NEGOTIATING DISPUTES IN THE WTO: USING PROCEDURAL ADVANTAGES INTRODUCED BY THE SYSTEM.

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**Abstract.** This paper presents the procedural advantages inherent in the dispute settlement mechanism in the WTO, which can be used by Member States to resolve disputes through negotiation. The authors omit a description of traditional advantages of alternative dispute settlement inherent in consultations and negotiations as such and focus exclusively on the opportunities provided by the WTO system to conclude mutually agreed bilateral agreements. This approach avoids overloading the WTO's Dispute Settlement Body and satisfies the interests of Member States through the use of a non-judicial form of dispute settlement. The results of the research are based on interviews, analysis of decisions of arbitration panels and bilateral agreements, as well as theoretical analysis of the package of WTO agreements. The paper argues that filing a dispute in the WTO opens up new opportunities and levers of pressure on a defendant to discuss and adopt a mutually agreed solution. The authors offer certain practical recommendations based on the procedural advantages of the system.

**Keywords:** dispute settlement mechanism in the WTO, bilateral mutually accepted agreement, negotiations.

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1. INTRODUCTION

According to Article 3.7 on the Dispute Settlement Understanding (hereinafter DSU), a solution that is mutually agreed to by the parties to the dispute and compatible with the agreements covered is "undoubtedly preferable" (Dispute Settlement Understanding, 1994). As of today, out of 522 disputes, 289 of them (about 55.3%) did not reach for various reasons the stage of consideration by their arbitration panel. It is presumed that about 250 disputes were settled through peaceful negotiations without formation of an arbitration panel. Mutually accepted agreements for the implementation of decisions of the arbitration panel (23) were also the end of many politically vulnerable disputes. Among the disputes settled peacefully through negotiations, there are such well-known cases as EC-Bananas, which after 20 years of litigation ended in cessation of the discriminatory importation of bananas from Africa, the Caribbean region and the Pacific region. In addition, such ambiguous cases as the EC-Biotechnology (European Communities – Measure Affecting the Approval and Marketing of Biotech Products, n. d) concerning access to the European market for genetically modified agricultural products, and EC-Hormones (European Communities – Measures Concerning Meat and Meat Products, n.d) concerning the ban on the importation of beef grown with the use of hormones, were partially settled through negotiations. These examples of recently settled cases emphasize the potential for achieving flexible agreements for settling disputes and enforcement of arbitration awards, especially those where legal costs are high and the absolute execution of a judgment is not possible due to political vulnerability. (Alilovic, 2000)

With all the attention to the WTO dispute settlement system, the topic of peaceful settlement of disputes through negotiations (at the beginning of a dispute or at any stage of the dispute) has not received adequate coverage in domestic and foreign studies. The studies were focused either on individual cases in the practice of the Dispute Settlement Body (Devereaux, Lawrence & Watkins, 2006) or limited to the analysis of individual legal aspects of bilateral agreements, for example, the implementation and enforcement of such judgments through the WTO dispute settlement system. (Horlick & Butterton, 2000) At the same time, focusing on individual cases or aspects of mutually agreed solutions does not give an idea of how to maximize the advantages of the dispute settlement system in the WTO to settle disputes through negotiation.

Some researchers assessed bilateral agreements and their relationships with the multilateral system, opposing their resolution of disputes in the WTO's Dispute Settlement Body (Alscher, 2014). This study considers negotiations as an integral part of the dispute settlement mechanism in the WTO and provides practical recommendations for conducting negotiations to accelerate resolution of disputes taking into account individual interests of the parties with minimal financial and time costs. The procedural advantages that can be used by a complainant party to settle a dispute peacefully include: inevitability of formation of the arbitration panel, possibility of participation of third parties in the dispute, possibility of including the implementation mechanism in the agreement, as well as confidentiality of consultations.

Despite the fact that the WTO dispute settlement mechanism proclaims a legalistic approach (compared to the previous GATT system) (Zhang, 2007), diplomatic methods continue to play an important role in settling the contradictions between member states on trade issues. This study shows that the WTO dispute settlement mechanism provides the parties to the dispute with ample opportunities for settling the dispute by peaceful means using the procedural possibilities established by the Dispute Settlement Understanding and the advantages of alternative dispute settlement methods. The conclusion of a mutually accepted agreement at the stage of consultation or negotiation in the process of consideration gives the parties an opportunity to take the solution of the case into their own hands and reach an agreement that covers the trade interests of both parties without violating the rights and obligations of the other members of the organization.

2. METHODS

This study combines empirical and theoretical approaches. Materials for work were the texts of bilateral mutually agreed solutions that were concluded between WTO member states as a result of negotiations and registered by the WTO Secretariat. The analysis of the statistics on the WTO website about the nature of the mutually accepted agreements concluded, including a comparative analysis of those agreements depending on the subject matter of the dispute, the stage of the dispute, the subject composition, the level of mutual concessions, and the implementation of the agreement by the parties to the dispute, was performed. The paper also used a comparative
analysis of the indicators of the previous GATT system and the current WTO system on concessions provided by respondents at various stages of the disputes.

