

Diplomatic channels A permissive way to settle disputes as part of world trade organization “good offices , conciliation, and mediation”

الأساليب الدبلوماسية طريق اختياري لتسوية النزاعات في إطار المنظمة العالمية للتجارة.
"المساعي الحميدة، التوفيق والوساطة"

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Abstract:

World Trade Organization played a key role in settling international trade disputes in general, and those arising among its members in particular, by means of channels guaranteed to member states under the protocol of entente on rules and procedures governing disputation settlement.

Besides arbitration and consultations, there are other diplomatic channels, such as good offices, conciliation and mediation provided in article 5 of the protocol, considered as permissive in case the disputed parties agree on having to do so for the purpose of surmounting lengthy and complex procedures associated with others.

Keywords : Good Offices, Conciliation, Mediation, World Trade Organization.

المخلص:

لعبت المنظمة العالمية للتجارة دورا أساسيا لتسوية خلافات التجارة الدولية بصفة عامة والخلافات الناشئة بين أعضاء المنظمة بصفة خاصة من خلال الأساليب التي كفلتها للدول الأعضاء بموجب مذكرة التفاهم على القواعد والإجراءات التي تحكم تسوية المنازعات،

ومن بين الأساليب التي كفلتها بالإضافة إلى التحكيم والمشاورات لتسوية الخلافات القائمة بين الأعضاء، نجد الوسائل الدبلوماسية المتمثلة في المساعي الحميدة والتوفيق والوساطة التي نصت عليها المادة الخامسة من مذكرة التفاهم التي تعتبر إختيارية في حالة اتفاق الأطراف المتنازعة على اللجوء لها، بهدف تجنب الإجراءات الطويلة والمعقدة التي تعتري الوسائل الأخرى.

الكلمات المفتاحية: المساعي الحميدة، التوفيق، الوساطة، المنظمة العالمية للتجارة.

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Introduction:

One of the most important objectives pursued by international organizations is the friendly and peaceful settlement of disputes¹, to which states generally resort in order to protect their rights when any dispute arises between them². In turn, international conferences stress the importance of friendly channels of dispute settlement, also called appropriate channels, which are different processes used to resolve disputes outside the scope of courts and official judicial bodies, and this is due to its speed, confidentiality and elasticity as well as considered appropriate channels for the settlement of a range of international trade disputes³.

World Trade Organization also works to settle disputes that arise between its members friendly before resorting to the channel, which can be said to be judicial, as disputing parties recourse willingly to friendly ways to settle arising disputes.

Article 5 of the protocol of entente , which stipulates diplomatic channels, is consistent with the general principles of international law, especially the requirements of Article 33 of the united nations charter, as it plays an important role in settling a significant number of disputes before resorting to filing complaints in front of official bodies in general and world trade organization Dispute Settlement Body in particular, as these channels are considered stages of it that help reach an acceptable solution to the disputing parties in order to put an end to the emerging disagreements.

The question that arises in this research is: how well the alternative diplomatic means are effective for disputing parties in WTO to which they recourse willingly so as to resolve their emerging conflicts?

We try to answer this question by demonstrating the commitment of states to the ethical aspect of the dispute settlement system in WTO, which requires from the disputing parties to resort to complex channels only after failing to do so. So we allocated the first axis to legal basics of permissive ways in WTO, then forms of diplomatic channels in WTO as second axis, and thirdly, we examine their implications.

1. diplomatic channels in World Trade Organization - legal fundamentals

Disputing Parties can agree to adopt friendly and permissive ways to settle their disputes, where they can use diplomatic channels, in order to reach a satisfactory settlement, before mandatory provisions are imposed on them by the arbitration panels of World Trade Organization.

In order to highlight legal fundamentals of diplomatic channels in WTO, we must first define their meaning (first subsection), then determinants (second subsection), and then examining implementation (third subsection)

¹- It is emphasised that the settlement of contentious disputes in inter-state relations must be by peaceful means, in accordance with Article 33 of the United Nations Charter, which stipulates that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first seek a solution of the dispute, by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" published on internet : www.un.org/en/documents/charter/chap6.shtml , see also: Jean JACK ROCHEE, Relations internationales, Gefrenoiss - Gualino-Joly, L.G.D.J, Montchrestien, 3éme édition, 2005, p145.

²- AbdulsalamJumaZagoud: (alalakat aldoalia fi dhili alnidham alalami aljaidid)International Relations under the New World Order, Dar Zahran for Publishing and Distribution, Jordan, 2014, p. 170.

