1
Introduction to the WTO Dispute Settlement System

WTO DSM - Section 1

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1 Introduction to the WTO Dispute Settlement System

- 1.1 Overview of the WTO Dispute Settlement System (data-based)
- 1.2 Importance of dispute settlement for international trade
- 1.3 Functions, Objectives and Key Features of the WTO dispute settlement system

1.1 Overview of the WTO Dispute Settlement System

- WTO is a rule-based organization.
- Members constantly have disagreements on trade measures taken by others.
- If members are unable to reach a mutually agreed solution concerning these disagreements, they can submit them to further procedures to obtain rulings on the consistency of the challenged measures with WTO agreements and resolve their disputes.

1.1 Overview of the WTO Dispute Settlement System

- As of 31 December 2023, WTO members referred 621 disputes to the Dispute Settlement Body, of which around 350 have gone forward to adjudication by panels (and possibly the Appellate Body).
- It is unquestionably one of – if not the – most **active** international adjudicatory systems in the world. And it still operates faster than any other.
- There is a **high compliance rate** in adjudicated disputes;

Chart 1: Participation of WTO members in dispute settlement (1995 – 2022)

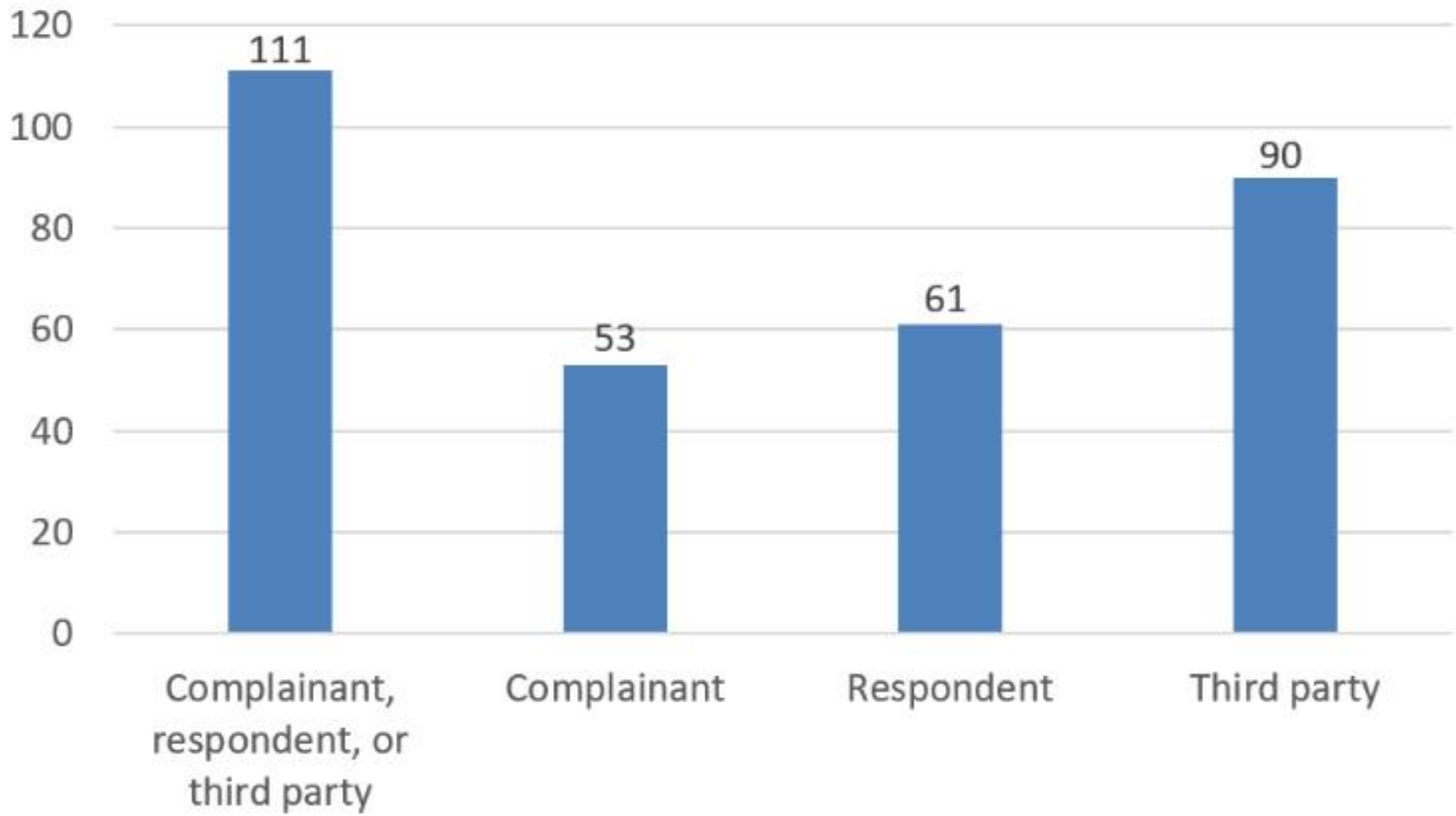


Chart 2: Requests for consultations (1995 – 2022)

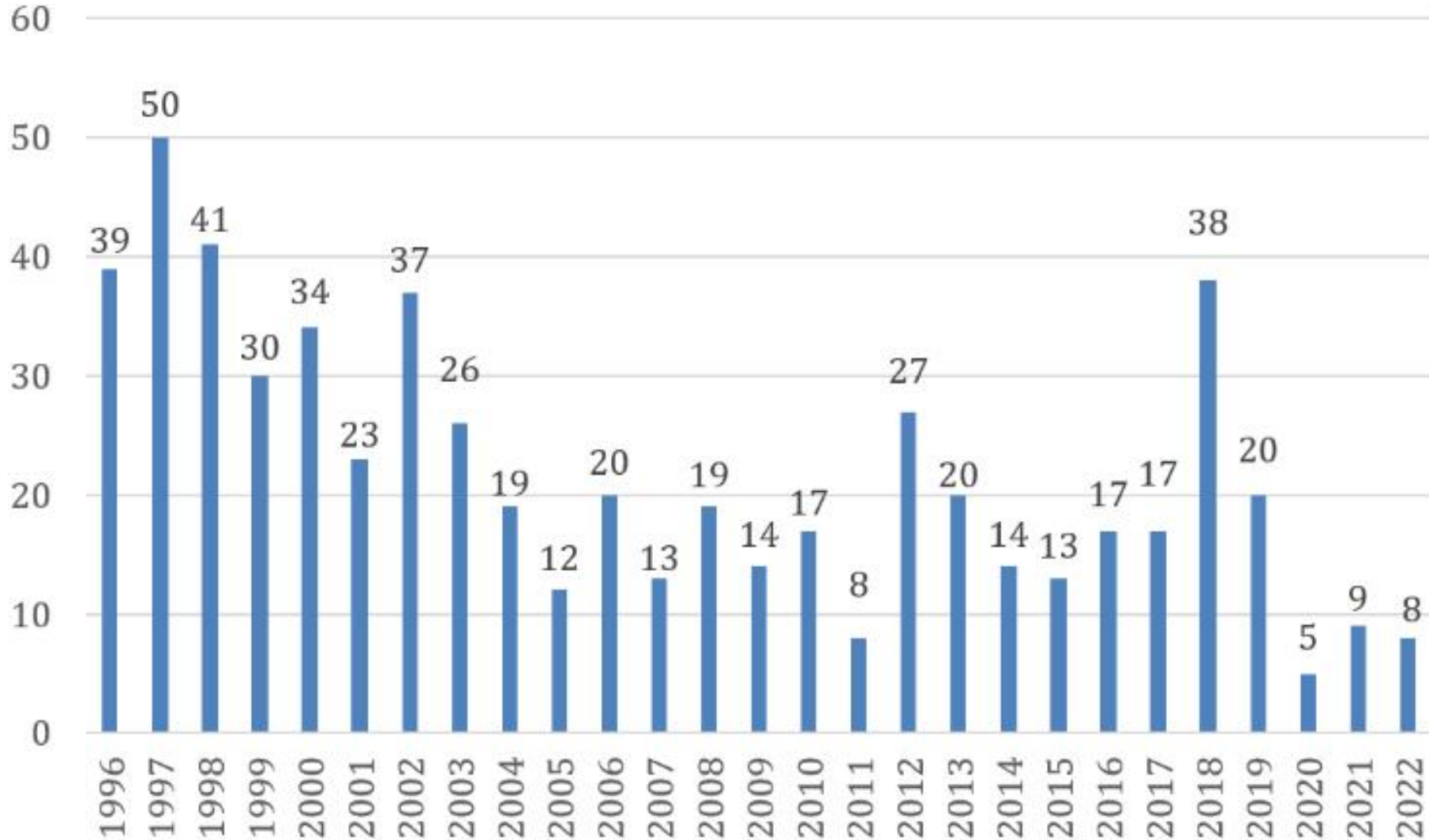
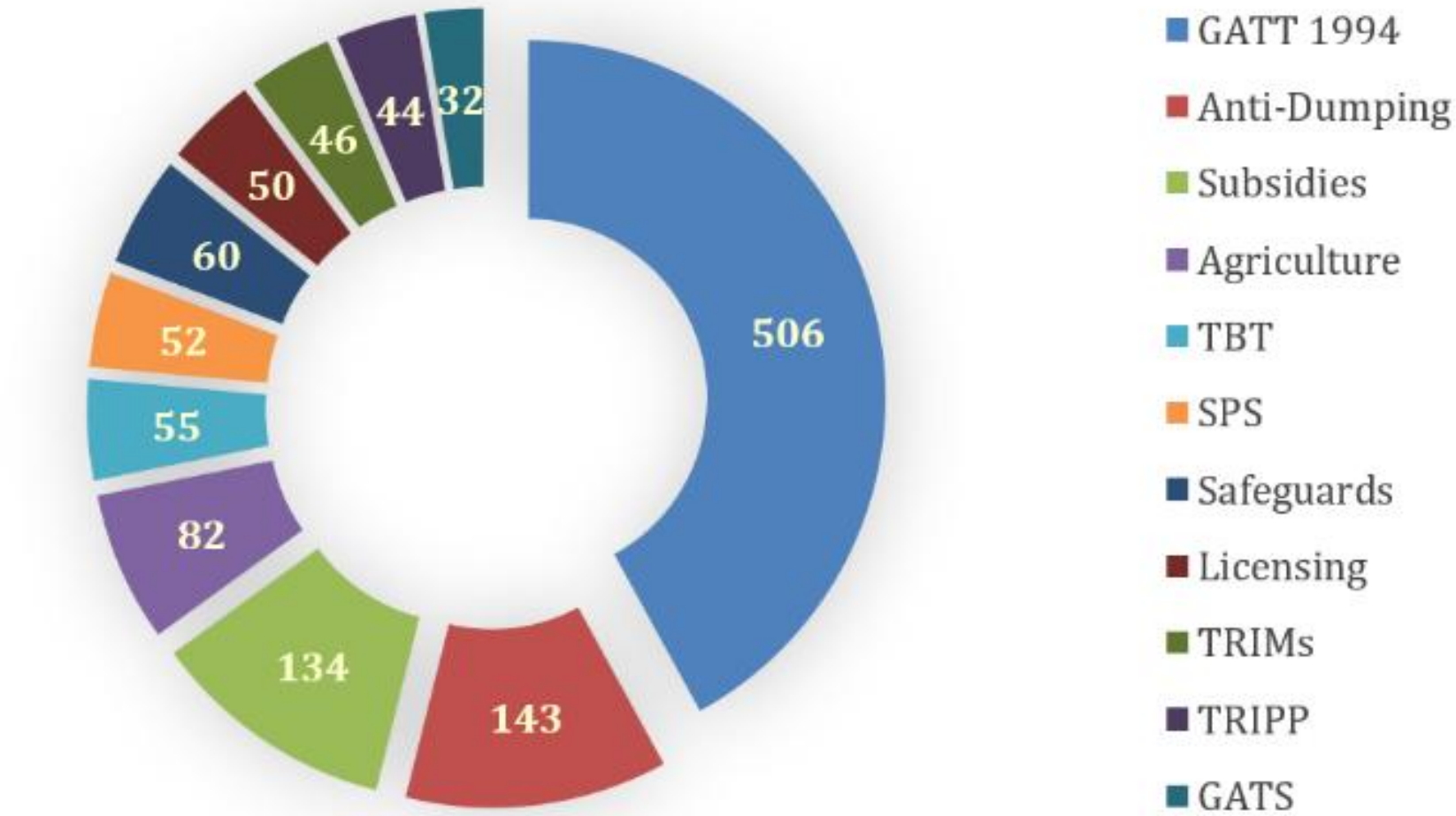


Chart 3: Agreements raised in WTO disputes (1995-2022)



1.2 Importance of dispute settlement for international trade

- There are disagreements, disputes need to be decided for the overall benefit of a rule-based international trade system.
  - The WTO Agreement is a treaty negotiated by dozens of countries over the seven-year span of the Uruguay Round of multilateral trade negotiations.
  - Except for plurilateral agreements, WTO members must accept the entirety of the WTO Agreement and may not pick and choose among the constituent trade agreements.
  - The larger the agreement and the number of the parties, the more challenging it is to arrive at a text that captures that common intention.

1.2 Importance of dispute settlement for international trade

- Once adopted, even a good-faith implementation of a clear legal text in the domestic law of parties with a variety of legal traditions and massive differences in economic and social development could result in divergent and inconsistent application of the negotiated agreement, and disagreement between parties in respect of such divergences.
- Disputes between WTO members in respect of both the scope of negotiated rights and obligations and the application of disciplines in specific instances are part and parcel of the normal functioning of such a complex treaty.

1.2 Importance of dispute settlement for international trade

- An effective dispute settlement system can, as a primary objective, safeguard the negotiated balance of rights and obligations.
- It can not only increase the practical value of commitments that parties undertake in an agreement, but also – and crucially – preserve the integrity and legitimacy of the agreement.
- The robust dispute settlement system of the WTO, built on the experience of the GATT in the four decades preceding the establishment of the WTO, does that, and more.
  - **Timely and structured dispute resolution** helps to reduce the detrimental impact of unresolved international trade conflicts.
  - **A permanent, standing Appellate Body** helps to provide for continuity and consistency in the interpretation and application of rights and obligations.

1.2 Importance of dispute settlement for international trade

- Effectiveness and success of the WTO DSM:
  - the very existence of the DSM helps WTO members to resolve disputes without having to resort to adjudication;
  - the WTO DSM is remarkably faster than its international counterparts, with an average time frame for WTO panel proceedings of around eleven months;
  - WTO disputes are not just numerous; they are very diverse in terms of the legal and factual issues encountered;
  - WTO disputes are not only diverse in **subject matter**, but increasingly diverse in terms of the **members** engaged in dispute settlement.

1.3 Functions, Objectives and Key Features of the WTO Dispute Settlement System

- The rules governing dispute settlement in the WTO are, in large part, set out in the ***Understanding on Rules and Procedures Governing the Settlement of Disputes*** (commonly referred to as the Dispute Settlement Understanding, and abbreviated as "**DSU**").

- The WTO dispute settlement system is often praised as one of the most important innovations of the Uruguay Round. But the DSU did not come out of nowhere. It builds on **rules, procedures and practices** developed over almost half a century under the 1947 GATT.

1.3 Functions, Objectives and Key Features of the WTO Dispute Settlement System

Functions

- Providing Security and Predictability
- Preserving the Rights and Obligations
- Clarification of Rights and Obligations

Objectives

- “Mutually Agreed Solution” as “Preferred Solution”
- Prompt Settlement of Disputes

Key Features

- Prohibition against Unilateral Actions
- Exclusive and Compulsory Jurisdiction
- An Integrated Set of Rules and Procedures

1.3.1 Providing Security and Predictability

- A central objective of the WTO DSM is to provide security and predictability to the multilateral trading system(Article 3.2 of the DSU).
  - **Predictability** is a signal requirement of the market. Market actors need stability and predictability in the governing laws, rules and regulations applying to their commercial activity, especially when they conduct trade on the basis of long-term transactions.
  - **Security** is the measure of members' confidence in the ability of the WTO dispute settlement mechanism to determine accurately the will of WTO members when negotiating and agreeing to be bound by the WTO Agreement.

1.3.1 Providing Security and Predictability

- To achieve these objectives, the DSU provides a framework for a fast, efficient, dependable and rules-oriented system to resolve disputes involving the application of the provisions of the WTO Agreement.
  - By reinforcing the rule of law, the dispute settlement system makes the international trading system more secure and predictable.
  - Where non-compliance with the WTO Agreement has been alleged by a WTO member, the DSM provides for a resolution of the matter through independent findings rendered by quasi-judicial bodies and confirmed by the DSB, a political organs of the WTO.

1.3.2 Preserving the Rights and Obligations

- The WTO dispute settlement system is only open to disputes concerning the rights and obligations resulting from the provisions of the WTO Agreement.
- All disputes concerning the application of the agreements listed in **Appendix 1 of the DSU** (the “covered agreements”) may be brought before the WTO DSM.
- WTO members cannot bring to the WTO DSM disputes concerning the rights and obligations encompassed in legal provisions outside the covered agreements.

1.3.2 Preserving the Rights and Obligations

- If the parties to the dispute do not manage to **reach a mutually agreed solution**, the disputes could **be examined by independent adjudicators** (panels and the Appellate Body).
- In doing so, the recommendations and rulings made by these adjudicators may not “add to or diminish the rights and obligations provided in the covered agreements” (Articles 3.2 and 19.2 of the DSU).
- The objective of dispute settlement is to ensure the correct interpretation and application of provisions of the negotiated agreements, and not to obtain benefits that have not been negotiated.

1.3.2 Preserving the Rights and Obligations

- Preserving all members' rights and obligations:
  - **Complainant:** the WTO dispute settlement system provides a mechanism through which the complainant can obtain an independent rules-based determination of its rights and the respondent's obligations in respect of a given measure, and a multilateral forum within which to resolve its bilateral trade dispute (Article 23.1 of the DSU).
  - **Respondent:** the system provides protection from a unilateral determination of violation and sanctions, and the respondent has the opportunity to defend the measure before independent adjudicators as not violating an obligation, or to justify it under the exceptions available in the covered agreements (Article 23.2(a) of the DSU).

1.3.3 Clarification of Rights and Obligations

- Like most municipal laws of general application, the provisions of the WTO Agreement are often drafted in broad terms so as to be of general applicability and to cover a multitude of individual cases;
  - it is neither practical – nor, indeed, possible – to foresee and regulate all specific cases that may arise in WTO members' jurisdictions.
  - these provisions need to be interpretated and applied to specific disputes.

1.3.3 Clarification of Rights and Obligations

- The WTO Agreement is a text forged in compromise;
- To make compromise possible, negotiators sometimes reconcile diverging positions by agreeing to a text that can be understood in more than one way.
- This means that applying legal provisions to a given set of facts is not always straightforward.
- Adjudicators must **first determine the meaning** of the legal provision at issue before they can apply it to the facts as they have been established.

1.3.3 Clarification of Rights and Obligations

- In determining the meaning of a treaty provision, the adjudicator seeks to give effect to “the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances”.
- The DSU specifically provides that this be done “in accordance with **customary rules** of interpretation of public international law” (Article 3.2 of the DSU).
  - Certain elements of these rules have been codified in the Vienna Convention on the Law of Treaties (VCLT), such as those set out in Articles 31, 32 and 33 of the VCLT.

1.3.3 Clarification of Rights and Obligations

- Panels and the Appellate Body must, in interpreting and applying the provisions of the WTO, start from these codified rules(VCLT Article 31,32,33).
- Other rules of interpretation in customary international law may also be relevant in this task.
- The purpose of treaty interpretation, particularly under Article 31 of the VCLT, is to ascertain the common intentions of the parties, which cannot be done on the basis of “subjective and unilaterally determined ‘expectations’” of one of the parties to a treaty.
- The interpretative exercise should yield a harmonious and coherent interpretation that fits comfortably with the treaty as a whole so as to render the treaty provision legally effective.

1.3.3 Clarification of Rights and Obligations

- Interpretation of the provisions of the covered agreements by panels and the Appellate Body in a particular dispute between WTO members **is to be distinguished from** an "authoritative interpretation" (Article IX:2, WTO Agreement).
- That provision stipulates that the Ministerial Conference and the General Council of the WTO have the "exclusive authority to adopt interpretations" of the WTO Agreement.
- Such "authoritative" interpretations are binding on all WTO members – *unlike interpretations by panels and the Appellate Body* in a particular dispute, which are *binding only on the parties to a dispute upon adoption of the relevant report.*
- WTO members have never adopted an "authoritative interpretation"

1.3.4 “Mutually Agreed Solution” as “Preferred Solution”

- The primary objective of the dispute settlement system is not to make rulings or to develop jurisprudence.
- Rather, the priority is to settle disputes, preferably through a mutually agreed solution that is consistent with the WTO Agreement (Articles 3.3, 3.6 and 3.7 of the DSU).
- To date, more than 100 mutually agreed solutions have been notified to the WTO.

1.3.4 “Mutually Agreed Solution” as “Preferred Solution”

- Adjudication is to be used only when the parties cannot work out a mutually agreed solution.
- By requiring formal consultations as the first stage of any dispute, the DSU provides a framework in which the parties to a dispute must always at least attempt to negotiate a settlement.
- Even when the case has progressed to the stage of adjudication, a bilateral settlement always remains possible, and the parties are always encouraged to make efforts in that direction (Articles 3.7, 5.2, 5.5 and 11 of the DSU).
- The content of the mutually agreed solution notified by the parties to the dispute may determine their rights and obligations with respect to the dispute settlement proceedings at issue.

1.3.5 Prompt Settlement of Disputes

- Prompt settlement of disputes is essential if the WTO is to function effectively and if the balance of rights and obligations between the members is to be maintained (Article 3.3 of the DSU).
- The DSU sets out in considerable detail the **procedures** and **corresponding deadlines** to be followed in resolving disputes.
- The detailed procedures are designed to achieve efficiency, including the right of a complainant to move forward with a complaint in the absence of agreement by the respondent (Articles 4.3 and 6.1 of the DSU).
- These make the dispute settlement system of the WTO functions relatively quickly.

