

WTO dispute settlement system and principles of interpretation

The WTO today is the most advanced institution engaged in application and interpretation of WTO rules, which are part of the contemporary international trade law. WTO is also engaged in the ruler making process and quasi-judicial functions of settlement of disputes. The dispute settlement system of the WTO has moved away from the traditional consensus-based system of the GATT, however, it has maintained at least one past element that is, prerequisite of adoption of reports, and this element distinguishes it from being a truly independent judicial system as this prerequisite of adoption, casts a doubt¹.

The settlement process is governed by the Dispute Settlement Understanding (DSU)². The system is composed of three essential elements: the panels, the Appellate Body, and the Dispute Settlement Body (DSB). Disputes that cannot be resolved by consultations are handled by panels though these Panels are not permanent bodies, since they are constituted for a specific dispute and their establishment is temporary one³.

As regards the selection of panels, the process is important one and where there is no agreement on the selection of panellists within twenty days after the establishment of the panel⁴, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant WTO Council or Committee, decides about the composition of the panel⁵. The Director-General can appoint any person whom he considers appropriate, except the citizens of contesting parties.

Determination of the terms of reference for the panel is an inherent right of the contesting parties. Where the contesting parties do not agree on the terms of reference within twenty days from the establishment of the panel, the panel can proceed according to the standard terms of reference prescribed by the DSU. The DSU also provides for an automatic fallback mechanism⁶. After the establishment the panel, the panel acts like a judicial body. WTO Members are prohibited to give instructions to panellist and to influence them with regard to disputed matters.⁷ The process of panel selection cannot exceed six months⁸. The admissibility of non-requested amicus curiae briefs cause problems and many believe that the act is not supported by the governing rules⁹?

Another controversial issue is that of interim review requested by the parties, the "Interim review." request is however, highly unusual¹⁰. There is a view that it might contribute to an improvement of the quality of panel reports and their acceptance by the parties to the dispute.

Panels are assisted by officials of the WTO Secretariat. These officials (and the administrative units to which they belong) are not exclusively at the service of panels. Panellists depend on the services rendered by these officials to varying degrees, due to their different professional training, experience,

and commitments. One may assume that the influence of these officials on the work of individual panel can be considerable. However, the DSU contains no rules that may guarantee the independence of the system.

While panels have to determine facts, appeals are limited to issues of law. The Appellate Body is composed of seven members who are to be appointed by the DSB for a four-year term¹¹. According to the DSU, the Appellate Body is to comprise of such members who are recognised in their profession and have demonstrated expertise in law and international trade¹².

The term of office for members of the Appellate Body is also an issue. A four-year term, which may be renewed once, does not seem to guarantee sufficiently the independence of the appointees. The Appellate Body has its own staff though, yet the staff is part of the Secretariat of the WTO. But functionally, it is independent from the rest of the WTO Secretariat and works under the authority of the Appellate Body¹³. The proceedings before the Appellate Body are governed by detailed rules of procedure. These rules were not negotiated during the Uruguay Round and therefore are not part of the DSU. According to the DSU, "working procedures are drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General". The DSU limits itself to the rule that says appeals from panel cases are to be decided by a bench of three members of the Appellate Body. The members are to be appointed by a system of rotation and the system of rotation stands laid down in the working procedures.

According to the Working Procedures, "the Members constituting a bench shall be selected on rotation basis, on the principle of random selection, providing unpredictability and opportunity for all Members to serve regardless of their national origin¹⁴." The Working Procedures of the appellate body has introduced a system of "exchange of views." among all its members¹⁵. It is claimed, the system of exchange of views has proved to be of enormous benefit to the Appellate Body, since it has contributed to "Providing security and predictability to the multilateral trading system¹⁶."

According to appellate body's working procedures Appellate Body's proceedings are to remain confidential. Like panel reports, Appellate Body reports are not final. In order to become final, they have to be adopted by the DSB¹⁷. The present rules require the consent of the winning party as well.

The adoption of a panel and an Appellate Body report is preceded by a discussion in the DSB, during which the parties to the dispute and other WTO Members can make statement about the report. The statement has no legal consequences but provides useful information about the reaction in respect of the ruling and findings contained Therein. It is evident that: (1) panels and even more so the Appellate Body operates as independent judicial organ, but (2) the dispute settlement system of the WTO as a whole cannot be qualified as a truly judicial system. It is a quasi-judicial system.