³- Mounir Mohammed Al-Janbaihi and Mamdouh Mohammed Al-Janbaihi: (aliatirafata bi kararat altahkim alajnabia w infadhoha) Recognition and Enforcement of Foreign Arbitral Awards, University Thought House, Alexandria, 2005, pp. 5 and 6.

1.1. Meaning.

Article 5 of the protocol of entente does not define the diplomatic means of good offices, conciliation and mediation, but only indicates that the parties may resort to willingly and permissively, i.e left to international law and customary in this regard.

Diplomatic channels of dispute settlement are friendly ways, and the solution found is not binding unless the parties accept that, i.e the procedures depend on the consent of these parties, and the decisions made are not mandatory except when the parties agree to do otherwise. In case of reverse, they resort to judiciary or arbitration to settle their disputes¹.

Diplomatic channels share a common point in that they represent efforts made by a third party to help to the disputing parties to settlement, where this party can be either a single individual such as the Secretary General of an international organization, a worldwide outstanding personality or an international organization².

1.2. Conditions.

The recourse of parties to permissive diplomatic means is subject to certain conditions, due to the nature of WTO on the one hand, and the bodies that carry out these tasks on the other.

- Consent to resort to these means, as no party can force the other to do so,
- Failing to solve disputes via consultations. Certainly, having recourse to diplomatic channels is willingly, as indicated, but in case the disputants consult and failure to find a satisfactory solution³,
- The parties, via these channels, are bound to reach a result or find a solution that is in compliance with WTO agreement provisions, and not violating members rights as well,
- Persons using these ways, i.e. those offering their good offices, conciliators or mediators, must have certain characteristics , such as: Strong presence, ability to communicate, patience, toughness, intelligence and professional competence, such as familiarity with administrative and legal issues, as well as an acceptable business career and its characteristics for the purpose of a quick understanding of case circumstances and therefore suggesting appropriate , solutions as much as possible⁴.
- And obviously, the most important condition is that they cannot be of disputing parties.

1.3. Determinants.

With reference to the protocol of entente in its article (5), we deduce a set of determinants the channels : good officers, conciliation and mediation are based on , and which consist of:

-voluntariness , i.e willingness

¹- Bashar Mohammed Al-Asaad, (okoud alistithmar fi alalakat aldowalia – mahiatoha, alkanoun alwajib altabik alaiha, wasayil taswiat monazaatiha)"Investment contracts in private international relations (what they are, the law applicable to them, means of dispute settlement)", Manshurat Al-Halabi Al-Jurkiyya, Beirut, 2006, p. 314.

²- Salim Boudleau, (monadhamat altijara alalamia w nidham taswiat alnizaat)"The World Trade Organization and the Dispute Settlement System", Journal of Human Sciences, Montauri University, Constantine, Vol. B, No. 32, December 2009, p. 352.

³- Salim Boudleau, op. cit., p. 354.

⁴- Abdelkhalek Dahmani (nidham taswiat almonazaat fi itar monadhamt altijara alalamia) The Dispute Settlement System under the World Trade Organization, Thesis for the Master's Diploma in Judiciary and Arbitration, Faculty of Legal, Economic and Social Sciences, Mohammed I University, Morocco, 2008-2009, p. 32

Article 5 first paragraph stipulates that: "Good offices, conciliation and mediation are voluntary procedures if both disputing parties agree to do so¹.

It is clear that these three channels are permissive and not compulsory, such as consultations, as they only resort to , if the disputing parties willingly and permissively agree to do so.

It is worthy of mention that article 5, in its sixth paragraph, the Director-General of the Organization offers his good offices, conciliation or mediation ex-officio, only for the purpose of assisting parties to settlement .This by no means mean forcing them to submission to his will ,his rule remains always as part of voluntariness and acceptance of disputing parties.

-Confidentiality.

Diplomatic means take place within a framework of complete confidentiality, as stipulated in Article 5, paragraph 2, of the protocol² , as well as Article 4, paragraph 6, which stipulates the confidentiality of consultations. The purpose of this confidentiality is to reach a settlement of the dispute, given the successful effect it makes on the process, and to position guaranteed to disputing parties, as well as what is exchanged in terms of memoranda that parties do not interest in announcing and disclosing to public opinion, and this guarantees them complete freedom to dialogue and exchange opinions and, that serves to search real causes of dispute, and consequently find final solutions to both disputing parties and world trade as a whole.