1.3.5 Prompt Settlement of Disputes

- If a dispute is adjudicated, it should normally take (Article 20 of the DSU)
  - no more than nine months from the beginning of the adjudication phase to the adoption of the report for panel rulings
  - and no more than one year if the case is appealed
- If the complainant deems the dispute urgent, consideration of the dispute should take even less time (Articles 4.8, 4.9 and 12.8 of the DSU).
- Generally shorter than the International Court of Justice (ICJ), European Court of Justice (ECJ) or the North American Free Trade Agreement (NAFTA).

1.3.5 Prompt Settlement of Disputes

- The “implementation” phase of WTO dispute settlement may add considerable delays to the final resolution of a dispute.
- Over the years, the proceedings became longer, because
  - the increase in complexity of the disputes, in both factual and legal terms,
  - the length of the parties’ submissions, the significant amount of evidence submitted,
  - limitations on the availability of panelists and WTO Secretariat staff
- the average length of WTO dispute settlement panel proceedings is approximately eleven months

1.3.6 Prohibition against Unilateral Determinations and Actions

- WTO members
  - have agreed that their trade relations should be conducted in the context of a rules-based, rather than a purely power-based, framework.
  - have established a dispute settlement mechanism equipped with independent, quasi-judicial bodies able to make findings in respect of alleged breaches by a member of its WTO obligations.
  - have undertaken to use that system to settle their WTO trade disputes and not to take the law into their own hands.
  - have agreed to abide by the rules and procedures of the DSU (Article 23 of the DSU).

1.3.6 Prohibition against Unilateral Determinations and Actions

- The DSU establishes the WTO dispute settlement system as the **exclusive forum for the resolution of disputes** seeking to redress a violation of the covered agreements and requires adherence to its rules (Article 23.1 of the DSU).
- This applies to situations in which a member believes that another member violates a covered agreement or otherwise nullifies or impairs benefits under that agreement or impedes the attainment of an objective of one of the agreements.
- In the absence of a prohibition on unilateral action, trading relations could descend into either rule by a hegemon or an all-out trade war.

1.3.6 Prohibition against Unilateral Determinations and Actions

- The DSU further provides some examples of unilateral actions that are prohibited.
  - Whatever actions that a member takes, it may only take them based on the findings of an adopted panel or Appellate Body report or arbitration award (Article 23.2(a) of the DSU).
  - A WTO member must also respect the procedures foreseen in the DSU for the determination of the time period for implementation.
  - Finally, a WTO member must only impose countermeasures on the basis of an authorization by the Dispute Settlement Body (DSB) (Article 23.2(b) and (c) of the DSU).

1.3.7 Exclusive and Compulsory Jurisdiction

- Article 23 of the DSU precludes the use of other fora for the resolution of a WTO-related dispute.
- The WTO dispute settlement system is compulsory.
- The DSU subjects all WTO members to the dispute settlement system for all disputes arising under the WTO Agreement.
- Unlike most other systems of international dispute resolution, there is no need for the parties to a dispute to accept the jurisdiction of the WTO dispute settlement system in a separate declaration or agreement.

1.3.7 Exclusive and Compulsory Jurisdiction

- Given the rise in preferential trade agreements, WTO members sometimes have the option of taking a dispute either to **the relevant regional dispute settlement adjudicatory institutions** or to **the WTO dispute settlement system**.
- It is not unusual for disputes under a RTA and the WTO to be (or alleged to be) linked in some way, or for rulings in one forum to spill over into the other.
- Panels and the Appellate Body have exercised jurisdiction over such matters under the covered agreements that were properly brought before them under the DSU.
- Panels cannot decline to exercise validly established jurisdiction because this would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU.

1.3.8 An Integrated Set of Rules and Procedures

- The DSU is a coherent and integrated system of rules and procedures for dispute settlement that applies to disputes brought pursuant to the consultation and dispute settlement provisions of the covered agreements, as well as to disputes concerning the rights and obligations under the provisions of the WTO Agreement and of the DSU (in isolation or in combination with any other covered agreement).
- Therefore, subject to certain exceptions, the DSU is applicable in a uniform manner to disputes under all the covered agreements.

1.3.8 An Integrated Set of Rules and Procedures

- In addition to the rules and procedures in the DSU, there are a number of provisions on "**consultation and dispute settlement**" in other covered agreements. Many of these consultation and dispute settlement provisions simply refer to Articles XXII and XXIII of the GATT 1994, or have been drafted using those provisions as a model.
- In addition, there are so-called "special and additional rules and procedures" on dispute settlement contained in the covered agreements (Article 1.2 and Appendix 2 of the DSU).

1.3.8 An Integrated Set of Rules and Procedures

- Special and additional rules and procedures take precedence over the rules in the DSU to the extent that there is a difference or inconsistency between the two (Article 1.2 of the DSU).
- Such a difference or inconsistency between the DSU and the special rules exists only “where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other”.
- Only in that case and to that extent do the special additional provisions prevail and the DSU rules not apply.

Summary

- Since its inception, the WTO DSM has received more than 620 disputes brought by Members, and has successfully dealt with them.The WTO DSM is unquestionably one of – if not the – most active international adjudicatory systems in the world.
- The DSU is the main legal document governing the procedures of the WTO DSM.
- The DSM has a number of functions, objectives and key features.

2
Historical background and evolution of the WTO DSM

WTO DSM - Section 2

2 Historical background and evolution of the WTO DSM

2.1 The system under GATT 1947 and its evolution

2.2 Major changes in the Uruguay Round

2.1 The system under GATT 1947 and its evolution

- The WTO dispute settlement system is one of the most important innovations of the Uruguay Round.
- But the WTO dispute settlement system was not a total innovation. Indeed, it is based on the GATT 1947 which also had a dispute settlement system--a procedure to handle disagreements and disputes.
- The GATT DSM was established by Articles XXII and XXIII of the GATT 1947.

2.1 The system under GATT 1947 and its evolution

- **Article XXII:1 of the GATT 1947** required each contracting party to afford an opportunity for consultations on representations made by another contracting party concerning any matter affecting the operation of the GATT.
- **Article XXIII:2 of the GATT 1947** provided that the contracting parties, acting jointly, would deal with situations in which a contracting party considered that the benefits it expected under the Agreement were being nullified or impaired, by investigating the matter and making appropriate recommendations or rulings on it.

2.1 The system under GATT 1947 and its evolution

- Articles XXII and XXIII of the GATT 1947 provided the foundation for the development of dispute settlement practices under the GATT.
- It addressed, though in a limited way, how disagreements among its contracting parties concerning the application of the Agreement should be treated.
- Based on these two Articles, the GATT dispute settlement system evolved quite remarkably over nearly 50 years.

2.1 The system under GATT 1947 and its evolution

- Disputes between individual contracting parties in the very early years of the GATT 1947 were decided by rulings of the Chairman of the GATT Council.

- Later, they were referred to working parties composed of representatives from all interested contracting parties, including the parties to the dispute. These working parties adopted their reports by consensus decisions.

2.1 The system under GATT 1947 and its evolution

- They were soon replaced by panels made up of three or five independent experts who were unrelated to the parties in dispute. These panels wrote independent reports with recommendations and rulings for resolving the dispute, and referred them to the GATT Council.

- Only upon approval by the GATT Council did these reports become legally binding on the parties to the dispute.

2.1 The system under GATT 1947 and its evolution

- The GATT panels thus built up a body of jurisprudence, still important today, following an increasingly rules-based approach and juridical style of reasoning in their reports.

- Several of the principles and practices that evolved in the GATT dispute settlement system were, over the years, codified in decisions and understandings of the contracting parties to the GATT 1947.

2.1 The system under GATT 1947 and its evolution

- The most important pre-Uruguay Round decisions and understandings were:
  - The Decision of 5 April 1966 on Procedures under Article XXIII;
  - The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979, including its annex entitled Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, restating customary GATT dispute settlement practice;
  - The Decision on Dispute Settlement, contained in the Ministerial Declaration of 29 November 1982;
  - The Decision on Dispute Settlement of 30 November 1984.

2.1 The system under GATT 1947 and its evolution

- As stipulated in Article 3.1 of the DSU, the current WTO DSM builds on, and adheres to, the principles for the management of disputes applied under Articles XXII and XXIII of the GATT 1947.

- Furthermore, the WTO Agreement provides that the WTO is to be guided by the GATT decisions, procedures and customary practices.

2.1.1 Limitations of the GATT Dispute Settlement System

- Some key principles remained unchanged up to the Uruguay Round, the most important being the rule of positive consensus that existed under the GATT 1947.
- Positive consensus meant that there had to be no objection to the decision from any contracting party. Importantly, the parties to the dispute were not excluded from participation in this decision-making process.
- The adoption of the panel report could be blocked by the respondent if it so wished. [And such a DSM could not possibly have worked.]

2.1.1 Limitations of the GATT Dispute Settlement System

- Fortunately,Remarkably, this was generally not the experience of the GATT 1947 DSM.
- Individual respondent contracting parties mostly refrained from blocking consensus decisions and allowed disputes in which they were involved to proceed, even if this was to their short-term detriment.
- They did so because they had a long-term systemic interest and knew that excessive use of the veto right would result in a response in kind by the other contracting parties. Panels were established and their reports frequently adopted.

2.1.1 Limitations of the GATT Dispute Settlement System

- However, the right to veto by defendant cannot be underestimated.
- The risk of a veto also weakened the GATT dispute settlement system. In addition, such vetoes actually occurred, especially in economically important or politically sensitive areas(such as anti-dumping).
- Finally, there was a deterioration of the system in the 1980s as contracting parties increasingly blocked the establishment of panels and the adoption of panel reports, especially in the areas of trade remedies and in other long-standing disputes (such as EC–Bananas).

2.1.1 Limitations of the GATT Dispute Settlement System

- Generally speaking, the structural weaknesses of the old GATT dispute settlement system were significant even though many disputes were ultimately resolved.
- This resulted in decreasing confidence by the contracting parties in the ability of the GATT dispute settlement system to resolve the more difficult cases.
- This also easliy led to more unilateral action by individual contracting parties, who, instead of invoking the GATT dispute settlement system, would take direct action against other parties in order to enforce their rights.

2.1.2 Fragmatation of DSM under the Tokyo Round "Codes"

- Several of the plurilateral agreements that emerged from the Tokyo Round in 1979, the so-called Tokyo Round "Codes", for example on anti-dumping, contained specific dispute settlement procedures.
- "*GATT à la carte*" took place. In some instances, where rules pertaining to a specific subject matter existed both in the GATT 1947 and in a Tokyo Round Code, a complainant had some leeway for "forum-shopping" and "forum-duplication", i.e. choosing the agreement and the dispute settlement mechanism that promised to be the most beneficial to its interests, or launching two separate disputes under different agreements on the same matter.

2.1.3 The Uruguay Round and the Decision of 1989

- As the inherent limitations in the GATT dispute settlement system led to increasing problems in the 1980s, many contracting parties to the GATT 1947, both developing and developed countries, argued that the system needed improving and strengthening.

- Negotiations on dispute settlement were given high priority on the agenda of the Uruguay Round negotiations, and by 1989, Parties were ready to have "an early harvest" on certain issues agreed.

2.1.3 The Uruguay Round and the Decision of 1989

- Accordingly, “Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures” was approved:
  - The Decision was applied on a trial basis until the end of the Uruguay Round and contained many of the rules later embodied in the DSU, such as the right to panel establishment and strict time frames for panel proceedings.
  - There was **no** agreement on the important issue of a procedure for the adoption of panel reports. Nor was appellate review foreseen at that stage.
- More improvement and reforms were to be made during later negotiations.

2.2 Major Changes in the Uruguay Round

- As part of the results of the Uruguay Round, the DSU introduced a significantly strengthened dispute settlement system.
  - It provides detailed procedures for the various stages of a dispute, including specific time frames and numerous deadlines, so as to ensure prompt settlement of disputes.

- It is also an integrated framework that applies to all the WTO multilateral agreements with only minor variations. No fragmatation or “forum choosing” .

2.2 Major Changes in the Uruguay Round

- Two important innovations:
  - The first one is to eliminate the right of individual parties to block the establishment of panels or the adoption of a report. This “negative” or “reverse” consensus rule ensures that the WTO dispute settlement process **is quasi-automatic** in that all procedural stages take place automatically, unless the consensus of members reverses or otherwise alters this process.
  - The second one is the appellate review of panel reports, and the establishment of a standing Appelate Body.

Summary

- The basis and source of The WTO DSM is the DSM established by GATT1947.
- DSM under GATT also used to be historically advanced, starting from simple clauses, and continuously enriched through the development of practice. Its operation has also produced a more positive effect. However, it also has institutional defects. The most important thing is that the report can only beadopted by consensus, which makes it difficult for DSM to deal with some important and complex cases, which is not conducive to improving the effectiveness and authority of MTS.

Summary

- The Uruguay Round made important improvements in this regard. It was also in America's overall interest at the time.
- The relevant decisions and jurisprudence under the GATT also serve as guidance and reference for cases and procedures under the WTO DSM.

3
Participants in the WTO Dispute Settlement System

WTO – DSM Section 3

3 Participants in the Dispute Settlement System

- The operation of the WTO dispute settlement process involves a number of actors.
- The primary actors are WTO members themselves, as parties and third parties.
- In addition, a number of WTO bodies are involved in dispute settlement. Among these, one can distinguish between a political institution, the DSB, and independent, quasi-judicial bodies such as panels, the Appellate Body and arbitrators.

3 Participants in the Dispute Settlement System

- Sometimes, external participants such as independent experts or specialized institutions may also play a role in the proceedings.
- In addition, non-state actors such as nongovernmental organizations (NGOs) and industry associations are becoming increasingly present in WTO dispute settlement proceedings via amicus curiae submissions to panels and to the Appellate Body, although this is still a controversal issue accroding to viewpoints of different Members.

3 Participants in the Dispute Settlement System

- 3.1 Parties and Third Parties
- 3.2 WTO Bodies involved in the dispute settlement process
  - The Dispute Settlement Body (DSB)
  - The Director-General and the WTO Secretariat
  - Panels
  - Appellate Body
  - Arbitrators
  - Experts
  - Rules of Conduct

3.1 Parties and Third Parties

- 3.1.1 Parties
- 3.1.2 Third Parties
- 3.1.3 No Direct Access for Non-State Actors

3.1.1 Parties

- Only WTO members may
  - participate as parties or third parties in the WTO dispute settlement system.
  - initiate dispute settlement proceedings under the DSU. Members enjoy broad discretion in deciding whether to bring a dispute under the DSU.
- The WTO Secretariat, WTO observer countries, other international organizations, regional or local governments, NGOs, firms or individuals are not entitled to initiate WTO dispute settlement proceedings.
- WTO members may be represented before panels and the Appellate Body by external representatives.

3.1.1 Parties

- The DSU sometimes refers to the member bringing the dispute as the “complaining party” or the “complainant”.

- The DSU also speaks of “responding party” and the “member concerned” (with respect to matters of implementation). In practice, the terms “respondent” or “defendant” are commonly used.

3.1.2 Third Parties

- Other WTO members that have an interest in a dispute may take part in the proceedings as “third parties” (also referred to as “third participants” at the appellate stage).

- Third Parties enjoys a number of rights. At different stages of WTO DSM proceedings, these rights vary to some extent. Besides those rights clearly stipulated in the DSU, third parties may request for extension of third party rights as appropriate.

3.1.2 Third Parties - Consultation

- A WTO member that is neither the complainant nor the respondent may **be interested in** the issues that the parties to a dispute are discussing in their consultations.
- The DSU provides that WTO members may request to join the consultations if they have **a "substantial trade interest"** in the matter being discussed, and if consultations were requested pursuant to Article XXII:1 of the GATT 1994, Article XXII:1 of the GATS or the corresponding provisions of the other covered agreements (Article 4.11 of the DSU).

3.1.2 Third Parties - Consultation

- Article 4.11 of the DSU provides that the member wishing to join the consultations as a third party may notify the consulting members and the DSB within ten days of the date of circulation of the original request for consultations.

- In practice, a request to join consultations is addressed to the respondent with copies to the complainant and to the chairperson of the DSB.
  - This is so because the acceptance of the request relies on the respondent, which must agree that the interested WTO member does indeed have a substantial trade interest in the consultations.

3.1.2 Third Parties – Consultation

- The DSU does not provide a definition of substantial trade interest, nor can one be found in the jurisprudence.
- At the end of the day, if the respondent disagrees, there is no recourse through which the interested WTO member can impose its presence at the consultations, irrespective of the legitimacy of the invoked substantial trade interest.
- The interested WTO member can always initiate WTO dispute settlement proceedings and request consultations directly with the respondent.

3.1.2 Third Parties – Penal Proceeding

- To participate in the panel proceedings as third parties, these WTO members must have a “substantial interest” in the matter before the panel and they must notify their interest to the DSB (Article 10.2 of the DSU).
- This requirement differs from that of the consultations stage, **neither** disputing party has the right to prevent another WTO member from being a third party.
  - In practice, requiring just a “substantial interest”, which could be of a systemic nature, leaves the door open to any WTO member wanting to become a third party to panel proceedings, without the respondent being able to block it.
- Certain limits may exist relating to **the timing of the request** to reserve third-party rights in panel proceedings.

3.1.2 Third Parties – Appellate Stage

- Third parties to panel proceedings **cannot appeal a panel report** (Article 17.4 of the DSU).
- However, WTO members that have been third parties at the panel stage may participate in an appeal as "third participants" (Rule 24(1) of the Working Procedures), and thus, **may make written submissions** to the Appellate Body and be given an opportunity to **be heard** by the Appellate Body during an oral hearing.
- A WTO member that has not been a third party at the panel stage is excluded from participation in the appellate review.
  - Such WTO member cannot join appellate proceedings, even if it identifies an interest in the dispute, for instance, in light of the content of the panel report.

3.1.2 Third Parties – Appellate Stage

- A third party has the following options if it wants to become a third participant in an appellate review, it may (the Working Procedures):
  - (a) **file a third participant's submission** within twenty-one days of the filing of the notice of appeal, appear at the oral hearing, and make an oral statement, if it so wishes
  - (b) not file any submission, but **notify the Appellate Body Secretariat in writing** and within twenty-one days of the intention to appear at the oral hearing, and to make an oral statement, if desired; or
  - (c) not file any submission and not make any notification of its intention to appear at the oral hearing within twenty-one days of the filing of the notice of appeal, but **notify the Appellate Body Secretariat thereafter**, preferably in writing and at the earliest opportunity, of its intention to appear at the oral hearing and *request* to make an oral statement at the Appellate Body's discretion.

3.1.3 No Direct Access for Non-State Actors

- Only WTO member governments may initiate disputes or participate directly in a dispute.
- Private individuals or companies do not have direct access to the dispute settlement system. They may not initiate WTO dispute settlement proceedings or participate directly in such disputes, even if they may often be those most directly and adversely affected (as exporters or importers) by the measures allegedly violating the covered agreements.
- The same is true of NGOs with a general interest or special expertise in a matter before the dispute settlement system.

3.1.3 No Direct Access for Non-State Actors

- Companies, associations, or NGOs can, and often do, exert influence or even pressure on the government of a WTO member to initiate a dispute or defend an impugned measure.
- Several WTO members have formally adopted internal legislation under which private parties may formally petition their governments to bring a dispute to the WTO.
- They may also engage in dispute settlement proceedings by filing *amicus curiae* submissions with WTO adjudication bodies.
- Panels and the Appellate Body have the discretion to accept or reject *amicus curiae* submissions, and are not obliged to consider them.

3.1.3 No Direct Access for Non-State Actors

- Other inter-governmental organizations (IGOs, like WIPO, ISO, Codex etc.) also may not bring disputes to the WTO dispute settlement system.
- They may, however, provide assistance and expert evidence in certain disputes.
- In this respect, a number of provisions within the covered agreements refer explicitly or implicitly to norms and standards from other IGOs.

3.2 WTO Bodies involved in the dispute settlement process

- 3.2.1 The Dispute Settlement Body (DSB)
- 3.2.2 The Director-General and the WTO Secretariat
- 3.2.3 Panels
- 3.2.4 Appellate Body
- 3.2.5 Arbitrators
- 3.2.6 Experts
- 3.2.7 Rules of Conduct

3.2.1 The Dispute Settlement Body (DSB)

- Composition and Functions
  - The General Council discharges its responsibilities under the DSU through the DSB.
  - The DSB is responsible for administering the DSU, i.e. for overseeing the entire WTO dispute settlement process.
  - It has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize the suspension of obligations under the covered agreements (Article 2.1 of the DSU).
  - In practice, the DSB usually has one regular meeting per month. When a member so requests, the Director-General convenes additional special meetings. The staff of the WTO Secretariat provides administrative support for the DSB.

3.2.1 The Dispute Settlement Body (DSB)

- Decision-making in the DSB
  - The general rule is for the DSB to take decisions by consensus. Consensus is achieved if no WTO member, present at the meeting when the decision is taken, formally objects to the proposed decision. Where a WTO member intends to block a decision, it must be present at the meeting and must raise its flag and voice opposition when the relevant decision is to be taken.
  - However, when the DSB establishes panels, adopts panel and Appellate Body reports, and authorizes countermeasures, the decision is approved unless there is a consensus against it. This special decision-making procedure is commonly referred to as “negative” or “reverse” consensus.

3.2.1 The Dispute Settlement Body (DSB)

- Decision-making in the DSB
  - As a matter of fact, a negative or reverse consensus is largely a theoretical possibility and, to date, has never occurred in the WTO. For this reason, we can speak of the quasi-automaticity of these decisions in the DSB. This contrasts sharply with the situation that prevailed under the GATT 1947, when panels could be established, their reports adopted and countermeasures authorized only on the basis of a positive consensus.
  - For a matter to be adopted by the DSB, it must be placed on the agenda of the DSB meeting.