The empirical base is presented by interviews with representatives of the permanent missions of the member states to the WTO. Six interviews and four questionnaires of representatives and legal consuls of permanent missions of Member States to the WTO, including the European Union, India, Indonesia, Brazil, Mexico, etc., were conducted. Thus, the authors set the goal to take into account the opinion of the member states differing in their level of economic development and representing various geographic regions and international trade agreements. Interviews were conducted in the form of personal interviews, online interviews, and questionnaires. The authors omit the names of the legal consuls with whom the interviews were conducted, for ethical reasons to preserve the confidentiality of the materials and the point of view of the interviewees.

The study is supplemented by an analysis of individual disputes with the participation of parties of various types.

3. RESULTS

Article 11 of the Dispute Settlement Understanding embraces a settlement of a dispute through a bilateral mutually accepted agreement, not only at the first and mandatory stage of consultations, but also during consideration of the dispute by the arbitration panel. Arbitration panels may suspend the proceedings on a complainant party's application (Article 12 of the Dispute Settlement Understanding), usually in order to enable the parties to reach a mutually agreed solution. In some cases, the parties came to an agreement before the adoption of the preliminary report (US-DRAMS (Article 21.5 - Korea)). In other cases, the decision was taken after adoption of a preliminary report and before the final report was distributed to the Member States (EC-Scallops (Canada), EC-Scallops (Peru and Chile), EC-Butter).

The unconditional advantages inherent in alternative dispute settlement and included in the WTO dispute settlement mechanism are incentives for an early resolution of the dispute without publication of the decision of the arbitration panel. For example, if the parties have reached a bilateral agreement in the dispute settlement process, the panel will issue a report that briefly describes the actual circumstances of the dispute and notes that the parties voluntarily reached a mutually accepted agreement (Article 12.7, Dispute Settlement Understanding). Thus, given that consultations and all subsequent negotiations are confidential, the parties have the opportunity to come to an agreement. The agreement is possible because it goes beyond the circumstances of this dispute and takes into account the specifics of the relationship between the two member states. In addition, it is obvious that the enforceability of agreements on the terms of which the party voluntarily agreed during the negotiations is higher than when the decision of the Dispute Settlement Body is taken. (McEwen & Thomas, 1993)

This approach is also widely used in agreements for the implementation of decisions of the WTO Appellate Body, when one of the parties (often with higher economic development) suggests the winning side of the concession in other areas of mutual trade or even international relations, because of the impossibility of fully implementing the decision of the Dispute Settlement Body. For example, in the Indonesia-Cigarette dispute, despite the fact that the Appellate Body has identified the discriminatory nature of the US ban on the import of cigarettes with cloves, it was clear that the US cannot execute the decision because of its domestic health legislation. Then Indonesia and the United States negotiated an agreement that the ban on the import of cigarettes will remain in place, but the US will provide Indonesia with significant concessions in other areas of trade and assurance that the US will not dispute the controversial Indonesian restrictions on the export of minerals.

Thus, the confidentiality of consultations and subsequent negotiations, as well as the lack of a firm commitment to provide the full text of the Agreement, is the advantage of the WTO's dispute settlement mechanism, which enables the parties to a dispute to reach an agreement at any time.

It should be noted that all interviewees stressed the fact that before a Member State decides to file a lawsuit with the WTO preliminary diplomatic negotiations always take place as an attempt to eliminate contradictions on any trade issue or measures taken. Thus, at the time of the application for consultations (the first and mandatory stage of the WTO dispute settlement mechanism), the Claimant State has already conducted a risk analysis and is confident of the need (economic or political) to consider the dispute in the WTO. When conducting consultations in the WTO, the
respondent, despite the preliminary negotiations, often much more will to make concessions given the fact that according to statistics, 81% of cases are decided in favor of a Complainant party State [2].

The value of consultations is also confirmed by previous studies which prove that the willingness of respondents to make concessions is higher at the consultation stage compared to other stages of a dispute settlement. Supplementing Robert Hudec’s statistics on the outcome of disputes, Reinhard and Bush proved that in 67.1% of the disputes that were settled before the decision of the arbitration panel, the respondent party granted full or partial concessions (for comparison, the frequency of concessions after making a decision was 62.2%) (Busch, Marc & Reinhardt, 2000), (Hudec, 1993). Thus, the inevitability of formation of an arbitration panel as a special feature of the WTO dispute settlement process, as well as the strictly established terms of formation of the arbitration panel, play an important stimulating role for the respondent party in an attempt to settle the dispute without publishing the decision of the arbitration panel (for comparison: according to the old GATT system, a reference was carried out by a full consensus, what significantly slowed down the process).