However, if we examine the second paragraph of Article 5, specifically the terms, "in particular the positions taken by the disputing parties", we can figure out that this article refers to the possibility of resorting to publicity for some procedures, if the disputing parties agree to do so.

1.4. Diplomatic channels are not subject to time constraints

(Article 5.2 of the same protocol provides that: "The good offices, conciliation and mediation procedures shall be confidential, in particular the positions taken by the parties to the dispute during such procedures, and shall be without prejudice to the rights of either party to any other means of litigation under such procedures."

The fact that diplomatic channels are not absolutely subject to time constraints we can then distinguish two cases :

1-when consultations are over : Article 5 of the protocol³ does not set a specific time limit for the application of the above-mentioned diplomatic procedures, but leaves the disputing parties free to do so.

2-When initiating and conducting consultations: full freedom is granted to the disputing parties to determine the appropriate time for diplomatic procedures is not absolute in all cases, as Article 5 in its fourth paragraph put an important restriction, as provided in : "when good

¹- Protocol of entente (modhakirat tafahom ala alkawaid w alijraat alati tahkom taswiat alnizaat on Rules and Procedures Governing the Settlement of Disputes. Published on the Internet: www.wipo.int

²- Article 5.2 of the same protocol stipulates that: "The good offices, conciliation and mediation procedures shall be confidential, in particular the positions taken by the parties to the dispute during such procedures, and shall be without prejudice to the rights of either party to any other means of litigation under such procedures."

³- Article 5.3 of the protocol of entente on Rules and Procedures Governing the Settlement of Disputes states that "Any party to a dispute may request good offices, conciliation or mediation at any time and may commence at any time and terminate at any time...."

offices, conciliation or mediation are initiated within sixty days after the request's date of receipt for consultations, the complaining party shall allow a period of sixty days from the afore-mentioned date before requesting the formation of the ad-hoc panel, and the complaining party may request the panel within the sixty-days period, if both disputing parties consider that diplomatic channels have failed to settlement"¹.

We conclude from this Article that if the parties initiate any procedure within sixty days after the request's date of receipt for consultations, the complaining State shall not submit a request for the formation of an ad-hoc panel before the expiring date, i.e. "the following sixty days of request for consultations", unless the disputing parties jointly consider that these channels have failed during which time the complaining State may submit to the Dispute Settlement Body a request for the formation of an ad-hoc panel.

Article 5, paragraph 5 of the protocol permits the possibility of resuming the good offices, conciliation or mediation proceedings the same time as the panel if the disputing parties agree to do so².

1.5. Other Determinants relevant to Diplomatic Channels

Diplomatic channels have other characteristics of which we mention:

- Preserving state sovereignty. That's to say , alone and solely to decide how and when to do so.
- Exploring dispute settlement by means of persons who are usually trusted by the parties.
- Endeavouring to assist the disputing parties in coming to terms away from influential political factors characterising relations between the disputing states, as the solution can combine legal and political considerations, justice and equity when the parties agree to do so³.

Savings: expenses are much less than those of arbitration fees in case of winning, but in case of losing the disputing parties come back to starting point having wasted money and time⁴.

2. Forms of diplomatic channels as a permissive way of dispute in World Trade Organization

Diplomatic channels as a permissive way of dispute settlement in WTO are good offices (first subsection), conciliation (second subsection), and mediation (third subsection).

2.1. Good Offices

Good offices are "a means by which a person or body mediates between the disputing parties in order to resume the negotiation process, which could lead to the resolution of the dispute."⁵ In other words, the disputing parties are unable to reach a satisfactory agreement by means of negotiations or consultations, they may seek or resort to a third party⁶.

And so on the circle of consultations extends from two parties to a third one in good offices channel, and this becomes particularly important in case of severance of diplomatic

¹- Protocol of entente on Rules and Procedures Governing the Settlement of Disputes, op. cit.

²- Article 5(5) of the same protocol.

³-KhairiFathi Al-Busaily, (taswiat almonazaat fi itar itifakat monadhamat altijara alalamia) Dispute Settlement under the World Trade Organization Agreements, Arab Renaissance House, Cairo, 2007, pp. 332-333.

⁴- The channels of mediation and conciliation are often resorted to in investment contracts, Bashar Mohammed Al-Asaad, op. cit., p. 315.

⁵- Salim Boudleau, op. cit., p. 352.