3.2.1 The Dispute Settlement Body (DSB)

- Decision-making in the DSB
  - An important organizational issue is the requirement for members to file items to be included on the agenda of an upcoming meeting no later than on the working day before the day on which the notice of the meeting is to be issued, which is at least ten calendar days before the meeting.
    - In practice, this means that items for the agenda must be identified on the eleventh day before the DSB meeting, or on the twelfth or thirteenth day if the eleventh day falls on a Saturday or Sunday.

3.2.2 The Director-General and the WTO Secretariat

- The Director-General has some, but limited, roles under the DSM.
  - may, acting in an *ex officio* capacity, offer his/her good offices, conciliation or mediation with a view to assisting members to settle a dispute;
  - convenes the meetings of the DSB;
  - appoints panel members upon the request of either party;
  - appoints the arbitrator(s) for the determination of the reasonable period of time for implementation;
  - appoints arbitrators for the review of the proposed countermeasures in the event of non-implementation.

3.2.2 The Director-General and the WTO Secretariat

- Limited roles of Director-General under the DSM: may, acting in an *ex officio* capacity

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5. appoints arbitrators for the review of the proposed countermeasures in the event of non-impleme

3.2.2 The Director-General and the WTO Secretariat

- The WTO Secretariat is responsible for the administrative aspects of the dispute settlement procedures, as well as for assisting panels on the legal and procedural aspects of the dispute.

- Some examples:
  - maintains a WTO Dispute Settlement Registry (Digital Dispute Settlement Registry);
  - assists parties in composing panels by proposing nominations of potential panelists;
  - assists panels once they are composed, and provides administrative support to the DSB.

3.2.3 Panels

- Panels review the **factual and legal aspects** of the dispute and submits a report to the DSB expressing its conclusions on whether an WTO inconsistency is found. And if so, it makes recommendations for implementation by the respondent.
- Panels are **quasi-judicial** bodies that adjudicate disputes between WTO members in the first instance.
- Panels are normally composed of three, and exceptionally five, experts selected on an *ad hoc* basis.

3.2.3 Panels

- The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn. It is not necessary, however, to be on the list to be proposed as a potential panelist in a specific dispute.
- There is no institutional continuity of personnel between the different *ad hoc* panels.
- Panelist serves independently and in an individual capacity once appointed.

3.2.4 Appellate Body

- The Appellate Body is a permanent body of seven members entrusted with the task of reviewing the legal aspects of the reports issued by panels.
- It is the **second and final** stage in adjudication under the dispute settlement system.
- One important reason for the creation of the Appellate Body is the quasi-automatic nature of the adoption of reports since the inception of the DSU. The review carried out by the Appellate Body provides a possibility for the correction of legal errors committed by panels. In this manner, the Appellate Body also provides consistency and coherence across panel decisions, in line with the central goal of the dispute settlement system, i.e. to provide security and predictability to the multilateral trading system.

3.2.4 Appellate Body

- The DSB decides by consensus to appoint an individual to a four-year term to the Appellate Body and can re-appoint that individual once for a second four-year term.
- Appellate Body members must be persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, and they must not be affiliated with any government.
- Being an Appellate Body member is theoretically only a part-time occupation.
- Appellate Body members must be available at all times and on short notice.

3.2.4 Appellate Body

- The seven Appellate Body members must be broadly representative of the membership of the WTO。
- The seven Appellate Body members elect one of their membership to serve as the chairperson of the Appellate Body for a term of one or two years. The chairperson is responsible for the overall direction of the Appellate Body, particularly its internal functioning.
- The Appellate Body Secretariat provides legal assistance and administrative support to the Appellate Body. It is legally separate from the WTO Secretariat and has a separate budget, although it reports on purely administrative matters to the Director-General.

3.2.5 Arbitrators

- arbitrators, either as individuals or as groups, can be called upon to adjudicate certain matters at various stages of the dispute settlement process.
- There are several forms of arbitration foreseen in the DSU:
  - the determination of the “reasonable period of time” (Article 21.3(c)).
  - the level or the nature of the countermeasures proposed by the complainant (Article 22.6).
  - an alternative to dispute resolution by panels and Appellate Body (Article 25)
- The WTO Secretariat also assists arbitrators.

3.2.6 Experts

- Disputes often involve complex factual questions of a technical or scientific nature.
- The DSU gives panels the right to seek information and technical advice from experts.
- Panels may seek information from any relevant source, but before seeking information from any individual or body within the jurisdiction of a member, they must inform that member.
- Some WTO agreements explicitly authorize or require panels to seek the opinions of experts.

3.2.7 Rules of Conduct

- According to the DSU, the actors taking part in dispute settlement proceedings are subject to certain rules designed to ensure due process and unbiased decisions.
- They must carry out their tasks in an impartial and independent manner.
- For instance, panel and Appellate Body members are prohibited from having any *ex parte* communications concerning matters under their consideration.

3.2.7 Rules of Conduct

- The DSB has adopted *Rules of Conduct* for the DSU, which aim to guarantee the integrity, impartiality and confidentiality of the dispute settlement system. These Rules of Conduct are applicable to panelists, experts and arbitrators, Appellate Body members and staff members of the WTO Secretariat and the Appellate Body Secretariat.

- A violation of the Rules of Conduct gives the parties to the dispute a right to challenge the participation of that person in the dispute settlement proceeding concerned and to request the exclusion of that person from any further participation in the process.

4
The Scope of WTO Disputes

WTO – DSM Section 4

4. The Scope of WTO Disputes

- 4.1 Legal basis for a dispute
- 4.2 When Can a Dispute be Initiated?
- 4.3 What Can be Challenged?

4.1 Legal basis for a dispute

- 4.1.1 Legal provisions in the multilateral trade agreements and the DSU
- 4.1.2 Types of complaints and required allegations in GATT 1994
- 4.1.3 Types of dispute in the other multilateral agreements on trade in goods
- 4.1.4 Types of dispute in the GATS, and TRIPS
- 4.1.5 Disputes on the WTO Agreement and the DSU

4.1.1 Legal provisions in the multilateral trade agreements and the DSU

- DSU — Reference to the “covered agreements”
  - Article 1.1 of the DSU stipulates that its rules and procedures apply to “disputes brought pursuant to the consultation and dispute settlement provisions of the ... ‘covered agreements’”.
  - The basis or cause of action for a WTO dispute must, therefore, be found in the “covered agreements” listed in Appendix 1 to the DSU, namely, in the provisions on “consultation and dispute settlement” contained in those WTO Agreements. In other words, it is not the DSU, but rather the WTO Agreements that contain the substantive rights and obligations of WTO Members, which determine the possible grounds for a dispute.

4.1.1 Legal provisions in the multilateral trade agreements and the DSU

- DSU — Reference to the “covered agreements”
  - this means that members cannot bring to the WTO dispute settlement system disputes concerning the rights and obligations encompassed in legal provisions outside these “covered agreements”.
  - The covered agreements include all the multilateral agreements on trade in goods, the GATS and the TRIPS Agreement. The DSU itself and the WTO Agreement (in the sense of Articles I to XVI of the Marrakesh Agreement) are also listed as covered agreements.
  - In most disputes brought to the WTO dispute settlement system, the complainant will invoke provisions of more than one covered agreement.

4.1.1 Legal provisions in the multilateral trade agreements and the DSU

- These provisions on “consultation and dispute settlement” can be found in almost all WTO agreements.
- Many of these provisions simply refer to Articles XXII and XXIII of GATT 1994, or have been drafted using Articles XXII and XXIII as a model. Article XXIII deserves being considered first and given special attention. Obviously, a dispute can be, and often is, brought under more than one covered agreement. In such a case, the question of the proper legal basis has to be assessed separately for the claims made under different agreements.

4.1.2 Types of complaints and required allegations in GATT 1994

- Generally speaking, the WTO dispute settlement system provides for three kinds of complaints: (a) “violation complaints”, (b) “non-violation complaints” and (c) “situation complaints”.
- It is possible for one case to simultaneously involve both these types of complaints, for instance when raised in the alternative (“if the Panel finds that there is no violation, the complainant submits that it would have to find that there is non-violation nullification or impairment”).
- Violation complaints are by far the most frequent. Only a few cases have been brought on the basis of an allegation of non-violation nullification or impairment of trade benefits. No “situation complaint” has ever resulted in a panel or Appellate Body report based on Article XXIII:1(c) of GATT 1994.

4.1.2 Types of complaints and required allegations in GATT 1994

- Why? Because of how Article XXIII of GATT 1994 was drafted.
- Article XXIII:1 of GATT 1994 states: “Nullification or Impairment”
  - If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:
    - the failure of another contracting party to carry out its obligations under this Agreement, or
    - the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
    - the existence of any other situation,

4.1.2 Types of complaints and required allegations in GATT 1994

- Article XXIII:1 of GATT 1994 states :“Nullification or Impairment”

> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

4.1.2 Types of complaints and required allegations in GATT 1994

- The first, and by far, the most common complaint is the so-called “violation complaint” pursuant to Article XXIII:1(a) of GATT 1994. This complaint requires **“nullification or impairment of a benefit”** as a result of the “the failure of another [Member] to carry out its obligations” under GATT 1994.

- This “failure to carry out obligations” is just a different way of referring to a legal inconsistency with, or violation of, the GATT 1994. There also needs to be “nullification or impairment” as a result of the alleged legal inconsistency.

4.1.2 Types of complaints and required allegations in GATT 1994

- The second type of complaint is the so-called “non-violation complaint” pursuant to Article XXIII:1(b) of GATT 1994. A non-violation complaint may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in “nullification or impairment of a benefit”. There have been a few such complaints both under GATT 1947 and in the WTO.
- The third type of complaint is the so-called “situation complaint” pursuant to Article XXIII:1(c) of GATT 1994. Literally understood, it could cover any situation whatsoever, as long as it results in “nullification or impairment”. However, although a few such situation complaints have been raised under the old GATT, none of them has ever resulted in a panel report. In the WTO, Article XXIII:1(c) of GATT 1994 has not so far been invoked by any complainant.

4.1.2 Types of complaints and required allegations in GATT 1994

- Given the admissibility of “non-violation” and “situation complaints”, the scope of the WTO dispute settlement system is broader than that of other international dispute settlement systems which are confined to adjudicating only violations of agreements.
- Simultaneously, the WTO dispute settlement system is narrower than those other systems, in the sense that a violation must also result in nullification or impairment (or possibly the impeded attainment of an objective).
- This particularity of the system for settlement of international trade disputes reflects the intention to maintain the negotiated balance of concessions and benefits between the WTO Members. It was GATT practice and it is now WTO law that a violation of a WTO provision triggers a rebuttal presumption of nullification or impairment of trade benefits.

4.1.2 Types of complaints and required allegations in GATT 1994

- Violation complaint
  - A violation complaint will succeed when the respondent fails to carry out its obligations under GATT 1994 or the other covered agreements, and this results directly or indirectly in nullification or impairment of a benefit accruing to the complainant under these agreements. If it can be established before a Panel and the Appellate Body that these two conditions are satisfied, the complainant will “win” the dispute.
  - In practice, the first of these two conditions, the violation, plays a much more important role than the second condition, nullification or impairment of a benefit. This is due to the fact that nullification or impairment is “presumed” to exist whenever a violation has been established.

4.1.2 Types of complaints and required allegations in GATT 1994

- Violation complaint
  - The effect of the legal presumption is that of a reversal of the burden of proof. The concept of a legal presumption and the language in the last sentence of Article 3.8 of the DSU imply that the presumption set out by Article 3.8 of the DSU can be rebutted. However, there has been no single case of a successful rebuttal in the history of GATT and the WTO to date.
  - In the practice of the WTO dispute settlement system, panels typically cite Article 3.8 of the DSU (other than disputes brought under the GATS) once they have concluded that the defendant has violated a rule of a covered agreement. Unless the defendant (exceptionally) makes an attempt to rebut the presumption, panels dedicate no more than a brief paragraph at the end of their reports to the issue of nullification or impairment.

4.1.3 Types of dispute in the other multilateral agreements on trade in goods

- Most of the multilateral agreements on trade in goods (which are contained in Annex 1A of the WTO Agreement) other than GATT 1994 include an express reference to Articles XXII and XXIII of GATT or paraphrase the criteria contained therein. In those cases, the requirements and options for a complaint are the same as discussed above.
- But one agreement has a special requirement. The SCM Agreement, in Article 4,specifically provides otherwise in relation to the prohibited subsidies as defined in Article 3 (export subsidies and import substitution subsidies), it is not necessary to put forward any claim of nullification or impairment of a benefit. Only a breach of obligation is enough to establish violation.

4.1.4 Types of dispute in the GATS, and TRIPS

- **GATS：**
- The dispute settlement provisions of the GATS (Agreement on Service) are contained in Articles XXII and XXIII of that Agreement. The GATS only provides for two types of complaints, the violation complaint and the non-violation complaint. There is no situation complaint.

4.1.4 Types of dispute in the GATS, and TRIPS

- **TRIPS：**
- In Article 64.1, the TRIPS Agreement (Agreement on IPR) contains a reference to Articles XXII and XXIII of GATT 1994.
- Article 64.2 of the TRIPS Agreement excluded non-violation and situation complaints for the first five years from the entry into force of the WTO Agreement.
- Article 64.3 mandated the Council for TRIPS to examine the scope and modalities for non-violation and situation complaints during the five-year moratorium and to submit recommendations to the Ministerial Conference for approval by consensus.
- But the TRIPS Council has not so far submitted recommendations to the Ministerial Conference, nor has the Ministerial Conference approved any recommendations in that regard. Despite this controversy, no non-violation and situation complaints were brought by Members under the TRIPS Agreement.

4.1.5 Disputes on the WTO Agreement and the DSU

- Articles I to XVI of the WTO Agreement the WTO Agreement and the DSU do not contain specific provisions concerning consultations and dispute settlement to deal with matters arising under Articles I to XVI of the WTO Agreement itself or the DSU itself.

- However, these two Agreements do fall within the category of “covered agreements”, as they are listed in Appendix 1 to the DSU. The second sentence of Article 1.1 of the DSU also provides specifically that the dispute settlement system applies to disputes under the WTO Agreement (in the sense of Articles I to XVI) and the DSU..

4.2 When Can a Dispute be Initiated?

- WTO members have broad discretion in deciding whether to bring a case against another member under the DSU.
- There also is no time limitation of action about when a Member should initiate a dispute once a measure is taken by another Member.
- But Article 3.7 of the DSU entrusts WTO members with the responsibility of exercising their own judgment in deciding whether it would be fruitful to bring a case. This reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU.

4.3 What Can be Challenged?

- The DSU refers to the impairment of benefits under the covered agreements “by measures taken by another Member” (Article 3.3 of the DSU), and the proper identification of the challenged measures is a key aspect of the procedures.
- The DSU does not define the notion of “measure”.
- These questions have been clarified through the jurisprudence: any act or omission attributable to a WTO member can be considered a measure by that member for purposes of dispute settlement proceedings.
- Measures usually include laws, regulations, administrative instructions and policies, and their application in specific instances.

4.3.1 Measures Attributable to a WTO Member

- Where the WTO-consistency of a measure is challenged, the measure in question must be attributable to a WTO member in order to be susceptible to a challenge under the DSU.
- Measures taken by regional or local subdivisions of a Member?
  - This does not mean that only central government measures are subject to the WTO dispute settlement system. Subjects of international law, typically States, are responsible for the activities of all branches of government within their system of governance, and also for all regional levels or other subdivisions of government.
  - A measure may thus be attributable to a WTO member even if it does not consist of an action or omission of the central government, but rather of local authorities or even private entities acting pursuant to instructions issued by government authorities.

4.3.2 Acts or Omissions

- Only governmental measures of Members?
  - As a general rule, only government measures can be the object of (WTO) complaints.
  - However, there can be instances in which certain private behavior has strong ties to some governmental action. Whether this permits the attribution of the private behavior to the Member in question, and therefore is actionable under the WTO, will obviously depend on the particularities of each case.

4.3.2 Acts or Omissions

- A challengeable measure for the purposes of WTO dispute settlement is defined as any act or omission attributable to a WTO member. This means that not only actions but also omissions, or the failure to take prescribed action, may be challenged.
- If a complaint is based on a provision that prohibits certain actions, , a positive action by a WTO member could constitute a violation of such a provision.
- In principle, inaction (i.e. the failure to adopt a law, regulation or decision) would not breach the obligation arising from that provision. The situation would be different under provisions of the WTO Agreement that do not prohibit certain behavior, but rather require positive action.

4.3.2 Acts or Omissions

- Written measures-a “written” document –can also be challenged in WTO dispute settlement.
- Unwritten measures – that is, acts or omissions attributable to a member that are not expressed in the form of a “written” document –can also be challenged in WTO dispute settlement.
  - A complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a member, and its precise content. Although there is some uncertainty as to whether the “practice” of a member may be challenged as a measure, concerted action or practice may be susceptible to challenge in WTO dispute settlement.

4.3.3 Challenges to Measures “As Such” and “As Applied”

- In litigation jargon, challenging the law “as such” means challenging a law independently of its application, and challenging the law “as applied” means challenging a law as it has been applied in a specific instance .
- WTO complaints are often directed against specific administrative measures taken by authorities of a WTO member pursuant to domestic laws.
- However, the underlying law itself may also violate a WTO legal obligation or otherwise nullify or impair benefits under the covered agreements.
- Accordingly, members frequently invoke the dispute settlement system against a law as such, independently of, or without waiting for, the application of that law.

4.3.3 Challenges to Measures “As Such” and “As Applied”

- It should be pointed out that the distinction between the two forms of challenges neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures that are susceptible to challenge. Rather, the distinction may serve as an analytical tool for understanding the nature of the measure at issue in a dispute.

4.3.3 Challenges to Measures “As Such” and “As Applied”

- Traditionally, only legislation that mandated a violation of obligations under the GATT 1947 could be found to be inconsistent with those obligations. This was because of the presumption that in implementing discretionary legislation, administrative bodies would, in good faith, act in accordance with their obligations. But this cannot be sued “in a mechanistic fashion”.
- In practice, the Appellate Body has found non-mandatory measures to be WTO inconsistent.

4.3.3 Challenges to Measures “As Such” and “As Applied”

- In a nutshell, Challenges of measures “as such” may refer not only to the challenge of legally binding instruments, but also to challenges of measures of a WTO member that are not mandatory in the domestic legal system.
- This objective would be frustrated if instruments setting out rules or norms inconsistent with a member’s obligations could not be brought before a panel without reference to a particular instance of application of such rules or norms.
- Allowing challenges against measures “as such” serves the purpose of preventing future disputes by eliminating the root of the WTO-inconsistent behavior.

5
Stages 1: Consultations

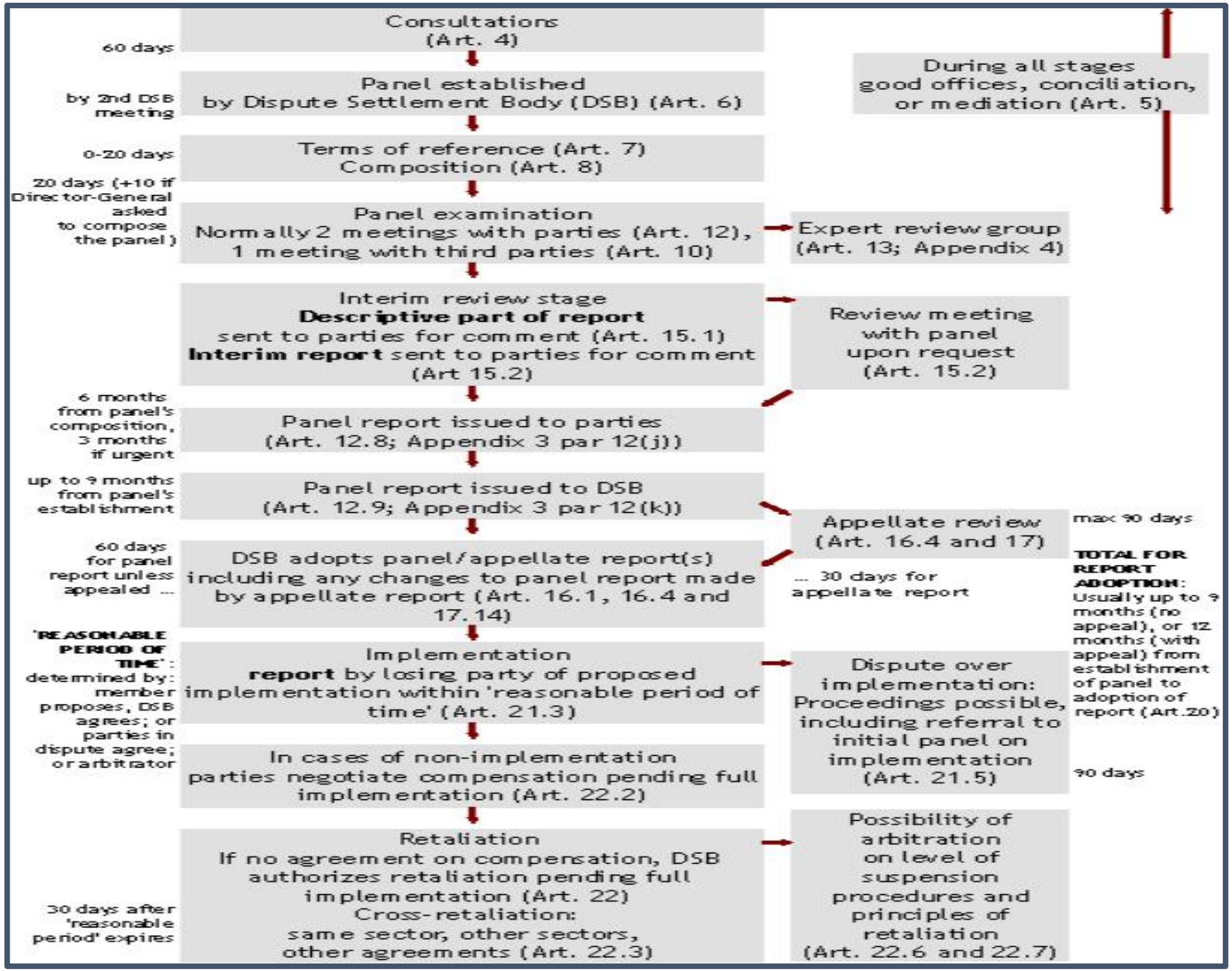
WTO – DSM Section 5

Stages 1: Consultations

- In principle, there are two main ways to settle a dispute once a complaint has been filed in the WTO:
  - either the parties find a mutually agreed solution, particularly during the phase of bilateral consultations;
  - or adjudication takes place, followed by the subsequent implementation of the panel and Appellate Body reports, which are binding upon the parties once adopted by the DSB.

