Complaints

- ▶ Violation complaints
- ▶ Non-violation complaints
- ▶ Situational complaints

Remedies

- ▶ Cessation of the illegal measures
- ▶ Restitution in kind
- ▶ Reparation by equivalent
- ▶ Satisfaction and guarantees of non-repetition
- ▶ Retaliation
- ▶ Countermeasures

Participants in the DSU Proceedings

- ▶ Member Governments only
- ▶ WTO Secretariat, WTO observer and other international organizations, regional or local governments cannot initiate the disputes
- ▶ Role of individuals
- ▶ Role of amicus curie

WTO bodies involved in the dispute settlement process

- ▶ Parties
- ▶ Third Parties
- ▶ Dispute Settlement Body (DSB)
- ▶ Panel
- ▶ Appellate Body
- ▶ WTO Secretariat
- ▶ Director General of the WTO
- ▶ Arbitrators
- ▶ Independent experts
- ▶ Several specialized institutions

Functions of the DSB

- ▶ What is DSB
- ▶ Establish Panels
- ▶ Adopt Panel reports
- ▶ Adopt Appellate Body reports
- ▶ Maintain surveillance of implementations of the rulings and recommendations
- ▶ Suspension of obligations under the covered agreements

Meeting of the DSB

- ▶ As often as necessary to adhere to time frames as provided under DSU
- ▶ Usually one meeting per month
- ▶ When a WTO Member so requests, the DG convenes additional special meetings

Process of the Decision making at DSB

- ▶ Consensus
 - (a) Positive consensus
 - (b) Negative consensus

Three stages of dispute resolution

- ▶ Consultations
- ▶ Panel
- ▶ Appellate Body

Consultations

- ▶ Article 4 of the DSU
- ▶ Importance of the consultations
- ▶ Purpose and objectives of consultations
- ▶ Panel without consultations ?
- ▶ Form and content of the consultations
- ▶ Timeframe of the consultations
- ▶ Shortening the period of consultations process

Workings of the Panel

- ▶ Status
- ▶ Responsibility: Adjudicate the dispute between Members at the first instance
- ▶ Composition: Three to five
- ▶ Experts can be appointed as an ad-hoc basis
- ▶ No permanent panel
- ▶ Different panel for different disputes
- ▶ Qualification of the Panel Members– Article 8

Workings of the Appellate Body

- ▶ Status
 - (a) Permanent
 - (b) Second and Final stage
- ▶ To review the legal aspects of the reports issued by the panel
- ▶ DSB appoints the AB members by consensus
- ▶ Term 4 years
- ▶ Re-appointment is possible only once
- ▶ Qualifications of the members of the AB–
Article 17

Matter referred before the Panel

- ▶ Measure at issue—only Governmental , such as a law or regulation
- ▶ Legal basis of the dispute
- ▶ Measure changed during proceedings
- ▶ Change in the legal justification
- ▶ Measure no longer in effect
- ▶ Regional and local government measure

Locus standi and Review of jurisdiction in the dispute

Locus standi

- ▶ Requirement of the legal or economic interest
- ▶ Exhaustion of local remedies
- ▶ Participation by *amicus curie*

Review of jurisdiction

- ▶ Challenge of jurisdiction by parties
- ▶ Ex- officers review of jurisdiction
- ▶ Res judicata
- ▶ Estoppel

Question relating to the validity of the municipal laws

- ▶ India– Patents case
- ▶ US– Anti–Dumping Measures on certain hot Rolled Steel Products from Japan case
- ▶ US– Section 211 of the Appropriations Act case

Principles of interpretations in the dispute

- ▶ Article 3.2 of the DSU
- ▶ Good Faith
- ▶ VCLT became the customary principle of International Law
- ▶ Only under special circumstances the supplementary materials be used to assist the interpretation
- ▶ Historical background of the treaty can be referred
- ▶ Reading of all the provisions of the treaty required

Timeframe for settling a dispute

- ▶ Consultation—60 days
- ▶ Panel formation—45 days
- ▶ Final panel report to parties –6 months
- ▶ Final report to WTO Members—3 weeks
- ▶ Adoption of the report by the DSB—60 days (without appeal)
- ▶ Appeals report– 60–90 days
- ▶ Adoption of the AB report – 30 days
- ▶ Total 1 year (without appeal)
- ▶ With appeal 1 year and 3 months

Reforms in the DSU

- ▶ Sequencing
- ▶ Flexibility and Member
- ▶ Transparency and Amicus Curiae briefs
- ▶ Mutually Agreed Solutions (MAS)
- ▶ Effective Compliance
- ▶ Post Retaliation
- ▶ Developing Country interests including special and differential treatment
- ▶ Remand
- ▶ Third Party Rights
- ▶ Panel Composition
- ▶ Time Frame
- ▶ Strictly Confidential Information

India at WTO DSB

As complainant India has requested consultation concerning 24 matters

As defendant India faced 32 cases

- ▶ 6 mutual settlement
- ▶ 5 lost

As Third Parties

- ▶ 179 cases

Some possible dispute

- ▶ REACH Regulation
- ▶ Visa case
- ▶ Ponni rice issue
- ▶ Distilled spirit issue
- ▶ Generic drugs case
- ▶ Child labor related issue

Thank You!!!