⁶- KaidiSamia, (altijara aldowalia w albaia) International Trade and the Environment, thesis for the degree of Doctor of Science in Law, Faculty of Law, MouloudMammery University, Tizi-Ouzou, 2010, p. 330.

relations, so the party uses its good offices after a request or initiatively, to convey messages and proposals, and try to create a climate in which the two disputing parties agree to hold direct consultations.

Good offices end once the disputing parties are persuaded to sit at the negotiating table, resume negotiations if they have broken them off, or even accept the principle of friendly settlement¹.

2.2. conciliation

Although international conventions recognise conciliation as a means of dispute resolution², they do not define it; they merely describe the means of settlement , leaving this matter to the jurisprudence.

Conciliation can be defined as: "a friendly way of settling disputes that arise between the parties, based on the selection of a third party (conciliator) to perform conciliation in order to resolve the dispute by views convergence."³

Conciliation is characterised as a flexible political-legal method that takes into account the circumstances of each dispute as well as the circumstances of its parties, while being subject to international law, which guarantees assurance to the parties that it will be subjected to objective legal rules and not to personal or ideological considerations⁴.

The conciliation commission is constituted based on the request of one of the disputing parties, unless the parties agree otherwise, this commission is composed of five members, each party appoints two members, and these members collectively choose a chairman, this is when the dispute is between two parties. But in case of multiple parties with the same interest, members are appointed to the committee by mutual agreement⁵.

2.3. Mediation

Mediation means that a third party creates the conditions to bring the conflicting parties together with the aim of conducting direct negotiations between them by proposing solutions in order to settle the dispute, and the mediator may invite the disputants individually or collectively for views approximation and propose solutions, advice or recommendations, which do not have the mandatory force⁶, as the mediator does not have the power to make

¹-Al-KhairQashi, (almofadhala bayna alwasail altahakomia wa ghayr altahakomia fi taswaiat almonazaat aldowalia) The trade-off between judicial and non-judicial means in the settlement of international disputes, University Foundation for Studies, Publishing and Distribution, Beirut, 1999, p. 21.

²-We point out that conciliation is a relatively recent technique that only entered international dealings after the Second World War, where its importance in the field of public international law in general and the field of commercial relations in particular emerged as a peaceful means of resolving international disputes, whose composition is dominated by the neutral element ... For more details see: Al-KhairQashi, op. cit., p. 25.

³-Mohamed Ibrahim Moussa, (altawfik altijari wa taghayor alnadhra alsaida hawla sobol taswiat monazaat altijara aldowalia) International Commercial Conciliation and the Changing Perception of International Trade Dispute Resolution, New University House, Alexandria, 2005, p. 23.

⁴-Abdelkhalek El Dahmani, (nidham taswiat almonazaat fi itar monadhamt altijara alaalamia The Dispute Settlement System under the World Trade Organization, Thesis for the Master's Diploma in Judiciary and Arbitration, Faculty of Legal, Economic and Social Sciences, Mohammed I University, Morocco, 2008-2009, Chapter II, p. 19, published on the website: www.marocodroit.com, p. 27.

⁵-QaidiSamia, op. cit., p. 330.

⁶-Suhail Hussein al-Fatlawi: (monadhamat altijara alalamia) The World Trade Organization, Dar Al-Thultafa for Publishing and Distribution, Amman, 2005, p. 135.

decision, but his powers are manifested in urging the disputants to accept only his recommendations and suggestions¹.

Mediation takes many forms. there is simple mediation, which is close to the conciliation system in the presence of a person who seeks to converge views of the disputing parties², and there is consultative mediation, in which the disputing parties request an expert or lawyer who has consulted on the subject to intervene as a mediator to resolve the dispute, and when the latter performs the task of arbitration, in case of failing , we are faced with arbitative mediation, and with judicial when the courts suggest to the parties mediation first before taking decision³.

It is worthy of mention that although mediation and conciliation are similar in that they do not have mandatory force, the mediation means differs from conciliation in that the margin is available for more movement , which allows it to play a more positive and effective role by giving it an important and essential ranked means for settling international trade dispute⁴.

2.4. Implications resulting from the use of diplomatic channels in World Trade Organization

The effects of using diplomatic channels are manifested as inevitable results; the dispute is settled, or we are faced with a state of non-settlement (first subsection), and we show that development countries are favoured with preferential treatment if they choose to recourse to one of the diplomatic channels as a way of resolving the dispute (second subsection).

