PACIFIC MEANS OF DISPUTE SETTLEMENT IN THE WTO: CHALLENGES AND PERSPECTIVES

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Abstract. Article 5 DSU lists means of pacific settlement of disputes that can be used instead or alongside with settlement of a particular dispute. Good offices, conciliation and mediation is an adherence of WTO dispute settlement mechanism to the principle of pacific settlement of disputes in international law enshrined in United Nations Charter and reminder of diplomatic approach that was dominating the previous GATT system. Nowadays, non-litigious ways of dispute settlement in WTO have a potential to be on rise, due to crisis situation caused by US in Appellate Body and Dispute Settlement Body in general. This article looks into reasons why means enshrined in Article 5 were not used by Member states frequently enough since establishment of the WTO. It looks closely into definitions and history of Article 5 DSU. Based on empirical observations, authors come to a conclusion that mediation has a potential and perspectives to be used more frequently in the future of the WTO dispute settlement. Mediation is treated as a unique mechanism that can be used by developing and least-developed countries to receive third-party assistance and mitigate power imbalances. Factors for successful mediation are deducted from the case analysis and interviews with representatives of permanent missions.

Key words: mediation, good offices, conciliation, pacific settlement of disputes, WTO, mutually agreed solution

1 INTRODUCTION

Article 5 of the Dispute Settlement Understanding (hereinafter DSU) provides parties of the dispute a range of discretionary instruments to solve the dispute at stake. Comparing to consultations (article 4 DSU) and arbitration (article 25 DSU) that introduce more formal alternatives of dispute settlement, Article 5 lists informal methods of solving disputes: good offices, conciliation and mediation. On 13 July 2001, the WTO Director-General (Mike Moore) addressed a communication to the Members expressing his views that "Members should be afforded every opportunity to settle their disputes through negotiations whenever possible"[1]. In his communication, the WTO Director-General noted that Article 5 of the DSU has not been used and reminded Members that he was ready and willing to assist them as is envisagев under the terms of Article 5.6 [20]. Since then, article 5 of the DSU was used only three times indirectly: mediation in case of *EC- Tuna* in 2002 by complaint of Philippines and Thailand and good offices in *EU-Bananas* dispute in 2007. Indeed, measures included in Article 5 are not popular among Members of WTO. Nevertheless, Article 5 measures can be one of the factors for facilitation of inclusion of developing countries in dispute settlement process. In this regard, during negotiations on improvements and clarifications of the DSU, two members (Paraguay and Jordan) suggested compulsory nature of good offices and mediation in cases where developing or least-developed countries are involved. The suggestion also contained a provision of introduction of complex system of mediation parallel to Panel adjudication [3; 4]. This work looks closely weather these suggestions would be valid in the future and provisions of Article 5 DSU would be used more often complemented by the *EC-Tuna* case analysis.

2 METHODS

This research combines theoretical and empirical methods. The results are based on the context analysis of the official documents (especially texts of MAS) notified by member states to the WTO Secretariat.

Ten semi-structured interviews were held with representatives of the permanent missions of the members to the WTO, including representatives of the European Union, India, Indonesia, Mexico, Brazil regarding their views on the pacific means of dispute settlement in the WTO and it perspectives. The author had a goal to take into account opinions of the countries that differ in their economic development, geographic location and participation in other multilateral treaties. In order to analyze the *EC-Tuna* case and its "meditative agreement", semi-structured interviews were conducted with representatives of Philippines and European Union. Author does not disclose the names of the representatives of the missions due to confidentiality constraints.

3 RESULTS AND DISCUSSION.

At the beginning, definition and delimitation of measures introduced by the Article 5 was conducted. DSU does not elaborate in detail on the characteristics of the good offices, conciliation and mediation. Whilst there are similarities between the three mechanisms, they differ conceptually [8]. One factor that unites them all is that all of them involve a third, independent person in the discussion [8]. However, differences lay in the functional pattern of the third person. Good offices normally consist primarily of providing logistical support to help parties negotiate in a productive atmosphere [8]. It includes supporting inter-party communication, encouraging parties to reach mutually agreed solution without participation of the third person in negotiation process itself. Conciliation and mediation includes participation of a third party in negotiation process in order to facilitate mutually agreed solution. While conciliation is more of a character of a fact-finding stage, in mediation third party plays quite important role and might suggest solution that is not obligatory to the parties.

