

# ClientAlert

## International Trade

June 2014

# WTO Dispute Settlement— Long Delays Hit the System

## Summary

- A recent increase in World Trade Organization (WTO) cases has strained resources in the WTO Secretariat and led to a notable slowdown in the dispute settlement process. In 2012, the WTO received the highest number of complaints in ten years, and activity remained elevated in 2013. Over the same period, the number of senior Secretariat lawyers decreased due to a policy implemented by then-Director General Pascal Lamy to freeze all staff promotions to senior grades and recruit only at junior levels.
- These events have had a tangible impact on the process: The time to complete panel proceedings has increased by 50 percent—from an average of 13 months (400 days) for panels established in 2010 to an estimated 19.8 months (595 days) for those established in 2013. WTO Panel reports are now routinely issued long after the maximum duration permitted by WTO rules. The WTO Secretariat has even been forced to delay panel proceedings in at least one instance until senior lawyers become available following the completion of other disputes.
- If the current delays in panel proceedings are “normalized” in the WTO system or get any worse, the WTO’s reputation as an effective dispute settlement forum may be diminished. And as the negotiating arm of the WTO struggles under the shadow of Doha gridlock, effective and efficient dispute settlement is now more important than ever.

## Analysis

### I. Introduction

The number of disputes filed at the WTO has increased significantly in recent years and, combined with shortages in senior Secretariat staff, has led to significant delays in panel proceedings.

#### A. Surge in Complaints

After years of relative consistency, WTO dispute settlement activity spiked in 2012 and remained elevated in 2013. In 2012, 27 Members filed requests for consultations—the highest number of consultations requests in ten years—and 13 of those requests proceeded to panel establishment.<sup>1</sup> As a result, in 2013, 28 disputes were examined in total (before panels, the Appellate Body, or an arbitrator; at one point, 15 panels covering 20 complaints were active at the same time). In the same year, 20 new requests for



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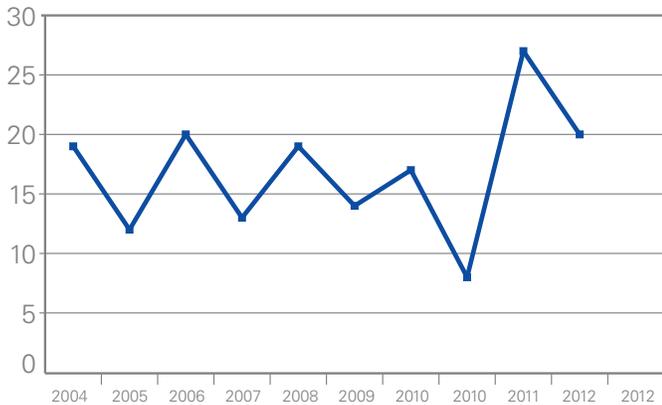
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<sup>1</sup> Ten of these disputes involved China as either complainant or respondent; five of those disputes were between the United States and China.

consultations were filed, representing the third-highest number of requests filed in the last ten years, and the Dispute Settlement Body (DSB) established 12 new panels to adjudicate 14 new matters.<sup>2</sup>

**WTO Consultations Requests**



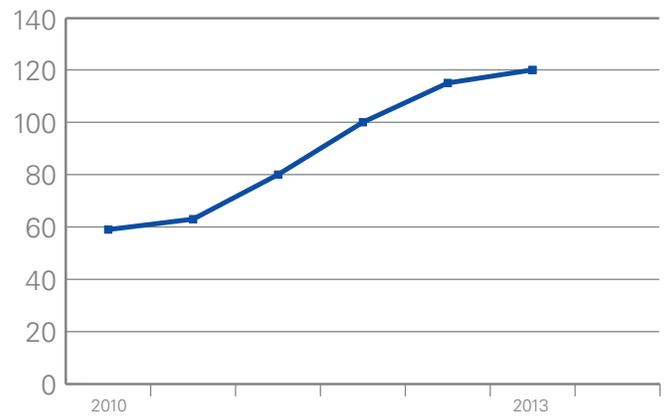
This heightened activity appears poised to continue in 2014: Five Members have filed requests for consultations to date and several more disputes are likely before the end of the year; 13 panels involving 20 complaints are currently composed.

