



The Cairo Regional Centre for
International Commercial Arbitration

*“The Settlement of Disputes According to
the Rules of the World Trade Organization
(WTO)
(A brief study)*

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Settlement of Disputes According to the Rules of the World Trade Organization

I . Introduction

Since the Uruguay Round was concluded in 1994 and the World Trade Organization was established, the multilateral trade systems has now become a sophisticated and comprehensive system including an unprecedented legal framework and mechanism for dispute settlement.

This comprehensive mechanism plays the important role of being the custodian and the guarantor of a legal and rule-based multilateral trading regime. The Dispute Settlement Body DSB is this an integral part of the WTO from the organic and legal point of view. The task of this dynamic and compulsory DSB is precisely to insure that trade rules and their effectiveness can keep pace with the rapid development of the world economy and to guarantee the honest implementation of the rules governing the Multilateral Trading System (MTS).

It is important and significant to note that the dispute settlement system of the WTO is unprecedented not only from the perspective of its content as we shall see, but also as for its universality. One hundred twenty countries have signed and are expected to abide by the WTO rules as well as its rulings.

In this paper we shall briefly analyze the dispute settlement system of the WTO from two perceptions. One of the most important achievements of the new World Trade Organization (WTO) was its success in formulating its different bodies and in practicing its jurisdictions through its different councils and committees according to

the final act embodying the results of the Uruguay Round and the Marrakesh agreement establishing the World Trade Organization.

I. Main Features and Overall View of the Dispute Settlement System within the WTO

The dispute settlement during the GATT era has been generally considered ineffective.

The main critics to the GATT / DS can essentially be centered on three main considerations :

a . The ineffectiveness of the DS in the GATT has often been rightfully attributed to the so-called “consensus rule”. This rule operated on three distinctive levels : the establishment of a panel to examine the dispute, the adoption of the report of the panel after having examined the dispute and finally the adoption of concrete countermeasures as a last resort if the panel report has not been accepted and implemented by both parties of the dispute. In fact, parties could block the settlement procedures at any of its aforementioned stages.

b . In addition to that fundamental critic, complaints had often been voiced as to the time needed to conclude a settlement. In fact, the GATT /DS did not contain a well-defined and compulsory time-frame by which the parties to the dispute should be bound during the settlement procedures.

c . Finally, the lack of transparency was a major default in the GATT/ DS. The panel reports, for example, remained confidential even after these reports have been adopted. It is not only a matter of confidence gained by the transparency, but the problem was also a legal one : the lack of transparency meant the inability of the GATT / DS to establish respected legal precedents. An element which is of capital importance to ensure the effectiveness of any dispute settlement system.

The main advantage of the WTO / DSB is that the “consensus rule” has been reversed : from “ consensus” to “negative consensus”. In this

respect, which stipulates that “ ... unless the dispute settlement body (DSB) decided by consensus not to establish a panel”. It is evident that the “negative consensus rule” at all three levels (establishing a panel, adopting its report and implementing its ruling) makes the whole system more operative and effective as there can be no blockage.

Moreover, strict deadlines are provided by the WTO / DSB : six months for normal settlement procedures, which can possibly be extended up to nine.

The thrust of the WTO / DSB is that it is a mandatory system which can not be neither blocked nor manipulated by any part to a dispute. The rulings of a panel are binding and implementable unless challenged, within precise framework and through defined procedures, within an Appellate Body whose decisions are final.

An Appellate Body is now fully established and effectively operated. On February 15, 1996, it adopted a detailed working procedures for appellate review of case examined and adjudicated within the WTO / DSB.

It is important to note that the possibility of appeal to any party to a dispute in a panel proceeding is only limited to questions of law, and not issues of facts, in the panel report and the legal interpretation and analyses developed by that panel.

Three members of the seven-person Appellate Body sit at any time to hear an appeal. They have the right to uphold, modify or reverse the legal analyses and the final outcome representing the conclusions of a panel report.