It is important to note that good offices, conciliation and mediation proceedings are strictly confidential and no third party can participate unless the parties agree. For the least-developed countries, DSU specifically foresees recourse to good offices, conciliation and mediation if consultations have not resulted in a satisfactory solution and if the least-developed member requests so [8]. To give a short overlook to the history of pacific means of dispute settlement in the GATT system, we should mention that Decision of GATT from April 5 1966 first mentioned possibility for the Director-General to provide good offices in *ex officio* capacity [18]. Agreement of 1979 later stipulated that parties to the dispute can recourse to good offices and conciliation if consultations did not lead to a mutually agreed solution. It provided as well a right for developing countries to refer to Director General as any stage of the dispute [17]. Meanwhile the text of the Article 5 DSU almost identically based on Montreal rules of 1989 [13].

Practice. As it has been mentioned before, Article 5 has never been formally invoked. However there have been two instances of good offices and one case of mediation within the WTO dispute settlement framework. Good offices procedures were requested separately by Colombia and Panama in the long-lasting case *EC-Bananas*, concerning regime for the importation of bananas. The process was initiated under Article 3.12 and the Decision of 5 April 1966 on Procedures under Article XXIII [2]. The first attempt was not successful [5, paras. 6-7], however second attempt when good offices were provided by Director General (Pascal Lamy) lead to positive solution between the parties [5, paras. 8-15]. Mutually agreed solution that was formulated in Geneva Agreement on Trade in Bananas brought to an end a dispute that lasted more than 5 years. The draft compromise solution was proposed by Director General [8].

EC-Tuna (Philippines and Thailand). On 4 September 2002, the Philippines, Thailand and European Communities had jointly requested mediation by Director General (Supachal Panitchpakti) or by mediator appointed by him with their arrangement [6]. In December Deputy Secretary General was appointed as a mediator [7]. The purpose of the mediation was "to examine the extent to which the legitimate interests of the Philippines and Thailand are being unduly impaired as a result of the implementation by the European Communities of the preferential tariff treatment for canned tuna originating in ACP states. In the event that the mediator concludes that undue impairment has in fact occurred, the mediator could consider means by which the situation may be addressed" [7].

It is important to state that Members considered that the matter at issue was not a "dispute" within the terms of the DSU, however mediator was guided by procedures similar to those envisaged for mediation under Article 5 of the DSU. Mediation procedures were finished in July 2003 by mutually agreed solution on conditions proposed by mediator. Representative of the Philippines who participated in mediation stated in his interview that mediation was an extremely effective way to settle the dispute amicable at its early stage. He stated as well that it was an example of successful diplomacy from the sides of both countries, complemented by WTO dispute settlement mechanism. From the side of Philippines, this step was vital for the support of the fishing industry as one of the main sectors of economy. In 1970s the main exporters of tuna were developed countries – USA, Japan, Spain, France and Italy. In 1980s the share of the Asian countries in international trade with tuna started rapid growth. Today Thailand and Philippines are taking first and second place respectively in tuna exports. Moreover, according to the latest information provided by the Department of Trade and Industry of the Republic of Philippines, Philippines are the main exporter of tuna to the EU [14]. In the beginning of 2000s, Thailand and Philippines had to pay export tariff of 24% while countries of APC were enjoying zero tariffs under EU General System of Preferences. Mediation agreement (proposed by the mediator) raised quotas from 25000 to 25750 tons of tuna for the next year with annual extension. Export in the frames of quota would be treated with 12% tariff. 52% of the quota was received by Thailand, 36% by Philippines, 11% by Indonesia and 1% by other countries. Today (by the date of 1 June 2018), Philippines are the main exporter of canned to the EC with zero tariff under EU General System of Preferences. Based on the interviews with representatives of EU and Philippines, several observations can be deducted regarding factors for successful mediation, especially for developing countries.