Stages 1: Consultations

- According to the DSU, there are three main stages in the WTO dispute settlement process:
  - (i) consultations between the parties;
  - (ii) adjudication by panels and, if applicable, by the Appellate Body; and
  - (iii) the implementation of the recommendations and rulings, which includes the possibility of countermeasures in the event of failure by the respondent to implement the recommendations and rulings.


Consultations (Art. 4)
60 days
Panel established by Dispute Settlement Body (DSB) (Art. 6)
by 2nd DSB meeting
Terms of reference (Art. 7)
Composition (Art. 8)
0-20 days
20 days (+10 if Director-General asked to compose the panel)
Panel examination
Normally 2 meetings with parties (Art. 12), 1 meeting with third parties (Art. 10)
Expert review group (Art. 13; Appendix 4)
During all stages good offices, conciliation, or mediation (Art. 5)
Interim review stage
Descriptive part of report sent to parties for comment (Art. 15.1)
Interim report sent to parties for comment (Art 15.2)
Review meeting with panel upon request (Art. 15.2)
6 months from panel's composition, 3 months if urgent
Panel report issued to parties (Art. 12.8; Appendix 3 par 12(j))
up to 9 months from panel's establishment
Panel report issued to DSB (Art. 12.9; Appendix 3 par 12(k))
Appellate review (Art. 16.4 and 17)
max 90 days
60 days for panel report unless appealed ...
DSB adopts panel/appellate report(s) including any changes to panel report made by appellate report (Art. 16.1, 16.4 and 17.14)
... 30 days for appellate report
TOTAL FOR REPORT ADOPTION: Usually up to 9 months (no appeal), or 12 months (with appeal) from establishment of panel to adoption of report (Art.20)
'REASONABLE PERIOD OF TIME': determined by: member proposes, DSB agrees; or parties in dispute agree; or arbitrator
Implementation report by losing party of proposed implementation within 'reasonable period of time' (Art. 21.3)
Dispute over implementation: Proceedings possible, including referral to initial panel on implementation (Art. 21.5)
90 days
In cases of non-implementation parties negotiate compensation pending full implementation (Art. 22.2)
Retaliation
If no agreement on compensation, DSB authorizes retaliation pending full implementation (Art. 22)
Cross-retaliation: same sector, other sectors, other agreements (Art. 22.3)
Possibility of arbitration on level of suspension procedures and principles of retaliation (Art. 22.6 and 22.7)
30 days after 'reasonable period' expires

5 Stages 1: Consultation

- 5.1 The Purpose of WTO Consultations.
- 5.2 Legal Basis and Requirements for a Request for Consultations
- 5.3. Procedure for Consultations
- 5.4 Third Parties in Consultations

5.1 The Purpose of WTO Consultations

- The first step in a formal dispute under the DSU is bilateral consultations between the parties (Article 4 of the DSU).
- Due to the complexities surrounding trade disputes, the preferred outcome under the DSU is for the disputing members to settle the dispute between themselves in a manner consistent with the covered agreements (Article 3.7 of the DSU).
- In this sense, WTO consultations provide the parties with an opportunity to continue to discuss the matter and to find a satisfactory solution within the framework of a formalized process (Article 4.5 of the DSU).

5.1 The Purpose of WTO Consultations

- Consultations can be requested for by giving a formal notice to the respondent of the general outline of the dispute.
- Indeed, some 40 per cent of cases never go past the consultations stage. [Consultations permit parties to assess more formally the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, thus, reach a mutually agreed solution...]
- In any event, a request for consultations is a legal rerequisite for panel proceedings.

5.1 The Purpose of WTO Consultations

- If the respondent does not respond to a request for consultations, or declines to enter into consultations, the complainant may dispense with consultations and proceed to request the establishment of a panel.

- Even when initial consultations have failed to resolve the dispute, it always remains possible for the parties to find a mutually agreed solution at a later stage of the proceedings.

5.2 Legal Basis and Requirements for a Request for Consultations

- As a matter of law, the request for consultations shall meet certain procedural and substantial requirements.
  - The request for consultations is addressed directly to the respondent and notified to the DSB and relevant councils and committees overseeing the agreement(s) in question.
  - The request for consultations informs the entire WTO membership and the public at large of the initiation of a WTO dispute and its subject matter. Consult_x0002_ations are governed by the provisions of Article 4 of the DSU and the covered agreement(s) at issue. This means that a complainant has to make the request pursuant to one or more of the covered agreements (Articles 4.3 and 1.1 of the DSU), specifically under the provision on consultations contained in the covered agreement(s) in question.

5.2 Legal Basis and Requirements for a Request for Consultations

- A request for consultations must be submitted in writing and must give the reasons for the request. This includes identifying the measures at issue and indicating the legal basis for the complaint (Article 4.4 of the DSU).
- Provisions referred to in the request for consultations need not be identical to those that will be set out in the panel request later if the case proceeds to the adjudication phase, provided that the complainant does not “expand the scope” or “change the ‘essence’” of the dispute in its panel request as compared to its consultations request.

5.3. Procedure for Consultations

- The DSU thus imposes on the respondent the obligation to accord sympathetic consideration to, and afford adequate opportunity for, consultations (Article 4.2 of the DSU).
- Consultations are confidential to the participating WTO members (Article 4.6 of the DSU).
- The WTO Secretariat is not involved.
- There is no formal transmission of the content of the consultations to a panel subsequently assigned to the matter. Panels may not, accordingly, use as a basis for their determination what the parties may allege to have taken place during consultations.

5.3. Procedure for Consultations

- Unless otherwise agreed, the respondent must reply to the request for consultations within 10 days, and must enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request for consultations.

- If the respondent fails to meet either of these deadlines, the complainant may immediately proceed to the adjudicative stage and request the establishment of a panel.

5.3. Procedure for Consultations

- Where the respondent engages in consultations, the complainant can proceed to request the establishment of a panel at the earliest 60 days after the date of receipt of the request for consultations by the respondent, if no satisfactory solution has emerged from the consultations.
- Disputing Members may jointly decide a date of consultations (out of 30 days) .In practice, parties to a dispute often allow themselves significantly more time than the minimum of sixty days.

5.4 Third Parties in Consultations

- A WTO member that is neither the complainant nor the respondent may be interested in the issues that the parties to a dispute are discussing in their consultations.
- The DSU provides that WTO members may request to join the consultations if they have a “substantial trade interest” in the matter being discussed, and if consultations were requested pursuant to Article XXII:1 of the GATT 1994, Article XXII:1 of the GATS or the corresponding provisions of the other covered agreements. [*Not all consultations are open for possible third party participation. Article XXIII:1 of the GATT 1994 does not grant a WTO member the right to join consultations as a third party.*]

5.4 Third Parties in Consultations

- At consultation stage, third party request and participation thereafter are not automatic.
- According to the DSU, the acceptance of the request relies on the respondent, which must agree that the interested WTO member does indeed have a substantial trade interest in the consultations.
- According to the DSU, if the request to join the consultation as a third party is denied, the requesting Member has no other meaningful remedy, except for filing a dispute itself.

6
Stages 2: Panel proceeding

WTO – DSM Section 6

6. Stages 2: Panel proceeding

- 6.1 Introduction
- 6.2 Establishment of a Panel
- 6.3 Multiple Complainants
- 6.4 The Panel's Terms of Reference
- 6.5 Third Parties before the Panel
- 6.6 Limited Rights Granted by the DSU
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- 6.10 Function of Panels
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- 6.12 Burden of Proof, Standard of Proof, Rules of Evidence
- 6.13 The Panel's Right to Seek Information
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6.1 Introduction

- If consultations fail to settle the dispute, the complainant may request the establishment of a panel to adjudicate the dispute.
- The panel review stage offers the complainant the possibility to uphold its rights or protect its benefits under the covered agreements. This procedure is equally important for the respondent as an opportunity to defend itself because t may disagree with the complainant on the facts and/or the correct interpretation of the rights and obligations under the covered agreements.
- The adjudicative stage of dispute settlement is intended to resolve a legal dispute and both parties must accept any rulings as binding.

6.2 Establishment of a Panel

- The Panel Request
  - The complainant initiates the phase of adjudication by addressing a panel request in writing to the chairperson of the DSB.
  - Article 6.2 of the DSU serves a pivotal function in WTO dispute settlement and sets out two key requirements that a complainant must satisfy in its panel request:
    - (i) the identification of the specific measures at issue, and
    - (ii) the provision of a brief summary of the legal basis of the complaint (or the claims) sufficient to present the problem clearly. Together, these two elements comprise the "matter referred to the DSB".

6.2.1 The Panel Request

- A complainant must identify the specific measures at issue. A complainant may do so, for example, by referring to the name, number, date and/or place of promulgation of a particular law or regulation or by providing a description of the nature of the contested measure. It is also rather common that complainants refer, in their panel requests, to measures that amend, are related to, or implement listed measures.
- A panel request must also include a brief summary of the legal basis of the complaint, and this must be sufficient to present the problem clearly. Identification of the specific treaty provisions claimed to have been violated by the respondent is a minimum prerequisite in each case.

6.2.1 The Panel Request

- Accordingly, if either of the requirements above is not satisfied, then the matter will not fall within the panel's terms of reference.
- If there is disagreement on the eligibilty of a panel request, it will be decided by the panel.
- Requests for preliminary rulings by panels on whether certain measures or claims are within the panel's terms of reference have become a common feature of panel work.
- Determining whether a panel request is "sufficiently precise" so as to conform to Article 6.2 of the DSU requires a panel to scrutinize carefully the language used in the panel request. Such a determination must be done on a case-by-case basis.

6.2.1 The Panel Request

- If, for example, some claims or measures are not identified with sufficient clarity, the case may be rejected by the panel (or the Appellate Body) acting on its own motion or as a result of an objection by the respondent.
- Therefore, a complainant should therefore be particularly vigilant in preparing its panel request, especially when numerous measures are challenged under several different provisions of the covered agreements.

6.2.2 Establishment of a Panel

- Panel cannot be established automatically.
- Only the DSB has the right to establish a panel.
- Establishing a panel is one of the functions of the DSB and is one of the three situations where a DSB decision does not require a consensus in order to be taken.
- The DSU has a very interesting arrangement in terms of the decision-making process of panel establishment.

6.2.2 Establishment of a Panel

- In the first DSB meeting at which a panel request is made, the respondent can block the panel's establishment, as was the case in the dispute settlement system under GATT 1947. It needs a "positive" consensus to establish a panel.
- At the second DSB meeting where the request is placed on the agenda, however, the panel will be established, unless the DSB decides by consensus not to establish the panel, i.e. the "negative" or "reverse" consensus rule is applicable (Article 6.1 of the DSU). The DSB decision to establish a panel is often described as virtually automatic because of this.

6.3 Multiple Complainants

- Given that government measures to regulate trade often affect more than one WTO Member, several WTO Members may wish to initiate a dispute against a particular Member at the same time or in close proximity.
- members have used various approaches under the dispute settlement rules to protect their commercial interests.
- The most passive approach is "wait and see" whether other Member will file a lawsuit.
- A more active approach has been to participate as a third party in a dispute between two other members involving a measure of interest.
- The most active approach available is to be a complainant

6.3 Multiple Complainants

- Article 9 of the DSU envisages two scenarios where more than one member requests the establishment of a panel with respect to the same matter:
  - (i) whenever feasible, a single panel may be established to examine multiple complaints (Article 9.1 of the DSU); and
  - (ii) in the event that separate panels are established to examine complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized (Article 9.3 of the DSU).
- The solutions provided in Article 9 of the DSU serve to promote a consistent and unified approach towards different complaints. It can also save resources for all participants and the WTO Secretariate.

6.3 Multiple Complainants

- 6.3.1 single panel
  - For most disputes to date in which a single panel was established, although the complainants made separate panel requests on different dates, the single panel was established on the same day. Co-complaints could coordinate in this regard.

6.3 Multiple Complainants

- 6.3.2 Separate Panels with Harmonized Proceedings
  - where separate panels are established to examine complaints related to the same matter, panels have generally been composed of the same members and have mostly harmonized their timetables.
  - However, if that's not possible due to various reasons (such as the unavailability of a panelist), the separate panels could generally not harmonize their timetables.
- 6.3.3 A third, novel, scenario has also arisen: disputes with related subject matter where separate panels with the same members were established.

6.4 The Panel's Terms of Reference

- According to Article 7 of the DSU, panels have "standard" terms of reference, unless the parties to the dispute agree otherwise. To date, special terms of reference were agreed upon in only one case.
- Nowadays, the standard terms of reference that appear in the document announcing the composition of a panel in a given case (therefore, under the WT/DS series) read as follows:
  - *To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the [complainant] in document WT/DS... [the panel request] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.*

6.4 The Panel's Terms of Reference

- The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. Only the specific measures and claims identified in the panel request may become the object of panel review.
- In addition to being identified in the panel request, and as a general rule, the measures included in a panel's terms of reference are those in existence at the time of the establishment of the panel.
- However, expired or future measures could also be examnied by the Panel if they fall within the terms of reference.

6.4 The Panel's Terms of Reference

- Expired measures at the time of panel established?
  - nothing prevents a panel from examining a measure identified in the panel request even if the measure has expired, as long as the effects of the measure are alleged to have been impairing the benefits accruing to the complainant under a covered agreement at the time when the panel was established.
  - In GATT/WTO practice, panels have refrained from considering measures that have expired, or that have been abandoned or revoked, prior to the establishment of the panel. But in exceptional circumstances, panels have ruled on expired measures,, taking into account various parameters.
  - Additionally, panels may examine a measure that replaces or amends a measure included in the panel request, as long as the replacement or amendment does not change the "essence" of the measure identified in the panel request.

6.4 The Panel's Terms of Reference

- Future measures at the time of panel established?
  - there are times when challenges concern domestic legislation that has already been adopted, but has not yet entered into force. In other words, the law has been adopted in its final form, but with the stipulation that it will be effective only as of a future date.
  - Several panels have addressed this and have found that the challenge was not premature because the entry into force was automatic at a future date and did not depend on further legislative action.

6.5 Third Parties before the Panel

6.5.1 How to be a third party?

- To participate in the panel proceedings, these WTO members must have a “substantial interest” in the matter before the panel and they must notify their interest to the DSB (Article 10.2 of the DSU).
- This requirement differs from that of the consultations stage, where members wanting to join as third parties in the consultations are required to have a “substantial trade interest” and, in practice, must be accepted by the respondent.
- Unlike at the consultations stage, neither disputing party has the right to prevent another WTO member from being a third party. In practice, requiring just a “substantial interest”, which could be of a systemic nature, leaves the door open to any WTO member wanting to become a third party to panel proceedings, without the respondent being able to block it.

6.5 Third Parties before the Panel

6.5.1 How to be a third party?

- However, Article 10 of the DSU–and the DSU as a whole–is silent on the deadline for a WTO member to request to join panel proceedings as a third party. (A negotiation omission....)

- To prevent such an outcome, on 21 June 1994, the GATT Council agreed on a Chairman's Statement inviting members (then contracting parties to the GATT 1947) to notify their third-party interest on the day a panel is established, and if that is not possible, within 10 days from the date of the establishment of the panel.

6.5 Third Parties before the Panel

6.5.1 How to be a third party?

- The legal status of the Chairman's Statement and thus of the ten-day deadline is still undecided by WTO members.
- This notification is made to the DSB chairperson when the panel has not yet been composed. Upon its composition, the notification is addressed to the panel via the DS Registry.
- In practice, WTO members generally comply with this deadline. In some early panel proceedings, the DSB chairperson rejected third-party requests that were made after those ten days.
- In later panel proceedings, the decision fell on the panels and they have shown more flexibility. Some have, after consultation with the parties, leaned towards accepting those requests.

6.5 Third Parties before the Panel

6.5.2 What rights does a third party have?

(1) Limited Rights Granted by the DSU

- the DSU explicitly grants three “legal” rights to third parties in panel proceedings.
  - the “opportunity to be heard by the panel”
  - the “opportunity ... to make written submissions to the panel”
  - “shall receive the submissions of the parties to the dispute to the first meeting of the panel”

6.5 Third Parties before the Panel

6.5.2 what rights does a third party have?

(1)Enhanced Third-party Rights

- Upon request from one or more of the third parties and after having consulted the parties to a dispute, panels can exercise their discretion and decide whether to grant enhanced rights to third parties.
- There is no standard list of enhanced rights granted to third parties.
- WTO jurisprudence to date suggests that panels have been cautious in granting enhanced rights to third parties.
- Once a panel decides to grant enhanced third-party rights, such rights are normally provided to all third parties, not just the requesting third party.

6.6 Panel Composition

- There are no permanent panels or panelists in the WTO.
- panels must be composed ad hoc for each dispute.
- Each panel is composed of three members unless the parties to the dispute agree.
- The Secretariat proposes nominations for the panel to the parties to the dispute.
  - For that purpose, the WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons from which panelists may be drawn.
  - But it is not necessary to be on the indicative list in order to be proposed as a potential panel member in a specific dispute.

6.6 Panel Composition

- A citizen of a party or a third party to a dispute cannot serve as a panelist without the agreement of the parties (Article 8.3 of the DSU).
- When a dispute is between a developing country member and a developed country member, the panel must, upon request by the developing country member, include at least one panelist from a developing country member.
- Traditionally, many panelists are trade delegates of WTO members or capital-based trade officials, but former Secretariat officials, government officials and academics may also serve as panelists.
- All panelists serve on a part-time basis, in addition to their usual professional activities.

6.6 Panel Composition

- When the WTO Secretariat proposes qualified individuals as panelists, the DSU provides that the parties must not oppose these nominations except for compelling reasons (Article 8.6 of the DSU).
- In practice, however, parties make quite frequent use of this clause.
- In such cases, there is no review of the reasons given.
- Rather, the WTO Secretariat seeks to propose other names.
- Such a recommendation/opposition process may take several rounds.
- What if disputing parties can not reach agreement on potential panelist?

6.6 Panel Composition

- If there is no agreement between the parties on the composition of the panel on that basis within twenty days after the date of its establishment by the DSB, either party may request the Director-General of the WTO to determine the composition of the panel.
- This procedure is important because it prevents a respondent from blocking the entire panel proceedings by delaying (possibly forever) the composition of the panel, which is what sometimes happens in other systems of international dispute resolution.
- The selected panelists must fulfil their task in full independence and not as representatives of a government or other organization for which they may happen to work.

6.7 The Panel Review Process

6.7.1 Panel Working Procedures and Timetable for Panel Proceedings

- One of the first tasks for the panel is to draw up its working procedures, and a timetable for its work.
- Once established and composed, the panel can start its work with the assistance of a team of lawyers and, depending on the subject matter of the case, economists or other staff from theWTO Secretariat.
- The annexes to the DSU provide examples of working procedures and a timetable.
- But the panel can follow different procedures after consulting the parties. Indeed, the evolution of panel proceedings has resulted in new aspects being addressed in the working procedures.

6.7 The Panel Review Process

6.7.1 Panel Working Procedures and Timetable for Panel Proceedings

- Once the panel has agreed on draft working procedures and a timetable, these are sent to the parties in advance of the organizational meeting of the panel124 with the parties, where their views will be heard.
- The DSU requires the panel to consult with the parties on these matters but the parties' views are not binding on the panel. After consultation with the parties, the panel will adopt its timetable and working procedures, which may still change over time depending on the circumstances of the case.
- As a general rule, a panel is required to issue the final report to the parties within six months from the date when it was composed (and, as the case may be,the date when the terms of reference were agreed upon), but in practice panel processes last eleven months on average.

6.7 The Panel Review Process

6.7.2 Sample of Timetable For Panel Proceedings

Title of Dispute (WT/DSXXX)
Timetable for the Panel Proceedings[1]

Adopted on ...
Panel established on . . .
Panel composed on . . .

Event	Date	Time
a. Organizational meeting:		
b. Receipt of first written submissions		
i. Complaining party(ies)		17:00
ii. Party complained against		17:00
c. Receipt of third parties' written submissions		17:00
d. [Panel may send advance questions to the parties and third parties]		
e. First substantive meeting with the parties		
f. Third-party session		
g. Receipt of executive summaries of third parties' arguments		17:00
h. Receipt of responses to questions posed by the Panel		17:00

6.7 The Panel Review Process

i.	Receipt of first integrated executive summaries of the parties	17:00
j.	Receipt of written rebuttals of the parties	17:00
k.	[Panel may send advance questions to the parties and third parties]	
l.	Second substantive meeting with the parties	
m.	Receipt of responses to questions posed by the Panel	17:00
n.	Receipt of comments on responses to questions posed by the Panel	17:00
o.	Receipt of second executive summaries of the parties	17:00
p.	Issuance of descriptive part of the report to the parties	

6.7 The Panel Review Process

(*cont.*)

Event	Date	Time
q. Receipt of comments by the parties on the descriptive part of the report		17:00
r. Issuance of the interim report, including findings and conclusions to the parties		
s. Deadline for parties to request review of part(s) of the report and to request interim review meeting		
t. Interim review meeting, if requested – If no meeting requested, deadline for comments on requests for review		
u. Issuance of final report to the parties		
v. Circulation of the final report to the Members		

6.7 The Panel Review Process

6.7.3 Deliberation of the Panel

- The panel examines the validity of the complainant(s)' claim(s) that the respondent has acted inconsistently with its WTO obligations or otherwise nullified or impaired the complainant(s)' benefits accruing under the agreements.
- The panel's deliberations are confidential, and its report is drafted in the absence of the parties.
- Panels make every effort to reach a consensual view on the matter before them, and most reports therefore reflect the common view reached by the panel as a result of its deliberations. Individual panelists have the right to express a separate opinion in the panel report but they must do so anonymously. In practice, there have been very few instances where this has occurred.