Article 3.2 of the DSU states that the dispute settlement procedure interprets the provisions of the agreement in accordance with the rules of customary international law. In its Report in United States.- Standards for Reformulated and Conventional Gasoline known as United States.-Gasoline case, the

Appellate Body observed that Article XX of the GATT 1994 is to be interpreted according to the general rule of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties¹⁸ (VCLT), which has attained the status of a rule of customary or of general international law. Similar statement was made in the case of Japan.-Taxes on Alcoholic Beverages¹⁹, The Appellate Body has thus established the rules of interpretation that would be followed in interpreting the trade agreements.

According to Article 31.1 of the Vienna Convention, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in the light of its object and purpose. Among these criteria, the Appellate Body has attached weight to the principle that ordinary meanings of the terms of the treaty are to be applied while interpreting the terms of agreement²⁰.

The principles of Articles 31 and 32 of the Vienna Convention as have been fully accepted in conformity with the requirements that the existing provisions of the disputed agreements are to be clarified, that is, in accordance with customary rules of interpretations of public international law. A heavy reliance is placed on giving “ordinary meaning” to the terms of the treaty. This approach has protected the Appellate Body from criticism. This interpretative approach has established a legitimising effect of the practice being followed by WTO.

Criticism is voiced, in particular, when the Appellate Body seems to stretch or to deviate from its own interpretative approaches. However, it is submitted that literal interpretation being practiced by the appellate body has limits and it is necessary that recourse to other interpretative criteria may be followed in terms of Articles 31 and 32 of the Vienna Convention.

Rule 3.2 of the DSU reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law. The importance of the interrelationship between the WTO Agreements and public international law will be more visible when these problems of substance are resolved according to the principles laid down in VCLT. One must consider the problems linked with state responsibility, as the same are delicate, and controversial. However, the fact that WTO law is part of public international law has been applauded by the members of the public international law community. It may be noted that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the agreements. Article 3.2 mandates that the dispute settlement system has to clarify the provisions of the agreements in accordance with the rules of interpretation of customary public international law.

(The writer is an advocate and is currently working as an associate with Azeem-ud-Din Law Associates Karachi)

1. As it stands today, it is more or less quasi-Judicial process.
2. The importance of dispute settlement for the WTO is underlined by Article 3.2 of DSU, according to which. “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.
3. According to Article 6.1 of the DSU, if the complaining party so requests, a panel is to be established

at the DSB. However DSB may decide by consensus not to establish a panel.

4. At the request of either party,

5. Consultation with the parties is necessary.

6. The possibility of deciding by consensus not to establish a panel can be avoided since it requires the consent of the complaining party.

7. The working procedure stands set out in Appendix 3.

8. In cases of emergency, it may be reduced to three months. Panels have wide information-seeking powers.

9. See Article 13 of DSU 10. However, there are no signs that the interim review has affected in any way the objectivity and independence of the panellists and the panel process.

11. These members can be re-appointed for one more time.

12. For the members awareness of the subject matter is necessary.

13. Headed by a director, it has grown in size over the last few years in order to match the increasing caseload of the Appellate Body.

14. Nationality of a member of the Appellate Body with respect to the parties to the dispute is thus irrelevant for the composition of the Appellate Body hearing the appeal.

15. See rule 4, the members are required to convene meetings on a regular basis to discuss matters of policy, practice and procedure and exchange of views with the other Members before finalising the report for circulation to the WTO Members

16. See the fundamental aim of the dispute settlement system as given in Article 3.2

17. See Article 17.14 of DSU, Appellate Body report is to be adopted by DSB and the same is also to be accepted by the parties unconditionally unless the DSB decides by consensus not to adopt it within 30 days following its circulation of the report to the Members.

18. See Article 31 of VCLT

19. See Article 32 of Vienna Convention

20. See Article 32 of the Vienna Convention Preparatory work of the Treaty and the low value extended to the negotiating history is the result of the secondary rank given to this criterion by the Vienna Convention Since reliable records of the negotiating history are not given meaningful weight handing.