As a general rule, the appeal proceedings should not exceed 60 days but in no case shall they exceed 90 days. Within 30 days after it is issued, the DSB has to adopt the report of the Appellate Body which then must be unconditionally accepted and faithfully implemented by all the parties to the dispute, unless there is a consensus against its adoption.

It is significant to quote the Chairman of the Appellate Body, Ambassador Julio Lacart- Muro, who, in a letter to the DSB Chairman,

pointed out the central concerns which motivated the conception as well as the drafting of the detailed Appellate working procedures as following:

“... the need for vigilance in protecting the basic right of all parties in the proceedings :

“ ... the need for rotation in the establishment of divisions along with the advantages of collegiality ;

“ ... the need for independence and impartiality in the decision making ;

“ ... the need for constant and conscientious compliance with both the letter and spirit of the Dispute Settlement Understanding (DSU) and all other covered agreements of the WTO in order to strengthen the multilateral trading system”

It can therefore be safely claimed that the “Bargaining Power Theory” is no longer the only determinant factor as for the settlement of commercial disputes on the international level. In fact, the WTO / DSB is overwhelmingly considered to be able to put an end to “power position” in international economic relations, and to widen and strengthen, instead, the scope of rule-oriented policies.

One of the most important bodies established in this regard is the system of dispute settlement based on the “ Understanding on Rules and Procedures Governing the Settlement of Disputes”. These rules of Dispute Settlement Understanding (DSU) apply on the disputes between the members of the WTO concerning their rights and obligations related to the organization. To realize this objective, the Dispute Settlement Body (DSB) was established. This body formulates a panel for each dispute. In this regard Article (2) of the DSU contained in the concluding document issued in Marrakesh on April 15,1994 Provides that : “the Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered

agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those members that are parties to that agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

* The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

* The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this understanding.

* Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus."

Article (3) of the Rules affirms that the members "adhere to the principles for the management of the disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified.

Article (4) of the Rules provides that, "If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the establishment of a panel.

* All such request for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request of consultations shall be submitted in writing and shall give the reasons for the request including the identifications of the measures at issue and an indication of the legal basis for the complaint.

* In the course of consultations in accordance with the provisions of a covered agreement, before restoring to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

* Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.”

* If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60 days period if the consulting parties jointly consider that consultations have failed to settle the dispute.

* In case of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.”

Article 5 of the Rules permit the use of : “ Good offices, conciliation and mediation” .

II - Legal Description of the Content and Mechanism of the Dispute Settlement System within the WTO

1- Establishment of Panels

In case consultations are not successful “ the complaining party may request a panel to 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.:

* 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 of 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. (Article 6)

The jurisdiction of the panels is provided for in Article (7) as follows :

1. "Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel :

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document and to make such findings as will, assist the DSB in making the recommendations or in giving the rulings for in that /those agreement(s).

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, 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 draw up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB."

- Panels shall be composed of well-qualified governmental and/ or non-governmental individuals.

- Panel Members are selected with a view to insuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

- Citizens of Members whose governments are parties to the dispute or third parties shall not serve on a panel concerned with the dispute, unless the parties to the dispute agree otherwise.

- The Secretary of the body shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications from which penalties may be drawn as appropriate.

- 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.

- The Secretariat shall propose nominations for the panels to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

- If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council of Committee, shall determine the composition of the panel by appointing the panelists whom the Director General considers most appropriate in accordance with any relevant special or additional rules or procedures of the consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date of the Chairman receives such a request.

- Panelists shall serve in their individuals capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

- When a dispute is between a developing country and a Member of a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

- Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance, and Administration(Art.8)

2- Panels Procedures

Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel and to make written submissions to the panel as a third party. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.(Art. 10)

- Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

- After consulting the parties to the dispute, the panelist shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process. (Art. 12)

- Where the parties to the dispute have failed to develop a mutual satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

- In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general

rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

- When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months. (Art.12)

-It is important to note that Panel deliberations shall be confidential. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

It is worth mentioning also that opinions expressed in the panel report by individual panelists shall be anonymous. (Article 14)

3- Panels Reports

In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

The parties to a dispute shall have the right to participate fully in consideration of the panel report by the DSB, and their views shall be fully recorded.

Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DST of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its

decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to Express their views on a panel report. (Article 16)

4-Appellate Review

A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It Shall be composed of seven persons, three of whom shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

The DSB shall appoint persons to serve on the Appellate Body for a four year term, and each person may be re-appointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years , to be determined by lot . Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term .

The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO .

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by he General Council, based on

recommendations of the Committee on Budget, finance and administration.(article 17)

An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. (Art17)

Where a panel or the Appellate Body concludes that a measure is in consistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.(Art.19)

At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DBS. If it is impracticable to comply immediately with the recommendations and rulings, the member concerned shall have a reasonable period of time in which to do so.

The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. (Art.21)

5- Compensation and the Suspension of Concessions

If the Member concerned fails to comply with the recommendations and rulings within the reasonable period of time, such member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with a party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20

days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the covered agreements (Art.22)

It is worth mentioning that particular attention is to be paid to matters affecting the interests of developing countries with respect to measures which have been subject to dispute settlement. (Art 21)

6-Expeditions Arbitration

Apart from the above mentioned ways of settling disputes between members states (Article 25.) of the Rules provides for a special technique of dispute settlement i.e., " Expeditions Arbitration" The said Article states the following:-

- ◆ 1- Expeditious arbitration within the W TO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
- ◆ 2 - Except as otherwise provided in this Understanding , resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
- ◆ 3 - Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award.

Arbitration awards shall be notified to the DSB and the Council or committee of any relevant agreement where any member may raise any point relating thereto.

- ◆ 4- Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

7- Evaluations

The practice of the WTO /DSB is very positive from the perspective of the rule of law. In fact, the WTO in its first decision formulated by a dispute settlement panel acted on the basis of a complaint presented by two developing countries against the United States of America.

The gasoline dispute between Venezuela and Brazil on one hand and the U.S. on the other hand has been considered in trade circles as the first test of a radical adjudication procedure installed as integral part of the WTO.

Venezuela first lodged its complaint against the U.S. within the GATT in 1994, but then withdrew it only to bring it to the WTO which, as we explained, has tough rules and better guarantees. A member of the Organization of Petroleum Exporting Countries, Venezuela complain that U.S. Environmental Protection Agency rules requiring re-formulation of gasoline sold in mine of the largest metropolitan areas discriminated against its exports by specifying cleaner gasoline than produced by many U.S. refiners. Brazil also complain on the same ground and its complain was referred to the same panel.

The WTO / DSB panel held that the U.S. was unfairly favoring domestic refiners. It also found that U.S. environment protection goals were not dependent on penalizing imported gasoline.

In the light of this case-study, which we mentioned briefly, it can be hoped, if not expected, that the future practice of the WTO /DSB shall be fair, effective and constructive. And that power-policies will gradually be replaced by the rule of law.

There has not been enough time to evaluate the above mentioned system of settling member disputes especially that the disputes which where settled between Member States were settled outside this system. Only

twenty disputes were referred to the above mentioned system, nine of which reached the stage of formulating panels. Seven disputes of them were still in the stage of consultations. It is worth mentioning that half the Claimants are from the developing countries which may give an indication that the system is working for the interests of developing countries .

Legal Aspects of Financing and Risk Allocation - BOT Projects

Raymond M. Auerback*

Synopsis of Presentation

INTRODUCTION

FINANCING ISSUES

- Fundamental Considerations applying to Project Finance
- Legislative and Corporate Authority
- Project Lands
- Consents and Licences
- Exchange Control
- Payment and Repayment
- Security
- Credit Support/Project Completion

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- **Environmental Liability**
- **Project Implementation**

RISK ALLOCATION

- **Construction and Physical Risk**
- **Market Risks**
- **Financial Risk**
- **Political Risk**
- **Legal Risk**
- **Environmental Risk**
- **Host Government/Transferee Risks**

CONCLUDING OBSERVATIONS