6.8 Function of Panels

6.8.1 The Panel's Standard of Review-Objective Assessment of the Matter (Article 11 of the DSU)

- Article 11 of the DSU requires that a panel undertake an objective assessment of the matter before it; this includes an objective assessment of the facts of the case and the applicability of, and conformity with, the relevant covered agreements.
- Article 11 of the DSU also requires panels to make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

6.8 Function of Panels

6.8.1 The Panel's Standard of Review-Objective Assessment of the Matter (Article 11 of the DSU)

① With respect to "an objective assessment of the matter "

- In the past few years, parties' claims on appeal that a panel has acted inconsistently with its duties or obligations under Article 11 of the DSU have substantially increased.
- Parties often claim (at the Appellate stage) that a panel failed to conduct an objective assessment of the matter before it.
- Only those errors that are so material that, "taken together or singly", undermine the objectivity of the panel's assessment of the matter before it would be inconsistent with Article 11.

6.8 Function of Panels

6.8.1 The Panel’s Standard of Review-Objective Assessment of the Matter (Article 11 of the DSU)

- Claims under Article 11 concern mostly the assessment of facts.
- With respect to the objective assessment of the facts of the case, "the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of facts".

② With respect to make“ findings” and “recommendations”

- Issues such as the panel’s use or misuse of judicial economy or the mischaracterization of claims have been examined by the Appellate Body under this aspect of the panel’s functions.

6.8 Function of Panels

6.8.2 The Special Standard of Review in Article 17.6 of the Anti-Dumping Agreement

- The Anti-Dumping Agreement, sets out a special standard of review for panels in Article 17.6 thereof.
  - Article 17.6 imposes two separate but cumulative requirements: a panel must assess (i) whether the investigating authorities have properly established the facts and evaluated those facts in an unbiased and objective manner (Article 17.6(i)), and (ii) whether the determination rests upon a permissible interpretation of the relevant provisions (Article 17.6(ii)).
- This provision is intended to provide a greater margin of deference to the member's anti-dumping determination than could be derived from Article 11 of the DSU.
- The application of this standard in practice is controversial and subject to many debates.

6.8 Function of Panels

6.8.3 Judicial Economy

- sometimes, complainants make multiple, overlapping claims of violation in respect of the same measure.
- In certain circumstances, a panel may decline to make findings on a particular claim if it considers that such findings would not assist in the ultimate resolution of the dispute.
- Where a panel refrains from making a finding on a particular claim in the light of prior findings of inconsistency with respect to the same measure, it exercises “judicial economy”.

6.8 Function of Panels

6.8.3 Judicial Economy

- Judicial economy is not stipulated in the DSU, but evolve in the practice.
- Panels, as adjudication body, have the discretion to decline to rule on certain claims; but they must do so explicitly;
- Judicial economy refers to a panel's treatment of claims, not arguments.A panel has the discretion to address "only those arguments it deems necessary to resolve a particular claim".
- This discretion must be exercised consistently with the objective of the dispute settlement system: to resolve the matter at issue and "to secure a positive solution to a dispute" (Article 3.7 of the DSU)
- The Appellate Body has cautioned against false judicial economy, as it would provide only a partial resolution of the matter at issue.

6.8 Function of Panels

6.8.4 order of analysis

- “order of analysis” is connected with “judicial economy”.
- One of the issues that panels have had to address is the “order of analysis”: the sequencing of the panel’s analysis to resolve multiple claims of violation related to the same measure.
- The order of analysis may well have an impact on a panel’s exercise of judicial economy in respect of certain claims and, in this way, a respondent’s implementation options.
- Panels have discretion in deciding the order of their analysis as they see fit, provided that their analysis is consistent with the “structure and logic” of the provisions at issue in each dispute.

6.8 Function of Panels

6.8.4 order of analysis

- But panels shall also take account of the manner in which a claim is presented to them by the complainant(s) and to consider if a particular order is compelled by principles of valid interpretative methodology, which, if not followed, may constitute an error of law.
- where two or more provisions from different covered agreements appear a priori to apply to the measure in question, the provision from the agreement that “deals specifically, and in detail” with the measures at issue should be analyzed first.

6.9 Burden of Proof

- The concept of the burden of proof refers to a fundamental question in any judicial or quasi-judicial system: **Which party must prove a certain assertion, claim or defense to the satisfaction of the adjudicator and win it?**
- The DSU does not set out any rules regarding burden and standard of proof or evidence in panel proceedings. In order to deal with disputes, panels and the Appellate Body have relied on general principles of law and the practice of international and domestic tribunals to develop the evidentiary rules under the WTO DSM.

6.9 Burden of Proof

- As a general matter, the burden of proof rests upon the party, whether complaining or defending, that asserts a fact or the affirmative of a particular claim or defense.
- This means that the party claiming a violation of a provision of a covered agreement (i.e. the complainant) must assert and prove its claim. In turn, the party invoking in defense a provision that is an exception to the allegedly violated obligation (i.e. the respondent) bears the burden to prove that the conditions set out in the exception are met.

6.10 Standard of Proof

- The concept of standard of proof refers to a different but related question: what threshold of proof must be satisfied in order for the adjudicator to rule that certain facts or claims have been proven?
- Can a claim be sustained or upheld by simply putting forward it?
- How much and what type of evidence and argument does a party bearing the burden of proof need for the adjudicator to rule that certain facts or claims have been proven?

6.10 Standard of Proof

"prima facie"

- The party bearing the burden of proof must put forward evidence sufficient to make a *prima facie* case (a presumption) that what is claimed is true.
- A *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favor of the complainant presenting the prima facie case".
- Precisely how much and what kind of evidence will be required to establish a presumption that what is claimed is true (i.e. what is required to establish a prima facie case) varies from measure to measure, provision to provision, and case to case.

6.11 Rules of Evidence

What kind of evidence could be submitted? When and How?..

- Each party must submit evidence **in support of its factual assertions**.
- **All kinds of evidence are possible** and the DSU does not put any limitation in this regard. Though in practice Panel proceedings usually involve almost exclusively documentary evidence.
- There is no “discovery” procedure in which parties are legally required to disclose requested information to one another. A party must produce the information requested by the panel; otherwise, the panel may draw “adverse inferences” in case of refusal.

6.11 Rules of Evidence

- With respect to the admissibility of evidence, in principle, all evidence is admissible, and it is for the panel to determine its weight.
- With respect to the time and format of the submission of evidence, the panel working procedures usually provide that evidence must be submitted to the panel, in the form of exhibits, by the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal; and in responses to questions, or comments on answers, provided by the other party.
- Panels may also adopt special working procedures to protect confidential information such as so-called “business confidential information” (BCI), “strictly confidential information” (SCI) and other types of confidential information submitted by the parties.

6.12 The Panel's Right to Seek Information

- Article 13 of the DSU authorizes panels to seek information and advice from experts and other relevant sources to help them to understand and evaluate the evidence submitted and the arguments made by the parties.
- This right is broad and comprehensive and its exercise is left to the discretion of the panel.
- However, a panel must not make the case for a complainant and therefore, notwithstanding its fact-finding authority, a panel cannot use this authority to relieve the complainant of making a prima facie case of inconsistency.

6.12 The Panel's Right to Seek Information

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- However, a panel must not make the case for a complainant and therefore, notwithstanding its fact-finding authority, a panel cannot use this authority to relieve the complainant of making a prima facie case of inconsistency.

6.12 The Panel's Right to Seek Information

- Article 13.1 of the DSU provides that a member "should respond promptly and fully" to any request for information. Accordingly, all WTO members, including the parties to the dispute, are under a legal obligation to surrender the requested information.
- An important aspect of the utilization of Article 13 is the panel's right to resort to experts.
- This provision has also been found to provide the legal basis for panels to accept and consider unsolicited amicus curiae submissions, which is a controversial practice.

6.13 The Panel Report

- Article 12.7 of the DSU provides that the panel report sets out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that the panel makes.
- The DSU also directs the panel to issue its report to the parties in consecutive parts:
  - a descriptive part,
  - an interim report, and
  - the all inclusive final report.

6.13 The Panel Report

6.13.1 The descriptive part

- The descriptive part comprises an introduction, the factual aspects of the dispute as the panel understands them (i.e. the draft factual findings), the parties' requests for findings by the panel, and the summary of the factual and legal arguments of the parties and third parties.

6.13.2 The interim report

- The interim report, which is issued as a confidential document, includes the descriptive part, the substantive findings of the panel, s; the conclusions and recommendations; and, as the case may be, suggestions for implementation. The interim report is thus a complete report, although it is not yet final.

6.13 The Panel Report

- Disputing parties may also request a meeting of the panel to further argue specific points raised with respect to the interim report. This is the so-called interim review stage.
- The interim review is designed to provide parties with an opportunity to request the panel “to review precise aspects of the interim report”(Article 15.2 of the DSU), so as to improve the report quality, avoid mistakes, improve MAS, etc..
- It is therefore not intended as an opportunity to re-open arguments already put before a panel – or, indeed, to make new arguments.
- If no comments are received on the interim report, it will become the final report of the panel.

6.13 The Panel Report

6.13.3 Findings and Recommendations

- The DSU requires panels to set out the basic rationale behind any findings and recommendations that they make.
- Panel findings are usually very detailed and specific. They typically include findings of facts relevant to the resolution of the dispute, interpretation of legal provisions at issue, the application of the law to the facts and, finally, findings on whether the respondent has acted inconsistently with the covered agreements invoked by the complainant.

6.13 The Panel Report

6.13.3 Findings and Recommendations

- Where the panel concludes (in a violation complaint) that the challenged measure is inconsistent with a covered agreement, the panel report also contains a recommendation that the respondent bring the challenged measure into conformity with that agreement (Article 19.1 of the DSU, first sentence), unless the measure has since been removed.
- This is a standard and routine language.
- The DSU also confers on panels and the Appellate Body the discretion to suggest ways in which their recommendations and rulings could be implemented, but such suggestions are not binding on the respondent.
- In practice, panels rarely make implementation suggestions.

6.13 The Panel Report

6.13.3 Findings and Recommendations

- Two exceptions:
  - If a non-violation complaint succeeds, there will be no obligation for the respondent to withdraw the measure. In such cases, the panel recommends that the respondent make an adjustment that is mutually satisfactory to the parties.
  - A special rule also exists in respect of prohibited subsidies under the SCM Agreement: if the panel concludes that the challenged subsidy is prohibited, it must "recommend that the subsidizing Member withdraw the subsidy without delay" and must specify the time period for this withdrawal.

6.14 Issuance and Circulation of the Final Report

- (Issuance) Once the interim review stage has concluded, the panel will finalize its report for issuance to the parties only.
- (Circulation)The report will only be circulated to the members once it is available in the three official languages of the WTO, i.e. English, French and Spanish.
- At that point (Circulation), it also becomes a public document, and the whole public has access to it.

7
Stages 3: Appellate Review

WTO – DSM Section 7

Stages 3: Appellate Review

- One of the most noteworthy features of the DSU is the possibility for members to appeal a panel report before the Appellate Body.
- WTO DSM is the only one among many international judicial and quasi-judicial adjudication systems that has a two-tier process.
- It’s a big test and a pioneer for governmental and international dispute resolutions.

Stages 3: Appellate Review

- 6.1 Applicable Rules and Appellate Review Procedures
- 6.2 Scope of Appellate Review
- 6.3 Right to Appeal
- 6.4 Third Participants at the Appellate Stage
- 6.5 Composition of Appellate Body Division
- 6.6 Procedures for Appellate Review
- 6.7 Mandate of the Appellate Body
- 6.8 The Appellate Body Report
- 6.9 Withdrawal of an Appeal
- 6.10Deadline for Completion of the Appellate Review

7.1. Applicable Rules and Appellate Review Procedures

- Article 17 is the main provision in the DSU dealing with the structure, function and procedures of the Appellate Body.
- The Working Procedures for Appellate Review, a separate document, contain the detailed procedural rules governing appeals.
- Several general rules in the DSU are applicable both to the panel and the appellate review processes.
- where a procedural question arises that is not covered by the Working Procedures, Rule 16(1) of the Working Procedures for Appellate Review bestows upon an Appellate Body division that is hearing an appeal, the authority to adopt an “appropriate procedure” in the “interests of fairness and orderly procedure” .

7.2 Scope of Appellate Review

- Appeals are limited to legal questions.
- Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review “issues of law covered in the panel report and legal interpretations developed by the panel”.
- Article 17.13 further provides that the Appellate Body may “uphold, modify or reverse the legal findings and conclusions of the panel”.
- Pursuant to Article 17.6 of the DSU, the . In an appeal, an Appellate Body division cannot address the facts upon which a panel report is based, for example, by requesting the examination of new factual evidence or by re-examining existing evidence.

7.2 Scope of Appellate Review

- Evaluating the evidence and establishing the facts is, in principle, the task of panels as the “triers of fact” in the dispute settlement system.
- The Appellate Body itself has stated that it has no authority to consider new facts on appeal.
- New arguments based on the facts on the record are not *per se* excluded from the scope of appellate review, provided that they relate to an issue of law covered in the panel report or to legal interpretations developed by the panel.

7.2 Scope of Appellate Review

- The distinction between legal and factual questions is important in defining the scope of appellate review.
- A fact is the occurrence of a certain event in time and space.
- A legal question may involve the interpretation of a term in a WTO legal provision.
- Sometimes, it seems easy to distinguish between law and facts.
- However, many of the more complex questions that regularly arise in disputes are mixed questions of law and fact, or, in other words, questions that can be answered only on the basis of both a legal and a factual assessment. “[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue. It is a legal question.”

7.2 Scope of Appellate Review

For instance:

- The characterization of domestic legislation, which often becomes the subject of dispute settlement, adds an interesting nuance to the distinction between questions of law and questions of fact.
- As part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue to make an objective assessment of the matter before it.
- Although factual aspects may be involved in the individuation of the text and of some associated circumstances (such as language, date of enactment, publication, enforcement, issuing authority, etc.), an assessment of the meaning of the text of a municipal law for purposes of determining whether the law complies with a provision of the covered agreements is a legal characterization and is therefore subject to appellate review under Article 17.6 of the DSU.

7.2 Scope of Appellate Review

- All of these assessments vary according to the circumstances of each case, including the national legal system in which the municipal law operates.

Another instance:

- The Appellate Body may also review a panel's compliance with the requirement under Article 11 of the DSU to make an objective assessment of the facts of a case, the applicability of the relevant covered agreements, and the conformity of the measures at issue with those agreements.
- This also involves a case-by-case analysis, but whether a panel's assessment of the facts was objective, and whether a panel has properly applied its standard of review is a fundamental legal issue.

7.3 Right to Appeal

- Only the parties to the dispute, i.e. the complainant(s) and the respondent (but not third parties) can appeal a panel report.

- Once one party to the dispute has filed an appeal, acting as an "appellant" (Rule 20 of the Working Procedures), a party to the dispute other than the appellant is also entitled to appeal aspects of the panel report, either on the same grounds as the appellant or on the basis of other alleged errors, thereby expanding the scope of appellate review.

7.3 Right to Appeal

- This form of appeal is called an “other appeal”, or, informally, a “cross-appeal”, and the party that files this appeal is called an “other appellant” (Rule 23(1) of the Working Procedures).

- If both of the parties to a dispute challenge the panel report on appeal, each of them is, at the same time, an appellant (as the party making a claim of error on the part of the panel) and an appellee (as the party responding to an alleged claim or error on the part of the panel).

7.3 Right to Appeal

- Usually, parties appeal when **they disagree with the findings and legal interpretations made by the panel** that do not upheld their claims or positions.
- But sometimes, parties have also appealed isolated panel findings with which they disagreed (for instance, a legal interpretation developed by the panel), even though these findings were part of the reasoning which ultimately upheld their position.

7.4 Third Participants at the Appellate Stage

- Third parties to panel proceedings cannot appeal a panel report.
- Third parties at the panel stage and at the appellate stage have a kind of continuity.
- WTO members that have been third parties at the panel stage may (have the rights, but may choose not to) participate in an appeal as “third participants” (Rule 24(1) of the Working Procedures), and thus, may make written submissions to the Appellate Body and be given an opportunity to be heard by the Appellate Body during an oral hearing.
- A WTO member that has not been a third party at the panel stage is excluded from participation in the appellate review. Such WTO member cannot join appellate proceedings, even if it identifies an interest in the dispute, for instance, in light of the content of the panel report.

7.4 Third Participants at the Appellate Stage

- But a WTO member that had not been a third party at the panel stage of the dispute chose to submit its views to the Appellate Body in the form of an amicus curiae brief.
- The Appellate Body stated that the fact that the WTO member, as a sovereign State, chose not to exercise its right to participate in the dispute as a third party at the panel stage does not undermine the legal authority of the Appellate Body under the DSU and the Working Procedures for Appellate Review to accept and consider the amicus curiae brief submitted by the WTO member.

7.4 Third Participants at the Appellate Stage

- A third party now has the following options if it wants to become a third participant in an appellate review, with varying degrees of involvement. It may:
  - file a third participant's submission, appear at the oral hearing, and make an oral statement, if it so wishes;
  - not file any submission, but notify the Appellate Body Secretariat in writing to appear at the oral hearing, and to make an oral statement, if desired ; or
  - not file any submission and not make any notification of its intention to appear at the oral hearing, but notify the Appellate Body Secretariat thereafter, preferably in writing and at the earliest opportunity, of its intention to appear at the oral hearing and request to make an oral statement at the Appellate Body's discretion.

7.5. Composition of Appellate Body Division

- An appeal is not heard by all seven members of the AB.
- According to the DSU, three of the seven Appellate Body members serve on each appeal and that the seven members serve in rotation.
- This group of three Appellate Body members is called as a “division”.
- They are selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Appellate Body members to serve on a division regardless of their nationality.

7.5. Composition of Appellate Body Division

- Noteworthy, the selection process differs from the process that occurs at the panel stage, and there is no recusal requirement.
- At panel stage, persons holding the citizenship of a party or third party cannot serve as panelists, except with the agreement of the parties.
- An Appellate Body member who is a citizen of a WTO member acting as a participant or third participant in an appeal may not be excluded from serving on the Appellate Body division hearing that appeal.

7.5. Composition of Appellate Body Division

- The three Appellate Body members comprising the division for a particular appeal shall, in turn, elect one member of the division to act as its presiding member.
- The presiding member coordinates the overall conduct of the appellate proceedings, chairs the oral hearing and meetings related to that appeal, and coordinates the drafting of the Appellate Body report.
- The AB operates in a collegial system. This means that although only the three members comprising the particular division for an appeal will take the final decision, the division must first exchange views on the appeal with all other non-division Appellate Body members before rendering their decision.

7.6 Procedures for Appellate Review

- 7.6.1 Notice of Appeal
- 7.6.2 Notice of Other Appeal
- 7.6.3 Written Submissions
- 7.6.4 Oral Hearing
- 7.6.5 Deliberations of the Appellate Body

7.6.1 Notice of Appeal

- The appeal process begins when “a party to the dispute formally notifies the DSB of its decision to appeal”.
- When to file a notice of appeal?
  - Article 16.4 of the DSU does not specify a precise deadline for the filing of an appeal. However, the appellant must notify the DSB of its decision before the adoption of the panel report.
  - Since the appeal must be filed before adoption actually occurs, the effective deadline for filing an appeal is variable and could be as short as twenty days, but it can also be longer, for instance, sixty days.

7.6.1 Notice of Appeal

- If the party that emerged from the panel proceedings as the “winner” wants to shorten the deadline for the other party to file an appeal, it can do so by placing the panel report on the agenda for a DSB meeting to occur on the twentieth day after the panel report has been circulated.

- In recent times, given the increase in the workload of the Appellate Body, parties have sometimes jointly requested the DSB to extend the period of time within which they may file an appeal in order to gain flexibility in the scheduling of appeals.

7.6.1 Notice of Appeal

- The content of the notice of appeal
  - A notice of appeal include a brief statement of the nature of the appeal, including the allegations of error in the issues of law covered in the panel report and legal interpretations developed by the panel.
  - In addition, the notice of appeal must include the list of the provisions of the covered agreements that the panel is alleged to have erred in interpreting or applying, as well as an indicative list of the paragraphs in the panel report that contain the alleged errors.
  - It is possible to amend a notice of appeal or a notice of other appeal provided that the Appellate Body authorizes it.

7.6.1 Notice of Appeal

- The transmission of panel stage documents
  - Upon the filing of the notice of appeal, the Dispute Settlement Registrar will transmit the panel record to the Appellate Body Secretariat, including the written submissions of the parties to the panel, their oral statements, their written responses to questions and comments thereon, exhibits introduced as evidence, the interim report and the interim review comments.
  - The DS Registry also provides access to the digital recordings of the substantive meetings.
  - However, the internal exchanges between the panel and the WTO Secretariat are not transmitted to the Appellate Body Secretariat and thus remain confidential within the DS Registry.

7.6.1 Notice of Appeal

- The allegations of error to be included in the notice of appeal must relate to the aspects of the panel report that the appellant wishes the Appellate Body to reverse.
- The allegations of error can thus include some, or all, of the panel's fifindings and conclusions, including its supporting reasoning that the measure at issue violates, or does not violate, the relevant covered agreement.
- The allegations of error can also concern an isolated legal interpretation that forms part of the panel's reasoning in support of a conclusion.
- In addition, the appellant may challenge the panel's adherence to the "objective assessment" standard in Article 11 of the DSU.
- A failure to comply with these requirements may result in the exclusion of a given claim from the scope of appellate review.

7.6.2 Notice of Other Appeal

- It is often the case that another party (or parties) chooses to cross-appeal.
- According the AB working procedures, this notice of other appeal shall be filed within 5 days after the date of the filing of the notice of appeal (the first one).
- This second notice of appeal, referred to as a “notice of other appeal”, must indicate either a statement of the issues raised on appeal by another participant with which the party joins; or a brief statement of the nature of the other appeal which satisfies the same requirements as a notice of appeal.

7.6.3 Written Submissions

- Written Submissions are the main legal documents that appellants and appellees use to advance their claims and argument in detail.
- On the same day as it files the notice of appeal, the appellant must also file its written submission, which must include:
  - (i) a precise statement of the grounds of appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof;
  - (ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and,
  - (iii) the nature of the decision or ruling sought.

