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DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.2 Panels



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The *Understanding on Rules and Procedures for the Settlement of Disputes* (the “DSU”) of the World Trade Organization (the “WTO”) provides for several methods to resolve disputes that arise between WTO Members concerning their rights and obligations under the *WTO Agreement*. Of these dispute settlement methods, the most frequently used is adjudication by *ad hoc* panels and the Appellate Body. This Module gives an overview of the process of adjudication by the *ad hoc* panels, i.e., the panel process, and focuses on the process of adjudication by the Appellate Body, i.e., the appellate review process.

Since adjudication by panels must always be preceded by consultations between the parties to the dispute, the first Section of this Module addresses this preliminary consultation process and examines the object and purpose of consultations, the consultation procedure and the outcome of consultations. The second Section of this Module examines the establishment and composition of the *ad hoc* panels that may hear and decide disputes after unsuccessful consultations. The third Section on “The Mandate of a Panel” discusses the terms of reference of these panels and the standard of review applied by them. It also addresses the issues of judicial activism and judicial economy by panels, the rules of conduct applicable to panelists and the role of the WTO Secretariat. The fourth Section on “Special Features of Panel Proceedings” examines the access to panel proceedings, the confidentiality of the proceedings, and the rules of interpretation as well as the rules on evidence applied by panels. The fifth Section, which is entitled “The Panel Proceedings”, deals with the working procedures for panels and the time frame for the panel proceedings, and explains the various steps in the panel proceedings. Finally, this Module addresses, in a sixth Section, the use made by developing country Members of consultations and the panel process and highlights the DSU rules providing for special and differential treatment for developing country Members in this context.

1. CONSULTATIONS

Objectives

On completion of this section, the reader will be able to appraise why it is important that recourse to adjudication by a panel is preceded by consultations between the parties to the dispute, how these consultations are conducted and what the result of these consultations may be.

1.1 Object and Purpose

Article 3.7 DSU

The aim of the WTO dispute settlement system is to secure a *positive* solution to a dispute. The DSU expresses a clear preference for solutions mutually acceptable to the parties to the dispute, rather than solutions resulting from adjudication by a panel. Therefore, each panel process must be preceded by consultations between the complaining and responding parties to the dispute with a view to reaching a mutually agreed solution. The DSU provides that in the course of consultations and before resorting to further action, Members should attempt to obtain satisfactory adjustment of the matter. The DSU requires that Members engage in consultations in good faith in an effort to resolve the dispute amicably before the dispute can be referred to a panel.

Article 4.5 DSU

Article 3.10 DSU

To resolve disputes through consultations is obviously cheaper and more satisfactory for the long-term trade relations with the other party of the dispute than adjudication by a panel. The consultations enable the disputing parties to understand better the factual situation and the legal claims in respect of the dispute. Such understanding may allow then to resolve the matter without further proceedings and, if not, will allow a party to learn more about the facts and the legal arguments that the other party is likely to use when the dispute goes to adjudication. In this respect, the consultations may serve as an informal pre-trial discovery mechanism. Their primary object and purpose, however, is to settle the dispute amicably.

1.2 The Consultation Procedure

1.2.1 Request for Consultations

Article 4.2 DSU

Article 4.4 DSU

Any WTO Member that considers that a benefit accruing to it under the *WTO Agreement* is being impaired or nullified by measures taken by another WTO Member may request consultations with that other Member. WTO Members are required to accord “sympathetic consideration” to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former. All such requests for consultations shall be notified to the Dispute Settlement Body (the “DSB”) and the relevant Councils and Committees by the Member, which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons

for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

1.2.2 Consultation Process

Article 4.6 DSU

Article 4.10 DSU

Article 4.3 DSU

Article 4.6 DSU

Articles XXII and XXIII GATT 1994

Article 4.11 DSU

Article 5 DSU

Parties have broad discretion as regards the manner in which consultations are to be conducted. The DSU provides few rules on the conduct of consultations. The consultation process is essentially a political-diplomatic process. Consultations are without prejudice to the rights of any Member in further legal proceedings. During consultations Members “should” give special attention to the particular problems and interests of developing country Members.

Unless otherwise agreed, the Member to which a request for consultation is made must *reply* to the request within 10 days after the date of its receipt and enter into consultations within a period of no more than 30 days after the date of receipt of the request. It must enter into consultations in good faith and with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 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, then the Member that requested the consultations may proceed directly to request the establishment of a panel.

While the request for consultations is notified to the DSB, the consultations themselves are confidential. Generally, consultations are held in Geneva and involve Geneva-based diplomats as well as capital-based trade officials of the parties to the dispute. The WTO Secretariat is not present at, and is in no other way involved with, the consultations.

Consultations can be requested either pursuant to Article XXII of the GATT 1994, or the corresponding provisions in other covered agreements, or pursuant to Article XXIII of the GATT 1994, or the corresponding provisions in other covered agreements. The Member requesting consultations is free to choose either type of consultations. There is only one, albeit significant, difference between these two types of consultations. Only in the context of consultations pursuant to Article XXII, or corresponding provisions, can a Member other than the consulting Members be allowed to participate in the consultations. A Member that considers that it has a substantial trade interest may notify the consulting Members and the DSB of such interest within 10 days after the date of the circulation of the request for consultations. Provided that the responding party to the dispute agrees that the claim of substantial interest is well founded, this Member shall be joined in the consultations. If consultations are conducted pursuant to Article XXIII, or corresponding provisions, it is not possible for other Members to join in the consultations.

During the consultations, the parties may agree to request good offices, conciliation or mediation provided for in Article 5 of the DSU. The Director-General of the WTO may, acting in an *ex officio* capacity, offer good offices,

conciliation or mediation with the view to assisting Members to settle a dispute. To date, no use has ever been made of this possibility although in 2001 the Director-General explicitly invited Members to do so.

1.3 Outcome of Consultations

1.3.1 *Mutually Agreed Solution*

Since 1995, a significant number of disputes on which consultations were held have been resolved, or appear to have been resolved, by the parties without the need for recourse to adjudication by a panel. In some cases, the dispute was simply not pursued any further; in other cases, a mutually agreed solution to the dispute was reached.

Article 3.5 DSU

All mutually agreed solutions must be consistent with the WTO agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

Article 3.6 DSU

All mutually agreed solutions must be notified to the DSB and the relevant Councils and Committees. Other Members may raise any point relating to the solutions reached in the DSB or other relevant WTO bodies. The requirement to notify a mutually agreed solution is, however, often not respected.

1.3.2 *Resort to a panel*

Article 4.7 DSU

If consultations between the parties fail to settle the dispute within 60 days of the receipt of the request for consultations, the complaining party may request the DSB to establish a panel to adjudicate the dispute. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute. In many cases, however, the complaining party will not, immediately upon the expiration of the 60 day period, request the establishment of a panel, but will allow for considerably more time to settle the dispute through consultations. For consultations involving a measure taken by a developing country Member, the DSU explicitly provides that the parties may agree to extend the 60-day period. If after the 60 day period has elapsed, the consulting parties cannot agree that

Article 12.10 DSU

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