First of all, it is clear that amicable settlement of the dispute by mutually agreed solution is possible only when both of the parties are interested in such rapid resolution of the dispute. Negotiating in good faith excluding coercion is a precondition for the mutual agreement [18, 128]. It is not a secret that due to absence of regressive liability in WTO some members are trying to use all the available procedural measures to drag the case as long as possible [12]. In addition, as G. Horlick noted there is only room for negotiation when both sides coincide on the likelihood of success or failure [10, 687].

Secondly, diplomatic concessions might be an effective tool, especially for developing countries. For example, in present case, in 2001 Philippines and Thailand came to an agreement with EU to start negotiations on tariffs on tuna in exchange for favorable vote of both countries for the final Doha declaration.

Thirdly, help of the private sector and local business that provide financial and scientific support for the case delivery at the WTO is one of the main factors.

Lastly, effective coalition with other interested WTO members would add diplomatic weight. There have been many examples, when properly chosen coalition with interested members helped to win a case [11].

Perspectives of Article 5 DSU

Since the establishment of the WTO, mediation and other forms of pacific settlement of disputes did not get enough attention. Majority of the representatives of permanent missions stated that one of the reasons for this is availability of the consultations stage as the first stage and possibility to negotiate a mutually agreed solution at any

stage of dispute settlement[1]. Therefore, many disputes that have potential to be settled are finished on the stage of consultations, where deals could be made without a third party. However, the fact that the DSU process requires parties to engage in consultations before being allowed to move to a panel stage does not mean that there is no longer room for mediation [9,17]. Mediation deserves special attention because it provides a much-needed intermediate step between the two extremes of the diplomatic consultations stage and the adjudicatory panel stage. Indeed, it would be helpful for developing and least-developed countries to have third-party assistance in defending their trade interests and mitigate power imbalances and political pressure. Comparing to consultations, simply the added presence of a third neutral can ensure allegiance to good faith principle and relevance DSU obligations [19, 70-73].

Moreover, today non-litigious ways of dispute settlement in WTO have a potential to be on rise, since dispute settlement body is paralyzed due to non-functioning of the Appellate Body. United States and current Trump administration by destabilizing dispute settlement system through deploying Appellate Body crisis, may wish to return to a more politicized dispute settlement system [16, 9]. Therefore, diplomatic ways of settlement of disputes will presumably be on rise. In such atmosphere, Article 5 DSU as well as mutually agreed solutions beyond the scope of Article 5 can be a way out for some members. Mutually agreed solutions can be the fastest, most flexible and beneficial settlement of a dispute if conducted properly [12]. The control over the dispute by the parties, their freedom to accept or reject the proposed settlement and possibility of avoiding "winner-lose-situations" with their repercussions on the prestige of the parties are among characteristics of negotiation-based dispute resolution [15].

4 SUMMARY

Based on the conducted analysis of the pacific means of dispute settlement in the WTO outlined in Article 5 DSU several conclusions can be drawn. First of all, although means outlined in Article 5 have not been used frequently by Member States, current political atmosphere with paralyzed dispute settlement body, would stimulate diplomatic means of settlement of disputes. Whether it is good or not, the fact stays the same: members, especially developing ones, can use mediation as a tool to settle disputes quickly with help of a third party. Advantages of the mediation, shaped in the prism of the WTO dispute settlement mechanism should be an incentive for both parties. Based on the case analysis, it is noted, that key components to success of the mediation are: mutual interest of the parties, diplomatic arrangements, support from business sector and coalition members.

5 CONCLUSIONS

Representative of the EU stated in his/her interview: "Everything in WTO is negotiation-even litigation". Indeed, current research states that in the upcoming years, means of pacific settlement of disputes stipulated in Article 5 DSU will be used more frequently due to the current climate in international trade relations. Backlash against international courts and preference of a diplomatic approach in dispute settlement will open new possibilities for Member States. Mediation introduces a unique intermediate step between two extremes of purely diplomatic consultations and panel adjudication. Assessment of the mediation procedures conducted in *EC-Tuna* case let us draw several conclusions. In order to reach a Mutually Agreed Solution that is beneficial for both parties and consistent with WTO covered agreements, it is important for the parties to ensure support from domestic industries and allies, be aware of the other party's interests and possible diplomatic trade-offs. Developing and least-developing countries through mediation can mitigate political imbalances and make sure other parties act in good faith.

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[1] *Note:* 11 Article DSU states: "Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution".

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