**B. Delays in Completion**

The Panel process has suffered from delays in recent years. Between 2010 and 2013, the average time taken to complete proceedings increased significantly. Delays begin as early as panel composition and extend throughout the proceedings to the publication of final panel reports.

Panel composition in 2013 took on average twice as long as it did in 2010. As the following graph shows, for panels established in 2010, panel composition took on average 58 days; this figure increased to 63 days in 2011; 112 days in 2012; and 118 days in 2013.<sup>3</sup> The panel composition process is driven by the disputing parties, which are the principal determinants of the time required at this stage of the process. Nevertheless, this has always been the case, yet panel composition continues to slow.

**Panel Composition**



As of June 13, 2014, eight panels established since January 2013 were still awaiting composition.<sup>4</sup>

In addition to delays at the stage of panel composition, WTO panels are taking far longer today to complete their work and issue final panel reports. The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) provides that, as a general rule, panels should issue their final reports within six months (180 days) of panel composition (Article 12.8). Where a panel considers that it cannot meet this deadline, it must inform the WTO DSB of the reason for the delay and provide an estimate as to when it will issue the final report; “[i]n no case” shall this exceed nine months (270 days)<sup>5</sup> from the date of panel establishment (Article 12.9).

Although these deadlines have long been considered unrealistic, the time between panel establishment and final panel reports has surged in recent years. Panels established in 2010 issued their final reports on average 13.4 months (401 days) after panel establishment, and this remained steady at 13.5 months (406 days) for panels established in 2011. Of the eight panels established in 2012, however, only five have thus far produced panel reports, averaging 17.4 months (523 days) to do so. If the three remaining 2012 panels<sup>6</sup> are completed according to official

<sup>2</sup> WTO 2014 Annual Report, at 82. Complaints dealing with the same matter are typically adjudicated by a single panel.

<sup>3</sup> Anomalous disputes, specifically *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (which involved five separate complaints and panels established between September 2012 and April 2014) and *EC—Seal Products* (DS400/DS401), have been excluded from these averages due to the exceptional nature of the delays.

<sup>4</sup> *EU—Fatty Alcohols (Indonesia)* (DS442); *Indonesia—Horticultural and Animal Products* (DS455); *India—Certain Measures Relating to Solar Cells and Solar Modules* (DS456); *Russia—Motor Vehicles* (DS462); *US—Washing Machines* (DS464); *Ukraine—Passenger Cars* (DS468); *US—Anti-Dumping Methodologies (China)* (DS471); *European Union—Anti-Dumping Measures on Biodiesel from Argentina* (DS473).

<sup>5</sup> All month/day comparisons are approximate.

<sup>6</sup> *India—Agricultural Products* (DS430); *US—Carbon Steel (India)* (DS436); *US—Countervailing Measures (China)* (DS437).

estimates, the average time frame for all 2012 panels will further climb to 19.2 months (576 days)—almost three times the DSU maximum and approximately six months longer than the time taken by panels established in 2010. No panels established in 2013 have yet circulated final panel reports, but based on official panel estimates (which could be extended), the average time to complete these panel proceedings will be 19.4 months (582 days).

### C. Reasons for Delays

The delays in the panel process today are attributable to two larger systemic problems faced by the WTO: (i) the increased number, size and complexity of disputes; and (ii) Secretariat resource constraints. (Of course, unique issues also can affect dispute timelines.)

First, increased delays in the circulation of final reports can be attributed in part to the increased number, size and complexity of disputes, and the large volumes of evidence involved. An absence of page limits in dispute settlement proceedings permits parties to file lengthy submissions accompanied by extensive exhibits. In certain cases, particularly those involving the WTO *Agreement on Sanitary and Phytosanitary Measures* (SPS), panels and parties also involve expert witnesses in the process, further adding to a panel's workload. In these circumstances, panels will notify the DSB that the final report will be published on a delayed date, and this date almost always exceeds the nine-month limit stipulated in the DSU. For example, the Chair of the Panel in the SPS dispute *India—Agricultural Products* (DS430) (established June 25, 2012) stated in a Communication dated August 5, 2013 that the final report would be published "no sooner than June 2014, taking into account the scale and complexity of the dispute."<sup>7</sup> Other panels have issued similar statements, with similarly long time frames.<sup>8</sup>

Second, resource constraints appear to have taken a toll on the dispute settlement process. The WTO's *2014 Annual Report* notes that due to the increased demand the WTO Secretariat has been forced to hire a number of new lawyers, both temporary and permanent: "As of December 2013, there were 30 permanent staff lawyers and 17 temporary lawyers in the Appellate Body, Legal Affairs Division and Rules Division working on disputes."<sup>9</sup> The WTO also posted several additional vacancies in the first quarter of 2014 and will likely fill these positions later this year.