7.6.3 Written Submissions

- The “other appellant” files a written submission within five days of the filing of the notice of appeal.
- Within eighteen days from the filing of the notice of appeal, any party to the dispute that wishes to respond to allegations raised in an appellant’s submission can file the appellee’s submission, which must set out:
  - (i) a precise statement of the grounds for opposing the specific allegations of errors, raised in the appellant’s submission, in the issues of law covered in the panel report and legal interpretations developed by the panel, as well as the legal arguments supporting those allegations of errors;
  - (ii) the acceptance of, or opposition to, each of the grounds set out in the appellant’s submission;
  - (iii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and
  - (iv) the nature of the decision or ruling sought.

7.6.3 Written Submissions

- Parties wishing to respond to the allegations raised by the “other appellant” may also file a written submission within eighteen days of the filing of the notice of appeal.
- Any third participants wishing to file a written submission setting forth their position and legal arguments must do so within twenty-one days of the filing of the notice of appeal.
- Submission format and time: official versions of documents in paper form are to be submitted to the Appellate Body Secretariat by 5 p.m. Geneva time on the day that the document is due. an electronic copy of each such document should also be submitted to the Appellate Body by the same deadline. Documents received outside the deadline fixed by the Appellate Body may be rejected.

7.6.3 Written Submissions

- Documents received outside the deadline fixed by the Appellate Body may be rejected.
- Though official versions of documents shall be submitted in paper form to the Appellate Body Secretariat by 17:00 Geneva time on the day that the document is due, the Appellate Body has not yet rejected submissions filed on that day but after the 17:00 deadline.
- Nonetheless, the Appellate Body has rejected executive summaries from third participants filed one or two days after the deadline.
- The Appellate Body requests participants in appellate proceedings to submit executive summaries of their written submissions by the same deadline as the written submissions themselves, and they were to be annexed to the Appellate Body report.

7.6.4 Oral Hearing

- Approximately thirty to forty-five days after the filing of the notice of appeal, the Appellate Body division assigned to the appeal holds an oral hearing. The hearings are usually only open to the participants and third participants. In recent years, though, as with some substantive meetings in panel proceedings, the Appellate Body has authorized the oral hearing to be open for public observation at the joint request of the participants.

- The Appellate Body division poses questions to the participants and third participants.

7.6.4 Oral Hearing

- There is usually one oral hearing at the appellate review stage.
- At the appellate review stage, oral statements are kept short; the participants in an oral hearing cannot ask each other questions.
- participants must respond at the hearing to the questions posed by the division;
- Third participants attend the entire hearing with the appellant and appellee;
- The hearings are transcribed.

7.6.4 Oral Hearing

- Oral hearing is the most challenging part at the appellate stage. No further chance to provide documents and answers.
- This is in contrast to the panel level, where the parties may refrain from answering a question posed by the panel during the substantive meeting – typically a factual question – on the ground that they need to consult their colleagues in capital. Parties may send their responses in writing within the deadline fixed by the panel.

7.6.5 Deliberations of the Appellate Body

- After the oral hearing, the division exchanges views on the issues raised in the appeal with the four other Appellate Body members who are not serving on the division.
- This exchange of views is intended to give effect to the principle of collegiality and serves to ensure consistency and coherence in the jurisprudence of the Appellate Body.
- Nevertheless, only the assigned division may ultimately decide on the appeal.
- Following the exchange of views with the other Appellate Body members, the division concludes its deliberations and the Appellate Body report is drafted.

7.6.5 Deliberations of the Appellate Body

- All deliberations of the Appellate Body are confidential, and the drafting of the report takes place without the presence of the participants and third participants.
- There is no interim review at the appellate review stage.
- A division of Appellate Body members deliberating on an appeal must make every effort to take their decisions by consensus. Where this is not possible, the majority decides.
- A division member may include a separate opinion in the Appellate Body report, but he/she must do so anonymously. There have been few instances where members of a division have expressed separate or concurrent opinions, views or statements

7.7 Mandate of the Appellate Body

- The DSU prescribes that the Appellate Body must address each of the legal issues and panel interpretations that have been appealed (Article 17.12 of the DSU). It may uphold, modify or reverse the legal findings and conclusions of the panel (Article 17.13 of the DSU).
- In most cases, the Appellate Body partly modifies the panel's legal findings, i.e. it agrees with the panel's final conclusion but not necessarily with the panel's legal reasoning.
- In certain cases, the Appellate Body also completes the analysis in the panel's findings with a view to securing a positive solution to the dispute.

7.7 Mandate of the Appellate Body

- The Appellate Body has on a number of occasions "completed the legal analysis" to resolve a dispute, where it determined that it had a sufficient factual basis to do so, on the basis of undisputed facts on the record or relevant factual findings made by the panel.
- The Appellate Body has also indicated that it may complete the analysis if a legal provision that a panel has not examined is closely related to a legal provision that the panel has examined, and if the Appellate Body believes that the two provisions are part of a logical continuum, provided that the participants' due process rights are not compromised.

7.7 Mandate of the Appellate Body

- Where this has not been the case, the Appellate Body has declined to complete the analysis.
- For instances, the Appellate Body has declined to complete the legal analysis of a panel in circumstances where that would involve addressing claims that the panel had not examined at all, or due to the absence of sufficient factual findings, or other reasons, such as "the complexity of the issues, the absence of full exploration of the issues before the panel, and, consequently, considerations for parties' due process rights".

7.8 The Appellate Body Report

- Appellate Body reports include a description of the arguments of the participants and third participants,
- an overview of the measures at issue, a findings section where the Appellate Body addresses in detail the issues raised on appeal, elaborates its conclusions and reasoning in support of such conclusions, and states whether the appealed panel findings and conclusions are upheld, modified or reversed.
- Where the Appellate Body concludes that the challenged measure is inconsistent with a covered agreement, it recommends that the respondent bring the inconsistent measure into conformity with its obligations under the covered agreement in question

7.8 The Appellate Body Report

- After the report is finalized and signed, and translated into other official languages, the WTO before circulation to members.

- The participants receive the Appellate Body report on the same day that it is circulated to all WTO members in all three official languages. In practice, however, the participants receive the Appellate Body report a few hours before it is made public.

7.9 Withdrawal of an Appeal

- Rule 30(1) of the Working Procedures for Appellate Review allows an appellant to withdraw its appeal at any time during the appeal. The possibility of withdrawing an appeal reflects the DSU's preference for the parties to find a mutually agreed solution to their dispute.
- The withdrawal of an appeal may terminate the appellate review proceedings. On occasions where the withdrawal of an appeal had the effect of terminating the appeal, the Appellate Body issued a brief report setting out the procedural history of the appeal and concluding that it had therefore completed its work in view of the withdrawal.
- On a number of occasions, appellants have withdrawn their appeals in order to re-file an appeal shortly thereafter.

7.10 Deadline for the Appellate Review

- The filing of a notice of appeal and the circulation of an Appellate Body report shall, as a general rule, not exceed sixty days.
- In no case shall the proceedings exceed 90 days.
- Since the establishment of the WTO, the Appellate Body has circulated its reports close to ninety days after the notice of appeal was filed, the average being ninety-eight days.
- But in the Boeing and Airbus cases: the completion of appellate review took exceptionally long due to the complexity of the cases.

7.10 Deadline for the Appellate Review

Some reasons may cause the extension of deadline:

- the overlap in composition of the divisions hearing the appeals, scheduling issues arising from these circumstances, the number and complexity of the issues raised in the concurrent appellate proceedings, the shortage of staff in the Appellate Body Secretariat, the demands placed on translation services, and the limited availability of Spanish-speaking staff for those appeals utilizing documents in Spanish.

8
Stages 4: Adoption of the Reports

WTO – DSM Section 8

8 Stages 4: Adoption of the Reports

- 8.1 Adoption of Reports by the DSB
- 8.2 Legal Effect of Reports and Rulings
- 8.3 Recommendations and Rulings

8.1 Adoption of Reports by the DSB

- The panel reports and AB reports have to be adopted by the DSB to have come into effect.
- To be adopted by the DSB, panel and AB reports must be placed on the agenda of a DSB meeting.
- Only WTO members may request that items be placed on the agenda of an upcoming DSB meeting; the Secretariat cannot do so.
- If no member requests that a panel report be placed on the DSB agenda for adoption, the adoption does not take place, even though, arguably, this does not respect Article 16.4 of the DSU.

8.1 Adoption of Reports by the DSB

- If both reports are placed on the DSB agenda for adoption, the DSB adopts the Appellate Body report together with the panel report, as upheld, modified or reversed by the Appellate Body report.
- Article 17.14 of the DSU also specifically provides that the parties to the dispute must accept the Appellate Body report “unconditionally”, i.e. accept it as resolution of their dispute without further appeal.
- If a panel report (not appealled) is adopted, the parties also have to accept it “unconditionally” although this is not clearly stated in the DSU.
- The adoption procedure is without prejudice to the right of members to express their views on a given panel and Appellate Body report.

8.2 Legal Effect of Reports and Rulings

8.2.1 Legal effects within the context of a particular dispute

- After the DSB adopts a panel report and the AB report (if applies), the recommendations and rulings contained in those reports become binding upon the parties to the dispute.
- Binding: Parties to a dispute must treat Appellate Body reports adopted by the DSB "as a final resolution to that dispute". Furthermore, a panel finding that is not appealed, and that is included in a panel report adopted by the DSB, must also be accepted by the parties as a final resolution to the dispute between the parties, in the same way and with the same finality as a finding included in an Appellate Body report adopted by the DSB.

8.2 Legal Effect of Reports and Rulings

8.2.1 Legal effects within the context of a particular dispute

- As a general principle, the AB report and the panel report are only binding on the parties to the dispute and are only effective to the particular dispute.
- As a general principle, the adopted Appellate Body reports and panel reports are not binding precedents.

8.2 Legal Effect of Reports and Rulings

01.Legal effects within the context of a particular dispute

- Even if adopted, the reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise.
- As in other areas of international law, there is no rule of stare decisis in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases. This means that a panel is not obliged to follow previous Appellate Body reports even if they have developed a certain interpretation of exactly the provisions which are now at issue before the panel. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases.

8.2 Legal Effect of Reports and Rulings

8.2.2 Legal status of adopted/unadopted reports in other disputes

- The legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system.
- The reasoning and conclusions contained in adopted panel and Appellate Body reports may be relied upon by panels and the Appellate Body in subsequent disputes.
- As a matter of fact, there are quasi-precedent effects of these reports, particularly the legal reasonings and interpretations developed by the AB.

8.2 Legal Effect of Reports and Rulings

- Legal status of adopted reports in other disputes
  - This is because adopted panel and Appellate Body reports create legitimate expectations among WTO members and, therefore, should be taken into account where they are relevant to any dispute. Indeed, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO members “take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports”.
  - In light of the functions of the Appellate Body and panels set out in the DSU, it is expected that panels would rely upon the findings and reasoning of the Appellate Body in respect of legal matters before them, especially where the issues are the same.

8.2 Legal Effect of Reports and Rulings

- Legal status of adopted reports in other disputes
  - In light of the functions of the Appellate Body and panels set out in the DSU, it is expected that panels would rely upon the findings and reasoning of the Appellate Body in respect of legal matters before them, especially where the issues are the same.
- Legal status of unadopted reports
  - Unadopted panel reports have no formal legal status in the GATT or WTO system.
  - The reasoning contained in an unadopted panel report can nevertheless provide useful guidance to a panel or the Appellate Body in a subsequent case involving the same legal question.

8.3 Recommendations and Rulings

- According to Article 19 of the DSU (Article 19.1 of the DSU, first sentence), where the panel (and the Appellate Body when there is appeal) concludes that the challenged measure is inconsistent with a covered agreement, it recommends (in a violation complaint) that the respondent bring the inconsistent measure into conformity with its obligations under the covered agreement in question, unless the measure has since been removed.
- In practice, these recommendations are addressed to the DSB.

8.3 Recommendations and Rulings

- Once the panel and AB reports are adopted by the DSB, then they become the decision of the DSB which has the authority to request the respondent to bring its measure into conformity with the relevant provisions of the covered agreements.
- In the context of a non-violation complaint (Article 26.1(b) of the DSU), if a non-violation complaint succeeds, there will be no obligation for the respondent to withdraw the measure found to nullify or impair benefits accruing under, or to impede an objective of, the relevant covered agreement. In such cases, the panel recommends that the respondent make an adjustment that is mutually satisfactory to the parties.

9
Stages 5: Compliance and Surveillance

WTO – DSM Section 9

Stages 5: Compliance and Surveillance

- Once the DSB adopts relevant reports requesting the respondent to bring its measure(s) into compliance with the relevant covered agreement, there comes the obligation for the respondent to implement these decisions.

- Under the WTO DSM, the implementation involves a number of principle, processes and procedures. They are legal process in nature and aims at restoring the balance of rights and obligations between disputing members under the WTO covered agreements.

Stages 5: Compliance and Surveillance

- 9.1 Prompt Compliance
- 9.2 Intentions in Respect of Implementation
- 9.3 Reasonable Period of Time for Implementation
- 9.4 Surveillance by the DSB
- 9.5 Compliance Proceedings under Article 21.5 of the DSU

9.1 Prompt Compliance

- Article 21.2 of the DSU calls for prompt compliance with recommendations or rulings of the DSB as essential in order to ensure effective resolution of disputes to the benefit of all WTO members.
- The concept of “compliance”, as well as that of “implementation”, has been interpreted as **the withdrawal or modification of the WTO-inconsistent measure, or part of it**.
- This means that a WTO member whose measure has been found to be inconsistent with the covered agreements may generally choose between two courses of action: either the withdrawal of the measure, or the modification of the measure by remedial action.

9.1 Prompt Compliance

- Where immediate compliance is impracticable, the DSU foresees a reasonable period of time (RPT) for the respondent to comply with the recommendations and rulings of the DSB.

- Because the WTO DSM does not provide a retrospective compensation or remedy, so there is possibility that the respondent will not promptly implement the DSB decision, but seek to prolong the implementation process. This makes the prompt compliance principle less effective. (Except in some subsidy disputes)

9.2 Intentions in Respect of Implementation

- The DSB is the WTO body responsible for **supervising** the implementation of the recommendations and rulings contained in adopted panel and Appellate Body reports.
- In this respect, it is the duty of the respondent to inform the DSB, at a meeting within thirty days after the adoption of the report(s), of its intentions with respect to the implementation of the recommendations and rulings of the DSB (Article 21.3 of the DSU).
- It is usually at that same meeting that the respondent states whether it is able to comply immediately with the relevant recommendations and rulings or needs an RPT to do so.

9.2 Intentions in Respect of Implementation

- If the respondent does not inform the DSB of its intention to implement, or informs the DSB that it has no intention to implement, such action will have a legal outcome, which **gives the complaints the right to directly ask for retaliation authorization**.

- In practice, there seem no such cases that the respondent member declares no intention to implement. Usually, the losing Member declares it will need a period of time to implement.

9.3 Reasonable Period of Time for Implementation

- If immediate compliance is impracticable, the respondent has an reasonable period of times (RPT) to achieve that compliance (Article 21.3 of the DSU).
- The RPT for complying with the recommendations and rulings of the DSB is therefore not available unconditionally, but only if immediate compliance is impracticable.
- In practice, WTO members may explain that they cannot immediately comply with the DSB's recommendations and rulings.
- The respondent may need to amend its domestic law or regulations in order to achieve implementation. Where legislative changes are required, such changes may take more time than changes that merely require regulatory action.

9.3 Reasonable Period of Time for Implementation

- In practice, WTO members may explain that they cannot immediately comply with the DSB's recommendations and rulings.
- The respondent may need to amend its domestic law or regulations in order to achieve implementation. Where legislative changes are required, such changes may take more time than changes that merely require regulatory action.
- The RPT is a grace period granted to the respondent for bringing its measures into compliance. During that period, the respondent cannot yet be the target of countermeasures foreseen by the DSU in the event of the continuation of violation/in-consistency.

9.3 Reasonable Period of Time for Implementation

- But the respondent cannot just wait for the expiration of the RPT.
- The respondent needs to take steps towards compliance from the moment of adoption.
- The DSB has the authority to keep surveillance over the implementation process.
- Article 21.6 of the DSU stipulates that six months after the initiation of the RPT, the respondent will start reporting to the DSB meeting until full implementation is achieved or until the complainant declares satisfaction.

9.3 Reasonable Period of Time for Implementation

- The DSU foresees three ways in which the RPT can be determined:
  - it may be proposed by the respondent and approved by the DSB by consensus.[This has so far never happened.]
  - it may be mutually agreed by the parties to the dispute within forty-five days after adoption of the report(s).[Nowadays, parties often manage to reach such an agreement.]
  - it may be determined by an arbitrator.
- If neither of these first two avenues proves successful, the parties may resort to arbitration under Article 21.3(c) of the DSU.

9.3 Reasonable Period of Time for Implementation

- This procedure is initiated at the request of a party, addressed to the chairperson of the DSB.
- The arbitrator can be an individual or a group of individuals.
- In practice, all arbitrators in Article 21.3(c) proceedings thus far have been current or former Appellate Body members. If the parties cannot agree on the arbitrator(s) within ten days after referral of the matter to arbitration, the Director-General appoints the arbitrator within another ten days, after consulting the parties.

9.3 Reasonable Period of Time for Implementation

- The arbitrator's task is limited to determining the RPT within which implementation must be completed.
- Whether the chosen means achieve full conformity, if contested, may ultimately be decided through recourse to the procedure in Article 21.5 of the DSU.
- The DSU provides, as a "guideline" for the arbitrator, that the RPT should not exceed fifteen months from the date of adoption of the report(s) (Article 21.3(c) of the DSU). However, this fifteen-month period is not an average or standard period. It may be shorter or longer, depending on the "particular circumstances".

9.3 Reasonable Period of Time for Implementation

- Article 21.3(c) of the DSU contemplates that an arbitration award be issued within ninety days of the adoption of the panel (and Appellate Body) report(s), but this time period is nearly always insufficient, not least because the request for arbitration is often made at a late stage.
- Thus, the parties have mostly agreed to extend the deadline.
- Parties may also ask the arbitrator to suspend the procedure or withdraw the for arbitration in view of a mutually agreed solution on the issue of implementation.

9.3 Reasonable Period of Time for Implementation

- Moreover, these arbitrations have developed from a succinct determination of one paragraph in the first award to fully fledged legal discussions and a detailed reasoning in the more recent awards, which makes more time necessary for deliberation, drafting and translation. On average, Article 21.3(c) arbitrations take between four and five months to be completed.

9.4 Surveillance by the DSB

- The DSB has the authority to keep surveillance over the implementation process.
- Article 21.6 of the DSU stipulates that six months after the initiation of the RPT, the respondent will start reporting to the DSB meeting until full implementation is achieved or until the complainant declares satisfaction.
- For that purpose, the respondent has to provide a written report stating what it is doing in terms of implementing the DSB decisions.
- This will put some pressure on the respondent to fulfil their commitment.

9.4 Surveillance by the DSB

- The DSB's surveillance continues (even where compensation has been agreed or obligations have been suspended) as long as the recommendation to bring a measure into conformity with the covered agreements has not yet been implemented (Article 22.8 of the DSU).

- In practice, however, the implementation progress of some disputes has been under DSB surveillance for more than twenty years, which also demonstrates the limits of DSB surveillance.

9.5 Compliance Proceedings under Article 21.5 of the DSU

- After the RPT, a question will naturally come up whether the respondent fully implement the DSB rulings and recommendations.
- When there is disagreement between the parties to a dispute as to the existence, or consistency with the covered agreements, of measures taken by the respondent in a particular case, in order to comply with the recommendations and rulings of the DSB, either party can request establishment of a panel under Article 21.5 of the DSU.
- This helps to solve the disagreement in a legal way.

9.5 Compliance Proceedings under Article 21.5 of the DSU

- This procedure is often referred to as “compliance” proceedings.
- In practice, before the expiry of the RPT, parties typically agree to undertake compliance panel proceedings under Article 21.5 of the DSU before or in parallel to suspension of concessions proceedings under Article 22.6 of the DSU.
- The compliance proceedings are aimed at avoiding a situation in which a complainant is forced to initiate dispute settlement proceedings afresh when the respondent has failed to comply with the recommendations and rulings of the DSB.

9.5 Compliance Proceedings under Article 21.5 of the DSU

- Article 21.5 of the DSU provides that the disagreement between the parties to a dispute as to the existence or WTO-consistency of measures taken to comply, is to be solved "through recourse to these dispute settlement procedures", including, wherever possible, recourse to the original panel.
- This reference to "these dispute settlement procedures" has been interpreted in practice as a reference to the DSU rules and procedures governing original disputes, while respecting the specific time limits and referral to the original panel, where possible.

9.5 Compliance Proceedings under Article 21.5 of the DSU

- But the DSU does not specifically stipulate all aspects of the compliance proceedings, for example, whether consultations are required before compliance panel proceedings.
- Additionally, the DSU is silent as to whether a member must first bring a compliance procedure under Article 21.5 before requesting suspension of concessions or other obligations under Article 22 of the DSU. This is a big "legislative loophole".
- In order to solve these "silences" and "legislative loopholes" , parties, in practice, often conclude an ad hoc agreement on the sequence of the procedures under Articles 21 and 22 of the DSU (known as a "sequencing agreement").

9.5 Compliance Proceedings under Article 21.5 of the DSU

- These agreements arose essentially from the need to tackle the "sequencing" problem between compliance panel proceedings under Article 21.5 of the DSU and the suspension of concessions and other obligations procedures under Article 22 of the DSU.
- In practices, these procedural agreements also usually include arrangements concerning the various stages of Article 21.5 compliance proceedings more generally, such as, for instance, the agreement of the parties to accept the establishment of the compliance panel at the first meeting of the DSB where the request is included in the agenda.