2.4.1.results

The effectiveness of diplomatic channels of good offices, conciliation and mediation is demonstrated in the following:

- Either the dispute is settled, in which case the disputing parties agree to the solution reached or the contrary , that's to say non settlement. and In this case, these parties may resort to requesting the formation of an ad-hoc panel in order to settle the dispute, and diplomatic procedures may continue in parallel with the process of establishing this team, provided that the disputing parties agree to do so, i.e as the proceedings started by the special panel until the report is issued and adopted by the dispute settlement body, as this special team does not have a favourable effect of diplomatic means in the dispute settlement system of World Trade Organization , as the objective is to find solutions in order to maintain the stability of trade relations and transactions between countries⁵.

Here, the question arises as to the feasibility of submitting this dispute to the Special Panel and making efforts to find solutions, when the disputing parties can announce have

¹-Mohammad Nabhi: (altorok albadila li taswiat alnizaat altijaria) Alternative channels of settlement of commercial disputes, thesis for the degree of Master of Business Law, Faculty of Law, University of Algiers 1, academic year 2011-2012, p. 35.

²-Suhail Hussein Al-Fatlawi, op. cit. p. 136.

³-Mohamed Nabhi, op. cit. p. 34.

⁴-Mohamed Salahuddin Sayed Mohamed Ali, (taswiat almonazaat altijaria fi itar itifakiat monadhamat altijara alalamia)"Settlement of commercial disputes within the framework of the World Trade Organization agreements", Nile Journal of Commercial and Legal Sciences and Information Systems, Volume 3, Issue 5, August 2023, published on the Internet, <https://mnsli.journals.ekb.eg/article>, p. 20.

⁵-Sandrine MALGEAN DUBOIS, (roit de l'organization mondiale du commerce et protection de l'environnement,)World Trade Organization Law and Environmental Protection, Bruylant, 2003, p356.

reaching a friendly settlement, and thus it can be said that it is a waste of time and preoccupation with issues that can be settled friendly.

2.4.2. Preferential treatment of developing countries by means of diplomatic channels

The Protocol of entente includes provisions that attach importance and give preferential treatment to developing countries as disputing parties, such as prolongation of the consultations period, and also in diplomatic means in case that a satisfactory solution is not reached, the Director General or the head of the Dispute Settlement Body may offer good offices, conciliation, mediation or arbitration before requesting the formation of the Special Panel, as an assistance to developing and least developed countries, and this is only done basing on the request of the State itself¹.

Among the privileges also granted to developing countries, if a member files a complaint against a developed country, the complaining member is free to choose whether to rely on the provisions provided in Article 4 on consultations, Article 5 on good offices, conciliation and mediation, or Articles 6 and 7 on special teams, or to resort to the provisions provided in the resolution issued on April 5th, 1966.

Diplomatic channels achieve their goal in settling disputes, if the principle of bona fide is applied by member states. If not, it is difficult to achieve the intended goal and spare member states from wasting time and excessive expenses², especially for developing countries, due to high costs and long procedures. This idea disappears, as the issue is a sovereign matter that cannot be ignored by the organization³.

Conclusion

World trade organization has given importance to friendly ways, so to speak, in settling disputes arising between members, as the Protocol granted the option to recourse to diplomatic channels of mediation, good offices and conciliation in order to settle the dispute that arose between them if the necessary conditions are met.

However, the Dispute Settlement Body did not leave for the members more than this area for their freedom of choice, considering that the remaining procedures, if resorted to, are compulsory and a prescribed line that the parties must follow. In this way, the authors of protocol aimed to combine choice and compulsion, elasticity and rigidity in settling disputes.⁴

¹-See respectively: Article 5(6) and Article 24(02) of the protocol of entente on Rules and Procedures Governing the Settlement of Disputes, op. cit.

²-Mohamed Hamed El-Sayed El-Meligy, The Impact of the GATT on Intellectual Property Rights and the International Dispute Settlement Mechanism in accordance with its provisions, Thesis submitted for the degree of Doctor of Laws, Faculty of Law, Ain Shams University, Egypt, 2003, p. 221.

³-Erzel Elkahna: (allojoa ila altahkim altijari aldowali fi itar almonadhama alalamia li tijara)"Recourse to International Commercial Arbitration under the World Trade Organisation", Proceedings of the International Forum on International Commercial Arbitration in Algeria, 14-15 June 2006, Abdelrahmane Meira University, Faculty of Law and Economic Sciences, Bejaia.

⁴-Dominique CARREAU, PATRICK Julliard, (Droit International Économique) International Economic Law, L.G.D.J DELTA, Paris, 4th edition, 1998, p75.

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