The *2014 Report* also comments, however, that although the recent hiring of staff provided some initial relief, the Secretariat still faces problems in terms of retaining senior lawyers. Experienced lawyers are essential to the efficiency and effectiveness of the process, and are needed to supervise and train junior staff. The shortage in senior lawyers stems from a 2011 decision by then-Director General Pascal Lamy to freeze all staff promotions to senior grades and recruit only at the most junior levels, the purpose being to address budget constraints and correct a top-heavy structure of grades of staff in the Secretariat. The result is that as senior lawyers leave the WTO, either due to retirement or departure, only junior lawyers are hired in their place. Some also blame the policy for actively driving senior lawyers to leave, as it eliminated the opportunity to advance within the organization and move up the pay scale.

Lamy's policy coincided with the surge in WTO complaints. Now lacking the senior staff to actually lead those new cases, the WTO Secretariat is forced to delay the beginning of panel proceedings from the very outset.

At least one WTO panel has expressly blamed delays on staffing problems: an April 2014 Chair communication in *Argentina—Financial Services* (DS453) stated that "the start of the proceedings was deferred owing to the unavailability of panelists and senior Secretariat lawyers."<sup>10</sup> Given the shortage of senior lawyers relative to the number of panels established today, parties to some disputes have been told that panel proceedings will have to wait until a senior lawyer becomes available following the conclusion of another case.

## II. The Coming Years

The problems facing WTO dispute settlement are likely to continue. First, there is no quick fix for these systemic problems. Although the delays set out above may level off slightly in 2014 and into 2015, with so many new cases being filed and the size and complexity of disputes growing, it will likely take several years to put in place the resources required to approach DSU timelines. This is the case regardless of the number of new lawyers hired; extensive training is likely needed to equip new junior lawyers with the necessary skills and knowledge required to efficiently coordinate and evaluate complex disputes. Director-General Azevêdo is conducting a review of personnel policies across the Secretariat, including hiring and promotion policies, but there is no indication yet of when any changes may be introduced. The staffing problem has become entrenched, and sources in the

<sup>7</sup> WTO Document WT/DS430/6.

<sup>8</sup> See, for example, in *US—Countervailing Measures (China)* (DS437); *Argentina—Measures Affecting the Importation of Goods* (DS438/DS444/ DS445); and *US—Animals* (DS447).

<sup>9</sup> WTO *2014 Annual Report*, at 88.

<sup>10</sup> WT Document WT/DS453/6.

Secretariat believe that it could take at least 18 months to correct even if hiring and promotion policies were reversed tomorrow.

Second, Members involved in panels are also not pushing to resolve the issue. The main litigants are also the main contributors to the WTO budget and wish to avoid budgetary pressures. Those Members also are often both complaining and responding parties in several disputes, and thus find advantages and disadvantages in the delays.

Finally, the lack of progress in WTO negotiations has caused Members to turn to dispute settlement to resolve their differences on novel and complex issues, such as energy and climate change, or ambiguities in the current WTO texts. As such, dispute settlement will likely continue to be the primary forum for interpreting WTO rules and applying them to new areas, and panel activity is therefore unlikely to abate.

### III. Conclusion

The dispute settlement system has a well-earned reputation for being able to deliver authoritative rulings, along with meaningful enforcement, in a reasonable timeframe. Consistent delays in panel proceedings—far exceeding DSU time frames—could compromise that reputation, discourage new disputes or even encourage governments to violate WTO rules. It also could push governments to seek dispute settlement in alternative fora, such as under major regional and bilateral trade agreements. Unfortunately, near-term resolution of the systemic issues causing such delays appears unlikely. As the negotiating arm of the WTO weakens, effective and efficient dispute settlement has become more important than ever.

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