9.5 Compliance Proceedings under Article 21.5 of the DSU

- A compliance panel is expected to rule in an expedited fashion, normally within ninety days (Article 21.5 of the DSU)
- The timetable in compliance panel proceedings therefore differs somewhat from that in original panel proceedings, reflecting the fact that these proceedings are expected to be completed in a shorter time frame.
- Compliance panel proceedings usually involve only one substantive meeting, which takes place after the parties have exchanged two sets of written submissions.

9.5 Compliance Proceedings under Article 21.5 of the DSU

- In respect of the measures that can be challenged, Article 21.5 proceedings have a more limited scope than original proceedings. Article 21.5 proceedings concern measures taken to comply with the recommendations and rulings of the DSB.
- In respect of the claims that can be raised in Article 21.5 proceedings, a "measure taken to comply" with DSB recommendations and rulings is "a new and different measure" that must be examined in its totality.
- A complainant may not re-litigate a claim regarding unchanged aspects of an original measure, nor may a complainant use compliance claims to "re-open" issues decided in substance in the original proceedings.

9.5 Compliance Proceedings under Article 21.5 of the DSU

- Either party may appeal a compliance panel report to the Appellate Body.

- The compliance panel report and the AB report decide whether the respondent brings its measures into conformity, which lays a foundation for next step.

10
Stages 6: Remedies in the event of non-implementation

WTO – DSM Section 10

Stages 6: Remedies in the event of non-implementation

- If a respondent fails to bring its measure into conformity with its WTO obligations within the RPT, the complainant is, under certain conditions, entitled to resort to temporary measures, which can be either compensation or the suspension of concessions or other obligations (countermeasures).
- This gives the WTO DSM “teeth” and add the effectiveness of the WTO rules.
- But as a general principle, neither of these temporary measures is preferred to full implementation of DSB recommendations and rulings.
- The DSU provides a number of rules concerning how remedy should be authorized.

10. Stages 6: Remedies in the event of non-implementation

- 10.1 Compensation
- 10.2 Countermeasures (Suspension of Concessions and Other Obligations)
- 10.3 Purpose of Countermeasures under the DSU
- 10.4 Procedure for the Authorization of Suspension
- 10.5 Principles and Procedures Governing retaliation
- 10.6 Permissible Level of Suspension
- 10.7 Permissible Sector of Countermeasures
- 10.8 Arbitration under Article 22.6 of the DSU
- 10.9 Surveillance until final implementation

10.1 Compensation

- If the respondent does not achieve full compliance by the end of the RPT, it must enter into negotiations with the complainant, if the latter so requests, with a view to agreeing to a mutually acceptable compensation.
- But Compensation pursuant to Articles 21 and 22 of the DSU must be WTO-consistent and mutually agreed.
- In practice to date, such compensation has hardly been used in cases reaching this stage.

10.1 Compensation

- The possible main reason is that conformity with the covered agreements implies, among others, consistency with the MFN obligations.
- Where relevant, this may imply that WTO members other than the complainant(s) would also benefit, if compensation is offered in the form of a measure to which such obligations apply, such as a tariff reduction. This may make compensation less attractive to both the respondent, as this raises the “price of compensation”, and the complainant, as it does not get an exclusive benefit.
- In a limited number of disputes, parties have agreed on temporary monetary arrangements, which have been described as compensation.

10.2 Countermeasures (Retaliation)

- If, within twenty days after the expiry of the RPT, the parties have not agreed on satisfactory compensation, the complainant may ask the DSB for permission to impose countermeasures against a respondent that has failed to implement the DSB's recommendations and rulings.
- Technically, this is called "suspending concessions or other obligations under the covered agreements". Often, it is called "retaliation" or "countermeasures".
- Retaliation is the final and most serious consequence that a non-implementing respondent faces in the WTO dispute.

10.2.1 Purpose of Countermeasures

- Suspension of concessions is the most common form of countermeasures.
- Concessions are, for example, tariff reduction commitments that WTO members have made in multilateral trade negotiations and that are bound under Article II of the GATT 1994.
- The complainant is thus allowed to impose countermeasures that would otherwise be inconsistent with the covered agreements, in response to a violation or a non-violation nullification or impairment.
- Countermeasures are applied selectively by the complainant against a respondent that fails to comply fully, and are thus discriminatory in nature (but legitimate because it is authorized).

10.2.1 Purpose of Countermeasures

- It should be noted that retaliation is also a “doubel-edge sword”. Article 3.7 of the DSU provides that members should have recourse to such countermeasures as a last resort.
- Measures raising trade barriers is contrary to the liberalization philosophy underlying the WTO, and come at a price because they are almost always economically harmful, not only for a respondent that has failed to comply, but also for a complainant imposing those barriers.
- Therefore, it is important to stress that countermeasures are the last resort in the WTO dispute settlement system and are not actually used in most cases.

10.2.1 Purpose of Countermeasures

- In fact, authorization to impose countermeasures has been requested and granted in just ten cases to date.
- It is thus the exception, and not the rule, for a dispute to reach this stage and not be resolved at an earlier stage through other means.
- Nevertheless, the availability of countermeasures is better than none and sometimes is a very effective tool to facilitate the resolution of disputes or implementation of the DSB recommendations and rulings.

10.2.2 Procedure for the Authorization

(1) Requesting authorization

- Taking retaliation requires prior authorization by the DSB.
- The DSU provides that the DSB, upon request, shall grant authorization to suspend concessions or other obligations within thirty days of the expiry of the RPT, unless the DSB decides otherwise by negative consensus.
- In practice, because of the existence of “sequencing agreement”, usually the complaint will request for the authorization of retaliation (with the level of retaliation, i.e. amount)once the compliance proceedings are completed and the AB and panel reports conclude that the respondent fail to bring it measures into conformity within RPT.

10.2.2 Procedure for the Authorization

(2) Arbitration

- If the respondent objects to the level of suspension proposed, or claims that the principles and procedures concerning how concessions should be suspended in different sectors have not been followed, the matter will be referred to arbitration.
- This arbitration will need to be completed before the DSB can authorize the countermeasures.
- Referral to arbitration does not require a specific action by the DSB for the matter to be properly referred (although there are still disagreements on this procedural issue).

10.2.2 Procedure for the Authorization

(3)Giving authorization

- Once the arbitrator has issued a decision, the complainant may again submit a request to the DSB to suspend concessions or other obligations consistent with the terms of the decision.
- The authorization will then be granted by the DSB through negative or reverse consensus, which in practice means automatically.

10.2.3 Principles and Procedures Governing retaliation

- When a complainant is considering whether to impose countermeasures, there are two elements that it needs to consider:
  - First, a quantitative requirement, i.e. the level of suspension that can be authorized and,
  - Second, a qualitative requirement, i.e. the type of countermeasures that can be authorized (the obligations in a trade sector or an agreement that can be suspended).
- On these two issues, there will be disagreement from the respondent. the DSU provides principles and procedures to give guidance and solve disagreements.

10.2.3 Principles and Procedures Governing retaliation

(1) Permissible Level of Suspension

- As a principles, the level of retaliation must be “equivalent” to the level of nullification or impairment.
- This has been interpreted to mean that the complainant’s countermeasures may not exceed the level of harm caused by the respondent’s original inconsistent measure. The impact of the WTO-inconsistent measure (the level of nullification or impairment) is generally calculated by comparing the actual level of trade (trade occurring under the inconsistent measure) with the hypothetical level of trade that would have occurred had the WTO-inconsistent measures been brought into conformity by the end of the RPT. This amount is generally calculated on an annual basis.

10.2.3 Principles and Procedures Governing retaliation

(2) Permissible Sector of Countermeasures

- Regarding the type of concessions or other obligations that may be suspended, the DSU calls for the complainant to apply a number of principles and procedures when considering what concessions or other obligations to suspend.
- The general principle is that the countermeasures should be imposed in the same sector and within the same agreement as that in which the violation or other nullification or impairment was found (Article 22.3(a) of the DSU).

10.2.3 Principles and Procedures Governing retaliation

(2) Permissible Sector of Countermeasures

- To give further guidance, the DSU itself defines what a “sector” and an “agreement” are for the purposes of this provision.
- The principle of “same-sector” countermeasures means that, for example, the response to a violation in the area of patent rights, under the TRIPS, should also relate to patent rights. If the violation occurred in the area of distribution services, under the GATS, then the countermeasure should also be in this area.
- At the same time, a WTO-inconsistent tariff on automobiles (a good) can be countered with a tariff surcharge on cheese, furniture or pajamas (also goods). A prohibited subsidy can also be countered with a tariff surcharge on goods since the SCM Agreement is an Annex 1A agreement (an agreement that governs trade in goods).

10.2.3 Principles and Procedures Governing retaliation

(2) Permissible Sector of Countermeasures

- However, if the complainant considers it impracticable or ineffective to retaliate within the same sector, the countermeasures can be imposed in a different sector under the same agreement.
- This option has no practical relevance in the area of goods (because all goods are considered to belong to the same agreement and sector), but, for example, a violation with regard to patents could be answered with countermeasures in the area of trademarks (that is, in another sector within the same agreement, in this case the TRIPS Agreement). Similarly, a violation in the area of distribution services could be countered in the area of health services.

10.2.3 Principles and Procedures Governing retaliation

(2) Permissible Sector of Countermeasures

- Further, if the complainant considers it impracticable or ineffective to retaliate within the same agreement, and the circumstances are serious enough, the countermeasures can be taken under another agreement. This is usually called ““cross-retaliation”.
- The objective of this hierarchy is to reduce the chances that retaliatory actions spill over into unrelated sectors while at the same time ensuring that the countermeasures taken are effective.
- Particularly for smaller and developing country members, “cross-retaliation” can be quite important for a number of reasons if they win the dispute against a big developed member.

10.3 Arbitration under Article 22.6

- The DSB must in principle grant the authorization to suspend concessions or other obligations within thirty days of the expiry of the RPT by negative consensus, unless the respondent disagrees with the complainant's proposed suspension.
- If the respondent objects to the proposed level, which is typically the case, the matter shall be referred to arbitration (Article 22.6).
- Such disagreement can relate either to the level of retaliation, and/or appropriateness of cross-retaliation. Both issues are to be dicided by Article 22.6 arbitrators.

10.3 Arbitration under Article 22.6

1) the composition of Art. 22.6 arbitration panel:

- If the original panelists are available, they will act as arbitrators;
- otherwise the WTO Director-General appoints an arbitrator.

2) the time duration of Art. 22.6 arbitration

- Art. 22.6 stipulates that the arbitration shall be completed within sixty days after the date of expiry of the RPT.
- However, this seems to be not the case. In practice, Art. 22.6 arbitration usually begin long after the expiry of the RPT, because it has to wait after completion of compliance proceedings under Article 21.5 of the DSU and then after request of retaliation request to the DSB is made and opposed. All these procedures need time.

10.3 Arbitration under Article 22.6

(3)the mandate of the 22.6 arbitration

- the level of proposed suspension
  - During the Art. 22.6 arbitration, the arbitrator will generally determine whether it correctly reflects the approximate value of the actual and potential trade opportunities lost as a result of the measure found to be WTO inconsistent or otherwise to nullify or impair benefits.
  - If the proposed one by the complainant is not reasonable, the arbitrator may need to calculate what would constitute a level of suspension equivalent to the level of nullification or impairment.
- the principles and procedures for cross-retaliation
  - The arbitrator also examines that claim.
  - But the arbitrator is precluded from examining the nature of the concessions or other obligations to be suspended.
  - In practice, aspects such as the choice of the products to be targeted or the level of the additional duty, are left to the discretion of the retaliating member.

10.3 Arbitration under Article 22.6

(4) the effect of Art. 22.6 arbitration

- The parties must accept the decision of the arbitrator as final and not seek a second arbitration.
- Once the decision is issued, the complainant may request the DSB to grant authorization to suspend concessions or other obligations. The DSB will do so by negative or reverse consensus provided that the request is consistent with the decision of the arbitrator.
- In that regard, the decision of the arbitrator can be distinguished from panel and Appellate Body rulings insofar as it does not have to be adopted by the DSB.

10.3 Arbitration under Article 22.6

(4) the effect of Art. 22.6 arbitration

- In that regard, the decision of the arbitrator can be distinguished from panel and Appellate Body rulings insofar as it does not have to be adopted by the DSB.
- Notably, complainants are not obliged to request the authorization to suspend concessions or other obligations further to the decision of the arbitrator.
- In fact, there have been cases where the complainants decided not to do so.

10.3 Arbitration under Article 22.6

(5) Authorization and implementation

- Having obtained authorization from the DSB to suspend concessions or other obligations does not mean that the complainant is obliged to implement it.
- Indeed, a complainant may choose not to proceed with the suspension but rather to use the authorization as a bargaining tool with the respondent.
- Once the authorization has been granted, the authorized member must ensure that it respects the requirement of equivalence in its application of any retaliation measures pursuant to the authorization.

10.4 Surveillance until full Implementation

- One of the functions of the DSB is the surveillance of the implementation by the respondent of its recommendations and rulings (Article 21.6 of the DSU).
- The issue of implementation is placed on the agenda of the DSB six months following the date of establishment of the RPT.
- The respondent is required to provide the DSB with a written status report of its progress. These status reports ensure transparency, and they may also act as an incentive towards implementation.
- The DSB's duty to keep the implementation of its rulings and recommendations under surveillance until the issue is resolved.
- Usually this means that the respondent has brought its measures into conformity or the complainant has declared satisfaction.

11
Alternative Resolution of Disputes

WTO – DSM Section 11

11. Alternative Resolution of Disputes

- The first priority of the WTO dispute settlement system is for parties to resolve their disputes in a cooperative manner.
- As a matter of fact, various other ways to solve disputes are available under the DSU, and they are alternatives to the panel and Appellate Body adjudication process which are compulsory and legal in nature
- Some of them may nevertheless take place in parallel with an ongoing panel process.
- Parties can always reach a mutually agreed solution at any time during the proceedings.

11. Alternative Resolution of Disputes

- 11.1 Mutually Agreed Solutions
- 11.2 Good Offices, Conciliation and Mediation
- 11.3 Arbitration Pursuant to Article 25 of the DSU

11.1 Mutually Agreed Solutions

(1) Nature of Mutually Agreed Solutions

- A solution that is mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.
- To reach a mutually acceptable solution, members can engage in consultations or resort to good offices, conciliation and mediation.
- However, not just any mutually agreed solution is permissible. Mutually agreed solutions must be WTO-consistent (Articles 3.5 and 3.7 of the DSU).

11.1 Mutually Agreed Solutions

(1) Nature of Mutually Agreed Solutions

- The mutually agreed solution must be notified to the DSB.
- This serves to inform the other WTO members and to give them an opportunity to raise any concern they may have with regard to the settlement.
- Apart from the requirements for WTO-consistency and notification, parties are left with wide discretion to negotiate the terms of mutually agreed solutions.

11.1 Mutually Agreed Solutions

(2) Legal Effect and Interpretation of Mutually Agreed Solutions

- MAS could be abolished by a disputing party sometimes.
- A mutually agreed solution does not necessarily imply that the parties have relinquished their right to have recourse to the dispute settlement system in the event of a disagreement.
- The waiving of such dispute settlement rights must be made explicitly in the mutually agreed solution, if that is the intention of the parties.
- If such claim is put forward in a dispute, a panel may determine the intention of the parties from the language used in the agreement.

11.2 Good Offices, Conciliation and Mediation

- In this respect, the DSU provides for good offices, conciliation and mediation on a voluntary basis, if the parties to the dispute so agree.
- The involvement of an outside, independent person can assist the parties in finding a mutually agreed solution to their dispute.
- These proceedings can also be initiated by the WTO Director General, who may, acting in an ex officio capacity, offer good offices, conciliation and mediation with a view to assisting members to settle a dispute.

11.2 Good Offices, Conciliation and Mediation

- Good offices consist primarily of providing logistical support to help the parties negotiate in a productive atmosphere, usually with an emphasis on maintaining the relationship or keeping communication channels open between the disputing parties.
- Conciliation and mediation will normally conclude with recommendations, although the parties are not obliged to accept them.
- In terms of the substantive basis of these mechanisms, good offices and mediation proceed on the basis that all aspects of the dispute are put on the table, as the case demands.
- Conciliation proceedings tend to focus on fact finding, although equity and legal factors may be taken into account.
- In practice, the three mechanisms tend to converge to some extent, making it difficult to draw a strict boundary or distinction between them.

11.2 Good Offices, Conciliation and Mediation

- Good Offices, Conciliation and Mediation are based on the consent of parties, and can be terminated by the parties at any time。
- Good offices, conciliation and mediation proceedings are strictly confidential, and are without prejudice to the position taken by either party in any dispute settlement procedure to follow。
- Communication from the Director-General on Article 5 of the DSU, WT/DSB/25, 17 July 2001. The communication also details the procedures to be followed when members request the Director-General's assistance for good offices, conciliation or mediation.

11.2 Good Offices, Conciliation and Mediation

- In particular, the communication stipulates that *ex parte* communications are permitted, that all communications during the process must remain confidential, and that no third party may participate in the process, except if the parties agree.

- Good Offices, Conciliation and Mediation are not used very often at the WTO. There were reportedly several cases, and, however, in these cases final solutions were found with the help of a third person (mainly the Director General).

11.3 Arbitration Pursuant to Article 25 of the DSU

- As an alternative to adjudication by panels and the Appellate Body, the parties to a dispute can resort to binding arbitration pursuant to Article 25.1 of the DSU.
- According to Article 25.2 of the DSU, the parties must agree on the arbitration as well as the procedures to be followed. The parties to the dispute are thus free to depart from the standard procedures of the DSU and to agree on the rules and procedures they deem appropriate for the arbitration, including the selection of the arbitrators.
- The parties must also clearly define the issues in dispute.

11.3 Arbitration Pursuant to Article 25 of the DSU

- Before the arbitration commences, the parties must notify all WTO members of their agreement to resort to arbitration. Other members may become party to the arbitration only with the agreement of the parties.

- They must agree to abide by the arbitration award, which, once issued, must be notified to the DSB and the relevant councils and committees overseeing the agreement(s) in question.

11.3 Arbitration Pursuant to Article 25 of the DSU

- Mostly importantly, the provisions of Articles 21 and 22 of the DSU on remedies, and on the surveillance of implementation of a decision apply to the arbitration award.

- Before 2020, WTO members have only resorted to arbitration under Article 25 of the DSU on one occasion for normal dispute settlement. In an innovative move, Article 25 arbitration is now being used to conduct appeal review of panel reports in the midst of the dysfunction of the Appellate Body.

12
Special Procedural Issues

WTO – DSM Section 12

12. Special Procedural Issues

- 12.1 Preliminary Rulings
- 12.2 Transparency and Confidentiality issue
  - 12.1 General Remarks
  - 12.2 Confidentiality during Consultations
  - 12.3 Confidentiality during Panel Proceedings
  - 12.4 Confidentiality during Appellate Review
- 12.3 Standing
- 12.4 Legal Representation
- 12.5 Non-party and Amicus curiae Submissions

12.1: Preliminary Rulings

- Preliminary rulings are very common in litigation and arbitration process, and such requests have become a common feature in WTO dispute settlement proceedings since its inception and with the increase of number of disputes.
- However, the WTO dispute settlement system does not contain rules on how to deal with parties' requests for an early ruling by the adjudicator on certain issues of procedural or jurisdictional nature.
- Over the years, parties have nevertheless requested panels and the Appellate Body to issue "preliminary rulings" on a number of issues.
- Panels and the AB deal with these issues based on common practices of litigation and due process.

12.1: Preliminary Rulings

- The most frequent subject is the consistency of a panel request with Article 6.2 of the DSU.
- Other issues include, for instance, the adequacy of consultations, jurisdictional issues, matters related to panel composition, alleged conflicts of interest, enhanced third-party rights, the admissibility of certain evidence, BCI procedures and other confidentiality issues, the participation of private counsel or industry experts, the panel's timetable, amicus curiae briefs, open hearings, consultations with scientific experts and interpretation in a language other than the official languages of the WTO.
- Recent panel working procedures include standard language providing for the early filing of preliminary ruling requests, in any event no later than in their first written submission to the panel.

12.1: Preliminary Rulings

- There are no pre-established criteria that panels must apply when deciding whether or not to issue preliminary rulings, other than the requirements of due process and to conduct proceedings efficiently and with a view to avoiding unnecessary delay.
- Articles 12.1 and 17.9 of the DSU respectively provide panels and the Appellate Body with the flexibility and authority to adjust their working procedures, either to issue the requested ruling on a preliminary basis17 or to defer such ruling to their report.
- The efficiency of panel proceedings and due process concerns demand that preliminary ruling requests be submitted as early as possible in the proceedings.

12.1: Preliminary Rulings

- However, preliminary ruling requests are not to be used as a litigation tool.
- Though nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request even before the filing of the first written submission, members shall engage in dispute settlement activities in good faith and the AB clarifies that "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".

12.2 Confidentiality

- The principle of confidentiality applies to the entire WTO dispute settlement proceedings.
- But this does not mean that the whole proceedings and all documents are confidential.
- The DSU stipulates that parties may make use of their right to disclose their own submissions to the public and may be requested to provide a non-confidential summary of those submissions.
- Furthermore, panel and Appellate Body reports also provide a description of the proceedings, including the positions taken by various participants. These reports are publicly available upon their official circulation to the WTO members.

12.2.1 Confidentiality During Consultations

- With respect to the principle of confidentiality during consultations, the obligation to maintain confidentiality is imposed on the members that participate in the consultations and refers to information that is not otherwise in the public domain.
- Panels should not inquire as to what happened during consultations.
- Settlement offers made in the context of consultations are, in case a mutually agreed solution is not reached, of no legal consequence to the later stages of dispute settlement.

12.2.2 Confidentiality During Panel Proceedings

- Article 14.1 of the DSU provides that panel deliberations must be confidential. At beginning, this applies to the whole panel proceedings and document.
- As regards written submissions to the panel, each party is entitled to disclose statements of its own positions while it cannot disclose the submissions of another party.
- There are breaches of such obligation sometimes, though not very often.
- Later, there come some new developments concerning oral hearings.
- Oral hearings are in principle held behind closed doors as a rule, panels have agreed to open the hearings to public observation, at the request of the parties.