According to the results of the survey, the next procedural feature of the dispute settlement mechanism in the WTO, which influences the willingness of the respondent party to make concessions, is the possibility of third parties’ participation on the complainant party’s side. In the course of the study, several disputes were analyzed, the outcome of which was essentially dependent on the number of parties involved in the dispute. One such example is the case of Peru vs. EC concerning the importation of sardines into the EU and their names. In this case, despite the fact that Peru was the only complainant party, the active participation of Canada, Chile, Colombia, Ecuador, Venezuela and the United States helped Peru achieve a change in the name rules established by the EU, despite the sensitivity of the fishing sector in Europe. The countries with direct interest can act on the side of the complainant party, presenting their position and giving arguments in support of their position. In the above case, Canada provided direct legal assistance in the argumentation of Peru's position, and the United States provided evidence supporting Peru's position. Thus, the possibility of creating coalitions and involving other interested member states as third parties is an effective lever of influence on the respondent party, especially for developing countries. It should be noted that during the interview, representatives of developed countries noted that bilateral negotiations are most preferable and the participation of third parties in the dispute does not affect their strategy and behavior during the consideration of disputes by the WTO body. In turn, developing countries, noting the advantages of bilateral negotiations, noted that the formation of coalitions is an important component of successful resolution of a dispute.

The very name of "mutually agreed bilateral agreements" recognizes the voluntary nature of the agreement and its flexibility. As stated above, the content of this agreement between States is usually confidential, and hence an Agreement can contain any condition that does not violate the rights and obligations of other member states.

An important component of such an agreement is the mechanism for the implementation of the agreement. All the interviewees noted that, when concluding a bilateral agreement on termination of a dispute, the incorporation of the mechanism for the implementation of such an agreement plays an important role in guaranteeing the agreement (Horlick, 1998). These provisions point out to the actions that the respondent must take or measures the complainant party can take in the event of non-fulfillment or incomplete fulfillment of the terms of the agreement. An analysis of the text of bilateral agreements shows that there can be such provisions as regular monitoring and annual verification of the conformity of the contested measures, road maps, notification by the respondent party that the measure / legislation has changed by the deadline. In addition, the guarantee of the right to request the formation / renewal of the arbitration panel in case of non-performance is recommended for inclusion by all practitioners (Chile-Measures Affecting the Transit and Importation of Swordfish –Joint Communication, 2010).

4. SUMMARY

The studies showed that the dispute settlement procedure established by the WTO Agreement facilitates the peaceful settlement of disputes through negotiations. Following the results of interviews and case studies, procedural advantages include:

- The irrevocability of formation of an arbitration panel that guarantees the continuation of the dispute settlement process as compared to the previous GATT system and can be used as a mechanism of pressure on the respondent party with the aim of
reaching a mutual agreement without a decision of the arbitration panel.

- The possibility of third party participation in a dispute that guarantees developing countries to create coalitions and challenge illegal measures of other member states, using the legal and political support of the states concerned.

- Confidential nature of consultations, which provides an opportunity for the parties to reach an agreement that most extensively takes into account the specific interests and positions of both sides of the dispute.

- The possibility of including in the agreement a performance mechanism that is a critical point of guarantee for the implementation of the decision to which the parties have come.

These procedural advantages of the dispute settlement system not only show the opportunities offered by the WTO system to settle disputes peacefully, but are also recommended ways to improve the stage of consultations and the adoption of bilateral agreements.

5. CONCLUSION

The authors considered the procedural advantages of the WTO dispute settlement system that facilitate the conclusion of bilateral mutually accepted agreements between the parties to the dispute. The WTO allows a dispute to be settled once with the help of negotiations during the entire process of dispute settlement: from the consultation stage to conclusion of the agreement on the execution of decisions of the WTO Appellate Body.

Confidentiality of the negotiations and the text of the agreement, the possibility of inclusion of additional conditions into the text, including the mechanism for implementing the agreement, in many cases make negotiations more attractive in comparison with the referral of the dispute to the arbitration panel where the parties do not have the ability to control the outcome of the dispute. In addition, the inevitability of the process and the possibility of third parties participation sometimes give the complainant party an advantage in balancing economic inequality and encouraging the respondent party to make concessions.

The authors do not argue that a bilateral agreement is always the best option for settling a dispute. On the contrary, the transfer of a dispute to the WTO Dispute Settlement Body is often the only possible way out due to complexity of a case and the subject composition of the parties. According to the research conducted earlier, a state’s desire to make concessions depends both on the seriousness of the case, and on the economic development of the parties, the political regime and the situation in the country, cultural characteristics, and the availability of allies. (Busch & Marc, 2000) Thus, it is worth noting that the above procedural advantages are applicable only in cases when both parties see it possible to settle the dispute without transferring it to the arbitration panel.

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