12.2.2 Confidentiality During Panel Proceedings

- Panels have considered that opening the hearings to public observation does not breach the requirement of confidentiality in Article 14.1 of the DSU.

- Furthermore, in practice, panels have developed, at the request of the parties, specific working procedures to deal with confidential information(mainly business confidential information) provided by disputing parties.

12.2 Confidentiality During Appellate Review

- The obligation to maintain confidentiality encompasses written submissions, legal memoranda, written responses to questions, oral statements by the participants and the third participants, transcripts or tapes of the oral hearings, and the deliberations, exchange of views and internal workings of the Appellate Body.
- There are breaches of such obligation sometimes, though not very often.
- The AB sometimes decides that the oral hearing (or a part of it) is open to public observation upon request by the participants and after considering other participants' views.

12.3 Standing

- In many legal systems, a complainant must have a direct legal interest, or “standing” in a matter in order to initiate legal proceedings. The situation is different in the WTO.
- Article XXIII:1 of GATT 1994 provides that a Member may challenge measures whenever it considers “that any benefit accruing to it directly or indirectly ... is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded.”
- Under the DSU there is no requirement that parties have “an economic interest” in order to act as complainant.
- According to practices, it is not necessary that a Member have a “legal interest,” in the sense of actual (as opposed to potential) trade interest, as a prerequisite to initiating dispute settlement, finding that such a need was not implied in the DSU or any other WTO agreement. Appellate Body noted that a “Member has broad discretion in deciding whether to bring a case against another Member under the DSU,” and that “a Member is expected to be largely self-regulating in deciding whether any such action would be ‘fruitful’”.

12.4 Legal Representation

- The DSU does not specifically address the issue of who may represent a party before panels and the Appellate Body.
- A question that arose early in the functioning of the WTO dispute settlement system was whether the parties and third parties to a dispute could send only government officials as their representatives to the meetings with the panel and the oral hearing of the Appellate Body, as was the practice during the GATT times.
- The AB decides that nothing in the WTO Agreement, the DSU, the working procedures, customary international law or the prevailing practice of international tribunals prevents a WTO member from determining the composition of its own delegation in WTO dispute settlement proceedings.

12.4 Legal Representation

- It is now common practice for private legal counsel, as part of a WTO member's delegation, to represent parties in panel and Appellate Body proceedings and plead on their behalf.
- Each member is, of course, responsible for these representatives, as for all its governmental delegates, and must ensure that they respect the confidentiality of the proceedings.
- Private legal counsel shall also abide by their own ethical and professional rules.

12.5 Non-party and *Amicus curiae* Submissions

- It is not explicitly regulated in the DSU is whether panels and the Appellate Body may accept and consider unsolicited submissions they receive from entities that are not a party or third party to a dispute.
- These submissions are commonly referred to as amicus curiae briefs.
- These submissions often come from NGOs, including industry associations, or from academics.
- Fact: Nothing in the DSU explicitly permits entities that are not WTO members, such as NGOs or individuals, to submit unsolicited amicus curiae briefs to a panel or to the Appellate Body. However, there is also no express prohibition of this practice.

12.5 Non-party and *Amicus curiae* Submissions

- The AB and panels generally think that panels and the AB can accept and consider amicus curiae briefs but are under no obligation to do so.
- But the issue remains contentious among WTO members. Some members are of the view that the DSU should not allow panels to accept and consider unsolicited amicus curiae briefs. They consider WTO disputes as procedures purely between WTO members and see no role for non-parties, particularly NGOs.
- To date, only a few panels have made use of their discretionary right to accept and consider unsolicited briefs. The Appellate Body has not explicitly relied on unsolicited amicus curiae submissions in its reasoning or the findings in the Appellate Body report.

13
Developing Countries in the WTO DSM

WTO – DSM Section 13

13. Developing Countries in the WTO DSM

- The DSU recognizes the particular situation of developing and least developed country members, and encourages WTO members to give special attention to this situation throughout the dispute settlement proceedings.
- Special and Differential Treatment (SDT) is also available under the DSU.
- In particular, the DSU provides for more flexible time frames, the possibility of resorting to an accelerated procedure specific to developing countries that would prevail over the existing DSU rules, as well as legal assistance, for developing and least-developed country members.

13. Developing Countries in the WTO DSM

- 13.1 SDT during Consultations
- 13.2 SDT during Panel Proceedings
- 13.3 SDT during Implementation Stages
- 13.4 SDT for Least-developed Country Members
- 13.5 Legal Assistances

13.1 SDT during Consultations

- During consultations, members should pay special attention to the particular problems and interests of developing country members.
- When consultations concern a measure taken by a developing country member, the parties may agree to extend the regular period of consultations.
- If, after the relevant period has elapsed, the parties cannot agree that the consultations have concluded, the chairperson of the DSB can extend even further the period for consultations.
- These SDTs have not been used often.

13.2 SDT during panel proceedings

- At the panel stage, in a dispute between a developing country member and a developed country member, the panel will, upon request by the developing country member, include at least one panelist from a developing country member.

- when a developing country member is a respondent, the panel must accord it sufficient time to prepare and present its argumentation. However, this must not affect the overall time period to complete the dispute settlement procedure.

13.2 SDT during panel proceedings

- In practice, this provision has been applied by granting the responding developing country member additional time in the panel's timetable.
- When a developing country member requests the application of provisions on special and differential treatment, the panel report shall explicitly indicate how these provisions have been taken into account.
- This rule is intended to provide transparency in the application of the special and differential treatment.

13.3 SDT during implementation stages

- At the implementation stage, particular attention should be paid to matters affecting the interests of developing country members.
- It is often that, when determining the reasonable period of time needed to implement the recommendations of the panel or the Appellate Body, arbitrators acting under Article 21.3(c) of the DSU will consider this provision, and gives more time for implementation.
- Article 21.7 of the DSU also stipulates that, if a developing country member has raised the matter, the DSB shall consider what further and appropriate action it might take, in addition to regular surveillance and status reports. In practice, this provison is not often used.

13.4 SDT for Least-developed Country Members

- The DSU sets forth a number of additional rules applicable only to least-developed country members.
- Where a least-developed country member is involved in a dispute, particular consideration shall be given to the special situation of that member.
- In this sense, members must exercise due restraint in raising complaints against a least-developed country member and in asking for compensation, or seeking authorization to suspend the application of concessions or other obligations against a least-developed country member.
- For disputes involving a least-developed country member, and upon request by a least-developed country member, the Director-General or the chairperson of the DSB will offer their good offices, conciliation and mediation.

13.5 Legal Assistance

13.5.1 Assistance from the Secretariat

- The right of using outside counsels is important for developing country members, as it may enable them to take part in dispute settlement proceedings even when they do not have the required legal capacity.
- However, the financial resources necessary to retain external counsel are significant, especially considering that most expert private practitioners are from developed country law firms.
- Developing country members can receive effective assistance in dispute settlement from the Geneva-based Advisory Centre on WTO Law (ACWL).

13.5 Legal Assistance

13.5.2 Assistance outside of the Secretariat

- The WTO Secretariat assists all members, but it may also provide additional legal advice and assistance to developing country members.
- Upon request by a developing country member, the Secretariat makes available a qualified legal expert from the WTO technical cooperation services to such a member
- The Institute for Training and Technical Cooperation, a division of the WTO Secretariat, employs independent consultants for this purpose.
- The WTO Secretariat also conducts technical cooperation activities and special training courses on the dispute settlement system.

13.5 Legal Assistance

13.5.2 Assistance outside of the Secretariat

- The ACWL was created in 2001, upon the initiative of a number of countries, especially the Netherlands and Colombia, to provide legal assistance on WTO law to developing country members.
- Developing countries that have become members of the ACWL and contributed to the ACWL's Endowment Fund are entitled to the services provided by the ACWL.
- All least-developed country members of the WTO are entitled to these services, without having to become a member of the ACWL.

13.5 Legal Assistance

13.5.2 Assistance outside of the Secretariat

- The legal services provided by the ACWL fall into two categories:
  - (i) assistance in WTO dispute settlement proceedings; and
  - (ii) assistance on matters not subject to dispute settlement proceedings.
- In addition, the ACWL provides training on WTO law and operates a secondment program, whereby officials from countries that are members of the ACWL gain valuable expertise on WTO procedural law.
- Even though having such legal assistance, the participation of least-developed country members in WTO dispute settlement proceedings to date has been scarce.

14
Comments and Reforms of the WTO Dispute Settlement Mechanism

WTO – DSM Section 14

14. Comments and Reforms of the WTO DSM

14.1 Appraisals and Criticisms of the WTO Dispute Settlement System

14.2 The Doha Round and DSU Reform (Negotiations to Improve and Clarify the DSU)

14.3 Secretariat’s Informal Consultations Concerning the Panel Process

14.4 The Appellate Body Crisis (Ongoing process)

14.5 Some Proposed reforms to the WTO Dispute Settlement System (Ongoing process)

14.1 Appraisals and Criticisms of the WTO DSS

- The World Trade Organization (WTO) Dispute Settlement Mechanism (DSM) has been both praised and criticized since its establishment.

14.1.1 Appraisals:

- Efficiency and Effectiveness:
  - The DSM is often praised for its efficiency and effectiveness in resolving trade disputes. It provides a structured framework with strict timelines for resolving disputes in a legal manner, which helps in preventing prolonged trade conflicts. A large majority of disputes was solved either through MAS or adjudication +implementation.

14.1 Appraisals and Criticisms of the WTO DSS

14.1.1 Appraisals:

- Rule-based approach, less political.
  - The DSM promotes adherence to international trade rules and reinforces the rule of law in international trade relations. This helps in fostering a predictable and stable trading environment for member countries. Power and politics play less influence during the WTO DSM.
- Independence and Impartiality:
  - The DSM is perceived as impartial and fair in its decisions, as dispute panels and the appellate body consist of independent experts who assess cases based on WTO agreements without bias towards any member country.

14.1 Appraisals and Criticisms of the WTO DSS

14.1.1 Appraisals:

- Preservation of Multilateralism:
  - The DSM plays a crucial role in preserving the multilateral trading system by providing a mechanism for resolving disputes within the framework of WTO rules, thereby preventing unilateral retaliatory measures.

14.1 Appraisals and Criticisms of the WTO DSS

14.1.2 Criticisms:

- Delays and Lengthy Procedures:
  - The DSS has been criticized for its lengthy procedures and delays in resolving disputes. The appellate process, in particular, can be time-consuming, leading to frustration among parties involved.
- Implementation and Enforcement Not Effective:
  - Critics argue that the DSM lacks very effective enforcement mechanisms to ensure compliance with its rulings. While the system can authorize retaliatory measures, enforcement ultimately depends on the willingness of parties to abide by WTO rulings.

14.1 Appraisals and Criticisms of the WTO DSS

14.1.2 Criticisms:

- Imbalanced utilization by Members/Uneven participation of Members:
  - Developing countries have generally made less use of the DSM than developed Members, and there are also issues of unequal access to legal expertise and resources, which could disadvantage developing Members in disputes with developed countries.
  - There are concerns that the DSS may be biased towards powerful member states, as they often have greater resources to influence the outcome of disputes or delay proceedings.

14.2 The Doha Round and DSU Reform

- There is broad consensus that the current dispute settlement system is an important asset of the WTO and generally functions well. Even so, improvements are possible, especially because as the system matures and more members resort to its rules, it needs to adapt to developing and changing circumstances.
- Indeed, negotiators of the DSU called for a full review of the DSU within four years after the entry into force of the WTO Agreement and for a decision on whether to continue, modify, or terminate the DSU when they concluded the Uruguay Round.
- A review started under this mandate in 1998 and did not result in an agreement.

14.2 The Doha Round and DSU Reform

- At the Fourth Ministerial Conference in Doha in November 2001, members were given the mandate to agree upon improvements and clarifications of the DSU. This is the authorization to continue the DSU negotiations.
- Various issues have been discussed. Various proposals under discussion have been grouped under twelve headings: panel composition; third-party rights; remand; mutually agreed solutions; strictly confidential information; sequencing; post-retaliation; transparency and amicus curiae briefs; time frames; developing country interests (including special and differential treatment); flexibility and member control; and effective compliance.

14.2 The Doha Round and DSU Reform

- However, Members have not been able to warp up the DSU negotiation so far due to various reasons.
- In a literal sense, the mandate of the Doha DSU negotiations is still valid, and members are now in the process of negotiating possible improvements and clarifications to the DSU.
- However, since 2019, the DSU negotiations have not made any meaningful progress due to the AB crisis caused by the United States.

14.3 Secretariat's Informal Consultations Concerning the Panel Process

- In 2010, at the request of the then-WTO Director-General, an informal process was initiated to explore ways to find efficiency gains in the panel review process so as to reduce the burden on WTO members and the WTO Secretariat.
- Such kind of informal process continued in 2015 but renamed as "Dispute Settlement Efficiency Exercise" with the aims the same as before, to find the possible ways and best practices available to enhance the efficiency of the WTO dispute settlement system.
- Some useful ideas were brought forward by members and other stakeholders, and several ideas have been implemented by individual panels on an *ad hoc* basis.

14.4 The Appellate Body Crisis (Ongoing process)

- For many years, the WTO dispute settlement system was referred to as the “jewel in the crown” of the WTO. It was also admired and coveted by international law scholars and practitioners active in other fields of international law.
- Ironically, the WTO dispute settlement is at present, however, in an existential crisis. Due to the demise of the Appellate Body, it is, as from 11 December 2019, not fully operational anymore and has been withering away since.

14.4 The Appellate Body Crisis (Ongoing process)

- Some Members, and in particular the United States, increasingly made antagonistic allegations of judicial overreach by the Appellate Body and accused it of unacceptable disregard of procedural rules, in particular the 90-day time frame for appellate review.
- the United States took overt as well as covert action affecting the independence and impartiality of Appellate Body members, primarily in the context of the process of reappointment.

14.4 The Appellate Body Crisis (Ongoing process)

- What Problem?
- The AB is composed with 7 members, and they have a fixed term of office. These members have a regular rotation based on a set of rules.
- The initiation of selection process of new AB members and the appointment of new AB members have to be agreed by all members at the DSB.
- Starting from middle 2017, the US opposed the initiation of selecting new AB members to fill the vacancies in the AB due, and has not changed its position so far.

14.4 The Appellate Body Crisis (Ongoing process)

- As a result of such activity, the incumbent member of the AB gradually reduce to less than three (the minimum quorum to compose a division to hear a case).
- The Appellate Body is currently a court without judges.
- The paralysis of the Appellate Body has not only deprived WTO Members of appellate review of first -instance panel reports. It has also undermined the whole WTO dispute settlement system.
- The direct consequence is that panel reports appealed can not be heard and these disputes are not able to be solved in a timely manner.
- This leads the stalemate and a crisis in the WTO DSM.

14.4 The Appellate Body Crisis (Ongoing process)

- Why the US blocked the appointment of the AB members?
  - The most significant concern of the United States, as the US voiced, is that the Appellate Body added to or diminished the rights and obligations of WTO Members under the WTO agreements.
  - The United States accuses the Appellate Body of 'judicial activism' on matters relating to anti-dumping measures, subsidies, countervailing measures, safeguard measures and technical barriers to trade. The United States argues, in particular, that the Appellate Body's case law limits its ability to counteract the importation of goods, which harm its domestic industry.

14.4 The Appellate Body Crisis (Ongoing process)

- Why the US blocked the appointment of the AB members?
  - In addition, according to the United States, the Appellate Body disregarded the rules on WTO dispute settlement by:
    - (1) exceeding the mandatory 90-day time limit for appellate review (without the consent of the parties);
    - (2) allowing outgoing Appellate Body members to complete work on appeals to which they had been assigned before the end of their term;
    - (3) issuing ‘advisory opinions’ on issues not necessary to resolve the dispute;
    - (4) reviewing factual findings of panels and, and in particular, panel findings on the meaning of the respondent’s domestic law; and
    - (5) treating its rulings as binding precedent.

14.4 The Appellate Body Crisis (Ongoing process)

- It should be noted that most Members, including the European Union, China, India and Canada, disagree with the United States that the Appellate Body systematically engaged in judicial overreach and demonstrated consistent and malicious disregard for procedural and institutional rules.
- In the view of the vast majority of WTO Members, the paralysis of the AB not only seriously damages the WTO dispute settlement mechanism, but also threatens the entire multilateral trading system.

14.4 The Appellate Body Crisis (Ongoing process)

- In response, many Members have made tremendous efforts to address the AB crisis:
  - First, there have been persistent calls in the Dispute Settlement Body (DSB) of the WTO to resume the selection of the AB members.
    - In November 2017, for the first time, 27 Members formally submitted a proposal to the DSB for a decision to start the selection process to fill the AB vacancies, and the proposal was rejected by the US at the DSB meeting. The proponents continued their efforts at almost every subsequent DSB meeting. At the DSB meeting on 26 October 2023, the 68th request s to initiate the selection of AB members was made by 130 supporting Members, while the US maintained its opposition as before.

14.4 The Appellate Body Crisis (Ongoing process)

- Second, efforts to clarify the rules and address the concerns of the US were made, but ultimately failed.
  - As authorized by the WTO General Council, New Zealand's Ambassador David Walker initiated informal consultations with Members in early 2019 to seek workable and agreeable solutions to improve the functioning of the AB and avoid the impending deadlock. A comprehensive text ("Walker Text") was submitted in October 2019. Regrettably, the US formally vetoed the Walker Text at the General Council on 9 December 2019. Structured discussions aimed at finding a solution to the AB crisis through clarification of the rules seem to have receded to a low ebb in the WTO since then.

14.4 The Appellate Body Crisis (Ongoing process)

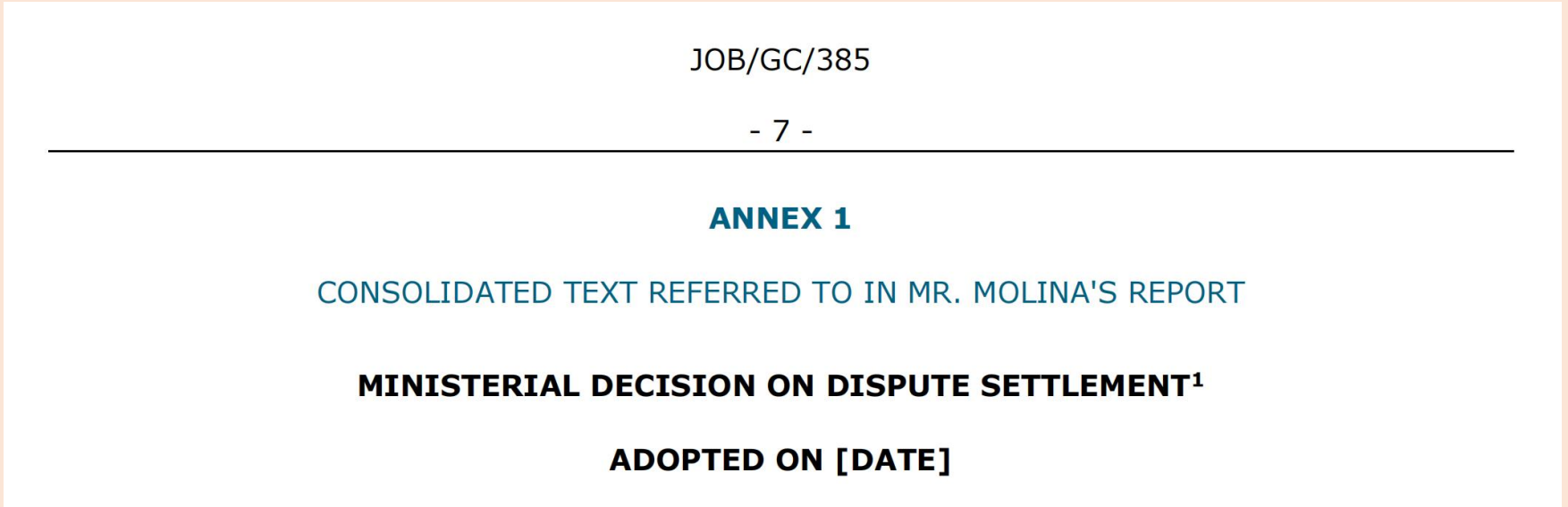
- Third, some Members have been actively exploring alternative means to maintain the availability of appeal review pursuant to Article 25 of the DSU.
  - The first bilateral arrangement was notified by Canada and the European Union (EU) on 25 July 2019. In March 2020, the EU, China and other Members concluded a **Multi-Party Interim Appellate Arbitration Arrangement (MPIA)** pursuant to Article 25 of the DSU, which temporarily provides an institutional appeal mechanism for cases between signatory Members. To date, the number of participants in the MPIA has grown to 26 (involving 53 WTO Members).
  - There have also been instances of recourse to Article 25 of the DSU through *ad hoc* appellate arbitration agreements on a case-by-case basis.

14.5 Some Proposed reforms to the WTO Dispute Settlement System (Ongoing process)

- The WTO DSM crisis (AB crisis) has not been solved so far.
- Members are making new effort.
- Paragraph 4 of the 2022 MC12 Outcome Document reads, '[W]e acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the AB, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.'

14.5 Some Proposed reforms to the WTO Dispute Settlement System (Ongoing process)

- It is reported that quite a number of proposals were put forward to improve the WTO DSM, including the appellate stage.
- Will the 2024 MC13 make a breakthrough?
- No.



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ANNEX 1

CONSOLIDATED TEXT REFERRED TO IN MR. MOLINA'S REPORT

MINISTERIAL DECISION ON DISPUTE SETTLEMENT[1]

ADOPTED ON [DATE]

14.5 Some Proposed reforms to the WTO Dispute Settlement System (Ongoing process)

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DISPUTE SETTLEMENT

30 MAY 2024

WTO members hold first formal meeting on dispute settlement reform

WTO members met at Heads of Delegation level on 30 May for their first formal meeting on dispute settlement reform, with an initial focus on how to resolve issues regarding appeal/review and accessibility. The facilitator of the process, Ambassador Usha Dwarka-Canabady of Mauritius, said the discussions revealed a "strong appreciation for the dispute settlement system overall" as a core element of the WTO system.